

Legacy of Schengen evaluation within the Council and its future role and responsibilities under the new mechanism

Justice and Home affairs Council meeting
Brussels, 5 December 2014

The Council adopted the following conclusions:

"The Council of the European Union acknowledges the annexed legacy of Schengen evaluation within the Council, outlining the achievements, expertise and experience acquired in fifteen years of working on Schengen evaluations.

The Council emphasizes the importance of mutual trust between Member States, cooperation between equals and evaluation by peers, all of which are and must continue to be driving factors to ensure the lasting success of the Schengen evaluation system.

It therefore welcomes that the redistribution of powers and responsibilities, as provided for by Council Regulation (EU) No 1053/2013, ensures that this high level of mutual trust continues to exist.

In this context, the Council reaffirms its obligations and responsibilities under the new Regulation, in particular those of its working structures as outlined in the annexed overview.

The Council welcomes the intention of the Commission to deal with and handle as appropriate under the new mechanism all serious issues that are still outstanding following the completion of all second mandate evaluations on 27 November 2014. It invites the Commission to make full use of the experience present within the Council structures on the conduct of Schengen evaluations and calls upon the Commission to provide the Council in a timely manner with all necessary background information, as foreseen by the legislative framework, for analysis purposes, allowing it to discharge its duties under the new mechanism as expected.

With regard to the Council's conclusions of 8 March 2012¹, it invites COREPER, with the support of the relevant preparatory bodies, to hold the necessary preparatory technical discussions on the functioning of the Schengen area preceding the political discussions thereon at the level of Ministers.

¹ Council conclusions of 8 March 2012 on the improvement of the governance of the Schengen area and of its functioning through political discussions at ministerial level.

In this respect, the Council welcomes the Commission's work in drawing up the bi-annual reports to the European Parliament and the Council on the functioning of the Schengen area, which are an important tool in upholding the good functioning of the Schengen area. The Council encourages the Commission to further develop these reports to highlight even more concretely those issues which the Commission considers to be the most relevant for a political discussion. The Council invites the Commission to make these reports available in a timely manner, allowing for political discussions to be held at the level of Ministers.

ANNEX: "The legacy of Schengen evaluation within the Council"

The legacy of Schengen evaluation within the Council

Concluding on fifteen years since Schengen integration into the EU

Introduction

On 27 November 2014, the responsibility for the system of Schengen evaluations will have been transferred to the Member States and the Commission², bringing to an end fifteen years of development of the Schengen evaluation system within the Council framework.

The General Secretariat of the Council has drawn up an overview of developments and accomplishments of an initiative that began as an intergovernmental act as far back as 1985, with evaluations starting in 1998, and has matured into a showcase example of European integration with the successful implementation of one of the four fundamental freedoms, the free movement of persons within the European Union with accompanying compensatory security measures.

The overview consists of a brief retrospective of 'Schengen' from the early days until today, followed by a rundown of actual work done within the Council framework, how it was done and how it developed over the years with its working methods and practices, and an outline of its main achievements, including know-how and expertise gained. It concludes with a look into the future at the role of the Council under the new mechanism.

This overview will be submitted for information to the Council together with Council Conclusions, by way of closure of the process of transfer to the new mechanism.

The pre-EU integration era

In June 1985, Belgium, France, Germany, Luxembourg and the Netherlands signed the Schengen Agreement with the aim of creating an area of free movement by gradually lifting, between them, internal border controls on persons. The 1985 Agreement, although modest in appearance, was an innovative and unprecedented initiative as it provided an entirely new interpretation of the notion of 'geographical freedom' by listing a series of measures aimed at gradually abolishing internal border controls.³

Five years later, in 1990, a second step followed with the conclusion of the Schengen Implementing Convention, setting out how and under which conditions the abolition of border controls would be achieved in practice. A series of accompanying measures, aimed at fostering mutual trust, were established to reinforce controls at the external borders and to compensate for the potential loss of security which could result from the abolition of internal controls at national borders – an indispensable element indeed when one country is responsible for safeguarding the external border on behalf of all.

The main compensatory measures for safeguarding security included the establishment of a common information sharing system (Schengen Information System or "SIS"); increased and harmonized control at the external borders based on commonly identified criteria for entry into the Schengen territory (which eventually led to the Schengen Borders Code⁴, ex-Common Manual); common agreed procedures for the issuing of uniform visas by Schengen Member States' Consulates (which eventually led to the EU Visa Code⁵, ex-Common Consular Instructions) and handbooks; harmonisation and/or alignment of legislation in a number of sensitive areas (weapons, drug trafficking, etc.); reinforced police cooperation, in particular cross-border (hot pursuit and

² As a result of the entry into force of Council Regulation (EU) No 1053/2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis ("the SchEval Regulation"), OJ L 295 of 6 November 2013, page 27.

³ Similarly, the Nordic Countries had established a travel free zone already in 1957 with the Nordic Passport Union.

⁴ Regulation (EC) No 562/2006

⁵ Regulation (EC) No 810/2009

surveillance), and simplified and reinforced cooperation between judicial authorities in criminal matters.

The key challenge facing the founders of the Schengen area was how to strike the right balance between freedom and security. This fundamental question led to a recognition of the need to agree on a number of common regulatory and operational measures, for instance on illegal immigration of third country nationals.

This multilateral undertaking in the field of internal security represented a major innovation in the pre-Maastricht era. For the first time, a group of countries engaged in a common legislative as well as operational approximation exercise to develop and reinforce cooperation in a truly European perspective.

Even if it was not until 1995 that the abolition of internal border controls actually took place between the (by that time) seven partner countries, the avant-garde nature of the instrument, its practical usefulness and the attractiveness of the "Schengen area" to a rapidly increasing number of other European countries could hardly be overestimated.

Following the abolition of internal border checks in 1995 by the initial five plus Portugal and Spain, Italy and Austria soon followed in 1997-1998, Greece in 2000, Denmark, Finland, Sweden, Iceland and Norway ⁶ in 2001, an unprecedented number of Member States (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia) in 2007, Switzerland in 2008-2009 and finally Liechtenstein in 2011 ⁷. The Council Decision on the full application of the Schengen acquis to Bulgaria and Romania is pending, following their evaluation between 2007 and 2011 and the resulting conclusions adopted by the Council on the successful completion thereof.

By Decision of the Executive Committee ⁸ (SCH/Com-ex (98) 26 rev def), better known as "the Mandate", a '*Standing Committee on the evaluation and implementation of Schengen*' was set up in 1998:

- to establish whether all preconditions for bringing the Convention into force in a candidate Schengen Member State had been fulfilled (the so-called first mandate evaluations),
- and to ensure that the Schengen *acquis* was properly applied by states already implementing the Convention, notably by identifying shortcomings and proposing solutions (the so-called second mandate evaluations).

⁶ In 1995-96, the Nordic countries collectively negotiated joint Schengen accession. This resulted in Denmark, Finland and Sweden signing the Schengen Convention as EU Member States and Association Agreements being drawn up with (non-EU Member States) Iceland and Norway. These agreements were later replaced by more elaborate ones following Schengen integration into the EU. Later joined by two more non-EU Member States, Switzerland and Liechtenstein, the four countries now participate fully in Schengen as associated countries, forming part of the "Mixed Committee" (Comix) installed in 1999 (OJ L 176 10 July 1999).

⁷ The applications of the United Kingdom and Ireland for partial participation in Schengen were approved in 2000 and 2002 respectively. The evaluation of Cyprus started but has not yet been completed. Full membership of Croatia, member of the European Union since 2013, will follow in due course if the evaluation of the proper implementation of all parts of the Schengen acquis is considered successful.

⁸ The decision-taking structure at ministerial level until Schengen was integrated into the EU, at which time its role was taken over by the Council.

The Treaty of Amsterdam of 1999 marked the end of the intergovernmental nature of Schengen by integrating the Schengen *acquis* into the legal framework of the EU: Article 8 of the Schengen Protocol annexed to the Treaties stipulated that the Schengen *acquis* was to be fully implemented by all acceding countries, in part upon accession ("Category 1" measures), the remaining part following a Council decision after a successful evaluation ("Category 2" measures).

The role of the Executive Committee was taken over by the Council and that of the Standing Committee was attributed to the Council's Schengen Evaluation Working Party, which later became the Council Working Party for Schengen Matters - Schengen Evaluation (the Scheval Working Party, hereafter "Working Party"). Something that had begun outside the European institutional framework quickly came to be considered as one of its core elements.

Post-integration: the EU era - working methods and how they developed

(1) In legal terms

For evaluation purposes, countries were visited at regular intervals by teams of experts from Schengen Member States accompanied by a representative from the General Secretariat of the Council and a Commission observer, to assess Schengen compliance as regards border control at air, land and sea borders, police cooperation, data protection, visa issuance and the functioning of the Schengen Information System (SIS) and SIRENE bureaus⁹.

This 'evaluation by peers' lies at the heart of the system. Establishing common standards is one thing, their application is another. Safeguarding external border by one on behalf of all presupposes a high degree of mutual trust and transparency.

The best way to check whether this collective trust exists and is justified is indeed for qualified experts from several countries, with hands-on experience, to verify together, jointly, that a given country merits this trust – and receives the necessary guidance when encountering difficulties.

Evaluations were carried out according to a specific sequence and timeframe, prepared by the Council Secretariat together with the Trio Presidencies and agreed by the Working Party. They provided a detailed overview of all practical issues in relation to individual evaluations. The evaluations themselves were based on replies to an extensive questionnaire drawn up by the Council Secretariat and the Working Party and agreed by the Council, and on on-site visits.

Findings were described in reports. Besides identifying difficulties and shortcomings, the expert teams drafted recommendations and proposals for improvement, identifying, where possible, best practices in the way the *acquis* was implemented. Reports, after their dissemination among all Member States, were discussed and adopted by the Working Party, and then submitted to the Mixed Committee for examination and to the Council for approval. This process resulted, in the case of new Member States, in a Council Decision to lift internal border controls, or, for states already members of Schengen, in Council conclusions. Member States then embarked on a follow-up exercise in an effort to remedy the identified shortcomings, a process closely monitored by the Working Party and the Council, resulting in 'Follow-up reports', also distributed among Member States, and 'Council Conclusions on follow-up'.

⁹ The SIS is a [database](#) used by Schengen Member States to maintain and distribute information on individuals and pieces of property, for national security, border control and law enforcement purposes. A second technical version of this system, SIS II went live on 9 April 2014 under the responsibility of the [European Commission](#). The SIRENE Bureau (Supplementary Information REquest at the National Entries) is the authority in each Member State responsible for the national section of the SIS; the two normally come under a national command structure.

(2) In practice

The single biggest challenge facing the Council after Schengen integration was the evaluation in 2005-2007 of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia. Where until then up to two to four Member States were being evaluated per year, each one in five to seven areas depending on whether they had sea and/or land borders also besides air borders, the accession wave of 2004 led to an unprecedented fifty-eight evaluation missions in the year 2006 alone.

Many lessons were learnt during this period, which resulted in a thorough review of working methods at various moments and in various ways to render the evaluation system more efficient, fair and transparent whilst ensuring equal treatment.

The main changes occurred in relation to programming, questionnaires, number and type of experts, training, reporting and follow-up. This process and the improvements it introduced subsequently found their way into the useful "Practical guide to Schengen evaluation – Recommendations for evaluated countries and experts"¹⁰, an initiative of the Czech Presidency in 2009.

(3) Towards a new evaluation mechanism

Further developments impacting on the functioning of the Schengen area and increasing the pressure to adapt the evaluation process included:

- the invitation by the European Council in the Hague Programme for strengthening freedom, security and justice in the European Union "*to submit, as soon as the abolition of controls at internal borders has been completed, a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States experts, and including unannounced inspections*"¹¹;
- the 2009 Lisbon Treaty, whereby most Justice and Home Affairs dossiers became subject to the ordinary legislative procedure with qualified majority voting and full co-legislative powers for the European Parliament and which included a specific legal basis on peer evaluation in this area (Article 70 of the Treaty on the Functioning of the European Union);
- the increased migratory pressure at external borders in the context of the 'Arab Spring', which sparked a chain of reactions leading to a call by the European Council of June 2011 for the Commission to submit a proposal for a "*mechanism (...) to respond to exceptional circumstances putting the overall functioning of Schengen at risk*".

¹⁰ Document 9468/2/09 REV 2.

¹¹ The Hague Programme: strengthening freedom, security and justice in the European Union (OJ C 53, 3 March 2005, pages 1–14). The Council recalled the request in June 2010 (Council conclusions on the Commission Communication "Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme")

As a result, the Commission presented a communication on Schengen governance including an amended proposal for a Regulation on the Schengen evaluation mechanism and an amendment to the Schengen Borders Code¹². After lengthy negotiations, *Council Regulation (EU) No 1053/2013* was adopted on 7 October 2013 and its operational entry into force was foreseen on 27 November 2014.

The regulation reaffirms that objective and impartial evaluation of the implementation of the Union policies within the area of freedom, security and justice should be conducted by Member States in collaboration with the Commission and so entrusts the Commission and the Schengen Committee with some of the tasks formerly carried out by the Standing Committee, respectively the Working Party. The responsibility for implementing the evaluation and monitoring mechanism is to be shared between the Member States and the Commission whilst the Council will, with access to the necessary background information, continue to bear full responsibility in relation to the adoption of the recommendations issued in response to findings detected during the evaluations and described in the evaluation reports. To strengthen the effectiveness of the evaluation in the follow-up and monitoring stage, a weak point in the previous process, the legislator introduces the new concept of an action plan to be presented by the evaluated Member State to the Council and the Commission in specified cases.

Looking back: The main achievements

With the development of working methods and an improved management of the system, the Schengen evaluation process has become increasingly efficient and effective. Thanks to various initiatives of the General Secretariat of the Council and of Member States, several improvements in methodology were agreed and introduced over the years. These include:

- a clear and uniform standard programme;
- a limitation of the number of experts taking part in evaluations;
- a list of requirements for evaluators (assessment of qualifications, table of expertise);
- targeted training sessions for evaluators;
- a standardized questionnaire;
- a standardized "blank format" for reporting;
- a standardized follow up procedure.

One of the most valuable achievements in this respect and a legacy in its own right, for future evaluations to build on, was the compilation of "soft *acquis*" in the form of the '*Schengen Catalogues of recommendations and best practices*', consolidated collections of best practices encountered during all categories of evaluations, including the Integrated Border Management concept.

¹² On 9 March 2009, the Commission presented to the Council a (first) Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis and a Proposal for a Council Decision on the establishment of an evaluation mechanism to monitor the application of the Schengen acquis. The European Parliament issued a negative opinion on both proposals in a Parliamentary Resolution and called on the Commission to resubmit a new legislative proposal to be adopted by the European Parliament as co-legislator. On 16 November 2010, after the entry into force of the Lisbon Treaty, the Commission presented a new Proposal for a Regulation of the European Parliament and the Council on the establishment of an evaluation mechanism to verify the application of the Schengen acquis.

In addition, the context in which Schengen developed has considerably evolved over the years, with the updating and recasting of many of the so-called 'flanking' (accompanying) Schengen measures into legal instruments¹³, most of which adopted by the European Parliament and the Council.

Another essential element is the setting up of financial and solidarity mechanisms to offset the burden on the countries situated along the external borders, with the support of Frontex, eu-LISA, the Internal Security Fund ("ISF") for borders, the ISF-Police and the European Asylum and Migration Fund.

Tangible achievements in the SIS-SIRENE area included *inter alia* bringing together in one workplace, in each Member State, all national offices providing support to international services such as Europol, Interpol and SIRENE.

Training too developed significantly. Over the years, the recognition grew within the Working Party that training was a key issue when it came to ensuring the proper implementation of the Schengen acquis and the effectiveness of the evaluation process, both to overcome complexities and misunderstandings and to create a common culture leading to better implementation of common rules.

The necessity to enhance the expertise of team-members carrying out evaluations with knowledge going beyond their national focus led to a series of proposals for training sessions in a number of areas, starting with borders, spreading to police cooperation and SIS and recently also to visa issuance. These training sessions, co-organised by Member States, Commission and agencies (Frontex, CEPOL...) were first held by way of a pilot project in 2008. They are now becoming more regular, due to their considerable success and excellent results, and we now have more professional evaluations and high-quality reports containing stringent recommendations. Looking back, these achievements will remain as a first and quite unique attempt by a group of countries to embark on a common legislative, operational and practical cooperation and harmonisation exercise and to establish measures compensating the abolition of internal border controls by developing and reinforcing cooperation in a number of Justice and Home Affairs areas in a truly European perspective. Schengen cooperation is the earliest, most tangible and successful implementation of the fundamental principle of free movement of persons within the European Union, based on two crucial elements – solidarity and mutual trust, principles that are key to many policy areas in the European Union.

'Schengen' has come a long way since 1999. Thanks to the significant improvements introduced by better structures, higher quality output and increased efficiency, the area of free movement, was to prosper with increasingly professional external border controls, enhanced security and intensified consular cooperation in third countries – thus enabling the system to mature to the point where the hand-over can be considered a logical step, practically as well as institutionally.

¹³ The most important of these include the *Common Manual*, replaced by Regulation (EC)562/2006 establishing the Schengen Borders Code, and its related Practical Handbook, the *Community Consular Instructions* (CCI) replaced by Regulation (EC) No 810/2009 establishing a Community Code on Visas, and the related Handbooks, Council Regulation (EC) 539/2001 determining the third countries whose nationals must be in possession of visas when crossing the external borders, the Visa Information System (VIS), the Schengen Information System second generation (SIS II) and the development of various new forms of police cooperation.

The considerable results and successes of the past fifteen years also demonstrate that the Council's cooperative approach truly made a difference. Its foundations firmly rest on mutual trust, cooperation between equals and evaluation by peers – rather than on a top-down approach of rebuking and punishing. These elements, which led to the acceptance of advice and a willingness to change on the part of the evaluated country, with a readiness on the part of the peers to provide guidance where necessary, must continue to be the driving factors for the lasting success of the Schengen evaluation system.

Looking ahead: New challenges for the Council and its Working Party on Schengen Matters

(1) In legal terms

The Council's future responsibilities stem from the new Regulation.

- Article 15 defines the procedure by which the Council shall adopt, on a proposal from the Commission, the recommendations for remedial action aimed at addressing any deficiencies identified in the evaluation reports.

The justification for conferring implementing powers on the Council, as per recital 11, is to strengthen mutual trust, ensure better coordination between Member States at European level and reinforce peer pressure and solidarity. The Council's competences contribute to an effective practical implementation of the European Union's policies and to improve governance through political discussions at ministerial level on the correct functioning of the Schengen area. These implementing powers are also meant to take account of the politically-sensitive nature of recommendations.

- Article 16 provides that the Council is associated to the follow-up of the recommendations that it has adopted (see in particular paragraphs 1, 2, 6 and 7).
- Article 1 in conjunction with Article 23(2) provides that the old mechanism will continue to apply, until 1 January 2016, to Member States in which the evaluation procedures had already started on 26 November 2013 (i.e. United Kingdom and Cyprus).
- Several types of information are communicated to the Council, in accordance with Article 5(1) (transmission of the multiannual evaluation programme), Article 6(2) (transmission of the annual evaluation programme, first section), Article 7(1) (transmission of Frontex risk analyses), Article 20 (yearly comprehensive report on the evaluations carried out) and Article 22 (presentation of review report).

(2) In practice

The future of the Council Working Party on Schengen Matters (Schengen Evaluation), notably in relation to its role, its tasks and the scope of its mandate, was addressed on several occasions by the Working Party itself. The Presidency and the Council Secretariat noted on this point that the current mandate and format do not require any immediate revision since its tasks will be exercised by the Working Party on Schengen Matters, in 'Scheval' format when appropriate.

As for future tasks, the Working Party will deal with all issues emanating from the new Regulation, as outlined above, after completion of all second mandate evaluations by 27 November 2014. The Council will invite the Commission to handle under the new mechanism all serious issues that might remain outstanding beyond this date.

More precisely, as mentioned above, it is recalled that the Council will continue to bear full responsibility for the adoption of the recommendations made in relation to the findings described in the evaluations reports. This means that the Working Party should be given timely access to the evaluation reports and other relevant background information allowing for a thorough analysis in order to discharge its duties as expected.

In a broader perspective, and with regard to the Council's conclusions of 8 March 2012 on the improvement of the governance of the Schengen area and of its functioning through political discussions at ministerial level, the Working Party can and should play an important role by holding technical discussions on the functioning of the Schengen area, inter alia on the basis of the Commission's bi-annual reports to the European Parliament and the Council thereon. This would usefully prepare the political discussion at the level of Ministers, allowing them and the Commission to benefit fully from the expertise and experience which the Working Party, through its members, has acquired in fifteen years of working on Schengen evaluations.

*

It is proposed that these achievements be noted in Council conclusions and that the responsibilities and missions of the Working Party be confirmed under the new mechanism. Indeed, it will be clear from the above that there is work to be done by the Council, with a Schengen Matters Working Party dedicated to the challenging tasks resulting from the amended legal framework and more generally from the implementation of the new Schengen governance system."
