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COVER NOTE

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Delegations will find attached document SWD(2021) 120 final.

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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

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) No
1053/2013**

{COM(2021) 278 final} - {SEC(2021) 225 final} - {SWD(2021) 119 final}

Executive Summary Sheet

Impact assessment on the revision of the Schengen Evaluation and Monitoring Mechanism

A. Need for action

Why? What is the problem being addressed?

Schengen is one of the most significant achievements of the European integration. It is an area where more than 420 million people, as well as goods and services, can circulate freely without border checks. Schengen contributes to the functioning of the Single Market and its creation has brought social and economic benefits to the European society¹.

The well-functioning of the area without internal border controls relies on Member States² applying effectively and efficiently the Schengen legal framework. It requires common efforts to maintain a high level of mutual trust between Member States. Instability in Europe's neighbourhood and beyond, the 2015 refugee crisis and its consequences, the COVID-19 pandemic, and the persistent terrorist threat has led to some Member States reintroducing internal border controls. In some cases, controls have been renewed several times since 2015. These developments have highlighted the need to improve the functioning of the Schengen area and the tools available to make Schengen work, including the Schengen Evaluation and Monitoring Mechanism. This Mechanism verifies and monitors the correct application of the Schengen *acquis* by the Member States complementing the other two pillars that form the Schengen Governance. The other two pillars include the measures at the external borders (external borders management) and the compensatory measures (common visa policy, police cooperation, return policy and the Schengen Information System). Although the Mechanism is a technical instrument, it aims at facilitating political dialogue on the state of Schengen. In the first five-year evaluation cycle, however, the Mechanism did not exert sufficient political pressure on Member States in addressing deficiencies and did not lead to comprehensive political discussions on Schengen.

Although during the first five-year evaluation cycle (2015-2019) the Mechanism improved its added-value in ensuring Schengen's functioning, **a number of shortcomings prevented the Mechanism from working as effectively as it could and should, undermining its full potential**. Notably, there are **three interlinked problems**, deriving from failures in the Mechanism's design and in its implementation:

- Limited strategic focus and significant fragmentation preventing an overview of the functioning of Schengen as a whole that would facilitate political discussion;
- Insufficient capacity to identify and quickly adapt and react to new circumstances, legislative developments and trends, particularly violations of fundamental rights at the external borders; and,
- Slow adoption and implementation of remedies with a peer-to-peer system not exerting the expected pressure.

These problems and the connected drivers (indicated in detail in the Impact Assessment Report) affect the functioning of the Mechanism and, overall, lead to undermine the resilience of the Schengen area.

What is this initiative expected to achieve?

In response to the recent challenges, the Commission announced in the New Pact on Asylum and Migration the adoption of a Schengen Strategy combining legislative and operational initiatives aimed at creating a stronger and more resilient Schengen. One such initiative is the revision of the Mechanism. The **general objective** of this initiative is to improve the functioning of the Mechanism, to boost its efficiency and strengthen the monitoring pillar of the Schengen governance. SCH-EVAL should be able to timely identify the most significant deficiencies and address them quickly, and allow drawing conclusions on the state of Schengen triggering political discussion. Responding to the problems identified above, this initiative seeks to achieve the following **specific objectives**:

¹ In 2016, it was estimated that the full reestablishment of internal border controls would generate immediate direct costs between EUR 5 and 18 billion annually, COM(2016) 120 final of 4.3.2016, p. 3.

² Beyond EU Member States, Schengen covers also Iceland, Norway, Switzerland and Liechtenstein (so-called 'Schengen Associated Countries'). Ireland is not part of the area without internal border controls but it will apply the Schengen *acquis* in part as of 1 January 2021. Bulgaria, Croatia, Cyprus and Romania are bound by the Schengen *acquis*, however, internal border controls have not yet been lifted in respect of these Member States. This impact assessment refers to all these countries as Member States.

- **Specific Objective 1:** Avoid gaps and increase strategic focus. The first specific objective is mostly linked to the first problem;
- **Specific Objective 2:** Rationalise the distribution of tasks and responsibilities, and simplify and accelerate the process and procedures. The second specific objective is mostly linked to the second and third problems;
- **Specific Objective 3:** Strengthen the implementation of fundamental rights safeguards under the Schengen *acquis*. The third specific objective is related to the second problem;
- **Specific Objective 4:** Optimise the participation of Member State experts and the involvement of EU bodies and agencies, and synergies with other instruments. The fourth specific objective is mostly linked to the first and second problems..

What is the value added of action at the EU level?

The **EU added-value** of the initiative stems from the importance of strengthening the mutual trust among the Member States so that all provisions of the Schengen *acquis* are correctly and adequately implemented. The evaluation coordinated at EU level facilitates a comparison of the implementation practices across Member States and assessment of the combined effects of the implementation in different Member States. It also makes it possible to identify deficiencies that arise from asymmetries and divergences in the implementation of the Schengen *acquis* that may put at risk the integrity of Schengen. The peer pressure resulting from the Mechanism may create an additional incentive to a correct implementation of the Schengen rules.

B. Solutions

What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?

The Commission has developed a number of legislative and non-legislative policy options based on all stakeholders' recommendations and on the five-year review of the implementation of the current Regulation. Following a pre-selection where some options were discarded, the following **policy options** were assessed in full detail, as an alternative to the baseline scenario:

- **Option 1** - This option consists of **operational changes** that adjust the scope of the evaluations but keep current policy-field fragmentation (to address problem 1 and achieve specific objective 1), accelerate the evaluation process while maintaining the current decision-making and follow-up procedures (problem 2 and 3, and objective 2), better involve Member State experts and EU bodies / agencies (problems 1 and 2, and objective 4), and strengthen the evaluation of fundamental rights (problem 2 and objective 3).
- **Option 2** - Building on the operational changes (as per Option 1), this option proposes **targeted legislative changes** to increase legal certainty. It creates flexibility regarding the evaluated fields and actors, and the programming (problem 1 and objective 1). It simplifies procedures and obligations, and creates a clear timeline for all actors involved, while keeping the same institutional balance (problems 2 and 3, and objective 2). It introduces flexibility in the evaluation team size and improves coordination with EU bodies and agencies (problems 1 and 2, and objective 4). In addition, it increases legal certainty on the elements relevant for fundamental rights' evaluation and highlights their prominence and political importance (problem 2 and objective 3).
- **Option 3** - This option presents **ambitious legislative changes** to incorporate the measures proposed under Options 1 and 2 and combines them with additional changes to SCH-EVAL's design and functioning. It expands the scope of the Mechanism to targeted areas beyond the Schengen *acquis*, it establishes comprehensive evaluations not articulated per policy fields but per Member State based on risk assessment and situational awareness, extends the evaluation cycle's length to seven years and creates additional fit-for-purpose evaluation and monitoring tools (problems 1 and 2, and objective 1). It proposes changes to the institutional balance in the decision-making process (combined adoption of evaluation reports and recommendations by the Commission with the Council focuses the adoption of recommendations in political relevant cases, namely 'serious deficiencies', 'first time evaluations' and 'thematic evaluations') and in the follow-up procedures, and introduces a fast-track procedure for serious deficiencies (problem 3 and objective 2). It modifies the process to designate Member State experts, also by creating a pool of experts, as well as maximises the coordination with EU bodies and agencies and other quality control mechanisms (problems 1 and 2, and objective 4); and introduces a specific fundamental rights evaluations (problem 2 and objective 3).
- **Option 4** - This option proposes a **combined approach** of the measures proposed under the other options (which are cumulative rather than alternatives), depending on the area of intervention and level of ambition. Option 4 proposes keeping the current scope covering all aspects of the Schengen *acquis*, while adapting

the priorities (policy fields) to the new realities and actors with a more flexible programming (as per Option 2; addressing problem 1 and achieving objective 1) and extending the evaluation cycle to seven years (as per Option 3; problem 1 and objective 1). It broadens the range of tools available and clarifies the criteria and conditions for their use (as per Option 3; problem 1 and 2 and objective 1). It includes measures to accelerate simplify procedures (as per Option 2; problem 3 and objective 2) and changes the decision-making process and creates a fast-track procedure for serious deficiencies (as per Option 3; problems 2 and 3, objective 2). It combines all measure proposed under the other options to optimise the participation of Member States experts and improve EU bodies and agencies' involvement (problems 1 and 2, and objective 4). Option 4 introduces changes to increase legal certainty on elements relevant for fundamental rights (as per Option 2; problem 2 and objective 3).

Following a detailed assessment and comparison of the impact of all policy options and taking into consideration the recommendations of consulted stakeholders, the **Preferred Policy Option** is Option 4. The factors leading to the choice of Option 4 are the following: the effectiveness and efficiency of the measures; potential for simplification and for reducing the administrative burden; realistic assessment of positions of different stakeholders' group, taking into account the practical and legal feasibility of proposed measures. The other policy options are excluded as they address the problems only to a certain degree and/or are difficult to adopt / implement.

Who supports which option?

The Commission developed the policy options taking in consideration the recommendations received during the consultation, which involved relevant stakeholders (European Parliament, Member States, EU bodies and agencies, civil society organisations). All stakeholders agreed on the operational changes proposed by Option 1. Option 2 presents legislative measures that found broad support among all stakeholders. Several stakeholders supported a number of measures proposed under Option 3. However, Member States were particularly divided on expanding the scope of the Mechanism beyond the Schengen *acquis*, and creating all-encompassing risk-based evaluations. Stakeholders did not support the proposed creation of a specific evaluation for fundamental rights. Option 4 combines the measures under the three other options that found overall broadest support by all stakeholders. It adopts a more cautious approach on the introduction of all-encompassing evaluations given Member States division on this matter. This option also keeps the Council involved in the adoption of recommendations in the most politically relevant cases and significantly increases its role in the follow up and monitoring of implementation of recommendations. Furthermore, Option 4 would better integrate fundamental rights considerations in the evaluations without adding a separate field, which did not find support during the consultation.

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)?

The Preferred Policy Option would address the identified problems and respond effectively to the general and specific objectives of this initiative. By contributing to the well-functioning of Schengen, the range of potential direct and indirect impacts is very wide, including positive economic and social impacts. However, the Impact Assessment does not attempt to quantify the indirect economic impacts; rather, it focuses on the main benefits deriving from the four policy options for Member States, Commission and EU bodies and agencies in the most resource-intensive activities. The Preferred Option would enhance the quality of the evaluations and allow Member States to have improved information on the actual situation in other Member States, thus contributing to reinforce the results of the evaluations and build trust among Members. By optimising the participation of experts, Member States would dedicate less financial resources to transport, food and civil servants mobilised for the evaluations. Member States may benefit from an impartial assessment of their administrations and recommendations about the areas where improvement might be necessary. Another benefit is the possible the transfer of knowlegde and best practices. The Commission would benefit from the coordination of and participation in an improved Mechanism as it would allow better monitoring the application and implementation of the EU law in the Member States. It would also enable the Commission to learn about emerging problems and challenges that it might address through new legislative initiatives. Thanks to more effective evaluations, the Commission experts would acquire additional expertise beneficial for their function. The Preferred Option would benefit the EU bodies and agencies. Through increased involvement and synergies, EU bodies / agencies would collect additional information during the evaluations, which also make the exchange of best practises and networking with colleagues from Member State administrations. The Preferred Option includes a number of measures that would allow simplification and reduce the administrative burden on the Commission, Member States and Council.

What are the costs of the preferred option (if any, otherwise main ones)?

The Preferred Option aims at optimising the use of available resources. It would reduce the overall burden on

Member States and Commission as it includes several measures that simplify the procedures and reduce the administrative costs in order to allow a more effective use of all evaluation tools. Additional obligations would arise for EU bodies and agencies, but this would generate limited additional costs compared to the significant positive impact of the initiative.

How will businesses, SMEs and micro-enterprises be affected?

This initiative is expected to have a positive economic impact as it contributes to strengthening the Schengen area, which in turn brings benefits to the Single Market in general and businesses, including SMEs. Therefore, the policy options are not expected to have direct impacts on businesses.

Will there be significant impacts on national budgets and administrations?

The achieved savings could be appreciable for certain smaller public administrations and Member States that carry today a disproportionate burden (i.e. for the unbalanced contribution of experts by Member States) for the functioning of the Mechanism.

Will there be other significant impacts?

The Mechanism should ensure the respect for relevant fundamental rights obligations in the implementation of the Schengen *acquis* and the compliance with the EU Charter of Fundamental Rights. All policy options have a positive impact on fundamental rights' protection by strengthening the evaluations in all fields including data protection. Targeted measures would also address gaps in the integration of fundamental rights protection in relation to certain practices that may not be sufficiently covered by the Mechanism today. No significant impact in the environmental area are expected.

D. Follow up

When will the policy be reviewed?

In line with Better Regulation rules, the evaluation of the functioning of the Mechanism will be based on a detailed programme for monitoring the outputs, results, impacts. The Commission will assess the overall success of the initiative at the end of the first evaluation cycle under the new provisions - when all Member States will have undergone at least one evaluation - and submit a report to the Council and the European Parliament.