

A Renewed Schengen Evaluation Mechanism in the Light of the Schengen Reforms

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The aim of the study is to identify the reasons, background and possible impacts of the international intention to reform the functioning of the Schengen area and to introduce a renewed Schengen evaluation and monitoring mechanism turned on by adopting a new Council regulation. In this article, the author examines the report from the Commission to the Council and the European Parliament on the functioning of the mechanism. The complex report presents comprehensive and detailed results of the first multi-annual evaluation programme, prepared and published by the European Commission in 2021, taking into account the feedback of Member States and relevant cooperating agencies and EU bodies. The study also examined two important elements of the Schengen renewal process, the EU strategy towards a fully functioning and resilient Schengen area and the preceding points of the new Schengen Regulation, which entered into force on 1 October 2021. The research concludes that recurring national shortcomings and divergent practices between Member States are likely to result from inconsistent implementation of the Schengen rules, which may have an impact on the overall functioning of the Schengen area as a whole. In addition to many other demands for change in the Schengen area, the states and EU institutions concerned have decided that the Schengen evaluation and monitoring mechanism needs to be renewed and undergo significant changes for the future. From a scientific point of view, the author concluded that in the field of law enforcement sciences, and especially in border management research, the renewal of the Schengen evaluation mechanism should be followed closely, as it is synergistic with several other related research issues (e.g. border management, border management education, etc.). With thorough research in this field, scientific works and scientific representation, the Hungarian law enforcement science is expected to be strengthened in the international scientific dimension.

Keywords: Schengen, Schengen, border management, European Union, law enforcement science

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Introduction

More than 36 years ago, on 15 June 1985, in Schengen, a small town in Luxembourg on the banks of the Moselle River, the five Member States² of the (former) European Economic Community (EEC) signed an agreement³ to gradually lift border controls along their common borders. As more and more EU countries have signed the Agreement during the years, there has been a general consensus that it should be integrated into EU procedures. The entry into force of the Amsterdam Treaty⁴ in 1999 brought the Agreement and the related Schengen Implementing Convention⁵ into the mainstream of EU law.⁶

Schengen, the name of the small town, has now become an international concept, as the Schengen area currently includes 26 European states and more than 400 million citizens, and is considered one of the most important achievements of the European Union, allowing the free movement of persons. The Schengen acquis is the body of rules and legislation – the Treaties, regulations, directives, decisions, delegated acts, implementing acts and Court of Justice case law – integrated into EU law, which allow the Schengen area to function properly, abolish border controls at internal borders within the Schengen area and regulate the strengthening of border controls at external borders.

In order to evaluate the practical implementation and functioning of the uniform principles of the Schengen area, it is essential to develop an evaluation mechanism that can provide a realistic picture of the activities of the Member States concerned and whether they really add value to the security of the Schengen area. The legitimacy of such a Schengen evaluation mechanism was already established at the same time as the creation of an area without internal borders – or more precisely, without internal border controls within Schengen.⁷ The Schengen acquis was monitored in 2015 under a new (now former) regime, making a slight break from the previous practice of on-site visits in five-year cycles. Council Regulation (EU) No. 1053/2013⁸ has become the main basis for this monitoring.

² Belgium, the Netherlands, Luxembourg, France and the former Federal Republic of Germany.

³ Schengen Agreement, 14 June 1985.

⁴ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (97/C 340/01).

⁵ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

⁶ HERCZEG 2022: 1491–1506.

⁷ BALLA 2018: 287–306.

⁸ Council Regulation (EU) No. 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

However, on 1 October 2022, the new EU Council Regulation⁹ on the establishment and operation of a renewed Schengen evaluation mechanism entered into force, following nearly one and a half years of preparation with the active involvement of Member States, the Council of the Union, the European Commission and other stakeholders. The need for a new regulation was based on the principle of making the mechanism more efficient, more strategic and better equipped to deal with new realities and challenges.

In the light of the above, this paper focuses on exploring the causes and circumstances, as well as the main background and possible impacts, of the international will to reform the functioning of the Schengen area and to introduce a renewed Schengen evaluation and control mechanism.

Schengen reforms – EU-wide approach

The lifting of internal border controls is closely intertwined with a series of transnational challenges that initially led Member States to seek common and effective solutions at supranational level. The migration crisis that started in 2015 has been quite a test for Europe, both morally and in terms of practical responses to the problem. The crisis, which is still not over today, has raised a number of political, policy, diplomatic and administrative questions for the EU and non-EU European countries. One of its main lessons has been the need to step up coordinated, complex and joint action if Member States are to achieve effective and forward-looking results in the area of migration management.

One of the lessons learned from the migration crisis that started in 2015 is the question of its partial link to terrorism. In some cases, it has been identified that terrorists have entered the EU “mixed in” with other migrants and in many cases have used false documents to travel. The Paris and Brussels attacks¹⁰ have clearly shown the link between terrorism and migration. The attacks were carried out by jihadist groups and claimed responsibility by the Islamic State.

Not even half a decade after the outbreak of the migration crisis in 2015, a global threat of unprecedented proportions emerged – the coronavirus epidemic. The pandemic, which started in China at the end of 2019, swept into Europe in a matter of moments. The coronavirus epidemic generated changes in many areas of health,

⁹ Council Regulation (EU) 2022/922 of 9 June 2022 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.

¹⁰ On the evening of 13 November 2015, a series of terrorist attacks were carried out in the evening of 13 November 2015 in Paris by terrorists armed with machine guns, who shot at innocent people and carried out several bombings in busy locations. On 22 March 2016, three bomb attacks took place in Brussels: two at the airport and one at the Maelbeek metro station. The attack killed 32 civilians, three of the perpetrators were also killed. The number of wounded was over 200. The terrorist organisation Islamic State claimed responsibility for the attacks (Grounds for Concern 2016).

market and business, technology and indeed all aspects of life, with unprecedented impacts on the functioning of the Schengen area. With the outbreak of the epidemic, Member States have routinely reintroduced, or rather re-established, border controls at their internal borders to prevent the spread of the virus through the movement of persons across borders. The legal basis for these measures is the Schengen Borders Code.¹¹

The Pact on Migration and Asylum¹² contains a number of related legislative proposals and policy orientations proposed by the Commission in the areas of the Common European Asylum System, strengthening the protection of external borders, illegal migration and return, the external dimension of migration, ensuring legal migration channels, including resettlement of beneficiaries of protection and integration. The Pact identified ensuring free movement within the Schengen area and integrated border management as key policy tasks:

“Integrated border management is an indispensable policy instrument for the EU to protect the EU external borders and safeguard the integrity and functioning of a Schengen area without internal border controls.”¹³

France chaired the Council of the European Union for six months from January 2022. In its Presidency programme, the French Presidency has indicated that one of its main objectives in the area of justice and home affairs is to make Europe more sovereign, as part of which it “will take action to proceed with the reform of the Schengen area”.¹⁴ The need for reforms for the whole area is not entirely new, since the creation of the so-called Schengen Forum¹⁵ is in fact one of the origins of the renewal and development of the Schengen system, a forum at political level, whose creation was intended by the European Commission “to stimulating concrete cooperation on issues related to Schengen among all actors involved and rebuilding trust”.¹⁶

Schengen Strategy

On 2 June 2022, the Strategy for a fully operational and resilient Schengen area (hereinafter: Schengen Strategy) was published, which takes stock of progress on these key pillars and other key measures to maintain the area of freedom, security

¹¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [COM(2020) 609 final].

¹³ Schengen Borders Code.

¹⁴ PFUE 2022.

¹⁵ The Commission announced in September 2020 the creation of a Schengen Forum to foster operational cooperation and stronger confidence in the rules (European Commission 2020).

¹⁶ Report from the Commission to the Council and the European Parliament on the Functioning of the Schengen Evaluation and Monitoring Mechanism pursuant to Article 22 of Council Regulation (EU) No. 1053/2013 First Multiannual Evaluation Programme (2015–2019) (COM/2020/779 final).

and justice and proposes further measures to make the area without internal border controls fully operational and more resilient.¹⁷

With the measures proposed in the Schengen Strategy, the Commission intends to complete the range of instruments necessary to ensure the proper functioning of the Schengen area. This can strengthen mutual trust between Member States, so that all residents and economies in the area can once again fully benefit from a Schengen area without internal border controls.

In addition to the long situation assessments, the strategy focuses on adequate preparedness for future crises, highlighting the importance of compensatory measures (e.g. linked to police cooperation). Coordination is of paramount importance in addressing the challenges facing the Schengen area, as the measures taken by Member States should complement each other. In addition, it should be stressed that in exceptional cases (e.g. serious public health risks), Member States should be allowed to act immediately and autonomously, as this can significantly increase efficiency.

The Schengen Strategy contains a number of legislative proposals (e.g. amendments to regulations, new draft regulations), which, of course, directly affect Hungary through its membership of the EU.

Reform of the Schengen Evaluation Mechanism

New regulation

On 1 October 2022, the new EU Council Regulation¹⁸ on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis (hereinafter: new Scheval Regulation) entered into force, after almost one and a half years of preparation with the active involvement of Member States, the Council of the Union, the European Commission and other stakeholders.

In principle, the main objectives of the new Scheval Regulation remain the same as those set out in the previous regulation. The purpose of the mechanism remains the overall evaluation and monitoring of the Schengen framework for those Schengen Member States, such as Hungary, which apply the acquis in full or in part. Moreover, Scheval also covers the monitoring of the fulfilment of the Schengen conditions by Member States that have not yet decided to apply the Schengen acquis in full or in part. The need for a new regulation was based on the principle of making the mechanism more efficient, more strategic and better equipped to deal with

¹⁷ Communication from the Commission to the European Parliament and the Council: *A Strategy towards a Fully Functioning and Resilient Schengen Area* (COM/2021/277 final).

¹⁸ Council Regulation (EU) 2022/922 of 9 June 2022 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.

new realities and challenges. The evaluations under the rules of the new Scheval regulation will apply from February 2023 on the basis of a multiannual evaluation programme prepared by 1 December 2022 and an annual evaluation programme with a detailed schedule of the evaluations due in 2023.¹⁹

The new regulation introduces a much more strategic orientation of the mechanism and simpler and more efficient evaluation and monitoring procedures, while strengthening cooperation with all relevant actors. In its recitals, it provides that “the forms of evaluations and methods should be made more flexible to increase the efficiency of the evaluation and monitoring mechanism and its capacity to adapt to new circumstances and legislative developments and to streamline the use of the resources”.²⁰

The legislative proposal for the new Regulation was presented by the European Commission on 3 June 2021 in the Council of the Union’s Schengen Working Party, whose main task is to coordinate and discuss legislative issues related to the Schengen acquis evaluation mechanism and all legislative issues related to the application of the Schengen acquis, and to prepare high-level EU decisions. In addition to the presentation of the first draft, the proposal for a regulation was discussed 15 times by member states’ delegations in the Council, with political agreement on the main orientations being reached among EU home affairs ministers in spring 2022.²¹

Article 70 of the Treaty on the Functioning of the European Union (TFEU) gives the Council exclusive power to adopt the Scheval Regulation (and many similar regulations), which allows it to adopt measures (in this case the Regulation) on a proposal from the Commission, as a basis for an objective and impartial assessment of the policies arising from the area of freedom, security and justice. However, a tripartite declaration between the Council, the Commission and the European Parliament²² was already in place when the previous Scheval Regulation was adopted, to the effect that the proposal would be submitted to the European Parliament under a consultation procedure so that its opinion could be taken into account as fully as possible before the final text was adopted. A similar procedure was followed by the three EU institutions when the new Scheval Regulation was being drafted.

¹⁹ *A Strategy towards a Fully Functioning and Resilient Schengen Area* (COM/2021/277 final), Article 31.

²⁰ Schengen Borders Code, Recital 13.

²¹ European Council 2022.

²² Council Regulation (EU) No. 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen – Statement from the European Parliament, the Council and the Commission.

Reasons of renewal (strategic problems raised)

On 25 November 2020, the European Commission published its report²³ on the functioning of the Schengen evaluation and monitoring mechanism, which summarises and organises the lessons learned from the evaluations of the 2015–2019 monitoring period (first multi-annual evaluation programme) and makes proposals for reforming the system for monitoring Schengen obligations.

A notable feature of the report is that the very long duration of evaluations is a key challenge to the effectiveness of Scheval. While the number of evaluation visits exceeded 200, the European Commission adopted nearly 200 evaluation reports and more than 4,500 recommendations, only 45 evaluations were fully completed, and a large number of evaluation reports and recommendations for evaluations carried out in 2019 have not yet been adopted.

It has been concluded that the evaluations and proposals have focused too much on specific and detailed circumstances rather than on the basic dimensions and expectations of the Schengen acquis. This is coupled with a number of other problems, such as the important observation that migration is a very fast evolving area with constantly changing trends and composition of flows. In the case of migration management, it may be particularly true that overly prolonged checks do not provide an adequate solution to a measure proposed at a given time but implemented after a long period of time, as circumstances may constantly change.

Another recurrent bad experience in relation to on-site visits was that unannounced on-site visits did not prove as effective as originally planned.

In addition to the above, the report identifies the following major weaknesses:

- the inclusion of respect for fundamental rights in the evaluation was not sufficiently implemented in the evaluations
- slow implementation of commitments in Member States' action plans and excessive administrative burdens on Member States
- the lack of experts in some areas, such as data protection and visa policy, and the imbalance in Member States' offers (one third of the experts were nominated by the same Member States)
- the system did not ensure an adequate level of management of the Schengen situation and the involvement of the European Parliament was not systematic

In the report, which is largely based on the experience and opinions of the Member States, in addition to the comments developed by the Schengen Governance unit,²⁴ the Commission has made it clear that the Schengen evaluation and control mechanism needs to be renewed in the future:

²³ European Commission 2020.

²⁴ European Commission, Directorate-General for Migration and Home Affairs, Schengen Governance (HOME.B.2).

“It has [...] become apparent that for the mechanism to work fully effectively in the future it is essential to complement the operational improvements with legislative changes needed to bring clarity and reinforce existing rules and procedures.”²⁵

New keypoints and strategic elements

Article 2 of the new Schengen regulation, which contains definitions, summarises the elements of the mechanism already in place, including the notion of unannounced or thematic evaluation. However, a new feature is that it distinguishes between “revisit” and “verification”²⁶ visits, the former being carried out in cases of serious shortcomings and deliberate non-compliance with the Schengen acquis and the latter in general to verify the implementation of the action plan of any Member State evaluated. The Member State concerned is obliged to submit an action plan to the Commission and the Council with a view to remedying the shortcomings identified during the evaluation.

Regarding the forms of evaluations, the new regulation distinguishes between so-called first-time, periodic, unannounced and thematic evaluations. Unannounced visits could be carried out when the Commission has been informed in advance that systemic deficiencies in a Member State put the functioning of the Schengen area as a whole at risk, or when there is evidence of serious (and deliberate) negligence by a Member State of its obligations to implement the Schengen acquis, or when the Commission wishes to assess the level of compliance with fundamental rights obligations. Thematic evaluations may be carried out in the context of the practical implementation of new EU legislation, following changes to EU law.

In the case of unannounced evaluations, the visit will not have to be notified if it concerns a serious deficiency at internal borders, a serious deficiency in the functioning of the Schengen area, a commitment deliberately not fulfilled by a Member State or an abuse of human rights.

For multi-annual evaluation programmes, the five years under the previous scheme have been changed to seven years. An important change is the reference in Recital 8 of the Regulation to the evaluation of the activities of EU agencies involved in the implementation of the Schengen acquis within the framework of this

²⁵ European Commission 2020.

²⁶ “Serious deficiency” means a general assessment of the situation attributed to one or more non-compliant findings which concern the effective application of the Schengen acquis and which, individually or in combination, risk to constitute a violation of fundamental rights or which have, or risk to have over time, a significant negative impact on one or more Member States or on the functioning of the area without internal border control.

Regulation, which may also allow, for example, the monitoring of the activities of the Frontex²⁷ Standing Corps.²⁸

In line with the experience gained during the Covid-19 crisis and the closures caused by the “Great Lockdown”, a new element in the mechanism is to allow for simultaneous assessment of several Member States and, in exceptional cases, the possibility of remote assessment, in whole or in part.

The creation of a pool of experts from the Member States is a completely new component. Article 17 of the new Scheval Regulation stipulates that the European Commission, in cooperation with the Member States, must establish each year a pool of experts with expertise in the policy areas identified in the multi-annual evaluation programme. The Regulation requires each Member State to ensure that at least one designated expert is available in each policy area during a given calendar year. This is to ensure that a sufficient number of experienced experts are involved in evaluation and monitoring activities and that teams are set up in a faster and less burdensome way.

Over the years, it has become clear that Member States’ expert input has not always been in line with needs. The number of experts available has sometimes proved too small for the needs of ongoing evaluations. The pool could provide both greater predictability and greater flexibility. The article lays down detailed rules and deadlines for the establishment of the pool and sets out the obligations of the Commission and the Member States. The expectation is that its members and national authorities (including the Hungarian authorities and administrations concerned) will respond positively to specific invitations, with refusals based only on serious professional or personal grounds.

One of the key elements of the evaluations carried out under Scheval is the so-called evaluation report, which is compiled by teams of experts on the ground. The content structure of the new system does not deviate significantly from the structure set out in the previous Regulation, so the findings may be good practices, areas for improvement or non-compliant elements that are contrary to the Schengen *acquis*. What is new, however, is that the Commission has four weeks to send the report to the Member State evaluated, instead of six weeks. In order to shorten the Commission’s procedure, the consultation of the assessed Member State must take place within five working days of receipt of the comments.

A key feature of the new draft is that, in principle, recommendations reflecting identified shortcomings would be set by the Commission (in the report itself) rather than the Council, so that Member States would have to submit their action plans to the Commission and the Council within two months of the adoption of the report. In addition, the regulation would not make it compulsory to register evaluation reports

²⁷ European Border and Coast Guard Agency.

²⁸ The Frontex Standing Corps is composed of four categories of operational staff, namely official staff, staff seconded by Member States to the Agency for long-term deployment, staff seconded by Member States for short-term deployment and staff of the Rapid Border Intervention Teams.

as classified information (restricted distribution), but would create the possibility to do so if the Member State evaluated can justify this with good reason.

Unlike the former practice, the evaluation report adopted by the Commission would already contain specific recommendations, unless the Member State evaluated substantially contests the content of the draft evaluation report or the nature of a finding within 10 working days of the drafting meeting.

The new Scheval Regulation has a specific chapter on procedures following the identification of serious deficiencies. Where assessments reveal serious deficiencies, specific provisions should be introduced to ensure that corrective action is taken swiftly by the Member States concerned. In view of the risk posed by a serious deficiency, the assessed Member State should, as soon as it becomes aware of the serious deficiency, immediately start implementing measures to remedy the deficiency, including, where appropriate, the use of all appropriate operational and financial instruments.

Analysis results

The analysis on which this paper is based concluded that changing circumstances and the experience of the last five-year evaluation period have certainly justified an adjustment of the framework of the mechanism to reflect reality.

A review of the history of the new regulation found that a complete reform of the Schengen evaluation system was necessary for a number of reasons. The comprehensive report on the functioning of the mechanism was preceded by a research in 2019²⁹ which found that, while the evaluation system was considered adequate for monitoring regulations, there were key areas for improvement in the process of conducting evaluations, maintaining expertise and sharing best practices.

A major drawback of the mechanism, which will be overhauled from February 2023, was the lengthy process of adopting the evaluation reports and the recommendations based on them, which in practice made it completely unjustified to reduce the deadlines for action plans to correct recommendations on the most serious shortcomings. The practice developed over the past years has not allowed the serious shortcomings identified in the evaluations (sometimes jeopardising the normal functioning of the whole Schengen area or seriously affecting, for example, the right to free movement) to be discussed at political level.

²⁹ KAASIK-TONG 2019: 1–18.

Conclusions and summary

From a scientific point of view, the author concluded that in the field of law enforcement sciences, and especially in border management research, the renewal of the Schengen evaluation mechanism should be followed closely, as it is synergistic with several other related research issues (e.g. border management, border management education, etc.). With thorough research in this field, scientific works and scientific representation, the Hungarian law enforcement science is expected to be strengthened in the international scientific dimension.

The new Schengen Regulation has succeeded in drafting a text which, on the one hand, preserves the spirit and positive elements of the current mechanism, but which also reflects the new legal and practical environment and the shortcomings identified in the previous mechanism.

The study concludes with a hypothesis that is for the future to prove: the new mechanism will not in principle impose any additional burden on Member States, but will make the evaluation itself much more efficient, faster and better targeted. Further scientific research and exploration of the elements of this claim is fully justified, but will only be possible in due course from the start of implementation.

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