

STUDY

Requested by the LIBE committee



# The state of play of Schengen governance

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An assessment of the Schengen  
evaluation and monitoring mechanism  
in its first multiannual  
programme



Policy Department for Citizens' Rights and Constitutional Affairs

Directorate-General for Internal Policies

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## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, assesses the operation and impact of the Schengen evaluation and monitoring mechanism in its first multiannual programme (2014-19), with the aim of identifying what has worked well and developing recommendations to strengthen it. The past decade has presented multiple controversies involving the governments of Schengen states as well as EU institutions, leading to a persistent state of apparent crisis. The ongoing "Schengen crisis" is rooted in political changes and in structural shortcomings of the Schengen regime. Despite these obstacles, the resilience of the Schengen system should not be underestimated.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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## LIST OF ABBREVIATIONS

<b>CEAS</b>	Common European Asylum System
<b>CEPOL</b>	European Union Agency for Law Enforcement Training
<b>CIRAM</b>	Common Integrated Risk Analysis Model
<b>CISA</b>	Convention implementing the Schengen Agreement
<b>COREPER</b>	Committee of the Permanent Representatives of the Governments of the Member States to the European Union
<b>DG HOME</b>	Directorate-General for Migration and Home Affairs
<b>EBCG</b>	European Border and Coast Guard (Frontex)
<b>EC</b>	European Commission
<b>ECRE</b>	European Council on Refugees and Exiles
<b>EES</b>	Entry/Exit System
<b>EFTA</b>	European Free Trade Area
<b>ETIAS</b>	European Travel Information and Authorisation System
<b>EU</b>	European Union
<b>EUIBM</b>	European Integrated Border Management
<b>eu-LISA</b>	European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
<b>Eurojust</b>	European Union Agency for Criminal Justice Cooperation
<b>Europol</b>	European Union Agency for Law Enforcement Cooperation
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>Frontex</b>	European Border and Coast Guard Agency
<b>ICMPD</b>	International Centre for Migration Policy Development
<b>ISF</b>	Internal Security Fund
<b>LIBE</b>	Committee on Civil Liberties, Justice and Home Affairs

<b>MPC</b>	Migration Policy Centre
<b>MS</b>	Member State
<b>NOD</b>	National Operations Department
<b>N-SIS</b>	National Schengen Information System
<b>SBC</b>	Schengen Border Code
<b>SCHEVAL</b>	Schengen Evaluation Group
<b>SCIFA</b>	Strategic Committee on Immigration, Frontiers and Asylum
<b>SEMM</b>	Schengen evaluation and monitoring mechanism
<b>SIS</b>	Schengen Information System
<b>TCN</b>	Third-country national
<b>UK</b>	United Kingdom
<b>VA</b>	Vulnerability assessment



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## EXECUTIVE SUMMARY

One of the biggest achievements of European Union (EU) integration – and one that is highly valued by EU citizens – is free movement within the Schengen area. **The lifting of internal borders, however, requires that Member States rigorously implement accompanying measures** in the areas of external borders, internal borders, return, visas, the Schengen Information System (SIS), police cooperation, data protection, the use of firearms and cooperation in the area of justice – thematic policy areas referred to jointly as the “Schengen *acquis*”.

Differently from other policy areas where the European Commission acts as the guardian of the treaties, **the Schengen *acquis* is evaluated via a joint effort of the Commission and Member States, with important roles also taken by the Council, EU agencies, European Parliament and national parliaments.** This less-common approach is due to the origin of the Schengen system, which was born in an intergovernmental setting. This pre-existing intergovernmental approach is maintained in the current Schengen evaluation mechanism, the Schengen monitoring and evaluation mechanism (SEMM), which was established in October 2013 by Regulation 1053/2013/EU.

**The first 5-year multiannual programme ran from 2014-19.** In accordance with the Schengen Evaluation Mechanism Regulation, the Commission is to present its evaluation of the first multiannual cycle (this is expected in the last quarter of 2020). In the meantime, towards the end of 2019 the Finnish presidency presented a first assessment of the SEMM, which contained a number of findings. The present process assessment has been conducted by a consortium whose members are not tasked with conducting evaluations under the SEMM, representing thus an **outsider view**. The fact that public access to SEMM documents is very limited has implications on the depth of analysis of some aspects of the mechanism; however, this study is strongly informed by interviews with key stakeholders involved in the SEMM in different capacities.

### *The evaluation mechanism*

The Commission drives the planning of evaluation programmes, which are strongly informed by risk analyses conducted by Frontex, Europol, the Fundamental Rights Agency and eu-LISA and undertaken in cooperation with Member States. Experts from the Commission and Member States, as well as EU agencies in an observer role, conduct on-site evaluation missions which are either announced or unannounced. **The missions are organised to cover one policy area in one country at a time. An exception to this is the option to conduct a thematic evaluation,** which covers one policy area looking across all Member States. The Commission adopts the evaluation report in comitology procedure and proposes recommendations for adoption by the Council. The Council-adopted recommendations are shared with the evaluated country, the European Parliament and the national parliament. The evaluated state responds to these recommendations with an action plan, which upon adoption is monitored regularly by the European Commission until all recommendations have been implemented.

### *Strengths and weaknesses of the current approach*

**Overall, the current SEMM constitutes a significant improvement in the evaluation of the Schengen *acquis* from the previous evaluation system.** Areas of enhancement that were highlighted in stakeholder interviews were: **increased effectiveness** due to the European Commission's coordination role; **more concise and higher-quality evaluation reports**; and the **inclusion of external observers** from agencies such as the European Border and Coast Guard Agency (Frontex), European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), European Union Agency for Law Enforcement

Cooperation (Europol) and Fundamental Rights Agency (FRA) in evaluation teams. Additionally, the recently established Schengen Evaluation unit within the Commission may contribute to a more consistent evaluation practice.

**Despite this progress, the SEMM was shown to be more advanced in some areas (e.g. external borders and return) than in others (e.g. police cooperation, visas and data protection).** These inconsistencies reflect differences in the availability of Member State experts and the provision of training for evaluators, particularly on visas and data protection. Additionally, while risk analysis is an important tool for annual planning, it is less developed in thematic areas such as visa policies.

**Peer evaluation**, which under the SEMM consists of an evaluation by experts appointed by Member States in a process coordinated by the European Commission, **is a defining feature of the mechanism.** It remains a high priority for Member States and ensures that the evaluation is conducted by practitioners – in addition to having the added value of promoting an exchange of (good) practise across Member States. The strong involvement of Member States is also seen as a way of building mutual trust, which is a key precondition for the functioning of the Schengen system. There are obvious drawbacks of a peer-review system, such as the potential conflict of interest in suggesting experts to assess other Member States' compliance with Schengen; the impact on the rigour with which compliance is assessed; and the potential constraints in pointing out shortcomings.

None of the stakeholders interviewed raised significant concerns regarding **transparency** or criticised the opaque nature of the process; they rather showed understanding due to the sensitivity of some information. However, the fact that there is little transparency in key stages of the development of the evaluation report and development of recommendations contributes to the assessment that the SEMM overall has taken a "tolerant" rather than "naming and shaming" approach to supporting compliance with the Schengen *acquis*.

The SEMM was found to provide a **snapshot-style evaluation** of a specific Schengen policy area in a particular country at a certain point in time. Furthermore, the **thematic separation of evaluation visits without a valid instrument to horizontally compile and analyse the various thematic strands prevents making more general statements on overall Schengen compliance across the different policy areas in a Member State.** Balancing the at-times **orchestrated nature of the announced visits** with what would constitute a more representative reflection of the state of Schengen implementation in a country is a challenge throughout the SEMM, but particularly evident in the case of compliance with fundamental rights obligations. Evidence of push-backs and collective expulsions in violation of the principle of *non-refoulement* may be well documented but will never be witnessed during on-site visits, whether announced or unannounced.

**A key challenge for the effectiveness of the SEMM is its long duration.** On average, it took 11 months from the completion of an evaluation visit to the Council's adoption of recommendations to address deficiencies. This is by far the lengthiest period in the process. Another challenge concerns the rapid pace of migratory developments and ensuing changes in the Schengen *acquis*, compared to which the cumbersome nature of the SEMM limits its responsiveness.

### **The SEMM's first multiannual programme**

In the first 5-year evaluation cycle, **all Member States were evaluated, largely in line with the multi-year plan.** The study identified a total of 199 evaluations during the 2014-19 cycle. The majority of evaluations (164 out of 199, 82%) involved announced visits. Unannounced visits account for 13% (27) of performed evaluations, while 8 evaluations were conducted in the context of revisits (4%). Most

evaluators interviewed for the study found that unannounced visits allow for more accurate assessment of the real performance of the Member State in question.

**The number of evaluations per country was found to reflect the status of the particular country regarding membership to and the scope of applying the Schengen *acquis*.** While countries that do not fully apply the Schengen *acquis*, like Cyprus, Ireland or the United Kingdom, received fewer evaluations, the majority of countries saw between 6 and 9 evaluations, although France was subjected to 12 evaluations. Croatia received particular attention, with 10 evaluations and revisits due to its status as a Schengen candidate EU Member State. The data on and the balance of the evaluations indicate an overall well-planned and managed implementation of the SEMM in its initial cycle.

There were **six cases of serious deficiencies identified** by Schengen evaluations during the first multiannual programme. **However, there is no clear and public definition of what constitutes a serious deficiency.** Moreover, **serious deficiencies do not necessarily result in a faster adoption of recommendations**; times varied between 3 months (Greece, 2015, external borders) and 27 months (UK, 2017, SIS).

While interviewees pointed out that the SEMM is not an appropriate tool to evaluate the overall fundamental rights compliance of EU Member States, the fact that fundamental rights should feature in SEMM evaluations was not contested.

More broadly, **the SEMM currently does not function as an instrument to extract broader conclusions on the state of Schengen** in the evaluated Member States or across the Member States. SEMM findings do not lead to a discussion of the overall functioning of the Schengen system or areas for reform at the political level, which was viewed as a **missed opportunity**. During the current evaluation period, no ministerial-level discussion on evaluation visits and findings took place.

### *Schengen and its "crisis"*

Looking more broadly at the functioning of the Schengen area, **the past decade has presented multiple controversies** involving the governments of Schengen states as well as EU institutions, **leading to a persistent state of apparent crisis.** The ongoing "Schengen crisis" is not a mere result of the 2015 "migration crisis" - it is rather **rooted in political changes and in structural shortcomings of the Schengen regime.** Despite these obstacles, **the resilience of the Schengen system should not be underestimated.** At the same time, constantly referring to the current challenges of Schengen as a crisis is potentially problematic, as it can fuel further politicisation of the issue.

Over the past decade, leaders have used the (pre-Covid-19) reintroduction of internal border controls to gain political capital among the electorate of the populist radical right. Calculations have also been based on political elites' perceptions of citizen's discontent with migration and mobility. However, the perception among political elites about public concerns linked to border control is partly misconstrued: **Political attitudes towards the EU or immigration have remained relatively stable and the Schengen crisis did not reinforce the link between the rejection of immigrants and rejection of the EU. Identity concerns constitute one of the most important predictors regarding citizens' attitudes towards the reintroduction of border controls.**

The current maintenance of internal border controls within the Schengen area is perceived by those Member States upholding them as a measure to prevent future migration (this study does not look at the impact of COVID-19 on Schengen). Member States understand that using internal border controls as a means of preventing migrant arrivals goes against the Schengen *acquis*. **The economic effects of internal Schengen border controls must be taken seriously and highlighting them might be**

**also a way to open up further avenues for solidarity and cooperation among Schengen Member States.**

### Conclusions

Assessing the main findings and results of the SEMM is challenging due to the lack of publicly available evaluation reports. This also influences the way in which the overall impact of the SEMM in contributing to compliance with the Schengen *acquis* can be assessed. What can be said is that **the extent to and ways in which SEMM has contributed to change in the application of the Schengen *acquis* in Member State differs**. Remedial actions to address deficiencies have been undertaken as part of Member States' preparations for SEMM visits, during the process of developing and adopting the evaluation report and as part of the implementation of the action plan. EU funding (e.g. the Internal Security Fund) can make an important contribution to the implementation of the SEMM recommendations.

**While the SEMM has performed well in its initial 5-year cycle, it has not yet managed to realise its full potential. Lengthy processes for adopting recommendations, especially concerning in cases of serious deficiencies, as well as an *acquis* that is scattered across various legal acts and compilations of recommendations and best practices are not helpful to creating mutual trust in the Schengen area – which, in turn, is the core purpose of the SEMM.** And, although the adoption of the SEMM was accompanied by an expectation that this would increase its political impact, the mechanism remained rather technical and has not sufficiently managed to involve the political, decision-making level.

### Recommendations

With a new 5-year cycle now upon us, recommendations for the European Parliament include:

- **Adopting targeted legislative changes to improve the effectiveness of the SEMM.** This includes considering the possibility of **introducing a definition of “serious deficiencies” in Article 2 of the SEMM Regulation**, retaining enough flexibility to cover the range of possible scenarios. **Article 10 of the SEMM Regulation** could be amended to provide the Commission with the possibility of **building a pool of evaluation experts** that could be used if Member States do not designate appropriate or a sufficient number of experts for a mission. Additionally, **specifying the meaning, scope and purpose of thematic evaluations** can help ensure that this tool is used appropriately and to its full potential. In particular, additional provisions should specify that thematic evaluations can be programmed by the Commission acting out of its own initiative or acting upon a request from the Council or European Parliament.
- **Making procedural changes to increase the effectiveness of the mechanism.** A key recommendation in this regard is **building more flexibility into the annual programme** to allow the Commission to adapt it to respond to developments as they arise. Along with this ability, **increasing the number of unannounced visits and thematic evaluations** can help to ensure that the SEMM effectively evaluates and monitors the implementation of the Schengen *acquis*. **Introducing deadlines for the Commission-led phase** of SEMM evaluations can shorten the overall process and speed up the implementation of actions to address identified deficiencies, thus having the added benefit of increasing trust in the mechanism. **Developing a prioritised procedure** that would apply when evaluation missions detect **serious deficiencies** can push Member States address them as soon as possible. Lastly, **widening the**

**scope of evidence** that is permitted and considered in preparation and during evaluations could help stakeholders get a more accurate picture of the actual situation.

- **Strengthening consistency across thematic areas to improve the internal coherence of the SEMM.** The European Parliament can **suggest that the European Commission set up a visa service that evaluates the risks of Member State visa practices**, following the model in other Schengen policy areas. Additionally, **evaluating fundamental rights across all Schengen policy fields** with the support of FRA and other reputable sources would enable the SEMM to more effectively assess this cross-cutting issue. **Offering more frequent training** will ensure that new and existing experts are well prepared to conduct evaluations, including by staying up-to-date with developments in a continuously evolving field. Meanwhile, **regularly updating best practice compilations and making them easily accessible** will enable evaluators to effectively use these tools when developing recommendations.
- **Allowing for the drawing of broader conclusions from SEMM evaluations that can benefit the Schengen area more broadly.** This can be done by introducing instruments in the SEMM that allow it to **1) provide a national Schengen fitness check covering all Schengen policy fields within a Member State** and **2) facilitate the analysis of individual evaluations to generate structural and horizontal strengths and weaknesses of Schengen across Member States.**



## 1. INTRODUCTION

The Schengen area of free movement – the largest area of free movement in the world – is considered one of the greatest achievements of the European integration process. European citizens highly value the ability to travel within it without being subject to border controls,<sup>1</sup> while the European Commission considers Schengen one of the main European Union (EU) mechanisms supporting the internal market and the freedoms and prosperity of European citizens.<sup>2</sup> The Schengen Evaluation and Monitoring Mechanism (SEMM), which was created to verify that the Schengen *acquis* is properly implemented, is important to ensuring the trust among Member States that is fundamental for the removal of internal borders.<sup>3</sup>

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, assesses the operation and impact of the SEMM in its first multiannual programme (2014-19), with the aim of identifying what has worked well and developing recommendations to further strengthen the SEMM going forward. After providing background on the Schengen system and major controversies and challenges, the analysis is divided into three main parts. The first looks at the SEMM itself, in policy and in practice. The second then focuses on the outcomes of Schengen evaluations and their impact on the implementation of the Schengen *acquis*. Lastly, the third part looks more broadly at the functioning of the Schengen area. The report concludes with a synthesis of the key findings in each of these three areas, with recommendations put forth for strengthening the Schengen system.

### 1.1. Background

Following the 1985 Schengen Agreement and the 1990 Convention implementing the Schengen Agreement (CISA), which entered into force in 1995, the Schengen area has experienced a number of controversies – however, it has also operated continuously since then. The Agreement and Convention established the goal of setting up an area without internal border control between the signatory states.

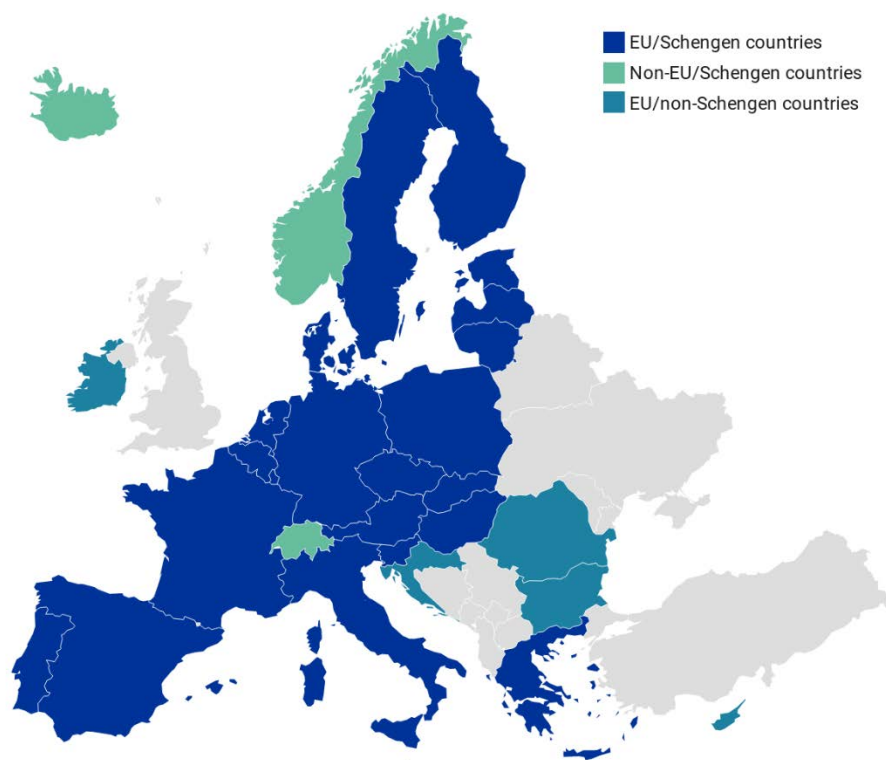
**The CISA details the measures to be adopted by Schengen states in order to “compensate” for the removal of border controls in the field of police and judicial cooperation, external border controls, visas and the establishment of the Schengen Information System (SIS).** Taken together, these measures constitute the “Schengen system” of rules and procedures for the functioning of the area without internal border controls. There are currently 26 Schengen states (see Figure 1), 22 of which are EU Member States (with the exception of Bulgaria, Croatia, Cyprus, Ireland and Romania) and four of which are European Free Trade Area (EFTA) countries (Iceland, Liechtenstein, Norway and Switzerland). Five EU Member States (Ireland that still maintains opt-outs and Bulgaria, Croatia, Cyprus, Romania) are not (yet) Schengen States.

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<sup>1</sup> European Commission (2020a)

<sup>2</sup> European Commission Communication: Back to Schengen - A Roadmap. Brussels, COM(2016) 120, p2

<sup>3</sup> 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

**Figure 1: Schengen states**

Source: Authors presentation.

The Schengen system was originally established outside of the EU's legal order and institutional arrangements; it was brought into EU law with the entry into force of the Amsterdam Treaty on 1 May 1999. **The Schengen Agreement, CISA and most of the rules adopted by the Schengen executive committee were defined as the "Schengen *acquis*"** by Council Decision 1999/435/EC of 20 May 1999<sup>4</sup> and subsequently published in the Official Journal of the European Communities.<sup>5</sup> **Since then, most Schengen provisions have been replaced or built upon by EU legislation.** Key examples include the Schengen Borders Code (SBC) that replaces CISA Articles 2-8, originally adopted in 2006;<sup>6</sup> the Community Code on Visas that replaces CISA Articles 9-17 and incorporates elements from the Schengen Common Consular Instructions, adopted in 2009<sup>7</sup>; and the SIS II Regulation establishing the second-generation Schengen Information System and replacing the provisions of CISA Title IV, originally adopted in 2006.<sup>8</sup>

<sup>4</sup> Council of the EU (1999) Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions and decisions which constitute the *acquis*, OJ 1999 L176/1

<sup>5</sup> Council of the EU (2000) The Schengen *acquis* as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999, OJ 2000 L239/1

<sup>6</sup> Regulation (EC) No 562/2006 (Schengen Borders Code) was recently codified by 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) (codification), OJ 2016 L77/1

<sup>7</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ 2009 L243/1

<sup>8</sup> The original SIS II Regulation and Council Decision 2007/533/JHA on the establishment and use of SIS II in the field of police and judicial cooperation have since been repealed by the following: Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ 2018



## 1.2. Schengen controversies and crises

Over the last decade, the functioning of the Schengen area has been disrupted by multiple controversies involving the governments of Schengen states as well as EU institutions, leading to a persistent state of apparent crisis. Disputes over the application of Schengen rules are arguably as old as the Schengen system itself,<sup>9</sup> but because the latest controversies have involved decisions by multiple governments to unilaterally reintroduce controls at the area's internal borders, they appear to have put into question the very principle upon which Schengen is based. The possibility of reintroducing checks at internal borders on a temporary basis, indeed, was foreseen from the onset of the Schengen system. Article 2 of the Schengen Agreement indicates that

"where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof."<sup>10</sup>

The original SBC Regulation foresaw that, in exceptional circumstances, internal border checks could be reinstated for up to 2 years.<sup>11</sup> Over the years, internal border controls were reintroduced by Schengen states due to public policy and public order concerns arising from major sporting events, for instance Portugal and Austria during the European Football Championships of 2004 and 2008.

In 2011, Italy witnessed increased numbers of arrivals of migrants from North Africa due to political and social instability in the region. When Italy issued residence permits for these newly arrived migrants, allowing them to travel to other Schengen States, France re-established border controls at its border with Italy. This decision was supported by those states that tend to argue for more state sovereignty, while it was highly criticised by other actors, such as the EU Commission, which argued that the arrival of migrants to Italy did not qualify as "emergency" under Article 2 of the abovementioned SBC. The European Parliament took the same position in its Schengen resolution from April 2019.<sup>12</sup> It was also argued that the temporary suspension of the Agreement in a way threatened EU cohesiveness and the integration process and action should be taken to revise the Schengen Agreement.<sup>13</sup>

A spike in arrivals in 2015-16 led several Member States to reintroduce internal border controls, which were often subsequently prolonged. These countries included Austria, Germany, France, Denmark, Sweden and Norway. Additionally, Hungary closed its borders with Serbia and Croatia (neither are

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L312/14; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ 2018 L312/56

<sup>9</sup> Guiraudon, V (2011), p 773-84

<sup>10</sup> The Schengen acquis - 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, Article 2

<sup>11</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006, Article 26

<sup>12</sup> European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders (COM(2017)0571 – C8-0326/2017 – 2017/0245(COD))

<sup>13</sup> McClure, L (2011), p327

Member States of the Schengen Agreement) and Slovenia (Member of the Schengen Agreement).<sup>14</sup> The argument for these restrictions was that the movement of asylum seekers within the Schengen area of free movement threatens the public order and security of Member States. Furthermore, repeated terrorist attacks motivated Member States to re-impose border controls and prolong the suspension of Schengen regulations. The Commission took key steps to remedy the suspension of the Schengen Regulations, such as the Back to Schengen Roadmap<sup>15</sup> and the Communication on preserving and strengthening Schengen.<sup>16</sup> As these events illustrate, **Member States reverted to national solutions and opted largely for non-compliance with EU policies.** At the same time, demands for disintegration regarding common asylum and migration policies grew more vocal.<sup>17</sup> In this context, **a key challenge has been the framing of a common policy on asylum, immigration and external border control that is based on solidarity among Member States and at the same time is fair to third-country nationals (TCNs).**<sup>18</sup>

The internal Schengen borders have been reinstated yet again in 2020 in light of the global Covid-19 pandemic. It has been argued that, due to the rapid spread of the virus and its significant threat to public health, countries face an “emergency” situation that calls for the reintroduction of internal border checks.<sup>19</sup> Because the majority of Member States reintroduced their border controls in situations which arguably required immediate action, they did not notify the Commission before doing so. This is yet another instance where, in a time of crisis, Member States devise national solutions rather than focusing on international cooperation.

These examples of countries reintroducing internal border controls inside the Schengen area have fuelled debates in the political arena about the efficiency of the Schengen Agreement, the role and rights of Member States and the flaws of the agreement, demonstrating that the current system should be re-evaluated. This includes an assessment of the SEMM as it stands today in practice, on which this report focuses.

### 1.3. Methodology

Schengen has generated lively debates among relevant stakeholders and the wider public; there is thus a range of sources commenting on the Schengen crisis and its broader impact on the EU as a whole. But while this is true for the overall Schengen governance regime, less attention has been paid specifically to the SEMM, where much of the pertinent information is less accessible or not publicly available. To get an accurate picture of the SEMM's functioning, this report uses a combination of written sources, including EU legislation, official reports and academic and policy analyses, in addition to information from virtual and telephone semi-structured qualitative interviews (see Annex II) with a range of key stakeholders including both evaluators and evaluated countries. Overall, 19 qualitative interviews were conducted with a total of 25 interviewees from 17 organisations. One interviewee provided information in writing.

These interviewees provided their insights on the SEMM's relevance, impact and output quality, and included officials from the European Commission, Member States, as well as EU agencies involved in the process, including the European Border and Coast Guard Agency (Frontex) and the European Union Agency for Fundamental Rights (FRA) (see Annex I for a complete list). Additionally, internal experts

<sup>14</sup> BBC (2016)

<sup>15</sup> European Commission COM(2016) 120.

<sup>16</sup> European Commission C(2017) 7000

<sup>17</sup> Börzel, T & Risse, T (2017)

<sup>18</sup> European Commission C(2017) 7000, p2

<sup>19</sup> European Commission (n.d.)

from the International Centre for Migration Policy Development (ICMPD), European Council on Refugees and Exiles (ECRE) and Migration Policy Centre (MPC) provided feedback on key findings and recommendations. Using multiple sources and types of data allowed for a triangulation across data sources and a validation of key themes and trends to ensure a strong basis for developing evidence-informed recommendations to strengthen the SEMM.

To get a broad and comprehensive view of the SEMM's functioning in the time available, the **interviewees** were identified from as many different countries as possible, ultimately **covering the following: Austria, the Czech Republic, Finland, Germany, Italy, Norway, Poland and Sweden**. These Member States encompass both internal and external borders and EU and non-EU countries, and represent differences in terms of their exposure to migration trends and capacities to respond. They also possess different visions and interests when it comes to cooperation on asylum and migration. Meanwhile, interviewees from intergovernmental agencies offered a broader, comparative viewpoint to complement these national perspectives.

While not purporting to be a formal evaluation, this paper uses modified evaluation criteria from the Organisation for Economic Co-operation and Development,<sup>20</sup> looking specifically at the relevance, coherence, effectiveness, efficiency and impact of the SEMM, in addition to its transparency.

The 2020 COVID-19 pandemic was explicitly not subject to detailed analysis in this report, as this is the focus of another European Parliament study.<sup>21</sup>

### 1.3.1. Limitations

As mentioned, this report does not constitute a formal evaluation (i.e. it does not focus on outcomes), it is rather an assessment of the ways in which the SEMM has been seen to function more and less effectively by those involved in the process. As such, it relies on qualitative data. While effort was made to include a broad sample of stakeholders to interview for this study, time constraints limited their availability to participate.

### 1.3.2. Research questions

The questionnaire included primary research questions for all interviewees as well as secondary questions related to each of the three areas of the analysis (**the full questionnaire can be found in Annex II**). The main research questions focused on the following lines of inquiry:

1. How well has the SEMM performed?
2. What are the SEMM's primary deficiencies and shortcomings?
3. How has the SEMM affected Member State alignment and compliance with the Schengen *acquis*?
4. How can the SEMM be improved to more efficiently, effectively and transparently assess Member State application and compliance with the Schengen *acquis*?
5. What are possible future steps to strengthen the Schengen system?

Findings from the review and conversations are laid out in the following sections.

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<sup>20</sup> OECD (n.d.)

<sup>21</sup> See Carrera & Luk (2020)

## 2. THE SCHENGEN EVALUATION AND MONITORING MECHANISM

### KEY FINDINGS

- This review of the first 5-year cycle of the SEMM showed **significant improvements in the evaluation of the Schengen acquis** compared to the previous evaluation system.
- The system of **peer-to-peer evaluation steered by the Commission** is praised by both Member State evaluators and evaluated Member States.
- Similarities between the **SEMM and Frontex's vulnerability assessments** have led to synergies but also duplication.
- In the area of external borders, a well-established **system of risk analysis** allows for targeted evaluations; such a system is missing in other areas such as visas and could be expanded in the SIS.
- **Non-binding best practice catalogues** are used in various fields as benchmarks for evaluations. Although non-binding, they become compulsory for evaluated states through the SEMM recommendations, which is seen as problematic as those practices are not rooted in law.
- The **SEMM helps Member States to address national shortcomings**, even if they are not national priorities, and may also give Member States access to additional (EU/MS) resources to address them.
- In some Schengen policy areas there is a **lack of national experts** for evaluation missions. **The training of evaluators** is well established in the area of external borders, but less so in other areas of the SEMM; as a result, it is difficult to identify appropriate experts to evaluate some themes.
- The SEMM is **not used to its full potential**, as it provides a snapshot-style evaluation of specific Schengen policy area(s) in a particular country but does not provide the instruments to extract from those findings Schengen-wide conclusions of a more strategic nature.

### 2.1. The legal framework

The incorporation of the Schengen system into the EU framework in 1999 formally put an end to the Schengen area's intergovernmental governance structure. The Council took over the role of the Executive Committee and integrated the Standing Committee into the Council Working Party for Schengen Matters, now called the SCHEVAL Working Party. The evaluation system almost immediately faced a significant challenge with the EU accession of ten new countries in 2004 (the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) and their respective Schengen evaluation processes between 2005 and 2007. In 2006 alone, 58 evaluation missions were conducted.<sup>22</sup>

This intensive evaluation period generated significant practical experience, which was compiled and formed one of the sources informing the development of the SEMM. Among the lessons learnt, the Council Conclusions from 5 December 2014<sup>23</sup> identified the utility of:

<sup>22</sup> European Commission (2008) Background on Schengen enlargement. Memo/07/619

<sup>23</sup> Council Conclusions of 5 December 2014: Legacy of Schengen evaluation within the Council and its future role and responsibilities under the new mechanism.

- a clear and consistent evaluation programme;
- a maximum size of evaluation teams (Member State experts);
- a list of required experience to guide the selection of evaluators;
- specific trainings for evaluators;
- standardised questionnaire and report templates; and
- a common follow-up procedure.

The creation of a revised evaluation mechanism, ultimately taking the form of the SEMM, was a long time in the making. In 2005, the **Hague Programme for the area of freedom, security and justice** asked the Commission to propose a way of supplementing the existing Schengen evaluation process with a supervisory mechanism that ensured the full participation of Member State experts and included unannounced evaluation visits.<sup>24</sup> 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*<sup>25</sup> and a Proposal for a Council Decision on the establishment of an evaluation mechanism to monitor the application of the Schengen *acquis*.<sup>26</sup> The European Parliament on 20 October 2009<sup>27</sup> issued a negative opinion on both proposals and called on the Commission to resubmit a new legislative proposal to be adopted by it as co-legislator. This rejection led ultimately to the withdrawal of the original proposal by the Commission on 16 November 2010. Meanwhile, concerns about evolving migration patterns in the context of the 2011 uprisings in North Africa and the Middle East further spurred the European Council to request a new evaluation mechanism that would respond to exceptional circumstances putting the overall functioning of Schengen at risk.<sup>28</sup>

**After a lengthy negotiation, the Schengen Evaluation Mechanism, Council Regulation (EU) 1053/2013,<sup>29</sup> was adopted on 7 October 2013 and entered into force on 27 November 2014. This Regulation established a 5-year multiannual evaluation programme for the period of 27 November 2014 to 31 December 2019.**

Building on these past evaluation experiences, the SEMM was created to establish a transparent and efficient method of evaluating Member States that outlined clear procedures, utilised experts and conducted follow-up activities. The functioning of the SEMM is outlined in Council Regulation (EU) 1053/2013. The mechanism has a two-part purpose:

1. To verify that Member States have completely applied<sup>30</sup> the Schengen *acquis*.
2. To determine whether Member States have met the necessary conditions to allow for the application of all components of the Schengen *acquis*.<sup>31</sup>

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<sup>24</sup> Council of the EU The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C 53/01

<sup>25</sup> Commission of the European Communities COM(2009)102 final.

<sup>26</sup> Commission of the European Communities COM(2009)105 final.

<sup>27</sup> European Parliament 2009/0033(NLE)

<sup>28</sup> European Council Conclusions from European Council 22/23 June 2011, EUCO 23/11/

<sup>29</sup> Council Regulation (EU) No 1053/2013.

<sup>30</sup> Some Member States, in accordance with relevant laws, are not bound to full application of the Schengen *acquis*; in these cases, the SEMM verifies that Member States are applying the aspects to which they are bound.

<sup>31</sup> Council Regulation (EU) No 1053/2013; According to Art 1 (1 b) an exception is made for Member States that have already completed an evaluation before the Regulation entered into force.

The SEMM is meant to examine all components of the Schengen *acquis*, including by reviewing and assessing how Member States conduct internal and external border controls as well as all relevant laws and operations. The mechanism is mandated to pay particular attention to the respect of fundamental rights.<sup>32</sup> Evaluations can cover related measures regarding internal and external borders, visa policy, police and judicial cooperation (the latter for criminal issues), the SIS and data protection.<sup>33</sup>

## 2.2. The SEMM Process

The SEMM process involves a range of different actors with various competencies and responsibilities related to the evaluation (see Figure 2 for an overview). The process can be split into different phases:

The **planning phase** is mostly in the hands of the European Commission. During each **multiannual programme**, every Member State will be evaluated; the programme identifies the order in which these evaluations will be conducted, considering the time since a Member State's last evaluation and the different aspects of the Schengen *acquis* to be assessed.<sup>34</sup> The Commission also develops annual evaluation programmes that are informed by risk analyses from Frontex, Frontex's VA, Europol, eu-LISA as well as answers to questionnaires by Member States. These **annual programmes** propose which Member States will be evaluated in the upcoming year and if there are any thematic evaluations that will be conducted across multiple Member States.<sup>35</sup> The annual programme consists of two parts, the announced and unannounced visits. While the announced are public and require – among others – a positive opinion of the Schengen Committee,<sup>36</sup> a "comitology" procedure<sup>37</sup> and a consultative forum for the Commission in accordance with Article 21 of the SEMM Regulation<sup>38</sup>, the unannounced part is not public and is decided within the Commission. Changes to the latter, however also require a number of bureaucratic steps preventing a more dynamic and flexible use of this instrument.<sup>39</sup>

The **evaluation phase** is coordinated by the Commission but follows closely the idea of a joint responsibility between the Commission and Member States. An evaluation team is formed for each evaluation mission, composed of experts from these two stakeholder groups, with one lead expert each from the Commission and Member States driving the evaluation. During the evaluation phase, the Commission informs the evaluated Member State of the upcoming evaluation and sends the SEMM questionnaire with the request to return it within 8 weeks. The Commission reaches out to other Member States to identify appropriate Member State experts and the Commission and Member State experts jointly develop the evaluation programme. The report and recommendations are drafted during the visit, with both Member State experts and the Commission sharing the responsibility of drafting and ensuring accuracy and quality. If there is a disagreement, the team must work to reach a compromise. The draft is completed by the end of an evaluation visit, with findings and recommendations ideally agreed to by the evaluation team before leaving. Following this, the two lead experts prepare the final draft for feedback from the team. The team leaders then agree together on

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<sup>32</sup> Council Regulation (EU) No 1053/2013, recitals 11., 14 -16, 19; Article 12

<sup>33</sup> Council Regulation (EU) No 1053/2013, Article 4

<sup>34</sup> Council Regulation (EU) No 1053/2013, Article 5

<sup>35</sup> Council Regulation (EU) No 1053/2013, Article 6

<sup>36</sup> Interview-EC-13/08/2020

<sup>37</sup> A regulatory procedure with scrutiny, to be used when EU legislation adopted under the co-decision procedure is amended and EP and Council choose to confer powers on the Commission to adopt implementing measures of general scope that can be described as "quasi-legislative". See Regulation (EU) No 182/2011.

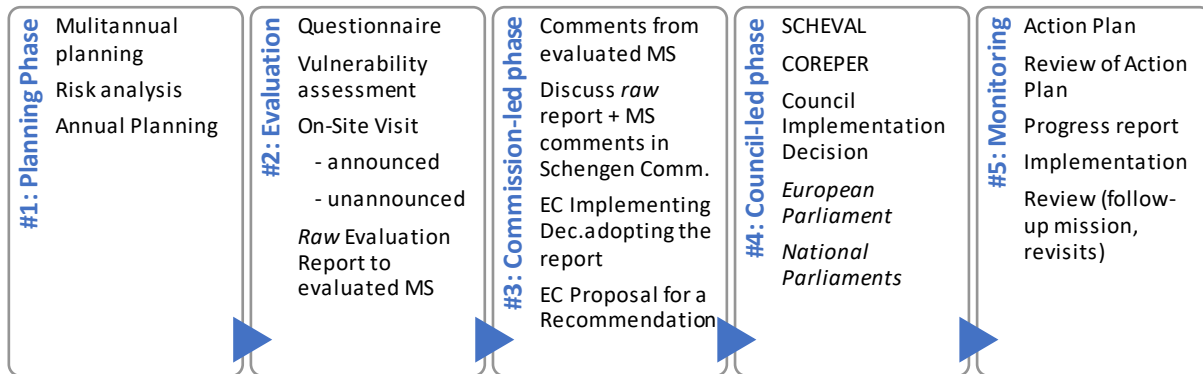
<sup>38</sup> Regulation (EU) No 182/2011 of 16 February 2011; Interview-EC-13/08/2020.

<sup>39</sup> Interview-EC-13/08/2020



the final content of the raw report<sup>40</sup> and the Commission shares it with the evaluated Member State within six weeks of the visit or questionnaire submission, at which point this Member State has the opportunity to provide comments. They are also able to send proposed revisions along with a justification. The evaluation team leaders determine what, if any, amendments will be incorporated. Following this process, the leading expert from the Commission sends a revised report draft to the Member States. At this time, an evaluated Member State can request a drafting meeting, if desired, in Brussels. If there are areas of significant disagreement, this can be mentioned in the report.<sup>41</sup>

**Figure 2: Overview of the SEMM process**



Source: Author's compilation

Note: MS = Member State; EC = European Commission

In the ensuing **Commission-led phase**, the draft report, along with any comments from the evaluated Member State, is shared with other Member States in the Schengen Committee. Member States can comment on the questionnaire responses, draft report or evaluated Member State comments. Once this feedback process has concluded, the Commission makes any necessary changes and adopts the evaluation report through an implementing act. It also shares the report with the European Parliament<sup>42</sup> and provides a proposal to the Council for their adoption.

The fourth step is **led by the Council**, where the report is first discussed in the SCHEVAL working group and upon adoption sent to the Permanent Representatives Committee (COREPER) for adoption as Council Implementing Decision. The adopted recommendations are sent to the European Parliament and Member State parliaments.<sup>43</sup> While information is shared with the European Parliament, these evaluation reports are classified as EU RESTRICTED.<sup>44</sup>

In the **final monitoring phase**, and no more than three months after receipt of the recommendations, the evaluated Member State is required to submit an **action plan** to the Commission and Council that details how it will address any deficiencies. This time period is reduced to one month if the evaluation found that the Member State in question was "seriously neglecting its obligations."<sup>45</sup> The action plan is also shared with the European Parliament. After speaking with the on-site and/or questionnaire team, the Commission shares its view on whether this plan is sufficient; at this point, other Member States are

<sup>40</sup> Interview-EC-13/08/2020

<sup>41</sup> Information provided by the European Commission

<sup>42</sup> Council Regulation (EU) No 1053/2013, Article 14

<sup>43</sup> Council Regulation (EU) No 1053/2013, Article 15

<sup>44</sup> Council Regulation (EU) No 1053/2013, Article 17

<sup>45</sup> Council Regulation (EU) No 1053/2013, Article 16

invited to provide their comments on the plan. **Evaluated Member States are required to report on the implementation of their action plans to the Commission within six months of the adoption of recommendations; they continue to report on their progress every three months until the action plan has been completely carried out.** Again, this initial period of six months is reduced to three months after the adoption of recommendations if the Member State in question was found to be neglecting its duties in a serious manner.

Depending on the degree of severity of identified deficiencies and the response to fixing them, the Commission can schedule announced **revisits** to the Member State to make sure that the action plan is being effectively implemented. At least four Member State experts who participated in the initial visit will join the revisit, along with any observers. The Commission will again develop the programme of this visit and must notify the Member State at least one month prior to a revisit – although it also has the option of conducting an unannounced visit. If during a revisit a Member State is found to have a “serious deficiency deemed to constitute a serious threat to public policy or internal security within the area without internal border controls,” the Commission is to immediately inform the European Parliament and Council.<sup>46</sup> If, on the other hand, a Member State has been identified as compliant but with room for improvement, the Member State must provide its assessment of how these improvements can be made within six months of the recommendations being adopted.<sup>47</sup>

**Once a year, the Commission presents a comprehensive report to the European Parliament and Council** on the evaluations carried out under the SEMM. This has not happened in the current evaluation cycle. The report is supposed to be available publicly and should include information about the evaluations and related conclusions from the previous year, as well as updates on any remedial activities. The Commission is supposed to also send this report to national parliaments.<sup>48</sup>

Finally, the SEMM Regulation also requires the Commission to review its implementation after the conclusion of the 5-year multiannual evaluation programme and to submit a report to the Council within 6 months of the adoption of all evaluation reports.<sup>49</sup> The review shall cover all elements of the Regulation and the functioning of the SEMM; it shall also be transmitted to the European Parliament. At the time of writing this report, the Commission is awaiting the adoption of this report, which is expected in the last quarter of 2020.

### 2.3. Evaluation tools in the SEMM

Evaluations under the SEMM rely on different tools. Questionnaires and site visits are the two main tools mentioned in the SEMM Regulation; these can be used independently or together to evaluate a particular Member State or issue area.<sup>50</sup> Outside of the SEMM evaluation tool itself but strongly influencing it, Frontex provides risk analyses and vulnerability assessments (VAs). Besides these, the evaluation reports, accompanied by recommendations and the resulting action plan, are key tools in themselves foreseen in the SEMM. This section presents the SEMM's main tools and how they were perceived by stakeholders interviewed for the present study.

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<sup>46</sup> Council Regulation (EU) No 1053/2013, Article 16

<sup>47</sup> Council Regulation (EU) No 1053/2013, Article 16

<sup>48</sup> Council Regulation (EU) No 1053/2013, Article 20

<sup>49</sup> Council Regulation (EU) No 1053/2013, Article 22

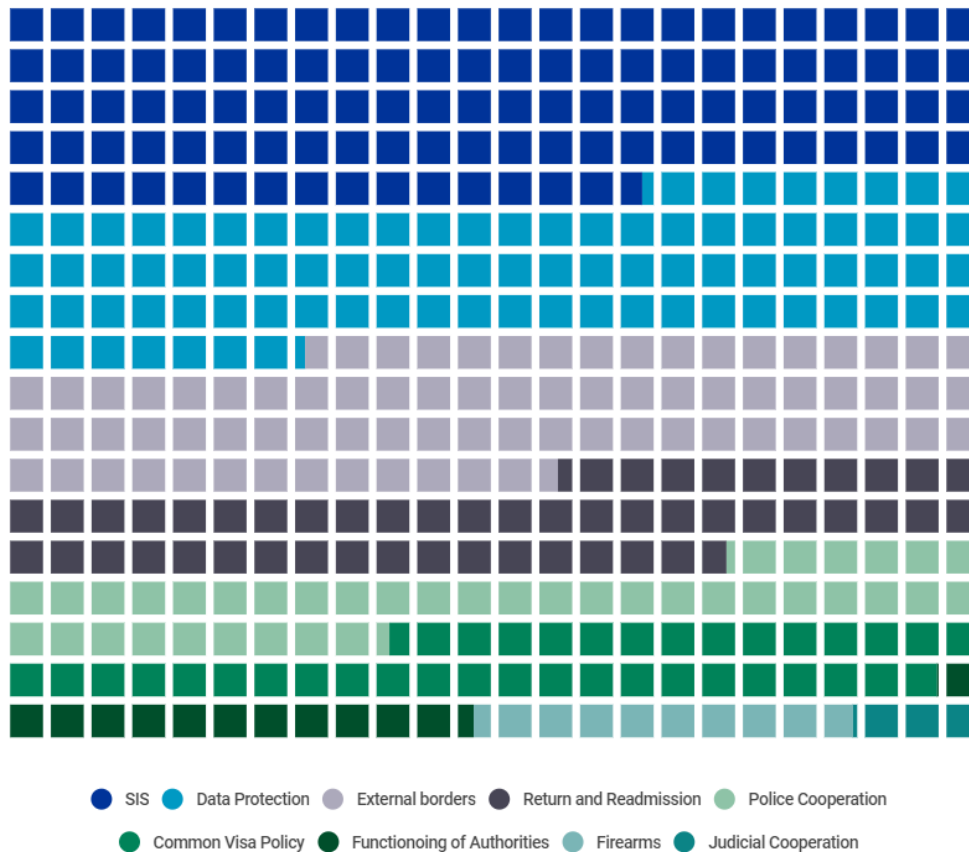
<sup>50</sup> Council Regulation (EU) No 1053/2013, Article 4



### 2.3.1. The questionnaire

Article 9 of Council Regulation (EU) No 1053/2013 tasked the European Commission with developing a **standardised questionnaire** for use in SEMM evaluation missions, in cooperation with the Member States, that encompasses questions related to relevant legislation, operational procedures and concepts. It also covers technical and organisational capacities related to the implementation of the Schengen *acquis* and available quantitative data.<sup>51</sup> The resulting questionnaire<sup>52</sup> was split into the main themes of the Schengen *acquis*, covering the following nine areas: 1) Management of External Borders, 2) Return and Readmission, 3) SIS; 4) Common Visa Policy; 5) Police Cooperation; 6) Data Protection; 7) Judicial Cooperation; 8) Legislation on Firearms; 9) Functioning of the Authorities Applying the Schengen *acquis*.

**Figure 3: The SEMM questionnaire: Questions per thematic area**



Source: Author's presentation based on European Commission C(2019) 6863 final

The questionnaire was updated in 2019<sup>53</sup> by aligning its content to the new Regulation (EU) 2019/1896 on European Border and Coast Guard (EBCG) and by deleting quantitative questions related to

<sup>51</sup> Council Regulation (EU) No 1053/2013, Article 9

<sup>52</sup> European Commission C(2014) 4657

<sup>53</sup> European Commission. Commission Implementing Decision of 30.9.2019 establishing a standard questionnaire in accordance with Article 9 of the Council Regulation (EU) No 1053/2013, and repealing Commission Implementing Decision. Brussels, C(2014) 4657; C(2019) 6863 final

capabilities in the area of border management. This information is to be retrieved in the VA,<sup>54</sup> which is shared by Frontex with the Commission for each Schengen evaluation as well as the evaluation teams. The questionnaire is composed of 414 questions in total.<sup>55</sup> The majority of questions refer to the Schengen Information System (107), followed by the Data Protection (84 questions), external borders (75 questions) and Return and Readmission (50 questions). The remaining areas are covered with 3 – 38 questions each (see Figure 3). The 2019 questionnaire also included new questions on fundamental rights standards in the context of external borders, requesting information on the handling of complaints, training on the topic and measures for vulnerable groups.

The Commission Implementing Decision<sup>56</sup> indicates that the questionnaire should be filled out by each Member State at least once every 5 years and shall serve as the major source of information for the preparation of on-site visits. The Implementing Decision considers an extensive questionnaire to be justified due to the objective of “ensuring high uniform standards in the application of the Schengen *acquis* and a high level of mutual trust among Member States.”<sup>57</sup> Member States that were interviewed confirmed that the SEMM questionnaire is very extensive and took a significant amount of time to answer.<sup>58</sup> In some instances, the questionnaire was considered redundant, as it was either not followed up on during the evaluation (e.g. questions on firearms),<sup>59</sup> similar to the Frontex VA (e.g. statistical data on staff, equipment, etc.)<sup>60</sup> or seen as obvious (e.g. questions on Frontex cooperation).<sup>61</sup> Answering overlapping questions on data, equipment or infrastructure in particular was a source of frustration for evaluated countries, which was addressed with the update in 2019.

On the positive side, the questionnaire was also viewed as valuable preparation for the evaluation mission<sup>62</sup> and a good way to conduct a sort of self-assessment on the national implementation of the Schengen *acquis*.<sup>63</sup> It was acknowledged that, while the initial response to the questionnaire is very time consuming, it will be easier in the next cycle of evaluation.<sup>64</sup> However, some countries reported that they only managed to finish the questionnaire in time because they started it well before they were officially invited to fill it in.<sup>65</sup> Moreover, interviewees indicated that the questionnaire needs regular update, as it does not reflect the latest policy developments in different areas.<sup>66</sup>

### 2.3.2. Site visits

Site visits can be either announced in advance or unannounced. Unannounced visits were a tool introduced with the SEMM Regulation to supplement announced visits, particularly in the area of

<sup>54</sup> Ibid, Recital 3.

<sup>55</sup> European Commission. Annex to the Commission Implementing Decision establishing a standard questionnaire in accordance with Article 9 of the Council Regulation (EU) No 1053/2013 and repealing Commission Implementing Decision. Brussels, C(2014) 4657; C(2019) 6863 final

<sup>56</sup> Ibid

<sup>57</sup> European Commission (2014c), Recital 3

<sup>58</sup> Interview-Gov-SE-07/09/2020; Interview-Gov-NO-08/09/2020. In the Norwegian case the response to the questionnaire filled 265 pages – see Ulrich, S, Nøkleberg, M & Gundhus, HOI (2020), p49.

<sup>59</sup> Interview-Gov-PL-02/09/2020

<sup>60</sup> Interview-Gov-SE-07/09/2020; Interview-Gov-NO-08/09/2020; Interview-Gov-PL-02/09/2020

<sup>61</sup> Interview-Gov-PL-02/09/2020

<sup>62</sup> Interview-Gov-NO-08/09/2020; Interview-Frontex-12/08/2020

<sup>63</sup> Interview-Frontex-12/08/2020

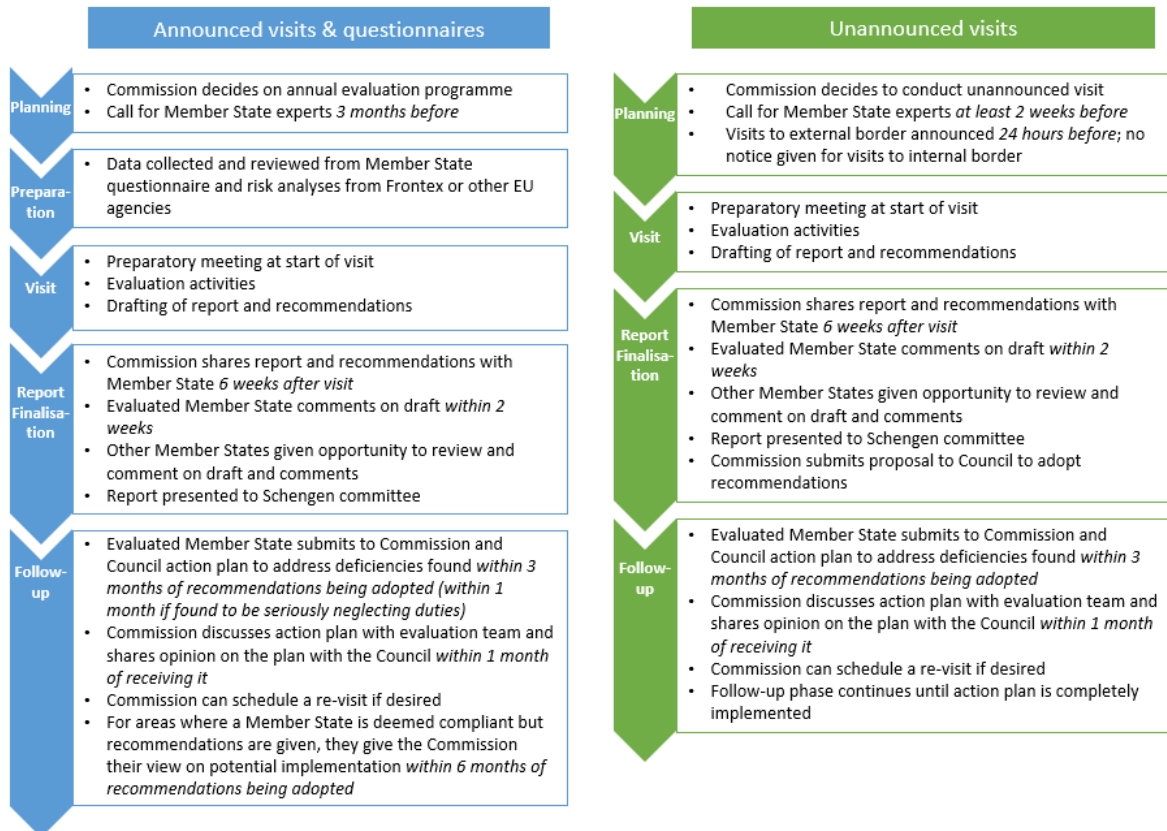
<sup>64</sup> Interview-Gov-NO-08/09/2020

<sup>65</sup> Interview-Gov-NO-08/09/2020

<sup>66</sup> Interview-Gov-AT-09/09/2020

border controls and visas.<sup>67</sup> The Commission determines in the annual evaluation programme which on-site visits will be announced and unannounced<sup>68</sup> (see Figure 4 for an overview of the processes involved in both types of visits). Announced visits are far more common than unannounced ones: During the first evaluation cycle, 164 visits were announced and 27 unannounced (of the latter, 13 were on external borders, 6 on internal borders, 3 on visas, 4 on return and 1 on the SIS).<sup>69</sup>

**Figure 4: The evaluation process for announced visits and unannounced visits**



Source: Author's presentation based on information provided by the European Commission

For **announced visits**, the Member State in question will be consulted and notified of the programme and timeline at least 6 weeks in advance. Members of the evaluation team prepare for the visit by reviewing the questionnaire as well as risk analyses from Frontex or other EU agencies. To supplement the information provided, Member States can give a presentation on the subject(s) of the evaluation.<sup>70</sup> In contrast, those who will receive **unannounced visits** to their external borders are given 24 hours' notice, with no prior notification given for unannounced visits taking place at internal borders. For these visits, teams are not given preparation materials prior to the visit. The Member State is responsible for ensuring that the evaluation team is able to speak with the relevant people and has all the access necessary to conduct its assessment.<sup>71</sup>

<sup>67</sup> Council Regulation (EU) No 1053/2013, Recital 12

<sup>68</sup> Council Regulation (EU) No 1053/2013, Article 6

<sup>69</sup> Interview-EC-13/08/2020

<sup>70</sup> Council Regulation (EU) No 1053/2013, Article 4; information provided by the European Commission

<sup>71</sup> Council Regulation (EU) No 1053/2013, Article 13; information provided by the European Commission

The Commission develops detailed programmes for both announced and unannounced visits; for those that are announced, it creates these in cooperation with Member State experts and the Member State being evaluated. Evaluation visits kick off with a preparatory meeting for the team members. After this, the actual evaluation activities commence, which may include visits, interviews, observations, tests and reviews of legislation and procedures. The team drafts the report and recommendations while still in the country; parts are written each day, with a longer drafting session taking place on the final day of the visit. Announced visits may be limited to five days, unannounced visits to three days, but the final duration of the on-site visit are based on the needs to conduct the evaluation.<sup>72</sup>

Most evaluators interviewed were of the opinion that **unannounced visits allow for a more accurate assessment of the real performance of Member States**, remarking that, in the case of announced visits, "...they are prepared for us. That's clear."<sup>73</sup> While it is important that countries take the evaluation visits seriously, these announced visits were characterised by some as a type of theatre.<sup>74</sup> While interviewees stated that the required 24 hours' notice for unannounced visits still gave evaluated countries time to prepare and was thus still a (lesser) challenge in this regard, unannounced visits were overall viewed as an instrument that should be used more often. Beyond their ability to more authentically assess the situation in a given country, unannounced visits were also seen as a helpful new tool for responding to issues as they arise.<sup>75</sup> Experts in the area of visas saw the need for unannounced visits but noted particular logistical challenges when they involve consular offices in countries that require, for instance, visas or vaccinations.<sup>76</sup> In contrast, unannounced visits were less welcomed by evaluated countries, as they can interfere with the work of staff at border-crossing points<sup>77</sup> and were seen as providing very limited insight into internal borders.<sup>78</sup> Most, though, see their utility, even if they may result in a stressful situation for the evaluated country.<sup>79</sup>

Regarding visits more broadly, **both evaluators and evaluated countries remarked that visits gave a snapshot of the Schengen *acquis*' implementation at a particular moment in time**. Stakeholders receiving evaluation visits also expressed that it can be difficult for a country to explain its culture, legislation or organisation within the constraints of the format of an evaluation, whether in a presentation, in writing or in person: "sometimes things are not possible to describe by just ticking a box."<sup>80</sup>

### 2.3.3. Frontex Vulnerability Assessments (VA)

Outside of the SEMM but with the aim of complementing it,<sup>81</sup> the EBCG Regulation<sup>82</sup> introduces a VA which is carried out by Frontex. The VA is to be based on objective criteria and shall assess the capacity and readiness of the Member States to face challenges at their external borders.<sup>83</sup> It is to cover Member

<sup>72</sup> Information provided by the European Commission

<sup>73</sup> Interview-Gov-DE-14/08/2020

<sup>74</sup> Interview-Gov-CZ-04/08/2020

<sup>75</sup> Interview-Frontex-12/08/2020

<sup>76</sup> Interview-Gov-AT-09/09/2020

<sup>77</sup> Interview-Frontex-12/08/2020

<sup>78</sup> Interview-Gov-PL-02/09/2020

<sup>79</sup> Interview-Gov-PL-02/09/2020

<sup>80</sup> Interview-Gov-SE-07/09/2020

<sup>81</sup> Regulation (EU) 2019/1896; Recital 45

<sup>82</sup> Regulation (EU) 2019/1896, Article 32/2

<sup>83</sup> Regulation (EU) 2019/1896, Recital 43, Article 32/4

States' equipment, infrastructure, staff, budget and financial resources as well as their contingency plans to address possible crises at the external borders.<sup>84</sup> The VA and the SEMM are similar in many ways. Both the questionnaire and the VA collect data with regard to capacity, equipment, staff and budget. Additionally, the on-site visit usually includes a presentation by the Member State at the beginning of the mission, where, again, all the basic data is presented.<sup>85</sup>

Following the EBCG Regulation, each Member State shall be subjected to such an assessment once every 3 years.<sup>86</sup> The VA is based primarily on quantitative data in one specific area of the Schengen *acquis*, namely external borders, whereas the SEMM is much broader, covering the whole Schengen *acquis* and consisting of both quantitative and qualitative data. While the SEMM evaluates the Schengen *acquis* in the framework of a multiannual evaluation programme, the VA is principally focussed on Member States facing a particular pressure to their external borders. Finally, the VA is conducted by Frontex alone, while the SEMM is a shared responsibility between the European Commission and Member States (see Table 1 for a comparison of the two instruments).

**Table 1: A comparison of the SEMM and VA**

	Schengen evaluation and monitoring mechanism (SEMM)	Vulnerability assessment (VA)
<b>Legal basis</b>	Specific SEMM Regulation (1053/2013)	Included in EBCG Regulation 2019/1896
<b>Aim and objective</b>	Verify application of Schengen <i>acquis</i> in Member States (Implementing and Candidate States) (Art 1/1)	Assess capacity and readiness of Member States to face challenges at the external borders (Art 32/4)
<b>Scope</b>	The whole Schengen <i>acquis</i>	External border
<b>Coverage (targeted MS)</b>	All Member States according to multiannual and annual action plans prepared by the Commission.	All Member States but especially those facing specific and disproportionate pressures
<b>Frequency</b>	Once every 5 years evaluation cycle + possible follow-up or unannounced visits	Evaluation cycle defined by the Frontex (at least once every 3 years)
<b>Methodology</b>	Standard Schengen Questionnaire, on-site visits	Determined by Frontex (Art 32/1 EBCG Regulation); involvement of Frontex liaison officers (Art 31/3/c)
<b>Responsible body</b>	EC led process, shared responsibility with MS + observers	Frontex
<b>Access to information</b>	Council of the EU, the European Parliament, National Parliaments	(Management Board), Supervisory Board

<sup>84</sup> Regulation (EU) 2019/1896, Recital 43

<sup>85</sup> Interview-Gov-PL-02/09/2020

<sup>86</sup> Regulation (EU) 2019/1896, Article 32/2

<b>Access to data between SEM and VA</b>	Proposed regulation does not provide needed access to the VA	The Agency is involved in the SEMM process and has (limited) access to Schengen evaluation related information (observer status and Art 12.4)
<b>Connection to Internal Security Fund - Borders and Visa fund</b>	Programming in line with the outcomes of the SEMM report. Dialogue with the Commission, the Agency and Member State concerned (Art 12/ISF-B). Where necessary, the Member State shall revise its National Programme.	

Source: Author's compilation

Note: MS = Member States, EC = European Commission

Some interviewees remarked that, from the perspective of evaluated countries, there is significant duplication between the SEMM and the VA. Member States inform Frontex on a monthly basis about new data, staffing and related issues. These processes, albeit under different mechanisms, are still perceived as quite constant evaluations.<sup>87</sup> However, evaluators complained that they had no access to Member States' VAs, even before the on-site visit,<sup>88</sup> an issue which was also taken up by the Finnish presidency<sup>89</sup> and the EBCG Regulation, which determines that the Commission shall share the results of the vulnerability assessments with all the members of the Schengen evaluation teams.<sup>90</sup>

#### 2.3.4. Thematic evaluations

In addition to unannounced visits, the SEMM Regulation also introduced a new element with thematic evaluations, which shall monitor the implementation of critical areas in accordance with Frontex's risk analysis or other criteria.<sup>91</sup> These thematic evaluations provide the possibility to evaluate "the application of specific parts of the Schengen *acquis* across several Member States."<sup>92</sup> In the first multiannual programme, just two thematic evaluations took place. The first, in 2015, evaluated local Schengen cooperation in New Delhi and Ankara on visa-related issues. The second concerned national strategies for European Integrated Border Management and took place in 2019.

#### 2.3.5. National quality mechanism

In its Article 3 the EBCG Regulation 2019/1896 lists the main elements of European Integrated Border Management (EUIBM), which shall – among others – also contain a quality control mechanism composed of the SEMM, the VA and "possible national mechanisms" to ensure the implementation of Union law in the area of border management.<sup>93</sup>

<sup>87</sup> Interview-Gov-CZ-04/08/2020

<sup>88</sup> Interview-Gov-PL-02/09/2020

<sup>89</sup> Council of the EU. Functioning of the Schengen evaluation mechanism (Reg. (EU) No 1053/2013) – Views of the Member States on the first multiannual evaluation cycle – Analysis of replies to the Presidency questionnaire. Brussels, 13244/2/19 REV2, 11.11.2019, para 3.8

<sup>90</sup> Regulation (EU) 2019/1896, Article 33/3.

<sup>91</sup> Council Regulation (EU) No 1053/2013, Article 6

<sup>92</sup> Council Regulation (EU) No 1053/2013, Article 6/1b

<sup>93</sup> Regulation (EU) 2019/1896, Article 3 (k)



### 2.3.6. Reports and recommendations

Reports are initially drafted during the evaluation itself (while in evaluated Member States in the event of announced or unannounced visits or in Brussels in the event of a questionnaire-based evaluation). They then go through an extensive feedback process involving the evaluation team, evaluated Member State, European Commission, other Member States and, in the case of unannounced visits, the Council. These reports detail the findings of the evaluation and the corresponding recommendations.<sup>94</sup> According to the Council Regulation, they “shall analyse the qualitative, operational, administrative and organisational aspects, as appropriate, and shall list any deficiencies identified during the evaluation.”<sup>95</sup> The team report also provides an overall assessment, with one of three options: 1) compliant; 2) compliant but improvement necessary; or 3) non-compliant.<sup>96</sup> The evaluation team develops recommendations in a separate document, based on the findings in the report. These recommendations focus on addressing deficiencies identified and include a prioritisation of these remedial efforts.<sup>97</sup>

With the introduction of the SEMM, interviewed stakeholders found that evaluation reports are now more straightforward, concise and of better quality. Prior to this, reports were characterised as a list of everything seen at border-crossing points, resulting in long, descriptive documents that were difficult to read and did not clearly come to valuable conclusions due to their length. In contrast, reports in the SEMM’s first multiannual programme were found to be more focussed and useful, centring on best practises and shortcomings identified.<sup>98</sup> According to one interviewee, as a result of this new format, “You get a really complete picture of how the country is managing their external border.”<sup>99</sup>

The fact that the evaluation report (adopted by the Commission) and the recommendations (adopted by the Council) are adopted by two different institutions and thus treated separately<sup>100</sup> is a result of a compromise when much of the SEMM responsibilities moved to the Commission. This division contributes to the rather lengthy process of adopting the evaluation report and the recommendations (albeit it may not be the main reason).<sup>101</sup>

## 2.4. Actors in the Schengen evaluation process

When the SEMM was designed, it took note of the broad consensus on the benefits of an evaluation system that is conducted among peers. The majority of the evaluation team is composed of country experts, one of whom acts as the leading Member State expert. The Commission, which used to have an observer role under the pre-SEMM evaluation system, became a central actor in evaluation activities. Additionally, observers from EU agencies such as Frontex, the European Union Agency for Law Enforcement Training (CEPOL), the European Union Agency for Law Enforcement Cooperation (Europol), the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), FRA, etc. may be involved, in accordance to their respective mandate. Generally, the approach of using a group of experts to offer an external view is

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<sup>94</sup> Information provided by the European Commission

<sup>95</sup> Council Regulation (EU) No 1053/2013, Article 14

<sup>96</sup> Council Regulation (EU) No 1053/2013, Article 14

<sup>97</sup> Information provided by the European Commission

<sup>98</sup> Interview-Gov-PL-02/09/2020; Interview-Gov-DE-14/08/2020

<sup>99</sup> Interview-Gov-DE-14/08/2020

<sup>100</sup> Before the SEMM Regulation, both the evaluation report and the recommendations were adopted by the Council.

<sup>101</sup> Interview-EC-13/08/2020. For a more detailed analysis of the duration of the various steps, see below in section 3.1.2.

deemed advantageous for identifying problems and evaluating national systems in “a more objective or a more comprehensive way.”<sup>102</sup> The Commission and Member States, according to Article 3 of Council Regulation 1053/2013, are to cooperate at all points during the evaluation process.

### Box 1: Composition of evaluation teams

- Leading expert from the Commission
- Leading expert from Member States
- Second Commission expert (if applicable)
- Other Member State experts (seven for announced visits and five for unannounced visits)
- Observer(s)

For evaluation teams assessing via questionnaire only, teams are comprised of Member State experts and Commission representatives.

Source: Authors' compilation based on information from the Commission

#### 2.4.1. European Commission

With the 2014 changes in the evaluation mechanism, the European Commission was given the most important role: it has an overall coordination function and, along with Member States, is jointly responsible for the SEMM's implementation. These coordination responsibilities include creating the multiannual and annual evaluation programmes (with input from Frontex and Europol), preparing evaluation questionnaires, scheduling and undertaking evaluation visits to Member States and preparing resulting reports and recommendations. It also makes sure that follow-up and monitoring activities related to the evaluation reports and recommendations are carried out as mandated. The leadership role of the Commission was envisioned both as a way to improve an intergovernmental evaluation system often referred to as “inefficient”<sup>103</sup> and to make evaluation and monitoring more neutral and objective.<sup>104</sup>

The Commission is thus leading the SEMM from the planning phase and the preparation of evaluation missions until the adoption of the evaluation report and the submission of the recommendations to the Council, with additional tasks regarding monitoring the implementation of the Member State action plan. These responsibilities also include the organisation and financing of evaluation missions, “which takes away a lot of burden from the evaluators and evaluated country.”<sup>105</sup>

Another significant step in streamlining the coordination role of the Commission happened with the restructuring of its Directorate-General for Migration and Home Affairs (DG HOME). Within DG HOME, the different Schengen policy tasks had been spread across different units. This was consolidated in 2019, when the Commission established a dedicated Schengen Evaluation Unit within the Directorate B for Borders, Interoperability and Innovation.

<sup>102</sup> Interview-Frontex-12/08/2020

<sup>103</sup> Interview-Gov-DE-14/08/2020

<sup>104</sup> Kaasik, J (2017), p12

<sup>105</sup> Interview-Gov-PL-02/09/2020



While interviewees agreed that the coordination of SEMM was improved through bundling the organisation of the SEMM and the lead expert function of the Commission, the evaluations also became more formal compared to the previously used peer-to-peer approach.<sup>106</sup>

#### 2.4.2. National Experts

There is a strong agreement among Member States and evaluators that **an important pillar of the SEMM is the element of peer evaluation**. The main arguments for this are threefold: 1) peers are well aware of the processes and challenges and can therefore effectively assess what is important; 2) the peer system brings mutual trust between evaluators and the evaluated<sup>107</sup>; and 3) it brings the added value of training in the sense that it allows Member States to learn from each other through conducting evaluation missions. Peer evaluation is also seen as bringing a strong practical focus, which prevents the evaluation from becoming too bureaucratic."<sup>108</sup>

"I think that Member States are very reluctant and certainly do not want to see just the Commission or agency coming in and telling you how to go about this right now. So, I think the peer evaluation component is a very important trust-building measure."<sup>109</sup>

At the same time, Member States and evaluators acknowledge the need for training and the lack of national experts in specific fields. Visa experts from consular services, for example, are subject to a rotation principle in their respective external services, which is why their availability for Schengen evaluations is limited in time.<sup>110</sup> Also, because Member States have the power to designate experts and may have specific interests in the evaluations of particular countries (e.g. along migratory routes to their own country), they may thus decide for strategic reasons to send an expert (or not) for an evaluation.<sup>111</sup>

There is no pool of Member State evaluation experts in the various policy fields; rather, the Commission invites countries to suggest appropriate experts for each evaluation mission. Among those proposed, the Commission selects experts taking into account a mix of countries, expertise and evaluation knowledge. However, in many instances the Commission lacks appropriate experts. One solution that was discussed in interviews was to create a pool of experts that could provide more flexibility and efficiency; however, some raised concerns that this may weaken the peer-to-peer element of the SEMM in the long term.<sup>112</sup>

#### Training

Those participating in evaluation missions are required to have the appropriate knowledge and experience regarding the topics evaluated. They must also have a strong foundation in evaluation methods and be able to conduct the mission in English. Member States and the Commission are responsible for ensuring that participating experts have received sufficient training in order to carry out their evaluation-related responsibilities, including specific training for these tasks that includes

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<sup>106</sup> Interview-Gov-CZ-04/08/2020

<sup>107</sup> Interview-EC-13/08/2020

<sup>108</sup> Interview-Gov-IT-30/07/2020

<sup>109</sup> Interview-Council-28/07/2020

<sup>110</sup> Interview-Gov-AT-09/09/2020

<sup>111</sup> Interview-Gov-DE-14/08/2020

<sup>112</sup> Interview-Gov-DE-14/08/2020

respecting fundamental rights. These trainings are supposed to be based on common standards and concepts to ensure consistency within and across evaluations.<sup>113</sup> Several EU agencies, including eu-LISA, Frontex and CEPOL, provide trainings in relevant areas for evaluators.

## Box 2: Frontex training for Schengen Evaluators

Frontex developed a training programme for Schengen evaluators, mainly for evaluators on borders and return. This one-week training is open for Member State experts who wish to become evaluators. The training encompasses:

- Day 1+2: Theoretical input
- Day 3: An evaluation exercise taking place in real time at a border crossing point (land/sea/air, depending on the training location)
- Day 4: Report drafting exercises related to the on-site evaluation

Together with the Commission, the training is also used to further develop evaluation tools such as a checklist or the design and content of the evaluation report.

Frontex requires that trainings encompass participants from a variety of Member States. Trainers are required to conduct Schengen evaluations at least once per year to ensure that trainers “stay on track and that we do not tell them [trainees] anecdotes from [the past].”

Source: Interview-Gov-DE-14/08/2020

Training is a key input for ensuring a high-quality SEMM, as the evaluators themselves are instrumental in the process: “...a real evaluation and training go hand in hand.”<sup>114</sup> Overall, stakeholders remarked that more standardised training had resulted in a higher degree of professionalism and improved the quality of evaluations under the SEMM.<sup>115</sup> This training was found to be particularly well advanced in the field of external borders, which was attributed to Frontex’s role in spearheading a strong training programme in this area.<sup>116</sup> However, training in other fields, such as visas, was seen as lacking.<sup>117</sup> Moreover, it was pointed out that the demand for training is consistently high, particularly given the need for continuous training to enable experts to stay up-to-date.<sup>118</sup>

Moreover, interviewees reported that training and staffing problems were interlinked.<sup>119</sup> They acknowledged that evaluations require a specialised background, which limits the potential pool of people to send on missions and to train: “...the community of people [working on] this is not that big and it is rather tight knit network of colleagues.”<sup>120</sup> One stakeholder at the EU level found that this was problematic, as it hampered the application of lessons learnt from the evaluations to policymaking.<sup>121</sup>

<sup>113</sup> Information provided by the European Commission

<sup>114</sup> Interview-Gov-DE-14/08/2020

<sup>115</sup> Interview-Gov-CZ- 25/08/2020; Interview-Gov-DE-14/08/2020

<sup>116</sup> Interview-Gov-AT-09/09/2020; Interview-EC-13/08/2020

<sup>117</sup> Interview-Gov-AT-09/09/2020

<sup>118</sup> For more, see CEPOL (2018)

<sup>119</sup> Interview-Gov-DE-14/08/2020

<sup>120</sup> Interview-Council-28/07/2020

<sup>121</sup> Interview-Council-28/07/2020

### 2.4.3. Observers

The third key group of stakeholders involved in the SEMM consists of observers from various EU bodies, institutions and organisations. Those specifically named in the Council Resolution setting up the SEMM are Frontex, Europol, Eurojust and the European Data Protection Supervisor, although the Commission can seek input from relevant EU bodies, offices and agencies involved in the implementation of the Schengen *acquis* more broadly.<sup>122</sup> The Commission can invite representatives from these EU entities to participate in on-site visits as observers when the area being evaluated relates to their mandate.

As mentioned, Frontex, Europol, FRA and eu-LISA play important roles in the SEMM through their specific risk analyses, which the Commission uses when setting priorities for upcoming evaluation programmes. Additionally, the agencies provide ad hoc expertise concerning on-site visits in their respective fields of expertise. Through its VA, Frontex provides an additional evaluation tool that can complement the SEMM. Besides Frontex evaluation trainings for borders, also CEPOL and eu-LISA provide training for expert evaluators and trainers on police cooperation, the SIS and other data systems to ensure they are properly prepared to undertake evaluation missions.<sup>123</sup>

## 2.5. Stakeholders reviewing and adopting SEMM recommendations

In addition to the stakeholders directly involved in a Schengen evaluation, other Member States, the Council and the European as well as national Parliaments are involved in reviewing and finalising recommendations.

### 2.5.1. Member States

Besides their key role in the SEMM of designating experts to participate on the evaluation teams, Member States can comment on the action plans of evaluated Member States during meetings of SCHEVAL within the Council Working Party on Schengen Matters and in writing. Thus, although the current evaluation system is seen as a supranational mechanism that is integrated into the EU system, Member States still influence the SEMM considerably.

### 2.5.2. The Council of the EU

The Council has the power to adopt recommendations for remedial action to resolve any weaknesses identified in Member State evaluation reports. It was given this role due to the politically sensitive nature of this task. The working party on Schengen Matters meets in four different formations – among which the SCHEVAL working party deals with the Schengen Evaluation Mechanism.<sup>124</sup> SCHEVAL is involved in the broader evaluation processes in two different steps. First, it discusses the recommendations put forward by the Commission based on the evaluation mission and may amend the draft recommendations and prepares the recommendations to be adopted by the COREPER. Once the recommendations have been passed from the Council to the evaluated Member State, SCHEVAL is once more involved in discussing the action plan prepared by the evaluated Member State after a prior assessment by the Commission.

### 2.5.3. European Parliament

Finally, the European Parliament plays an active role in monitoring the application of and compliance with the Schengen *acquis*. The EP LIBE committee Working Group on Schengen Scrutiny liaises with

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<sup>122</sup> Council Regulation (EU) No 1053/2013

<sup>123</sup> Written input from CEPOL

<sup>124</sup> Council of the EU (2017)

the European Commission and the Council at relevant steps of the evaluation and monitoring process, such as concerning the final evaluation report, adopted recommendations and action plan. It also regularly organises in camera or public meetings on the Schengen Area.

### 3. OUTLOOK, RESULTS AND IMPACT OF THE SEMM IN 2014-19

#### KEY FINDINGS

**All Schengen countries were evaluated** on all policy areas during the 2014-19 cycle. The most substantial change in planned evaluations is the addition of Croatia to the programme after it declared on 13 March 2015 its readiness to start the Schengen evaluation process as of 1 July 2015.

France and Croatia were the most evaluated Schengen countries in 2014-19. The management of the **external border is the policy area for which the largest number of evaluations were performed** during the evaluation cycle.

**On average, it took 11 months from the completion of an evaluation visit to the adoption of a Council Decision laying down recommendations to address deficiencies.** The longest period between an evaluation visit and the adoption of recommendations is 27 months, in the case of the UK (SIS); the shortest is 3 months, in the case of Greece (external borders).

**The SEMM has been implemented in a way that is not conducive to generating horizontal findings** about the state of the Schengen area.

The most time (9 months on average) is spent on the period between the completion of the evaluation visit and the adoption of the report and related recommendations (the Commission-led phase).

There have been **six cases of serious deficiencies** identified by Schengen evaluations during the last cycle. However, there is no clear and public definition of what constitutes a serious deficiency. Moreover, **serious deficiencies do not necessarily result in a faster adoption of recommendations**; they varied between 3 months (Greece on external borders) and 27 months (UK on SIS).

From a formal perspective, the monitoring phase of the SEMM complied in practice with the requirements of its founding Regulation, although this alone does not guarantee that Member States have appropriately implemented remedial actions.

**Member States have adopted different concrete approaches towards the implementation of measures related to their application of the Schengen acquis.** Due to the scheduled nature of most evaluations, remedial action has been undertaken as part of preparations for SEMM visits, as well as before the Commission adopted the evaluation report and proposal for recommendations.

There has been **political interference** with the functioning of the SEMM during the 2014-19 cycle, in particular when credibly documented violations of fundamental rights at the external borders of Croatia were overlooked.

**Political support at the national and EU levels is an important factor in ensuring the implementation of remedial action following Schengen evaluations.** EU funding (e.g. from the ISF) can make an important contribution to the implementation of the SEMM recommendations.

The strength of the **monitoring** component of the SEMM, that is its capacity to ensure that remedial action is indeed undertaken, **is dependent on the mobilisation of national political authorities and political support for remedial action at the EU level - and on the availability of resources**, in particular EU funding, to support this action.

### 3.1. Planning and overview of SEMM evaluations 2014-19

#### 3.1.1. Multiannual and annual planning of SEMM evaluations 2014-19

Council Regulation 1053/2013 establishing the SEMM came into force end of November 2013. The first multiannual evaluation programme was adopted by the European Commission in June 2014 and foresaw that 26 countries would be evaluated according to the timeline in Figure 5.

**Figure 5: Multiannual programme of SEMM country evaluations, 2014-19**



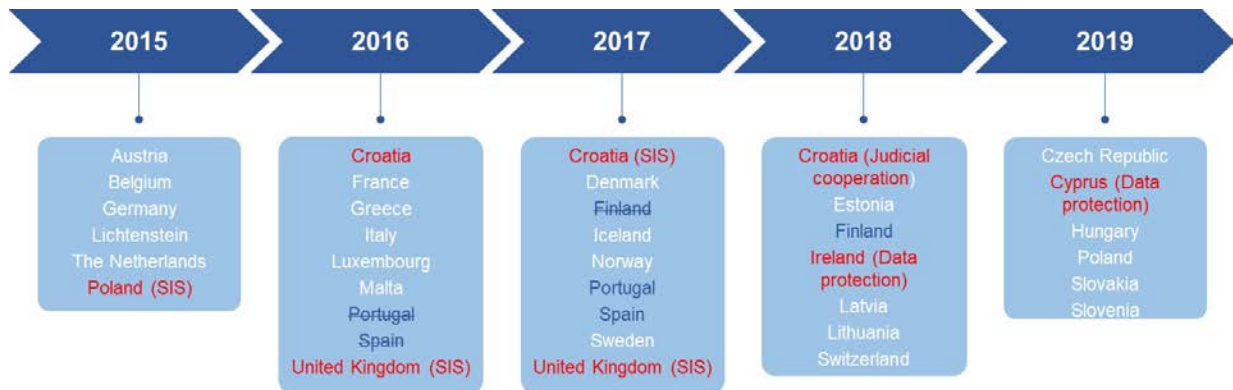
Source: Author's compilation

The initial programme roughly followed a regional logic, with Northern European Schengen countries evaluated in 2015, Southern Member States (with the addition of France and Luxembourg) in 2016, Nordic Schengen countries in 2017, the Baltic states in 2017 (with the addition of Switzerland) and the Visegrád countries in 2019 (with the addition of Slovenia).

As foreseen in Article 5(3) of the SEMM Regulation, the multiannual programme was adapted using the annual evaluation programmes, developed by the Commission following the procedure established in Article 6(1) of said Regulation and particularly taking into account risk analysis by Frontex or other EU bodies. Annual evaluation programmes consist of two sections: **the schedule of announced evaluations for the upcoming year**<sup>125</sup> and **a list of unannounced on-site visits to be carried out in the following year**. As the latter refers to unannounced visits, it is considered confidential, is not communicated and is not available publicly. Article 6(1) of the SEMM Regulation determines that annual evaluation programmes shall be established by the European Commission "by 31 October of the year preceding that to which the programme relates". The Commission adopted the annual evaluation programmes on schedule for the 2015 and 2019 programmes, but after the deadline for the programmes for the years 2016 through 2018. Figure 6 illustrates modifications to the multiannual programme, as introduced by annual programmes during the evaluation cycle.

<sup>125</sup> See: Commission Implementing Decision (2014b) 7881 of 30.10.2014 and Annex (2015 annual programme); European Commission (2015b) and Annex (2016 annual programme); European Commission (2016b) and Annex (2017 annual programme); European Commission (2017a) Annex (2018 annual programme); European Commission (2018a) and Annex (2019 annual programme).

**Figure 6: Modifications to the SEMM multiannual programme foreseen by annual programmes**



Source: Author's compilation

Note: Country names in red are additions to the annual evaluation programme. Country names in blue are planned evaluations transferred from the previous year.

As shown, the schedule of announced country evaluations established in the multiannual programme is mostly reflected in annual programmes. There are two types of modifications. First, **planned country evaluations have been transferred from one year to the next**. This is the case for the evaluation of Portugal and Spain, scheduled in 2016 and undertaken in 2017, and for the evaluation of Finland (moved from 2017 to 2018). Second, annual evaluation programmes have introduced **additional scheduled evaluations**. The most substantial change in planning in this regard is the addition of **Croatia** to the programme after it declared on 13 March 2015 its readiness to start the Schengen evaluation process as of 1 July 2015. The addition of Croatia was accomplished by a modification of the multiannual evaluation programme in July 2015.<sup>126</sup> Croatia was evaluated in all policy areas in 2016, except for the SIS, which was delayed to 2017 pending the adoption of a Council decision on Croatia's application of the Schengen *acquis* in that field. The evaluation of the **United Kingdom's** (UK's) application of the *acquis* in the field of the SIS is the second important addition to the multiannual programme. The evaluation was initially planned for 2016 and subsequently took place in 2017, as a Council decision on the application of the *acquis* in the field of the SIS was outstanding. **Ireland** was not listed in the multiannual programme, but an evaluation on the application of the Schengen *acquis* in the field of data protection was later planned in the annual programme for 2018. The same applies to **Cyprus**, which was not initially listed in the multiannual programme but was evaluated on its application of the Schengen *acquis* in the field of data protection in 2019.<sup>127</sup> Neither the multiannual programme nor subsequent annual programmes include evaluations of the application of the Schengen *acquis* by **Bulgaria** or **Romania**. This was justified on the grounds that the Council decision on the full application of the *acquis* by the two countries had not been adopted.<sup>128</sup>

Article 5(4) of the SEMM Regulation further establishes that the multiannual evaluation programme "may contain reference to **thematic evaluations**" which concern "the application of specific parts of the Schengen *acquis* across several Member States" as specified in Article 6(1)(b) of the Regulation. The 2014-19 multiannual programme indicates that all Member States should be evaluated on "specific

<sup>126</sup> European Commission. Commission Implementing Decision C(2015) 4827 of 23.7.2015

<sup>127</sup> Cyprus is listed in the 2020-24 multiannual evaluation programme as a Member State to be evaluated in 2020 for the purpose of Article 1(1)(b) of the SEMM Regulation, that is to assess its readiness to apply the Schengen *acquis* (see European Commission (2019a)), following its application to join the Schengen area introduced in July 2019.

<sup>128</sup> The situation remains unchanged at the time of finalising this study (October 2020). See the 2020-24 multiannual evaluation programme established by European Commission (2019a).



aspects of the visa policy" throughout the cycle. Annual programmes have specified and modified the planning of thematic evaluations to local Schengen cooperation for 2015 and the Member States' national IBM strategies for 2019.

### 3.1.2. Overview of 2014-19 SEMM evaluations

Based on figures communicated by the European Commission,<sup>129</sup> **199 Member State evaluations** were conducted, including unannounced visits and revisits, in addition to **2 thematic evaluations** (one in the field of visa policy and one in border management). Out of the 199 Member State evaluations, the research identified at the time of writing (October 2020) **173 publicly available Council Implementing Decisions that set out recommendations to address deficiencies**<sup>130</sup> The overview of the implementation of evaluations addresses the following points:

- **Consistency between planned and performed evaluations:** Did all planned evaluations take place and how many times was each Schengen country evaluated during the first multiannual programme?
- **Unannounced evaluations:** How many and which evaluations were unannounced evaluations within the meaning of Article 13(2) of the SEMM Regulation - that is evaluation visits "without prior notification to the Member State(s) concerned"?
- **Revisits:** How many and which evaluations performed were "revisits" within the meaning of Article 16(5) of the SEMM Regulation – i.e. evaluation visits meant to "verify implementation of the action plan" adopted by a Member State following an initial evaluation?
- **Policy areas evaluated:** Which policy areas were covered by evaluations during the 2014-19 cycle?
- **Timeliness:** Overall, how much time did it take for an initial evaluation to be completed, from the moment when the evaluation took place to the adoption of a Council recommendation?

#### 3.1.2.1. Consistency between planned and performed evaluations

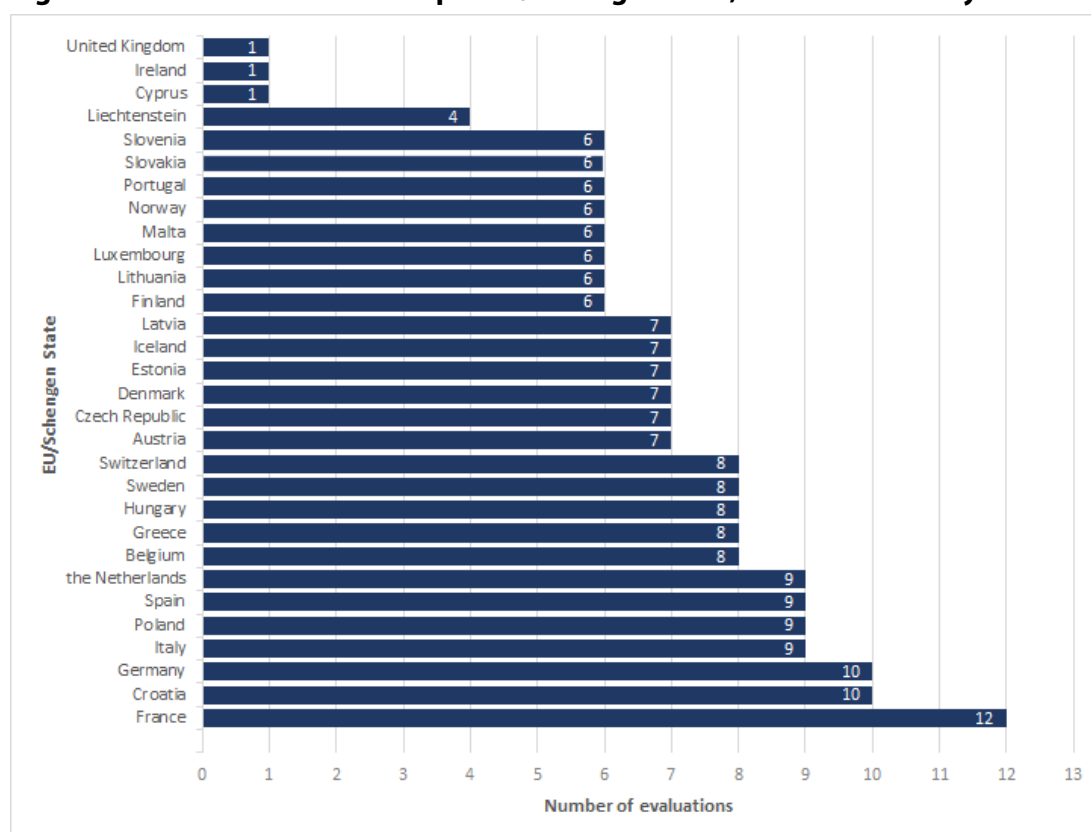
First, **all countries listed in the multiannual programme have been evaluated** during the 2014-19 evaluation cycle. In this regard, the SEMM should be assessed as having performed appropriately. The number of evaluations has differed sometimes significantly from one country to another. This is shown in Figure 7 below, which ranks Schengen countries based on the number of evaluations performed during the period.

<sup>129</sup> Information provided by the European Commission

<sup>130</sup> The discrepancy between the total number of performed evaluations communicated by the European Commission and the number of Council Implementing Decisions found in the Council Register of Documents is explained by the fact that the majority of recommendations related to evaluations conducted in 2019 were yet to be adopted at the time of writing. The process was delayed as a consequence of the Covid-19 pandemic and its impact on the work of the institutions.



**Figure 7: Number of evaluations per EU/Schengen state, 2014-19 SEMM cycle**



Source: Author's compilation.

Note: The number of evaluations per Member State accounted for in the chart exceeds the number of Member State evaluations provided above (205 to 199). This is because of internal border evaluations involving more than one Member State (France-Germany 2015, Austria-Italy 2016, France-Italy 2018), which result in each evaluation being counted twice for each Member State here.

### 3.1.2.2. Types of evaluation performed

The number of evaluations performed per evaluated Schengen state can be disaggregated by the conduct of unannounced visits and revisits, as well as by differences of status regarding membership of the Schengen area and scope of application of the Schengen *acquis*. Countries that do not participate in full in the Schengen *acquis* are logically evaluated on fewer areas (e.g. Cyprus, Ireland, the United Kingdom), while Croatia as a Schengen applicant was evaluated more repeatedly and on more areas. Table 2, below, provides a further breakdown of evaluations by type of evaluation, Schengen country/policy area and date.

**Table 2: Types of evaluation conducted during the 2014-19 SEMM cycle**

Type of evaluation	2015	2016	2017	2018	2019
Announced visits & questionnaires <sup>131</sup>	Austria Belgium Germany	Croatia France Greece	Croatia (SIS) Denmark Iceland	Croatia (judicial cooperation) Estonia Finland	Cyprus (data protection) Czech Republic Hungary

<sup>131</sup> Unless specified, the countries listed here were evaluated for the six main policy fields covered by the SEMM, namely data protection, external borders, police cooperation, SIS, return and visa policy.

	Netherlands Liechtenstein	Italy Luxembourg Malta France	Norway Sweden Portugal Spain	Ireland (data protection) Latvia Lithuania Switzerland	Poland Slovakia Slovenia
Unannounced visits	France & Germany (internal borders) Greece (external borders) Hungary (external borders) Latvia (internal borders) Poland (external borders) Spain (external borders) Sweden (external borders) Switzerland (external borders)	Austria & Italy (internal borders) Denmark (external borders) Estonia (external borders) France (return) Germany (return) Spain (external borders)	Czech Republic (internal borders) The Netherlands (Visa) The Netherlands (external borders) Hungary (return) Italy (external borders) Poland (external borders)	Belgium (visa) France & Italy (internal borders) Germany (SIS) Greece (external borders)	France (external borders) France (visa) Germany (return) The Netherlands (visa) Spain (visa) Switzerland (visa)
Revisits	Poland (SIS)	Belgium (SIS)	Croatia (external borders) United Kingdom (SIS)		Croatia (external borders) Iceland (external borders) France (SIS) Sweden (external borders)

Source: Information provided by the European Commission

Overall, **France** has been the most evaluated EU and Schengen country during this period, with a total of **12 evaluations**. In addition to evaluations in the six main policy areas covered by the SEMM, France received unannounced visits in the fields of internal borders (2015 with Germany, 2018 with Italy), external borders (2019, Orly Paris Airport and Nice Airport), return (2016, Pas de Calais area) and visa policy (2019), as well as an evaluation revisit in the field of the SIS (2019), for which the 2016 planned evaluation had identified serious deficiencies. **Croatia** and **Germany** are the next two most evaluated EU and/or Schengen countries, with the case of Croatia deserving a little more attention given its status as a Schengen candidate EU Member State. Croatia is the **only Member State participating in the SEMM** that has been evaluated for its application of the Schengen *acquis* in the field of **firearms** (2016) and **judicial cooperation** (2017). While it has not received unannounced visits, it is also the only

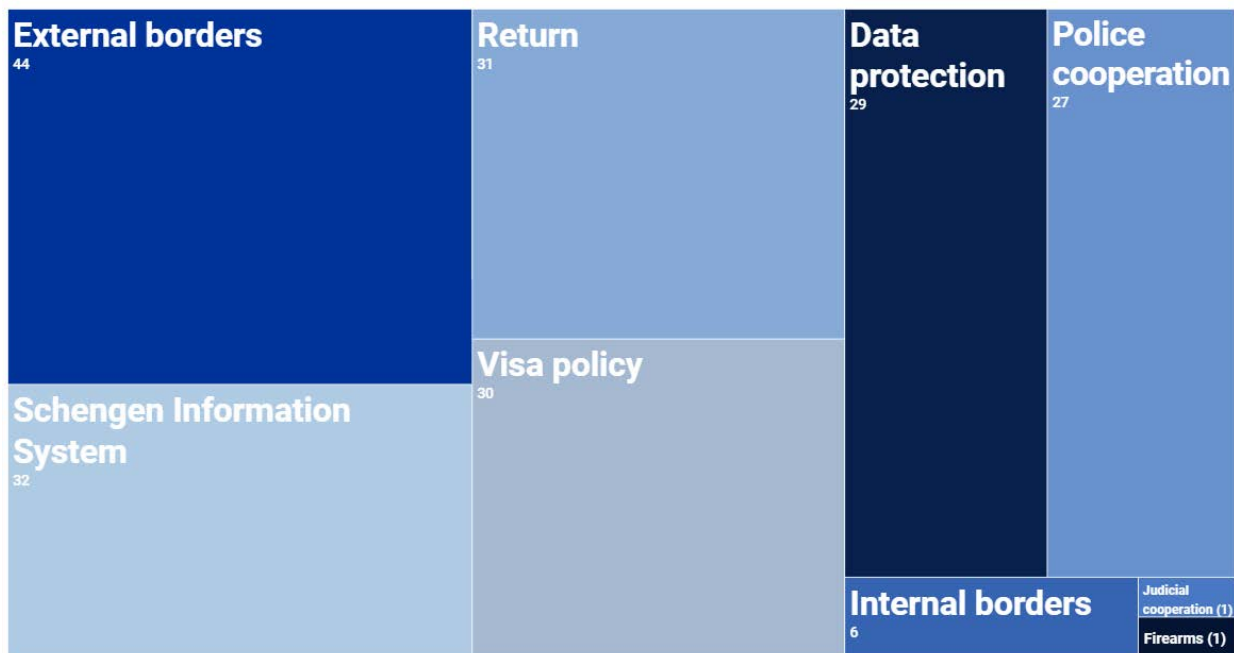
participating Member State that has **received two evaluation revisits**, both in the field of **external borders** (2017 and 2019).

SEMM evaluations have taken place in three Member States that did not apply the Schengen *acquis* in full during the 2014-19 cycle: Cyprus (2019, data protection), Ireland (2018, data protection) and the United Kingdom (originally scheduled in 2016, conducted in 2017 in the field of the SIS). Finally, the **overwhelming majority** (164 out of 199, 82%) of evaluations during the 2014-19 cycle **involved announced visits**. Unannounced visits accounted for 13% (27) of performed evaluations, while 8 evaluations were conducted in the context of revisits (4%).<sup>132</sup>

### 3.1.2.3. Policy areas evaluated

The aforementioned evaluation visits have covered **nine different policy areas**. These include the six core areas listed in Article 4 of the SEMM Regulation (data protection, the management of external borders, police cooperation, return, SIS and visa policy), as well as the application of the Schengen *acquis* in the field of internal borders, firearms and judicial cooperation in criminal matters. The full breakdown of evaluations by policy area is presented in Figure 8 below.

**Figure 8: Breakdown of SEMM Council Implementing Decisions by policy area, 2015-20**



Source: Author's compilation

Note : The two thematic evaluations conducted during the cycle on local Schengen cooperation and national strategies for European Integrated Border Management are included under visa policy and external borders, respectively.

The **management of external borders** has been the most evaluated policy field under the SEMM in 2014-19 (44, about 22%), followed at some distance by the SIS (32 evaluations). At the other end, **firearms** and **judicial cooperation in criminal matters** are the least evaluated policy areas (one evaluation each). As it was explained to us by interviewees, the application of the Schengen *acquis* in both fields is only evaluated for countries that have signalled their readiness to join the Schengen area,

<sup>132</sup> Information provided the European Commission

which explains why Croatia was the only evaluated Member State in that domain.<sup>133</sup> Finally, Recital (1) of the SEMM Regulation also identifies **drugs policies** as an evaluation area, although it is not subsequently listed in Article 4. There were, however, no evaluations as part of the SEMM in this policy field during the 2014-19 cycle, the reasoning being that the Schengen *acquis* here was evaluated through other areas such as police cooperation or border management.<sup>134</sup>

**Two thematic evaluations** were conducted during the 2014-19 cycle. In line with the multiannual programme, the 2015 thematic evaluation looked at local visa cooperation<sup>135</sup> between Member State consulates in Ankara (Turkey) and New Delhi (India). A second thematic evaluation involving all Member States took place in 2019 and focused on EUIBM. While not foreseen in the multiannual programme, this thematic evaluation was added by the European Commission in the 2019 annual programme following a request from the Council in its conclusions on EUIBM of June 2018.<sup>136</sup> The request anticipated the adoption of a technical and operational EUIBM strategy by Frontex,<sup>137</sup> foreseen at the time for the end of 2018<sup>138</sup> and responded to the outline of the main elements for the EUIBM presented by the European Commission in Annex 6 of its March 2018 progress report on the implementation of the European Agenda on Migration.<sup>139</sup> It followed the invitation issued by the Council to the Member States in the same conclusions to "prepare or align appropriate national IBM strategies [...] at the latest by June 2019, or within six months from the adoption of the technical and operational strategy by Frontex, if the latter is adopted after the end of 2018."<sup>140</sup>

#### 3.1.2.4. Timeliness

The last point on the implementation of the planned SEMM evaluations during the 2014-19 cycle concerns their **timeliness**. On the one hand, the length of the entire SEMM procedure (from evaluation to the adoption of recommendations by the Council) is regularly cited by interviewees as one of the limits of the mechanism. In its resolution of 30 May 2018 on the annual report on the functioning of the Schengen area, the European Parliament also states its opinion that the "major delays" between evaluation visits and the adoption of Council recommendations should be addressed.<sup>141</sup> On the other hand, the SEMM Regulation does not always foresee clear deadlines for each step of the evaluation process, and specifically for the parts of the process that the European Parliament considers as a source of major delays. As detailed above, the Regulation establishes the following deadlines:

- The Commission "shall communicate the draft evaluation report to the evaluated Member State **within six weeks**" and the "evaluated Member State shall provide its comments on the draft evaluation report **within two weeks of its receipt**." (Article 14(4));
- Evaluated Member States have to **communicate an action plan to remedy the identified deficiencies within 3 months** of the adoption of recommendations, or 1 month in case of serious deficiencies (Article 16(1));

<sup>133</sup> Interview-EC-13/08/2020

<sup>134</sup> Interview-EC-13/08/2020

<sup>135</sup> Regulation (EC) No 810/2009, Article 48

<sup>136</sup> See Council of the EU Outcome of the Council Meeting 9680/18 and Council of the EU; Draft Council Conclusions on European Integrated Border Management (EUIBM). Brussels, 9000/18.

<sup>137</sup> Originally in the framework of Article 3 of the European Border and Coast Guard (EBCG) Regulation. See Regulation (EU) 2016/1624 repealed by Regulation (EU) 2019/1896.

<sup>138</sup> Eventually published in 2019 – see Frontex (2019).

<sup>139</sup> Council of the EU; Draft Council Conclusions on European Integrated Border Management (EUIBM), 9000/18

<sup>140</sup> Council of the EU Outcome of the Council Meeting 9680/18, p4

<sup>141</sup> European Parliament. Resolution of 30 May 2018 on the annual report on the functioning of the Schengen area, 2017/2256 (INI), OJ C 76, 9.3.2020, point 25

- The Commission shall present its assessment of said action plan to the Council within 1 month (Article 16(2)); and
- The evaluated Member State shall **report** to the European Commission **on the implementation of its action plan within 6 months** of the adoption of the recommendations **and every three months after that** until the action plan is fully implemented (Article 16(3)), or 3 months of the adoption of the recommendations in case of serious deficiencies (Article 16(4)).

Article 14 and Article 15 (on recommendations) do not foresee a specific timetable for 1) the Commission to adopt evaluation reports and transmit them to the Council; 2) for the Commission to draft and submit a proposal for recommendations on remedial actions to the Council; or 3) for the Council to adopt said recommendations.

Given the lack of publicly available information, it is not possible to provide a systematic assessment of compliance with Article 14(4) and Article 16(2) to (4). Records in the Council register of documents regarding Article 16(1), on the other hand, are not entirely complete **but can offer a fuller picture based on the 107 action plans that were identified.**<sup>142</sup> Table 3, below, illustrates the time elapsed between the adoption of recommendations by the Council and the transmission of the relevant action plan by the evaluated Member States in these 107 cases.

**Table 3: Time between adoption of Council recommendations and transmission of action plans by evaluated Member States under Article 16(1) SEMM Regulation**

Time to transmission	Number of cases
1 month	3
2 months	1
3 months	62
4 months	27
More than 4 months	14

Source: Author's compilation

The average transmission time for all 107 action plans that could be found is within 4 months. More than 60% of action plans in the sample were transmitted within 3 months, in compliance with Article 16(1) of the SEMM Regulation and more than 85% within 4 months. **However, 13% of action plans exceeded the foreseen transmission deadline of Article 16(1) by more than 1 month.**

Based on records found in the Commission and Council registers of documents, we have established the three following indicators to further assess the timeliness of SEMM evaluations during the 2014-19 cycle:

<sup>142</sup> Most of these 107 action plans are not publicly available, but the date of transmission is one of the public information provided by the Council register of documents.

- **Time to recommendation from evaluation:** This is the total time between the completion of the on-site or questionnaire-based evaluation and the adoption of the relevant Council Implementing Decision.
- **Time to adoption of evaluation report:** This is the time between the completion of an evaluation via on-site visits or questionnaires and the adoption by the European Commission of an evaluation report transmitted to the Council.
- **Time to adoption of Council recommendation:** This is the time between the adoption by the European Commission of an evaluation report (Article 14(5) SEMM Regulation) and the adoption of a Council Implementing Decision laying down recommendations to address deficiencies (Article 15(3) SEMM Regulation).<sup>143</sup>

It is important to note that these indicators do not correspond to legally-binding requirements established by the SEMM Regulation. They nonetheless help provide a more complete picture of the time and pacing of the implementation of planned evaluations. The information provided below **only takes into account planned evaluations** and **excludes both unannounced visits and revisits**, since the relevant information is more reliably available for the former than for both of the latter.

First, **it took on average 11 months from the completion of an evaluation to the adoption of a Council Decision** laying down recommendations to address deficiencies during the 2014-19 evaluation cycle. This is based on a sample of **145 cases** for which all of the relevant information was available. For these 145 cases, **the time from evaluation to recommendation is never less than 6 months**. More specifically, as detailed in Table 4 below, about a quarter of evaluations led to the adoption of a Council Decision within 6 to 9 months, and **more than 70% of recommendations were adopted by the Council within 12 months**. For **just under one-third of evaluations, the time to the adoption of recommendations by the Council was more than 1 year**. The longest lapse of time between evaluation and the adoption of recommendations is **27 months**, in the case of the evaluation of the **UK's application of the Schengen *acquis* in the field of the SIS**.

**Table 4: Time between the completion of an evaluation and the adoption of recommendations during the 2014-19 SEMM cycle**

Time	Number of cases	Ratio
6-9 months	36	25%
10-12 months	67	46%
13-18 months	36	25%
19-27 months	6	4%
Total	145	

Source: Author's compilation

<sup>143</sup> For methodological reasons, this indicator has been chosen over the time between the transmission of a Commission proposal for recommendations to the Council (Article 15(2) of the SEMM Regulation) and the adoption of said recommendations by the Council. This is because it has proven difficult to more systematically identify proposals for recommendations in the Commission register of documents.

In order to understand what part of the entire evaluation process takes the longest, it can be broken down into two components:

- the “Commission-led phase,” during which the Commission leads discussions on the “raw” evaluation report and recommendations drafted at the end of an evaluation, together with the authorities of the evaluated Member State and with the inputs of other Member States and in the context of the Schengen committee; and
- the “Council-led phase” that follows the transmission of the evaluation report and of the proposal for recommendations by the Commission to the Council.

A rough approximation of the duration of the “**Commission-led phase**” can be obtained by looking at the time between the completion of an evaluation and the adoption by the Commission of the evaluation report on the basis of Article 14(5) of the SEMM Regulation. This took on average **9 months** and **never less than 3 months** during the 2014-19 cycle, based on a sample of **137 cases**. More specifically, as detailed in Table 5 below, about **one-fifth of evaluation reports** were adopted within **3 to 6 months of the evaluation**, and **slightly less than 70% within 9 months**. About **one-third** of evaluation reports were adopted **within 10 to 19 months**.

**Table 5: Time between the completion of an evaluation and the adoption of the evaluation report during the 2014-19 SEMM cycle**

Time	Number of cases	Ratio
3-6 months	29	21%
7-9 months	65	47%
10-12 months	29	21%
13-19 months	14	10%
Total	137	

Source: Author’s compilation

A rough approximation of the duration of the “**Council-led phase**” can be provided for **141 cases**. It took **on average 3 months** for the Council to adopt recommendations following the adoption by the Commission of the evaluation report during the 2014-19 SEMM cycle. More specifically, as detailed in Table 6 below, **half** of Council recommendations were adopted **within 2 months of the transmission of the evaluation report by the Commission**, while **more than 75%** were adopted **within 3 months** and **95% within 4 months**.

**Table 6: Time between adoption of evaluation report and adoption of recommendation**

Time	Number of cases	Ratio
1 month	30	21%
2 months	41	29%



3 months	36	26%
4 months	27	19%
More than 4 months	7	5%
Total	141	

Source: Author's compilation

Overall, it appears that the **Commission-led phase is in general the lengthiest stage in the process**. This assessment has also been shared in the interviews for this study. There seem to be **several factors playing a part in this situation**. It is first worth recalling that it was only in 2018 that a dedicated Schengen evaluation unit was set up in DG HOME. Second, besides the deadlines foreseen in Article 14(4), **the SEMM Regulation does not provide a clear timetable for the completion of this phase of the evaluation process**. Third, it is our understanding, based on interview inputs, that evaluated **Member States take the opportunity for discussions with the Commission and within the Schengen committee to provide additional information and clarifications regarding the outcomes of the evaluation**, and that the ensuing back and forth contributes to lengthening this phase of the process.<sup>144</sup> For example, in the case of the 2016 evaluation of France, which resulted in the identification of serious deficiencies in the field of the SIS, a report from the French Senate points out that, upon being informed of the outcomes of the evaluation, the relevant French services proceeded to inform the Commission that work had already been under way for some time to address the issues listed in the report. They further requested that some of the findings be reclassified from "non-compliant" to "compliant with improvements".<sup>145</sup>

On the other hand, the **relatively modest average length of the Council-led phase may come across as a surprise**, given the emphasis put in the SEMM Regulation (Recital 11) that the mechanism should contribute to "improving the governance of the Schengen area through political discussions at ministerial level on the correct functioning of the Schengen area." Interviewees pointed out that discussions of evaluation outcomes and recommendations for remedial action remained mostly within the SCHEVAL working party, where the focus is on building a shared understanding of the evaluation reports and ensuing recommendations.<sup>146</sup> Whether such discussions made it to the level of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) is a matter of debate among interviewees, with some arguing that they could not recall such occasions and that outcomes of discussions within SCHEVAL were upon completion transmitted to COREPER as an "A-point" (for approval only), while others recalled that they occasionally did.<sup>147</sup> What seems clear, however, is that **discussions at the ministerial level foreseen in the SEMM Regulation did not take place**. This is acknowledged by Member States as a limitation of the mechanism. In their analysis of Member State replies, the Finnish presidency indeed notes that "[t]he overall functioning of the Schengen system,

<sup>144</sup> Interview-EC-13/08/2020

<sup>145</sup> Sénat français (2017), p199

<sup>146</sup> Interview-Council-28/07/2020; Interview-Council-03/09/2020

<sup>147</sup> Interview-Council-28/07/2020; Interview-Council-03/09/2020

and especially identified deficiencies, is not sufficiently communicated at [the]political level and the results of the valuable work of the on-site teams have not been discussed at political level.”<sup>148</sup>

### 3.2. Findings and results of SEMM evaluations

This section examines the main findings and results of SEMM evaluations, with this discussion broken down this discussion into three points. First is the possibility of synthesising overarching findings and results from publicly available SEMM material. The section then focuses specifically on evaluations that led to the identification of serious deficiencies. While the SEMM Regulation does not determine criteria for what constitutes a serious deficiency, the possibility of serious shortcomings being identified through evaluations is central to the rationale of the SEMM, including in justifying the conferral of the implementing power to adopt recommendations for remedial action to the Council, as established in Recital 11 of the SEMM Regulation. Lastly, reflections on the policy areas that are currently covered by the SEMM are summarised.

#### 3.2.1. Overarching findings and results

In the absence of both dedicated synthesis reports from the European Commission under Article 20 of the SEMM Regulation and of publicly available evaluation reports, it proves challenging to assess the main findings and results of evaluations performed during the 2014-19 cycle. If revisits and unannounced visits can be used as an indication of policy areas where concerns with the application of the Schengen *acquis* were most prominent, external borders (50% of revisits and 50% of unannounced visits) seem to have received particular attention. In addition to the limitations of such an approach based on inference, this also does not provide more detailed understanding of which aspects in a policy area are of particular concern. In fact, among recommendations for remedial action, the main horizontal concern across evaluated Member States and policy areas that were identified by interviewees relates to staff and the fact that, in most evaluated policy areas, national authorities are insufficiently staffed or that levels of training in the application of the Schengen *acquis* are inadequate.<sup>149</sup>

It is also the case that **the SEMM is not currently designed in a way that would be conducive to generating horizontal findings**, outside of the possibility to undertake thematic evaluations which have not been used to their full potential. **On the other hand, the contribution of thematic evaluations to building such an overall picture may be limited.** Out of the two thematic evaluations performed during the 2014-19 cycle, as mentioned above, one focused on operational matters related to local Schengen cooperation in the field of visa policy, while the other was a desk-based assessment of EUIBM looking at Schengen state national integrated border management strategies. The thematic evaluation of operational matters is feasible in the context of visa policy if the focus is on how Member State consular authorities apply the Schengen *acquis* in a specific location (Ankara and New Delhi in the aforementioned case), but would appear a more difficult task to perform if involving operational matters across all Schengen states. **Thematic evaluations** that look at the ongoing implementation of a Schengen policy requirement, such as the implementation of EUIBM, **are helpful for building a snapshot of how Schengen states adapt to recent legislative evolutions in the Schengen *acquis*. However, they do not contribute to an overarching understanding of how the Schengen *acquis* is applied operationally because they are mostly questionnaire based evaluations.**

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<sup>148</sup> Council of the EU, Functioning of the Schengen evaluation mechanism (Reg. (EU) No 1053/2013) – Views of the Member States on the first multiannual evaluation cycle – Analysis of replies to the Presidency questionnaire. Brussels, 13244/2/19 REV2, 11.11.2019.

<sup>149</sup> Interview-EC-13/08/2020

**The vocabulary used to discuss Schengen evaluations is also not always helpful for building a general picture of the functioning of the Schengen area.** In particular, the framing of the outcome of evaluations, namely the recommendations adopted by the Council through which evaluated Member States can address “deficiencies”, is misleading. This is because it creates the expectation that what the SEMM is meant to find is areas where Member States either do not apply or insufficiently or improperly apply the Schengen *acquis*. While such occurrences are certainly part of what evaluations and subsequent recommendations identify, they also appear to do more. A typical recommendation adopted by the Council, at minimum, reviews three aspects of a member country’s application of the Schengen *acquis* in a given area – they:

- outline good or best practices, usually in the recitals, characterised as “points of interest”;
- identify remedial action(s) in areas where the evaluated Member State is found to be non-compliant with the Schengen *acquis*. These are presented as priority recommendations<sup>150</sup>; and
- list actions to be taken that are less about immediate compliance with the Schengen *acquis* and more about enhancing its application by the evaluated Member State in the area under consideration (also known as a “compliant with improvement necessary” assessment).

A purely quantitative assessment of recommendations, furthermore, is misleading in that the number of recommendations issued for a Member State is not necessarily an indication of a high level of non-compliance. Indeed, it was suggested that in the case of some Member States, the recommendations issued were aimed at making an already compliant Member State perform even better (compliant with improvements). It is therefore more insightful to analyse priority recommendations which are issued to address the non-compliance of Member States.

### 3.2.2. Serious deficiencies in the application of the Schengen *acquis*

**What shortcomings in the application of the Schengen *acquis* should be characterised as “serious deficiencies” is not defined in the SEMM Regulation.** The European Commission considers a serious deficiency to be based on one or more non-compliant findings which 1) relate to key elements for the effective application of the Schengen *acquis* (in any of the relevant policy fields) and 2) have, or risk to have over time, a significant negative impact (for example in terms of security) on one or more Member States, the Schengen area as a whole or on private persons.<sup>151</sup> Key elements differ according to the policy field and no exhaustive list of them exist.

**Serious deficiencies were identified in six cases (3%) out of a total of 199 evaluations** in the 2014-19 evaluation cycle.<sup>152</sup> Half of the cases concern the application of the Schengen *acquis* in the field of the management of the external border by Greece (evaluation visit of 2015), Sweden (2017) and Iceland (2018). Two are in relation to the application of the Schengen *acquis* in the field of the SIS by France (2016) and the UK (2017). The most recent case of serious deficiencies in the 2014-19 cycle concerns the application of the Schengen *acquis* in the field of visa policy by Finland (2018). The timeline between the evaluation visit and the Council Implementing Decision on related recommendations in the case of serious deficiencies varied greatly: It took 27 months in the case of UK and 3 months in the case of Greece.

<sup>150</sup> Interview-EC-13/08/2020.

<sup>151</sup> Interview-EC-13/08/2020

<sup>152</sup> Taking into account the fact that the outcome of most of the evaluations conducted in 2019 was not known at the time of writing.

A summary of three select cases where serious deficiencies were found is below:

### **Case study 1: Evaluation of the management of external borders in Greece in 2015**

As a result of an unannounced visit to the Greek sea border sites (Chios and Samos Islands) and land border sites (Orestiada, Fylakio, Kastanies, Nea Vyssa) in November 2015, the following issues were identified as serious deficiencies:<sup>153</sup>

- a lack of appropriate identification and registration of irregular migrants (including fingerprinting);
- a lack of sufficient staff and equipment for verifying identity documents;
- a lack of a comprehensive and effective coastal surveillance system, situational awareness and risk assessment to identify, detect and apprehend illegal border crossings; and
- a lack of facilities to accommodate people during registration.

In assessing what makes these deficiencies amount to the level of serious deficiencies, the behaviour of other Member States and the reintroduction of border controls as a reaction to the onward movement of refugees through Greece played a significant role. The Council Implementing Decision adopting the recommendations states that part of the urgency with which the deficiencies have to be addressed is due to the introduction of temporary border controls which put the functioning of Schengen at risk. This is also prominent in the Commission's Communication 'Back to Schengen – A roadmap' from April 2016, which is primarily concerned with the situation in Greece.<sup>154</sup> It includes a detailed timeline of the process that is to be taken as a result of the SEMM's findings, including dates for the assessment of action plans and revisits, which has not been the case for any of the other serious deficiencies reports.

### **Case study 2: Evaluation of the UK on the SIS in 2017 (revisit)**

The evaluation revisit of the implementation of the SIS in the UK was carried out in November 2017 following on from an on-site visit that had taken place before the current SEMM regulation came into effect which had concluded that the UK's implementation of the Schengen *acquis* related to the SIS had been partial. The visit covered different offices where SIS data was held, juxtaposed border checkpoints and airports and included surprise visits to policy stations in both England and Scotland.

The evaluation found that some major deficiencies in the legal, operational and technical implementation of the SIS identified during the evaluation of 2015 were not effectively remedied and still persisted. In particular, the following deficiencies were highlighted:

- The use of SIS copies by the UK: unlawful copying of SIS data into national databases, administration of full or partial copies of the SIS database by different private companies, no full synchronisation of SIS databases
- A selective approach to SIS data by the UK: for instance, the UK Warning Index only contained alert categories that were considered important by the UK

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<sup>153</sup> Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2015 evaluation of the application of the Schengen *acquis* in the field of management of the external borders by Greece. Brussels, 5985/16, 12.2.2016

<sup>154</sup> European Commission COM(2016) 120 final

- Limited reciprocity in the UK's SIS implementation: for example, restrictions on the recognition of European Arrest Warrants
- Limited national end-user information technology applications: police and border force used outdated applications which included limited information

A leaked copy of the evaluation report<sup>155</sup> shows that the evaluation team found that these amounted to very serious deficiencies. In particular, the high number of partial and complete SIS copies were considered a serious and immediate risk concerning the integrity of the SIS as well as data security. The fact that 16 recommendations from the 2015 assessment had not been implemented may have contributed to this result as well.

### **Case study 3: Evaluation of management of external borders in Sweden in 2017**

An evaluation visit to assess Sweden's management of its external borders was carried out in 2017 and identified the following issues:<sup>156</sup>

- Integrated border management: lack of a national integrated border management strategy, national coordination capacities to ensure its implementation, clearly defined responsibilities and division of labour between services in charge of border management and permanent inter-agencies/inter-service cooperation structures in the field of border management
- Human resources and professionalism: insufficient training of border staff, especially in coastal areas; lack of a national training capacity and insufficient national capacity for quality control in border management and for conducting vulnerability assessment
- Risk analysis: no risk analysis system for border management in Sweden that was aligned with EU requirements including the Common Integrated Risk Analysis Model (CIRAM) 2.0
- Sea border surveillance: the need to increase cooperation and information exchange among national maritime authorities for border checks on small and leisure craft

#### **3.2.3. Analysis on areas covered by the SEMM**

As discussed earlier, evaluations were performed across nine different policy areas during the 2014-19 SEMM cycle, six of which were systematically examined for all Schengen states and Croatia. Out of these, five (data protection, external borders, policy cooperation, SIS and visa policy) form the core of the Schengen *acquis* and already featured in the previous evaluation mechanism, while the area of return was added by the SEMM Regulation. This section provides an analysis of some of the features of these policy areas during the 2014-19 SEMM cycle below, starting with return as the newest area of Schengen evaluation. It finishes by discussing the role of the SEMM in assessing fundamental rights, which was part of the brief for this study, and with the question of potentially including asylum as an SEMM policy area, which has been a matter of discussions in the last two years. Due to difficulties in securing relevant interviews at this time, the areas of data protection and police cooperation have been left out of the discussion.

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<sup>155</sup> European Commission (2018a)

<sup>156</sup> Council of the EU. Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2017 evaluation of Sweden on the application of the Schengen *acquis* in the field of management of the external border, 15810/18, 20.12.2018

## Return

Interviewees were generally positive about the inclusion of return in the SEMM, while it was also mentioned that the fact that it has been added just recently meant that it was less developed than other policy areas.<sup>157</sup> In the field of return, the SEMM draws upon the Return Directive<sup>158</sup> and numerous international legal standards particularly related to detention, return and *non-refoulement*<sup>159</sup>. The SEMM assesses both objectives of EU return policy, namely the effectiveness of national return systems and the application of fundamental rights safeguards. However, interviewees suggested that the dynamics and outcome of the SEMM give precedence to the former over the latter.<sup>160</sup> In its own assessment, the FRA finds that return-related recommendations are primarily related to pre-removal detention, where Member States have not implemented relevant fundamental rights safeguards, return procedures (including prioritisation of voluntary return and imposition of entry ban) and forced return monitoring.<sup>161</sup>

## External borders

External borders have been the most evaluated policy area during the 2014-19 cycle. This can be explained by the fact that this area is considered as the litmus test for a functioning Schengen area, apparently to a greater extent than what is happening at the internal borders. In addition, the VAs developed by Frontex, together with the clear legal reference framework that provides a benchmark for evaluations, contribute to a stronger application of the SEMM in the area of external border management.

From a fundamental rights perspective, recommendations are of a more general nature (related to e.g. staff training) and the persistent fundamental rights violations that exist, such as *non-refoulement*, are not picked up by the SEMM<sup>162</sup> due to the nature of the evaluation visits and the restrictive approach to considering evidence. The understanding is that the SEMM cannot be expected to detect fundamental rights issues (e.g. *refoulement* and push-backs) due to the orchestrated nature of announced visits and the fact that, for unannounced visits to external borders, the host state must be informed 24 hours in advance. In addition, it is not designed to respond and react in a speedy way to possible violations.

## Internal borders

Six evaluations assessed the application of the Schengen *acquis* in the field of internal borders during the 2014-19 SEMM cycle. Given concerns with the preservation of the area of free travel, it may come as a surprise that the SEMM was not used more systematically to assess this area. One interviewee involved in such evaluations, however, highlighted the difficulties of assessing this part of the *acquis*. This in part due to challenges in ascertaining that the *acquis* is not applied properly by the evaluated states, and particularly of obtaining evidence thereof. Helpful information might, for instance, come from regular border crossers such as truck drivers rather than from direct observation or from exchanges with the authorities in charge; however, this cannot be included as evidence in the evaluation report.<sup>163</sup> In addition, the political sensitivity of the absence of controls at the internal

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<sup>157</sup> Interview-Gov-NO-08/09/2020

<sup>158</sup> Directive 2008/115/EC

<sup>159</sup> non-refoulement as a core principle of international refugee and human rights law that prohibits states from returning individuals to a country where there is a real risk of being subjected to persecution, torture, inhuman or degrading treatment or any other human rights violation.

<sup>160</sup> Interview-FRA-19/08/2020

<sup>161</sup> Fundamental Rights Agency (2020)

<sup>162</sup> Interview-FRA-19/08/2020

<sup>163</sup> Interview-Gov-PL-02/09/2020



borders during the period covered by the last SEMM cycle may explain why this area was not assessed systematically, given that several Member States consistently reintroduced internal checks in 2014-19, mostly out of concern for secondary movements. It is also the case that the situation was assessed regularly by the European Commission through its reports on the functioning of the Schengen area.

### **Schengen Information System**

SEMM evaluations identified two cases of serious deficiencies in the application of the Schengen *acquis* in the field of the SIS during the 2014-19 cycle, related to France and the UK. The latter has already been documented above. In the case of the 2016 evaluation of France, the main deficiencies were identified in relation to compliance with Article 9(2), 10 and 20 of both the SIS II Regulation<sup>164</sup> and SIS II Decision<sup>165</sup> as well as Article 8(2) and 8(3) of the SBC. Evaluators found that the French authorities had not officially adopted the security plan for its national copy of the SIS II (National Schengen Information System II (N.SIS II)) according to Article 10 SIS II Regulation and SIS II Decision. They further identified issues with the requirement found in Article 9(2) of the SIS II Regulation and Decision that the data stored in the N.SIS II be "identical and consistent" with the central SIS II database and that a search in the N.SIS II should produce a result "equivalent to that of a search in the SIS II database," as well as with the categories of data that national applications<sup>166</sup> available to the French police and gendarmerie enabled their users to enter into the N.SIS II (namely photographs and fingerprints). Evaluators further highlighted issues related to the performance of minimal checks for all travellers at the external borders (Article 8(2) SBC) and the possibility to perform thorough checks of TCNs upon entry and exit (Article 8(3) SBC).<sup>167</sup>

The cases of the 2016 evaluation of France and 2017 evaluation revisit of the UK outline the fact that SEMM policy areas occasionally overlap. In the case of the UK, the unlawful copying of SIS data is arguably as much a matter of the application of the Schengen *acquis* in the field of data protection as it is a matter related to the SIS. In the case of France, non-compliance with Article 8(2) and 8(3) of the SBC reflects an overlap between the policy areas of the management of external borders and of the SIS.

An observation shared by interviewees regarding this specific SEMM policy area is also that it might need to be widened in coming years. Indeed, over the last 5 years, legislation has been passed that establishes new information systems building on the Schengen *acquis* – the Entry/Exit System (EES) and the European Travel Information and Authorisation System (ETIAS) – and organises interoperability between the SIS and most of the EU border, visa and law enforcement information systems. Moving from the SIS to "large-scale information systems" as an evaluation area would be relevant in view of the implementation of this legislation, which is ongoing and will in all likelihood be completed over the course of the next evaluation cycle.

### **Visa policy**

A single instance of serious deficiencies in the application of the Schengen *acquis* in the field of visa policy was identified during the 2014-19 cycle following the 2018 evaluation of Finland. Serious

<sup>164</sup> Regulation (EC) No 1987/2006, OJ L 381/4, 28.12.2006

<sup>165</sup> Council Decision 2007/533/JHA of 12 June 2007, OJ L 205/63, 7.8.2007

<sup>166</sup> Specifically the application related to the FPR (*Fichier des personnes recherchées*) and COVADIS, which is used to query national information systems.

<sup>167</sup> While the details provided in the recommendations adopted by the Council are insufficient for understanding the scope of the issue in more detail, it would appear that it concerned the fact that border control officers could not automatically query the FPR database by swiping a traveller's travel document and had to enter their query manually (see Sénat français (2017), p199-200)



deficiencies were identified during on-site visits to the Finnish Consulate General in St. Petersburg (Russia) and the Service Centre for Entry permits in Kouvola (Finland). These serious deficiencies concerned the tasks performed by the external service provider of consular services contracted by the Finnish authorities, as well as the way in which Finnish authorities examined visa applications by Russian citizens.<sup>168</sup> Overall, interviewees pointed out that evaluations in the field of the visa policy are logistically more complex because they involve on-site visits in third countries rather than in EU Member States.<sup>169</sup>

### Box 3: The drawbacks of thematically separated evaluations

A single evaluation on specific Schengen policy area(s) has the clear disadvantage that it does not show the overall performance of a Member State on managing Schengen. In providing such a snapshot, the SEMM does not leverage its findings for broader aims such as the further development of national or EU/Schengen policies.

"We could do that together with the presidencies and the Commission. So I think we're not using actually Schengen's evaluations to its full potential. [...] those that are handling these evaluations are in so specialised departments somewhere down in the structure of the commission or colleagues in the Council. So its colleagues dealing just with that, there is not the knowledge sharing that should exist."

"Both in the Commission and the Council we never have the horizontal or more comprehensive debate okay what needs to be improved in the Schengen system based on the outcome of the evaluation. Such a debate never happens and that's our own fault."

Evidently, one of the challenges regards the timing of evaluations: since Member States are not evaluated at the same time and because the Schengen acquis is constantly developing, horizontal conclusions based on Schengen evaluations at different points in time are hard to identify. Still, **the annual reports in which the Commission summarises the evaluations conducted in the past year or the – so far less used – thematic evaluation could be valuable tools to capture such horizontal perspectives, thereby extending the effectiveness of the SEMM.**

Source: Interview-Council-28/07/2020

### Fundamental rights

Fundamental rights are not a specific evaluation field, but Recital 14 of the SEMM Regulation indicates that "particular attention to respect for fundamental rights in the application of the Schengen *acquis* should be paid" which should be read in conjunction with Article 4 of the SBC. Article 12 further indicates that Schengen evaluators should "receive appropriate training, including on respect for fundamental rights." Accordingly, the FRA conducts a training module for all Schengen evaluators on fundamental rights. The Agency also has observer status in the SEMM, but its involvement is limited to

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<sup>168</sup> Council of the EU. Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2018 evaluation of Finland on the application of the Schengen acquis in the field of the common visa policy, 8623/19, 15.4.2019, p3

<sup>169</sup> Interview-EC-13/08/2020

the areas of the management of external borders and return, which are the policy fields that are considered to present the most acute risks for violations of fundamental rights.<sup>170</sup> The FRA's involvement is also limited to evaluations conducted in Schengen EU Member States, since its mandate does not cover Schengen associate countries.<sup>171</sup>

The question then arises of whether fundamental rights should be turned into a formal policy area evaluated under the SEMM. When asked about this, interviewees from EU institutions, the FRA as well as from Member States argued that the SEMM is not an appropriate tool to assess and monitor compliance with fundamental rights. Additionally, turning fundamental rights into a specific evaluation area would affect their horizontality as a matter of concern to be taken into consideration across the SEMM's policy fields. It was, however, suggested that more could be done to reinforce the way in which fundamental rights are evaluated across all policy fields.<sup>172</sup>

## Asylum

The analysis provided by the Finnish presidency regarding a questionnaire it sent to Member States about the functioning of the SEMM indicates that there have been discussions about including asylum "to some extent" as an evaluation area within the SEMM.<sup>173</sup> Divisions in the Council on this issue have been significant and are one of the reasons that the initial plan to adopt Council Conclusions on the SEMM had to be reconsidered.<sup>174</sup>

Interviewees appreciated the link between the Schengen *acquis* and the Common European Asylum System (CEAS). It is difficult, for instance, to disentangle the evaluation of Greece on external borders in 2015 from the overall political crisis in which the EU found itself as a result of the increase in the number of refugees and migrants arriving in Europe that year. The Greek case illustrates the strong connection between the asylum and Schengen *acquis* – and while the former is not assessed within the SEMM, many of the recommendations related to registration and reception point to a lack of implementation of the asylum *acquis* in Greece. This connection is not reconciled, and even though Article 3(3) of the SBC expressively exempts refugees and persons requesting international protection from rules penalizing entry into the Schengen zone, it is suggested that the prevention of the entry of people searching for protection is required for Schengen to be functioning.

On the whole, however, there was little enthusiasm among stakeholders interviewed for introducing the assessment of compliance with the CEAS *acquis* as part of the SEMM. Reasons provided for this related to the different legal bases (the fact that asylum is not part of the Schengen *acquis*) as well as the disagreements in the Council about the implementation and reform of the Dublin Regulation.<sup>175</sup> It is also questionable whether a peer-to-peer mechanism like the SEMM would contribute to more compliance with the CEAS *acquis*. Furthermore, it seemed likely that adding another legal framework to be assessed would make the SEMM on the whole more complex and slower. A suggestion was made, however, to ensure that the training of Schengen evaluators would include a component or module on asylum, in order to foster awareness of the impact that practices evaluated at the national level might have on international protection and implementation of the CEAS.<sup>176</sup>

<sup>170</sup> Interview-FRA-19/08/2020

<sup>171</sup> Ibid

<sup>172</sup> Ibid

<sup>173</sup> Council of the EU, Functioning of the Schengen evaluation mechanism (Reg. (EU) No 1053/2013) – Views of the Member States on the first multiannual evaluation cycle – Analysis of replies to the Presidency questionnaire, 13244/2/19 REV2, 11.11.2019, p11

<sup>174</sup> Interview-Gov-FI-10/09/2020

<sup>175</sup> Interview-EC-13/08/2020; Interview-Council-28/07/2020; Interview-Gov-AT-09/09/2020

<sup>176</sup> Interview-FRA-19/08/2020

### 3.3. Monitoring and impact during the 2014-19 SEMM evaluation cycle

The SEMM features an elaborate system for monitoring Member States' implementation of remedial action to address the recommendations adopted by the Council. In this last section, we discuss the concrete functioning of the mechanism's monitoring phase and its impact during the 2014-19 cycle. Given the relative scarcity of published information about these matters, the following discussion relies more markedly on the outcome of interviews conducted for the study. We examine monitoring and impact together, furthermore, because these two dimensions are not easily dissociated. **Understanding the relevance and limits of the SEMM's monitoring phase requires, specifically, an understanding of how, when and where the SEMM actually makes an impact with regard the application of the Schengen *acquis* by Member States.**

Based on the design of the mechanism and the SEMM Regulation, **the expectation is that Schengen evaluations make their impact on the application of the Schengen *acquis* after the adoption of recommendations by the Council.** Member States are expected to submit an action plan describing how they plan to address recommendations and undertake remedial action, which is assessed by the European Commission. The implementation of action plans is subsequently monitored through regular reporting by the Member State to SCHEVAL Council working party. Revisits can be (and have been) organised in order to monitor more closely the implementation of recommendations.

Overall, interviewees from the European Commission and Council Secretariat units dealing with the SEMM consider **the monitoring procedure foreseen by the SEMM Regulation to have worked appropriately during the 2014-19 cycle.** In the majority of cases, evaluated Member States submitted their first remedial action plan as required, mostly within the deadlines foreseen in the Regulation.<sup>177</sup> Based on our own research, we indeed find that the average transmission time of an action plan to the Council was within four months, and that only approximately 12% of action plans were transmitted within five months or more.<sup>178</sup> **From a formal perspective, then, the monitoring phase of the SEMM complied in practice with the requirements of its founding Regulation.** Some interviewees, however, question whether the SEMM's follow-up procedure allows for an appropriate monitoring of remedial action undertaken by Member States.<sup>179</sup> This is because the procedure mostly takes place in writing, except in cases where an evaluation revisit is organised. It is therefore possible for Member States to comply with the letter of the monitoring phase without meaningfully addressing the recommendations they have received, with very little in the way of political or legal consequences.<sup>180</sup>

In this respect, the **finding of serious deficiencies does not seem to in general lead to more a) concerted action by the Member States concerned and/or b) pressure and oversight by the European Commission.** In the case of the UK and the SIS, the report of the 2017 revisit was considered by the Council in May and June 2018. It took almost two years until the Council Implementing Decision on the recommendations was adopted in March 2020. The assessment of the UK's action plan to address the deficiencies was published shortly therefore in April 2020. It found that the UK's action plan was not adequately addressing the deficiencies raised. The suggested timeline for at least 10 of the recommendations was considered very lengthy and therefore not acceptable. In addition, the UK challenged nine recommendations, meaning that it disagreed with those recommendations. The overall implication of the action plan proposed is that the UK will not implement at all at least three of those recommendations, up to four of them will be implemented only partially and only two will be

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<sup>177</sup> Interview-Council-03/09/2020

<sup>178</sup> Fourteen out of a sample of 108 cases for which all the required information was available.

<sup>179</sup> Interview-Gov-AT-31/07/2020

<sup>180</sup> Ibid

implemented in full. The case of the UK still being allowed access the SIS despite the identification of serious deficiencies and the controversies surrounding the evaluation findings has come up several times in this respect, which for some interviewees further indicates that monitoring in the SEMM does not affect Member States in the same way depending on their political weight in the EU and in the Schengen area.<sup>181</sup>

The follow-up to the finding of serious deficiencies regarding the external border in Greece in 2015 seems to confirm such an assessment. Ahead of the adoption of the Council Implementing Decision, Greece issued a statement in which it disagreed with the assessment of 'serious deficiencies' and expressed its intention to vote against the Decision. But despite this resistance, Greece adopted an action plan to address all of the recommendations that had been adopted. The European Commission's assessment of this plan found that significant improvement had been made but that further improvements were needed, in addition to more details and/or clarifications for several actions, mostly in relation to timing, responsibilities and financing. For the further follow-up on these issues, the SEMM process is subsequently overtaken by other EU policy processes, such as implementation reports on the EU-Turkey deal or the European Agenda for Migration, which is also one of the possible reasons provided as to why there have been no yearly reports in line with Article 20 of the SEMM Regulation.<sup>182</sup> The fact that within 6 months of the evaluation visit not only had the evaluation report been written but both the Council's and Commission's Implementing Decisions regarding the recommendations had been adopted and an action plan had been prepared and reviewed by the European Commission is unprecedented in Schengen evaluations during the 2014-19 cycle. It also demonstrates that serious deficiencies can be treated in an expedited manner if relevant EU actors, including the European Commission, prioritise this.

In the case of Sweden, where serious deficiencies in external border management were found in 2017, the government decided to centralise the coordination of remedial action across most of the evaluated policy areas within the National Operations Department (NOD) of the Swedish Police Authority.<sup>183</sup> This decision was strongly affected, it is understood, by the finding of serious deficiencies in the country's application of the Schengen *acquis* in the field of the management of the external borders. The outcome of the Schengen evaluation was further used by the Swedish authorities as an opportunity to apply for funding from the EU's ISF,<sup>184</sup> enabling the NOD to hire external staff and a project manager to work on remedial action.

Another interpretation that emerges from interviews, in this respect, is that the European Commission, the SCHEVAL working party and Member States have adopted a "tolerant" approach to deficiencies identified in SEMM evaluations and valorised the building of a shared understanding of what compliance with the Schengen *acquis* among Member States entails, rather than a "name-and-shame" approach to non-compliance or partial compliance.<sup>185</sup> In this respect, it is worth noting that we could not identify, together with interviewees, cases where discussions on SEMM evaluations in the Council had to be brought for political debate and discussion beyond the confines of the SCHEVAL working

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<sup>181</sup> Interview-Gov-AT-31/07/2020; Interview-GOV-CZ-04/08/2020

<sup>182</sup> Interview-Gov-FI-10/09/2020

<sup>183</sup> Interview-Gov-SE-07/09/2020

<sup>184</sup> Regulation (EU) No 513/2014 (ISF Police); Regulation (EU) No 515/2014 (ISF Borders and Visas)

<sup>185</sup> Interview-Gov-IT-30/07/2020; Interview-Council-03/09/2020

party.<sup>186</sup> In this regard, it would seem that SEMM evaluations did not, or at least not explicitly, contribute to “political discussions at [the] ministerial level on the correct functioning of the Schengen area,” even for “situations where evaluation reports have shown serious shortcomings,” as stated in Recital (11) of the SEMM Regulation.

However, **this should not be interpreted to mean that there is no political interference with the SEMM.** The case of Croatia is illustrative in this regard. Despite several evaluations at the external border, the persistent and well documented incidents of violence and verified reports about systematic and ongoing human rights violations<sup>187</sup> at Croatia’s borders were not captured and addressed as part of the SEMM. Such violations included the denial of access to asylum and summary expulsions in violation of *non-refoulement*, particularly at the green border with Bosnia and Herzegovina did not result in an assessment of non-compliance or the issuing of prioritised recommendations. Instead, based on Croatia’s monthly progress reports on the implementation of the action plan, the Commission’s Communication in October 2019<sup>188</sup> concluded that Croatia ‘continues to fulfil its commitment in relation to the protection of human rights’ and is overall ready to become a Schengen member. Relatedly, it has been suggested that the findings of the second evaluation visit in 2019 have not been taken into consideration.<sup>189</sup> Prior declarations of President Juncker<sup>190</sup> concerning Croatia’s readiness to join Schengen may have resulted in political pressure to provide a positive assessment on Croatia’s readiness to join Schengen, before the final evaluation team even submitted its report and related recommendations had been discussed. The case of Croatia also highlights the shortcomings of announced visits and evaluations that can only take into consideration information that has been recorded during the visits, thereby ignoring analysis and evidence relevant to assessing the implementation of the Schengen *acquis* from reputable sources such as statutory bodies like the Croatian Ombudswoman.<sup>191</sup>

Interviews with practitioners involved in the conduct of evaluations further show that the national authorities of Member States have adopted different concrete approaches towards the implementation of remedial measures related to their application of the Schengen *acquis* during the 2014-19 cycle. In some cases, **the knowledge that an evaluation was coming has led Member States to run extensive preparations**, involving mock evaluation visits, at times organised with the cooperation of Schengen evaluation experts from another Schengen country. In the case of the Czech Republic, for instance, we understand from interviewees that preparations began three to four months ahead of the start of the evaluation.<sup>192</sup> National authorities of the Czech Republic and Slovakia prepared their evaluations together, sending experts from one country to visit the other as part of a mock “pre-evaluation”.<sup>193</sup> In the case of Norway, which was evaluated in 2017, preparations were initiated with the reception and reply to the Schengen Questionnaire, which was received in August 2016.<sup>194</sup> Further pre-

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<sup>186</sup> Interview-Council-28/07/2020; Interview-Council-03/09/2020

<sup>187</sup> Asylum Information Database (2020); Amnesty International (2020); Human Rights Watch (2019)

<sup>188</sup> European Commission. Communication on the verification of the full application of the Schengen *acquis* by Croatia, COM(2019) 497, 22.10.2019.

<sup>189</sup> Interview-Gov-PL-02/09/2020

<sup>190</sup> Reuters (2019)

<sup>191</sup> Croatian Ombudswoman (2019), p2

<sup>192</sup> Interview-Gov-CZ-04/08/2020

<sup>193</sup> Ibid

<sup>194</sup> Ulrich, S, Nøkleberg, M & Gundhus, HOI (2020), p99

evaluation preparations involved cooperation between Nordic countries, with Danish, Norwegian and Swedish evaluators performing visits to the sites scheduled for assessment through the SEMM in each other's country, helping, by one account, to identify "things which needed to be corrected before the real evaluation."<sup>195</sup> For some interviewees, such preparations mean that what Schengen evaluators see during a visit is staged and does not reflect how the Schengen *acquis* is applied in more ordinary circumstances in the country.<sup>196</sup> Preparation, in this logic, skews the situation and practices observed by Schengen evaluators, and therefore limits the ability of the SEMM to reliably identify instances of non-compliance with the Schengen *acquis* and consequently limits the impact that the mechanism might have in improving the functioning of the Schengen area. Others consider that such preparations are legitimate because they enable the evaluated national authorities to demonstrate how they operate and what they consider to be best practice in the application of the Schengen *acquis* as well as receiving feedback on said application.<sup>197</sup> Also, interviewees reported that some Member States already make use of the preparation for visits for an internal quality control of the application of the Schengen Acquis.<sup>198</sup>

What further emerges from discussions with interviewees is that, regardless of whether or not national authorities run pre-evaluation preparations, **the findings of SEMM evaluations can be unsurprising to national practitioners.**<sup>199</sup> This suggests that preparation does not necessarily or always skew evaluation outcomes, but also that evaluations are not only about evaluators going in "with a red pencil [...] say[ing] you are not doing your job very well," as one interviewee put it.<sup>200</sup> It would seem that in some cases SEMM evaluations give national practitioners the opportunity to discuss the issues they experience with the application of the Schengen *acquis* with external experts and to put these issues on the national political agenda, making the higher echelons of government aware of said issues in ways that would not have been possible without the SEMM.<sup>201</sup> For others, however, prior awareness of issues with the application of the Schengen *acquis* means that the SEMM is not particularly helpful and only means that they have to share these issues with the Commission.<sup>202</sup>

Preparations ahead of Schengen evaluations and prior awareness of issues related to the application of the Schengen *acquis* in evaluated countries combine with a third factor that shapes the way national authorities approach remedial action, namely the time that elapses between the end of an evaluation and the adoption by the European Commission of the evaluation report and proposal for recommendations. As discussed above, this is on average the lengthiest stage in the entire evaluation process. It was suggested that **Member States who are aware of the report's findings and possible related recommendations may take steps to address problems ahead of the end of the Commission-led phase**, either to demonstrate their willingness to deal with the issues identified, to try and pre-empt the adoption of some recommendations, or to be able to report back on remedial actions already implemented along with their action plan.<sup>203</sup> **This means that in some cases, the**

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<sup>195</sup> Ibid, p103

<sup>196</sup> Interview-Gov-PL-02/09/2020

<sup>197</sup> Interview-Gov-NO-08/09/2020

<sup>198</sup> Interview-Gov-NO-08/09/2020; Interview-Frontex-12/08/2020

<sup>199</sup> Interview-Gov-NO-08/09/2020; Interview-Gov-SE-07/09/2020

<sup>200</sup> Interview-Gov-IT-30/07/2020

<sup>201</sup> Interview-Gov-SE-07/09/2020

<sup>202</sup> Interview-Gov-CZ-04/08/2020

<sup>203</sup> Interview-FRA-19/08/2020



**SEMM makes its biggest impact on the application of the Schengen *acquis* well before the adoption of recommendations by the Council**, which however was not shared by all interviewees, pointing to contrary experiences where Member States would not address deficiencies before the adoption of recommendations.<sup>204</sup>

These insights point to two important dimension that shape the way in which the SEMM can effect changes at the national level. The first dimension is **the willingness of political authorities in the Member States to spur and support remedial action, as well as political support in the EU institutions** for such remedial action. The second dimension is **the availability of resources, in particular of financial resources, to support national authorities in the implementation of remedial action**. Concerning the first factor, it is not possible to draw general conclusions as to how political support at the Member State level has been secured following Schengen evaluations. The case of Sweden outlined above is one example we have become aware of. The articulation between the SEMM and ISF funding, on the other hand, has repeatedly been put to us as a strong feature of Schengen evaluations and as making the implementation of remedial action to address deficiencies more likely.<sup>205</sup>

Insights provided by interviewees further allow us to partly reconcile favourable and less favourable assessments of how the monitoring component of the SEMM has concretely functioned in 2014-19. On the one hand, **the process of formal monitoring as designed in the SEMM operated appropriately**. On the other, **national authorities in evaluated Member States had the opportunity to prepare for, anticipate and possibly pre-empt the formal monitoring mechanism** by taking steps either before scheduled evaluations were conducted or as the evaluation report and recommendations were being discussed with the European Commission. As it therefore stands, the monitoring component of the SEMM is adequate but not entirely appropriate when it comes to achieving a full picture of the remedial actions, or lack thereof, undertaken by Member States. Furthermore, **the strength of the monitoring mechanism**, that is its capacity to ensure that remedial action is indeed undertaken, **is also dependent on the mobilisation of national political authorities in the process and on the availability of resources**, in particular EU funding, to support this action.

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<sup>204</sup> Interview-Gov-PL-02/09/2020

<sup>205</sup> Interview-Gov-NO-08/09/2020; Interview-Gov-SE-07/09/2020; Interview-EC-13/08/2020



## 4. SCHENGEN AND ITS CRISIS

### KEY FINDINGS

The ongoing "Schengen crisis" is not a mere effect of the 2015 migration crisis but is **rooted in political changes, as well as structural shortcomings of the Schengen regime**.

The **resilience of the Schengen system should not be underestimated**.

To constantly refer to the current challenges of Schengen as a crisis is potentially **problematic**, as it can fuel further politicisation of the issue.

The current maintenance of internal border controls within Schengen is perceived by Member States upholding them as a measure to prevent future migration. **Member States are well aware that using internal border controls as a means of preventing the arrival of migrants goes against the Schengen acquis**.

The economic effects of internal Schengen border controls must be taken seriously and **highlighting them might be also a way to open up further avenues for solidarity and cooperation among Schengen Member States**.

The **perception among political elites about public concerns linked to border control is partly misconstrued**: Political attitudes towards the EU or immigration have remained relatively stable and the "Schengen crisis" did not reinforce the link between the rejection of immigrants and rejection of the EU.

**Identity concerns constitute one of the most important predictors** regarding citizens' attitudes towards the reintroduction of border control.

### 4.1. Introduction

As noted above, the SBC regulates the management of internal and external EU borders, including the exceptional reintroduction of border checks at internal borders. **In case of a foreseeable threat (e.g. a high-level political meeting), an immediate threat or persistent serious deficiencies related to Schengen's external borders, Member States are allowed to reintroduce internal border controls. Three principles guide the reintroduction of border checks: exceptionality, temporariness and proportionality.**<sup>206</sup>

As the number of countries reintroducing border controls in the Schengen area increased especially from the mid-2010s onwards, constraining the freedom of movement as envisaged by the Schengen Agreement, Schengen is often viewed as undergoing a severe crisis. This is also reflected in the expert interviews we conducted for this report:

"External border management is not working at all or not enough [...] I see Schengen in danger, migration will not stop, I mean that is the that is the main reason nowadays why the whole Schengen system is not working properly. And unless there is a real European solution, some proper system of external border management, reforms won't save us from migration flows. Germany, Denmark, Sweden they don't make any signs that they would open the borders again [...]." <sup>207</sup>

<sup>206</sup> Regulation (EU) 2016/399

<sup>207</sup> Interview-Gov-AT-31/07/2020

"The current situation cannot be considered as the proper functioning of Schengen. Internal border controls in several Member States have been in place since 2015 and the enlargement of Bulgaria, Romania and Croatia has been frozen, despite the successful evaluation of these countries."<sup>208</sup>

"If the second wave of migration like the one in 2015 will come, there is definitely going to be challenges for Schengen system again."<sup>209</sup>

Schengen is perceived by actors working in the field as a project that has gone from a project full of the spirit of cooperation to a project of trying merely to keep it together:

"[...] it's perhaps not been a very happy journey in the last five years to see an area where a lot of cooperation, a lot of progress was made in the first years with, for instance, the Prüm cooperation [...] There was a lot of hope also in the joint centres and agreements on cross-border surveillance and things like that. I think that definitely the spirit of cooperation has declined, not due to Covid, but due to the security situation and the political situation also that with Brexit and things like that. [...] it is extremely important to keep people motivated. But I think that the motivation is of a different kind now than when I started working with Schengen issues, because now it's more a motivation of saving what is left than to develop something that really could be good. [...] we are in the phase where we are more or less trying to save what is left."<sup>210</sup>

As Member State interviewees also underlined, the current impasse of Schengen is usually linked to the 2015 spike in migrant arrivals to Europe, with the sticking point being external border control, as well as the secondary movement of asylum seekers within Schengen.

**While the 2015 so-called "migration crisis" certainly increased the attention paid to the issues of immigration and mobility by the Schengen Member States, concerns with Schengen pre-date 2015 events and are related to deeper changes in the social foundations of European politics and European integration.** The EU has been going through a series of crises in the last 10 years, two of the most severe being the Euro crisis and the Schengen crisis. The rising sovereignism across Schengen Member States (i.e. the rise of political forces that advocate a return to the sovereign nation state) has been the result of growing discontent with globalisation since the early 1990s and poses a severe challenge for Schengen.<sup>211</sup> The (pre-Covid-19) reintroduction of internal border controls in the past decade aimed to gain political capital among the electorate of the populist radical right,<sup>212</sup> and/or were based on political elites' perception of citizen's discontent with migration and mobility.

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<sup>208</sup> Interview-Gov-CZ-25/08/2020

<sup>209</sup> Interview-MP-CZ-31/07/2020

<sup>210</sup> Interview-Gov-SE-07/09/2020

<sup>211</sup> Basile, L & Mazzoleni, O (2020); de Vries, C & Hoffmann, I (2020)

<sup>212</sup> While this report does not deal with the effect of Covid-19 on the state of Schengen, it can be noted that this health crisis has both strengthened and transformed sovereignism. In the wake of the health crisis, traditional divisions between those advocating sovereignism and those promoting global, supranational cooperation have become blurred: EU citizens want more EU cooperation, but also to be protected and shielded from global dangers (Krastev, I & Leonard, M (2020)). The health crisis hence exhibits opportunities as well as further challenges for Schengen governance. While being an inherently global problem, the EU as a whole has managed the health crisis to a very little extent. Each Member State has introduced its own measures when dealing with the Covid-19 pandemic, thus exposing the Schengen governance crisis - an international phenomenon being fully tackled locally instead of by the EU as a whole.

"Obviously, for people living in the Czech Republic migration is the biggest topic. I don't understand why, but it is."<sup>213</sup>

"You won't win an election today, if you say: 'oh we will open the borders again, we don't care.'"<sup>214</sup>

"It [the internal border controls] gives them a feeling of security. They internal border controls [are thought to] contribute to more security. I personally doubt this; we don't have border control everywhere. We have it on certain places and they are random controls, so there are still illegal border crossings, there is no 100 percent security or there is no hundred percent closed border, so it's not like this."<sup>215</sup>

While European publics have consistently regarded freedom of movement as one of the main achievements of European integration,<sup>216</sup> at the same time the Schengen regime has been equally publicly contested in the areas of governance, border control and unregulated migration to EU Member States.<sup>217</sup>

The 2015 migration crisis clearly heightened the focus on border security and immigration control also within the Schengen territory. An exceptional reading of the migration crisis and its impact on Schengen, by neglecting the pre-crisis situation, would fail to take into account the mentioned political changes, as well as underlying structural shortcomings of the Schengen regime and the fact that border practices have been also previously partly deviating from legal frameworks.<sup>218</sup> **Schengen "crises" or disputes are not novel, but have indeed been re-occurring, which also points towards the resilience of the system despite its shortcomings.** Moreover, the reintroduction of internal border controls under exceptional circumstances as noted above is built into the Schengen system and can be regarded as one of the safeguards supporting its resilience rather than undermining it.

The particularity about the contemporary, ongoing impasse is that internal border controls within the Schengen territory have become the default position – not the exception – by key Schengen Member States (see Table 7). The 2018 German government coalition agreement states, that "until the protection of the EU external borders works effectively, internal border controls are legitimate."<sup>219</sup> Similarly, the 2020 Austrian coalition agreement notes a need for the "Protection of Austria's internal border until the EU external border protection is not impeccable."<sup>220</sup> There are also indications that Scandinavian countries foresee a continuation of internal border controls also in the (near) future, such as including resources for border checks into their national budgets.

**Table 7: Reintroduction of Internal border controls in the Schengen area (as of July 2020)**

Country	Reasons given for reintroduction of internal border controls
Lithuania	Covid-19
Finland	Covid-19, OSCE meeting, Euromed meeting, Political Meeting

<sup>213</sup> Interview-MP-CZ-31/07/2020

<sup>214</sup> Interview-Gov-AT-31/07/2020

<sup>215</sup> Interview-PermRep-AT-04/09/2020

<sup>216</sup> European Commission (2020)

<sup>217</sup> Trauner, F (2016), p1

<sup>218</sup> Van der Woude, M (2020); Colombeau, SC (2020)

<sup>219</sup> Government of Germany (2018)

<sup>220</sup> ÖVP (2020)

Spain	Covid-19, UN Conference, Meeting, Basque celebration (terrorism)
Portugal	Covid-19, NATO summit
Germany	Covid-19, secondary movement, external border, migration and security policy, security situation in Europe, recomm. Council 11 May 2017, recomm. Council 7 Feb 2017, recomm. Council 11 Nov 2016, recomm. Council 12 May 2016, large number of persons seeking international protection, G7, G8
Iceland	Covid-19, Visit of Hells Angels Motorcycle Club
Switzerland	Covid 19
Czech Republic	Covid-19
Belgium	Covid-19, irregular migrants, G7
Austria	Covid-19, secondary movements, terrorism, organised crime, external border, security situation in Europe, European Council meeting, JHA meeting, security situation in Europe, recomm. Council 11 May 2017, recomm. Council 7 Feb 2017, recomm. Council 11 Nov 2016, recomm. Council 12 May 2016, large number of persons seeking international protection, WEF, Euro 2008
Slovakia	Covid-19
Estonia	Covid-19, POTUS visit, NATO meeting
Poland	Covid-19, Ministerial Event, Climate conference, NATO summit, World Youth Days, Pope visit, Conference, Euro football
Hungary	Covid-19, large number of persons seeking international protection
Norway	Covid-19, terrorism, secondary movement, security situation in Europe, world championship, recomm. Council 11 May 2017, recomm. Council 7 Feb 2017, recomm. Council 11 Nov 2016, recomm. Council 12 May 2016, large number of persons seeking international protection, unexpected migratory trends, terrorism, Nobel Prize ceremony
Sweden	Terrorism, external border, serious threat to public policy and internal security, Summit, security situation in Europe, secondary movement, recomm. Council 11 May 2017, recomm. Council 7 Feb 2017, recomm. Council 11 Nov 2016, recomm. Council 12 May 2016, large number of persons seeking international protection, unexpected influx, Oslo bomb & shooting in Utoya (terrorism)
Denmark	Covid-19, terrorism, organised crime, serious threat to public policy and internal security, security situation in Europe, secondary movement, recomm. Council 11 May 2017, recomm. Council 7 Feb 2017, recomm. Council 11 Nov 2016, recomm. Council 12 May 2016, large number of persons seeking international protection, unexpected migratory trends, UN Conference
France	Terrorism, Covid-19, political events, secondary movement, external border, state of emergency (terrorism), Euro Football championship, Tour de France, UN Conference, G20, Summit, ETA anniversary (terrorism), Batasuna demonstration, NATO Summit, Conference, Basque meeting (terrorism)

Source: European Commission, Member States' notifications regarding the temporary reintroduction of border controls at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code

The country experts we spoke to have acknowledged that, given the decreasing numbers of migrants arriving, the current upholding of border control goes against the Schengen *acquis*. It was emphasised that border controls are seen as a measure to prevent a new increase in migrant arrivals in the future. The internal border controls are thus seen by the Schengen Member States that opted for the prolongation of those controls as a signal to potential migrants that “our borders are closed.”<sup>221</sup>

“I think for the Austrian government, like for all the other governments having internal border controls, what they fear is having the crisis of 2015 repeated. And in order to avoid this, we have the internal border controls because we want to avoid another situation where we are confronted with lot of illegal border crossings and having people there without any control and being overloaded. [...] But it is true that the internal border controls – and this is also what the regulation of the Schengen Border Code says – they have to be a last resort and there has to be a limit of time. I think we have now internal border controls now for 5 years almost, so this is already a very, very long time. So other Member States and associated states also have the right to say now: look, this is now too long. You have to come back to Schengen and you have to come back to no border controls [...].”<sup>222</sup>

**The insistence on internal border control has not only heightened tensions between Schengen Member States, and EU institutions, but has also led to conflict within countries.** For instance, dissatisfaction in Bavaria (Germany) with the federally employed border police emerged. Hence, as of 2018, Bavaria reinstituted border police of its own to monitor its borders, despite border protection being a federal task according to German constitutional law.<sup>223</sup>

At the same time, the limited number of countries that actually have, repeatedly, introduced internal border checks also emphasise that **to speak of these measures as a crisis might be misleading, too**, and might serve as a further politicisation of the issue instead of thinking of productive ways forward. As one of our interviewees for this study put it: “So saying Schengen is dead because of that, I don't believe so. Nevertheless, we should not be overly over-optimistic in the sense that the fact that those Member States keep those border controls for such a long period is not something normal.”<sup>224</sup>

In addition to being opposed to the spirit and legal foundations of Schengen, **the continuing of border checks has also economic effects**. Studies have repeatedly underlined the economic losses in the wake of the reimposition of border controls. Different studies indicate a decrease in bilateral trade between countries belonging to the Schengen Area of more than 10%, which can lead to a drop of 0.8% in the zone's GDP.<sup>225</sup> In terms of economic costs, Central and Eastern European states in particular have raised concerns, given the increased costs for road transportation of goods.<sup>226</sup> Put differently, **economic arguments might act as an incentivizing force also for the Visegrád countries to think about common, productive ways out of the Schengen impasse via cooperation in the field of asylum**. Those countries that did reintroduce internal border checks have been shifting their justification to keep them in place from one legal basis to the other – and the justifications were widely

<sup>221</sup> Interview-Gov-AT-31/07/2020

<sup>222</sup> Interview-PermRep-AT-04/09/2020

<sup>223</sup> Svensson, S (2020)

<sup>224</sup> Interview-Council-28/07/2020

<sup>225</sup> See for example Aussilloux, V and Le Hir, B (2016); RAND (2016); Bertelsmann Stiftung (2016)

<sup>226</sup> De Somer, M (2020)

criticised as rather weak, given that migration-related reasons were still used as an argument long after numbers of arrivals significantly dropped.

The Commission could have taken action, including infringement procedures against this group of Member States, but refrained, as these actions were driven by perceived concerns of the public over the control of borders.<sup>227</sup> While there are obvious reasons for not wanting to add further fuel to tensions across Schengen Member States, the perception of public concerns however might be partly misleading. **Public opinion has been much more nuanced on this matter as generally assumed by the political elites** (see the section on public opinion below).

In an attempt to regularise their practices, 2017 five out of the six countries that have continuously relied on reinstating internal border controls (Austria, Denmark, France, Germany and Norway) proposed<sup>228</sup> to the Commission that it amend the SBC. Following this proposal, further extensions of internal border controls (up to a maximum of a total of 4 years as opposed to the current 2 years, under Article 29 of the SBC) would be legally permissible. In direct response to this attempt by this group of Member States, the Commission was proposing a revision, which would have legally enabled the extension of internal control. Given the divergent position on the matter across Member States and across EU institutions, a solution on revising the SBC has not been found yet. The question of how to solve the ongoing and re-occurring tension remains highly relevant. What are the opportunities and challenges at the EU and national levels for the problems of Schengen cooperation? And what is the role of the SEMM in addressing these tensions?

## 4.2. Challenges and opportunities for Schengen cooperation

**While asylum is the major issue influencing current tensions within Schengen** (tensions over secondary movements and solidarity mechanisms), **it is not part of the Schengen *acquis***. “I think that is problematic because it allows Member States to see the cooperation on asylum independently from the issue of the absence of internal borders. Historically, that is utterly wrong.”<sup>229</sup> Consequently, there have been repeated attempts to link the CEAS to Schengen. This has included calls for making the implementation of the Dublin Regulation<sup>230</sup> part of the SEMM and having countries that show no solidarity in terms of relocation expelled from Schengen.

Traditional receiving countries of asylum seekers such as Germany, Austria or the Netherlands are concerned about the secondary movements of asylum seekers. EU Member States at the external borders, in turn, are strongly in favour of solidarity mechanisms within CEAS, such as relocation, and at the same time also benefit from secondary movements as they reduce the number of asylum seekers they have to manage according to the Dublin Regulation. Lastly, some countries are opposed to solidarity measures among EU Member States, given that they are not receiving large numbers of asylum applications and/or benefit relatively strongly from a strong sovereignist position mobilising their electorate. In Hungary, for instance, as a result of a strong emphasis on the governing party for years<sup>231</sup> prior to the 2018 election, migration was among the main concerns of voters (see Figure 9).

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<sup>227</sup> Ibid

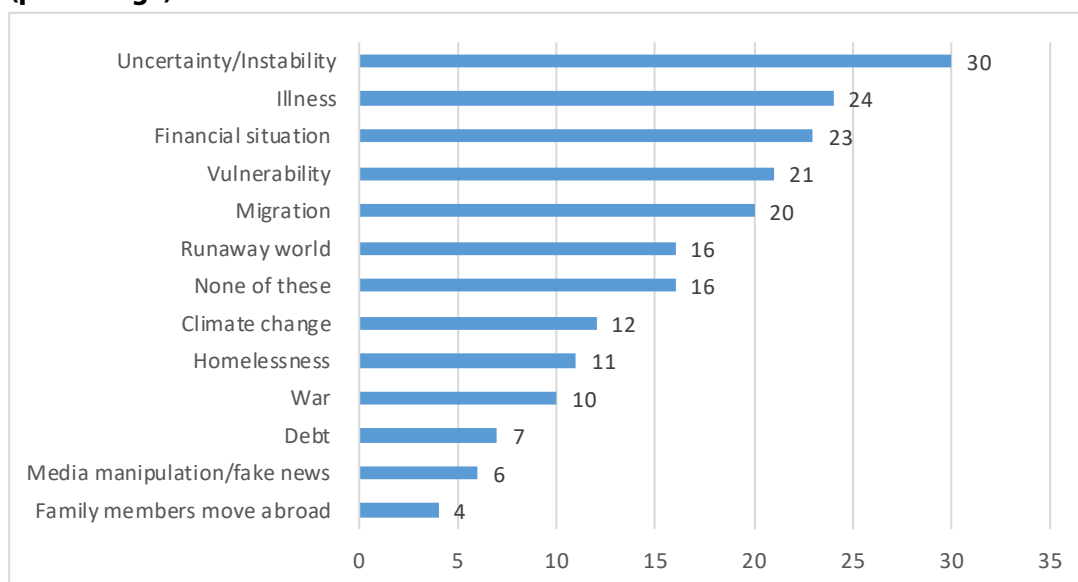
<sup>228</sup> Statewatch (2017)

<sup>229</sup> Interview-Council-28/07/2020

<sup>230</sup> Regulation (EU) No 604/2013

<sup>231</sup> Bíró-Nagy, A (forthcoming)

**Figure 9: The fears of Hungarian voters in the final days of the 2018 election campaign (percentage)**



Source: Boros, T & Laki, G (2018), field work: Závecz Research. Time of data collection: March 28-April 5, 2018. Original question: Please select the three most important issues that you have thought about during the last month which made you apprehensive/fearful.

**These contradictory interests and divisions among EU Member States on asylum questions reflect the impasse within Schengen, with the sticking point of the Dublin Regulation that is incentivising solidarity-averse behaviour.** These are enduring and are not likely to vanish. Consequently, the chances that there will be a consensus of linking the issue of CEAS and Schengen with each other is rather slim, as also the different experts we interviewed for this study underlined (see also section 3.2.3).

At the political level, there have been repeated proposals for mini Schengen areas. However, these would face the same tensions as the larger Schengen area, if asylum standards between these countries diverge or migration flows are uneven between these countries.<sup>232</sup> **Reducing Schengen can be also seen as posing a severe legitimacy problem for the EU,** given that freedom of movement as established by Schengen, is considered as one of the most important achievement of the European project.<sup>233</sup>

**Instead of major overhauls or restructuring Schengen, more incremental changes and practices hence seem to be the more viable way out of the current impasse.**

#### 4.2.1. Alternatives to internal border controls

In order to overcome the Schengen impasse, **the European Commission has been calling repeatedly<sup>234</sup> on Member States to use internal police checks,** provided that they are not systematic but are conducted on reasonable suspicion, instead of continuing internal border controls. Article 23 of the SBC allows for such police checks provided that: (a) border control is not their objective; (b) they

<sup>232</sup> De Somer, M (2020)

<sup>233</sup> European Commission (2020)

<sup>234</sup> European Commission. Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area. C(2017) 3349, OJ L 122, 13.5.2017



are based on general police information and aim in particular to combat cross-border crime; (c) they are devised in a manner clearly distinct from systematic checks at external borders; and (d) they are carried out on the basis of spot checks. These provisions ought to prevent that police checks are used as a de facto substitute for internal border controls.

Some Schengen Member States, such as Norway, have in the wake of the Commission's recommendation taken the initiative to introduce more police checks.<sup>235</sup> However, the Danish and Swedish governments have rejected intensified police checks, deeming them incompatible with national legislation or inadequate.<sup>236</sup> Furthermore, the potential overuse of interoperability components for conducting police checks has been seen by experts as possibly leading to a reintroduction of systematic border controls. The Court of Justice of the European Union (C-188/10, C-189/10, C-278/12, C-9/16) has been very clear in its rulings that it is not willing to accept intensified police checks as a de facto substitute for border control.<sup>237</sup>

### 4.3. Public opinion

In many European countries in recent years the public discourse about the EU appears to be more salient and polarised than in previous decades, especially due to the series of EU crises. Nevertheless, based on recent research, **Euroscepticism among the general public remains stable and these crises did not reinforce the link between the rejection of immigrants and rejection of the EU.** Finally, it is suggested that (national/European) identity constitutes a significant and powerful predictor of these attitudes – respondents with a European identity support Schengen membership significantly more than those identifying exclusively with their nation-state.

In many Member States, the **public discourse about the EU appears to be more salient and polarised than in previous decades.** Events such as Brexit and the Dutch and French referendums on the European constitution show how the attitudes of the general public can strongly influence European politics. In recent years, this has been reflected in an increased interest of scholars and EU institutions alike in understanding the factors affecting attitudes towards the EU which include Euroscepticism, attitudes towards immigration, attitudes towards asylum policy to attitudes to globalisation understood commonly by Europeans as trade (increased movement of goods and money) and migration (increased movement of people).<sup>238</sup>

Overall, public attitudes towards the EU depend on how much each of the different dimensions composing these general attitudes count – for instance, attitudes towards the EU can represent a trade-off between welfare system sustainability because of the contribution of foreign workers versus potential labour market competition.<sup>239</sup> It is precisely these **different expectations about economic outcomes, either on the individual or societal level, that are shown to result in varying attitudes**

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<sup>235</sup> Bossong, R & Etzold, T (2018)

<sup>236</sup> Bossong, R & Etzold, T (2018)

<sup>237</sup> De Somer, M (2020)

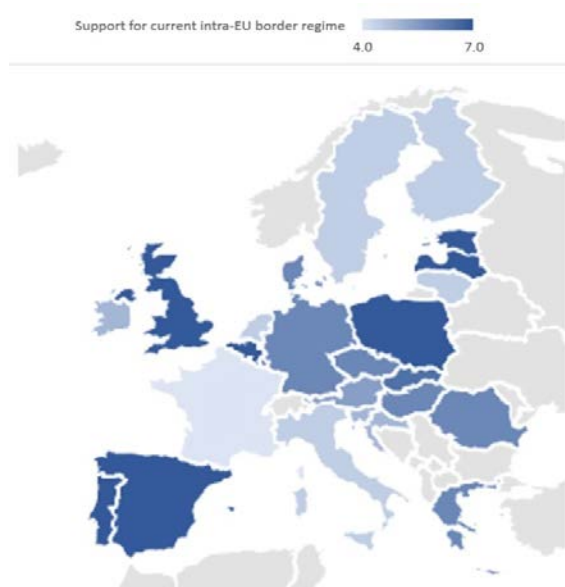
<sup>238</sup> de Vries, C & Hoffmann, I (2018)

<sup>239</sup> Karstens, F (2020a)

**towards European integration**<sup>240</sup> and “linking the EU’s liberal labour market regime to higher labour market risks is particularly effective in undermining support for Freedom of Movement.”<sup>241</sup>

It should be emphasised that attitudes towards the institutional framework for migration within the EU, freedom of movement, the Schengen area or attitudes towards border regimes specifically<sup>242</sup> are explored much less. For instance, almost all available literature on attitudes towards the freedom of movement relies on a single data source, the Eurobarometer. As an exception to this, Karstens conducted an original EU-wide survey in 2017 (N= 10,827) that analysed factors affecting border regime support in EU countries and contained national representative samples from France, Germany, Italy, Poland, Spain and the UK. He finds that respondents in Germany are more supportive of open borders inside Schengen than the average Schengen member country, whereas respondents in France are on average the least supportive, followed by those in Italy (see Figure 10).<sup>243</sup>

**Figure 10: Support for Current Border Regime towards Schengen Neighbours on a scale running from 0 (strongly against) to 10 (strongly in favour).**



Source: Karstens, F (2020)

**The understanding of public preferences regarding the Schengen regime remains limited, due to the lack of available data and diverse data sources.** In line with this, DG HOME issued a special Eurobarometer survey on Schengen in 2018 to assess the awareness, attitudes and opinions of Europeans regarding the Schengen area.<sup>244</sup> In this survey (see Figure 11), the reintroduction of internal borders by Germany, Austria, Denmark, Sweden, Norway and France is seen by the majority of respondents in these countries as a measure to discourage people from coming irregularly to the country (Germany, Austria, Denmark, Sweden). Only in France does the majority of respondents see the reintroduction of border control as an action to prevent terrorism.<sup>245</sup>

**Figure 11: Reasons for re-introduction of internal borders according to the public**

<sup>240</sup> Gabel, M (1998)

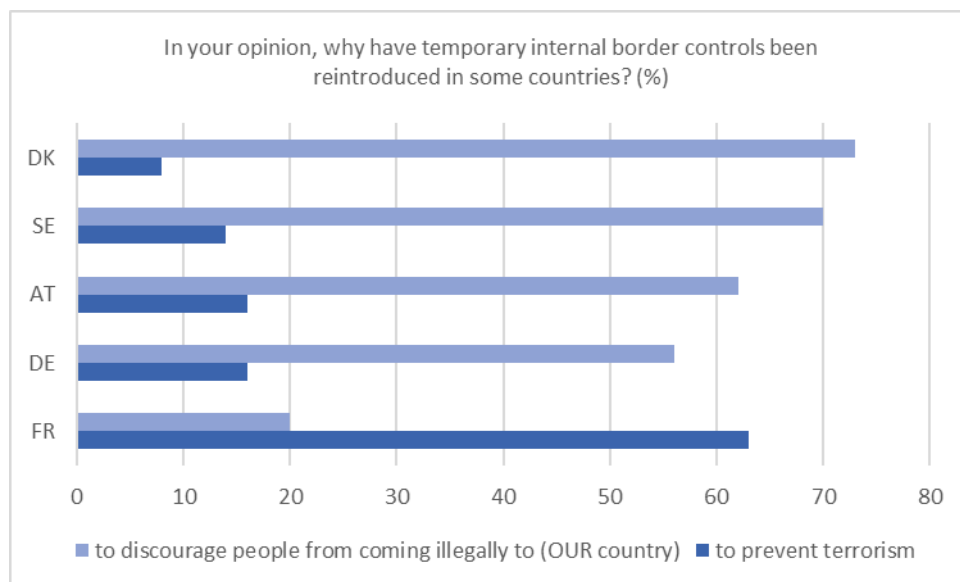
<sup>241</sup> Karstens, F (2020b), p55

<sup>242</sup> Karstens, F (2020a)

<sup>243</sup> Karstens, F (2020a)

<sup>244</sup> European Commission (2018b)

<sup>245</sup> European Commission (2018b). Interestingly, this reflects the Articles in the Schengen Code cited by these countries as the reason for the re-introduction of borders. France extended its border controls by referencing the continuing terrorist threat, whereas Germany, Austria, Denmark, Sweden and Norway used a systematic threat to the entire Schengen zone.



Source: European Commission (2018d).

Although it is commonly assumed that a series of EU crises such as the Euro crisis, the “Schengen crisis” and Brexit have led to backlash and Euroscepticism among the general public, research shows that, in fact, **political attitudes such as those towards immigration or the EU remain stable and that the crisis did not reinforce the link between the rejection of immigrants and rejection of the EU.**<sup>246</sup> Several scholarly analyses from recent years<sup>247</sup> on public opinion towards the EU and/or public support for the freedom of movement suggest that (national/European) identity, along with the national context,<sup>248</sup> constitutes a significant and powerful predictor of these attitudes because citizens regard the absence of border controls as a threat to the national way of life.<sup>249</sup> Respondents exhibiting a European identity support Schengen membership significantly more than those identifying exclusively with their nation-state. Thus, **the endorsement of Schengen and further European integration depend strongly on an inclusive European collective identity.**<sup>250</sup>

<sup>246</sup> Stockemer, D et al. (2019)

<sup>247</sup> Karstens, F (2020b); Vasilopoulou, S & Talving, L (2019); Kuhn, T (2019)

<sup>248</sup> de Vries, C (2018)

<sup>249</sup> Karstens, F (2020b)

<sup>250</sup> Karstens, F (2020a)

## 5. CONCLUSIONS

To set the stage for the recommendations that follow, this section provides a brief assessment of the SEMM in light of the findings of the desk research and interviews. It then looks at the broader level to identify ways forward for Schengen, given the aforementioned challenges and controversies.

### Conclusions on the design of the SEMM

#### Relevance

**All stakeholders interviewed for this study saw the SEMM as relevant to assessing and supporting the further implementation of the Schengen acquis.** Evaluated Member States largely found the exercise beneficial – even if report findings revealed areas for improvement of which they were already aware. Additionally, the majority of respondents considered a well-functioning SEMM to be essential to developing mutual trust in the Schengen area. **However, the long duration of the SEMM procedure, complexities of amending annual programmes and limited use of unannounced visits were found to hamper its ability to respond to current events or the latest risk analyses.**

#### Coherence

The different Schengen policy areas are evaluated independently from each other. This applies to the evaluation missions, but also to the selection and training of evaluators. Interviews revealed that some thematic areas were stronger than others in terms of the knowledge and availability of experts conducting SEMM evaluations **pointing to the need for increased internal coherence across evaluated policy themes.**

Regarding external coherence, the **SEMM is operating in a complex area of migration, asylum and border management that inherently also concerns fundamental rights.** EU agencies like Frontex already are tasked to monitor certain parts, while the European Asylum Support Office's monitoring of asylum issues has yet not been adopted by EU legislators. Most recently, the Commission published the New Pact on Migration and Asylum, which, among other measures, foresees a national monitoring mechanism for fundamental rights within its proposed regulation introducing a screening of third-country nationals at external borders.<sup>251</sup> Whether this mechanism could address the shortcomings of monitoring compliance with Article 4 of the SBC that were highlighted in the case of SEMM will depend on whether the narrow scope of the monitoring mechanism (which is currently proposed to be limited to the screening procedure) and questions regarding the independence of the authorities involved as well as their ability to contribute to accountability for violations of rights are addressed.

The existence of other relevant evaluation mechanisms, such as the human rights monitoring mechanism of the Council of Europe, mean that complementarity and coordination may well add further value while avoiding duplication of efforts.

In this context, Frontex's VA was frequently mentioned by interviewees as similar to some aspects of the SEMM questionnaire. As a new questionnaire was just adopted in 2019, this study is not able to determine whether this new iteration was effective in reducing any overlapping Member State

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<sup>251</sup> European Commission. Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final, Article 7

reporting requirements in practice. However, sharing the VA findings with evaluation teams is a positive development that will assist them in preparing for evaluation visits.

### Effectiveness

The study found that, generally speaking, **the SEMM was perceived as effective in identifying the degree of implementation of the Schengen acquis and related conditions. However, the complexity of the legal framework was seen as posing a challenge in this regard.** As several interviewees pointed out, the evaluation system can be only as good as the legal framework against which it evaluates. This works particularly well with evaluating clear requirements like infrastructure or staffing<sup>252</sup> but is more difficult with less determined requirements, particularly so-called “good practices”. Three key challenges were mentioned by interviewees in this respect, all of which challenge the effectiveness of the SEMM:

1. migration is a very fast developing field, with ever-changing trends and compositions of flows;
2. the *acquis* is fragmented in different policy areas; and
3. non-binding compilations of “best practices” are seen as neither easily accessible (i.e. they are scattered across different compilations<sup>253</sup>) nor always transferable to every national system.

More broadly, **several interviewees also acknowledged that the SEMM was not being used to its full potential.** The SEMM was designed as an instrument to effectively evaluate the performance of an individual Member State in specific Schengen policy area(s) at a certain point in time. Interviews suggested that **this “snapshot” approach reveals weaknesses** in four key ways:

- it cannot keep pace with **fluid policy and legal developments and evolving situations on the ground;**
- it **fails to address shortcomings of the implementation** of the Schengen *acquis* – even those that are documented and well-known – **if these are not witnessed** during the evaluation visit;
- it **does not offer a way to bring all thematic areas together to analyse a national border and migration system in its entirety,**<sup>254</sup> and
- it **misses the opportunity of institutionalising the roll up of country-level findings to further develop Schengen at the horizontal level, thus hindering its ability to impact the Schengen area as a whole.**

### Efficiency

Without exception, interviewees agreed that **the SEMM lacks efficiency due to the long time period between the evaluation and the adoption of the recommendations** by the Council (see section 3.2.1). Additionally, several interviewees remarked that the SEMM **would be more efficient if it could more flexibly make use of unannounced visits** for ad hoc follow up regarding identified deficiencies.

### Transparency

Transparency has different facets in the SEMM. Broadly speaking, it extends to the transparency of the process itself. Many parts of the SEMM are conducted under access restrictions and confidentiality.

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<sup>252</sup> Interview-Council-28/07/2020

<sup>253</sup> Interview-Gov-FI-10/09/2020

<sup>254</sup> Interview-Council-28/07/2020

Examples include, for instance, evidence considered ahead of a SEMM visit, the process of developing the evaluation report as well as the report itself.

However, **none of the interviewees raised significant concerns or criticised the opaque nature of the process** but rather showed understanding due to the sensitivity of some information and the confidentiality of evaluation processes as such. The issue of transparency was also raised in interviews with respect to tools for measuring compliance, such as the best practice compilation where neither the origin nor the compilation as such seems to be accessible for everyone. Evaluators also criticised the restricted access to the VA, which are only shared by Frontex with the Commission, which however should be changed in the future according to the ECBG Regulation.<sup>255</sup> Where the lack of transparency and a related accountability gap has become particularly apparent was the case of Croatia, where it was suggested that political pressure led to a hasty assessment of the readiness of Croatia to join Schengen.

### The impact of the SEMM on Schengen

The SEMM's impact on the functioning of the Schengen system could not be assessed in the short time span of this research and the limited access to relevant documents. However, the interviews illustrated that, due to its authoritative power, the SEMM's findings and recommendations regarding the implementation of the Schengen *acquis* across Member States provide a strong argument for national experts to also bring less-disputed issues to the political and administrative attention of national authorities. Ultimately, this also helps to free resources that are needed to comply with the findings.<sup>256</sup>

Another positive element that increases the wider impact of the SEMM on Schengen is achieved through its connection to multiannual funding programmes. Based on an analysis of Schengen evaluations, the Commission proposes areas in which it thinks certain Member States should invest and discusses this with these countries during the negotiations of national programmes.<sup>257</sup> Sweden, for example, made use of Internal Security Fund (ISF) funds to develop a national task force to oversee the implementation of the SEMM recommendations.<sup>258</sup>

On the other hand, particularly recommendations deriving from best practices - which often are not shared by Member States - or the far too long SEMM process overall diminish its impact and are areas that particularly stand to benefit from adjustment.

### Ways forward for Schengen

Whereas police checks to end internal border controls do not seem to solve the issue, and big reforms do not seem feasible at the moment, one way forward for Schengen cooperation a more effective approach seems to be **focusing on incrementally changing already existing frameworks, tools and mechanisms available**. As one interviewee put it:

"[...] we are in the phase where we are more or less trying to save what is left. And [...] new proposals are perhaps not the best way forward. Now, maybe it's better to consolidate and implement things that are working than to put forward new proposals for extensive new IT systems and things like that. I think that at least in my country, politics, I'm not really ready for that. [...]"<sup>259</sup>

<sup>255</sup> Regulation (EU) 2019/1896, Article 33/3; Interview-Gov-IT-30/07/2020

<sup>256</sup> Interview-PermRep-AT-04/09/2020; Interview-Gov-NO-08/09/2020

<sup>257</sup> Interview-Council-28/07/2020

<sup>258</sup> Interview-Gov-SE-07/09/2020

<sup>259</sup> Interview-Gov-SE-07/09/2020

Based on our interviews and literature review, potential measures could be:

- Stronger partnerships with Schengen Member States that are not EU members, including them into Measures in the Area of Freedom, Security and Justice.
- Trust-building measures.

**The SEMM can be a particularly useful tool to help find a way out of the current impasse through trust-building measures.** As mentioned, experts interviewed for this study have indicated that the peer review process is effectively contributing to establishing more trust and enabling the exchange of good practices among Member States.<sup>260</sup> A further emphasis on trust-building measures within the framework of the SEMM might play a positive role in the future of Schengen as well. Experts interviewed underlined that the impression of controlling or having a forced oversight can be fractious at times, or to quote an interviewee: "We know our gaps and we know our pain, we know what we are missing, we know our troubles. So, we only have to show the pain to the European Commission or in the Parliament and it does not help us, really."<sup>261</sup> Member States want to feel a supportive spirit. According to experts, further specific ways how to improve the Schengen system are:

- **Establishing a reporting and statistical component in the SIS II.** In terms of police checks discussed above, one proposal experts have been suggesting is setting up a monitoring system for those checks that fall under the scope of the SBC by establishing a reporting and statistical component in the SIS II.<sup>262</sup>
- **Establishing an independent complaint mechanism and an EU border monitor.** In terms of fundamental rights, experts have, moreover, suggested the creation of an independent complaint mechanism and an EU border monitor to deal with cases of alleged mistreatment and fundamental rights violations. This monitoring system could be indeed part of future SEMM evaluations.<sup>263</sup>
- **Increasing responsibility for eu-LISA.** Experts have also suggested that increasing the accountability eu-LISA regarding fundamental rights violations linked to wrong or false data would be fruitful.<sup>264</sup>
- **Ex-post corrections of data records.** In the field of data cooperation, procedures for ex-post corrections of incomplete and/or flawed records could also be established.<sup>265</sup> Once established, these procedures would also be evaluated by the SEMM.
- **Better ways to communicate: reframe questions of control.** Reframing the idea of control would be another soft but effective measure. National governments would need to reframe their ability to control towards their citizens by outlining that, when needed, they can introduce border controls as foreseen by the SBC and could lift them when not needed to the benefit for their own citizens. In government, communication emphasising that because the governments have everything under control and are effective in controlling immigration internal borders controls are not necessary would be beneficial. This would be a productive communication

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<sup>260</sup> Interview-Gov-IT-30/07/2020; Interview-Gov-CZ-04/08/2020; Interview-Council-03/09/2020. One interview partner also emphasized that in his/her impression, the European Commission does exhibit less trust of the evaluated Member States than the other Member States (Interview-Gov-CZ-04/08/2020). So, supranational bodies should also especially put an emphasis on developing and implementing further trust-building measures.

<sup>261</sup> Interview-Gov-CZ-04/08/2020

<sup>262</sup> Carrera, S et al. (2019)

<sup>263</sup> Ibid

<sup>264</sup> Ibid

<sup>265</sup> Vavoula, N (2020)



technique for national governments who want to demonstrate their ability to control; this would also help to again secure the freedom of movement within the Schengen area.

In summary, while Schengen is facing difficulties that are deeply political, there are a variety of measures that can be taken to improve the functioning of Schengen, including measures that either are not politicised or can be used by governments – including ways that are in their favour, such as the abovementioned reframing of the capacity to control.

## 6. RECOMMENDATIONS

Heading into to the next 5-year cycle, below are ways in which the European Parliament and other stakeholders can strengthen the SEMM and, in turn, the Schengen area:

- **Develop a prioritised procedure to apply when evaluation missions detect serious deficiencies** (4 months for the Commission to adopt the report and send the draft recommendations to the Council; 2 months for the Council to adopt the recommendation) to ensure that Member States address them at the earliest possible time to uphold the credibility of the SEMM.
- **Introduce additional deadlines for the Commission-led phase of SEMM evaluations** by amending Article 14 and 15 of the SEMM Regulation. An amendment could indicate that the Commission shall adopt the evaluation report (Article 14(5)) and submit a proposal to the Council to adopt recommendations (Article 15(2) within 9 months of the end of the evaluation. Likewise, a modification to Article 15(3) could introduce a deadline for the Council to adopt the recommendations “within 4 months” of the submission of the Commission proposal, as this is the average time this stage took during the last evaluation cycle.
- **Discuss the opportunity of introducing a definition of “serious deficiencies” in Article 2 of the SEMM Regulation**, while retaining enough flexibility to cover the range of possible scenarios. This definition should minimally establish that serious deficiencies correspond to findings of non-compliance within the meaning of Article 14(3)(c) of the Regulation that may significantly affect the functioning of the Schengen area.
- **Amend article 10 of the SEMM Regulation to provide the Commission with the possibility of building an expert pool for evaluation experts** in the various Schengen policy areas. The expert pool should, however, be subsidiary and only be used should Member States not designate appropriate or a sufficient number of experts for an evaluation mission.
- **Specify the meaning, scope and purpose of thematic evaluations** to ensure that this tool is used appropriately and to its full potential. In particular, additional provisions should specify that thematic evaluations can be programmed by the Commission acting on its own initiative or upon request from the Council (as was the case for the 2019 thematic evaluation on EUIBM) or European Parliament. The scope of thematic evaluations should include both specific operational features in the application of the Schengen *acquis* (such as local Schengen cooperation, as was the case of the 2015 thematic evaluation); the implementation of strategic cross-cutting aspects of border management systems; and the implementation of recently adopted legislation.
- **Build more flexibility into the annual programme** to allow the Commission to adapt it to respond to developments as they arise. For instance, the Commission may on its own initiative conduct an additional number of unannounced visits annually to quickly follow up on changing migratory patterns or evolving risks under a prioritised Committee procedure of amending the annual programme.
- **Recalibrate the ratio between announced and unannounced visits** in favour of conducting more unannounced SEMM visits. This would enable evaluation teams to make better use of this tool to help them get a realistic picture of the situation.
- **Evaluate fundamental rights across all Schengen policy fields** with the support of FRA and taking into account potential findings from other monitoring systems and reputable sources such as the Council of Europe, statutory bodies and independent organisations. The SEMM covers a broad range of policy fields, which are evaluated separately. Issues such as fundamental rights cut across most of them, yet there is no mechanism that would capture this

cross-cutting theme. Training on the topic should also be provided regularly to ensure that evaluators are equipped to incorporate this lens into their assessment activities.

- **Suggest that the European Commission sets up a visa service** to evaluate the risks of Member State visa practices, following the model of other agencies that provide risk analyses such as Frontex, Europol and FRA. Risk assessments are so far well-functioning regarding border-related issues. Other areas, particularly visas, lag behind. Alternatively, the option of extending Frontex's mandate for risk and vulnerability assessments in other areas such as consular visa services could be examined.
- **Increase the transparency of procedural aspects of the SEMM**, including what evidence or sources are considered in the preparation of on-site missions, clarity on what constitutes serious deficiencies and how they are addressed. This would build trust in the system by internal and external stakeholders.
- **Widen the scope of evidence** beyond information provided by the evaluated Member State through questionnaires and during the on-site visits by also permitting evaluation teams to collect and consider, for instance, analyses from reputable sources and statutory bodies or exchanges with relevant non-governmental stakeholders during the evaluation visits. This would also enable teams to gain an accurate understanding of implementation.
- **Improve consistency across themes to strengthen the internal coherence of the SEMM.** A key aim of the SEMM is to ensure consistency across Member States – but for this to work well, consistency should be increased within the SEMM itself – for instance, in the quality and availability of training for evaluators in different thematic areas.
- **Regularly update of questionnaires** (both the SEMM questionnaire and checklists used for visits) to reflect the latest legislative developments in the SEMM's thematic areas. To guarantee that the questionnaires cover the latest *acquis*, Article 9 of the SEMM Regulation could foresee a specific frequency (e.g. every 2 years) of which to update the questionnaire.
- **Offer more frequent training for experts**, particularly in policy areas such as visas. This would help ensure that new as well as experienced experts are well prepared to conduct evaluations, including by staying up-to-date with developments in the field. Trainings should be offered regularly and might take the form of basic and advanced in-person courses as well as webinars. Possible short refresher trainings before evaluation missions start could also be developed. One potential way these could be scaled up is for Frontex to extend its training to other areas related to SEMM evaluation.
- **Ensure that the SEMM and the VA remain and strengthen their complementarity** as envisaged in the ECBG. Ensure access to VAs for evaluation experts to facilitate their preparation for on-site missions as outlined under the ECBG regulation, which additionally may contribute as a means to cross check the information provided for the VA.
- **Regularly update best practice compilations and ensure they are easily accessible.** Benchmarks are crucial for a well-functioning evaluation and monitoring system. The Schengen *acquis* consists of legislation, commonly agreed-upon recommendations and best practices that are scattered across the various policy areas in different catalogues. Based on several concerns raised by stakeholders, it is recommended that evaluators use best practice examples cautiously, as such standards of soft law are not binding themselves but become binding once included in recommendations. Ensuring best practice compilations are up-to-date and accessible to evaluators will enable them to more effectively use this tool when identifying recommendations for evaluated Member States.
- **Introduce the opportunity to draw broader conclusions from evaluations** by introducing instruments in the SEMM that allow it to 1) provide a national Schengen fitness check covering all Schengen policy fields within a Member State and 2) facilitate the analysis of individual

evaluations to generate structural and horizontal strengths and weaknesses of Schengen across Member States. Such an analysis may become part of the annual report from the Commission to the Council and European Parliament according to Article 20 of the SEMM Regulation or may be introduced into the Council-led phase.

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## ANNEX I. INTERVIEWEES

Bibliography format	Foot note format
Representative of government organisation, Norway, September 2020	Interview-Gov-NO-08/09/2020
Representative of Swedish Police Authority, September 2020	Interview-Gov-SE-07/09/2020
Representative of ASGI, Italy, July 2020	Interview-NGO-IT-31/07/2020
Representative of government organisation, Austria, July 2020	Interview-Gov-AT-31/07/2020
Representative of the Parliament of the Czech Republic, July 2020	Interview-MP-CZ-31/07/2020
Representative of government organisation, Czech Republic, August 2020	Interview-Gov-CZ-25/08/2020
Representatives of European Commission, Belgium, August 2020	Interview-EC-13/08/2020
Representative of government organisation, Poland, September 2020	Interview-Gov-PL-02/09/2020
Representatives of European Council, September 2020	Interview-Council-03/09/2020
Representative of a non-governmental organisation, Austria, August 2020, September 2020	Interview-NGO-AT-27/08/2020
Representative of government organisation, Germany, August 2020	Interview-Gov-DE-14/08/2020
Representation of Austria to the European Union, September 2020	Interview-PermRep-AT-04/09/2020
Representative of Frontex, August 2020	Interview-Frontex-12/08/2020
Representative of Ministry of Foreign Affairs, Austria, September 2020	Interview-Gov-AT-09/09/2020
Representative of government organisation, Czech Republic, August 2020	Interview-Gov-CZ-04/08/2020
Representative of the Fundamental Rights Agency, Austria, August 2020	Interview-FRA-19/08/2020
Representative of government organisation, Finland, September 2020	Interview-Gov-FI-10/09/2020
Representative of government organisation, Italy, July 2020	Interview-Gov-IT-30/07/2020
Representative of European Council, July 2020	Interview-Council-28/07/2020



## ANNEX II. STUDY QUESTIONNAIRE

1. How would you assess the functioning of the Schengen system since the Schengen Evaluation and Monitoring Mechanism (SEMM) regulation was adopted in 2014?
2. In your opinion, what are the strengths and what are the shortcomings of the current SEMM design? How do you, for example, assess the duration of an evaluation process, the frequency of Member State evaluations and the possibility to react in a timely manner to 'serious deficiencies' identified?
3. Overall, does the SEMM fulfil its objective of identifying shortcomings in the implementation of the Schengen acquis in individual countries? What have you seen in your area of expertise and what have you heard from colleagues?
4. Which thematic areas have been the most disputed among the different actors involved in evaluations during the 2014 - 2019 cycle, and why?
  - a. Do you think there are any thematic areas missing or there are areas that should be covered better by the mechanism?
  - b. How do you see fundamental rights covered?
  - c. What is your view on the thematic separation of SEMM missions?
5. How representative are the adopted recommendations of the evaluation's findings?
6. How are recommendations met in your experience, and what impedes or supports them in being fulfilled (monitoring, follow up)? Can you comment on how effective the monitoring of recommendations is in ensuring their implementation?
7. To what extent does the lack of transparency within the SEMM affect its effectiveness?
8. What legislative changes and/or other measures could increase the effectiveness of the SEMM?
9. Do you see any opportunities now or in the future to (further) improve the Schengen system?







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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, assesses the operation and impact of the Schengen evaluation and monitoring mechanism in its first multiannual programme (2014-19), with the aim of identifying what has worked well and developing recommendations to strengthen it. The past decade has presented multiple controversies involving the governments of Schengen states as well as EU institutions, leading to a persistent state of apparent crisis. The ongoing "Schengen crisis" is rooted in political changes and in structural shortcomings of the Schengen regime. Despite these obstacles, the resilience of the Schengen system should not be underestimated.

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