

**Opinion of the European Economic and Social Committee on the communication from the Commission to the European Parliament and the Council ‘A strategy towards a fully functioning and resilient Schengen area’**

**(COM(2021) 277 final)**

**and the proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing Regulation (EU) No 1053/2013**

**(COM(2021) 278 final – 2021/0140 (CNS))**

(2022/C 105/17)

Rapporteur: **Ionuț SIBIAN**

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## **1. Conclusions and recommendations**

1.1. The European Economic and Social Committee (EESC) welcomes the Commission’s Strategy towards a fully functioning and resilient Schengen area.

1.2. The Committee reaffirms its full support, as expressed in its resolution of 17 February 2016, for the principles underlying Schengen cooperation: the unimpeded exercise of the fundamental treaty freedoms in a common area of freedom, security and justice and the need to reinforce joint responsibility and solidarity in the management of the external borders.

1.3. The Committee reiterates that, when framing and implementing EU policy for border management, interoperability, migration and asylum management, and police and criminal justice cooperation, the EU and its Member States are at all times bound by the Charter of Fundamental Rights, whose provisions they are obliged not only to respect but also to promote.

1.4. The Committee is deeply concerned by reports of fundamental rights violations at the EU’s external borders and calls upon the Commission and the European Border and Coast Guard Agency (EBCGA — Frontex) to remedy, monitor and follow up on reports of fundamental rights violations without delay and to ensure that the accountability mechanisms set out in the EBCG Regulation are implemented effectively. The Committee calls for the Consultative Forum on Fundamental Rights to be strengthened and for organised civil society, via the EESC, to be involved in it.

1.5. The Committee expresses its concern at the semi-permanent reintroduction of border controls at parts of Member States internal borders and the negative economic and social impact this has had on EU citizens, businesses, and in particular frontier workers, border communities and Euroregions. It calls upon the Commission to carefully monitor and assess the necessity and proportionality of these reinstatements on a periodic basis and to take action where necessary. It applauds the Commission’s stated intention to more readily use its enforcement powers where Schengen Evaluations may give rise to such action.

1.6. The Committee expresses its concern about the continued exclusion from full application of the Schengen *acquis* of the Member States Cyprus, Romania, Bulgaria and Croatia. Along with the Commission, it calls for swift and decisive action from the Council in this regard.

1.7. The Committee notes that many of the elements that are constituent parts of the Strategy are still legislative proposals. It wishes to point out that the Committee has issued specific opinions on some of these proposals, most notably the New Pact for Migration and Asylum and Interoperability. The Committee asks the Commission to take due note of these opinions.

1.8. The Committee notes that many of the elements of the Pact rely on the timely implementation of recently adopted legislation, most notably the interoperability regulation and the European Border and Coast Guard 2.0 Regulation. The Committee expresses its concern about the progress made in this regard and calls upon the Commission to monitor any delays and budget overruns closely and remedy them effectively.

1.9. The Committee evaluates the proposals to improve the functioning of the Schengen Evaluation Mechanism as positive, in particular the quicker follow-up, increased synergies with the Vulnerability Assessment Mechanism and increased and more horizontal attention to human rights, including the envisaged role for the Fundamental Rights Agency. However, care should be taken to ensure that the Schengen Evaluation Mechanism does not politicise issues of a more technical nature.

1.10. The Committee is of the opinion that the Schengen Forum can provide political impetus to the safeguarding and development of the Schengen area, but warns that it should not entail a return to Schengen's intergovernmental past, the functioning of which was prejudiced by intergovernmentalism and lack of transparency. Other EU institutions, as well as the Committee, should be kept informed at all times and be able to attend as participants.

1.11. The Committee understands that the related fields of police and criminal justice cooperation, including improved cooperation on the prevention of terrorism, are of the utmost importance to the trust of EU citizens and the Member States in the Schengen area. Such cooperation should at all times require full respect for fundamental rights in all Member States, including the safeguarding of an independent judiciary, in order to allow for instruments of mutual trust, such as the European Arrest Warrant, to function properly.

1.12. The Committee firmly believes that cooperation with third countries should not exclusively focus on migration and asylum controls, but should constitute a genuine partnership aimed at improving the position of migrants and refugees in third countries as well, in particular victims of human trafficking, and should seek to address the root causes of migration, promoting safe and orderly migration.

1.13. As emphasised by Commission President Ursula von der Leyen in her 2021 State of the Union address, it is critically important to agree on a common European system for the management of our external borders, migration and asylum in order not to allow third countries to take advantage of a lack of unity.

## 2. Background to the opinion

2.1. In 1985, a number of Member States adopted the international Schengen Agreement, taking the decision to abolish all border controls at their internal borders. The Schengen Implementing Convention of 1990 provided the necessary 'flanking measures', aiming to offset externalities resulting from the lifting of controls.

2.2. The Treaty of Amsterdam integrated the Schengen *acquis* into the EU legal order and regulated the special position of the United Kingdom, Ireland and Denmark.

2.3. The conclusion of bilateral agreements with Norway, Iceland, Switzerland and Liechtenstein has allowed for these countries' participation in Schengen cooperation.

2.4. Bulgaria, Romania and Croatia participate in parts of the Schengen *acquis*, but lifting of checks at their internal borders requires a unanimous Council Decision to that effect. The Council has refused to take that decision even though the Commission has found these countries to be technically ready.

2.5. Since the Schengen *acquis* was incorporated into the EU legal order, it has progressively developed, notably with the adoption of the Schengen Borders Code, the Visa Code and the European Border and Coast Guard Regulation. Cooperation in the field of borders, visas, migration and asylum is supported by a number of large-scale IT databases for information exchange (SIS, VIS, Eurodac, EES, ETIAS, TCN-ECRIS), which are currently interoperable.

2.6. Although responsibility is shared, individual Member States remain responsible for their respective parts of the external borders, meaning that deficiencies in the management of the external borders in one Member State are likely to have serious repercussions in the entire area of freedom, security and justice.

2.7. Over the past five years, the Schengen area has been under considerable pressure as a result of the repeated and continued reinstatement of checks at the internal borders by some Member States. This occurred in response to the refugee and migration situation of 2015 and the threat of terrorist violence in Europe.

2.8. The COVID-19 pandemic led to further border closures and restrictions to the free movement of persons.

2.9. In response to the 2015 refugee and migration situation, Frontex, the European Agency for the Management of Operational Cooperation between the Member States at the External Borders, was reformed as the European Border and Coast Guard Agency in 2016 and further reinforced in 2019.

2.10. In its New Pact on Migration and Asylum, the European Commission affirmed that 'integrated border management is an indispensable policy instrument' for the integrity of the Schengen area and 'an essential component of a comprehensive migration policy'. It announced a separate strategy on the future of Schengen, which was published on 2 June 2021.

2.11. The aim of the strategy is to make the Schengen area stronger and more resilient. It takes stock of the challenges faced by the Schengen area in recent years, including during the pandemic crisis, and sets out a path forward that maintains the benefits of Schengen.

2.12. The strategy aims to:

- (1) **ensure effective management of the EU's external borders;**
- (2) **reinforce the Schengen area internally;**
- (3) **improve preparedness and governance;**
- (4) **complete the Schengen area.**

2.13. The new strategy is accompanied by the proposal for a Council Regulation establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing Regulation (EU) No 1053/2013 <sup>(1)</sup>.

2.14. The Commission proposes an overhaul of the Schengen evaluation and monitoring mechanism. Changes include accelerating the evaluation process as well as a fast-track procedure in case of significant deficiencies that could put Schengen as a whole at risk.

### 3. General comments

#### 3.1. *Modern and effective management of the external borders*

3.1.1. The Committee supports the swift adoption of a Multiannual Strategic Policy for European Integrated Border Management as part of the integrated management system provided for by Article 77(2)(d) TFEU. It asks to be consulted on this strategy prior to its adoption <sup>(2)</sup>.

3.1.2. The Committee continues to support an effective European Border and Coast Guard Agency, and the establishment of its operational arm. It is, however, concerned with the progress that is being made in this regard. In particular, it points to the recent findings of the EU's Court of Auditors stating that the Agency has not fully implemented its 2016 mandate and that there were several risks and shortcomings in relation to the implementation of its 2019 mandate <sup>(3)</sup>.

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<sup>(1)</sup> COM(2021) 278 final.

<sup>(2)</sup> See point 4.8 in OJ C 110, 22.3.2019, p. 62.

<sup>(3)</sup> European Court of Auditors Special Report, Frontex's support to external border management: not sufficiently effective to date, 2021.

3.1.3. The Committee is particularly concerned by the reports on fundamental rights abuses during Frontex coordinated operational activities and knowledge thereof by the Agency, as reported by different media sources and NGOs, and discussed in the report of the LIBE Committee's Frontex Scrutiny Working Group. It is pleased with the recent appointment of a new Fundamental Rights Officer, and the ongoing recruitment of fundamental rights monitors, but emphasises that the Fundamental Rights Office needs to receive adequate resources to fulfil its tasks in full independence. It calls upon the Agency to fully implement the accountability mechanisms and structures provided for in its founding regulation.

3.1.4. The Committee is concerned with the emphasis in the strategy on the pre-entry screening system, which in its opinion on the Pact it considered a novel contribution worth considering. However, the Committee questioned its practical feasibility and considered it inadequate from the perspective of fundamental rights<sup>(4)</sup>. It emphasises the need for a mechanism for independent monitoring by the Member States as provided for in the Screening Regulation.

3.1.5. The Committee has always considered reaching full interoperability of IT systems as a necessary step toward building a coherent and effective EU-wide policy. In line with that view, it also supports further digitalisation of visa procedures and travel documents.

3.1.6. The Committee expresses its concern as regards the Commission's statement that delays in individual Member States may hold up the Europe-wide implementation of interoperability. Given past experience with the implementation of SIS II and in light of the recent state of play with implementation of the Entry/Exit System and the European Travel Information and Authorisation System<sup>(5)</sup>, the Committee would like to hear what concrete steps the Commission is taking to ensure a timely implementation of interoperability, in line with the envisaged budget.

3.1.7. The Committee emphasises that further technological development and full interoperability should be achieved with due regard for the protection of personal data and fundamental rights. As regards the proposal of a revised Eurodac, and in relation to the use of large-scale databases in general, the Committee reiterates that full interoperability should be achieved with due regard for the protection of fundamental rights. Measures must be strictly necessary and proportionate, given the sensitivity of the data, especially where applicants for international protection and the confidentiality of the procedure are concerned. It should be pointed out that personal data processed in relation to border management and return fall under the General Data Protection Regulation and do not qualify as operational personal data under Regulation (EU) 2018/1725 of the European Parliament and of the Council<sup>(6)</sup>.

3.1.8. The EESC points out that when cooperating with third countries, especially also when Frontex acts on third-country territory, fundamental rights, including the right to the protection of personal data, must be fully respected and appropriate accountability mechanisms must be put in place.

### 3.2. Measures for reinforcing Schengen internally

3.2.1. The Committee is pleased with the attention paid to measures that, although not strictly speaking Schengen-developing measures, are linked to the functioning of the Schengen area.

3.2.2. Member States' security concerns are better addressed with more and strengthened cooperation between law enforcement authorities than with the reintroduction of controls at the internal border.

3.2.3. The Committee emphasises that in all forms of police cooperation and criminal justice cooperation, fundamental rights, including the right of defence<sup>(7)</sup> and the rights of victims<sup>(8)</sup>, must be fully respected. This also means that if fundamental rights are breached, the division of responsibilities between different actors (EU and national) must not result in an accountability deficit.

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<sup>(4)</sup> EESC opinions on migration, OJ C 123, 9.4.2021, p. 15, OJ C 155, 30.4.2021, p. 58, OJ C 155, 30.4.2021, p. 64.

<sup>(5)</sup> European Commission Note on Implementation of interoperability: state of play on the implementation of the Entry/Exit System and the European Travel Information and Authorisation System, June 2021.

<sup>(6)</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

<sup>(7)</sup> In line with Title VI of the Charter of Fundamental Rights and relevant secondary legislation.

<sup>(8)</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012, p. 57), as well as the legislation for specific categories of victims of human trafficking, sexual exploitation and child pornography, and terrorism.

3.2.4. The protection of personal data, under the appropriate legal frameworks, needs to be respected at all times, especially when highly sensitive personal data, as under the Prüm Decisions, is concerned.

3.2.5. As regards the use of artificial intelligence (AI) for cross-border policing, the Committee refers to its opinion on the Regulation on artificial intelligence <sup>(9)</sup>.

3.2.6. The Committee would like to point out that, in the annex to the proposal for an Artificial Intelligence Act <sup>(10)</sup>, allows for the possibility of using AI for migration, asylum and border control management. In particular the reference to the use of 'polygraphs and similar tools or [tools] to detect the emotional state of a natural person' is worrisome, since scientific evidence for the reliability of such methods is lacking.

3.2.7. As regards the specific measures proposed in the New Pact on Migration and Asylum, the Committee refers to its opinion of 17 December 2020 <sup>(11)</sup>.

3.2.8. The Committee questions the added value of an increase in the use of Advance Passenger Information in combination with Passenger Name Records, and finds that the Commission has not made a convincing case to allow for systematic and mass the intra-Schengen exchange of personal data, which by default would also affect EU citizens exercising their right to free movement.

3.2.9. As regards the use of the European Arrest Warrant, and other instruments that facilitate law enforcement cooperation, such as the European Investigation Order, the Committee points out that for the smooth functioning of these instruments of mutual recognition, mutual trust is indispensable. This requires even more effective rule of law monitoring by the EU institutions and entails a responsibility on the part of the Member States to uphold the rule of law, in particular the right to effective judicial protection under Article 47 of the Charter of Fundamental Rights of the EU (hereinafter 'the Charter') and Article 19(1) TEU.

### 3.3. *Enhanced governance*

3.3.1. The Committee appreciates that the Schengen Forum may provide Member States with a venue to discuss politically salient issues related to Schengen cooperation. However, other EU institutions, as well as the Committee, should remain informed and have the right to attend as participants. The Forum and its actions should be as transparent as possible and it should provide access to its documents. The relaunch of the State of Schengen Report is to be applauded, but it is not sufficient in this regard.

3.3.2. The Committee supports the idea that the Schengen Borders Code requires amendment to incorporate some of the lessons learnt from the COVID-19 pandemic. It stresses that these lessons go beyond the issue of internal borders and touch upon the functioning of the internal market itself. Any such amendment should therefore be part of a broader fitness test for Europe's regulatory framework for free movement in a world where COVID-19 is likely to continue to be a fact of life. The Committee supports the idea that such an approach should include rules on travel into the EU, which are currently absent from the Schengen Borders Code. The Committee would also like to know from the Commission whether it envisages any amendment to the Local Border Traffic Regulation.

3.3.3. The Committee believes that the Commission should take a stronger stance in support of borderless travel in Europe. The EU Treaty is clear that the EU shall offer its citizens an area without borders. The right for Member States to reintroduce border controls is an exception to that right, which must be interpreted narrowly. It cannot be regarded as a sovereign prerogative, and is instead bound by the rules of the Schengen Borders Code. Any revision of the Code needs to fully take into account the exceptional nature of the reinstatement of border controls.

3.3.4. The Committee takes a positive view of the proposals to improve the functioning of the Schengen Evaluation Mechanism, in particular those to ensure quicker follow-up, increased synergies with the Vulnerability Assessment Mechanism and those paying increased attention and taking a cross-cutting approach to human rights. However, care should be taken that the Schengen Evaluation Mechanism does not politicise questions of a more technical nature.

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<sup>(9)</sup> INT/940 (OJ C 517, 22.12.2021, p. 61).

<sup>(10)</sup> COM(2021) 206 final, pp. 4 and 5.

<sup>(11)</sup> OJ C 123, 9.4.2021, p. 15.

3.3.5. The Committee encourages the Commission to actively make use of its enforcement powers under the Treaties in situations where there is a lack of follow-up to deficiencies found during Schengen Evaluations. Priority should be given to systemic practices that violate fundamental rights norms. Importantly, the Commission should not solely rely on the findings of the Schengen Evaluation Mechanism, but also monitor the fundamental rights situation itself actively.

#### 3.4. *Completion of the Schengen area*

3.4.1. The Committee applauds the Commission's stance as regards the completion of the Schengen area. It emphasises the link between free movement, EU citizenship and the absence of border controls. Currently the citizens of Bulgaria, Croatia and Romania do not fully enjoy their rights as EU citizens under the Treaties.

3.4.2. The Committee emphasises that these Member States already control their external borders in line with the Schengen Borders Code. Their full accession would increase the functioning and security of the European Union, through their full participation in all large-scale Justice and Home Affairs (JHA) databases.

3.4.3. The Committee invites the Commission to present a more detailed roadmap towards full accession and invites the Council to swiftly act accordingly.

Brussels, 20 October 2021.

*The President*  
*of the European Economic and Social Committee*  
Christa SCHWENG

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