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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 4.3.2009
COM(2009)105 final

2009/0032 (CNS)

Proposal for a

COUNCIL DECISION

**on the establishment of an evaluation mechanism to monitor the application of the
Schengen acquis**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objective of the proposal**

The main objective of the proposed Decision is to establish a legal framework for evaluating the correct application of those elements of the Schengen *acquis* that form part of EU law. It goes together with the proposal for a Regulation on the establishment of an evaluation mechanism to verify the application of those elements of the Schengen *acquis* that are part of Community law. This double evaluation mechanism is designed to maintain mutual trust between Member States in their capacity to effectively and efficiently apply the accompanying measures allowing the creation of an area without internal borders.

The overall objectives of the new mechanism should be to ensure transparent, effective and consistent implementation of the Schengen *acquis*, also reflecting the changes in the legal situation after the integration of the Schengen *acquis* within the framework of the European Union.

- **General context**

The area without internal borders as set up by the Schengen *acquis* — the Schengen area — was developed within an intergovernmental framework in the late 80s and beginning of the 90s by Member States willing to abolish internal border controls and implement accompanying measures to this end, such as common rules on external border controls, a common visa policy, police and judicial cooperation and the establishment of the Schengen Information System (SIS). It was not possible to abolish internal border controls within the Community framework, as the Member States could not agree on the need for their abolition in order to achieve the objective of the free movement of persons (Article 14 EC Treaty). Over the years, however, all Member States at that time except the United Kingdom and Ireland have joined the Schengen area.

The Schengen *acquis* became part of the European Union framework with the entry into force of the Amsterdam Treaty in 1999¹.

The Schengen area is based on full mutual trust between the Member States in their capacity to fully implement the accompanying measures allowing the lifting of internal border controls: e.g. checks at external borders are carried out by Member States not only to protect their own interests but also on behalf of all other Member States to which people could travel once having crossed the external borders of the Schengen area.

¹ To this end, it was necessary to define the Schengen *acquis* (Council Decision 1999/435/EC, OJ L 176 of 10.7.1999, p. 1) and to determine the legal basis in the Treaties for each of the provisions or decisions constituting this *acquis* (Council Decision 1999/436/EC, OJ L 176 of 10.7.1999, p. 17). Each provision of the *acquis* received a legal basis under the first or the third pillar. Those provisions of the Schengen *acquis* for which no single legal basis could be determined (i.e. the SIS provisions) were considered to be part of the third pillar. All modifications to this *acquis* must have an appropriate legal basis under the Treaties.

In order to gain and maintain this mutual trust, the Schengen Member States set up a Standing Committee in 1998. Its mandate is set out in a decision of the Schengen Executive Committee (SCH/Com-ex (98) 26 def) and consists of two separate tasks:

1. Verification whether all preconditions for application of the Schengen *acquis* (i.e. lifting of border controls) have been met by Member States wanting to join Schengen ('putting into effect/application');
2. Verification that the Schengen *acquis* is being correctly applied by the Member States implementing the *acquis* (implementation').

Schengen thus makes a distinction between 'putting into effect' and 'implementation'. Therefore, first of all, checks have to be made to determine whether the conditions for mutual trust are met before the *acquis* can be put into effect. Secondly, mutual trust then needs to be maintained by checking the correct implementation of the *acquis*. In the intergovernmental phase of Schengen, specific provisions for verifying correct implementation were needed.

The Schengen *acquis* was integrated within the European Union framework without being renegotiated. The Standing Committee and its 1998 mandate were thus taken over without change, except that the Standing Committee became the Schengen Evaluation Working Group (SCH-EVAL) in the Council. It came under Article 66 EC Treaty and Articles 30 and 31 EU Treaty, as the Schengen *acquis* covers both first and third pillar measures.

Given its intergovernmental basis, Schengen evaluation has been and still is entirely in the hands of the Member States, with the Commission participating as an observer. This continues to be a logical approach for the first part of the mandate, as there is nothing similar in the EU/Justice and Home Affairs *acquis* with a distinction between 'putting into effect' and 'implementation'. Moreover, it should be noted that the decision-making procedure for the lifting of internal border controls and the full application of the Schengen *acquis* was, for the enlargements of 2004 and 2007, laid down in the accession treaties, thus in primary law. The Acts of Accession provided for a Council Decision after consultation of the European Parliament. There is no right of initiative foreseen for the Commission.

However, the approach is less logical for the second part of the mandate, especially as far as first pillar matters are concerned — though not only these². Hence, already at the time of integration of the *acquis*, the Commission issued a declaration stating that it 'considers that the integration into the Union framework of the Decision of the Executive Committee setting up a Schengen Implementing Convention Standing Committee (SCH/Com-ex (98) 26 Def of 16.9.1998) does not in any way affect the powers devolving on it from the Treaties and in particular its responsibility as guardian of the Treaties'.

As evaluation before putting into effect is fundamental for Member States in order to gain mutual trust, it seems reasonable for this to remain the responsibility of Member States. Moreover, where a Member State does not follow the recommendations made, no decision can be taken to lift internal border controls, which is thus an effective 'incentive' for full and correct application of the *acquis*. The Commission will continue to participate fully as an observer in these evaluations.

² The establishment of an area of freedom, security and justice falls within the remit of the EC Treaty.

- **The need to improve evaluation of the correct application of the *acquis***

The Hague Programme of 2004 invites the Commission ‘*to submit, as soon as the abolition of controls at internal borders has been completed, a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States experts, and including unannounced inspections*’.

Since 1999, there have been several discussions between Member States and with the Commission on making the Schengen evaluation mechanism more efficient, in particular concerning the second part of the mandate, namely verification of the correct application of the *acquis* after the lifting of internal border controls. The following main weaknesses have been identified:

- (1) The current methodology for the evaluation mechanism is inadequate. The rules on consistency and frequency of evaluations are not clear. There is no practice of conducting unannounced on-site visits.
- (2) There is a need to develop a methodology for priority-setting based on risk analysis.
- (3) A consistently high quality of expertise during the evaluation exercise needs to be ensured. The experts participating in the evaluation should possess an adequate level of legal knowledge and practical experience. Sending an expert from each Member State on each on-site visit may be detrimental to the efficiency of the exercise. An appropriate number of experts to participate in visits needs to be determined.
- (4) The post-evaluation mechanism for assessing the follow-up given to recommendations made after the on-site visits needs improving, as the measures taken to remedy deficiencies as well as the timeframe within which they are to be remedied vary from one Member State to another.
- (5) The institutional responsibility of the Commission as guardian of the Treaty concerning first pillar matters is not reflected in the current evaluation system.

The following points are intended to address these weaknesses:

Methodology for evaluations

The present proposal introduces a clear programming, providing for multiannual and annual programmes of announced on-site visits. Member States will continue to be evaluated on a regular basis in order to ensure the overall correct application of the *acquis*. All parts of the Schengen *acquis* which have their legal basis in the Treaty on European Union can be the subject of evaluation.

This evaluation can be based on replies to questionnaires, on-site visits or a combination of both. In the latter case, the visits can take place shortly after the replies to the questionnaires are received.

In recent years, Member States have not seen the need to carry out evaluations on the spot concerning judicial cooperation in criminal matters and drugs. Data protection has also not always been subject to on-site evaluations.

Nevertheless, on-site visits are not limited to police cooperation and can cover all parts of the Schengen *acquis*. The concrete need for such visits will be determined by the Commission after seeking the advice of the Member States, taking into account changes in the legislation, procedures or organisation of the Member State concerned.

In addition, if necessary, thematic or regional evaluations can also be included in the annual programme.

Both multiannual and annual programmes can always be adapted if need be.

As regards the methodology for priority-setting based on risk assessment in relation to the Schengen *acquis* on police cooperation and on judicial cooperation, the Commission does not yet see a role for Europol and Eurojust given their current mandates. However, if Europol or Eurojust produce risk analyses for the *acquis* in question, the Commission will certainly use these in order to plan the evaluations.

Expertise of the Member States

As the correct implementation of the accompanying measures allowing the lifting of internal border controls is of fundamental importance for the internal security of Member States, Member State experts will continue to play an important role in the evaluation process. The members of the team making an on-site visit will appoint a coordinating expert with overall responsibility for drafting the report. Giving this role to a Member States expert reflects the need to work in partnership to ensure effective evaluation.

In order to guarantee a high quality of expertise, Member States must ensure that the experts have appropriate qualifications, including a solid theoretical knowledge and practical experience in the areas covered by the evaluation, as well as a sound knowledge of on-site visit principles, procedures and techniques.

Experts of Europol or Eurojust can also participate in the evaluation as observers. Appropriate training should be provided for by the relevant bodies (e.g. Cefpol) and funds should be made available to Member States for initiatives targeted at specific training in the field of Schengen *acquis* evaluations through existing financial instruments and their development.

Given the need to reduce the number of participating experts in order to ensure efficient evaluation on the spot, the number of experts participating in a visit should be limited to eight.

Follow-up of the evaluation

In order to address effectively the identified weaknesses and shortcomings, the findings of the report should each be assigned to one of three categories. Within two weeks, the Member State concerned should provide its comments on the report and within six weeks an action plan on how to remedy the weaknesses. The Member State will be obliged to report within six months on the implementation of its action plan. Depending on the weaknesses identified, the Commission may schedule and carry out announced on-site visits in order to verify the correct implementation of the action plan. In the event of serious deficiencies, the Commission has to inform the Council without delay.

Integration of the Schengen *acquis* within the European Union framework

The Commission will coordinate the evaluation process in fields covered by the EU Treaty in order to ensure coherent evaluation of all parts of the Schengen *acquis* that apply after the lifting of internal border controls. The involvement of the Member State experts, in particular the appointment of a Member State expert to be responsible for coordination, takes account of the different responsibilities enshrined in the Treaties.

The costs of the participation of the Member State experts will be borne by the EU budget.

It should also be recalled that the correct application of the provisions to be put into effect by Member States upon accession is not subject to the new evaluation mechanism. The correct application of these provisions first needs to be evaluated by the Council to determine whether internal border controls can be lifted.

- **Existing provisions in the area of the proposal**

Decision of the Executive Committee setting up a Schengen Implementing Convention Standing Committee (SCH/Com-ex (98) 26 Def of 16.9.1998)

- **Consistency with the other policies and objectives of the Union**

The proposal is consistent with existing policies and objectives of the European Union, in particular the objective of creating and maintaining an area of freedom, security and justice.

2. CONSULTATION OF INTERESTED PARTIES

Since 1999, several discussions have been held within the Council Working Group ‘Schengen Evaluation’ in order to render the Schengen evaluation mechanism more efficient. The group agreed for instance to limit the number of experts participating in evaluations. However, this agreement is not legally binding and every Member State still has the right to send an expert on evaluation visits, which sometimes makes it difficult to ensure the smooth functioning of these visits. In addition, the frequency and methodology of the evaluations have also been discussed.

In April 2008, the Commission organised an expert meeting. Member States agreed with the assessment of the weaknesses as identified by the Commission. While the Member States acknowledged the need to change the current mechanism, some Member States expressed doubts about the institutional role of the Commission in a new Schengen evaluation mechanism.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The instrument provides for a new Schengen evaluation mechanism in order to ensure transparent, effective and consistent implementation of the Schengen *acquis*. It also reflects the changes in the legal situation after the integration of the Schengen *acquis* within the European Union framework.

- **Legal basis**

Articles 30 and 31 of the Treaty on European Union. The intergovernmental mandate received Articles 30 and 31 of the Treaty on European Union (as well as Article 66 EC Treaty) as legal basis and the areas of evaluation remain the same.

- **Subsidiarity and proportionality**

In accordance with the principle of subsidiarity, the objective of the proposed instrument, namely rendering more efficient the existing Schengen evaluation mechanism, which is currently the responsibility of the Council, can only be achieved at EU level.

The present proposal remains within the current framework, while limiting the number of participating experts and increasing efficiency. It does not go beyond what is necessary to achieve its objective.

- **Choice of legal instrument**

An evaluation mechanism to ensure the correct application of EU law by its very nature cannot require any action by Member States to transpose it into national law, so the instrument chosen is a Decision.

4. BUDGETARY IMPLICATIONS

The Commission has prepared a common financial statement annexed to the Regulation on the establishment of an evaluation mechanism to verify the correct application of the Schengen *acquis* under Title IV of the EC Treaty. This statement also applies to this Decision. Adequate human and financial resources will have to be allocated to the Commission, which will be responsible for the new Schengen evaluation mechanism. Costs incurred by the Member State experts will also be reimbursed.

5. ADDITIONAL INFORMATION

Consequences of the various protocols annexed to the Treaties and of the association agreements concluded with third countries

The legal basis for this proposal is in Title VI of the EU Treaty, so the system of ‘variable geometry’ provided for in the protocols on the position of the United Kingdom and Ireland and in the Schengen protocol applies.

This proposal builds upon the Schengen *acquis*. The following consequences in relation to the various protocols therefore have to be taken into account:

United Kingdom and Ireland: The United Kingdom is taking part in this Decision, in accordance with Article 5 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 8(2) of Council Decision 2000/356/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some provisions of the Schengen *acquis*³.

³ OJ L 131, 1.6.2000, p. 43.

Ireland is taking part in this Decision, in accordance with Article 5 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article (6)2 of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the *acquis*⁴.

Consequences for the new Member States of the two-stage procedure for implementing instruments building on the Schengen *acquis* (Bulgaria, Cyprus and Romania):

Article 3(1) of the 2003 Act of Accession⁵ and Article 4(1) of the 2005 Act of Accession⁶ state that the provisions of the Schengen *acquis* and the acts building upon it or otherwise related to it, listed respectively in Annex I and Annex II to these Acts, will be binding on and applicable in the new Member States from the date of accession. Provisions and acts not referred to in the Annexes, while binding on the new Member States from the date of accession, will only apply in a new Member State pursuant to a Council Decision to that effect taken in accordance with these Articles.

This is the two-stage implementation procedure, whereby certain provisions of the Schengen *acquis* are binding and applicable from the date of accession to the Union whereas others, specifically those linked intrinsically to the removal of checks at the internal borders, are binding from the date of accession but applicable in the new Member States only after the Council Decision referred to above.

It should be underlined that the provisions listed respectively in Annex I and Annex II of the Acts of Accession are thus applicable upon accession. Nevertheless, the evaluation mechanism introduced by the present instrument will apply to these provisions only after the Council has carried out the Schengen evaluation to determine whether internal border controls can be lifted.

Norway and Iceland: As regards Norway and Iceland, this proposal constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of the latter two States with the implementation, application and development of the Schengen *acquis*⁷.

Switzerland: As regards Switzerland, this proposal constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the European Union, the European Community and the Swiss Confederation on the latter's association with the implementation, application and development of the Schengen *acquis*⁸.

Liechtenstein: As regards Liechtenstein, this proposal constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss

⁴ OJ L 64 of 7.3.2002, p. 20.

⁵ OJ L 236, 23.10.2003, p. 33.

⁶ OJ L 157, 21.6.2005, p. 29.

⁷ OJ L 176, 10.7.1999, p. 36.

⁸ OJ L 53, 27.2.2008, p. 52.

Confederation's association with the implementation, application and development of the Schengen *acquis* which falls within the area referred to in Article 1, point G to I of Council Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/262/JHA⁹.

Participation of experts from Member States that do not yet fully apply the *acquis* or which are allowed to apply only parts of the *acquis*:

As far as Cyprus, Bulgaria and Romania are concerned, their experts can participate in the evaluation of those parts of the *acquis* which they already apply in accordance with the respective Acts of Accession (e.g. police cooperation).

As far as the United Kingdom and Ireland are concerned, their experts can only take part in evaluations of those parts of the *acquis* which have already been put into effect.

⁹ OJ L 83, 26.3.2008, p. 5.(corrigendum OJ L 110, 22.4.2008, p. 16).

Proposal for a

COUNCIL DECISION

on the establishment of an evaluation mechanism to monitor the application of the Schengen *acquis*

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 30 and 31 thereof,

Having regard to the proposal from the Commission¹⁰,

Having regard to the opinion of the European Parliament

Whereas:

- (1) The Hague programme¹¹ invited the Commission ‘to submit, as soon as the abolition of controls at internal borders has been completed, a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States experts, and including unannounced inspections’.
- (2) By decision of the Executive Committee of 16 September 1998¹², a Standing Committee on the evaluation and implementation of Schengen was set up. The Standing Committee was given the mandate, firstly, to establish whether all the preconditions for lifting internal border controls with a candidate State have been fulfilled, and secondly, to ensure that the Schengen *acquis* is properly applied by the States already implementing the *acquis* in full.
- (3) A specific evaluation mechanism to monitor the application of the Schengen *acquis* is necessary given the need to maintain a high level of mutual trust between those Member States that form part of an area without internal border controls and the need to ensure high uniform standards in the application of the Schengen *acquis* in practice. Such a mechanism should build upon close cooperation between the Commission and those Member States.
- (4) The evaluation mechanism set up in 1998 should therefore be revised as regards the second part of the mandate given to the Standing Committee. The first part of the mandate given to the Standing Committee should continue to apply as laid down in part I of the Decision of 16 September 1998.

¹⁰ OJ C , , p. .

¹¹ OJ 53 C, 3.3.2005, p. 1 (point 1.7.1)

¹² OJ L 239, 22.9.2000, p. 138

- (5) The Schengen *acquis* contains both provisions covered by the Treaty establishing the European Community and provisions covered by the Treaty on European Union. The experience gathered during previous evaluations demonstrates the need to maintain a coherent evaluation mechanism covering both pillars.
- (6) This Decision constitutes the necessary legislative basis for implementing the evaluation mechanism in respect of matters falling within the scope of the Treaty on European Union. Council Regulation XXXX/XXX/EC of ... establishing an evaluation mechanism to verify the application of the Schengen *acquis* constitutes the necessary legislative basis for implementing the evaluation mechanism in respect of matters falling within the scope of the Treaty establishing the European Community.
- (7) The fact that the legislative basis necessary for setting up the evaluation mechanism consists of separate instruments does not affect the principle that all evaluations should be implemented as part of one single mechanism. Certain provisions of these instruments should therefore be identical.
- (8) The evaluation mechanism established by this instrument respects the specific nature of the cooperation between police, customs and other law enforcement authorities, but also in the field of criminal justice.
- (9) The evaluation mechanism should set up transparent, efficient and clear rules on the methodology to be applied for the evaluations, the use of highly qualified experts for on-site visits, and the follow-up to be given to the findings of the evaluations.
- (10) Member States should ensure that experts made available for on-site visits have the necessary experience and have undergone specific training for this purpose. Appropriate training should be provided for by the relevant bodies (e.g. Cepol) and funds should be made available to Member States for initiatives targeted at specific training in the field of Schengen *acquis* evaluations through the existing financial instruments and their development.
- (11) The United Kingdom is taking part in this Decision, in accordance with Article 5 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 8(2) of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some provisions of the Schengen *acquis*¹³.
- (12) Ireland is taking part in this Decision, in accordance with Article 5 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article (6)2 of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the *acquis*¹⁴.
- (13) As regards Iceland and Norway, this Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of

¹³ OJ L 131, 1.6.2000, p. 43.

¹⁴ OJ L 64 of 7.3.2002, p. 20.

Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*¹⁵ which falls within the areas referred to in Article 1, point G to I of Council Decision 1999/437/EC¹⁶ of 17 May 1999 on certain arrangements for the application of that Agreement.

- (14) As regards Switzerland, this Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis*¹⁷, which fall within the area referred to in Article 1, point G to I, of Council Decision 1999/437/EC read in conjunction with Article 3 of the Council Decision 2008/149/JHA¹⁸.
- (15) As regards Liechtenstein, this Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of the Protocol signed between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point G to I, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/262/JHA¹⁹.

HAS ADOPTED THIS DECISION:

Article 1

Purpose and scope

This Decision establishes an evaluation mechanism to monitor the application of the Schengen *acquis* in the Member States to which the Schengen *acquis* applies in full and in the Member States which have been authorised by the Council to take part in some of the provisions of the Schengen *acquis*.

Member States which have been authorised to take part in some of the provisions of the Schengen *acquis* shall only participate in the evaluation of the provisions that are covered by the authorisation and which they already apply.

Member States which do not yet fully apply the *acquis* shall only participate in the evaluation of those parts of the *acquis* which they already apply.

Article 2

Definitions

¹⁵ OJ L 176, 10.7.1999, p. 36.

¹⁶ OJ L 176, 10.7.1999, p. 31.

¹⁷ OJ L 53, 27.2.2008, p. 52 .

¹⁸ OJ L 53, 27.2.2008, p. 50.

¹⁹ OJ L 83, 26.3.2008, p. 5.(corrigendum OJ L 110, 22.4.2008, p. 16).

For the purposes of this Decision the following definition applies:

‘Schengen *acquis*’, means the provisions of the Schengen *acquis* as integrated into the framework of the European Union by the Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community as well as the acts building upon it or otherwise related to it, in so far as those provisions and acts have their legal basis in Title VI of the Treaty on European Union.

Article 3

Responsibilities

1. The Commission is responsible for the implementation of this evaluation mechanism. This mechanism is coordinated by a group, hereinafter referred to as "coordination group", which consists of representatives of the Member States and of the Commission. The group is chaired by a representative of the Commission. The Commission may invite Europol to participate in the coordination group as observers.
2. Member States shall cooperate with the Commission within the coordination group to allow the Commission to carry out the tasks conferred on it by the present Decision. Member States shall also cooperate with the Commission during the preparatory, on site visit, reporting and follow up phases of evaluations.

Article 4

Evaluations

1. Evaluations may consist of questionnaires and on-site visits. Both may be supplemented by presentations by the evaluated Member State of the area covered by the evaluation. On-site visits and questionnaires may be used independently or in combination in relation to specific Member States and specific areas. Only announced on-site visits may be carried out.
2. The specific areas that may be covered by evaluations are listed in the Annex to this Decision, in so far as these areas relate to acts or provisions that have their legal bases in Title VI of the Treaty on European Union. The Annex contains a non exhaustive list of such areas.

Article 5

Multiannual programme

1. A multiannual evaluation programme covering a period of five years shall be established by the Commission in close cooperation with the coordination group not later than three months before the start of the next five-year period.
2. The multiannual programme shall contain the list of Member States to be evaluated each year. Each Member State shall be evaluated at least once during each five-year

period. The order of the Member States to be evaluated will take into account the threats to internal security, the time elapsed since the previous evaluation and the balance between the different parts of the Schengen *acquis* to be evaluated.

3. A standard questionnaire shall be attached to the multiannual programme.
4. The multiannual programme may be adapted, if necessary, in close cooperation with coordination group.

Article 6

Annual programme

1. An annual evaluation programme detailing the evaluation activities shall be established by the Commission in close cooperation with the coordination group not later than 30 November of the previous year. The programme may provide for the evaluation of:
 - the application of the *acquis* by one Member State, as specified in the multiannual programme;and in addition, where relevant:
 - the application of specific parts of the *acquis* across several Member States (thematic evaluations);
 - the application of the *acquis* by a group of Member States (regional evaluations).
2. The programme, will enumerate the Member States to be evaluated in the coming year in accordance with the multiannual programme contain a list of the areas to be evaluated and include the questionnaire to be communicated to the Member States concerned. If an assessment is possible at that stage, the programme shall contain a list of on-site visits to be carried out.
3. The Commission, in close cooperation with the coordination group, shall decide, after analysis of the replies to the questionnaire, whether an on-site visit is to take place or not.

An on-site visit shall not take place earlier than four months after communication of the questionnaire by the Commission to the Member State concerned.
4. The annual programme may be adapted on the initiative of the Commission or a Member State, if necessary, in accordance with the provisions referred to in paragraph 2 and 3 .

Article 7

List of experts

1. The Commission shall establish a list of experts designated by Member States, Europol and Eurojust for participation in on-site visits. The list shall be classified as restricted and communicated to the coordination group.
2. Member States, Europol and Eurojust shall indicate the respective areas of expertise of each expert with reference to the areas listed in the Annex to this Decision. Member States, Europol and Eurojust shall notify the Commission of any changes as soon as possible.
3. The experts shall have appropriate qualifications, including a solid theoretical knowledge and practical experience in the areas covered by the evaluation mechanism, as well as sound knowledge of evaluation principles, procedures and techniques, and shall be able to effectively communicate in a common language.
4. Member States, Europol and Eurojust shall ensure that their designated experts meet the requirements specified in the previous paragraph, including by indicating the training the experts have received, and shall ensure that the experts receive continuous training to maintain their compliance with these requirements.

Article 8

Teams responsible for on-site visits

1. On-site visits shall be carried out by teams appointed by the Commission. The teams shall consist of experts drawn from the list of experts referred to in Article 7 and Commission official(s). The Commission shall ensure the geographical balance and competence of the experts taking part in each team. Member State experts may not participate in an on-site visit to the Member State where they are employed. Experts of Europol and Eurojust may participate only as observers.
2. The number of experts participating in the on-site visits may not exceed eight persons.
3. Member States whose experts have been appointed in accordance with paragraph 1 shall be notified by the Commission not later than 4 weeks before the on-site visit is scheduled. Member States shall confirm the availability of the experts within one week.
4. Prior to the on-site visits, the members of the team shall agree jointly on the appointment of one of the Member State experts as the coordinating expert for the on-site visit. If no agreement is reached before the on-site visit starts, the coordinating expert shall be a Commission official.
5. The coordinating expert shall be responsible for conducting the on-site visits.

Article 9

Conduct of on-site visits

1. The on-site visit teams shall undertake all necessary preparatory activities in order to ensure the efficiency, accuracy and consistency of on-site visits.
2. The Member States shall be notified at least 2 months before the on-site visit is due to take place.
3. The members of the on-site visit team shall each carry identification authorising on-site visits on behalf of the European Union.
4. The Member State concerned shall ensure that the team of experts can directly address relevant persons. It shall ensure access of the team to all areas, premises and documents as required for the evaluation. It shall ensure that the team is able to exercise its mandate to verify the activities related to the areas to be evaluated.
5. The Member State concerned shall, by any means within its legal powers, assist the team in accomplishing its task.
6. The Commission shall provide the relevant Member States with the names of the experts of the team in advance. The Member State concerned shall designate a contact point for making the practical arrangements for the on-site visit.
7. The Member States shall be responsible for making the necessary arrangements for travel and accommodation for their experts. The costs of travel and accommodation for experts participating in the visits shall be reimbursed by the Commission.

Article 10

Questionnaire

1. The questionnaires shall cover the relevant legislation and the organisational and technical means available for the implementation of the Schengen *acquis* and statistical data for each field of evaluation.
2. Member States shall provide their replies to the questionnaire to the Commission within six weeks of its communication.

Article 11

Evaluation reports

1. A report shall be drawn up following each evaluation. The report shall be based on the findings of the on-site visit and the questionnaire as relevant.
 - a) If the evaluation is based only on the questionnaire, the report shall be drawn up by the Commission.
 - b) In the case of on-site visits, the report shall be drawn up by the team during the visit. The coordinating expert appointed in accordance with Article 8(4) shall take overall responsibility for drafting the report as well as ensuring its integrity and quality.

- c) Each report shall be approved by all experts of the expert team. In the case of disagreement the team shall endeavour to reach a compromise. Dissenting opinions may be included in the report.
2. The report shall analyse the qualitative, quantitative, operational, administrative and organisational aspects as relevant and shall list any shortcomings or weaknesses established during the evaluation. The report shall contain recommendations for remedial action as well as respective deadlines for their implementation.
3. One of the following classifications shall apply to each of the findings of the report:
 - a) compliant;
 - b) compliant but improvement necessary;
 - c) non-compliant, with serious deficiencies.
4. The report shall be notified by the Commission to the Member State concerned within four weeks of the on-site visit or the receipt of replies to the questionnaire as relevant. The Member State concerned shall provide its comments on the report within two weeks.

Within six weeks of receipt of the report, the Member State concerned shall provide an action plan on how to remedy any weaknesses identified.

5. The report and the reply of the Member State concerned shall be presented by the coordinating expert to the coordination group. The Commission, after consulting the expert team, shall present its assessment of the adequacy of the action plan. Member States shall be invited to comment on the report and the action plan.
6. The Member State concerned shall report to the Commission on the implementation of the action plan within six months of receipt of the report, and shall thereafter continue to do so every three months as long as the action plan is not fully implemented. Depending on the severity of the weaknesses identified and the measures taken to remedy those weaknesses, the Commission, in close cooperation with the coordination group, may schedule on-site visits to monitor the implementation of the action plan.
7. If an on-site visit reveals a serious deficiency deemed to have a significant impact on the overall level of security of one or more Member States applying the Schengen *acquis* in full, the Commission, on its own initiative or at the request of a Member State, shall inform the Council as soon as possible.

Article 12

Sensitive information

The teams shall regard as confidential any information they acquire in the course of performing their duties. The reports drawn up following on-site visits shall be classified as restricted. The Commission and the Member State concerned shall decide which part of the report can be made public.

Article 13

Transitional provisions

1. The first multiannual programme in accordance with Article 5 and the first annual programme in accordance with Article 6 shall be established six months after the entry into force of this Decision. The starting dates for both programmes shall be one year after the entry into force of this Decision.
2. Member States shall designate their experts in accordance with Article 7 not later than three months after the entry into force of this Decision.

Article 14

Reporting to the Parliament and the Council

The Commission shall present a yearly report to the Council and the European Parliament on the evaluations carried out pursuant to this Decision. The report shall be made public and shall include information on:

- the evaluations carried out during the previous year, and
- the conclusions in relation to each evaluation and the state-of-play with regard to remedial actions.

Article 15

Repeal

Where this relates to the Schengen *acquis* as defined in Article 2, part II of the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/Com-ex (98) 26 def.), entitled ‘Implementation committee for the states already applying the convention’, shall be repealed as of one year after the entry into force of this Decision.

Article 16

Entry into force

This Decision shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Done at Brussels,

For the Council
The President

ANNEX

- **Police cooperation**

- Law enforcement and police cooperation
- Bilateral agreements on police cooperation at internal borders
- Operational cooperation
- Mutual assistance, mechanisms for hot pursuit and surveillance
- Mechanism for cross-border cooperation, including mutual assistance and exchange of information
- Cooperation involving liaison officers
- Transmission of information in border areas
- Direct cooperation at internal borders between services of neighbouring Member States

- **Data protection**

- Legal, organisational and technical aspects of the protection of facilities and personal data
- Data subject rights and complaints handling
- Supervisory role (on-site visits)
- Cooperation with other Schengen Data Protection Authorities (DPAs)
- Measures to prevent access to information systems and to data stored

- **Schengen Information System (SIS) / Sirene**

- Security of data and premises
- Legislative and regulatory provisions regarding the SIS
- Data handling, entry, modification, deletion of alerts, data quality measures
- Technical availability and operational capacity of the Sirene Bureaux
- End-user access to relevant SIS data
- Training

- **Judicial cooperation in criminal matters**

- Mutual assistance

- Extradition

- **Drugs**

- Legal, organisational and technical measures against drug trafficking at external borders