Schengen Restored

The CJEU Sets Clear Limits to the Reintroduction of Internal Border Controls

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On 26 April 2022, the Court of Justice of the EU (CJEU) rendered a ruling in joined cases C-368/20 *NW v Landespolizeidirektion Steiermark* and C-369/20 *NW v Bezirkshauptmannschaft Leibnitz* stating that Member States of the European Union (EU) can re-introduce border controls within the Schengen Zone only under strict conditions. The Court has stepped up as a guardian of the Treaties protecting free movement of people without controls at the internal borders of the EU as "one of the major achievements of European integration" (para 65 and 74). At the same time, the Court has left some aspects of the application of these strict new rules unclear, leaving room for the European and national executives to exercise their function and fill in the blanks.

Border controls between Schengen Member States

Six Schengen countries, namely Germany, France, Austria, Denmark, Norway and Sweden, have reintroduced border controls over the past years for national security reasons (see a full list, including those introduced during the Covid-19 pandemic). The Schengen Zone is supposed to be an area without internal borders. Border controls can only exceptionally be re-introduced and even then, such re-introductions should be temporary. The abolishment and re-introduction of border controls are regulated in the Schengen Borders Code (SBC). Austria has had border controls on its southern borders to Hungary and Slovenia *de facto* continuously since September 2015 (until November 2021 at the time of these proceedings). They have been re-introduced 14 times based on five different articles of the SBC (para 26).

The applicant, an Austrian national, has been subject to border controls at the Austrian border when entering from Slovenia on two occasions, on 29 August and 16 November 2019, and refused to show an identity card or passport when asked by the border guards. Being more than an informed citizen, the applicant, who works otherwise as an EU and international law scholar, asked expressly whether the officers were conducting an identity check or a border control and obtained a confirmation that this was an instance of a border control. The applicant challenged both border controls as well as the imposed fine of 36 Euros before an administrative court, which decided to refer preliminary ruling questions to the Court in Luxembourg on 5 August 2020.

In the public and political debates, the re-introduction of border controls within the Schengen Zone was not meant to target the EU citizens returning from their summer holiday, but rather individuals who are unlikely to bring legal proceedings: third-country nationals who have irregularly crossed the Schengen external borders or alleged criminals who are hiding from the law enforcement. The case has been one of high political salience due to the tension between, on the one hand, the sovereignty arguments invoked by the Member States regarding their national

security and, on the other hand, the importance of a Schengen Zone without internal borders in the bigger project of European integration, complementing the EU internal market and citizenship.

The political salience of the case was reflected in the judicial proceedings in Luxembourg (see our previous blog post) and the case was assigned to the Grand Chamber by the CJEU President. In the oral hearings in June 2021, apart from the Austrian government, three other governments presented their views as intervening parties (Germany, France and Denmark). It was clear that, due to the *erga omnes* effects of preliminary rulings of the CJEU, their respective practices of border controls would also be affected by the judgment.

Strict judicial interpretation of the exceptions to the area without internal borders

In its ruling, the Court clearly sides with the applicant and the European Commission confirming that the SBC should be interpreted as prohibiting border controls such as those in place in Austria. While the Court engages carefully with the arguments of the Member States, it does not cite the Advocate General Opinion (discussed in our previous blogpost) even a single time.

The Court focusses on the first of the three questions referred by the national court, asking whether Article 25(4) SBC allows for the reintroduction of border controls that exceed the maximum total duration of six months. The judgment revolves around three points: 1) which time limits are applicable to the reintroduction of border controls based on Article 25 SBC? 2) what circumstances allow for their reintroduction? 3) Can Member States directly rely on Article 72 TFEU to reintroduce border controls?

An absolute six-month limit

When considering the applicable time limits, the Court sets out by finding that the very wording of Article 25(4) SBC indicates that such limit is six months, as opposed to the two-years limit in Article 29 SBC, and that is it absolute.

Several elements from the legislative context corroborate this conclusion: the system of time limits set out in the SBC is clear and precise. It encompasses the initial reintroduction of border controls, their prolongation in case of a persisting threat, and their total duration which, again, ‘shall not exceed six months’. A legislative gap seems implausible in such a tight system.

Teleological interpretation leads to the same result. The Court sees the SBC as part of the broader framework balancing free movement of persons, public policy and national security (Article 3(2) TEU, Article 67(2) TFEU, see also *Staatssecretaris van Justitie en Veiligheid*). The possibility for Member States to reintroduce border controls must therefore be considered an exception. Free movement of persons is one of the ‘main achievements of the European Union’ (para 65) and exceptions to

it should be interpreted strictly (recital 27 SBC, see also *Kempf* and *Jipa*). A laxer interpretation, allowing border controls based on the same threat to extend beyond six months would result in a potentially unlimited reintroduction, jeopardizing this achievement (para 66).

When is a threat a new threat?

The second point concerns the question of what constitutes a 'new threat'. This is crucial, because a new threat allows for an *ex-novo* application of the time limits. The Court remains vague on the specific substantive criteria distinguishing new from persisting threats, possibly granting discretion to the executive in this regard. It does, however, establish that Member States should provide sufficient information on why the circumstances represent a new threat and thus allow for external scrutiny of such a decision when they express the intention to reintroduce or prolong Article 25 border controls (para 81).

National security exceptions in primary EU law

The last point addressed in detail by the Court is the possibility for Member States to directly invoke primary law, namely Article 72 TFEU, to justify a derogation from the SBC. Germany argued that the 'migration crisis' constituted a situation unforeseen by the SBC and invoked the national security exceptions enshrined in primary EU law. The Court acknowledges that Member States retain their responsibility to ensure national security but recalls that this should not result in an exemption from compliance with EU law (*Ministrstvo za obrambo*). The cases in which Member States can rely on primary EU law, including Article 72 TFEU, in order to derogate from secondary EU law must be interpreted strictly (*Commission v Hungary*). The SBC framework is all but insensitive to the needs of public security, already seeking to balance free movement and public security concerns (para 88). The Court refuses the idea of 'exceptional exceptions' that Member States could call upon.

The Court's final words are of reproach. The Commission, especially, remained silent when Member States notified it of the intention to reintroduce border controls. However, when forced to take a stance in these proceedings, brought by an individual applicant, it deemed such border controls unnecessary and disproportionate (para 91). The SBC confers upon the Commission clear oversight powers (Article 27(4)), which it should exercise by issuing opinions and engaging with Member States politically. A word of caution is also directed at the Member States, which are expected to exchange information, consult each other, and cooperate as provided in Article 27 SCB to ensure that the balance between free movement and public security is maintained. While the Court clearly steps up to enforce the SBC against the Commission's and the Member State's reluctance, it also signals what spaces remain open for political actors on both the EU and the national level to intervene. Those include the definition of what constitutes a new threat and the exact criteria for national measures' proportionality (para 71).

Remaining uncertainties: What next?

At least three uncertainties remain after this ruling of the CJEU:

In principle, all border controls currently in place in the Schengen Area should be perceived as contrary to EU law. As already foreseen by the Court itself (para 82), if we apply the conditions set out by the CJEU based on Articles 25 and 29 SBC, we can expect that the referring court will declare the border controls in force in Austria in 2019 outside of the allowed exceptions. As a preliminary ruling, this case clarifies the interpretation of the exceptions in the SBC for the entire EU. The same reasoning would therefore apply, without much doubt, to all the internal border controls currently in place. In their current practices, Member States have not provided any significant material (studies, statistics or reasoning) to justify the existence of a new threat.

While the situation is relatively clear-cut as a matter of principle, it is unclear how this could be implemented in practice following this ruling. The Commission could feel empowered to take up again its role as guardian of the Treaties and enforce this strict interpretation of the SBC exceptions vis-à-vis Austria and the other Member States. It could be an example of a mutual empowerment of the Commission and the CJEU in EU law enforcement. Otherwise, the ruling could be enforced on a case by case basis before national courts in the respective Member States. We can then also expect that some national courts that have granted a lot of deference to the national executive, such as the French Council of State, would need to adjust their reasoning to integrate the CJEU arguments.

A second uncertainty concerns the legality of new border controls in the future in the Schengen Area. The Austrian, German and Danish authorities have been rather careful in commenting on the consequences of the judgment. The national administrations are exploring the leeway left by the Court's ruling. And the Court has left quite some margin for the Member States to argue, this time within the parameters of EU law, the proportionality of border controls as well as the existence of a new threat that could justify their re-introduction. These gaps could be filled by the Commission, the national courts or the CJEU in future rulings. An incremental development of a line of case law on the legality of re-introduction seems likely. It remains open whether it will develop along the lines of this judgment and emphasize that the exceptions to the rule of open borders within Schengen have to be interpreted narrowly. The CJEU has probably not said its last word yet.

The third uncertainty concerns the implications of this ruling for other areas of EU law. In its judgment, the Court does not emphasize the special character of the Area Freedom Security and Justice (AFSJ), which has traditionally been a rather intergovernmental policy area. This seems to suggest that its interpretation of Member States' national security is not particular to this domain of EU law. The Court emphasizes that invoking national security does not give the national governments a *carte blanche* in terms of EU law (para. 84). National security exceptions are relevant also in other areas of EU law. Data protection law provides a recent prominent example (Quadrature du Net (2020)). Moreover, the Court

does not respond to the applicant's argument about a possible violation of the Citizens' Rights Directive. The Court emphasizes instead that border controls within Schengen should remain exceptional, "irrespective of the nationality" of the person (para 63). It therefore remains unclear whether a reasoning based on free movement of EU citizens would also be possible.

Conclusion

In the joined cases C-368/20 *NW v Landespolizeidirektion Steiermark* and C-369/20 *NW v Bezirkshauptmannschaft Leibnitz*, the Grand Chamber of the CJEU takes a very principled stance on the abolishment of internal border controls within the Schengen Zone. Member States have made clear legal commitments to an area without internal borders, which the Court upholds. In light of those commitments, it interprets the exceptions strictly, confirming the absolute nature of the six-month limit for the reintroduction of border controls. This judgment puts pressure on the EU's political institutions to end the current discrepancies between law and state practice, by either enforcing or reforming the existing legal framework.
