

**Case C-368/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

5 August 2020

**Referring court:**

Landesverwaltungsgericht Steiermark (Austria)

**Date of the decision to refer:**

23 July 2020

**Appellant:**

NW

**Respondent authority:**

Landespolizeidirektion Steiermark (Regional Police Directorate, Styria)

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**Subject matter of the main proceedings**

Regulation (EU) 2016/399 (Schengen Borders Code) — Ban on internal border control — Temporary reintroduction of border control — Prolongation of border control under several domestic decrees beyond the time limits laid down in the Schengen Borders Code — Admissibility — Compatibility with the right to freedom of movement

**Subject matter and legal basis of the reference**

Interpretation of EU law, Article 267 TFEU

**Questions referred**

1. Does EU law preclude domestic legislation in the form of consecutive domestic decrees prolonging border control which, cumulatively, allow for the reintroduction of border control for a period which exceeds the two-year

time limit laid down in Article 25 and Article 29 of 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) without a corresponding Council recommendation pursuant to Article 29 of 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)?

2. If Question 1 is answered in the negative:

Is the right to freedom of movement of EU citizens laid down in Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union to be interpreted, especially in the light of the principle of the absence of checks on persons at internal borders established in Article 22 of 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), as meaning that it includes the right not to be subject to checks on persons at internal borders, subject to the conditions and exceptions listed in the Treaties and, in particular, in 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)?

#### **Provisions of EU law cited**

TFEU, specifically Article 21(1) and Article 72

Charter of Fundamental Rights of the European Union, specifically Article 45(1)

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) ('the SBC'), specifically Articles 22, 25 and 29

Council Implementing Decision (EU) 2017/818 of 11 May 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk

#### **Provisions of national law cited**

Verordnung des österreichischen Bundesministers für Inneres vom 9. Mai 2019 über die vorübergehende Wiedereinführung von Grenzkontrollen an den Binnengrenzen (Decree of the Austrian Federal Minister for the Interior of 9 May 2019 on the temporary reintroduction of border control at internal borders, 'the decree of 9 May 2019')

### **Brief summary of the facts and procedure**

- 1 On entering the country by car from Slovenia on 16 November 2019, a check was carried out on the appellant at the Spielfeld motorway border crossing point, during which he was asked to produce his passport or identity card. When he asked whether he had been stopped for a border control or an identity check, he was told that it was for a border control. When he then asked what would happen if he refused to produce his passport, he was told that he would be issued with a penalty notice.
- 2 On 19 December 2019, the appellant lodged an appeal with the referring court against the border control, on the grounds that it was an unlawful act of direct authority and coercive power.

### **Brief summary of the basis for the reference**

- 3 The referring court has doubts as to the compatibility of the legal basis for the border control in question (the decree of 9 May 2019) with EU law, especially the SBC.
- 4 Article 22 of the SBC prohibits border checks at the internal borders of the European Union and provides for two exceptions to that ban. According to Article 25 of the SBC, border control may be reintroduced at internal borders if there is a serious threat to public policy or internal security. According to Article 29 of the SBC, border control may be reintroduced in the event of persistent serious deficiencies relating to external border control which put the overall functioning of the area without internal border control and public policy or internal security at risk.
- 5 Border control was reintroduced in Austria on 16 September 2015. Border control between 16 September 2015 and 10 May 2016 was based initially on Article 29 of the SBC and subsequently on Article 25(2) of the SBC. Border control was prolonged several times from 11 May 2016 to 11 November 2017 based on three consecutive Council implementing decisions, the most recent being the 2017/2018 implementing decision.
- 6 As the European Commission did not table any further proposals to the Council for prolonging border control after 11 November 2017, border control in Austria had to be based after that point on Article 25(1) of the SBC.
- 7 On 12 October 2017, the Federal Minister for the Interior notified the European Commission of a further six-month prolongation to border control (11 November 2017 to 11 May 2018), following which it was prolonged another three times by six months at a time pursuant to three further decrees of the Federal Minister for the Interior, the most recent being the decree of 9 May 2019 for the period from 13 May 2019 to 13 November 2019.

- 8 The referring court regards this seamless series of decrees prolonging border control as a cumulation of permissible maximum periods for the reintroduction of border control laid down in the SBC that is contrary to EU law, as it is precluded by the wording of Article 25(4) of the SBC. Were it permissible, any temporal limit on the prolongation of border control could be circumvented.
- 9 The referring court has not overlooked the fact that it is also possible to derogate from the ban on checks at internal borders on the basis of Article 72 TFEU, but concludes that that article does not apply in the present case.
- 10 The notifications which the Austrian Federal Minister for the Interior sent to the European Commission concerning the reintroduction of controls at internal borders are not based on Article 72 TFEU, as that provision was not referred to in any of those notifications. Furthermore, reliance upon Article 72 TFEU would appear to be generally inadmissible. The provisions of the SBC governing derogations are of themselves exceptions, as they concern public policy and internal security in connection with border control and must therefore be regarded as *lex specialis* in respect of Article 72 TFEU. The effect of the temporal limit on the reintroduction of border controls laid down in the SBC would be undermined if a Member State could repeatedly rely upon Article 72 TFEU on expiry of the time limit expressly enacted therein.