# Anonymised version



**Case C-554/19**

**Request for a preliminary ruling**

**Date lodged:**

18 July 2019

**Referring court:**

Amtsgericht Kehl (Germany)

**Date of the decision to refer:**

28 June 2019

**Applicant:**

Staatsanwaltschaft Offenburg (Germany)

**Accused:**

FU

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…

Amtsgericht Kehl

(Local Court, Kehl)

**Order**

In the criminal proceedings against

FU,

…

charged with deliberately driving a vehicle without a licence

the Amtsgericht Kehl … ordered as follows on 28 June 2019:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the first paragraph, under (a), and the second paragraph of Article 267 TFEU:

1. Are Article 67(2) TFEU and Articles 22 and 23 of Regulation (EC) 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) to be interpreted as precluding a national legislative provision which confers on the police authorities of the Member State in question the power to check the identity of any person, within an area of 30 kilometres from that Member State's land border with other States that are party to the 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, signed at Schengen (Luxembourg) on 19 June 1990, with a view to preventing or terminating unlawful entry into or **[Or. 2]** residence in the territory of that Member State or preventing certain criminal offences which undermine the security of the border, irrespective of the conduct of the person concerned or the existence of specific circumstances, and which is supplemented as follows by ministerial decree:

'(a) Cross-border crime takes place dynamically (in terms of time and location, and using various means of transport) and flexible police powers are therefore required to combat it. The exercise of the aforementioned power ultimately aims to prevent or eliminate cross-border crime;

(b) The control measures must be executed within the strictly defined framework of the abovementioned criteria of Article 21(a) of the Schengen Borders Code. They must be devised in such a way that they are clearly distinct from systematic checks on persons at the external borders and do not have an effect equivalent to border checks. The implementation of these control measures must in turn be subject to a framework so that it is ensured that they are not equivalent to border checks in terms of intensity and frequency.

(c) This framework is structured as follows:

The control measures shall not be implemented on a permanent basis, but rather executed in an irregular manner, at different times, in different places and on a random basis, taking into account the volume of traffic.

The control measures shall not be executed solely in response to the crossing of borders. They shall be carried out on the basis of continuously updated situational intelligence and/or (border) police experience, which the Federal police services are to develop on the basis of their own situational information or that of other authorities. General or specific police

information and/or experience relating to cross-border crime, for example relating to frequently used transport means or routes or certain patterns of behaviour, and analysis of the available information on cross-border crime obtained from the police services' own sources or from other authorities shall be the starting point for the exercise of police measures and for the intensity and frequency of those measures.

The form taken by the control measures shall be the subject of regular administrative and technical supervision. Fundamental rules are set out in the fourth sentence of Paragraph 3(1) of the Gemeinsame Geschäftsordnung der Bundesministerien (Common Rules of Procedure of the Federal Ministries; 'the GGO') and in the Grundsätze zur Ausübung der Fachaufsicht der Bundesministerien über den Geschäftsbereich (Principles governing the exercise of technical supervision by the Federal Ministries over their areas of activity). Regarding the Federal Police, these rules are given concrete form by the 'Ergänzende Bestimmungen zur Ausübung der Dienst- und Fachaufsicht des BMI über die Bundespolizei' (Supplementary provisions for the exercise of administrative and technical supervision by the BMI [Federal Ministry of the Interior] over the Federal Police). The Federal Police Headquarters and the bodies and agencies subordinated thereto have made provision for the execution **[Or. 3]** of administrative and technical supervision in their task allocation plans and implemented it via their own concepts.

(d) In order to avoid a proliferation of controls, the control measures should be coordinated with other authorities to the greatest extent possible or should be executed within the framework of joint operation/cooperation schemes.'?

2. Is the law of the European Union, in particular the second subparagraph of Article 4(3) … TEU, Article 197(1) TFEU and Article 291(1) TFEU, to be interpreted as precluding, automatically or after weighing up prosecution interests and those of the accused party, the use of intelligence or evidence in criminal proceedings if it was obtained from a police check on the accused party that is contrary to Article 67(2) TFEU or to Articles 22 and 23 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)?

II. The proceedings are stayed pending a ruling from the Court of Justice of the European Union on the questions referred.

**Grounds:**

I.

The Amtsgericht Kehl, in the person of the single judge sitting in criminal matters ('the referring court'), is required to give a ruling on the request of the Public Prosecution Service in Offenburg that it impose a fine, by way of a penalty order, on the accused for the offence of deliberately driving a vehicle without a licence.

1. At the present stage of the investigation, the following facts form the basis of the request for a preliminary ruling:

   The accused, a French national residing in France, drove a passenger car on Straßburger Straße in 77694 Kehl (Germany) … at around 3:20 a.m. on 20 July 2018 even though, as he was aware, he did not have the required driving licence. **[Or. 4]**

   The accused was identified as the driver of the vehicle during a check carried out by the Federal Police after he had entered the territory of the Federal Republic from France via the Europabrücke bridge between Kehl and Strasbourg. During the check, it was established that he did not have the required driving licence.

   According to a note recorded by the police, the check was carried out on the basis of point (3) of Paragraph 23(1) of the Bundespolizeigesetz (Law on the Federal Police; 'the BPolG') in order to prevent or eliminate illegal migration and to … prevent cross-border crime pursuant to points (1) to (4) of Paragraph 12(1) of the BPolG. Furthermore, the police merely noted that the check carried out was 'a random, irregular measure not implemented on a permanent basis'. Temporary border controls pursuant to [Title III] of Chapter II of the Schengen Borders Code were not in place at this border section at the time of the check.

2. Constituting the offence of deliberately driving a vehicle without a licence, this act would be [punishable] pursuant to point (1) of Paragraph 21(1) of the Straßenverkehrsgesetz (Law on road transport), which [provides for] the imposition of a criminal penalty in the form of imprisonment for a maximum of one year or a fine of between five and 360 units under the daily rate system.

3. The Public Prosecution Service requests that the accused be ordered to pay a fine of 30 units of EUR 30 under the daily rate system.

II.

The referring court considers an answer to the questions referred to be necessary in order to enable it to decide on the request that a penalty order be issued. It therefore refers those questions to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling pursuant to the first paragraph, under (a), and the second paragraph of Article 267 TFEU.

Regarding the decision on the issuing of the penalty order applied for, the referring court must assess whether there are adequate grounds to suspect that the accused committed an offence. This requires that a conviction is probable on the basis of the available evidence. It must be noted here that unlawfully obtained evidence may be subject to a prohibition on its use. In the present case, the finding that the accused was the driver of a passenger car is based on the check carried out by the Federal Police. According to the referring court, there would not be adequate grounds to suspect that the accused committed the offence [if] the check had been unlawful, and this would result in a prohibition on the use, in criminal proceedings, of the information and evidence obtained as a result of that check. **[Or. 5]**

1. The first question referred:

a. Regarding point (3) of Paragraph 23(1) of the BPolG, the Court of Justice held, by judgment of 21 June 2017 (… *A*, C-9/16, EU:C:2017:483), that Article 67(2) TFEU and Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code 2006), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (since replaced by Articles 22 and 23 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), must be interpreted as precluding a national provision which confers on the police authorities of the Member State in question the power to check the identity of any person, within an area of 30 kilometres from that Member State's land border with other States that are party to the 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, signed at Schengen (Luxembourg) on 19 June 1990, with a view to preventing or terminating unlawful entry into or residence in the territory of that Member State or preventing certain criminal offences which undermine the security of the border, irrespective of the conduct of the person concerned and of the existence of specific circumstances, unless that legislation lays down the necessary framework for that power ensuring that its practical exercise cannot have an effect equivalent to that of border checks.

b. On 7 March 2016, the Federal Ministry of the Interior issued a decree clarifying the application of the powers of the Federal Police to carry out identity checks in border areas pursuant to point (3) of Paragraph 23(1) of the BPolG (*Gemeinsames Ministerialblatt* [Joint Ministerial Gazette], GMBl, 2016, number 10, page 203; 'the ministerial decree'). This decree reads as follows:

'(a) Cross-border crime takes place dynamically (in terms of time and location, and using various means of transport) and flexible police powers are therefore required to combat it. The exercise of the aforementioned power ultimately aims to prevent or eliminate cross-border crime;

(b) The control measures must be executed within the strictly defined framework of the abovementioned criteria of Article 21(a) of the Schengen Borders Code. They must be **[Or. 6]** devised in such a way that they are clearly distinct from systematic checks on persons at the external borders and do not have an effect equivalent to border checks. The implementation of these control measures must in turn be subject to a framework so that it is ensured that they are not equivalent to border checks in terms of intensity and frequency.

(c) This framework is structured as follows:

The control measures shall not be implemented on a permanent basis, but rather executed in an irregular manner, at different times, in different places and on a random basis, taking into account the volume of traffic.

The control measures shall not be executed solely in response to the crossing of borders. They shall be carried out on the basis of continuously updated situational intelligence and/or (border) police experience, which the Federal police services are to develop on the basis of their own situational information or that of other authorities. General or specific police information and/or experience relating to cross-border crime, for example relating to frequently used transport means or routes or certain patterns of behaviour, and analysis of the available information on cross-border crime obtained from the police services' own sources or from other authorities shall be the starting point for the exercise of police measures and for the intensity and frequency of those measures.

The form taken by the control measures shall be the subject of regular administrative and technical supervision. Fundamental rules are set out in the fourth sentence of Paragraph 3(1) of the Gemeinsame Geschäftsordnung der Bundesministerien (Common Rules of Procedure of the Federal Ministries; 'the GGO') and in the Grundsätze zur Ausübung der Fachaufsicht der Bundesministerien über den Geschäftsbereich (Principles governing the exercise of technical supervision by the Federal Ministries over their areas of activity). Regarding the Federal Police, these rules are

given concrete form by the ‘Ergänzende Bestimmungen zur Ausübung der Dienst- und Fachaufsicht des BMI über die Bundespolizei’ (Supplementary provisions for the exercise of administrative and technical supervision by the BMI [Federal Ministry of the Interior] over the Federal Police). The Federal Police Headquarters and the bodies and agencies subordinated thereto have made provision for the execution of administrative and technical supervision in their task allocation plans and implemented it via their own concepts.

(d) In order to avoid a proliferation of controls, the control measures should be coordinated with other authorities to the greatest extent possible or should be executed within the framework of joint operation/cooperation schemes.’

c. Whether the ministerial decree fulfils the conditions imposed by the Court of Justice on the required regulatory framework is a matter of debate in German case-law ….

The referring court also has doubts as to whether this decree clarifies the enabling rule under point (3) of Paragraph 23(1) of the BPolG in the requisite manner …. It is true that this ministerial decree can in principle be ascribed a judicially reviewable capacity to bind control practice and thus the normative character that is clearly expected by the Court of Justice. The decree does not contain specific provisions — which guide discretion — on how the random nature of all the controls should be ensured, for example by means of a quantitative restriction ….

d. Upon enquiry by the referring court, the Federal Police stated that police action is regulated not only by the ministerial decree but also by the internal instructions ‘BRAS 120’ in the version of August 2016. However, these service instructions essentially do nothing more than reproduce the wording of the provisions of the ministerial decree and, beyond that, likewise do not contain any specific provisions on the conduct of the controls. In addition, these service instructions are not publicly accessible, meaning that they do not meet the minimum requirements for a provision that can form the regulatory framework required by the Court of Justice ….

e. The same applies to the situational surveys on irregular migration and the smuggling of human beings, which are drawn up periodically and used to plan the deployment of resources. The referring court can only assume that these are the ‘continuously updated situational intelligence’ referred to in the ministerial decree. Moreover, it should be noted in this regard that it is clear that these situational surveys, which are intended to justify the exceptional nature of the controls, are essentially based on intelligence that was obtained through controls pursuant to point (3) of Paragraph 23(1) of the BPolG itself.

f. In so far as the judgment of the Court of Justice already discusses Paragraph 15 of the BPolG, pursuant to which, among several possible and suitable measures, the measure that is likely to be the least harmful to individuals and the general public must be taken (subparagraph 1), a measure **[Or. 8]** must not result in detriment that is clearly disproportionate to the outcome sought (subparagraph 2), and a measure is permissible only until its purpose has been achieved or it becomes apparent that it cannot be achieved (subparagraph 3), this provision is not capable of providing the required regulatory framework, even in conjunction with the ministerial decree of 7 March 2016. The reason for this is that Paragraph 15 of the BPolG is merely a statutory reproduction of the principle of proportionality of all government action in individual cases. Going beyond individual cases, it is unable to prevent police practice from having the effect of border checks when point (3) of Paragraph 23(1) of the BPolG is implemented, particularly as a result of 'cumulative effects' ….

2. The second question referred:

a. The German law on criminal procedure does not make provision for a general prohibition on the use of evidence arising from the unlawfulness of the manner in which the evidence was obtained. With the exception of a number of special provisions that expressly provide for a prohibition on the use of evidence …, the erroneous taking of evidence does not always result in a prohibition on the use of that evidence …. Rather, according to the settled case-law of the Bundesverfassungsgericht (Federal Constitutional Court) and the Bundesgerichtshof (Federal Court of Justice), it is necessary to weigh up all the relevant aspects of each individual case and the conflicting interests, namely the principle in the German law on criminal procedure that the court must investigate the truth and, to that end, extend of its own motion the taking of evidence to all facts and evidence, and the individual interest of the party adversely affected by the unlawful measure …. A prohibition on the use of evidence constitutes an exception requiring justification; a prohibition is, however, at least necessary in the case of serious, deliberate or arbitrary procedural irregularities where fundamental safeguards have been methodically or systematically disregarded …. This judicial practice is in principle compatible with the European Convention on Human Rights, in particular Article 6 …. The rule/exception relationship postulated in the case-law is criticised by some commentators in the legal literature, who, conversely, call for a prohibition on the use of evidence as a rule, and for specific justification for the use of **[Or. 9]** unlawfully obtained evidence ….

According to this case-law of the highest courts, in the case to be decided by the referring court an infringement of EU law in the collection of evidence would not entail a prohibition on the use as evidence of the information obtained as a result of the check carried out on the accused, even if the crime involved is not serious, as is the case here. This is because, unlike in the case

of a search of a home, for example, the encroachment on the rights of the party concerned is only slight in terms of its intensity.

b. However, if the check on the accused infringes provisions of EU law and was therefore unlawful, the question that arises for the purpose of effective implementation of EU law and the uniform application of that law across the European Union, especially in view of the potential existence of stricter rules on the possibility of using unlawfully obtained evidence in other Member States, is whether EU law requires that information and evidence that has been obtained in breach of EU law should automatically be subject to a prohibition on use in criminal proceedings or, at the very least, that the interests of the European Union must be duly considered in the appraisal to be carried out, such that, at least in the case of crimes that are not serious in nature, the State's interest in criminal prosecution must take second place.

So far as can be ascertained by the referring court, the Court of Justice has not yet given a — general — answer to this question. However, the [judgment of 10 April 2003, *Steffensen*, C-276/01, EU:C:2003:228] …, for example, indicates that, in accordance with the principle of effectiveness, EU law can have such an influence on the law and practice of obtaining and using evidence in a Member State. The referring court understands that, although in the [*Steffensen*] case [C-276/01] … the Court of Justice found that a prohibition on the use of evidence did not result directly from EU law, it ruled that the national court is obliged to determine, in accordance with national law, which facts it considers to be proven and relies on as the basis for its decision, observing the adversarial principle and the right to a fair hearing.

Unlike the case to be ruled on by the referring court here, however, the issue in the [*Steffensen*] case [C-276/01] was not the general, effective implementation of EU law in — moreover — a key policy area of the European Union. This is because **[Or. 10]** controls carried out by the Federal Police, such as those in the case to be ruled on by the referring court here, take place not just sporadically, but rather on a large scale. According to the Federal Government's reply to a question put by Members of the German Bundestag, 1 475 499 controls were carried out on the basis of point (3) of Paragraph 23(1) of the BPolG throughout the territory of the Federal Republic in 2016, 1 730 499 in 2017 and 1 604 184 in 2018 […].

It should be noted here that it is clearly only in very isolated cases that the persons affected by the controls question their legality with the police or even seek judicial review of that legality. According to the same replies provided by the Federal Government to the parliamentary questions, there were a total of 28 complaints in the period from 1 January 2017 to 30 April 2018 and a total of 58 complaints in the period from 1 January 2018 to 30 April 2019; four and three sets of judicial proceedings, respectively, were pending throughout Germany at the time of the replies. By contrast, at least

22 sets of comparable criminal proceedings relating to non-serious crime, in which information or evidence had been obtained via checks pursuant to point (3) of Paragraph 23(1) of the BPolG and in which criminal proceedings were initiated solely on the basis of those checks, have been pending since September 2018 before the referring court, the jurisdictional area of which covers approximately 50 kilometres of the border of the Federal Republic. It can be assumed here that, on grounds of expediency, the competent public prosecution service closed a significant number of sets of proceedings of this nature at the end of the investigations.

III.

The referring court requests that, pursuant to Article 95(2) of the Rules of Procedure of the Court of Justice of the European Union, the Court of Justice maintain the anonymity of the person accused in the main proceedings.

…