

**Case C-369/20****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:**

Bezirkshauptmannschaft Leibnitz (District Administrative Authority, Leibnitz)

**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. 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)?
  3. If question 2 is answered in the affirmative:  

Are Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union to be interpreted, in light of the effectiveness of the right to freedom of movement, as precluding the application of national legislation which obliges a person, on pain of receiving an administrative penalty, to present a passport or identity card on entry via an internal border, even where the particular check at the internal border is contrary to the provisions of EU law?

### **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)

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, specifically Article 5.

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)

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**

Bundesgesetz betreffend das Passwesen für österreichische Staatsbürger (Federal Law on the Passport System for Austrian Nationals, 'the Austrian Passport Law')

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 29 August 2019, the appellant arrived at the Spielfeld border crossing point in order to enter Austria. During the border control carried out there, the travel documents of the vehicle occupants, including those of the appellant, were spot checked. When asked to present his passport, he asked whether he had been stopped for a border control or an identity check. Having been told that it was for a border control, he presented his driving licence as proof of identity, as he considered that border control at that point was contrary to EU law. He refused to present his passport, despite several requests.
- 2 By a periodic penalty order dated 9 September 2019, the appellant was charged with infringement of the Austrian Passport Law. On 23 September 2019, he lodged a notice of objection, following which an administrative penalty order was issued on 7 November 2019 charging him with having crossed the Austrian federal border and entered Austria without being in possession of a valid travel document and imposing a fine of EUR 36. The appeal on which the referring court is required to rule is directed against that order.

**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 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 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 control 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.

- 11 Furthermore, the referring court has doubts as to whether the decree of 9 May 2019 is consistent with the right to freedom of movement guaranteed under EU law.
- 12 Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union establish the right of EU citizens to move freely in the territory of the Member States. The precise meaning of the term ‘move freely’ follows in particular from Directive 2004/38 and the SBC. Article 5(1) of Directive 2004/38 explicitly grants EU citizens the right to enter a Member State.
- 13 The right to move freely applies subject to the conditions and restrictions set out in the Treaties. Those restrictions include, in particular, the exceptions to the ban on checks on persons at internal borders laid down in the SBC.
- 14 The referring court has not overlooked the fact that, according to the case-law of the Court, the Member States retain the right to oblige a person concerned to present a valid passport or identity card during the course of an identity check and to impose penalties for breach of such an obligation (see judgment of 21 September 1999, *Wijsenbeek*, C-378/97, EU:C:1999:439, paragraphs 43 and 44) and that national legislation such as the Austrian Passport Law must be interpreted consistently with EU law. Furthermore, national legislation and procedures must be interpreted and applied in accordance with the principle of effectiveness, such that the exercise of a right conferred by EU law is not made practically impossible or excessively difficult. According to the case-law of the Court, this means in particular that it is necessary to assess the compatibility of the specific application of national legislation with fundamental rights (see judgment of 10 April 2003, *Steffensen*, C-276/01, EU:C:2003:228, paragraphs 66 to 71).
- 15 By its judgment of 13 December 2018, *Touring Tours*, C-412/17, EU:C:2018:1005, the Court addressed the effectiveness of the ban on checks on persons at EU internal borders. The Court clarified at paragraph 50 of that judgment that EU law precludes legislation obliging private transport undertakings, on pain of a penalty, to check passengers’ travel documents, as this compromises the effectiveness of the ban on measures having equivalent effect in Article 21(a) of Regulation (EC) No 562/2006. The Court found at paragraph 72 of that judgment that a penalty in the form of a recurring fine is not compatible with EU law, inasmuch as it is imposed in order to ensure compliance with an obligation to carry out checks which itself does not comply with EU law.
- 16 The referring court therefore concludes that the Austrian Passport Law is to be interpreted as meaning that the administrative penalty must be disapplied where it

essentially applies to border controls which are incompatible with EU law. The referring court further notes that infringements of the Austrian Passport Law may attract a fine of up to EUR 2 180 or a term of imprisonment of up to 6 weeks, or both in the event of a repeat infringement.

WORKING DOCUMENT