



Bundesverwaltungsgericht

Decision of 1 June 2017 - BVerwG 1 C 23.16

ECLI:DE:BVerwG:2017:010617B1C23.16.0

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Request to the Court of Justice of the European Union for a preliminary ruling in order to clarify questions related to the obligation of bus undertakings to perform checks at Schengen internal borders

Headnotes

Request to the Court of Justice of the European Union for a preliminary ruling in order to clarify questions under EU law regarding the obligation of bus undertakings to check their passengers' travel documents when crossing a Schengen internal border.

A preliminary ruling of the Court of Justice of the European Union is obtained on the following questions in accordance with article 267 TFEU:

1. Do article 67 (2) TFEU and 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) preclude a provision of national law of a Member State which has the effect of requiring bus undertakings operating regular services across a Schengen internal border to check their passengers' travel documents before crossing an internal border in order to prevent foreign nationals not in possession of a passport or residence permit from being brought into the territory of the Federal Republic of Germany?

In particular:

a) Does the general statutory duty, or the administrative obligation directed at individual carriers, not to bring into federal territory foreign nationals not in possession of a passport or residence permit as required, which is properly discharged only if carriers check all passengers' travel documents before crossing an internal border, constitute, or fall to be treated as, a check on persons at internal borders within the meaning

of article 22 of the Schengen Borders Code?

b) Is the imposition of the duties referred to in point 1 to be assessed by reference to article 23 (a) of the Schengen Borders Code, even though carriers do not exercise "police powers" within the meaning of that provision and, moreover, do not formally enjoy any powers of public authority by virtue of the State-imposed obligation to carry out checks?

c) If the answer to question 1 b) is in the affirmative: Do the checks which carriers are required to carry out, taking into account the criteria laid down in the second sentence of article 23 (a) of the Schengen Borders Code, constitute an impermissible measure having an effect equivalent to border checks?

d) Is the imposition of the duties referred to in point 1, in so far as it concerns bus undertakings operating regular services, to be assessed by reference to article 23 (b) of the Schengen Borders Code, which provides that the absence of border control at internal borders is not to affect the power of carriers to carry out security checks on persons at ports and airports? Does it follow from this that checks within the meaning of question 1 are impermissible even when carried out other than at ports and airports if they do not constitute security checks and are not also carried out on persons travelling within a Member State?

2. Do articles 22 and 23 of the Schengen Borders Code permit provisions of national law under which, for the purposes of ensuring compliance with that duty, an order imposing a prohibition on pain of a penalty payment may be made against a bus undertaking in cases where the failure to carry out checks has enabled even foreign nationals not in possession of a passport or residence permit to be brought into the territory of the Federal Republic of Germany?

Sources of law

Residence Act	AufenthG, <i>Aufenthaltsgesetz</i>	section 63
Treaty on the Functioning of the European Union (TFEU)		article 67 (2)
Schengen Borders Code 2016		article 2 no. 11, 14 and 15, articles 5 (3), 22, 23 (a) and (b)
Directive 2002/90/EC		article 4
Directive 2001/51/EC		article 1
Framework Decision 2002/946/JHA		article 3

Summary of the facts

The claimant is a bus undertaking that is based in Germany and offers regular cross-border services. It contests an order from the defendant prohibiting it from transporting foreign nationals not in possession of the required passport and residence permit on pain of a penalty payment in the event of violation.

The claimant offers several regular services in Western Europe, and its bus routes regularly reach the federal territory across the border between Germany and the Netherlands. When evaluating cases where foreign nationals, who were not in possession of the required documents, were intercepted in Germany, the defendant found that the claimant had transported significant numbers of foreign nationals without the required travel documents to the Federal Republic of Germany. In March 2014, the defendant approached the claimant, issuing a "written warning" (*Abmahnung*) including a list of cases of unlawful transport, and announced the issuance of a prohibition order pursuant to section 63 (2) of the Residence Act (*AufenthG*, *Aufenthaltsgesetz*) if such violations continue. The claimant pointed out that the border between Germany and the Netherlands is a Schengen internal border implying that the national provision of section 63 *AufenthG* was not applicable due to the primacy of EU law.

In its order dated 18 November 2014, the defendant prohibited the claimant from transporting foreign nationals without the required passport and residence permit by land to Germany (1) on pain of a penalty payment of EUR 1,000 for each case of violation (2). The defendant argued that the claimant is obliged by law to make any reasonable efforts in order to prevent in each individual case the transport to Germany of foreign nationals not in possession of the required border crossing documents. Complying with this obligation would not be impossible for the claimant in legal or factual terms. The claimant could also be reasonably expected to check the passengers' travel documents together with the tickets on entering the bus. The defendant argued that the prohibition order was necessary after the claimant transported 37 foreign nationals without the required border crossing documents between 1 April and 1 May 2014, including 26 without any travel documents, six with visas that were either no longer or not yet valid, two with forged travel documents and two without the required visa. Provisions of EU law would not preclude the application of section 63 *AufenthG*. In its notice dated 3 June 2015, the defendant rejected the objection (*Widerspruch*) filed against the prohibition order.

In response to the action filed, the Administrative Court (*Verwaltungsgericht*) annulled the notice contested in the form of the objection notice. The Administrative Court stated the following key reasons for its decision: The constituent elements of section 63 (2) first sentence *AufenthG* authorising an order imposing a prohibition on pain of a penalty payment were fulfilled. But the provision was not applicable due to the primacy of application of EU law to carriers transporting foreign nationals to Germany across a Schengen internal border. In this respect, section 63 *AufenthG* violated the provisions of articles 67 (2) and 77 (2) TFEU as well as articles 20 and 21 of Regulation (EC) No 562/2006 (Schengen Borders Code 2006, SBC 2006). The incompatibility of section 63 *AufenthG* with EU law could not be cured by interpretation in conformity with EU law. As a consequence, the provision could not be applied to carriers whose services only cross a border within the meaning of article 20 SBC 2006.

The defendant's leapfrog appeal (*Sprungrevision*) contests this. The defendant claims, amongst other things, that EU law imposes an obligation to sanction violations of transport prohibitions without the provisions of the Schengen Borders Code preventing this. The defendant insofar refers to Directive 2002/90/EC of 28 November 2002 and to Framework Decision 2002/946/JHA adopted the same day. The defendant argues that the provisions of Directive 2002/90/EC and of Framework Decision 2002/946/JHA constituted the more specific ones in relation to those of the Schengen Borders Code. Furthermore, the provision of section 63 *AufenthG* was compatible with Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 (Schengen Borders Code 2016, SBC 2016). The required document checks could not be deemed to be border checks within the meaning of article 22 SBC 2016 simply because no border guards

were to be employed for this. Furthermore, the measure could not be deemed as having equivalent effect within the meaning of article 23 (a) SBC 2016. The objective was not to control the crossing of a border, but to enforce provisions relating to entry into the territory. The check was not carried out by public officials, but by the staff of a private undertaking. Its scope and depth fell short of those of a border control. It was, for instance, not possible to take any coercive or search measures if a person refuses to be checked.

Reasons (abridged)

7 Proceedings must be suspended. In accordance with article 267 TFEU, a preliminary ruling by the Court of Justice of the European Union (Court of Justice) is to be obtained on the questions raised in the operative part of the decision. (...)

8 1. Under national law, the legal assessment of the action for annulment of the notice of 18 November 2014 is based on section 63 AufenthG in the version promulgated on 25 February 2008 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 162), last amended by article 4 of the Act on Claims of Foreign Nationals regarding Basic Security Benefits for Job-seekers according to Social Code Book II and in Social Welfare according to Social Code Book XII (Gesetz zur Regelung von Ansprüchen ausländischer Personen in der Grundsicherung für Arbeitssuchende nach dem Zweiten Buch Sozialgesetzbuch und in der Sozialhilfe nach dem Zwölften Buch Sozialgesetzbuch) of 22 December 2016 (BGBl. I p. 3155). In terms of EU law, the Schengen Borders Code of 9 March 2016 applies. The factual and legal situation prevailing at the time of the last oral hearing of the Administrative Court is decisive here because the contested order imposing a prohibition on pain of a penalty payment has a lasting legal effect (see Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), judgment of 16 December 2004 - 1 C 30.03 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 122, 293 <301>). However, changes in the law occurring during the appeal proceedings on points of law must be taken into consideration if they had to be considered by the Administrative Court - if it were to decide instead of the Federal Administrative Court (established jurisprudence, see BVerwG, judgment of 30 July 2013 - 1 C 9.12 - BVerwGE 147, 261 para. 8 with further references). This leads to the application of the version of the Residence Act and of the Schengen Borders Code prevailing at the time of the decision on the appeal on points of law.

9 The following provisions of national law are hence the decisive legal framework for the legal dispute:

Section 63 Residence Act

Obligations of carriers

(1) A carrier may only transport foreign nationals into the federal territory if they are in possession of a required passport and a required residence permit.

(2) The Federal Ministry of the Interior or a body designated by the Federal Ministry of the Interior may, in consultation with the Federal Ministry of Transport and Digital Infrastructure, prohibit a carrier from

transporting foreign nationals into the federal territory in contravention of subsection 1 on pain of a penalty payment in case of violation. Any objections or legal actions shall have no suspensive effect; this shall also apply with regard to the imposition of a penalty payment.

(3) The penalty payment against the carrier shall be no less than EUR 1,000 and no more than EUR 5,000 for each foreign national whom he transports in contravention of an order pursuant to subsection 2. The penalty payment may be imposed and enforced by the Federal Ministry of the Interior or a body designated by the said ministry.

(4) The Federal Ministry of the Interior or a body designated by the Federal Ministry of the Interior may agree arrangements for implementation of the obligation specified in subsection 1 with carriers.

- 10 On the basis of the Residence Act, the Federal Minister of the Interior issued an administrative regulation with the consent of the Bundesrat which the foreigners authorities (Ausländerbehörden) are obliged to respect when applying the law without such rule being binding upon the courts (General Administrative Regulation regarding the Residence Act (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*) of 26 October 2009, Joint Ministerial Gazette (GMBL., Gemeinsames Ministerialblatt) 2009, 878). The numbers of the administrative regulation relevant for the application of section 63 AufenthG read in extracts as follows:

63.1 Checking and protection obligations

63.1.1 The provision prohibits carriers to transport foreign nationals not having the required travel documents to the federal territory. The prohibition applies to air and sea transport as well as land transport with the exception of cross-border rail transport. The prohibition of transport does not have to be specifically ordered. The legal prohibition to transport foreign nationals to the federal territory if they do not have the required passport or visa which they must have because of their nationality also implies the obligation of the carrier to sufficiently check the passport and visa. The checking obligation is intended to ensure that a foreign national fulfils the requirements for crossing the border pursuant to section 13 (1). Annex 9 to the Convention on International Civil Aviation (ICAO Convention) also sets forth a checking obligation.

63.1.3.1 The checking obligation pursuant to section 63 (1) obliges the carrier to check prior to transport whether the foreign national has the required documents ...

63.2 Prohibition of transport and penalty payment

63.2.0 Both the transport prohibition and the threat, imposition and enforcement of a penalty payment are intended to induce the carrier to check compliance with the passport and visa obligation in each individual case.

- 11 2. The questions referred are relevant for the decision and require clarification by the Court of Justice of the European Union.
- 12 a) Pursuant to section 63 (1) AufenthG, a carrier may only transport foreign nationals into the federal territory if they are in possession of a required passport and a required residence permit. Section 63 (1) imposes a directly and generally effective legal prohibition on transporting foreign nationals without the required travel documents. The transport prohibition implies the carrier's obligation to check the passport and residence permit of the foreign nationals transported. The checking obligation is intended to ensure that a foreign national fulfils the requirements for crossing the border. In this respect, the legislature leaves it to the carrier to select the way and means applied to fulfil his obligations (BVerwG, judgment of 21 January 2003 - 1 C 5.02 - BVerwGE 117, 332 <336>). The transport prohibition implies positive obligations in the form of checking obligations which are not defined in more detail in the Act. This also corresponds to the understanding of the provision in no. 63.1.1 of the General Administration Regulation on the Residence Act.

If necessary, the transport prohibition pursuant to section 63 (1) AufenthG with its direct legal effect will be concretised and individualised by a prohibition order pursuant to section 63 (2) AufenthG. In the event that a carrier violates his obligation under section 63 (1) AufenthG, the Federal Police Headquarters, having the required authority therefor pursuant to section 63 (2) AufenthG, can issue a prohibition order on pain of a penalty payment against the carrier. In the event of further violations a penalty payment of between EUR 1,000 and EUR 5,000 can be imposed for each individual case.

- 13 The checking obligations which are linked to the transport prohibition constitute a form of engagement of private undertakings in order to prevent violations of entry provisions without transferring powers of public authority to the carrier in this respect. The process of checking passengers with regard to travel documents is integrated into the transport process which is performed within the scope of the transport contract under private law (BVerwG, decision of 14 April 1992 - 1 C 48.89 - (...)).
- 14 The carrier has the obligation, which is determined according to objective criteria, to prevent violations of entry provisions as far as reasonably possible and in each individual case. In line with the jurisprudence of the referring court, however, requirements that cannot be fulfilled from a legal or factual perspective must not be imposed on the carrier (BVerwG, judgment of 21 January 2003 - 1 C 5.02 - BVerwGE 117, 332 <336>). The transport prohibition must be interpreted in such a manner that it is limited to violations which appear to be objectively unlawful on the basis of an interpretation of the prohibition in conformity with the law (BVerwG, judgment of 16 December 2004 - 1 C 30.03 - BVerwGE 122, 293 <298>). If a carrier cannot be expected under EU law to check his passengers' identity documents when transporting them across a Schengen internal border, he does not violate his obligation under section 63 (1) AufenthG by failing to perform a check. At issue is therefore not the question as to whether the legal provision of section 63 AufenthG violates EU law, but the determination of its contents in conformity with EU law. What is relevant for the decision is the question as to whether EU law - in this case: the Schengen Borders Code of 9 March 2016 - prohibits the checking measures demanded by the defendant. Different legal opinions exist with regard to the question which the Court of Justice of the European Union has not yet decided. Clarification is therefore necessary under EU law.
- 15 b) First question referred for a preliminary ruling

The first question referred for a preliminary ruling aims to obtain clarification as to whether article 67 (2) of the Treaty on the Functioning of the European Union (TFEU) as well as articles 22 and 23 SBC of 9 March 2016 preclude a provision of national law of a Member State which has the effect of requiring bus undertakings operating regular services across a Schengen internal border to check their passengers' travel documents before crossing an internal border in order to prevent foreign nationals not in possession of a passport and residence permit from being brought into the territory of the Federal Republic of Germany. Pursuant to article 67 (2) TFEU, the European Union ensures that persons are not checked at internal borders. Article 22 SBC specifies this in more detail, stating that the internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. Article 23 (a) SBC prohibits measures which have an effect equivalent to border checks. Article 23 (b) SBC sets forth that carriers are permitted to perform checks under certain conditions which are defined in more detail. Sub-question a) submitted by the referring court concerns the more specific contents of article 22 SBC, with sub-questions b) and c) concerning the contents of article 23 (a) SBC and sub-question d) the contents of article 23 (b) SBC.

- 16 (1) With sub-question 1 a), the referring court requests clarification of the question as to whether the document checks demanded of the claimant constitute a "check on persons" at "internal borders" within the meaning of article 22 SBC or whether they fall to be treated as equivalent to a check on persons. The referring court is of the opinion that the definitions of the relevant terms in article 2 SBC must be used as a basis. Article 2 no. 1 (a) SBC defines the term "internal border", amongst other things, as the common land border of the Member States. Although article 2 SBC does not contain a dedicated definition of the term

"check on persons", article 2 no. 11 SBC defines the term "border checks". Border checks are defined as the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it. If the term "check on persons" as used in article 22 SBC is hence to be understood as a sub-case of border checks within the meaning of article 2 no. 11 SBC, the question then arises as to whether checks at points other than border crossing points can at all be deemed to be "checks on persons" within the meaning of article 22 SBC. This is the key question in this case because the document check (as generally required of bus undertakings) is requested to be performed prior to commencing transport, i.e. on entering the bus and therefore before reaching the Schengen internal border to be crossed. So far, the Court of Justice has only dealt with sovereign measures performed within the territory of a Member State at the border or in the border region, but not with measures performed before the border (Court of Justice of the European Union (CJEU), judgments of 22 June 2010 - C-188/10 and C-189/10 [ECLI:EU:C:2010:363], *Melki and Abdeli* - para. 68 and of 19 July 2012 - C-278/12 [ECLI:EU:C:2012:508], *PPU - Adil* - para. 56). Furthermore, a point against a "check on persons" within the meaning of article 22 SBC could also be the fact that the check is to be performed by employees of private carriers within the meaning of article 2 no. 15 SBC rather than by public border guards within the meaning of article 2 no. 14 SBC. On the other hand, the effective enforcement of the prohibition of checks on persons at internal borders pursuant to article 67 (2) TFEU (*effet utile*) could also require that checks before the border be included in the checks on persons by private undertakings if the State imposes such an obligation on those undertakings, if such checks are limited to transports across the border and if their effect on the persons concerned is similar to that of a prohibited border check.

- 17 According to the reasons stated in the Commission's Proposal for a Council Regulation of 26 May 2004 on the predecessor provision of article 22 SBC: "All routine and random checks on people crossing internal borders are incompatible with the idea of the area without frontiers and are therefore prohibited" (COM(2004) 391 final p. 31). This seems to suggest a broader interpretation of the term "checks" according to article 22 SBC. Furthermore, in its reasoned opinion of 20 February 2014, the Commission asked the Czech Republic to amend its legislation to ensure that penalties are not imposed on carriers when transporting foreign nationals without the relevant travel documents on intra-Schengen flights. The Commission considered the imposition of rules to carry out systematic checks on persons to be not in line with EU legislation on the abolition of the internal border controls (Report from the Commission to the European Parliament and the Council of 26 May 2014, COM(2014) 292 final p. 5).
- 18 (2) With its sub-question 1 b), the referring court requests clarification of the question as to whether the imposition of the checking obligation being the subject matter of this case is to be assessed by reference to article 23 (a) SBC even though carriers do not exercise "police powers" and, moreover, do not formally enjoy any powers of public authority. According to the case-law of the Court of Justice, checks on persons can under certain conditions be subject to the prohibition of measures of equivalent effect within the meaning of article 23 (a) SBC (CJEU, judgments of 22 June 2010 - C-188/10 and C-189/10 - para. 68 et seqq. and of 19 July 2012 - C-278/12 - para. 57 et seqq.). The Court of Justice evaluates the question as to whether a measure is of equivalent effect on the basis of an overall assessment of the criteria in article 23 (a) (i) to (iv) SBC. One indication for having equivalent effect can, for instance, be the fact that checks serve the same purpose as border checks and that these checks are performed systematically rather than on the basis of spot-checks (CJEU, judgment of 22 June 2010 - C-188/10 and C-189/10 - para. 70 et. seqq.). Pursuant to section 63 (1) *AufenthG*, the obligation to check documents, which is implied by the transport prohibition, applies to all transport modes, i.e. land, air and sea. Rail transport is exempt by the above-mentioned administrative regulation which, however, cannot be changed by the Act. This obligation applies to checks on persons exclusively in cross-border transport and to systematic checks which concern each individual transport case rather than being performed on the basis of spot-checks. This means that some of the criteria are fulfilled which the Court of Justice considers to be relevant for a measure having equivalent effect.
- 19 It must, however, be clarified whether the criteria of article 23 (a) SBC do in fact refer to checks on persons

performed by private carriers. One argument against this could be the fact that the provision expressly refers only to the "exercise of police powers" (article 23 (a) first and second sentence SBC). In this case, however, private carriers are expected to perform the checks. When performing such checks, private carriers do not exercise any police powers nor do they formally enjoy any powers of public authority. The checking of their passengers' border crossing documents required of them does not replace official border controls in as far as these are permitted (see BVerwG, decision of 14 April 1992 - 1 C 48.89 - (...)). One argument in favour could be the fact that the carriers exercise the checks not on the basis of their own decision, for instance, for safety and security reasons, but because the German state obliges them to do so in order to ensure compliance with entry provisions and uses coercive measures in order to enforce the performance of the legal obligations. This raises the question as to whether section 23 (a) SBC also applies to measures which in practice have an effect similar to border checks, but are performed by private undertakings in fulfilment of a legal obligation.

- 20 (3) With sub-question 1 c), the referring court requests, should the answer to sub-question 1 b) be in the affirmative, clarification of the question as to whether the checks which carriers are required to carry out in the case in question, taking into account the criteria laid down in the second sentence of article 23 (a) SBC, constitute an impermissible measure having an effect equivalent to border checks. In this context, it must be considered that the document checks are performed exclusively in cross-border transport and that their purpose is to prevent illegal border crossing. However, the fact alone that their purpose is identical to border checks by public officials does not imply equivalent effects. The checking obligation, however, applies to each individual transport case. The carriers are obliged to perform checks systematically rather than on the basis of spot-checks in order to fulfil the comprehensive transport prohibition with its direct legal effect. However, an argument against equivalent effects could be that the checks do not have the same depth as document checks by the police. Bus drivers - despite further qualification measures offered - do not have comparable expertise in detecting forged documents. They do not have access to public databases. Furthermore, the only coercive measure at their disposal is to refuse transport in contrast to the police who can, for instance, arrest persons.
- 21 (4) With sub-question 1 d), the referring court requests clarification as to whether the checks required in this case are to be assessed by reference to article 23 (b) SBC and/or whether this provision provides an indication regarding the scope of the impermissibility of checks. Pursuant to this provision, the authority of carriers to carry out security checks on persons at ports and airports does not affect the prohibition of border checks at internal borders provided that such checks are also carried out on persons travelling within a Member State. To the referring court, the question arises as to whether this reversely implies that the checks being the subject matter of this case are not permissible because these checks are neither security checks nor carried out on persons travelling within a Member State. The obligation to perform checks on the basis of section 63 (1) AufenthG is imposed on carriers within the meaning of article 23 (b) SBC, with these checks serving to verify whether foreign nationals transported have the documents required to cross a border. These checks do not constitute security checks. However, and in deviation from the requirement laid down in article 23 (b) SBC, these checks do not have to be carried out at ports and airports, but prior to commencing transport in cross-border regular bus services.
- 22 The provision of article 23 (b) SBC can be considered to be a special provision for cross-border transports at ports and airports or as a provision that can be generalised pursuant to which even carriers are prohibited from performing checks on persons which the passenger - unlike security checks - perceive as a measure having an effect equivalent to prohibited border checks. Since the provision expressly covers carriers, a possible interpretation could be that even checks by private individuals or entities ordered by the State could violate the prohibition of measures of equivalent effect if such measures have an effect similar to that of border checks. Such an interpretation may contribute towards the effective enforcement of the requirement enshrined in article 67 (2) TFEU, to ensure the absence of internal border controls. This is also how the reasoned opinion of the Commission on the incompatibility of sanctioned checking obligations which the Czech Republic imposed on airlines (see COM(2014) 292 final p. 5) can be understood. In this case too, it must be considered that the checks performed by carriers do not have the same depth as document checks

performed by the police and that apart from refusing transport the carriers' employees have no further coercive measures comparable to that of the police on hand.

23 c) Second question referred for a preliminary ruling

The second question referred for a preliminary ruling is to clarify whether articles 22 and 23 SBC prohibit a national provision like section 63 (2) AufenthG which is the subject matter of this case and under which, for the purposes of ensuring compliance with the duty to check documents derived from section 63 (1) AufenthG, an order imposing a prohibition on pain of a penalty payment may be made against a bus undertaking in cases where the failure to carry out checks has enabled even foreign nationals not in possession of a passport or residence permit to be brought into the territory of the Federal Republic of Germany. The essence of the question refers to the contested measures for the compulsory enforcement of the obligation to perform checks on persons transported across a Schengen internal border. As part of a phased enforcement procedure, the available measures are the basis for the possibility to impose a penalty payment of between EUR 1,000 and EUR 5,000 for each future case of violation. Their intensity of interference is thus greater than that of a checking obligation that is not sanctioned. Moreover, the arguments in favour of and against the view of a violation of articles 22 and 23 SBC correspond to what was said in relation to the first question referred. The answer to the second question referred might have to consider article 11 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter the Protocol). Pursuant to article 11 (2) of the Protocol, "each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol", i.e. smuggling of migrants. Article 11 (3) of the Protocol expressly provides that the State Parties can establish an obligation on carriers to check their passengers.

24 3. However, the referring court does not seek clarification of the question as to the relationship between the provisions of articles 22 and 23 SBC and Council Directive 2002/90/EC of 28 November 2002 (OJ L 328 p. 17) and of Council Framework Decision 2002/946/JHA of the same day on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328 p. 1). The above-mentioned Directive and the Framework Decision set forth that Member States impose suitable sanctions on individuals and legal persons who intentionally assist a person to facilitate unauthorised entry, transit and residence. It can remain unanswered whether these provisions - such as article 5 (3) SBC, article 26 of the Schengen Convention (SC, OJ L 239 p. 19) and article 4 of Council Directive 2001/51/EC of 28 June 2001 - provide for sanctions solely for the illegal crossing of Schengen external borders (on the contents of article 5 (3) SBC, see CJEU, judgment of 7 June 2016 - C-47/15 [ECLI:EU:C:2016:408], Affum - para. 91). Because these provisions do not determine the scope of permissible checks on persons. Instead, the scope is determined by articles 22 and 23 SBC. Only if a check measure is in conformity with the SBC, non-compliance can be sanctioned under the provisions of Council Directive 2002/90/EC of 28 November 2002 and the Council Framework Decision 2002/946/JHA of the same day. Otherwise the coercive measures pursuant to section 63 (2) AufenthG are contingent upon any objective violation of a transport prohibition whilst Directive 2002/90/EC and Framework Decision 2002/946/JHA only sanction intentional acts which usually do not apply to cases like the present one. The transport of passengers not in possession of the required travel documents does not typically constitute intentional facilitation of unauthorised entry. Instead, the performance of permitted passenger transport operations as part of regular bus services is initially a "neutral" act typical for the profession (see Federal Court of Justice (BGH, *Bundesgerichtshof*), judgments of 8 March 2001 - 4 StR 453/00 - (...) and of 22 January 2014 - 5 StR 468/12 - (...) juris para. 26, 29), where the carrier can trust that his passengers will not abuse this in order to commit an offence. The carrier typically has no positive knowledge of unauthorised entry and does not want to knowingly support this.

25 Furthermore, the Senate does not seek clarification with regard to article 26 SC in conjunction with

Directive 2001/51/EC and its recital 4. Since these provisions apply to Schengen external borders, they do not imply a right to impose an obligation on carriers to perform checks at internal borders.

- 26 4. In answering the questions raised, the Court of Justice may have to consider that the European Union's external borders are at present only insufficiently protected and that a significant amount of illegal secondary movement is taking place in the Schengen area. This could give additional weight to the public interest in effective countermeasures. In view of the limited dysfunctionality of the Schengen area, the Commission repeatedly agreed to the temporary reintroduction of border controls at certain internal borders. However, the Federal Republic of Germany did not adopt a decision for the temporary reintroduction of border controls (see article 25 et seqq. SBC) at the border between Germany and the Netherlands which is the subject matter of this case.