



Bundesverwaltungsgericht

Press release

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CJEU to clarify the legality of imposing a duty on carriers to check persons at internal Schengen borders

The Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*) in Leipzig today submitted in two cases to the Court of Justice of the European Union (CJEU) a request for a preliminary ruling regarding the question as to whether checks on persons, which bus undertakings are required to perform under German law when transporting foreign nationals across internal Schengen borders, are compatible with the removal of border controls under the Schengen Borders Code of the European Union.

The claimants are bus undertakings who operate regular cross-border services in Western Europe. Pursuant to German law (section 63 (1) of the Residence Act (*AufenthG, Aufenthaltsgesetz*)), a carrier may only transport foreign nationals into the federal territory if they are in possession of the required passport and the required residence permit. During the course of evaluating cases of illegal entry to Germany, the Federal Police (*Bundespolizei*) as the defendant found that the claimant's regular buses transported more than just insignificant numbers of foreign nationals without the required travel documents across the border between Germany and the Netherlands and between Germany and Belgium. Consequently, at the end of 2014 the Federal Police Headquarters imposed an order under section 63 (2) *AufenthG* upon both claimants prohibiting them from transporting to Germany foreign nationals not in possession of the required passport or the required residence permit on pain of a penalty payment of EUR 1,000 for each case of violation. This order implies a duty on the part of carriers to check passengers' passports and residence permits prior to entering the territory of the Federal Republic of Germany. The Administrative Court repealed the orders. It stated that the legal preconditions of national law were fulfilled. However, the application of the provision would violate EU law in as far as it also affected undertakings whose transport service only crosses an internal Schengen border. This was because the Schengen Borders Code provides that internal borders within the European Union may be crossed without checks on persons. The Federal Police as the defendant contests this.

The 1st Senate deciding on appeals on points of law of the Federal Administrative Court requests clarification under EU law with regard to the question as to whether the duties of checking imposed upon the bus undertakings violate articles 22 and 23 of the Schengen Borders Code of the European Union of 9 March 2016. The questions are attached hereto. Pending the decision by the Court of Justice, the Federal Administrative Court has suspended the appeal proceedings on points of law.

Footnote:

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?

BVerwG 1 C 23.16 - Decision of 1 June 2017

BVerwG 1 C 25.16 - Decision of 1 June 2017