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EDITORIAL

Who can end the border controls within Schengen? Implementing the CJEU's judgment in NW v Steiermark*

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Schengen under pressure

The Schengen Zone is a cornerstone of European integration. By abolishing controls at the internal borders and allowing free movement of goods, services, capital and people it has effectively become «part of our European way of life» and «a symbol of Europe's interconnectedness» (Commission Communication, 2 June 2021). In recent years, however, the various 'crises' (migration, terrorism, pandemic) in the European Union (EU) have put the Schengen Zone's integrity to a test. National claims to sovereignty over borders have grown

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louder. Can Member States invoke national security to reintroduce border controls for longer than six months? What is the balance between free movement and national security in the Schengen Zone?

On 26 April 2022, the Court of Justice of the EU (CJEU) addressed these questions in its judgment in joined cases C-368/20 *NW v Landespolizeidirektion Steiermark* and C-369/20 *NW v Bezirkshauptmannschaft Leibnitz* putting strict conditions to Member States' reintroduction of border controls within the Schengen Zone. The Court's intervention exposed the gap between the legal commitments undertaken by the Member States at EU level and the tacitly accepted practice of repeated reintroduction of border controls. In this editorial, we set out the background to the CJEU's decision, summarize its main findings and innovative aspects. We then focus on the role of three types of actors – the national governments, the Commission and national courts – in actually restoring the functioning of the Schengen Zone and highlight the implications of the judgment for other domains of EU law.

An eventful border crossing

The case originates at the Austrian-Slovenian border, where the applicant, an Austrian national and legal scholar, was subject to border controls on 29 August and 16 November 2019. He refused to show an identity card or passport and incurred a 36-Euro fine, which he then challenged before an administrative court.

In the EU, the possibility for Member States to reintroduce border controls is regulated by the Schengen Borders Code (SBC) as an exceptional and temporary measure. Since 2015, however, several Member States, namely Germany, France, Austria, Denmark, Norway, Estonia and Sweden, have reintroduced border controls based on national security reasons. Austria, in particular, has had border controls on its southern borders to Hungary and Slovenia continuously from September 2015 until November 2021. They have been re-introduced 14 times based on four different articles of the SBC (namely Articles 25, 27, 28, and 29), alleging a threat to national security. Against this background, the referring court essentially asked whether Article 25(4) SBC allows for the reintroduction of border controls that exceed the maximum total duration of six months. The case was assigned to the Grand Chamber by the CJEU president and the oral hearing, which took place in June 2021, saw the participation of three other governments (German, French and Danish) besides the Austrian. At the hearing, a series of tough questions were addressed, by the Member States and the judges, to the Commission regarding its silent acceptance of national notifications about the reintroduction of border controls every six months over a period of several years. In these proceedings, the Commission deemed those reintroductions illegal under EU law, and justified its inaction by arguing that it had prioritized legislative reform over judicial enforcement as a strategy to ensure compliance. In the final ruling, the Court reprimanded the Commission for not exercising its oversight powers to issue opinions and engage with Member States (Article 27(4) SBC).

Strict limits for the reintroduction of border controls within Schengen

The Court sided unambiguously with the applicant and the Commission. It set out tight conditions for the exceptional reintroduction of border controls, with absolute time limits and no exceptions based on primary EU law allowed.

The Court found the time limits of six months in Article 25(4) SBC and two years in Article 29 SBC to be absolute. Hereby, it radically departed from the Advocate General's (AG) Opinion (discussed here). The wording, context and purpose of the provisions all militate in favor of this conclusion. The SBC sets out a clear and stringent system of time limits, which leaves no room for unintended legislative omissions. In addition, the SBC is informed by the broader EU framework balancing free movement of persons, on the one hand, and public policy and national security, on the other hand. Within this framework, Member States can reintroduce border controls, but only by way of exception, subject to strict interpretation (recital 27 SBC, see also *Kempf* and *Jipa*). This is important to uphold the Schengen *acquis* considered as one of the 'main achievements of the European Union' (paras 65 and 74).

As the six-month limit applies *ex novo* in case of a national measure based on a new threat, it is essential to clarify what constitutes a new – as opposed to a persistent or renewed – threat in the context of the SBC. This is the second point addressed by the Court. While remaining vague on the applicable substantive criteria distinguishing new from persisting threats, the Court allocated the burden of proof on the Member States. It is for them to provide sufficient information as to the concrete circumstances representing a new threat (para 81), when notifying their intention to reintroduce or prolong border controls under Article 25 SBC. Such information can therefore form the basis for external scrutiny – by the Commission or the CJEU itself.

Finally, the Court excluded the possibility for Member States to derogate from the SBC based on primary law (Article 72 TFEU) in case of unforeseen circumstances for which the SBC itself allegedly proved to be ill-equipped, such as the migration crisis. The Court acknowledged that Member States are responsible for national security, but found that such responsibility is well accounted for in Treaties and reflected in the SBC. Here, a balance is struck between free movement and public security (para 88), to the effect that exceptional derogations based on primary law are unnecessary. Instead, according to Article 27 SBC, Member States and the Commission should cooperate to maintain this balance.

The Court tried to mediate between, on the one hand, emphasizing the importance of giving effect to rules of secondary EU law and, on the other hand, leaving room for political actors' intervention. In particular, the Court is silent as to both what constitutes a 'new threat' (paras 79-80) and to the exact criteria for national measures' proportionality (para 68). In a nutshell, Schengen is to be restored, but the modalities seem to be open to political bargaining between the EU and the Member States.

Who can actually restore Schengen?

The judgment clarified, as a matter of principle, that the current border controls within the Schengen Zone are incompatible with EU law. Still, the road from this principled ruling to the actual restoring of a Schengen Zone without internal borders could be long. Member States will probably be reluctant to effectively abolish border controls. In view of its deference to the political process so far, it is unclear whether the Commission would be willing to scrutinize such behavior. The question of enforcement is likely to remain in the hands of individuals and national courts.

The Grand Chamber ruling should be interpreted as declaring all the Article 25 SBC border controls, currently in place for over six months and not based on a new threat, contrary to EU law. The conditions for the exceptional reintroduction of border controls established by the CJEU (para 82) will, most probably, result in the referring court declaring the border controls in force in Austria in 2019 outside of the allowed exceptions. As a preliminary ruling, this judgment applies *erga omnes* and sets the standard for internal border controls allowed under EU law. The same conclusion should therefore also apply to all the other border controls currently in place (as also argued by Jonas Bornemann). First, they have been ongoing for longer than six months. Second, Member States have not justified them by providing evidence of a new threat (studies, statistics or reasoning).

Uncertainties remain, however, as to the legality of new border controls that Member States might (re)introduce following the Court's judgment. It has been observed more broadly that partial compliance with CJEU judgments is a common *modus operandi* in the EU. Without expressly challenging the authority of the Court's rulings, Member States find ways to 'work around' their full implementation (Hofmann 2018). Against this background, the effectiveness of the Court's ruling in *NW v Landespolizeidirektion Steiermark* is at stake. At least three types of actors can influence the effective enforcement of the judgment – the national governments, the European Commission and national courts.

While the Court has been outspoken on the importance of open borders in the EU as a matter of principle, the responses by national political institutions have been rather disinclined. The Austrian, German and Danish authorities have not acknowledged that the CJEU's ruling puts them on notice to abolish border controls. Instead, they have reiterated their importance for national security and reintroduced border controls until November 2022, together with France, Norway, and Sweden (see here a full list). On 6 May 2022, Sweden has reintroduced border controls for another six months (until 11 November 2022). This decisions, all effective as of 12 May 2022, appear to disregard the CJEU's judgment rendered only two weeks before. The Swedish authorities, for example, conflate reasons stemming from Articles 25 SBC («prevent possible terrorist attacks») and 29 SBC («[c]ontrols at the Schengen area's external border are not adequately enforced»). The CJEU intended on holding those grounds apart (para 82), because Article 29 SBC, referring to dysfunctionalities at the external Schengen borders,

requires a Council recommendation, which expired on 10 November 2017 (para 26). The Swedish government is also not arguing that there is a new threat justifying a reintroduction of border controls. The press release of the Ministry of Justice states that «there is still a serious threat to public order and internal security in Sweden». The approach adopted by Swedish authorities – ignoring the judgment – seems to have been followed by other Member States, which have similarly extended internal border controls. Since the ruling on 26 April 2022, Norway, Sweden, Denmark, Germany, France, Estonia and Austria re-introduced border controls based on national security reasons.

Some national administrations are also exploring the margin left by the Court's ruling. The Court has showed trust in the Member States' commitment to Schengen and left them quite some leeway to argue the proportionality of border controls as well as the existence of a new threat justifying their reintroduction. The Austrian authorities prolonged the border controls in spite of a pending decision of a national court following the answer to its preliminary ruling question in Luxembourg. The regulation from the Ministry of Interior invokes multiple reasons for the re-introduction of border controls – some of them clearly old (migration and situation at external borders) and some of them which might be potentially argued as new threats (war in Ukraine). We will see how the legality of this renewed introduction of border controls will be evaluated. What undoubtedly changes following the CJEU ruling is that Member States are now required to engage with EU law reasoning and to present evidence of the actual situation at the borders, if they want to re-introduce border control.

A second actor that could prove crucial in restoring Schengen and enforcing the Court's ruling is the European Commission. In the oral hearings and their written reasoning, the Luxembourg judges have clearly condemned the Commission's silence in response to repeated notifications it received from Member States about the reintroduction of border controls. The ruling could provide the Commission with a clear legal basis to revive its role as guardian of the Treaties and enforce the strict interpretation of the SBC exceptions vis-à-vis Austria and the other Member States. So far, the Commission has favored a reform of the Schengen legislation over infringement proceedings as means to address the dissonance between law and the practice of Member States in this field. In 2017, it prepared a legislative proposal to revise the SBC. It left space to the political debates in the Council and Parliament, but, to its disappointment, the interest of, in particular, France and Germany in this legislative procedure diminished around 2019. This appears to reflect the general trend of the European Commission prioritizing its role as "engine of European integration" over its role as "guardian of the Treaties" across various domains of EU law, as shown with extensive empirical evidence (Daniel Kelemen & Tommaso Pavone).

The third type of actors with the power to enforce the Court's pronouncement are national courts. They have to be seized by individuals, legal or natural persons, who are either subject to illegal border controls or suffer financial harm from their reintroduction (state liability). In these regards, the upcoming developments in France, where border controls were introduced in 2015, are particularly worth of attention. In a 2017 ruling, the French Council of State

showed deference to the national executive and upheld the legality of the controls at the French border, without referring a preliminary ruling question to Luxembourg. The same Council of State will be now asked to rule on the legality of French border controls following the CJEU's principled ruling. It remains to be seen to what extent the French highest court will revise its reasoning in light of the CJEU's pronouncement on the strict interpretation of exceptions to the Schengen principle of open borders.

The question of the legality of the reintroduction of border controls within Schengen is also likely to return before the bench in Luxembourg in the future. An incremental line of case law can therefore be expected. It remains open whether it will develop along the lines of this judgment and emphasize that the exceptions to the rule of open borders within Schengen have to be interpreted narrowly. The CJEU has probably not said its last word yet.

National security exceptions in EU law

The repercussions of this Gran Chamber ruling go beyond the dilemma of enforcing or reforming the SBC rules. It can also have implications for the interpretation of national security exceptions in other areas of EU law. In its judgment, the Court does not emphasize the special character of the Area of Freedom Security and Justice (AFSJ) as the former "third pillar". This seems to suggest that its interpretation of Member States' national security is not particular to this previously intergovernmental domain of EU law. The Court emphasizes that national security is not a trump card allowing any national derogations from EU law (para 84). National security exceptions are relevant also in data protection law (Quadrature du Net (2020)). Precisely here, we have seen how a Court's principled ruling can eventually be enforced by private applicants and national courts. In 2014, the CJEU ruled in Digital Rights Ireland that collecting and storing of metadata from personal communications on a mass scale constitute a violation of the right to data privacy enshrined in articles 7 and 8 of the Charter of Fundamental Rights of the EU. After the Court annulled a directive that introduced such measures, effectively the same substantive measures were introduced by some Member States through national legislation. It took two more preliminary rulings, Tele2 Sverige coming from Sweden and Watson from the UK, for the Court to confirm its interpretation of data protection (Cameron 2017). It is possible that the question of internal border controls within Schengen might develop parallels to the incremental and mostly private enforcement that we have observed in the domain of data protection. In addition, the two domains share the political salience and the tension between national security protection and enforcement of EU law.

Finally, the Court does not really answer the last question referred by the national Court about a possible violation of the Citizens' Rights Directive. The political argument for maintaining internal border controls usually refers to third-country nationals whose status within Schengen is not regularized or alleged criminals who are hiding from the law enforcement. It has been also argued in academic debates that the lack of enforcement of the Schengen rules is related to the dominant market rationale taking precedence over giving effect to EU

citizenship: in so far as the abolition of internal borders is largely understood as serving first and foremost the economic interests of the internal market (free movement of goods, services, and workers), its non-market dimension (free movement of persons as essential constitutive element of EU citizenship) has been considered as a second-order priority (Salomon & Rijpma 2021). The Court did not adopt this proposed line of reasoning based on EU citizenship in this case. It emphasized rather the general principle of absence of internal borders «irrespective of the nationality» of the person (para 63). It remains to be seen whether a reasoning based on free movement of EU citizens could be included in the judicial reasoning in the future.

Conclusions

In *NW v Landespolizeidirektion Steiermark* the Court took a principled stance against the prolonged reintroduction of border controls in the Schengen Zone. It referred to the absence of internal borders as one of the «main achievements of European integration» and held Member States to account for their commitment to it, as enshrined in the Treaties and in the SBC. It also called upon on the Commission to live up to its role as guardian of the Treaties. In this way, the CJEU's pronouncement reads as a wake-up call for political institutions at the EU and national levels against the risk of jeopardizing the principle of free movement of persons. A month after the publication of the judgment, it seems that its full implementation might be a bumpy road. Member States seem reluctant to give full effect to the ruling and to actually renounce border controls. The Commission has put the reform of the SBC high on its agenda as a solution to the current discrepancies between the legal obligations and the border realities. Finally, national courts could play an important role in ensuring governments' accountability by initiating preliminary ruling procedures or holding the state liable for damages. This is, however, a longer and more decentralized path of enforcement, relying on active engagement of concerned companies and citizens.

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