30 days, six months… forever? Border control and the French Council of State

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For Christmas 2017, the French Council of State – the Supreme Court for administrative matters in France – gave a nasty present to those attached to the free movement of persons in the Schengen area. In a ruling issued on 28 December (see here, in French), it upheld the decision of the French Government to reintroduce, for the ninth time in a row, identity control at its "internal" borders, i.e. borders with other Schengen countries – even though checks at internal borders are not, in fact, systematically performed. This decision, issued without even bringing the matter to the Court of Justice of the European Union for a preliminary ruling, sets aside, probably unlawfully, the time limit set by the Schengen Borders Code.

Facts and background

On 13 November 2015, France reintroduced identity checks at its borders, by way of derogation to the so-called "Schengen Legislation" (after the Schengen agreements 1985 and 1990, which have been made part of EU Law with the Amsterdam Treaty 1997). The French Government had decided this measure before the November Paris attacks (13 November 2015), in order to ensure the security of the Paris Conference on Climate (30 November – 11 December 2015). This measure has been extended or renewed nine times consecutively since then, justified by the continuous existence of a terrorist threat and on the fact that important events, whether political (like the presidential and legislative elections) or in sports (EURO 2016, Tour de France), took place in France and could be targets for terrorists.

At the same time, several other Schengen countries took similar measures in order to deal with the so-called "migrant crisis", mostly fueled by the arrival of Syrian asylum seekers. Since then, some of these measures have come to an end, while others are still in force.

On 3 October 2017, the French Government notified the Secretary-General of the Council of the Union of its intention to reintroduce border control from the 1st November 2017 to 30 April 2018, in accordance with articles 25 and 27 of the 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). Several NGOs have filed an application for annulment of the decision revealed by this notification before the Council of State.

The ruling

The Council of State dismissed the application.

The judges considered that the decision to prolong border control is based on the continuous existence of a terrorist threat. According to them, controlling the identity and the country of origin of those willing to enter the French territory is necessary to prevent the risk of terrorist attacks. Therefore, the decision is proportionate to the gravity of the threat.

The applicants also claimed that the overall duration of the derogation to the Schengen rules did not respect the time limit set by Article 25 of the Schengen Borders Code. According to Article 25 of the Schengen Borders Code, where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days, for a total period that shall not exceed six months. The Council of State dismissed this argument, without

even asking the Court of justice of the European Union for a preliminary ruling. The judges considered that if Article 25 limits the total period during which border control is reintroduced at internal borders to six months, it does not prohibit a new period of border control, for another maximum duration of six months, in case of new or renewed (this distinction is important to understand some of my criticisms of the decision) threat to public policy or internal security. To reach this conclusion, the judges relied on the Commission Recommendation (EU) 2017/1804 of 3 October 2017 on the implementation of the provisions of the Schengen Borders Code on temporary reintroduction of border control at internal borders in the Schengen area.

Since 13 November 2015, the French Government has reintroduced or prolonged border control for variable durations, but never more than six months in a row. The Council of State furthermore agrees that there is currently a high level of terrorist threat in France, based on the evidence provided by the Government. This "renewed threat", according to the judges, allowed the Government to exercise again the faculty laid down at Article 25 of the Schengen Borders Code. Since the foreseeable duration of this threat exceeds 30 days but cannot be determined with any precision, the Government could legally determine, from the outset, a six-month duration.

Comments

By issuing its ruling on 28 December, the Council of State may have hoped that it would go unnoticed, or at least would not be noticed immediately. It clearly underestimated the vigilance of academics. On the very next day, our colleague Paul Cassia, on his blog, wrote a devastating comment of the ruling (see here, in French only unfortunately). Cassia's analysis is logically impeccable and merciless, and I will mostly follow his reasoning here.

The central feature of the Schengen legislation is, of course, the prohibition of border control at internal borders. There are, however, possible derogations. Chapter II of the Schengen Borders Code deals with the temporary reintroduction of border control at internal borders. There are three circumstances in which such a reintroduction is possible, and each of these circumstances is linked to a specific legal framework. In case of emergency, where a serious threat to public policy or internal security in a Member State requires immediate action to be taken, a State can reintroduce border control for 10 days, up to two months, provided that a summary notification is given at the same time to the other Member States and the Commission (see Art. 28). In case of threat to public policy or internal security, a State can reintroduce border control for 30 days, up to six months, provided that a precise prior notification is given to the other Member States and the Commission (see Art. 25). In case of exceptional circumstances threatening the overall functioning of the Schengen area, the Council can recommend reintroducing border control in one or several States for six months, up to two years (see Art. 29).

In the case heard by the Council of State, Article 29 was not at stake, and was not invoked by the French Government. The Council has adopted a "recommendation" under Article 29 in May 2016, renewed three times (see here, here and here), but it was addressed to Austria, Germany, Denmark, Sweden and Norway, not to France. The case fell only under Article 25. The time limit was therefore supposed to be six months. What kind of legal magic has allowed the French Government to reintroduce again border control nearly two years after the initial reintroduction, for a period going even beyond the two years allowed by Article 29?

In order to justify its solution, the Council of State refers, as mentioned before, to a Commission Recommendation (EU) 2017/1804 of 3 October 2017. This argument, however, is heavily mistaken for two reasons. First, the recommendation in question is not binding, and therefore cannot be used as a ground for a legal reasoning, especially since Article 25(4) clearly and explicitly states that "the total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of this Article, shall not exceed six months" (emphasis added). Secondly, the Council of State misquotes the recommendation in question.

According to the second recital of this recommendation:

> *The current provisions of the Schengen Borders Code provide for the possibility to rapidly reintroduce temporary internal border control where a serious threat to public policy or internal security requires immediate action in a Member State, for a period of maximum 2 months (Article 28). The Code also provides for the reintroduction of border controls for serious threats to public policy or internal security in case of foreseeable events, for a period of maximum 6 months (Article 25). The combined implementation of Articles 28 and 25 of the Schengen Borders Code allows maintaining border control for a total period of up to eight months. Moreover, a new threat to public policy or internal security triggers a new application of the rules (and thus a new calculation of the duration of the period of controls) [emphasis added].*

The reasoning of the Council of State is therefore extremely misleading when it extends this possibility to situation of a *renewed* threat to public policy or internal security. Indeed, the threat invoked by the Government is not new in nature. It is merely the continuation of the threat that justified the initial reintroduction of border control back in 2015.

In any event, this interpretation is fully inconsistent with the Proposal for a Regulation amending the Schengen Borders Code, adopted by the European Commission in September 2017 and mentioned also in the recommendation of October. According to this proposal, the maximum duration set in Article 25(4) would no longer be six months, but one year. There would also be a new provision, Article 27a, according to which "in exceptional cases, where the Member State is confronted with the *same* serious threat to public policy or internal security *beyond the period referred to in Article 25(4) first sentence*, and where commensurate exceptional national measures are also taken within the territory to address this threat, the border control as temporarily reintroduced to respond to that threat may be further prolonged in accordance with this Article" (emphasis added). In this case, "the Council, taking due account of the opinion of the Commission, may recommend that the Member State decide to further prolong border control at internal borders for a period of up to six months. That period may be prolonged, no more than three times, for a further period of up to six months". What would be the point of such a provision if it was already possible to bypass the time limit set at Article 25(4) in case of "renewed" threat to public policy or internal security?

At the very least, it seems that there is a legitimate doubt as to the interpretation of Article 25(4) of the Schengen Borders Code. And since the Council of State is a court "against whose decisions there is no judicial remedy under national law", it is arguable that Article 267 TFEU compelled it to bring this matter before the Court of justice of the European Union for a preliminary ruling. Alas, old habits apparently die hard. Let us not forget that the Council of State is the inventor of the "Acte-clair doctrine" (see the famous case CE, Ass., 19 juin 1964, Société des pétroles Shell-Berre, Rec. 344, n°47007 – not available online). According to this doctrine, the legal obligation for supreme courts to ask the Court of Justice for a preliminary ruling concerning the interpretation of EU Law does not exist when the EU provision applicable to the case is clear enough not to require interpretation. This doctrine has since then been endorsed by the Court of justice (See ECJ, CILFIT, 1982), but the Council of State has been known for having now and again a broad conception of what "clear" means. In recent years, the Council of State seemed to have mended its ways as regards its cooperation with the Court of Justice. In 2006 (the so-called "shallots" case, see here in French), for example, the Council of State abandoned its previous case-law according to which the preliminary rulings of the Court of Justice are only binding to the extent that the Court of justice answers the question asked by the national court, but not when it goes beyond, and for example not when the Court limits ex officio the past effects of its rulings (see the Office National Interprofessionnel des Céréales – ONIC – case 1985, here in French). It now seems that there is still some sand in the cogs of cooperation between the

Council of State and the Court of justice of the European Union.

It seems quite clear here that the Council of State has put (alleged) considerations of public security above a sound legal reasoning. Furthermore, it may allow never-ending border control. After all, will there be a day when the terrorist threat really disappears? And if not, does it mean that France can maintain border controls forever, six-month period after six-month period?

There is also a risk of contagion. The third prolongation of the 2016 Council Recommendation to reintroduce temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (mentioned above) has expired in November 2017. However, the five States to whom this recommendation was addressed (Austria, Germany, Denmark, Sweden and Norway) subsequently decided to make a notification under Article 25, based on the "security situation in Europe and threats resulting from the continuous significant secondary movements", which allows them to reintroduce border controls until 12 May 2018. Why would they, too, not then add six-month periods to six-month periods, ad infinitum?

The Schengen area is being put under an enormous pressure by the conjunction of terrorist threats, the so-called "migrant crisis" and, sometimes, xenophobic domestic policies. By proposing to amend the Schengen Borders Code, the European Commission is trying to heal a very sick patient, but there is no guarantee that the Schengen area will survive, except maybe in appearance. It is therefore quite unfortunate that a national supreme court would decide, a bit prematurely, to plant a nail in its coffin. Let us hope that the Court of Justice will have, as soon as possible, an opportunity to remind the Council of State that reasons of public safety do not allow governments – nor judges – to break the Law.

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