The Guardian is Absent

Legality of Border Controls within Schengen before the European Court of Justice

Pola Cebulak & Marta Morvillo

25.06.2021 doi: 10.17176/20210625-193249-0

What limits does European Union (EU) law impose on Member States invoking national security to temporarily re-introduce border controls within the Schengen Area? This question will be answered soon by the European court of Justice (ECJ) in the joined cases C-368/20 *NW v Landespolizeidirektion Steiermark* and C-369/20 *NW v Bezirkshauptmannschaft Leibnitz*.

In principle, the Schengen Area is an area without internal borders, and systematic border controls have been abolished since 1995. By way of exception, the Schengen Borders Code (SBC) foresees the possibility for EU Member States to re-introduce border controls for reasons of public policy and internal security, within the maximum overall time limit of two years. Currently, five EU Member States (Germany, France, Austria, Denmark and Sweden) and Norway have such border controls in place within the Schengen Area.

The cases at hand challenge the legality of border controls introduced by Austria on its southern border with Slovenia in 2015 and renewed until today. What is essentially at stake in the two cases pending before the ECJ is the balance between free movement and national security. On the one hand, the free movement of goods, services, capital and people enabled by the absence of internal borders is "part of our European way of life" and "a symbol of Europe's interconnectedness" (Commission Communication, 2 June 2021). On the other hand, national security is closely related to Member States' sovereignty. The threats to national security invoked by Member States to justify the re-introduction of border controls include the so-called migration crisis, prevention of terrorism, and, most recently, the Covid19 pandemic.

Three crucial questions have been addressed in the oral hearing: what is the difference between a persisting threat to internal security and a new threat that re-starts the clock on the two-year time limit? Did the migration crisis expose a regulatory gap in the SBC, allowing Member States' recourse to EU Treaties to re-introduce border controls? Can any meaning be attributed to the European Commission's silence on the renewed notifications by the Austrian government?

Facts of the Case

The joined cases represent a textbook example of strategic litigation. The applicant is an EU and international law scholar at the University of Amsterdam. On 16 November 2019, he refused to show his documents at a border crossing between Slovenia and Austria and was fined accordingly. He later challenged both the 36 Euro fine and the border control itself before the Landesverwaltungsgericht Steiermark. On 5 August 2020, the Austrian court referred a request for a preliminary ruling asking whether various provisions of EU law have to be interpreted as precluding national legislation in the form of consecutive Austrian decrees prolonging border controls. The oral hearing took place on 15 June 2021 in Luxembourg.

The cases' legal and political salience transpires both from their assignment to the Grand Chamber and from the questions discussed during the oral hearing. According to the ECJ's own Judicial Activity Report, in 2016-2020, the Grand Chamber, presided by the Court's president, has dealt with around 7% of all the cases. Those are usually the cases where the Court clarifies new questions of law. The European Commission and several Member States who also have border controls in place (Denmark, France and Germany) intervened in the proceedings. The hearing lasted for over three hours and included questions from the judges and the Advocate General that clearly put the

Austrian government and the European Commission up against the wall. They included references to Hans Christian Andersen's tale about the emperor standing naked in front of his subjects, which was used to showcase both the lack of legal grounds for the Austrian government to maintain border controls beyond the two years limit and the European Commission abdicating its responsibilities to flag and enforce violations of EU law.

The ECJ addressed four questions to all the parties in the proceedings before the oral hearing, which appear crucial in view of the upcoming judgment. We explain and highlight the importance of the first three of those questions in the following sections. The fourth question concerned the compatibility of the Austrian border controls with citizenship rights, derived in particular from Article 5 of the Citizens' Rights Directive. It was, however, not addressed extensively in the oral hearing.

The Difference between New and Persisting Threat to National Security

The main legal question before the Court is whether the reintroduction of border controls at the internal borders can last over two years. The answer depends on whether this limit applies only to a prolonged threat of the same nature or also to the cumulative reintroduction of new measures based on new threats. The Court asked the parties, first, to clarify the criteria to differentiate a new threat (requiring the introduction of new measures) from a persisting threat (for which an extension of existing measures is sufficient). Second, what procedural differences are there between the assessments underpinning extensions and reintroductions *ex novo* respectively.

The applicant and the Commission argued in favour of a strict two-year limit applicable to both extensions and cumulative reintroductions, the absence of which would put at risk the effectiveness of EU law. They insisted on the need for a clear, qualitative distinction between a new threat justifying the 're-setting of the clock' and a persistent threat. An increased intensity, for instance of irregular migrants in the EU, cannot constitute a new threat, but a threat of a new terror attack or the Covid19 pandemic could. The maximum time limit of two years is in line with the wording of the SBC referring the "*temporary* reintroduction of border control". Granting the Member States a carte blanche to derogate from it would risk "overstretching Schengen's flexibility and of actually eroding the *acquis*".

Member States, on the contrary, argued in favour of the possibility to extend the border controls beyond the two-year limit. In particular, such limit would not apply to consecutive reintroductions to address new threats. The ability of Member States to address serious, and often dynamic, threats to national security would otherwise be jeopardized. This reasoning was in line with a decision of the French Council of State, which, in a ruling from 28 December 2017, confirmed the legality of the French reintroduction of border controls and distinguished between a "*nouvelle menace*" and a "*menace renouvelée*". Each of the intervening Member States highlighted a different reason for rejecting the applicant's and Commission's arguments, presenting the Court with a panoply of potential substantive and procedural arguments.

Austria argued that persistent and new threats can overlap in nature, the difference lying in the type of assessment to be carried out. In the case of an extension, such assessment entails a comparison between the current and the original situation, in order to establish whether the measure is (still) proportionate. In the case of a new measure, a new comprehensive assessment of the threat is necessary, including current data, new proportionality analysis and a new procedure. Such procedure seemed mostly centered around the ministries rather than expert-driven. Denmark affirmed that a new procedure is necessary, even if a repetition of the substantive assessment can sometimes be unavoidable. It highlighted the extensive nature of such a procedure in Denmark, including broad expert consultations. Germany took a different approach, proposing a substantive distinction between a new and a persistent threat. Such distinction rests on both qualitative and quantitative assessments and would be subject to judicial review. While in both cases a serious threat must

(continue to) exist, only significant qualitative and quantitative changes can justify a "re-setting of the clock" for the two-years time limit. Procedurally, the assessment is to be based on threat, risk, and proportionality analysis.

Recourse to Exceptions in EU Treaties

A second central question discussed at the hearing was whether Member States can ground the derogation from the two-year limit directly on primary law, namely on Article 72 TFEU (Member States' responsibilities with regard to law and order and safeguarding national security) and on Article 4(2) TEU (exercise of essential State functions).

Member States generally argued that, when the EU legislator approved the SBC, it operated on the assumption that any systemic problems in the management of external borders would be resolved through common EU measures within a period of two years. As this was not possible within the context of the migration crisis, the current circumstances exceeded the framework of the SBC. We are therefore facing a regulatory gap in EU secondary law, so the argument goes, justifying recourse to primary law. The existence of such a gap was, generally, at the centre of all Member States' pleadings. Germany argued that the extension of border controls beyond the two years limit can be grounded directly in primary law, provided that it is necessary and proportionate in light of public safety and order. The other Member States, however, considered the direct applicability of primary law subordinately, favouring instead an extensive interpretation of the SBC consistent with the Treaties.

The applicant and the Commission pursued the opposite line of reasoning. The absence of secondary law provisions governing border controls exceeding two years is not the result of a regulatory gap. It is rather a conscious decision of the EU legislator to circumscribe derogations to the absence on internal borders into strictly defined time limits. Hence, the SBC takes into sufficient account Member States' responsibilities by providing the possibility for derogation, but limits it to two years. Furthermore, relying on a national security exception should be regarded as an *extrema ratio* and requires a higher threshold, similarly to the emergency clause in internal market law (Article 347 TFEU), which is not met by migration control exigencies. The Court has already established in previous case law, that Article 72 TFEU does not grant Member States the power to unilaterally announce their derogations, but imposes a necessity requirement, which is subject to judicial review at EU level (C-808/18, paragraphs 215-216 and Joined Cases C-715/17, C-718/17 and C-719/17, paragraphs 144-147).

Commission's Silence

The third question addressed in the hearing was more political in nature and went beyond the facts of the particular case. It revolved around the silence of the European Commission when notified by Austria about the decision to prolong the border controls every 6 months for six years now (2015-2021). In light of this silence, it might seem surprising that the Commission intervened in the pending case in support of the applicant, claiming that Austria's border controls do not contribute to any substantive goals of border management.

The first aspect of the question was whether the Austrian government could derive any legitimate expectations on the legality of its actions from the Commission's silence. Member States pointed out that the Commission never asked Austria for further information justifying the extension of border controls and never issued an opinion in reaction to the extensions exceeding the two-years limit. They pointed to Article 27(4) SBC stating that, if the Commission "has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders, (…) it shall issue an opinion to that effect". Second, the members of the Court repeatedly questioned the Commission about its reasons to refrain from any action with regard to the re-introduction of internal border controls by Austria (and other Member States), if it was convinced of its incompatibility with EU law. The Commission argued that it chose a political rather a legal route. Instead of issuing an opinion or a letter of formal notice, it prepared a legislative

proposal in 2017 to revise the SBC, including its Article 27. It therefore did not want then to disturb the political debates in the Council and Parliament. To the Commission's disappointment, the interest of, in particular, France and Germany in this legislative procedure diminished around 2019. The Commission claimed that its silence cannot be read as acceptance of the legality of Austria's actions, because it did signal its disapproval, albeit on political rather than legal plane.

It is unlikely for the Court to find that the Commission's silence could be read as precluding the illegality of Member States' actions. As a result, while this question might not be crucial for reaching a decision with this particular case, it contributes to a broader trend of frustrations with how the Commission executes its mandate as "Guardian of the Treaties". Similar criticism of the Commission not starting infringement proceedings has in fact been voiced when it comes to the rule-of-law crisis in the EU. In his speech on 13 January 2020 , when the Von der Leyen Commission was sworn in, the ECJ President himself stressed the importance of the Commission's role as the European prosecutor and its interaction with the Court.

Outlook

The joined cases are currently pending before the Grand Chamber of the ECJ, with the Opinion of Advocate General Saugmandsgaard Øe scheduled for 30 September 2021. In the meantime, pressure is growing on both the Council and the Parliament to adopt some revisions to the SBC and on the Commission to take action under Article 258 TFEU against Member States extending internal border controls beyond two years. It remains to be seen whether the ECJ will call on the Commission to uphold its role in controlling reintroductions of border controls within Schengen, or whether the judges will step into this role themselves.

ABOUT THE AUTHORS

Pola Cebulak
Pola Cebulak is an Assistant Professor in European Law at the University of Amsterdam.
Marta Morvillo
Marta Morvillo is an Assistant Professor in European Law at the University of Amsterdam.Marta Morvillo is an Assistant Professor in European Law at the University of Amsterdam.

SUGGESTED CITATION

Cebulak, Pola; Morvillo, Marta: The Guardian is Absent: Legality of Border Controls within Schengen before the European Court of Justice, Verfassungsblog, 25.06.2021, doi: 10.17176/20210625-193249-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20210625-193249-0.