



**Legality of Reintroduction of Internal Border Controls:
Necessity and Proportionality under the Schengen Border Code and
the Right to Free Movement of EU Citizens**

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1. Introduction

This expert opinion was written at the request of the appellant in the case, which led to preliminary questions in Cases C-368/20 and C-369/20 before the Court of Justice of the European Union (henceforth: CJEU). It concerns the legality of the reintroduction of border controls at the internal borders of the European Union (henceforth: EU) during prolonged periods of time. The reinstatement of internal border controls is allowed on limited grounds and for limited periods of time by Articles 25 and 29 of the Schengen Border Code (Regulation (EU) 2016/399, henceforth: SBC).¹

1.1 Background of the case

From 15 September 2015 until today, the Republic of Austria has reintroduced controls at all land borders and it plans to continue these border controls until 11 November 2021.² The Austrian Government used different legal bases for this reintroduction. Initially, it used a combination of Articles 23 and 25 of the former SBC, which allowed for the reintroduction of internal border controls where there is a 'serious threat to public policy or internal security'.³ After several prolongations of this measure, the Council of the European Union (henceforth: the Council) issued a recommendation on 13 May 2016 to reintroduce internal border controls on the basis of Article 29 SBC (new). According to the Council, the overall functioning of the area without internal border control was put at risk 'as a result of persistent serious deficiencies relating to external border control'. The Austrian Government made use of this recommendation to justify the prolongation of its internal border controls.⁴ After 11 November 2017, there was no longer a justification for Austria to extend its internal border controls on the basis of Article 29 SBC.⁵ As from that date, the Austrian Government presumably applied Article 25 SBC for the continuation of the internal border controls. However, the notification letters by the Austrian Government on the subsequent prolongations between 2017 and 2019 do not indicate any provision in the SBC on the basis of which these measures have been adopted.⁶

The case before the referring court, concerns questions with regard to the legality of the obligation of the appellant, an Austrian citizen, to submit his identification documents during border controls at the internal borders of Austria. Moreover, it regards the legality of the penal fine imposed on the appellant when he refused to comply with this obligation.

¹ 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) [2016] OJ L 77/1.

² See Annex 1 to this expert opinion.

³ Now Arts 25 and 28 SBC.

⁴ Letter of the Austrian Government to the Working Party on Frontiers/Mixed Committee (13 May 2016) available at <<https://data.consilium.europa.eu/doc/document/ST-8947-2016-REV-1/en/pdf>>.

⁵ This was recognised by the referring Austrian court in its judgment. See CJEU Case C-368/20, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice (2020) para 6.

⁶ See the letters of the Austrian Government to the Working Party on Frontiers/Mixed Committee of 7 October 2017, available at <<https://data.consilium.europa.eu/doc/document/ST-13207-2017-ADD-1/en/pdf>>; 9 April 2018, available at <<https://data.consilium.europa.eu/doc/document/ST-7832-2018-REV-1/x/pdf>>; 10 October 2018, available at <<https://data.consilium.europa.eu/doc/document/ST-13049-2018-INIT/x/pdf>>; and 11 April 2019, available at <<https://data.consilium.europa.eu/doc/document/ST-8518-2019-INIT/x/pdf>>.

The appellant's cases

On 29 August 2019, the appellant was requested to produce an identification document as a result of the execution of border controls at the border control point of Spielfeld between Slovenia and Austria. Unwilling to comply with the request of the border control officer, the appellant was fined for € 36 pursuant to section 24(1) of the Austrian Passport Act.⁷ The appellant appealed the decision to impose this fine before the *Landesverwaltungsgericht Steiermark*.

During another border crossing from Slovenia to Austria on 16 November 2019, the appellant was again subjected to border control on the basis of section 10(2) of the Austrian Border Control Act, in conjunction with the Regulation of the Federal Minister of the Interior on the Temporary Reintroduction of Border Controls at the Internal Borders.⁸ This time, he lodged an appeal at the *Landesverwaltungsgericht Steiermark* against the act of the border control itself, in accordance with Article 130 para 1 no. 2 of the Federal Constitutional Law.

1.2 The preliminary questions

The appellant claimed before the *Landesverwaltungsgericht Steiermark* that the Austrian Government is jeopardising the core values and principles of the Union. He claims that the border control was unlawful since there was no corresponding legal basis in the SBC. Furthermore, he argued that the border checks and the fine imposed on him violated his right to freedom of movement under Article 21(1) of the Treaty on the Functioning of the European Union (henceforth: TFEU), in conjunction with Article 22 SBC.⁹

In the absence of an *acte clair* the *Landesverwaltungsgericht Steiermark* decided to submit the following questions to the CJEU for a preliminary ruling:

1. Does EU law preclude domestic legislation in the form of consecutive domestic decrees prolonging border control which, cumulatively, allow for the reintroduction of border control for a period, which exceeds the two-year time limit laid down in Article 25 and Article 29 of Regulation (EU) 2016/399 without a corresponding Council recommendation pursuant to Article 29 of that Regulation?
2. Is the right to freedom of movement of EU citizens laid down in Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union (henceforth: the Charter) to be interpreted, especially in the light of the principle of the absence of checks on persons at internal borders established in Article 22 of Regulation (EU) 2016/399, as meaning that it includes the right not to be subject to checks on persons at internal borders, subject to the conditions and exceptions listed in the Treaties and, in particular, in the above Regulation?

If question 2 is answered in the affirmative:

⁷ Austrian Passport Act, Federal Law Gazette 839/92.

⁸ Regulation of the Federal Minister of the Interior on the Temporary Reintroduction of Border Controls at the Internal Borders, Federal Law Gazette 2 No. 316/2019

⁹ CJEU Case C-368/20, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice (2020) para 1.

3. Are Article 21(1) TFEU and Article 45(1) of the Charter to be interpreted, in light of the effectiveness of the right to freedom of movement, as precluding the application of national legislation which obliges a person, on pain of receiving an administrative penalty, to present a passport or identity card on entry via an internal border, even where the particular check at the internal border is contrary to the provisions of EU law?

1.3 Content and structure of this expert opinion

This expert opinion will examine and answer the questions referred to the CJEU by the Austrian court. Chapter 2 describes the general goals and framework of the SBC. It assesses the meaning of Articles 25 and 29 SBC in the light of the history, the text and the purpose of the SBC and the CJEU's case law. Chapter 3 deals with the reintroduction of internal border controls by the Member States, and specifically Austria, in order to prevent secondary migration flows. Chapter 4 looks into the relationship between the reintroduction of internal border controls and the principle of freedom of movement of EU citizens, as protected in Articles 21(1) TFEU and 45(1) of the Charter. Chapter 5 will draw conclusions and provide answers to the preliminary questions.

1.4 Methodology

The expert opinion adopted a legal normative approach, in order to answer the preliminary questions and analyse the situation at stake. It bases its argumentation on EU law provisions and the general substantive and procedural principles of EU law. Furthermore, it draws on case law of the CJEU. In order to illustrate current practices among Member States, the expert opinion relies on various reports by the EU Institutions, national institutions and legal scholars. Information on the practices and notification letters by Member States with regard to the temporary reintroduction of internal border controls, was found by searching the website of the Council.¹⁰

¹⁰ See data.consilium.europa.eu. We used different search terms, including 'temporary border Austria'.

2. Necessity and Proportionality of Reinstatement of Internal Border Controls under the Schengen Border Code

The first preliminary question concerns the interpretation of the provisions in the Schengen Borders Code with regard to the temporary reintroduction of internal border controls. In the context of this question, it should be examined whether EU law is violated by domestic legal provisions which, through a complex stringing together of measures, result in an cumulation of extension periods for the reintroduction of border controls. For this purpose, we will first look at the historical background of the Schengen Borders Code as well as its general purpose (section 2.1). Moreover, we will discuss the legal grounds for reintroduction of internal border controls laid down in Articles 25 and 29 SBC (section 2.2) and the procedure for such reintroduction (section 2.3). Subsequently we will focus on the scope of the requirement of the existence of a ‘serious threat to public policy or internal security’ (section 2.4). This will be followed by a discussion on the required proportionality test (section 2.5). Finally, we will examine whether, in general, a cumulation of measures based on both Article 25 and 29 is in line with the Schengen Borders Code (section 2.6). The next chapter will focus specifically on the reintroduction of internal border controls on migratory grounds.

2.1 Historical Background of Schengen and the Schengen Borders Code

2.1.1. The abolition of internal border controls

Freedom of movement has long been one of the core principles of the EU. As early as during the Coal and Steel Community, the Treaty of Paris (1951) provided free movement for workers in those industries. In the Treaty of Rome (1957), this right was extended to all workers in the European Economic Community. The abolishment of internal borders was a logical next step in this process. However, this abolition of border controls was controversial, because some Member States felt that their borders were so intertwined with their sovereignty that it would go too far to relinquish their grasp over these matters.¹¹ In 1985, a number of individual countries decided to go one step further than others and entirely abolished internal borders. This was laid down in the Schengen Agreement of 1985.¹² The five original members of the 1985 Schengen Agreement agreed to gradually abolish internal borders and to extend control of the external borders. In 1990, the Schengen Implementing Convention supplemented this agreement with concrete safeguards and arrangements regarding the implementation of freedom of movement. This included the abolishing of internal border controls, a cohesive system for visas, a single database named the Schengen Information System (SIS) and more cohesion between internal and immigration officers.¹³

In 1995, the Schengen Implementing Convention of 1990 was implemented in seven Member States.¹⁴ This Convention was integrated into EU law via a protocol to the Treaty of Amsterdam of 1997

¹¹ S Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford, Oxford University Press, 2016).

¹² European Commission, Schengen Area <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en>.

¹³ K Hailbronner and D Thym, *EU Immigration and Asylum Law: A Commentary: Part B Entry and Border Controls* (München, C.H. Beck, 2016) p 32.

¹⁴ House of Lords Library Note, *Schengen agreement: a short history* (March 2016) available at <<https://lordslibrary.parliament.uk/research-briefings/lln-2016-0013/>>.

and entered into force in 1999. On the basis of Article 77(1) TFEU, the EU has the power to develop policies and legislation regarding both the internal and external borders of the Member States. Since 1997, many measures have been adopted within this area, including the Schengen Borders Code.

In the years following the adoption of the Schengen Agreement, the area it encompassed became gradually larger. After the adoption of the protocol to the Treaty of Amsterdam in 1999, the number of states joining the Schengen area went up by 15. These states abolished their internal borders in 2007. Currently, 26 states take part in the Schengen acquis, including non-EU Members States, Norway, Iceland, Switzerland, and Liechtenstein, and excluding EU Member States Bulgaria, Croatia, Cyprus, Romania, and Ireland.

2.1.2 The Schengen Borders Code

In 2006, a Schengen Borders Code (Regulation 562/2006) was adopted on the basis of Article 62(1) of the Treaty establishing the European Community, providing rules governing the crossing of EU's external borders and the absence of border controls at the internal borders.¹⁵ It included provisions on the checks on persons at the external borders of the EU, entry conditions, and the conditions on the temporary reintroduction of internal border controls.

The provisions on the reintroduction of border controls could be found in Article 23 of the former SBC of 2006. This provision limited the period of reintroduction of border controls to 30 days. However, it allowed for prolongations of this time period, without mentioning a maximum duration. Such maximum period was only included in the amended SBC of 2016. Furthermore, the SBC adopted in 2006, did not contain a provision for the reintroduction of temporary internal borders because of external border deficiencies. This possibility was introduced in Article 29 of the amended SBC in 2016.

Regulation 562/2006 was amended in 2013, inserting a new mechanism for the reintroduction of internal border controls, which will be described in the next section. In the same year, the Council and the European Parliament adopted a Regulation establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis. Amongst others, this Schengen Evaluation and Monitoring Mechanism (SEM) includes the carrying out of on-site visits by teams consisting of experts designated by the Member States and of representatives of the European Commission (henceforth: the Commission).¹⁶

In 2016, the whole Regulation 562/2006 was replaced by Regulation 2016/399, now on the basis of Article 77(2)(e) TFEU, and entered into force in 2016. Title III of the current SBC contains the provisions with regard to the temporary reintroduction of internal borders controls, which will be dealt with in the next section.

2.2 Legal basis for the temporary reintroduction of internal border controls

Article 22 SBC provides as a general rule that '[i]nternal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.' There are three main

¹⁵ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105.

¹⁶ Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen [2013] OJ L 295/27.

provisions, which make an exception to this rule by giving Member States the power to temporarily reintroduce internal border controls. First, Article 25 SBC states that internal border controls may be reinstated if there is a serious threat to public policy or internal security. Second, Article 28 SBC provides a specific procedure for the temporary reinstatement of border controls, in cases a serious threat to public policy or internal security requires an immediate action by a Member State. Third, Article 29 SBC provides for a specific procedure to reinstate internal border controls in the case of 'exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control' and insofar these exceptional circumstances constitute a serious threat to public policy or internal security. Reintroduction of border controls on this ground needs to be based on a recommendation by the Council.

The current mechanism for the reintroduction of internal border controls has its origin in an amendment of the SBC in 2013, which was adopted in response to the so-called 'Franco-Italian affair', following the large influx of migrants from Northern Africa during the Arab Spring situation in 2011. At the time, Italy issued temporary residence permits on humanitarian grounds to migrants, which allowed them to travel further to other Schengen states. In reaction, France closed its border with Italy.¹⁷ Afterwards, it became apparent that both Member States were neglecting their obligations under the SBC. New EU legislation was adopted, in order to prevent new controversies with regard to the implementation of the SBC.

The amendment's purpose was threefold. First, it would introduce a system to monitor adherence to the Schengen acquis. Second, it would entail a stricter approach to the procedural elements of the reintroduction of internal border controls. This would enlarge the influence of EU institutions, so as to guarantee the proportionality of any measures taken. Third, a new provision was formulated upon which external border deficiencies could be considered a reason to reintroduce border controls if recommended by the Council.¹⁸

The European Council stressed the exceptional nature of the reintroduction of internal border controls, which should be used as a last resort 'in a truly critical situation'.¹⁹ Moreover, it considered that the mechanism of reintroduction of internal border controls should not jeopardise the principle of free movement of persons.²⁰

2.2.1 Article 25 SBC

According to Article 25(1) SBC, border controls may be imposed temporarily by a Member State if there is a serious threat to public policy or internal security. Furthermore, these controls must 'exceptional' and 'strictly necessary', which suggests a high threshold for their application.²¹ The criteria for the temporary reintroduction, mentioned in Article 25(1), are further developed in Article 26 SBC. Each

¹⁷ S Carrera et al, *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair* (CEPS, April 2011) available at < <https://www.ceps.eu/ceps-publications/race-against-solidarity-schengen-regime-and-franco-italian-affair/>> pp 1-2

¹⁸ E Brouwer, 'Vrij personenverkeer in Schengen en het deficit van Dublin: Tekortkomingen aan de buitengrenzen als rechtvaardiging voor binnengrenscontroles?' (2017) *SEW Tijdschrift voor Europees en Economisch Recht*, p 60

¹⁹ European Council, *European Council Conclusions 23 and 24 June 2011*, EUCO 23/1/11 available at < https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123075.pdf> p 8.

²⁰ Ibid.

²¹ See also Recital 23 Preamble SBC.

time a Member State reintroduces border controls or prolongs such controls, there must be an assessment of the proportionality and an assessment of whether these controls will effectively remedy the threat.

2.2.2 Article 29 SBC

On the basis of Article 29 SBC, Member States can introduce internal border controls if there are 'persistent serious deficiencies relating to external border control', which have caused a serious threat to internal security or public policy. What exactly constitute 'persistent serious deficiencies' at the external Schengen borders is not precisely defined in the SBC, nor in any other Commission or Council document. The terms 'persistent and serious' suggest a high threshold.

Article 29(2) SBC provides the Council with the power to recommend internal border controls if all other measures are ineffective in reducing the threat. Member States cannot independently reintroduce internal border controls on the basis of Article 29 SBC. This is to protect common interests within the Schengen area. The conditions for invoking Article 29 SBC are thus similar to those for Article 25 SBC, with the addition that the threat to public policy or internal security must be caused by persistent serious deficiencies at the external borders.

2.3 Procedure for the reintroduction of internal border controls

This section will briefly describe the procedure to be followed if a Member State or the Council wants to reintroduce internal border controls.

2.3.1 Reintroduction on the basis of Article 25 SBC

The procedure for invoking Article 25 SBC is laid down in Article 27 SBC. Article 27(1) SBC states that four weeks before the planned reintroduction of internal borders under Article 25 SBC, other Member States and the Commission must be notified. This notification period may be shorter than four weeks if the circumstances giving rise to the need of reintroducing internal border controls became known less than four weeks before the planned reintroduction.

The Member State planning to reintroduce the border controls must supply the other Member States and the Commission with the information mentioned in Article 27(1)(a) to (e) SBC:

- a. the reasons for the proposed reintroduction, including all relevant data detailing the events that constitute a serious threat to its public policy or internal security;
- b. the scope of the proposed reintroduction, specifying at which part or parts of the internal borders border control is to be reintroduced;
- c. the names of the authorised crossing-points;
- d. the date and duration of the planned reintroduction;
- e. where appropriate, the measures to be taken by the other Member States

The requirement to provide all relevant data on the reasons and the scope of the planned border controls, should enable the other Member States and the Commission to examine the necessity and proportionality of such measure. Both the other Member States and the Commission have the power on the basis of Article 27(4) SBC, to issue an opinion if they have doubts on the necessity and proportionality. In accordance with Article 31 SBC, the Commission and Member State(s) concerned

must inform the European Parliament and the Council as soon as possible of any reasons which might trigger the application of the provisions on the reintroduction of internal border controls.

2.3.2 Reintroduction on the basis of Article 29 SBC

For the reintroduction of internal border controls on the basis of Article 29 SBC procedure, the Council must issue a recommendation on the basis of a Commission proposal.²² In its recommendation, the Council shall include the information referred to in Article 27(1)(a) to (e) SBC cited above. In accordance with Article 30(2)(a) SBC, the Commission may request Member States, Frontex, Europol or other EU bodies, offices or agencies to provide further information or carry out on-site visits, to obtain or verify information relevant for its recommendation.

2.4 The scope of a ‘serious threat to public policy or internal security’

There is no CJEU jurisprudence regarding the specific definition of public policy or internal security in either Article 25 or 29 SBC. According to settled case law of the CJEU, the meaning of a provision must be interpreted through its wording and according to its context and purpose.²³ From the exact wording of Article 25 or 29 SBC, it is not clear what exactly constitutes a serious threat to public policy or internal security. However, it follows from Article 26(a) SBC that Member State cannot simply state the threats. They should take into account ‘the likely impact of any threats to its public policy or internal security, including following terrorist incidents or threats and including those posed by organised crime’.

It may be argued that the required serious threat to public policy or internal security for the application of Articles 25 and 29 SBC, must be interpreted strictly in order to be in accordance with context and purpose of those provisions. First, as was mentioned above, the power of Member States to reinstate border controls was meant to be limited to exceptional situations. Accordingly, any definition of public policy and internal security must also be limited in scope. Secondly, it is relevant to compare Articles 25 and 29 SBC to Article 6(1)(e) SBC. This last provision states as an entry condition that a third-country national is not ‘considered to be a threat to public policy, internal security’. The threshold in Articles 25 and 29 SBC seems to be higher than that in Article 6 SBC. Articles 25 and 29 SBC add the condition that the threat is ‘serious’, something which is not explicitly stated in Article 6(1)(e) SBC.

The question is how much discretion Member States have when interpreting the term ‘serious threat to public policy or national security’. In *E.P.*, the CJEU considered that in the case of Article 6(1)(e) SBC, Member States have wide discretion when determining whether an individual is a threat to public policy.²⁴ However, the CJEU also underlined that such determination must be based on a prior individual assessment and proportionality test.²⁵ Furthermore, the CJEU stressed that national authorities may only invoke a threat to public policy if there is a ‘consistent, objective and specific evidence that provides grounds for suspecting that that third-country national has committed such an offence’.²⁶

²² Art 29(2) SBC.

²³ CJEU Case C-84/12 *Koushkaki* [2013] para 34.

²⁴ CJEU Case C-380/18, *E.P.* [2019] paras 47-49.

²⁵ *Ibid*, para 47.

²⁶ *Ibid*, para 49.

In addition, it should be emphasised that, even if it were to be concluded that the Member States have wide discretion in evaluating public policy and internal security grounds in Articles 25 and 29 SBC, this does not give Member States a *carte blanche* to set aside obligations under EU law. Article 4(2) TEU provides that the Union shall respect the Member States' essential State functions including 'maintaining law and order and safeguarding national security'. It even states that 'national security remains the sole responsibility of each Member State'. Nevertheless, the CJEU held in *Commission v Poland, Hungary and the Czech Republic* that Member States cannot simply invoke Article 4(2) TEU to justify any derogation from EU law.²⁷ EU institutions should have some level of control over these State actions.

2.5 Necessity and proportionality

It follows from Articles 25 and 29 SBC that the reintroduction of internal border controls should be strictly necessary, suited to achieve the aim envisaged and proportionate. Article 26(b) and 30(1) SBC require Member States to assess 'the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security'. The condition that internal border controls are reintroduced as a measure of last resort, implies that alternatives to such measure should be considered. Finally, these provisions oblige Member States to assess the proportionality of the measure taking into account, next to the impact of the threat/the deficiencies of external border control on public policy and national security, 'the likely impact of such a measure on free movement of persons within the area without internal border control'. These aspects will be discussed in the next sections.

2.5.1 Alternatives to the reintroduction of internal border controls

Article 25(2) SBC states that border controls at internal borders shall only be reintroduced as a last resort. This principle of 'last resort measure' is repeated in Articles 26 and Article 29(2). This implies that alternatives must always be considered first and where a similar result can be achieved with a lesser effect on free movement, no internal borders can be reintroduced.

Member States have the option under the SBC to introduce police checks on the basis of Article 23 SBC. This was highlighted recently in the Migration Pact: 'There are also alternatives to internal border controls – for example, police checks can be highly effective, and new technology and smart use of IT interoperability can help make controls less intrusive.'²⁸

When carrying out police checks, Member States must make sure that they do not amount to measures equivalent to border controls. They must therefore introduce specific provisions in relation to the intensity and frequency of such police checks.²⁹ According to the Commission:

²⁷ CJEU Joined Cases C-715/17, C-718/17, C-719/17 *Commission v. Poland, Hungary and the Czech Republic* [2020] paras 144-147.

²⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM/2020/609, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0609&from=EN>>, para 4.4 (henceforth: New Pact on Migration and Asylum).

²⁹ CJEU Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] para 70.

The exercise of police powers should not, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective, are based on general police information or experience regarding possible threats to public security and aim, in particular, to combat cross border crime, are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, and are carried out on the basis of spot-checks.³⁰

In contrast, border controls are, according to the CJEU in the *Melki and Abdeli* judgement, meant ‘first, to ensure that persons may be authorised to enter the territory of the Member State or authorised to leave it and, second, to prevent persons from circumventing border checks.’³¹

Under Article 23 of the SBC, certain police checks within the territory of the Member State are permissible, but only under strict conditions. In *Adil*, the CJEU ruled that national rules on mobile controls by the police were allowed under Articles 20 and 21 SBC not only for law enforcement purposes, but also for the purpose of immigration control.³² However, the objectives of police checks have to be different from ‘border controls’, as stipulated in Article 23(a) SBC.

Where it concerns the reintroduction of internal border controls on the basis of Article 29 SBC, Article 30(a) SBC requires that the Council assesses whether technical or financial support measures at national or at EU level, including assistance by Union bodies, offices, or agencies (including EASO or Europol), could have been or have been resorted to. In particular, Article 21(1) SBC gives the Commission the power to recommend a Member State to initiate deployment of European border guard teams and to submit strategic plans to Frontex³³ for an opinion. Article 29 SBC can thus only be invoked, if the use of Article 21 SBC is insufficient to address the serious deficiencies in the external border control of a Member State.³⁴

2.5.2 Impact on the free movement of persons

In the recent proposal for the EU Migration and Asylum Pact, the Commission underlined that free movement in the Schengen area is a policy imperative and that ‘the Schengen area is one of the major achievements of European integration’.³⁵ Given the impact that the reintroduction of internal border controls may have on all persons having the right to move freely within the area without internal border control, the scope and duration of such measures should be restricted to the bare minimum necessary to respond to the serious threat to public policy or internal security.³⁶ According to Article 26(b) SBC, the likely impact of internal border controls on free movement of persons within the area

³⁰ European Commission, *Commission recommendation proportionate police checks and police cooperation in the Schengen area* (12 May 2017) available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170502_recommendation_on_schengen_area_police_checks_and_cooperation_en.pdf>, pp 2-3.

³¹ CJEU Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] para 71.

³² CJEU Case C-278/12 *Adil* [2012].

³³ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States.

³⁴ See Art 29(2) SBC. See also Directorate General for Internal Policies, *Internal border controls in the Schengen area: is Schengen crisis-proof?* (2016) available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU%282016%29571356_EN.pdf>, p 51

³⁵ New Pact on Migration and Asylum, pp 1 and 14.

³⁶ Recital 22 and 23 Preamble SBC.

without internal border control must be taken into account when assessing the proportionality of the measure.

2.5.3 Impact on the economy

When assessing the proportionality of controls at the internal borders their economic impact should be taken into account.³⁷ The reintroduction of internal border controls is challenging the EU Single Market in several ways. Border checks are increasing queue times for EU and non-EU citizens when travelling to and from work. They not only restrict job mobility. They could also affect the profitability of businesses, for example because it affects the efficiency of the European logistics sector. In addition, if border controls lead to fragmentation in the EU's common visa policy, this could influence the tourism and hospitality industries. Lastly, the suspension of Schengen might be interpreted by the financial markets as a sign that these countries are no longer committed to being part of the EU's core idea, which could lead to a greater redenomination risk. The Commission has estimated in 2016 that a two-year suspension of the Schengen Agreement would cost the European economy (including one-off costs) a total of almost €5 billion, in the case of a suspension limited to 7 countries, and up to €51 billion for the entire Schengen area.³⁸ These costs would be concentrated on certain actors and regions, but would inevitably impact the EU economy as a whole.

2.6 Temporal limitations for reintroduction of internal border controls

The next question, which should be addressed, is how long the reintroduction of internal border control may last. Can they be prolonged for years, as is the practice in several Member States, including Austria, at the moment?

Under Article 25 SBC, internal border controls can be temporarily reinstated for up to thirty days. The measures can be extended for subsequent thirty-day periods, as long as they do not exceed six months.³⁹ A prolongation to a maximum of two years is only possible if the exceptional circumstances of Article 29 SBC are applicable. The SBC does not allow a longer period. Article 25(4) SBC states:

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. Where there are exceptional circumstances as referred to in Article 29, that total period may be extended to a maximum length of two years, in accordance with paragraph 1 of that Article.

³⁷ See EPRS, *Cost of Non-Schengen: the Impact of Border Controls Within Schengen on the Single Market* (April 2016) available at

<[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL_STU\(2016\)578974_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL_STU(2016)578974_EN.pdf)>.

³⁸ European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Back to Schengen - A Roadmap, COM(2016)120 final, available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf> p 3 and further.

³⁹ Artt 25(3) and 25(4) SBC.

The permitted duration for the reintroduction of internal border controls based on Article 29 SBC is six months, with the possibility to extend this period with a maximum of three times.⁴⁰ This makes the maximum duration of this measure two years.

2.6.1 The legality of cumulation of reintroduction measures

The repeated prolongations of internal border controls by different Member States, including Austria, seem to be based on the cumulation of different time periods as provided in the SBC: the six-month period in Article 25(4) and the two-year period in Article 29 SBC.

Taking into account the emphasis in the different provisions and recitals 23 and 24 of the SBC regarding the strictly limited scope and time of any reintroduction of internal borders, any interpretation allowing for such cumulation must be considered incompatible with the goal and content of the SBC. Whenever the time limit of Article 29 SBC has been exhausted (i.e. the reintroduction of internal border controls has been applied for two years), Member States cannot simply invoke Article 25 SBC for a further prolongation of internal border controls on the same grounds. The text and purposes of the SBC exclude such a prolongation without any new information being provided justifying the necessity and proportionality of these internal border controls. This means that any subsequent use of Article 25 SBC after Article 29 SBC has been exhausted, must be based on a new substantiated ground for the reintroduction of internal border controls, and this new measure must be adopted in accordance with the procedural and material conditions as described above.⁴¹

2.7 Conclusion

It should be concluded that the requirements for the application of Articles 25 and 29 SBC are strict. First, the threat to public policy or national security must be ‘serious’ in order to justify the reintroduction of internal border controls. Moreover, such measure should be strictly necessary and able to adequately remedy the threat to public policy or internal security. The condition that internal border controls only be used as a measure of last resort implies that there should be no alternative available to remedy such threat. Finally, the measure should be proportionate, taking into account the interest of the free movement of persons and economic interests.

Moreover, the wording of Article 25(4) SBC does not allow for a prolongation of internal border controls on the basis of Article 25(1) SBC beyond six months, rendering continued controls contrary to the letter of the SBC. Experience has shown that certain serious threats to public policy or internal security may persist well beyond the limited periods in Articles 25 and 29 SBC.⁴² This was also recognised at the EU level and the Commission already proposed to adjust the time limits applicable to the temporary reintroduction of border control to the current needs and to extend the general

⁴⁰ Art 29(1) SBC.

⁴¹ Policy Department for Citizens' Rights and Constitutional Affairs, *The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016* (March 2018) available at < [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604943](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604943)>.

⁴² See for example the temporary reintroduction of internal border controls because of Covid-19 or the terrorist attack in Vienna in November 2020.

deadline applicable under Article 25 SBC to one year.⁴³ Nevertheless, it must be ensured that this measure is not abused and remains an exception, to be used proportionately and only as a last resort.

The next chapter of this expert opinion will therefore discuss the reintroduction of internal border controls on migratory grounds in more detail. It will discuss the justifications for, and the consequences of this measure as well as the potential alternatives available.

⁴³ This is illustrated by the proposal to amend Regulation 2016/399, in which the reference 'such as cross-border terrorist threats or specific cases of secondary movements of irregular migrants within the Union that justified the reintroduction of border controls' has been deleted. See Council Document 8210/18, para 4.

3. Reintroduction of Internal Border Controls for Migratory Reasons

This chapter will specifically address the reintroduction of internal border controls in the context of migration. It will start by describing Member State practice concerning such reintroduction and particularly the case of Austria (section 3.1). After that, the question will be examined whether secondary migration flows can be considered a threat to public policy or national security (section 3.2). Section 3.3 will assess whether Member States can rely on 'deficiencies at the external border' in order to continue the application of internal border controls on the basis of Article 25 SBC. Section 3.4 will focus on the proportionality of the reintroduction of internal border controls on migratory grounds. Finally, the legality of the cumulation of measures reintroducing internal border controls is examined in section 3.5.

3.1 Practice in the Member States

From 2006 until the summer of 2015, Member States of the Schengen area reinstated internal border controls 36 times, always for a limited period of time and only in exceptional and casuistic cases.⁴⁴ The justification varied from major political or sports events, like the 2008 European Football Championship in Austria, to reasons of internal security, for example following the London bombings in 2008.⁴⁵

However, from September 2015 until the moment this expert opinion was written, border controls have been reintroduced and prolonged almost 205 times.⁴⁶ In addition to the high increase in the number of cases, the reasoning for the reintroduction of border controls started to change. Various Schengen Member States, including Germany, Austria, Sweden, Denmark, Norway and France, reintroduced controls at their internal borders in response to the uncontrolled nature of the influx of refugees.⁴⁷ The European Parliament has stressed that many of the prolongations of the internal border controls were 'not in line with the existing rules as to their extension, necessity and proportionality, and are therefore unlawful.'⁴⁸

⁴⁴ See the website of the Commission for the full list of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and further SBC: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control.pdf (henceforth: the Commission full list of Member States' notifications).

⁴⁵ K Groenendijk, 'Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?' (2004) *European Law Journal*, pp 150-170.

⁴⁶ See the Commission full list of Member States' notifications.

⁴⁷ S Carrera, *The State of the Schengen Area in the Light of the 2019 European Parliament Election* (RSCAS Policy Paper, December 2019) available at <https://cadmus.eui.eu/handle/1814/61595>, p 3; See also the Commission full list of Member States' notifications.

⁴⁸ European Parliament, *Report on the annual report on the functioning of the Schengen area* (2017/2256(INI)) available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0160_EN.html.

3.1.1 The case of Austria

Austria notified the Commission on 15 September 2015 about the temporary reintroduction of border controls at all land borders with a starting date of 16 September 2015, for the period of 10 days.⁴⁹ Subsequently, this period was extended four times.⁵⁰ After the possibility to rely on the recommendation of the Council on the basis of Article 29 SBC was exhausted, Austria resorted back to Article 25 SBC in November 2017. Until this day, Austria's borders are still closed on the basis of Article 25(3) SBC.⁵¹

The decision to reintroduce internal border controls in September 2015 was based on the extraordinary influx of persons seeking international protection, crossing the borders of Austria in a spontaneous manner, often without necessary documents or adequate recording in Eurodac upon their first arrival in the EU.⁵² According to the Austrian authorities, over the period between 5 September and 8 October 2015, 238,485 persons had been apprehended of which 9,017 applied for international protection in Austria. Also, specific reference was made to the need to combat cross-border human trafficking.

At that time, the Austrian authorities were forced to mobilise all available resources, from the army to NGOs, to ensure appropriate reception conditions and medical care, posing an immense challenge for all actors involved. The analysis of the situation in the broader region indicated that the rush of asylum seekers towards Austria would continue unabated. The reintroduction of internal border control and its prolongation was thereby considered necessary for maintaining law and order, safeguarding internal security and avoiding continuous overstressing of police force, rescue services and public infrastructure.

The Austrian authorities confirmed that the controls would be applied gradually and flexibly, adapted in time and to the circumstances. The Austrian authorities also stressed that the reintroduction only had a limited impact on free movement. They referred for example to the fact that, over the period between 5 September and 1 October 2015, only 329 refusals of entry were made at the border sections with Hungary and Slovenia.⁵³ Accordingly, the measures taken were seen as proportionate by the Austrian authorities. In addition, the Austrian Government confirmed in its letter of 3 November 2015 its ongoing commitment to the Schengen area and the free movement of persons as pillars of the European unification process and the support to all efforts regarding the termination of internal border controls.⁵⁴

⁴⁹ See Council Document 12110/15, available at <<https://data.consilium.europa.eu/doc/document/ST-12110-2015-INIT/en/pdf>>: Reintroduction of border controls on the basis of Article 25 Regulation (EC) 562/2006 (now Article 28 SBC).

⁵⁰ See Council Document 12435/15, Council Document 13127/15, available at <<https://data.consilium.europa.eu/doc/document/ST-13127-2015-INIT/en/pdf>>, Council Document 13726/15, available at <<https://data.consilium.europa.eu/doc/document/ST-14211-2015-INIT/en/pdf>> etc.

⁵¹ See Council Document 12435/15; Council Document 13127/15, Council Document 13726/15 etc.

⁵² Council Document 12110/15 (also referring to a statement of reasons for the prolongation of the temporary reintroduction of border controls at the Austrian internal borders transmitted to the Council on 02.10.2015).

⁵³ Commission opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria, C (2015) 7100, available at <<https://ec.europa.eu/transparency/regdoc/rep/3/2015/EN/3-2015-7100-EN-F1-1.PDF>>, para 19.

⁵⁴ Council Document 13726/15.

In its notification to the Council in November 2017, the Austrian Government justified the renewed border closure again with the security situation in Europe and threats to public policy resulting from the continuous significant secondary movements of migrants. The Austrian Government could not provide exact statistics on the number of border crossings. However, in the period from 11 November to 4 December 2017, a total of 1.310 asylum applications were filed in Austria. This was a much lower number than in the same period in 2015.⁵⁵ Therefore, the situation in November 2017 was in no way comparable to the European refugee humanitarian crisis in Summer 2015. The number of asylum applications was already rapidly falling and the risk of overstressing the police force, rescue services and public infrastructure was no longer present.

Only during a few months in 2020, the prolongation of internal border controls in Austria was based on other than migratory grounds: the Covid-19 virus.⁵⁶ In its letter of 4 June 2020, the Austrian Government informed the Council that border closures due to the epidemiological situation would be lifted for persons having their residence or habitual abode in one of the neighbouring countries. However, for all other persons the measures continue to apply. The border controls with Hungary and Slovenia, which were introduced due to the migration and security situation, will be maintained.⁵⁷ No further explanation was given. This raises the question whether this continuing extension of border controls still meets the requirements in the SBC.

3.2 Migration flows as a threat to public policy or national security?

This section addresses the question whether migration flows constitute a ‘serious threat to public policy or internal security’ in Articles 25 and 29 SBC. During the negotiations surrounding the amendment of the mechanism for reintroduction of internal border controls in 2013, the EU legislator found that migratory flows could not generally justify the reintroduction of such controls.⁵⁸ This was later expressly included in recital 26 SBC which states that ‘migration and the crossing of external borders by a large number of third-country nationals should not, *per se*, be considered to be a threat to public policy or internal security’.

As was set out above, in recent years many Member States reintroduced internal border controls in response to the ‘large influx’ of migrants and their potential effect on public order and internal security. This initiated a Commission opinion of 2015 on the necessity and proportionality of the internal border controls carried out by Germany and Austria.⁵⁹ In its opinion, the Commission stated that ‘the sheer number of persons entering the territory of Austria in view of transiting and seeking international protection would indeed appear to have led to a threat to public policy and

⁵⁵ See Council Document 15829/17 available at <<https://data.consilium.europa.eu/doc/document/ST-15829-2017-INIT/x/pdf>> in comparison to Council Document 12110/15.

⁵⁶ Council Document 7189/20, available at <<https://data.consilium.europa.eu/doc/document/ST-7189-2020-INIT/x/pdf>>.

⁵⁷ Council Document 8617/20, available at <<https://data.consilium.europa.eu/doc/document/ST-8617-2020-INIT/x/pdf>>.

⁵⁸ E Guild et al, *What is happening to the Schengen borders?* (CEPS, 2015) available at <<https://www.ceps.eu/ceps-publications/what-happening-schengen-borders/>> , p 9 and further.

⁵⁹ Commission opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria, C (2015) 7100. This opinion was based on Art 27(4) SBC (then Article 24 SBC).

internal security'.⁶⁰ The Commission also found that the measures taken by these Member States were proportionate at that given moment.⁶¹

In May 2016, the Commission presented a proposal to the Council to operationalise Article 29(2) SBC. In October 2016 the Council recommended the prolongation of temporary internal border controls due to 'exceptional circumstances putting the overall functioning of the Schengen area at risk'⁶². According to this decision, the sharp increase of mixed migratory flows since 2015 would have resulted in severe deficiencies at parts of the Union's external border.⁶³ Therefore, the reintroduction of controls at internal borders was seen as necessary and proportionate by the Council. Member States were allowed to continue internal border controls for another six months.⁶⁴ However, the Council emphasised that these controls should be carried out only to the necessary extent and should take place only as long as required.⁶⁵

The measure based on Article 29 SBC could only be renewed three consecutive times for similar six-month periods if the exceptional circumstances persisted. Thus, after 11 November 2017, the possibility of extending Article 29 SBC was exhausted. The Commission stated in a 2017 Communication 'Preserving and Strengthening Schengen' and an accompanying press release that, as of November 2017, it was no longer possible for any Schengen state to invoke the unprecedented migratory and refugee crisis which started in 2015, the deficiencies in the external border management by Greece and the secondary movements.⁶⁶ Nevertheless, Member States, including Austria, resorted back to Article 25 SBC to prolong internal border control on this ground.⁶⁷

3.3 Relying on deficiencies at the external border

The backbone of the Austrian Government's arguments for the continuation of internal border controls, which is present in the notification letters from September 2015 until November 2020, resorts to the 'deficiency at the external border of the Union'.⁶⁸ The Austrian Government used this to support the reinstatement of internal border controls within the scope of Article 25 SBC.⁶⁹ Using the

60 Commission opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria, C (2015) 7100, para 40.

61 Ibid, para. 37 and further.

62 Council decision 8835/16 of 12 May 2016, available at <<https://data.consilium.europa.eu/doc/document/ST-8835-2016-INIT/en/pdf>>.

63 Ibid, para 1 and 10.

64 Ibid, para 11 and 17. See also S Carrera, *The State of the Schengen Area in the Light of the 2019 European Parliament Election* (RSCAS Policy Paper, December 2019) p 3, footnote 8.

65 Council decision 8835/16 of 12 May 2016, paras 19-20.

66 Communication from the Commission to the European Parliament and the Council on preserving and strengthening Schengen, COM/2017/0570 final, available at <<https://op.europa.eu/de/publication-detail/-/publication/085a4460-a428-11e7-9ca9-01aa75ed71a1/language-en>>; See also S Carrera, *The State of the Schengen Area in the Light of the 2019 European Parliament Election* (RSCAS Policy Paper, December 2019) p 4.

67 See Council Document 15829/17, available at <<https://data.consilium.europa.eu/doc/document/ST-15829-2017-INIT/x/pdf>>.

68 Council Document 13018/19, available at <<https://data.consilium.europa.eu/doc/document/ST-13018-2019-INIT/x/pdf>> and Council Document 13207/17, available at <<https://data.consilium.europa.eu/doc/document/ST-13207-2017-INIT/x/pdf>>.

69 S Carrera, *The State of the Schengen Area in the Light of the 2019 European Parliament Election* (RSCAS Policy Paper, December 2019) p 4.

‘deficiencies at the external border of the Union’ as general ground for reintroduction of border controls has also become practice in various other Member States.⁷⁰

Using ‘deficiencies at external borders’ in order to sustain grounds invoked under Article 25 SBC, is insufficient and flawed for two reasons. First, the mention of ‘deficiencies at external border’ is insufficient in itself to establish a threat to public policy and internal security. In 2017, the European Parliament insisted that the reintroduction of border controls constitutes a mere perception of threats to public policy and internal security, rather than being sound evidence of their actual existence.⁷¹

Second, only the Council may act to protect the common interests within the area without internal borders ‘where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control’ on the basis of Article 29 SBC. In March 2016, the Commission stated that if ‘migratory pressures and the serious deficiencies in external border control’ persevered, it would propose the operationalisation of Article 29 SBC.⁷² As we have seen above, this happened in October 2016 when the Council adopted a recommendation for extending temporary border controls.⁷³

3.4 Proportionality of the reintroduction of internal border controls

This section will discuss the necessity and proportionality of the (prolonged) reintroduction of internal border controls on migratory grounds. First, it will be shown that other Member State have used alternatives to the reintroduction of such controls, which indicated that this reintroduction was not used as a measure of last resort. Moreover, we will discuss the proportionality of the reintroduction of internal border controls on migratory grounds. In this context, two specific interests have to be taken into account next to the interest of the free movement of persons and economic interests: the fundamental rights of asylum seekers and refugees and the principle of solidarity.

3.4.1 Alternatives used in other EU Member States

Though many Member States have resorted to a single use of Article 25 SBC in order to tackle the increased migratory flows at their respective borders, it should be pointed out that alternative approaches have also been developed.⁷⁴ In six Schengen states (Belgium, Denmark, Finland, Luxembourg, Netherlands and Switzerland) relatively large numbers of asylum requests were filed during the third quarter of 2015. However, instead of introducing controls at their internal borders, they intensified the (police) controls in the zones behind their internal borders.⁷⁵

⁷⁰ Council Document 8597/19, available at <<https://data.consilium.europa.eu/doc/document/ST-8597-2019-INIT/en/pdf>>; Council Document 8221/19, available at <<https://data.consilium.europa.eu/doc/document/ST-8221-2019-INIT/en/pdf>>; Council Document 8023/18, available at <<https://data.consilium.europa.eu/doc/document/ST-8023-2018-INIT/en/pdf>>; Council Document 13205/17, available at <<https://data.consilium.europa.eu/doc/document/ST-13205-2017-INIT/en/pdf>>.

⁷¹ European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area (2017/2256(INI)).

⁷² European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Back to Schengen - A Roadmap, COM(2016)120 final.

⁷³ Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, Council Document 8835/16, available at <<https://data.consilium.europa.eu/doc/document/ST-8835-2016-INIT/en/pdf>>.

⁷⁴ Council Document 13170/15, available at <<https://data.consilium.europa.eu/doc/document/ST-13170-2015-INIT/en/pdf>>.

⁷⁵ E Guild et al, *What is happening to the Schengen borders?* (CEPS, 2015) p 9.

By using the aforementioned approach of police checks, the Government of the Netherlands used Article 21 SBC in order to develop spot checks for the purpose of combating illegal migration and various forms of cross-border crimes. The Dutch response to the increased migratory flows was to instate the Mobile Security Supervision and consequently intensify the frequency and duration of mobile border checks in the border areas.⁷⁶ This alternative also envisaged situations whereby the aerial controls, controls on sea and land can be intensified in times of ‘a sudden or expected increase of irregular migrants crossing the border’.⁷⁷ It is worth mentioning that this approach has been scrutinised by the CJEU and has been subjected to strict limits, in order to ensure that the exercise of these powers does not produce an effect equivalent to border controls.⁷⁸

It can be argued that this approach is a result of a *bona fide* weighing up of the last resort element of the proportionality and the less intrusive measures test. The use of Article 25 SBC is thereby reserved for situations of grave threats to public policy and internal security. Most importantly, this approach resulted in sporadic and more targeted police checks, without arbitrary exercise of checks on every vehicle by entering or exiting the state territory.⁷⁹ It may be argued that the Netherlands, by doing this, avoided further limitations to the freedom of movement rights of EU citizens and third-country nationals.⁸⁰

3.4.2 Fundamental rights of asylum seekers and refugees

When assessing the proportionality of the prolonged application of Articles 25 SBC by the Member States, the fundamental human rights obligations of asylum seekers and refugees should be considered. According to Article 14(1) SBC, ‘a third-country national who does not fulfil all the entry conditions [...] shall be refused entry to the territories of the Member States [...] *without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.*’⁸¹ The reintroduction of internal border control was a reaction to the mass influx of asylum seekers and refugees from Southern European countries such as Greece. This resulted in a situation where asylum seekers and refugees were not allowed to move on rapidly to seek asylum in Member States with properly functioning asylum systems.⁸²

Where it concerns Greece, there were, and still are, serious concerns about the situation of asylum seekers. In 2011, judgments by both the ECtHR and the CJEU, stopped any Dublin transfer of asylum seekers to Greece by other Member States. According to the courts, there was a risk of violation of Article 3 ECHR respectively Article 4 of the Charter, on the basis of the systemic deficiencies in the asylum procedures and reception conditions in Greece.⁸³ By closing the internal border asylum seekers are stuck in a situation, which violates their fundamental rights. This is confirmed by the number of

⁷⁶ J Brouwer, M van der Woude and J van der Leun, ‘Op de grens van het vreemdelingentoezicht: discretionaire beslissingen binnen het Mobiel Toezicht Veiligheid’ (2017) *Tijdschrift voor Veiligheid* pp 74-79.

⁷⁷ Ibid.

⁷⁸ CJEU Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] and CJEU Case C-278/12 *Adil* [2012].

⁷⁹ M van der Woude, *The Dutch Response to the Refugee Crisis* (2015), available at <<https://leidenlawblog.nl/articles/the-dutch-response-to-the-refugee-crisis>>.

⁸⁰ ‘Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness’. See CJEU Case C-127/08 *Metock and Others* [2008], para 84.

⁸¹ Emphasis added.

⁸² Policy Department for Citizens' Rights and Constitutional Affairs, *The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016* (March 2018) p 8.

⁸³ ECtHR 21 January 2011, *M.S.S. v Belgium and Greece*, Appl no 30696/09 and CJEU Joined Cases C-411/10 and C-493/10 *N. S. and others* [2011].

complaints regarding the violation of Article 3 ECHR in the Greek hotspots lodged before the European Court of Human Rights (henceforth ECtHR).⁸⁴

This seems to be contrary to Article 3 SBC, which guarantees that the scope of the Regulation is without prejudice to ‘the rights of refugees and persons requesting international protection, in particular as regards *non refoulement*’. Moreover, it may infringe Article 4 SBC, which provides that measures must comply with the EU Charter of Fundamental Rights and the Geneva Convention when applying the Schengen Borders Code.

Furthermore, Member States reintroducing internal border controls often apply *de facto* border procedures at their internal borders. This happens for example at the French border with Italy and Spain and the border between Italy and Slovenia. Such procedures evade the rules applicable under the Dublin Regulation. Moreover, asylum seekers are not granted the procedural guarantees applicable to border procedures laid down in Article 43 of the Procedures Directive.⁸⁵ This situation therefore jeopardises the integrity of the Common European Asylum System.⁸⁶

3.4.3 The principle of solidarity

Finally, it may be argued that the reintroduction of internal border controls is not in line with the ‘principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States’.⁸⁷ On the one hand, the reintroduction of internal border controls is used as a sanction to those States, which are not effectively controlling their external borders. Whereas, on the other hand, the Member States with external borders are reluctant or unable to manage the registration of the mass influx of asylum seekers in order to activate the Dublin mechanism.⁸⁸ The closure of the internal borders resulted in itself to an even greater overload of the asylum systems in the EU countries with external borders.

Member States may save considerable fiscal costs by managing to turn away significant numbers of migrants that arrive from other EU countries. However, those costs will be pushed to another Member State. To reduce overall costs and to save the Schengen as a whole, a coordinated response with shared administrative and fiscal responsibility will be needed.⁸⁹ Therefore, reintroduction of internal borders seems to be an unnecessary and disproportionate answer to the current migration flows.

3.5 Cumulation of internal border control measures

⁸⁴ See for example ECtHR 25 January 2018, *J.R. and others v Greece*, Appl no 22696/16 and ECtHR 3 October 2019, *Kaak v Greece*, Appl no 34215/16. See also Ph Schönberger, *Lebensbedingungen im hotspot auf Samos verletzen die EMRK* (2020), available at <<https://rlc-journal.org/2020/lebensbedingungen-im-hotspot-auf-samos-verletzen-die-emrk/>>.

⁸⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] *OJ L 180*.

⁸⁶ European Parliamentary Research Service, *Asylum procedures at the border, European Implementation Assessment* (2020) available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU\(2020\)654201_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf) pp 33 and 42

⁸⁷ See for example recital 2 Preamble RAPD and Artt 3(3) and 4(3) TEU.

⁸⁸ E Guild et al, *What is happening to the Schengen borders?* (CEPS, 2015) p 11.

⁸⁹ EPRS, *Cost of Non-Schengen: the Impact of Border Controls Within Schengen on the Single Market* (April 2016) p 67.

Several Member States, including Austria, have now been carrying out internal border controls on (mostly) migratory grounds for over five years. As was set out in section 2.6, Articles 25 and 29 SBC outline a clear and foreseeable procedural application and clear non-cumulative temporal rules. By prolonging internal border control measures over and over again, Member States have circumvented the temporal scope of Articles 25 and 29 SBC.

It may be argued that this is contrary to the principle of legal certainty, which requires that 'Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.'⁹⁰ The principle of legal certainty is embedded in Article 52(1) of the Charter, which requires a legal basis for any limitation of the fundamental rights and freedoms as protected in the Charter, such as the right to free movement. Where the implementation of EU law and SBC is unforeseeable, the proper functioning of the area without internal borders and safeguarding of the four freedoms outlined in Article 26 TFEU comes at a great cost.⁹¹

Moreover, it is contended that by endlessly prolonging internal border controls Member States have been resorting to an arbitrary application of EU law. This may be considered contrary to the principle of the rule of law, which is a core value of EU law.⁹² The primary function of the principle ensures that supremacy of laws and compliance with the EU legislation remain respected across the Union.

3.6 Conclusion

It should be concluded that the reintroduction of internal border controls may have been justified in the light of the high migratory pressure on the Member States in the period 2015-2017. However, the extensive prolonging of such border controls after November 2017, when the possibility of extending such controls on the basis of Article 29 SBC was exhausted, should be considered contrary to EU law for several reasons. First, as was pointed out in sections 2.6 and 3.5 cumulation of reintroduction measures on the same ground (in this case migration flows and deficiencies at the external border) are simply not allowed under Articles 25 and 29 SBC. Moreover, the ground that there are deficiencies at the external border cannot be invoked in the context of a reintroduction measure on the basis of Article 25 SBC. The endless prolonging of internal border controls without a legal basis may be considered contrary to the principle of legal certainty and the principle of the rule of law.

Apart from that, the continuation of internal border controls on migratory grounds should be considered unnecessary and disproportionate. It is unnecessary, because after 2017, the migratory pressure on Member States, such as Austria has diminished. Moreover, as was shown by several Member States, there were alternatives available to internal border controls (even during the peak of the influx in 2015-2016), such as police controls. Finally, internal border controls may lead to infringements of fundamental rights of asylum seekers and refugees, circumvention of the guarantees provided to asylum seekers by the Common European Asylum System and undermine the solidarity between the Member States.

⁹⁰ CJEU Case C-345/06 *Heinrich* [2009] para 44, Case 325/85 *Ireland v Commission* [1987] and General Court Case T-548/14 *Spain v Commission* [2016].

⁹¹ EPRS, *Cost of Non-Schengen: the Impact of Border Controls Within Schengen on the Single Market* (April 2016).

⁹² See Art 2 TEU. See also CJEU Case C-294/83 *Les Verts v Parliament* [1986] para 23.

4. The Right of Free Movement of EU Citizens

The Austrian authorities do not only subject third-country nationals to border checks at its internal border, but also EU citizens. At the internal borders, EU citizens are treated the same as third-country nationals. They are not provided separate lanes, subjected to the same border checks and may be imposed a fine if they fail to cooperate with these checks. The referring court questioned whether such practice is in line with EU law.

This chapter therefore examines whether the right to free movement of EU citizens includes a right not to be subject to checks at internal borders, subject to the exceptions and conditions laid down in the treaties. The answer to this question is closely related to the question whether the right to free movement precludes the application of national legislation, which obliges a person to present a passport or identity card on entry via an internal border, even where the particular check at the internal border is contrary to the provisions of EU law on pain of receiving an administrative penalty. The chapter concludes by answering the second and third preliminary questions.

This chapter will first briefly analyse the legislative history and background of the right to free movement of EU citizens. Next, it explains the fundamental nature of the right to free movement of EU citizens and the conditions for the limitations of this right. It will also argue that subjecting EU citizens to border checks, requiring them to show a passport or identity card and imposing fines for failure to do so, constitute a limitation of their freedom of movement. Finally, it argues that such limitation should have a basis in EU law, which means in the context of internal border controls that the conditions of Articles 25 and 29 SBC must be fulfilled. Moreover, it explains that, if internal border controls are legally based on Article 25 or 29 SBC, EU citizens should be subjected to minimum border checks and should be provided separate lanes, which limits the negative effects of such border checks.

4.1. Legislative History

The meaning of the right to freedom of movement has changed considerably since its conception in 1957. It was originally established as part of the European Economic Community because the free movement of workers was an essential element to the common market.⁹³ In 1990 the right of entry and residence was extended to those who were no longer employed, students and family members.⁹⁴ Since the Treaty of Maastricht, all EU citizens, regardless of their status or occupation, have the right to move and reside freely.⁹⁵

The case law of the CJEU has been fundamental to increasing the protection of free movement. It informed the text of the Citizenship Directive (Directive 2004/38/EC), which consolidated the diverse

⁹³ Treaty of Rome; Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56; Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257.

⁹⁴ Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180; Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L 180/30 and Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180.

⁹⁵ Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. C-326/47-326/390, Arts 20 and 21.

Directives concerning free movement into one comprehensive piece of legislation centred around EU Citizenship. This Directive has remained the main source of free movement rights.⁹⁶

4.2 The fundamental right to free movement and its limitations

The Citizenship Directive grants a right to EU citizens to enter another Member State and reside there. The Directive is based on Article 21(1) TFEU, which links the right to move and reside freely with EU citizenship, established by Article 20 of the TFEU. It is also established as a specific right in Article 45 of the Charter, which states that every citizen of the Union has the right to move and reside freely within the territory of the Member States.⁹⁷

The right to free movement of EU citizens is not absolute.⁹⁸ Article 21(1) TFEU expressly states that the right can be subject to limitations in the Treaties and by the measures adopted to give them effect. The Citizenship Directive and the Schengen Borders Code may be considered to be such measures.

The CJEU has consistently protected the right to free movement when interpreting the provisions of the Citizenship Directive. It emphasises that the right to freedom of movement is - as a fundamental principle of EU law- the general rule. For this reason, the conditions for limiting this right must be construed narrowly and strictly in compliance with the limits imposed by EU law.⁹⁹

Moreover, measures limiting the right to free movement should be proportionate. In this context they should fulfil four requirements:

- they must be applied in a non-discriminatory manner;
- they must be justified by imperative requirements in the general interest;
- they must be suitable for securing the attainment of the objective which they pursue; and
- they must not go beyond what is necessary in order to attain it.¹⁰⁰

Based on these conditions, in order to effectively assess the proportionality of a measure limiting the freedom of movement of EU citizens, the State's objective must be identified. Once the objective has been established as legitimate, it must then be confirmed that 'no other measures could have been equally effective but less restrictive of the freedom in question.'¹⁰¹ Furthermore, the effectiveness of the measure should be examined in detail, along with any supporting evidence. States do have a margin of manoeuvre to apply restrictions on the right to free movement in light of the general interest. However, due to the harmonisation of laws in the area of free movement and immigration, the margin of discretion to Member States to decide on the appropriateness of a measure is limited. This is especially true for measures restricting the provisions in the Citizenship Directive. As

⁹⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158.

⁹⁷ Art 45 of the Charter; CJEU Case C-413/99 *Baumbast* [2002].

⁹⁸ CJEU Joined Cases C-482/01 and C-493/01 *Orfanopoulos* [2004] para 47; Case C-434-10 *Aladzhov* [2011] para 28; See also recital 27 Preamble SBC.

⁹⁹ CJEU Case C-93/18 *Bajratari* [2019] para 35, Case C-140/12 *Brey* [2013] para 70; Case C-413/99 *Baumbast* [2002] para 91; Case C-200/02 *Chen* [2004] para 31-32; Case C-278/94 *Commission v Belgium* [1996] para 39.

¹⁰⁰ CJEU Case C-55/94 *Gebhard* [1995] para 37.

¹⁰¹ CJEU Case C-400/08 *Commission v Spain* [2011] Opinion of Advocate General Sharpston, para 89.

emphasized by the CJEU in the *Brey* case, the state's margin of manoeuvre is limited in two respects: it cannot be used to undermine the Directive's purpose and effectiveness or compromise EU citizen's primary right to move and reside freely within the EU territory.¹⁰²

4.3 Internal border checks and the right to free movement of EU citizens

The subjection of EU citizens to checks at the internal border arguably constitutes a limitation to their freedom of movement. As was explained in section 2.5.3 border checks are increasing queue times when travelling, restrict job mobility and affect the profitability of businesses. This applies even more to a requirement to present a passport or identity card upon entry via an internal border on pain of receiving an administrative penalty. As was explained above, such limitations should be based on a provision of EU law.

4.3.1 A legal basis for border checks on EU citizens at the internal border

The general rule laid down in Article 22 SBC is that 'internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out'. Article 5 of the Citizenship Directive requires specifically with regards to EU citizens that 'no entry visa or equivalent formality be imposed' on them. As long as they show a valid identity card or passport, they are allowed to enter another Member State. Recital 7 of the Directive further states that the formalities connected with the free movement of EU citizens should be clearly defined, without prejudice to the provisions applicable to national border controls.¹⁰³

Where EU citizens are subjected to border checks at an internal border, this should thus be based on Articles 25 or 29 SBC. If the conditions for imposing internal border control laid down in these provisions are not fulfilled, this limitation of the right to free movement (the border check, the requirement to show a passport or identity card and the imposition of a fine in case of a failure to comply with this requirement) cannot be considered legal. The previous chapter concluded that a situation where Member States extend the reintroduction of internal border controls time and again on the basis of migratory grounds, does not comply with the conditions of Articles 25 and 29 SBC.

If the border check of a Union takes place in the context of an internal border control, which can be based on Article 25 or 29 SBC, the next question should be what such check should entail. Article 32 of the SBC states that where border control is reintroduced at internal borders, the relevant provisions on external borders 'shall apply *mutatis mutandis*'. External borders are the Member States' land border, sea borders, airports and other ports, which must be distinguished from the internal borders between Member States.¹⁰⁴ Article 8 SBC covers the rules on border checks on persons at external borders. As a result of Article 32 SBC, the framework in Article 8 SBC must be applied, when border control at internal borders has been reintroduced.

Border checks at external borders are stringent, as they are the first point of contact for travellers to the EU and therefore the different conditions for entry of third-country nationals to the EU territory must be implemented.¹⁰⁵ Specifically, Article 8(2) SBC states that persons enjoying the right of free movement in Union law shall undergo a 'minimum check' in order to establish their

¹⁰² CJEU Case C-140/12 *Brey* [2013] para 71; See also CJEU Case C-508/10 *Commission v Netherlands* [2012], Opinion of Advocate General Bot, paras 54 and 67.

¹⁰³ Recital 7 Preamble Directive 2004/38.

¹⁰⁴ Art 2(2) SBC.

¹⁰⁵ Art 6 SBC.

identities, on the basis of travel documents. Third-country nationals are subject to different, more thorough, checks.¹⁰⁶ The SBC further emphasises that 'in order to reduce waiting times of persons enjoying the Union right of free movement, separate lanes [...] should, where circumstances allow, be provided at border crossing points.'¹⁰⁷ Minimum checks may be considered an effective bridge between allowing some controls to remain, but still enabling free movement to be achieved.¹⁰⁸ This is thus also ensures the proportionality of border checks on EU citizens.

4.3.2 Proportionality

The question remains whether Member States may impose a fine on EU citizens who fail to present a passport or identity card on entry via an internal border. In *Wijsenbeek* the CJEU specifically noted that penalties should not be so disproportionate to create an obstacle to free movement, 'such as a term of imprisonment'.¹⁰⁹ The passport provisions in Article 24(1) of the Austrian law punish illegal entry, which includes crossing the Austrian borders without the necessary identity documents, by a fine of up to €2180 or a prison sentence of up to six weeks.¹¹⁰ It may be argued that such (maximum) punishment may indeed create an obstacle to free movement.

4.4 Conclusion

It should be concluded that EU citizens may only be subjected to border checks, required to show their passport or identity card and imposed a fine for failure to do so at the internal border, where the conditions for reintroduction of internal border controls laid down in Article 25 or 29 are fulfilled. If internal border controls can be based on one of these provisions, it follows from Article 32 SBC read in combination with Articles 8(2) and 10 SBC that EU citizens should be subjected to minimum checks and that (where possible) special lanes should be created in order to reduce waiting times. Finally, a fine imposed on EU citizens who do not comply with the requirement to show their passport or identity card during an internal border control allowed on the basis of Article 25 or 29 SBC, may not be so disproportionate to create an obstacle to free movement.

¹⁰⁶ Art 8(3) SBC.

¹⁰⁷ Recital 16 Preamble SBC and Art 10 SBC.

¹⁰⁸ R Zaiotti, 'Revisiting Schengen: Europe and the emergence of a new culture of border control' (2007), *Perspectives on European Politics and Society*, p 46; F Versteeg, 'Bangemann-wave' is in Europa vervangen door nieuwe controles' (1 March 1994), available at: <https://www.nrc.nl/nieuws/1994/03/01/bangemann-wave-is-in-europa-vervangen-door-nieuwe-7215731-a823947>

¹⁰⁹ CJEU Case C-3778/97 *Wijsenbeek* [1999] para 44.

¹¹⁰ Passgesetz BGBl 839/92.

5. Conclusions and answers to the preliminary questions

This opinion concerned the reintroduction of internal border controls by the Austrian Government under the Schengen Borders Code. This case is significant, as it extends to many other Member States, which have interpreted the SBC and right to free movement in the same manner. The continued prolongation of the measures and the lack of a clear framework risks violating the provisions in the SBC and the fundamental right of EU citizens to free movement of persons.

This expert opinion has separately addressed the two issues of the infringement of the SBC (Chapter 2 and 3) and the restriction on the right to free movement (Chapter 4). Through comprehensive analysis of the legislative background, text and purpose of both the SBC and the Citizenship Directive as well as the CJEU's case law, we answered the preliminary questions posed to the CJEU.

Temporary Reintroduction of Internal Border Controls

The abolishment of internal border controls through the SBC is a stand-out achievement of the EU. There has been a clear history and legislative timeline, which shows how the law has developed into the comprehensive and cooperative system we have today. The purpose of Schengen has always been clear; to allow persons to move freely across Member States without being checked and to create a protective perimeter around the new common space. Hence, the abolishment of internal border controls was established alongside the strengthening of controls at the external borders and the use of common information systems. This bifurcated approach has been key to the success of the Schengen regime.

The Schengen regime relies on solidarity between Member States and therefore the reintroduction of border controls at an internal border based on Article 25 SBC or Article 29 SBC is only allowed in exceptional circumstances. For this reason, internal border controls cannot be reintroduced for any reason. Given their exceptional nature, there must be a serious and substantiated threat to public policy or internal security. Member States cannot simply cite public policy or internal security as a reason without providing sufficient evidence that the measures serve a clear purpose. Internal border controls can only be introduced as a last resort and they must be proportionate to the aim pursued, given their impact on one of the fundamental freedoms of the EU.

The rules in the SBC only allow for internal border controls to be reintroduced for a limited period of time, emphasising their temporary nature. Cumulation of periods of internal border control based on Article 25 and 29 SBC is not allowed where there is no new information regarding the potential serious threat to public policy or internal security.

Reintroduction of internal border controls on migratory grounds

Austria has reintroduced internal border controls in 2015 and they continue until today. The Austrian government has continued to use migratory reasons and deficiencies at the external border as justification for the necessity of reintroducing internal border controls. This extensive prolonging of such border controls should be considered contrary to EU law for several reasons.

First, as was mentioned before the cumulation of reintroduction measures on the same ground (in this case migration flows and deficiencies at the external border) are not allowed under Articles 25 and 29 SBC. Moreover, the ground that there are deficiencies at the external border cannot be invoked in the context of a reintroduction measure on the basis of Article 25 SBC. Finally, the endless

prolonging of internal border controls without a legal basis may be considered contrary to the principle of legal certainty and the principle of the rule of law.

Apart from that, the continuation of internal border controls on migratory grounds should be considered unnecessary and disproportionate. It is unnecessary, because after 2017, the migratory pressure on Member States such as Austria, has diminished. Moreover, as was shown by several Member States, there were alternatives available to internal border controls (even during the peak of the influx in 2015-2016), such as police controls. Internal border controls may also lead to infringements of fundamental rights of asylum seekers and refugees and circumvention of the guarantees provided to asylum seekers by the Common European Asylum System. Finally, the lack of coherence when Member States apply Articles 25 and 29 SBC has detrimental effects not only on the integrity of the whole Schengen acquis but on the rule of law, EU economy, and the principle of solidarity and sincere cooperation with regard to the protection of asylum seekers and refugees.

Free movement of EU citizens

The right to move freely within the EU derives directly from EU citizenship. This right has become a cornerstone of EU integration. The right covers entry and residence in all EU Member States. The CJEU has been fundamental to ensuring the effective exercise of this right for EU citizens and their family members. Any limitations placed on this right must therefore be interpreted strictly, be based on an EU provision and be proportionate.

Subjecting EU citizens to border checks, requiring them to show a passport or identity card in this context and imposing a fine on them if they refuse to do so, may be considered limitations to their freedom of movement. It was argued that these limitations are only allowed where the conditions for reintroduction of internal border controls laid down in Article 25 or 29 are fulfilled. As was mentioned above, it was concluded earlier that the prolonged application of internal border controls on migratory grounds does not fulfil these conditions.

If border controls can be based on these provisions, the rules applicable at external borders must be applied due to *mutatis mutandis* principle laid down in Article 32 of the SBC. This means that there should be a minimum check for EU citizens. Moreover, Article 10 SBC requires that, where possible, special lanes are created in order to reduce waiting times. Finally, a fine imposed on EU citizens who do not comply with the requirement to show their passport or identity card during an internal border control allowed on the basis of Article 25 or 29 SBC, may not be so disproportionate to create an obstacle to free movement.

On the basis of our research we suggest the CJEU to answer the proposed preliminary questions as follows:

1. EU law precludes domestic legislation in the form of consecutive domestic decrees prolonging border control, which, cumulatively, allow for the reintroduction of border control for a period which exceeds the two year time limit laid down in Article 25 and 29 of the SBC, without a corresponding Council Recommendation pursuant to Article 29 of the SBC.
2. The right to freedom of movement of EU citizens laid down in Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the EU is to be interpreted, especially in light of the principle of absence of checks on persons at internal borders established in Article 22 of the SBC, as meaning that it includes a right not to be subject to checks on persons at internal

borders, subject to the conditions and exceptions listed in the treaties and in particular in the SBC.

3. Article 21(1) TFEU and Article 45 of the Charter preclude the application of national laws imposing fines to EU citizens persons refusing to submit a passport or identity document during internal border controls, where these border controls have been reintroduced or prolonged, contrary to the provisions of EU law.

Annex I

This annex provides an overview of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 and further of the Schengen Borders Code

NB	Member State	Duration	Reasons/Scope
241	Finland	23/11/2020-13/12/2020	Coronavirus COVID-19; all internal borders
240	Austria	12/11/2020-11/05/2021	Secondary movements, risk related to terrorists and organized crime, situation at the external borders; land borders with Hungary and with Slovenia
239	Norway	12/11/2020-09/02/2021	Coronavirus COVID-19; all internal borders
238	Finland	11/11/2020-22/11/2020	Coronavirus COVID-19; all internal borders
237	Hungary	31/10/2020-29/11/2020	Coronavirus COVID-19; all internal borders
236	Germany	12/11/2020-11/05/2021	Secondary movements, situation at the external borders; land border with Austria
235	Norway	13/10/2020-11/11/2020	Coronavirus COVID-19; all internal borders
234	Denmark	12/11/2020-11/05/2021	Terrorist threats, organized criminality threats, Coronavirus COVID-19; to be determined but may concern all internal borders
233	Sweden	12/11/2020-11/05/2021	Terrorist threats, shortcomings at the external borders; to be determined but may concern all internal borders
232	France	01/11/2020-30/04/2020	Terrorist threats, situation at the external borders: all internal borders
231	Finland	12/10/2020-10/11/2020	Coronavirus COVID-19; all internal borders

230	Finland	18/09/2020 – 18/10/2020	Coronavirus COVID-19; borders with Lithuania and Poland
229	Finland	18/09/2020 – 18/10/2020	Coronavirus COVID-19; borders with Iceland, Norway, Sweden, Germany, Slovakia, Estonia
228	Norway	14/9/2020 – 13/10/2020	Coronavirus COVID-19: all internal borders

227	Hungary	30/9/2020 – 30/10/2020	Coronavirus COVID-19: all internal borders
226	Finland	18/09/2020 – 18/10/2020	Coronavirus COVID-19; borders with Austria, Belgium, Switzerland, Czech Republic, Denmark, Greece, Italy, Hungary, Spain, France, Luxembourg, The Netherlands, Malta, Portugal, Sweden, Slovenia
225	Hungary	01/09/2020- 30/9/2020	Coronavirus COVID-19: to protect public health, all internal borders
224	Finland	24/08/2020- 18/09/2020	Coronavirus COVID-19; borders with Austria, Belgium; Switzerland, Czech Republic, Germany, Denmark, Spain, France, Iceland, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Sweden, Slovenia
223	Norway	14/08/2020- 13/09/2020	coronavirus COVID-19; internal air, land and sea borders
222	Lithuania	16/08/2020- 14/09/2020	coronavirus COVID-19; internal air and sea borders
221	Finland	10/08/2020- 08/09/2020	coronavirus COVID-19; borders with Spain, Luxembourg, Portugal, Poland, France, Sweden, Czechia, Austria, Slovenia and Switzerland
220	Finland	27/07/2020- 25/08/2020	coronavirus COVID-19; borders with Spain, Luxembourg, Portugal, Poland, France, Sweden, Czechia, Austria, Slovenia and Switzerland
219	Lithuania	17/07/2020- 15/08/2020	coronavirus COVID-19; internal air and sea borders
218	Finland	15/07/2020- 11/08/2020	coronavirus COVID-19; borders with Spain, Luxembourg, Portugal, Poland, France, Sweden and Czechia

217	Spain	21/06/2020-30/06/2020	coronavirus COVID-19; borders with Portugal
216	Portugal	16/06/2020-30/06/2020	coronavirus COVID-19; land border with Spain
215	Germany	16/06/2020-21/06/2020	coronavirus COVID-19; air borders with Spain (lifting the controls reintroduced on the basis of coronavirus at the borders with Austria, Switzerland, France, Denmark and Italy as of 15 June 2020)
214	Iceland	16/06/2020-22/06/2020	coronavirus COVID-19; all internal borders

213	Finland	15/06/2020-14/07/2020	coronavirus COVID-19; all internal borders, except borders with Norway, Denmark, Iceland, Estonia, Latvia and Lithuania
212	Lithuania	17/06/2020-16/07/2020	coronavirus COVID-19; internal air and sea borders (lifting the border controls at the land border with Poland as of 12 June 2020)
211	Switzerland	09/06/2020-15/06/2020	coronavirus COVID-19; all internal air and land borders except from borders with Liechtenstein
210	Czechia	14/06/2020-30/06/2020	coronavirus COVID-19; all internal air borders (lifting the border controls at the internal land borders as of 5 June 2020)
209	Spain	08/06/2020-21/06/2020	coronavirus COVID-19; all internal borders
208	Iceland	04/06/2020-15/06/2020	coronavirus COVID-19; all internal borders
207	Belgium	09/06/2020-14/06/2020	coronavirus COVID-19; all internal borders
206	Austria	01/06/2020-15/06/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia
205	Lithuania	01/06/2020-16/06/2020	coronavirus COVID-19; land border with Poland, sea borders, air borders

204	Slovakia	28/05/2020- 26/06/2020	coronavirus COVID-19, all internal borders
203	Spain	24/05/2020- 07/06/2020	coronavirus COVID-19; all internal borders
202	Estonia	18/05/2020- 16/06/2020	coronavirus COVID-19; internal air and sea borders (lifting the border controls at the internal land borders as of 15 May 2020)
201	Iceland	14/05/2020- 03/06/2020	coronavirus COVID-19; all internal borders
200	Germany	16/05/2020- 15/06/2020	coronavirus COVID-19; land and air borders with Austria, Switzerland, France, Denmark, Italy and Spain, sea border with Denmark;
199	Portugal	15/05/2020- 15/06/2020	coronavirus COVID-19; land border with Spain

198	Spain	15/05/2020- 24/05/2020	coronavirus COVID-19; all internal sea and air borders
197	Poland	14/05/2020- 12/06/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
196	Slovakia	08/05/2020- 27/05/2020	coronavirus COVID-19, all internal borders
195	Hungary	12/05/2020- 11/11/2020	coronavirus COVID-19; all land and air borders
194	Spain	10/05/2020- 24/05/2020	coronavirus COVID-19; all land borders
193	Finland	14/05/2020- 14/06/2020	coronavirus COVID-19; all internal borders
192	Lithuania	14/05/2020- 31/05/2020	coronavirus COVID-19; all internal borders
191	Czechia	14/05/2020- 13/06/2020	coronavirus COVID-19; land borders with Germany and Austria, air borders

190	Austria	08/05/2020-31/05/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia
189	Iceland	04/05/2020-15/05/2020	coronavirus COVID-19; all internal borders
188	Poland	04/05/2020-13/05/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
187	Portugal	05/05/2020-15/05/2020	coronavirus COVID-19; land border with Spain
186	Germany	05/05/2020-15/05/2020	coronavirus COVID-19; land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark
185	Czechia	24/04/2020-14/05/2020	coronavirus COVID-19; land borders with Germany and Austria, air borders
184	Switzerland	02/05/2020-08/06/2020	coronavirus COVID-19; all internal air and land borders except from borders with Liechtenstein
183	Norway	05/05/2020-16/05/2020	coronavirus COVID-19; all internal borders

182	Belgium	08/05/2020-08/06/2020	coronavirus COVID-19; all internal borders
181	Spain	26/04/2020-10/05/2020	coronavirus COVID-19; all land borders
180	Hungary	01/05/2020-11/05/2020	coronavirus COVID-19; all land and air borders
179	Estonia	01/05/2020-17/05/2020	coronavirus COVID-19; all internal borders
178	Austria	28/04/2020-07/05/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia
176	Lithuania	28/04/2020-14/05-2020	coronavirus COVID-19; all internal borders

175	Iceland	24/04/2020-04/05/2020	coronavirus COVID-19; all internal borders
174	Austria	12/05/2020-11/11/2020	secondary movements, risk related to terrorists and organized crime, situation at the external borders, risk of Coronavirus causing additional migrant movements; land borders with Hungary and with Slovenia.
173	Belgium	19/04/2020-08/05/2020	coronavirus COVID-19; all internal borders
172	Slovakia	17/04/2020-07/05/2020	coronavirus COVID-19, all internal borders
171	Germany	15/04/2020-05/05/2020 12/05/202011/11/2020	coronavirus COVID-19; internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark secondary movements, situation at the external borders; land border with Austria
171	Estonia	15/04/2020-01/05/2020	coronavirus COVID-19; all internal borders
170	Portugal	15/04/2020-05/05-2020	coronavirus COVID-19; land border with Spain

169	Norway	15/04/2020-05/05/2020 15/05/2020-13/08/2020 12/05/2020-12/11/2020	coronavirus COVID-19; all internal borders coronavirus COVID-19; all internal borders terrorist threats, secondary movements; ports with ferry connections with Denmark, Germany and Sweden;
168	Poland	14/04/2020-03/05/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
167	Hungary	11/04/2020-01/05/2020	coronavirus COVID-19; all land and air borders

166	Slovakia	08/04/2020- 17/04/2020	coronavirus COVID-19, all internal borders
165	Spain	11/04/2020- 26/04/2020	coronavirus COVID-19; all land borders
164	Austria	10/04/2020- 27/04/2020	coronavirus COVID-19; land borders with Czechia and Slovakia
163	Lithuania	13/04/2020- 27/04/2020	coronavirus COVID-19; all internal borders
162	Switzerland	12/04/2020- 02/05/2020	coronavirus COVID-19; all internal air and land borders except from borders with Liechtenstein
161	Sweden	12/05/2020- 12/11/2020	terrorist threats, shortcomings at the external borders; to be determined but may concern all internal borders
160	Denmark	12/05/2020- 12/11/2020	coronavirus COVID-19 (to the extent necessary), terrorist threats, organized criminality; all land, air and sea borders. After lifting the COVID-19 travel restrictions, the border controls will be limited to the Danish land and sea borders with Germany and Sweden (Øresundsforbindelsen).
159	Austria	08/04/2020- 27/04/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland and Liechtenstein
158	Finland	14/04/2020- 13/05/2020	coronavirus COVID-19; all internal borders
157	Switzerland	04/04/2020- 24/04/2020	coronavirus COVID-19; all air borders except air borders with Liechtenstein

156	Czechia	04/04/2020- 24/04/2020	coronavirus COVID-19; land borders with Germany and Austria, air borders
155	France	01/05/2020- 31/10/2020	continuous terrorist threat and the risk of terrorists using the vulnerability of States due to COVID-19 pandemics, support to measures aiming at containing the spread of virus; all internal borders
154	Belgium	30/03/2020- 19/04/2020	coronavirus COVID-19; all internal borders

153	Portugal	26/03/2020-15/04/2020	coronavirus COVID-19; land border with Spain
152	Norway	26/03/2020-15/04/2020	coronavirus COVID-19; all internal borders
151	Spain	27/03/2020-11/04/2020	coronavirus COVID-19; all land borders
150	Germany	26/03/2020-15/04/2020	coronavirus COVID-19; internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark
149	Poland	25/03/2020-13/04/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
148	Lithuania	24/03/2020-13/04/2020	coronavirus COVID-19; all internal borders
147	Switzerland	25/03/2020-04/04/2020	coronavirus COVID-19; all air borders except air borders with Liechtenstein
146	Estonia	27/03/2020-15/04/2020	coronavirus COVID-19; all internal borders
145	Switzerland	28/03/2020-17/04/2020	coronavirus COVID-19; air borders with Italy, France, Germany, Austria and Spain
		26/03/2020-15/04/2020	coronavirus COVID-19; land borders with France, Germany and Austria
		23/03/2020-12/04/2020	coronavirus COVID-19; land border with Italy
142	Belgium	20/03/2020-30/03/2020	coronavirus COVID-19; all internal borders
141	Germany	19/03/2020-29/03/2020	coronavirus COVID-19; air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea borders with Denmark
140	Austria	18/03/2020-07/04/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland and Liechtenstein

139	Hungary	22/03/2020- 11/04/2020	coronavirus COVID-19; land borders with Slovenia, Austria and Slovakia, all air borders
138	Switzerland	18/03/2020- 28/03/2020	coronavirus COVID-19; air borders with Spain, Italy, France, Germany and Austria
137	Finland	19/03/2020- 13/04/2020	coronavirus COVID-19; all internal borders
136	Spain	17/03/2020- 26/03/2020	coronavirus COVID-19; all land borders
135	Portugal	16/03/2020- 26/03/2020	coronavirus COVID-19; land border with Spain
134	Switzerland	16/03/2020- 26/03/2020	coronavirus COVID-19; land borders with France, Germany and Austria
133	Norway	16/03/2020- 26/03/2020	coronavirus COVID-19; all internal borders
132	Estonia	17/03/2020- 27/03/2020	coronavirus COVID-19; land borders with Latvia, air borders, sea borders
131	Czechia	18/03/2020- 04/04/2020	coronavirus COVID-19; land borders with Germany and Austria, air borders
130	Germany	16/03/2020- 26/03/2020	coronavirus COVID-19; land borders with Denmark, Luxembourg, France, Switzerland and Austria.
129	Lithuania	14/03/2020- 24/03/2020	coronavirus COVID-19; all internal borders
128	Poland	15/03/2020- 24/03/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
127	Denmark	12/11/2019 – 12/05/2020	coronavirus COVID-19, terrorist threats, organized criminality from Sweden; all land, air and sea borders
127	Austria	14/03/2020- 24/04-2020	coronavirus COVID-19; land borders with Switzerland and Liechtenstein

126	Switzerland	13/03/2020- 23/03/2020	coronavirus COVID-19; land border with Italy
125	Czechia	14/03/2020- 18/03/2020	coronavirus COVID-19; land borders with Austria and Germany, air borders
124	Hungary	12/03/2020- 22/03/2020	coronavirus COVID-19; land borders with Austria and Slovenia
123	Austria	11/03/2020- 21/03/2020	coronavirus COVID-19; land border with Italy
122	Spain	28/11/2019- 13/12/2019	XXV United Nations Conference on Climate Change (COP25) in Madrid; Air borders (mainly Madrid and Barcelona airports), sea borders, mainly ports in northern Spain, land border with France, keeping the usual authorized crossing points.
121	Norway	12/11/2019 – 12/05/2020	terrorist threats, secondary movements; ports with ferry connections with Denmark, Germany and Sweden;
121	Sweden	12/11/2019 – 12/05/2020	terrorist threats, shortcomings at the external borders; to be determined but may concern all internal borders;
120	Denmark	12/11/2019 – 12/05/2020	terrorist threats, organized criminality from Sweden; land border with Germany and with Sweden, ferry connections to Germany and to Sweden, until 12 May 2020;
119	Austria	12/11/2019 – 12/05/2020	coronavirus COVID-19 (as of mid-March), secondary movements, risk related to terrorists and organized crime, situation at the external borders; land borders with Hungary and with Slovenia;
118	Germany	12/11/2019 – 12/05/2020	secondary movements, situation at the external borders; land border with Austria;
117	France	31/10/2019- 30/04/2020	coronavirus COVID-19 (as of beginning of March), persistent terrorist threat, upcoming high-profile political event in Paris, secondary movements; all internal borders;

116	Norway	12/05/2019- 12/11/2019	security situation in Europe; all internal borders with an initial focus on ferry connections with Denmark, Germany and Sweden;
115	Sweden	12/05/2019- 12/11/2019	serious threat to public policy and internal security; to be determined but may concern all internal borders;
114	Denmark	12/05/2019- 12/11/2019	severe threat to public order and internal security; internal border with Germany (land and ports with ferry connections)
113	Austria	12/05/2019- 12/11/2019	security situation in Europe and continuous significant secondary movements; land borders with Hungary and with Slovenia;
112	Germany	12/05/2019- 12/11/2019	migration and security policy; land border with Austria
111	France	01/05/2019- 31/10/2019	Terrorist threats, situation at the external borders
110	Poland	10-16/02/2019	Ministerial to Promote a Future of Peace and Security in the Middle East; all internal borders
109	Sweden	12/02/2019 – 11/05/2019	serious threat to public policy and internal security; all internal borders
108	Poland	22/11/2018 - 16/12/2018	climate conference COPT 24, all internal borders
107	Austria	12/11/2018 - 11/05/2019	security situation in Europe and threats resulting from the continuous significant secondary movements; land borders with Hungary and with Slovenia
106	Norway	12/11/2018 - 11/05/2019	security situation in Europe and threats resulting from the continuous significant secondary movements; all internal borders with an initial focus on ferry connections with Denmark, Germany and Sweden
105	Sweden	12/11/2018 - 11/02/2019	serious threat to public policy and internal security; all internal borders
104	Denmark	12/11/2018 - 11/05/2019	persistent and severe threat to public order and internal security; all internal borders with an initial focus on the land border with Germany and ports with connection to Germany

103	Germany	12/11/2018 - 11/05/2019	threats resulting from the continuous significant secondary movements; land border with Austria
102	France	01/11/2018 - 30/04/2019	terrorist threats, situation at the external borders, upcoming high-level political meetings
101	Austria	17/09/2018- 21/09/2018	informal meeting of the European Council in Salzburg; border Salzburg and Upper Austria to Germany, border East Tyrol and Carinthia to Italy, Salzburg Airport (all arriving flights)
100	Austria	09/07/2018 – 13/07/2018	informal meeting of Justice and Home Affairs Ministers in Innsbruck; border Tyrol to Germany, border North Tyrol to Italy, Innsbruck Airport (all arriving flights).
99	Norway	12/05/2018 – 11/11/2018	security situation in Europe and threats resulting from the continuous significant secondary movements; all internal borders with an initial focus on ferry connections with Denmark, Germany and Sweden
98	Sweden	12/05/2018 – 11/11/2018	continuous serious threat to public policy and internal security; all internal borders
97	Denmark	12/05/2018 – 11/11/2018	security situation in Europe and threats resulting from the continuous significant secondary movements; all internal borders with an initial focus on the land border with Germany and ports with connection to Germany
96	Germany	12/05/2018 – 11/11/2018	security situation in Europe and threats resulting from the continuous significant secondary movements; land border with Austria
95	Austria	12/05/2018 – 11/11/2018	security situation in Europe and threats resulting from the continuous significant secondary movements; land borders with Hungary and with Slovenia
94	France	30/04/2018- 30/10/2018	persistent terrorist threat; all internal borders
93	Sweden	12-19/11/2017	Social Summit for Fair Jobs and Growth; Gothenburg Landvetter Airport and Svinesund (Sweden/Norway border)
92	Norway	12/11/017 - 12/05/2018	security situation in Europe and threats resulting from the continuous significant secondary movements; ferry connections with Denmark, Germany and Sweden

91	Sweden	12/11/2017 - 12/05/2018	security situation in Europe and threats resulting from the continuous significant secondary movements; selected harbours in Police Regions South and West and at the Öresund Bridge;
90	Denmark	12/11/017 - 12/05/2018	security situation in Europe and threats resulting from the continuous significant secondary movements; internal border with Germany;
89	Germany	12/11/017 - 12/05/2018	security situation in Europe and threats resulting from the continuous significant secondary movements; land border with Austria and flight connections from Greece;

88	Austria	12/11/017 - 12/05/2018	Security situation in Europe and threats resulting from the continuous significant secondary movements; land borders with Hungary and with Slovenia
87	France	01/11/2017 – 30/04/2018	Persistent terrorist threat All internal borders
86	Norway	26/08/2017- 25/09/2017	UCI Road World Championship in Bergen Bergen air border
85	Italy	10-30/05/2017	G7 Summit Taormina
84	Norway	11/05/2017- 11/11/2017	In line with Recommendation of the Council of 11 May 2017, in the Norwegian ports with ferry connections to Denmark, Germany and Sweden
83	Sweden	11/05/2017- 11/11/2017	In line with Recommendation of the Council of 11 May 2017, Swedish harbors in the Police Region South and West and at the Öresund bridge
82	Denmark	11/05/2017- 11/11/2017	In line with Recommendation of the Council of 11 May 2017, Danish ports with ferry connections to Germany and at the Danish-German land border
81	Germany	11/05/2017- 11/11/2017	In line with Recommendation of the Council of 11 May 2017, land border with Austria
80	Austria	11/05/2017- 11/11/2017	In line with Recommendation of the Council of 11 May 2017, land border with Slovenia and with Hungary

79	Norway	11/02/2017- 11/05/2017	In line with Recommendation of the Council of 7 February 2017, in the Norwegian ports with ferry connections to Denmark, Germany and Sweden
78	Sweden	11/02/2017- 10/05/2017	In line with Recommendation of the Council of 7 February 2017, Swedish harbors in the Police Region South and West and at the Öresund bridge
77	Denmark	11/02/2017- 11/05/2017	In line with Recommendation of the Council of 7 February 2017, Danish ports with ferry connections to Germany and at the Danish-German land border
76	Germany	11/02/2017- 11/05/2017	In line with Recommendation of the Council of 7 February 2017, land border with Austria
75	Austria	11/02/2017- 11/05/2017	In line with Recommendation of the Council of 7 February 2017, land border with Slovenia and with Hungary

74	France	27/01/2017- 15/07/2017	Persistent terrorist threat - all internal borders
73	Malta	21/01/2017- 09/02/2017	Malta Informal Summit and Joint Valetta Action Plan Meeting - air and sea borders
72	Norway	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, in the Norwegian ports with ferry connections to Denmark, Germany and Sweden
71	Sweden	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, Swedish harbors in the Police Region South and West and at the Öresund bridge
70	Denmark	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, Danish ports with ferry connections to Germany and at the Danish-German land border
69	Germany	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, land border with Austria
68	Austria	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, land border with Slovenia and with Hungary
67	France	26/07/2016- 26/01/2017	In relation to the emergency state as introduced further to the Nice attack All internal borders
66	Poland	04/07/2016 02/08/ 2016	- NATO Summit, World Youth Days and visit of Pope All internal borders

65	Norway	10/06/2016 12/11/ 2016	-	In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC Norwegian ports with ferry connections to Denmark, Germany and Sweden.
64	Sweden	08/06/2016 12/11/2016	-	In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC Swedish harbours in the Police Region South and West and at the Öresund bridge
63	Denmark	01/06/16 12/11/2016	-	In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC Danish ports with ferry connections to Germany and at the Danish-German land border
62	Austria	16/05/2016 12/11/2016	-	In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC, land border with Slovenia and with Hungary
61	Germany	12/05/2016 12/11/2016	-	In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC, land border with Austria

60	France	27/05/2016 - 26/07/2016		EURO 2016, Tour de France All internal borders
59	Belgium	23/02/2016- 22/04/2016		Irregular migrants attempting to travel to UK - Border between the Province of West-Vlaanderen and France
58	Denmark	04/03/2016 02/06/2016	-	Big influx of persons seeking international protection All internal borders, with focus on ferries from Germany and land border with Germany.
57	Norway	15/01/2016 11/06/2016	-	Continues threat of big influx of persons seeking international protection All borders with focus on ports with ferry connections to Norway via internal borders
56	Sweden	10/01/2016- 07/06/2016		Continuous big influx of persons seeking international protection All borders, with special focus on harbours in Police Region South and Police Region West as well as on the Öresund Bridge between Denmark and Sweden.
55	Denmark	04/01/2016 03/03/2016	-	Unexpected migratory flow All internal borders, with focus on ferries from Germany and land border with Germany.

54	France	14/12/2015- 26/05/2016	In relation to the emergency state as introduced further to Paris attacks All internal borders
53	Norway	26/11/2015- 15/01/2016	Unexpected migratory flow All borders with focus on ports with ferry connections to Norway via internal borders
52	Austria	16/11/2015 16/05/2016	- Continuous big influx of persons seeking international protection All borders, with special focus on the land border with Slovenia, Hungary and Italy, subject to possible changes The border can be crossed only at authorised border crossing points (the list attached)
51	Germany	14/11/2015 13/05/2016	- Continuous big influx of persons seeking international protection All borders, with focus on the German-Austrian land border

50	France	13/11- 13/12/2015	21st UN Conference on Climate Change from 30 November to 11 December 2015, internal land borders and air borders
49	Sweden	12/11 - 09/01/2016	Unprecedented influx of persons All borders, with special focus on harbours in Police Region South and Police Region West as well as on the Öresund Bridge between Denmark and Sweden.
48	Malta	9/11 - 31/12/2015	Valetta Conference on Migration and Commonwealth Heads of Government Meeting Terrorist threat and smuggling of illegal migrants Air and sea passenger terminal
47	Hungary	17-26/10/2015	Big influx of persons seeking international protection, land borders with Slovenia
45- 46	Slovenia	17-26/9; 27/9-16/10/2015	Big influx of persons seeking international protection, land borders with Hungary

41-44	Austria	16-25/9; 26/9-15/10; 16/10-4/11/2015; 5/11/2015-15/11/2015	Big influx of persons seeking international protection, all borders, focus on land borders with Italy, Hungary, Slovenia and Slovakia
37-40	Germany	13-22/09; 23/09-12/10; 13/10-1/11/2015; 2/11-13/11/2015	Big influx of persons seeking international protection, all borders with focus on Austrian land borders
36	Germany	16/5-15/6/2015	G7 Summit
35	Estonia	31/8-3/9/2014	Visit of the US President
34	Norway	24-31/7/2014	terrorist threat
33	Belgium	1-6/2014	G7 Summit
32	Netherlands	14-28/3/2014	Netherlands on 14-28 March 2014 Nuclear Security Summit in the Hague
31	Poland	8-23/11/2013	19th session of the Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC), the 9th session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol and the 39th Session of the Subsidiary Bodies in Warsaw (11-22/11/2013) All internal borders
30	Norway	3-12/12/2012	Nobel Peace Prize ceremony in Oslo (10/12/2012)
29	Poland	4/6/2012-1/7/2012	Euro 2012 Football Championships (8/6-1/7/2012) All internal borders
28	Spain	2-4/5/2012	Meeting of the Governing Council of the European Central Bank in Barcelona
27	France	24/10/2011-05/11/2011	G-20 meeting in Cannes (03-04/11/2011)

26	Sweden	22/07/2011, 23h00- 23/07/2011, 09h00	– Bomb explosion in Oslo and shooting on the island Utøya on 22/07/2011
25	Norway	22/07/2011, 17h23- 25/07/2011, 17h00	Bomb explosion in Oslo and shooting on the island Utøya on 22/07/2011
24	Austria	04/06/- 09/06/2011	World Economic Forum (07/06/-09/06/2011)
23	Portugal	16/11- 20/11/2010	NATO Summit in Lisbon (19/11/-20/11)
22	Latvia	24/05- 01/06/2010	NATO Parliamentary Assembly in Riga (28/05-01/06/2010).
21	France	28/05- 02/06/2010	Franco-African Summit in Nice (31/05-01/06/2010).
20	Estonia	17-23/04/2010	Informal meeting of NATO Foreign Ministers in Tallinn (22/23/04/2010).
19	Malta	5-18/04/2010	Visit of Pope Benedict XVI (17-18/04/2010)
18	Denmark	1-18/12/2009	UN Climate Change Conference in Copenhagen (7-18/12/2009). DK-DE and DK-SE borders

17	Norway	27/11/2009– 12/12/2009	Nobel Peace Prize Ceremony in Oslo (10/12/2009).
16	France	27/09/2009	50 th Anniversary of ETA. FR-ES land borders, BCP border complex from Hendaye to Arneguy (14 border crossing points).
15	Spain	26-27/09/2009	Celebration of 'Basque Warrior day' in the Basque Country and Navarra (ES) and in Pyrénées-Orientales (FR) ES-FR land borders in the provinces of Guipuzcoa and Navarra

14	France	19/09/2009, 13h — 19:40	Demonstration by Batasuna in Bayonne. Five FR-ES border crossing points (highway A63, St Jacques international bridge, Béhobie international bridge, Hendaye station, port of Hendaye)
13	Italy	28/06/2009– 15/07/2009	G8 Summit in L'Aquila (10-12/7/2009) Land, air and sea borders
12	France	30/03/2009– 5/04/2009	NATO Summit in Strasbourg (3-4/4/2009) Land and air borders with BE, LU, DE, CH, IT and ES
11	Germany	20/03/2009– 5/04/2009	NATO Summit in Strasbourg, Baden-Baden and Kehl (34/4/2009). Land, air and sea borders
10	Iceland	05-07/03/2009	Visit of <i>MC Hells Angels</i> to the Icelandic Motorcycle club in Reykjavik. Air borders (16 flights checked from SE, DK, NL, FR, DE, and NO)
9	Finland	24/11/2008– 5/12/2008	Meeting of Council of Ministers of OSCE in Helsinki (45/12/2008). Controls mainly at Helsinki-Vantaa airport and at ports of Helsinki and Turku
8	France	27/09/2008, 08h — 18:45	Demonstration on 27 September at 16:00 in Bayonne, supervised by Batasuna. Five FR-ES border crossing points (Hendaye: highway A63, St Jacques international bridge, Béhobie international bridge, Hendaye station, port of Hendaye)
7	Austria	02/06/2008– 01/07/2008	European Football Championship EURO 2008, AT — CH (7/6-29/6/2008). Land and air borders
6	Iceland	2–3/11/2007	Participation of <i>MC Hells Angels</i> at the inauguration of the Icelandic Motorcycle club in Reykjavik (1-4/11/2007). Air borders (14 flights checked from SE, DK, FI, DE and NO)

5	Germany	25/5–9/06/2007	G8 Summit in Heiligendamm/Mecklenburg-Western Pomerania (6-8/6/2007) Land, air and sea borders
4	France	12–16/02/2007	Conference of Heads of States of Africa and France in Cannes (13-16/2/2007). FR-IT border (detailed information provided in the notification)
3	Finland	13–29/11/ 2006	EUROMED meeting in Tampere. Controls mainly at Helsinki-Vantaa, Turku and TamperePirkkala airports and the ports of Helsinki, Hanko and Turku, FI-SE and FI-NO land borders
2	Finland	9–21/10/2006	Informal meeting of Heads of States and Government in Lahti. Controls mainly at Helsinki-Vantaa, Turku and TamperePirkkala airports and the ports of Helsinki, Hanko and Turku, FI-SE and FI-NO land borders
1	France	21/10/2006, 08h – 20:00	Youth Days of radical young Basques in Saint-Pée-sur-Nivelle and demonstration organised in Bayonne by the support committee of Philippe Bidart. FR-ES land border (border crossing point on the highway A63 in Biriadou, St Jacques bridge, Béhobie bridge, Hendaye station)

* In line with the Schengen Borders Code in case of foreseeable events constituting a serious threat to the internal security and public policy the Member States may reintroduce border control at internal borders for a period of up to 30 days or, if from the outset it is known that the serious threat will persist for a period exceeding 30 days, for the foreseeable duration of the threat.

Annex II:

Letters of Notification by the Austrian Authorities

Notification by	Start	End	Reasoning	Border
Austria	02.06.08	01.07.08	European Football Championship EURO 2008, AT — CH (7/6-29/6/2008)	Land and air borders
Austria	04.06.11	09.06.11	World Economic Forum (07/06/-09/06/2011)	?
Austria	16.09.15	25.09.15	Big influx of persons seeking international protection	all borders, focus on land borders with Italy, Hungary, Slovenia and Slovakia
Austria	26.09.15	15.10.15	Big influx of persons seeking international protection	all borders, focus on land borders with Italy, Hungary, Slovenia and Slovakia
Austria	16.10.15	04.11.15	Big influx of persons seeking international protection	all borders, focus on land borders with Italy, Hungary, Slovenia and Slovakia
Austria	05.11.15	15.11.15	Big influx of persons seeking international protection	all borders, focus on land borders with Italy, Hungary, Slovenia and Slovakia
Austria	16.11.15	16.05.16	Continuous big influx of persons seeking international protection	All borders, with special focus on the land border with Slovenia, Hungary and Italy, subject to possible changes. The border can be crossed only at authorised border crossing points (the list attached)
Austria	16.05.16	12.11.16	In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC	land border with Slovenia and with Hungary
Austria	12.11.16	12.02.17	In line with Recommendation of the Council of 11 November 2016	land border with Slovenia and with Hungary
Austria	11.02.17	11.05.17	In line with Recommendation of the Council of 7 February 2017	land border with Slovenia and with Hungary
Austria	11.05.17	11.11.17	In line with Recommendation of the Council of 11 May 2017	land border with Slovenia and with Hungary
Austria	12.11.17	12.05.18	Security situation in Europe and threats resulting from the continuous significant secondary movements	land borders with Hungary and with Slovenia

Austria	12.05.18	11.11.18	security situation in Europe and threats resulting from the continuous significant secondary movements	land borders with Hungary and with Slovenia
Austria	09.07.18	13.07.18	Informal meeting of Justice and Home Affairs Ministers in Innsbruck	border Tyrol to Germany, border North Tyrol to Italy, Innsbruck Airport (all arriving flights).
Austria	17.09.18	21.09.18	Informal meeting of the European Council in Salzburg	border Salzburg and Upper Austria to Germany, border East Tyrol and Carinthia to Italy, Salzburg Airport (all arriving flights)
Austria	12.11.18	11.05.19	security situation in Europe and threats resulting from the continuous significant secondary movements	land borders with Hungary and with Slovenia
Austria	12.05.19	12.11.19	security situation in Europe and continuous significant secondary movements	land borders with Hungary and with Slovenia
Austria	11.03.20	21.03.20	Coronavirus COVID-19	land borders with Italy
Austria	14.03.20	24.04.20	Coronavirus COVID-19	land borders with Switzerland and Liechtenstein
Austria	18.03.20	07.04.20	coronavirus COVID-19	land borders with Germany, Italy, Switzerland and Liechtenstein
Austria	08.04.20	27.04.20	coronavirus COVID-19	land borders with Germany, Italy, Switzerland and Liechtenstein
Austria	10.04.20	27.04.20	coronavirus COVID-19	land borders with Czechia and Slovakia
Austria	28.04.20	07.05.20	coronavirus COVID-19	land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia
Austria	08.05.20	31.05.20	coronavirus COVID-19	land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia
Austria	12.05.20	11.11.20	secondary movement, risk related to terrorists and organized crime, situation at the external borders, risk of Coronavirus causing additional migrant movements	land borders with Hungary and with Slovenia
Austria	01.06.20	15.06.20	Coronavirus COVID-19	land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia

Austria	12.11.20	11.05.21	secondary movement, risk related to terrorists and organized crime, situation at the external borders	land borders with Hungary and with Slovenia
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Annex III

Overview of notifications on the basis of the Schengen Borders Code by Austria between 2015 and 2019 as published in the document register of the European Council/Council of the European Union

- Art. 25 SBC (563/2006): ST 12110 2015 (<https://data.consilium.europa.eu/doc/document/ST-12110-2015-INIT/en/pdf>), prolonged by ST 12435 2015 (<https://data.consilium.europa.eu/doc/document/ST-12435-2015-INIT/en/pdf>), ST 13127 2015 INIT (<https://data.consilium.europa.eu/doc/document/ST-13127-2015-INIT/en/pdf>) and ST 14211 2015 (<https://data.consilium.europa.eu/doc/document/ST-14211-2015-INIT/en/pdf>)
- Art. 23/24 SBC (563/2006): ST 14211 2015, prolonged by ST 6071 2016 (<https://data.consilium.europa.eu/doc/document/ST-6071-2016-INIT/en/pdf>), and ST 7136 2016 (<https://data.consilium.europa.eu/doc/document/ST-7136-2016-INIT/en/pdf>);
- Art. 29 SBC (2016/399): ST 8947 2016 REV 1 (<https://data.consilium.europa.eu/doc/document/ST-8947-2016-REV-1/en/pdf>), further prolonged by ST 14879 (2016/399) (<https://data.consilium.europa.eu/doc/document/ST-14879-2016-INIT/en/pdf>), ST 6252 2017 (<https://data.consilium.europa.eu/doc/document/ST-6252-2017-INIT/en/pdf>), and ST 9147 2017 (<https://data.consilium.europa.eu/doc/document/ST-9147-2017-INIT/x/pdf>); (these SBC notifications were based on the Council Implementing Decisions);
- Art. 25 SBC (2016/399) (presumably): ST 13207 2017 (<https://data.consilium.europa.eu/doc/document/ST-13207-2017-ADD-1/en/pdf>), prolonged by ST 7832 2018 (<https://data.consilium.europa.eu/doc/document/ST-7832-2018-REV-1/x/pdf>), ST 13049 2018 (<https://data.consilium.europa.eu/doc/document/ST-13049-2018-INIT/x/pdf>), and ST 8518 2019 (<https://data.consilium.europa.eu/doc/document/ST-8518-2019-INIT/x/pdf>).