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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

26 April 2022 (*)

(Reference for a preliminary ruling – Area of freedom, security and justice – Free movement of persons – Regulation (EU) 2016/399 – Schengen Borders Code – Article 25(4) – Temporary reintroduction of border control at internal borders for a maximum total duration of six months – National legislation providing for a number of successive periods of border control resulting in that duration being exceeded – Non-compliance of such legislation with Article 25(4) of the Schengen Borders Code where the successive periods are based on the same threat or threats – National legislation requiring, on pain of a penalty, a passport or identity card to be presented when the internal border control is carried out – Non-compliance of such an obligation with Article 25(4) of the Schengen Borders Code when the border control itself is contrary to that provision)

In Joined Cases C-368/20 and C-369/20,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria), made by decisions of 23 July 2020, received at the Court on 5 August 2020, in the proceedings

NW

v

Landespolizeidirektion Steiermark (C-368/20),

Bezirkshauptmannschaft Leibnitz (C-369/20),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, K. Jürimäe, C. Lycourgos, E. Regan (Rapporteur), S. Rodin, I. Jarukaitis and J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, M. Safjan, F. Biltgen, P.G. Xuereb, N. Piçarra and L.S. Rossi, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 15 June 2021,

after considering the observations submitted on behalf of:

- NW, by C. Tometten, Rechtsanwalt,
- the Austrian Government, by A. Posch, M. Witzmann, J. Schmoll and M. Augustin, acting as Agents,
- the Danish Government, initially by M. Søndahl Wolff, J. Nymann-Lindegren and M.P. Brøchner Jespersen, and subsequently by M. Søndahl Wolff and V. Jørgensen, acting as Agents,
- the German Government, by J. Möller and R. Kanitz, acting as Agents,
- the French Government, initially by E. de Moustier, D. Dubois and T. Stéhelin, and subsequently by D. Dubois and T. Stéhelin, acting as Agents,
- the Swedish Government, by H. Shev, C. Meyer-Seitz, A. Runeskjöld, M. Salborn Hodgson, R. Shahsavan Eriksson and H. Eklinder, acting as Agents,
- the European Commission, by G. Wils and J. Tomkin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2021,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 22, 25 and 29 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1), as amended by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 (OJ 2016 L 251, p. 1) ('the Schengen Borders Code'), and of Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in proceedings brought by NW against the Landespolizeidirektion Steiermark (Regional Police Directorate, Styria, Austria) (C-368/20) and the Bezirkshauptmannschaft Leibnitz (administrative authority of the district of Leibnitz, Austria) (C-369/20) concerning border checks in the course of which NW was requested to present, in one instance, a passport or identity card and, in the other, a passport.

Legal context

European Union law

Directive 2004/38/EC

3 Article 5 of 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 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34), headed ‘Right of entry’, provides in paragraph 1:

‘Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

...’

Regulation (EC) No 562/2006

4 Article 21 of 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) (OJ 2006 L 105, p. 1), headed ‘Checks within the territory’, provided:

‘The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. ...

...’

Regulation (EU) No 1051/2013

5 Recitals 1 and 2 of Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances (OJ 2013 L 295, p. 1) stated:

‘(1) The creation of an area in which the free movement of persons across internal borders is ensured is one of the main achievements of the Union. In an area without internal border control, it is necessary to have a common response to situations seriously affecting the public policy or internal security of that area, of parts thereof, or of one or more Member States, by allowing for the temporary reintroduction of internal border control in exceptional circumstances, but without jeopardising the principle of the free movement of persons. Given the impact that such measures of last resort may have on all persons having the right to move within the area without internal border control, the conditions and procedures for reintroducing such measures should be laid down, in order to ensure that they are exceptional and that the principle of proportionality is respected. The scope and duration of any temporary reintroduction of such measures should be restricted to the bare minimum needed to respond to a serious threat to public policy or internal security.

(2) Free movement of persons within the area without internal border control is a key Union achievement. As free movement of persons is affected by the temporary reintroduction of internal border control, any decision to reintroduce such control should be taken in accordance with commonly agreed criteria and should be duly notified to the [European] Commission or be

recommended by a Union institution. In any case, the reintroduction of internal border control should remain an exception and should only be effected as a measure of last resort, for a strictly limited scope and period of time, based on specific objective criteria and on an assessment of its necessity which should be monitored at Union level. Where a serious threat to public policy or internal security requires immediate action, a Member State should be able to reintroduce border control at its internal borders for a period not exceeding ten days. Any prolongation of that period needs to be monitored at Union level.’

The Schengen Borders Code

6 Regulation No 562/2006 as amended from time to time was codified and replaced by the Schengen Borders Code.

7 Recital 21 of the Schengen Borders Code states:

‘In an area where persons may move freely, the reintroduction of border control at internal borders should remain an exception. Border control should not be carried out or formalities imposed solely because such a border is crossed.’

8 Recitals 22 and 23 of the Schengen Borders Code essentially reproduce recitals 1 and 2 of Regulation No 1051/2013.

9 Recitals 27 and 34 of the Schengen Borders Code state:

‘(27) In accordance with the case-law of the Court ..., a derogation from the fundamental principle of free movement of persons must be interpreted strictly and the concept of public policy presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

...

(34) Since the objective of Regulation [No 562/2006] and its successive amendments, namely the establishment of rules applicable to the movement of persons across borders, could not be sufficiently achieved by the Member States but could rather be better achieved at Union level, the Union was able to adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 [TEU]. ...’

10 Article 1 of the Schengen Borders Code, headed ‘Subject matter and principles’, provides:

‘This Regulation provides for the absence of border control of persons crossing the internal borders between the Member States of the Union.

...’

11 Article 22 of the Schengen Borders Code, headed ‘Crossing internal borders’, is worded as follows:

‘Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’

12 As set out in Article 23 of the Schengen Borders Code, headed ‘Checks within the territory’:

‘The absence of border control at internal borders shall not affect:

...

(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

...’

13 Article 25 of the Schengen Borders Code, headed ‘General framework for the temporary reintroduction of border control at internal borders’, provides:

‘1. Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

2. Border control at internal borders shall only be reintroduced as a last resort, and in accordance with Articles 27, 28 and 29. The criteria referred to, respectively, in Articles 26 and 30 shall be taken into account in each case where a decision on the reintroduction of border control at internal borders is considered pursuant, respectively, to Article 27, 28 or 29.

3. If the serious threat to public policy or internal security in the Member State concerned persists beyond the period provided for in paragraph 1 of this Article, that Member State may prolong border control at its internal borders, taking account of the criteria referred to in Article 26 and in accordance with Article 27, on the same grounds as those referred to in paragraph 1 of this Article and, taking into account any new elements, for renewable periods of up to 30 days.

4. 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.’

14 Article 26 of the Schengen Borders Code, headed ‘Criteria for the temporary reintroduction of border control at internal borders’, provides:

‘Where a Member State decides, as a last resort, on the temporary reintroduction of border control at one or more of its internal borders or at parts thereof, or decides to prolong such reintroduction, in accordance with Article 25 or Article 28(1), it shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security, and shall assess the proportionality of the measure in relation to that threat. In making such an assessment, the Member State shall, in particular, take the following into account:

(a) 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;

(b) the likely impact of such a measure on free movement of persons within the area without internal border control.’

15 Article 27 of the Schengen Borders Code, headed ‘Procedure for the temporary reintroduction of border control at internal borders under Article 25’, is worded as follows:

‘1. Where a Member State plans to reintroduce border control at internal borders under Article 25, it shall notify the other Member States and the Commission at the latest four weeks before the planned reintroduction, or within a shorter period where the circumstances giving rise to the need to reintroduce border control at internal borders become known less than four weeks before the planned reintroduction. To that end, the Member State shall supply the following information:

- (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.

...

4. Following notification by a Member State under paragraph 1 and with a view to consultation provided for in paragraph 5, the Commission or any other Member State may, without prejudice to Article 72 TFEU, issue an opinion.

If, based on the information contained in the notification or on any additional information it has received, the Commission has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders, or if it considers that a consultation on some aspect of the notification would be appropriate, it shall issue an opinion to that effect.

5. The information referred to in paragraph 1 and any Commission or Member State opinion under paragraph 4 shall be the subject of consultation, including, where appropriate, joint meetings between the Member State planning to reintroduce border control at internal borders, the other Member States, especially those directly affected by such measures, and the Commission, with a view to organising, where appropriate, mutual cooperation between the Member States and to examining the proportionality of the measures to the events giving rise to the reintroduction of border control and the threat to public policy or internal security.

...’

16 As set out in Article 28 of the Schengen Borders Code, headed ‘Specific procedure for cases requiring immediate action’:

‘1. Where a serious threat to public policy or internal security in a Member State requires immediate action to be taken, the Member State concerned may, on an exceptional basis, immediately reintroduce border control at internal borders, for a limited period of up to ten days.

...

3. If the serious threat to public policy or internal security persists beyond the period provided for in paragraph 1 of this Article, the Member State may decide to prolong the border control at internal borders for renewable periods of up to 20 days. In doing so, the Member State concerned shall take into account the criteria referred to in Article 26, including an updated assessment of the necessity and the proportionality of the measure, and shall take into account any new elements.

...

4. Without prejudice to Article 25(4), the total period during which border control is reintroduced at internal borders, on the basis of the initial period under paragraph 1 of this Article and any prolongations under paragraph 3 of this Article, shall not exceed two months.

...’

17 Article 29 of the Schengen Borders Code, headed ‘Specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk’, provides:

‘1. In 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 as referred to in Article 21 of this Regulation or as a result of the non-compliance of a Member State with a [decision of the Council of the European Union] referred to in Article 19(1) of [Regulation 2016/1624], and in so far as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced in accordance with paragraph 2 of this Article for a period of up to six months. That period may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist.

2. The Council may, as a last resort and as a measure to protect the common interests within the area without internal border control, where all other measures, in particular those referred to in Article 21(1) [of this Regulation], are ineffective in mitigating the serious threat identified, recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders. The Council’s recommendation shall be based on a proposal from the Commission. The Member States may request the Commission to submit such a proposal to the Council for a recommendation.

In its recommendation, the Council shall at least indicate the information referred to in Article 27(1) (a) to (e).

The Council may recommend a prolongation in accordance with the conditions and procedure set out in this Article.

Before a Member State reintroduces border control at all or at specific parts of its internal borders under this paragraph, it shall notify the other Member States, the European Parliament and the Commission accordingly.

...

4. On duly justified grounds of urgency relating to situations where the circumstances giving rise to the need to prolong border control at internal borders in accordance with paragraph 2 become known less than 10 days before the end of the preceding reintroduction period, the Commission

may adopt any necessary recommendations by means of immediately applicable implementing acts in accordance with the procedure referred to in Article 38(3). Within 14 days of the adoption of such recommendations, the Commission shall submit to the Council a proposal for a recommendation in accordance with paragraph 2 of this Article.

5. This Article shall be without prejudice to measures that may be adopted by the Member States in the event of a serious threat to public policy or internal security under Articles 25, 27 and 28.’

18 As is apparent from its heading, Article 30 of the Schengen Borders Code lays down the criteria applicable to the temporary reintroduction of border control at internal borders in exceptional circumstances – as referred to in Article 29 – that put the overall functioning of the area without internal border control at risk.

Austrian law

The Law on Passports

19 The Bundesgesetz betreffend das Passwesen für österreichische Staatsbürger (Passgesetz 1992) (Federal law on the passport system for Austrian nationals (Law on Passports 1992)) (BGBl. 839/1992), in the version applicable at the material time (‘the Law on Passports’), provides in Paragraph 2(1):

‘Unless otherwise provided for by an international agreement or by international custom, Austrian nationals ... require a valid travel document (passport or equivalent) to enter or leave the territory of the Republic of Austria. ...’

20 Paragraph 24(1) of the Law on Passports provides:

‘Any person who:

1. enters or leaves the national territory unlawfully (Paragraph 2),

...

commits, in so far as the act does not constitute a criminal offence, an administrative offence punishable by a fine of up to EUR 2 180 or a custodial sentence of up to six weeks. In the case of a repeated offence, a fine and a custodial sentence shall both be imposed where there are aggravating circumstances.’

The Law on Border Control

21 The Bundesgesetz über die Durchführung von Personenkontrollen aus Anlaß des Grenzübertritts (Grenzkontrollgesetz – GrekoG) (Federal law on the carrying out of checks on persons crossing the border (Law on Border Control)) (BGBl. 435/1996), in the version applicable at the material time (‘the Law on Border Control’), provides in Paragraph 10, headed ‘Crossing the border’:

‘1. Save where otherwise provided for by international custom or by an international agreement, the external border may be crossed only at border crossing points.

2. The internal border may be crossed at any point. Where it appears that the maintenance of public peace, public policy and public security so requires, the Federal Minister for the Interior shall nevertheless be authorised, within the framework of international agreements, to adopt a decree providing that, for a given period, certain parts of the internal border may also be crossed only at border crossing points.

...’

22 Paragraph 11 of the Law on Border Control, headed ‘Border control obligation’, provides:

‘1. Crossing the border at border crossing points ... shall entail for the person concerned the obligation to be subject to a border check (border control obligation).

2. Crossing the border at the internal border shall, with the exception of the cases referred to in Paragraph 10(2) and (3), entail no border control obligation.

...’

23 Paragraph 12 of the Law on Border Control, headed ‘Implementation of border control’, provides in subparagraph 1:

‘Border control shall be the responsibility of the administrative authority. In so far as its implementation entails the exercise by the administrative authority of a direct power to issue orders and to compel, it shall be reserved to officers of the public security service and the regional police directorate (Paragraph 12b). ...’

24 Paragraph 12a of the Law on Border Control, headed ‘Powers of officers of the public security service’, provides in subparagraph 1:

‘Officers of the public security service shall be authorised to carry out a border check in respect of a person in so far as there is reason to believe that that person is subject to the border control obligation ...’

Decree No 114/2019 relating to border control

25 The Verordnung des Bundesministers für Inneres über die vorübergehende Wiedereinführung von Grenzkontrollen an den Binnengrenzen (Decree of the Federal Minister for the Interior on the temporary reintroduction of border control at internal borders) of 9 May 2019 (BGBl. II, 114/2019) (‘Decree No 114/2019 relating to border control’) is worded as follows:

‘On the basis of Paragraph 10(2) of [the Law on Border Control], it is hereby ordered:

Article 1. In order to safeguard public peace, public policy and public security, the internal borders with the Republic of Slovenia and Hungary may, from 00.00 on 13 May 2019 until 24.00 on 13 November 2019, be crossed on land at border crossing points only.

Article 2. This decree shall cease to have effect at midnight on 13 November 2019.’

The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

26 As is apparent from the material before the Court, the Republic of Austria reintroduced border control at its borders with Hungary and the Republic of Slovenia from 16 September 2015. For the first two months, that border control was founded on Article 25 of Regulation No 562/2006 (now Article 28 of the Schengen Borders Code). From 16 November 2015, the Republic of Austria relied on Articles 23 and 24 of Regulation No 562/2006 (now Articles 25 and 27 of the Schengen Borders Code). From 16 May 2016, it relied on four successive Council recommendations adopted on the basis of Article 29 of the Schengen Borders Code in order to carry out that border control for a further 18 months. The fourth of those recommendations expired on 10 November 2017.

27 On 12 October 2017, the Republic of Austria notified the other Member States and several EU institutions, including the Commission, that border control would be reintroduced at its borders with Hungary and the Republic of Slovenia for six months, from 11 November 2017 to 11 May 2018. That border control was subsequently reintroduced again for several successive six-month periods, from 11 May to 11 November 2018, and then from 12 November 2018 to 12 May 2019 and from 13 May to 13 November 2019. The Republic of Austria gave subsequent notifications in order to reintroduce that border control until November 2021.

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28 On 16 November 2019, the applicant in the main proceedings, NW, was subject to a border check on the basis of Paragraph 12a(1) of the Law on Border Control when he was about to enter Austrian territory from Slovenia by car at the border crossing point at Spielfeld (Austria).

29 The border control officer requested NW to identify himself by means of a passport or an identity card. NW asked the officer whether this was a border check or an identity check. Upon being informed that it was a border check, NW requested the officer's service number. NW was then asked to move his vehicle to the side of the road and another border control officer joined them. The border control officers brought the check to an end and informed NW of their service numbers.

30 On 19 December 2019, NW brought an action before the referring court, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria), challenging the exercise by the Austrian control authorities of a direct power to issue orders and to compel. He submits that the carrying out of a border check on the basis of Paragraph 12a(1) of the Law on Border Control constitutes an act adopted in the exercise of such a power.

31 The referring court is uncertain whether Decree No 114/2019 relating to border control and Paragraph 24(1) of the Law on Passports, a statute which is implemented by that decree, are compatible with EU law and, in particular, with the Schengen Borders Code, in the light, inter alia, of the right to free movement of citizens of the Union enshrined in Article 21(1) TFEU and Article 45(1) of the Charter and fleshed out by Directive 2004/38.

32 In particular, the referring court observes that the border check at issue in the main proceedings constitutes, in principle, a check prohibited pursuant to Article 22 of the Schengen Borders Code. It states that that code provides, however, for two exceptions to that principle. First, under Article 25(1) of that code, it is possible to reintroduce border control at internal borders, but only where there is a serious threat to public policy or internal security. Second, internal border control may also be reintroduced pursuant to Article 29(1) of that code, provided however that there are persistent serious deficiencies relating to external border control, putting at risk the functioning of the area without internal border control, and public policy or internal security.

33 The referring court notes that the approach chosen by the Republic of Austria, consisting in the successive adoption of various ministerial decrees providing for the reintroduction of internal border control, resulted in its reintroduction continuing beyond the maximum duration of six months laid down in Article 25(4) of the Schengen Borders Code. It is accordingly unsure whether that approach is consistent with EU law and, in particular, with Articles 25 and 29 of that code.

34 In particular, the referring court finds that, whilst the Republic of Austria first relied on Article 29 of the Schengen Borders Code to justify the reintroduction of internal border control, since the Commission did not, after 11 November 2017, submit new proposals to the Council to prolong internal border control on the basis of that article, the Republic of Austria could subsequently, from that date, rely only on Article 25(1) of that code to justify prolonging its reintroduction.

35 Consequently, the referring court wonders whether, since the very wording of Article 25(4) of the Schengen Borders Code precludes the maximum permitted duration of the reintroduction of internal border control from being exceeded, the Member State remains free to adopt, successively and without interruption, ministerial decrees providing for the reintroduction of internal border control the cumulative effect of which exceeds that maximum period.

36 The referring court observes that the notifications by which the Federal Minister for the Interior informed the Commission of the reintroduction of internal border control were not founded on Article 72 TFEU, as that article was not referred to in any of the notifications concerned. In any event, it doubts that it is possible to rely on Article 72 TFEU, since the derogating provisions of that code themselves constitute exceptions in respect of internal border control that relate to public policy and internal security and are consequently to be classified as a *lex specialis* with regard to Article 72 TFEU. The temporal limitation of the reintroduction of internal border control that is imposed by the Schengen Borders Code would be rendered redundant if, following the expiry of a period expressly laid down by secondary law, a Member State could rely repeatedly on Article 72 TFEU.

37 In those circumstances, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) decided to stay the proceedings and to refer the following questions to the Court of Justice 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 Articles 25 and 29 [of the Schengen Borders Code] without a corresponding Council implementing decision pursuant to Article 29 [of that code]?’

If question 1 is answered in the negative:

(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] 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 that code], 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 [that code]?’

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38 NW had already wished to enter Austrian territory at the Spielfeld border crossing point on 29 August 2019.

39 In a spot check carried out by the border control officer concerned, NW was requested to present his passport. NW then asked whether it was a border check or an identity check. When the border control officer replied that it was a border check, NW refused to present his passport and identified himself by showing his driving licence, taking the view that border control was, on that date, contrary to EU law. Despite the border control officer requesting NW several times to present his passport and informing him that, by his refusal, he was contravening the Law on Passports, NW did not present a passport. Consequently, the border control officer brought the action concerned to an end and informed NW that a complaint would be filed in his regard.

40 The acts alleged to have been committed by NW were brought to the notice of the Austrian authorities by police officers of the Regional Police Directorate, Styria, on 6 September 2019.

41 By notice of 9 September 2019, NW was stated to be guilty of a contravention of Paragraph 2(1) of the Law on Passports. In the objection that he lodged against that notice on 23 September 2019, NW contended, first, that the border check carried out was unlawful as Title III of the Schengen Borders Code provided no legal basis for the action concerned and, second, that that check and the notice of 9 September 2019 infringed his right to freedom of movement under Article 21(1) TFEU in conjunction with Article 22 of that code.

42 By administrative penalty order of 7 November 2019, NW was declared guilty of having, when entering Austrian territory, crossed the Austrian border without being in possession of a valid travel document. NW was accordingly considered to have contravened Paragraph 2(1) of the Law on Passports and he was ordered to pay a fine of EUR 36 pursuant to Paragraph 24(1) of that law.

43 NW brought an action against that decision before the referring court, which questions whether the check to which he was subject and the penalty that was imposed upon him as a result are compatible with EU law.

44 In particular, in addition to the considerations set out in paragraphs 31 to 35 of the present judgment, first, the referring court is uncertain whether, under Article 21(1) TFEU and Article 45(1) of the Charter, citizens of the Union have the right not to be subject to an internal border check where such a check does not meet the conditions and/or is not covered by the exceptions laid down by the Treaties and, in particular, by the Schengen Borders Code.

45 Second, the referring court notes that, in accordance with the Court's case-law deriving from the judgment of 21 September 1999, *Wijzenbeek* (C-378/97, EU:C:1999:439, paragraphs 43 and 44), the Member States retain the right to oblige a person to present a valid identity card or passport when an identity check is carried out and to impose penalties for breach of such an obligation. The provisions of national law, such as Paragraph 24 of the Law on Passports, must, however, be interpreted in conformity with EU law. In particular, under the Court's case-law deriving from the judgment of 10 April 2003, *Steffensen* (C-276/01, EU:C:2003:228, paragraphs 66 to 71), it should be ensured that the specific application of a national provision is compatible with fundamental rights.

46 Thus, in the judgment of 13 December 2018, *Touring Tours und Travel and Sociedad de Transportes* (C-412/17 and C-474/17, EU:C:2018:1005), the Court held that, where a penalty is designed to ensure compliance with an obligation to undergo checks which itself does not comply with EU law, that penalty is also contrary to EU law.

47 The referring court observes that, in the present instance, the general obligation to be in possession of a valid travel document is set out in Paragraph 2(1) of the Law on Passports. The special obligation laid down in Paragraph 24(1) of that law means that the person concerned must not only be in possession of a passport, but also present it when a border check contrary to EU law is carried out. The referring court doubts whether such an obligation is compatible with Article 21(1) TFEU and Article 45(1) of the Charter.

48 In those circumstances, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) decided to stay the proceedings and to refer the following questions to the Court of Justice 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 Articles 25 and 29 [of the Schengen Borders Code] without a corresponding Council implementing decision pursuant to Article 29 [of that code]?’

(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] 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 that code], 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 [that code]?’

(3) If question 2 is answered in the affirmative:

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?’

The procedure before the Court

49 By decision of the President of the Court of 10 September 2020, Cases C-368/20 and C-369/20 were joined for the purposes of the written and oral parts of the procedure and of the judgment.

Consideration of the questions referred

The first question referred in Case C-368/20 and the first question referred in Case C-369/20

50 According to settled case-law of the Court, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 26 October 2021, *PL Holdings*, C-109/20, EU:C:2021:875, paragraph 34 and the case-law cited).

51 According to the information available to the Court, as set out in paragraphs 26 and 27 of the present judgment, the Republic of Austria reintroduced border control at its borders with Hungary and the Republic of Slovenia in 2015. That border control was reintroduced a number of times. The

last reintroduction mentioned by the referring court is the reintroduction that ran until November 2021. As is apparent from that information, in order to justify the border control being reintroduced, the Republic of Austria relied, depending on the date concerned, upon various provisions in Articles 25 to 29 of the Schengen Borders Code. It is undisputed that the last of the four Council recommendations adopted pursuant to Article 29(2) of that code that were relied upon by the Republic of Austria to justify the border control being reintroduced expired on 10 November 2017. After that date, it appears to have been reintroduced on the basis of Articles 25 and 27 of that code until November 2021.

52 Thus, the two border control measures to which NW was subject and the legality of which is contested in the main proceedings, carried out on 29 August and 16 November 2019, were founded not on the Council recommendations adopted pursuant to Article 29 of the Schengen Borders Code, but on Articles 25 and 27 of that code. However, on the dates when those measures were carried out, the reintroduction by the Republic of Austria of border control at its border with the Republic of Slovenia pursuant to Articles 25 and 27 had already exceeded the maximum total duration of six months laid down in Article 25(4) for the reintroduction of border control on the basis of Articles 25 and 27.

53 In those circumstances, by its first question in Case C-368/20 and its first question in Case C-369/20, the referring court should be regarded as asking, in essence, whether Article 25(4) of the Schengen Borders Code must be interpreted as precluding border control at internal borders from being temporarily reintroduced on the basis of Articles 25 and 27 of that code where that reintroduction, which results from the successive application of the periods provided for in Article 25 of that code, exceeds the maximum total duration of six months set in Article 25(4).

54 First of all, it should be noted that Article 25 of the Schengen Borders Code, which is set out, together with Articles 26 to 35, in Chapter II of Title III thereof, relating to the temporary reintroduction of border control at EU internal borders, lays down the general framework governing such reintroduction where there is a serious threat to public policy or internal security in a Member State and prescribes inter alia maximum periods within which such border control may be reintroduced. In particular, under Article 25(1) of that code, a Member State may exceptionally reintroduce such border control for a limited period of up to 30 days or for the foreseeable duration of that threat if its duration exceeds 30 days. In all cases, the duration of the temporary reintroduction of border control is not to exceed what is strictly necessary to respond to the threat. Under Article 25(3), if the threat persists, the Member State may prolong such border control for renewable periods of up to 30 days. Finally, whilst, under Article 25(4), the total period during which such border control is reintroduced – including any prolongation provided for under Article 25(3) – is not to exceed six months, Article 25(4) specifies that that total period may be extended to two years in the exceptional circumstances referred to in Article 29 of that code.

55 NW and the Commission contend that the reintroduction of internal border control under Articles 25 and 27 of the Schengen Borders Code for a period exceeding the maximum duration of six months laid down in Article 25(4) necessarily results in that border control being incompatible with EU law. According to those parties, only a serious and inherently new threat could justify fresh application of Article 25 and, consequently, fresh application of the periods laid down in that provision. Whilst the French and Swedish Governments contend that a new serious threat to public policy or internal security may result in fresh application of those periods, the French Government is also of the view, as are the Austrian and Danish Governments, that a fresh assessment of the earlier threat should also enable fresh application of the relevant provisions. Finally, the German Government submits that the Member States should be able to derogate from those periods by having direct recourse to Article 72 TFEU.

56 In that regard, it should be recalled that, in accordance with settled case-law, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)*, C-505/19, EU:C:2021:376, paragraph 77 and the case-law cited).

57 As regards, first of all, the wording of Article 25(4) of the Schengen Borders Code, the words ‘shall not exceed six months’ would indicate that any possibility of that duration being exceeded is precluded.

58 So far as concerns, next, the context of Article 25(4) of the Schengen Borders Code, and in respect of, first, the other provisions of that article, it should be observed that Article 25 lays down clearly and precisely the maximum durations both for the initial reintroduction of internal border control and for any prolongation thereof, including the maximum total duration applicable to such border control.

59 Indeed, it follows from recital 1 of Regulation No 1051/2013, which inserted in Regulation No 562/2006 the rule relating to the maximum duration of six months that was subsequently reproduced in Article 25(4) of the Schengen Borders Code, that the EU legislature wished to lay down the conditions and procedures for the temporary reintroduction of internal border control in order to ensure that those measures were exceptional and that the principle of proportionality was respected. Recital 1 of Regulation No 1051/2013 is reproduced in recital 22 of the Schengen Borders Code.

60 It should also be observed that, under Article 25(3) of the Schengen Borders Code, if the initial serious threat persists beyond the 30-day period provided for in Article 25(1), the Member State concerned may prolong internal border control on the same grounds as those that justified its initial reintroduction, while taking into account any new elements, for renewable periods of up to 30 days.

61 It follows that, on account of the express reference to Article 25(3) of the Schengen Borders Code made by Article 25(4) thereof, successive prolongations of border control that are decided upon on the basis of Article 25(3) cannot exceed a total duration of six months. Likewise, when the maximum initial duration of internal border control is determined by reference to the foreseeable duration of the serious threat pursuant to Article 25(1), it may admittedly exceed 30 days, but it cannot exceed six months either, as otherwise the use of the adjective ‘total’ in Article 25(4) and the reference made therein to Article 25(3) would be rendered pointless.

62 It should be pointed out in that regard that, whilst ‘any new elements’, envisaged in Article 25(3) of the Schengen Borders Code, may be relied upon by a Member State to justify the prolongation of internal border control for renewable periods of up to 30 days, those elements must nevertheless be directly related to the threat that initially justified the reintroduction of border control, as, by virtue of the very wording of that provision, the prolongation of border control must in fact be ‘on the same grounds as those referred to in [Article 25(1)]’ of the Schengen Borders Code.

63 Second, in so far as Article 25 of the Schengen Borders Code provides for the possibility of reintroducing border control at EU internal borders, it constitutes, in the light of the general scheme of that code, an exception to the principle laid down in Article 22 thereof, under which internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out there. Indeed, according to Article 1 of that code, the latter’s very

subject matter is that it provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union.

64 As the Court has held and as is noted in recital 27 of the Schengen Borders Code, exceptions to and derogations from the free movement of persons are to be interpreted strictly (see, to that effect, judgments of 3 June 1986, *Kempf*, 139/85, EU:C:1986:223, paragraph 13, and of 10 July 2008, *Jipa*, C-33/07, EU:C:2008:396, paragraph 23 and the case-law cited).

65 It is in that context that recitals 21 to 23 of the Schengen Borders Code state that, in an area where persons may move freely, without internal borders, which constitutes one of the main achievements of the European Union in accordance with Article 3(2) TEU, the reintroduction of internal border control should remain an exception and should only be effected as a measure of last resort.

66 The fact that Article 25 of the Schengen Borders Code must therefore be interpreted strictly militates against an interpretation of Article 25(4) under which the persistence of the threat initially identified, even when assessed in the light of new elements, or of a reappraisal of the necessity and proportionality of the border control established to respond to it, under Article 25(1), *in fine*, would be sufficient to justify that border control being reintroduced beyond the period of a maximum duration of six months that is laid down in that provision. Such an interpretation would in practice effectively allow the reintroduction of internal border control on account of the same threat for an unlimited period, thereby compromising the very principle that there is to be no internal border control, as enshrined in Article 3(2) TEU and reiterated in Article 67(2) TFEU.

67 Third, as regards the other provisions in Chapter II of Title III of the Schengen Borders Code, it should be pointed out first that the type of assessment that must be carried out and the procedure that must be followed, for the purpose of the temporary reintroduction of internal border control under Article 25 of that code, are governed by a detailed framework laid down in Articles 26 to 28 thereof.

68 It is apparent from Articles 26 and 27 of the Schengen Borders Code *inter alia* that both the reintroduction of internal border control under Article 25 of that code and any prolongation thereof must, on the one hand, be necessary and proportionate in relation to the threat identified and, on the other, comply with the detailed criteria and procedural rules, expressly laid down by that code, a fact which tends to suggest that, if a mere reappraisal in the light of those criteria of necessity and proportionality were to suffice in order to justify the reintroduction of internal border control under Article 25 beyond a period of six months, the EU legislature would have so provided expressly.

69 That reading of the Schengen Borders Code is also supported by recital 23 thereof, according to which, on account of the fact that free movement of persons is affected by the temporary reintroduction of internal border control, any decision to reintroduce such control should be taken in accordance with commonly agreed specific objective criteria. The prolongation of internal border control reintroduced under Article 25 of that code beyond the maximum duration expressly prescribed in Article 25(4) is difficult to reconcile with the setting of commonly agreed clear and objective criteria for such reintroduction.

70 In addition, to interpret Article 25 of the Schengen Borders Code as meaning that, where there is a threat within the meaning of Article 25(1), a Member State could exceed the total duration of six months laid down in Article 25(4) for internal border control would render pointless the distinction drawn by the EU legislature between internal border control reintroduced under Article 25 and that reintroduced in the exceptional circumstances putting the overall functioning of

the area without internal border control at risk which are referred to in Article 29, as a longer maximum duration, of two years, is expressly laid down for the latter border control. According to such an interpretation, internal border control reintroduced under Article 25 of the Schengen Borders Code could be prolonged for an unlimited period that is therefore capable of exceeding two years, even though the specific circumstances and criteria prescribed in Articles 29 and 30 of that code would not be, respectively, present or met. Furthermore, the final sentence of Article 25(4) of the Schengen Borders Code militates against such an interpretation since it provides that it is under Article 29 of that code, and not Article 25, that the maximum duration of the reintroduction of internal border control may be extended to two years.

71 That said, the reintroduction of internal border control under Article 29 of the Schengen Borders Code for a maximum duration of two years does not prevent the Member State concerned, in the event of a new serious threat to public policy or internal security arising, from reintroducing, directly after those two years have come to an end, border control under Article 25 of that code for a maximum duration of six months, provided that the conditions imposed in the latter provision are met. As is clear from Article 29(5) of the Schengen Borders Code, Article 29 is to be without prejudice to measures that may be adopted by the Member States in the event of a serious threat to public policy or internal security under Articles 25, 27 and 28.

72 Finally, so far as concerns the objectives pursued by Article 25(4) of the Schengen Borders Code and by that code itself, it should be pointed out that that code is part of the more general framework of an area of freedom, security and justice in which, in accordance with Article 3(2) TEU and Article 67(2) TFEU, the free movement of persons is ensured in conjunction with appropriate measures with respect, *inter alia*, to external border controls (see, by analogy, judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the port of Rotterdam)*, C-341/18, EU:C:2020:76, paragraph 55 and the case-law cited). That framework is intended to strike a fair balance between, on the one hand, the free movement of persons and, on the other, the need to safeguard public policy and internal security of the territory on which they move.

73 Indeed, first of all, Article 26 of the Schengen Borders Code obliges the Member State wishing to reintroduce internal border control under Article 25 of that code to take into account – in its assessment of the proportionality of that border control in relation to the threat identified – in particular, on the one hand, the likely impact of any threats to its public policy or internal security and, on the other, the likely impact of such border control on free movement of persons within the area without internal border control.

74 Next, recital 22 of the Schengen Borders Code states that the creation of an area in which the free movement of persons without internal border control is ensured is one of the main achievements of the European Union and that, in that area, it is necessary to have a common response to situations seriously affecting public policy or internal security, by allowing for the temporary reintroduction of internal border control in exceptional circumstances, but without jeopardising the principle of the free movement of persons. Recital 22 also explains that the laying down of the conditions and procedures for reintroducing internal border control is intended to ensure that such border control is exceptional and that the principle of proportionality is respected, thereby making sure that the duration of any temporary reintroduction of such border control is restricted to the bare minimum needed to respond to a serious threat to public policy or internal security.

75 Finally, it follows from recital 2 of Regulation No 1051/2013 that the reintroduction of internal border control should, in particular, be for a strictly limited period of time and be based on

specific objective criteria. Those considerations are now set out in recital 23 of the Schengen Borders Code.

76 The objective pursued by the rule relating to the maximum duration of six months laid down in Article 25(4) of the Schengen Borders Code is thus a continuation of that general objective which consists in reconciling the principle of free movement with the Member States' interest in safeguarding the security of their territories.

77 Whilst it is consequently true that in the area without internal border control a serious threat to public policy or internal security in a Member State is not necessarily limited in time, it is apparent that the EU legislature considered that a period of six months was sufficient for the Member State concerned to adopt, where appropriate in cooperation with other Member States, measures enabling such a threat to be met while maintaining, after that six-month period, the principle of free movement.

78 In the light of the considerations set out in paragraphs 57 to 77 of the present judgment, it must be held that the period of a maximum total duration of six months laid down in Article 25(4) of the Schengen Borders Code for the reintroduction of internal border control is mandatory, with the result that, should it be exceeded, any internal border control reintroduced under Articles 25 and 27 of that code after it has elapsed is necessarily incompatible with that code.

79 It is also apparent from those considerations that such a period may be applied afresh only where the Member State concerned is able to demonstrate the existence of a new serious threat affecting its public policy or internal security. In that case, fresh periods of a specific duration that are provided for in Article 25 of the Schengen Borders Code may be regarded as beginning to run, subject to compliance by that Member State with all the criteria and procedural rules laid down in Articles 26 to 28 of that code.

80 As regards the circumstances in which it is possible to consider a given threat to be new in relation to a threat that has previously justified the reintroduction of internal border control on the basis of Article 25 of the Schengen Borders Code, it should be pointed out that, when the Member State concerned notifies the other Member States and the Commission that it is planning to reintroduce border control at EU internal borders, Article 27(1) of that code refers, *inter alia*, to 'the circumstances giving rise to the need to reintroduce border control at internal borders' and 'the events that constitute a serious threat' to the public policy or internal security of the Member State concerned. Likewise, Article 27(5) of that code refers to 'the events giving rise to the reintroduction of border control'.

81 Accordingly, it is always by reference to those circumstances and events that it is to be assessed whether, at the end of the maximum period of six months referred to in Article 25(4) of the Schengen Borders Code, the threat that the Member State faces remains the same threat or whether it is a new threat allowing that Member State, immediately after that six-month period has ended, to continue internal border control so as to meet that new threat. That being so, it must be held that, as the Commission essentially contends, the emergence of a new threat, which is distinct from the threat initially identified, is capable of justifying, subject to compliance with the other applicable conditions, fresh application of the periods provided for in Article 25 of that code for the reintroduction of internal border control.

82 In the present instance, as the Commission contends, it seems – a matter which will, however, be for the referring court to determine – that, from 10 November 2017, the date on which the last of the four Council recommendations adopted on the basis of Article 29 of the Schengen Borders Code

expired, the Republic of Austria did not demonstrate the existence of a new threat, pursuant to Article 25 of that code, that would have justified triggering anew the periods provided for in Article 25 and that would have thus enabled the two border control measures to which NW was subject, on 29 August and 16 November 2019 respectively, to be regarded as having been carried out within the limits of the maximum total duration of six months laid down in Article 25(4).

83 Those considerations are not called into question by the line of argument relied upon by the German Government that, when exceptional circumstances so justify, the Member States may invoke Article 72 TFEU in order to derogate from the provisions of the Schengen Borders Code setting maximum total durations for the reintroduction of temporary internal border control.

84 According to settled case-law of the Court, although it is for the Member States alone to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, the mere fact that a national measure, such as a decision relating to internal border control, has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with EU law (see, to that effect, judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 40 and the case-law cited). The same must apply to national measures adopted for the purpose of maintaining public policy (*ordre public*) of a Member State.

85 As regards more specifically Article 72 TFEU, it is true that that provision states that Title V of the FEU Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order (*ordre public*) and the safeguarding of internal security.

86 However, as the Court has held, the only articles in which the FEU Treaty expressly provides for derogations applicable in situations which may affect law and order or public security are Articles 36, 45, 52, 65, 72, 346 and 347, which deal with exceptional and clearly defined cases. The derogation provided for in Article 72 TFEU must, as is stated in settled case-law, be interpreted strictly. It follows that Article 72 TFEU cannot be read in such a way as to confer on Member States the power to depart from the provisions of EU law on the basis of no more than reliance on the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (see, to that effect, judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)*, C-808/18, EU:C:2020:1029, paragraphs 214 and 215 and the case-law cited).

87 As regards the Schengen Borders Code, it is apparent from the considerations set out in paragraphs 72 to 77 of the present judgment that the choice to adopt the maximum total duration of six months laid down in Article 25(4) of that code, which may be extended to a maximum duration of two years in the exceptional circumstances referred to in Article 29 thereof, forms part of the comprehensive framework – established by the EU legislature in the exercise of the competences conferred upon it by Article 3(2) and (6) TEU and Article 5(1) and (2) TEU in conjunction with Article 4(2)(j) and Article 77(2)(b) and (e) TFEU – governing the way in which the Member States exercise the responsibilities incumbent upon them for the purpose of the maintenance of public policy and the safeguarding of internal security.

88 That framework thereby seeks specifically to strike a fair balance, envisaged in Article 3(2) TEU, between, on the one hand, the objective pursued by the European Union of establishing an area without internal frontiers in which the free movement of persons is ensured and, on the other, appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

89 Consequently, in the light of the fundamental importance that the free movement of persons possesses among the objectives of the European Union referred to in Article 3 TEU and of the considerations set out in paragraphs 58 to 77 of the present judgment regarding the detailed way in which the EU legislature circumscribed the Member States' ability to interfere with that freedom by temporarily reintroducing internal border control, an approach which attests to a wish to strike a balance between the various interests at issue, it must be held that, in laying down the rule relating to the maximum total duration of six months set out in Article 25(4) of the Schengen Borders Code, the EU legislature took due account of the exercise of the responsibilities incumbent upon the Member States in relation to public policy and internal security.

90 It follows that Article 72 TFEU does not permit a Member State to reintroduce, in order to meet a serious threat to its public policy or internal security, temporary internal border control founded on Articles 25 and 27 of the Schengen Borders Code for a period that exceeds the maximum total duration of six months, expressly laid down in Article 25(4) of that code.

91 In addition, it should be pointed out that, under Article 27(4) of the Schengen Borders Code, if, on the basis of the information contained in the notification that it has received from a Member State wishing to reintroduce internal border control, the Commission has concerns as regards the necessity or proportionality of the planned reintroduction, it is required to issue an opinion to that effect. However, in the present cases, as the Commission itself expressly acknowledged at the hearing, it did not issue such an opinion following the notifications that it received from the Republic of Austria concerning the internal border control reintroduced by that Member State from 10 November 2017, even though it takes the view that, from that date, that border control was incompatible with the Schengen Borders Code and, consequently, with EU law.

92 In that regard, it should be stated that it is essential, in order to ensure proper operation of the rules established by the Schengen Borders Code, that, when a Member State wishes to reintroduce internal border control, both the Commission and the Member States exercise the powers conferred upon them by that code, in particular so far as concerns the exchanges of information and opinions, the consultations and, where appropriate, the mutual cooperation that are specifically provided for in Article 27 of that code.

93 Nevertheless, the fact that, in a specific case, following a notification made by a Member State pursuant to Article 27(1) of the Schengen Borders Code, the Commission does not issue an opinion stating that it considers the border control notified to be incompatible with that code does not, in itself, have any bearing on the interpretation by the Court of its provisions.

94 In the light of all the foregoing considerations, the answer to the first question referred in Case C-368/20 and the first question referred in Case C-369/20 is that Article 25(4) of the Schengen Borders Code must be interpreted as precluding border control at internal borders from being temporarily reintroduced by a Member State on the basis of Articles 25 and 27 of that code where the duration of its reintroduction exceeds the maximum total duration of six months, set in Article 25(4), and no new threat exists that would justify applying afresh the periods provided for in Article 25.

The second question referred in Case C-368/20 and the second question referred in Case C-369/20

95 In the light of the answer given to the first question in each of the present cases, there is no need to answer the second question referred in Case C-368/20 or the second question referred in Case C-369/20.

The third question referred in Case C-369/20

96 By its third question in Case C-369/20, the referring court asks, in essence, whether Article 25(4) of the Schengen Borders Code precludes national legislation by which a Member State obliges a person, on pain of a penalty, to present a passport or identity card on entering the territory of that Member State via an internal border, when the reintroduction of the internal border control in relation to which that obligation is imposed is contrary to that provision.

97 In that regard, it is sufficient to point out that, as the Court has held, a penalty mechanism is not compatible with the provisions of the Schengen Borders Code where it is imposed in order to ensure compliance with an obligation to undergo checks which itself does not comply with those provisions (see, to that effect, judgment of 13 December 2018, *Touring Tours und Travel and Sociedad de Transportes*, C-412/17 and C-474/17, EU:C:2018:1005, paragraph 72).

98 Consequently, the answer to the third question referred in Case C-369/20 is that Article 25(4) of the Schengen Borders Code must be interpreted as precluding national legislation by which a Member State obliges a person, on pain of a penalty, to present a passport or identity card on entering the territory of that Member State via an internal border, when the reintroduction of the internal border control in relation to which that obligation is imposed is contrary to that provision.

Costs

99 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the cost of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. Article 25(4) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), as amended by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016, must be interpreted as precluding border control at internal borders from being temporarily reintroduced by a Member State on the basis of Articles 25 and 27 of that code where the duration of its reintroduction exceeds the maximum total duration of six months, set in Article 25(4), and no new threat exists that would justify applying afresh the periods provided for in Article 25.**
- 2. Article 25(4) of Regulation 2016/399, as amended by Regulation 2016/1624, must be interpreted as precluding national legislation by which a Member State obliges a person, on pain of a penalty, to present a passport or identity card on entering the territory of that Member State via an internal border, when the reintroduction of the internal border control in relation to which that obligation is imposed is contrary to that provision.**

[Signatures]

* Language of the case: German.