



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Cases C-368/20 and C-369/20
Landespolizeidirektion Steiermark

According to Advocate General Saugmandsgaard Øe, a Member State faced with persistent serious threats to public policy or internal security may reintroduce controls at its internal borders for longer than only six months

However, the exceedance of that period is subject to particularly strict conditions

NW was ordered to pay a fine of € 36 in Austria for having crossed the Slovenian-Austrian border at Spielfeld in August 2019 without being in possession of a valid travel document. NW had refused to present his passport to the inspector who was requesting him to do so, being of the view that controls within the internal borders of the Schengen area were contrary to EU law. In November 2019, NW was again controlled as he was about to enter Austria by car (again at Spielfeld) from Slovenia.

NW challenged those two controls as well as the fine before the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) (Austria). That court has requested the Court of Justice to interpret EU law and, in particular, the Schengen Borders Code,¹ which aims to ensure the absence of any control of persons when they cross internal borders.

The Landesverwaltungsgericht Steiermark states that Austria reintroduced controls at the Slovenian border in the context of the migration crisis from September 2015. Subsequently, those controls continued on the basis of various exceptions provided for in the Schengen code.

At the time of the controls at issue, namely in 2019, Austria had already made use of the same exception² several times in a row, each time for a period of six months. That exception authorises Member States, in exceptional circumstances or where they are faced with a serious threat to public policy or internal security, to reintroduce temporarily, under certain conditions, internal border controls. However, the code provides for a maximum period of six months in that regard.

Against this backdrop, **the Landesverwaltungsgericht Steiermark wishes to know whether the Schengen Borders Code precludes the reapplication of the exception at issue in the event that a Member State, on expiry of the six-month period, is still faced with a serious threat to public policy or internal security.**

In his Opinion of this day, Advocate General Henrik Saugmandsgaard Øe proposes answering that question in the negative. However, where it is, in essence, a continuation of the earlier serious threat ('a renewed threat'), the principle of proportionality implies compliance with **particularly strict criteria.**

The Advocate General takes the view that an interpretation whereby the exception cannot be reapplied several times in a row is liable to lead to unacceptable, or even absurd, results.

Serious threats to public policy or internal security are not necessarily limited in time.

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) (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 L251, p.1) (hereinafter "the Schengen Borders Code").

² Provided for in Article 25(1) of the Schengen Borders Code.

Moreover, and more importantly, such an interpretation is liable to have an adverse effect on the powers for maintaining law and order and safeguarding internal security reserved to the Member States. If a Member State were forced to abolish a strictly necessary control at its borders on expiry of the six-month period, that Member State would be prevented from assuming the powers and responsibilities incumbent on it. According to the Advocate General, it is inconceivable that the European legislature intended to arrive at such a result and thus to exclude the possibility of reapplying the exception at issue, in the event of a 'renewed threat'.

He recalls inter alia that the Schengen Borders Code aims not only to ensure the absence of any control at internal borders, but also the maintenance of public policy and the combating of all threats to public policy. Therefore, **the Member States' powers and responsibilities in that area cannot be framed by absolute periods.**

Although the Advocate General considers that the Schengen Borders Code should be interpreted as permitting, in principle, the **reapplication** of the exception at issue in the case of a 'renewed threat', he nevertheless considers that, where the serious threat in question is essentially similar to the preceding serious threat, **the requirement of proportionality implies considerable limitations** in that regard, in that it lays down particularly strict conditions for the purposes of such reapplication.

The Member State concerned must, in particular, explain, on the basis of specific, objective and comprehensive analyses, first, why the renewal of controls would be appropriate, by assessing the degree of effectiveness of the initial measure reintroducing the controls. Second, it must make clear why this remains a necessary measure, by explaining why no other less coercive measure would be sufficient, such as, for example, the use of police control, intelligence, police cooperation at EU level and international police cooperation.

Moreover, **where reapplication has taken place several times in a row, as in the present case, the enhanced proportionality condition becomes even stricter each time it is reapplied.**

According to the Advocate General, **the Commission**, to which such a measure must be notified before its adoption (as well as to the other Member States), **must each time examine scrupulously whether that condition is satisfied.** In that regard, he expresses regret that the Commission did not issue an opinion, in accordance with the Schengen Borders Code, on the notifications that had been sent to it by Austria, as it considers them unfounded.

Last, the Advocate General takes the view that where a Member State subjects EU citizens to checks on persons at internal borders, in accordance with the requirements of the Schengen Borders Code, that check is also consistent with the right of free movement of EU citizens, as guaranteed by the Treaty on the Functioning of the European Union (TFUE) and by the Charter of Fundamental Rights of the European Union.

It follows that **the possible imposition of a penalty for breach of the obligation to present a passport or an identity card is not, in such circumstances, contrary to EU law.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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