The Exception that Proves the Rule?

Schengen and the Reintroduction of Internal Border Controls

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Abstract

The Schengen area is a cornerstone of European integration. In recent years, however, the integrity of the Schengen area has been tested by the migration crisis, terrorism, and, not least, the COVID-19 pandemic. Some Member States have responded to these crises by maintaining border controls beyond the six-month time limit set by the Schengen Borders Code. This study aims to examine whether Member States can invoke public security considerations to reintroduce border controls for a more extended period and whether integration requirements of free movement can be balanced against the security interests of Member States in the Schengen area.

Keywords: internal borders, Schengen, border control, public security, public health

1. Introduction

The Schengen system faces new challenges today, constantly testing the idea of a Europe without borders.[1] For example, in the autumn of 2023, Germany introduced border controls on its borders with the Czech Republic and Poland, while Slovenia introduced border controls on its Croatian-Slovenian and Hungarian-Slovenian borders. The Czech Republic, Poland, and Austria have done the same on their border sections with Slovakia, specifically in response to increasing migratory pressure and to curb the activities of people smugglers. Following the Austrian measure, Slovakia also introduced temporary border controls along the entire Slovak-Hungarian

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1 *See* at www.reuters.com/world/europe/european-countries-tighten-borders-2023-11-24/.

border. When introducing these measures, the Member States concerned all claimed that the reintroduction of border controls would reduce the number of asylum applications lodged and the number of migrants apprehended. These Member States have extended the above measures without exception.[2]

Even if, in many cases, these measures are (or at least appear to be) only random checks, it is clear that the reintroduction of border controls threatens the very objective of integration, the functioning of the internal market without borders. It is, of course, debatable how much harm these national measures may cause to individual citizens. However, I believe that the question of intgerity of the Schengen area is a matter of principle that will determine the framework for the future functioning of the Union in the long term.

Shortly after the creation of the European Communities, it was stated that economic and political integration implied the creation of an area without internal border controls.[3] In its White Paper on the Single Market, the Commission pointed out that a European area divided by borders was "to the ordinary citizen the obvious manifestation of the continued division of the Community".[4] By abolishing internal border controls and allowing the free movement of goods, services, capital and persons, the Schengen area has become "part of our European way of life" and "a symbol of Europe's interconnectedness and of the ties between the people's of Europe".[5]

This is reinforced by the current treaty structure, where the free movement of persons and the area without internal border controls guarantees its objectives in four different places. First and foremost, as part of the objective of the TFU to establish an area of freedom, security, and justice. Article 3(2) TEU states that "[t]he Union shall offer its citizens an area of freedom, security, and justice without internal frontiers, in which the

2 In January 2024, Slovakia's Minister of the Interior said that although Slovakia will not extend border controls after 22 January 2024, if illegal migration activity increases, controls will be re-introduced.

3 Communication by the Commission of the European Common Market to the Council of the EEC and to the Member States Governments, 2 October 1962.

4 White Paper on Completing the Internal Market COM(85) 310 final, paras. 12 and 24.

5 Communication from the Commission: A strategy for a fully operational and resilient Schengen area, COM(2021) 277 final.

free movement of persons is ensured […]."[6] Similarly, the internal market provision of the TFEU, including Article 26 TFEU, expressly establishes that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of persons is ensured in accordance with the provisions of the Treaties". Finally, in terms of primary legislation, we must mention the provisions of the TFEU that apply to EU citizens, namely Articles 20 and 21 TFEU, which already guarantee the right of EU citizens to move and reside freely within the territory of the Member States, irrespective of their economic activity.

As far as secondary legislation is concerned, a key provision of the Schengen Borders Code[7] (last amended by the European Parliament and the Council in June 2024),[8] which lays down the technical rules for the lifting of border controls, states that "internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out".[9] To guarantee the fullest possible exercise of free movement, the EU legislator has laid down precise rules in the Schengen Borders Code on the exceptional cases in which border checks may be reintroduced. The common feature of these cases is that border checks can only be re-introduced on a temporary basis.

Despite these strict rules, several Member States – including Austria, Denmark, France, Germany, and Sweden – have continually renewed internal border controls since the beginning of the migration crisis in 2015, essentially rendering them permanent.[10] To justify the reintroduction of border controls, Member States have invoked various justifications, ranging from irregular migration to terrorism and the public health risks associated with the COVID-19 pandemic.

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6 Among the general provisions on the area of freedom, security and justice, this is confirmed in Article 67(2) TFEU, which states that "The Union shall ensure the absence of checks on persons at internal borders […]."

7 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.

8 Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. At the time of writing this article, the new regulation has not yet entered into force. For this reason, the 2016 Regulation is still used as the basis for the study. This is all the more relevant as this study focuses on the CJEU's interpretation of the relevant provisions of the existing 2016 Regulation.

9 Regulation 2016/399/EU, para. 22.

10 *See* at https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en.

In this study, I examine the extent to which the practices followed by the Member States in question are compatible with the requirements of EU law. The study also poses the question why the European Commission, responsible for enforcing EU law, has not been sufficiently effective in dealing with these Member States' actions and what the future consequences of the Commission's failure to act may be for European integration.

2. The Legal Framework and Actual Practice Governing Internal Border Control

Articles 25–29 of the 2016 Schengen Borders Code provide a legal mandate for the temporary reintroduction of checks at internal borders. The first category covers 'foreseeable' and 'unforeseeable' threats to the public policy or internal security of the Member State (Articles 25–28). The reintroduction of border checks may be exceptional and *ultima ratio*, in strict compliance with the principle of proportionality. The Code also maximizes the duration of the measure, between two and six months, depending on the reason for the order.

In addition, the Code also provides for the possibility of reintroducing internal border controls in exceptional circumstances where the overall functioning of the area without internal border controls is put at risk by persistent and serious deficiencies relating to external border controls. In the above cases, the Council may, as a last resort, recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders. In such cases, the maximum duration of internal border controls shall be six months, which may also be extended.

From the above, it can be concluded that *(i)* it is possible to reintroduce internal border controls in exceptional cases, and *(ii)* they can only be introduced based on specific grounds and for a specific duration. While this seems to be a stringent rule, it is also worth looking at actual practice.

When Member States reintroduced checks at their internal borders in the autumn of 2015 due to illegal migration, they did so at their own discretion, initially for a period of six months. However, before the expiry of this six-month deadline, the Council proposed that Germany, Denmark, Austria, Sweden, and Norway (the latter as a Schengen-associated state) maintain checks at their internal borders for a maximum of six months. The Council justified its decision on the basis of deficiencies in border controls in Greece, which it subsequently extended three more times. After

the expiry of the extended period for border controls proposed by the Council also expired, border controls remained unchanged – as in the first period, based on decisions taken by Member States.

The duration of the measures introduced in 2015 is very different from those introduced earlier, as some Member States have maintained border controls essentially without interruption for the past eight years. The Commission has not taken any action against this practice; it has not launched infringement proceedings, nor did it issue a negative opinion on the legality of the measures.[11]

Under Article 27(4) of the Code, the Commission may issue an opinion following a notification by a Member State. In fact, the legal text states that the Commission shall issue an opinion if, on the basis of the information contained in the notification or any other additional information provided to it, it has concerns about the necessity or proportionality of the planned reintroduction of border control at internal borders. It follows from the wording of the Code (the Commission's obligation to give an opinion) that, *a contrario,* the Commission had no concerns about reintroducing border control. This is particularly interesting in the light of the Commission's rigorous approach in other cases to Member States' behavior that threatens the single internal market – especially when Member States joined the EU with the Eastern enlargement.

Interestingly, the only case concerning Schengen border controls that have come before the CJEU so far was not an infringement action brought by the European Commission but a reference for a preliminary ruling from a national court. Although in the *Landespolizeidirektion Steiermark* case,[12] described in detail below, the Commission's Legal Service intervened on behalf of the applicant and argued that the checks had been in breach of EU law since 2017, the Commission, exercising its discretion under Article 256 TFEU, had not launched infringement proceedings in the years preceding the case. Furthermore, the Commission has not issued a public opinion on the unlawfulness of these controls since 2015.[13]

11 If a Member State intends 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, exceptionally, within a shorter period.

12 Judgment of 26 April 2022, *Joined Cases C-368/20 and C-369/20, Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, ECLI:EU:C:2022:298.

13 The Commission has only issued an opinion on Germany's reintroduction of initial checks at the height of the migration crisis. In that opinion, it considered that these

3. Joined Cases Landespolizeidirektion Steiermark

It was in *Landespolizeidirektion Steiermark* that the CJEU first addressed the question of the legality of the reintroduction of border controls and, more specifically, their duration. According to the facts of the case, the applicant, an Austrian national, was subjected to border checks at the Austrian border on two occasions, on 29 August and 16 November 2019, when entering Austria from Slovenia, and refused to produce his identity card or passport when requested to do so by the border guards. The applicant, an expert in European and international law, asked whether this was an identity check or a border check. After being told that the driving license would lead to a border check, the applicant asked for the service number of the border guard and refused to produce his driving license, resulting in a fine of €36. He challenged the fine before the Administrative Court, which referred a preliminary question to the CJEU.

In the reference for a preliminary ruling, the main question was whether the Code allowed for the reintroduction of border controls beyond the maximum total period of six months provided for in Article 25(4) of the Code. According to the Advocate General, since serious threats to public policy or internal security cannot be defined in time, forcing Member States to abolish border controls would be unacceptable even if they continue to face a serious threat. Since they could reintroduce border controls after a certain period to combat the serious threat in question, it would be illogical to force them to abolish border controls for a short period only to reintroduce them later.[14]

This interpretation would allow Member States to override a clear and unambiguous provision of secondary law, in this case, the principle of no border controls, in the interests of their security. Considering this, the Advocate General proposed the introduction of a sliding-scale proportionality test, where the strictness of the proportionality test would increase with the duration of the border control.[15]

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measures could be justified by public policy concerns about the uncontrolled entry of third-country nationals.

14 Opinion of Advocate General Oe delivered on 6 October 2021, *Joined Cases C-368/20 and C-369/20, Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, ECLI:EU:C:2021:821, paras. 51–52.

15 Thus, a Member State planning to apply a derogation under Article 25(1) must, on the one hand, explain why the renewal of border checks would be an adequate measure, including an evaluation of the effectiveness of the original measure to

The Court did not follow the Advocate General's opinion in this case. It held that if secondary law maximizes the duration of border controls, this means that there is a maximum duration of border controls beyond which they are necessarily unlawful.[16] However, the CJEU itself pointed out a loophole. Secondary law only sets a maximum duration for border checks based on the 'same threat'. Nothing prevents Member States from discovering new threats that do not mean extending the same measure formally, but reintroducing one immediately after the expiry of the maximum duration of the previous border control, based on new grounds. The question, however, is what constitutes a 'new threat'. The CJEU is somewhat vague about the specific substantive criteria that characterize a new threat. All it says is that there are two criteria for assessing whether a Member State is faced with a new threat at the end of the six-month period, namely *(i)* the circumstances necessitating the reintroduction of border control at internal borders and *(ii)* the events giving rise to the reintroduction of border control. However, it does not specify these criteria, leaving them to the discretion of Member States' law enforcement authorities.[17]

The question, however, is whether it is sufficient for one of the criteria to change or whether both must be met cumulatively. This is illustrated by the question raised by co-authors Salomon and Rijpma, asking whether the smuggling of third-country nationals from war-torn Ukraine poses a new threat compared to the smuggling of third-country nationals from Greece.[18] In an extreme reading, the mere fact that it is not the same third-country nationals who are trying to enter the EU illegally could also constitute a

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reintroduce border control. On the other hand, it must explain why it still considers the original measure to be necessary and why it does not consider a less restrictive measure than maintaining controls, such as police checks, to be sufficient. Id. para. 67.

16 According to the Court's reasoning, the system of time limits laid down in the Code is clear and precise. This is also confirmed by the intended interpretation of the legislation. A less restrictive interpretation, which would allow border controls based on the same threat to last longer than six months, could lead to the reintroduction of unlimited border controls. Free movement of persons is 'one of the main achievements of the EU' and exceptions to it must be interpreted strictly. *Joined Cases C-368/20 and C-369/20, Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, para. 65.

17 However, it requires Member States to provide sufficient information as to why the circumstances pose a new threat. Regulation 2016/399, Article 81.

18 Stefan Salomon & Jorrit Rijpma, 'The Promise of Free Movement in the Schengen Area – the Decision of the Court of Justice in Landespolizeidirektion Steiermark (NW)', *European Law Review*, Vol. 48, Issue 1, 2023, p. 129.

new threat. Let us assume that this assessment is left to the national courts. That case runs the risk that the different courts will reach conflicting conclusions without referring the question for a preliminary ruling, thereby jeopardizing the uniform application of EU law.[19]

The case also raised the question of the relationship between the principle of free movement and the internal security of Member States.[20] As Article 72 TFEU emphasizes that the maintenance of law and order and the safeguarding of internal security remain the responsibility of the Member States, some national governments have interpreted this, with some justification, as allowing them to derogate from binding EU law in the event of a serious threat to public policy or internal security. On this issue, the Advocate General has taken the view that where the right to free movement conflicts with Member States' security concerns, the interests of the Member States prevail,[21] effectively pitting the two categories against each other. By contrast, the CJEU has held that free movement and internal security are conceptually linked: the right to free movement is guaranteed precisely because strict control of external borders guarantees internal security. In the Court's view, the EU legislator has, in fact, already carried out a balancing exercise between free movement and internal security – and the result of this exercise is reflected in secondary EU law.[22] In other

19 This fear is not unfounded, as in 2017, several NGOs initiated proceedings against the extension of border controls before the *Conseil d'Etat*, which ultimately did not refer the matter for a preliminary ruling. Instead, it found that the controls did not infringe EU law, essentially on the basis of similar reasoning to that of the Advocate General.

20 The conflicting interpretations of the time-limits in the Code by the CJEU and the Advocate General are the result of different assessments of the principles of EU primary law, which also determine the interpretation of certain provisions of the Code. In this respect, the key issue in the case is to assess the relationship between the principle of free movement and the competence of Member States to maintain their internal security under Article 72 TFEU, which also determines the legal framework of the Code.

21 If a Member State were forced to lift strictly necessary border controls at the end of the six-month period, it would be prevented from exercising these powers. Such a situation would also, in certain cases be contrary to Article 4(2) TEU, which guarantees respect for the national identity of the Member States, in so far as it would prevent a State from addressing a threat to its national security.

22 Similarly, in *Alimanovic*, which concerned the payment of social benefits to EU citizens, the Court of Justice ruled that a subsistence allowance could be refused without a proportionality test, beacuse the legislator had already taken account of individual circumstances by providing for the possibility of maintaining the status of worker for a certain period. Judgment of 15 September 2015, *Case C-67/14, Alimanovic*, ECLI:EU:C:2015:597.

words, Member States cannot rely on national security or public security grounds that would otherwise be found in primary EU law beyond what is permitted under secondary law.[23]

With the ruling that EU Member States may only reintroduce border controls within the Schengen area under stringent conditions,[24] the CJEU essentially acts as a contractual guardian of the integration *acquis* of free movement, preventing the practice of Member States treating Schengen as their 'quasi-sovereign domain'.[25]

The approach of the Luxembourg forum is perfectly understandable from a purely positivist point of view: if the EU legislator has laid down a set of rules, they must be respected. The question, however, is to what extent a purely positivist position can be accepted when that set of rules has become 'obsolete'. The ECtHR has often applied the 'living instrument' doctrine to precisely such situations, *i.e.* adapting legislation and jurisprudence to present-day conditions. However, this presupposes that the current meaning of the norm in question can be changed – which, while not unthinkable even in EU law, would at least require a rethinking of the doctrines of *acte clair* and *acte éclairé*.

4. Future Uncertainties and Reform of the Legal Framework

The Austrian Administrative Court, which ruled on the above cases based on a preliminary ruling by the CJEU, concluded that the extension of internal border controls by the Austrian Ministry of the Interior since November 2017 was contrary to EU law. Nevertheless, Austria – and the other Member States – have not lifted their internal border controls.[26] On this basis, I can agree with Cebulak and Morvillo that it will be a long and bumpy road

23 Ágnes Töttős, 'The Possibility of Using Article 72 TFEU as a Conflict-of-Law Rule. Hungary Seeking Derogation from EU Asylum Law', *Hungarian Yearbook of International Law and European Law*, Vol. 9, 2021, pp. 212–232.

24 *Joined Cases C-368/20 and C-369/20*, *Landespolizeidirektion Steirmark and Bezirkshauptmannschaft Leibnitz*, paras. 65 and 74.

25 Jonas Bornemann, 'Reviving the Promise of Schengen', *VerfassungsBlog,* 28 April 2022.

26 Despite the Court's clear position that open borders are a priority for integration, the response Member States' response has been rather muted. The Austrian, German and Danish authorities have not accepted that the ECJ ruling calls for the abolition of border controls and, stressing the importance of national security, have re-extended border controls until November 2022, together with France, Norway and Sweden.

from this decision in principle to re-establish the Schengen area without internal borders.[27] How the above-mentioned Luxembourg court decision could be enforced in practice is still unclear. The judgment provides a clear legal basis for the Commission to act the guardian of the Treaties and to enforce the Code. However, knowing that the Commission has not acted in the past against the infringements in question against the Member States – a fact for which the CJEU reprimands it in the reasoning of its judgment[28] – it is to be feared that this task will, in the future, fall to the citizens of the Member States[29] and the national courts.[30]

Of course, the question is whether the Commission has any obligation to enforce secondary EU law, especially when the CJEU has firmly established the legality of this issue in a preliminary ruling. In my view, the answer is clearly yes, all the more so because if a court of a Member State were to disregard the same judgment of the CJEU (*i.e.* the interpretation of the law from Luxembourg contained in that judgment), this would undoubtedly establish the liability of that Member State. At the same time, it is questionable whether the Commission's arbitrary passivity does not violate the principle of the rule of law,[31] especially since it indirectly acknowledged

These decisions, all effective from 12 May 2022, appear to ignore the Court's ruling just two weeks earlier.

27 Pola Cebulak & Marta Morvillo, 'Who can end the border controls within Schengen? Implementing the CJEU's judgment in NW v Steiermark.' *AdiM blog*, May 2022, p. 4.

28 *Joined Cases C-368/20 and C-369/20*, *Landespolizeidirektion Steirmark and Bezirkshauptmannschaft Leibnitz*, para. 91. Pola Cebulak & Marta Morvillo, 'Schengen Restored', *VerfassungsBlog*, 5 May 2022.

29 The main issue here is state responsibility, *i.e.* where natural or legal persons suffer material damage as a result of the reintroduction of border controls by a Member State. However, this route to the enforcement of rights is much longer and more difficult, not to mention the fact that it requires the active participation of citizens.

30 The national forum does not necessarily make use of the possibility of referring to a previous decision. In France, for example, the *Conseil d'État* has already ruled twice on the legality of internal border controls, and has not referred the matter to the CJEU on either occassion. *See* Christoph Tometten, 'Contrôles aux frontières intérieures: La CJUE met fin à une pratique illégale', *La Revue des Droits de l'Homme*, June 2022.

31 The Commission has been heavily criticised in legal literature for the fact that, while its Legal Service sided with the applicant in the present proceedings and claimed that the border controls had been in breach of EU law since 2017, it had not taken any firm action against the Member State's breach in the period before that and had not used its discretionary powers under Article 256 TFEU to initiate infringement proceedings. Salomon & Rijpma 2023, p. 133.

the untenability of the existing practice when it initiated the legislative amendment.[32]

In this respect, the Commission argued that its silence could not be interpreted as an acceptance of the legality of the Austrian measures. In the hearing, it was keen to emphasise that it wished to approach the issue of the reintroduction of internal border controls from a political rather than a legal perspective and that it had decided to work closely with the Member States to abolish the controls.[33] Thus, instead of issuing an opinion or a letter of formal notice on the infringement in 2017, it presented a legislative proposal[34] to revise the Code, but its negotiations appear to have failed. This draft legislation proposed to widen the possibilities for Member States to reintroduce border controls, including their duration. On the other hand, it was intended to encourage Member States to replace the reintroduction of internal border controls with police checks in border areas.

The new legislative proposal[35] presented by the Commission following the adoption of its Schengen Strategy[36] in 2021 also included both elements of the previous proposal, such as the widening of possibilities for reinstatement and alternative checks in border areas. The legislative proposal,[37] which was finally approved in June 2024[38] with the aim of ensuring free movement, paradoxically extends the period for reintroducing checks at internal borders to two years, with the possibility of renewing the six-month period.[39] Moreover, the original proposal even allowed for an unlimited

32 This also reflects the general trend followed by the Commission in prioritising its role as the 'engine of integration' over its role as the 'guardian of the treaties'. *See* R. Daniel Kelemen & Tommaso Pavon, 'Law Enforcement and the Politics of Supranational Forbearance in the European Union', *World Politics,* Vol. 75, Issue 4, 2023, pp. 779–825.

33 Pola Cebulak & Marta Morvillo,'The Guardian is Absent', *VerfassungsBlog*, 25 June 2021.

34 COM(2017) 571.

35 Proposal to amend Regulation (EU) 2016/399 on the EU Code on the rules governing the movement of persons across borders, COM(2021) 891.

36 COM(2021) 277.

37 *See* Jean-Yves Carlier & Eleonora Frasca, 'For a wiser and effective management of reintroducing internal border controls: Comment on the NW judgment', *EU Migration Law Blog*, 26 June 2023.

38 Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.

39 *See* the new Article 25a(5) of the Code.

extension thereof in the case of renewed threats.[40] It should also be noted that the new Schengen Code also explicitly mentions secondary movements as a public policy justification for reintroducing border controls, giving Member States much more room for manoeuvre.[41] The Commission has still not issued an opinion or taken any steps to initiate infringement proceedings. It continues to use political means and negotiations to persuade Member States maintaining internal border controls to move to less intrusive measures, such as police checks.[42]

5. Recent CJEU Ruling on the Reintroduction of Internal Border Controls, from a Public Health Perspective

It was already clear at the time of the pandemic that the long-term effects of the travel bans and restrictions introduced by Member States would become apparent over time and that the question of their legality (compatibility with EU law) would be raised before both national and international fora. This was the case in the *Nordic Info BV* case, which was referred to the CJEU for a preliminary ruling.[43] The judgment, which was published by the Court in December 2023, highlights once again the complex and multifaceted relationship between the guarantee of the fundamental freedom of movement and the fight to contain the pandemic.

Nordic Info BV focused on the public health restrictions imposed in relation to the outbreak of COVID-19. At the outbreak of the pandemic, the EU introduced strict measures *vis-á-vis* third countries and between individual Member States, significantly restricting the free movement of people across its borders. While most of these measures were lifted by the end of June 2020, several Member States, including Belgium, where the plaintiff

40 *See* Article 27a(5) of the 2021 proposal.

41 "[…] a serious threat to public policy or internal security can also result from large scale unauthorised movements of irregular migrants between the Member States […]." Recital (35) of the Code. It is feared that prioritising the prevention of secondary movements over the strengthening of external border protection will place additional burdens on peripheral states, including Hungary.

42 This may also be due to the fact that an infringement procedure against the states concerned would also hamper, for example, the decision on Schengen enlargement, as Austria's veto on the dismantling of border controls at the Romanian-Bulgarian land borders would be difficult to overcome if the Commission were to take a tougher stance on the reinstatement/sustainability of internal border controls.

43 Judgment of 5 December 2023, *Case C-128/22*, *Nordic Info BV*, ECLI:EU:C:2023:951.

in the main case, Nordic Info BV was based, maintained restrictions on international travel as a precautionary measure, fearing a possible second wave of COVID-19.[44] Nordic Info BV was forced to cancel all its trips to Sweden scheduled for the 2020 summer season due to the colour codes imposed by the Belgian ministerial decree. This color code was subsequently changed from red to orange for the region in question within a relatively short period of time, effectively lifting the travel restrictions in question. The company then brought an action against the Belgian Government for compensation for the damage it allegedly suffered as a result of the introduction and subsequent amendment of the colour codes provided for in the Ministerial Decree. It claimed, *inter alia*, that the Belgian authorities had carried out checks at the border between Belgium and other Schengen States in order to implement the travel restrictions in question, in breach of the Schengen Borders Code. The case was referred to the CJEU for a preliminary ruling, with the national court asking whether the travel bans/restrictions were compatible with the provisions of the Free Movement Directive[45] on the one hand, and the Schengen Borders Code[46] on the other. In particular, whether the police control of travel restrictions in border areas[47] constituted border checks and, if so, whether the conditions for the exceptional reintroduction of border control at these borders were met.

With regard to the first question, which concerned the compatibility of the restrictions with the directive, the Court held, first, that while Articles 27 and 29 of the directive allow restrictions on the freedom of movement

44 Among other things, it has maintained a travel ban on 'non-essential' travel to and from certain countries considered to be at high risk of infection; a quarantine and testing requirement for Belgian residents returning from those countries, and controls at or near Belgian borders to enforce these travel restrictions.

45 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.

46 The main question was whether *(i)* a general ban on non-essential travel for nationals and residents intending to travel to the Red Zone and *(ii)* the imposition of entry restrictions (quarantine and inspections) on non-nationals and non-residents arriving from the Red Zone were compatible with the Directive.

47 For example, at railway stations where police officers randomly checked some passengers of international high-speed trains from neighbouring countries when they disembarked at the first station where these trains stopped after entering Belgian territory.

for reasons of public health on epidemiological grounds, and that this applies a *fortiori to* pandemics,[48] irrespective of whether the restrictive measures are adopted in the form of an individual act or a general measure.[49] However, the CJEU placed particular emphasis on the requirement of proportionality in the form of a strict proportionality test,[50] which it also linked to the precautionary principle.

It should be noted that the proportionality of the measures taken by the Member State was examined by the CJEU as a whole in the light of the package of measures aimed at restoring freedom of movement, which led to the conclusion that the relevant provisions of the Directive did not preclude the general travel ban and the various travel restrictions (quarantine, testing) introduced by Belgium.

Concerning the second question, whether the police control of travel restrictions in border areas amounted to border checks, the Court ultimately left it to the referring court to answer this question,[51] while at the same time subtly indicating that the police checks were probably not border controls due to their specific nature.[52]

Were the court nevertheless to find so, the CJEU held that, although the Code on border controls does not explicitly mention the threat to public health as one of the grounds for reintroducing checks,[53] it could constitute a serious threat to internal security and public order.[54]

48 *Case C-128/22*, *Nordic Info BV*, paras. 52–53.

49 Id. para. 67. In that regard, I share the Court's view that, in the absence of an express provision to the contrary in a directive, the legislature may not require an individual assessment in the absence of a threat to public health. Laura Gyeney, 'Editorial Comments: Covid-19 – EU Citizenship and the Right to Free Movement in a Public Health Crisis', *Hungarian Yearbook of International Law and European Law,* Vol. 9, 2021, p. 14.

50 *Case C-128/22*, *Nordic Info BV*, para. 92. Under this test, a Member State may be required to take measures that are less restrictive of free movement within the EU, even if this would result in a lower level of protection of its legitimate interests. On the proportionality of the measures taken in the context of the pandemic, *see* id. pp. 15–16.

51 *Case C-128/22*, *Nordic Info BV*, para. 109.

52 Id. para. 116. Firstly, it stressed that the nature of the controls was to check compliance with the prohibition on crossing the border. Secondly, these checks were carried out temporarily (not systematically) and only in specific places such as airports and major international railway stations.

53 Gyeney 2021, p. 13.

54 *Case C-128/22*, *Nordic Info BV*, paras. 125–126.

> "A pandemic of a scale such as that of COVID-19, characterised by a contagious disease capable of causing death among various categories of the population and overstretching or even overwhelming national healthcare systems, is liable to affect one of the fundamental interests of society, [...]"

and thus "[...] may be classified a serious threat to public policy and/or internal security within the meaning of Article 25(1) of the Schengen Borders Code."[55]

In summary, the Court held that the Article of the Code in question does not preclude legislation prohibiting the crossing of internal borders on public health grounds to combat the COVID-19 pandemic, provided that this did not constitute border control but merely the exercise of police powers. The reintroduction of border controls is also permissible, as the pandemic falls under the internal security/public order exception.

It is apparent from the above that the CJEU is very lenient in its assessment of otherwise stringent national measures. This may seem particularly surprising given that freedom of movement is, in the words of the Advocate General in this case, the 'dearest child' of EU law.[56] Some authors attribute the Court's lenient assessment of these measures to the fact that the Luxembourg body, just like the legislator, probably regarded the COVID-19 pandemic as a 'one-off disruption'. As such, the wide discretion (or almost *carte blanche*) granted to Member States will not have a long-term impact on the case law.[57]

In my view, the unprecedented degree of seriousness of the health crisis and the scientific uncertainty surrounding the treatment of viral diseases were much more compelling arguments for the Court's broad interpretation of the public health exception than those mentioned above. Last but not least, the fact that the measures taken by the Member States in the context of the pandemic were ultimately aimed at ensuring freedom of movement in the long term by means of short-term restrictions played an important role in the Court's decision.

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55 Id. para. 127.

56 Opinion of Advocate General Emiliou delivered on 7 September 2023, *Case C-128/22, Nordic Info BV*, ECLI:EU:C:2023:645, para. 128.

57 Danaja Fabcic Povse, 'So long and see you in the next pandemic? The Court's one-and-done approach on permissible reasons to restrict freedom of movement for public health reasons in the Nordic Info case (C-128/22) of 5 December 2023', *European Law Blog*, 19 December 2023.

6. Conclusions

In times of crisis, citizens expect concrete responses, especially from their own Member State. One such response has been the imposition of travel bans/restrictions by Member States in the context of the COVID-19 pandemic, the police control of the enforcement of these bans, and the reintroduction of border controls at internal borders between Member States in response to migratory pressures and terrorist threats. There is no question that in a multi-level governance system, the EU must leave room for Member States to act, which is also possible under the relevant secondary legislation in the form of public interest exceptions. For example, the Schengen Borders Code allows Member States to temporarily reintroduce border controls in the event of a threat to public policy and public security, which, at least according to the recent case law of the CJEU, includes a public health crisis. While this approach may be logical from a practical point of view, it rightly raises the question of whether a restriction of a fundamental right on grounds of public health can then be considered to be fully equivalent to a restriction on grounds of public policy or public security, and why the 'founding fathers' of EU integration have in many cases explicitly mentioned public health in the except to EU law in primary law. It is precisely in light of these primary law characteristics that the CJEU – going beyond its role as quasi-legislator – has corrected legislative shortcomings in the work of the EU legislature.[58]

This case law of the CJEU is also controversial because, at the same time, the CJEU itself interprets the applicability of the derogations very strictly, both in terms of time (the duration of border controls may not exceed six months) and in terms of their compatibility with general principles of law (the measures must comply with the principle of proportionality). Compliance with these exceptions was the main issue in the *Landespolizeidirektion Steiermark* and *Nordic Info BV* cases. In both cases, the CJEU expressly based its decision on the rules laid down in secondary law, *i.e.* the Schengen Borders Code, but it reached different conclusions in the two cases due to different interpretations of these rules. While in the case of *Landespolizeidirektion Steiermark*, the exception rule for border controls

58 Under the new rules, it will now be possible to put in place harmonised temporary travel restrictions at the EU's external borders in the event of a large scale public health emergency, following a Council decision. *See* the new Articles 21a and 28 of the Code.

was interpreted very strictly, in the case of *Nordic Info BV*, it was interpreted very broadly, also in the light of the precautionary principle.

The difference in the Court's approach is probably due to the fact that, although in both cases the Court based its decisions technically on the interpretation of secondary law, the Luxembourg court was primarily guided in these decisions by the need to enforce the requirement of free movement in primary law. While the measures taken by Member States in the context of a pandemic are ultimately aimed at ensuring freedom of movement, this is not necessarily the case in the context of measures taken by Member States to control migratory pressures and human smugglers. However, it is regrettable that in *Landespolizeidirektion Steiermark*, the CJEU no longer sought to reconcile freedom of movement with the Member States' need for security, since, at least in the Court's view, the two are conceptually linked. In its view, the right to freedom of movement is guaranteed precisely because strict control of external borders is itself a guarantee of internal security.

Even if one can agree with the conclusion of the CJEU in the *Landespolizeidirektion Steiermark* case that Member States cannot maintain border controls *ad infinitum*, one has to recognise that the CJEU interprets secondary law according to its own needs and chooses the path it considers to be the most politically expedient. All this (*i.e.* the political will or lack of it) applies all the more to the Commission, which, although it has argued in favour of free movement across the Schengen borders in the judicial process, has previously stood by and watched for many years as Member States continued to break the law.[59] Against this background, it is questionable, to say the least, how an institution that has so far been completely passive can be expected to enforce a judicial decision.[60]

The issue is becoming increasingly urgent. Starting with 1 April 2024, air and sea border controls between Romania, Bulgaria, and the Schengen area member states are abolished. A decision on the abolition of land border

59 As Bornemann notes somewhat ironically, the Commission could have taken a leaf out of the book of the plaintiffs in the main proceedings, who, with considerable professional skill, have made a persistent effort to enforce EU law. Jonas Bornemann, 'Reviving the Promise of Schengen', *VerfassungsBlog*, 28 April 2022.

60 At the same time, it must be acknowledged that the political environment (concerns about migratory pressures, the forthcoming enlargement of Schengen) is not conducive to the Commission's transformation from a political actor into a mere legal executive. *See* at www.euronews.com/my-europe/2023/12/05/austria-still-opposed-to-schengen-accession-of-romania-and-bulgaria-preventing-december-vo.

controls is also expected soon.[61] The enlargement of the Schengen area is likely to raise further practical questions about the day-to-day functioning of an area without border controls – especially in an era of new and emerging crises.

61 The Hungarian Presidency will also aim to facilitate the finalisation of the Schengen enlargement process, in particular by fostering a consensus in the Council on the lifting of border controls at the internal land borders of Romania and Bulgaria. Programme of the Hungarian Presidency of the Council of the European Union in the Second Half of 2024, p. 24.