



The compatibility of German internal border controls with the Schengen Borders Code

with particular reference to the case law of the European Court of Justice and the current
reform of the Schengen Borders Code

- Study -
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Executive summary

The absence of internal border controls is a fundamental principle of EU law and the core rule of the Schengen area. Although internal border controls in the Schengen area should be a narrowly defined exception, a massive increase in internal border controls has been observed in the Federal Republic of Germany and other Member States since 2015. The Federal Republic of Germany cites increased irregular migration, the threat of terrorism and the fight against COVID-19 as the main reasons for reintroducing internal border controls. This study examines the compatibility of the reintroduction of internal border controls by the Federal Republic of Germany with its obligations under EU law.

The Schengen Borders Code (SBC) provides strictly defined exceptions from the principle that there shall be no controls at the internal borders. Member states may only temporarily reintroduce internal border controls if there is a serious threat to internal security or public order. Moreover, internal border controls may only be used as a last resort and on a temporary basis, as the Court of Justice of the EU (CJEU) confirmed.

Germany's current state practice however shows a different picture. Since 2015 Germany continuously prolonged controls at its internal border, in particular at the German-Austrian border. This practice is in violation of Germany's obligations under EU law. This study concludes that since November 2017, the controls at the internal borders with Austria, conducted for reasons related to migration and security policy, lack legal basis. Consequently, these controls have been unlawful since that time.

This study emphasises that the prolongation of internal border controls by the German federal government is increasingly based on abstract risks - instead of actual, substantiated threats to internal security or public policy as required by the SBC. Moreover, the internal border controls often are disproportionate and increasingly seem to constitute symbolic measures that are motivated by general political rationales rather than actual threats.

The European Commission, as the guardian of the treaties, is only insufficiently fulfilling its mandate to enforce compliance with the rules of the SBC. The way in which German administrative courts deal with appeals against internal border controls is equally problematic. The narrow interpretation of standing requirements by German administrative courts means that legal actions against internal border controls are dismissed as inadmissible. Currently, affected individuals lack an effective legal remedy against unlawful internal border controls. Primarily affected by this situation are Union citizens.

The current reform of the SBC is a response to these challenges. While the reform extends member states' discretion to reinstate controls at their internal borders, it also imposes more stringent procedural obligations on them in doing so. The practical outcome regarding the reduction of internal border controls hinges primarily on the Commission's commitment to enforcing the amended rules of the SBC.

I. Subject matter, background and structure of the study

Today, the Schengen area comprises all EU member states,¹ with the exception of Cyprus and Ireland, as well as the non-EU states Iceland, Norway, Switzerland and Liechtenstein. The basic principle of the Schengen area is the absence of border controls between its member states. The abolition of internal border controls has been at the heart of European political and economic integration since the early days of the European Community.² In today's constitutional framework of EU law, the area without internal borders, in which Union citizens can move freely, is defined as a fundamental objective of the Union.³

However, the Schengen area has been under considerable pressure since 2015. In response to terrorist attacks, secondary migration (of third-country nationals seeking protection) and the Covid-19 pandemic, member states reintroduced "temporary" controls at their internal borders. Although border controls should only be reintroduced on a temporary basis and in exceptional circumstances, the continuous prolongation of border controls since 2015 has resulted in a quasi-permanent state of border controls in the Schengen area. The German federal government carries out controls at its land borders with Austria since 2015 and recently expanded internal border controls to its borders with Poland, the Czech Republic and Switzerland. In addition, the reform of the Schengen SBC of April 2024 provides for an expansion of member states' leeway in the reintroduction and extension of internal border controls. Germany's control practice and the reform of the SBC raise a number of legal questions, which this study analyses.

This study focuses on three key aspects:

- (1) the compatibility of Germany's internal border controls with EU law.
- (2) the effects of Germany's internal border controls, especially the structural implications of Germany's prolonged reintroduction of border controls on the legal framework and their economic consequences.
- (3) the key aspects of the 2024 reform of the SBC in light of the reintroduction of internal border controls.

The study proceeds as follows.

Given that the principle of the absence of internal border controls is enshrined in the EU treaties, Part II initially presents the primary legal framework of this principle. Part III then examines the secondary legal elaboration of this primary framework in the Schengen Borders Code. Part IV describes the German internal border control practice since 2015 and examines whether it is compatible with the requirements of EU law. The period under examination spans from September 13, 2015, to February 1, 2024.

¹ Bulgaria and Romania joined the EU with effect from March 31, 2024, whereby only checks at the internal air and sea borders were lifted for a transitional period.

² Communication by the Commission of the European Common Market to the Council of the EEC and to the Member States Governments, 2.10.1962. See also: White Paper from the Commission to the European Council on Completing the Single Market, 28-29.6.1985, COM(85) 310, para. 12, 24 and 48.

³ Art. 3(2) TEU.

Part V delves into the jurisprudence of German administrative courts concerning the reintroduction of internal border controls within the context of Union law provisions. Part VI addresses the legal and economic ramifications of German internal border controls. The period under investigation is from 13 September 2015 to 1 February 2024. As guardian of the Treaties, the European Commission assumes the central role in monitoring and enforcing compliance with obligations under EU law. Part VII therefore examines the Commission's role in enforcing the obligations under the SBC. Part VIII concludes and provides a brief analysis of the key aspects of the reform of the SBC 2024.

II. The principle of the absence of internal border controls in EU primary law

The principle that there shall be no controls at the internal borders in the Schengen area⁴ has a threefold basis in EU primary law. Firstly, it is a constitutional objective in Art. 3(2) of the Treaty on European Union (TEU) and a structural principle of the EU (II.1.). Secondly, it is a central component of the free movement of EU citizens and as such enshrined as a fundamental right (II.2.). Thirdly, it is an integral part of the internal market (II.3.).

1. The absence of internal border controls as an objective of the Union

The area of freedom, security and justice (AFSJ) is one of the fundamental objectives of the Union. Art. 3(2) TEU states:

The Union shall offer its citizens an area of freedom, security and justice *without internal frontiers*, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. [emphasis added]

Art. 3(2) TEU is of central importance for European integration.⁵ The historical development of Art. 3(2) TEU illustrates this importance in the current constitutional structure of Union law. The Treaty of Nice still provided for a "gradual establishment" (Art. 63 TEC) and the "maintenance and development" (Art. 2(1) TEU) of the area as an objective. The draft Constitutional Treaty still placed the objectives of the AFSJ and the establishment of the internal market in the same place. Art. 3(2) TEU now mentions the AFSJ before the establishment of the internal market and Art. 67(1) TFEU states that the Union "shall constitute" an area of freedom, security and justice. These changes are not mere semantic changes, but reflect the increasing importance of the area without internal border controls in the constitutional framework of EU law.

⁴ Not all EU member states are fully part of the Schengen area. In some cases, regular internal border controls therefore also take place permanently within the Schengen area. For example, Bulgaria and Romania were only partial users of the SBC until March 31, 2024 and therefore not yet fully-fledged members of the Schengen area. From March 31, 2024, only internal border controls for intra-Schengen air and ferry connections will be abolished, while border controls at the internal land borders will continue. The SBC itself also refers to the "area without internal border controls", see for example recital 22, Art. 25(1), 29 (1) and (2), Art. 30 (1)(1a) SBC. However, for the sake of clarity, the terms "Schengen area" and "area without internal border controls" are used interchangeably.

⁵ Ruffert in Calliess/Ruffert, 6th ed. 2022, EU Treaty (Lisbon) Art. 3(1).

In the legal literature, the AFSJ is attributed a twofold quality. Firstly, it represents a geographical area in which EU citizens can actually move freely.⁶ Secondly, the AFSJ is a legal area that is substantively qualified by the terms “freedom, security and justice”.⁷ Following this literature, the legal content of this qualification results from Art. 67(2) and Art. 77(1a) and (2e) TFEU. While Art. 67(1) TFEU makes clear that the Union constitutes an AFSJ, its paragraphs 2-4 refer programmatically to the notions of freedom, security and justice. Art. 67(2) TFEU refers to “freedom” by stipulating that persons shall not be subject to checks at internal borders. The notion of “freedom” in Art. 67(2) TFEU, which substantively qualifies the content of the treaty objective in Art. 3(2) TEU, thus includes the freedom to move within the area without being subject to controls at internal borders.

No case law of the CJEU exists yet that specifies the concrete legal consequences that follow from the principle that there shall be no internal border controls. However, Advocate General Yves Bot interpreted the AFSJ in Article 3(2) TEU as an “area without internal borders” in which “the free movement of Union citizens and third-country nationals who have legally entered and resided in the Union shall not be hindered by internal border controls, whatever their nationality”.⁸ The legal literature also emphasises that the freedom to move unhindered across internal borders is constitutive of the entire AFSJ and an essential part of what the Union offers its citizens.⁹ The German Federal Constitutional Court underlined the importance of the area without internal border controls for European integration by describing it as an area in which EU citizens could move and thrive freely.¹⁰

Art. 67 TFEU addresses EU institutions¹¹ and thus does not include subjective rights for individuals. Nevertheless, the literature suggests that Article 67(2) TFEU is functionally related to EU citizenship as its objective of free movement is flanking the free movement rights of Union citizenship.¹²

2. The right to free movement in Union citizenship

It is clear from Art. 3(2) TEU that Union citizens are the primary beneficiaries of the AFSJ. Art. 3(2) TEU represents the territorial counterpart to the free movement of EU citizens. Art. 21(1) TFEU grants EU citizens the right to move and reside freely within the territory of the Member

⁶ *Fichera*, Sketches of a theory of Europe as an area of freedom, security and justice, in *Fletcher/ Herlin-Karnell/ Matera*, 2016, 40ff; *Gibbs*, Constitutional Life and Europe's Area of Freedom, Security and Justice, 2011, 84ff; *Lindahl*, Finding a place for freedom, security and justice, 2004 E.L.Rev., 463ff.

⁷ *Fichera*, *ibid.*, 40ff; *Lindahl*, *ibid.*, 463ff; *Costello*, The Human Rights of Migrants and Refugees in European Law, 2016, 17ff.

⁸ Opinion of Advocate General Yves Bot of 6.9.2018, C-412/17 and C-474/17, para. 35, 36.

⁹ See: *Geiger/Kirchmair* in *Geiger/Khan/Kotzur/Kirchmair*, 7th ed. 2023, TEU Art. 3 para. 6; *Peers*, EU Justice and Home Affairs Law, Vol. I, 4th ed. 2016, p. 85; *Monar*, Der Raum der Freiheit, der Sicherheit und des Rechts, in v. *Bogdandy/Bast* (Eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* 2009, 754; *Röben*, Art. 67 TFEU, in *Grabitz/Hilf/Nettesheim*, *Das Recht der Europäischen Union*, 70th ed., May 2020, para. 10, 55; *Salomon/Rijpma*, A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship, *German Law Journal* 2023, 1 (27f.).

¹⁰ See: BVerfG, judgment of 30 June 2009, 2 BvE 2/08, para. 248, with explicit reference to Art. 3 para. 2 TEU.

¹¹ CJEU, order of 6.6.2013, C-14/13, para. 24, CJEU, Cholakova judgement of 22 June 2010, C-188/10, para. 64.

¹² cf. *Röben*, *ibid.*, para. 18.

States. This general right to freedom of movement applies regardless of the specific purpose of residence and the internal market-related rights to freedom of movement.¹³ This right to free movement is expressed in terms of fundamental rights in Article 45(1) of the EU Charter of Fundamental Rights (CFR), which also grants EU citizens the right to move and reside freely within the territory of the member states in almost identical wording.¹⁴

The question of whether Art. 21(1) TFEU in conjunction with Art. 45(1) CFR includes a right to uncontrolled crossing of internal borders is assessed differently in the literature, but is predominantly answered in the affirmative.¹⁵ The CJEU has not yet conclusively clarified this question.¹⁶ However, the CJEU emphasises that “citizenship of the Union under Article 21 TFEU confers on every citizen of the Union the fundamental and personal right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the Treaties and by the measures adopted to give them effect”.¹⁷ Moreover, Advocate General Yves Bot affirmed that internal border controls interfere with the right of free movement enshrined in Art. 45 CFR.¹⁸

This study agrees with the prevailing view in the literature and the opinion of the Advocate General that Art. 21 TFEU and Art. 45 CFR include a right of Union citizens to move freely across internal borders without being subject to internal border controls, unless such controls are explicitly permitted by Union law.¹⁹

3. The European Single Market as an area without internal borders

As early as 1962, the Commission emphasised the need to abolish internal border controls in order to establish a common market. In the view of the Commission, border controls would not only prevent the establishment of a genuine common market, but also obscure for European citizens the political significance of the project entered into by the six member

¹³ Khan/Schäffer in Geiger/Khan/Kotzur/Kirchmair, 7th ed. 2023, TFEU Art. 21, para. 1; see also Wollenschläger, Grundfreiheit ohne Markt 2017.

¹⁴ On the relationship between the two norms, see Jarass GrCh, 4th ed. 2021, EU Charter of Fundamental Rights Art. 45(2); Art. 45(1) CFR is generally classified as a fundamental right. With the probably dominant view in the literature in the affirmative: Streinz in Streinz, GR-Charta, 3rd ed. 2018, Art. 45 para. 2; van Vormizeele in Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 4th ed. 2019 Art. 45 para. 2; Heselhaus in Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEU, 2nd ed. 2023, Art. 45 para. 2, 11 et seq.; Kadelbach, cited in Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEU, 2nd ed. 2023, Art. 45 para. 11, is probably dismissive.

¹⁵ Affirming the interference: Jarass, EU-Grundrechte-Charta, 4th ed. 2021, Art. 45 para. 11; denying it: Kluth in Calliess/Ruffert, 6th ed. 2022, TFEU Art. 21 para. 6; Pechstein/Bunk, EuGRZ 1997, 547 (552); differentiating according to the frequency and exact circumstances of the border control: Heselhaus in Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEU, 1st ed. 2017, GRC Art. 45 para. 21.

¹⁶ Salomon/Rijpma, [Fn. 9], 1 (21); CJEU, judgement of 21 September 1999, C-378/97, Wijzenbeek.

¹⁷ CJEU, judgement of 16 October 2012, C-364/10, (43), Hungary/Slovak Republic.

¹⁸ CJEU, Opinion of AG Bot of 6 September 2018, C-412/17, C-474/17, (38), Touring Tours.

¹⁹ On the geographical fragmentation of EU citizens' rights as a consequence of this right to free movement and its constitutional justification, see: Salomon/Rijpma, [Fn. 9], 302 et seq.

states.²⁰ Despite these early references to the political dimension of the abolition of internal border controls, the idea of an "area without internal borders" was strongly influenced from the outset by the functional logic of the internal market. In 1985, the Commission proposed the complete abolition of internal border controls in the White Paper on completing the internal market. Entry controls at internal borders would "perpetuate the costs and disadvantages of a divided market" and were "visible proof of the continuing fragmentation of the Community", as well as "a sign of arbitrary administrative power" over individuals.²¹ With the amendment of Art. 8a of the EEC Treaty by the Single European Act in 1986, the internal market was defined for the first time as an "area without internal frontiers" in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.²² This formulation has endured and is today enshrined in Art. 26(2) TFEU. However, as integration progressed, the European project - and with it the idea of an "area without internal borders" - increasingly emancipated itself from the functional orientation of the market economy.²³ More recent research increasingly points to the political dimension of free movement in the Schengen area and its (historical) links with establishing European citizenship, which, with a few exceptions,²⁴ has long been neglected by the legal literature.²⁵

4. Art. 72 TFEU: No primary law derogation from the absence of internal border controls

In connection with the reintroduction of internal border controls, the question arises as to the relationship between the principle of the absence of internal border controls on the one hand and Art. 72 TFEU on the other hand. According to Art. 72 TFEU, the exercise of member states' responsibilities for maintaining law and order and safeguarding internal security shall not be affected by the provisions of Title V TFEU (relating to the AFSJ). Moreover, Art. 4(2) TEU states that the maintenance of national security remains within the exclusive responsibility of member states. In connection with internal border controls, the question therefore arises as to whether a member state may invoke Art. 72 TFEU or Art. 4(2) TEU in order to prolong internal border controls, if the derogations in Art. 25-29 SBC do not permit this. In other words: may a member state invoke its powers under primary law, if secondary law, as the German Federal Government among others argues,²⁶ would not provide sufficient possibilities for combating a threat?

²⁰ The European Community, A communication by the Commission of the European Common Market to the Council of Ministers of the EEC and the Member governments. European Community Information Service, October 2, 1962, available at <http://aei.pitt.edu/53872/>.

²¹ White Paper from the Commission to the European Council on the completion of the internal market, 28-29.6.1985, COM(85) 310, para. 12, 24 and 48.

²² Commission of the European Communities, [Fn. 20], para. 27 ; *Salomon/Rijpma*, [Fn. 9], 1 (9ff.).

²³ On this development *Monar*, [Fn. 9], p. 753ff.

²⁴ *Groenendijk*, Reinstatement of Controls Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?, *European Law Journal* 2004, 150.

²⁵ *Salomon/Rijpma*, [Fn. 9], 1 (8).

²⁶ *Cebulak/Morvillo*, The Guardian is absent, June 25, 2021 Constitution blog, available at <https://verfassungsblog.de/the-guardian-is-absent/>.

The CJEU answered this question with a clear “No”. According to the settled case law of the CJEU, although it is for member states to adopt appropriate measures to ensure order and security on their territory, “it cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law.”²⁷ This would otherwise impair the binding nature and uniformity of Union law.²⁸ Rather, the exceptions in Art. 72 TFEU, the CJEU clarifies, refer to “very specific exceptional cases” and must be interpreted narrowly.²⁹ Generic references to Art. 72 TFEU are therefore not permitted.

In the case *Landespolizeidirektion Steiermark*, the CJEU specifically addressed the question of whether Member States may rely on Art. 72 TFEU or Art. 4(2) TEU when reintroducing internal border controls. The CJEU reiterated its previous case law and clarified that the derogations in Art. 25 et seq. SBC set out a “comprehensive framework” for the reintroduction of internal border controls; therefore member states may not invoke Art. 72 TFEU or Art. 4(2) TEU when reintroducing internal border controls.³⁰ The strict time limits for the reintroduction of internal border controls in the SBC would be undermined, if a Member State could invoke Art. 72 TFEU to prolong its controls when the time limits had been exhausted.³¹

III. The secondary law framework governing internal border controls: The Schengen Borders Code

The SBC is the central secondary legislation for achieving the objective of an area without internal borders.³² This is largely based on the differentiation between internal and external borders. While the external borders are to be controlled in accordance with Title II of the SBC, Title III stipulates that such controls should not be carried out at internal borders.³³ Title III SBC in turn provides for a rule-exception relationship. While Arts. 22-24 SBC regulate the basic principle of the absence of internal border controls in the Schengen area, Arts. 25-35 SBC contain detailed provisions for the temporary reintroduction of internal border controls, which is only permitted in exceptional circumstances.³⁴

²⁷ CJEU, judgement of April 2 2020, C-715/17, C-718/17 and C-719/17, (143), *Commission v. Poland, Hungary, Czech Republic*.

²⁸ CJEU, *ibid.*, (143).

²⁹ CJEU, *ibid.*, (143-144).

³⁰ CJEU, judgement of 26 April 2022, C-368/20 and C-369/20, (87), *Landespolizeidirektion Steiermark*.

³¹ CJEU, judgement of 26 April 2022, C-368/20 and C-369/20, (55, 83-90), *Landespolizeidirektion Steiermark*; see also the argumentation of the French government in ECJ judgement of 21 September 2023, C-143/22, (45), ADDE; on the competence of the CJEU with regard to internal border controls against the background of Art. 72 and 276 TFEU, see *Bornemann*, Member State discretion in the Schengen Borders Code - Consequences for an area without internal border controls, *Integration* (2018), 41:3, (201ff.).

³² Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1-52, hereinafter “SBC”.

³³ See *Progin-Theuerkauf/Epiney*, in: Thym/Hailbronner (eds.), 3rd ed. 2022 EU immigration and asylum law, Chapter 5: Schengen Borders Code Regulation (EU) 2016/399, Art. 1 para. 1 et seq.

³⁴ Emphasising this rule-exception relationship CJEU, [Fn. 30] *Landespolizeidirektion Steiermark*, (63-65).

1. The core rule: no control of persons at internal borders

Art. 1 SBC reflects the principle of the absence of internal border controls:

This Regulation provides for the absence of border control of persons crossing the internal borders between the Member States of the Union. It lays down rules governing border control of persons crossing the external borders of the Member States of the Union.

Art. 22 SBC emphasises this principle again and constitutes the core rule of the SBC:

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

This provision has direct effect, as its wording is sufficiently clear and specific and its application is not dependent on any further conditions.

2. Exceptions to the absence of internal border controls

The core rule in the SBC that there shall be no border checks rule is however not absolute. Member states may temporarily reintroduce internal border controls as a measure of last resort when they face a serious threat to public order or internal security. The SBC includes two different procedures for reintroducing internal border controls: (a) the "unilateral" procedure under Art. 25 and 28 SBC, which is the most relevant in practice, and (b) the "supranational" procedure under Art. 29 SBC, which is rarely applied in practice. Both procedures contain detailed material and procedural requirements for the reintroduction of internal border controls.

a) The unilateral reintroduction of internal border controls in Art. 25 and 28 SBC

Member states are permitted to unilaterally reintroduce temporary internal border controls in two different constellations: firstly, if they face a *foreseeable* serious threat to public policy or the internal security (Art. 25 SBC); secondly, if they face an *unforeseeable* serious threat to public policy or internal security that requires immediate action (Art. 28 SBC).

(1) Material requirement: Serious threat to public order or internal security

Internal border controls may only be temporarily reintroduced to prevent serious threats to public policy or internal security.³⁵ The SBC specifies that "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".³⁶ In line with its case law on Art. 72 TFEU,³⁷ the CJEU held that the reintroduction of internal border controls as a restriction on the free movement of EU citizens constitutes an exception to the principle of the absence of

³⁵ See recitals 22, 23, 24 SBC.

³⁶ See recital 27 SBC.

³⁷ CJEU, judgement of 2 April 2020, C-715/17, C-718/17 and C-719/17, (143), Commission v. Poland, Hungary, Czech Republic.

checks on persons at internal borders described above and must therefore be interpreted strictly.³⁸

If a Member State invokes the exceptional circumstances of public order or internal security, it is up to it to prove that this is actually necessary.³⁹ The SBC emphasises that the existence of an actual and present danger must be based “on certain objective criteria”.⁴⁰ Despite this strict standard, member states retain a certain margin of discretion in the assessment of whether a situation amounts to a serious threat to internal security or public order.⁴¹

Specific examples of foreseeable threats within the meaning of Art. 25 SBC include political summits, demonstrations or major sporting events, while unforeseeable threats within the meaning of Art. 28 SBC include for example terrorist attacks.⁴² According to recital 26 SBC, migration and the crossing of external borders by a large number of third-country nationals per se should not be considered a threat to public policy or internal security.

In the *Nordic Info* case, the CJEU dealt for the first time with the question of whether a pandemic constitutes a threat to public policy or internal security within the meaning of Art. 25(1) SBC. The CJEU held that a threat to public health as such does not justify the reintroduction of internal border controls. However, under certain circumstances, a pandemic could meet the threshold of a threat to public policy: “a pandemic of a scale such as the Covid19 pandemic, characterised by a contagious disease that can lead to death in various population groups and overburden or even overload national health systems” would amount to a serious threat in the sense of Art. 25(1) SBC.⁴³

(2) Temporary restriction: Only temporary reintroduction of internal border controls

Against the background of the principle that there shall be no controls at the internal borders, the temporal limitation of internal border controls is a core aspect. Here too, a distinction must be made between *foreseeable* threats under Art. 25 SBC and *unforeseeable* threats under Art. 28 SBC. Parts of the legal literature state that the permissible duration under Art. 25 and 28 SBC are cumulative.⁴⁴ In addition, the temporal limitations apply to the individual border sections affected by internal border controls.

In the event of foreseeable threats in accordance with Article 25(1) SBC, internal border controls may be reintroduced for a limited period of no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of internal border controls shall not exceed what is strictly necessary to deal with the serious threat. If the threat persists beyond the period referred to in Art. 25(1) SBC, the member state concerned may extend internal border controls in accordance with Art. 25(3)

³⁸ CJEU, [Fn.30], (63-66), Landespolizeidirektion Steiermark.

³⁹ CJEU, [Fn.37], (147), *Commission v Poland, Hungary, Czech Republic*.

⁴⁰ Recital 23 SBC.

⁴¹ *Progin-Theuerkauf/Epiney*, [Fn. 33], Art. 35, para. 12; for details see *Bornemann*, [Fn. 31], (199).

⁴² *Progin-Theuerkauf/Epiney*, [Fn. 33], Art. 35, para. 11ff, 16; For a detailed overview of these reasons, see *Groenendijk* [Fn. 24], (159ff.).

⁴³ CJEU, judgement of 5 December 2023 C-128/22, *Nordic Info* (127).

⁴⁴ *Progin-Theuerkauf/Epiney*, [Fn. 33], Art. 35, para. 11 et seq,

SBC for further periods not exceeding 30 days, taking into account the criteria set out in Art. 26 SBC and the procedure set out in Art. 27 SBC. In accordance with Art. 25(4) SBC, the total period of internal border controls, including any extensions in accordance with Art. 25(3) SBC, may not exceed six months.

In the event of unforeseeable threats internal border controls may only be reintroduced for a limited period of up to ten days according to Art. 28(1) SBC. However, if the threat persists beyond this period, controls may be extended for a maximum period of 20 days. The total period of internal border controls is a maximum of two months, taking into account any extensions under Art. 28(4) SBC.

The time limitations for internal border controls in Art. 25(4) SBC was addressed for the first time by the CJEU in *Landespolizeidirektion Steiermark*. All member states intervening in the proceedings argued that a prolongation of internal border controls beyond the maximum duration of six months in Art. 25(4) SBC was compatible with Union law, if a threat lasted longer than six months.

The CJEU did not endorse this view. The Court distinguished between “new threats” and “renewed threats”, a distinction that was first made by the French Council of State.⁴⁵ According to Advocate General Saugmandsgaard Øe, a new threat is one that is “*new by its nature*”.⁴⁶ In other words, a terrorist threat is not a major sporting event, a major sporting event is not a pandemic, and a pandemic is not a political summit. The CJEU found that a new threat results in a new application of Art. 25(4) SBC. The clock starts again. The CJEU left it to the national court to determine whether a new threat exists.⁴⁷ A renewed threat, on the other hand, refers to a situation in which the same threat persists beyond the six-month period in Art. 25(4) SBC. In a textbook example of legal interpretation - wording, objective, and systematic interpretation - the CJEU concluded that Art. 25(4) SBC clearly and precisely sets forth a maximum duration of six months. This maximum duration is mandatory. Accordingly, a *renewed* threat does not permit a renewed application of Art. 25(4) SBC. The CJEU emphasises several times in the decision that internal border controls must be interpreted narrowly as exceptions to the freedom of movement of EU citizens.⁴⁸

According to the CJEU, the assessment of whether a new threat exists must therefore be based on two criteria: (1) an assessment of the circumstances requiring the reintroduction of internal border controls; and (2) an assessment of the events constituting the serious threat.⁴⁹ The CJEU does not specify additional criteria.

When national courts apply these two criteria, they will above all have to take into account that any exceptions to the principle of the absence of internal border controls must be narrowly interpreted. Accordingly, a mere new assessment of the circumstances that would

⁴⁵ Conseil d'État, Décision No. 415291 (December 28, 2017), para. 7; Conseil d'État, Décision No. 425936 (October 16, 2019), para. 7.

⁴⁶ Opinion of Advocate General Saugmandsgaard Øe, C368/20 and C369/20, 6 October 2021, ECLI:EU:C:2021:821, (43), Landespolizeidirektion Steiermark. [italics in original]

⁴⁷ CJEU, [Fn. 30], para. 81 f., Landespolizeidirektion Steiermark.

⁴⁸ CJEU, [Fn.30], para. 64 f., Landespolizeidirektion Steiermark.

⁴⁹ CJEU, [Fn. 30], para. 80, Landespolizeidirektion Steiermark.

require the reintroduction of border controls or their necessity and proportionality is, as the CJEU made clear, unlikely to fulfil these criteria.⁵⁰

(3) Proportionality: internal border controls as ultima ratio

Internal border controls may only be reintroduced as a measure of last resort,⁵¹ and only on a temporary basis. Only if other measures are inadequate to respond to a serious threat, a member state may rely on border controls. As internal border controls derogate from free movement rights, they must always be proportionate. With regard to measures that restrict the free movement of persons, the ECJ specified in its *Ligue des Droits humains* case:

*“In accordance with settled case-law, an obstacle to the freedom of movement of persons can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions. A measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective.”*⁵²

Art. 26 SBC qualifies the principle of proportionality by specifying that the effects of the threat on the public order and internal security of the member state concerned must be balanced against the effects of the measures on the free movement of persons. In order to verify whether border controls are proportionate, the concerned member state must submit an *ex post* report to the European Commission, the Council and the European Parliament in which the proportionality of internal border controls is assessed.

The academic literature on internal border controls regularly points out that internal border controls are largely ineffective as response to threats to internal security and public order.⁵³ Even the Commission questions the effectiveness of reintroducing internal border controls, for example in the context of terrorist threats.⁵⁴

(4) The notification process

If member states invoke a threat to public order or internal security, they are obliged to demonstrate that reintroduction of border controls is necessary to respond to these threats.⁵⁵

⁵⁰ CJEU, [Fn. 30], para. 66, Landespolizeidirektion Steiermark.

⁵¹ Cf. recitals 22, 23, 30, Art. 25 (2), Art. 26, Art. 29(2), Art. 30 (1) SBC.

⁵² CJEU, judgement of 21 June 2022, C-817/19, (280), *Ligue des Droits Humains*.

⁵³ *Magiera* in Streinz, 3rd ed. 2018, TFEU Art. 21 para. 38; *Groenendijk*, [Fn. 24], 150 (169f.); *Thym*, European migration law 2023, p. 98, refers to the impossibility of scientifically assessing the effectiveness of border controls in a serious manner. There are even indications that the Member State authorities themselves do not believe in the effectiveness of internal border controls, see *Groenendijk*, [Fn. 24], 150 (164). In relation to the Covid-19 pandemic, see *Guild*, Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19, Eur. J. Migr. Law 2021, Vol. 23 No. 4, (404).

⁵⁴ European Commission, Commission Staff Working Document Impact Assessment Report accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, SWD(2021) 462 final, Annex 7, p. 111.

⁵⁵ CJEU, [Fn. 27], (147), *Commission v Poland, Hungary, Czech Republic*.

The existence of an actual and present danger must thereby be based on “objective criteria”.⁵⁶ To this end, Art. 27 SBC obliges member states to notify the Commission, the European Parliament and the Council on any reintroduction of border controls. Member states must provide in their notifications concrete reasons and specific information on the events that give rise to a threat. Notifications must be submitted at least four weeks before the planned reintroduction of internal border controls so that EU institutions and other member states can review the necessity of controls. Such a review is subject to full judicial review by the CJEU. The Commission and any other Member State may also issue an opinion and initiate a consultation on this in accordance with Art. 27(4) and (5) SBC. The purpose of this consultation is to foster cooperation and coordination between member states, if necessary, and to re-examine the proportionality of controls.

b) The supranational reintroduction of internal border controls in Art. 29 SBC

The rarely used supranational procedure for the temporary reintroduction of internal border controls is regulated in Art. 29 SBC. It provides for a special procedure in exceptional circumstances that put the overall functioning of the area without internal border controls at risk.⁵⁷ This provision was included in the SBC in 2013 as a reaction to the so-called “French-Italian crisis” in 2011 that concerned a confrontation between the Italian and French governments over the issuing of visas to Tunisian nationals by the Italian government.⁵⁸ This crisis revealed that the SBC did not have a procedure for dealing with systematic control deficits at the Schengen external borders in a supranationally coordinated manner and eventually resulted in the amendment of the SBC.

The procedure in Art. 29 SBC is supranational because EU institutions play an essential role: a member state may only reintroduce border controls on the basis of an implementing decision by the Council, which is based on a proposal from the Commission. The threshold for the reintroduction of internal border controls in Art. 29 SBC is higher than that in Art. 25 SBC. Art. 29 SBC requires the existence of persistent serious deficiencies in the checks at the external borders which put the overall functioning of the area without internal border controls at risk and constitute a serious threat to public policy or internal security in that area. On the basis of Art. 29 SBC, internal border controls may be reintroduced for a maximum period of six months. This period may be extended a maximum of three times by six months each time, provided that these circumstances persist.

3. Measures having equivalent effect to internal border controls

According to Art. 23 SBC, the general abolition of internal border controls does not include certain controls within the territory of the Member States. The most important group of cases

⁵⁶ Recital 23 SBC.

⁵⁷ *Progin-Theuerkauf/Epiney*, [Fn.33], Art. 35 para. 17-19.

⁵⁸ Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to establish common rules for the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295, 6.11.2013, p. 1-10; *Progin-Theuerkauf/Epiney*, [Fn. 33], Art. 35, para. 3.

here is the exercise of police powers by the competent authorities of the Member States in accordance with national law, provided that their exercise does not have the same effect as border controls.⁵⁹ In the case of Germany, this concerns particularly police checks regardless of concrete suspicions in the border area based on Section 23(1) No. 3 of the Federal Police Act (so-called "*Schleierfahndung*").⁶⁰ This means that the SBC does not in itself stand in the way of checks on persons regardless of concrete suspicions, provided that their design in national law and application meet the specific legal requirements of the SBC.

According to Art. 23a SBC, police checks must meet the following specific requirements in order not to have the same effect as prohibited border checks: (i) police checks must not have border checks as their objective; (ii) they must be based on general police information about possible threats to public security; (iii) they must be clearly different in design and implementation from systematic border checks; and (iv) they must be carried out on the basis of spot checks.⁶¹ The ECJ has specified these cumulative legal requirements in its case law.⁶²

(1) *The decision in Melki and Abdeli (C-188/10)*

The decision in *Melki and Abdeli* concerned a French law that allowed police authorities to check a person's identity regardless of their behaviour within a 20km border area. The main legal question in the case concerned whether identity checks based on this law had the equivalent effect as prohibited border checks.

The CJEU first held that such checks were not border checks, as they did not depend on whether the person being checked crossed a border and were not carried out at the moment a person crossed a border.⁶³ The CJEU then examined whether these checks nevertheless have an equivalent effect to border checks. To this end, the CJEU essentially established two criteria that clarify the above-mentioned criteria.

First, a national law that permits identity checks irrespective of a person's conduct in a border area would not pursue the same objective as border checks. The former would have the objective of ensuring compliance with an obligation to carry identity documents; the latter would have the objective of checking whether someone is authorised to enter the territory of the member state and to prevent someone from circumventing border checks.⁶⁴ Second, a national law that grants the police authorities the power to carry out identity checks in the border area must provide the necessary legal framework for the exercise of that power. In particular, such a law would have to include the intensity and frequency of the control powers conferred on the police authorities in order to ensure that police checks do not have an equivalent effect to border checks.⁶⁵

⁵⁹ See *Progin-Theuerkauf/Epiney*, [Fn.33], Art. 24, para. 2 et seq.

⁶⁰ See *Schenke in Schenke/Graulich/Ruthig*, 2nd ed. 2018, BPolG § 23 para. 11.

⁶¹ Art. 23a SGK.

⁶² *Progin-Theuerkauf/Epiney*, [Fn. 33], Art. 24 SBC, para. 2 et seq.

⁶³ CJEU, judgement of 20 June 2010 - C-188/10, (70), *Melki and Abdeli*.

⁶⁴ CJEU, [Fn.63], (71), *Melki and Abdeli*.

⁶⁵ CJEU, [Fn.63], (74), *Melki and Abdeli*.

(2) The decision of the CJEU in Adil (C-278/12 PPU)

Two years after the decision in *Melki and Abdeli*, the CJEU dealt in *Adil* with a Dutch law that permitted identity checks irrespective of a person's behaviour in the border area. The particular aspect of the Dutch law was that identity checks in the border area were aimed at enforcing provisions of immigration law and permitted to conduct checks in the border area that were not permitted in the rest of the territory.

On the one hand, the CJEU stated that a national law that permits identity checks, irrespective of a person's behaviour, in order to combat irregular residence would not as such have an equivalent effect to border checks, because they would not aim at preventing entry and would not be carried out systematically.⁶⁶ On the other hand, however, the CJEU emphasised that the more evidence exists for an equivalent effect of identity checks with border controls, the stricter and more detailed the national laws that govern such police checks must be.⁶⁷ The CJEU held that such laws must be detailed enough to allow for an effective review of the necessity of the checks in general and the control measures in particular.⁶⁸

(3) The decision in criminal proceedings against A (C-9/16)

Following a request for a preliminary ruling from the District Court of Kehl, the CJEU further specified the requirements for police checks in border areas. The principal legal question in the proceedings concerned the compatibility of Sections 22 and 23 of the Federal Police Act with EU law, which permitted the Federal Police to carry out identity checks irrespective of a person's behaviour in a 30km border area, as well as in cross-border trains and train stations. The CJEU reiterated the principles it enunciated in its previous case law: the more evidence exists that police checks could have an equivalent effect to border checks, the stricter the requirements in national law must be that direct the conduct of authorities.⁶⁹ According to the CJEU, a national law that permits identity checks irrespective from a person's behaviour,⁷⁰ must guide the discretion of the authority when exercising its control powers.⁷¹ Although the CJEU did not formulate any new requirements in Case C-9/16, it structured the requirements in the previous case law: (i) it must be established whether police checks take place directly at the border or on the territory of a Member State. The former are indicative of an equivalent effect;⁷² (ii) the objectives pursued by a national regulation on suspicionless checks must differ in essential respects from border checks. The main distinguishing criterion is whether a regulation pursues the verification or prevention of lawful entry;⁷³ (iii) the limitation of control powers to the territorial scope in the border area is not in itself an indication of a similar effect. However, if there are special rules for the territorial scope compared to the other

⁶⁶ CJEU, judgement of 19 July 2012, C-278/12, (62), *Adil*.

⁶⁷ CJEU, *ibid*, (75), *Adil*.

⁶⁸ CJEU, *ibid*, (76), *Adil*.

⁶⁹ CJEU, judgement of 21 June 2017, C-9/16, (38), *criminal proceedings against A*.

⁷⁰ CJEU, [Fn.69], (39-40), *Criminal proceedings against A*.

⁷¹ CJEU, [Fn.69], (39), *Criminal proceedings against A*.

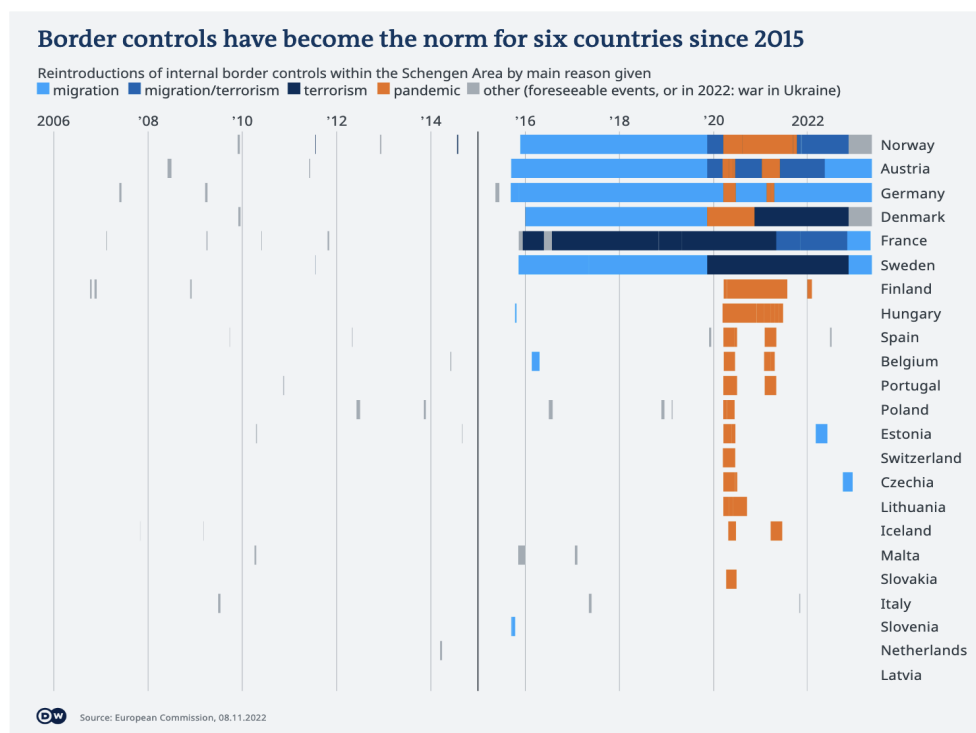
⁷² CJEU, [Fn.69], (42), *Criminal proceedings against A*.

⁷³ CJEU, [Fn.69], (44), *Criminal proceedings against A*.

provisions in the respective national regulation, this is an indication of the existence of a similar effect;⁷⁴ and (iv) the national legislation must provide a legal framework that specifies the details and limitations of the intensity, frequency and selectivity of checks in such a way that it can be verified that they are different from systematic border checks.⁷⁵

IV. The German internal border control practice

Empirical data on the reintroduction of internal border controls shows a sharp increase of internal border controls since September 2015. This concerns both the number and the duration of internal border controls.



Source: Kira Schacht / Deutsche Welle (<https://www.dw.com/en/schengen-states-extend-border-checks-ignoring-eu-court/a-63747406>, 24.04.2024)

A list published by the European Commission provides an up-to-date overview of the notified internal border controls in the Schengen area and contains a summary of the reasons given by the respective Member States.⁷⁶ However, this list does not specify the legal basis of the internal border controls, nor does it substantiate the reasons given by the Member States.⁷⁷

⁷⁴ CJEU, [Fn.69], (52-53), Criminal proceedings against A.

⁷⁵ CJEU, [Fn.69], (59), Criminal proceedings against A.

⁷⁶ European Commission, Temporary Reintroduction of Border Control, available at https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en.

⁷⁷ This discrepancy is illustrated by the German notification letter dated 01.10.2015. The Commission's overview only mentions the mass influx of people seeking protection as a reason. The German notification letter, on the other hand, refers far beyond this to unproven potential risks of infiltration by people from the area of general crime, members of militant groups or individuals with extremist views, outbreaks of violence among the residents of reception facilities, consequences for the authorities and social order in the Federal Republic of Germany.

Therefore this study analyses the notifications sent by the German ministry of the interior to the European Commission pursuant to Art. 27 SBC. These notifications are not publicly accessible and have been obtained for this study through access to information requests to the European Commission and the German ministry of the interior. An overview of the German notifications for the relevant period can be found in the annex to the study.

In the following, the German internal border control practice from 13. September 2015 to 1 February 2024 is analysed. A total of 43 German notifications, Council implementing decisions and European Commission opinions were analysed.

1. Controls at the German-Austrian border: 2015-2024

With regard to the reintroduction of controls at the German-Austrian border, four different phases can be distinguished.

a) Immediate response to the increase in arriving refugees: September 2015 - April 2016

(1) Control practice

The first notification relevant to the period under review dates from 13.09.2015. Based on Art. 25 SBC 2006 (unforeseen threats that require immediate action),⁷⁸ Germany notified the temporary reintroduction of internal border controls at all German internal Schengen borders (land, air and sea) with a focus on the German-Austrian land border.⁷⁹ The brief two-page letter cites “uncontrolled and uncontrollable influx of third-country nationals into the federal territory” as the principal reason for reinstating border controls. Furthermore, the notification clarifies that “the great willingness of the Federal Republic of Germany to help” should not be overstretched. The letter concludes with a reference to the provisions of the Common European Asylum System, which would show that Germany is not responsible for the vast majority of asylum applications. In the notification of 1 October 2015, Germany also refers to the “potential threats” associated with the migration flows. Specifically, the notification mentions that refugee flows could include criminals, members of militant groups or extremists. However, the letter admits that there are no reliable findings in this regard.

Subsequent notifications were even shorter. The notifications from 22 September 2015, 1 October 2015 and 9 October 2015 each state that controls are extended for a further 20 days based on the same grounds. The notifications state that the reintroduction of border controls would be “mandatory” and had only been taken after careful consideration. However, neither are these considerations disclosed, nor any empirical data provided.⁸⁰ Despite this absence, the notifications reassure that the scope and intensity of controls would be limited “to what is strictly necessary for maintaining security in each case”. Border controls would be the only

⁷⁸ Regulation (EC) No 562/2006 (Schengen Borders Code), as amended by (amending) Regulation (EU) No 1051/2013, OJ L 295, 6.11.2013, p. 1-10 (hereinafter cited as SBC 2006).

⁷⁹ Special procedure for cases that require immediate action.

⁸⁰ Exact figures can be found in European Commission, Commission Opinion of 23.10.2015 on the necessity and proportionality of the reintroduced internal border controls by Germany and Austria pursuant to Art. 24(4) of Regulation (EC) No 562/2006 (Schengen Borders Code, C(2015) 7100 final, para. 13 et seq.

way to avoid security deficits, which would be “in the interests of all citizens in the Schengen area”. The notifications do not include any references to possible restrictions on freedom of movement. Instead, the notifications mention that the effects of migration on the “social order” must be taken into account,⁸¹ and references are made to the tense accommodation capacities for asylum seekers,⁸² which had led to outbreaks of violence among asylum seekers.⁸³

The German ministry of the interior prolonged in its notification of 27 October 2015 internal border controls for the last time on the basis of Art. 25 SBC 2006 for 20 days. In addition, the German ministry of interior notified that it would henceforth base subsequent controls on Art. 24 SBC 2006 (foreseeable events) and prolonged internal border controls by three months. A proportionality assessment was not included in the notification. Possibly encouraged by the Commission's unclear position in this regard, the notification supplemented the “high number of people seeking protection” as principal reason for reinstating controls with the “obvious” threat of people radicalised in crisis and war zones, human smuggling and “other related forms of crime”. Against this backdrop, the commitment to the Schengen area and the free movement of persons as a “pillar of the European unification process” at the end of the letter seems to be paying lip service.

In a notification dated 5 February 2016, Germany prolonged internal border controls for a further three months. Once again, this measure is justified, in addition to the high “influx” of third-country nationals, with the aim of “(...) preventing too high social burdens and resentment”.

(2) Analysis

This first phase of German internal border control practice shows the emergence of patterns that continue in the subsequent phases. For instance, reference to high numbers of third-country nationals seeking protection does not define what exactly constitutes a threat to public order or internal security. Recital (5) SBC 2006 explicitly stated that migration and a high number of persons crossing the external borders should not as such be considered a threat. Furthermore, the Commission criticised the abstract reference to the possible infiltration of the migration movement and took the view that this would need to be substantiated in more detail to show the existence of a threat.⁸⁴

None of the notification letters contain even a rudimentary proportionality assessment - although this is expressly required under Art. 27 SBC. Rather, the notifications often state in general terms that reintroduction of controls would be “mandatory”. In this context, it is problematic that the first six letters notify the reinstatement of border controls at *all* German land, air and sea internal borders. Although the focus of controls was on the German-Austrian

⁸¹ Notification from 01.10.2024.

⁸² For example notification from 16.02.2024, 15.12.2023.

⁸³ Notification of 01.10.2015, 13.10.2015.

⁸⁴ European Commission, Opinion of the Commission of 23.10.2015 on the necessity and proportionality of the reintroduced internal border controls by Germany and Austria pursuant to Article 24(4) of Regulation (EC) No 562/2006 (Schengen Borders Code, C(2015) 7100 final, para. 14, 30.

border, the reintroduction of controls at all German borders seems disproportionate in order to deal with a local situation. Socio-political reasons (protecting Germany's willingness to help, avoiding too high social burdens and resentment, etc.) have no basis in the SBC.

b) The extension of internal border controls on the basis of Art. 29 SBC: April 2016 - November 2017

On 12 May 2016, the Council of the European Union adopted an implementing decision on the basis of Art. 29 SBC,⁸⁵ in which it recommended Austria, Germany, Denmark, Sweden and Norway to carry out controls at certain sections of their internal borders for a maximum period of six months. However, these should be proportionate and targeted, limited to the necessary sections of the internal borders and restricted to what is absolutely necessary in terms of scope, frequency, spatial and temporal extension. The implementing decision made clear that controls should be reviewed regularly and reported to the Commission every two months. After the Council implementing decision expired in November 2016, the Council adopted three subsequent Council decisions that recommended the prolongation of border controls: first twice for three months⁸⁶ then again for six months,⁸⁷ but always subject to strict proportionality and reporting requirements. The Council also emphasised that the Member states should examine alternative measures to internal border controls, in particular police checks. Member states should notify the results and the reasons for their considerations in this regard.⁸⁸ With reference to the Council implementing decisions, Germany extended its internal border controls a total of four times from 12 May 2016 to 10 November 2017.

c) Increasing reference to terrorism, persistence of migration: November 2017 - October 2022

(1) Control practice

After the Commission announced that it would not submit a new proposal to the Council on the basis of Art. 29 SBC, Germany notified the prolongation of internal border controls for a further six months at the land border with Austria and of internal flight connections to Greece on the basis of Art. 25 SBC by letter dated 11 October 2017. In April 2018 and three subsequent notifications of 12 October 2018, 11 April 2019 and 09 October 2019, Germany prolonged controls at its border with Austria for a further six months each. Migration and security policy reasons were the principal reasons for prolonging controls in the notifications.

⁸⁵ Council Implementing Decision (EU) 2016/894 of 12 May 2016 on a recommendation on temporary internal border controls in exceptional circumstances threatening the functioning of the Schengen area as a whole, OJ 2016 L 151/8.

⁸⁶ Council Implementing Decision 2016/1989 of November 11, 2016, OJ 2016 L 306/13; Council Implementing Decision 2017/246 of February 7, 2017, OJ 2017 L 36/59.

⁸⁷ Council Implementing Decision 2017/818 of May 11, 2017, OJ 2017 L 122/73.

⁸⁸ Recital 12 Implementing Decision (EU) 2017/246 of 7.2.2017; Recital 13 Implementing Decision (EU) 2017/818 of 11.5.2017.

(2) Analysis

The trend of an increasing abstraction from what exactly constitutes a threat to internal security continues in the notifications mentioned above. These notifications illustrate a pattern of basing alleged migration-related threats on increasingly abstract potentialities and circumstances that are geographically ever further away from Germany's territory. Notifications added new reasons to the already known deficits in the protection of external borders and "considerable illegal secondary migration". For example, the notifications cite the "dramatic terrorist attacks" in Germany and other member states, as well as human smuggling, the general security situation that would remain tense due to the threat from international terrorism (although this is not substantiated any further). Although the notification dated 12 October 2018 admits that irregular migration was reduced compared to the preceding years 2015-2017, the "migration potential" on the eastern Mediterranean route would have increased again, which would still require maintaining internal border controls. In a similar vein, the notification dated 9 October 2019 refers to the "worrying and fragile situation on the Turkish-Greek border", as well as the increasing landings on the Greek islands and the irregular "migration potential" along the Balkan route.

In this phase, the proportionality of border controls is increasingly questionable. With regard to possible alternative, less restrictive measures such as police checks regardless of concrete suspicions in the border area ("*Schleierfahndung*"), the notifications simply state that these would not be a substitute for internal border controls. Furthermore, in view of the high number of asylum applications and illegal secondary migration, refusals of entry at the border would constitute an "effective and successful instrument".

The duration of internal border controls is problematic in this phase. As stated by the CJEU in its decision *Landespolizeidirektion Steiermark*, the maximum duration of internal border controls on the basis of Art. 25(1) SBC is six months.⁸⁹ Border controls that go beyond this are incompatible with the SBC, unless a new threat exists. The notifications in this phase do not demonstrate the existence of such a new threat. In the five notifications from 11 October 2017, 12 April 2018, 12 October 2018, 11 April 2019 and 9 October 2019, the German federal ministry of the interior essentially refers to reasons relating to migration and security that differ only minimally from one another. As already analysed above (Part III.2), the CJEU sets strict requirements for assessing whether a new threat exists. These include in particular (i) an assessment of the circumstances requiring the maintenance of internal border controls and (ii) an assessment of the events constituting the serious threat.⁹⁰ Such an assessment requires detailed information and reasons why this information allows for such an assessment. None of the notifications contain such detailed information or reasons that demonstrate the existence of an actual, genuine threat requiring the reintroduction of internal border controls as a last resort.

In the opinion of the authors of this study, border controls maintained by the German federal government at the German-Austrian border have therefore been incompatible with the SBC

⁸⁹ CJEU, [Fn. 30],(78), *Landespolizeidirektion Steiermark*.

⁹⁰ CJEU, [Fn. 30],(80), *Landespolizeidirektion Steiermark*.

from 11 November 2017 onwards,⁹¹ and the Federal Republic of Germany is in violation of its obligations under EU law since.

d) Increasing diffusion of threat scenarios: Secondary migration, terrorism, Russian war of aggression, situation in the countries of origin (October 2022 - April 2024)

(1) Control practice

The notification of 13 October 2022 marks the beginning of the last phase of German internal border control practice. This notification extends internal border controls at the German-Austrian land border again by six months on the basis of Art. 25(1) SBC. It illustrates the transition to a new justification strategy by the German federal government, which continues in the subsequent notifications of 13 April 2023 and 13 October 2023.

The notification of 13 October 2022 explicitly reacts to the CJEU decision in *Landespolizeidirektion Steiermark*. With a scope of four pages, it is unusually detailed and lists a whole potpourri of reasons to justify the existence of a new threat within the meaning of Art. 25(1) SBC.

The notification refers to the worrying development of “irregular migration”, an increasing number of irregular border crossings, as well as the Serbian visa policy, which has already led to an increase in asylum applications in Austria as justifications to prolong internal border controls. Furthermore, it states that “involuntary homelessness” must be avoided in view of the countries' exhausted reception capacities, “hostile Russian activities against German critical infrastructure” could not be ruled out, and finally takes a sweeping *tour d’horizon* of “major upheaval in a number of economic and social areas” that result from the Russian attack on Ukraine (e.g. secure and affordable energy supply, concerns about job losses and the containment of inflation, among others). The notification concludes by emphasising the importance to “counteract an uncontrolled increase in migration flows and thus a possible overburdening of society and to limit irregular migration”.

This tone continues and intensifies in the follow-up notification of 13 April 2023. The notification refers to potentially further deteriorating economic and humanitarian situations in countries of origin (particularly Afghanistan, Syria and Turkey), and the islamization of society in Afghanistan, as well as its deteriorating human rights situation and living conditions which might have an impact on migration trends. It cites Frontex estimations that “Africa as the region of origin of many refugees” would continue to create “push factors for irregular migration towards Europe due to economic difficulties, high inflation, declining tourist travel (loss of foreign currency) and necessary debt restructuring measures by states”. The notification concludes by stating that, referring once again to the CJEU decision in

⁹¹ The CJEU and the Advocate General also left little doubt in *Landespolizeidirektion Steiermark* that the Federal Republic of Austria had not demonstrated any new threats since the end of the Council's last implementing decision on November 11, 2017. The Provincial Administrative Court of Styria found that the “*Republic of Austria has not demonstrated the existence of a new threat since November 10, 2017 [sic!], the date of expiry of the Council's last recommendation.*” LVwG 20.3-3028/2019-20, p. 6.

Landespolizeidirektion Steiermark, that these would amount to new reasons that justify the prolongation of internal border controls.

(2) Analysis

In response to the *Landespolizeidirektion Steiermark* decision, the above cited notifications aim to identify every six months supposedly new reasons to justify the prolongation of internal border controls. Even with good will and taking into account member states' margin of appreciation, these justifications seem incompatible with the criteria set forth by the SBC, which requires an actual, present and sufficiently serious threat that affects a fundamental interest of society.⁹²

With regard to the proportionality of the border controls, the concerns already raised above are further exacerbated. Although notifications in this phase address the proportionality of controls in more detail compared to preceding notifications, the proportionality of controls is still done in a fleeting and very superficial manner. References to unproven abstract risks and to threats whose existence could not be ruled out, does not represent a legitimate purpose: it is impossible to minimise all security risks in order to achieve "absolute security".⁹³ Furthermore, references to police checks as alternative measures to border controls are brushed aside without any concrete reasons provided. Moreover, some of the purposes pursued with the reintroduction of internal border controls appear downright abstruse and controls entirely unsuitable to achieve them. For example, if Russian saboteurs were not already in Germany, they would have been unlikely to choose the only internal border controlled at that time to enter the country.

The notifications since October 2022 represent so far the peak of a substantive dilution and geographical diffusion of the notion of "serious threat" under Art. 25 SBC. Broad references to security concerns that include economic, monetary, and socio-political considerations, among others, illustrate the ever expanding understanding of security on which the German federal government appears to base its interpretation of the SBC. Generic references to entire continents are however unsuitable for justifying actual and genuine threats at the German-Austrian border.

2. Internal border controls to combat the pandemic: 2020-2021

Internal border controls to combat the COVID-19 pandemic were probably the most intensive controls that occurred since the establishment of the Schengen area. Within a very short span of time, almost all member states reintroduced virtually seamless internal border controls at their land, sea and air borders.

⁹² See recital 27 SBC.

⁹³ See also *Mangold/Kompatscher*, Vereinbarkeit kontinuierlicher Kontrollen an der deutsch-dänischen Grenze mit unionsrechtlichen Vorgaben, 22.12.2022, available at <https://www.uni-flensburg.de/fileadmin/content/portal/hochschulkommunikation/news/kurzgutachten-de-grenzkontrollen-daenemark-mangoldkompatscher-rasmusandresen.pdf>, p. 22.

a) Control practice

Germany notified temporary internal border controls on the basis of Art. 28 SBC by letters dated 15, 19 and 24 March 2020 with reference to the threat posed by the Covid-19 pandemic. Initially, internal border controls at the land borders with Denmark, Luxembourg, France, Switzerland and Austria were notified for a period of ten days from 16 March 2020. From 19 March 2020, controls were extended to include checks on internal flight connections to Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, as well as the sea borders with Denmark. These controls were again extended until 15 April 2020 by letter dated 24 March 2020. By letter dated 14 April 2020, internal border controls were again extended for a further 20 days on the basis of Art. 28 SBC.

A chain of extensions of internal border controls followed with varying duration and geographical scope, depending on the dynamic development of COVID-19 transmission rates in the Schengen area. At the same time, internal border controls at the land border with Austria to combat irregular secondary migration were continued on a six-monthly basis. The only notable change in this period until mid-2022 was the temporary reintroduction of internal border controls at all German internal borders from 13.06.2022 to 03.07.2022 to protect the G7 summit in Elmau.

b) Analysis

Internal border control practices during the coronavirus pandemic differ from previous situations. Pandemic related controls affected free movement of persons and goods to an unprecedented extent. In contrast to previous reintroductions of controls, the justifications for reinstating controls in the notifications were much more detailed and based on scientific data, such as the classification of certain countries and regions as risk, high-risk or virus variant areas. The time periods of the controls were also generally shorter. In some cases, border controls were lifted or relaxed even before the actual notified period had expired when infection numbers fell. Proportionality assessments in the notifications paid particular attention to the impact of controls on the cross-border movement of goods, but also on cross-border commuters. Coordination by the European Commission, for example in the context of the so-called green lane system to ensure cross-border flows of goods, was also taken into account to a significant extent.

3. Checks at the Polish, Czech and Swiss internal borders (October 2023-April 2024)

a) Control practice

The last development concerns the extension of internal border controls to the German land borders with Poland, the Czech Republic and Switzerland. Controls at these borders were initially reintroduced for 10 days by letter dated 13 October 2023 on the basis of Art. 28 SBC and subsequently extended by letters dated 25 October 2023, 14 November 2023 and 04 December 2023. By letter dated 15 December 2023, the legal basis for reinstating controls was changed to Art. 25(1) SBC and internal border controls were prolonged for another three months. The latest notification from 16 February 2024 extends controls to 15 June 2024. The

reasons provided were the “development of irregular migration” and the “dramatic development” of increasingly unscrupulous human smuggling, the security situation in the Middle East and the tense accommodation capacities for asylum seekers in the *Länder* and municipalities.

b) Analysis

The justification for the existence of a serious threat situation in the notification referred to above is extremely thin. The reference to the general security situation in the Middle East illustrates the continuity of the substantive hollowing out of the notion of “serious threat” and its diffusion by referring to geographically ever more distant alleged threats. In terms of proportionality, references to the protection of migrants from unscrupulous human smugglers disregards the fact that dangerous smuggling routes and practices often try to circumvent intensified border controls and are thus the indirect result of these.⁹⁴ Internal border controls therefore appear to be unsuitable to reach the purpose of preventing more dangerous smuggling practices. Alternative measures such as border patrols in the border area are even considered by members of the federal police to be more effective than stationary border controls.⁹⁵ Border controls at the borders with Poland, the Czech Republic and Switzerland have not yet exceeded the maximum permitted duration. However, if no new threat is demonstrated by 15 June 2024, these controls would also be in breach of Germany’s obligations under the SBC.

V. Proceedings before German administrative courts

At the time this study was completed, a total of three decisions were handed down by German administrative courts that dealt with the legality of the reintroduction of internal border controls. Before examining these cases in the following, it is helpful to provide an overview of the different types of action and the associated procedural problems that arise when taking legal action against internal border controls before German administrative courts.

1. The procedural requirements for actions against internal border controls

When taking legal action against internal border controls that violate EU law, two different types of legal remedies are relevant in German administrative law.

The first type is the action for annulment pursuant to Section 42(1) of the German Code of Administrative Court Procedure (VwGO). Under German administrative law, an annulment action is only admissible, if a suitable cause of action exists in the form of an administrative act within the meaning of Section 35 of the Administrative Procedure Act (VwVfG).⁹⁶ Such an

⁹⁴ See, for example, *Mitteldeutscher Rundfunk*, Flucht vor der Polizei - Sieben Tote bei Unfall von Schleuserfahrzeug in Bayern, 13.10.2023, available at <https://www.mdr.de/nachrichten/deutschland/panorama/unfall-bayern-sieben-tote-schleuser-100.html>.

⁹⁵ *Tagesschau*, Gewerkschaft der Polizei gegen stationäre Grenzkontrollen, 26.09.2023, available at <https://www.tagesschau.de/inland/innenpolitik/migration-grenzkontrollen-debatte-102.html>.

⁹⁶ See HK-VerWR/Christoph *Sennekamp*, 5th ed. 2021, VwGO § 42 para. 9ff.

administrative act is typically issued by the Federal Police in the course of controlling cross-border traffic and includes measures required to establish identity, such as stopping, questioning about personal details and the request to hand over identification documents in accordance with Section 23 (1) No. 2 of the Federal Police Act.

In the context of internal border controls, the principal problem is that an action for annulment is only admissible, if the contested administrative act continues to unfold legal effects for the plaintiff. However, when an individual complies with an (unlawful) measure, for instance by showing her passport after being ordered by a police officer to do so, the measure does not produce legal effects after the measure is completed (i.e. the passport shown). In the terminology of German administrative law, the administrative act (i.e. the measures) “expires” in accordance with Section 43(2) VwVfG. An action for annulment is thus inadmissible. Alternatively, an individual subject to a border check could engage in civil disobedience, for instance by actively resisting the measure or refusing to show identity documents, which would render the individual liable for a fine. This fine, in turn, could then be challenged with an action for annulment.⁹⁷ However, the fact that an individual has to incur a fine in order to effectively avail themselves of their free movement rights under EU law would be incompatible with the principle of effectiveness under Union law.

The second legal remedy against internal border controls is an action for a declaratory judgement pursuant to Section 113(1) sentence 4 VwGO. Under Section 113(1) sent. 4 VwGO administrative courts can determine that an administrative act had been unlawful even if it does not unfold legal effects for the plaintiff anymore. However, German administrative courts and legal doctrine subject the declaratory action under Section 113(1) sent. 4 VwGO to strict standing requirements. An action under Section 113(1) sent. 4 VwGO is only admissible, if the plaintiff has a legitimate interest in the *ex-post* determination of the lawfulness of an administrative act. A legitimate interest can result, in particular, from a particularly serious infringement of fundamental rights, a legitimate interest in rehabilitation after a discriminatory administrative act or the risk that the plaintiff is subject to a recurrent unlawful administrative act under the same legal conditions (risk of recurrence). In the context of internal border controls, a risk of recurrence of an unlawful administrative act (because a plaintiff is regularly subject to unlawful border controls) and a serious interference with fundamental rights are the most relevant criteria. Both are, however, restrictively interpreted by German administrative courts.

2. The decisions of German administrative courts on the admissibility of the reintroduction of internal border controls

***a) Judgement of the Administrative Court of Munich, 31.7.2019, K 18.3255*⁹⁸**

Toni Schuberl, a member of the Bavarian state parliament, had brought in 2019 a declaratory action under Section 113(1) sent. 4 VwGO before the Administrative Court Munich against

⁹⁷ Such a constellation, but under Austrian law, is the basis of the case Landespolizeidirektion Steiermark [Fn. 30]; for another, earlier case of civil disobedience against internal border controls, see CJEU, [Fn.16] Wijsenbeek.

⁹⁸ Administrative Court Munich Judgement of. July 31, 2019 - M 7 K 18.3255, BeckRS 2019, 19455, (2).

the reintroduction of internal border controls at the Bavarian-Austrian border. The Administrative Court Munich dismissed Mr Schuberl's action as inadmissible because Mr Schuberl would lack a legitimate interest in declaring the internal border controls that he had been subjected to as unlawful. Although Mr Schuberl's had argued that he resides at the - Bavarian-Austrian border and regularly crosses the border, the court denied the existence of a risk of recurrence. According to the Administrative Court, it was unlikely that future control measures at the German-Austrian border would take place under essentially unchanged legal circumstances.⁹⁹ The Administrative Court also rejected the plaintiff's argument that border controls amount to a serious infringement of fundamental rights. From the perspective of German Basic Law, an identity check carried out as part of a border control would only amount to a "relatively minor infringement" of fundamental rights.¹⁰⁰ Finally, the Administrative Court considered that the plaintiff also lacked a legitimate interest in rehabilitation. Such an interest would require that border checks have a discriminatory effect on the plaintiff. Since border controls would, the court argued, apply to "a large number of travellers" irrespective of their background, they would not have any discriminatory effect on the plaintiff.¹⁰¹ A merely ideal interest in declaring an "expired" administrative act unlawful would not constitute an interest in rehabilitation that would merit judicial protection.¹⁰²

b) Judgement of the Higher Administrative Court Koblenz, 17.11.2022 - 7 A 10719/21¹⁰³

A similar tenor can be found in the case of the Higher Administrative Court Koblenz on the legality of a refusal of entry issued at the German-French border in accordance with Section 6(1) sentence 2 of the German Law on Freedom of Movement (EU). The case concerned a refusal of entry that was issued against the plaintiff in the context of COVID-19 related border controls in May 2020. In the same vein as the Administrative Court Munich, the Higher Administrative Court Koblenz considered that not every interference with free movement rights guaranteed by EU law would constitute a legitimate interest for the determination of unlawfulness of an administrative act. Such a legitimate interest would require a serious infringement with a fundamental right.¹⁰⁴ The Higher Administrative Court Koblenz made clear, referring to the case law of the German Constitutional Court on the right to an effective remedy (Art. 19 Basic Law), that these strict standing requirements would not infringe the right to an effective remedy - even when it concerns rights guaranteed by the EU legal order.¹⁰⁵

⁹⁹ Administrative Court Munich judgement of. July 31, 2019, *ibid.*

¹⁰⁰ Administrative Court Munich, [Fn.98], (26).

¹⁰¹ Administrative Court Munich, [Fn. 98], (24).

¹⁰² Administrative Court Munich, *ibid.*

¹⁰³ OVG Koblenz judgement of. November 17, 2022 - 7 A 10719/21, BeckRS 2022, 39174.

¹⁰⁴ OVG Koblenz, *ibid.*, with reference to BVerfG, decision of March 3, 2004 - 1 BvR 461/03 -, BVerfGE 110, 77, (36).

¹⁰⁵ OVG Koblenz, *ibid.*, with reference to decisions of the German Constitutional Court (BVerfG), decisions of July 6, 2016 - 1 BvR 1705/15 -, (11) and of March 3, 2004 - 1 BvR 461/03 -, BVerfGE 110,(77).

c) Judgement of the Munich Administrative Court, 31.01.2024 - M 23 K 22.3422

The latest decision on internal border controls was given by the Administrative Court Munich on 31.01.2024 and concerns again an action under Section 113(1) sent. 4 VwGO against controls at the German-Austrian border. This case concerns a Union citizen residing in the Netherlands who regularly travels through Germany and thereby crosses the Austrian-German border.¹⁰⁶ The Administrative Court Munich rejected the case as inadmissible on the same ground as the two administrative courts cited above. However, the 2024 decision of the Administrative Court Munich differs from the two preceding decisions on internal border controls.

On the one hand, the Court considered that there was no risk of recurrence or serious infringement of fundamental rights. The Court argued that the plaintiff would not be subject to a check every time he crossed the border, which in turns means that he is only potentially affected by future border controls. This, the Court stated, is not sufficient for a concrete risk of recurrence.¹⁰⁷ Likewise, according to the Court no serious infringement with fundamental rights existed, because an identity check as part of a border control would generally be a relatively minor interference.¹⁰⁸ The Court thus rejected the action as inadmissible.

On the other hand, the Administrative Court Munich stated in an *obiter dictum* that the border check to which the plaintiff was subject to may have violated Art. 25(4) SBC. The Administrative Court Munich expressly referred to the decision of the CJEU in *Landespolizeidirektion Steiermark*. The SBC would provide for a maximum total period of six months for the reintroduction of internal border controls and this maximum period of six months, according to the Administrative Court Munich, was held to be mandatory by the CJEU.¹⁰⁹ Exceeding the six months limitation would inevitably mean that internal border controls maintained after this period are incompatible with the SBC: "The CJEU has stated this unequivocally."¹¹⁰ In its *obiter dictum*, the Administrative Court Munich continued and considered that the German federal government has not shown the existence of a new threat:

"The present border control on June 11, 2022 was carried out on the basis of the notification letter from the Federal Ministry of the Interior and for Home Affairs dated 14 April 2022, which "reordered" the temporary reintroduction of internal border controls at the Austrian-German land border for migration and security policy reasons linked to that, with effect from 12 May 2022 for a 6-months period on the basis of Art. 25 to 27 of the SBC. The previous notification letter from the Federal Ministry of the Interior, Building and Community dated 15 October 2021 had ordered the temporary reintroduction of internal border controls for the same reasons. This alone shows that, despite the wording of the "new" order, the total period of 6

¹⁰⁶ Declaration: one of the authors of this study is a party to the proceedings before the Administrative Court Munich.

¹⁰⁷ Administrative Court Munich, judgement of January 31, 2024 - M 23 K 22.3422, (27), with reference to VG Munich, judgement of 8 December 2021 - M 23 K 19.5873 and 5811.

¹⁰⁸ Administrative Court Munich, judgement of 31 January 2024 - M 23 K 22.3422, (29).

¹⁰⁹ Administrative Court Munich, *ibid.*, (35).

¹¹⁰ Administrative Court Munich, *ibid.*

months had already been exhausted, apart from the fact that this and the previous notification letters were not actually based on new threat situations.”¹¹¹

3. The German administrative court case law on internal border controls in the light of the right to effective legal protection under EU law pursuant to Art. 47 of the Charter of Fundamental Rights

The case law of the administrative courts on internal border controls raises the following dilemma. While internal border controls (at least at the German-Austrian border) are “likely to have violated the Schengen Borders Code”,¹¹² no effective legal remedy against unlawful internal border controls is available under German administrative law due to the narrow interpretation of the standing requirements by German administrative courts. This narrow interpretation of standing requirements regarding a declaratory action under Section 113(1) sent. 4 VwGO raises the more fundamental question of the relation between the procedural autonomy of the member states on the one hand and the effectiveness of free of movement rights under EU law on the other.

In principle, it is up to member states to determine the specific procedural standards that guarantee the protection of the rights conferred by EU law (principle of procedural autonomy). However, according to settled case law of the CJEU, the principle of effectiveness requires that procedural rules in the legal systems of member states must not make it practically impossible or excessively difficult to exercise subjective rights guaranteed by EU law.¹¹³ In other words, legal remedies in national legal systems must effectively guarantee the protection of subjective rights under Union law.

The principle of effectiveness is not absolute. The CJEU aims to find an appropriate balance between the principle of procedural autonomy of member states legal orders and the practical effectiveness of EU law. Whether a national provision or administrative action violates the principle of effectiveness depends on the objective and purpose of a national law or administrative action.¹¹⁴ When assessing the aim and purpose, the CJEU focuses in particular on two aspects: (i) whether a national procedural provision was intended to safeguard a principle of EU law;¹¹⁵ or (ii) whether a national procedural provision reflects a general principle of law that is enshrined in most legal systems of the Member States.¹¹⁶

¹¹¹ Administrative Court Munich, *ibid.*

¹¹² Administrative Court Munich, *ibid.*

¹¹³ See e.g. CJEU, judgement of 20 May 2021, C-120/19, (69), X (Véhicules-citernes GPL); CJEU, judgement of 6 October 2015, C-71/14, (52), East Sussex, and the case law cited therein; CJEU, judgement of 11 July 2002, C-62/00, (34), Marks & Spencer.

¹¹⁴ CJEU, judgement of 24 October 2018, C-234/17, XC and Others, (49).

¹¹⁵ see inter alia CJEU, C-120/19 [Fn. 113] X (Véhicules-citernes GPL) (74-75).

¹¹⁶ see inter alia CJEU, judgement of 14 December 1995, C-430/93 and 431/93, Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten, (21).

Neither of these aspects is relevant for present purposes. The standing requirements of the declaratory action under Section 113(1) sent. 4 VwGO neither reflect nor aim at safeguarding a general principle of EU law.

According to the case law of the CJEU, the principle of effectiveness is infringed where the specific conditions of admissibility of an appeal would make obsolete any possibility for plaintiffs to challenge an apparent infringement of Union law before national courts on the merits.¹¹⁷

Furthermore, the principle of effectiveness is also qualified by the case law of the CJEU on Art. 47 of the Charter of Fundamental Rights (CFR). According to Art. 47 CFR, any person whose rights or freedoms guaranteed by Union law have been infringed has the right to an effective remedy before a court. This guarantee of legal protection is a general principle of Union law¹¹⁸ and of central importance in the constitutional framework of EU law.¹¹⁹ Member states are bound by this principle when implementing Union law in accordance with Art. 51(1) CFR, in particular in the context of judicial proceedings.¹²⁰ Although member states' procedural laws are applicable when a plaintiff takes action against a member state, Art. 47 CFR must be taken into account and effective legal protection must be granted in accordance with the principle of effectiveness.¹²¹ This is particularly relevant when it comes to the admissibility of legal remedies, that is, the question of whether national courts even have to deal with the substance of an appeal brought before them.¹²²

The preceding analysis of the case law by German administrative courts demonstrates that free movement rights of Union citizens are only guaranteed to a limited extent in the context of internal border controls. Due to a strict interpretation of admissibility requirements, Union citizens are effectively precluded from invoking an infringement of their rights in Art. Art. 21 (1) TFEU and Art. 45 CFR due to unlawful internal border controls before German administrative courts. Such a narrow interpretation of the admissibility requirements is difficult to reconcile with the principle of effectiveness and the principle of effective legal protection under Art. 47 CFR. If German administrative courts have doubts about the conformity of the narrow admissibility requirements of the action in Section 113(1) VwGO with EU law, they have to clarify these doubts by referring preliminary questions to the CJEU according to Art. 267 TFEU and, eventually, interpret the strict standing requirements in accordance with EU law.

¹¹⁷ see CJEU, C-120/19 [113] (77).

¹¹⁸ CJEU, judgement of 27.2.2018, C-64/16 (35) *Juizes Portugueses*.

¹¹⁹ CJEU, judgement of 25.7.2002, C-50/00 (38), *Pequeños*.

¹²⁰ Jarass [Fn.14], para. 4.

¹²¹ *Ibid*, paras. 21, 34.

¹²² Jarass [Fn.14], para. 35.

4. Police checks in border areas in the case law of German administrative courts

Based on the above-mentioned CJEU decisions on police checks (see Part V.3.), the Higher Administrative Court Mannheim ruled in a 2018 judgement¹²³ that, with regard to Section 23(1) no. 3 BPolG¹²⁴, several “indications” would suggest that police controls carried out in the border areas would have an “equivalent effect to border checks”. The Higher Administrative Court Mannheim referred expressly to the CJEU decisions in its judgement. The Higher Administrative Court Mannheim clarified that these indications would result, *inter alia*, from the fact that special rules relating to the border area apply to the territorial scope of the checks. The Higher Administrative Court Mannheim considered discretionary administrative regulations by the federal police insufficient to guide the conduct for checks.¹²⁵ Neither the form nor the content of these administrative regulations were suitable to guarantee a sufficiently precise and detailed legal framework that is required under EU law in order to control the intensity, frequency and selectivity of the checks.¹²⁶ Against these criteria mandated by EU law, the administrative regulations already formally did not constitute a “legal framework” because they were classified.¹²⁷ Access to these administrative regulations was restricted and information about them could not be passed to the public.¹²⁸ The legal framework for “specifying and restricting” checks in border areas, which apply irrespective of a person’s conduct, must be “sufficiently precise and detailed” so that both the necessity of the checks and the specific control measures permitted can themselves be subject to checks.¹²⁹ The Court considered that the administrative regulations of the Federal police did not meet these requirements.

VI. The effects of German internal border controls

Although the reintroduction of internal border controls in Germany mainly aim to restrict the mobility of third-country nationals (such as terrorism suspects and irregular secondary migration), they primarily affect German nationals and Union citizens.

¹²³ VGH Mannheim, judgement of 13.2.2018 - 1 S 1469/17, NVwZ 2018, 1893.

¹²⁴ § Section 23 I no. 3 BPolG permits identity checks “in the border area up to a depth of thirty kilometres to prevent or stop unauthorised entry into the federal territory or to prevent criminal offences within the meaning of Section 12 I nos. 1-4 (BPolG)”.

¹²⁵ In this respect, the defendant referred to the “BRAS 120”, Volume I, Section II, with the information contained therein on the performance of border police tasks (“Best Grepo”) and the status of 1.3.2008, which was still relevant in November 2013, which in its opinion are discretionary administrative regulations, VGH Mannheim [Fn.123], para. 37.

¹²⁶ VGH Mannheim, *ibid*.

¹²⁷ So-called “BRAS 120” (“BRAS” means “regulations, guidelines, instructions, catalogues, reference work”), available at https://www.asyl.net/fileadmin/user_upload/dokumente/26053.pdf.

¹²⁸ see § 4 I a, III and IV of the Security Inspection Act (SÜG).

¹²⁹ Cf. CJEU, C-9/16 [Fn.69] Criminal proceedings against A (40); CJEU, judgement of 19 July 2012, C-278/12 Adil para. 76.

Unhindered cross-border freedom of movement within the EU is now an essential part of the lifestyle of many mobile Union citizens.¹³⁰ The Schengen area, which makes this possible, is part of the “DNA of the EU”.¹³¹ In a 2018 survey, 68% of the respondents described Schengen as one of the EU's key achievements.¹³² The single market also depends to a large extent on the ability to cross European internal borders without controls or delays. Every day, around 3.5 million people cross the borders of the Schengen area, of which around 1,7 million commute across borders.¹³³ Across Europe, around 150 million people or 30% of the total population live in border regions, which account for 40% of the EU's territory and generate 30% of the EU's GDP.¹³⁴

In the following, four effects of internal border controls, which have been continuously prolonged since 2015, are analysed: the economic consequences (1.), the impact on the principle of the absence of internal border controls (2.), racial profiling (3.) and pushbacks at internal borders (4.).

1. Economic consequences of internal border controls

The economic impact of internal border controls is enormous. A whole range of studies enquired into the impact of border controls on cross-border supply chains, cross-border commuters and tourism. The COVID-19 pandemic in particular revealed the problematic nexus between controls at and at times even closure of internal borders and the single market.¹³⁵

In 2016, a study by the European Parliament concluded that the reintroduction and maintenance of controls by seven member states over a period of two years would result in direct and indirect costs of five billion euros.¹³⁶ A study by the Kiel Institute for the World Economy estimates that at each internal border where controls on goods traffic are reintroduced, causes additional costs of 0,4 to 0,9 percent of GDP for the member state concerned and is likely to result in additional costs of seven to fourteen billion euros per year for the EU as a whole.¹³⁷ France Stratégie, an autonomous institution of the French

¹³⁰ CJEU, Opinion of AG Emiliou of 7 September 2023, C-128/22, Nordic Info, (128).

¹³¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891 final, 14.12.2021, p. 1.

¹³² European Commission, Special Eurobarometer 474: Europeans' perceptions of the Schengen Area, p. 6, available at <https://europa.eu/eurobarometer/api/deliverable/download/file?deliverableId=67585>.

¹³³ European Commission, Towards a stronger and more resilient Schengen Area, 02.06.2021, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_2708/IP_21_2708_EN.pdf.

¹³⁴ Ibid, p. 4.

¹³⁵ See European Commission, Communication from the Commission to the European Parliament, the European Council and the Council: Strengthening the Green Lanes transport approach to keep the economy going during the resurgence of the COVID-19 pandemic, COM(2020) 685 final.

¹³⁶ *Neville et. al*, Costs of non-Schengen: the impact of border controls within Schengen on the Single Market, European Parliament, PE 578.974 (May 2016), available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL_STU\(2016\)578974_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL_STU(2016)578974_EN.pdf), p. 9.

¹³⁷ *Luecke, Breemersch, Vanhove*, Schengen Border Controls: Challenges and Policy Options, European Parliament, IP/A/IMCO/2016-01 (June 2016), available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578990/IPOL_IDA\(2016\)578990_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578990/IPOL_IDA(2016)578990_EN.pdf), p. 11.

government, estimates that permanent internal border controls would reduce trade between the Schengen member states by 10 to 20 percent and reduce the total GDP of the Schengen area by around 0,8 percent (or 100 billion euros).¹³⁸ According to a study commissioned by the Bertelsmann Stiftung in 2016, the permanent reintroduction of internal border controls in Germany alone would result in a loss of growth of 77 to 235 billion euros by 2025.¹³⁹ Projected for the EU, losses of 500 billion to 1.4 trillion euros were expected for the same period. An overview study by the Scientific Service of the German Bundestag concludes that the economic consequences of the reintroduction of internal border controls cannot be conclusively assessed.¹⁴⁰

Against this backdrop, the continuous prolongation of internal border controls raises serious concerns regarding the economic impact on cross-border mobility, particularly with regard to cross-border commuters. In German border regions, cross-border commuters account for up to 10% of employees, who are subject to social security contributions. This number can be significantly higher in certain economic sectors.¹⁴¹ Especially cross-border commuters from Eastern European member states compensate for the shortage of skilled workers in Germany in certain sectors. These cross-border commuters are particularly affected by waiting times caused by internal border controls.¹⁴² On average, border controls lead to around 20 minutes of waiting time per border crossing.¹⁴³ According to a study by the Federal Institute for Research on Building, Urban Affairs and Spatial Development, a new record number of 201,764 people commuted from other EU member states to work in Germany in 2022.¹⁴⁴ It can be assumed that this figure has increased since. The largest proportion of these cross-border commuters came from Poland (93,44; equivalent to 46.3%), followed by France (42,416; equivalent to 21%), the Czech Republic (39,417; equivalent to 19.5%) and Austria

¹³⁸ *Aussilloux/Le Hir*, *The Economic Costs of Rolling Back Schengen* (2016), available at https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/the_economic_cost_of_rolling_back_schengen.pdf, p. 1.

¹³⁹ *Böhmer et. al*, *Abkehr von Schengen-Abkommen - Gesamtwirtschaftliche Wirkungen auf Deutschland und die Länder der Europäischen Union*, Bertelsmann Stiftung (ed.), 22.02.2016, available at https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/NW_Abkehr_vom_Schengen-Abkommen.pdf, p. 16.

¹⁴⁰ *Deutscher Bundestag*, *Wissenschaftliche Dienste: Ökonomische Auswirkungen von Binnengrenzkontrollen im Schengen-Raum*, WD 5-3000-109/18, 13.09.2018, available at <https://www.bundestag.de/resource/blob/573430/b6ff790e687fca6af4c5c1d9a56cbfcf/WD-5-109-18-pdf.pdf>.

¹⁴¹ *Federal Institute for Research on Building, Urban Affairs and Spatial Development*, *Einpendelnde Personen aus den Nachbarländern*, 14.06.2023, available at <https://www.bbsr.bund.de/BBSR/DE/forschung/fachbeitraege/raumentwicklung/einpendelnde-aus-nachbarlaendern/01-start.html>.

¹⁴² *Böhmer et. al*, [Fn. 139], pp. 7, 13.

¹⁴³ *Felbermayr, Gröschl, Steinwachs*, *Handelseffekte von Grenzkontrollen*, ifo Forschungsbericht 73, March 2016, https://www.ifo.de/DocDL/ifo_Forschungsberichte_73_2016_Felbermayr_etal_Handelseffekte_Grenzkontrollen.pdf (11.04.2024), p. 7, 20ff.

¹⁴⁴ *Federal Institute for Research on Building, Urban Affairs and Spatial Development*, *Einpendelnde Personen aus den Nachbarländern*, 14.06.2023, available at <https://www.bbsr.bund.de/BBSR/DE/forschung/fachbeitraege/raumentwicklung/einpendelnde-aus-nachbarlaendern/01-start.html>.

(10,539; equivalent to 5.2%). The current internal border controls at Germany's borders with Poland, the Czech Republic and Austria therefore affect three of the four most important countries of origin of cross-border commuters.

Based on these figures, the damage caused by internal border controls for cross-border commuters from Poland, the Czech Republic and Austria can be illustrated for the year 2024. It is assumed that German internal border controls will continue during the entire year 2024. In addition, it is optimistically assumed that a 10 minute delay occurs when crossing the border into Germany. As a result, a loss of time of 4.8 full working days per cross-border commuter could be expected. Based on this calculation, internal border controls would cause indirect additional costs for border commuters of up to € 138.47 million in 2024.¹⁴⁵

Against this backdrop, it is not surprising that regional business associations are increasingly warning against internal border controls.¹⁴⁶ Even parts of the police question their effectiveness¹⁴⁷ and neighbouring EU member states are also increasingly critical of Germany's border control practice.¹⁴⁸

It should be emphasised that the above figures are merely an illustrative approximation of the indirect additional costs of internal border controls and not a precise economic calculation. From a purely legal point of view, such an illustration is necessary: indirect additional costs of internal border controls are an essential part of the proportionality assessment, as these additional costs are an important standard to determine the broader impact of internal border controls on the free movement rights of cross-border commuters. In this respect, it is all the more problematic that neither the notification letters nor a parliamentary question to the federal ministry of Interior contain any specific mention of direct or indirect additional costs.¹⁴⁹

2. Impact on the principle of the absence of internal border controls

a) From concrete threats to socio-politically motivated risk governance

The preceding review (see Part IV.) of German notifications since 2015 reveals a worrisome trend. Instead of referring to concrete reasons and actual verifiable threats, as required by

¹⁴⁵ The calculation is based on 249 statistical working days in 2024 minus the statutory minimum leave of a five-day week of 20 days with average gross earnings of € 25.30 per hour: available at https://www.destatis.de/DE/Presse/Pressemitteilungen/Zahl-der-Woche/2024/PD24_06_p002.html; average gross earnings for 2023: available at <https://de.statista.com/statistik/daten/studie/1220521/umfrage/durchschnittlicher-bruttoverdienst-von-maennern-und-frauen/>.

¹⁴⁶ *IHK Niederbayern*, Wirtschaft warnt vor stationären Grenzkontrollen, 09.10.2023, available at <https://www.ihk.de/niederbayern/presse/pressearchiv/grenzkontrollen-tschechien-5941502>.

¹⁴⁷ *ZEIT online*, Kritik an Verkehrsbehinderungen durch Grenzkontrollen, 17.10.2023, available at <https://www.zeit.de/politik/deutschland/2023-10/grenzkontrollen-deutschland-faeser-gewerkschaft-polizeikretschmann-stuebgen>.

¹⁴⁸ *Mdr*, Tschechiens Ministerpräsident Fiala sieht keinen Grund für Grenzkontrollen, 08.05.2023, available at <https://www.mdr.de/nachrichten/welt/politik/grenzkontrollen-tschechien-fiala-kein-grund-100.html>.

¹⁴⁹ *Deutscher Bundestag*, Drucksache 20/8274, Zurückweisungen von Schutzsuchenden an den Binnengrenzen im ersten Halbjahr 2023 und Fragen zur Zurückweisungspraxis der Bundespolizei, 07.09.2023, available at <https://dserver.bundestag.de/btd/20/082/2008274.pdf>, pp. 19-20.

the SBC, the notifications cite increasingly abstract and potential risks to justify internal border controls. This development has also been observed in the notification practice of other member states.¹⁵⁰

On the one hand, notifications regularly refer to potential security threats and often explicitly acknowledge that these are not based on reliable evidence. This includes, for example, the *possible* infiltration of refugee movements by people from the area of general crime, members of militant groups or individuals with extremist views.¹⁵¹ Particularly during times in which the number of arriving asylum seekers declines, German notifications refer more to a tense “general security situation” in Germany due to terrorist attacks in Europe, a “common European zone of dangers”¹⁵² an an “illegal migration *potential*” in various places¹⁵³. In the context of the Russian invasion of Ukraine, German notifications mention that hostile Russian activities against German critical infrastructure “cannot be ruled out”.¹⁵⁴ This increasing abstraction of threats turns border controls into instruments of risk governance, which are reintroduced and extended by the security authorities at their own discretion and according to political expediency. The compatibility of internal border controls with the EU law seems to have become a secondary matter. This finding reflects existing analyses in the interdisciplinary border studies.¹⁵⁵

Secondly, notifications increasingly refer to alleged threats that are geographically distant. Reasons and places that would to justify the prolongation of internal border controls include the “highly fragile situation at the border between Turkey and Greece”¹⁵⁶ to Serbia (visa policy),¹⁵⁷ Turkey (deteriorating economic situation/inflation, earthquake), Syria (earthquake), Afghanistan (Islamization of society, in particular the situation of women and girls, deteriorating living conditions), the whole of (!) Africa (economic difficulties, inflation, loss of foreign currency due to declining tourism, debt restructuring measures),¹⁵⁸

Finally, it is noticeable that the Federal government increasingly seeks to justify internal border controls by socio-political motivations. The notifications are garnished with a whole bouquet of economic, labour market, monetary and social policy reasons. Although academic observers took note of this already some time ago,¹⁵⁹ the unveiled admittance by member states that their key motivation for maintaining internal border controls is their symbolic power, is nevertheless astonishing. The German notification in the aftermath of the Russian

¹⁵⁰ On the Danish notifications, see: *Mangold/Kompatscher*, [Fn. 93], (21ff.).

¹⁵¹ For the first time in this direction: Notification letter dated 01.10.2015, also in the letter dated 13.10.2015 and in modifications in subsequent letters.

¹⁵² Notification letter dated 18.04.2015.

¹⁵³ Notification letter dated 14.04.2020, emphasis added.

¹⁵⁴ Notification letter dated 13.10.2022.

¹⁵⁵ *Bigo*, Freedom and Speed in Enlarged Borderzones, in: Squire (ed.), *The contested politics of mobility*, 2012, p. 8f.; *Miggelbrink*, *Staatliche Grenzen*, 2019, p. 29ff.; *Karamanidou/Kasperek*, From Exceptional Threats to Normalized Risks: Border Controls in the Schengen Area and the Governance of Secondary Movements of Migration, *Journal of Borderlands Studies* 37:3, 2022, 623, (623 ff.).

¹⁵⁶ Notification letter dated 14.04.2020.

¹⁵⁷ Notification letter dated 13.10.2022.

¹⁵⁸ Notification of 13.04.2023, 13.10.2023.

¹⁵⁹ Groenendijk, [Fn. 24], 150 (167 ff.).

war of aggression is particularly noteworthy in this respect. It speaks of a “time of great upheaval in a large number of economic and social areas”, in the face of which it is necessary to avoid uncontrolled migration flows and to overburden society with uncontrolled migration.¹⁶⁰ Internal border controls function as symbolic measures,¹⁶¹ and migration is stylized as representation of a variety of social challenges. If, according to the former German minister of interior Horst Seehofer, migration is “the mother of all problems”,¹⁶² internal border controls appear to be the solution to all problems for the German government.

b) From legal obligations to factual “necessity”

The above analysed notifications demonstrate that executive logics of risk governance increasingly replace legal assessments when reinstating internal border controls. German notifications frequently include assurances that the Schengen area would represent a central achievement of European integration and that the return to border-free internal borders is a key objective of German policy. They then add, however, that internal border controls could only be ended if that was “justifiable” in light of the migration and security situation.¹⁶³ In this logic, questions of legality of internal border controls are subordinated to executive necessity. In the same vein, German notifications regularly make the phasing out of quasi-permanent border controls conditional on the successful implementation of various reforms of the SBC.¹⁶⁴ So long as these reforms have not yet been adopted and implemented “(...) the Schengen area with open internal borders remains at risk”.¹⁶⁵ The Federal Government's notifications appear to be little more than a fig leaf intended to conceal the increasing dominance of executive prerogative and a risk governance logic with regard to internal border controls.

3. Racial profiling

Particularly problematic in this context is the unlawful practice of racially discriminatory police checks, also known as racial profiling. Racial profiling refers to the “use by the police of grounds such as race, skin colour, language, religion, nationality, or national or ethnic origin without objective and reasonable justification in control, surveillance, or investigation activities.”¹⁶⁶ Racial profiling is particularly problematic in the context of police checks that pursue immigration controls objectives.¹⁶⁷ Such controls affect racialized Union citizens and

¹⁶⁰ Notification from 13.10.2022.

¹⁶¹ *Thym/Bornemann*, Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics, European Papers 2021, Vol. 5 No. 3.

¹⁶² *Deutsche Welle*, Seehofer: Migration is the “mother of all problems”, 06.09.2018, available at <https://www.dw.com/de/seehofer-nennt-migration-mutter-aller-probleme/a-45377457>.

¹⁶³ See for example the notification of 16.02.2024, 13.10.2022, 14.04.2022.

¹⁶⁴ Notification from 13.10.2022.

¹⁶⁵ Notification from 13.10.2023.

¹⁶⁶ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, CRI(2007),39, June 29, 2007, available at <https://rm.coe.int/ecri-general-policy-recommendation-no-11-on-combating-racism-and-racia/16808b5adf>, p. 4, 23.

¹⁶⁷ See European Union Agency for Fundamental Rights (FRA): Being Black in the EU - Experiences of People of African Descent, 2023, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2023-being-

third-country nationals alike.¹⁶⁸ A study by the EU Agency for Fundamental Rights on the experiences of persons of African descent in the EU found that 69% of respondents who had been checked by the German police in the previous 12 months believed that a racist motivation was involved. This represents the highest rate among the analysed EU member states.¹⁶⁹

National and international courts regularly deal with allegations of racially discriminatory border control practices in Germany and declare them unlawful.¹⁷⁰ Due to a lack of statistical surveys, precise statements about the exact extent of racial profiling in the course of police checks in border areas are not possible. However, it can be assumed that both EU citizens and third-country nationals are affected by such practices to a considerable extent. A possible effect of experiences of discrimination might be that racialized Union citizens restrict their mobility out of fear of discrimination and only exercise their fundamental rights under Art. 45(1) CFR to a limited extent ("chilling effect").¹⁷¹

4. Pushbacks at the German internal borders?

Notifications regularly establish a nexus between the need for internal border controls and (excessively) high numbers of people seeking protection. In this context, reference is made to rejections at the border as an "effective and successful border police instrument".¹⁷² This raises questions about the legality of Germany's border police actions, as people seeking protection shall not be turned back at the border if they apply for asylum. A ban on rejections applies to persons seeking international protection.¹⁷³ According to Art. 3(1) Dublin-III Regulation, the authorities must examine every asylum application, including those made at

[black in the eu en.pdf](#), pp. 63, 71ff., 115. See also: Salomon, *The Racialized Borders of the Netherlands*, *VerfBlog*, 29 January 2022, available at <https://verfassungsblog.de/the-racialized-borders-of-the-netherlands/>.

¹⁶⁸ On the term, see European Commission against Racism and Intolerance (ECRI), ECRI's opinion on the concept of "racialization", adopted at ECRI's 87th plenary meeting on 8 December 2021, available at <https://rm.coe.int/ecri-opinion-on-the-concept-of-racialization/1680a4dcc2#:~:text=European%20history%20is%20replete%20with%20examples%20of%20racialization,as%20Jews%2C%20Muslims%20and%20Sikhs%2C%20and%20indigenous%20peoples:> "ECRI understands "racialization" as the process of ascribing characteristics and attributes that are presented as innate to a group of concern to it and of constructing false social hierarchies in racial terms and associated exclusion and hostility."

¹⁶⁹ See European Union Agency for Fundamental Rights (FRA), [Fn. 167], p. 71ff.

¹⁷⁰ OVG Koblenz, decision of 29.10.2012, Ref.: 7 A 10532/12.OVG; VG Stuttgart, judgement of 22.10.20215, 1 K 5060/13;. Conviction of Germany for failure to clarify relevant allegations: ECtHR, complaint no. 215/19 (Basu/Germany), 18.01.2023.

¹⁷¹ The CJEU [Fn. 52] (279), *Ligue des droits humains*, argues along these lines and in relation to the same primary legal framework of freedom of movement for EU citizens with regard to the general digital surveillance of internal Schengen flights; see also the argumentation of the Bavarian Member of Parliament Toni Schuberl in his statement of claim concerning internal border controls at the German-Austrian border, available at https://toni-schuberl.de/fileadmin/Speicherplatz/bayern/kv_passau-land/Redaktion/Redaktion/2018/180702_klage_grenzkontrollen/anton_schuberl_klage_grenzkontrollen.pdf (12.04.2024), p. 4: "In order to avoid the controls, the plaintiff, relying on the short duration of the controls, avoided traveling to Austria as far as possible since then."

¹⁷² See the notification dated 12.10.2018.

¹⁷³ On this complex of issues, see: *Thym*, "Pushbacks" an den deutschen Grenzen: ja, nein, vielleicht?, *VerfBlog*, 2023/9/29, available at <https://verfassungsblog.de/pushbacks-an-den-deutschen-grenzen-ja-nein-vielleicht/>.

the border.¹⁷⁴ Current figures on refusals of entry and direct returns by the Federal Police at the German borders reinforce the impression that internal border controls are used as instruments to push-back back asylum seekers.¹⁷⁵ In practice, the federal police appears to operate in a "grey area" that it proactively exploits. For example, the federal police does not seem to ask whether an individual wants to lodge an asylum application and language barriers make it even more difficult to submit an application.¹⁷⁶ Internal border controls therefore harbour the risk for asylum seekers of becoming victims of illegal pushbacks at German borders.

VII. The European Commission: the absent Guardian of the Treaties

It is noteworthy that the case of *Landespolizeidirektion Steiermark*¹⁷⁷ had reached the CJEU through a preliminary ruling of a national court, rather than through an infringement procedure initiated by the Commission. Although the Commission argued in *Landespolizeidirektion Steiermark* that the controls have violated EU law since 2017, it exercised its discretion under Article 258 TFEU and did not initiate infringement proceedings. The Commission also did not issue a public statement on the legality of the continued extension of internal border controls under Article 27 of the Schengen Borders Code.

The only occasion on which the Commission issued an opinion on the reintroduction of border controls was in September 2015 in relation to the reintroduction of border controls by Germany and Austria. Here, the Commission concluded that the reintroduction of border controls would be justified in view of the uncontrolled entry of a very large number of third-country nationals in order to maintain public order¹⁷⁸ - although recital 5 of the SBC 2006 expressly states that migration flows in themselves do not justify the reintroduction of internal border controls. What is remarkable about the Commission's opinion is that it also expressly mentions the "threat associated with organised crime and terrorism" in order to affirm the need for controls, which it had previously found to be insufficiently substantiated.¹⁷⁹ The Commission's opinion illustrates how difficult it is for the Commission to carry out its mandate as guardian of the treaties in the field of internal border controls where member states jealously guard their sovereign powers.

¹⁷⁴ Art. 3 para. 1, Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

¹⁷⁵ *Deutscher Bundestag*, [Fn.149] Rejections of protection seekers; see also Bayerischer Rundfunk, *Illegale "Pushbacks" in Bayern? Flüchtlingsrat versus Polizei*, 31.05.2023, available at <https://www.br.de/nachrichten/bayern/illegale-pushbacks-in-bayern-fluechtlingsrat-versus-polizei,TfoCgSg> .

¹⁷⁶ Thym, [Fn.173] "Pushbacks" at the German borders.

¹⁷⁷ See above under Part IV 1.

¹⁷⁸ Commission, Opinion on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation 562/2006 (Schengen Borders Code), C(2015) 7100 final, para. 33, 45.

¹⁷⁹ *Ibid*, para. 30, 34.

Instead of initiating infringement proceedings or issuing an opinion under Article 27 SBC, the Commission instead sought to reform the SBC and submitted a first legislative proposal in 2017 and a second proposal in 2021.¹⁸⁰

The Commission's silence contradicts the wording of Article 27 SBC, which states that the Commission *must* issue an opinion if it has concerns about the necessity or proportionality of internal border controls. Both the Advocate General and the CJEU criticised the Commission's role in *Landespolizeidirektion Steiermark*. The Advocate General described it as “regrettable that it did not perform the role conferred on it by the [Schengen Borders Code]” and emphasised the importance of the Commission's role in monitoring the provisions of the SBC.¹⁸¹ Similarly, the CJEU stressed that issuing a public opinion was “essential to ensure the proper operation of the rules laid down by the Schengen Borders Code, that [...] the Commission and the Member States exercise the powers conferred on them by that code”.¹⁸² Despite the clear words of the Court and the Advocate General, the Commission has not yet issued a public opinion under Article 27 SBC, nor has it threatened to initiate infringement proceedings under Article 258 TFEU against the member states concerned.

The Commission's cautious approach is in stark contrast to its previous practice. For example, when France maintained controls at its internal borders with Belgium and Luxembourg in 1995 due to the liberal Dutch policy on soft drugs, the Commission publicly criticised the French practice as contrary to EU law.¹⁸³ In 2011, when the French government reintroduced controls at its border with Italy in Ventimiglia, the Commission intervened publicly, although it did not initiate infringement proceedings against France.¹⁸⁴

This finding is underlined by a report of the European Court of Auditors, which strongly criticises member states' internal border controls and the Commission's role during the COVID-19 pandemic.¹⁸⁵

On the one hand, the Commission's inaction could be a sign of a general retreat from public enforcement, which has already been observed by academics.¹⁸⁶ According to this view, the

¹⁸⁰ *European Commission*, 'Proposal for a Regulation amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders', COM(2017) 571 final; Commission, Proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM(2021) 891 final, 14.12.2021. See also: Cebulak, Morvillo, [Fn.26].

¹⁸¹ AG Saugmandsgaard Øe in Cases C-368/20 and C-369/20 [Fn.46], para 73.

¹⁸² CJEU [Fn 30], C-368/20 and C-369/20, para. 92.

¹⁸³ *Steenbergen*, "All the King's Horses.... Probabilities and Possibilities for the Implementation of the New Title IV EC Treaty" (1999) 1 *European Journal of Migration and Law* 29, 45.

¹⁸⁴ *Zaiotti*, *Cultures of Border Control*, 2011, p. 337; *Rijpma*, 'It's My Party and I'll Cry If I Want To-'Celebrating' Thirty Years of Schengen, in *Steenbergen, Voermans, Van den Bogaert* (eds.), *Fit for the Future? Reflections from Leiden on the Functioning of the EU*, 2016, pp. 164-165.

¹⁸⁵ Accordingly, the Member States had not provided sufficient evidence in their notifications that their internal border controls were actually proportionate and limited in time. The Member States also did not notify all internal border controls. The required ex-post reports were not submitted or were incomplete. see: European Court of Auditors, *Special report 13/2022: Free movement in the EU during the COVID-19 pandemic*, Luxembourg, 2022, available at <https://www.eca.europa.eu/en/publications?did=61240>.

¹⁸⁶ *Kelemen, Pavone*, *Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union*, (2022) APSA Preprint.

Commission is prioritising its role as a driver of integration - by submitting legislative proposals to reform the Schengen Borders Code - over its role as guardian of the Treaties to enforce EU law.¹⁸⁷ At the same time, however, there are also differences in the Commission's approach depending on the specific reasons that member states advance for reinstating controls. When Member States reintroduced border controls in March 2020 to contain the spread of COVID-19, the Commission quickly set up coordination procedures and soon after issued a communication advocating "a return to the unrestricted free movement of persons".¹⁸⁸ In comparison, the Commission remained silent on internal border controls that were maintained due to secondary movements or terrorism during the past 9 years.

The Commission's inaction with regard to the enforcement of the SBC ultimately shifts responsibility onto individuals and companies. However, if the German Federal Government systematically fails to comply with its obligations under European law and the administrative courts are not an effective corrective, there are clear limits to the private enforcement of Union law.

VIII. The reform project for the Schengen Borders Code

The SBC has been amended several times since 2006. The current 2016 version of the SBC has already been amended three times.¹⁸⁹ The Commission last developed a reform proposal in 2017, which was withdrawn due to a lack of sufficient support.¹⁹⁰ On 14 December 2021, the European Commission therefore presented a new reform proposal.¹⁹¹ The responsible rapporteur is Sylvie Guillaume (S&D Group). The main aim of the reform proposal is to respond to the crises and challenges that the Schengen area has faced in recent years and to make it "stronger and more resilient". In the following, selected points of significance for the Schengen internal borders of the reform are critically examined. This is based on the version adopted by the European Parliament on 24 April 2024 (hereinafter: SBC 2024).¹⁹²

1. Revision of the regulations on the reintroduction of internal border controls

As part of the reform, the legal framework for internal border controls was revised. On the one hand, additional grounds for the reintroduction of internal border controls were added

¹⁸⁷ *Cebulak, Morvillo*, Backtracking or defending free movement within the Schengen Area? NW v. Landespolizeidirektion Steiermark, (2023) Common Market Law Review 1075 (1094).

¹⁸⁸ European Commission, Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls - COVID-19, Communication (2020/C 169/03), 30.

¹⁸⁹ *Progin-Theuerkauf/Epiney*, [Fn. 33], Art. 1 para. 31.

¹⁹⁰ *European Commission*, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, COM(2017)571, 27.9.2017; see *Progin-Theuerkauf*, Mit Kanonen auf Spatzen: The planned reform of the Schengen system, EuZ 2022, (13f.).

¹⁹¹ European Commission, [Fn. 69].

¹⁹² *European Parliament*, Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, Report - A9-0280/2023, 15.04.2024, available at https://www.europarl.europa.eu/doceo/document/A-9-2023-0280-AM-163-163_EN.pdf.

and the maximum permissible duration was extended. On the other hand, stricter requirements for the necessity of internal border controls were added and the Commission's role in monitoring compliance with these requirements was extended.

a) Art. 25 SBC 2024: Extension of the basis for the reintroduction of internal border controls

(1) Amendment

Art. 25 SBC is supplemented by a non-exhaustive list of various serious threats to public policy and internal security in the Member States. Art. 25 SBC 2024 now explicitly mentions terrorist incidents or threats, including those posed by serious organised crime.¹⁹³ large-scale public health emergencies,¹⁹⁴ large-scale or high-profile international events¹⁹⁵ and exceptional situations resulting from sudden and large-scale unauthorised movements of third-country nationals between Member States which are likely to put at risk the overall functioning of the area without internal border controls¹⁹⁶.

(2) Analysis

The inclusion of large-scale public health emergencies is to be welcomed for reasons of legal clarity. In the course of the Covid-19 pandemic, this was initially unclear,¹⁹⁷ but was later confirmed by the ECJ,¹⁹⁸ so this codification is only logical. While the previous version of the SBC stipulated that "migration and the crossing of large numbers of third-country nationals" should not in itself be considered a threat to internal security,¹⁹⁹ Art. 25(1) SBC 2024 now explicitly mentions sudden and large migration flows between Member States as a threat to internal security and public order. The main problem with this amendment is that the definition is very abstract and vague.²⁰⁰ It is true that Art. 27(3) SBC 2024 requires affected member states to carry out a risk assessment and provide detailed information. In the context of the lax information and justification practice of the Member States and the Commission's reluctance in this regard, it is more likely that this amendment will finally normalise internal border controls by member states. Instead of enforcing the previous legal framework against member states unlawful control practices, these control practices now seem to be legalised and normalised.²⁰¹

¹⁹³ Art. 25(1 a) SBC 2024.

¹⁹⁴ Art. 25 (1)(b) SBC 2024.

¹⁹⁵ Art. 25 (1)(d) SBC 2024.

¹⁹⁶ Art. 25 (1) (c) SBC 2024.

¹⁹⁷ *Thym/Bornemann*, [Fn. 161] (1148f.).

¹⁹⁸ CJEU, judgement of 5 December 2023, C-128/22, (123-129), Nordic Info.

¹⁹⁹ Recital no. 26, SBC 2016.

²⁰⁰ See also *Meijers Committee*, Commentary on the Commission Proposal amending the Schengen Borders Code (COM (2021) 891), May 2022, CM 2205, p. 4.

²⁰¹ See also the criticism in *Bornemann*, The Commission's proposed reform of the Schengen area - stronger enforcement or conflict aversion?, available at <https://eulawenforcement.com/?p=8157>.

b) Art. 25a) SBC 2024: Procedure for unforeseeable or foreseeable events

(1) Amendment

The newly inserted Art. 25a) SBC 2024 provides for two procedures: one for unforeseeable events and another for foreseeable events.

In the event of unforeseeable threats that require immediate action, member states may immediately reintroduce internal border controls for a period of one to three months in accordance with Art. 25a) (1-3) SBC 2024, provided that they simultaneously notify the European Parliament, the Council, the Commission and other member states.

In the event of foreseeable threats, member states may reintroduce internal border controls for a period of up to six months in accordance with Art. 25a) para. 4-5 SBC 2024, which may initially be extended in periods of six months up to a maximum period of two years. However, this maximum duration can be exceeded twice again for a period of six months each. According to Art. 25a) (6a) SBC 2024, this is permitted in the case of persistent threats that constitute a serious exceptional situation. However, member states must submit a detailed risk assessment for this purpose.

(2) Analysis

The merging of Art. 25 and 28 SBC in the new Art. 25a) SBC 2024 is to be welcomed for reasons of enhanced clarity and better systematics. However, the significant extension of the periods for permissible internal border controls is questionable.²⁰² Whereas internal border controls to combat unforeseeable threats were previously only permitted for a period of ten days in accordance with Art. 28 (1) SBC, this is now permitted for up to one month in accordance with Art. 25a) (3) SBC 2024. The maximum period has also been extended from two to three months.

A similar picture emerges with regard to internal border controls to combat foreseeable dangers. Here too, the time periods are being extended. Previously, the maximum limit for internal border controls was six months in accordance with Art. 25(4) SBC. Only in exceptional circumstances within the meaning of Art. 29 SBC, in which the overall functioning of the area is at risk without internal border controls, this could be extended to two years in accordance with Art. 25(4) SBC. According to Art. 25a) (4-6a) SBC 2024, this period is extended to a maximum of three years under certain circumstances. This also shows an expansion of member states' scope for extending their internal border controls.

c) Art. 28 SGK 2024: Procedure for large-scale health emergencies

(1) Amendment

Art. 28 SBC introduces a new procedure for cases in which a large-scale health emergency puts in risk the overall functioning of the area without internal border controls. If the Commission identifies such a situation, it may submit a proposal to the Council for an

²⁰² Meijers Committee, [Fn. 200], p. 4, is critical in this respect.

implementing decision authorising the reintroduction of internal border controls for a period of six months at a time, without being bound by a maximum duration.

(2) Analysis

The supranationalization of member states border control practices in situations of large-scale health emergencies is to be welcomed and represents a lesson learned from the initially uncoordinated approach during the COVID-19 pandemic. However, it is important to note that there is no scientific evidence that internal border controls and travel restrictions are effective in combating the pandemic;²⁰³ the amendment of the SBC however gives such an impression. In addition, border closures rather than internal border controls were initially the main problem during the Covid-19 pandemic.

2. Art. 23a) SBC 2024: Pushbacks of third-country nationals at internal borders?

(1) Amendment

Art. 23a) in conjunction with Annex XII SBC 2024 provides for a transfer procedure for third-country nationals apprehended in border areas.²⁰⁴ Accordingly, persons apprehended for example in the course of joint police patrols who do not meet entry requirements can be directly returned to the neighbouring country from which they presumably entered. Persons seeking international protection within the meaning of the Asylum Procedure Regulation and persons with international protection status within the meaning of the Qualification Regulation are excluded from the procedure. Minors who do not meet entry requirements are not excluded. Although individuals have the right to appeal against a transfer, appeal against a transfer does not have suspensive effect. Details of cooperation on transfers in border areas are to be regulated bilaterally between member states. The possibility of taking back third-country nationals outside the border area within the framework of bilateral agreements within the meaning of Art. 6 (3) of the Return Directive remains unaffected.²⁰⁵

(2) Analysis

This amendment represents one of the most problematic points of the reform. Firstly, the territorial scope of the “border area” is not precisely defined. Furthermore, the new procedure under Art. 23a) SBC 2024 undermines the basic concept enshrined in Art. 6 (1) of the Return Directive²⁰⁶, according to which the member state in whose territory the third-country national is apprehended is responsible for the return.²⁰⁷ The purpose of this rule in

²⁰³ See in this regard with regard to general travel restrictions for example CJEU, Opinion of AG Emiliou (99ff.) [Fn. 68]; Guild, [Fn. 38] (404.); Meijers Committee, [Fn. 200], p. 4.

²⁰⁴ See also recitals 25, 27 SBC 2024.

²⁰⁵ Recital 27, Art. 23a) para. 4 SBC 2024.

²⁰⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, pp. 98-107.

²⁰⁷ Lutz in Thym/Hailbronner, [Fn. 25] Chapter 11, Art. 6 para. 1 et seq.

the Return Directive is to avoid so-called “ping-pong” returns through bilateral arrangements in which member states “push” third-country nationals to each other before they are returned to their home country.²⁰⁸ This amendment thus presents a significant step into turning Schengen internal borders into spaces of migration control and might eventually result in further bilateral fragmentation of the internal border regime. As a result, migrants are likely to become even more “balls between two member states”.²⁰⁹

The fact that minors (and families) are not exempt from this burdensome procedure appears questionable in terms of fundamental rights.²¹⁰ The abstract reference in Art. 23a) (1) SBC 2024 to ensure that all measures are taken in the best interest of the child will have to prove itself in practice and should be closely monitored.

In addition, this amendment provides an incentive for intensified surveillance of the internal border area, which increases the risk of racialized people (EU citizens and third-country nationals alike) becoming victims of racial profiling in border areas.²¹¹

Finally, the exemption of persons seeking protection or persons with protection status from the procedure under Art. 23a) (1) SBC 2024 also appears inadequate and questionable with regard to the principle of non-refoulement.²¹² The grey area in which member state authorities operate at internal borders and practices of pushbacks at internal borders have already been discussed above.²¹³ The provision of Art. 23a) SBC 2024 might provide a greater incentive for member states to rely even more on such practices.

3. Article 23 SBC 2024: Increasing surveillance possibilities at internal borders - also for EU citizens

The new Art. 23 SBC 2024 extends the possibilities of member states to monitor and control mobility across internal borders, which primarily affects Union citizens.

Recital 21 and Art. 23 (1a) SBC 2024 expressly stipulate that the absence of border controls at internal borders does not affect the use of surveillance technologies. In the course of the reform process, the possible digital surveillance of internal Schengen mobility by using PNR and API databases, which have so far only been used in air traffic, was also discussed. Such surveillance involves the mass collection and processing of personal data of mobile persons

²⁰⁸ On this issue, see *ibid.* chapter 11, para. 16ff.

²⁰⁹ Progin-Theuerkauf, [Fn. 190], (20).

²¹⁰ See the criticism by NGOs with reference to conflicting case law: Statewatch, 85 civil society organizations call on MEPs to uphold fundamental rights and reject the harmful Schengen Borders Code recast, 15.03.2024, available at <https://www.statewatch.org/news/2024/march/85-civil-society-organisations-call-on-meps-to-uphold-fundamental-rights-and-reject-the-harmful-schengen-borders-code-recast/>; PICUM, The new draft Schengen Borders Code risks leading to more racial and ethnic profiling, available at <https://picum.org/blog/the-new-draft-schengen-borders-code-risks-leading-to-more-racial-and-ethnic-profiling/#:~:text=In%20short%2C%20the%20new%20Code,complete%20absence%20of%20any%20safeguard> (18.04.2024); Progin-Theuerkauf [Fn. 190], (20).

²¹¹ Meijers Committee, [Fn. 200], p. 8; PICUM, *ibid.*; Progin-Theuerkauf, *ibid.*

²¹² Progin-Theuerkauf, *ibid.*; Meijers Committee, [Fn. 200], p. 8.

²¹³ Thym, [Fn. 65]; Bayerischer Rundfunk, [Fn. 123].

and is highly controversial in terms of data protection.²¹⁴ During the reform process, the CJEU considerably restricted the use of surveillance practices within the Schengen area, citing data protection concerns, restrictions on freedom of movement and the principle of abolishing internal border controls.²¹⁵ The explicit reference to this in Art. 23 (1e) SBC of the original reform proposal was subsequently deleted at the suggestion of the LIBE Committee.²¹⁶ It remains to be seen which specific means of technological surveillance member states will use to increase the surveillance of internal borders and border areas.²¹⁷

4. Conclusion

The conclusion on the reform proposal is mixed. The Commission appears to adopt a "give and take" approach. On the one hand, member states are granted more room of manoeuvre when reintroducing and extending internal border controls. A stark emphasis is placed on migration controls at the Schengen internal borders, which further pushes the "securitization" of migration by describing migration as a security threat that has to be combated directly at internal Schengen borders. This is "shooting at sparrows and migrants with cannons".²¹⁸

Despite significant concerns regarding fundamental rights, member states are determined to show that they act tough on migration and security - even though the actual effectiveness of many measures is highly questionable. Many of these measures are likely to be symbolic in nature, if at all. It is important to emphasise that these measures will not only affect (asylum-seeking) third-country nationals, but primarily Union citizens who will be subject to increased surveillance, racial profiling, and longer waiting times at internal borders with all the ensuing economic consequences.

On the other hand, the reform proposal tightens the procedural requirements for member states' border control practices in particular and specifies the requirements for the Commission in monitoring them. For example, the procedure for reintroducing and prolonging internal border controls will be more formalised and standardised. To prove the proportionality of border controls, more detailed obligations to provide evidence, reports and justifications as well as a mandatory risk assessment are introduced. Observers have pointed out that the reform proposal does not represent a renationalization, but rather an increased supranationalisation of the administration of the Schengen area, despite member states'

²¹⁴ Züllig, Evolution and Mutation in the EU's DNA, Verfassungsblog, 10.12.2022, <https://verfassungsblog.de/evolution-and-mutation-in-the-eus-dna/> (21.04.2024); Meijers Committee, [Fn. 200], p. 5f.

²¹⁵ CJEU [Fn. 52] (263ff., 270ff.), Ligue des Droits Humains.

²¹⁶ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 2021/0428(COD), 08.11.2022, p. 46 Amendment 55.

²¹⁷ For example, recital 16 SBC 2024 mentions drones, motion sensors, mobile units and all types of stationary and mobile infrastructure.

²¹⁸ Progin-Theuerkauf, [Fn. 138], (24).

wider room of manoeuvre.²¹⁹ Ultimately, however, the effectiveness of these stricter criteria depends on whether and how the Commission enforces them. The Commission's track record in enforcing the provisions of the SBC gives cause for scepticism that the stricter criteria will prove effective. Civil society involvement, for example in the context of strategic litigation, may make an important contribution here.

Generally positive is the assessment that the reform seizes the opportunity to unify and streamline the rules on the temporary reintroduction of internal border controls. This enhances legal clarity.

Another aspect worth mentioning is the creation of so-called "cross-border regions", which also include "twin cities", as provided for in Art. 42b) SBC 2024.²²⁰ These are to be determined by the member states in close consultation with each other within six months of the entry into force of the SBC 2024; twin cities are characterised by particularly close economic and social ties. In future, these close ties are to be given special consideration in decisions on the reintroduction and extension of internal border controls and should be protected from negative effects of reintroductions of internal border controls. It remains to be seen how affected regions will position themselves in this regard in the coming months.

In the overall assessment, however, more member state discretion comes at the expense of the identity-defining political vision of a borderless space. This illustrates that the vision of Schengen as a security-driven project is increasingly gaining dominance.²²¹

Ultimately, it remains to be seen in practice whether this outlook will be too pessimistic or whether the Commission, in particular, succeeds in reversing the gradual institutionalisation of internal border controls within the Schengen Area and manages to breathe new life into the "spirit of Schengen."

²¹⁹ *Bornemann*, *Competing Visions and Constitutional Limits of Schengen Reform: Securitization, Gradual Supranationalization and the Undoing of Schengen as an Identity-Creating Project*, *German Law Journal* 2024, 1 (11ff., 19f.).

²²⁰ See recitals 42, 43, Art. 26 para. 1 b) ii), para. 3, Art. 33, 39 para. 1 h), Art. 42b) SBC 2024.

²²¹ *Bornemann*, [Fn. 218], 1 (19f.).

Annex: Overview of German notifications of internal border controls since 2015

No.	Date notification	Legal basis	Duration	Main reasons according to Commission	Scope	Additional reasons mentioned in notification ²²²
43	16/02/2024	Art. 25 SBC	16/03/2024 - 15/06/2024	High level of migrant smuggling activity, the impact on security and migration in the Schengen area due to the security situation in the Middle East.	Land borders with Poland, Czechia and Switzerland.	
42	15/12/2023	Art. 28 SBC	16/12/2023 - 15/03/2024	High level of migrant smuggling activity, the impact on security and migration in the Schengen area due to the security situation in the Middle East.	Land borders with Poland, Czechia and Switzerland.	
41	04/12/2023	Art. 28 SBC	05/12/2023 - 15/12/2023	High level of migrant smuggling activity, the impact on security and migration in the Schengen area due to	Land borders with Poland, Czechia and Switzerland.	

²²² Reasons mentioned by Germany that go significantly beyond the reasons cited by the Commission.

				the security situation in the Middle East.		
40	14/11/2023	Art. 28 SBC	15/11/2023 - 04/12/2023	High level of migrant smuggling activity, the impact on security and migration in the Schengen area due to the security situation in the Middle East.	Land borders with Poland, Czechia and Switzerland	
39	25/10/2023	Art. 28 SBC	26/10/2023 - 14/11/2023	Migratory situation via the Eastern Mediterranean route, the Balkan region and through the Eastern route, increase in human smuggling.	Land borders with Poland, Czechia and Switzerland.	
38	13/10/2023 [Part 2]	Art. 28 SBC	16/10/2023 - 25/10/2023	Migratory situation via the Eastern Mediterranean route, the Balkan region and through the Eastern route, increase in human smuggling.	Land borders with Poland, Czechia and Switzerland.	
37	13/10/2023 [Part 1]	Art. 25-27 SBC	12/11/2023 - 11/05/2024	Increase in irregular migration, Russia's war of aggression against Ukraine, the security situation exacerbated by terrorist groups in	The land border with Austria.	

				the Middle East, strain on the asylum reception system, increase in human smuggling.		
36	13/04/2023	Art. 25-27 SBC	12/05/2023 - 11/11/2023	Increasing irregular migration from Turkey through the Western Balkans, strain on the asylum reception system, human smuggling.	The land border with Austria.	<p>Situation in countries and regions of origin.</p> <p>Afghanistan: economic situation, islamization of society, situation of women and girls.</p> <p>Turkey: earthquake and economic situation.</p> <p>Syria: earthquake and economic situation.</p> <p>Africa: economic situation.</p>
35	13/10/2022	Art. 25-27 SBC	12/11/2022 - 11/05/2023	Secondary movements, smuggling, strain on national refugee reception facilities, need to increase security of critical infrastructures.	The land border with Austria.	'Possible overburdening of society' in times of great upheaval, referring to the Russian assault on Ukraine, energy supply, concern about job loss, inflation.

34	30/05/2022	Art. 25-27 SBC	13/06/2022 - 03/07/2022	G7 Summit in Elmau.	All internal borders.	'Generally increased abstract threat through terrorism', 'Entry of potentially violent perpetrators'.
33	14/04/2022	Art. 25-27 SBC	12/05/2022 - 11/11/2022	Secondary movements, situation at the external borders.	Land border with Austria.	
32	15/10/2021	Art. 25-27 SBC	12/11/2021 - 11/05/2022	Secondary movements, situation at the external borders.	Land border with Austria.	Smuggling, developments in Afghanistan, ongoing challenge of containment and control of the pandemic, potential for irregular migration on the Balkan route.
31	14/04/2021	Art. 25-27 SBC	12/05/2021- 11/11/2021	Secondary movements, situation at the external borders.	Land border with Austria.	Smuggling, ongoing challenge of containment and control of the pandemic.
30	31/03/2021	Art. 28 SBC	01/04/2021- 14/04/2021	Coronavirus COVID-19.	Internal borders with the Czech Republic.	
29	17/03/2021	Art. 28 SBC	18/03/2021- 31/03/2021	Coronavirus COVID-19.	Land and air border with the Czech Republic, air border with Austria.	

28	03/03/2021	Art. 28 SBC	04/03/2021-17/03/2021	Coronavirus COVID-19.	Land and air border with the Czech Republic, air border with Austria.	
27	23/02/2021	Art. 28 SBC	24/02/2021-03/03/2021	Coronavirus COVID-19.	Land and air border with the Czech Republic, air border with Austria.	
26	12/02/2021	Art. 28 SBC	14/02/2021-23/02/2021	Coronavirus COVID-19.	Land and air border with the Czech Republic, air border with Austria.	
25	15/10/2020	Art. 25-27 SBC	12/11/2020-11/05/2021	Secondary movements, situation at the external borders.	Land border with Austria.	Ongoing challenge of containment and control of the pandemic, potential for illegal migration on the Balcan Route.
24	15/06/2020	Art. 25-27 SBC	16/06/2020-21/06/2020	Coronavirus COVID-19.	Air borders with Spain.	
23	15/05/2020	Art. 25-27 SBC	16/05/2020-15/06/2020	Coronavirus COVID-19.	Land and air borders with Austria, Switzerland, France, Denmark, Italy and Spain, sea border with Denmark.	
22	04/05/2020	Art. 28 SBC	05/05/2020-15/05/2020	Coronavirus COVID-19.	Land and air borders with Austria, Switzerland, France, Luxembourg, Denmark,	

					Italy and Spain, sea border with Denmark.	
21	14/04/2020 [Part 2]	Art. 28 SBC	15/04/2020- 05/05/2020	Coronavirus COVID-19.	Internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark.	
20	14/04/2020 [Part 1]	Art. 25-27 SBC	12/05/2020- 11/11/2020	Secondary movements, situation at the external borders.	Land border with Austria.	Despite current decrease of irregular secondary migration: Persisting potential for illegal migration on the Balkan Route.
19	25/03/2020	Art. 28 SBC	26/03/2020- 15/04/2020	Coronavirus COVID-19.	Internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark.	
18	19/03/2020	Art. 28 SBC	19/03/2020- 29/03/2020	Coronavirus COVID-19.	Air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea borders with Denmark.	
17	15/03/2020	Art. 28 SBC	16/03/2020, 8pm - 26/03/2020	Coronavirus COVID-19.	Land borders with Denmark, Luxembourg,	

					France, Switzerland and Austria.	
16	09/10/2019	Art. 25-27 SBC	12/11/2019 - 12/05/2020	Secondary movements, situation at the external borders.	Land border with Austria.	
15	11/04/2019	Art. 25-27 SBC	12/05/2019-12/11/2019	Migration and security policy.	Land border with Austria.	
14	12/10/2018	Art. 25-27 SBC	12/11/2018 - 11/05/2019	Threats resulting from the continuous significant secondary movements.	Land border with Austria.	
13	12/04/2018	Art. 25-27 SBC	12/05/2018 - 11/11/2018	Security situation in Europe and threats resulting from the continuous significant secondary movements.	Land border with Austria.	
12	11/10/2017	Art. 25-27 SBC	12/11/2017 - 12/05/2018	Security situation in Europe and threats resulting from the continuous significant secondary movements.	Land border with Austria and flight connections from Greece.	
11	11/05/2017	Recommendation of the Council of 11 May 2017. under Art. 29 SBC.	11/05/2017-11/11/2017	Migration, deficits in external border control putting the overall functioning of the area without internal border control at risk.	Land border with Austria.	

10	07/02/2017	Recommendation of the Council of 7 February 2017 under Art. 29 SBC.	11/02/2017-11/05/2017	Migration, deficits in external border control putting the overall functioning of the area without internal border control at risk.	Land border with Austria.	
9	11/11/2016	Recommendation of the Council of 11 November 2016 under Art. 29 SBC.	12/11/2016 - 12/02/2017	Migration, Deficits in external border control putting the overall functioning of the area without internal border control at risk.	Land border with Austria.	
8	12/05/2016	Recommendation of the Council of 12 May 2016 under Art. 29 SBC. ²²³	12/05/2016 - 12/11/2016	Migration, Deficits in external border control putting the overall functioning of the area without internal border control at risk.	Land border with Austria.	
7	05/02/2016	Art. 23, 24 SBC (EC) 562/2006, last modified by Reg. (EU) 1051/2013).	14/02/2016-13/05/2016			Prevention of a potential overburdening of society and resentment.

²²³ Note: The Schengen Borders Code was reformed in March 2016: 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) (codification), OJ. L 77, 23.3.2016, P. 1-52. References to the Schengen Borders Code without further clarification refer to this version.

6	27/10/2015	Art. 25 (3) SBC (EC) 562/2006, last modified by Reg. (EU) 1051/2013).	2/11-13/11/2015	Big influx of persons seeking international protection, all borders with focus on Austrian land borders	All borders with focus on the German-Austrian land border.	Further references to threats of 'general crime', radicalized persons, smuggling.
	[13/10/2015]	<i>No official notification.</i> Letter from the German Minister of the Interior Dr. Thomas de Maizière to Commissioner Avramopoulos	-	-	-	Further references to unprecedented and uncontrolled migration of third country nationals, 'potential threats' through risks associated to terrorism, burden on German public authorities.
5	09/10/2015 [Part 2]	Art. 23, 24 SBC (EC) 562/2006, last modified by Reg. (EU) 1051/2013).	14/11/2015 - 13/02/2016	Continuous big influx of persons seeking international protection.	All borders with focus on the Austrian land border.	
4	09/10/2015 [Part 1]	Art. 25 (3) SBC (EC) 562/2006, last modified by Reg. (EU) 1051/2013).	13/10-1/11/2015	Big influx of persons seeking international protection.	All borders with focus on Austrian land borders.	

3	01/10/2015	Art. 25 (3) SBC (EC) 562/2006, last modified by Reg. (EU) 1051/2013).	23/09-12/10/2015	Big influx of persons seeking international protection.	All borders with focus on Austrian land borders.	Additional references to risks of infiltration through terrorists and general criminals (although admittedly not based on reliable findings); consequences for the 'societal order'.
2	22/09/2015	Art. 25 (3) SBC (EC) 562/2006, last modified by Reg. (EU) 1051/2013).	23/09-12/10/2015	Big influx of persons seeking international protection.	All borders with focus on Austrian land borders.	
1	13/09/2015	Art. 25 (1) SBC (EC) 562/2006, last modified by Reg. (EU) 1051/2013).	13/09-22/09/2015	Big influx of persons seeking international protection.	All borders with focus on Austrian land borders.	Germany's great willingness to help must not be overstretched.