Backtracking or defending free movement within the Schengen Area?

NW v. Landespolizei Steiermark

Cebulak, P.; Morvillo, M.

DOI
10.54648/cola2023075

Publication date
2023

Document Version
Final published version

Published in
Common Market Law Review

Common Market Law Review **60**: 1075–1100, 2023.

Backtracking or defending free movement within the Schengen Area? *NW* v. *Landespolizei Steiermark*

Joined Cases C-368/20, *NW* v. *Landespolizeidirektion Steiermark*, and C-369/20, *NW* v. *Bezirkshauptmannschaft Leibnitz*, judgment of the Court (Grand Chamber) of 26 April 2022, EU:C:2022:298

1. Introduction

The Schengen Area is an area without internal borders, where people can move freely between countries without being subject to border controls.[1] Its establishment resulted from a combination of economic and political considerations, the former linked to the establishment of the internal market,[2] the latter considering free movement as one of the cornerstones of the emerging European political identity.[3] Its governance entails a delicate balance between free movement and national security, intersecting issues of migration control, crime prevention, public policy, and European Union (EU) citizenship. Notwithstanding these multiple challenges, the Schengen Area is considered one of the success stories of European integration. In the words of the European Commission, it is "part of our European way of life" and "a symbol of Europe's interconnectedness".[4]

Celebratory tones, however, conceal a much less idyllic picture. In recent years, the integrity of the Schengen Area as an area without internal borders has been increasingly under pressure. Since the 2015 migration crisis, numerous Member States have reintroduced internal border checks, reaching a peak during the early phase of the Covid-19 pandemic.[5] At the time of writing, six Member States carry out internal border controls for reasons other

1. Art. 2(1) Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, O.J. 2000, L 239/19–62. See also Art. 3 TEU and Art. 67 TFEU.

2. Cornelisse, "What's wrong with Schengen? Border disputes and the nature of integration in the area without internal borders", 51 CML Rev. (2014), 741, 744–745.

3. Salomon and Rijpma, "A Europe without internal frontiers: Challenging the reintroduction of border controls in the Schengen area in the light of Union citizenship", 24 GLJ (2023) 281, 288.

4. COM(2021)277 final, Communication from the Commission to the European Parliament and the Council, "A strategy towards a fully functioning and resilient Schengen area", p. 1.

5. In April 2020, 18 Member States had internal border controls in place. European Parliament Briefing, "Schengen reform. Key challenges and proposals", PE 733.599 – July 2022, 2.

than Covid-19.[6] The reintroduction of internal border checks is envisaged in EU law, namely in the Schengen Borders Code (SBC),[7] as a temporary and exceptional measure to deal with serious threats to public policy or internal security, subject to strict temporal and substantive limits.[8] Some of the current derogations, however, have been continuously in place for over seven years, due to repeated prolongations.[9] The increased frequency of internal border controls within the Schengen Area might turn their reintroduction into a rule rather than an exception, which would be in tension with the EU legal framework.[10] Despite this tension, this practice has gone largely uncensored by EU institutions.[11] The attempts at reform of the SBC had gained little traction before June 2022.[12]

In Joined Cases C-368/20, *NW* v. *Landespolizeidirektion Steiermark*, and C-369/20, *NW* v. *Bezirkshauptmannschaft Leibnitz*, the practices of border control reintroduction by Member States are brought under the scrutiny of the European judiciary. By asking the Court of Justice of the European Union

6. The Member States are: Germany, Denmark, Norway, Austria, Sweden and France. European Commission, Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code, available at <https://home-affairs.ec.europa.eu/system/files/2023-06/Member%20States%20notifications%20of%20the%20temporary%20reintroduction%20of%20border%20control%20at%20internal%20borders_en.pdf> (all websites last visited 25 May 2023). Reasons include e.g. irregular migration, terrorist threats, war in Ukraine, organized crime. See Guild, "Schengen borders and multiple national states of emergency: From refugees to terrorism to COVID-19", 23 *European Journal of Migration and Law* (2021), 385–404.

7. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), O.J. 2016, L 77/1–52. The temporary reintroduction and eventual prolongation of border checks is an exception to the principle of absence of border controls at internal borders; see Arts. 25(1) and 22 SBC.

8. See *infra* section 2.

9. E.g. in Austria, France, and Sweden. See Gülzau, "A 'new normal' for the Schengen area. When, where and why Member States reintroduce temporary border controls?", (2021) *Journal of Borderlands Studies*.

10. See Salomon and Rijpma, op. cit. *supra* note 3, 286–288; European Parliament, DG for internal policies, "Internal border controls in the Schengen area: Is Schengen crisis-proof? Study for the LIBE committee", (2016) PE 571 356.

11. In particular the European Commission, which only issued an opinion in 2015 and otherwise mostly adopted a laissez-faire approach. See European Commission, Commission opinion of 23 Oct. 2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Art. 24(4) of Regulation 562/2006 (Schengen Borders Code), C(2015)7100 final. See also European Parliament, "Annual Report on the functioning of the Schengen area", European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area (2017/2256(INI)), P8_TA(2018)0228.

12. See COM(2017)571 final 2017/0245 (COD), 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. See further *infra* section 5.1.

(ECJ) to clarify the time limits set out in the SBC in relation to the measures introduced by the Republic of Austria, the cases call into question the leeway of the Member States to reintroduce border controls under EU law, as well as the balance of free movement and national security in the governance of the Schengen Area.

This case note explains the legal and factual background of the joined cases arising before the ECJ (section 2). It then discusses the arguments raised by Advocate General Saugmandsgaard Øe to suggest that the Austrian authorities acted had within the exceptions granted by EU law (section 3). In its ruling of 26 April 2022, the Grand Chamber of the ECJ departed from the Advocate General's Opinion and set a clear time limit for the reintroduction of checks at the internal borders under Article 25 SBC (section 4). The judgment takes a clear stand in defence of the integrity of the Schengen Area. It exposes the problematic institutional dynamics taking place between the EU's and Member States' executives, while at the same time leaving the interpretation of several aspects open to the discretion of political actors. In the final part, this note reflects on the broader implications of this landmark ruling for the legal debates about national security exceptions under EU law, as well as the ongoing struggles to give full effect to the Court's ruling (section 5). In the broader institutional context of the EU, the judgment created momentum to reopen the discussions about reforming the SBC.

2. Factual and legal background

The case originated at the Austrian-Slovenian border. Here, border controls were reintroduced in 2015 and have been seamlessly renewed until today,[13] based on a variety of reasons (from migrants' influx and the "security situation in Europe", to "risk related to terrorists and organized crime", to the Covid-19 pandemic) and on different legal bases, re-enacted every six months.[14] In late 2019, border checks were carried out based on the decree of 9 May 2019 of the Federal Minister of the Interior. The applicant – an Austrian citizen and EU law scholar – was stopped by the border guards upon entering Austria and asked to identify himself twice, in August and November 2019. Having expressly confirmed with the border guards that he was undergoing a border control and not a mere identity check, he refused to show his passport and incurred a fine of 36 euros. He subsequently challenged the fine before the

13. Judgment, para 51; Opinion in Joined Cases C-368/20, *NW* v. *Landespolizeidirektion Steiermark*, and C-369/20, *NW* v. *Bezirkshauptmannschaft Leibnitz*, EU:C:2021:821, paras. 19–21.

14. Namely Arts. 25, 27, 28, and 29 SBC; judgment paras. 26–27.

national administrative court which, doubting its compatibility (and that of its legal basis) with the SBC, referred a preliminary ruling question to the ECJ under Article 267 of the Treaty of Functioning of the EU (TFEU).

The SBC was adopted as a regulation based on the EU's competence to ensure the "absence of any controls on persons, whatever their nationality, when crossing internal borders" enshrined in Article 77(2)(e) TFEU. Despite its general goal to create an area without internal borders, the SBC also foresees a legal framework for the need of Member States to re-instate border controls. Title II of the SBC comprehensively articulates the exceptions to the abolition of internal border checks: Article 25 sets out the general rules for foreseeable threats, Article 28 a special procedure for cases requiring immediate action (unforeseeable threats), and Article 29 a special procedure for exceptional circumstances, where the functioning of the entire Schengen Area is impaired.[15]

According to Article 25, the reintroduction of border controls is subject to three types of conditions. First, Member States can introduce internal border controls only if there is a serious threat to public policy or internal security.[16] It is exceptional, limited to the "strictly necessary"[17] and to be considered a "last resort".[18] It is subject to a proportionality assessment in light of the threat and of its impact on both internal security and free movement.[19] Second, it is temporary: namely for "a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days".[20] It can be prolonged, in case of persistence of the threat, "for renewable periods of maximum 30 days",[21] provided that "the total duration of the border controls does not exceed 6 months".[22] Third, the reintroduction of internal border checks under Article 25 is subject to a specific procedure, according to which Member States notify the Commission and the other Member States (and inform the Council and the European Parliament) of the intention to reintroduce border controls in advance, explaining the reasons, scope, and details of the measures.[23] The Commission (or any other Member State) may

15. On the distinction between foreseeable and unforeseeable threats see COM(2011)561 final, Commission Communication to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Schengen governance – strengthening the area without internal border control" of 16 Sept. 2011, p. 10.
16. Art. 25(1) SCB.
17. Ibid.
18. Art. 25(2) SBC.
19. Art. 26 SBC.
20. Art. 25(1) SBC.
21. Art. 25(3) SBC.
22. Art. 25(4) SBC.
23. Art. 27(1) SBC. With regard to the European Parliament and the Council, see also Art. 31 SBC.

then issue an opinion on the proposed measure. Where the Commission is concerned about the necessity or proportionality of the measure, or where it considers that a consultation among Member States is needed, it "shall" issue an opinion.[24]

This general framework is completed by the special procedures set out in Articles 28 and 29, for unforeseeable threats and for exceptional circumstances putting the overall functioning of the area without internal borders at risk, respectively. In the former case, the total duration of the measures shall not exceed two months; in the latter, two years. Article 29, with the two-year limit, requires a Commission proposal and a Council recommendation to conclude the threat for the functioning of the entire Schengen Area.[25]

Against this background, the referring Court raised three interpretative questions. First, whether the system of time limits set out in Articles 25 and 29 precludes national measures, such as the Austrian, reintroducing border controls for a period of time exceeding two years, based on an uninterrupted series of reiterated orders. Second, whether the right not to be subject to checks at internal borders can be derived from the right to free movement of EU citizens as in Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the EU.[26] The third question is a follow-up to the second one and asks whether the EU law precludes the legality of actual border controls and fines in case the second question is answered in the affirmative. Both the Opinion of the Advocate General and the judgment of the Court focus mostly on the first question,[27] reaching, however, diametrically opposed conclusions.

3. Opinion of the Advocate General

The Opinion of Advocate General Saugmandsgaard Øe adopts a highly deferential approach to national security considerations. It revolves around two elements: the identification of the applicable time limits and the procedural and substantive safeguards for reintroduction of border controls.

The Advocate General finds the applicable time limit "clearly defined" in Article 25(4) SBC and amounting to six months.[28] He also finds, however, that "it cannot . . . be inferred . . . that that provision precludes any reintroduction

24. Art. 27(4) SBC.
25. Arts. 25(4) and 29(2) SBC.
26. Judgment, paras. 37 and 48.
27. The second question is discussed cursorily by both the A.G., Opinion, paras. 78–80, and the Grand Chamber, judgment, paras. 95–98.
28. Opinion, para 39.

of controls exceeding that period"[29] at least "to a certain extent".[30] Based on the differentiation between *new* and *renewed* (or *persistent*) threats, first put forward by the French Council of State, he identifies a rather generous margin for extension beyond the six-month limit.[31] An *entirely new* ("by its nature") threat follows a previous "precisely defined, single, serious" threat[32] and warrants a fresh application of the time limits for the reintroduction of border controls, leading to their potential extension beyond the original six months.[33] A *renewed threat*, on the other hand, is characterized by a dynamic and evolving nature, presenting elements of both continuity and discontinuity with the initial threat.[34] This is the case of *NW* v. *Landespolizei Steiermark*. The Court is therefore left with the alternative of either treating the Austrian measures *as if* they were responses to new threats, thus granting a fresh application of the time limits, or considering them as responses to a "renewed threat", thus declaring their incompatibility with the SBC.

According to the Advocate General, the latter course of action would lead to "unacceptable, and indeed absurd, results".[35] Unacceptable, in so far as threats to national security are dynamic in nature and their duration is often unpredictable: not allowing for extensions in case of persistent threats would lead to Member States being obliged to abolish border controls which are still needed, resulting in their inability to guarantee national security.[36] Absurd, in so far as nothing in the SBC's wording prevents Member States from introducing a new measure immediately after the expiry of the six-month period, should the threat persist.[37] More generally, reading the six-month limits as absolute would undermine Member States competences in the fields of law and order and national security (Art. 72 TFEU and Art. 4(2) TEU)[38] and alter the balance struck by the EU legal framework between free movement and national security, prioritizing the former over the latter.[39]

29. Ibid.
30. Ibid., para 40.
31. See Conseil d'État Decision No 415291 of 28 Dec. 2017, *Association nationale d'assistance aux frontières pour les étrangers (ANAFE) et autres*, paras. 7–8, and Decision No. 425936 of 16 Oct. 2019, *ANAFE et Groupe d'information et de soutien aux émigrés (GISTI)*, paras. 6–7.
32. Opinion, para 43.
33. Ibid., paras. 41–43.
34. Ibid., para 61.
35. Ibid., para 49.
36. Ibid., para 51. Here, the A.G. refers to the judgment in Joined Cases C-511, 512 & 520 /18, *La Quadrature du Net and others*, EU:C:2020:791, paras. 134–138.
37. Opinion, para 52.
38. Ibid., para 56.
39. Ibid., para 58, referring to Case C-157/14, *Neptune Distribution*, EU:C:2015:823, para 75.

The Advocate General is hence left with the second option: treating persistent threats *as if* they were new threats. On closer inspection, Article 25 SBC "leaves a margin" for such an interpretation:[40] first, there is no clear definition of "threat", thus making it difficult to sharply distinguish between new and persistent threats; second, the time between the expiry of a six-month period and the beginning of the following one, when dealing with two separate threats, is not defined in the SBC. The Advocate General deems these elements sufficient to follow the approach of the French Council of State and consider a fresh application of time limits admissible, also for renewed threats.[41]

The distinction between new and renewed threat has practical implications in terms of substantive and procedural safeguards. The reintroduction of border controls is subject to a strict proportionality test – increasingly strict with each renewal.[42] Member States should ground their decisions on objective and compelling evidence and re-evaluate the adequacy of the renewal against the effectiveness of the initial measure. Border controls shall not be introduced when less intrusive measures (e.g. police control or cross-border cooperation of intelligence services) are available.[43] The requirements of this "enhanced proportionality" are left for the Court to further articulate.[44]

In terms of procedure, the reintroduction of border controls entails precise institutional safeguards.[45] The Advocate General stresses in particular the tasks conferred upon the Commission: the *obligation* to issue an opinion in case of doubts as to the lawfulness of the Member State's measure;[46] the consultation Commission and Member States can hold on such opinions; and the possibility for the Commission to initiate infringement proceedings against the Member State.[47] The Advocate General finds it "regrettable" that the Commission did not voice its concerns as to Member States' prorogations

40. Ibid., para 60.

41. Ibid., para 63. This approach would also solve the question of the possibility of the immediate reintroduction of border controls after the expiration of the six-month limit (see para 64).

42. Ibid., paras. 67–69.

43. Ibid., para 67.

44. Ibid.

45. See Art. 27(4) SBC.

46. Opinion, para 71. According to the A.G., the wording of the provision suggests that the Commission can always issue an opinion on the Member States' notification, but must do so when it has concerns over the necessity and proportionality of the planned measure.

47. Art. 258 TFEU; Opinion, para 72.

at an earlier stage, to then argue their unlawfulness when intervening in front of the ECJ.[48]

In a nutshell, the interpretation put forward by the Advocate General shows significant deference towards Member States' national security concerns, by allowing a fresh application of the six-month time limit in cases of persistent threats. Such leniency, however, is counterbalanced by strict substantive and procedural obligations, falling on both Member States and Commission, aimed at ensuring the measures' necessity and proportionality.

4. The judgment

The Grand Chamber of the ECJ shares the Advocate General's reproach for the Commission's inaction as well as the view that exceptions to the Schengen Area without internal borders should be governed by EU law. The Court otherwise pursues a radically different line of reasoning compared to the Advocate General, resulting in a strict interpretation of the six-month time limit set out in Article 25 SBC for the reintroduction of internal border controls. The judgment is underpinned by the importance of free movement in the Schengen Area and represents a wake-up call for Member States and the Commission to cooperate in order to manage threats to the public order and national security in an orchestrated way.

The Court focuses on the first question referred by the national court: whether Article 25(4) SBC must be interpreted as precluding border controls at the internal borders from being reintroduced on the basis of Articles 25 and 27 SBC, where that reintroduction exceeds the six-month limit set out therein. It answers this question in the affirmative, stating that the reintroduction of border checks is exceptional and should not exceed the mandatory six-month time limit.[49] This conclusion is substantiated by the "wording, context, and objectives" of the legal framework.[50]

First, the wording of Article 25(4) SBC: compared to the Advocate General's textual analysis, the Court is fast in finding that the provision clearly indicates that "any possibility of that [six-month] duration being exceeded is precluded".[51] Second, its context: Article 25 sets out a precise system of time limits (for both initial reintroduction and potential prolongations of border

48. Opinion, para 73. The Commission's inaction represented one of the key points of discussion at the hearing; see Cebulak and Morvillo, "The guardian is absent: Legality of border controls within Schengen before the European Court of Justice", *VerfBlog* (26 June 2021), available at <verfassungsblog.de/the-guardian-is-absent/>.

49. Judgment, para 94.

50. Ibid., para 56.

51. Ibid., para 57.

controls), including their *total* maximum duration, which is set at six months.[52] Here, the Court implicitly considers renewed or persistent threats as expressions of the original threat: the threat referred to in Article 25(4) is the same that triggered the initial reintroduction and potential prolongation of border controls – and is subject to the same time limits.[53] When reading Article 25 in the broader context of the SBC, it is clear to the Court that its provisions represent exceptions to the very *raison d'être* of the Code: ensuring free movement of persons across internal borders.[54] This represents "one of the main achievements of the European Union"[55] and exceptions to it should be interpreted narrowly.[56] *A contrario*, admitting a prolongation beyond six months in cases of persistent threats (even when assessed in light of new elements or of reappraisals of its necessity and proportionality) is incompatible with a narrow interpretation and effectively allows "the reintroduction of internal border control on account of the same threat for an unlimited period, thereby compromising the very principle that there is to be no internal border control".[57] Other provisions in the SBC corroborate this conclusion: the detailed framework set out in Articles 26 to 28 SBC, governing the substantive and procedural requirements for the reintroduction of border controls, suggests that, had the legislature envisaged more extended time limits, they would have been expressly included.[58] A laxer interpretation would sit uncomfortably both with the emphasis placed by the regulation on the need for Member States to act based on "commonly agreed specific and objective criteria"[59] and with the provision of a longer maximum time limit for exceptional circumstances.[60]

Third, the Court engages in a teleological interpretation of Article 25(4), in light of its objectives and of those pursued by the SBC. It embeds the Code in

52. Ibid., para 58. This is confirmed by both the references made by Arts. 25(4) to 25(3) (paras. 60–62) and by Recital 11 of Regulation 1051/2013 (which initially inserted the six-month limit).

53. Judgment, para 62.

54. Ibid., para 63. This is apparent from Arts. 1 and 22 SBC. See also Recitals 21 to 23 SBC.

55. Judgment, para 65, where the Court refers directly to Art. 3(2) TEU and Art. 67(2) TFEU. See also judgment, paras. 74 and 89.

56. Ibid., para 64. The Court refers to Recital 27 SBC, Case C-139/85, *Kempf*, EU:C:1986 :223, para 13; and Case C-33/07, *Jipa,* EU:C:2008:396, para 23.

57. Judgment, para 66.

58. Ibid., paras. 67–68.

59. Ibid., para 69 and Recital 23 SBC.

60. Judgment, para 70. See the two-year time limit set out in Art. 29 SBC. The latter is explicitly referred to by Art. 25(4). The Court notes (judgment, para 71) that the measures adopted according to Art. 29 SBC are without prejudice to the possibility to adopt measures based on Art. 25 SBC, provided that the relevant procedural and substantive requirements are fulfilled.

the broader framework of the Area of Freedom, Security, and Justice (AFSJ). Here, EU primary law strikes a balance between the competing objectives of free movement, on the one hand, and internal security, including the protection of external borders (Art. 3(2) TEU and Arts. 67(2), 72, and 77(2)(b) and (e) TFEU), on the other.[61] The provisions of the SBC are part of this balance, expressed in Recitals 22 and 23 and Article 26 SBC. The latter, in particular, requires Member States to assess both the impact of the threat on national security and that of their measures on free movement in the context of their proportionality assessment, so to ensure that both concerns are taken into account in the temporary reintroduction of border controls. Also the time limit set out in Article 25(4) is "a continuation of that general objective".[62] While the Court acknowledges the possibility of threats exceeding the six-month period, it holds that such time frame has been deemed sufficient by the EU co-legislator for the Member State concerned to adopt measures that can simultaneously address the threat and ensure the principle of free movement.[63] Contrary to the Advocate General, the Court treats persistent threats as expressions of the "original" threat, thus subjecting them to the same time limit. Textual, contextual, and teleological interpretation all corroborate the same conclusion: the six-month time limit set out in Article 25(4) SBC is mandatory and internal border controls exceeding its duration are "necessarily incompatible" with the Code.[64]

Last, the Court addresses the question of whether Member States can directly invoke primary law to extend the duration of internal border controls beyond the Article 25(4) limit. The issue was raised by the German Government, arguing that the migration crisis would amount to an exceptional circumstance allowing a direct recourse to Article 72 TFEU. Here, the Court's reasoning shifts towards a higher level of abstraction. In its view, the fact that a national measure pursues the protection of national security – a matter that remains firmly anchored within Member States' competences and unaffected by the Treaty provisions on the AFSJ – is not sufficient to render EU law inapplicable.[65] A derogation from EU law is possible only where expressly stated by the Treaties and in exceptional and clearly defined cases, subject to strict interpretation.[66] A generic invocation of Member States' responsibility

61. Judgment, para 72. See also Case C-341/18, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the port of Rotterdam)*, EU:C:2020:76, para 55.

62. Judgment, para 76.

63. Ibid., para 77.

64. Ibid., para 78.

65. Ibid., paras. 84–85, referring to Case C-742/19, *Ministrstvo za obrambo*, EU:C:2021:597, para 40.

66. Judgment, para 86. See Case C-808/18, *Commission* v. *Hungary (Reception of applicants for international protection)*, EU:C:2020:1029, paras. 212–216.

for maintaining public order and national security is not sufficient to justify a derogation from EU law based on Article 72 TFEU.[67] All the more so, when the secondary legislation in question, namely the SBC, is one of the key components of the framework specifically aimed at maintaining a fair balance between free movement and national security, accounting also for Member States' national security responsibilities.[68]

Besides setting a clear and strict time limit to the reintroduction of internal border controls based on Article 25(4) SBC and protecting it against derogations based on primary law, the Court clarifies two additional aspects relevant to the case.

First, the circumstances in which border controls can be in place for more than six months. While the Court does not follow the Advocate General's approach (i.e. treating persistent threats as if they were new threats), it does acknowledge that the emergence of a new threat under Article 25(4) justifies the fresh application of the relevant time limits.[69] It does, however, stop short of establishing any criteria guiding the identification of a new threat. Instead, it states that the existence of a new threat is to be assessed against the same criteria established for the assessment of the initial threat, as set out in Article 27(1) and (5) SBC (circumstances and events constituting a serious threat). The Court defers to the national judge the assessment of whether the Austrian measures can be qualified as responding to new threats, hinting however at a negative answer.[70] Another scenario justifying the reintroduction of border controls for more than six months is the consecutive occurrence of a serious threat under Article 25 SBC, followed by an exceptional circumstance justifying action under Article 29 SBC, provided that the more demanding substantive and procedural requirements are met.[71]

The second systemic point clarified by the ECJ in this ruling is institutional in nature. Similarly to the Advocate General, the Court stresses that the Commission is under an obligation to issue an opinion when it has concerns as

67. Ibid. See also Thym, "Legal framework for entry and border controls" in Hailbronner and Thym (Eds.), *EU Immigration and Asylum Law: A Commentary* (C. H. Beck, 2016), pp. 44–45.

68. Judgment, paras. 87–89. Here, the Court answers in the affirmative the question raised by the A.G., as to whether Art. 25 SBC "sufficiently takes into account the responsibilities incumbent on the Member States under Article 72 TFEU and/or Article 4(2) TEU and, accordingly, whether that Article 25 is valid or, on the contrary, should be disapplied", Opinion, note 38.

69. Judgment, paras. 79–81.

70. Ibid., para 82. According to Bornemann, "Reviving the promise of Schengen: The Court of Justice's judgment in Landespolizeidirektion Steiermark on internal border controls", *VerfBlog* (28 April 2022), available at <verfassungsblog.de/reviving-the-promise-of-schengen />; this represents a discontinuity vis-à-vis the Court's previously more deferential approach.

71. Judgment, para 71.

to the lawfulness of the planned reintroduction or prolongation of internal border controls by a Member State; an obligation to which the Commission did not live up in the present case (nor in any other).[72] While not having any consequence on the Court's interpretation of the SBC,[73] such omission, especially if systematic, can affect the correct functioning of the framework set out in the SBC itself and therefore of the Schengen Area as a whole. From the Court's reasoning, this emerges as revolving around two tenets. First, the crucial importance of free movement in the Schengen Area within the broader context of EU integration. This is reiterated multiple times throughout the judgment, where Schengen is referred to as one of the EU's main achievements.[74] The second important tenet of the Court's reasoning is the cooperative nature of the Schengen Area itself. The Court clearly states that the functioning of the area without internal borders (including the exceptional reintroduction and prolongation of border controls therein, and the very balance between free movement and national security) is critically dependent on Member States and EU institutions, in particular the Commission, exchanging, consulting, and cooperating with each other.[75] Without such mutual cooperation, the effectiveness of the "commonly agreed specific and objective criteria"[76] set out in legislation is to be rendered meaningless.

5. Comment

The judgment *NW* v. *Landespolizeidirektion Steiermark* is an important ruling on the principled nature of the Schengen Area and comes at a time of high political controversy over its reform. On the one hand, EU Member States have made a clear commitment to an area without internal borders. On the other hand, they wish to control irregular immigration of third-country nationals to the EU, while they do not trust the effectiveness of the external Schengen borders and the fairness of the distribution of non-EU immigrants among the Member States.

72. Ibid., para 91. On this aspect of the judgment see also Rom, "Of the legal limits when checking the national geographical ones: Reflections on the Court of Justice's judgment of 26 April on Austria's internal border control", *European Law Blog* (30 May 2022), available at <europeanlawblog.eu/2022/05/30/of-the-legal-limits-when-checking-the-national-geographical-ones-reflections-on-the-court-of-justices-judgment-of-26-april-on-austrias-internal-border-control/>.

73. Judgment, para 93.

74. Ibid., paras. 65, 74 and 89. See also Berrod, "The Schengen crisis and the EU's internal and external borders: A step backwards for security-oriented migration policy?", 1 *Borders in Globalization Review* (2020), 53, 57, available at doi.org/10.18357/bigr12202019602.

75. Judgment, paras. 69 and 77.

76. Ibid., para 69 and Recital 23 SBC.

This ambivalence should be read in the broader context of the rule-of-law crisis faced by the EU and of the growing influence of populist politics at national level. In particular when it comes to borders, right-wing populist movements tend to play a double game. Internally, they emphasize the importance of protecting national borders (and values), thus ultimately undermining the commitments made on the EU level regarding the absence of internal borders within Schengen. Externally, they position themselves as economically liberal supporting free movement within the internal market. We have witnessed such discourses even in the town of Schengen itself, by populist politicians, such as Florian Philippot from the Front National.[77] With the growing social polarization on issues of identity and migration, the functioning of the Schengen Area has become a political powder keg. This politically explosive material has been met with a deadlock in Brussels, where the Commission's 2016 attempt at reform was stalled by a lack of the necessary majorities in the Council, and coupled with the Commission's own inertia keeping it from policing Member States' recourse to Article 25 SBC.

It is against this background that the case was referred to the Court in Luxembourg. The ECJ does not control its docket and has to deal with the questions addressed to it by national courts. The applicant in the national proceedings strategically used the possibility to confront the European judges with the discrepancy between law on the books, guaranteeing free movement, and the law in practice, resulting in a continuous presence of border controls in Austria for eight years now. The Court lived up to its role as a constitutional arbiter and called for cooperation of national and EU institutions in fulfilling their obligations under EU law. The judges also left room for further interpretation in the follow-up cases that will undoubtfully reach the ECJ after *NW*. Still, the road from this principled ruling to the actual restoring of a Schengen Area without internal borders is likely to be long.

This case note highlights three selected aspects of the Grand Chamber ruling in *NW* v. *Landespolizei Steiermark*, which bear systemic consequences for the development of EU law and European integration. The Court's ruling has given new impetus to the legislative debates about reforming the functioning of the Schengen Area (section 5.1). However, the direction of these reforms is still very contested. We do not know whether the practice of internal border controls will be subject to more supranational control or whether longer national exceptions will be enshrined in the legislation. This note focuses on the role of the Court's ruling in those debates. The second highlighted aspect is the role of different judicial and political, national and European actors in giving full effect to the Court's judgment (section 5.2). The

77. Lamour, "Right-wing populist media events in Schengen Europe. The negotiated border discourse in-between nation States", 21 *Journal of Language and Politics* (2022), 521–543.

case *NW* v. *Landespolizei Steiermark* has so far been a relevant example of limited compliance with the Court's rulings. Finally, the Court's judgment of 26 April 2022 contributes to a bigger legal debate about the concept of national security in EU law (section 5.3). The scope of national security exceptions is contested across many fields of EU law.

5.1. *Reform of the Schengen Borders Code*

A first scenario is that of legislative reform. Even before the ECJ ruling, the reform of the SBC had already returned to the political agenda in Brussels. This process is part of the bigger political process of reforming the EU's internal and external migration governance with the Pact of Migration in September 2020.[78] The European Commission presented a legislative proposal in this sense in December 2021,[79] seeking to address the political tensions over the reintroduction of internal border controls.

The stated aims of the Commission's reform proposal are twofold.[80] First, tightening the control on EU external borders. Second, reducing internal border checks and controlling the movement of third-country nationals within the Schengen Area with alternative means. These include joint police patrols leading to targeted controls and the possibility of immediate removal of third-country nationals found to be irregularly within Schengen, if there are clear indications that the person crossed from another Member State.[81] It appears questionable whether these proposed new measures provide sufficient guarantees to protect the rights of third-country nationals seeking asylum or temporary protection from *non refoulement*.[82] Overall, the Commission proposal is responsive to the Member States' concerns. It extends to two years the duration of internal border controls for foreseeable threats, with the possibility of a further prolongation in case of "exceptional situations justifying the continued need for internal border controls" based on grounds of public policy or internal security.[83] It also strengthens the procedural safeguards by, for example, requiring Member States to support each

78. Smeets and Beach, "It is like déjà vu all over again, An inside analysis of the management of EU migration reform", (2023) J.Eur.Int., available at https://doi.org/10.1080/07036337.2023.2209273.

79. Communication COM(2021)891 final of the Commission of 14 Dec. 2021 on a proposal for amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Commission SBC reform proposal).

80. Apatzidou, "Schengen reform: 'Alternatives' to border controls to curb 'secondary movements'", *European Papers*, Vol. 7, 2022, No. 2, 573–582, 574.

81. Commission SBC reform proposal.

82. Apatzidou, op. cit. *supra* note 80, 578

83. Commission SBC reform proposal, Arts. 25a(5) and 27a(5).

six-month prolongation with a risk assessment[84] and requiring the Commission itself to issue an opinion on the measures' necessity and proportionality and to consult the Member States, whenever internal border controls have been in place for more than 18 months.[85]

For at least six months, this proposal was tabled without much follow-up, while Member States continued to deal with the risk of illegal immigration by unilaterally reintroducing border controls and bilaterally concluding readmission agreements. In June 2022, following the Grand Chamber ruling, the Council of the EU adopted its general approach on the proposal,[86] signalling a revival of Member States' political willingness to address the issue multilaterally. In its general approach, the Council proposed an enhanced justificatory threshold for Member States[87] and required the Commission to issue an opinion after reintroductions exceeding 12 months.[88] It is hard to predict whether the proposal will make it into legislation and if so, in what form. In its current state, however, the reform proposal sits more comfortably with the Advocate General's Opinion than with the Court's judgment. It ultimately concedes quite some leeway for Member States' national security concerns to justify the prolonged reintroduction of border controls, albeit in the context of a reinforced procedural and cooperative framework.

On 8 November 2022, the Committee for Civil Liberties, Justice and Home Affairs (LIBE Committee) of the European Parliament issued its draft report on the amendment of the SBC.[89] This draft report represents still a preliminary stage of the legislative procedure. It is subject to debate within the European Parliament, in the Committee itself and in the plenary, as well as with the Council. The draft report can, however, provide a first indication as the intention of the European Parliament to introduce significant amendments to the Commission's draft and the Council's position. First, the amendments proposed to the preamble of the SBC stress the value of the Schengen Area

84. Ibid., Art. 27(2).

85. Ibid., Art. 27a(3).

86. Interinstitutional File: 2021/0428(COD) 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 – General approach, 9 June 2022 (Council general approach).

87. E.g. Council general approach, Art. 25(1)(c), requiring Member States to substantiate the existence of an "exceptional situation characterized by large scale unauthorized movements of third-country nationals between the Member States, ... putting a substantial strain on the overall resources and capacities of the responsible national services" with "information analysis and all available data, including from EU agencies". See also Art. 27a(5).

88. Council general approach, Art. 27a(3) and (5).

89. European Parliament, LIBE Committee, Draft Report, PE737.471, 8 Nov. 2022, available at <www.europarl.europa.eu/doceo/document/LIBE-PR-737471_EN.pdf>.

without internal borders. The proposed changes highlight that the recent situation of growing internal border controls within Schengen shows "the need for a clearer and more robust framework to ensure the absence of any controls on persons, whatever their nationality, when crossing internal borders while enabling Member States to provide an effective response to challenges they face".[90] This approach seems a direct reflection of the pronouncements of the Court about the importance of the Schengen Area and free movement for European integration.[91]

The initially proposed substantive changes in the draft report of the LIBE Committee of the European Parliament seem to push back on the degree of leeway for the reintroduction of internal border controls granted to the Member States. First, the draft report proposes to keep a narrower indication of what constitutes a "serious threat to public policy or internal security" according to Article 25 SBC. It removes the reference to a significant influx of third-country nationals and rephrases the terrorism-related reasons to "a direct and immediate threat of acts of terrorism". This is justified by the fact that internal border controls should be a measure of last resort and the provisions proposed by the Council are "much too broad in that context".[92] Second, the European Parliament's draft report proposes to remove the possibility for Member States to reintroduce internal border controls based on a persistent threat, which seems in line with the Court's distinction between a new and persistent threat. Internal border controls would only be possible in case of a new threat. Third, changes are proposed to the procedures for Member States to reintroduce internal border controls. They could be introduced for periods of three (instead of six) months and the Member State concerned would have to notify not only the Commission and other Member States, but also the European Parliament, which could increase public and political accountability of those notifications. The justification of the Parliament's approach in the draft report highlights that internal border controls in the Schengen Area "should remain the exception and not the rule".[93]

In light of these developments, it is evident that the strategic litigation in *NW* v. *Landespolizeidirektion Steiermark*, with the Court adopting a more free movement oriented approach than both the Commission and the Council, might backfire in terms of the legislative train set in motion in December 2021. As the legislative procedure is still ongoing, the political process will have to strike a balance between protecting the essence of the Schengen Area,

90. Ibid., p. 7.
91. See express reference to the Court's case law, ibid., p. 18.
92. Ibid., p. 48.
93. Ibid., p. 49.

where border controls remain exceptional, and allowing Member States sufficient leeway to protect their national security when it is under threat.

5.2. *Actors involved in the implementation*

While political actors broker compromises in Brussels, the question remains as to the legality of the border controls currently in place. The judgment clarified, as a matter of principle, that the current border controls within the Schengen Area are incompatible with EU law. Yet, Member States have already shown some reluctance to effectively abolish existing border controls. In view of its deference to the political process so far, it is unclear whether the Commission would be willing to scrutinize such behaviour. The question of enforcement is likely to remain in the hands of individuals and national courts.

The Grand Chamber ruling should be interpreted as declaring all the Article 25 SBC border controls, currently in place for over six months and not based on a new threat, contrary to EU law. Following this decision, the referring Austrian court in Steiermark declared the border controls in question illegal and annulled the issued fine with reference to the primacy of EU law.[94] The Austrian court also declared that the 36 euro fine imposed on the applicant, violated the right to free movement of the applicant as an EU citizen.[95]

The ECJ judgment in procedure following Article 267 TFEU is binding for all Member States and sets the standard for internal border controls allowed under EU law. The same conclusion should therefore also apply to all the other border controls currently in place.[96] First, they have been ongoing for longer than six months. Second, Member States have not justified them by providing evidence of a new threat (studies, statistics or reasoning).

Uncertainties remain, however, as to the legality of new border controls that Member States might (re)introduce following the Court's judgment. It has been observed more broadly that partial compliance with ECJ judgments is a common *modus operandi* in the EU.[97] Without expressly challenging the authority of the Court's rulings, Member States find ways to "work around" their full implementation.[98] Against this background, the effectiveness of the Court's ruling in *NW* v. *Landespolizeidirektion Steiermark* is at stake. At least

94. Landesverwaltungsgericht Steiermark, 1 June 2022, LVwG 20.3-3028/2019, available at <www.ris.bka.gv.at/Dokumente/Lvwg/LVWGT_ST_20220601_LVwG_20_3_3028_2019_00/LVWGT_ST_20220601_LVwG_20_3_3028_2019_00.html>.

95. Ibid.

96. As also argued by Bornemann, op. cit. *supra* note 70.

97. Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press, 2002).

98. Hofmann, "Resistance against the Court of Justice of the European Union", 14 *International Journal of Law in Context* (2018), 258.

three types of actors can influence the effective enforcement of the judgment – the national governments, the European Commission, and national courts.

While the Court has been outspoken on the importance of open borders in the EU as a matter of principle, the responses by national political institutions have been rather disinclined. The Austrian, German, Swedish, Norwegian, French, and Danish authorities have not acknowledged that the ECJ's ruling puts them on notice to abolish border controls. Instead, they have reiterated their concerns for national security and reintroduced border controls.[99] These decisions, all effective as of May 2022, appear to disregard the ECJ's judgment rendered on 26 April 2022.

The German border controls concern the border between Bavaria and Austria. Just one day after the ECJ's ruling, the Bavarian Minister of Interior, in a press statement, highlighted the importance of border controls for security and called for the German authorities to use all leeway possible under EU law to keep them in place long term.[100] Sweden, in turn, announced the reintroduction of border controls on 6 May 2022, right after the Court's ruling.[101] The Swedish authorities invoked jointly reasons stemming from Article 25 SBC ("terrorist threats") and Article 29 SBC ("shortcomings at the external borders").[102] The ECJ intended to hold those grounds apart,[103] because Article 29 SBC, referring to dysfunctionalities at the external Schengen borders, requires a Council recommendation, which expired on 10 November 2017.[104] Some national administrations are also exploring the margin left by the Court's ruling. The Court has shown trust in the Member States' commitment to Schengen and left them quite some leeway to argue the proportionality of border controls as well as the existence of a new threat justifying their reintroduction. The Austrian authorities prolonged the border controls in spite of a pending decision of a national court following the answer to its preliminary ruling question in Luxembourg. The regulation from the Ministry of Interior invokes multiple reasons for the reintroduction of border controls – some of them clearly old (migration and situation at external borders), and some of them which might be potentially argued as new threats, such as those related to the effects of the war in Ukraine ("potential risk that

99. For a full list see *supra* note 6.

100. Bayerisches Staatsministerium des Innern, "Herrmann begrüßt Verlängerung der Grenzkontrollen an der deutsch-österreichischen Grenze", München, 27 April 2022, available at <www.stmi.bayern.de/med/pressemitteilungen/pressearchiv/2022/126/index.php>.

101. The border controls were introduced again for periods of six months: 12 May – 11 Nov. 2022 and 12 Nov. 2022 – 11 May 2023. For the latest decision see the Press Release of the Ministry of Justice of Sweden, available at <www.government.se/press-releases/2022/11/reintroduced-temporary-internal-border-controls/>.

102. See *supra* note 6, notification n. 327.

103. Judgment, para 82.

104. Ibid., para 26.

weapons are brought to the EU, use of established flight and migration routes by organized crime actors").[105] It remains to be seen how the legality of these renewed introductions of border controls will be evaluated. What undoubtedly changes following the ECJ ruling is that Member States are now required to engage with EU law reasoning and to present evidence of the actual situation at the borders, if they want to reintroduce border controls.

The position of Slovenia showcases the potential of Member States in enforcing Schengen. On 26 April 2023, Slovenia issued an opinion under Article 27 SBC denouncing the illegality of Austrian border controls under EU law.[106] The Slovenian President and Ambassador to Austria made public statements regretting the reintroduction of border controls at the internal border between the two Schengen countries for the 17th time in row.[107]

A second actor that could prove crucial in restoring Schengen and enforcing the Court's ruling is the European Commission. In the oral hearings[108] and their written reasoning, the Luxembourg judges have clearly condemned the Commission's silence in response to repeated notifications it received from Member States about the reintroduction of border controls. Following the judicial reprimand and the opinion issued by Slovenia, the Commission has launched a formal consultation procedure on the legality of border controls at the Slovenian/Austrian border.[109] This consultation was announced on 16 May 2023, more than a year after the judgment. Article 27(6) SBC prescribes that the consultations should take place at least ten days before the date planned for the reintroduction of border controls. In this case, the new round of Austrian border controls has been announced for the period from 12 May 2023 to 11 November 2023. The consultation is aimed at the Commission getting access to the full spectrum of information on the threats to internal security and public policy, which Member States might not want to share with the public. Following this consultation, the Commission will assess whether there is indeed a *new* threat and whether the national measures are necessary and proportionate. The Commission highlights its preparedness "to make use of legal means at its disposal".[110]

105. See *supra* note 6, notification n. 329.

106. European Commission, State of Schengen report 2023. COM(2023)274 final, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 16 May 2023, p.17.

107. Jentsch, "Sloweniens Botschafter im Interview: 'Die Grenzkontrollen sind rechtswidrig'", *Tiroler Tageszeitung* (27 April 2023), available at <www.tt.com/go/30852905>.

108. See *supra* note 51.

109. See *supra* note 107.

110. Ibid.

Taking into account the various actions of the Commission on the enforcement of the SBC, the Court's judgment and the SBC reform debates, the Commission favours a reform of the Schengen legislation over infringement proceedings as a means to address the dissonance between law and the practice of Member States in this field. This appears to reflect the general trend of the European Commission prioritizing its role as "engine of European integration" over its role as "guardian of the Treaties" across various domains of EU law, as shown by extensive empirical evidence.[111] Legitimate doubts therefore remain as to whether the Commission will be responsive to the Court's call in the absence of a clear legislative mandate.

The third type of actors with the power to enforce the Court's pronouncement are national courts. They have to be seized by individuals, legal or natural persons, who are either subject to illegal border controls or suffer financial harm from their reintroduction (State liability). In these regards, the developments in France, where border controls were introduced in 2015, can serve as a case study for the role that national courts can play in undercutting the effects of the ECJ's judgment. In a 2017 ruling, the French Council of State showed deference to the national executive and upheld the legality of the controls at the French border, without referring a preliminary ruling question to Luxembourg.[112] The same Council of State has been seized with the question of the legality of reintroduction of border controls in France again, after the ECJ ruling in *NW* v. *Landespolizei Steiermark*. The two joined cases were brought by four non-governmental organizations active in the field of migration. They asked the Council of State to declare illegal the reintroduction of border controls in France between 1 May 2022 and 31 October 2022. On 27 July 2022, the Council of State ruled to uphold the legality of the decision of the French Government to reintroduce border controls.[113] It recalls that the SBC allows for Member States to reintroduce border controls in cases of a new and serious threat to public order and internal security. The French judges relied on the ruling in *NW* v. *Landespolizei Steiermark* to stipulate that the newness of the threat should be assessed by reference to "circumstances and events" giving rise to the reintroduction of border controls.[114] This is the only time that the Council of State refers to the ECJ ruling in its reasoning. It develops its own broad interpretation of a new threat, by stating that this includes not only threats that are different in nature,

111. Kelemen and Pavone, "Where have the guardians gone? Law enforcement and the politics of supranational forbearance in the European Union", *APSA Preprints*, available at <preprints.apsanet.org/engage/apsa/article-details/61ca1ec002c214092c3443f4>.

112. Conseil d'État Decision cited *supra* note 31, paras. 7–8.

113. Conseil d'État (Council of State), 27 July 2022, No. 463850, FR:CECHR:2022:463850.20220727.

114. Judgment, paras. 80–81.

but also situations when new circumstances and events change the characteristics of a threat in such a way as to modify its timeliness, scope or content.[115]

The Council of State goes on to analyse whether the French Prime Minister faced such a new threat when deciding to reintroduce border controls in 2022. It cites a series of new events around the globe. Regarding terrorist threats, they range from general statements about instability in Iraq, Syria, Afghanistan, as well as central and western Africa, to references to specific events, such as the attack on the prison in Hassaké in north-eastern Syria on 20 January 2022 and the planned judgment of French court for the attacks of 13 November 2015.[116] All of these events relate to increased numbers of returning terrorist combatants, more calls for terrorists attacks, in particular against the Jewish population, and expansion of Islamic terrorist networks.[117] With regard to the Covid-19 pandemic, the threat is the arrival of new variants in 2022, which are easier to transmit and more resistant to vaccines. The Council of State does not examine whether the influx of third-country nationals could be considered a renewed threat, as this reason was not *sine qua non* for the reintroduction of border controls.

The approach adopted by the Council of State in its ruling of 27 July 2022 does not fully give effect to the ECJ's Grand Chamber ruling of 26 April 2022. Following the reasoning of the Council of State, events occurring anywhere around the world could constitute new threats to national security of an EU Member State. In an age of global instability, the list of such potential events seems endless, leaving open the risk of border controls within the Schengen Area becoming the rule rather than an exception.

The question of the scope of exceptions to the rule of open borders within Schengen is likely to return before the bench in Luxembourg in the future. The Court has always developed its jurisprudence incrementally and in dialogue with national courts.

5.3. *National security concept in EU law*

The ruling in *NW* v. *Landespolizei Steiermark* can have implications for the interpretation of national security exceptions in EU law in general. Security discourses have dominated many policy areas in a process analysed as securitization.[118] Critical security scholars have been pointing out for a long

115. Ibid., para 5.
116. Ibid., para 6.
117. Ibid.
118. Huysmans, "The European Union and the securitization of migration", 38 JCMS (20 00), 751–77.

time how securitization discourses lead to a normalization of exceptional measures.[119] The Court, in this case, resisted such a normalization of the exception of border controls. The Court remained vague on the concept of a (new) threat to national security. Member States in their notifications of prolonged border controls to the European Commission have been emphasizing "risks" rather than actual threats to national security.[120] The European Commission did not challenge these national narratives. This risk-based conception of security is also predominant in other EU institutions.[121] The ECJ itself seems to award quite some discretion to the framing adopted by the Member States. It did, however, emphasize that national security is not a trump card allowing any national derogations from EU law.[122] This means that the Court will retain authority to further interpret this concept and the meaning of a new or renewed threat in the future.

The ruling can also have effects in other domains of EU law where the national security exceptions have already been invoked. In its judgment, the Court does not emphasize the particular character of the Area of Freedom Security and Justice (AFSJ), as the former intergovernmental "third pillar". This seems to suggest that its interpretation of Member States' national security is not exclusive to this previously intergovernmental domain of EU law. The general pronouncement of the Court puts national security within the ambit of EU law and its interpretative powers. National security exceptions are relevant also in data protection law (*Quadrature du Net*[123]). Precisely here, we have seen how a Court's principled ruling can eventually be enforced by private applicants and national courts. In 2014, the ECJ ruled in *Digital Rights Ireland* that collecting and storing metadata from personal communications on a mass scale constitutes a violation of the right to data privacy enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the EU.[124] After the Court annulled a directive that introduced such measures, effectively the same substantive measures were introduced by some Member States through national legislation. It took two more preliminary rulings, *Tele2 Sverige* from Sweden and *Watson* from the UK, for the Court to confirm its interpretation of

119. Ceccorulli, "Back to Schengen: The collective securitisation of the EU free-border area", 42 *West European Politics* (2019), 302–322.

120. Karamanidoua and Kasparek, "From exceptional threats to normalized risks: Border controls in the Schengen area and the governance of secondary movements of migration", 37 *Journal of Borderlands Studies* (2022), 623–643.

121. Horii, "The effect of Frontex's risk analysis on the European border controls", 17 *European Politics and Society* (2016), 242–258.

122. Judgment, para 84.

123. Joined Cases C-511, 512 & 520/18, *La Quadrature du Net and others*.

124. Joined Cases C-293 & 594/12, *Digital Rights Ireland*, EU:C:2014:238.

data protection.[125] In both cases, the Court seems to assert its constitutional authority on interpreting the exceptions from EU law. It is possible that the question of internal border controls within Schengen might develop parallels to the incremental and mostly private enforcement that we have observed in the domain of data protection. In addition, the two domains share the political salience and the tension between national security protection and enforcement of EU law.

Second, the Court does not really answer the last question referred by the national Court about a possible violation of the Citizens' Rights Directive.[126] The political argument for maintaining internal border controls usually refers to third-country nationals whose status within Schengen is not regularized or alleged criminals who are hiding from the law enforcement authorities. It has also been argued in academic debates that the lack of enforcement of the Schengen rules is related to the dominant market rationale taking precedence over giving effect to EU citizenship. In so far as the abolition of internal borders is largely understood as serving first and foremost the economic interests of the internal market (free movement of goods, services, and workers), its non-market dimension (free movement of persons as an essential constitutive element of EU citizenship) has been considered a second-order priority.[127] The Court did not adopt this proposed line of reasoning based on EU citizenship in this case. It emphasized rather the general principle of absence of internal borders "irrespective of the nationality" of the person.[128] It remains to be seen whether a reasoning based on free movement of EU citizens could be included in the judicial reasoning in the future.

Finally, by rejecting the arguments of Member States about the extraordinary nature of the threats and conducting its balancing between the security threats and the exceptional nature of border controls in the Schengen Area within the framework of the SBC, the ECJ maintained legal certainty with regard to all secondary EU law that presupposes free movement. The judgment in *UFC – Que choisir and CLCV* (Case C-407/21) concerns the question whether a justified derogation from freedom of movement in the EU

125. Joined Cases C-203 & 698/15 *Tele2 Sverige and Tom Watson and others*, EU:C:2016 :970. See Cameron, "Balancing data protection and law enforcement needs: *Tele2 Sverige and Watson*", 54 CML Rev. (2017), 1467–1495.

126. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, O.J. 2004, L 158/77–123.

127. Salomon and Rijpma, op. cit. *supra* note 3, 281.

128. Judgment, para 63. See also Salomon and Rijpma, ″The promise of free movement in the Schengen area: The decision of the Court of Justice in Landespolizeidirektion Steiermark (NW)″, 48(1) EL Rev. (2023), 124, 132.

can similarly justify further derogations from a specific provision of secondary EU law. The preliminary ruling question from the French Council of State referred in 2021 concerns European private law and the reimbursement for package travel. In her Opinion, Advocate General Medina argued against qualifying, in this case, the Covid-19 pandemic as such an extraordinary crisis that it is not foreseen in the EU legal order.[129] Otherwise, "such an exception could imply that during a public health emergency EU law is not applicable".[130]

The ECJ's Grand Chamber ruling in *NW* v. *Landespolizeidirektion Steiermark* provides a significant contribution to the debate about the balance between national security of the Member States and the primacy and uniform application of EU law. It remains a sensitive and politically salient balance struck on a case-by-case basis.

6. Conclusion

In *NW* v. *Landespolizeidirektion Steiermark*, the Court took a principled stance against the prolonged reintroduction of border controls in the Schengen Area. It referred to the absence of internal borders as one of the "main achievements of European integration" and held Member States to account for their commitment to it, as enshrined in the Treaties and in the SBC. It also called on the Commission to live up to its role as guardian of the Treaties. In this way, the ECJ's pronouncement reads as a wake-up call for political institutions at the EU and national levels to act together for the protection of the Schengen legacy.

More than a year after the publication of the judgment, it seems that its full implementation might be a bumpy road. National authorities seem reluctant to give full effect to the ruling and to actually renounce border controls. The Commission has put the reform of the SBC high on its agenda as a solution to the current discrepancies between the legal obligations and the border realities, making significant concessions to Member States' security concerns. Finally, national courts could play an important role in ensuring the accountability of governments by initiating preliminary ruling procedures or holding the State liable for damages. This is, however, a longer and more decentralized path of enforcement, relying on active engagement of companies and citizens concerned.

The judgment in *NW* v. *Landespolizeidirektion Steiermark* can be a trail blazer for the era of differentiated integration. The Schengen Area is an

129. Opinion in Case C-407/21, *UFC – Que choisir and CLCV*, EU:C:2022:690, para 37.
130. Ibid., para 39.

example of the Court asserting the authority of EU law even in domains where Member States are reluctant to enact further integration and enforce strict commitments. Instead, the institutions involved seem to operate based on a plethora of unilateral legal acts, bilateral agreements, as well as EU law. Through this ruling, the Court asserts that the granting of national exceptions is still governed by EU law and subject to judicial scrutiny. National security is one of the key concepts allowing Member States to derogate from EU law and opens possibilities for differentiated integration. The ECJ ruling of 26 April 2022 shall be relevant for the interpretation of such national security exceptions across various domains of EU law.

Regardless of the immediate implementation, this Grand Chamber principled ruling will become an important milestone in the case law on free movement in EU law. The Court has highlighted that free movement within the Schengen Area means lack of border controls. Exceptions to free movement in the form of the reintroduction of border controls should not become the rule.

Pola Cebulak and Marta Morvillo*

* This contribution builds on a previous blog post published by the authors: Cebulak and Morvillo, "Schengen restored: The CJEU sets clear limits to the reintroduction of internal border controls", *VerfBlog* (5 May 2022), available at <verfassungsblog.de/schengen-restored/>. The authors also worked with the applicant in his academic capacity.