

AG: Reintroduction of Internal Border Checks for Longer than Six Months

Anna Pingen

News

On 6 October 2021, Advocate General (AG) *Saugmandsgaard Øe* presented his [opinion](#) in [Joined Cases C-368/20 and C-369/20](#). According to the AG, “a Member State faced with persistent serious threats to public policy or internal security may reintroduce controls at its internal borders for longer than only six months.”

[Background of the cases:](#)

Austria reintroduced controls at the Slovenian border in conjunction with the migration crisis in September 2015. Those controls were continued on the basis of various exceptions provided for in the Schengen Borders Code. In 2018/2019, Austria made use of the legitimate exception in the Schengen Borders Code that allows Member States to temporarily reintroduce internal border controls in exceptional circumstances and when faced with a serious threat to public policy or internal security. This happened twice in a row, each time for a period of six months.

NW was ordered to pay a fine of €36 in Austria for having crossed the Slovenian-Austrian border in August 2019 without being in possession of a valid travel document. He was controlled again trying to enter Austria by car from Slovenia in November 2019. The defendant challenged these two controls as well as the imposed fine before the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria).

The Landesverwaltungsgericht Steiermark had doubts as to the lawfulness of the seamless juxtaposition of the exemption regulations, since such a cumulation is not provided for in the Schengen Borders Code. In essence, the referring court wished to know whether the Schengen Borders Code precludes the reapplication of the exception in the event that a Member State is still faced with a serious threat to public policy or internal security after expiry of the six-month period.

[The AG’s opinion:](#)

First, the AG takes the view that serious threats to public policy or internal security are not necessarily limited in time. This means that the Member States’ powers and responsibilities in this area cannot be framed by absolute periods, as the Schengen Borders Code aims not only to ensure the absence of any internal border controls but also to maintain public policy and to combat all threats to public policy. Thus, reapplication of the exception several times in a row is to be admitted.

Second, the AG argues that, if the reapplication took place several times in a row and on the basis that the “renewed threat” was similar to the preceding serious threat, the “enhanced proportionality condition”

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becomes stricter each time the exception is reapplied. The Member State concerned must clarify why the renewal of controls would be appropriate as a necessary measure by explaining why another, less coercive measure would not be sufficient. The AG also stresses that the reapplication decision must be notified to the Commission before its adoption, and the Commission must critically examine the proportionality of the measure.

Third, the AG points out that checks on persons at internal borders must be consistent with the right to free movement of EU citizens. The AG concludes that the possible imposition of a penalty for a breach of the obligation to present a passport or an identity card is not contrary to EU law under these circumstances.

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