



Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 6 October 2021¹

Joined Cases C-368/20 and C-369/20

NW

v

Landespolizeidirektion Steiermark (C-368/20)

and

NW

v

Bezirkshauptmannschaft Leibnitz (C-369/20)

(Request for a preliminary ruling from the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria))

(Reference for a preliminary ruling – Area of freedom, security and justice – Schengen Borders Code – Regulation (EU) 2016/399 – Article 25 – Temporary reintroduction of internal border control – National legislation providing for several successive periods of controls – Proportionality – Article 72 TFEU – Free movement of persons – Article 4(2) TEU)

I. Introduction

1. Article 3(2) TEU provides that the European Union is to ‘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’. In the present cases, the Court is, in essence, being called upon to rule on the delicate balance apparent from that provision between the freedom of EU citizens to move in an area without internal frontiers and the maintenance of security in that area.

2. The present cases concern more specifically the interpretation of, in particular, Article 25 of the Schengen Borders Code.² That provision constitutes an exception to the general principle of that code according to which internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.³ In that regard, paragraph 1 of that article authorises Member States, in exceptional circumstances where they are faced with a

¹ Original language: French.

² 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 border (Schengen Borders Code) (OJ 2016 L 77 p. 1), as amended by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 (OJ 2016 L 251, p. 1) (‘the Schengen Borders Code’).

³ Article 22 of the Schengen Borders Code.

serious threat to public policy or internal security, to reintroduce temporarily control at internal borders, on the conditions laid down in that provision. The first sentence of paragraph 4 of that article provides that the maximum period during which the control is reintroduced is to be six months.

3. In the present cases, the Court is, in essence, being called upon to state whether Article 25 of the Schengen Borders Code precludes paragraph 1 from being freshly applied where, on the expiry of the six-month period laid down in paragraph 4 of that article, a Member State still faces a serious threat to public policy or internal security.

4. That question has been raised in the context of the reintroduction by the Republic of Austria of control at the border between that Member State and the Republic of Slovenia on the basis of Article 25(1) of the Schengen Borders Code. Being of the view, in essence, that it was faced with *persistent* serious threats, the Republic of Austria had reintroduced controls pursuant to that provision several times in a row, each time for a period of six months. I note, however, that the question referred falls within a wider context. In fact, several other Member States have for years reintroduced controls at their internal borders by successively applying that same provision for similar reasons.⁴

5. Following my opening remarks, I shall explain why, in my view, Article 25 of the Schengen Borders Code does not preclude, in principle, paragraph 1 thereof from freshly applying where, on the expiry of the six-month period laid down in paragraph 4 of that article, a Member State is still faced with a serious threat to public policy or internal security. Nevertheless, where the threat in question is, in essence, a continuation of the earlier serious threat, I consider that, for the purposes of such a fresh application, the principle of proportionality implies compliance with particularly strict criteria which I shall set out.

II. Legal background

A. *The Schengen Borders Code*

6. Article 25 of the Schengen Borders Code, entitled ‘Temporary reintroduction of border control at internal borders’, provides:

‘1. Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

2. Border control at internal borders shall only be reintroduced as a last resort, and in accordance with Articles 27, 28 and 29. The criteria referred to, respectively, in Articles 26 and 30 shall be taken into account in each case where a decision on the reintroduction of border control at internal borders is considered pursuant, respectively, to Article 27, 28 or 29.

⁴ As I have understood it, those States include, at least, the Federal Republic of Germany, the Kingdom of Denmark, the Kingdom of Sweden and the French Republic, which are also interested parties in the present cases (see also, in that regard, the list of notifications available at https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en).

3. If the serious threat to public policy or internal security in the Member State concerned persists beyond the period provided for in paragraph 1 of this Article, that Member State may prolong border control at its internal borders, taking account of the criteria referred to in Article 26 and in accordance with Article 27, on the same grounds as those referred to in paragraph 1 of this Article and, taking into account any new elements, for renewable periods of up to 30 days.

4. The total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of this Article, shall not exceed six months. Where there are exceptional circumstances as referred to in Article 29, that total period may be extended to a maximum length of two years, in accordance with paragraph 1 of that Article.'

7. Article 26 of that code, entitled 'Criteria for the temporary reintroduction of border control at internal borders', provides:

'Where a Member State decides, as a last resort, on the temporary reintroduction of border control at one or more of its internal borders or at parts thereof, or decides to prolong such reintroduction, in accordance with Article 25 or Article 28(1), it shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security, and shall assess the proportionality of the measure in relation to that threat. In making such an assessment, the Member State shall, in particular, take the following into account:

- (a) the likely impact of any threats to its public policy or internal security, including following terrorist incidents or threats and including those posed by organised crime;
- (b) the likely impact of such a measure on free movement of persons within the area without internal border control.'

8. Article 27 of that code, entitled 'Procedure for the temporary reintroduction of border control at internal borders under Article 25', states:

'1. Where a Member State plans to reintroduce border control at internal borders under Article 25, it shall notify the other Member States and the Commission at the latest four weeks before the planned reintroduction, or within a shorter period where the circumstances giving rise to the need to reintroduce border control at internal borders become known less than four weeks before the planned reintroduction. To that end, the Member State shall supply the following information:

- (a) the reasons for the proposed reintroduction, including all relevant data detailing the events that constitute a serious threat to its public policy or internal security;
- (b) the scope of the proposed reintroduction, specifying at which part or parts of the internal borders border control is to be reintroduced;
- (c) the names of the authorised crossing-points;
- (d) the date and duration of the planned reintroduction;
- (e) where appropriate, the measures to be taken by the other Member States.

A notification under the first subparagraph may also be submitted jointly by two or more Member States.

If necessary, the Commission may request additional information from the Member State(s) concerned.

2. The information referred to in paragraph 1 shall be submitted to the European Parliament and to the Council at the same time as it is notified to the other Member States and to the Commission pursuant to that paragraph.

...

4. Following notification by a Member State under paragraph 1 and with a view to consultation provided for in paragraph 5, the Commission or any other Member State may, without prejudice to Article 72 TFEU, issue an opinion.

If, based on the information contained in the notification or on any additional information it has received, the Commission has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders, or if it considers that a consultation on some aspect of the notification would be appropriate, it shall issue an opinion to that effect.

5. The information referred to in paragraph 1 and any Commission or Member State opinion under paragraph 4 shall be the subject of consultation, including, where appropriate, joint meetings between the Member State planning to reintroduce border control at internal borders, the other Member States, especially those directly affected by such measures, and the Commission, with a view to organising, where appropriate, mutual cooperation between the Member States and to examining the proportionality of the measures to the events giving rise to the reintroduction of border control and the threat to public policy or internal security.

6. The consultation referred to in paragraph 5 shall take place at least ten days before the date planned for the reintroduction of border control.'

B. Austrian law

1. The PassG

9. The Bundesgesetz betreffend das Passwesen für österreichische Staatsbürger (Passgesetz 1992) (Federal law concerning the issue of passports to Australian nationals (1992 Law on passports; 'the PassG')), provides in Paragraph 2(1) thereof:

'Unless otherwise provided for in an international agreement or by international custom, Austrian nationals (nationals) must be in possession of a valid travel document (passport or equivalent) to enter or leave the territory of the Republic of Austria.'

10. Paragraph 24(1) of that law provides:

'Anyone who

(1) unlawfully enters or leaves the national territory (Article 2),

...

shall, unless the act does not constitute a criminal offence, commit an administrative offence punishable by a fine of up to EUR 2 180 or a custodial sentence of up to six weeks. In the case of a repeated offence, the fine and custodial sentence shall be imposed jointly where there are aggravating circumstances.’

2. *The GrekoG*

11. The Bundesgesetz über die Durchführung von Personenkontrollen aus Anlaß des Grenzübertritts (Grenzkontrollgesetz – GrekoG) (Federal law on the control of persons crossing the border (Law on border control; ‘the GrekoG’)) provides, in Paragraph 10 thereof, entitled ‘Crossing the border’:

‘1. Unless otherwise provided for in an international agreement or by international custom, the external border may be crossed only at border crossing points.

2. The internal border may be crossed at any place. Where it appears that the maintenance of public peace, public policy and public security so requires, the Federal Minister for the Interior shall nevertheless be authorised, within the limits of international agreements, to adopt a decree providing that, during a given period, certain parts of the internal border may be crossed only at border crossing points.

...’

12. Paragraph 11 of that law, entitled ‘Border control obligation’, provides:

‘1. Crossing the border at border crossing points ... shall entail for the person concerned the obligation to be subject to a control (border control obligation).

2. Crossing the border at the internal border shall, apart from the cases referred to in Paragraph 10(2) and (3), entail no border control obligation.

...’

13. Paragraph 12 of that law, entitled ‘Implementation of the border control’, provides, in subparagraph 1 thereof:

‘Border control shall be the responsibility of the authority. Where its implementation entails the exercise by the administrative authority of a direct power to issue orders and to use force, it shall be reserved to the law enforcement bodies and to the General Directorate of the police (Paragraph 12b). ...’

14. Paragraph 12a of that same law, entitled ‘Powers of law enforcement bodies’, provides, in subparagraph 1 thereof:

‘Law enforcement bodies shall be authorised to carry out border control in respect of a person where there are reasons to believe that that person is bound by the border control obligation ...’

3. Decree No 114/2019

15. The Verordnung des Bundesministers für Inneres über die vorübergehende Wiedereinführung von Grenzkontrollen an den Binnengrenzen (Decree of the Federal Minister for the Interior concerning the temporary reintroduction of internal border control) of 9 May 2019 (BGBl. II, 114/2019; ‘Decree No 114/2019’) is worded as follows:

‘On the basis of Paragraph 10(2) of the Law on border control (GrekoG), it is hereby ordered:

Paragraph 1. In order to maintain public peace, policy and security, the internal borders with the Republic of Slovenia and Hungary may, between midnight on 13 May 2019 and midnight on 13 November 2019, be crossed on land only at border crossing points.

Paragraph 2. This Decree shall cease to apply at midnight on 13 November 2019.’

III. The disputes in the main proceedings and the questions referred for a preliminary ruling

A. Case C-369/20

16. On 29 August 2019, NW wished to enter Austrian territory from Slovenia at the Spielfeld border crossing point.

17. Upon being requested by Inspector CO to present his passport, NW asked whether it was a border check or an identity check. Inspector CO replied that it was a border check and the applicant identified himself by showing his driving licence, because he considered that border controls were, on that date, contrary to EU law. Even after Inspector CO had repeated several times his request that the applicant present his passport and informed the applicant that he was contravening the PassG, the applicant did not present his passport. Inspector CO therefore terminated the administrative operation and informed the applicant that a complaint would follow.

18. By administrative penal order of 7 November 2019, NW was found guilty of having crossed the Austrian border during his entry into the territory of the Republic of Austria without being in possession of a valid travel document. The applicant had therefore contravened Paragraph 2(1) of the PassG and he was ordered to pay a fine of EUR 36 pursuant to Paragraph 24(1) of that law. The acts which the applicant was alleged to have committed had been brought to the authorities’ notice by means of a complaint lodged by police officers of the Landespolizeidirektion Steiermark (Directorate-General of the Police, Styria, Austria) on 6 September 2019. By a notice of offence of 9 September 2019, the applicant had then been declared guilty of an offence contrary to Paragraph 2(1) of that law. In the complaint which he had lodged on 23 September 2019 against the notice of offence, the applicant had claimed that the unlawful nature of the borders check carried out – as Title III of the Schengen Borders Code provided no legal basis for the administrative operation in question – and the administrative operation and notice of offence constituted a breach of his right to freedom of movement under Article 21(1) TFEU in conjunction with Article 22 of the Schengen Borders Code.

19. The referring court states that the Republic of Austria reintroduced controls at the border with the Republic of Slovenia from September 2015. From 16 September 2015 to 10 May 2016, those controls were based, in EU law, initially on Article 29 of the first Schengen Borders Code (Regulation (EC) No 562/2006),⁵ then on Article 25(2) of that code.⁶ Next, between 11 May 2016 and 11 November 2017, the prolongation of the border control was based on three Council implementing decisions adopted on the basis of Article 29 of the Schengen Borders Code.

20. As the European Commission did not submit a new proposal to the Council after 11 November 2017 for the prolongation of the border control on the basis of Article 29 of the Schengen Borders Code, a prolongation of the border control in Austria after that date could, according to the referring court, be based only on Article 25(1) of that code.

21. On 12 October 2017, the Republic of Austria notified the Commission of a prolongation of the implementation of border control for six months, from 11 November 2017 to 11 May 2018.⁷ The border control was then prolonged for a further six months, from 11 May 2018 to 11 November 2018,⁸ then from 12 November 2018 to 12 May 2019⁹ and, finally, from 13 May 2019 to 13 November 2019. This last period of prolongation, during which NW was subject to the control, was based on Decree No 114/2019.

22. In the referring court's view, the Republic of Austria's approach, using a succession of regulatory instruments of national law, results in an aggregation of periods the total duration of which exceeds the maximum period of six months provided for in Article 25(4) of the Schengen Borders Code. The referring court considers that that uninterrupted chain of ministerial decrees constitutes an aggregation of six-month periods. Article 25(4) of the code precludes such aggregation and, even assuming that it were permissible, that aggregation circumvents, in this instance, the two-year period provided for in that provision.

23. In those circumstances, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law preclude domestic legislation in the form of consecutive domestic decrees prolonging border control which, cumulatively, allow for the reintroduction of border control for a period which exceeds the two-year time limit laid down in Articles 25 and 29 [of the Schengen Borders Code] without a corresponding Council recommendation pursuant to Article 29 [of that code]?

⁵ Regulation of the European Parliament and of the Council of 15 March 2006 establishing a Community code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), as amended, most recently, by Regulation (EU) No 1051/2013 of 22 October 2013 (OJ 2013 L 295, p. 1). That code preceded the Schengen Borders Code. I note however that, according to the information provided by the Austrian Government and by the Commission, it is not Article 29 of Regulation No 562/2006 which corresponds to Article 28 of the Schengen Borders Code, but Article 25 of that regulation.

⁶ I note however that, according to the information provided by the Austrian Government and by the Commission, it is not Article 25(2) of Regulation No 562/2006 which corresponds to Article 25 of the Schengen Borders Code, but Article 23 of that regulation.

⁷ Verordnung des Bundesministers für Inneres über die vorübergehende Wiedereinführung von Grenzkontrollen an den Binnengrenzen (Decree of the Federal Minister for the Interior concerning the temporary reintroduction of internal border control, BGBl. II, 98/2018).

⁸ Verordnung des Bundesministers für Inneres über die vorübergehende Wiedereinführung von Grenzkontrollen an den Binnengrenzen (Decree of the Federal Minister for the Interior concerning the temporary reintroduction of internal border control, BGBl. II, 274/2018).

⁹ Verordnung des Bundesministers für Inneres über die vorübergehende Wiedereinführung von Grenzkontrollen an den Binnengrenzen (Decree of the Federal Minister for the Interior concerning the temporary reintroduction of internal border control, BGBl. II, 114/2019).

(2) Is the right to freedom of movement of EU citizens laid down in Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union [¹⁰] to be interpreted, especially in the light of the principle of the absence of checks on persons at internal borders established in Article 22 [of that code], as meaning that it includes the right not to be subject to checks on persons at internal borders, subject to the conditions and exceptions listed in the Treaties and, in particular, in [that code]?

(3) If question 2 is answered in the affirmative:

Are Article 21(1) TFEU and Article 45(1) of the [Charter] to be interpreted, in light of the effectiveness of the right to freedom of movement, as precluding the application of national legislation which obliges a person, on pain of receiving an administrative penalty, to present a passport or identity card on entry via an internal border, even where the particular check at the internal border is contrary to the provisions of EU law?

B. Case C-368/20

24. On 16 November 2019, NW was subject to a border check on the basis of Paragraph 12a(1) of the GrekoG, when, coming from the Republic of Slovenia, he was preparing to enter Austrian territory in a motor vehicle at the border crossing point on the Spielfeld motorway. The border control entity requested NW to identify himself by presenting a passport or an identity card.

25. On 19 December 2019, NW brought an action challenging the lawfulness of that control.

26. In the light, in particular, of the considerations set out in points 19 to 22 of this Opinion, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does EU law preclude domestic legislation in the form of consecutive domestic decrees prolonging border control which, cumulatively, allow for the reintroduction of border control for a period which exceeds the two-year time limit laid down in Articles 25 and 29 [of the Schengen Borders Code] without a corresponding Council recommendation pursuant to Article 29 [of that code]?

(2) If question 1 is answered in the negative:

Is the right to freedom of movement of EU citizens laid down in Article 21(1) TFEU and Article 45(1) of the [Charter] to be interpreted, especially in the light of the principle of the absence of checks on persons at internal borders established in Article 22 [of that code], as meaning that it includes the right not to be subject to checks on persons at internal borders, subject to the conditions and exceptions listed in the Treaties and, in particular, in [that code]?’

¹⁰ ‘the Charter’.

C. The procedure before the Court

27. The requests for a preliminary ruling in Cases C-368/20 and C-369/20, dated 23 July 2020, were registered at the Registry of the Court on 5 August 2020. NW, the Austrian, Danish, German, French and Swedish Governments and the Commission have lodged written observations. Those same parties and interested parties, apart from the Swedish Government, participated in the hearing on 15 June 2021.

IV. Analysis

A. The interpretation of Article 25 of the Schengen Borders Code (first questions in Cases C-368/20 and C-369/20)

28. By its first questions, the referring court asks, in essence, whether EU law precludes a Member State from reintroducing, by a means of a succession of national regulatory instruments, border controls for a period in excess of the limit laid down in Articles 25 and 29 of the Schengen Borders Code.

29. By those questions, the referring court specifically seeks to ascertain whether the two controls at issue in the cases in the main proceedings, carried out at the border between Austria and Slovenia in 2019, were in conformity with EU law in view of the maximum period for the reintroduction of such a control laid down in the Schengen Borders Code.¹¹ To that end, it asks the Court, in essence, to clarify, first, the maximum relevant limit for the reintroduction of such a control and, second, whether EU law precludes the reintroduction of a control which exceeds that limit.¹² I shall address in turn those issues in the following two sections.

1. The maximum duration relevant to this case for the temporary reintroduction of internal border controls

30. In essence, the Schengen Borders Code contains three exceptions to the general rule on the elimination of controls set out in Article 22. For each of those three exceptions, the code lays down a different maximum period.

31. The first exception, mentioned in Article 25(1) of that code, assumes the existence of a *foreseeable* serious threat¹³ to public policy or internal security in one (or more) Member State(s), while the second exception, provided for in Article 28 of the same code, concerns the situation in

¹¹ The referring court mentions, as the legal basis in Austrian law for border control during the period concerned, Decree No 114/2019 (see points 21 and 26 of this Opinion). According to the information provided by that court, that decree was in force only until 13 November 2019, which means that the second check at issue, carried out on 16 November 2019, took place after that date. The requests for a preliminary ruling do not state whether the period of application of that decree was prolonged, but, in view of the questions relating to the second check, I assume that to be the case.

¹² See, in that regard, the explanation given by the referring court, cited in point 22 of this Opinion.

¹³ According to the Commission, a serious threat is *foreseeable* when the event giving rise to a need to reintroduce internal border controls is foreseeable, such as major sporting events, political demonstrations and high-profile political meetings (see its 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 September 2011 (COM(2011) 561 final)). It is not disputed, however, that Article 25 of the Schengen Borders Code may also be relied on in order to combat other types of foreseeable threats, including certain migratory movements and terrorist threats.

which an *unforeseeable* serious threat¹⁴ to public policy or internal security presents itself in one (or more) Member State(s), requiring immediate action. The third exception is provided for in Article 29 of the Schengen Borders Code and can be applied only where *exceptional circumstances* put the overall functioning of the area without internal border control at risk as a result of persistent serious deficiencies relating to external border control. The application of this last exception requires a procedure accompanied by a Council recommendation based on a proposal from the Commission, which is not required for the application of the other exceptions.

32. The exception relevant to this case is the first one, since the two checks at issue in the main proceedings were carried out on the basis of Article 25(1) of the Schengen Borders Code.¹⁵

33. As regards the period during which that exception may be implemented, Article 25(1) of the Schengen Borders Code fixes a duration of 30 days, unless the foreseeable duration of the serious threat exceeds 30 days. Article 25(3) of the code nevertheless authorises prolongations of up to 30 days. Last, Article 25(4) of the code lays down a *maximum total period* or, more accurately, two maximum total periods. First, it lays down, in its first sentence, a period of six months. Second, it lays down a period of two years in the exceptional circumstances referred to in Article 29 of the code.

34. Article 25(4) of the Schengen Borders Code therefore provides for two distinct periods for the reintroduction of internal border control. In that regard, I consider, as does the referring court, that it is the maximum six-month period laid down in the first sentence of Article 25(4) of the code that is the relevant maximum period in this instance, and not the two-year period referred to in the second sentence of that provision.

35. The second sentence of Article 25(4) of the Schengen Borders Code refers to the third exception, provided for in Article 29(1) of that code and relating to the exceptional circumstances referred to above in point 31 of this Opinion. The latter article requires the application of a procedure involving the adoption of a Council recommendation on a proposal from the Commission. In that regard, I take the second sentence of Article 25(4) of that code and the reference to Article 29(1) of the same code to mean that, in the absence of such a recommendation adopted by the Council pursuant to Article 29 of the Schengen Borders Code, there are no exceptional circumstances within the meaning of that provision that might justify a maximum period of reintroduction of the control of up to two years by the ‘aggregation’ of six-month control periods based on Article 25(4) of that code.¹⁶

¹⁴ A serious threat is *unforeseeable* when the events giving rise to a need to reintroduce internal border controls are by their nature unforeseeable. They could be, for example, terrorist attacks or other major criminal incidents, where there is a need to take all possible measures to ensure the prompt apprehension of the perpetrators (see 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 September 2011 (COM(2011) 561 final)).

¹⁵ See, in that regard, points 20, 21 and 26 of this Opinion.

¹⁶ It is therefore not, contrary to what the German Government contends, two separate two-year periods provided for in the second sentence of Article 25(4) and Article 29(1) of the Schengen Borders Code, respectively, but with one and the same maximum period of two years applicable in the event of exceptional circumstances within the meaning of Article 29 of that code. After all, as I have explained in point 31 of this Opinion, the reintroduction of a control on the basis of Article 29 of that code requires a specific procedure, which includes a Council recommendation on a proposal from the Commission, since that provision assumes exceptional circumstances imperilling the *overall functioning* of the area without internal border control as a result of persistent serious deficiencies relating to *external border control*. If one were to consider that, by means of the second sentence of Article 25(4) of the same code, a Member State could itself trigger a maximum period of two years, this would then constitute a circumvention of the specific procedure provided for in Article 29 of the Schengen Borders Code, relating to exceptional circumstances.

36. Given that, in this instance, the control which justified the checks at issue was reintroduced pursuant to Article 25(1) of the Schengen Borders Code and not pursuant to a Council recommendation adopted on the basis of Article 29 of that code, it is the maximum period of six months, provided for in the first sentence of Article 25(4) of the code, that is the relevant period for assessing the lawfulness of the control that justified the checks at issue.

37. In view of the fact that, as I have indicated in the introduction to this Opinion, the Republic of Austria had already, at the time of the checks at issue, reintroduced the control under Article 25(1) of the Schengen Borders Code several times in a row, on each occasion for a period of six months,¹⁷ the relevant question which arises in this instance is whether EU law precludes the reintroduction of a control for a period exceeding the maximum period of six months provided for in the first sentence of Article 25(4) of that code.¹⁸

2. Does EU law preclude the reintroduction of a control for a period exceeding the six-month period provided for in the first sentence of Article 25(4) of the Schengen Borders Code?

38. In order to answer the abovementioned question, it is necessary, in the first place, to interpret the Schengen Borders Code and, more specifically, Article 25 thereof, to see whether it precludes the temporary reintroduction of internal border control exceeding the six-month period.

(a) Preliminary considerations

39. It is indeed common ground that the maximum six-month period provided for in Article 25(4) is, in itself, clearly defined. It cannot however be inferred, in my view, contrary to what NW contends in its written observations, that that provision precludes any reintroduction of control exceeding that period.

40. Like all the other interested parties, I consider that it follows clearly from a combined reading of paragraphs 1 to 4 of Article 25 of the Schengen Borders Code that that article permits, at least *to a certain extent*, a fresh application of Article 25(1) of that code and, accordingly, a recalculation of the maximum six-month period laid down in paragraph 4 of the same article, which leads, in practice, to a period exceeding those six months.

41. That follows more particularly from the fact that the six-month period provided for in Article 25(4) of the Schengen Borders Code is to apply to a reintroduction justified by a precisely defined *single* serious threat, which can be inferred, first, from the use of the definite article ‘the’ and of the demonstrative article ‘that’, used in Article 25(1) and in the first paragraph of Article 26 of the Schengen Borders Code, respectively, to designate the specific threat justifying

¹⁷ More particularly, it is apparent from the facts of the disputes in the main proceedings that, before the reintroduction of the control that formed the basis of the first check at issue, the Republic of Austria had already introduced, three times in a row, a six-month control on the basis of that same Article 25(1) of the Schengen Borders Code. As regards the control that formed the basis of the second check at issue, it was thus the fifth time in a row that that provision formed the legal basis of the control (see, in that regard, points 20, 21 and 26 of this Opinion).

¹⁸ Beyond this question, a number of the interested parties in these cases have also expressed their views on whether the Schengen Borders Code allows a Member State to aggregate the *different maximum periods* provided for by the various exceptions set out in Articles 25 to 30 of that code. It is thus apparent from the facts of the main proceedings that, at the time of the checks at issue, the Republic of Austria had reintroduced controls at its border with the Republic of Slovenia for almost four years, relying *on various provisions* of that code, namely, in chronological order, in essence, Articles 28, 25, 29 thereof and, last, Article 25 again. In the light of my proposed interpretation of Article 25(1) of the same code, I do not consider it necessary to express a view on that point in order to provide a useful answer to the questions referred.

the initial temporary reintroduction of internal border control¹⁹ and for any prolongation of that control.²⁰ Second, both the conditions required for the temporary reintroduction of controls and the procedures laid down for such a reintroduction assume that the threat concerned is precisely defined. Thus, when a Member State plans to reintroduce or prolong internal border control, it is required to notify the other Member States and the Commission and to provide them with the precise reasons for the reintroduction, including *all relevant data detailing the events* that constitute a serious threat to its public policy or internal security,²¹ in order that the Commission and the other Member States be in a position to issue an opinion on the lawfulness of the control.

42. To my mind, it follows that, if a Member State that has reintroduced internal border control pursuant to Article 25(1) of the Schengen Borders Code, is faced, at the end of the maximum six-month period laid down in the first sentence of Article 25(4) of that code, with a different serious threat, what might be called a *new* serious threat, that Member State is therefore authorised, as long as the conditions and procedures laid down in Article 25(1) of that code are satisfied, to apply that provision again to reintroduce internal border controls in order to address that *new* serious threat.

43. In that context, it seems to me to be helpful to distinguish between two different situations. On the one hand, there is the situation where, on the expiry of the six-month period during which border controls have been reintroduced in order to respond to a serious threat, the Member State concerned is faced with a serious threat which is *new by its nature*. For example, it might first be a terrorist threat and, thereafter, a migration threat or a health crisis. In that case, there can in my view be no doubt, in view of points 40 to 42 of this Opinion, that Article 25 of the Schengen Borders Code permits a fresh application of paragraph 1 thereof, which is moreover a view which is shared by all the interested parties, apart from NW.

44. Second, there is the situation where, on the expiry of the six-month period during which border controls have been reintroduced in order to respond to a serious threat, that threat persists, thus constituting what might be called a *renewed* threat.²²

45. In the case at hand, the facts of the disputes in the main proceedings seem to me to come within that second situation. The file before the Court thus appears to suggest that the period of reintroduction of controls which formed the basis of the two checks at issue was motivated by

¹⁹ See Article 25(1) of the Schengen Borders Code ('... the foreseeable duration of *the serious* threat ... to respond to *the serious* threat') and the first paragraph of Article 26 of that code ('assess the proportionality of the measure in relation to *that threat*') (emphasis added).

²⁰ See Article 25(3) of the Schengen Borders Code ('if *the serious* threat ... persists') (emphasis added).

²¹ See, to that effect, Article 27(1)(a) and Article 28(1).

²² As I shall explain in point 63 of this Opinion, the Conseil d'État (Council of State, France) has ruled on a question similar to the questions for a preliminary ruling raised in the present cases. In that regard, I note that, in interpreting Article 25 of the Schengen Borders Code, the Conseil d'État (Council of State) drew a similar distinction between 'a new threat' and 'a renewed threat', which corresponds, in essence, as I understand those terms, to the distinction made in this Opinion between a threat *that is new by its nature* and a *renewed* threat.

persistent threats.²³ The essential question that arises in this case is therefore whether Article 25 of the Schengen Borders Code precludes, in such a scenario, several fresh applications of paragraph 1 thereof in a row.

46. As regards the situation of a *renewed* threat, the Commission and NW argue, in essence, that Article 25 of the Schengen Borders Code clearly precludes a fresh application of paragraph 1 thereof, which is apparent, in particular, from its wording and legislative history.

47. As regards, first of all, its wording, given that the first sentence of Article 25(4) of the Schengen Borders Code provides for a maximum duration of six months for the reintroduction of controls for *a single* serious threat,²⁴ it must be inferred that that maximum period is absolute, such that, once that period has expired, that threat cannot justify a fresh application of Article 25(1) of that code, even though it persists after that period. Otherwise, the maximum period laid down in the first sentence of Article 25(4) of that code would seem superfluous.²⁵

48. Next, the legislative history of the rules relating to maximum periods should be read in the same sense. The first Schengen Borders Code, namely Regulation No 562/2006, did not provide for maximum periods for the reintroduction of controls,²⁶ those maximum periods having been introduced at a later stage via an amendment of that regulation.²⁷ By introducing such periods, the legislature thus envisaged setting absolute limits.²⁸

49. While I acknowledge, by virtue of the foregoing, that arguments can be made in support of the Commission's and NW's approach, I nevertheless consider, as do the Austrian, Danish, German and French Governments, that the interpretation referred to in point 46 of the present Opinion is liable to lead to unacceptable, and indeed absurd, results.

²³ I note that the content of the Republic of Austria's notifications to the Commission, submitted pursuant to Article 27 of the Schengen Borders Code and justifying the control, is not described in the requests for a preliminary ruling. Those notifications have however been presented by the Commission. In that regard, without it being necessary to rule on the justification of the entire period during which the Republic of Austria reintroduced border control, it is sufficient to state that, as concerns the justification of the control that formed the basis of the checks at issue, it is apparent from the notification of 8 April 2019 relating to the control during the six-month period from 13 May 2019 to 12 November 2019 – the period during which the first control at issue was carried out – that the reasons stated for that control were, in particular, *migratory movements to Europe and secondary movements, the underlying threat of terrorism throughout the Union and recent developments in the western Balkans*. Those same reasons had been invoked in the notification of 10 October 2018 concerning the preceding six-month control period. Likewise, it is apparent from the notification of 10 October 2019 relating to the control period from 13 November 2019 to 12 May 2020, a period during which the second control at issue was carried out, that that control was, for its part, motivated by similar reasons (*migratory movements to Europe and secondary movements*).

²⁴ See point 41 of this Opinion.

²⁵ That reading is moreover supported by the fact that the Schengen Borders Code, where it provides, in Article 25(3) thereof, for the possibility of prolonging the control that has been reintroduced, requires Member States to '[take] into account any new elements'. That code thus takes into consideration the fact that the specific serious threat which initially justified the reintroduction of the control may develop over time and, for that reason, may also persist in time. That circumstance notwithstanding, the first sentence of Article 25(4) of the code provides for a maximum period, which would support the idea that that period is absolute and cannot be applied several times in a row.

²⁶ See Article 23(1) and (2) of that regulation.

²⁷ 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 provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances (OJ 2013 L 295, p. 1).

²⁸ I note that the *travaux préparatoires* concerning those limits could be read in the same sense. Thus, during the negotiations that led to the adoption of those periods, the issue of persistent threats was raised by certain delegations to the Council, and it was proposed that the periods proposed by the Commission, which correspond to the periods adopted, be dropped, on the ground that the control should be maintained for as long as the threat identified persists (see <https://data.consilium.europa.eu/doc/document/ST-15780-2011-INIT/en/pdf> and <https://data.consilium.europa.eu/doc/document/ST-15853-2011-INIT/en/pdf>). That proposed amendment was not followed, however. That being the case, I note, however, that the reason for which the proposed amendment was not followed is not apparent, to my knowledge, from the *travaux préparatoires*.

(b) The need to respect the Member States' powers in public policy and internal security matters

50. It is generally accepted (and the Commission, moreover, has itself acknowledged²⁹) that serious threats to public policy or internal security are not necessarily limited in time. It cannot therefore be precluded that a single serious threat to public policy or internal security will last beyond the six-month period laid down in Article 25(4) of the Schengen Borders Code.

51. Taking that into account, the interpretation proposed by the Commission and NW may lead to the unacceptable result that the Member States would be forced to abolish control at their borders on the expiry of the six-month period, even though they were then still faced with a serious threat to public policy or internal security for which border control would be strictly necessary.³⁰

52. Such an interpretation would moreover have absurd results. In my view, Member States would in any event be able to reintroduce once again border control under Article 25(1) of the Schengen Borders Code in order to address the serious threat in question a certain time after the expiry of the six-month period laid down in Article 25(4) of that code. I would emphasise that there is nothing in that code to suggest that Article 25(1) could be used only a single time for a single type of threat in the period during which that code is in force. If it were thus conceded that that code does not prevent the Member States from applying Article 25(1) thereof several times, it would be wholly illogical to force the Member States, when they are faced with a serious threat for which border control would be strictly necessary, to abolish controls for a certain time (one day, three weeks, six months, or indeed another period, that period not being defined), only to allow them to reintroduce controls again thereafter.

53. Moreover, and more importantly, I consider, as do the Austrian, Danish, French and German Governments, that the interpretation proposed by the Commission and NW is liable to have an adverse effect on the powers for maintaining law and order and safeguarding internal security reserved to the Member States by Article 72 TFEU and Article 4(2) TEU.

54. The Schengen Borders Code was adopted, in particular, on the basis of Article 77(1)(a) TFEU, which provides that the European Union is to develop a policy with a view to ensuring, inter alia, the absence of any controls on persons, whatever their nationality, when crossing internal borders. It is in that context that the general rule of that code provides for the abolition of internal border control. Article 77(1)(a) TFEU comes under Title V of Part Three of the FEU Treaty, entitled 'Area of freedom, security and justice', and that title also includes Article 72, which provides that Title V is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. In addition to Article 72 TFEU is Article 4(2) TEU, which provides that the European Union is to respect essential State functions, including maintaining law and order and safeguarding 'national security'.

²⁹ See Commission Recommendation (EU) 2017/1804 of 3 October 2017 on the implementation of the provisions of the Schengen Borders Code on temporary reintroduction of border control at internal borders in the Schengen area (OJ 2017 L 259, p. 25), where it is apparent that, according to recital 4 that, 'while in the vast majority of cases the time limits currently in force have proved to be sufficient, recent times showed that certain serious threats to public policy or internal security, such as terrorist threats or important uncontrolled secondary movements within the Union, may persist well beyond [those periods]'.

³⁰ That said, I would emphasise that, by this consideration, I have not examined whether the situation at issue in the main proceedings corresponded to a serious threat to public policy or internal security for which border control would be strictly necessary. That assessment is for the referring court to make.

55. In clearly recognising the powers and responsibilities incumbent upon Member States in relation to the maintenance of law and order and the safeguarding of internal security and national security, Article 72 TFEU and Article 4(2) TEU serve above all to remind the EU legislature of the need to set out in any measure of secondary law, in particular adopted on the basis of Title V of the FEU Treaty, provisions allowing the Member States to assume those responsibilities.³¹

56. If a Member State were forced to abolish a strictly necessary control at its borders on the expiry of the six-month period, that Member State would be prevented from assuming the powers and responsibilities incumbent upon it under Article 72 TFEU. Such a situation would even, in certain cases, run counter to Article 4(2) TEU, in so far as the State could then no longer combat a threat to its national security. It follows that the Member States' powers and responsibilities in those areas cannot be framed by *absolute* periods.³²

57. To my mind, it is inconceivable that, in adopting Article 25 of the Schengen Borders Code, the legislature intended to arrive at such a result and thus to exclude the possibility of a fresh application of paragraph 1 thereof in the event of a *renewed* threat, which moreover is by no means apparent from the recitals of that code.³³ Article 25 of that code aims to take account of the express derogation provided for in Article 72 TFEU and therefore to allow the Member States to assume the responsibilities incumbent on them under that provision.³⁴

58. In addition, the interpretation proposed by the Commission and by NW is also liable to have an adverse effect on one of the objectives of the same code, consisting in maintaining law and order. While it is true that the Schengen Borders Code does indeed aim to ensure the absence of any control of persons when they cross internal borders, that code also aims, as the Court has already recognised, to maintain public policy and to combat all threats to public policy.³⁵ In that regard, in a situation such as that referred to in point 51 of this Opinion, the interpretation proposed by the Commission and by NW does not meet the necessity, established by the Court's settled case-law, to strike a balance between the various interests at issue,³⁶ since it would amount to prioritising the freedom of movement of persons to the detriment of the maintenance of public policy.

³¹ See also Opinion of Advocate General Sharpston in *Commission v Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2019:917, point 202).

³² See also, to that effect, judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraphs 134 to 138), in which the Court held, in the light of Article 4(2) TEU, that the objective of safeguarding national security is capable of justifying measures entailing more serious interferences with fundamental rights than those that might be justified by the objectives of combating crime and of safeguarding public security. Thus, the Court made it clear that although the duration of each instruction given cannot exceed a foreseeable period of time, it cannot be precluded that an interference might, *owing to the ongoing nature of such a threat, be renewed*.

³³ It is apparent from recitals 1 and 2 of Regulation No 1051/2013, which introduced maximum periods, that the legislature, with those amendments, wished to ensure the exceptional nature of the control and compliance with the principle of proportionality, in view of the impact which the reintroduction of border control may have on all persons having the right to move within the Schengen area without internal border control. In that general context, maximum periods were fixed because 'the ... duration of any temporary reintroduction of such measures should be restricted to the bare minimum needed'.

³⁴ Incidentally, I would add that the Commission proposed, in 2017, increasing the periods set out in the Schengen Borders Code (see (COM(2017) 571 final)). In particular, it proposed prolonging the six-month period provided for in Article 25(4) of that code to one year and, where there were exceptional circumstances, to two years.

³⁵ See, to that effect, judgment of 12 December 2019, *E.P. (Threat to public policy)* (C-380/18, EU:C:2019:1071, paragraphs 44 and 45).

³⁶ See, to that effect, judgment of 17 December 2015, *Neptune Distribution* (C-157/14, EU:C:2015:823, paragraph 75 and the case-law cited).

(c) The possibility of interpreting Article 25 of the Schengen Borders Code in accordance with Article 72 TFEU and Article 4(2) TEU

59. In the light of the foregoing and having regard, in particular, to the general principle of interpretation according to which a measure of secondary law must be interpreted, *as far as possible*, in such a way as not to affect its validity and in conformity with primary law as a whole,³⁷ the essential question is whether it is possible to interpret Article 25 of the Schengen Borders Code in a way which does not affect its conformity with Article 72 TFEU and Article 4(2) TEU, or whether Article 25 of that code should be regarded as being perfectly clear and as precluding such an interpretation, in allowing no discretion on that point.³⁸

60. In my view, it is the first of those cases that applies. I consider that, in several respects, the provision contained in Article 25 of the Schengen Borders Code is not entirely clear and that it leaves a margin of discretion which makes it possible to arrive at an interpretation that ensures its conformity with primary law.

61. *First*, while it seems clear that the existence of a *new* threat may justify a fresh application of Article 25(1) of the Schengen Borders Code, it should nevertheless be stated that the important question of what makes a serious threat *new* compared to the previous threat and, therefore, under which conditions a fresh application of that provision is authorised, is by no means unambiguous. That follows *inter alia* from the fact that the code does not contain a definition of ‘the ... threat’ within the meaning of Article 25 thereof nor does it, accordingly, define its limits. In view of the dynamic nature of a threat and the myriad potential situations in which threats to the public policy or internal security of a Member State might exist and develop, the distinction between the two scenarios is not clear cut and is very difficult to apply in practice, as the German Government, *inter alia*, rightly noted at the hearing.

62. Let us take, by way of example, a terrorist threat against a Member State originating from a jihadist group. If, thereafter, the Member State concerned is still faced with a terrorist threat, but this time from a different group, is it still the same threat, for the purposes of Article 25 of the Schengen Borders Code, merely because the two threats come within the category of ‘terrorist threats’, even though the two groups use different means, which require different responses?³⁹ As may be seen from these examples, even persistent threats can change in such a way that they become different threats.⁴⁰

³⁷ Judgment of 15 February 2016, *N*, (C-601/15 PPU, EU:C:2016:84, paragraph 48 and the case-law cited).

³⁸ I would emphasise that, should the Court find that Article 25 of the Schengen Borders Code is clear on that point, the question then arises whether that article 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. See, in that regard, judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraphs 212 to 216 and the case-law cited).

³⁹ Or let us take the example of a migration crisis, used by the German Government at the hearing. Is it possible to speak of a *new* threat, for example where only the number of migrants unlawfully crossing the border has increased? Must that number be considerably higher, but at what point does it exceed the considerably higher threshold? Is it at 20%, or indeed is a higher number not sufficient, and must the danger originate from a different source? What if the number lowers, but a new source of danger appears, for example if the intelligence services report the presence of an ever-increasing number of suspected terrorists among the migrants?

⁴⁰ On that point, the Commission essentially stated at the hearing that, in its view, the decisive factor for a threat to be classified as *new* is whether it is *new by its nature*. I note that, while Article 25 of the Schengen Borders Code does indeed permit the fresh application of paragraph 1 in the case of such a threat that is *new by its nature* (see, in that regard, point 43 of this Opinion), the Schengen Borders Code contains no element supporting the assumption that it is that criterion (which moreover seems to me to be arbitrary and excessively restrictive in the light of points 61 and 62 of this Opinion) that will be decisive for making a fresh application of Article 25(1) of the Schengen Borders Code.

63. I assume, moreover, that it is due to that lack of clarity of Article 25 of the Schengen Borders Code that the Conseil d'État (Council of State), in order to ensure an interpretation consistent with Article 72 TFEU and Article 4(2) TEU, interpreted that provision in two judgments as permitting a fresh application of paragraph 1 thereof both in case of a 'new threat' and in case of a 'renewed threat'.⁴¹ The Conseil d'État (Council of State) thus, as regards the possibility of making a fresh application of Article 25, treated a 'renewed threat' as a 'new threat', which to my mind is reasonable in the light of the aforementioned reasons.

64. *Second*, Article 25 of the Schengen Borders Code also lacks clarity on another essential point which, in my view, indicates that the Commission and NW's interpretation is not self-evident. If one accepts the premiss mentioned in point 52 of this Opinion, according to which the Member States may reintroduce border control again a certain time after the expiry of the six-month period laid down in Article 25(4) of that code, the essential question which then arises is what is the duration of that time. As that duration is not defined – or even mentioned – in the code, the interpretation proposed by the Commission and NW would to my mind result in a considerable legal void and considerable legal uncertainty, which strengthens the argument seeking to treat a *renewed* threat as a threat which is *new by its nature* for the purpose of the interpretation of Article 25 of the same code.

65. Although I am the view that Article 25 of the Schengen Borders Code should be interpreted as permitting, in principle, a fresh application of paragraph 1 thereof in the case of a *renewed* threat, I nevertheless consider that, where the serious threat in question is essentially similar to the previous serious threat, the requirement of proportionality provided for in Article 25(1) of that code implies considerable limitations in that regard, in that it sets *particularly strict* conditions for the purposes of such a fresh application.

(d) The necessity of framing a fresh application of Article 25(1) of the Schengen Borders Code by particularly strict criteria

66. I recall that all the material criteria provided for in the Schengen Borders Code must be satisfied in order for Article 25(1) thereof to be applied and, therefore, also in order for it to be applied again. That requires there to be an *exceptional* situation linked to the existence of a *genuine, present and sufficiently serious* threat affecting one of the fundamental interests of society, that the scope and duration of the temporary reintroduction of internal border controls not exceed what is *strictly necessary* to respond to the serious threat and that controls be reintroduced only as a *last resort*.⁴² Pursuant to Article 26 of that code, the Member State concerned is required to assess the extent to which the reintroduction of controls is liable to remedy adequately the threat to public policy or internal security and to evaluate the proportionality of the measure in relation to that threat by taking into account, in particular, the likely impact of the threat to its public policy or internal security as well as the likely impact of such a measure on the free movement of persons within the area without internal border control.

⁴¹ See Decision No 415291 of 28 December 2017, *Association nationale d'assistance aux frontières pour les étrangers (ANAFE) et autres*, paragraphs 7 and 8, and Decision No 425936 of 16 October 2019, *ANAFE et Groupe d'information et de soutien aux émigrés (GISTI)*, paragraphs 6 and 7, concerning decisions of the French authorities to reinstate controls at the internal land borders with Belgium, Luxembourg, Germany, the Swiss Confederation, Italy and Spain and at the air and sea borders, from November 2017 to 30 April 2018 and from 1 November 2018 to 30 April 2019.

⁴² See Article 25(1) and (2) and recitals 22, 23 and 27 of the Schengen Borders Code.

67. In that regard, I consider, as does the French Government, that the abovementioned proportionality condition means that, where a measure involving the renewal of internal border controls is planned due to the persistence of a threat, the experience acquired requires that the Member State concerned evaluate *in even greater detail* the strict proportionality of the measure in order to prove that the continuation of the controls is strictly necessary. In other words, having regard to the period during which controls have already been applied, a Member State which plans a fresh application of Article 25(1) of the Schengen Borders Code must, inter alia, explain, on the basis of specific, objective and comprehensive analyses, first, why the renewal of controls would be *appropriate*, by evaluating *the degree of effectiveness of the initial measure reintroducing the controls*. Second, it must make clear why it remains a *necessary* measure, by explaining the reasons why no other less coercive measure would be sufficient, such as, for example, the use of police control,⁴³ intelligence, police cooperation at EU level and international police cooperation.⁴⁴

68. I invite the Court, in the forthcoming judgment, to define that condition of enhanced proportionality.⁴⁵

69. The interpretation that I propose means that, to assess the lawfulness of a fresh application of Article 25(1) of the Schengen Borders Code in the case of a *renewed* threat, it is necessary to ascertain whether that condition of enhanced proportionality is satisfied.⁴⁶ Where a fresh application of that provision is made several times in a row, as in the present case, the condition of enhanced proportionality becomes even stricter upon each fresh application.

70. Beyond the material criteria mentioned above, I recall, moreover, that Article 25 of the Schengen Borders Code is also framed by *procedural* provisions aimed, in particular, at ensuring – in the form of monitoring carried out by the Commission – that the material criteria are satisfied whenever a Member State plans to reintroduce (or prolong or renew) border control at its borders.⁴⁷

⁴³ In that regard, I recall, first, that, under Article 23(1) of the Schengen Borders Code, the absence of border control at internal borders provided for in Article 22 of that code is not to affect the exercise of police powers by the competent authorities of the Member State under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that is also to apply in border areas. Second, under Article 5(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), Member States are to retain the power to check that EU citizens who reside on their territory are in possession of a valid identity card or passport.

⁴⁴ I would emphasise, in that regard, that the feeling of security of the population certainly does not suffice to justify a (fresh) application of Article 25(1) of the Schengen Borders Code. I would also emphasise that, in general, threats against Member States will always exist and that the existence of a threat therefore does not suffice (freshly) to apply Article 25(1) of that code, either. As is apparent from point 66 of this Opinion, the (fresh) application of that provision requires a *genuine, present and sufficiently serious* threat to the public policy or internal security of a Member State, and is therefore confined to exceptional and clearly defined situations (see also, to that effect, judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)*, C-808/18, EU:C:2020:1029, paragraph 214 and the case-law cited).

⁴⁵ That condition of enhanced proportionality thus makes it possible to distinguish the *prolongation* of the control within the meaning of Article 25(3) and (4) of the Schengen Borders Code, which is permitted within the six-month period provided for in that latter paragraph, from the *fresh application* of Article 25(1) of that code. On that point, I am therefore not certain that I subscribe to the interpretation used by the Austrian and Danish Governments. According to the latter government, since a threat is a dynamic and constantly evolving phenomenon, a fresh assessment of the threat, carried out several months after the preceding assessment and finding that a serious threat to public policy or internal security persists, represents a *new* threat which justifies a fresh application of Article 25(1), *if only because it is carried out at a different time*. The Austrian Government has put forward similar arguments. To my mind, that interpretation seems to undermine the effectiveness of the maximum period of six months laid down in Article 25(4) of the Schengen Borders Code and, therefore, the principle of proportionality, in so far as it does not seem to take sufficient account of the effectiveness of the initial measure (see point 67 of this Opinion).

⁴⁶ I would specify that, in applying this condition of enhanced proportionality, it cannot be ruled out that the experience already acquired through the control is not relevant, or that its importance is relatively minor. That will be the case where the *renewed* threat differs from the preceding threat in such a way that the experience already acquired has, in practice, no essential relevance to combating that threat.

⁴⁷ See, to that effect, recital 23 of the Schengen Borders Code.

71. Thus, under Article 27 of that code, before deciding to take such a measure, the Member State must notify the Commission (and the other Member States) of the reasons for its decision. Following such notification, the Commission (or any other Member State) ‘may’ issue an opinion. If the Commission has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders, however, it *must* issue an opinion to that effect. Contrary to what the Commission argued at the hearing, I consider that *an obligation* follows for that institution, and not merely an option, to issue an opinion in such a situation. In my view, this follows from the very wording of Article 27(4) of the Schengen Borders Code, pursuant to which the Commission ‘may’ always issue an opinion on the Member States’ notifications, whereas the second subparagraph of Article 27(4) provides that the Commission ‘shall issue’ an opinion to that effect if it has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders. The present indicative of the only verb ‘issue’ is used here to express the mandatory nature of the provision,⁴⁸ which is also apparent, in essence, from recital 23 of that code, according to which the reintroduction of internal border control by a Member State ‘should’ be monitored at EU level.

72. Next, pursuant to Article 27 of the Schengen Borders Code, each opinion issued by the Commission (or by a Member State) is to be the subject of consultation, with a view to organising, where appropriate, mutual cooperation between the Member States and to examining the proportionality of the measures to the events giving rise to the reintroduction of border control and the threat to public policy or internal security. If, thereafter, the Commission still has concerns about the lawfulness of the control, it may bring infringement proceedings under Article 258 TFEU.

73. To summarise, the Commission plays an important role in ensuring that Article 25(1) of the Schengen Borders Code is applied, and applied again, in a manner consistent with all the criteria set out in that provision. On that point, I note that, in the present cases, the Commission challenged the lawfulness of the controls introduced by the Republic of Austria. At the hearing, however, it confirmed that it had not issued an opinion on the notifications that had been sent to it by that Member State. To the extent that the Commission considered the notifications in question to be unfounded, I find it regrettable that it did not play the role entrusted to it by that code.⁴⁹

74. In the light of all the foregoing, while the interpretation that I propose does mean that a control can, in certain circumstances, exceed the six-month period, that point is however counterbalanced, first, by the application of the principle of enhanced proportionality and, second, by the monitoring carried out by the Commission, which must verify scrupulously whether that condition is satisfied each time that a fresh application of Article 25(1) of the Schengen Borders Code is planned.

(e) Conclusion

75. On the basis of all the foregoing, I propose that the Court answer the first question to the effect that Article 25(1) and (4) of the Schengen Borders Code must be interpreted as meaning that, where, on the expiry of the six-month period laid down in Article 25(4), a Member State is still faced with a serious threat to public policy or internal security, those provisions do not

⁴⁸ See, to that effect, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)* (C-717/18, EU:C:2020:142, paragraph 20).

⁴⁹ Nevertheless, I would add that whether or not the Commission has issued an opinion does not affect the lawfulness of the control, such that the absence of an opinion would not automatically render the control lawful.

preclude, irrespective of the degree of similarity of the serious threat to the preceding serious threat, a fresh successive application of Article 25(1) of that code provided that all the criteria laid down by that code are satisfied, in particular that of proportionality. In that regard, the principle of proportionality implies that, where the serious threat to public policy or internal security is, in essence, similar to the preceding serious threat, the Member State concerned must assess, in even greater detail, by reference to the period during which the control has already been applied, the strict proportionality of the measure in order to prove the necessity of continuing the control.

B. The interpretation of Article 21(1) TFEU and Article 45 of the Charter (second questions in Cases C-368/20 and C-369/20 and third question in Case C-369/20)

76. By its second questions, the referring court asks whether the right of free movement of EU citizens laid down in Article 21(1) TFEU and in Article 45(1) of the Charter must be interpreted as including the right not to be subject to checks on persons at internal borders, subject to the conditions and exceptions listed in the Treaties and in particular in the Schengen Borders Code.

77. Specifically, the referring court seeks to ascertain whether, where the provisions of that code do not preclude the temporary reintroduction of border control for a period exceeding the maximum duration of six months laid down in Article 25(4) of that code, that reintroduction might nevertheless result in an infringement of the abovementioned provisions. I do not believe that to be the case.⁵⁰

78. Article 21(1) TFEU, after all, provides that every citizen of the European Union is to have the right to move and reside freely within the territory of the Member States, *subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect*. The reservation which that provision attaches to the exercise of the right to freedom of movement also limits, having regard to Article 52(2) of the Charter, the right to freedom of movement enshrined in Article 45(1) of the Charter.

79. Thus, even on the assumption that the freedom of movement laid down in Article 21(1) TFEU and in Article 45(1) of the Charter does include a right not to be subject to a check on the person at the internal borders and that such a check therefore constitutes an interference with that freedom, that right cannot be regarded as unconditional.

80. Any interference with the freedom of movement laid down in those provisions must however be justified and proportionate. I recall that, in accordance with Article 25 of the Schengen Borders Code, the temporary reintroduction of border control at internal borders must take place only as a last resort and in exceptional circumstances. In addition, it must be restricted *to the bare minimum needed* to respond to a serious threat to public policy or internal security.⁵¹

81. In the light of those factors, I consider that, in so far as the reintroduction of internal border control is consistent with the Schengen Borders Code, any interference with the right of free movement laid down in Article 21(1) TFEU and in Article 45(1) of the Charter that results from such a control must be regarded as justified and proportionate and therefore not as contrary to those latter provisions.

⁵⁰ It is not specified in the requests for a preliminary ruling that NW is an EU citizen, but given that the questions asked concern provisions applicable to EU citizens, I assume that to be the case.

⁵¹ See recitals 21 to 23 of the Schengen Borders Code, and my analysis in Part A of this Opinion.

82. I therefore propose answering the second questions referred for a preliminary ruling to the effect that, where a Member State subjects EU citizens to a check on the person at internal borders, in accordance with the requirements of the Schengen Borders Code, that check is also consistent with Article 21(1) TFEU and with Article 45(1) of the Charter.

83. It follows, moreover, with regard to the third question on the possible imposition of a penalty for breach of the obligation to present a passport or identity card, that that obligation is not, in such circumstances, contrary to EU law.⁵²

V. Conclusion

84. Having regard to the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria) as follows:

- (1) Article 25(1) and (4) of 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), as amended by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016, must be interpreted as meaning that where, on the expiry of the six-month period laid down in Article 25(4), a Member State is still faced with a serious threat to public policy or internal security, those provisions do not preclude, irrespective of the degree of similarity of the serious threat to the preceding serious threat, a fresh successive application of Article 25(1) of that regulation provided that all the criteria laid down by that regulation are satisfied, in particular that of proportionality. In that regard, the principle of proportionality implies that, where the serious threat to public policy or internal security is, in essence, similar to the preceding serious threat, the Member State concerned must assess, in even greater detail, by reference to the period during which the control has already been applied, the strict proportionality of the measure in order to prove the necessity of continuing the control.
- (2) Article 21(1) TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, where a Member State subjects EU citizens to a check on the person at internal borders, in accordance with the requirements of Regulation 2016/399, as amended by Regulation 2016/1624, that check is also consistent with those provisions and may, where appropriate, be the subject of a penalty.

⁵² See, to that effect, judgment of 13 December 2018, *Touring Tours und Travel and Sociedad de transportes* (C-412/17 and C-474/17, EU:C:2018:1005, paragraph 72).