**The reintroduction of internal EU border controls: a disproportionate, ineffective and illegal instrument of combating the pandemic**

In March 2020, during the first wave of the COVID-19 (*Coronavirus SARS-CoV-2*) pandemic in Europe, several Member States, including the Federal Republic of Germany, saw fit to resort to the reintroduction of border controls with some of their neighbours, including the Grand Duchy of Luxembourg. This reintroduction was then justified by the urgency and the need to contain the spread of the virus. So that there is no misunderstanding: these were exclusively identity checks and checks on documents authorizing their holders to cross borders and not health checks to detect carriers of the virus.

This contribution aims to establish, using the example of the German-Luxemburg border controls, that the use of this extraordinary means does not stand the test of its effectiveness, proportionality and even less of its legality. To the extent that the perpetrator was himself a victim of this extraordinary measure, he may be forgiven for the somewhat militant character of the following lines.

The German Minister of the Interior, Mr *Horst Seehofer*, who took this decision on behalf of Germany, may have invoked the European Union (EU) Border Code as the legal basis for his decision to reintroduce internal border controls in the Schengen area, but it must be questioned whether he has complied with the letter and spirit of this regulation.

An in-depth analysis of the provisions of this Borders Code (I.) shows indeed that the unilateral decision taken by Minister *Seehofer was* taken arbitrarily (II.) and does not stand the test of its validity under Union law (III.)

# The legal framework for internal border controls: The EU Borders Code

The European Union Borders Code, also known as the Schengen Borders Code (SBC), was adopted in 2016.[[1]](#footnote-1) A consolidated version, dated 11 June 2019 and containing the amendments made to it, is available on the EU website. [[2]](#footnote-2)

This regulation was adopted on the legal basis of Article 77(2) (b) and (e) of the Treaty on the Functioning of the EU (TFEU), which specifically provides that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures on (...) the checks to which persons crossing external borders are subject [and] the absence of any checks on persons, whatever their nationality, when crossing internal borders”.

Since the principle is thus defined as the absence of internal border controls, the SBC nevertheless allows some temporary derogations from this principle. Articles 25 and 28 SBC deserve particular attention in this respect in the situation under review.

Article 25 lays down the general framework for temporary reintroductions of border controls, provided that they are necessary to deal with foreseeable events which seriously threaten public policy or internal security.

The Court of Justice of the EU (ECJ) has had occasion to state that „article 25 of the Schengen Borders Code allows, exceptionally and under certain conditions, a Member State to reintroduce temporarily border control at all or specific parts of its internal borders where there is a serious threat to public policy or internal security in that Member State. Under Article 32 of the code, where border control at internal borders is reintroduced, the relevant provisions of the code relating to external borders are to apply *mutatis mutandis*.“ [[3]](#footnote-3) The reintroduction of such controls by a Member State is therefore possible, but subject to precise conditions and not left to its discretion.

Article 28 provides for a specific procedure in cases requiring immediate action. It therefore introduces a partially specific regime for unforeseen or unforeseeable situations where “a serious threat to the public policy or internal security of a Member State requires immediate action to be taken”.

The two provisions are of a complementary nature, but differ as regards the procedure for restoring controls. Thus, prior notification of the planned reintroduction to the other Member States and the Commission is required under Article 2(2) of Article 25, while under Article 28 the reintroduction and notification must be simultaneous. The maximum duration of controls and their extension is also different, i.e. six months under Art. 25 SBC and two months for cases requiring immediate action.

In both cases, measures adopted unilaterally by national authorities must respect the principles of necessity and proportionality - particularly in terms of duration and territorial scope - and must be specifically motivated.

Article 26 SBC lays down strict criteria for the temporary reintroduction of internal border controls.

Admittedly, in accordance with articles 25 or 28(1) of the SBC, the decision to resort to the temporary reintroduction of checks at one or more of its internal borders or on sections thereof or to extend such reintroduction is a matter for each Member State. However, it should only be taken as a “last resort”.

Article 26 further specifies that the Member State, “shall assess the extent to which such reintroduction is likely to adequately remedy the threat to public policy or internal security”. Although this is not explicitly stated, it is understood that this assessment must precede the decision. Otherwise, Article 26 would be able to fulfil its ‘*effet utile’*. On the other hand, it is clear that the use of the words “shall assess” means that the Member State must assess this, which is more explicit than in the French or German version of the SBC.

Similarly, it is made obligatory for that Member State to “assess the proportionality of the measure in relation to that threat”. In making this assessment, the Member State must take into account both the “likely impact of any threat to its public policy or internal security” and the “likely impact of such a measure on the free movement of persons within the area without internal border control”.

Article 27 sets out a number of clarifications on the procedure for the temporary reintroduction of border controls and in particular on the prior notification of this intention to the other Member States and the Commission. On the basis of the information contained in the notification, the Commission will then be in a position to examine in turn the necessity and proportionality of the planned reintroduction of internal border control. If it considers that consultation on certain aspects of the notification is appropriate, it will issue an opinion to that effect. These rules apply *mutatis mutandis* to an immediate reintroduction of checks under the specific procedure provided for in Article 28.

# The Arbitrary Reintroduction of Controls by the German Government

The German government’s website states very laconically that “internal border controls at the internal borders with Austria, Switzerland, France, Luxembourg and Denmark will be carried out by the federal police from 16 March 2020. Federal Interior Minister *Seehofer* ordered this reintroduction of temporary border controls on the basis of the Schengen Border Code on 15 March 2020. The European Commission and the interior ministers of the European Union were informed of the order in a so-called notification letter”. [[4]](#footnote-4)

Furthermore, a written reply from the Federal Ministry of the Interior (BMI) to a request from an individual states that: “The EU-level order and notification of the temporary reintroduction of controls at Germany’s internal Schengen borders with Austria, Switzerland, France, Luxembourg and Denmark as well as with Italy and Spain took place on 16 March 2020 and 19 March 2020 respectively on the basis of Article 28 of Regulation (EU) 2016/399 ("Schengen Borders Code"). This is a regulation directly applicable in the individual Schengen states, i.e. also in Germany, and therefore also provides the necessary legal basis”. [[5]](#footnote-5)

It is to be welcomed that the BMI refers to the direct applicability of this regulation and the fact that the legal basis for the ministerial decision is indeed to be found in this text. However, it is regrettable that no public communication has been made as to whether the criteria set out in articles 26, 27 and 28 SBC have been met. It is therefore difficult to know whether the mandatory assessments provided for in Article 26 SBC have indeed been carried out. There can be no doubt that these are legal obligations. An EU regulation is not only “directly applicable”, but also shall have “general application” and shall be “binding in its entirety”.[[6]](#footnote-6) Hopefully, the Legal Service of the BMI is aware of this state of affairs, which is not entirely new.

The ministerial decision to re-establish border controls has not been published in the *Federal* Gazette (*Bundesanzeiger*). However, since, during the temporary reintroduction of controls, the land border with the neighbouring countries concerned could only be crossed at certain border crossing points, these were published in the Federal Gazette on 3 April 2020.[[7]](#footnote-7) At that time, the Federal Police had pointed out that the border may only be crossed at designated and approved border crossing points.

From 16 March to 15 May 2020 only nine of the twenty border crossings on the German-Luxembourg border were opened to traffic. This caused great inconvenience for the population of the *Grande-Région*, especially those living in neighbouring towns and villages.

The organization of the controls had been entrusted to the Federal Police (*Bundespolizei*). Heavily armed police officers, mostly from other German federal states (*Bundesländer*) than the Greater Region, were deployed day and night at the crossing points that remained open. Border workers needed a certificate from their employers to cross the border. A model of such a certificate had been made available online by the Luxembourg government on 16 March. Another model had been put online by the federal police.

In a press release of 17 April 2020, the Minister for Foreign and European Affairs, *Jean Asselborn*, welcomed the opening of two new border crossing points with Germany, namely Remich and Bollendorf. This decision was made possible after a meeting between Minister *Asselborn* and *Hans-Georg Engelke,* State Secretary at the Federal Ministry of the Interior, Construction and Home Affairs. [[8]](#footnote-8)

Initially, on 20 March, all but seven border crossings between Germany and Luxembourg were closed. Border Crossing was only possible at the following points: Echternach, Grevenmacher, Mesenich (A1), Wasserbillig, Wormeldange, Schengen (motorway and trunk road). Luxembourg then campaigned at various levels for the opening of additional border crossings. Thanks to intensive diplomatic contacts and cooperation with the Luxembourg customs authorities, an agreement was reached with the German government that 50 Luxembourg customs officers were to support the German federal police. On Friday 20 March, the first officers took up their duties, ensuring the opening of the Dasburg and Vianden crossing points. On 25 March, Minister *Asselborn* had also sent a letter to the Federal Minister of the Interior *Horst Seehofer on the* difficult situation in the border area.

Minister *Seehofer,* little aware of the situation in the Greater Region*,* seemed to consider that the decision to proceed with the immediate reintroduction of controls at the EU’s internal borders is a sovereign decision of each Member State. This view cannot be shared.

Authorized by Article 28 SBC, such a decision is subject to compliance with the conditions set out in articles 25 to 28 SBC. It is not the exercise of a sovereign competence, but the exercise of an exceptional right that the SBC recognizes to the Member States while laying down the principle of the absence of controls.

The creation of an area of freedom, security and justice (AFSJ) is one of the Union’s major objectives. According to Article 3(2) of the Treaty on European Union (TEU), the Union shall provide its citizens with “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”.

This is an area of shared competence between the Union and its Member States under Article 4 TFEU. With regard more specifically to border controls, Article 77 (1) TFEU, furthermore, assigns very explicitly to the Union the competence to develop a policy “to ensure the absence of any controls on persons, whatever their nationality, when crossing internal borders”.

Moreover, it follows from the terms of Article 2 TFEU that “where the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its own. Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence”.

Therefore, Member States cannot claim to exercise sovereign power when reintroducing internal border controls. This is a competence that is only granted to them by virtue of and according to the precise rules of the SBC.

# Assessing the validity of the decision to reintroduce controls

As will be shown below, there is little agreement with the view expressed in doctrine that “from a legal point of view, temporary reintroductions based on the COVID-19 epidemic are hardly questionable”. [[9]](#footnote-9)

Quite the contrary!

The SBC stresses the fact that, since the principle is the absence of internal border controls, the reintroduction of such controls must remain exceptional. In order to ensure this, it lists a number of conditions that must be met when a Member State is considering reintroducing controls. It is therefore essential that any reintroduction of checks should be exceptional, limited in time and justified by the duly demonstrated existence of a serious threat to public policy or internal security of that Member State.

It is therefore very surprising to note that the European Commission, which has the primordial role of guardian of respect for EU law, has reacted to the decisions of several Member States to reintroduce controls with a very conciliatory communication. This communication, adopted on 16 March 2020 and entitled “Guidelines on border management measures to protect public health and ensure the availability of essential goods and services”, seems to validate *a posteriori* the closure of internal borders. [[10]](#footnote-10)

It states rather trivially in point 18 that “Member States may reintroduce temporary border controls at internal borders if justified on grounds of public policy or internal security. In an extremely critical situation, a Member State may determine the need to reintroduce border controls in response to the risk posed by a communicable disease. Member States must notify the reintroduction of border controls in accordance with the Schengen Borders Code”.

Does this mean that internal border controls, introduced in response to a health emergency, are to be considered legitimate, as some seem to consider?[[11]](#footnote-11) We do not think so.

At no time does the Commission seems to have carried out any real control of the necessary and justified character and therefore of the legality of the various national decisions to reintroduce border controls. In our opinion, it should have carried out a six-stage control to this end.

It would have been advisable to assess individually the necessity and proportionality of those decisions (A.), to verify their adequacy (B.), to monitor compliance with the formal conditions (C.), to take account of the restrictions on the free movement of persons resulting from those measures (D.), to evaluate the acceptable duration of the checks (E.) and, lastly, to consider the advisability of bringing infringement proceedings against Member States which have not complied with those conditions (F.).

The following check will be carried out as an example for the reintroduction of checks at the German-Luxembourg border.

## Assessing the necessity and proportionality of the reintroduction of controls

The preamble to the SBC rightly emphasizes in paragraph 24 that “the necessity and proportionality of the measure to reintroduce internal border controls must be assessed in the light of the threat to public order or internal security which is at the root of the need to reintroduce such controls”.

It is therefore necessary to question both the necessity and the proportionality of the German ministerial decision of 15 March 2020. Admittedly, the Commission’s Communication of 16 March seems to reflect the view that the reintroduction of controls was justified in view of the risks emanating from the pandemic. However, it has no binding legal value. It only reflects the general position of this single institution and there is no indication that this position was taken after a thorough examination of the legality of the national decisions.

As for necessity ...

The fact that the German decision of 15 March reintroduces controls at the German-Luxembourg border without doing the same at the German-Belgian and German-Dutch borders, even though the epidemiological data were similar in these two neighbouring countries, is somewhat perplexing. This difference in treatment was due to political dealings within the Union of Conservative Parties. The powerful Minister-President of North Rhine-Westphalia, *Armin Laschet* (CDU), had obtained this favour from Minister *Seehofer (*CSU) as a result of his political pressure.

This disparity is sufficient proof that the need for the controls was relative and that the justification linked to the risk of spreading the virus did not hold water, so to speak.

As for proportionality ...

In order to determine whether the proportionality test was met, it is necessary to examine whether there were no less restrictive measures that would have made it possible to achieve the objective pursued or at least the stated objective. It would certainly be possible to dispense with monitoring compliance with this criterion, since the need for such monitoring is clearly lacking. However, taken in isolation, the German decision can still be regarded as proportionate in principle, since the closure of the 'small' border crossing points and the reintroduction of controls had not prevented cross-border workers from moving. This does not mean, however, that it is not possible that in a specific case the impossibility for a person to cross the German-Luxembourg border could not be deemed disproportionately in that it constituted, for example, a disproportionate interference in the normal family life of family members residing on both sides of the border.

## The Adequacy of the Reintroduction of Controls

With regard to national measures that constitute restrictions (obstacles) to the free movement of persons, the ECJ has long applied a test of their admissibility based on compliance with four criteria.[[12]](#footnote-12) Such obstacles must be non-discriminatory, justified by an overriding reason relating to the public interest, adequate and proportionate. While the SBC explicitly refers only to an assessment of necessity and proportionality, it seems very likely that the Court will not neglect the criterion of adequacy. It will thus verify whether the disputed measure was 'clean' or 'adequate' to achieve the desired objective.

This raises the question of whether border controls by heavily armed federal police officers prevent the virus from spreading and thus containing the pandemic. The answer can only be negative.

Having undergone these controls me for two months, I can attest to the fact that no health tests were carried out during these controls. The police merely checked the identity documents and certificates issued to frontier workers by their employers.

The introduction of border controls has not prevented the virus from circulating. This was never the objective. It was more a means for public authorities to show the public that they were acting. It was pure political actionism. The exceptions allowed for border workers, of whom there were about 50,000, and for freight transporters also show that significant flows of people were still crossing the border every day.

During the second wave of the pandemic, all German actors also ruled out any further recourse to border controls from the outset, which proved to be ineffective and unnecessary.

## Formal requirements

The formal requirements for a national decision to immediately reintroduce internal border controls are based on a combined reading of articles 27 and 28 SBC. When a Member State immediately reintroduces checks at its internal borders, it must notify this fact “simultaneously to the other Member States and the Commission”. In addition, it must communicate the information referred to in Article 27 (1), including the reasons justifying recourse to the special procedure of Article 28.

The notification may therefore “exceptionally” be concomitant with the reintroduction of checks “where a serious threat to public policy or to the internal security of a Member State requires immediate action” by that Member State. It should be stressed that, under the SBC, this possibility constitutes an exception to the Member State’s 'right' to reintroduce checks, which itself should only be exercised in exceptional cases. It follows that the justification required under Article 28 goes far beyond the justification required under Article 25.

In any event, it could be argued that the duty of loyal cooperation between Member States and the institutions of the Union, which is incumbent on Member States under Article 4 (3) TEU, applies in this matter and should lead governments to give prior notification as early as possible to enable neighbouring countries to adapt to the situation.

Furthermore, it is questionable whether this notification, which is addressed only to the Commission and the other Member States, should not be published so that it can subsequently be used to assess compliance with the conditions laid down in the SFC for effective judicial review within the meaning of articles 19 TEU and 47 of the Charter of Fundamental Rights of the European Union (EUCFR). This is, after all, a measure which places a significant restriction on the free movement of persons guaranteed by the Treaties and the Charter.

## The restriction on the free movement of Union citizens

According to paragraph 27 of the preamble of the SBC “in accordance with the case law of the Court of Justice of the European Union, any derogation from the fundamental principle of the free movement of persons must be interpreted restrictively and the concept of public policy presupposes the existence of a real, present and sufficiently serious threat to affect one of the fundamental interests of society”.

It is easy to understand that the notion of public order can include that of public health. Other texts of Union law thus refer to the triptych of public order, public safety and public health.

Despite the European Commission’s attempts at coordination, many EU governments, including the German government, have decided on their own initiative to impose a massive ban on entry into their territory and to control their borders. All these measures represent serious infringements of EU citizens’ rights. They interfere with the freedom of movement of workers under Article 45 TFEU, the freedom of movement of Union citizens under Article 21 TFEU and the prohibition of discrimination under Article 18 TFEU. [[13]](#footnote-13)

According to the settled case law of the Court of Justice of the European Union, recourse to the concept of public policy presupposes in any event the existence of a real, present and sufficiently serious threat to affect one of the fundamental interests of society (recital 27 of the Borders Code). Article 29 of Directive 2004/38 on the free movement of citizens of the European Union codifies the rules applying to Member States when they want to take restrictive measures justified by threats to public policy, public security or public health. [[14]](#footnote-14)

These rules result in particular from the case law of the Court, which must also apply in the context of the SBC. It is more than doubtful whether the Court finds that the German decision of 15 March 2020 meets the conditions which the Court has formulated with regard to the possibility of restricting freedom of movement for the purposes of public policy. Will it be more flexible where a state invokes a serious threat to public health? Can States invoke a greater margin of appreciation in this area? Nothing is less certain.

## The Duration of the Disputed Measures

With regard to the immediate reintroduction of controls on the basis of Article 28 SBC, this provides for an initial period of no more than 10 days. However, paragraphs 3 and 4 allow extensions of up to two months in total. Where the Member State wishes to extend its decision, it must take account of any new elements.

With regard to the controls at the German-Luxemburg border, it can be noted that following numerous interventions with Minister Seehofer, the latter decided to lift the controls on 15 May 2020. This was celebrated on the same day at a meeting of Foreign Ministers *Asselborn* and *Maas* at the Remich border bridge.

The total time allowed has therefore not been exceeded. The fact remains that the initial decision and the extensions adopted disregarded the letter and spirit of the SBC. It is therefore regrettable that the European Commission did not take the opportunity to bring an action for failure to fulfil obligations, thus allowing the Court of Justice to clarify the reading of articles 25 to 28 of the SBC.

## Missed Opportunity to Bring an Action for Failure to Fulfil Obligations

Compliance by Member States with the conditions listed in Articles 25 to 28 SBC is subject to control by the ECJ. However, the ECJ will only be able to give a ruling if the matter is referred to it. In the present case, such a referral should have come from the European Commission. As the guardian of legality, the Commission should have brought infringement proceedings against the Federal Republic of Germany.

The comparison of the German decision of 15 March 2020 with the strict criteria of the SBC raises very serious doubts, to say the least, as to its conformity with EU law. This could not escape the Commission’s legal experts nor the Luxembourg government. So why has there not been an action for failure to fulfil obligations accompanied, if necessary, by a request for interim measures by way of summary proceedings before the ECJ?

Contacted by e-mail, the ministries of Justice and Foreign Affairs of the Grand Duchy indicated that the Luxembourg government did not itself wish to bring infringement proceedings against the neighbouring state. This was understandable. Diplomatic approaches were preferred.

The author of these lines is nevertheless convinced that the Court of Justice would have been very sensitive to arguments based on the violation of the principles of necessity and the SBC rules. The restrictions on the free movement of persons resulting from the German decision were clearly not justified by the needs of public policy or public health. The measures imposed were therefore neither adequate, nor justified by an overriding reason of public interest, nor proportionate to the aim pursued.

The regrettable inaction of the Commission chaired by *Ursula von der Leyen* risks tarnishing its image as the guardian of legality in the European Union. Having already refrained from bringing an action for failure to fulfil obligations against Federal Germany following the German Constitutional Court (*BVerfG*) ruling of 5 May 2020 in which it openly sought conflict with the ECJ, [[15]](#footnote-15) the Commission must guard against appearing too timid to take action against the country of origin of its President.

1. 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), OJEU, L 77, 23.3.2016, pp. 1-52. [↑](#footnote-ref-1)
2. https://eur-lex.europa.eu [↑](#footnote-ref-2)
3. ECJ,19 March 2019, Préfet des Pyrénées-Orientales v Abdelaziz Arib, C-444/17, ECLI:EU:C:2019:220, point 49. [↑](#footnote-ref-3)
4. Cf. https://www.bundesregierung.de/breg-de/themen/coronavirus/kontrollen-an-den-grenzen-1730742, translated from German by the author. [↑](#footnote-ref-4)
5. https://fragdenstaat.de/anfrage/grenzkontrollen-2/, translated from German by the author. [↑](#footnote-ref-5)
6. Article 288 TFEU. [↑](#footnote-ref-6)
7. Notice of Notification of Border Crossing Points under the Temporarily Re-introduced Internal Border Controls at the Land Borders with Denmark, Luxembourg, France, Switzerland and Austria", 24.03.2020, BAnz AT 03.04.2020 B1. [↑](#footnote-ref-7)
8. https://gouvernement.lu/de/actualites/toutes\_actualites/communiques/2020/04-avril/17-oeffnung-grenzen.html [↑](#footnote-ref-8)
9. See, however, Stefano Montaldo, *The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste*, European Papers, 04.11.2020, https://www.europeanpapers.eu, p. 5. [↑](#footnote-ref-9)
10. EU Commission, Guidelines on border management measures to protect public health and to ensure the availability of essential goods and services, EUOJ C 86 I, 16 March 2020, p. 1. See also Frédérique Berrod, *L'Union européenne et la COVID-19 ou le réarmement des frontières*, Europe, November 2020, pp. 4-9. [↑](#footnote-ref-10)
11. See Frédérique Berrod, op. cit, p. 5. [↑](#footnote-ref-11)
12. See in particular ECJ, 30 November 1995, Gebhard, Case C-55/94, ECLI:EU:C:1995:411, paragraph 37. "However, it follows from the case law of the Court that national measures liable to impede or render less attractive the exercise of the fundamental freedoms guaranteed by the Treaty must satisfy four conditions: they must be applied in a non-discriminatory manner, they must be justified by overriding reasons relating to the public interest, they must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary to attain that objective (see judgment of 31 March 1993, Kraus, C-19/92, ECR I-1975, paragraph 37). p. I-1663, paragraph 32)". [↑](#footnote-ref-12)
13. See also Aude Bouveresse, *La libre circulation des personnes à l'épreuve du COVID-19: extremis malis extrema remedia*, RTDE 2020, pp. 509-530. [↑](#footnote-ref-13)
14. 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, OJ L 158, 30.4.2004, p. 77-123. [↑](#footnote-ref-14)
15. Thomas Klein, Ticking time bomb. A ruling by the German Constitutional Court raises existential questions for the European Union, Luxemburger Wort, 17 juin 2020, p. 16 avec un interview de l'auteur de cette contribution. [↑](#footnote-ref-15)