

PROPORTIONALITY OF INTERNAL BORDER CONTROLS: FROM THE COVID-19 PANDEMIC TO THE 2021 PROPOSAL

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Abstract: Most Schengen Member States reintroduced internal border controls in response to the COVID-19 pandemic. These controls, which in some instances lasted for several months, jeopardised the principle of an area without borders and had to comply with the principle of proportionality. This article examines four aspects of these controls related to proportionality: the type of threat invoked, the adequacy of the measures, the duration of the controls, and the scrutiny over proportionality. First, it demonstrates that the current Schengen Borders Code contains appropriate safeguards for each aspect. However, some Schengen Member States disregarded them during the COVID-19 pandemic, and the Commission did not use its scrutiny powers. In December 2021, the Commission proposed to amend the Schengen Borders Code. This 2021 proposal adapts the rules to the Schengen Member States' practices during the COVID-19 pandemic. Then, this article argues that this proposal improves the aspects of legal certainty and scrutiny but does not satisfactorily address the aspects of adequacy and duration of internal border controls. In addition, the article presents some recommendations to increase the proportionality of the controls that the Schengen Member States would reintroduce following the 2021 proposal.

Keywords: Schengen Borders Code, proportionality, internal border controls, Covid-19, 2021 proposal, health emergency, NORDIC INFO, scrutiny.

1 Introduction

'A crisis without borders cannot be resolved by putting barriers between us. And yet, this is exactly the first reflex that many European countries had. This simply makes no sense'.¹ With these words, President von der Leyen of the European Commission (Commission) condemned, among other things, the reintroduction of internal border controls within

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¹ Commission, 'Speech by President von der Leyen at the European Parliament Plenary on the European coordinated response to the COVID-19 outbreak' (26 March 2020) SPEECH/20/532.

the Schengen area² during the COVID-19 pandemic. This recent crisis³ is not the only one that has put this border-free area under severe strain. The past seven years have been particularly challenging. Indeed, besides the pandemic, numerous Member States⁴ reintroduced internal border controls for months during the migration crisis of the mid-2010s⁵ and after the terrorist attacks in the European Union (EU) in 2015-2016.⁶ These crises⁷ have shown that the benefits of European integration should not be taken for granted.⁸

Freedom of movement and the possibility of border-free travel are two intertwined mechanisms.⁹ They are essential to establish an area where persons may move freely, without internal borders,¹⁰ which is one of the

² As of September 2022, as during the COVID-19 pandemic, the Schengen area encompasses twenty-six European countries: these are also Member States of the European Union, except for Iceland, Norway, Switzerland, and Liechtenstein.

³ Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (2021 Proposal)' COM (2021) 891 final 1. The COVID-19 pandemic is the global outbreak of the SARS-CoV-2 virus. This virus quickly spread from China, where it was first detected in December 2019, to the rest of the world. On 30 January 2020, the World Health Organization declared a Public Health Emergency of Internal Concern and on 11 March 2020 it characterised the outbreak as a pandemic. World Health Organization, 'Coronavirus disease (COVID-19) pandemic' <<https://www.who.int/europe/emergencies/situations/covid-19>> accessed 1 September 2022.

⁴ When this article refers to 'Member States', the expression should be understood as to include the twenty-six European States that are part of the Schengen area.

⁵ COM (2021) 891 final 1. For further information about the reintroduction of internal border controls during the migration crisis in 2015-2016, see Elspeth Guild, 'Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19' (2021) 23 *European Journal of Migration and Law* 385, 390-393.

⁶ COM (2021) 891 final 1. For further information on the reintroduction of internal border controls following the terrorist threat, see Guild (n 5) 393-397.

⁷ Guild distinguishes the first two crises from the one resulting from the COVID-19 pandemic. The first two were framed as issues with external border controls, while the most recent crisis concerned internal borders and the internal market. Guild (n 5) 386-387.

⁸ Hanneke van Eijken and Jorrit Rijpma, 'Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona' (2021) 17 *Utrecht Law Review* 34, 34. Between 2006 and 2014, Member States reintroduced internal border controls only 35 times. However, from the start of the mentioned crises in 2015, there was a significant increase in the number of internal border controls. Between 1 January 2015 and 1 September 2022, the Member States reintroduced internal border controls 299 times. Commission, 'List of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq of the Schengen Borders Code' (1 September 2022). PDF available at <https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en> accessed 1 September 2022.

⁹ Daniel Schade, *Crisis-proof Schengen and Freedom of Movement: Lessons from the COVID-19 Pandemic* (Hertie School – Jacques Delors Centre 2021) 2; Elspeth Guild, 'Covid-19 Using Border Controls to Fight a Pandemic? Reflections From the European Union' (2020) 2 *Frontiers in Human Dynamics* 1, 2.

¹⁰ This objective of the EU of offering 'an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured [...]' is set in Article 3(2) of the Treaty on European Union (TEU).

main achievements of the EU.¹¹ Freedom of movement of persons is one of the four freedoms guaranteed in the EU. It is enshrined in the Treaty on the Functioning of the European Union (TFEU),¹² the Charter of Fundamental Rights of the European Union (Charter),¹³ and Directive 2004/38/EC (Free Movement Directive).¹⁴ The abolition of border controls is limited to the Schengen area and *de facto* facilitates the movement of persons.¹⁵ The TFEU¹⁶ and Regulation (EU) 2016/399 (Schengen Borders Code or

¹¹ 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) [2016] OJ L77/1, Recital 22; Joined Cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark* ECLI:EU:C:2022:298, para 65. In a 2018 survey, 68% of EU respondents perceived the Schengen area as one of the EU's main achievements. Kantar Public, Special Eurobarometer 474: European perceptions of the Schengen Area: Summary (Survey requested by the European Commission, Directorate-General for Migration and Home Affairs and co-ordinated by the Directorate-General for Communication, 2018) 10.

¹² Article 20(2)(a) TFEU reads as follows: '2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) *the right to move and reside freely within the territory of the Member States*' (emphasis added).

Article 21(1) TFEU reads as follows:

'1. *Every citizen of the Union shall 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' (emphasis added).

¹³ Article 45(1) of the Charter reads as follows: 'Freedom of movement and of residence

1. *Every citizen of the Union has the right to move and reside freely within the territory of the Member States*' (emphasis added).

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 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 (Text with EEA relevance) [2004] OJ L158/77 (Free Movement Directive). This Directive is frequently mentioned in discussions about freedom of movement during the COVID-19 pandemic since it contains a chapter on the right of exit and entry. This article focuses on the reintroduction of internal border controls and the Schengen Borders Code. Therefore, it does not discuss further Directive 2004/38/EC.

¹⁵ European Court of Auditors, *Free Movement in the EU During the COVID-19 Pandemic: Limited Scrutiny of Internal Border Controls, and Uncoordinated Actions by Member States* (Special Report, 2022) para 4.

¹⁶ Article 67(2) TFEU reads as follows:

'2. [The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals' (emphasis added).

Article 77(1)(a) TFEU reads as follows:

'1. The Union shall develop a policy with a view to:

(a) *ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders*' (emphasis added).

SBC)¹⁷ guarantee the absence of internal border controls.

During the COVID-19 pandemic, one of the precautionary measures adopted to limit the spread of the novel virus was the reintroduction of internal border controls.¹⁸ Member States also adopted other measures to contain the pandemic, such as lockdowns, curfews, and travel restrictions.¹⁹ The reintroduction of border controls was often a prerequisite to enforcing other restrictive measures, such as entry bans,²⁰ and was financially costly for the Member States²¹ and the internal market.²² As a general caveat, this article focuses solely on the temporary reintroduction of internal border controls in the Schengen area; it does not cover additional requirements to cross borders, such as the presentation of a negative antigen test, or the reintroduction of external border controls.²³

¹⁷ Paragraph 1 of Article 1 SBC reads as follows: ‘This Regulation provides for the *absence of border control of persons crossing the internal borders between the Member States of the Union*’ (emphasis added).

Article 22 SBC reads as follows: ‘Crossing internal borders

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

¹⁸ COM (2021) 891 final 19.

¹⁹ Marco Stefan and Ngo Chun Luk, *Limitations on Human Mobility in Response to COVID-19: A Preliminary Mapping and Assessment of National and EU Policy Measures, Their Sanctioning Frameworks, Implementation Tools and Enforcement Practices* (CEPS Paper in Liberty and Security in Europe, 2021) 10.

²⁰ Aude Bouveresse, ‘La libre circulation des personnes à l’épreuve de la Covid-19: *extremis malis extrema remedia?*’ (2020) 3 *Revue trimestrielle de droit européen* 509, 513; Commission, ‘Impact Assessment Report Accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders’ SWD (2021) 462 final 13; Daniel Thym and Jonas Bornemann, ‘Schengen and Free Movement Law During the First Phase of the COVID-19 Pandemic: Of Symbolism, Law and Politics’ (2020) 5 *European Papers* 1143, 1146.

²¹ In 2016, the administrative costs due to the increase in staff for border controls were estimated between EUR 0.6 and EUR 5.8 billion, while the costs of physically establishing internal border controls were approximately EUR 7.1 billion for the entire Schengen area. Given inflation, the costs would be even higher during the COVID-19 pandemic. Andrew Lilico, Summayah Leghari and Marika Hegg, *The Cost of Non-Schengen: Impact of Border Controls within Schengen on the Single Market* (Study requested by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value) 2016, 9. Moreover, it is likely that staff temporarily assigned to border controls come from other services, resulting in shortages in those services. ‘Impact Assessment Report Accompanying the 2021 Proposal’ (n 20) 26.

²² A 2016 study estimated the economic costs for a two-year reintroduction of internal border controls by seven participating states at up to €5 billion and by the entire Schengen area at up to €50 billion. Lilico, Leghari and Hegg (n 21) 9. Given inflation, the costs would be even higher during the COVID-19 pandemic. However, as of September 2022, there exists no study yet about the economic impact of border controls reintroduced during the COVID-19 pandemic. Salomon and Rijpma argue that the reintroduction of internal border controls also has negative effects on European citizenship. Stefan Salomon and Jorrit Rijpma, ‘A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship’ 2021 *German Law Journal* (‘Online First’) 1, 23–25.

²³ According to Article 2(10) SBC, border controls consist of border checks and border surveillance. They can take various forms, but usually consist of identity checks. For further information on border controls and what they entail, see Subsection 3.2.2.1 below.

The Schengen Borders Code lays down conditions and procedures for the reintroduction of internal border controls 'to ensure that they are exceptional and that the principle of proportionality is respected'.²⁴ Proportionality is a general principle of EU law²⁵ applicable to conflicts between two interests or rights claims.²⁶ It requires that measures are appropriate to pursue a legitimate objective and are the least restrictive.²⁷ Proportionality binds the EU institutions and Member States,²⁸ including in the application of the Schengen Borders Code.²⁹ This article uses proportionality as a standard to analyse the internal border controls reintroduced during the COVID-19 pandemic and the corresponding rules of the Schengen Borders Code, as it stands and as it might soon be amended.

Internal border controls reintroduced during the COVID-19 pandemic raised a number of (legal) questions giving rise to heated debates. These interrogations are particularly relevant nowadays for two reasons. Firstly, in December 2021, the European Commission published a proposal to amend the Schengen Borders Code (2021 proposal).³⁰ This proposal aims, among other things, to clarify and expand the procedural safeguards in the case of the unilateral reintroductions of internal border controls and to encourage the use of alternative measures.³¹ On 1 September 2022, the European Parliament was in the reporting phase,³²

²⁴ SBC, Recital 22. The European Court of Justice made a reference to this recital in paragraphs 59 and 74 of NW (n 11).

²⁵ Juliane Kokott and Christoph Sobotta, 'The Evolution of the Principle of Proportionality in EU Law: Towards an Anticipative Understanding?' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (OUP 2017) 168; Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2017) 15 *Cambridge Yearbook of European Legal Studies* 439, 442; Tor-Inge Harbo, 'The Function of the Proportionality Principle' (2010) 16 *European Law Journal* 158, 159.

²⁶ Harbo (n 25) 158.

²⁷ *ibid* 165; Kokott and Sobotta (n 25) 168; Sauter (n 25) 448.

²⁸ Sauter (n 25) 440. The ECJ applies the proportionality test differently to acts of the EU institutions and acts of the Member States. The EU institutions are subject to a manifestly disproportionate test, while the Member States are bound by modified versions of a least restrictive means test. Sauter (n 25) 439–440, 445, and 465; Harbo (n 25) 172.

²⁹ For further information, see Part 2 below. In its Communication of 16 March 2020, the Commission encouraged the Member States to apply internal border controls in a 'proportionate manner'. Commission, 'COVID-19 – Guidelines for border management measures to protect health and ensure the availability of goods and essential services' (Information) COM (2020) 1753 final, para 19. The European Court of Auditors would have appreciated if the Commission had given detailed advice on how the border controls reintroduced in the specific context of the pandemic could comply with the general principle of proportionality. European Court of Auditors (n 15) para 56.

³⁰ COM (2021) 891 final. Part 4 of this article covers the 2021 proposal in more detail.

³¹ *ibid* 7–8.

³² Costica Dumbrava, 'Revision of the Schengen Borders Code' (*Legislative Train Schedule*, 20 August 2022) <<https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-revision-of-the-schengen-borders-code?sid=6101>> accessed 1 September 2022. On 31 March 2022, MEP Sylvie Guillaume was designated to draw up a report on the 2021 proposal. European Parliament, 'Procedure file 2021/0428(COD)' (2022) <<https://oeil.secure.europarl.europa.eu/oeil/popups/printficheplayers.pdf?id=733495&lang=en>> accessed 1 September 2022). On 1 September 2022, this report was not yet ready.

whereas the Council of the European Union (Council) adopted a general approach to the proposal during the Schengen Council of 10 June 2022.³³ Secondly, in February 2022, the Dutch-speaking Court of First Instance of Brussels sent a preliminary reference to the European Court of Justice (ECJ) to interpret the Schengen Borders Code.³⁴ In essence,³⁵ the Belgian court asked, among other things, ‘whether, in times of crisis, an infectious disease can be equated with a threat to public policy or internal security within the meaning of Articles 23(a) and 25 [SBC]’³⁶ and explicitly referred to the 2021 proposal.³⁷ Thus, the ECJ will soon have to decide, in the *NORDIC INFO* case, on some issues related to internal border controls reintroduced during the COVID-19 pandemic.

Building upon those considerations, this article answers the following research question: to what extent do the Schengen Borders Code and the 2021 proposal to amend it ensure that proportionality is respected when it comes to the reintroduction of border controls at the internal borders of the Schengen area in situations of health emergencies?

To answer this research question, this article first determines in Part 2 which aspects of proportionality the Member States must respect when they reintroduce internal border controls based on the Schengen Borders Code. Then, it is organised symmetrically and comprises two main parts: Part 3 concerns the internal border controls reintroduced during the COVID-19 pandemic, and Part 4 covers the 2021 proposal. Each consists of two main sections: one presents the topic, and the other contains an assessment of proportionality. Part 3 starts with the legal framework applicable to the reintroduction of internal border controls during the COVID-19 pandemic. Section 3.2 investigates how the Schengen Borders Code ensures that proportionality is respected when reintroducing these controls. It focuses on four aspects of proportionality: the type of threat, the adequacy of the measures, the duration of the controls, and the scrutiny over proportionality. Section 3.3 summarises the findings of the pro-

³³ Council of the European Union, ‘Schengen Borders Code: Council adopts its general approach’ (Press release 534/22, 10 June 2022).

³⁴ Request for a preliminary ruling from the *Nederlandstalige rechtbank van eerste aanleg Brussel* (Belgium) lodged on 23 February 2022 — *NORDIC INFO v Belgische Staat* (Case C-128/22) [2022] OJ C213/26). In this pending case, a travel organisation had to cancel all its trips from Belgium to Sweden following the prohibition of non-essential travel from and to Belgium issued by the Belgian federal government. Three days after the issue of the prohibition, the Belgian government again authorised, while advising against, non-essential trips to Sweden. The travel organisation claims compensation for the damage it suffered following the change in travel advice of the Belgian government. Case C-128/22: Summary of the request for a preliminary ruling (Working document, 23 February 2022) paras 1–4.

³⁵ This question about the scope of public policy and internal security is not one of the questions explicitly referred to the ECJ. It appears in the argumentation of the parties and the observations of the referring court.

³⁶ Case C-128/22, para 18. This notion of ‘threat to public policy or internal security’ is subject to debate as to whether it encompasses ‘public health emergencies’. Subsection 3.2.1 below discusses this matter further.

³⁷ *ibid.*, para 20.

proportionality assessment. Then, Part 4 begins with a presentation of the 2021 proposal and its main amendments to the rules on the reintroduction of internal border controls. Section 4.2 investigates whether the proposal would provide additional safeguards concerning proportionality when Member States reintroduce internal border controls during health emergencies. It focuses on the same four aspects of proportionality. Section 4.3 recapitulates and offers some recommendations for improving the 2021 proposal on each aspect. Finally, Part 5 summarises the findings of Parts 3 and 4 and provides an answer to the research question.

This article primarily uses a legal doctrinal methodology. It also resorts to an evaluative methodology when determining how the Schengen Borders Code and the 2021 proposal ensure respect for the principle of proportionality. The sources perused to write this article are primary sources from the EU institutions, such as regulations, judgments, and proposals, and secondary sources, including academic journal articles, book chapters, blog posts, and reports. However, the recent publication of the 2021 proposal limits the number of sources on the topic.

2 Proportionality and Schengen Borders Code

In this article, proportionality is the standard to examine the internal border controls reintroduced during the COVID-19 pandemic and their legal basis in the Schengen Borders Code. When assessing the proportionality of a measure under EU law, the EU relies on a four-step test. The measure must:

- 1) be appropriate – also called the suitability test –
- 2) to pursue a legitimate objective – also called the legality test,
- 3) constitute the least restrictive measure – also called the necessity test, and
- 4) not be manifestly disproportionate – also called proportionality *stricto sensu*.³⁸

If a measure fails to meet any requirement, it will be disproportionate.³⁹ The ECJ does not always apply all four steps consistently.⁴⁰ The exact content of the test depends on the area of EU law and the degree of harmonisation.⁴¹

³⁸ Kokott and Sobotta (n 25) 168; Sauter (n 25) 448. The order of the steps varies between the two sources, but the steps remain the same.

³⁹ Kokott and Sobotta (n 25) 168.

⁴⁰ Sauter (n 25) 448. Usually, the least restrictive measure test and the final balancing are alternatives rather than complements (*ibid*).

⁴¹ *ibid* 454–455; Harbo (n 25) 180. For instance, the test applicable to freedom of establishment includes a requirement that the measure is non-discriminatory, which is not explicit in the general proportionality test. Sauter (n 25) 455. Additionally, the greater the impact of the measure on the EU interest, the stricter the proportionality test is likely to be. Sauter (n 25) 453.

This article argues that Article 26 SBC defines the steps of the proportionality test relevant for the reintroduction of internal border controls and constitutes a *lex specialis* to the general four-step test. When Member States reintroduce or prolong internal border controls based on Article 25 or 28(1) SBC, ie when the serious threat to public policy or internal security is foreseeable or unforeseeable, Article 26 requires them to assess ‘*the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security, and [...] the proportionality of the measure in relation to that threat*’. Three aspects of proportionality can be extracted from the wording of Article 26 SBC:

- 1) The type of threat, ie a serious threat to public policy or internal security – related to the legitimate objective of the general proportionality test, but not identical;
- 2) The extent to which the reintroduction of internal border controls is likely to adequately remedy the threat – comparable to the suitability test; and
- 3) The proportionality of the measure in relation to the threat – similar to the *stricto sensu* balancing.

Additionally, when conducting the assessment required in Article 26 SBC, Member States must consider the likely impact of the threat on their public policy or internal security and of such a measure on the free movement of persons.⁴² Furthermore, they bear the burden of proof to justify the necessity and proportionality of the reintroduction of internal border controls.⁴³ This burden of proof is incremental with the prolongation of controls.⁴⁴ This proportionality requirement is reinforced by the Member States’ duty to conduct an ex-post assessment of proportionality after the lifting of internal border controls⁴⁵ and the Commission’s obligation to issue an opinion if it ‘has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders’.⁴⁶ This scrutiny aspect is not a step of the general proportionality test. Yet, a discussion on proportionality is not complete without mentioning the measures to control the respect for proportionality. Hence, this article also discusses the scrutiny over proportionality as a fourth aspect. Parts 3 and 4 below base their analysis of the proportionality of the internal border controls reintroduced during the COVID-19 pandemic and the Schengen Borders Code, as it is and as it could be amended, on the three aspects extracted from Article 26 SBC and this fourth aspect of scrutiny. In order to narrow down the balancing exercise of the third aspect, ie proportionality *stricto sensu*, this article focuses on the duration of internal border controls.

⁴² SBC, Article 26(a) and (b).

⁴³ Sergio Carrera and Ngo Chun Luk, *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU* (Study requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, 2020) 49.

⁴⁴ *ibid.*

⁴⁵ SBC, Article 33, 1st paragraph.

⁴⁶ *ibid* Article 27(4), 2nd paragraph.

3 Proportionality of internal border controls reintroduced during the Covid-19 pandemic

3.1 Articles 25 and 28 SBC during the COVID-19 pandemic

As a general rule, Article 22 SBC states that '[i]nternal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out'.⁴⁷ Chapter II of Title III of the Code provides for three exceptions for the temporary reintroduction of internal border controls: when there is a serious foreseeable threat to public policy or internal security, when the same kind of threat is unforeseeable, and where exceptional circumstances put the overall functioning of the Schengen area at risk.⁴⁸ Resort to these exceptions is not new, but the recurrence and scale of internal border controls over the last two and a half years are unprecedented.⁴⁹ The Member States did not coordinate their controls.⁵⁰ The duration, intensity and territorial coverage of the controls varied greatly from Member State to Member State and from the first wave of contagion to the other waves.⁵¹

Between 1 February 2020 and 30 April 2022,⁵² Member States notified the Commission 182 times of the reintroduction of internal border controls under Articles 25 and 28 SBC for reasons of 'Coronavirus

⁴⁷ 'Internal borders' are defined in Article 2(1) SBC as:

- (a) the common land borders, including river and lake borders, of the Member States;
- (b) the airports of the Member States for internal flights;
- (c) sea, river and lake ports of the Member States for regular internal ferry connections'.

⁴⁸ SBC, Articles 25–35.

⁴⁹ Sandra Mantu, 'Schengen, Free Movement and Crises: Links, Effects and Challenges' (2021) 23 *European Journal of Migration and Law* 377, 377; Saira Heinikoski, *COVID-19 Bends the Rules on Border Controls: Yet Another Crisis Undermining the Schengen Acquis?* (FIIA Briefing Paper 2020) 3. Until 2014 and the start of the migration crisis, the provisions on the reintroduction of internal border controls were used for specific events, such as high-level political meetings, mass events, demonstrations, and sports events, and only for a few days. It was a short-term solution completely different from the massive reintroduction of border controls during the COVID-19 pandemic that lasted for months. Fabian Gülzau, 'A "New Normal" for the Schengen Area. When, Where and Why Member States Reintroduce Temporary Border Controls?' (2021) *Journal of Borderlands Studies* 1, 2–3 and 13.

⁵⁰ Philippe De Bruycker, 'The COVID Virus Crisis Resurrects the Public Health Exception in EU Migration Law' (2021) 2 *Frontiers in Political Science* 1, 6; Guild (n 9) 2.

⁵¹ Stefano Montaldo, 'Internal Border Control in the Schengen Area and Health Threats: Any Lessons from the COVID-19 Pandemic?' (2021) 23 *European Journal of Migration and Law* 405, 408; Sergio Carrera and Ngo Chun Luk, *Love Thy Neighbour? Coronavirus Politics and Their Impact on EU Freedoms and Rule of Law in the Schengen Area* (CEPS Paper in Liberty and Security in Europe 2020) 2–3. The exact dates of the waves of contamination differ among the Member States. It is commonly accepted that the first wave took place in spring 2020, the second in autumn 2020, and the third in spring 2021. Stefan and Luk (n 19) 23.

⁵² The epidemiological data improved in spring 2022: there were fewer infections and admissions to hospitals. Since 30 April 2022, there has not been any new notification of the reintroduction of internal border controls for reasons of 'Coronavirus COVID-19'. Therefore, the number of notifications related to the COVID-19 pandemic did not change between May 2022 and August 2022.

COVID-19'.⁵³ Articles 25 and 28 SBC are complementary and provide for different procedures for the reintroduction of border controls.⁵⁴ The following paragraphs analyse these two provisions, their requirements, and recourse to them by the Member States during the pandemic. The third procedure for the reintroduction of internal border controls, provided for in Article 29, is not discussed further because it requires a Council recommendation which the institution did not issue during the COVID-19 pandemic.⁵⁵

At the outset of the pandemic, most Member States relied on Article 28 SBC.⁵⁶ This article contains the specific procedure for situations requiring immediate action due to a serious threat to public policy or internal security.⁵⁷ Member States must notify the Commission and the other Member States at the same time as they reintroduce border controls.⁵⁸ The controls may be maintained for a limited period of up to ten

⁵³ Commission, 'List of Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq of the Schengen Borders Code' (30 April 2022). PDF available at <https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en> accessed 30 April 2022. The notifications also include border controls that start after 30 April since border controls reintroduced under Article 25 of the Schengen Borders Code require prior notifications (SBC, Article 27(1)). At the outbreak of the pandemic, France, Austria, Denmark, Norway, and Germany already had some internal border controls in place for reasons of migration or terrorism. They added a health reason on top of this and did not start a new six-month period at that time. Moreover, Luxembourg and Greece did not reintroduce internal border controls at the beginning of the pandemic. Sarah Wolff, Ariadna Ripoll Servent and Agathe Piquet, 'Framing Immobility: Schengen Governance in Times of Pandemics' (2020) 42 *Journal of European Integration* 1127, 1130.

⁵⁴ Jörg Gerkrath, 'The Reintroduction of Internal EU Border Controls: A Disproportionate, Ineffective and Illegal Instrument of Combating the Pandemic' (2021) 47 *EU Law Live – Weekend Edition* 2, 3; 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' (2020) 5 *European Papers* 523, 525.

⁵⁵ Since 2013, the Article 29 procedure has been available when the overall functioning of the Schengen area is at risk. Based on a Commission proposal, the Council may recommend that certain Member States reintroduce internal border controls for a maximum of six months, renewable three times (SBC, Article 29(1)-(2)). On 12 May 2016, the Council resorted to this mechanism and recommended that Austria, Germany, Denmark, Sweden, and Norway reintroduce internal border controls for six months due to the migration crisis and security threats. Council of the European Union, 'Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for a temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk' [2016] OJ L151/8. The Council made this recommendation three more times, in November 2016, February 2017, and May 2017 (European Court of Auditors (n 15) para 28) but not during the COVID-19 pandemic.

⁵⁶ Carrera and Luk (n 43) 54. For further information on the internal border controls reintroduced by the Member States between March 2020 and August 2020 inclusive, see Carrera and Luk (n 43); for the reintroduction of internal border controls between 1999 and 2020, see Gülzau (n 49).

⁵⁷ SBC, Article 28(1).

⁵⁸ *ibid.*, Article 28(2).

days⁵⁹ and be prolonged for renewable periods of up to twenty days.⁶⁰ In any event, the period of reintroduction of internal border controls under Article 28 may not exceed two months.⁶¹

Subsequently, when the maximum period of two months had elapsed, the Member States could no longer rely on Article 28 SBC. They then used Article 25 in conjunction with Article 27 SBC.⁶² Article 25 SBC provides the general framework for the temporary reintroduction of internal border control in foreseeable cases where there is a serious threat to public policy or internal security and when 'immediate or urgent actions are not required'.⁶³ Member States must notify the Commission, the other Member States, the European Parliament, and the Council at the latest four weeks before the planned reintroduction or within a shorter period if the circumstances become known later.⁶⁴ Border controls may be reintroduced 'for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days'.⁶⁵ Thereafter, they may be prolonged for renewable periods of up to 30 days.⁶⁶ The total duration may not exceed six months under Article 25. However, if exceptional circumstances resulting from 'persistent serious deficiencies relating to external border control', putting the overall functioning of the Schengen area without internal border control at risk materialise, Member States may prolong their controls for up to two years.⁶⁷ During the COVID-19 pandemic, such exceptional circumstances mentioned in Article 29 SBC did not occur and hence the Council did not issue a recommendation,⁶⁸ so the Member States could not legally extend their internal border controls for two years. They could only rely on Articles 25 and 28 SBC to reintroduce internal border controls. The following section assesses the proportionality of the measures taken pursuant to these two articles during the COVID-19 pandemic.

3.2 Four aspects of proportionality during the COVID-19 pandemic

3.2.1 First aspect: type of threat

The first aspect of proportionality concerns the type of threat invoked by Member States to reintroduce internal border controls during

⁵⁹ *ibid*, Article 28(1).

⁶⁰ *ibid*, Article 28(3).

⁶¹ *ibid*, Article 28(4).

⁶² Only Iceland remained within the maximum period set in Article 28 SBC and did not subsequently rely on Article 25 SBC. Carrera and Luk (n 43) 54.

⁶³ SBC, Article 25(1).

⁶⁴ *ibid*, Article 27(1)-(2).

⁶⁵ *ibid*, Article 25(1).

⁶⁶ *ibid*, Article 25(3).

⁶⁷ *ibid*, Article 25(4).

⁶⁸ *ibid*, Article 29(1); Montaldo (n 54) 525.

the COVID-19 pandemic. It relates to the legality test of the general proportionality test, but is not identical. Protecting public health is a legitimate objective to pursue. However, the question is whether this is one of the grounds in the Schengen Borders Code for the reintroduction of internal border controls. Articles 25 and 28 SBC provide that Member States may only reintroduce internal border controls when there is a ‘serious threat to public policy or internal security’. However, during the COVID-19 pandemic, Member States took some precautionary measures primarily to protect public health.⁶⁹ Subsection 3.2.1.1 presents the two main arguments raised in this debate: on one hand, public health falls under public policy or internal security, and, on the other hand, public health is not a ground provided for in the Schengen Borders Code. Then, Subsection 3.2.1.2 focuses on a case pending before the ECJ concerning this ground of ‘public health’, *NORDIC INFO*,⁷⁰ and suggests a line of reasoning that the ECJ might follow in this future judgment.

3.2.1.1 Debate about public health as a type of threat

On one hand, academics accepting public health as part of public policy or internal security rely on the Communication of the Commission of 16 March 2020⁷¹ and the broad interpretation of these concepts. First, Montaldo, Brosset, and Ramji-Nogales and Goldner Lang argue that the Commission reckons that, in principle, border controls are an appropriate response to a pandemic, which is then a matter of public policy or internal security.⁷² They rely on this statement from the Commission: ‘Member States may reintroduce temporary border controls at internal borders if justified for reasons of public policy or internal security. In an extremely critical situation, a Member State can identify a need to rein-

⁶⁹ Wolff, Ripoll Servent and Piquet (n 53) 1135. Internal border controls were primarily reintroduced to slow down the spread of the coronavirus. At the same time, they prevented people from stockpiling or seeking medical assistance in the neighbouring Member States, or temporarily relocating to regions with better epidemiological data. Heinikoski (n 49) 6. On the other hand, Carrera and Chunk Luk argue that Member States invoked the protection of public health even though health checks did not seem to be the primary objective of the reintroduction of border controls. Carrera and Luk (n 51) 27.

⁷⁰ Request for a preliminary ruling from the *Nederlandstalige rechtbank van eerste aanleg Brussel* (Belgium) lodged on 23 February 2022 — *NORDIC INFO v Belgische Staat* (Case C-128/22) [2022] OJ C213/26).

⁷¹ COM (2020) 1753 final.

⁷² Montaldo (n 54) 528; Estelle Brosset, ‘Le droit de l’Union européenne des pandémies à l’épreuve de la crise de la Covid-19: entre confinement et déconfinement’ (2020) 3 *Revue trimestrielle de droit européen* 493, 495; Jaya Ramji-Nogales and Iris Goldner Lang, ‘Freedom of Movement, Migration, and Borders’ (2020) 19 *Journal of Human Rights* 593, 596–597. Carrera and Chun Luk consider that the communication set an alarming precedent for current and future derogations. Carrera and Luk (n 43) 57–58. On the other hand, Gerkrath believes that not too much weight should be accorded to the communication of the Commission since it is not legally binding and only reflects the view of one EU institution. Moreover, he adds that there is no evidence that the Commission conducted a thorough examination of the legality of the national decisions before adopting its position. Gerkrath (n 54) 8.

roduce border controls as a reaction to the risk posed by a contagious disease'.⁷³

Second, Montaldo, De Bruycker, Brosset, Thym, Bornemann, Commissioner Johansson, and van Eijken and Rijpma argue that the concept of public policy or internal security comprises public health concerns arising from the COVID-19 pandemic, sometimes with some limitations. The scope of public policy and internal security is unclear and varies between Member States.⁷⁴ Montaldo considers that the health emergency spilled over and affected the community's social and economic life and the regular functioning of key public services.⁷⁵ De Bruycker bases his opinion mainly on the absence of treatment (especially at the beginning of the pandemic) and the threat of the virus to the entire population.⁷⁶ Brosset emphasises the broad scope of public policy and internal security,⁷⁷ while Thym highlights the numerous fundamental society interests affected by the outbreak.⁷⁸ Thym and Bornemann deem that the severe social, economic and health effects of the pandemic meet the threshold of public policy.⁷⁹ Commissioner Johansson stated that '[i]n an extremely critical situation, public policy could include reasons of public health'.⁸⁰

⁷³ COM (2020) 1753 final, para 18 (emphasis added). Rittleng considers that the Commission legitimised *a posteriori* the controls reintroduced by the Member States. Dominique Rittleng, 'L'Union européenne et la pandémie de Covid-19: de la vertu des crises' (2020) 3 Revue trimestrielle de droit européen 483, 485. Commissioner Johansson repeated the exact words of the communication in her answer to an MEP's question on 24 July 2020. Ylva Johansson, 'Answer given by Ms Johansson on behalf of the European Commission to question for written answer E-001971/2020' (*European Parliament*, 24 July 2020) <https://www.europarl.europa.eu/doceo/document/E-9-2020-001971-ASW_EN.html> accessed 1 September 2022. Additionally, in her statement of 12 August 2020, Commissioner Johansson stated that the decision to reintroduce internal border controls 'may be taken, in extremely critical situations, based on a threat to public health'. Ylva Johansson, 'Answer given by Ms Johansson on behalf of the European Commission to question for written answer E-001827/2020' (*European Parliament*, 12 August 2020) <https://www.europarl.europa.eu/doceo/document/E-9-2020-001827-ASW_EN.html> accessed 1 September 2022).

⁷⁴ Montaldo (n 51) 419. Usually, the notion of public policy refers to threats to fundamental interests of the States and internal security can be invoked, for example, in situations of disrupted provision of essential services. Montaldo (n 54) 527.

⁷⁵ Montaldo (n 51) 416-417. Montaldo broadens his reasoning to any public health emergency reaching a certain threshold of seriousness and magnitude (*ibid* 419).

⁷⁶ De Bruycker (n 50) 4.

⁷⁷ Brosset (n 72) 495.

⁷⁸ Daniel Thym, 'Travel Bans in Europe: A Legal Appraisal' (*Verfassungsblog*, 19 March 2020) <<https://verfassungsblog.de/travel-bans-in-europe-a-legal-appraisal/>> accessed 1 September 2022.

⁷⁹ Thym and Bornemann (n 20) 1148. In addition, Thym and Bornemann contend that the Schengen Borders Code includes public health concerns arising from a pandemic when interpreted in the light of Article 35 of the Charter. That article guarantees that '[a] high level of human health protection shall be ensured in the [...] implementation of all the Union's policies and activities'. *ibid* 1149.

⁸⁰ Ylva Johansson, 'Answer given by Ms Johansson on behalf of the European Commission to priority question for written answer P-001115/2020' (*European Parliament*, 15 June 2020) <https://www.europarl.europa.eu/doceo/document/P-9-2020-001115-ASW_EN.html> accessed 1 September 2022.

Van Eijken and Rijpma consider that the COVID-19 pandemic constituted a serious threat to public policy given the exceptional and generalised threat to public health, but only at the outset of the pandemic and with a highly purposive interpretation.⁸¹

On the other hand, three arguments and the European Parliament's view⁸² comfort the opinion of academics refusing to consider public health as a ground under the Schengen Borders Code, such as Carrera and Luk. First, Title III of the Code on internal borders does not include public health as a reason for reintroducing internal border controls, nor do Recitals 24 and 25 of the preamble.⁸³ Carrera and Luk contend that Member States should not misuse the notions of public policy and internal security to derogate from the Schengen Borders Code.⁸⁴ Second, Article 8(2)(b) SBC includes public health in the justifications to reintroduce *external* border controls. The absence of explicit mention of public health in the provisions concerning internal border controls shows that the EU legislature did not intend public health to be a ground for the reintroduction of internal border controls contrarily to external border controls.⁸⁵ Third, the legislative history of the Code confirms this.⁸⁶ In a proposal for a predecessor regulation, the Commission included 'a threat to public health' among the grounds justifying the reintroduction of internal border controls.⁸⁷ However, the European Parliament deliberately deleted this ground, arguing that the reintroduction of internal border controls would not be the most appropriate and proportionate response in the event of a health crisis. Instead, the Member States should adopt

⁸¹ Van Eijken and Rijpma (n 8) 40–41. They argue that this way of interpreting the Schengen Borders Code shows its inadequateness. At first, they considered that the collapse of the public health system could have led to a breakdown of public order and hence threatened essential state functions. However, in the latter stage of the COVID-19 pandemic, they contend that the threat to public policy could no longer justify the internal border controls. *ibid.*

⁸² European Parliament, 'Resolution of 19 June 2020 on the situation in the Schengen area following the COVID-19 outbreak' (2020/2640(RSP)) para 7.

⁸³ Van Eijken and Rijpma argue that the absence of public health as a justifying ground in the Schengen Borders Code may explain why France did not solely rely on the spread of the virus in its first notification of the reintroduction of internal border controls. France also added 'the continuing threat of terrorism and the risk that terrorists would use the health situation to carry out attacks'. van Eijken and Rijpma (n 8) 40.

⁸⁴ Carrera and Luk (n 43) 57.

⁸⁵ *ibid.*; Montaldo (n 51) 414.

⁸⁶ Carrera and Luk (n 43) 57.

⁸⁷ Commission, 'Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders' COM (2004) 391 final, Article 20. This Article 20 is now Article 25 SBC.

health-related measures, such as quarantines.⁸⁸ The ECJ will presumably close the debate soon when it renders its judgment in the *NORDIC INFO* case.

3.2.1.2 *NORDIC INFO* will close the debate

As mentioned in the introduction, in February 2022, a Belgian court sent a preliminary reference to the ECJ, asking, among other things, ‘whether, in times of crisis, an infectious disease can be equated with a threat to public policy or internal security within the meaning of Articles 23(a) and 25 SBC, thus making the reintroduction of internal border controls [...] possible on that basis’.⁸⁹ Then, the Belgian court refers to the Commission’s Communication of 16 March 2020, which, in its opinion, does not expressly confirm that the Commission considers the pandemic to be a public policy reason justifying the reintroduction of internal border controls.⁹⁰ In its written submission, the applicant argues that the Schengen Borders Code does not include public health as a justification for the temporary reintroduction of border controls.⁹¹ On the contrary, the defendant considers that public health is an underlying objective of the Schengen Borders Code, and that the precautionary principle and the safeguarding of public policy and internal security can justify the measures taken.⁹² The arguments in this pending case mirror those in the current academic debate presented above.

Building upon the arguments mentioned above and following the traditional interpretation method of an EU law provision of the ECJ, ie the ‘text-context-objectives’ method,⁹³ these paragraphs present a likely outcome for the *NORDIC INFO* case. Regarding the wording, Article 25 SBC clearly establishes in which situations Member States may reintroduce internal border controls, namely where ‘there is a serious threat to public policy or internal security’. It does not include a ‘threat to public health’ among the circumstances allowing the temporary reintroduction

⁸⁸ MEP Sylvia-Yvonne Kaufmann declared that ‘[i]t is difficult to imagine that in such a case internal border controls should be reintroduced to undertake health checks of travellers (if “threat to public health” is the justification to reintroduce controls then that makes only sense if the controls focus on detecting such a threat)’. European Parliament, Amendment by Sylvia-Yvonne Kaufmann (MEP), Amendment 171. This point is mentioned by Carrera and Luk (n 43) 57, fn 258. However, it is nearly impossible to identify the exact document of the European Parliament.

⁸⁹ Case C-128/22: Summary of the request for a preliminary ruling (Working document, 23 February 2022) para 18.

⁹⁰ *ibid*, para 19.

⁹¹ *ibid*, para 7.

⁹² *ibid*, para 9.

⁹³ When asked to interpret EU law, the ECJ considers the wording, the context, and the objectives of the provision and the legislation of which it forms part. NW (n 11) para 56.

of internal border controls.⁹⁴ Then, as it concerns the context, there is no ambiguity either considering that the Code has never included a 'threat to public health' in its wording.⁹⁵ As regards the objectives, the procedure in Article 25 SBC constitutes an exception to the general principle ensuring the absence of control of persons when they cross internal borders and hence must be strictly interpreted.⁹⁶ The reintroduction of internal border controls on the basis of Article 25 SBC must thus be stringently limited to the situations mentioned explicitly in the article so as not to jeopardise the area without internal frontiers set in Article 3(2) TEU. Therefore, the ECJ is unlikely to agree with the defendant that public health as such is an underlying objective of the Schengen Borders Code. It will rather conclude that the scope of Article 25 SBC is limited to situations of serious threat to public policy and internal security. The three elements of the traditional interpretation method tally with the applicant's position.

However, the absence of mention of public health in the Code does not mean that the consequences of a public health emergency may not fall within the scope of public policy or internal security under exceptional circumstances and trigger the conditions set in Article 25. With this judgment, the ECJ should take the opportunity to clarify when a threat posed by a virus constitutes 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society',⁹⁷ meeting the threshold of a threat to public policy. The Court could note that, for example, at the outset of the COVID-19 pandemic, the new virus constituted a threat to public policy due to the exceptional characteristics of the pandemic.⁹⁸ However, the ECJ has to determine whether the COVID-19 pandemic in July 2020, when the Belgian government took the disputed measure,⁹⁹ can be equated with a threat to public policy or internal security.¹⁰⁰ In July 2020, most Member States lifted their internal border controls reintroduced on the ground of 'coronavirus COVID-19'.¹⁰¹ The public policy and internal security of the Member States were not under threat due to the pandemic. Moreover, the epidemiological situation had

⁹⁴ The case before the ECJ only concerns the specific procedure under Article 25 SBC. Hence, this paragraph does not mention Article 28 SBC, which comprises the same circumstances to reintroduce internal border controls.

⁹⁵ Carrera and Luk (n 43) 57.

⁹⁶ SBC, Recital 27.

⁹⁷ *ibid.*

⁹⁸ This reasoning would be similar to the one mentioned in Van Eijken and Rijpma (n 10) 40–41 and Montaldo, (n 51) 415.

⁹⁹ Case C-128/22: Summary of the request for a preliminary ruling (Working document, 23 February 2022) paras 2–3.

¹⁰⁰ *ibid.*, para 18.

¹⁰¹ Only Denmark (to the extent necessary), Norway, Hungary, Finland, and Lithuania had border controls in place in July 2020 for reasons of 'coronavirus COVID-19'. Commission, 'List of Member States' notifications' (1 September 2022) (n 8) notifications 163, 172, 198, 215–216, and 221–223). Other Member States, such as Austria, Germany and Sweden, also had border controls in place in July 2020 but for other reasons, including terrorist threats and secondary movement. *ibid.*, notifications 164, 175, and 181.

improved in Europe, including in Belgium, compared to March and April 2020.¹⁰² In the light of these considerations, the Court could hardly conclude that, when the Belgian government took the disputed measure, the COVID-19 pandemic still constituted a threat to public policy or internal security. However, this matter is ultimately for the referring court to determine.¹⁰³

In conclusion, the Court could answer that Article 25 SBC precludes the Member States from reintroducing internal border controls in situations of a serious threat to public health alone. However, Article 25 SBC does not preclude the Member States from reintroducing internal border controls when the threat caused by an infectious disease or a pandemic seriously affects one of the fundamental interests of society or the internal security of a Member State. If the Court follows this approach, it will uphold the legislature's will by firmly restricting recourse to Article 25 SBC to situations of serious threats to public policy and internal security and increase legal certainty as to the circumstances that may trigger the reintroduction of internal border controls.

3.2.2 *Second aspect: adequacy*

In second place, it is controversial whether the reintroduction of internal border controls adequately remedies the threat created by the COVID-19 pandemic. Except for the words 'adequately remedy' in Article 26, the Schengen Borders Code is silent about adequacy. This second aspect of proportionality is similar to the test of suitability of the general principle of proportionality. Subsection 3.2.2.2 assesses whether internal border controls were appropriate to limit the spread of the virus and distinguishes the first wave of contamination from subsequent waves. Before conducting this assessment, Subsection 3.2.2.1 explains the differences between border controls in the Schengen Borders Code and health screenings at the borders during the COVID-19 pandemic.

3.2.2.1 Border controls vs health checks

Article 2(10) SBC defines border controls as 'the activity carried out at a border, [...] in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration [...]'. This definition is quite broad and may encompass different activities depending on the type of threat requiring the reintroduction of internal border

¹⁰² For example, in the week of 8 to 14 July 2020, when the disputed measure was taken, there were on average 127.4 new cases every day in Belgium, while three months before, between 7 and 13 April 2020, there were on average 3,452 new cases per day. Sciensano, 'Belgium COVID-19 Epidemiological Situation' <<https://datastudio.google.com/embed/reporting/c14a5cfc-cab7-4812-848c-0369173148ab/page/ZwmOB>> accessed 2 December 2022.

¹⁰³ Usually, the ECJ clearly states that the application of the principle that it has established to the facts of the case is a matter to be determined by the referring court. See, for example, *NW* (n 11) para 82.

controls. The minimum verification consists of quickly checking the validity of the document authorising border crossing.¹⁰⁴

During the COVID-19 pandemic, internal border controls included identity checks, but also health checks, usually in the form of a temperature record.¹⁰⁵ Carrera and Luk consider that health checks conducted at the borders during the pandemic pursued a different objective than border controls.¹⁰⁶ The former aimed at ensuring that people crossing the border did not present symptoms of COVID-19,¹⁰⁷ while the latter intended to check that people crossing the border had the necessary documents to enter the country legally.¹⁰⁸ This change in the nature of controls put the border guards in the incongruous position of ‘doctors’.¹⁰⁹ The Commission claimed that the organisation of these health checks does not require the formal introduction of border controls.¹¹⁰ Montaldo argues that it is more effective to perform these checks within the Member States’ territory.¹¹¹ Yet, most Member States formally reintroduced internal border controls to conduct health checks and, at the same time, enforce entry bans or other restrictions on freedom of movement.

3.2.2.2 Different waves: from uncertain effectiveness to political message

Scientific uncertainty prevailed during the first wave of the pandemic.¹¹² Between late April and June 2020, at the peak of the reintroduction of internal border controls, eighteen Member States had reintroduced such measures mainly to enforce border closures,¹¹³ despite the European Centre for Disease Prevention and Control and the World Health

¹⁰⁴ Bouveresse (n 20) 512.

¹⁰⁵ Ségolène Barbou des Places, ‘Covid-19: le renforcement des contrôles aux frontières Schengen’ (*Le Club des Juristes – Blog Coronavirus*, 12 May 2020) <<https://blog.leclubdes-juristes.com/covid-19-le-renforcement-des-contrôles-aux-frontières-schengen/>> accessed 1 September 2022.

¹⁰⁶ Carrera and Luk (n 51) 26.

¹⁰⁷ In its Guidelines of 16 March 2020, the Commission made clear that those infected by the coronavirus should not be refused entry, but rather have access to health care. COM (2020) 1753 final, para 19.

¹⁰⁸ Carrera and Luk (n 51) 26.

¹⁰⁹ *ibid.*

¹¹⁰ COM (2020) 1753 final, para 20. The Commission did not clearly explain the difference between border controls and health checks at the borders in the context of the COVID-19 pandemic. The European Court of Auditors is worried that the Member States implement health checks which are de facto border controls without notifying the Commission. European Court of Auditors (n 15) para 56. Besides the absence of the notification obligation, health checks have no maximum duration. Heinikoski (n 49) 6.

¹¹¹ Montaldo (n 51) 415.

¹¹² Iris Goldner Lang, ‘“Laws of Fear” in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19’ (2021) *European Journal of Risk Regulation* 1, 6.

¹¹³ Schade (n 9) 1.

Organization not supporting them.¹¹⁴ At this stage of the pandemic, the Member States enjoyed a high level of discretion considering the lack of reliable scientific knowledge.¹¹⁵ It was unknown whether the reintroduction of internal border controls was adequate to remedy the threat, but at least it showed citizens that their government was acting.¹¹⁶

In subsequent waves, fewer Member States reintroduced or prolonged internal border controls since it became more difficult for them to justify these measures.¹¹⁷ Indeed, scientific research has not demonstrated that the reintroduction of border controls effectively contributes to containing the spread of the virus.¹¹⁸ The Commission considers that these measures were unsuccessful and not the most efficient to address the threat resulting from the pandemic.¹¹⁹ Montaldo believes that border controls are not fit for purpose.¹²⁰ When border controls solely consist of verifying identity documents and checking some documents, they do not prevent a virus from crossing borders.¹²¹ Additionally, the virus was present in every Member State at that stage of the pandemic.¹²² Yet, some Member States still reintroduced border controls known to be ineffective and inadequate.¹²³ Guild notes a convergence between these Member States and those that had reintroduced internal border controls for migration and anti-terrorism reasons.¹²⁴ She concludes that these Member

¹¹⁴ Goldner Lang (n 112) 14. In February and May 2020, the European Centre for Disease Prevention and Control stated that '[a]vailable evidence [...] does not support recommending border closures which will cause significant secondary effects and societal and economic disruption in the EU'. European Centre for Disease Prevention and Control, *Guidelines for the use of non-pharmaceutical measures to delay and mitigate the impact of 2019-nCoV*, ECDC Technical Report, 2020) 8; European Centre for Disease Prevention and Control, *Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA* (ECDC Technical Report, 2020) 3.

¹¹⁵ Montaldo (n 51) 415.

¹¹⁶ The Member States actually reintroduced internal border controls well after the first infections in the EU. Stefan and Luk (n 19) 3.

¹¹⁷ Montaldo (n 51) 409; Thym and Bornemann (n 20) 1170. Gerkrath argues that the fact that some Member States, such as Germany, did not reintroduce internal border controls in the subsequent waves proves that that measure was ineffective and unnecessary. Gerkrath (n 54) 10. Nevertheless, one month after the publication of Gerkrath's article, Germany reintroduced internal border controls despite the earlier promise of not doing so. Schade (n 9).

¹¹⁸ Carrera and Luk (n 43) 48.

¹¹⁹ 'Impact Assessment Report Accompanying the 2021 Proposal' (n 20) 11 and 37.

¹²⁰ Montaldo (n 51) 418.

¹²¹ Gerkrath (n 54) 9.

¹²² For instance, during the second wave, which took place partly in November 2020 in Europe, every Member State reported new cases of infection with the new coronavirus. European Centre for Disease Prevention and Control, 'Download Historical Data (to 14 December 2020) on the Daily Number of New Reported COVID-19 Cases and Deaths Worldwide' (ECDC, 14 December 2020) <<https://www.ecdc.europa.eu/en/publications-data/download-todays-data-geographic-distribution-covid-19-cases-worldwide>> accessed 1 September 2022.

¹²³ Montaldo (n 51) 415.

¹²⁴ Guild (n 5) 403.

States consider border controls as a significant political solution to various crises.¹²⁵

Gerkrath and Heinikoski argue that the reintroduction of internal border controls was not intended to prevent the circulation of the virus. Rather, it was a way of showing the public that the authorities were acting.¹²⁶ The reintroduction of internal border controls was thus a political symbol rather than an effective epidemiological measure.¹²⁷ In addition to being ineffective, these controls are an aberration from a public health perspective. Indeed, border guards had contact with potentially infected people, and the controls led to the emergence of large gatherings, such as queues, at border crossing points. Both increased the risk of spreading the virus.¹²⁸ The reintroduction of internal border controls was thus a mere political measure not adequate to remedy the threat resulting from the COVID-19 pandemic.

3.2.3 *Third aspect: duration of internal border controls*

In third place, the proportionality of the measures in relation to the threat resulting from the pandemic is debatable. The duration of the reintroduced internal border controls must be considered when assessing proportionality. This question of duration is included in the necessity test, which requires that the measure taken is the least restrictive. Keeping controls for long periods is certainly not the least restrictive measure. The following subsection gives more details about Member States' practices of prolonging their controls by switching legal bases. Then, Subsection 3.2.3.2 presents a judgment in which the Grand Chamber of the ECJ decided on the maximum duration of internal border controls reintroduced under Article 25 SBC.

Before turning to the Member States' practices and the ECJ case law, this paragraph shows that the Schengen Borders Code offers clear safeguards regarding necessity. Article 25(1) requires that '[t]he 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'. Moreover, Articles 25 and 28 limit the reintroduction of internal border controls to six months when the threat is foreseeable¹²⁹ and two months when it is unforeseeable.¹³⁰ These articles demonstrate that the reintroduction of border controls is supposed to be a temporary

¹²⁵ *ibid.*

¹²⁶ Gerkrath (n 54) 10; Heinikoski (n 49) 7.

¹²⁷ Montaldo (n 51) 417.

¹²⁸ Guild (n 5) 399; COM (2020) 1753 final, para 22. In its Guidelines, the Commission warned the Member States to prevent large gatherings when reintroducing internal border controls. However, in practice, long queues at border crossing points were frequent and were accentuated by border closures.

¹²⁹ SBC, Article 25(4).

¹³⁰ *ibid.*, Article 28(4).

measure of last resort,¹³¹ since it is a derogation to the general rule contained in Article 22 SBC.¹³²

3.2.3.1 Switching legal bases

It appears that, during the COVID-19 pandemic, similarly to during the migration and terrorism crises,¹³³ some Member States jumped from one legal basis to another to prolong the duration of their internal border controls beyond the legal limit.¹³⁴ For instance, France notified three times the Commission of the reintroduction of internal border controls for reasons of ‘Coronavirus COVID-19’ (in combination with the continuous terrorist threat and secondary movements) for the continuous period between 1 May 2021 and 31 October 2022,¹³⁵ and Norway nine times for the continuous period between 14 August 2020 and 7 October 2021.¹³⁶ These Member States’ controls lasted well beyond the six months allowed, resulting in a ‘partial de facto suspension of Schengen’.¹³⁷

¹³¹ *ibid.*, Articles 25(2) and 26.

¹³² ‘Resolution of 19 June 2020’ (n 82) para 5.

¹³³ These practices of switching legal basis to extend the duration of controls are not typical of the COVID-19 pandemic. They had already taken place during the two previous crises affecting the Schengen area. France, Austria, Denmark, Germany, Sweden, and Norway kept their internal border controls for seven years, between 2015 and 2022, to deal with migration, terrorism, and the COVID-19 pandemic. Mariana Martins Pereira, ‘Op-Ed: “The Court of Justice’s ruling in the case of temporary reintroduction of internal border controls: to codify or not to codify? (Joined Cases C-368/20 and C-369/20)”’ (*EU Law Live*, 24 May 2022) <<https://eulawlive.com/op-ed-the-court-of-justices-ruling-in-the-case-of-temporary-reintroduction-of-internal-border-controls-to-codify-or-not-to-codify-joined-cases-c-368-20-and-c-369-20-by/>> accessed 1 September 2022; Barbou des Places (n 105); Salomon and Rijpma (n 22) 6. For instance, Joined Cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark* ECLI:EU:C:2022:298 concern the switch of legal bases during the migration crisis.

¹³⁴ Carrera and Luk (n 43) 48; Barbou des Places (n 105). However, most Member States reintroduced their border controls without switching legal bases to extend their duration. On 24 August 2020 (about six months after the first reintroduction of controls), only five Member States had their border controls still in place for reason of COVID-19: Denmark, Finland, France, Lithuania, and Norway. Carrera and Luk (n 43) 18).

¹³⁵ ‘List of Member States’ notifications’ (n 8) notifications 288, 314 and 325. France is not the only Member State which switched legal bases to extend the duration of its controls as mentioned in n 133. However, it is the only Member State that kept its border controls for reasons of ‘Coronavirus COVID-19’ in spring 2022. Martins Pereira (n 133). Since the establishment of the Schengen area, France has been reluctant to remove border controls. Between 1999 and 2022, it was for only four years that France did not reintroduce temporary border controls. Gülzau (n 49) 13.

¹³⁶ ‘List of Member States’ notifications’ (n 8) notifications 226, 231, 238, 243, 259, 274, 291, 302, and 313. Based on the duration of the controls notified, usually one month, it is likely that Norway relied on Article 28 SBC for seven of them, while France rather used Article 25 SBC and chose periods of six months. These examples show the diversity of Member States’ responses to the COVID-19 pandemic.

¹³⁷ Salomon and Rijpma (n 22) 2.

The Schengen Borders Code does not allow these practices, even though it does not explicitly prohibit them.¹³⁸ Switching legal bases to continuously prolong border controls goes against the wording and the spirit of the Code.¹³⁹ The European Parliament is concerned about these practices of ‘artificially changing the legal basis for reintroduction to extend it beyond the maximum possible period in the same factual circumstances’ and made a call to stop them even during the previous crisis in 2018.¹⁴⁰ However, this injunction had little effect on the Member States’ practices, as observed during the COVID-19 pandemic.¹⁴¹

3.2.3.2 Strict limits set in *NW*

In its recent judgment of 26 April 2022,¹⁴² the ECJ had the opportunity to rule for the first time on these practices of switching legal bases for artificially extending the duration of internal border controls.¹⁴³ The Grand Chamber of the ECJ agreed with the European Parliament and confirmed that the Member States may not reintroduce internal border controls based on Articles 25 and 27 SBC for a duration exceeding ‘the maximum total duration of six months,¹⁴⁴ set in Article 25(4) [when] no

¹³⁸ Carrera and Luk (n 43) 50.

¹³⁹ Salomon and Rijpma (n 22) 2; Martins Pereira (n 133).

¹⁴⁰ European Parliament, ‘Resolution of 30 May 2018 on the annual report on the functioning of the Schengen area’ (2017/2256(INI)) para 10.

¹⁴¹ On 1 September 2022, only France was maintaining its controls for reasons of COVID-19, but the five other Member States familiar with the legal bases switch were maintaining their controls for other reasons. The legal basis switch no longer occurs for reasons of COVID-19, but these Member States continue to prolong their border controls beyond the time limits set in the Schengen Borders Code. ‘List of Member States’ notifications’ (n 8).

¹⁴² *NW* (n 11). This judgment concerns the reintroduction of internal border controls by Austria at its borders with Hungary and Slovenia during the migration crisis (para 26). The Austrian border controls reintroduced on the basis of Article 25 started on 11 November 2017 and were continuously prolonged at least until 13 November 2019 (paras 26–27).

¹⁴³ Martins Pereira (n 133). It is the first time that the ECJ rules on the long-standing internal border controls, although the practice is not new. In France, non-governmental organisations had unsuccessfully challenged the reintroduction of continuous border controls even in 2017 and 2019, before the *NW* judgment. However, in both instances, the French Council of State considered that Article 25 SBC does not prevent the reintroduction of border controls for a further period of up to six months in the event of a new or renewed threat to public order or internal security. It did not define these notions of ‘new or renewed threat’. In contrast to the Austrian court, the French Council of State did not refer to the ECJ. French Council of State, Decision No 415291 (28 December 2017) para 7; French Council of State, Decision No 425936 (16 October 2019) paras 6–7.

¹⁴⁴ The ECJ considers that the EU legislature regards a period of six months as sufficient for the Member States to adopt measures able to meet the serious threat to public policy or internal security, while maintaining freedom of movement after that six-month period. *NW* (n 11) para 77. A parallel can be drawn between this possibility to reintroduce internal border controls for up to six months and the institution of Roman dictatorship that lasted for a maximum of six months as well. During the Roman republic, men realised that additional powers in order to meet a threat should be limited in time. The EU legislature adopted a similar approach when deciding to limit the reintroduction of internal border controls under Article 25 SBC for up to six months. For further information on the institution of Roman dictatorship, see Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006) 17–26.

new threat exists that would justify applying afresh the periods provided for in Article 25'.¹⁴⁵ The strict and clear wording of the maximum duration in the Code was decisive, as were the context and objectives of the provision.¹⁴⁶

The ECJ added that allowing the reintroduction of internal border controls on account of the same threat beyond six months would jeopardise the principle behind the creation of the Schengen area, namely the absence of internal border control.¹⁴⁷ The Court emphasised that the Member States must prove the existence of a new threat, but remained vague about what constitutes a new threat.¹⁴⁸ Thym fears that Member States would abuse this concept of a 'new threat' by invoking any new risk or discontinuing their controls for a few weeks before reintroducing them based on the same threat.¹⁴⁹ This fear materialised with the decision of the French Council of State of 27 July 2022.¹⁵⁰ The French Council of State considered a threat to be new 'either when it is of a different nature from previously identified threats, or when new circumstances and events change its characteristics in such a way as to alter its topicality, scope or consistency. Such circumstances and events may relate, in particular, to the subject of the threat, its scale or intensity, its location and its origin'.¹⁵¹ This definition is broad, and the French Council of State interpreted it accordingly. In the context of the COVID-19 pandemic, it considered that the arrival of new dominant variants of COVID-19, which have a particularly high level of transmissibility and for which vaccines

¹⁴⁵ *NW* (n 11) para 94.

¹⁴⁶ *ibid*, paras 57–62.

¹⁴⁷ *ibid*, para 66. In his opinion in the *NW* case, AG Saugmandsgaard Øe held a different point of view. For him, '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 code provided that all the criteria laid down by that code are satisfied, in particular that of proportionality'. *Joined Cases C-368/20 and C-369/20 NW v Landespolizeidirektion Steiermark* ECLI:EU:C:2021:821, Opinion of AG Saugmandsgaard Øe, para 75.

¹⁴⁸ *NW* (n 11) paras 79–81; Pola Cebulak and Marta Morvillo, 'Schengen Restored: The CJEU Sets Clear Limits to the Reintroduction of Internal Border Controls' (*Verfassungsblog*, 5 May 2022) <<https://verfassungsblog.de/schengen-restored/>> accessed 1 September 2022.

¹⁴⁹ Daniel Thym, 'Op-Ed: "Illegality of Internal Border Controls: The Court of Justice feeds the Appetite for Legislative Reform: Landespolizeidirektion Steiermark (C-368/20 & C-369/20)"' (*EU Law Live*, 4 May 2022) <<https://eulawlive.com/op-ed-illegality-of-internal-border-controls-the-court-of-justice-feeds-the-appetite-for-legislative-reform-landespolizeidirektion-steiermark-c-368-20-c-369-20-by-daniel-thym/>> accessed 1 September 2022.

¹⁵⁰ French Council of State, Decision No 463850 (27 July 2022). In this decision, the French Council of State rejected the application of human rights associations to annul the French decision to extend border controls from 1 May 2022 to 31 October 2022 (introductory part and para 7).

¹⁵¹ Author's translation of French Council of State, Decision No 463850 (27 July 2022) para 5.

are less effective, constituted a new threat.¹⁵² The more a virus circulates, the more likely it is to have variants,¹⁵³ so it would be easy to meet the threshold of a 'new threat' in any pandemic situation, when by definition a virus circulates widely.¹⁵⁴ This national interpretation of a 'new threat' opens the door to abuses, as Thym feared, particularly in situations of large scale health emergencies.

Additionally, the ECJ clarified that the Member States could not rely on Article 72 TFEU to circumvent the strict time limit of six months.¹⁵⁵ The Court has been intransigent and thereby has protected the work of the EU legislature.¹⁵⁶ Due to the *erga omnes* effect of preliminary rulings, Austria is not the only Member State affected.¹⁵⁷ The judgment calls into question the practices of several Member States and would lead to the conclusion that the long-lasting internal border controls in the last decade have been illegal on numerous occasions.¹⁵⁸ It remains to be seen whether the Member States will comply with this recent judgment and refrain from using more than one legal basis to reintroduce internal border controls when a single threat persists. Subsection 4.2.3.2 below discusses the possible impact this judgment could have on the content of the 2021 proposal. Cebulak believes that the ECJ will probably develop a line of case law on the legality of the reintroduction of internal border controls.¹⁵⁹

¹⁵² French Council of State, Decision No 463850 (27 July 2022) para 6.

¹⁵³ World Health Organization, 'COVID-19: Variants' <<https://www.who.int/westernpacific/emergencies/covid-19/information/covid-19-variants>> accessed 2 December 2022.

¹⁵⁴ Merriam-Webster, 'Pandemic' <<https://www.merriam-webster.com/dictionary/pandemic>> accessed 2 December 2022. A pandemic is 'an outbreak of a disease that occurs over a wide geographic area (such as multiple countries or continents) and typically affects a significant proportion of the population'. *ibid.*

¹⁵⁵ NW (n 11) para 90.

¹⁵⁶ Martins Pereira (n 133).

¹⁵⁷ Cebulak and Morvillo (n 148).

¹⁵⁸ Thym (n 149); Cebulak and Morvillo (n 148). In paragraph 82 of the NW judgment, the ECJ declared that it seems that Austria did not prove the existence of a new threat and thus prolonged its border controls beyond the maximum duration of six months. Then it adds that it will be for the referring court to decide. NW (n 11) para 82.

¹⁵⁹ Cebulak and Morvillo (n 148). On 1 September 2022, there were two pending cases on the interpretation of the Schengen Borders Code. None of them explicitly requires that the ECJ rules on long-lasting controls reintroduced during the COVID-19 pandemic. The first case, *NORDIC INFO*, mentioned above, concerns Belgian measures. Based on the list of notifications received by the Commission, Belgium did not extend its border controls beyond the maximum duration during the COVID-19 pandemic. In the second case, *ADDE and Others*, the French Council of State lodged a request for a preliminary ruling on 1 March 2022. Some human rights associations requested that the judiciary annul Decree No 2020-1734 of 16 December 2020, which establishes a regime for the refusal of entry of third-country nationals coming from another Schengen Member State to France in the event of the reintroduction of internal border control. Case C-143/22: Request for a preliminary ruling of 24 February 2022 (Working document, 1 March 2022). France is one of the six Member States which have continuously been keeping internal borders since 2015, as mentioned in n 133. When deciding on the *ADDE and Others* case, the ECJ might take the opportunity to rule on the legality of continuous border controls.

3.2.4 Fourth aspect: scrutiny over proportionality

In the Schengen Borders Code, two mechanisms ensure that the re-introduced internal border controls are proportionate. On the one hand, the Member States have three main obligations linked to proportionality.¹⁶⁰ First, they must assess the proportionality of the reintroduction of internal border controls and their prolongation under Article 26 SBC. Second, they must notify the Commission and the other Member States of certain information, such as the reasons and the scope of the reintroduction of internal border controls.¹⁶¹ When the threat is foreseeable, they must simultaneously submit the same information to the European Parliament and the Council.¹⁶² This notification duty must be read in combination with Article 31 SBC, which requires Member States to inform the European Parliament and the Council as soon as possible of any reasons triggering internal border controls. Third, under Article 33 SBC, they must present an ex-post report to the European Parliament, the Council, and the Commission with certain information including an ex-post assessment of the proportionality of the reintroduced internal border controls.

On the other hand, the Commission has a supervisory role. It must request additional information if necessary¹⁶³ and issue an opinion if it has 'concerns as regards the necessity or proportionality' of internal border controls.¹⁶⁴ Moreover, the Commission has a reporting role: it must inform the European Parliament and the Council as soon as possible of any reasons triggering internal border controls¹⁶⁵ and present a report, at least annually, on the functioning of the Schengen area to the European Parliament and the Council.¹⁶⁶ Thus, the Schengen Borders Code provides clear rules on the proportionality assessment, notification and report duties of the Member States and the scrutiny and reporting roles of the Commission.¹⁶⁷

¹⁶⁰ Carrera and Luk (n 43) 50.

¹⁶¹ SBC, Article 27(1) when the threat is foreseeable and Article 28(2) when the threat is unforeseeable.

¹⁶² *ibid*, Article 27(2). When the threat is unforeseeable, Member States do not have such a duty. Instead, according to Article 28(5) SBC, the Commission must inform without delay the European Parliament of the notifications made under Article 28.

¹⁶³ *ibid*, Article 27(1).

¹⁶⁴ *ibid*, Articles 27(4), 28(3), and the second paragraph of Article 33. Article 27(4) SBC allows the Member States to issue an opinion when another Member State decides to reintroduce internal border controls.

¹⁶⁵ *ibid*, Article 31.

¹⁶⁶ *ibid*, third paragraph of Article 33.

¹⁶⁷ Moreover, Article 27(5) and (6) SBC provides the possibility to hold consultations, including joint meetings between the Member State planning to reintroduce controls, the Member States affected by the reintroduction of controls, and the Commission. These consultations, taking place at the latest ten days before the planned reintroduction, aim at arranging mutual cooperation between the Member States and examining the proportionality of the controls. This article does not focus on this mechanism.

Yet, during the COVID-19 pandemic, several Member States failed to comply with their duties related to proportionality, and the Commission did not address these failures. Indeed, the Member States' notifications did not provide sufficient information that the internal border controls had been reintroduced as last resort measures, as proportionate, and of limited duration.¹⁶⁸ The European Parliament has been worried about the lack of justification concerning respect for the principle of proportionality and the strictly limited period in the notifications.¹⁶⁹ Moreover, some ex-post reports did not contain sufficient information, while some Member States did not even send their ex-post reports.¹⁷⁰ Despite these Member States' failures, the Commission remained inactive: it did not request additional information or issue an opinion.¹⁷¹ The Commission's inaction has been criticised in the literature and by the European Parliament.¹⁷² The following subsection discusses further the Commission's passivity regarding its scrutiny role. It investigates why the Commission did not act under the Code. Then, the last subsection focuses on the infringement procedure, another tool available to the Commission to ensure that the Member States respect EU law, *inter alia*, when they reintroduce internal

¹⁶⁸ 'Resolution of 19 June 2020' (n 82) para 5. Only a limited number of notifications of the Member States included some considerations about the proportionality of the reintroduction of internal border controls. Carrera and Luk (n 43) 68. Some Member States have not, or only to a limited extent, assessed the necessity of temporarily reintroducing internal border controls. They did not show either that they were last resort measures. European Court of Auditors (n 15) para 37. For example, in its notification, the Czech Republic merely stated that '[i]n connection with the spread of COVID-19 caused by the new coronavirus SARS-CoV-2, a serious threat to public order and internal security of the Czech Republic has been identified'. Carrera and Luk (n 43) 69.

¹⁶⁹ 'Resolution of 19 June 2020' (n 82) para 5.

¹⁷⁰ European Court of Auditors (n 15) para 40; 'Impact Assessment Report Accompanying the 2021 Proposal' (n 20) 141. The European Court of Auditors reviewed twelve ex-post reports of controls reintroduced during the COVID-19 pandemic. Ten of them did not contain a sufficiently detailed proportionality assessment and only three mentioned, very briefly, possible alternative measures. European Court of Auditors (n 15) para 41.

¹⁷¹ European Court of Auditors (n 15) para 38; Salomon and Rijpma (n 22) 6. By 1 September 2022, the Commission had not taken any step to enforce the rules of the Schengen Borders Code.

¹⁷² European Parliament, 'Resolution of 8 July 2021 on the Annual Report on the Functioning of the Schengen Area' (2019/2196(INI)) para 4; Gerkrath (n 54) 8.

border controls.¹⁷³

3.2.4.1 Soft law and opinions under the code

The Commission remained inactive regarding respect of proportionality during the COVID-19 pandemic and did not issue any opinion¹⁷⁴ despite its duty enshrined in the second paragraph of Article 27(4) SBC and the Joint Roadmap of 2020 stating that '[t]he Commission [would] continue to analyse the proportionality of measures taken by Member States [...] and [would] intervene to request the lifting of measures considered disproportionate [...]'.¹⁷⁵ Already in 2020, the European Parliament called on the Commission to make use of its prerogatives by requesting additional information from the Member States and adopting opinions when necessary.¹⁷⁶ In 2022, the European Court of Auditors also deplored that the Commission did not use its scrutiny powers and recommended that the EU institution ask for supplementary information when the notification or report lacks sufficient information and issue opinions when it has concerns as regards proportionality.¹⁷⁷ The Commission argued that requesting additional information in writing to Member States was not the most efficient measure considering the rapidly evolving context of the pandemic.¹⁷⁸ It preferred regular meetings with the 'COVID-19 Informa-

¹⁷³ The Schengen Evaluation and Monitoring Mechanism is another tool that the Commission could use. Subsection 3.2.4.2 focuses on the infringement procedure rather than the Schengen Evaluation and Monitoring Mechanism. Heinikoski argues that the Schengen Evaluation and Monitoring Mechanism de facto replaces the infringement procedure as regards the monitoring of the Schengen Borders Code. The Regulation on the Schengen Evaluation Mechanism would be a *lex specialis*. Council of the European Union, 'Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen' [2013] OJ L295/27; Heinikoski (n 49) 5. This intergovernmental enforcement mechanism evaluates annually the implementation of the Schengen acquis of some Member States, and it is not specific to the reintroduction of internal border controls. Moreover, the Commission itself acknowledges that it has shortcomings. Jonas Bornemann, 'The Commission's Proposed Reform of the Schengen Area: Stronger Enforcement or Conflict Aversion?' (*EU Law Enforcement*, 31 January 2022) <<https://eulawenforcement.com/?p=8157>> accessed 1 September 2022). In June 2021, the Commission proposed to revise this mechanism. COM (2021) 891 final 9.

¹⁷⁴ Carrera and Luk (n 43) 51; Gerkrath (n 54) 8; Montaldo (n 51) 423. Just as during the migration crisis, the legal framework provided a possibility to challenge the continuous border controls, but the Commission lacked political will to do so. Marie De Somer, 'Schengen: Quo Vadis?' (2020) 22 *European Journal of Migration and Law* 178, 185.

¹⁷⁵ European Commission and European Council, 'Joint European Roadmap towards lifting COVID-19 containment measures' [2020] OJ C126/1, 14.

¹⁷⁶ 'Resolution of 19 June 2020' (n 82) para 13.

¹⁷⁷ European Court of Auditors (n 15) 38-39. The Commission accepted these recommendations. Commission, 'Replies of the European Commission to the European Court of Auditors' special report: Free movement in the EU during the COVID-19 pandemic: Limited scrutiny of internal border controls, and uncoordinated Member States' actions' (2022) 7.

¹⁷⁸ 'Replies of the European Commission' (n 177) 4.

tion group – Home affairs'.¹⁷⁹

Academics interpret the lack of a strong response by the Commission differently. Schade argues that the Commission was unlikely to adopt some strong measures during the COVID-19 pandemic since it did not react to the reintroduction of border controls following the migration crisis and merely holds an advisory role in the EU approach to the restrictions on freedom of movement.¹⁸⁰ Indeed, during the migration crisis, the Commission opted for soft law measures, such as dialogue with Member States and coordination. However, this approach was inconclusive since six Member States have been keeping internal border controls for more than six years.¹⁸¹ Wolff, Ripoll Servent and Piquet agree that the alignment of the reintroduction of internal border controls during the pandemic with previous initiatives explain the absence of contestation or debate.¹⁸² On the other hand, Bouveresse considers that the Commission did not issue any negative opinion as regards proportionality because it wished to react quickly rather than sanction Member States.¹⁸³ According to her, the adoption of soft law instruments by the Commission, such as communications and guidelines,¹⁸⁴ shows its pragmatism and search for efficiency.¹⁸⁵

The ECJ and AG Saugmandsgaard Øe seem to disagree with the Commission's approach to mainly issue guidelines and communications. In its *NW* judgment, the ECJ reminds the Commission of its duty to issue an opinion if it has concerns as regards proportionality or necessity under Article 27(4) SBC.¹⁸⁶ The ECJ criticises that the Commission did not issue any opinion about the Austrian long-lasting controls even though it considered that the controls were incompatible with the Schengen Borders Code and thus EU law.¹⁸⁷ It is likely that the ECJ will follow similar reasoning if it rules on long-lasting controls reintroduced during the COVID-19 pandemic.¹⁸⁸ In his opinion in the *NW* case, AG Saugmands-

¹⁷⁹ *ibid.*

¹⁸⁰ Schade (n 9) 8–9.

¹⁸¹ European Court of Auditors (n 15) paras 34 and 80. As mentioned in n 133, Austria, Denmark, France, Germany, Norway, and Sweden have been keeping continuous border controls since 2015.

¹⁸² Wolff, Ripoll Servent and Piquet (n 53) 1129.

¹⁸³ Bouveresse (n 20) 519.

¹⁸⁴ See, for example, Commission, 'Communication from the Commission: Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19' COM (2020) 3250 final.

¹⁸⁵ Bouveresse (n 20) 519.

¹⁸⁶ *NW* (n 11) para 91.

¹⁸⁷ *ibid.*; Cebulak and Morvillo (n 148). The ECJ added that the lack of opinion by the Commission does not have any bearing on the interpretation of the Schengen Borders Code by the Court. *NW* (n 11) para 93).

¹⁸⁸ As mentioned in n 159, there was no pending case at the time of 1 September 2022 directly questioning long-lasting internal border controls reintroduced during the COVID-19 pandemic.

gaard Øe found it regrettable that the Commission did 'not play the role entrusted to it by th[e Schengen Borders Code]'.¹⁸⁹

3.2.4.2 Infringement procedure

As the guardian of the Treaties, the Commission is responsible for monitoring compliance with EU law.¹⁹⁰ The Commission may launch an infringement procedure against a Member State.¹⁹¹ Under Article 258 TFEU, the Commission must deliver a reasoned opinion to a Member State that fails to fulfil an obligation under the Treaties.¹⁹² If a Member State does not comply, the Commission may refer the matter to the ECJ.¹⁹³ The Commission has not yet launched an infringement procedure related to internal border controls reintroduced during the COVID-19 pandemic despite its concerns that they fail to comply with EU law.¹⁹⁴ Gerkrath believes that the Commission should have started infringement proceedings.¹⁹⁵ The European Court of Auditors also recommends that the Commission launch enforcement action in situations of long-term non-compliance with the Code.¹⁹⁶ Yet, the Commission did not accept this recommendation, arguing that it interferes with its discretion as regards its enforcement policy and whether or not to start an infringement procedure.¹⁹⁷ Moreover, the Commission considers that launching infringement procedures is not the most appropriate response considering the number of Member States concerned, the complex implications involved, and the negative effect it would have on trust between itself and the Member States.¹⁹⁸

¹⁸⁹ Opinion of AG Saugmandsgaard Øe (n 147) para 73.

¹⁹⁰ TEU, Article 17(1).

¹⁹¹ In practice, the Commission first sends a letter of formal notice to the Member State concerned requesting additional information. The Member State usually has two months to send a detailed reply. If the Commission is not satisfied with the reply, it may officially start the infringement procedure by sending a reasoned opinion.

¹⁹² TFEU, first paragraph of Article 258.

¹⁹³ *ibid*, second paragraph of Article 258.

¹⁹⁴ European Court of Auditors (n 15) para 33. In 2020, the Commission announced that it would 'more systematically consider the launching of infringement procedures' where the Member States keep their internal border controls beyond what is necessary. Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum' COM (2020) 609 final 15. However, as of September 2022, it has not yet put its words into action.

¹⁹⁵ Gerkrath (n 54) 12.

¹⁹⁶ European Court of Auditors (n 15) 39.

¹⁹⁷ 'Replies of the European Commission to the European Court of Auditors' (n 177) 7.

¹⁹⁸ 'Impact Assessment Report Accompanying the 2021 Proposal' (n 20) 37. With regard to the long-lasting border controls reintroduced during the migration crisis, the Commission did not initiate an infringement procedure either, as this would have been counterproductive and increased the politicisation and emotionalisation of the situation, according to De Somer (De Somer (n 174) 185).

3.3 Conclusion: proportionate internal border controls during the COVID-19 pandemic?

As mentioned above in Section 3.1, when reintroducing internal border controls during the COVID-19 pandemic, most Member States first relied on Article 28 SBC, and then, after the first two months, used Article 25 SBC.¹⁹⁹ Section 3.2 showed that the articles in Chapter II of Title III of the Schengen Borders Code provide the following safeguards to ensure that proportionality is respected when Member States reintroduce internal border controls in situations of health emergencies.

First, the Schengen Borders Code provides two clear 'legitimate objectives' to pursue when reintroducing internal border controls, namely public policy and internal security. However, it remains silent regarding a threat to public health, which gave rise to a preliminary reference on the question in the *NORDIC INFO* case. Second, the Code requires that Member States assess the extent to which the reintroduction of internal border controls adequately remedies the identified threat. Yet, it does not provide many details about this requirement of suitability, which makes it the weakest of the examined safeguards. Third, the Code provides maximum durations for internal border controls, which can restart solely if a new threat arises, according to the ECJ in its *NW* judgment. It also requires that their duration does not exceed what is strictly necessary. Fourth, the Code contains some clear safeguards to ensure scrutiny over proportionality. On one hand, Member States must notify the Commission when they reintroduce and prolong internal border controls and send an ex-post report after lifting them. The notifications and reports must both contain an assessment of the proportionality of the measures. On the other hand, the Commission has the power to require additional information when it cannot evaluate the proportionality of the assessments and issue opinions when it has concerns regarding proportionality and necessity.

Section 3.2 above also demonstrated that the Member States disregarded these safeguards when they reintroduced internal border controls during the COVID-19 pandemic. They invoked a threat to public health, which is not included in the Code. They reintroduced internal border controls that are not adequate to remedy the threat arising from the pandemic. Some of their border controls lasted longer than the time limits provided in the Code and some switched legal bases. Moreover, the Member States sent incomplete notifications and reports with assessments lacking important information. The Commission did not use any of its prerogatives under the Schengen Borders Code: it did not request additional information or issue any opinion when this would have been necessary.

In conclusion, there are safeguards on paper for the four aspects of proportionality discussed. However, in practice, they are insufficiently

¹⁹⁹ Wolff, Ripoll Servent and Piquet (n 53) 1130.

respected or used. As a result, the internal border controls reintroduced during the COVID-19 pandemic were disproportionate. The problem thus comes from the lack of political will of the Member States and the Commission to enforce the safeguards rather than from the content of the Schengen Borders Code.²⁰⁰

4 Proportionality and the 2021 Proposal to amend the Schengen Borders Code

4.1 2021 Proposal

Part 3 above has shown that, despite clear safeguards, four aspects of proportionality were problematic when the Member States reintroduced internal border controls during the COVID-19 pandemic. A discrepancy between law and practice is not desirable. The European Parliament shares this opinion and declared that the Schengen Borders Code is 'no longer fit for purpose and requires urgent and meaningful reform'.²⁰¹ To remedy the situation, on 14 December 2021, the Commission released a proposal to amend the Schengen Borders Code.²⁰² It is part of a broader framework intended to strengthen and increase the resilience of the Schengen area²⁰³ and could be the first major amendment to the Code.²⁰⁴ The proposal includes some provisions to amend the articles concerning the reintroduction of border controls at internal borders²⁰⁵ and external borders.²⁰⁶

The 2021 proposal is not the Commission's first attempt to amend the rules about the reintroduction of internal border controls. In 2017, following two years of significant increase in internal border controls for reasons of migration and terrorism, the Commission issued a proposal to amend solely the provisions dealing with the reintroduction of internal border controls, the '2017 proposal'.²⁰⁷ It provided for a significant extension of the maximum period for the reintroduction of internal border con-

²⁰⁰ Thym and Bornemann (n 20) 1169–1170.

²⁰¹ 'Resolution of 8 July 2021' (n 172) para 40.

²⁰² COM (2021) 891 final.

²⁰³ Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders – General approach' 2021/0428(COD) paras 1–2.

²⁰⁴ EU Law Live, 'New Regulation to Deal with Schengen Challenges Proposed by Commission' (*EU Law Live*, 15 December 2021) <<https://eulawlive-com.mu.idm.oclc.org/new-regulation-to-deal-with-schengen-challenges-proposed-by-commission/>> accessed 1 September 2022.

²⁰⁵ COM (2021) 891 final 5.

²⁰⁶ *ibid* 2–3. This article focuses on internal border controls, so it does not discuss amendments to rules on external borders.

²⁰⁷ Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders (2017 Proposal)' COM (2017) 571 final 2.

trols: for instance, the time limit for persistent foreseeable threats would have been extended from six months to three years.²⁰⁸ The inclusion of better procedural safeguards, such as stricter reporting requirements and a mandatory Commission opinion after one year of controls, would have balanced these longer time limits.²⁰⁹ The EU co-legislature failed to agree on the 2017 proposal, so the Commission withdrew it in 2021.²¹⁰

The scope of the 2021 proposal is broader. It is based on discussions in connection with the previous 2017 proposal and the lessons drawn from the COVID-19 pandemic.²¹¹ Similarly, it has to go through the ordinary legislative procedure before amending the Schengen Borders Code.²¹² In that procedure, the Commission has the power of initiative, whereas the Council and the European Parliament decide jointly on its wording and adoption.²¹³ The position of the EU legislature thus constitutes a good indication of the future wording of the Schengen Borders Code. The Council has released its general approach about the 2021 proposal,²¹⁴ while the European Parliament is still in the reporting phase.²¹⁵ The relevant amendments of the 2021 proposal to Chapter II of Title III of the Schengen Borders Code can be classified into four categories.

First, as with the 2017 proposal, the Commission wishes to strengthen the procedural safeguards required when reintroducing unilateral internal border controls.²¹⁶ It clarifies and broadens the list of elements the Member States must assess when reintroducing internal border controls²¹⁷ and adds an obligation to conduct a risk assessment in the case of prolonged internal border controls in situations of foreseeable threats.²¹⁸

²⁰⁸ *ibid* 3–4, 7, and 15–17.

²⁰⁹ *ibid* 4, 7, and 15–17.

²¹⁰ COM (2021) 891 final 11. For further information about the legislative process of the 2017 proposal, see Anja Radjenovic, *Temporary Reintroduction of Border Control at Internal Borders* (*Legislative Train Schedule*, 20 August 2022) <<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-temporary-reintroduction-of-border-control-at-internal-borders?sid=6101>> accessed 1 September 2022.

²¹¹ Commission, ‘Communication from the Commission to the European Parliament and the Council: A strategy towards a fully functioning and resilient Schengen Area’ COM (2021) 277 final 18. Montaldo argues that the way the Member States used the provisions of the Schengen Borders Code during the COVID-19 pandemic could influence the heated debates concerning the 2021 proposal. Montaldo (n 54) 525.

²¹² COM (2021) 891 final 23; ‘Procedure file 2021/0428(COD)’ (n 35).

²¹³ TFEU, Article 294.

²¹⁴ ‘2021 Proposal – General approach’ (n 203).

²¹⁵ On 31 March 2022, the European Parliament designated its rapporteur and shadow rapporteurs among the members of the LIBE committee. By 1 September 2022, no report about the 2021 proposal had been issued. ‘Procedure file 2021/0428(COD)’ (n 212). For further information about the legislative process concerning the 2021 proposal, see Dumbrava (n 32).

²¹⁶ COM (2021) 891 final 8.

²¹⁷ *ibid* 7.

²¹⁸ *ibid*, Article 27(2). This mandatory risk assessment was already included in the 2017 proposal and had found the general backing of the EU legislature (*ibid* 11).

Further, the proposal clarifies when the Commission could or should issue an opinion on the necessity and proportionality of internal border controls.²¹⁹ Second, it encourages the limitation of the impact of the measures on internal border regions.²²⁰ The Member States should take greater account of border regions when conducting their risk assessment.²²¹ Subsection 4.2.4 below analyses these changes when assessing whether the 2021 proposal would ensure that the Commission makes greater use of its scrutiny powers regarding proportionality and the Member States conduct stricter risk assessments.

Third, the Commission would like to encourage the use of alternative and proportionate measures.²²² The proposal clarifies when and how the Member States may introduce checks other than border controls in border areas.²²³ Fourth, the EU institution supports the creation of a new mechanism where the serious threat to public policy or internal security simultaneously affects a majority of Member States, putting the overall functioning of the area without internal border controls at risk.²²⁴ Subsection 4.2.2 below presents this contingency plan in detail and investigates whether police checks would remedy more adequately the threats caused by public health emergencies.

4.2 Four aspects of proportionality in the 2021 proposal

4.2.1 First aspect: type of threat

4.2.1.1 The new Article 25(1)(b)

In the proposal, the new Article 25 provides a general framework applicable to any kind of reintroduction of internal border controls.²²⁵ Paragraph 1(b) of this Article specifies that, among other things, 'large scale public health emergencies' can give rise to a serious threat to public

²¹⁹ *ibid* 7, 22 and Article 27a.

²²⁰ *ibid* 8.

²²¹ *ibid* 8 and 22.

²²² *ibid* 8.

²²³ *ibid*.

²²⁴ *ibid* 7 and Article 28.

²²⁵ *ibid* 21.

policy or internal security.²²⁶ This new provision would bring more legal certainty by making clear that the Member States have a legal basis to reintroduce internal border controls in situations similar to the COVID-19 pandemic.

If the proposed article is adopted as it stands with this explicit mention, it would close the debate mentioned above on whether public health is included in the concepts of public policy and internal security or is an acceptable ground under the Schengen Borders Code.²²⁷ The 2021 proposal is in line with the first position. The general approach of the Council also leans in that direction.²²⁸ The European Parliament had earlier called for 'clearer rules on public health emergencies',²²⁹ so it probably welcomes the inclusion of 'large scale public health emergencies' in Article 25(1)(b) of the proposal. De Bruycker considers that it is the 'minimum for the sake of clarity'.²³⁰ The Meijers Committee embraces this explicit introduction since it enhances legal certainty.²³¹ However, it wanted a 'clear and narrowly circumscribed definition' of 'large scale public health emergencies' to accompany this introduction.²³² In conclusion, as the 2021 proposal stands, it explicitly broadens the scope of situations where the Member States may reintroduce internal border controls and fails to provide a threshold that the threat must meet.

4.2.1.2 Public health not as a separate ground and *NORDIC INFO*

Bornemann and the Meijers Committee question the Commission's approach: why is public health included under public policy and internal security, and not a ground on its own?²³³ This interrogation is legitimate

²²⁶ Article 25(1) of the 2021 proposal mentions three other circumstances: '(a) activities relating to terrorism or organised crime; [...] (c) a situation characterised by large scale unauthorised movements of third-country nationals between the Member States, putting at risk the overall functioning of the area without internal border control; (d) large scale or high-profile international events, such as sporting, trade, or political events'. These four new situations encompass all the circumstances which have led to the reintroduction of internal border controls since the creation of the Schengen area. At the outset of the establishment of the Schengen area, the provisions about the reintroduction of internal border controls were used in the circumstances listed under d). Then, during the migration crisis in the mid-2010s, Member States invoked the activities under c). With the rise of terrorism in the EU, Member States relied on situations mentioned under a). Finally, during the COVID-19 pandemic, the circumstances under b) arose. For further information about the circumstances leading to the reintroduction of internal border controls in the Schengen area between 1999 and 2020, see Gülzau (n 49).

²²⁷ For further information about the debate, see Subsection 3.2.1.1 above.

²²⁸ The Council did not suggest any modification to Article 25(1)(b) of the 2021 Proposal. '2021 Proposal – General approach' (n 203) 33.

²²⁹ 'Resolution of 8 July 2021' (n 172) para 40.

²³⁰ De Bruycker (n 50) 6.

²³¹ Meijers Committee, *Commentary on the Commission Proposal Amending the Schengen Borders Code (COM(2021) 891)* (Meijers Committee, 2022) 4.

²³² *ibid.*

²³³ Bornemann (n 173); *idem.*

because the 2021 proposal, contrarily to other texts of EU law, such as the Free Movement Directive,²³⁴ does not include the triptych of public order, public safety, and public health.²³⁵ Instead, public health falls under public order and internal security. The referring court in *NORDIC INFO* is also puzzled by the fact that one situation of public health would fall under public policy following the 2021 proposal, while it would constitute a separate ground of public health under the Free Movement Directive.²³⁶ Bornemann explains that the new Article 25(1)(b) replicates the interpretation that underpinned the Member States' practices during the early stages of the pandemic.²³⁷ The Meijers Committee believes that it is a way to provide a legal basis for the current and past reinstatements of internal border controls.²³⁸

Moreover, the ECJ judgment in the *NORDIC INFO* case could influence the wording of the new Article 25(1) depending on the date that it is rendered. If the ECJ first renders its judgment, the 2021 proposal would *de facto* have to consider it and perhaps change its wording. However, if the EU legislature adopts the 2021 proposal before and the ECJ decides to exclude public health from the grounds under the Code, it would be more problematic since the wording of the (newly) amended Schengen Borders Code would already not be in accordance with the case law. To avoid any discrepancy between the Schengen rules in the Code and case law, it would thus be preferable for the EU legislature to adopt the 2021 proposal after the Court has rendered its judgment in the *NORDIC INFO* case. Yet, this might delay the adoption of the 2021 proposal since the ECJ would only rule on the matter in 2023 or even 2024.²³⁹

4.2.2 Second aspect: adequacy

4.2.2.1 The new Article 28 mechanism

Article 28 of the proposal establishes a new mechanism that would safeguard the Schengen area where 'the same serious threat to public policy or internal security affects a majority of Member States, putting at risk the overall functioning of the area without internal border con-

²³⁴ For example, Article 1(c) of the Free Movement Directive (n 14) mentions the grounds of public policy, public security, and public health on an equal footing.

²³⁵ Gerkrath uses this concept of 'triptych' in Gerkrath (n 54) 10.

²³⁶ Case C-128/22: Summary of the request for a preliminary ruling (Working document, 23 February 2022) para 20.

²³⁷ Bornemann (n 173).

²³⁸ Meijers Committee (n 231) 4.

²³⁹ In 2021, the average duration of proceedings for references for preliminary rulings was 16.7 months. Court of Justice of the European Union, *Annual Report 2021: Judicial Activity* (Annual Report, 2022) 243. Following these statistics, the Court would decide on the *NORDIC INFO* case in around June/July 2023 since the Belgian court sent a reference for a preliminary ruling in February 2022.

trols'.²⁴⁰ Based on a proposal from the Commission, the Council would adopt an implementing decision authorising the reintroduction of internal border controls by the Member States.²⁴¹ This new mechanism could be applied in situations similar to the COVID-19 pandemic and is a clear response to that crisis. With its amendments to the 2021 proposal, the Council intends to lower the threshold set by the Commission to rely on that mechanism and give more powers to the Member States. For instance, according to the Council, the threat would have to affect only several Member States and not the majority of them, and the Member States would be competent to request the Commission to make a proposal to the Council.²⁴² Moreover, the Council does not want the Commission to suggest mitigating measures in its proposal or issue a recommendation about other measures to adopt.²⁴³

This mechanism would ensure that the reintroduction of internal border controls is more coordinated since it would replace any national measure in place.²⁴⁴ Nonetheless, this 'more Europeanised procedure'²⁴⁵ does not address the issue of the lack of adequacy of internal border controls to remedy the public health threat identified above. It is paradoxical that the Commission proposed a new mechanism applicable notably in situations similar to the COVID-19 pandemic when scientific evidence has shown that border controls did not help meet the threat arising from the pandemic. Indeed, the involvement of the Commission and the Council does not make border controls more adequate from an epidemiological point of view.

It is also questionable whether there was a need for a fourth mechanism considering that the Member States have been abusing the existing mechanisms and prolonged their controls for months, as shown in Subsection 3.2.3.1 above. It is even more controversial when one knows that controls reintroduced under the new Article 28 could last indefinitely. Indeed, the decision to reintroduce internal border controls would cover a period of up to six months and could be renewed for periods of the same duration as long as the threat persists.²⁴⁶ Therefore, this new Article 28 undermines the border-free area principle with such lax rules.

²⁴⁰ COM (2021) 891 final, Article 28(1).

²⁴¹ *ibid*, Article 28(1). This mechanism is similar to the one established in Article 29 for situations where exceptional circumstances put the overall functioning of the area without internal border control at risk. In both instances, the Council acts upon a proposal from the Commission. Bornemann (n 173).

²⁴² '2021 Proposal – General approach' (n 203) Article 28(1).

²⁴³ *ibid*, Articles 28(4) and (7). The power of the Commission to refer to any appropriate mitigating measures was an important element of this new mechanism. COM (2021) 891 final 7.

²⁴⁴ COM (2021) 891 final 22.

²⁴⁵ Bornemann (n 173).

²⁴⁶ COM (2021) 891 final, Article 28(2). The Council did not make any amendment to that paragraph, so it *de facto* agrees with the absence of a time limit. '2021 Proposal – General approach' (n 203) 40.

4.2.2.2 More adequate alternatives?

With its 2021 proposal, the Commission wishes to increase the use of alternative measures, in particular police checks, instead of internal border controls.²⁴⁷ This objective is not new: the Commission had already called on the Member States to give precedence to police checks in situations of a serious threat to internal security or public policy.²⁴⁸ Article 23 SBC explains that these checks cannot have border controls as their objective, must aim in particular to combat cross-border crime, cannot be equivalent to systematic checks at external borders, and must consist in spot checks.²⁴⁹ The 2021 proposal clarifies the type of checks authorised in border areas²⁵⁰ and requires that the Member States consider whether the use of alternative measures, such as checks, could be more appropriate when prolonging border controls.²⁵¹ Moreover, it states that the exercise of powers based on general information and experience of the authorities to contain the spread of an infectious disease with epidemic potential is not equivalent to the exercise of border checks.²⁵² Checking identity documents in border areas alone will not contribute to meeting a public health threat. Thus, establishing police checks does not help with the problem of lack of suitability in the event of a public health emergency. Moreover, it is unlikely that the Member States possess enough police officers to effectively check all concerned border areas²⁵³ and these checks are outside the scope of the Commission's supervision.²⁵⁴

Police checks are not the only alternatives to border controls. One option consists in taking measures related to health, such as mass screenings and testing, contact tracing, and quarantines. Health-related measures are more suitable in situations of public health emergencies. However, according to the Commission, health checks do not require

²⁴⁷ COM (2021) 891 final, 5 and 8.

²⁴⁸ Commission, 'Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area' COM (2017) 3349 final, para 2; Ylva Johansson, '11. Situation in the Schengen area following the Covid-19 outbreak (debate)' (*European Parliament*, 18 June 2020) <https://www.europarl.europa.eu/doceo/document/CRE-9-2020-06-18-ITM-011_EN.html> accessed 1 September 2022. The Commission's encouragements to use police checks in border areas constitute a significant change from its original approach of strictly limiting their use. De Somer (n 174) 188. Montaldo explains this shift by the lack of effectiveness of the formal toolkit designed to preserve the internal dimension of Schengen. Montaldo (n 51) 428.

²⁴⁹ Article 23 is under Chapter I of Title III of the Schengen Borders Code, called 'Absence of border control at internal borders'. This position in the Code emphasises that police checks within the territory are not equivalent to border controls. The Treaty basis of police checks is Article 72 TFEU. Montaldo (n 51) 428. The ECJ further clarifies the concept of police checks in its case law (eg C-188/10 (Melki), C-278/12 (Adil), and C-444/17 (Arib)). Carrera and Luk (n 43) 51.

²⁵⁰ COM (2021) 891 final 21.

²⁵¹ *ibid.*, Article 26(2).

²⁵² *ibid.*, third indent of Article 23(a)(ii).

²⁵³ Carrera and Luk (n 43) 69.

²⁵⁴ Montaldo (n 51) 428.

the reintroduction of formal border controls,²⁵⁵ similarly to the other health-related measures mentioned and none of them are specifically border related. The Schengen Borders Code is thus not the appropriate instrument to include such alternatives.

Another option would be to consider epidemiological data when reintroducing border controls. Similarly to the traffic light system introduced for intra-EU mobility during the COVID-19 pandemic,²⁵⁶ controls could be allowed only between Member States or regions with different colours, meaning that their infection and positivity rates differ significantly. Involving the European Centre for Disease Prevention and Control (ECDC) would give some legitimacy to the controls, especially since the ECDC would be involved at the external borders to determine whether there is a disease with epidemic potential in third countries in the 2021 proposal.²⁵⁷ Yet, reintroducing border controls based on epidemiological data in the Member States or advice by the ECDC does not make internal border controls more suitable if they are limited to checking identity and travel documents. In conclusion, this difficulty in finding appropriate measures related to border controls to meet the threats arising from public health emergencies might show that border controls are not suitable in such circumstances and that the Code should not be amended to include 'large scale public health emergencies'. In future pandemics, the Member States should rely on instruments other than the Schengen Borders Code to meet the threat.

4.2.3 *Third aspect: duration of internal border controls*

4.2.3.1 The new Articles 25a and 27a

Article 25a of the proposal contains the procedure applicable to unilateral reintroductions of internal border controls when the threats are foreseeable and unforeseeable and merges the procedures of the current Articles 25 and 28 SBC.²⁵⁸ This new article also changes the maximum duration of controls from two months to three months for unforeseeable threats and from six months to two years for unforeseeable threats.²⁵⁹ Thus, the 2021 proposal significantly extends the maximum duration of

²⁵⁵ COM (2020) 1753 final, para 20.

²⁵⁶ With its non-binding Recommendation (EU) 2020/1475, the Council established a colour-based 'traffic light' system to coordinate the restriction to cross-border mobility. The ECDC attributes a colour to the EU regions based on the epidemiological data of the regions (14-day cumulative COVID-19 case notification, test positivity, and testing rates). For example, the Council recommends that Member States should not restrict travel to regions classified as 'green'. Council of the European Union, 'Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic' [2020] OJ L337/3, 6 ff.

²⁵⁷ COM (2021) 891 final, Article 21a(1).

²⁵⁸ *ibid* 21.

²⁵⁹ *ibid*, Article 25a(3) and (5); SBC, Articles 25(4) and 28(4).

internal border controls. The Council validated these new time limits in its general approach.²⁶⁰

Paragraph 5 of Article 27a goes even further and would allow controls to persist beyond these time limits in exceptional scenarios.²⁶¹ The Council is more moderate than the Commission. In its general approach, it tightened the conditions to rely on Article 27a(5): there must be a 'major exceptional situation in respect to a persisting threat', the notification must include a thorough risk assessment, and the Commission must issue a recommendation on the proportionality and necessity of the controls.²⁶² These extensions of the maximum durations suggest that the Commission yielded to some Member States' practices of keeping their border controls for months.²⁶³

Yet, the text is not likely to be adopted with these extended time limits for two reasons. First, the European Parliament will most probably refuse. During the negotiations on the 2017 proposal, the European Parliament refused to extend the maximum durations: it wanted to limit the period of the first reintroduction of border controls to six months instead of twelve, and the subsequent prolongation to an additional year instead of two.²⁶⁴ Additionally, it called for more stringent rules on the maximum duration of controls.²⁶⁵

Second, in its *NW* judgment, the ECJ held that the EU legislature considered that a period of six months was long enough when the Member States faced a foreseeable threat.²⁶⁶ If asked, the ECJ is unlikely to agree with the extension of maximum durations in the 2021 proposal and the possibility to prolong internal border controls beyond the maximum duration. It would certainly have preferred the proposal to include

²⁶⁰ '2021 Proposal – General approach' (n 203) 34 and 35.

²⁶¹ Article 27a(5) of the 2021 proposal reads as follows: '*Where a Member State considers that there are exceptional situations justifying the continued need for internal border controls in excess of the maximum period referred to in Article 25(5), it shall notify the Commission in accordance with Article 27(2). The new notification from the Member State shall substantiate the continued threat to public policy or internal security, taking into account the opinion of the Commission given pursuant to paragraph 3. The Commission shall issue a follow up opinion*' (emphasis added).

²⁶² '2021 Proposal – General approach' (n 203) 4-5 and Article 27a(5).

²⁶³ Bornemann (n 173).

²⁶⁴ European Parliament, 'Amendments adopted by the European Parliament on 29 November 2018 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders (COM (2017)0571 — C8-0326/2017 — 2017/0245(COD))' [2020] OJ C363/385, Amendments 12 and 40.

²⁶⁵ Montaldo (n 54) 530. Among other things, the European Parliament wanted any prolongation of the controls beyond the initial six months to require a Council recommendation. 'Amendments adopted by the European Parliament on 29 November 2018' (n 264) Amendments 15 and 17.

²⁶⁶ *NW* (n 11) para 77. Martins Pereira argues that, in that paragraph, the ECJ implicitly held that internal border controls constitute inappropriate means in situations of persistent threats. Martins Pereira (n 133).

a 'sunset clause' that would prevent Member States from extending controls indefinitely.²⁶⁷

4.2.3.2 End of legal basis switch and more respect for necessity?

As mentioned above, some Member States used to switch legal bases to disproportionately extend the duration of their internal border controls beyond the limit set in the Schengen Borders Code.²⁶⁸ It is legitimate to wonder whether the 2021 proposal will put an end to these practices. Considering that the Commission has remained silent on the disproportionate controls in place since 2015,²⁶⁹ it is not surprising that the 2021 proposal does not include any clause prohibiting the switch between legal bases when the same threat persists. The Commission released its proposal before the ECJ rendered its *NW* judgment, which condemned these practices. In theory, the judgment would suffice, and there would be no need for an additional clause. In practice, this will depend on the level of compliance of the Member States. Furthermore, one can argue that the 2021 proposal would *de facto* end these practices. Indeed, it would extend the maximum time limits and even allow the prolongation of controls beyond them. In these circumstances, it would no longer be necessary to switch legal bases to keep border controls in place for months or even years.

During the COVID-19 pandemic (and the previous crises), Member States, six in particular, maintained internal border controls for months by switching legal bases.²⁷⁰ The approach of the Commission and the Council gives more flexibility to the Member States and the necessary resources to legally prolong their internal border controls for months and even years. Extending the maximum duration of internal border controls and allowing controls to persist beyond in exceptional scenarios do not improve the necessity of the controls. On the contrary, the requirement that the controls constitute the least restrictive measures would be more difficult to fulfil, leading more easily to disproportionate internal border controls. Nonetheless, the European Parliament is likely to suggest amendments to diminish the maximum duration and perhaps prohibit it from being exceeded.

²⁶⁷ Carrera and Chun Luk mention this notion of 'sunset clause' for the duration of internal border controls in *Love Thy Neighbour?* (n 51) 40.

²⁶⁸ For further information, see Subsection 3.2.3.1 above.

²⁶⁹ Meijers Committee (n 231) 2.

²⁷⁰ See n 133.

4.2.4 Fourth aspect: scrutiny over proportionality

4.2.4.1 Stricter and more frequent assessments

One way to improve scrutiny over proportionality is to require Member States to conduct stricter and more frequent assessments of proportionality. The 2021 proposal contains such rules. The new Article 26 would specify the content of the assessment depending on whether the Member States reintroduce for the first time or prolong, in situations of foreseeable threats, their internal border controls.²⁷¹ The list of elements to consider would differ between the two situations due to the Member States' incremental burden of proof.²⁷² It would include new elements, such as the impact on cross-border regions²⁷³ and mitigating measures.²⁷⁴ The new Article 27(1) would require the Member States to use a template for their notifications, which would improve the quality. In addition, according to the new Article 27(2), the Member States would have to submit a risk assessment when their controls have been in place for six months and when they wish to prolong them. Lastly, the Member States would also have to conduct a risk assessment when they want to extend their controls beyond the maximum period, ie three months or two years.²⁷⁵ The Meijers Committee welcomes these stricter reporting obligations on the Member States.²⁷⁶

The 2021 proposal also addresses the poor quality and lack of ex-post reports with the new Articles 33 and 27. The new Article 33(2) would require the Member States to submit an ex-post report every twelve months even if they have not lifted their controls for foreseeable threats and extend them beyond the maximum duration. Moreover, similarly to the notifications under the new Article 27, the Commission would have to adopt a uniform format for ex-post reports.²⁷⁷

In conclusion, the 2021 proposal would increase the scrutiny on the Member States' side by requiring more elements to be assessed in the risk assessments and more frequent risk assessments, using templates to

²⁷¹ COM (2021) 891 final, Article 26(1) concerns the first-time reintroduction, while Article 26(2) contains the rules for the prolongation of internal border controls when the threat is foreseeable.

²⁷² *ibid* 22. In 2021, the European Parliament recommended that additional safeguards and oversight measures should accompany each prolongation of border controls. 'Resolution of 8 July 2021' (n 172) para 40. The 2021 proposal requires that the Member States assess more elements when they decide to prolong their border controls. It thus meets this recommendation since it requires an assessment of additional elements in the event of prolongation. However, it does not make any distinction between further prolongations.

²⁷³ COM (2021) 891 final, Article 26(1)(b). The Meijers Committee welcomes the inclusion of the free movement of persons in cross-border regions. Meijers Committee (n 231) 4.

²⁷⁴ COM (2021) 891 final, Article 26(3).

²⁷⁵ *ibid*, Article 27a(5).

²⁷⁶ Meijers Committee (n 231) 4.

²⁷⁷ COM (2021) 891 final, Article 33(4).

harmonise notifications and ex-post reports sent to the Commission, and requesting more frequent ex-post reports. It seems that it would be more difficult for the Member States to ignore their scrutiny duties with these new rules that are more demanding. Hopefully, the Member States will comply more assiduously with these scrutiny requirements than they did during the COVID-19 pandemic.

4.2.4.2 More powers and obligations for the Commission

The second way to improve scrutiny over proportionality is to grant more powers to the Commission or impose additional monitoring obligations.²⁷⁸ Article 27a of the proposal clarifies when the Commission could or should issue an opinion on the necessity and proportionality of internal border controls and when consultations between the Commission and Member States should occur.²⁷⁹ Issuing an opinion would be optional,²⁸⁰ except for one situation: when border controls have been in place for a total of eighteen months – or twelve months, according to the Council.²⁸¹ Member States wishing to prolong border controls beyond the maximum period would have to consider this opinion, and the Commission would have to issue a follow-up opinion.²⁸²

In essence, the 2021 proposal adopts a different and more objective approach as regards the opinions. Under the Schengen Borders Code, the Commission must issue an opinion when it has doubts about the proportionality and necessity of the controls. The proposal rather mentions some situations where the Commission would have to issue an opinion, regardless of whether or not it has doubts. This change is desirable considering that the Commission did not use its prerogatives during the COVID-19 pandemic. If the Commission has the duty to issue an opinion in certain circumstances, it could not argue that it did not issue an opinion because it had no doubts as regards proportionality. The Meijers

²⁷⁸ The new Article 33(6) clarifies the elements that the Commission should include in its State of Schengen Report. The third paragraph of Article 33 SBC already requires the Commission to present, at least annually, a report on the functioning of the Schengen area without internal border control. However, the Commission has not issued such a report since 2015. In 2021, it announced that it would relaunch the adoption of the report. 'Replies of the European Commission to the European Court of Auditors' special report' (n 177) 5. This report concerns the reintroduction of internal border controls in general and is not specific to the proportionality of border controls, hence it is not mentioned in the body of the article.

²⁷⁹ COM (2021) 891 final 22.

²⁸⁰ For instance, opinions related to the ex-post assessments remain optional. *ibid.*, Article 33(5).

²⁸¹ *ibid.*, Article 27a(3). The Council wishes to reduce the time before which the Commission would have a duty to issue an opinion. '2021 Proposal – General approach' (n 203) 4 and 38.

²⁸² COM (2021) 891 final, Article 27a(5). As mentioned in n 272, the European Parliament recommended that additional safeguards and oversight measures should accompany each prolongation of border controls. 'Resolution of 8 July 2021' (n 172) para 40. The 2021 proposal requires the Commission to issue an opinion not for each prolongation but only after eighteen months. Therefore, it only meets partially the recommendation of the European Parliament. The institution would have certainly preferred that the Commission should issue an opinion for any prolongation of border controls.

Committee would prefer the Commission to issue opinions for every reinstatement of border controls and when relying on the new Article 28 mechanism.²⁸³ In conclusion, requiring the Commission to issue an opinion on the necessity and proportionality under certain determined circumstances would already be a good step towards more proportionality. However, as the Meijers Committee noted, the 2021 proposal could have gone further and extended the duty to issue opinions to other situations.

4.3 Conclusion and recommendations

The previous sections have shown that the 2021 proposal improves the aspects of legal certainty and scrutiny by including 'large scale public health emergencies' in the circumstances leading to a serious threat to public policy or internal security, requiring stricter and more frequent assessments from the Member States, and compelling the Commission to issue opinions as regards proportionality and necessity in certain circumstances. So far, the proposal does not satisfactorily address the aspects of adequacy and duration of the controls. It creates a new mechanism to reintroduce border controls and encourage the use of police checks, which are both not more adequate to meet the threat, and largely extends the maximum duration of controls, even allowing them to be exceeded. In conclusion, the 2021 proposal ensures that two of the four aspects of proportionality are respected when Member States would reintroduce internal border controls in situations of health emergencies. Consequently, in the event of a new pandemic, the Member States might reintroduce disproportionate internal border controls regarding their duration and adequacy.

The following paragraphs recommend some amendments to the 2021 proposal to increase the proportionality of controls in the event of a future pandemic. First, concerning the type of threat, if the new Article 25(1)(b) remains as it is, it would be necessary to add a definition, preferably in Article 2 SBC, of 'large scale public health emergencies' to avoid abuse, as the Meijers Committee suggested.²⁸⁴ This definition could be similar to the definition of 'threat to public health' in Article 2(21) SBC, which mentions disease with epidemic potential. This would bring greater legal certainty as to what constitutes such emergencies.

²⁸³ Meijers Committee (n 231) 4. The Council deleted the second situation mentioned in the new Article 28(7) when the Commission may issue a recommendation about less restrictive measures. It is thus unlikely that there will be an obligation to issue an opinion in that situation. '2021 Proposal – General approach' (n 203) 41. This recommendation from the Meijers Committee approaches a little the third option presented in the impact assessment accompanying the 2021 proposal, but not retained. The third option consisted in requiring the prior approval of one EU institution for the reintroduction of internal border controls (or removing the possibility to reintroduce internal border controls). The Meijers Committee's recommendation is not as strict since it would only require a Commission's opinion and not an EU institution's approval for each reintroduction of internal border controls (and does not call for the prohibition of border controls altogether). 'Impact Assessment Report Accompanying the 2021 Proposal' (n 20) 44–46.

²⁸⁴ Meijers Committee (n 231) 4.

Regarding adequacy, it seems complicated to render internal border controls adequate to meet a threat arising from a public health emergency. Police checks are not more adequate. Health-related measures, such as screenings and testing, are more appropriate, but they do not require the formal reintroduction of internal border controls and should thus not be regulated in the Schengen Borders Code. Consideration should therefore be given to removing 'large scale public health emergencies' from the grounds allowing the reintroduction of internal border controls in the new Article 25(1) since scientific evidence has shown that internal border controls are not adequate to remedy the serious threats arising from pandemics. However, if the legislature is determined to include these circumstances in the new Schengen Borders Code, it is crucial to define large scale public health emergencies, as mentioned above.

As regards duration, it is advisable to lower the maximum duration of controls, following the European Parliament's approach in the discussion about the 2017 proposal.²⁸⁵ Otherwise, longer time limits could encourage Member States to maintain their internal border controls for longer periods, even if they are no longer necessary. When balancing the interests at stake, the longer the controls last, the more they impact other interests, such as border-free travel and freedom of movement. Two months for unforeseeable threats in the new Article 25a(3) and twelve months for foreseeable threats in the new Article 25a(5) seem to strike a fair balance. Then, in order to avoid controls being reintroduced on the grounds of a single continued threat to last for months or even years, it is crucial to delete the new Article 27a(5), which allows the maximum periods to be exceeded. Furthermore, if the EU legislature reduces the maximum durations as recommended, it is necessary to add a clause forbidding Member States from switching legal bases as long as the same threat persists. This clause would enshrine in a legal text one of the findings of the *NW* judgment²⁸⁶ and could be phrased as 'Member States may not maintain internal border controls once the maximum total duration set in [the new] Article 25a(5) has elapsed and there is no new threat justifying an application afresh of the periods provided for in [the new] Article 25'.

In terms of scrutiny, dissociating the issue of opinions from the Commission's doubts is a good start. It would be even better to require the Commission to issue an opinion on necessity and proportionality for each reintroduction of internal border controls, as recommended by the Meijers Committee.²⁸⁷ It is important to include this duty in situations of foreseeable and unforeseeable threats. This would increase scrutiny over each reintroduction of internal border controls. Moreover, this would involve the Commission at the beginning of the reintroduction of internal border controls, which is not the case under the new Article 25a contrari-

²⁸⁵ 'Amendments adopted by the European Parliament' (n 264) Amendments 12 and 40.

²⁸⁶ *NW* (n 11) para 94.

²⁸⁷ Meijers Committee (n 231) 4.

ly to the mechanisms in the new Article 28 and Article 29, which start with its proposals. The Commission would not have to wait for the controls to be prolonged to issue an opinion as regards their proportionality and necessity as is currently the case under the 2021 proposal.

Lastly, the Schengen Borders Code should give more binding power to the opinions of the Commission to ensure that the Member States respect their duties related to proportionality and stop lacking political will to conduct proper assessments and lift their border controls as observed during the COVID-19 pandemic. Instead of requiring the Member States to 'take into account' these opinions, the prolongation, or even reintroduction, of internal border controls could be dependent on a positive opinion of the Commission on necessity and proportionality. This approval requirement would only concern the proportionality aspect of the border controls. The Member States would have to conduct proper assessment of proportionality to receive a positive opinion. The new Article 25a could include a seventh paragraph which would read as follows: 'The reintroduction of internal border controls under paragraphs 1 and 4 is conditional upon a positive opinion of the Commission on their proportionality and necessity'. This alternative would provide a clear legal basis for the Commission to sanction Member States if they reintroduce or prolong internal border controls without a positive opinion on proportionality and necessity. Under the current Code, it is more difficult for the Commission to check whether Member States comply with their obligation since the latter only have to take account of its opinion, without necessarily having to follow it.

5 Conclusion

This article has investigated the extent to which the Schengen Borders Code and the 2021 proposal ensure that the Member States reintroduce proportionate internal border controls in situations of health emergencies. It has analysed four aspects related to proportionality to offer a broad analysis of the proportionality of internal border controls reintroduced in these circumstances: the kind of threat arising out of a pandemic, the adequacy of the reintroduction of internal border controls to remedy the situation, the duration of border controls, and the scrutiny over proportionality. As mentioned in Part 2, the first three aspects have been extracted from the wording of Article 26 SBC, which requires that Member States assess 'the extent to which [the reintroduction of internal border controls] is likely to adequately remedy the threat to public policy or internal security, and [...] the proportionality of the measure in relation to that threat'. The adequacy and duration of the controls are similar to the tests of the suitability and necessity of the general principle of proportionality. The fourth aspect about scrutiny is found in Articles 27, 28, and 33 SBC and is not a step of the general proportionality test.

Part 3 has shown that Chapter II of Title III of the Schengen Borders Code contains clear rules with strict safeguards on proportionality as regards the four aspects examined. The circumstances triggering the reintroduction of internal border controls, ie a serious threat to public policy or internal security, are clear, aside from the debate on whether these concepts include a serious threat to public health, and the Code explicitly mentions in Article 25(1) that the scope and duration of the controls should not go beyond what is strictly necessary. Moreover, the Code sets clear maximum durations for the controls, imposes notification, assessment, and ex-post report obligations on Member States and gives the Commission the power to request additional information and issue opinions as regards proportionality if necessary. However, despite these clear safeguards on proportionality, when Member States relied on Articles 25 and 28 SBC during the COVID-19 pandemic, some did not respect them, nor did the Commission enforce them. In practice, some Member States invoked a threat to public health without a legal basis, reintroduced border controls knowing that they were inadequate and for longer than the legal time limits, and sent incomplete notifications and reports to the Commission, which did not request additional information and issue opinions. The lack of political will to comply with the Schengen Borders Code during the COVID-19 pandemic was problematic.

Part 4 has focused on the 2021 proposal, which adapts the Schengen Border Code to the Member States' practices during the COVID-19 pandemic: it broadens the scope and lengthens the maximum duration of the exceptions to the general prohibition of internal border controls. The 2021 proposal improves two aspects of proportionality. First, it enhances legal certainty by including 'large scale public health emergencies' in the grounds for reintroducing internal border controls even though the forthcoming ECJ judgment in the *NORDIC INFO* case could bring some changes. Then, the 2021 proposal improves scrutiny over proportionality by requiring stricter and more frequent assessments of the Member States and mandatory opinions of the Commission in certain circumstances. This strengthening of scrutiny duties is a welcome move towards more respect for proportionality and less inaction by the Member States and the Commission. However, the 2021 proposal could have provided more safeguards as regards the aspects of adequacy and duration. The new Article 28 mechanism and police checks do not seem to be more adequate than existing border controls to meet health threats. The extension of the maximum durations of controls and the possibility to exceed them are not in line with the search for the least restrictive measures. Nevertheless, the legislative process of the 2021 proposal is still ongoing. The European Parliament has the opportunity to suggest amendments and improve the two remaining aspects.

Section 4.3 presented some recommendations to increase the proportionality of the controls that would be reintroduced following the 2021 proposal. First, adding a definition of 'large scale public health emergen-

cies' mentioned in the new Article 25(1)(b), inspired by the definition of 'threat to public health' in Article 2(21) SBC, would increase legal certainty. However, second, since it seems that the measures available in the Schengen Borders Code, ie border controls and police checks, are inadequate to remedy the threat arising from a public health emergency, 'large scale public health emergencies' should not be included in the grounds for reintroducing internal border controls. Third, reducing the time limits set in the 2021 proposal to two months for unforeseeable threats and twelve months for foreseeable threats and adding a clause prohibiting a legal basis switch if the same threat persists would contribute to limiting internal border controls to what is necessary. Fourth, the Commission should be required to issue an opinion for each reintroduction of internal border controls to enhance scrutiny also when Member States reintroduce controls and not only when they prolong them. Finally, the reintroduction of internal border controls should be conditional upon a positive opinion of the Commission on their proportionality and necessity to improve the quality of the proportionality assessment and ensure that the Member States respect the Commission's opinions.

In conclusion, if the current Schengen Borders Code had been correctly applied during the COVID-19 pandemic, it would have ensured that Member States reintroduce proportionate internal border controls as regards four aspects: the reason for reintroducing internal border controls, their duration, their adequacy, and their monitoring. However, this was not always the case during the pandemic. It seems that the Commission issued the 2021 proposal to give a legal basis to these internal border controls reintroduced during the COVID-19 pandemic. This proposal, as currently formulated, would ensure that Member States reintroduce proportionate internal border controls in health emergencies, in particular with regard to the aspects of legality and scrutiny. Looking at the evolution of the reintroduction of internal border controls from the COVID-19 pandemic to the 2021 proposal, it can be seen that the content of the Schengen Borders Code will change considerably if the proposal is adopted in its current form, but Member States' practices will remain largely the same if they comply with the new rules.



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