

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

13 December 2018 (*)

(Reference for a preliminary ruling — Area of freedom, security and justice — Regulation (EC) No 562/2006 — Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) — Articles 20 and 21 — Abolition of internal border controls in the Schengen area — Checks within the territory of a Member State — Measures having an effect equivalent to border checks — Rules of a Member State requiring a coach travel operator on routes crossing the internal borders of the Schengen area to check passengers' passports and residence permits — Penalty — Threat to impose a recurring fine)

In Joined Cases C-412/17 and C-474/17,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decisions of 1 June 2017, received at the Court on 10 July 2017 (C-412/17) and on 8 August 2017 (C-474/17), in the proceedings

Bundesrepublik Deutschland

v

Touring Tours und Travel GmbH (C-412/17),

Sociedad de Transportes SA (C-474/17),

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the First Chamber, acting as President of the Second Chamber, A. Prechal (Rapporteur), C. Toader, A. Rosas and M. Ilešič, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2018,

after considering the observations submitted on behalf of

- the Bundesrepublik Deutschland, by W. Roth, Rechtsanwalt,
- the German Government, by S. Eisenberg and T. Henze, acting as Agents,
- the European Commission, by C. Cattabriga and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2018,

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Article 67(2) TFEU, and Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1) ('Regulation No 562/2006').
- 2 The requests were made in proceedings between, in Case C-412/17, Touring Tours und Travel GmbH, and, in Case C-474/17, Sociedad de Transportes SA, two coach travel operators established, respectively, in Germany and in Spain ('the transporters in question'), and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundespolizeipräsidium (Directorate of the Federal Police, Germany), concerning the legality of decisions taken by the latter preventing them, subject to the imposition of a recurring fine, from transporting third-country nationals not in possession of the requisite passport or residence permit to the territory of the Federal Republic of Germany.

Legal context

International law

- 3 The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime was signed by the European Community on 12 December 2000, in accordance with Council Decision 2001/87/EC of 8 December 2000 (OJ 2001 L 30, p. 44, 'the Additional Protocol'). That protocol was approved by Council Decision 2006/616/EC of 24 July 2006 (OJ 2006 L 262, p. 24), in so far as the provisions of the Additional Protocol fall within the scope of Articles 179 and 181A EC, and by Council Decision 2006/617/EC of 24 July 2006 (OJ 2006 L 262, p. 34), in so far as those provisions fall within the scope of Part Three, Title IV of the EC Treaty.
- 4 According to Article 3 of the Additional Protocol:

'For the purposes of the present Protocol:

(a) "smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(b) "illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

...'

5 Article 6(1)(a) of that protocol provides:

'Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) the smuggling of migrants’.

6 Under Article 11 of that protocol, entitled ‘Border measures’:

‘...

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1(a), of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

...’

EU law

The CISA

7 Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed in Schengen on 19 June 1990 and entered into force on 26 March 1995 (‘the CISA’), provides:

‘1. The Contracting Parties undertake, subject to the obligations resulting from their accession to the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, to incorporate the following rules into their national law:

(a) If aliens are refused entry into the territory of one of the Contracting Parties, the carrier which brought them to the external border by air, sea or land shall be obliged immediately to assume responsibility for them again. ...

(b) The carrier shall be obliged to take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories of the Contracting Parties.

2. The Contracting Parties undertake, subject to the obligations resulting from their accession to the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, and in accordance with their constitutional law, to impose penalties on carriers which transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories.

3. Paragraphs 1(b) and 2 shall also apply to international carriers transporting groups overland by coach, with the exception of border traffic.’

8 Article 27 of the CISA, repealed by Article 5 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17) was worded as follows:

- ‘1. The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party’s laws on the entry and residence of aliens.
2. If a Contracting Party is informed of actions as referred to in paragraph 1 which are in breach of the law of another Contracting Party, it shall inform the latter accordingly.
3. Any Contracting Party which requests another Contracting Party to prosecute, on the grounds of a breach of its own laws, actions as referred to in paragraph 1 must specify, by means of an official report or a certificate from the competent authorities, the provisions of law that have been breached.’

Directive 2001/51/EC

- 9 Recitals 2 and 4 of Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ 2001 L 187, p. 45) provides:

- ‘(2) This measure is among the general provisions aimed at curbing migratory flows and combating illegal immigration.

...

- (4) The freedom of the Member States to retain or introduce additional measures or penalties for carriers, whether referred to in this Directive or not, should not be affected.’

Directive 2002/90

- 10 Recitals 1 to 4 of Directive 2002/90 state:

- ‘(1) One of the objectives of the European Union is the gradual creation of an area of freedom, security and justice, which means, inter alia, that illegal immigration must be combated.
- (2) Consequently, measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.
- (3) To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of this Directive and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [(OJ 2002 L 328, p. 1)].
- (4) The purpose of this Directive is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of Framework Decision [2002/946] in order to prevent that offence.’

- 11 Article 1 of Directive 2002/90, entitled ‘General infringement’, provides in paragraph 1:

‘Each Member State shall adopt appropriate sanctions on:

- (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the

entry or transit of aliens;

- (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.'

12 Article 2 of that directive, entitled 'Instigation, participation and attempt', provides:

'Each Member State shall take the measures necessary to ensure that the sanctions referred to in Article 1 are also applicable to any person who:

- (a) is the instigator of,
- (b) is an accomplice in an infringement as referred to in Article 1(1)(a) or (b) ...

...'

13 Article 3 of that directive, entitled 'Sanctions' provides that each Member State is to take the measures necessary to ensure that the infringements referred to in Articles 1 and 2 thereof are subject to effective, proportionate and dissuasive sanctions.

Framework Decision 2002/946

14 Article 1 of Framework Decision 2002/946 provides the following:

'1. Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive [2002/90] are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

2. Where appropriate, the criminal penalties covered in paragraph 1 may be accompanied by the following measures:

- confiscation of the means of transport used to commit the offence,
- a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed,

...'

15 Article 2 of that framework decision, entitled 'Liability of legal persons', provides:

'1. Each Member State shall take the measures necessary to ensure that legal persons can be held liable for the infringements referred to in Article 1(1) and which are committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, ...

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the infringements referred to in Article 1(1) for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators or instigators of or accessories in the offences referred to in paragraph 1.'

16 Article 3 of that framework decision, entitled ‘Sanctions for legal persons’ provides:

‘1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions ...

2. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(2) is punishable by effective, proportionate and dissuasive sanctions or measures.’

Regulation No 562/2006

17 Regulation No 562/2006, applicable at the material time, was repealed and replaced by 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) (OJ 2016 L 77, p. 1).

18 According to Article 2(9) to (11) and (14) of Regulation No 562/2006:

‘For the purposes of this Regulation:

...

(9) “border control” means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;

(10) “border checks” means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;

(11) “border surveillance” means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks;

...

(14) “carriers” mean any natural or legal person whose profession it is to provide transport of persons’.

19 Article 5 of that regulation, entitled ‘Entry conditions for third-country nationals’, provides in paragraph 1:

‘For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document entitling the holder to cross the border satisfying the following criteria:

(i) its validity shall extend at least three months after the intended date of departure from the territory of the Member States. In a justified case of emergency, this obligation may be waived;

(ii) it shall have been issued within the previous 10 years;

- (b) they are in possession of a valid visa, if required, except where they hold a valid residence permit or a valid long-stay visa;

...’

20 Article 20 of Regulation No 562/2006, entitled ‘Crossing internal borders’, provides:

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

21 Article 21 of that regulation, entitled ‘Checks within the territory’, was worded as follows:

‘The abolition of border control at internal borders shall not affect:

- (a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:
 - (i) do not have border control as an objective;
 - (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;
 - (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;
 - (iv) are carried out on the basis of spot-checks;
- (b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;
- (c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;
- (d) the possibility for a Member State to provide by law for an obligation on third-country nationals to report their presence on its territory pursuant to the provisions of Article 22 of the [CISA].’

German law

22 Paragraph 13 of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on residence, employment and integration of foreign nationals in the Federal Territory) of 30 July 2004 (BGBl. 2004 I, p. 1950), in the version applicable to the facts in the main proceedings (‘the AufenthG’), entitled ‘Crossing borders’ contains, in subparagraph 1, the obligation for all foreign nationals to have in their possession a recognised valid passport or a document replacing a passport on entering or leaving the national territory and to submit to police checks on cross-border traffic.

23 Paragraph 63 of the AufenthG, entitled ‘Obligations of transport undertakings’, provides:

- ‘1. A carrier may bring foreign nationals into the territory of the Federal Republic of Germany only if they are in possession of the requisite passport or residence permit.

2. The Federal Ministry of the Interior or the authority designated by it may, with the agreement of the Federal Ministry of Transport and Digital Infrastructure, prohibit a carrier from bringing foreign nationals into the territory of the Federal Republic of Germany in breach of subparagraph 1 and threaten that carrier with recurring fines in the event of infringement. ...

3. The amount of the recurring fines imposed on the carrier shall be at least EUR 1 000 and not more than EUR 5 000 per foreign national carried by that undertaking in breach of an order adopted in accordance with subparagraph 2. ...

4. The Federal Ministry of the Interior or the authority designated by it may reach an agreement with carriers on the rules intended to implement the obligation referred to in subparagraph 1.'

24 Paragraph 63(1) and (2) of the Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (General Administrative Instructions concerning the Law on residence) of 26 October 2009 (GMBI. 2009, p. 878), is worded as follows:

‘63.1 Control and security obligations

63.1.1 [Paragraph 63 of the AufenthG] prohibits transporters from transporting to the territory of the Federal Republic of Germany foreign nationals who are not in possession of the requisite travel documents. That prohibition relates to transport by air, sea and land, with the exception of cross border rail traffic. ... The legal prohibition on transporting foreign nationals to the territory of the Federal Republic of Germany, when they are not in possession of the requisite passport or visa due to their nationality, simultaneously entails an obligation on the part of the transporter to carry out adequate checks of the passport and visa. The obligation to carry out checks is intended to ensure that foreign nationals satisfy the requisite conditions in Paragraph 13(1) for crossing the border. ...

...

63.1.3.1 The obligation to carry out checks under Paragraph 63(1) requires the transporter to verify whether the foreign national is in possession of the requisite documents ...

63.2 Prohibition on transport and recurring fines

63.2.0 The prohibition on transport and the threat, setting and enforcement of recurring fines are intended to force the transporter to verify compliance, in all cases, with the requirement to be in possession of a passport or visa.'

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

25 The transporters in question provide coach services and operate, inter alia, regular services to the Federal Republic of Germany, which cross the borders between Germany and the Netherlands and between Germany and Belgium.

26 Having decided that those undertakings had transported to Germany a large number of third-country nationals who were not in possession of the requisite travel documents in breach of Paragraph 63(1) of the AufenthG, the Directorate of the Federal Police, first, sent them, in November 2013 and in March 2014 respectively, a ‘warning’ listing the cases of unauthorised transport and stating that, if the infringement continued, a prohibition order would be issued in accordance with Paragraph 63(2) of the AufenthG.

27 Subsequently, having found that the transporters in question were persisting in their unlawful conduct,

the Directorate of the Federal Police issued those prohibition orders, on 26 September 2014 and 18 November 2014 respectively, which were accompanied by a fine in the sum of EUR 1 000 for each new infringement.

- 28 Those orders required the transporters in question, under Paragraph 63(1) of the AufenthG, to do everything in their power to prevent the entry into German territory of any foreign national who was not in possession of the requisite travel documents. To that end, the transporters would be required to check those documents, when checking tickets as the passengers boarded the coach, and would have to refuse access to third-country nationals not in possession of the requisite travel documents.
- 29 In an action brought by the transporters in question against those orders, the Verwaltungsgericht (Administrative Court, Germany) annulled those orders, holding, in essence, that, in the light of the primacy of EU law, Paragraph 63(2) of the AufenthG should not be applied, since its application to undertakings transporting nationals from third countries to Germany across an internal border of the Schengen area was contrary to Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006. The controls imposed on those undertakings would have to be classified as measures having an ‘effect equivalent to border checks’, for the purposes of Article 21 of Regulation No 562/2006, bearing in mind, *inter alia*, their systematic nature and the fact that they had to be carried out before the border is crossed.
- 30 The Federal Republic of Germany brought an appeal on a point of law against that judgment before the referring court, the Bundesverwaltungsgericht (Federal Administrative Court, Germany), arguing, *inter alia*, that EU law and specifically Directive 2002/90 and Framework Decision 2002/946, which are special provisions compared with those in Regulation No 562/2006, require the imposition of penalties for infringements of transport prohibitions such as those laid down in Paragraph 63 of the AufenthG.
- 31 In any event, according to the Federal Republic of Germany, the checking of travel documents required by that provision of national law cannot be classified as a measure having an ‘effect equivalent to border checks’, for the purposes of Article 21(a) of Regulation No 562/2006. The objective pursued is not to control the crossing of the border, but to enforce provisions relating to entry into the territory. Moreover, since those checks were carried out, not by public officials but by the staff of a private undertaking, they were not as in-depth as those at the borders. Thus, it is not possible for those members of staff to use coercive measures or to carry out a search in the event of a refusal by the interested parties to undergo those checks.
- 32 Against that background, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions, which are worded identically in Case C-412/17 and Case C-474/17, to the Court of Justice for a preliminary ruling:

‘(1) Do Article 67(2) TFEU and Articles [20 and 21 of Regulation No 562/2006] preclude a provision of national law of a Member State which has the effect of requiring coach transport undertakings operating regular services across a Schengen internal border to check their passengers’ travel documents before crossing an internal border in order to prevent foreign nationals not in possession of a passport or residence permit from being brought into the territory of the Federal Republic of Germany?

In particular:

- (a) Does the general statutory duty, or the administrative obligation directed at individual carriers, not to bring into federal territory foreign nationals not in possession of a passport or residence permit as required, which is properly discharged only if carriers check all passengers’ travel documents before crossing an internal border, constitute, or fall to be

treated as, a check on persons at internal borders within the meaning of Article [20 of Regulation No 562/2006]?

- (b) Is the imposition of the duties referred to in question 1 to be assessed by reference to Article [21(a) of Regulation No 562/2006], even though carriers do not exercise “police powers” within the meaning of that provision and, moreover, do not formally enjoy any powers of public authority by virtue of the State-imposed obligation to carry out checks?
- (c) If the answer to question 1(b) is in the affirmative, do the checks which carriers are required to carry out, taking into account the criteria laid down in the second sentence of Article [21(a) of Regulation No 562/2006], constitute an unlawful measure having an effect equivalent to border checks?
- (d) Is the imposition of the duties referred to in question 1, in so far as it concerns coach transport undertakings operating regular services, to be assessed by reference to Article [21(b) of Regulation No 562/2006], which provides that the absence of border control at internal borders is not to affect the power of carriers to carry out security checks on persons at ports and airports? Does it follow from this that checks for the purposes of question 1 are not permissible even when carried out other than at ports and airports if they do not constitute security checks and are not also carried out on persons travelling within a Member State?

- (2) Do Articles [20 and 21 of Regulation No 562/2006] permit provisions of national law under which, for the purposes of ensuring compliance with that duty [to carry out checks as referred to in question 1], an order imposing a prohibition and a threat of a recurring fine against a coach transport undertaking in cases where the failure to carry out checks has enabled even foreign nationals not in possession of a passport or residence permit to be brought into the territory of the Federal Republic of Germany?’

- 33 By decision of 24 April 2018, the Court of Justice decided to join Cases C-412/17 and C-474/17 for the purposes of the written procedure, the oral procedure and the judgment.

Consideration of the questions referred

- 34 By those two questions in each of the joined cases, which should be examined together, the referring court asks, in essence, whether Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006 must be interpreted to the effect that they preclude legislation of a Member State, such as that at issue in the main proceedings, which requires every coach transport undertaking providing a regular cross-border service within the Schengen area to the territory of that Member State to check the passports and residence permits of passengers before they cross an internal border in order to prevent the transport of third-country nationals not in possession of those travel documents to the national territory, and which allows, for the purposes of complying with that obligation to carry out checks, the police authorities to issue orders prohibiting such transport, accompanied by a threat of a recurring fine, against transport undertakings which have been found to have conveyed to that territory third-country nationals who were not in possession of those travel documents.
- 35 As a preliminary point in relation to the scope of the questions referred for a preliminary ruling, it should be noted that they are limited to an examination of the provision in Paragraph 63 of the *AufenthG* in the light of Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006.
- 36 However, the Federal Republic of Germany, as a party to the main proceedings, submitted, both in its

written observations and at the hearing before the Court of Justice, that the transporters' obligation to carry out checks, subject to the imposition of a recurring fine, under Paragraph 63 of the AufenthG, does not contravene EU law. Some provisions of Directive 2002/90, of Framework Decision 2002/946, of the Additional Protocol and of Directive 2001/51 require Member States to impose obligations on passenger carriers to carry out checks such as those laid down in Paragraph 63 of the AufenthG and to impose appropriate sanctions on transporters which knowingly help third-country nationals to enter the territory of a Member State, to pass through the territory of a Member State or to reside unlawfully in that territory.

- 37 However, it is clear from the requests for a preliminary ruling that the referring court, in reply to that line of argument already put to that court by the Federal Republic of Germany in support of its appeal on a point of law, expressly stated that it did not need clarification regarding the possible effect of Directive 2002/90, of Framework Decision 2002/946 and of Directive 2001/51 on the reply which had to be given to the questions asked, explaining clearly why it was of that opinion.
- 38 Therefore, it must be stated that the referring court did not refer, in its questions submitted for a preliminary ruling, to any of those three provisions of EU law or, indeed, to the Additional Protocol.
- 39 In that regard, it should be recalled that it is for the referring court alone to determine and formulate the questions to be referred for a preliminary ruling concerning the interpretation of EU law which are necessary in order to resolve the dispute in the main proceedings (judgment of 18 July 2013, *Consiglio Nazionale dei Geologi*, C-136/12, EU:C:2013:489, paragraph 31).
- 40 Thus, although the referring court is at liberty to request the parties to the dispute before it to suggest wording suitable for the question to be referred, the fact remains that it is for that court alone ultimately to decide both its form and content (judgment of 21 July 2011, *Kelly*, C-104/10, EU:C:2011:506, paragraph 65).
- 41 It is also clear from the case-law of the Court of Justice that, if the referring court expressly stated in its order for reference that it did not consider it necessary to ask a question or if it implicitly refused to submit to the Court of Justice a question raised by one of the parties, the Court of Justice may not answer that question or take it into account in the reference for a preliminary ruling (see, to that effect, judgments of 5 October 1988, *Alsatel*, 247/86, EU:C:1988:469, paragraph 8; of 2 June 1994, *AC-ATEL Electronics Vertriebs*, C-30/93, EU:C:1994:224, paragraph 19; and of 26 September 2000, *Engelbrecht*, C-262/97, EU:C:2000:492, paragraphs 21 and 22).
- 42 In those circumstances, the Court of Justice may not, in the present case, extend the scope of the questions asked by examining them in the light, not only of Articles 20 and 21 of Regulation No 562/2006, but also of the provisions of Directive 2002/90, Framework Decision 2002/946 and Directive 2001/51.
- 43 Furthermore, it may be stated that, even if, under certain conditions, a Member State may, in principle, be obliged, under some of the provisions of those three acts or provisions of the Additional Protocol, to require, subject to the imposition of penalties, including criminal penalties, undertakings transporting by coach third-country nationals to the territory of that Member State to check the travel documents which they must be in possession of, that obligation must be implemented as part of the Schengen Borders Code in the version amended by Regulation No 562/2006.
- 44 With regard to the substance of the questions asked and, therefore, the compatibility of a provision of national law such as Paragraph 63 of the AufenthG with the provisions of Regulation No 562/2006, it must be pointed out that it does not have to be examined in the light of Article 20 of Regulation No 562/2006.

- 45 It is clear from the case-law of the Court of Justice that, where the checks at issue in the main proceedings are carried out, not ‘at borders’ or ‘when the border is crossed’, but, in principle, inside the territory of a Member State, in the present case the one in which the travellers board the coach at the start of the cross-border journey, those checks do not amount to border checks prohibited by Article 20 of Regulation No 562/2006, but checks within the territory of a Member State, referred to in Article 21 of that regulation (see, by analogy, judgments of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 68, and of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 56).
- 46 Therefore, it is necessary to examine whether checks within the territory of a Member State, such as those devised and carried out under Paragraph 63 of the AufenthG, are prohibited under Article 21(a) of Regulation No 562/2006. That would be the case if those checks, in fact, had an effect equivalent to border checks, within the meaning of that provision (see, by analogy, judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 57).
- 47 However, before carrying out that examination, there is the preliminary issue of the applicability of Article 21(a) of Regulation No 562/2006 to checks such as those at issue in the main proceedings, in that they must be carried out, not by the police or similar service, but by the staff employed by private law transporters without public authority powers, when Article 21(a) refers to the ‘the exercise of police powers by the competent authorities of the Member States under national law’ and to ‘police measures’.
- 48 In that regard, it is important to note that, in the present case, the requirement to check travel documents imposed on the transporters in question arises both under the general legal obligation laid down in Paragraph 63(1) of the AufenthG and the specific legal obligation stemming from the orders, subject to the imposition of a recurring fine, issued against them by the Directorate of the Federal Police on the basis of Paragraph 63(2) of the AufenthG.
- 49 It is therefore the competent authorities of the Member State concerned which, under national law, require transport undertakings to carry out, if necessary subject to the imposition of a recurring fine, the checks of travel documents which are normally carried out by the police or similar authorities. Thus, even though those undertakings do not have powers conferred by public law, they must carry out those checks on the instruction and under the control of authorities which are vested with such powers.
- 50 Therefore, even if they are carried out by transporters, those checks still fall within the scope of Article 21(a) of Regulation No 562/2006. If that were not the case, that provision could easily be circumvented and its effectiveness compromised.
- 51 With regard to Article 21(a), it should be recalled, in the first place, that the Court has already held that that provision cannot be interpreted to the effect that it includes a condition requiring that police checks in a border area be identical, in terms of their methods and purposes, to those carried out throughout the national territory. That interpretation is supported by the fact, on the one hand, that the European Commission’s proposal to introduce such a condition was not adopted by the EU legislature and, on the other, that it is expressly provided for in Article 21(b) of that regulation in relation to security checks carried out in ports and airports which are authorised only if they are also carried out on persons travelling within a Member State (see, to that effect, judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 73).
- 52 In reply to question 1(d) asked by the referring court, it also follows that, although Article 21(b) of Regulation No 562/2006 expressly covers ‘transporters’, it cannot be inferred, *a contrario*, from that provision that checks such as those carried out under Paragraph 63 of the AufenthG are prohibited solely because they do not satisfy the requirements laid down by that provision and that therefore they are neither security checks carried out in ports or airports, nor checks on persons travelling within the

Member State concerned.

- 53 As is apparent, in particular, from the case-law of the Court cited in paragraph 51 above, the provisions of Article 21(a) and those of Article 21(b) of Regulation No 562/2006 have their own scope and application conditions.
- 54 In the second place, it is apparent from the case-law of the Court that the indicia listed in the second sentence of Article 21(a) of Regulation No 562/2006 are indicators of the existence of an effect equivalent to border checks. If some of those indicators are present, the checks in question will be authorised only if they are carried out within a framework, in national legislation identifying those checks, which is governed by detailed rules and limitations, which are themselves sufficiently precise and detailed with regard to the intensity, frequency and selectivity of those checks. Thus, the more extensive the indicia reflected in that national legislation, in relation to the objective pursued by the checks carried out in a border area, the territorial scope of those checks and the existence of a distinction between the basis of those checks and that of the checks carried out in the remainder of the territory of the Member State concerned, the greater the need for those detailed rules and limitations to be strict and strictly observed (judgment of 21 June 2017, *A*, C-9/16, EU:C:2017:483, paragraphs 38 to 41).
- 55 In the present case, with regard to the examination of Paragraph 63(2) of the *AufenthG* against, in the first place, the indicator in the second sentence of Article 21(a), item (i), of Regulation No 562/2006, according to which the exercise of police powers cannot be regarded as ‘equivalent to the exercise of border checks’, in particular where the checks provided for in that national legislation ‘do not have border control as an objective’, the Court has already held that it is clear from Article 2(9) to (11) of that regulation that that objective aims, first, to ensure that persons may be authorised to enter the territory of the Member State or to leave it and, secondly, to prevent persons from circumventing border checks. The checks concerned may be carried out systematically (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 61).
- 56 It is clear from the General Administrative Instructions concerning the Law on residence that the requirement to check travel documents arising out Paragraph 63(1) of the *AufenthG* is intended to ensure that the third-country nationals concerned ‘satisfy the requisite conditions in Paragraph 13(1) [of the *AufenthG*] for crossing the border’.
- 57 Paragraph 13, entitled ‘Crossing borders’, contains, in subparagraph 1, the obligation for all foreign third-country nationals to have in their possession a recognised valid passport or a document replacing a passport on entering or leaving the national territory and to submit to police checks on cross-border traffic.
- 58 It must therefore be stated that the objective of the checks at issue in the main proceedings is ‘border control’, for the purposes of the second sentence of Article 21(a), item (i), of Regulation No 562/2006, since they are intended to verify that the conditions for entering the Member States that make up the Schengen area, listed in Article 5(1)(a) of Regulation No 562/2006, are satisfied as regards the requisite travel documents, which provision is reproduced in Paragraph 13(1) of the *AufenthG*.
- 59 As the Advocate General made clear in point 85 of his Opinion, the sole purpose of the checks which have to be carried out under Paragraph 63 of the *AufenthG* is therefore to ensure that the persons on board the coach in question who intend to cross the border of the Member State of destination are actually permitted to enter the territory of that Member State. Thus, the purpose of those checks is to prevent passengers from entering the territory of that State if they do not have the requisite travel documents, which is the same as the purpose of the checks carried out by the border police in connection with the crossing of external borders.

- 60 In the second place, with regard to the examination of Paragraph 63(2) of the AufenthG in the light of the indicator in the second sentence of Article 21(a), item (i), of Regulation No 562/2006, it may be considered that the checks imposed by the orders adopted under Paragraph 63(2) of the AufenthG on the transporters operating certain cross-border coach services are based on general police information or experience regarding possible threats to public order, in that those orders are issued after a warning has been sent to the transporters concerned on the ground that it has been established that foreign nationals are entering German territory without being in possession of the requisite travel documents by using certain coach services which they operate.
- 61 On the other hand, that would not be the case for checks imposed on the basis of the obligation under Paragraph 63(1) of the AufenthG, since that obligation is of a general character, covering all cross-border services, irrespective of the conduct of the persons concerned or of circumstances giving rise to a risk to public order (see, by analogy, judgment of 21 June 2017, *A*, C-9/16, EU:C:2017:483, paragraph 55).
- 62 In the third place, with regard to the indicator in the second sentence of Article 21(a), items (iii) and (iv), of Regulation No 562/2006, it is true that the checking of travel documents carried out by the transporters' staff under Paragraph 63 of the AufenthG is, by its very nature, less in-depth than that carried out by the police, not least because the staff have neither the expertise, nor the resources, such as access to databases, nor the powers, conferred by public law, of the police or similar authorities. Thus, only obvious forgeries of passports could be spotted by those members of staff.
- 63 However, as the referring court stated, it is clear from the national legislation at issue in the main proceedings that checks on travel documents must be carried out systematically on all persons travelling on all cross-border coach services.
- 64 Paragraph 63(1) of the AufenthG contains neither detailed rules nor limitations in relation to the intensity, frequency and selectivity of the checks which have to be carried out on that legal basis (see, by analogy, judgment of 21 June 2017, *A*, C-9/16, EU:C:2017:483, paragraphs 57 and 59).
- 65 In that context, it is also common ground that the checks at issue in the main proceedings are not carried out on the basis of spot checks.
- 66 In the fourth place, with regard to the factors which may, as was pointed out in paragraph 54 above, serve as indicators of the existence of an effect equivalent to border checks, in particular those concerning the territorial scope of the checks and the distinction between the basis of those checks and the basis of checks carried out in the rest of Germany, it must be stated, as was pointed out by the Commission in its written observations, without being contradicted on that point at the hearing before the Court, that the checks which have to be carried out under Paragraph 63 of the AufenthG are characterised by the fact that they are triggered precisely by the crossing of an internal border.
- 67 That essential characteristic of the checks at issue in the cases in the main proceedings, also pointed out by the Advocate General in point 85 of his Opinion, differentiates them from the checks at issue in other cases which gave rise to judgments of the Court concerning the interpretation of Article 21(a) of Regulation No 562/2006, more particularly, the judgments of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363), of 19 July 2012, *Adil* (C-278/12 PPU, EU:C:2012:508), and of 21 June 2017, *A* (C-9/16, EU:C:2017:483), which concerned police checks in border areas not exceeding 20, or even 30, kilometres from a border inside the Schengen area.
- 68 The fact that, in the present case, the checks at issue in the main proceedings are characterised by the particularly close connection which they have with the crossing of an internal border, inasmuch as that is specifically the event which triggers those checks, is particularly indicative of an 'effect equivalent to

border checks' for the purposes of Article 21(a) of Regulation No 562/2006.

- 69 That is all the more true since the checks imposed under Paragraph 63 of the AufenthG and those carried out in the rest of Germany have distinct legal bases, where the second type of check may concern internal services covering a distance comparable to the cross-border journeys covered by the first type of check. According to the case-law recalled in paragraph 54 above, that circumstance must be taken into consideration in the overall assessment required in order to classify a provision requiring checks to be carried out as a measure having an 'effect equivalent to border checks' for the purposes of Article 21(a) of Regulation No 562/2006.
- 70 As was also pointed out by the referring court, Paragraph 63 of the AufenthG applies only to coach transport services crossing a border within the Schengen area and does not cover those which are confined to German territory alone, which may, however, be of a distance equal to, or even greater than, those cross-border services.
- 71 In those circumstances, in view of the presence of a number of indicators listed in the second sentence of Article 21(a) of Regulation No 562/2006, of an assessment of their relative weight and of the absence in the national legislation at issue in the main proceedings of sufficient detailed rules and limitations with regard to the intensity, frequency and selectivity of the checks imposed under Paragraph 63(1) of the AufenthG, such checks must be classified as a measure having an 'effect equivalent to border checks', prohibited by the first sentence of Article 21(a) of that regulation.
- 72 It also follows that Article 21(a) of Regulation No 562/2006 precludes the provision in Paragraph 63(2) of the AufenthG in so far as it penalises an infringement of the general obligation to carry out checks in Paragraph 63(1) of the AufenthG by way of an order prohibiting transport, together with a threat to impose a recurring fine. Such a penalty provision is not compatible with Article 21(a), inasmuch as it is imposed in order to ensure compliance with the obligation to carry out checks which itself does not comply with that provision.
- 73 In view of the foregoing, the answer to the questions asked is that Article 67(2) TFEU and Article 21 of Regulation No 562/2006 must be interpreted to the effect that they preclude legislation of a Member State, such as that at issue in the main proceedings, which requires every coach transport undertaking providing a regular cross-border service within the Schengen area to the territory of that Member State to check the passports and residence permits of passengers before they cross an internal border in order to prevent the transport of third-country nationals not in possession of those travel documents to the national territory, and which allows, for the purposes of complying with that obligation to carry out checks, the police authorities to issue orders prohibiting such transport, accompanied by a threat of a recurring fine, against transport undertakings which have been found to have conveyed to that territory third-country nationals who were not in possession of those travel documents.

Costs

- 74 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 67(2) TFEU and Article 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), as amended by Regulation (EU)

No 610/2013 of the European Parliament and of the Council of 26 June 2013, must be interpreted to the effect that they preclude legislation of a Member State, such as that at issue in the main proceedings, which requires every coach transport undertaking providing a regular cross-border service within the Schengen area to the territory of that Member State to check the passports and residence permits of passengers before they cross an internal border in order to prevent the transport of third-country nationals not in possession of those travel documents to the national territory, and which allows, for the purposes of complying with that obligation to carry out checks, the police authorities to issue orders prohibiting such transport, accompanied by a threat of a recurring fine, against transport undertakings which have been found to have conveyed to that territory third-country nationals who were not in possession of the requisite travel documents.

[Signatures]

* [—](#) Language of the case: German.