Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 June 2017*

(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 — Crossing internal borders — Checks within the territory — National legislation authorising checks to establish the identity of persons apprehended within 30 kilometres of the common border with other States parties to the Convention implementing the Schengen Agreement — Possibility of checks irrespective of the behaviour of the person concerned or of the existence of specific circumstances — National legislation permitting certain controls on persons on the premises of railway stations)

In Case C-9/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Kehl (Local Court, Kehl, Germany), made by decision of 21 December 2015, received at the Court on 7 January 2016, in the criminal proceedings against

A,

other party:

Staatsanwaltschaft Offenburg,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan (Rapporteur), J.-C. Bonichot, A. Arabadjiev and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 17 November 2016,

after considering the observations submitted on behalf of:

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the Czech Government, by J. Vláčil and M. Smolek, acting as Agents,

— the Greek Government, by T. Papadopoulou, acting as Agent,

— the Swiss Government, by R. Balzaretti, acting as Agent,

* Language of the case: German.

— the European Commission, by C. Cattabriga and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns 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 request has been made in criminal proceedings brought against A, a German national, accused of offences under German narcotics legislation and of resisting an enforcement officer.

Legal context

EU law

3 According to preamble to Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290):

'The High Contracting Parties,

noting that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, have been integrated into the framework of the European Union by the Treaty of Amsterdam of 2 October 1997;

desiring to preserve the Schengen acquis, as developed since the entry into force of the Treaty of Amsterdam, and to develop this acquis in order to contribute towards achieving the objective of offering citizens of the Union an area of freedom, security and justice without internal borders;

…

have agreed upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union'.

4 Article 2 of that protocol states:

'The Schengen acquis shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or to Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.'

5 The Schengen acquis comprises, inter alia, 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 at Schengen (Luxembourg) on 19 June 1990 ('the CISA'), Article 2 of which concerned the crossing of internal borders.

6 Under Article 2(1) to (3) of the CISA:

'1. Internal borders may be crossed at any point without any checks on persons being carried out.

2. However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof.

3. The abolition of checks on persons at internal borders shall not affect the provisions laid down in Article 22, or the exercise of police powers throughout a Contracting Party's territory by the competent authorities under that Party's law, or the requirement to hold, carry and produce permits and documents provided for in that Party's law.'

7 Article 2 of the CISA was repealed as from 13 October 2006, in accordance with Article 39(1) of Regulation No 562/2006.

8 Under Article 2, points 9 to 11, of that regulation:

'For the purposes of this Regulation the following definitions shall apply:

…

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 articles 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'.

9 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.'

10 Article 21 of that regulation, entitled ‘Checks within the territory’, provides:

‘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;

…

(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

The Law on the Federal Police

11 Contained in Section 1, entitled ‘Tasks and assignments’, of the Gesetz über die Bundespolizei (Law on the Federal Police) of 19 October 1994 (BGBl. 1994 I, p. 2978; ‘the BPolG’) is Paragraph 2 of that law, itself entitled ‘Border protection’, which provides:

‘(1) The Federal Police is responsible for protection of the Federal territory by means of police border surveillance (border protection) except if a *Land*, in agreement with the Federal State, carries out border police tasks with its own resources.

(2) Border protection includes:

1. police surveillance of borders,

2. police checks on cross-border traffic, including
   (a) checks of documents valid for crossing the border and of the entitlement to cross the border,
   (b) border searches
   (c) the prevention of threats,

3. within 30 kilometres of the border and within a 50 kilometre radius of the sea border, the prevention of threats which undermine border security.

The Federal Ministry of the Interior is authorised, in order to secure the border area, to extend, from the sea border, the territory defined in point (3) of the first sentence by decree, with the approval of the Bundesrat, to the extent that border surveillance in the German coastal area requires. The decree must precisely identify the route of the rear line delimiting the enlarged border area. From the sea border, that line must not exceed a width of 80 kilometres.

(3) The agreement referred to in subparagraph 1 must take the form of a written agreement concluded between the Federal Ministry of the Interior and the *Land* in question, and published in the *Bundesanzeiger* (German Federal Gazette). The agreement must regulate the cooperation between the Federal Police and the police of the *Land*.

(4) If the police of a *Land* carries out the tasks referred to in subparagraph 1 with its own resources, in agreement with the Federal State, the performance of those tasks shall be governed by the law applying to the police of the *Land*.'

12 In that Section 1, Paragraph 3 of the BPolG, entitled 'Railway police', provides in subparagraph 1:

'The Federal Police is responsible, on the railway premises of the federal railways, for preventing risks to public security or public order which

1. threaten the users, premises or operation of the railway, or

2. occur during the operation of the railway or emanate from railway premises.'

13 Also in Section 1, Paragraph 12 of the BPolG, entitled 'Prosecution of criminal offences', states in subparagraph 1:

'The Federal Police performs police tasks in the field of the prosecution of criminal offences (Paragraphs 161 and 163 of the Code of Criminal Procedure) where an offence (Paragraph 12(2) of the Criminal Code) is suspected which

1. is directed against border security or the performance of the tasks referred to in Paragraph 2,

2. is to be prosecuted under the provisions of the Law on Passports, the Law on Residence or the Law on Asylum, where that offence was committed by the crossing of the border or was directly connected with that crossing,

3. is intended to permit a border crossing by means of deceit, threats, violence or any other illegal means, where the offence is ascertained during a check on cross-border traffic,

4. effects the movement of goods across the border without administrative authorisation as a constituent element of the criminal provision, in so far as the Federal Police, by or pursuant to a law, has been assigned the task of monitoring the prohibition of movement,

…'

14 Contained in Section 2 of the BPolG, entitled 'Powers', Subsection 2, Part 1, is Paragraph 22 of that law, itself entitled 'Questioning and duty to provide information', which provides in subparagraphs 1 and 1a:

'(1) The Federal Police may question a person if there are facts to justify the supposition that that person can provide information relevant to the performance of a task under the responsibility of the Federal Police. For the purposes of the questioning, the person may be stopped. Upon request, the person must hand over for examination the identity papers he carries.

(1a) With a view to preventing or terminating unlawful entry into the territory of the Federal Republic, the Federal Police may, on trains and on the railway premises of the federal railways (Paragraph 3), to the extent that it is to be assumed, on the basis of knowledge of the situation or of border police experience, that those amenities will be used for the unlawful entry, and on premises used for air

transport or in an installation of an international passenger airport (Paragraph 4), briefly stop and question any person and require him to hand over for examination the identity papers he carries or the documents valid for crossing the border and examine the articles carried by him.'

15 Also in Section 2, Subsection 2, Part 1, is Paragraph 23 of that law, itself entitled 'Identification and checking of papers', subparagraphs 1 and 3 of which are worded as follows:

'(1) The Federal Police may check the identity of a person

1. to prevent a danger,

2. for the purpose of police checks on cross-border traffic,

3. within 30 kilometres of the border for the purpose of preventing or terminating any unauthorised entry into Federal territory or preventing criminal offences within the meaning of points (1) to (4) of Paragraph 12(1),

4. where the person is present in an establishment of the Federal Police (Paragraph 1(3)), on the premises or in an installation of the federal railways (Paragraph 3), on premises used for air transport or an installation of a passenger airport (Paragraph 4), at the seat of a constitutional body or federal ministry (Paragraph 5), at a border crossing point (Paragraph 61) or in close proximity to those premises and there are facts to justify the supposition that criminal offences are to be committed there whereby persons on those premises or the premises themselves are threatened directly, and the identity check is necessary owing to the present danger or information concerning the person, or

5. for the protection of private rights.

…

(3) For the purposes of identification, the Federal Police may take the necessary measures. It may in particular stop the person concerned, question him on his identity and require him to hand over his identity documents for examination. During the police check on border traffic, the Federal Police may also require that the person concerned provide documents valid for crossing the border. The person concerned may be arrested and taken to the police station if his identity or right to cross the border cannot be established in another way or only with serious difficulty. Under the conditions stipulated in the fourth sentence, the person concerned and the articles carried by him may be searched for objects capable of establishing his identity.

…'

The Criminal Code

16 According to Paragraph 113(1) of the Strafgesetzbuch (Criminal Code, BGBl. 1998 I, p. 3322), a person who, by force or by threat of force, offers resistance to or attacks a public official or soldier of the German armed forces charged with the enforcement of laws, regulations, judgments, judicial decisions or orders and acting in the performance of such official duty will be liable to a sentence of imprisonment of up to three years or a fine.

17 Pursuant to Paragraph 113(3), the act is not punishable if the action in the performance of official duty was unlawful.

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

18 On 1 April 2014 A crossed on foot the Europabrücke (Europe Bridge) from Strasbourg (France) to Kehl (Germany), and proceeded directly to the railway station operated by Deutsche Bahn AG, located approximately 500 metres beyond the bridge.

19 This was observed by two officers of the German Federal Police on patrol in the area at the front of the railway station. On the basis of point (3) of Paragraph 23(1) of the BPolG, those officers carried out an identity check on A.

20 A, having forcibly resisted that check, was charged with the offence of resisting an enforcement officer under Paragraph 113(1) of the Criminal Code.

21 The Amtsgericht Kehl (Local Court, Kehl, Germany) took the view that the offence of resisting an enforcement officer was established and that A was to be punished, in so far as the acts of the police officers acting in the performance of their official duty were lawful. That court considers that, in the light of point (3) of Paragraph 23(1) or Paragraph 22(1a) of the BPolG, the check by the Federal Police officers as to A's identity was lawful.

22 That court nevertheless has doubts as to the compatibility of those provisions with EU law, which must be applied in priority. It refers, in that regard, to the judgment of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363). According to the referring court, if those doubts were well-founded, A's attempt to avoid a check on his identity using force would not be punishable under Paragraph 113 of the Criminal Code.

23 In those circumstances, the Amstgericht Kehl (Local Court, Kehl) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 67(2) TFEU and Articles 20 and 21 of Regulation [No 562/2006], or any other rules of EU law, be interpreted as precluding a rule of national law which grants the police authorities of the Member State in question the power to check, within an area of up to 30 kilometres from the land border of that Member State with the States party to the [CISA], the identity of any person, irrespective of his behaviour and of specific circumstances, with a view to preventing or terminating unlawful entry into the territory of that Member State or to preventing certain criminal offences directed against the security of the border or implementation of border protection or committed in connection with the crossing of the border, in the absence of any temporary reintroduction of border controls at the relevant internal border pursuant to Article 23 et seq. of [Regulation No 562/2006]?

2. Must Article 67(2) TFEU and Articles 20 and 21 of Regulation [No 562/2006], or any other rules of EU law, be interpreted as precluding a rule of national law which grants the police authorities of the Member State in question the power briefly to stop and question any person on a train or on the premises of the railways of that Member State, with a view to preventing or terminating unlawful entry into the territory of that Member State, and to request that person to hand over for examination the identity documents or border crossing papers carried by him and visually inspect the articles carried by him, if, on the basis of knowledge of the situation or border police experience, it is to be supposed that such trains or railway premises are being used for unlawful entry and that entry is effected from a State party to the [CISA], in the absence of any temporary reintroduction of border controls at the relevant internal border pursuant to Article 23 et seq. of [Regulation No 562/2006]?'

Consideration of the questions referred

Admissibility

24 The German Government contends that the questions referred for a preliminary ruling are admissible, arguing at the hearing that, even if the Court answered the questions asked in the affirmative and the check at issue in the main proceedings were thus contrary to Articles 20 and 21 of Regulation No 562/2006, such an answer would not concern the lawfulness of the actions of the German police. Therefore, according to that government, the questions asked are not relevant.

25 In that regard, it must be observed that the referring court indicates in its request for a preliminary ruling that it considers an answer to the questions asked necessary in order to rule on whether the accused can be convicted for resisting an enforcement officer under the national law at issue in the main proceedings, in particular Paragraph 113(1) of the Criminal Code. That court proceeds from an interpretation of national law according to which, in the event that the identity check at issue was carried out without any legal basis because the national provisions on which the enforcement officer relied were held to be contrary to EU law, the accused would not be liable to punishment for resisting an enforcement officer under Paragraph 113(1) of the Criminal Code.

26 It should be recalled that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgments of 22 December 2008, *Regie Networks*, C-333/07, EU:C:2008:764, paragraph 46; of 8 September 2009, *Budějovický Budvar*, C-478/07, EU:C:2009:521, paragraph 63; and of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 27).

27 Therefore, in the present case, the Court must take as established, notwithstanding the doubts that have been expressed in that regard by the German Government, the factual and legal circumstances set out by the referring court. In the light of those circumstances, the possibility cannot be ruled out that the Court's answer to the questions relating to the interpretation of Article 67 TFEU and Articles 20 and 21 of Regulation No 562/2006 will be such as to enable the referring court to resolve the dispute in the main proceedings.

28 In those conditions, the present request for a preliminary ruling must be declared admissible.

The first question

29 By its first question, the referring court asks, in essence, whether Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which confers on the police authorities of the Member State in question the power to check the identity of any person, within an area of 30 kilometres from that Member State's land border with other States parties to the CISA, with a view to preventing or terminating unlawful entry into or residence in the territory of that Member State or preventing certain criminal offences which undermine the security of the border or the implementation of border protection or which are committed in connection with the crossing of the border, irrespective of the behaviour of the person concerned and of the existence of specific circumstances, without there being any temporary reintroduction of border controls at the internal border concerned under Articles 23 to 26 of Regulation No 562/2006.

30 It should be recalled, as a preliminary step, that Article 67(2) TFEU, which falls within Title V of the FEU Treaty concerning the area of freedom, security and justice, provides that the Union is to ensure the absence of internal border controls for persons. Article 77(1)(a) TFEU states that the Union is to develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 48)..

31 As is apparent from recital 1 of Regulation No 562/2006, the abolition of internal border controls forms part of the Union's objective, stated in Article 26 TFEU, of establishing an area without internal borders in which the free movement of persons is ensured (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 49).

32 Article 20 of that regulation provides that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. Under Article 2, point 10, of that regulation, 'border checks' means the checks carried out at border crossing points to ensure that persons may be authorised to enter the territory of the Member States or authorised to leave it (judgments of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 67, and of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 51).

33 Article 72 TFEU provides that Title V of the FEU Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 52).

34 Article 21(a) of Regulation No 562/2006 provides that the abolition of border control at internal borders is not to affect the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that is also to apply in border areas (judgments of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 69, and of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 53).

35 According to the second sentence of that provision, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective, are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime, are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders and are carried out on the basis of spot-checks (judgments of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 70, and of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 54).

36 Furthermore, the possibility for a Member State to provide for an obligation to hold or carry papers and documents in its national law is not, pursuant to Article 21(c) of Regulation No 562/2006, affected by the abolition of border control at internal borders (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 63 and the case-law cited).

37 In those circumstances, compliance with EU law and, in particular, Articles 20 and 21 of Regulation No 562/2006, must be ensured by setting up and complying with a framework of rules guaranteeing that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks (see, to that effect, judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 68).

38 In particular, in the face of evidence of an effect equivalent to that of border checks, compliance by those controls with Article 21(a) of Regulation No 562/2006 must be ensured by the details and limitations contained in the framework for the practical exercise of the police powers enjoyed by the Member States, a framework which should be such as to avoid such an equivalent effect (see judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 70 and the case-law cited).

39 In that regard, national legislation granting a power to police authorities to carry out identity checks — a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order — must, inter alia, guide the discretion which those authorities enjoy in the practical application of that power (judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 74).

40 The Court has also stated that the more extensive the evidence of the existence of a possible equivalent effect, within the meaning of Article 21(a) of Regulation No 562/2006, apparent from the objective pursued by the checks carried out in a border area, from the territorial scope of those checks and from the existence of a distinction between the basis of those checks and that of those carried out in the remainder of the territory of the Member State concerned, the greater the need for strict detailed rules and limitations laying down the conditions for the exercise by the Member States of their police powers in a border area and for strict application of those detailed rules and limitations, in order not to imperil the attainment of the objective of the abolition of internal border controls set out in Article 3(2) TEU, Article 26(2) TFEU and 67(1) TFEU, and provided for in Article 20 of Regulation No 562/2006 (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 75).

41 Last, the framework required must be sufficiently clear and precise to enable the need for the checks and the checks actually authorised themselves to be checked (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 76).

42 In the first place, as regards checks such as those provided for in point (3) of Paragraph 23(1) of the BPolG, which is the provision referred to by the referring court in its first question, it must be stated that those checks are carried out not at the borders or at the moment the border is crossed, but within the national territory. Moreover, it is apparent from the documents before the Court that the check at issue in the main proceedings was carried out at the railway station operated by Deutsche Bahn, in Kehl, located approximately 500 metres from the internal border between Germany and France.

43 Those checks are thus checks within the territory of a Member State, referred to in Article 21 of Regulation No 562/2006 (see, to that effect, 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).

44 In the second place, so far as concerns the objective pursued by the German legislation providing for the checks in point (3) of Paragraph 23(1) of the BPolG, it is apparent from the information submitted to the Court — to be verified by the national court — that the objectives pursued by the checks provided for in that provision can be distinguished in certain essential respects from those pursued by border checks within the meaning of Article 2, point 10, of Regulation No 562/2006.

45 In that regard, it should be recalled that, according to that provision, 'border checks' means the checks carried out at border crossing points to ensure that persons may be authorised to enter the territory of the Member States or authorised to leave it.

46 The identity and papers checks provided for in point (3) of Paragraph 23(1) of the BPolG are aimed not only at preventing or terminating unlawful entry into German territory, but also at preventing the criminal offences referred to in points (1) to (4) of Paragraph 12(1) of the BPolG. It is apparent from

the order for reference that that provision is aimed in particular at criminal offences which undermine border security as well as those allegedly committed through the crossing of the border and contrary to the provisions of the Law on Passports, the Law on Residence or the Law on Asylum.

47 The fact that the checks based on point (3) of Paragraph 23(1) of the BPolG thus aim to prevent or terminate illegal entry into the territory of the Federal Republic of Germany or to prevent criminal offences such as crimes which undermine border security or the carrying out of Federal Police tasks — whereas Article 21(a) of Regulation No 562/2006 does not refer specifically to that objective — does not mean that there is an objective of border control contrary to Article 21(a)(i) (see, by analogy, judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 64).

48 First, Article 21(a) of Regulation No 562/2006 provides neither an exhaustive list of the conditions which must be satisfied by police measures in order not to be considered as equivalent to border checks, nor an exhaustive list of the objectives which those police measures may pursue. That interpretation is confirmed by use of the words 'in particular' in the second sentence of Article 21(a) of Regulation No 562/2006 and in Article 21(a)(ii) (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 65).

49 Second, neither Article 79(1) and (2)(c) TFEU – which provides for the development by the European Union of a common immigration policy aimed at ensuring, inter alia, the prevention of illegal immigration and unauthorised residence – nor Regulation No 562/2006 rules out Member State powers in the field of combating illegal immigration and unauthorised residence, even if it is clear that Member States must adjust their laws in that field in order to ensure compliance with EU law (see, to that effect, judgment of 6 December 2011, *Achughbabian*, C-329/11, EU:C:2011:807, paragraphs 30 and 33).

50 The provisions of Article 21(a) to (d) of Regulation No 562/2006 and the wording of Article 72 TFEU confirm that the abolition of internal border controls has not affected the responsibilities of the Member States with regard to the maintenance of law and order and the safeguarding of internal security (judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 66).

51 It follows that the objective pursued by point (3) of Paragraph 23(1) of the BPolG of preventing or terminating illegal entry into the German federal territory or to prevent certain criminal offences does not in itself mean that the checks carried out pursuant to that provision have an equivalent to border checks, prohibited by Article 21(a) of Regulation No 562/2006.

52 In the third place, as regards the question of whether the exercise of control powers granted, in the present case, by point (3) of Paragraph 23(1) of the BPolG has an equivalent effect within the meaning of Article 21(a) of Regulation No 562/2006, it must be recalled that the fact that the territorial scope of those powers is limited to a border area does not suffice in itself to warrant the finding of such an effect. The first sentence of that provision refers expressly to the exercise of police powers by the competent authorities of the Member States under national law, also in border areas (see, by analogy, judgments of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 72, and of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 69).

53 However, the checks set out in point (3) of Paragraph 23(1) of the BPolG are subject, as far as their territorial scope is concerned, to specific rules, unlike the other provisions of Paragraph 23, a factor which might constitute evidence of the existence of such an equivalent effect (see, by analogy, judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 72).

54 In that regard, it is not apparent from the order for reference that the checks governed by point (3) of Paragraph 23(1) of the BPolG are based on police knowledge of the situation or experience, as is provided for in Article 21(a)(ii) of Regulation No 562/2006.

55 Therefore, it seems that those checks are authorised irrespective of the behaviour of the person checked and of circumstances giving rise to a risk of breach of public order.

56 Moreover, it is not apparent from the documents before the Court that the checks provided for in point (3) of Paragraph 23(1) of the BPolG are carried out, in conformity with Article 21(a)(iii) of Regulation No 562/2006, in a manner clearly distinct from systematic checks on persons at the external borders of the European Union.

57 In particular, point (3) of Paragraph 23(1) of the BPolG contains neither further details nor limitations on the power thus conferred — in particular in relation to the intensity and frequency of the checks which may be carried out on that legal basis — for the purposes of preventing the practical application of that power by the competent authorities from leading to controls with an effect equivalent to border checks within the meaning of Article 21(a) of Regulation No 562/2006 (see, by analogy, judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 73). Nevertheless, it is for the referring court, which alone has jurisdiction to decide on the facts, to verify whether that is, in practice, the case.

58 Therefore, it appears that the checks performed pursuant to that point (3) of Paragraph 23(1) of the BPolG may be carried out in a border area within a 30 kilometre radius, without any detailed rules or limitations being provided in that provision.

59 In those circumstances, it must be stated that the powers conferred by point (3) of Paragraph 23(1) of the BPolG must be subject to a regulatory framework meeting the requirements set out in paragraphs 38 to 41 of the present judgment. In the absence of such detailed rules or limitations, themselves sufficiently precise and detailed, in national legislation for the purposes of defining the intensity, frequency and selectivity of checks, it cannot be ruled out that the practical exercise of the police powers granted under German law results — contrary to Article 21(a) of Regulation No 562/2006 — in controls which have an effect equivalent to border checks.

60 In the fourth place, the German Government argues, on that point, that the legislative provisions at issue in the main proceedings are supplemented by other national law provisions, in particular by Paragraph 15 of the BPolG, which provides for the application of the proportionality principle to measures taken by the police, and an administrative regulation, called ‘BRAS 120’, in addition to an administrative decree. According to that government, those provisions supplement the framework for checks carried out under the BPolG and are sufficient to ensure that the practical exercise of the police power consisting in carrying out identity checks cannot have an effect equivalent to that of border checks.

61 However, it is for the referring court, which alone has jurisdiction to decide on such facts, to determine, first, whether such provisions were in force at the time of the facts of the main proceedings and, second, to verify whether those provisions provide a framework for checks carried out under the BPolG as required by the case-law of the Court, in order to avoid such checks being regarded as having an effect equivalent to a border check.

62 In the absence of such a framework in the national legislation, it cannot be considered that those checks, first, are selective and thus not systematic like border checks and, second, are police measures applied on the basis of spot-checks, as required by Article 21(a)(iii) and (iv) of Regulation No 562/2006.

63 In view of all the foregoing considerations, the answer to the first question is that Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which confers on the police authorities of the Member State in question the power to check the identity of any person, within an area of 30 kilometres from that Member State’s land border with other States parties to the CISA, with a view to preventing or terminating unlawful entry into or residence in the territory of that Member State or

preventing certain criminal offences which undermine the security of the border, irrespective of the behaviour of the person concerned and of the existence of specific circumstances, unless that legislation lays down the necessary framework for that power ensuring that the practical exercise of it cannot have an effect equivalent to that of border checks, which is for the referring court to verify.

The second question

64 By its second question, the referring court asks, in essence, whether Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the police authorities of the Member State in question to carry out, on board trains and on the premises of the railways of that Member State, identity or border crossing document checks on any person, and briefly to stop and question any person for that purpose, if knowledge of the situation or border police experience give reason to suppose that those trains or railway premises are being used for unlawful entry into the territory of that Member State and that entry is made from a Member State which has acceded to the CISA, with a view to preventing or terminating unlawful entry into the territory of the Member State in question, without there being any temporary reintroduction of border controls at the internal border concerned under Articles 23 to 26 of Regulation No 562/2006.

65 That question is asked in the event that the Court finds, in relation to the first question, that the checks provided for in point (3) of Paragraph 23(1) of the BPolG are contrary to Articles 20 and 21 of Regulation No 562/2006.

66 In view of the answer to the first question, it must be pointed out, in the first place, that the checks provided for in Paragraph 22(1a) of the BPolG, which is the provision referred to by the referring court in its second question, and in particular the check at issue in the case in the main proceedings, are carried out not at the borders or at the moment the border is crossed, but within the national territory.

67 In the second place, it should be ascertained whether the objective of the checks provided for in that provision is the same as that of border controls, within the meaning of Regulation No 562/2006. In that regard, it is apparent from the documents before the Court that that provision is aimed at preventing or terminating illegal entry into the territory of the Federal Republic of Germany.

68 As is apparent from paragraph 51 above, the objective pursued by the provision at issue in the main proceedings of preventing or terminating illegal entry into German federal territory does not in itself mean that the checks carried out pursuant to the BPolG have an effect equivalent to border checks, prohibited by Article 21(a) of Regulation No 562/2006. However, unlike the checks provided for in point (3) of Paragraph 23(1) of the BPolG, the sole objective of the checks provided for in Paragraph 22(1a) of that law is to prevent or terminate illegal entry into German federal territory, which might indicate that those checks have an effect equivalent to border checks, prohibited by Article 21(a).

69 In the third place, as regards the territorial scope of Paragraph 22(1a) of the BPolG, it should be pointed out that that provision does not lay down any special rules concerning where the checks provided for in that provision may take place and thus does not distinguish between carrying out such controls in a border area and carrying them out elsewhere in the national territory.

70 In the fourth place, it is apparent from the documents before the Court that the checks provided for in Paragraph 22(1a) of the BPolG are based on the fact that the Federal Police is entitled to assume, on the basis of knowledge of the situation or of border police experience, that the installations mentioned

in that provision will be used for unlawful entry, which, according to Article 21(a)(ii) of Regulation No 562/2006, is also an indication that that provision does not have an effect equivalent to a border check.

71 In the fifth place, it is not apparent from the documents before the Court whether and to what extent the checks provided for in Paragraph 22(1a) of the BPolG are executed in a manner clearly distinct from systematic checks on persons at the external borders of the European Union.

72 As has already been recalled in paragraph 40 above, the more extensive the evidence of the existence of a possible equivalent effect, within the meaning of Article 21(a) of Regulation No 562/2006, the greater the need for strict detailed rules and limitations laying down the conditions for the exercise by the Member States of their police powers in a border area and for strict application of those detailed rules and limitations. In the present case, such evidence is to be found in the objective pursued by the checks provided for in Paragraph 22(1a) of the BPolG, which does not differ from those pursued by border checks, in particular in so far as those checks are aimed at preventing or terminating unlawful entry into the German territory, which partly matches the definition given in Article 2, point 10, of Regulation No 562/2006, which states that the objective of border checks is to ensure that persons may be authorised to enter the territory of the Member States.

73 In the sixth place, in those circumstances, it is for the referring court, which alone has jurisdiction to decide on the facts, to verify whether the German legislation contains detailed rules and limitations, themselves sufficiently precise and detailed, such as to define the intensity, frequency and selectivity of the checks provided for in Paragraph 22(1a) of the BPolG in order to ensure that the practical exercise of the police powers granted under German law does not result — contrary to Article 21(a) of Regulation No 562/2006 — in controls which have an effect equivalent to border checks.

74 Thus, it is only if such a framework is found to exist in the German legislation that it may be considered that those checks, first, are selective and thus not systematic like border checks and, second, are police measures applied on the basis of spot-checks, as required by Article 21(a)(iii) and (iv) of Regulation No 562/2006.

75 In view of all the foregoing considerations, the answer to the second question is that Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which permits the police authorities of the Member State in question to carry out, on board trains and on the premises of the railways of that Member State, identity or border crossing document checks on any person, and briefly to stop and question any person for that purpose, if those checks are based on knowledge of the situation or border police experience, provided that the exercise of those checks is subject under national law to detailed rules and limitations determining the intensity, frequency and selectivity of the checks, which is for the referring court to verify.

Costs

76 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 (First Chamber) hereby rules:

1. **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), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of**

26 June 2013, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which confers on the police authorities of the Member State in question the power to check the identity of any person, within an area of 30 kilometres from that Member State's land border with other States parties to 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, signed at Schengen (Luxembourg) on 19 June 1990, with a view to preventing or terminating unlawful entry into or residence in the territory of that Member State or preventing certain criminal offences which undermine the security of the border, irrespective of the behaviour of the person concerned and of the existence of specific circumstances, unless that legislation lays down the necessary framework for that power ensuring that the practical exercise of it cannot have an effect equivalent to that of border checks, which is for the referring court to verify.

2. **Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006, as amended by Regulation No 610/2013, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which permits the police authorities of the Member State in question to carry out, on board trains and on the premises of the railways of that Member State, identity or border crossing document checks on any person, and briefly to stop and question any person for that purpose, if those checks are based on knowledge of the situation or border police experience, provided that the exercise of those checks is subject under national law to detailed rules and limitations determining the intensity, frequency and selectivity of the checks, which is for the referring court to verify.**

[Signatures]