



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 6 September 2018¹

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

Bundesrepublik Deutschland

v

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

Sociedad de Transportes SA (C-474/17)

(Requests for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(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 border control at internal borders of the Schengen area — Rules of a Member State requiring a coach travel operator crossing the internal borders of the Schengen area to check passengers' passports and residence permits — Directive 2002/90/EC — Framework Decision 2002/946/JHA — Facilitation of unauthorised entry)

I. Introduction

1. International coach services, although they allow citizens of the European Union and legally staying third-country nationals to move freely within the European Union, also provide an opportunity for illegally staying third-country nationals to take advantage of the facilities offered by that area of free movement and thus serve as a means of illegal immigration.
2. Apart from the temporary reintroduction of internal border controls, how, within the area of freedom, security and justice of which the Schengen area forms part, can that illegal immigration be countered without jeopardising the freedom of movement promised to citizens of the European Union and third-country nationals legally resident in the European Union?
3. Can a Member State require coach transport undertakings² providing a regular cross-border service within the Schengen area to check, before crossing the internal border, that passengers are in possession of the travel documents required for entry into the national territory and penalise any infringement of that obligation, without thereby restoring borders which have in principle been abolished?

¹ Original language: French.

² Here, 'carrier' must be understood as meaning 'any natural or legal person whose profession it is to provide transport of persons', as defined by the EU legislature in Article 2(14) 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 (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) ('the Schengen Borders Code'). Regulation No 562/2006 was repealed and replaced by Regulation (EU) No 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 (OJ 2016 L 77, p. 1). Regulation No 562/2006 was applicable at the time of the facts in the main proceedings.

4. Those questions were raised in proceedings brought by Touring Tours und Travel GmbH and Sociedad de Transportes SA, two coach transport undertakings established, respectively, in Germany and in Spain, against the Bundesrepublik Deutschland (Federal Republic of Germany), concerning decisions prohibiting them from bringing into German territory foreign nationals not in possession of the passport or residence permit required by Paragraph 13(1) of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in federal territory)³ of 30 July 2004 and threatening them with a penalty payment of EUR 1 000 per foreign national in the event of infringement of that prohibition.

5. In order to ensure that foreign nationals fulfil the requirements for crossing the border laid down by that provision, the German legislature requires that carriers providing air, sea and land transport, with the exception of cross-border rail transport, check that foreign nationals are actually in possession of the required travel documents.

6. Accordingly, Paragraph 63 of the AufenthG, entitled ‘Obligations of transport undertakings’,⁴ the legality of which under EU law must be assessed here, provides:

‘1. A carrier may bring foreign nationals into the territory of the Federal Republic of Germany only where they are in possession of a passport and the required residence permit.

2. The Bundesministerium des Innern (Federal Ministry of the Interior, Germany) or the authority determined by it may, with the agreement of the Bundesministerium für Verkehr und digitale Infrastruktur (Federal Ministry of Transport and Digital Infrastructure, Germany), prohibit a carrier from bringing foreign nationals into the territory of the Federal Republic of Germany in infringement of subparagraph 1 and threaten that carrier with penalty payments in the event of infringement. ...

3. The amount of the penalty payments 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 infringement of a decision adopted in accordance with subparagraph 2. ...

4. The Federal Ministry of the Interior or the authority which it has determined may reach an agreement with carriers on the rules intended to implement the obligation referred to in subparagraph 1.’

7. That legislation transposes, as regards both the obligation which it lays down and the penalty which it imposes, the obligations adopted in Article 26 of the Convention implementing the Schengen Agreements,⁵ as supplemented by Directive 2001/51/EC.⁶ It is therefore not legislation which exists in isolation.⁷ In accordance with Article 26 of the CISA, that legislation must apply to carriers from a State with respect to which the Schengen *acquis* does not apply.

3 BGBl. 2004 I, p. 1950, in the version applicable to the facts in the main proceedings (‘the AufenthG’).

4 The implementation of that article is set out in paragraphs 63.1 and 63.2 of the Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (General administrative provision relating to the law on the residence of foreign nationals) of 26 October 2009 (GMBL. 2009, p. 878, ‘the General administrative provision relating to the AufenthG’).

5 Convention 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 in Schengen (Luxembourg) on 19 June 1990 (OJ 2000 L 239, p. 19; ‘the CISA’).

6 Council Directive of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement (OJ 2001 L 187, p. 45).

7 See, in that regard, the comparative analysis of Bruycker, P., ‘Rapport de synthèse concernant la transposition de la directive visant à compléter les dispositions de l’article 26 de la Convention d’Application de l’Accord de Schengen du 14 juin 1985’, *Immigration and Asylum Law of the EU: current debates*, Bruylant, Brussels, 2005, pp. 417 to 424, and that of the European Migration Network, entitled ‘Ad-Hoc Query on implementing Council Directive 2001/51/EC’, of 13 December 2012, available at the following internet address: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/eu-acquis/436_emn_ad-hoc_query_on_implementing_council_directive_200151ec_5november2012_wider_dissemination_en.pdf.

8. Paragraph 63 of the *AufenthG* is therefore not open to criticism if applied to carriers transporting a foreign national across the external border of a Member State.

9. What is more open to criticism, however, or, in any event, raises a difficulty in this case, is the application of that provision to coach transport undertakings which provide a regular cross-border service within the Schengen Area itself and which therefore bring a foreign national to the internal border of a Member State.⁸ The absence of internal border controls constitutes the very essence of the Schengen area.⁹

10. It was in that context that the Bundesverwaltungsgericht (Federal Administrative Court, Germany) decided to stay the proceedings in the disputes before it and to make a reference to the Court of Justice for a preliminary ruling.

11. By the two questions referred, the referring court asks the Court whether Article 67(2) TFEU and Articles 20 and 21 of the Schengen Borders Code preclude a Member State from applying to coach transport undertakings providing a regular cross-border service within the Schengen area itself national legislation which, first, requires carriers to check, before crossing the border, that their passengers are in possession of the passport and residence permit required for lawful entry into the national territory and, secondly, prescribes penalties for any failure to fulfil that obligation to carry out checks.

12. The questions referred by the Bundesverwaltungsgericht (Federal Administrative Court) have not been previously addressed by the Court.

13. In the cases which gave rise to the judgments of 22 June 2010, *Melki and Abdeli*,¹⁰ of 19 July 2012, *Adil*,¹¹ and of 21 June 2017, *A.*,¹² the Court examined whether checks carried out by authorities exercising public powers and conducted within the actual territory of a Member State, at its border or in a border area, were compatible with the provisions of the Schengen Borders Code. In this case, however, the checks implemented under Paragraph 63 of the *AufenthG* are carried out by the staff of private carriers having no police powers and must be conducted before crossing the internal border and therefore outside the territory of the Member State.

14. The implications of the replies to the questions raised by the referring court are clear.

15. The question to be determined is to what extent legislation such as that at issue — which is intended to deprive illegally staying third-country nationals of the possibility of moving from one Member State to another using a means of transport, in this case regular coach services — constitutes, for the purpose of Article 3 TEU, an ‘appropriate measure’ relating to immigration in an area which is intended to be an area of freedom, security and justice without internal borders, but at a time when terrorism, cross-border crime and the risks of secondary movements of persons who have illegally crossed external borders threaten the public policy and internal security of Member States.

⁸ As is clear from the study by the European Migration Network, cited in footnote 7 above, the national legislation at issue, and apparently much other national legislation, makes no distinction according to whether carriers are transporting passengers from a Member State of the Schengen area or from a third State.

⁹ See Labayle, H., ‘La suppression des contrôles aux frontières intérieures de l’Union’, *Les frontières de l’Union européenne*, Bruylant, Brussels, 2013, pp. 19 to 53. The author states that ‘ce mouvement de suppression est à la base de l’une des réalisations les plus remarquables de l’Union ... celle d’un “espace” ouvert à la libre circulation des personnes’ (‘that impetus towards abolition is the basis for one of the most remarkable achievements of the European Union ... that of an “area” which is open to the free movement of persons’ (p. 19)).

¹⁰ C-188/10 and C-189/10, EU:C:2010:363.

¹¹ C-278/12 PPU, EU:C:2012:508.

¹² C-9/16, EU:C:2017:483.

16. Today, many Member States are calling for the restoration of internal borders — citing the shortcomings and deficiencies in the controls at the external borders of the Schengen area — and are making amendments to their legislation.¹³ In its order for reference, the Bundesverwaltungsgericht (Federal Administrative Court) thus points out that the legislation at issue is capable of constituting an ‘effective countermeasure’ to those secondary movements, thereby making it possible to remedy the permeability or porosity of the external borders of the Schengen area where internal border controls have not been reintroduced on a temporary basis.

17. In the first place, I shall examine the checks at issue in the light of the provisions of the Schengen Borders Code on which the referring court bases its request for a preliminary ruling.

18. In that regard, I shall set out the reasons why those checks must, in my view, be treated as ‘border checks’ prohibited under Article 20 of the Schengen Borders Code. I shall consider that, by introducing such an obligation to carry out checks, the Member State is using legislation originally intended for external border controls, is covertly restoring borders where they have in principle been abolished and is circumventing the fundamental prohibition set out in Articles 1 and 20 of the Schengen Borders Code.

19. Although the Member States have a perfectly legitimate interest in controlling illegal immigration, I do not think that irregular immigration ought to be countered through the introduction of a scheme established outside the framework and limits of the Schengen Borders Code which requires transport undertakings to carry out checks in the territory of another Member State and to make assessments that are normally the responsibility of police authorities alone.

20. Such a scheme is ineffective and open to criticism in the light of the protection of certain fundamental rights such as the right to asylum enshrined in Article 18 of the Charter of Fundamental Rights of the European Union.¹⁴

21. Legitimising such a scheme would, in my view, jeopardise not only the principles on which the Schengen area is based, but also its reality, since the Schengen area presently allows citizens of the European Union and legally staying third-country nationals to take full advantage of the free movement it safeguards. Moreover, that approach would fail to take into account the police powers which Member States retain in order to ensure public policy and internal security on their territory and the instruments of cooperation also made available to them. Finally, it would disregard the many legislative instruments which have been adopted within the European Union in order better to control migratory flows and, in particular, the measures adopted in the area of the management and control of external borders and the fight against migrant smuggling.

22. In the second place, in order to give the referring court a useful answer allowing it to resolve the disputes before it, I shall propose that the Court examine the legislation at issue in the light of the provisions of EU law specifically intended to combat illegal immigration and, in particular, the provisions in Directive 2002/90/EC¹⁵ and Framework Decision 2002/946/JHA¹⁶ aimed at preventing the facilitation of unauthorised entry, transit and residence.

¹³ Some Member States thus exempt coach transport undertakings from the fine provided for in the event of an infringement of their control obligation during the crossing of the external borders, if those undertakings provide evidence of either checks on entry into the territory of one of the States with which the Schengen *acquis* applies or checks by the competent services on entry into the national territory.

¹⁴ I think that such a scheme is open to criticism in so far as it makes no distinction according to whether the third-country national without the requisite travel documents is an illegal immigrant or an asylum seeker. However, secondary migratory movements include persons who may be entitled to international protection. Although, as EU law now stands, asylum seekers are supposed to submit their application in the first Member State of entry, many move irregularly within the Schengen area, taking the view that they are more likely to be granted refugee status in one Member State than another, since, in spite of the harmonisation achieved, the prevailing framework is still one of national asylum systems.

¹⁵ Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17).

¹⁶ Council framework Decision 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).

23. I would point out in that regard that, in the event that the competent national authorities were to find that transport undertakings, such as those at issue in the dispute in the main proceedings, are in fact using their activities intentionally to facilitate the unlawful entry of third-country nationals into national territory and were to consider that both the material and mental elements [the *actus reus* and *mens rea*] of the offence of facilitation of unauthorised entry assistance are satisfied, it would then be for those national authorities to take the necessary measures to ensure that that offence is subject to an effective, proportionate and dissuasive penalty, in accordance with the principles set out in Directive 2002/90 and Framework Decision 2002/946.

II. Facts in the main proceedings

24. The transport undertakings at issue 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.

25. Taking the view that those undertakings had transported into Germany a significant number of foreign nationals without the requisite travel documents in infringement of Paragraph 63(1) of the AufenthG, the Bundespolizeipräsidium (Directorate of the Federal Police, Germany) sent those undertakings a ‘warning’, in November 2013 and March 2014 respectively, listing the cases of unauthorised transport and announcing, on the basis of Paragraph 63(2) of the AufenthG, that, in the event of continued infringement, they would be prohibited from transporting foreign nationals into national territory where those foreign nationals are not in possession of the required travel documents.

26. Subsequently, having found that the infringement had continued, the Directorate of the Federal Police adopted such prohibition decisions, on 26 September 2014 and 18 November 2014 respectively, which were accompanied by a threat of penalty payments of EUR 1 000 for each new infringement.

27. Those decisions stated, by way of a statement of reasons, that the transport undertakings at issue were obliged, under Paragraph 63(1) of the AufenthG, to make sufficient efforts to prevent the transport into German territory of any foreign national without the requisite travel documents, and that those undertakings were, both in fact and in law, in a position to fulfil those obligations. To that end, those undertakings were required to check those documents when checking tickets as a coach is boarded and could refuse to allow foreign nationals without the required travel documents to board a coach.

28. In an action brought by the transport undertakings concerned against those decisions, the Verwaltungsgericht (Administrative Court, Germany) annulled those decisions, 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 foreign nationals to Germany across an internal border of the Schengen area would be contrary to Article 67(2) TFEU and Articles 20 and 21 of the Schengen Borders Code. The controls imposed on those undertakings should be classified as ‘measures having an effect equivalent to border checks’, for the purposes of Article 21 of that code, in the light, inter alia, of their systematic nature and the fact that they are carried out even before the border is crossed.

29. The Federal Republic of Germany brought before the referring court an appeal on a point of law against that judgment, arguing, in particular, that EU law and specifically Directive 2002/90 and Framework Decision 2002/946, which are special provisions compared with those provided for by the Schengen Borders Code, require the imposition of penalties for infringements of transport prohibitions such as those provided for in Paragraph 63 of the AufenthG.

30. In any event, it claims, 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 purpose of Article 21(a), of the Schengen Borders Code. The objective pursued is not to control the crossing of the border, but to enforce the provisions relating to entry into the territory. Moreover, since those checks were carried out not by public officials but by the personnel of a private undertaking, they are not as extensive or intense as those of a border control. Thus, it is not possible to use coercive measures or to carry out a search in the event of a refusal to be subject to the checks.

III. Questions referred for a preliminary ruling

31. In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do Article 67(2) TFEU and Articles [20 and 21] of (the Schengen Borders Code) preclude a provision of national law of a Member State which has the effect of requiring bus 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 the Schengen Borders Code?
 - (b) Is the imposition of the duties referred to in point 1 to be assessed by reference to Article [21](a) of the Schengen Borders Code, 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 the Schengen Borders Code, constitute an impermissible measure having an effect equivalent to border checks?
 - (d) Is the imposition of the duties referred to in point 1, in so far as it concerns bus undertakings operating regular services, to be assessed by reference to Article [21](b) of the Schengen Borders Code, 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 within the meaning of Question 1 are impermissible 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 the Schengen Borders Code 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 on pain of a penalty payment may be made against a bus 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?’

32. The Federal Republic of Germany, represented by the Bundespolizeipräsidium (Federal Police Board), the German Government and the European Commission have submitted written observations and presented oral argument.

IV. Preliminary observations

33. Before I examine the questions raised by the referring court, it is important, in my view, to make a preliminary remark concerning the obligations incumbent upon the Member States in a situation such as that at issue.

34. According to Article 3(2) TEU, ‘the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’.

35. Within that area without internal frontiers, which is the area of freedom, security and justice, Member States must ensure, on the one hand, the free movement of persons and, on the other hand, the curbing of migratory flows, which entails combating illegal immigration.

36. In the first place, Member States are therefore required not to impede, by means of controls at their internal borders, the free movement of citizens of the European Union and third-country nationals who have entered or are residing lawfully in the European Union, irrespective of their nationality.

37. This falls, on the one hand, within the scope of the ‘General provisions’ of Article 67(2) TFEU, which provides that the European Union is to ensure the absence of internal border controls for persons, and, on the other, of Article 77(1)(a) TFEU, which states, under the heading ‘policies on border checks, asylum and immigration’, that the European Union is to develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing those borders.

38. For citizens of the European Union, the right to move freely and unhindered within the territory of the Member States constitutes a fundamental right in accordance with Article 3(2) TEU and Article 20(2) and Article 21 TFEU.

39. For legally staying third-country nationals, the removal of the nationality clause provided for by Article 20 of the Schengen Borders Code and Article 67 TFEU also makes them beneficiaries of free movement without internal border controls during the period of time granted to them under the legislation.

40. Member States are thus required to abolish checks at internal borders under Article 20 of the Schengen Borders Code as well as any other measure having an effect equivalent to the exercise of such checks for the purposes of Article 21 of that code.

41. Nevertheless, according to Article 72 TFEU, the abolition of border control at internal borders 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.

42. The EU legislature, under Article 21(a) of the Schengen Borders Code, thus permitted the competent national authorities to exercise their police powers under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks, which also applies in border areas. According to that provision, the exercise of those powers may not '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 ...'

43. Under Article 21(b) of the Schengen Borders Code, the EU legislature also permits the competent national authorities to carry out security checks on persons at ports and airports.

44. In the second place, Member States are also required to adopt appropriate measures to counter illegal immigration, since third-country nationals who entered or are staying illegally in the European Union cannot enjoy the rights conferred by the Treaties.¹⁷

45. The EU legislature has therefore put in place a number of measures.

46. The first set of measures, like the scheme provided for by the national legislation at issue, introduces control obligations for carriers bringing third-country nationals to the external border of the Schengen area, with the aim of preventing illegal immigration.

47. Those measures were adopted within the framework of the CISA. They are 'accompanying measures', the terms of which are defined in Article 26 thereof. That article 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.

¹⁷ Those measures are applicable without prejudice to the protection afforded to refugees and asylum seekers.

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

48. Those provisions were supplemented by Directive 2001/51.

49. Recitals 1, 2 and 4 of that directive are worded as follows:

‘(1) In order to combat illegal immigration effectively, it is essential that all the Member States introduce provisions laying down the obligations of carriers transporting foreign nationals into the territory of the Member States. In addition, in order to ensure a greater effectiveness of this objective, the financial penalties currently provided for by the Member States for cases where carriers fail to meet their control obligations should be harmonised to the extent possible

(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.’

50. That directive specifies in Articles 2 and 3 thereof the requirements for the application of the return obligation and in Articles 4 and 5 thereof the nature and the amount of the penalties applicable in the event of infringement by carriers of their control obligations.

51. The Member States must thus ensure, under Article 4 of Directive 2001/51, that the penalties applicable to carriers under the provisions of Article 26(2) and (3) of the CISA are dissuasive, effective and proportionate, and the EU legislature lays down a maximum and minimum amount for those penalties. Moreover, under Article 5 of that directive, the Member States may adopt or retain penalties of another nature, such as the temporary suspension or withdrawal of the operating licence.

52. The second set of measures to counter illegal immigration was adopted in the context of Directive 2002/90 and Framework Decision 2002/946 and seeks to impose penalties for the facilitation of illegal immigration.¹⁸

53. According to Article 5 of Directive 2002/90 and Article 10 of Framework Decision 2002/946, those legislative measures repeal the mechanism initially established in Article 27 of the CISA.¹⁹

54. According to recital 2 of each measure, Directive 2002/90 and Framework Decision 2002/946 apply to the unauthorised crossing of the internal borders of a Member State.²⁰

55. While Directive 2002/90 defines the offences relating to facilitation of unauthorised entry, transit and residence, Framework Decision 2002/946 lays down minimum rules concerning the nature of the penalties which may be imposed, the liability of legal persons and jurisdiction as between the Member States.

18 According to Article 6 of Framework Decision 2002/946, that mechanism is to apply without prejudice to the protection afforded refugees and asylum seekers.

19 Under Chapter 6, entitled ‘Accompanying measures’, Article 27(1) of the CISA requires that ‘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’.

20 In recital 2 of both Directive 2002/90 and Framework Decision 2002/946, the EU legislature stated that ‘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’ (emphasis added).

56. Article 1 of Directive 2002/90, entitled ‘General infringement’, thus 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;

...’

57. Under Article 2 of that directive, those sanctions must be applied against any person who is the instigator or accomplice or attempts to commit that infringement.

58. Article 1 of Framework Decision 2002/946 requires that the offence of facilitation of unauthorised entry into the territory be punishable by effective, proportionate and dissuasive criminal penalties. The offence committed may thus give rise to a form of ‘extradition’, confiscation of the means of transport used to commit the offence, a prohibition on practising the occupational activity in the exercise of which that offence was committed and a custodial sentence where the offence was carried out as an activity of a criminal organisation or where its commission endangered the lives of the persons who are the subject of the offence.

59. Those measures, in so far as they apply to crossings of a Member State’s internal borders, may be relevant in the context of the examination of the national legislation at issue.

V. My analysis

60. By its first question, the referring court essentially asks the Court whether Article 67(2) TFEU and Articles 20 and 21 of the Schengen Borders Code preclude a Member State from applying to coach transport undertakings providing a regular cross-border service within the Schengen area national legislation which requires carriers to check, before crossing the border, that their passengers are in possession of the passport and residence permit required for lawful entry into the national territory.

61. In particular, the referring court asks whether the controls implemented under that legislation constitute or may be treated as ‘border checks’, in accordance with Article 20 of the Schengen Borders Code, or whether they constitute ‘checks within the territory’, in accordance with Article 21(a) of that code. In the latter case, the referring court asks the Court whether, having regard to the criteria referred to in that provision, those checks are capable of having an effect equivalent to border checks.

62. By its second question, the referring court also asks the Court whether Articles 20 and 21 of the Schengen Borders Code must be interpreted as precluding national legislation, such as that at issue, which makes it possible to adopt a decision prohibiting coach transport undertakings that provide a regular cross-border service within the Schengen area from transporting into the national territory illegally staying third-country nationals and, in addition, permits those undertakings to be threatened with a penalty payment if they continue to commit that offence.

63. In its order for reference, the Bundesverwaltungsgericht (Federal Administrative Court) focuses its analysis on the provisions of Articles 20 and 21 of the Schengen Borders Code, which abolish internal border controls within the Schengen area.

64. As I have stated, the questions raised by the referring court have not been previously addressed by the Court.

65. In the context of the disputes which have been brought before it, the Court has examined whether checks carried out by authorities exercising public powers and conducted within the actual territory of a Member State, at its border or in a border area, were compatible with the provisions of the Schengen Borders Code.

66. First of all, in the case which gave rise to the judgment of 22 June 2010, *Melki and Abdeli*,²¹ the persons concerned were subject to a French police control, pursuant to Article 78-2, fourth paragraph, of the Code of Criminal Procedure, in the area between the land border of France with Belgium and a line drawn 20 kilometres inside that border. The objective of that control was to check compliance with the obligations to hold, carry and present identity papers and documents provided for by law.

67. Next, in the case which gave rise to the judgment of 19 July 2012, *Adil*,²² the person concerned had been stopped during a check carried out by the Koninklijke Marechaussee (Royal Mounted Police, Netherlands) under Article 4.17a of the Vreemdelingenbesluit 2000 (Decree on foreign nationals of 2000), when he was a passenger in a Eurolines coach. He was stopped on the motorway coming from Germany, in the territory of a municipality bordering that Member State. In accordance with the national rules at issue in that case, that stop was intended to make it possible to establish the identity, nationality and residence status of the person, in the context of combating illegal residence of persons after they have crossed the border and, as it was concerned with land transport, was carried out solely in the context of the monitoring of foreign nationals on roads in a 20 kilometre area extending from the common border with Belgium and Germany.

68. Finally, in the case which gave rise to the judgment of 21 June 2017, *A.*,²³ the person concerned was the subject of an identity check carried out by a Bundespolizei (federal police, Germany) patrol shortly after he had crossed on foot the Europabrücke (Europe Bridge) from Strasbourg (France) to Kehl (Germany) and had proceeded to the railway station approximately 500 metres beyond the bridge. Paragraph 23(1)(3) of the Gesetz über die Bundespolizei (Law on the federal police)²⁴ of 19 October 1994 allows the federal police to check the identity of a person within 30 kilometres of the border for the purpose of preventing or terminating any unauthorised entry into Federal territory or preventing criminal offences.

69. The checks carried out under Paragraph 63 of the AufenthG are therefore very clearly distinguishable from those upon which the Court has had to adjudicate to date, which were limited in scope to the border areas within a Member State. The checks at issue are carried out by the staff of private carriers having no police powers and must be conducted before crossing the internal border and therefore outside the territory of the Member State.

70. The Federal Republic of Germany maintains firmly, for its part, that the national legislation at issue, far from instituting border checks prohibited by Article 20 of the Schengen Borders Code, is actually intended to implement the measures to counter illegal immigration adopted at international and European level.

²¹ C-188/10 and C-189/10, EU:C:2010:363.

²² C-278/12 PPU, EU:C:2012:508.

²³ C-9/16, EU:C:2017:483.

²⁴ BGBl. 1994 I, p. 2978.

71. Accordingly, its observations are devoted to showing that the legislation at issue is required by Article 11 of the Protocol against the smuggling of migrants by land, air and sea, supplementing the United Nations Convention against transnational organised crime,²⁵ that it is, moreover, permitted in the light of Directive 2001/51, which lays down the control obligations imposed on carriers by Article 26 of the CISA, and, finally, that it was adopted ‘in compliance with and in application’ of the requirements of Directive 2002/90 and Framework Decision 2002/946, which prevent the facilitation of unauthorised entry into the territory of a Member State.

72. In this Opinion, I shall examine the controls at issue in the light of the provisions of the Schengen Borders Code on which the referring court bases its request for a preliminary ruling, before carrying out an analysis of the provisions of EU law specifically intended to counter illegal immigration and, in particular, to prevent the facilitation of unauthorised entry, transit and residence, on which the Federal Republic of Germany focuses.

A. The interpretation of the provisions of the Schengen Borders Code

73. For the reasons which I shall now set out, I consider that the checks at issue must be treated as ‘border checks’ prohibited under Article 20 of the Schengen Borders Code.

74. According to Article 1 thereof, the Schengen Borders Code ‘provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union ...’.

75. According to Article 2(9) of that code, border controls are ‘the activity carried out at a border ... in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance’.

76. Border checks are, under Article 2(10) of that code, ‘the checks carried out at border crossing points, [²⁶] 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’.

77. Article 20 of the Schengen Borders Code gives specific expression to the principle set out in Article 1 thereof, by providing that ‘internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out’.

78. That provision therefore has the objective of prohibiting border checks where they are carried out ‘at borders’ or when the border is crossed.²⁷

79. Article 21 of the Schengen Borders Code, which is entitled ‘Checks within the territory’, prohibits for its part checks which take place throughout the territory of a Member State or in its border areas and which, under cover of police powers, have an effect equivalent to border checks.²⁸

²⁵ That protocol was approved, on behalf of the European Community, by Council Decision 2006/616/EC of 24 July 2006, on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime, concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community (OJ 2006 L 262, p. 24) and by Council Decision 2006/617/EC of 24 July 2006, on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime, concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community (OJ 2006 L 262, p. 34) (‘the additional protocol of the United Nations’).

²⁶ Article 2(8) of that code defines border crossing points as crossing points authorised by the competent authorities for the crossing of external borders.

²⁷ See, in that regard, judgments of 19 July 2012, *Adil* (C-278/12 PPU, EU:C:2012:508, paragraph 56 and case-law cited), and of 21 June 2017, *A* (C-9/16, EU:C:2017:483, paragraph 42).

²⁸ See, in that regard, recital 5 and recommendation 1 of Commission Recommendation of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area [C(2017) 3349 final].

80. From which perspective should the checks carried out under Paragraph 63 of the AufenthG be understood?

81. From the outset, those checks seem to me to be excluded from the scope of Article 21 of the Schengen Borders Code. They are carried out not within the territory of the Member State but outside it, since carriers must check passengers as they board coaches and their tickets are being checked.

82. However, those checks may be understood in the light of Article 20 of the Schengen Borders Code, since they are, in my view, comparable to ‘border checks’.

83. It is true that the checks carried out under Paragraph 63 of the AufenthG take place not in connection with the crossing of the border, but before it is crossed. Accordingly, for the purposes of the case-law of the Court relating to Directive 2008/115/EC,²⁹ there is no ‘direct temporal and spatial link’ with the crossing of the border.³⁰

84. However, those checks are, by their very nature, comparable to border checks.

85. This is very clear from the wording of paragraph 63.1.1 of the General administrative provision relating to the AufenthG, in which it is stated that ‘the duty to carry out checks [provided for in Paragraph 63 of the AufenthG] is intended to ensure that foreign nationals satisfy the conditions laid down in Paragraph 13(1) [of the AufenthG] *for crossing the border*’.³¹ At the hearing, the Federal Republic of Germany also fully accepted that those checks are triggered by the crossing of the internal border. The sole purpose of such checks is to ensure that the persons on board the coach who intend to cross the border of the Member State of destination are indeed permitted to enter the territory of that Member State. Moreover, those checks have the effect of preventing passengers from entering the territory of that State if they do not have the required travel documents, in the same way as checks carried out by border guards in connection with the crossing of internal borders. The refusal to transport an illegally staying foreign national is, in the present case, analogous to *refoulement*.

86. In reality, the scheme under consideration has the effect of breaking the direct temporal and spatial link with the crossing of the border, thereby extending territorial borders outwards and introducing what commentators have described as ‘remote checks’ or ‘outsourced’ checks.³² *Refoulement* takes place not at the borders, but well before they are crossed.

87. Moreover, once the law prohibits carriers from transporting into national territory third-country nationals without the travel documents required for lawful entry and threatens those carriers with a penalty payment in the event of infringement of that prohibition, this can be regarded as involving a systematic obligation to carry out checks, compliance with which is unconditional and infringement of which is unlawful. It is also clear from paragraph 63.2.0 of the General administrative provision relating to the AufenthG that those checks are intended to cover and must be carried out ‘in all cases’.

29 Directive of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348 2008, p. 98).

30 That criterion was used by the Court in paragraph 72 of the judgment of 7 June 2016, *Affum* (C-47/15, EU:C:2016:408), in connection with the interpretation of Article 2(2)(a) of Directive 2008/115. That provision specifies that the apprehension or interception of the third-country nationals concerned must take place ‘in connection with the irregular crossing’ of an external border. According to the Court, that wording implies a direct temporal and spatial link with the crossing of the border, which covers third-country nationals who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the external border or near that border after it has been so crossed.

31 Emphasis added.

32 See, in that regard, Lantero, C., ‘La politique de sanction des transporteurs’, *Les flux migratoires au sein de l’Union européenne*, Bruylant, Bruxelles, 2017, pp. 265 to 281, who refers to ‘dispositifs de non-entrée’ (‘non-entry arrangements’) (p. 265); Cuttitta, P., ‘Le monde frontière. Le contrôle de l’immigration dans l’espace globalisé’, *Cultures et conflits*, OpenEdition, Marseille, 2007, No 68, pp. 61 to 84, who refers, for his part, to ‘flexibilisation ... de la frontière à travers la délocalisation des contrôles’ (‘increasing the flexibility ... of the border through the outsourcing of controls’) (p. 69); Guiraudon, V., ‘Logiques et pratiques de l’État délégué: les compagnies de transport dans le contrôle migratoire à distance, parties 1 et 2’, *Cultures et conflits*, OpenEdition, Marseille, 2002, No 45, pp. 51 to 79, and Rossetto, J., ‘Le contrôle de l’immigration’, *Les frontières de l’Union européenne*, Bruylant, Brussels, 2013, pp. 111 to 129, in particular, p. 121.

88. The fact that those checks are carried out by the personnel of the transport undertakings is not sufficient, in my view, to exclude them from the scope of Article 20 of the Schengen Borders Code. If that were the case, it would then be easy to circumvent the prohibitions laid down.

89. First, except for undermining the effectiveness of the checks carried out, that delegation of powers alters neither the purpose nor the essential characteristics of those checks.

90. Secondly, in view of the scope of the obligations incumbent upon them and the risk of penalties which they face, carriers today are undeniably assuming the role of border guards or border police,³³ which is now raising fundamental questions that are regularly discussed in the legal literature.

91. Making carriers accountable and imposing penalties on them are not new migration policy instruments.³⁴

92. Article 26 of the CISA, which was supplemented by Directive 2001/51, imposes control and return obligations on carriers which by air, sea or land bring third-country nationals to the external borders of the Schengen area and makes the carriers liable to penalties in the event of infringement of those obligations.

93. Directive 2004/82/EC³⁵ imposes on those carriers the further obligation to communicate, at the request of the authorities responsible for the control of persons at the external borders, passenger data, the infringement of which obligation also renders carriers liable to penalties. According to Article 1 of that directive, this is intended to improve border controls and combat illegal immigration by the transmission of advance passenger data by carriers to the competent national authorities. That directive supplements Directive 2001/51 in that it pursues the same objectives while using other means.

94. More recently, carriers have been subject to additional obligations.

95. Article 13(3) of Regulation (EU) 2017/2226³⁶ supplements the control obligations referred to in Article 26(1)(b) of the CISA. In the context of that control, carriers are now required to communicate, via the web service established in the context of the integrated border management of external borders, the surname, first names, date of birth, nationality and sex of third-country nationals holding a short-stay visa, and also the type, number and date of expiry of the travel document and the three letter code of the issuing country of the document in order to verify whether those persons have already used the number of entries authorised by their visa.³⁷ With the exception of the facial image, those are the data on the basis of which the border authorities create the individual file of the nationals concerned.

³³ See Cruz, A., *Nouveaux contrôleurs d'immigration: transporteurs menacés de sanctions*, L'Harmattan, Paris, 1995.

³⁴ See in that regard, in addition to the works and articles already cited, Carlier, J.-Y., 'Les transporteurs, nouveaux contrôleurs des migrations internationales? À propos des sanctions à charge des transporteurs qui prennent à leur bord des personnes non munies des documents requis pour leur entrée dans le pays de destination', *Liber amicorum Jacques Putzeys, études de droit des transports*, Bruylant, Brussels, 1996, pp. 15 to 35; Dumas, P., *L'accès des ressortissants de pays tiers au territoire des États membres de l'Union européenne*, public doctoral thesis submitted in 2010, Bruylant, Brussels, 2013, p. 220 et seq., and Le Bourhis, K., *Les transporteurs et le contrôle des flux migratoires*, L'Harmattan, Paris, 2001, p. 61.

³⁵ Council Directive of 29 April 2004 on the obligation of carriers to communicate passenger data (OJ 2004 L 261, p. 24).

³⁶ Regulation of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 (OJ 2017 L 327, p. 20).

³⁷ On that basis, the web service provides them with an OK/NOT OK answer. Carriers may store the information sent and the answer received and must establish an authentication scheme to ensure that only authorised staff have access to that service.

96. Moreover, at national level, many Member States, such as the French Republic, have required carriers to verify the authenticity and validity of travel documents, which should include an assessment of irregularities such as identity theft, falsification, forgery or expiry.³⁸ Some Member States, such as the Kingdom of Spain, have also expressly imposed on transport undertakings the obligation to train members of their staff in the detection of forged documents, which raises the question of the role of those members of staff when they are carrying out the checks.³⁹

97. According to the Constitutional Council (France), the provisions relating to penalties for carriers ‘cannot be understood as granting police powers to the carrier in place of the public authority’, in so far as, when checking that a passenger’s travel documents are in order, the carrier must confine itself to ‘determining the situation of the person concerned without having to undertake any investigations’.⁴⁰ According to the referring court, nor is there any transfer to the transport undertakings of public authority powers. The checking of passenger travel documents is an integral part of the carriage process, which is carried out in the context of a contract of carriage governed by private law. The legislature also allows the carrier to choose the manner and means of complying with its obligations.

98. Nevertheless, the fact remains that, in the present case, the carriers must make assessments and adopt measures which, by their very nature, fall within the competences of the customs or police authorities, even though those carriers have neither the authority nor necessarily the means to do so.⁴¹

99. This undermines the effectiveness of the legislation. Carriers may only refuse to board illegally staying persons, who remain in the territory of the Member State of departure, but there is no possibility of adopting, under Article 13 of the Schengen Borders Code,⁴² a ‘decision to refuse entry’ into the territory, with the safeguards it contains, and no possibility of triggering application of the supplementary provisions concerning the right of asylum and to international protection.

100. By introducing such an obligation to carry out checks, the Member State is, in fact, using legislation originally intended for external border controls, is covertly and with less obvious effectiveness restoring borders where they have, in principle, been abolished and is circumventing the fundamental prohibition set out in Articles 1 and 20 of the Schengen Borders Code. The Member State thus requires private operators to carry out checks which the competent national authorities are no longer authorised to conduct at internal borders, in accordance with those provisions, and are likewise not authorised to carry out on the territory of another Member State.

101. In view of those factors, and in order not to jeopardise attainment of the objective of abolishing internal border controls set out in Article 3(2) TEU, Article 26(2) TFEU and Article 67(2) TFEU, and provided for in Articles 1 and 20 of the Schengen Borders Code, it seems to me essential that the checks carried out under Paragraph 63 of the AufenthG should be treated as ‘border checks’ for the purposes of Article 20 of the Schengen Borders Code.

38 Ministry of the Interior, ‘Rapport au Parlement: responsabilité des transporteurs, l’application de la loi No 92-190 du 26 février 1992 du 1^{er} mars 1993 au 31 décembre 1995’, Direction des Libertés publiques et de l’action judiciaire, Paris, 1996.

39 Garcia Coso, E., ‘Spain — Report on the transposition of the Directive supplementing Article 26 of the Schengen Convention’, *Immigration and Asylum Law of the EU: current debates*, Bruylant, Brussels, 2005, pp. 481 to 485, in particular p. 484.

40 See Decision No 92-307 of the Constitutional Council (France), of 25 February 1992, on the law amending Order No 45-2658 of 2 November 1945, as amended, concerning the conditions of entry and residence of foreign nationals in France (paragraph 32).

41 See, in that regard, Lochak, D., ‘Commentaire de la décision du Conseil constitutionnel du 25 février 1992 (Entrée et séjour des étrangers)’, *Journal du droit international (Clunet)*, LexisNexis, Paris, July 1992, pp. 669 to 692, in particular p. 690, and Dumas, P., *op. cit.*, in particular p. 224.

42 If it is applied here by analogy to internal borders.

102. In the light of those factors, I consider that the checks which must be carried out by coach transport undertakings providing a regular cross-border service within the Schengen area and which require those undertakings to verify, before the crossing of the internal border, that passengers are in possession of the travel documents required for entry into national territory are comparable to 'border checks' prohibited under Article 20 of the Schengen Borders Code.⁴³

103. In so far as I consider that the control obligations at issue are contrary to EU law, the penalty payments adopted on the basis of infringement of those obligations — which in view of their function (deterrence and sanction) are analogous to financial penalties — cannot be justified.

104. In the light of all those considerations, I am of the view that Article 67(2) TFEU and Article 20 of the Schengen Borders Code preclude national legislation, such as that at issue in the main proceedings, which requires carriers to check, before crossing the border, that passengers are in possession of the passport and residence permit required for the purposes of lawful entry into the national territory and which threatens those carriers with a penalty payment in the event of failure to fulfil that obligation, where that legislation applies to coach transport undertakings providing a regular cross-border service within the Schengen area.

105. Two remarks must be made in connection with that conclusion.

106. In the first place, that interpretation of the rules of the Schengen Borders Code does not mean that the Member States are deprived of the means lawfully to counter illegal immigration into their territory.

107. First, in circumstances such as those at issue, where, as the Federal Republic of Germany has stated in its written and oral observations, the competent national authorities have precise information making it possible to determine the road transport routes most exposed to the risk of illegal immigration, there is nothing to prevent the Member State of departure and the Member State of destination from using existing instruments of operational cooperation in order jointly to counter that illegal immigration, by exercising their police powers in their respective territories, in particular in and around bus stations.

108. Operational cooperation is based on the conclusions of the Tampere European Council of 15 and 16 October 1999 on solidarity between Member States and the sharing of responsibilities. That is an obligation enshrined in Article 16 of the Schengen Borders Code, since Member States are obliged to exchange all relevant information, assist each other and maintain close cooperation with a view to the effective implementation of external border control. In circumstances such as those at issue, in which Member States draw attention to the shortcomings of external border controls, there is in my view nothing to prevent them from using those instruments in order jointly to coordinate measures to counter illegal immigration within the Schengen area itself.

109. This would make it possible to establish far more effective checks than those introduced under the legislation at issue, since they would also fall entirely within the competences reserved to the Member States by Article 21(a) of the Schengen Borders Code.

110. It should be recalled that that provision allows Member States to carry out identity and document checks within their territory and border areas with a view to preventing or terminating unlawful entry into the territory or in order to prevent the commission of offences, provided, however, that those controls do not in practice have an effect equivalent to border checks.

⁴³ Given the interpretation which I propose that the Court adopt, I shall not answer the sub-questions raised by the referring court concerning the interpretation of Article 21(a) and (b) of the Schengen Borders Code.

111. Accordingly, as I have already stated, in the judgment of 21 June 2017, A.,⁴⁴ the Court was required to adjudicate on the checks laid down for that purpose by the Federal Republic of Germany in the Law on the federal police, in a case in which the person concerned was the subject of an identity check carried out by a German federal police patrol shortly after he had crossed on foot the Europabrücke (Europe Bridge) from Strasbourg to Kehl and had proceeded to the railway station approximately 500 metres beyond the bridge.

112. It should also be recalled that Member States are now authorised to intensify police checks throughout their territory. The Commission adopted the measure not only because of pressure on the public policy and internal security of Member States caused by the massive influx of irregular migrants and the multiplication of terrorist attacks, but also because of shortcomings which undermine the effectiveness of the Schengen architecture.

113. Thus, in its recommendation of 12 May 2017,⁴⁵ the Commission emphasised the manner in which the Member States must exercise their police powers throughout their territory and in border areas. Considering that the ‘proper functioning of such an area relies not only on the uniform application of the Union *acquis*, but also on the use of national competences with regard to the maintenance of law and order and the safeguarding of internal security in line with the objectives of Schengen *acquis*,’⁴⁶ the Commission stressed that the intensification of police checks throughout the territory of Member States may be considered necessary and justified, since such checks are more efficient than internal border controls and adapted more easily to evolving risks.⁴⁷

114. Secondly, should the competent national authorities also find that certain coach transport undertakings fail to comply with their obligation to carry out checks with the aim of participating in the smuggling of migrants, those authorities may then convict such undertakings on the basis of the rules laid down by Directive 2002/90 and Framework Decision 2002/946, since the facilitation of unauthorised entry constitutes a criminal offence, the constituent elements of which I shall set out below. The Federal Republic of Germany has also transposed those provisions in Paragraphs 95 to 97 of the AufenthG.

115. Thirdly, if the national authorities consider that there is a serious threat to public policy or internal security, they may, under Article 23(1) of the Schengen Borders Code, temporarily reintroduce border controls at their internal borders.⁴⁸ It is interesting to note that, in the light of the increase in secondary movements of irregular migrants and the increase in cross-border terrorist threats, the Commission is proposing to revise the existing framework in order better to address those phenomena.⁴⁹

44 C-9/16, EU:C:2017:483.

45 Recommendation cited in footnote 28 of this Opinion.

46 See recital 1 of that recommendation.

47 See recital 6 of that recommendation.

48 In its Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders [COM(2017) 571 final], the Commission recalls in point 1 that, on account of the migration crisis and terrorist attacks, border control at internal borders, with respect to which the Schengen Borders Code has established the principle and laid down the arrangements, has been reintroduced and prolonged some 50 times since September 2015, either on account of a serious threat to public policy or internal security (Article 25 of that code) or due to exceptional circumstances where the overall functioning of the Schengen area is put at risk (Article 26 of that code).

49 See the proposal cited in the preceding footnote.

116. In the second place, that interpretation of the rules of the Schengen Borders Code must make the Member States face their responsibilities to ensure the implementation of all the measures intended to strengthen external border controls and management.⁵⁰ It should be noted that, under Article 14 of the Schengen Borders Code,⁵¹ Member States are to deploy appropriate staff and resources in sufficient numbers to carry out border control at the external borders, in such a way as to ensure an efficient, high and uniform level of control at their external borders.

B. The interpretation of the provisions of EU law aimed at combating illegal immigration

117. It is now necessary to examine whether, as the Federal Republic of Germany firmly maintains in its observations, those checks may be regarded as being imposed under the provisions of international and European law which have been adopted in order to combat illegal immigration.

1. The prevention of the facilitation of unauthorised entry under Directive 2002/90 and Framework Decision 2002/946

118. In the first place, the observations of the Federal Republic of Germany are devoted to showing that the legislation at issue was adopted ‘in accordance with and in application of’⁵² the requirements of Directive 2002/90 and Framework Decision 2002/946, which prevent the facilitation of unauthorised entry into the territory of a Member State.

119. ‘In accordance with’, on the one hand, since legislation such as that at issue constitutes an important measure to counter illegal immigration within the Schengen area and makes it possible for transport undertakings not to be convicted of facilitation of unauthorised entry.

120. ‘In application of’, on the other hand, since Directive 2002/90 and Framework Decision 2002/946 enable and require Member States to impose penalties on anyone facilitating unauthorised entry across internal borders, including criminal penalties against individual perpetrators and administrative penalties against legal persons.

121. The Federal Republic of Germany submits that any transport undertaking which carries a foreign national without the requisite travel documents and transports him into the territory of a Member State in breach of the latter’s legislation necessarily facilitates the unauthorised entry of the person concerned for the purposes of Article 1(1)(a) of Directive 2002/90. If such an undertaking has been informed by the competent authorities that its service has already been used for the purposes of unauthorised entry and is therefore fully aware of its unlawful conduct, but nevertheless refrains from carrying out the required checks, although such checks are practicable and reasonable, it should be regarded as consenting, at least in part, to allow further unauthorised entries and as acting with indirect intent (*dolus eventualis*).

122. I do not share the view expressed by the Federal Republic of Germany in its observations.

⁵⁰ Those measures, which the Commission sets out in its communication to the European Parliament and the Council entitled ‘on preserving and strengthening Schengen’ [COM(2017) 570 final], include, inter alia, the new European Border and Coast Guard (Frontex) Regulation, the creation of ‘hotspots’ and the introduction, in response to the terrorist threats, of systematic checks against relevant databases at external borders for all travellers, including citizens of the European Union (pp. 5 to 7).

⁵¹ That provision appears in identical terms in Article 15 of Regulation 2016/399, which replaced the Schengen Borders Code applicable to the facts of the dispute in the main proceedings.

⁵² In the language of the case: ‘in Übereinstimmung und in Umsetzung’.

123. In the first place, the Federal Republic of Germany fails to point out that the offence of facilitation of unauthorised entry defined and declared unlawful in Article 1 of Directive 2002/90 has been transposed into German law in Paragraphs 95 to 97 of the AufenthG, concerning the facilitation of illegal immigration.⁵³

124. In the second place, even if the legislation at issue indeed helps to combat illegal immigration — in so far as its purpose is to impose on carriers an obligation to carry out checks on persons in order to prevent unauthorised entry into national territory — this is not a sufficient basis for finding that it was adopted ‘in accordance with and in application of’ the requirements of Directive 2002/90 and Framework Decision 2002/946.

125. That approach fails to take into account the purpose and scope of Directive 2002/90 and Framework Decision 2002/946.

126. It also overlooks the fact that provisions of criminal law were adopted within the framework of that package of measures, which requires, in accordance with the principle that criminal offences and penalties must be defined by law, a strict interpretation of the material and mental elements constituting that offence.

127. Directive 2002/90 and Framework Decision 2002/946 form a set of inseparable measures intended to supplement the arsenal for combating illegal immigration.⁵⁴ Described as a ‘facilitators package’,⁵⁵ they combat illegal immigration networks and, in particular, migrant smuggling networks.

128. This is also clearly apparent from recital 2 of Directive 2002/90 and recital 2 of Framework Decision 2002/946, in which the EU legislature states that it seeks by those measures ‘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*’.⁵⁶ In fact, that recital clearly and unequivocally reflects the origin of that package of measures, which was adopted following the macabre discovery in Dover (Great Britain) in 2000 of the dead bodies of 58 Chinese nationals, prospective illegal immigrants, in a sealed container of a truck registered in the Netherlands; the Member States entrusted the French Republic, which then held the Presidency of the European Union, with proposing measures to combat those offences and counter the rapid development of illegal immigration networks in the European Union.

129. In order to prevent criminal networks from taking advantage of the absence of criminalisation and penalties in certain Member States to develop their activities and select their route of entry through forum shopping,⁵⁷ that package of measures seeks to approximate national legislation by laying down, first, in Directive 2002/90, a common definition of the offence of facilitation of unauthorised entry, transit and residence and, secondly, in Framework Decision 2002/946, minimum rules on the nature of the penalties likely to be imposed, as well as the applicable rules concerning liability of legal persons and rules on the allocation of jurisdiction between the Member States.⁵⁸

⁵³ Those provisions were examined by the Court in the judgment of 10 April 2012, *Vo* (C-83/12 PPU, EU:C:2012:202).

⁵⁴ See recital 5 thereof.

⁵⁵ See the European Parliament Briefing entitled ‘Combatting migrant smuggling into the EU. Main instruments’, April 2016, available at the following internet address: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581391/EPRS_BRI%282016%29581391_EN.pdf (p. 2, 6 and 14).

⁵⁶ Emphasis added.

⁵⁷ The migrant smuggling market is extremely flexible, with market participants adapting their strategies on the basis of the strengthening of national legislation and border controls.

⁵⁸ See recital 3 of that directive and recital 3 of that framework decision.

130. The material and mental elements of the facilitation of unauthorised entry are defined in the following terms in Article 1(1)(a) of Directive 2002/90:

‘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 ... the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.’⁵⁹

131. The offence of facilitation of unauthorised entry is introduced into EU law as a ‘general infringement’, as is apparent from the title of Article 1 of Directive 2002/90 but also from the general nature of the terms used by the EU legislature. The scope of that offence is therefore particularly broad and may be explained by the need to combat illegal immigration networks. The concept of ‘facilitation’, although one of the constituent elements of the offence, is not strictly defined here, which makes it possible to encompass the various forms which the facilitation of illegal immigration may take, and thus the *modus operandi* of smugglers, from transport in the strict sense, to the management of that transport, the manufacture or the supply of forged documents, the organisation of marriages of convenience or any other means of facilitating entry, transit or residence.⁶⁰

132. Moreover, by penalising assistance provided by ‘anyone’, the EU legislature took into account the varied and numerous roles of the persons likely to be involved, whether or not for profit,⁶¹ so as to encompass all the members of a smuggling network, such as smugglers, top men, recruiters or even drivers or skippers, messengers, spotters, forgers of passports, suppliers (boat, car or bus owners) and corrupt officials and service providers.⁶²

133. Furthermore, the offence is committed irrespective of whether the facilitation of illegal immigration takes place in connection with the irregular crossing of an internal or an external border of the Schengen area. Indeed, the EU legislature criminalises the facilitation of illegal immigration in connection with entry ‘into the territory of a Member State’, that legislature having previously stated in recital 2 of Directive 2002/90 that it was necessary to combat the aiding of illegal immigration in connection with unauthorised crossing of the border ‘in the strict sense’.

134. Lastly, describing the measure actually applied to the carrier as a ‘penalty payment’ does not seem to me to reflect its legal reality.

135. As expressly stated at the hearing, the penalty payment referred to in Paragraph 63(3) of the *AufenthG* is a pecuniary penalty of a significant amount (at least EUR 1 000 and up to EUR 5 000) imposed on a carrier for each passenger in breach of the rules governing the conditions of entry of foreign nationals into German territory. The purpose of that legislation, which was expressed with equal clarity, is to deter carriers from failing to carry out the required checks and to penalise them each time it is found that the checks have not been carried out.

⁵⁹ Under Article 3 of that directive, that infringement must be subject to effective, proportionate and dissuasive sanctions, the nature and amount of which are determined in Article 1 of Framework Decision 2002/946.

⁶⁰ ‘Smuggling is a complex issue and the *modus operandi* of smugglers is often very flexible and changes frequently. It is therefore important to tackle smuggling from a holistic perspective.’ European Parliament Briefing cited in footnote 55 above (p. 14).

⁶¹ The infringement defined in Article 1(1)(b) of Directive 2002/90 seeks to suppress for-profit smuggling networks, as with its predecessor Article 27 of the CISA.

⁶² The European Migration Network has stressed that those participants are present in third countries as well as in EU Member States where they facilitate secondary movements. In the EU, facilitators are usually nationals of the country of transit or destination, see ‘A study on smuggling of migrants: Characteristics, responses and cooperation with third countries, Executive summary, September 2015’, available at the following internet address.

https://prod.emnbelgium.be/sites/default/files/publications/study_on_smuggling_of_migrants_executive_summary_english_271015_pdf_0.pdf (point 1.3.2).

136. The function of that penalty, namely to prevent and punish at the same time, is precisely the same as that of a penalty imposed in connection with an offence. Therefore, the unavoidable issue of intention arises because of the principle that criminal offences and penalties must be defined by law, which requires that the law must establish all the constituent elements of the offence and, in particular, its material and psychological elements.

137. However, I am convinced that, in Article 1(1)(a) of Directive 2002/90, the legislature sought to criminalise not a person who takes the risk of helping an illegally staying person to enter the territory (indirect intent), but rather a person who has the criminal intention of committing the specific act prohibited by law (specific intent).

138. In its observations, the Federal Republic of Germany actually refers to a form of intention which it calls '*dolus eventualis*', which it defines as 'indirect intention'. That form of intention covers a person who did not intend to commit an offence in its entirety. In the present case, the person concerned does not have a proven wrongful intent to commit a serious offence of collaborating with a smuggling network, but is acting recklessly, carelessly or negligently. It is true that the EU legislature is free to criminalise negligence vis-à-vis the legislation, but this must also be clearly set out and defined, and penalised in a non-disproportionate manner, in the provision establishing the offence.

139. It is clear that that definition of the *dolus eventualis* and the resulting system of penalties are not compatible with the wording of Article 1 of Directive 2002/90, which forms the legal basis for the system of penalties and leaves no doubt in the light of its wording, purpose and scheme.

140. In the French version, the EU legislature requires that the natural or legal person must have acted '*sciemment*', the German version uses the term '*vorsätzlich*', the English version '*intentionally*', the Italian version '*intenzionalmente*', the Dutch version '*opzettelijk*', the Romanian version '*în mod conștient*' and, lastly, the Slovak version '*úmyselne*'.

141. Those terms must be given an autonomous and uniform interpretation throughout the European Union and their meaning must, above all, be determined in this case in the light of the principle of the autonomy of criminal law and of the general principles of criminal law.

142. However, the term '*sciemment*' ('knowingly'), which is translated interchangeably in the other language versions of the Directive as '*intentionally*', '*deliberately*' or even '*voluntarily*', in itself excludes the concept of '*indirect intent*'. It must be accepted that a person who '*knowingly*' or '*intentionally*' facilitates the unauthorised entry of a third-country national into the territory does not have the same criminal intent as a person who only negligently takes that risk.

143. Moreover, it is quite clear from the overall scheme of which Article 1 of Directive 2002/90 forms part that the EU legislature seeks to deal with persons who, in a considered and intentional manner, engage in conduct with the aim of performing the prohibited act. Here, it is necessary to penalise not only persons who commit the offence but also, under Article 2 of that directive, persons who attempt to commit it or are instigators or accomplices. As regards the applicable penalties, as defined in Article 1 of Framework Decision 2002/946, they must be dissuasive. However, it is possible to dissuade only persons who intend to commit the act punishable by law or to re-offend. Moreover, the severity of the penalties, which may take the form of an '*extradition*' measure or custodial sentences, precludes, in my view, such penalties being imposed on persons who take only the risk of committing the offence.

144. Finally, the clearly stated objective of Directive 2002/90 is actually to combat those who belong to smuggling networks and benefit from illegal immigration.

145. In the light of those considerations, I therefore cannot concur with the view of the Federal Republic of Germany that any coach transport undertaking providing a regular cross-border service within the Schengen area which permits the boarding of foreign nationals without the requisite travel documents necessarily facilitates their unauthorised entry for the purposes of Article 1(1)(a) of Directive 2002/90. The meaning of the concept of '*dolus eventualis*' therefore cannot be extended so as to treat persons who have acted with 'indirect intent' in the same way as accomplices or co-perpetrators.

146. Although the facilitation of illegal immigration actually covers transport activities and may involve service providers such as transport undertakings operating within the European Union, it is nevertheless necessary to establish that both the material and mental elements of the offence are satisfied. This is a matter for the national court, which must therefore assess on a case-by-case basis whether, in transporting the foreign national into the national territory, the carrier has deliberately participated in the criminal activity of bringing illegally staying persons into the national territory, by facilitating the secondary movement of such persons within the Schengen area.

147. In the light of those considerations, I take the view that, in the event that the competent national authorities find that a coach transport undertaking providing a regular cross-border service within the Schengen area benefits from its activity in order deliberately to facilitate the unauthorised entry of third-country nationals into the territory of the Member State of destination and consider that the material and mental elements of the offence of facilitation of unauthorised entry are satisfied for the purposes of Article 1(1)(a) of Directive 2002/90, it is for those competent national authorities to take the measures necessary to ensure that that offence is subject to an effective, proportionate and dissuasive criminal penalty, in accordance with the principles set out in Framework Decision 2002/946.

2. The prevention of migrant smuggling under the Additional Protocol of the United Nations

148. In the second place, the Federal Republic of Germany submits that the national legislation at issue is consistent with the provisions of the Additional Protocol of the United Nations, which is binding upon both the European Union and the Member States.

149. It is true that, in accordance with Article 11 of that protocol, the States Parties must strengthen such border controls as may be necessary to prevent and detect the smuggling of migrants and, in that context, must adopt appropriate measures at borders to prevent means of transport operated by commercial carriers from being used in the commission of that criminal offence.⁶³ Where appropriate, the States Parties are thus required, in particular, to establish the obligation of commercial carriers, including any transportation company or operator of any means of transport, to ascertain, on pain of penalties, that all passengers are in possession of the travel documents required for entry into the receiving State.

150. However, it is necessary to take into account the reservation set out in Article 11(1) of the Additional Protocol of the United Nations, and recalled in Article 11(3) thereof, according to which those obligations apply 'without prejudice to international commitments in relation to the free movement of people' to which the States are party.

⁶³ The smuggling of migrants constitutes a criminal offence as provided for in Article 6(1)(a) of the Additional Protocol of the United Nations. According to Article 3(a) of that protocol, that offence is defined, in so far as concerns its material and mental elements, as the intentional 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.

151. It is also necessary to take into account the declaration made by the European Union when it acceded to the Additional Protocol of the United Nations on 6 September 2006, in which it stated ‘that it has competence with regard to the crossing of external borders of the Member States, regulating standards and procedures when carrying out checks on persons at such borders ... [as well as] measures on immigration policy regarding conditions of entry and residence and measures to counter illegal immigration and illegal residence ...’.

152. Since the Federal Republic of Germany is a State Party to the CISA and a Member State of the European Union, it may implement the obligations laid down in Article 11(2) to (4) of that protocol only in so far as that they are compatible with the relevant provisions of EU law and, in particular, the provisions adopted in the context of the CISA, Directive 2002/90 and Framework Decision 2002/946.

153. In those circumstances, I do not think that the Federal Republic of Germany can refer in the present case to the wording of the Additional Protocol of the United Nations in order to establish the legality of those checks.

3. The obligations imposed on carriers under Directive 2001/51

154. In the third place, and finally, the Federal Republic of Germany submits that the wording of Directive 2001/51 and, in particular, recital 4 thereof, allows Member States to retain or introduce checks such as those implemented on the basis of Paragraph 63 of the AufenthG.

155. The Federal Republic of Germany is here mistaken about the scope of that directive and, in particular, recital 4 thereof.

156. According to its title, Directive 2001/51 ‘supplement[s] the provisions of Article 26 of the [CISA]’.

157. Under Article 26 thereof, the Contracting Parties must impose on international carriers which transport groups overland by coach and which, in the context of that service, bring an alien to the ‘external border’⁶⁴ an obligation to check travel documents and a return obligation, the infringement of which must be penalised.⁶⁵ Those obligations, as is clear from the title of Chapter 6, of which they form part, constitute ‘accompanying measures’ vis-à-vis the abolition of checks on persons at internal borders, the principle for which is set out in Article 2 of the CISA.

158. In recital 4 of Directive 2001/51 — on which the Federal Republic of Germany relies — the EU legislature states that 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. According to the Federal Republic of Germany, such a recital therefore allows the Member States to retain or introduce control obligations in respect of carriers transporting third-country nationals by coach across the internal borders of a Member State.

159. The expression ‘whether referred to in this Directive or not’, used by the EU legislature in recital 4 of Directive 2001/51, is unfortunate in that, by its general nature, it introduces an element of uncertainty into a provision intended to impose penalties of a criminal or administrative nature on carriers. It must therefore be interpreted strictly, taking into account the purpose and scheme of the directive of which that recital forms part.

⁶⁴ See Article 26(1)(a) (emphasis added).

⁶⁵ See new provisions laid down in the context of Regulation 2017/2226, in particular recital 16 and Article 13(3) thereof.

160. As regards the purpose of that directive, it is clear that it is not intended to amend the scope of the control obligations imposed on carriers or to extend it beyond the scope of those obligations as defined in Article 26 of the CISA. The purpose of Directive 2001/51, as expressly stated in its title and in Article 1 thereof, is to supplement those provisions. Although Articles 2 and 3 of that directive specify the requirements for the application of the return obligation, Articles 4 and 5 of that directive confine themselves to specifying the nature and amount of the penalties applicable in the event of infringement by carriers of their obligation to carry out checks.

161. Recital 4 of Directive 2001/51 therefore cannot be interpreted as having such an effect in itself, other than by clearly disregarding the meaning and scope of the provision of which it forms part and depriving of all practical effectiveness the principle of the abolition of internal border controls, as set out in Article 3(2) TEU, Article 26(2) TFEU and Article 67(2) TFEU, and as provided for in Article 20 of the Schengen Borders Code, on which that directive is based.

162. Turning now to the scheme of Directive 2001/51, it is clear that the principle set out in recital 4 thereof, according to which the Member States have discretion to retain or introduce additional measures or penalties for carriers, is given concrete expression in Article 5 of that directive only in part, since the legislature merely refers to ‘carriers’, with no reference to the expression ‘whether referred to in this Directive or not’.

163. In the light of those considerations, I think that the wording of Directive 2001/51 and, in particular, recital 4 thereof, cannot be interpreted as allowing Member States to retain or introduce control obligations for international carriers which transport groups overland by coach and which carry third-country nationals across the internal borders of a Member State, other than by clearly disregarding the purpose of Article 26 of the CISA and the principles on which it is based.

164. Measures adopted under Article 26 of the CISA, the implementing rules of which are laid down by Directive 2001/51, apply only in connection with the crossing of external borders.

VI. Conclusion

165. Having regard to the foregoing considerations, I propose that the Court answer the questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) as follows:

- (1) The checks which must be carried out by coach transport undertakings providing a regular cross-border service within the Schengen area and which require those undertakings to verify, before the crossing of the internal border, that passengers are in possession of the travel documents required for entry into national territory are comparable to ‘border checks’ for the purposes of Article 20 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, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013.
- (2) Article 67(2) TFEU and Article 20 of Regulation No 562/2006 preclude national legislation, such as that at issue in the main proceedings, which requires carriers to check, before crossing the border, that passengers are in possession of the passport and residence permit required for the purposes of lawful entry into the national territory and which threatens those carriers with a penalty payment in the event of failure to fulfil that obligation, where that legislation applies to coach transport undertakings providing a regular cross-border service within the Schengen area.
- (3) In the event that the competent national authorities find that a coach transport undertaking providing a regular cross-border service within the Schengen area benefits from its activity in order deliberately to facilitate the unauthorised entry of third-country nationals into the territory

of the Member State of destination and consider that the material and mental elements of the offence of facilitation of unauthorised entry are satisfied for the purposes of Article 1(1)(a) of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, it is for those competent national authorities to take the measures necessary to ensure that that offence is subject to an effective, proportionate and dissuasive criminal penalty, in accordance with the principles set out in 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.