



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 3 June 2021¹

Case C-35/20

Syyttäjä

v

A

(Request for a preliminary ruling
from the Korkein oikeus (Supreme Court, Finland))

(Reference for a preliminary ruling – Right of EU citizens to move freely within the territory of Member States – Article 21 TFEU – Requirement, under threat of criminal penalties, to carry an identity card or passport when crossing the border of a Member State – Directive 2004/38/EC – Articles 4 and 5 – Crossing the sea border of a Member State in a pleasure boat – Regulation (EC) No 562/2006 (Schengen Borders Code) – Annex VI – Day-fines penalty system – Calculation of the fine based on the offender’s ability to pay – Proportionality)

I. Introduction

1. A Union citizen crosses a national sea border on board a pleasure boat in the course of a round trip between two Member States, namely Finland and Estonia, without carrying travel documents.
2. That is the background to the questions referred by the Korkein oikeus (Supreme Court, Finland), which concern, in essence, the question whether Member States may require Union citizens, under threat of criminal penalties, to carry a valid identity card or passport when crossing the border of a Member State. The Court is also called upon to rule on the proportionality of the Finnish day-fines penalty system provided for in the event of failure to comply with that requirement.

¹ Original language: French.

3. This reference for a preliminary ruling thus concerns the interpretation, in particular, of Article 21(1) TFEU, Articles 4, 5 and 36 of Directive 2004/38/EC² – the latter article not yet having been interpreted by the Court – and Annex VI to Regulation (EC) No 562/2006.³

II. Legal framework

A. EU law

1. Directive 2004/38

4. Article 4 of Directive 2004/38, entitled ‘Right of exit’, provides in paragraph 1 thereof:

‘Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.’

5. Article 5 of that directive, entitled ‘Right of entry’, provides in paragraphs 1, 4 and 5 thereof:

‘1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

...

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.’

² Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2005 L 197, p. 34).

³ Regulation of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1) (‘Regulation No 562/2006’). Regulation No 562/2006, which was applicable at the time of the facts in the main proceedings, was repealed and replaced by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1).

6. Article 36 of that directive, entitled ‘Sanctions’, is worded as follows:

‘Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than 30 April 2006 and as promptly as possible in the case of any subsequent changes.’

2. Regulation No 562/2006

7. Article 1 of Regulation No 562/2006,⁴ entitled ‘Subject matter and principles’, provided:

‘This Regulation provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union.

It establishes rules governing border control of persons crossing the external borders of the Member States of the European Union.’

8. Article 2 of that regulation, entitled ‘Definitions’, stated:

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

1. “internal borders” means:

...

(c) sea, river and lake ports of the Member States for regular internal ferry connections;

2. “external borders” means the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders;

...

8. “border crossing point” means any crossing-point authorised by the competent authorities for the crossing of external borders;

...’

9. Article 4 of that regulation, entitled ‘Crossing of external borders’, provided:

‘1. External borders may be crossed only at border crossing points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.

...

⁴ Articles 1, 2, 22 and 23 of Regulation 2016/399 are drafted, essentially, in terms identical, respectively, to those of Articles 1, 2, 20 and 21 of Regulation No 562/2006. The same is true of points 3.2.4 and 3.2.6 of Annex VI to Regulation 2016/399 and points 3.2.5 and 3.2.7 of Annex VI to Regulation No 562/2006.

2. By way of derogation from paragraph 1, exceptions to the obligation to cross external borders only at border crossing points and during fixed opening hours may be allowed:

(a) for individuals or groups of persons, where there is a requirement of a special nature for the occasional crossing of external borders outside border crossing points or outside fixed opening hours, provided that they are in possession of the permits required by national law and that there is no conflict with the interests of public policy and the internal security of the Member States. Member States may make specific arrangements in bilateral agreements. General exceptions provided for by national law and bilateral agreements shall be notified to the Commission pursuant to Article 34;

...

(c) in accordance with the specific rules set out in Articles 18 and 19 in conjunction with Annexes VI and VII.

...'

10. Article 7 of that regulation, entitled 'Border checks on persons', stated:

'...

2. All persons shall undergo a minimum check in order to establish their identities on the basis of the production or presentation of their travel documents. Such a minimum check shall consist of a rapid and straightforward verification, where appropriate by using technical devices and by consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost and invalidated documents, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting.

The minimum check referred to in the first subparagraph shall be the rule for persons enjoying the right of free movement under Union law.

However, on a non-systematic basis, when carrying out minimum checks on persons enjoying the right of free movement under Union law, border guards may consult national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to the public health.

The consequences of such consultations shall not jeopardise the right of entry of persons enjoying the right of free movement under Union law into the territory of the Member State concerned as laid down in Directive [2004/38].

...

6. Checks on a person enjoying the right of free movement under Union law shall be carried out in accordance with Directive [2004/38].

...'

11. Article 18 of Regulation No 562/2006, entitled ‘Specific rules for the various types of border and the various means of transport used for crossing the external borders’, was worded as follows:

‘The specific rules set out in Annex VI shall apply to the checks carried out at the various types of border and on the various means of transport used for crossing border crossing points.

Those specific rules may contain derogations from Articles 4 and 5 and Articles 7 to 13.’

12. Article 20 of that regulation, entitled ‘Crossing internal borders’, stated:

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

13. Article 21 of that regulation, entitled ‘Checks within the territory’, provided:

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

...

(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

...’

14. Annex VI to Regulation No 562/2006 concerned, according to its heading, ‘Specific rules for the various types of border and the various means of transport used for crossing the Member States’ external borders’. Point 3 of that annex, entitled ‘Sea borders’, contained point 3.1., entitled ‘General checking procedures on maritime traffic’, which provided:

‘3.1.1. Checks on ships shall be carried out at the port of arrival or departure, or in an area set aside for that purpose, located in the immediate vicinity of the vessel or on board ship in the territorial waters as defined by the United Nations Convention on the Law of the Sea.
[⁵] Member States may conclude agreements according to which checks may also be carried out during crossings or, upon the ship’s arrival or departure, on the territory of a third country, respecting the principles set out in point 1.1.4.’

15. Point 3.2. of that annex, entitled ‘Specific check procedures for certain types of shipping’, included a section entitled ‘Pleasure boating’, worded as follows:

‘3.2.5. By way of derogation from Articles 4 and 7, persons on board a pleasure boat coming from or departing to a port situated in a Member State shall not be subject to border checks and may enter a port which is not a border crossing point.

However, according to the assessment of the risks of illegal immigration, and in particular where the coastline of a third country is located in the immediate vicinity of the territory of the Member State concerned, checks on those persons and/or a physical search of the pleasure boat shall be carried out.

⁵ Convention signed in Montego Bay on 10 December 1982 (‘the Montego Bay Convention’) and entered into force on 16 November 1994 (United Nations Treaty Series, Vol. 1833, 1834 and 1835, p. 3). The Montego Bay Convention was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

3.2.6. By way of derogation from Article 4, a pleasure boat coming from a third country may, exceptionally, enter a port which is not a border crossing point. ...

...

3.2.7. During those checks, a document containing all the technical characteristics of the vessel and the names of the persons on board shall be handed in. A copy of that document shall be given to the authorities in the ports of entry and departure. As long as the vessel remains in the territorial waters of one of the Member States, a copy of that document shall be included amongst the ship's papers.'

B. Finnish law

16. Paragraph 1 of the Passilaki (Law on passports) (671/2006), in the version applicable to the dispute in the main proceedings, which is worded, in essence, in the same way as Paragraph 9 of the Perustuslaki (Finnish Constitution) (791/1999), provides:

'Finnish nationals shall have the right to leave the country in accordance with the provisions laid down in this Law.

Finnish nationals cannot be prevented from entering the territory.'

17. Under Paragraph 2 of the Law on passports:

'Finnish citizens in possession of a passport shall have the right to leave and to enter the territory, subject to any exceptions set out in the present Law, EU law or international agreements by which Finland is bound. Finnish citizens may travel without a passport to Iceland, Norway, Sweden and Denmark. A regulation adopted by the Council of Ministers shall determine the other countries to which Finnish citizens may travel using an identity card as a travel document instead of a passport ...'

18. Paragraph 1 of the valtioneuvoston asetus matkustusosoikeuden osoittamisesta eräissä tapauksissa (Regulation adopted by the Council of Ministers concerning proof of the right to travel in certain specific cases) (660/2013), in the version applicable to the dispute in the main proceedings, states:

'Finnish citizens may travel from Finland to the following countries using an identity card as a travel document instead of a passport ...: Netherlands, Belgium, Bulgaria, Spain, Ireland, United Kingdom, Italy, Austria, Greece, Croatia, Cyprus, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Portugal, Poland, France, Romania, Germany, San Marino, Slovakia, Slovenia, Switzerland, Czech Republic, Hungary and Estonia.'

19. Paragraph 7 of the rikoslaki (Criminal Code) (39/1889), entitled 'Border offence', which is contained in Chapter 17 of that code, itself entitled 'Offences against public order', in the version applicable to the dispute in the main proceedings, provides:

'Any person who

crosses or attempts to cross the Finnish border without a valid travel document, visa, residence permit or any other document equivalent to a travel document, or does so at any place other

than an authorised point of entry or departure, or in breach of any statutory prohibition other than the prohibition of entry,

...

commits a border offence punishable by a fine or a term of imprisonment of up to one year.’

20. Paragraph 7a of that chapter of the Criminal Code, entitled ‘Minor border offence’, states:

‘A fine for a minor border offence shall be imposed on the offender if the border offence is considered, as a whole, to be minor, in view of the short duration of the stay or unauthorised movement, the nature of the prohibited act or the other circumstances of the offence.’

21. Under Paragraph 1 of Chapter 2a of that code:

‘Fines shall be imposed as day fines, from a minimum of 1 to a maximum of 120.’

22. Paragraph 2 of that chapter of the Criminal Code provides:

‘The amount of the day fine shall be set in a reasonable manner, in the light of the offender’s ability to pay.

The amount of the day fine shall be deemed to be reasonable if it represents one sixtieth of the offender’s average monthly income, after deduction of the taxes and charges which shall be set out in a regulation adopted by the Council of Ministers and of a fixed amount for current living expenses. Any maintenance obligation of the offender may reduce the amount of the day fine.

The income shown on the most recent tax assessment provided by the offender shall be the primary basis for calculating that monthly income. If the offender’s income cannot be determined with sufficient reliability from the tax data or has changed significantly since the most recent tax assessment provided, it may be determined on the basis of another available document.

The day fine is set by the court on the basis of the data available at the time of the court proceedings, and, in summary criminal proceedings, on the basis of the data available at the time of the application for such proceedings. However, the Public Prosecution Service sets the fine on the basis of the data available at the time of issuing the summary penal order, if it has become apparent that the ability to pay of the person to whom the order is addressed has changed appreciably as compared with the data available when the procedure was requested.

A regulation adopted by the Council of Ministers shall lay down more specific provisions governing the calculation of average monthly income, the method of rounding the amount of the day fine, the fixed amount for current living expenses, the manner in which the maintenance obligation is to be taken into account and the minimum amount of the day fine.’

23. Paragraph 5 of the *asetus päiväsakon rahamäärästä* (Regulation adopted by the Council of Ministers concerning day fines) (609/1999), in the version applicable to the dispute in the main proceedings, states:

‘The amount of the day fine shall not be less than EUR 6.’

III. The facts giving rise to the dispute in the main proceedings, the questions referred and the procedure before the Court

24. The relevant facts of the dispute in the main proceedings, as set out in the order for reference, may be summarised as follows.

25. On 25 August 2015, A, a Finnish national, made a round trip between Finland and Estonia by pleasure boat. The place of departure and the place of return for that journey were both in Finland. During the journey, A crossed international waters between Finland and Estonia.

26. A held a valid Finnish passport but was carrying neither it nor any other travel document on that journey and was therefore unable to present his passport at a border control in Helsinki, Finland, on the return journey. Although A did not present a travel document, his identity could be established on the basis of the driving licence he was carrying. Moreover, it is common ground that it was possible to verify electronically that A held a valid passport.

27. The Syyttäjä (Public Prosecution Service) brought proceedings against A before the Helsingin käräjäoikeus (District Court, Helsinki, Finland) concerning a minor border offence. A contested the charge against him.

28. By decision of 5 December 2016, the Helsingin käräjäoikeus (District Court, Helsinki) found that A had committed a minor border offence. It is an offence to cross the national border without carrying a travel document. The fact that A holds a valid passport is irrelevant. That court did not impose a sentence, however, considering that the offence was minor and that, if a fine were imposed, the amount of the fine, calculated on the basis of A's average monthly income in accordance with the day-fines penalty system, would have been excessive.

29. The Public Prosecution Service lodged an appeal before the Helsingin hovioikeus (Court of Appeal, Helsinki, Finland). A lodged a cross-appeal.

30. By judgment of 15 June 2018, the Helsingin hovioikeus (Court of Appeal, Helsinki), while finding that it had been duly established that A was not carrying a travel document with him at the time of the control, dismissed the appeal of the Public Prosecution Service. That court found that A's conduct did not amount to a minor border infringement.

31. The Public Prosecution Service appealed against that judgment to the Korkein oikeus (Supreme Court, Finland). That court considered that the case must be examined from the point of view of EU law.

32. The referring court notes that the Court held, in paragraph 45 of the judgment in *Wijsenbeek*,⁶ that EU law, as it stood at the time of the events in question, did not preclude a Member State from requiring a person, whether a national of a Member State or of a non-member country, under threat of criminal penalties, to establish his or her nationality upon his or her entry into the territory of that Member State by an internal frontier of the European Union, provided that the penalties applicable are comparable to those which apply to similar national infringements and are not disproportionate.

⁶ Judgment of 21 September 1999 (C-378/97, EU:C:1999:439).

33. The referring court also points out that the Court, in the judgment in *Oulane*,⁷ examined whether the requirement to present, in certain situations, a valid identity card or passport was consistent with the EU legislation then in force. In the referring court's view, however, uncertainty remains as to whether national legislation such as that at issue in the main proceedings is consistent with EU legislation which has entered into force subsequent to the date of those two judgments.

34. It is true that it follows from Regulation No 562/2006 that any Member State may provide for an obligation to 'hold or carry papers and documents'.⁸ However, even if this means that Member States may require all persons to carry a travel document when crossing a national border, it remains uncertain whether, and if so, in what circumstances, a penalty may be imposed for failure to comply with such a requirement. The referring court observes that Article 5(5) of Directive 2004/38 provides that a Member State may require the person concerned to 'report his/her presence within its territory within a reasonable and non-discriminatory period of time' and that this is the reason why the EU legislature provided, in that article, for the possibility of imposing sanctions.

35. The referring court does not rule out the possibility that the imposition of that requirement on Union citizens, under threat of criminal penalties, may undermine the right of free movement within the territory of the Member States, conferred by Article 45(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 21(1) TFEU.

36. In order to determine whether that right has been undermined, account must be taken, in particular, of Articles 4 and 5 of Directive 2004/38 and Article 21 of Regulation No 562/2006, since that regulation constituted the Schengen Borders Code in force at the time of the facts giving rise to the dispute in the main proceedings.

37. It is also necessary to determine, in the light of Articles 2, 4, 7, 20 and 21 of Regulation No 562/2006, and point 3.2.5 of Annex VI thereto, whether the fact that the person concerned travelled from one Member State to another by pleasure boat via international waters is relevant.

38. Moreover, assuming that EU law does not preclude the requirement, under threat of criminal penalties, to carry another valid travel document, the referring court also seeks to ascertain whether a system of day fines, such as that provided for by the Criminal Code, complies with the principle of proportionality, from the point of view of Article 27(2) of Directive 2004/38.

39. In that regard, the referring court states that a minor border offence such as that described, in this case, in the indictment is usually punishable by a fine of 15 times the day fine. In accordance with the criteria laid down in the Criminal Code and the relevant moment being when the offence was committed, the day fine applicable to A amounted to EUR 6 350. Accordingly, the total amount of the fine which could have been imposed on him at that time was EUR 95 250.

⁷ Judgment of 17 February 2005 (C-215/03, EU:C:2005:95).

⁸ See Article 21(c) of Regulation No 562/2006 (Article 23(c) of Regulation 2016/399).

40. It was in those circumstances that the Korkein oikeus (Supreme Court), by decision of 21 January 2020, received at the Court Registry on 24 January 2020, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does EU law, in particular Article 4(1) of [Directive 2004/38] and Article 21 of [Regulation No 562/2006], or the right of EU citizens to move freely within the territory of the European Union, preclude the application of a national provision requiring a person (whether or not an EU citizen), under threat of criminal penalties, to carry a valid passport or other valid travel document when travelling from one Member State to another by pleasure boat via international waters without entering the territory of a third country?
- (2) Does EU law, in particular Article 5(1) of [Directive 2004/38] and Article 21 of [Regulation No 562/2006], or the right of EU citizens to move freely within the territory of the European Union, preclude the application of a national provision requiring a person (whether or not an EU citizen), under threat of criminal penalties, to carry a valid passport or other valid travel document upon entering the Member State concerned from another Member State by pleasure boat via international waters without having entered the territory of a third country?
- (3) In so far as no obstacle within the meaning of [the first and second questions] arises under EU law: is the penalty normally imposed in Finland in the form of daily fines for crossing the Finnish border without carrying a valid travel document compatible with the principle of proportionality that follows from Article 27(2) of [Directive 2004/38]?’

41. Written observations were submitted by A, the German and Finnish Governments and the European Commission. The same parties also replied in writing to the questions put by the Court, which decided to give judgment without holding a hearing.

IV. Analysis

42. It is clear from the order for reference that A was not subject to a control upon his departure from Finland. The failure to comply with the requirement to carry a travel document was not established by the Finnish authorities until his return, in a border control carried out in Helsinki. Nevertheless, the main criminal proceedings are concerned with both the exit from and return to Finland, since the requirement to be in possession of a travel document applies to each border crossing.

43. The referring court has raised three questions. As is clear from the information it has provided, the first two questions seek, in essence, to ascertain whether the right of free movement of persons precludes a Member State from requiring, under threat of criminal penalties, Union citizens to carry a travel document when they travel between that Member State and another Member State via international waters. If the answer to those questions is in the negative, the referring court raises a third question, which seeks to ascertain whether a system of day fines, such as that provided for by the Finnish Criminal Code, is consistent with the principle of proportionality.

44. In view of the connection between the first and second questions, I shall deal with them together but answer them separately. In the first place, I shall examine the requirement imposed on Union citizens, under threat of criminal penalties, to carry a travel document, first, in the context of the right of exit, within the meaning of Article 4(1) of Directive 2004/38 (first

question), and, secondly, in the context of the right of entry, within the meaning of Article 5(1) of Directive 2004/38 (second question). In the second place, I shall consider the checks carried out during border controls on persons enjoying the right of free movement under Union law, in accordance with Regulation No 562/2006 (first and second questions). In the third place, I shall assess the proportionality of the amount of the fine imposed in the event of failure to comply with such a requirement (third question).

45. Before beginning that analysis, I consider it appropriate to make a few preliminary remarks on the connection between Articles 4 and 5 of Directive 2004/38 and their relationship with the Schengen Borders Code.

A. Preliminary remarks

46. I would like to recall at the outset that, under Article 20 TFEU, every national of a Member State enjoys the status of a citizen of the Union and may therefore rely on the rights pertaining to that status, including against his Member State of origin, and in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States.⁹

47. It follows from the case-law of the Court that the right of freedom of movement includes both the right for citizens of the Union to enter a Member State other than their Member State of nationality and the right to leave the latter Member State.¹⁰ As the Court has pointed out, the fundamental freedoms guaranteed by the FEU Treaty would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State.¹¹ It follows that, in order for that right of exit, guaranteed by Article 4 of Directive 2004/38, to be fully effective, a Union citizen who exercises his right of free movement by leaving the Member State of which he is a national to travel to another Member State must be able to exercise his right to return to his own Member State in accordance with the arrangements and facilities laid down in Article 5 of that directive.

48. The Schengen acquis is of particular importance for the exercise of the right of free movement and, therefore, the rights of exit and entry provided for in Articles 4 and 5 of Directive 2004/38. It follows from the recitals and from the relevant provisions of the Schengen acquis¹² that measures relating to the crossing of the external and internal borders of Member States apply without prejudice to the rights of persons enjoying a right of free movement under EU law.¹³ As the Court has already had occasion to point out, the provisions applicable to the Schengen area

⁹ See, to that effect, judgments of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 17); of 17 November 2011, *Gaydarov* (C-430/10, EU:C:2011:749, paragraph 24); and of 17 November 2011, *Aladzhov* (C-434/10, EU:C:2011:750, paragraph 24).

¹⁰ See, to that effect, judgments of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 18); of 17 November 2011, *Gaydarov* (C-430/10, EU:C:2011:749, paragraph 25); and of 17 November 2011, *Aladzhov* (C-434/10, EU:C:2011:750, paragraph 25).

¹¹ See, inter alia, judgments of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 18), and of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraph 31).

¹² Recital 5 of Regulation No 562/2006 states that '[t]he definition of common rules on the movement of persons across borders neither calls into question nor affects the rights of free movement enjoyed by Union citizens and members of their families and by third-country nationals and members of their families'. Accordingly, on the one hand, Article 3 of that regulation, entitled 'Scope', provides that the regulation is to apply 'to any person crossing the internal or external borders of Member States, *without prejudice* [in particular] to the rights of persons enjoying the right of free movement under Union law' and, on the other hand, Article 7 of that regulation, entitled 'Border checks on persons', provides, under paragraph 6, that 'checks on a person enjoying the right of free movement under Union law shall be carried out in accordance with Directive [2004/38]'. Emphasis added.

¹³ Article 2(5)(a) of Regulation No 562/2006 defines persons enjoying the right of free movement under Union law as 'Union citizens within the meaning of Article 20(1) [TFEU], and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive [2004/38] ... applies'.

expressly state that they do not affect the freedom of movement of Union citizens and their family members accompanying or joining them, as guaranteed, *inter alia*, by Directive 2004/38,¹⁴ including citizens of Member States which are not part of the Schengen area.¹⁵

49. It is against that background that I propose to examine the three questions submitted by the referring court.

B. The first and second questions referred

1. The requirement, under threat of criminal penalties, to carry a travel document

(a) In the context of the right of exit, within the meaning of Article 4(1) of Directive 2004/38

50. I must recall at the outset that Article 21 TFEU confers on every citizen of the Union the right to move and reside freely within the territory of the Member States, ‘subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’, that is to say Directive 2004/38.

51. Article 4(1) of Directive 2004/38 expressly provides – without requiring the prior exercise of the right to move and reside freely – that ‘all Union citizens with a valid identity card or passport ... shall have the right to leave the territory of a Member State to travel to another Member State’.¹⁶

52. In the present case, A is a Finnish national who, in the course of a round trip by pleasure boat, left Finland to travel to Estonia. As the referring court found, his situation thus falls within the scope of that provision.

53. The question therefore arises as to whether the requirement imposed by the Finnish legislation, under threat of criminal penalties, to carry an identity card or passport in the case of a round trip between Finland and Estonia is consistent with Article 4(1) of Directive 2004/38.

(1) The expression ‘with a valid identity card or passport’

54. It is clear from the very wording of Article 4(1) of Directive 2004/38, in particular from use of the expression ‘with a valid identity card or passport’, that the right of exit is subject to the requirement to ‘carry’ a valid travel document.

55. The Finnish Government seems to understand the word ‘with’ as meaning that the Union citizen need *not be in possession* of a travel document at the time of leaving the territory of the Member State concerned *but must hold* such a document.

56. I do not agree with that interpretation by the Finnish Government, for the following reasons.

¹⁴ Judgment of 18 June 2020, *Ryanair Designated Activity Company* (C-754/18, EU:C:2020:478, paragraph 40).

¹⁵ The Court held, in the judgment of 18 June 2020, *Ryanair Designated Activity Company* (C-754/18, EU:C:2020:478, paragraph 41), that ‘in general, [Directive 2004/38] applies without distinction to all Member States, whether or not they are part of the Schengen area’. The case which gave rise to that judgment concerned the right of entry to a Member State, with a permanent residence card of a family member of a Union citizen issued by the United Kingdom of Great Britain and Northern Ireland.

¹⁶ Judgment of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraph 32). See also point 46 of this Opinion.

57. First, I would point out that use of the word ‘with’, in Article 4(1) of Directive 2004/38, implies the carrying of a travel document. The choice of the legislature to use that word cannot be understood as referring solely to the fact of being the holder of such a document. I note, in that regard, that the language versions examined do not seem to suggest otherwise.¹⁷

58. Secondly, that interpretation is supported by an analysis of the aim of Directive 2004/38. The purpose of that directive, as may be seen from recitals 1 to 4 thereof, is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU, and one of the objectives of that directive is to strengthen that right.¹⁸ Article 4 of Directive 2004/38 thus aims to ensure that a person enjoying the right of free movement can be identified as such in the context of any verification of his identity.¹⁹ That objective would be undermined if Union citizens were able to claim exemption from the requirement, laid down in that article, to carry a valid identity card or passport when travelling from one Member State to another.

59. Thirdly and lastly, that interpretation is supported by the origin of Directive 2004/38. According to Article 5(1) of the Commission’s initial proposal²⁰ (Article 4(1) of Directive 2004/38), ‘this subparagraph is basically taken from Article 2(1) of Directive 68/360/EEC,^[21] which stipulates that the right to leave the territory of a Member State “shall be exercised simply on production of a valid identity card or passport”, but changed in line with the new arrangements abolishing checks at EU-internal borders. For this purpose, “on production of” has been changed to “with” ...’.²² It is clear from that provision of the proposal for a directive that that change reflects the abolition of border controls at EU internal borders in the context of the Schengen acquis.

60. In those circumstances, I am of the view that Article 4(1) of Directive 2004/38 requires Union citizens to be in possession of travel documents when they leave the territory of a Member State.²³ Consequently, in imposing the requirement to carry an identity card or passport to travel from Finland to Estonia, the Finnish legislation is consistent with Article 4(1) of Directive 2004/38.

61. That said, it is now necessary to determine whether a Member State may impose a penalty in the event of failure to comply with that requirement.

(2) The possibility of imposing a penalty in the event of failure to comply with the requirement to carry a travel document

62. For the sake of brevity, and in view of the fact that, in the present case, the failure to comply with the requirement to carry a valid travel document was established only upon returning to Finland, when checks were carried out by the Finnish authorities, the question whether a

¹⁷ See, in particular, the versions in Spanish (‘estén en posesión’), German (‘mit sich führen’), Greek (‘φέρουν’), English (‘with’), Italian (‘munito’), Lithuanian (‘turintys’), Polish (‘posiadający’), Portuguese (‘municados’), Romanian (‘deţin’) and Slovenian (‘z’).

¹⁸ Judgment of 11 April 2019, *Tarola* (C-483/17, EU:C:2019:309, paragraph 23 and the case-law cited).

¹⁹ Such identification may also be necessary for the purpose of implementing restrictions on freedom of movement justified on grounds of public policy and public security.

²⁰ Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, p. 10.

²¹ Council Directive of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ English special edition: Series I, Chapter 1968(II), p. 485).

²² Moreover, according to Article 6(1) of that proposal (Article 5(1) of Directive 2004/38), ‘this paragraph is taken from Article 3(1) of Directive [68/360] regarding the right to enter the territory of a Member State, which is exercised by Union citizens and their family members by virtue of [producing] an identity card or passport. Here too, “on production of” has been changed to “with”’.

²³ The same considerations apply to the interpretation of the term ‘with’, within the meaning of Article 5(1) of Directive 2004/38, which is the subject matter of the second question. In that regard, see point 58 and footnote 22 of this Opinion.

Member State may impose a criminal penalty in a situation such as that in the main proceedings will be dealt with in the examination of the requirement to carry a travel document in the context of the right of entry.

(b) In the context of the right of entry, within the meaning of Article 5(1) of Directive 2004/38/38

63. The Finnish Government maintains in its written observations that EU law precludes the application of the national legislation at issue when nationals of a Member State leave and return to that Member State. However, that government notes, first, that the highest courts have not yet ruled on the question whether conduct such as that of A constitutes an offence within the meaning of the Criminal Code. Secondly, it points out that it follows from the *travaux préparatoires* for the Criminal Code that a situation such as that at issue in the main proceedings can be classified neither as a ‘border offence’, within the meaning of Paragraph 7 of Chapter 17 of that code, nor as a ‘minor offence’, within the meaning of Paragraph 7a of Chapter 17 of that code.²⁴

64. I wish to recall from the outset that, as a corollary to the right of exit, guaranteed in Article 4(1) of Directive 2004/38, the first subparagraph of Article 5(1) of that directive guarantees the right to enter the territory of the Member States. That provision provides that *Member States* are to grant Union citizens leave to enter their territory *with* a valid identity card or passport.²⁵ According to the settled case-law of the Court, the right of nationals of a Member State to enter the territory of another Member State, for the purposes intended by the Treaty, is a right conferred directly by the Treaty or, as the case may be, by the provisions adopted for its implementation.²⁶

65. In the present case, A, a Finnish national, was subject to checks upon his return to Finland. Consequently, A was travelling not to a State other than that of which he is a national, as provided for by Article 3 of Directive 2004/38, but to the Member State of which he is a national. In other words, it appears that, in principle, the conditions for the application of Article 3(1) of Directive 2004/38 are not fulfilled in the situation in the present case.

66. In those circumstances, the following preliminary issue arises: must Article 5(1) of Directive 2004/38 be regarded as not applying in situations where a Union citizen returns to the Member State of which he is a national?

(1) The scope of applicability of Article 5(1) of Directive 2004/38

67. The Commission submits that Article 5(1) of Directive 2004/38 applies by analogy in a situation such as that in the main proceedings.

²⁴ See points 19 and 20 of this Opinion.

²⁵ As regards interpretation of the word ‘with’, within the meaning of Article 5(1) of Directive 2004/38, I refer to points 57 to 61 of this Opinion.

²⁶ Judgments of 8 April 1976, *Royer* (48/75, EU:C:1976:57, paragraph 31); of 5 March 1991, *Giagounidis* (C-376/89, EU:C:1991:99, paragraph 12); and of 17 February 2005, *Oulane* (C-215/03, EU:C:2005:95, paragraph 17).

68. The question whether that directive is applicable in situations where a Union citizen has returned to the Member State of which he or she is a national has already been examined by the Court in cases concerning the derived right of entry and residence of third-country nationals who are members of the family of a Union citizen. An analysis of that case-law makes it possible to identify two lines of authority.

69. In the first place, as regards the *right of entry*, the Court first of all held, in the judgment in *McCarthy and Others*,²⁷ that, in so far as the Union citizen concerned had exercised his right of freedom of movement by *becoming established* in a Member State other than that of which he is a national and in which his spouse, a third-country national, was residing with him, they were both covered by Directive 2004/38 for the purposes of Article 3(1) thereof.²⁸ The Court then found that Article 5 of Directive 2004/38 refers to ‘Member States’ and does not draw a distinction on the basis of the Member State of entry, in particular in so far as it provides that possession of a valid residence card, as referred to in Article 10 of the directive, is to exempt family members of a Union citizen who are not nationals of a Member State from the requirement to obtain an entry visa. Finally, the Court pointed out that there is nothing at all in Article 5 of that directive indicating that the right of entry of family members of the Union citizen who are not nationals of a Member State is limited to Member States other than the Member State of origin of the Union citizen.²⁹

70. In the second place, as regards the *right of residence*, the Court has observed – in particular in the judgments in *O. and B.*,³⁰ *Coman and Others*³¹ and *Banger*,³² which extended the *Singh*³³ and *Eind*³⁴ case-law, concerning Article 3(1) of Directive 2004/38 – that it follows from a literal, systematic and teleological interpretation of that directive that the directive governs only the conditions of entry and residence of a Union citizen in a Member State other than the Member State of which he or she is a national and that it does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.³⁵ However, in order to prevent the Union citizen from being discouraged from leaving the Member State of which he or she is a national in order to exercise his or her right of residence under Article 21(1) TFEU in another Member State, the Court held that, in certain cases, third-country nationals, family members of a Union citizen, who were not eligible, on the basis of Directive 2004/38, for a derived right of residence in the Member State of which that citizen is a national, could, nevertheless, be accorded such a right on the basis of Article 21(1) TFEU.³⁶ According to the Court, the conditions for granting a derived right of residence, based on Article 21(1) TFEU, to a thirdcountry national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, should not, in principle, be more strict than those provided for by Directive 2004/38 for

²⁷ Judgment of 18 December 2014 (C-202/13, EU:C:2014:2450).

²⁸ Judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 36). See also judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 73), and of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 39).

²⁹ Judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 41).

³⁰ Judgment of 12 March 2014 (C-456/12, EU:C:2014:135, paragraph 37).

³¹ Judgment of 5 June 2018 (C-673/16, EU:C:2018:385).

³² Judgment of 12 July 2018 (C-89/17, EU:C:2018:570).

³³ Judgment of 7 July 1992 (C-370/90, EU:C:1992:296).

³⁴ Judgment of 11 December 2007 (C-291/05, EU:C:2007:771).

³⁵ Judgments of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 37); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 20); and of 12 July 2018, *Banger* (C-89/17, EU:C:2018:570, paragraph 23). See also judgments of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraph 53), and of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 33).

³⁶ Judgments of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 54); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 23 and 24); and of 12 July 2018, *Banger* (C-89/17, EU:C:2018:570, paragraphs 27 and 28).

the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his or her right of freedom of movement by becoming established in a Member State other than the Member State of which he or she is a national. Thus, even though the Court considered that Directive 2004/38 does not cover such a return, it nevertheless held that that directive should be applied by analogy.³⁷

71. The analysis of those two lines of authority makes it possible, in my view, to draw several conclusions as to the scope of applicability of Article 5(1) of Directive 2004/38 in the present case.

72. The Court held, in *McCarthy and Others*,³⁸ that the Union citizen concerned, although he was travelling to the Member State of which he was a national (the United Kingdom), was covered by Directive 2004/38, for the purposes of Article 3(1) thereof, because he ‘had settled’ in another Member State (Spain). The Court therefore held that, when he entered the United Kingdom, that citizen was still exercising his rights of free movement, since he was residing in the host Member State (Spain). His spouse, a third-country national, in so far as she was residing with that Union citizen in Spain, was also covered by Directive 2004/38, for the purposes of Article 3(1) thereof. In those circumstances, in view of the fact that the wording of Article 5(1) of Directive 2004/38 refers to ‘Member States’ and does not draw a distinction on the basis of the Member State of entry, the Court held that that provision and therefore the formalities connected with the exercise of the right of entry provided for therein applied to the third-country national spouse of the Union citizen.

73. By contrast, in the judgments in *O. and B.*,³⁹ *Coman and Others*⁴⁰ and *Banger*,⁴¹ and the case-law on which those judgments were based,⁴² the Union citizen concerned had in principle permanently left the host Member State and returned with his family members, who were third-country nationals, to the Member State of which he was a national. In those circumstances, according to the Court, that Union citizen was no longer covered by Directive 2004/38 for the purposes of Article 3(1) thereof and, consequently, did not fall within its scope. However, in view of the fact that he had exercised his right of free movement, members of his family who were third-country nationals and had resided with him in the host Member State could be granted a derived right of residence in the Member State of which he was a national on the basis of Article 21(1) TFEU. In those cases, and for the reasons already set out above,⁴³ the Court held that Directive 2004/38 should be applied by analogy to the Union citizens concerned.⁴⁴

74. In the present case, A’s situation is that of a Union citizen who returns to the Member State of which he or she is a national after having travelled to another Member State in the context of a round trip by pleasure boat. Thus, in contrast to the cases giving rise to the judgments of the Court in the two lines of authority analysed above,⁴⁵ in the present case, first, the order for

³⁷ Judgments of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraphs 50 and 61); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 25); and of 12 July 2018, *Banger* (C-89/17, EU:C:2018:570, paragraph 29).

³⁸ Judgment of 18 December 2014 (C-202/13, EU:C:2014:2450).

³⁹ Judgment of 12 March 2014 (C-456/12, EU:C:2014:135).

⁴⁰ Judgment of 5 June 2018 (C-673/16, EU:C:2018:385).

⁴¹ Judgment of 12 July 2018 (C-89/17, EU:C:2018:570).

⁴² Judgments of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296), and of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771).

⁴³ See point 70 of this Opinion.

⁴⁴ Judgments of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraphs 50 and 61); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 25); and of 12 July 2018, *Banger* (C-89/17, EU:C:2018:570, paragraph 29).

⁴⁵ See points 69 to 73 of this Opinion.

reference does not indicate that when A returned to Finland he was accompanied by members of his family who were third-country nationals and, secondly, although he exercised his right of free movement, he was not established in Estonia at the time of his return to Finland.

75. The rule laid down in the judgment in *McCarthy and Others*⁴⁶ is therefore not relevant in the present case.⁴⁷ Nevertheless, how do matters stand as regards the rule laid down in the judgments in *O. and B.*,⁴⁸ *Coman and Others*⁴⁹ and *Banger*?⁵⁰

76. It is clear from that second line of case-law that the Court, in those judgments, applied Directive 2004/38 by analogy to *Union citizens* who return to the Member State of which they are nationals, after exercising their right of free movement, with the aim of *guaranteeing them the full exercise of their fundamental right of free movement*, thereby preventing their being deterred from leaving the Member State of which they are a national in order to exercise their right of residence, under Article 21(1) TFEU, in another Member State. In other words, a Union citizen who has returned to his or her Member State and who therefore does not fall within the scope of Directive 2004/38 must not be treated less favourably than a Union citizen who, by moving to and residing in another Member State, falls within the scope of that directive.

77. Although the Court has interpreted Article 21(1) TFEU as meaning that a third-country national who is a family member of a Union citizen has a derived right of residence in the territory of the Member State of which that Union citizen is a national and that that derived right of residence cannot be subject to conditions which are more strict than those provided for by Directive 2004/38, this is precisely because the arrangements and facilities *for entry and residence* laid down by that directive for Union citizens include, for their family members, the right of those family members, whatever their nationality, to accompany or join the Union citizen.

78. It is true that the present case does not concern the derived right of residence of family members of a Union citizen. However, as I have already stated, that case-law seems to me to be relevant to the present case for the following reasons.

79. In the first place, the Court has repeatedly held that the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States.⁵¹ It follows from the case-law of the Court that a national of a Member State who has, in his or her capacity as a Union citizen, exercised his or her freedom to move and reside freely in a Member State other than that

⁴⁶ Judgment of 18 December 2014 (C-202/13, EU:C:2014:2450).

⁴⁷ However, as I had already stated in my Opinion in *McCarthy and Others* (C-202/13, EU:C:2014:345, points 57 and 60 to 88), I am in some doubt as to the applicability by analogy of Directive 2004/38, in the light of the principle of the hierarchy of primary law and secondary legislation. Indeed, I am of the view that it is secondary legislation that ought to be interpreted in the light of the Treaties, and not vice versa, in particular in order to avoid a situation where an EU measure would lead to a revision of the Treaties outside the procedures prescribed for that purpose. Thus, in that Opinion, I proposed that the Court should hold, *inter alia*, that Directive 2004/38, interpreted in the light of Article 21(1) TFEU, applies to third-country nationals who are family members of a Union citizen, within the meaning of Article 2(2) of that directive, where, following the prior exercise of the right of freedom of movement by the Union citizen and after he has genuinely resided in another Member State, the citizen and his family members travel to the Member State of which that citizen is a national. That said, I support the position taken by the Court.

⁴⁸ Judgment of 12 March 2014 (C-456/12, EU:C:2014:135).

⁴⁹ Judgment of 5 June 2018 (C-673/16, EU:C:2018:385).

⁵⁰ Judgment of 12 July 2018 (C-89/17, EU:C:2018:570).

⁵¹ See judgments of 20 September 2001, *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 31); of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124, paragraph 41); order of 6 October 2016, *Bogendorff von Wolfersdorff* (C-438/14, EU:C:2016:758, paragraph 29); and judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 30).

of which he or she is a national, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU, also, where appropriate, against the Member State of which he or she is a national.⁵²

80. In the second place, if that case-law, and that examined in points 70 and 73 of this Opinion, is applied to the case in the main proceedings, it would mean that, when a Union citizen returns to the Member State of which he or she is a national, the substantive requirements relating to the right of entry deriving from Article 21(1) TFEU cannot be interpreted as being more strict than those provided for in Article 5(1) of Directive 2004/38.⁵³ Indeed, as I have noted,⁵⁴ in order for the right of exit guaranteed by Article 4 of that directive to be fully effective, a Union citizen who exercises his or her right of free movement by leaving the Member State of which he or she is a national to travel to another Member State must, even though Directive 2004/38 does not cover the return to that Member State, be able to exercise his or her right to enter the Member State of which he or she is a national in accordance with the arrangements and facilities laid down in that directive and, in particular, in Article 5 thereof.

81. Consequently, in a situation such as that in question in the main proceedings, Directive 2004/38 must be applied by analogy, including Article 5(1) thereof, as regards the conditions under which Member States are to grant Union citizens leave to enter their territory ‘with a valid identity card or passport’.

82. Moreover, I note that it is clear from the Finnish Government’s written observations that Paragraph 155(1) and (2) of the *Ulkomaalaislaki* (Law on foreigners) (301/2004) concerns the entry into and residence in Finland of Union citizens.⁵⁵ In that regard, the Finnish Government confirmed, in response to a written question put by the Court, that Paragraph 155(1) and (2) of the Law on foreigners transposes into Finnish law Article 5(1) and (4) of Directive 2004/38.⁵⁶

(2) The possibility of imposing a penalty in the event of failure to comply with the requirement to carry a travel document

83. Article 36 of Directive 2004/38 provides that ‘Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application’.

⁵² Judgment of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 51).

⁵³ See, to that effect, judgments of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraphs 50 and 61); of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 61); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 25); and of 12 July 2018, *Banger* (C-89/17, EU:C:2018:570, paragraph 29). See also judgment of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraphs 54 and 55).

⁵⁴ See point 47 of this Opinion.

⁵⁵ According to the Finnish Government, that law provides, in Paragraph 155(1), that ‘a Union citizen entering or residing in the territory must hold a valid identity card or passport’ and, in Paragraph 155(2), that ‘where a Union citizen ... is not in possession of the required travel document or any necessary visa, he shall be given the opportunity, before entry is refused, to obtain the necessary documents or have them brought to him or to prove by other means that he is covered by the right of free movement and residence’.

⁵⁶ The referring court states that the Finnish legislation at issue in the main proceedings allowed A to enter national territory as soon as he was able to prove by another means, in this instance a driving licence, that he enjoyed the right of entry. In that regard, the Finnish Government stated, in reply to a question from the Court, that in Finland a driving licence is, in certain situations, accepted as a document proving the identity of its holder. The Finnish Government states that it is conceivable that, in a situation where a Union citizen has forgotten his or her identity card or passport in Finland when leaving that Member State, he or she may, upon his or her return, prove his or her identity, inter alia, by means of his or her driving licence and be permitted to enter Finland. The Finnish Government states, however, that the Finnish legislation does not lay down any such requirement and that it is for the Finnish authorities to determine, in a particular case, which papers or documents allow the identity of the person concerned to be established.

84. In the first place, the question therefore arises as to whether that article is relevant in responding to the first and second questions raised by the referring court. I believe that it is, as I shall explain in the considerations below.

85. It is clear from the proposal for a directive⁵⁷ that Article 33 thereof (Article 36 of Directive 2004/38) codifies the previous case-law of the Court, according to which EU law does not prohibit Member States from penalising persons subject to EU law who do not obtain one of the identity documents.⁵⁸

86. More specifically, the penalties referred to in that article are those provided for in Article 5(5),⁵⁹ Article 8(2),⁶⁰ Article 9(3)⁶¹ and Article 20(2) of Directive 2004/38.⁶²

87. By contrast, neither Article 4 nor Article 5 of that directive lays down specific provisions permitting Member States to penalise a failure to comply with the requirement of every Union citizen to carry a valid identity card or passport.⁶³ The reason why the EU legislature provided, in Article 5(5) of Directive 2004/38, for the possibility of imposing penalties is that that provision allows a Member State to require the person concerned to ‘report his/her presence within its territory within a reasonable and non-discriminatory period of time’.

88. However, the silence of Articles 4 and 5 of that directive as to the possibility of penalising a failure to comply with the requirement of every Union citizen to carry a valid identity card or passport seems to me to be remedied by the existence of Article 36 of that directive, since that article codifies the previous case-law of the Court on the possibility for Member States to penalise persons subject to EU law who do not obtain one of the identity documents.⁶⁴

89. Consequently, pursuant to Article 36 of Directive 2004/38, failure to comply with the requirement to carry a valid identity card or passport when travelling from one Member State to another may result in penalties.

90. In the second place, the question arises as to the nature of the penalty which Member States may impose in the event of failure to comply with an administrative formality provided for by Directive 2004/38,⁶⁵ since Article 36 thereof does not lay down the types of penalties (administrative or criminal) which may be imposed in the event of failure to comply with that requirement.

⁵⁷ COM(2001) 257 final, p. 26.

⁵⁸ On the failure to comply with the formalities required as proof of the right of residence of a worker enjoying the protection of Directive [68/360] and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), both repealed by Directive 2004/38, see the judgments of 7 July 1976, *Watson and Belmann* (118/75, EU:C:1976:106, paragraphs 20 to 21 and paragraph 2 of the operative part); of 12 December 1989, *Messner* (C-265/88, EU:C:1989:632, paragraphs 14 and 15, and the case-law cited); and of 30 April 1998, *Commission v Germany* (C-24/97, EU:C:1998:184, paragraph 14).

⁵⁹ In the event of failure to comply with the requirement of a Union citizen or a family member who is not a national of a Member State to report his or her presence within the territory of the host Member State.

⁶⁰ In the event of failure to comply with the requirement to register with the relevant authorities of the host Member State.

⁶¹ In the event of failure to comply with the requirement to apply for a residence card for family members who are not nationals of a Member State.

⁶² In the event of failure to comply with the requirement to apply for a permanent residence card.

⁶³ As regards the right of entry, see Article 5(4) of Directive 2004/38.

⁶⁴ See point 85 and footnote 58 of this Opinion.

⁶⁵ According to recital 7 of Directive 2004/38, the penalties should be clearly defined, without prejudice to the provisions applicable to national border controls. See also Article 21(c) of Regulation No 562/2006.

91. It is true that the Court has already pointed out, in the context of the right of entry and residence, that the presentation of a valid identity card or passport for the purpose of proving that a person is a Member State national ‘is an *administrative formality* the sole objective of which is to provide the national authorities with proof of a right which the person in question has directly by virtue of their status’,⁶⁶ and, accordingly, a Member State may not impose on a Union citizen, as a condition for entry into its territory, any requirement other than that of being in possession of a valid identity card or passport.⁶⁷

92. However, in so far as Article 36 of Directive 2004/38 is silent as to the nature of the penalties which may be imposed in the event of failure to comply with the national provisions adopted pursuant to that directive,⁶⁸ the imposition of a *criminal* penalty in the event of failure to comply with the requirement to carry a travel document is not, in my view, incompatible with Directive 2004/38, since Member States are empowered ‘to choose the penalties which seem to them to be appropriate’, provided that they exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality.⁶⁹

93. In that context, in view of the fact that the third question raised by the referring court concerns the proportionality of the Finnish day-fines penalty system, I shall return to this matter in my examination of that question.

94. First of all, I shall consider the checks carried out during border controls within the framework of Regulation No 562/2006.

2. The checks carried out during border controls on persons enjoying the right of free movement under Union law within the framework of Regulation No 562/2006

95. The first and second questions raised by the referring court also mention Article 21 of Regulation No 562/2006.

96. In that regard, it is clear from the order for reference that, during his journey between Estonia and Finland, A travelled by pleasure boat via international waters, thereby crossing the Finnish sea border.

97. In that connection, I must point out from the outset that the fact that A crossed the Finnish sea border seems insignificant in so far as he is a Union citizen who exercised his right of free movement between two Member States and that, irrespective of whether he crossed an internal or external border, he must carry a valid identity card or passport when crossing borders, for the purposes of Article 4(1) and Article 5(1) of Directive 2004/38. However, in the alternative and for the sake of completeness, I shall address the question whether a person in A’s situation should be regarded as crossing an external border of the Schengen area when he or she travels between two Member States, in order to determine whether Regulation No 562/2006 precludes a check such as that to which A was subject.

⁶⁶ Judgment of 17 February 2005, *Oulane* (C-215/03, EU:C:2005:95, paragraph 24). Emphasis added.

⁶⁷ See, to that effect, judgment of 3 July 1980, *Pieck* (157/79, EU:C:1980:179, paragraph 10).

⁶⁸ At a certain stage of the legislative procedure, it was envisaged that all the provisions on penalties might provide only for administrative penalties, though this was not the position taken in the final document. See amendment 33 and the considerations underpinning it in the amended proposal, COM(2003) 199 final, p. 6.

⁶⁹ See, to that effect, inter alia, judgments of 4 March 2020, *Schenker* (C-655/18, EU:C:2020:157, paragraph 42), and of 19 October 2016, *EL-EM-2001* (C-501/14, EU:C:2016:777, paragraph 37 and the case-law cited).

98. To that end, I shall at the outset examine the scope of the concept of ‘sea border’, for the purposes of Article 2(2) of Regulation No 562/2006.

(a) The scope of the concept of ‘sea border’ for the purposes of Article 2(2) of Regulation No 562/2006

99. In his reply to a written question from the Court, A stated that he had travelled on a pleasure boat between two Member States which are parties to the Schengen Agreement, without crossing an area located outside the Schengen area.⁷⁰ As regards the concept of ‘sea border’, for the purposes of Article 2(2) of Regulation No 562/2006, the German and Finnish Governments have maintained that it refers to the outer limit of the territorial sea, within the meaning of Article 4 of the Montego Bay Convention,⁷¹ whereas the Commission stated that this is a specific concept applicable to Regulation No 562/2006, which does not necessarily correspond to the concept of ‘sea border’ as defined in Article 4 of the Montego Bay Convention.

100. I share the view of the Commission. The Court has held that the mere fact that a person has crossed a ‘border crossing point’ within the meaning of Article 2(8) of Regulation No 562/2006, where the external border control imposed by that regulation has been carried out, does not mean that that person has exited the Schengen area if he or she is still staying in part of the territory of a State forming part of that area.⁷² It is true that Article 2(2) of Regulation No 562/2006 defines the concept of ‘external borders’ of the Schengen area as referring, first, to the Member States’ land and sea borders and, secondly, inter alia, to their airports and sea ports, provided that they are not internal borders. However, the Court has held that the sole purpose of that provision, as is apparent from its wording, is to connect certain airports and ports of the States forming part of the Schengen area to the external borders of the Schengen area for the sole purpose of, in accordance with the provisions of Article 77(2)(b) TFEU, facilitating the practical application of checks on persons crossing the external borders of the Schengen area.⁷³

101. In the present case, A stated in his written observations that he had, over the course of a day, travelled by pleasure boat between Helsinki and Tallinn. He also explained that, upon his return, Finnish border guards, in agreement with the captain, escorted the pleasure boat on which he was travelling to its port of departure in Helsinki, the marina at Katajanokka (Finland) located in central Helsinki; A further stated that the latter port was not a ‘border crossing point’ within the meaning of Article 2(8) of Regulation No 562/2006, that is to say, was not a ‘crossing-point authorised by the competent authorities for the crossing of external borders’.

⁷⁰ Indeed, A explained that, ‘according to the Estonian and Finnish legislation, in accordance with the general rule concerning the extent of their maritime areas, the Schengen sea borders adjoin one another between Tallinn (Estonia) and Helsinki, disregarding the freely navigable maritime corridor of 11.11 km (or 6 miles x 1.852)’. As regards the Finnish sea border, A refers to Article 5 of Law No 981/1995.

⁷¹ Article 4 of that Convention provides that ‘the outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea’.

⁷² Judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)* (C-341/18, EU:C:2020:76, paragraph 45).

⁷³ As regards the concept of ‘exit’, for the purposes of Article 11 of Regulation No 562/2006, see the judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)* (C-341/18, EU:C:2020:76, paragraphs 47 and 48). See also Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders (COM(2004) 391 final, 26 May 2004, p. 28), according to which: ‘ports are as a rule always treated as external borders’ for the purposes of Regulation No 562/2006 (emphasis added).

102. In that regard, I consider it appropriate to note that it is apparent from the list of border crossing points referred to in Article 2(8) of Regulation No 562/2006, which is drawn up on the basis of information communicated by Republic of Finland to the Commission in accordance with Article 34(1)(b) of that regulation,⁷⁴ that, at the material time, the marina at Katajanokka was not included among the ‘coastguard stations operating as border crossing points for pleasure craft’.⁷⁵

103. It follows that, in principle, at the material time, when A travelled between Estonia and Finland he crossed not an ‘external border’ for the purposes of Article 2(2) of Regulation No 562/2006, but an ‘internal border’ for the purposes of Article 2(1) of that regulation. Accordingly, A’s situation and consequently the checks to which he was subject by the Finnish authorities fall, in principle, within the scope of Article 21 of that regulation, which concerns the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents. Nevertheless, I am of the view that this is not the case here, for the following reasons.

(b) A person in A’s situation crosses an external border of the Schengen area when he or she travels between two Member States

104. First of all, I would point out that, since A travelled by pleasure boat, his situation should be governed not by Article 21 of Regulation No 562/2006 but by Annex VI thereto. It is apparent from Article 4(1) of that regulation that external borders may be crossed only at border crossing points, which must be notified by the Member States to the Commission. However, Article 4(2)(c) of that regulation provides for *a derogation from that requirement for pleasure boats*. Thus, according to the ‘general checking procedures on maritime traffic’ set out in point 3.1 of Annex VI to that regulation, checks on ships are, in principle, to be carried out ‘at the port of arrival or departure, or in an area set aside for that purpose, located in the immediate vicinity of the vessel’.

105. Accordingly, the fact that pleasure boats are exempt from the requirement to cross external borders at border crossing points notified for that purpose by the Member States to the Commission does not mean that A did not cross an external border of the Schengen area, even though, as I have stated in point 102 of this Opinion, the port of Katajanokka was not, at the material time, among the border crossing points for that type of vessel.⁷⁶

106. Moreover, although, in principle, a person may be considered to have crossed the external border of the Schengen area if a grant of leave to enter or exit that area is affixed in the form of a stamp to his or her travel documents ‘on entry’ and ‘on exit’,⁷⁷ the fact that the travel documents of a person enjoying the right of free movement under Union law are not stamped during checks at external borders does not mean that that person is not crossing an external border when, as in the present case, by crossing a sea border, he or she is travelling between two Member States.⁷⁸

⁷⁴ Update of the list of border crossing points referred to in Article 2(8) of [Regulation No 562/2006] (OJ 2015 C 72, p. 17).

⁷⁵ However, it is apparent from the Update of the list of border crossing points as referred to in Article 2(8) of [Regulation 2016/399] (OJ 2016 C 484, p. 30), which is not applicable in the present case, that the port of Helsinki is included among the ‘coastguard stations operating as border crossing points for pleasure craft’.

⁷⁶ See point 100 and footnote 73 of this Opinion.

⁷⁷ See, in that regard, judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)* (Case C-341/18, EU:C:2020:76, paragraph 33 and the case-law cited).

⁷⁸ That interpretation is supported by Annex VII to Regulation No 562/2006, entitled ‘special rules for certain categories of persons’, point 8 of which states that ‘by way of derogation from Articles 4 and 7 [of Regulation No 562/2006], offshore workers as defined in Article 2, point 18a, who regularly return by sea or air to the territory of the Member States without having stayed on the territory of a third country shall not be systematically checked’. Consequently, workers returning to an offshore installation located in the territorial waters of a Member State must be considered to have crossed external borders, since, otherwise, there would be no need to provide for a derogation from Articles 4 and 7 of that regulation.

However, I would point out that the fact that a person has crossed an external border does not mean that he or she has exited the Schengen area if he or she is still staying in part of the territory of a State forming part of that area.⁷⁹ Consequently, I would note that A crossed an external border, within the meaning of Regulation No 562/2006, when travelling between Estonia and Finland but did not exit the Schengen area.

107. As regards the checks to which A was subject during the control carried out by Finnish border guards, the first paragraph of point 3.2.5 of Annex VI to Regulation No 562/2006, by way of derogation from Articles 4 and 7 thereof,⁸⁰ exempts pleasure boating from the minimum checks at external borders.⁸¹ However, the second paragraph of point 3.2.5 of that annex provides, in turn, for an exception to the exemption provided for in the previous paragraph, to the effect that ‘according to the assessment of the risks of illegal immigration, ... [border] checks on those persons and/or a physical search of the pleasure boat shall [nonetheless] be carried out’.

108. In that regard, it is apparent from A’s observations that his journey took place during a period of increased risks of illegal immigration. The Finnish Government argues that, according to the information provided by the border surveillance service, the risks of illegal immigration began to increase from April 2015 onwards and that immigration had risen sharply by the end of July 2015, reaching its peak in the period between autumn and the end of 2015. Accordingly, the Finnish authorities were entitled to carry out border checks on 25 August 2015, when A returned to Helsinki after crossing the Finnish sea border. In view of the fact that the exception provided for in the second paragraph of point 3.2.5 of Annex VI to Regulation No 562/2006 appears to have been applied by the Finnish border guards, the derogation from Articles 4 and 7 of that regulation does not apply.

109. Accordingly, since A is a Union citizen, pursuant to the first subparagraph of Article 7(2) of Regulation No 562/2006, the Finnish border guards were entitled to subject A to the *minimum check* referred to in that provision, which ‘shall be the rule for persons enjoying the right of free movement under Union law’.⁸² The purpose of that minimum check is to establish the identity of persons ‘on the basis of the production or presentation of their travel documents’ and ‘shall consist of a rapid and straightforward verification ... of the validity’ of those documents.

110. In that regard, I think it is necessary to point out, first, that the fourth subparagraph of Article 7(2) of Regulation No 562/2006 provides, as regards persons enjoying the right of free movement under Union law, that the consequences of any ‘non-systematic’ consultations of national and European databases *are not to jeopardise their right of entry into the territory of the Member State concerned as laid down in Directive 2004/38*. Secondly, Article 7(6) of Regulation No 562/2006 provides that checks on a person enjoying the right of free movement under Union law *are to be carried out in accordance with Directive 2004/38*.⁸³

⁷⁹ See, in that regard, judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)* (Case C-341/18, EU:C:2020:76, paragraph 45). See also, in that regard, point 100 and footnote 73 of this Opinion.

⁸⁰ I consider it appropriate to point out that the fact that the first paragraph of point 3.2.5 of Annex VI to Regulation No 562/2006, by way of derogation from Articles 4 and 7 thereof, exempts pleasure boating from the minimum checks at external borders shows that an external border is regarded as having been crossed in the case of pleasure boating, since, otherwise, there would have been no need to provide for a derogation from Articles 4 and 7 of that regulation. See, in that regard, point 107 of this Opinion.

⁸¹ See Article 7(2) and (6) of Regulation No 562/2006.

⁸² Article 7(2), second subparagraph, of Regulation No 562/2006.

⁸³ In that regard, see my preliminary remarks and, in particular, point 48 of this Opinion.

111. Therefore, although border guards were entitled to carry out a check at the Finnish external border on A's return to Finland from Estonia, A's right of free movement, in particular his right of entry, within the meaning of Article 5(1) and (4) of Directive 2004/38, may not be undermined. I would point out, in that regard, that the Court has held that the provisions applicable to the Schengen area expressly state that they do not affect the freedom of movement of Union citizens and their family members accompanying or joining them, as guaranteed, inter alia, by Directive 2004/38.⁸⁴

3. *Interim conclusion on the first and second questions referred*

112. It follows from the foregoing analysis that the right of free movement of persons does not preclude a Member State from requiring Union citizens to carry a travel document when they travel between that Member State and another Member State by pleasure boat via international waters. Although the imposition of a criminal penalty in the event of failure to comply with the requirement to carry a travel document is not, in principle, incompatible with Directive 2004/38, I must still assess the proportionality of such a penalty.

C. The third question referred

113. The third question raised by the referring court seeks to assess the proportionality of a system of day fines, such as that provided for by the Finnish Criminal Code, in the light of Article 27(2) of Directive 2004/38. That article concerns the justifications for restrictions on freedom of movement on grounds of public policy, public security or public health. According to the Court, failure to comply with legal formalities pertaining to persons' access, movement and residence does not by itself constitute a threat to public policy or security.⁸⁵

114. Consequently, as I have argued,⁸⁶ the day-fines penalty system at issue in the main proceedings must be analysed not from the point of view of Article 27 of Directive 2004/38, but from that of Article 36 thereof.

115. I am therefore of the view that, in order for the Court to be able to provide the referring court with an answer which will be of use to it and enable it to determine the case before it,⁸⁷ the third question should be reformulated as seeking to ascertain, in essence, whether Article 21(1) TFEU and Article 36 of Directive 2004/38 must be interpreted as meaning that the requirements for the penalties referred to in the latter provision to be effective and proportionate preclude a day-fines penalty system, such as that at issue in the main proceedings, which is applicable in the event of failure to comply with the requirement to carry a valid travel document when crossing the border, in so far as that system imposes, for a minor offence, a fine amounting to 20% of the offender's average monthly income.

⁸⁴ Judgment of 18 June 2020, *Ryanair Designated Activity Company* (C-754/18, EU:C:2020:478, paragraph 40). See, in that regard, point 48 of this Opinion.

⁸⁵ Judgment of 17 February 2005, *Oulane* (C-215/03, EU:C:2005:95, paragraph 42).

⁸⁶ See points 83 to 93 of this Opinion.

⁸⁷ Judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 33 and the case-law cited).

116. The wording of Article 36 of that directive is very clear: the sanctions applicable to breaches of national rules adopted for the implementation of that directive must be ‘effective and proportionate’.⁸⁸

117. In that regard, it is clear from the Court’s case-law that the principle of proportionality requires the Member States to adopt measures that are appropriate for attaining the objectives pursued and do not go beyond what is necessary for attaining them.⁸⁹

118. In the first place, in the present case, the system of day fines provided for by the Finnish Criminal Code must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.⁹⁰

119. I would recall that the Court has already explained, in the context of the right of residence, first, that the sole objective of the presentation of a valid identity card or passport by persons enjoying the right of free movement is to provide the national authorities with proof of that right and, secondly, that if the person concerned is able to provide unequivocal proof of his identity by means other than the presentation of those documents, the host Member State may not refuse to recognise his right of residence on the sole ground that he has not presented one of those documents.⁹¹

120. In my view, that case-law, which concerns the right of residence of Union citizens, is applicable by analogy to the right of entry of Union citizens for the purposes of Article 5(1) of Directive 2004/38. The aim of that provision is to ensure that a person enjoying the primary and individual right to move freely within the territory of the Member States can be identified as such in order to facilitate the exercise of that right. Thus, failure to comply with the requirement to carry a valid identity card or passport when entering a Member State, laid down in Article 5(1) of that directive, cannot be regarded as a serious offence where the objective of that requirement is achieved by other means.⁹² Admittedly, it is clear from the order for reference that, under Paragraph 7a of Chapter 17 of the Criminal Code, the offence that persons in Finland are generally charged with is considered to be *minor*. In the present case, however, A is liable to a fine of 15 times the day fine, with the fine amounting to 20% of net monthly income.⁹³

⁸⁸ In that connection, I must point out that it follows from the proposal for a directive that that article clearly lays down the principles to be respected in setting the penalties applicable to violations of national provisions enacted pursuant to that directive (COM(2001) 257 final, p. 26). Although the wording of Article 33 of that proposal for a directive (Article 36 of Directive 2004/38) provided that ‘penalties must be effective, proportional and dissuasive; they must be comparable to those applied by the Member States to their own nationals in the event of minor offences’, the explanatory memorandum to the amended proposal nonetheless states that the amendment to that article proposed by the European Parliament and adopted in the final document ‘makes the principles of effectiveness and proportionality the only reference points for the penalties’. See Amendment 90 and the considerations underpinning it in the amended proposal, COM(2003) 199 final, p. 10. See also European Parliament report, Final A5-0009/2003, p. 51.

⁸⁹ Judgment of 4 October 2018, *Link Logistik N&N* (C-384/17, EU:C:2018:810, paragraph 40). According to paragraph 41 of that judgment, ‘that principle, which is also guaranteed by Article 49(3) of the Charter ..., which provides that the severity of penalties must not be disproportionate to the criminal offence, is binding on Member States when they are implementing EU law, in accordance with Article 51(1) of the Charter’. Having said that, I am of the view that, in so far as the right of free movement of persons is at issue in this case, the assessment of proportionality must be stricter and carried out in the light of Article 36 of Directive 2004/38, Article 49(3) of the Charter applying to all types of penalties in a much wider context.

⁹⁰ See, to that effect, judgment of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229, paragraph 40 and the case-law cited).

⁹¹ See, to that effect, judgment of 17 February 2005, *Oulane* (C-215/03, EU:C:2005:95, paragraphs 24 and 25). See also judgment of 5 March 1991, *Giagounidis* (C-376/89, EU:C:1991:99, paragraphs 15 and 18). See also Article 5(4) of Directive 2004/38.

⁹² In that regard, I refer to Article 5(4) of Directive 2004/38.

⁹³ The referring court states that, in 2014, the average day fine was EUR 16.70, which corresponds to a net monthly income of EUR 1 257.

121. In the second place, it should be noted that a day-fines penalty system based on the offender's ability to pay⁹⁴ does not, in itself, appear to be disproportionate.⁹⁵ However, in the light of the nature and seriousness of the offence, which is considered to be a minor offence, the imposition of a fine amounting to 20% of the offender's average monthly income for failure to comply with an administrative formality is, in my view, contrary to the principle of proportionality. That conclusion cannot be invalidated by the fact, relied on by the Finnish Government, that a court is still able to decide to acquit a defendant when, as in the present case, the amount of a fine appears to be too high.

122. In the present case, it is clear from the order for reference that, despite the fact that A proved his identity by other means, a fine of EUR 95 250 could have been imposed on him.⁹⁶ Accordingly, it does not appear that this fact was taken into account in setting the amount of the fine.⁹⁷

123. In the third place, the effectiveness of the system of day fines provided for by the Finnish Criminal Code cannot be disputed. However, I consider that the imposition of such a large fine on the ground that a Union citizen has failed to comply with a formal requirement for the exercise of the right of free movement goes beyond what is necessary for attaining the objectives pursued by Article 5(1) of Directive 2004/38 and impairs the very substance of the right of free movement directly conferred by the Treaty,⁹⁸ in that it constitutes an obstacle to the free movement of that citizen.

124. Accordingly, I consider that that system is disproportionate given that the offence committed is a minor one.

125. In the light of the foregoing, I propose that the answer to the third question should be that Article 21(1) TFEU and Article 36 of Directive 2004/38 must be interpreted as meaning that the requirements for the penalties referred to in the latter provision to be effective and proportionate preclude a system of day fines such as that at issue in the main proceedings, which is applicable in the event of failure to comply with the requirement to carry a valid travel document when crossing the border, in so far as that system imposes, for a minor offence, a fine amounting to 20% of the offender's average monthly income.

V. Conclusion

126. In the light of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Korkein oikeus (Supreme Court, Finland) as follows:

- (1) Article 4(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC,

⁹⁴ See Paragraph 2 of Chapter 17 of the Criminal Code.

⁹⁵ Judgment of 12 September 2019, *Maksimovic and Others* (C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, paragraph 41 and the case-law cited).

⁹⁶ The referring court explains that, when the offence was committed, and taking into account A's income, the day fine would have been EUR 6 350 and the total amount of the fine would have been EUR 95 250. See footnote 39 of this Opinion.

⁹⁷ See judgment of 12 July 2001, *Louloudakis* (C-262/99, EU:C:2001:407, paragraphs 75 and 76).

⁹⁸ See, to that effect, judgment of 17 February 2005, *Oulane* (C-215/03, EU:C:2005:95, paragraph 40). See also judgment of 12 September 2019, *Maksimovic and Others* (C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, paragraph 45 and the case-law cited).

75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, and point 3.2.5. of Annex VI to Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, do not preclude the application of legislation of a Member State which imposes on citizens of the Union the requirement, under threat of criminal penalties, to carry a valid travel document when they leave the territory of a Member State to travel to another Member State by pleasure boat via international waters.

- (2) Article 21(1) TFEU, Article 5(1) of Directive 2004/38 and point 3.2.5 of Annex VI to Regulation No 562/2006, as amended by Regulation No 610/2013, do not preclude legislation of a Member State which imposes on Union citizens the requirement, under threat of criminal penalties, to carry a valid travel document when they return to that Member State by pleasure boat via international waters.
- (3) Article 21(1) TFEU and Article 36 of Directive 2004/38 must be interpreted as meaning that the requirements for the penalties referred to in the latter provision to be effective and proportionate preclude a system of day fines such as that at issue in the main proceedings, which is applicable in the event of failure to comply with the requirement to carry a valid travel document or passport when crossing the border, in so far as that system imposes, for a minor offence, a fine amounting to 20% of the offender's average monthly income. 098