

Case note

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*Ole Leitner*\*

## Effectively Protecting an Area without Internal Frontiers within the EU?

VGH München, Judgment of 17 March 2025 – 10 BV 24.700

### Abstract

The article analyses the VGH Munich judgment of 17 March 2025 (10 BV 24.700), the first German decision to declare Germany’s internal border controls at the German–Austrian border unlawful under EU law. It situates the case within the Schengen system, whose core achievement is the abolition of systematic controls at internal borders. Since 2015, however, several Member States have repeatedly reintroduced “temporary” controls, initially in response to the refugee crisis and later justified by terrorism, secondary migration and COVID-19, with some measures persisting for years. While the Schengen Borders Code (SBC) permits reintroduction only exceptionally and within strict time limits, Member States have increasingly exceeded those limits, and the Commission has largely refrained from enforcement, shifting the burden to individuals and national courts. The case arose from an identity check carried out as an internal border control in June 2022. The plaintiff, an Austrian academic who frequently crosses the border, sought a declaratory judgment that the check was unlawful. The VGH held the action admissible on the basis of a concrete risk of recurrence, rejecting arguments based on short-term expiry and finding the check not to be a “serious” rights infringement. Substantively, applying CJEU case law in *NW*, it held the SBC time limits to be absolute: controls become unlawful once they exceed the permitted duration unless a genuinely “new” serious threat is shown. Judicial review is limited to the reasons stated in the Article 25a notification. The judgment highlights both national courts’ enforcement role and the potential incompatibility of German admissibility rules with effective judicial protection under EU law.

### Key words

Schengen Borders Code, internal border controls, free movement of persons, effective judicial protection, national procedural autonomy, strategic litigation

\* LL.M. (Stockholm University), e-mail: [ole.leitner@gmail.com](mailto:ole.leitner@gmail.com).

## 1. Introduction

Ever since the Convention Implementing the Schengen Agreement entered into force, internal border controls within the EU have been abolished, giving rise to the Schengen area. The removal of checks at internal borders has been vital both for completing the internal market and for advancing European integration.<sup>1</sup> Over its nearly thirty-year existence, people have travelled freely among Schengen states without systematic border checks.

Despite this achievement, Member States have increasingly challenged freedom of movement by reintroducing internal border controls.<sup>2</sup> Since 2015, several Member States have reintroduced “temporary” border controls, initially in reaction to the refugee crisis.<sup>3</sup> Member States have also invoked secondary migration, terrorism, and later the COVID-19 pandemic as justifications for border controls that were, at the outset, introduced as tempo-

rary measures.<sup>4</sup> What began as provisional measures now persists in some countries for years.<sup>5</sup> In Austria, for example, controls at the Slovenian and Hungarian borders have operated continuously since 2015.<sup>6</sup>

From a legal perspective, these developments must be assessed under the Schengen Borders Code (SBC).<sup>7</sup> While the general rule prohibits internal border checks, the SBC provides narrow exceptions, permitting Member States to reintroduce controls in exceptional cases and within strict time limits.<sup>8</sup> Increasingly, Member States (e.g. Germany) have clearly breached these time limits. Yet the European Commission has taken no legal steps to enforce the SBC.<sup>9</sup> Arguably, this inaction undermines the effectiveness of

<sup>1</sup> Economic perspective: Cornellisse, 2014, p. 744; European integration perspective: Salomon and Rijpma, 2023; see also: the White Paper from the Commission to the European Council on Completing the Single Market, 28–29 June 1985, COM(85) 310, paras. 12, 24 and 48.

<sup>2</sup> European Commission ‘Member States’ notifications of the temporary reintroduction of border controls at internal borders pursuant to Articles 25 and 28 et seq. of the Schengen Borders Code’.

<sup>3</sup> The Member States introducing border controls were: Germany, Austria, Slovenia, Hungary and Sweden.

<sup>4</sup> See European Commission ‘Member States’ notifications of the temporary reintroduction of border controls’.

<sup>5</sup> See Gülzau, 2023.

<sup>6</sup> See for example: Noyan (2022) *Austria extends Hungarian, Slovenian border control amid Ukraine war* [e-source]. Available at: Austria extends Hungarian, Slovenian border control amid Ukraine war – Euractiv (accessed 15 August 2025).

<sup>7</sup> 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 [2016] OJ L 77 (Schengen Borders Code).

<sup>8</sup> Articles 25–29 SBC.

<sup>9</sup> For a description of this “enforcement gap”, see: Carrera, Colombi & Cortinovis, 2023, pp. 61–68; for an analysis of the general trend of the Commission prioritising political initiatives over law enforcement, see: Kelemen & Pavone, 2023.

the Schengen rules and shifts enforcement onto individuals and national courts.<sup>10</sup>

Strategic litigation can, in this context, help to ensure the effective enforcement of EU law.<sup>11</sup> More recently, it has brought German border-control practice before the *Verwaltungsgerichtshof München* (VGH Munich), a second-instance administrative court, through case 10 BV 24.700. The VGH Munich thus had the opportunity to assess the legality of Germany's border controls under EU law, becoming the first German court to rule them unlawful. The VGH Munich case is significant for the Schengen area, as it builds on CJEU case law on border controls and demonstrates how national courts can strengthen enforcement of the SBC rules. At the same time, it highlights how procedural hurdles can hinder effective legal protection of individuals' free-movement rights.

This case note is structured as follows. Beginning with the factual and legal background of the VGH Munich case (section 2), the court's reasoning is then outlined (section 3). The proceeding section discusses the judgment in the broader context of EU law and, in particular, examines whether the German procedural rules are compatible with the principle of effective judicial protection (section 4). The case note concludes with some final thoughts on the effectiveness of Schengen rule enforcement (section 5).

## 2. Factual and Legal Background

The judgment of the VGH Munich centres on the legality of German border controls at the German–Austrian border, where Germany has conducted border checks continuously since 2015.<sup>12</sup> The plaintiff is an Austrian national who works as an EU legal scholar in the Netherlands and therefore travels regularly through Germany between his homeland and workplace. On 11 June 2022, he was requested to identify himself shortly after crossing the German–Austrian border. At that time, the border checks were carried out based on the notification of the Ministry of the Interior dated 14 April 2022. The federal police, carrying out the border check, expressly confirmed that the check was conducted as a border control and not as a general police measure. The plaintiff complied with the border check. He nevertheless challenged the border check before the Administrative Court of Munich (*Verwaltungsgericht München*), seeking a declaratory judgment confirming that the border check had been conducted unlawfully. The court of first instance ruled the plaintiff's action inadmissible, on the ground that he lacked a legitimate interest.<sup>13</sup> The plaintiff appealed that ruling to the VGH Munich.

As regards the legality of border checks at internal borders, the SBC constitutes

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<sup>10</sup> Salomon, 2024, pp. 1062–1066.

<sup>11</sup> On strategic litigation generally, see: Cebulak, Morvillo & Salomon, 2024.

<sup>12</sup> VGH Munich, Judgment of 17 March 2025 – 10 BV 24.700, paras. 1–3 and 21.

<sup>13</sup> Verwaltungsgericht Munich, Judgment of 31 January 2024 – M 23 K 22.3422.

the main relevant legislation.<sup>14</sup> The SBC was adopted to ensure “the absence of any controls on persons, whatever their nationality, when crossing internal borders”, as set out in Article 77(1)(a) TFEU, and to realise the general goal of the EU to establish an area without internal frontiers in which the free movement of persons is ensured.<sup>15</sup> At the same time, the SBC takes into account the national security interests of the Member States.<sup>16</sup> It aims to balance those interests with the EU’s goal of creating an area without internal frontiers. Title III, Chapter 2 of the SBC, therefore, provides a detailed legal framework under which Member States may to reintroduce border checks at their internal borders. Article 25 SBC allows, exceptionally, the unilateral reintroduction of internal border controls if there is a serious threat to public policy or internal security in a Member State. As an exception to the general principle of no border controls at internal borders, Article 25 SBC must be interpreted strictly.<sup>17</sup>

The reintroduction of internal border controls under Article 25 SBC is permitted under three conditions. First, there must be a serious threat to public policy or internal security in a Member State. The SBC lists different examples in which such a serious threat can arise.<sup>18</sup> For instance, a serious threat to public policy or internal security may follow from a terrorist attack, a high-profile international event, or a sudden large-scale unauthorised movement of third-country nationals between Member States.<sup>19</sup> Second, the introduction of internal border controls must be proportionate.<sup>20</sup> This is ensured, in particular, by time limits for the border controls set out in Article 25a SBC. The latest amendments to the SBC allow internal border controls to last up to three years in the case of a foreseeable threat. However, the version of the SBC in force when the VGH Munich decided the case, limited internal border controls to a maximum duration of six months. Third, the reintroduction of internal border controls is subject to a notification procedure.<sup>21</sup> Member States are obliged to notify the EU institutions in advance of the intended introduction of border controls, demonstrating the reasons for, and scope of, the meas-

<sup>14</sup> As an EU regulation, it is both directly applicable and directly effective.

<sup>15</sup> Article 3(2) TEU. Articles 1(1) and 22 SBC restate the principle of no controls at internal borders.

<sup>16</sup> Article 72 TFEU obliges the EU legislator to take into account national security concerns; on the different functions of Article 72 TFEU, see de Verdellan, 2024.

<sup>17</sup> CJEU Joined Cases C-368/20 and C-369/20 *NW v. Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, judgment of 26 April 2022, ECLI:EU:C:2022:298 (*NW*), para. 64; for a narrow interpretation of derogations from free movement provisions in general, see CJEU C139/85 *Kempf*

*v. Staatssecretaris van Justitie*, judgment of 3 June 1986, ECLI:EU:C:1986:223, para. 13.

<sup>18</sup> Article 25(1) subpara. 2 a)-d) SBC.

<sup>19</sup> See Article 25 (1) subparagraph 2 a), c) and d) SBC.

<sup>20</sup> Articles 25(2) and 26 SBC; Schumacker, 2022, pp. 157–158.

<sup>21</sup> See Articles 25a and 27 SBC.

ures.<sup>22</sup> Article 25 SBC is complemented by Articles 28 and 29 SBC, which set out Union-level mechanisms for reintroducing border controls in response to threats to the entire area without internal borders.

The Court of Justice of the European Union (CJEU) landmark judgment in *NW v. Landespolizeidirektion Steiermark* clarified the nature of the SBC time limits and elaborated on the possibility of departing from the SBC.<sup>23</sup> The CJEU held that the SBC's time limits are absolute.<sup>24</sup> Border controls cannot be extended beyond those limits, even if a serious threat to public policy or internal security persists. Allowing extensions would undermine the general rule that there shall be no internal border controls.<sup>25</sup> However, a Member State may start a fresh time period of border controls if it can show a “new” serious threat, meaning a threat sufficiently different from the previous justification.<sup>26</sup> The Court also ruled that internal border controls can be based only on the SBC. Member States cannot invoke Article 72 TFEU's national security exception to justify such controls.<sup>27</sup> Allowing that would disrupt the SBC's system, since

national security interests are already addressed within the SBC.

To understand the procedural issues raised by the VGH Munich judgment, it is important to outline the two types of legal action available under German administrative law to challenge a border check.

The first type is an action for annulment.<sup>28</sup> An action for annulment requires a so called “administrative act”.<sup>29</sup> In the border-control context, such an act occurs when the federal police stop an individual and demand the presentation of identity documents. An action for annulment is available only while that act continues to produce legal effects. Once an individual complies with the request, the measure ceases to have legal effects, making an action for annulment inadmissible.<sup>30</sup> By contrast, if the individual refuses and is fined, the fine remains a continuing administrative act and may itself be challenged by way of annulment. The second type of action is a declaratory judgment.<sup>31</sup> German administrative courts can rule an administrative act unlawful even if it no longer produces legal effects for the individual. However, the plaintiff must have a legitimate interest in the declaration;<sup>32</sup> otherwise, the action for a declaratory judgment is inadmissible.<sup>33</sup> German ad-

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<sup>22</sup> The Commission then has the possibility to initiate a consultation process (Article 27a SBC).

<sup>23</sup> *NW* also concerned a check at the German–Austrian border; the case was brought by the same EU legal scholar as in the present case. For an analysis of *NW*, see: Cebulak & Morvillo, 2023.

<sup>24</sup> *NW*, para. 61.

<sup>25</sup> *NW*, para. 66.

<sup>26</sup> *NW*, paras. 78–81.

<sup>27</sup> *NW*, paras. 85–90.

<sup>28</sup> Section 42(1) VwGO (German Code of Administrative Court Procedure).

<sup>29</sup> Within the meaning of section 35(1) VwVfG (German Administrative Procedure Act).

<sup>30</sup> Section 43(2) VwVfG.

<sup>31</sup> Section 113(1), sentence 4 VwGO.

<sup>32</sup> In accordance with section 113(1) sentence 4 VwGO.

<sup>33</sup> Riese, 2024, section 113 VwGO, para. 121.

ministrative courts interpret this requirement narrowly.<sup>34</sup> A legitimate interest may arise only from: first, rehabilitation following a discriminatory administrative act; second, a reasonable likelihood of the same act recurring under unchanged circumstances (risk of recurrence); or third, the act's short-term expiry. In the latter case, two conditions must be met: first, the act must expire before judicial review concludes, thereby preventing judicial protection; and second, the act must involve a serious infringement of fundamental rights.<sup>35</sup> The plaintiff in the present case brought a declaratory action because his compliance with the border check caused the administrative act to expire, rendering annulment inadmissible.

Against this background, the VGH Munich had to decide on the admissibility of the action and whether the plaintiff had a legitimate interest in a declaratory judgment. If so, it then had to assess whether the border check complied with the SBC.

### 3. The Court's Reasoning: From Risk of Recurrence to Unlawful Border Controls

In sum, the VGH Munich found the plaintiff's action admissible and ruled the internal border control unlawful. As regards admissibility, the VGH Munich held the plaintiff's action admissible by refer-

ence to a demonstrated concrete risk of recurrence. The court agreed with the court of first instance that the identity check did not amount to a serious infringement of fundamental rights and, therefore, could not establish a legitimate interest based on a short-term expiring administrative act. Although the measure concerned EU free movement rights, the court explicitly stated (by way of obiter dictum) that this EU dimension did not affect its assessment, and that the identity check alone remained insufficient to establish a legitimate interest.<sup>36</sup> However, given the plaintiff's frequent crossings of the German–Austrian border and Germany's ongoing control practice, the court found it likely that he would face similar checks under essentially unchanged circumstances.<sup>37</sup>

Turning to the legality of the border-check, the court held that the internal border control was unlawful under the SBC.<sup>37</sup> It found that no “new” serious threat existed and therefore ruled that the controls at the German–Austrian border became unlawful once they exceeded the time limits set out in the SBC.<sup>38</sup> While the court stressed that Member States have discretion in assessing the existence of a “new” threat, it found that this discretion is subject to judicial review for manifest errors and arbitrariness.<sup>40</sup> The court ruled that the basis for judicial review of

<sup>34</sup> Decker, 2025, section 113 VwGO, paras. 85, 86 and 93.

<sup>35</sup> Bundesverwaltungsgericht, Judgment of 21 November 1980 (7 C 18.78); Decker, 2025, section 113 VwGO, paras. 87.4 and 93.

<sup>36</sup> It further rejected rehabilitation as inapplicable, since no discriminatory act had occurred.<sup>37</sup> VGH Munich, Judgment of 17 March 2025 – 10 BV 24.700, paras. 14, 16 17 and 20–28.

<sup>37</sup> *Ibid.*, para. 30.

<sup>38</sup> *Ibid.*, paras. 39–43. <sup>40</sup> *Ibid.*, para. 34.

the Member State's decision to introduce or prolong internal border controls is exclusively the notification, under Article 25a SBC, from the Federal Ministry of the Interior to the EU institutions.<sup>39</sup> Circumstances not included in that notification could not be considered for the purposes of judicial review. The court concluded that the German Government had not provided sufficient evidence in its notification to establish a “new” threat and hence had made a manifest error. The court particularly criticised the German Government for failing to show a sufficiently concrete link between the threat described and the justifications given in the notification, on the one hand, and the actual events at the German border, on the other.<sup>42</sup> It also rejected the argument that Article 4(2) sentence 3 TEU and Article 72 TFEU permit internal border controls beyond the SBC's time limits.<sup>40</sup>

#### 4. An EU Law Perspective on the Judgment

The judgment of the VGH Munich is a significant national ruling on the legality of internal border controls and the protection of the Schengen area as a space without internal frontiers. It highlights the crucial role of national courts as enforcers of EU law, and the potential role they can play in enforcing the SBC, while also exposing the challenges inherent in a more decentralised system of enforcement.

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<sup>39</sup> *Ibid.*, paras. 35–38.

<sup>40</sup> *Ibid.*, paras. 45–49.

#### 4.1. VGH Munich Judgment in the EU Law Context

The VGH Munich contributed to the uniform application of EU law and to safeguarding a Union-wide area without internal frontiers. It did so by aligning the substantive parts of its judgment with the CJEU's decision in *NW*.<sup>41</sup>

Building on *NW*, the court further developed the scope, basis, and intensity of judicial review of a Member State's decision to reintroduce internal border controls. It held that the assessment of a “serious threat” is subject to judicial review, but only for manifest errors.<sup>42</sup> By limiting judicial review to manifest errors, the court applied the standard normally used in German administrative law for reviewing discretionary decisions. From an EU law perspective, this approach respects Member State discretion while maintaining the balance between an open Schengen area and national security interests under Article 72 TFEU.<sup>43</sup> At the same time, it enables courts to set clear limits on that discretion, ensuring that Member States do not misuse the powers granted to them under the SBC. Judicial review,

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<sup>41</sup> The French Council of State, by contrast, held the French controls lawful in clear contradiction to *NW*, Conseil d'État, Décision n° 499702 of 7 March 2025. See for an analysis of the French case law: Salomon, 2024, pp. 1060–1061.

<sup>42</sup> VGH Munich, Judgment of 17 March 2025 – 10 BV 24.700, para. 34.

<sup>43</sup> *NW*, paras. 87 and 88 emphasises the importance of this balance; for a discussion of the Member State discretion in the SBC: Bornemann, 2018.

the court found, must be limited to the reasons provided in the notification under Article 25a SBC, which is consistent with Recital 44 of Regulation 2024/1717.<sup>44</sup> Allowing Member States to introduce new or additional justifications at a later stage would undermine the procedure under Article 27a SBC and weaken enforcement. It would also allow Member States to rely on vague or overly broad reasoning. By requiring that the justification must be included in the notification, the court enhances legal certainty and places limits on the frequent practice Member States submitting abstract or general justifications for internal border controls.<sup>45</sup>

#### 4.2. “Legitimate Interest” as a Barrier to Effective Judicial Protection?

While the VGH Munich judgment substantively aligns with the SBC and relevant CJEU case law, its reasoning on admissibility raises concerns, as the German administrative procedural rules themselves appear highly questionable in light of the EU principle of effective judicial protection.

As stated earlier, the VGH Munich found the action admissible solely on the basis of a risk of recurrence. As the plaintiff regularly crosses the German–Austrian

border, the court had little difficulty concluding that he was likely to be subjected to similar controls in the future. This made it easy to establish the required legitimate interest. But what about individuals who do not cross the border regularly? In the absence of a risk of recurrence, how can a legitimate interest in judicial review be established to claim an infringement of EU free-movement rights?

If a court does not find a legitimate interest, a declaratory action is dismissed as inadmissible. As explained above, German case law recognises three situations that can establish such an interest: (1) rehabilitation after a discriminatory act; (2) risk of recurrence; and (3) short-term expiry of the act, if it involves a serious infringement of fundamental rights. Border checks usually fall under the third category. However, the VGH Munich explicitly held that a border check does not amount to a “serious infringement”, even where EU rights are affected.

As a result, individuals may have no way to challenge a border check in court, despite a possible violation of EU-protected rights.<sup>46</sup> This interpretation of German administrative law conflicts with the EU principle of effective judicial protection.

As a general rule, it is for the Member States to establish the procedural rules

<sup>44</sup> Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Regulation 2024/1717).

<sup>45</sup> On the abstract justifications of the German government in the past: Naghipour, Salomon & Züllig, 2024, pp. 15–23.

<sup>46</sup> The possibility of appealing a fine under section 42 VwGO (imposed for refusing to comply with a border check) does not constitute effective judicial protection under EU law. Forcing individuals to risk a fine to exercise their EU rights undermines the principle of effectiveness.

governing their national court proceedings (national procedural autonomy).<sup>47</sup> National legislators may decide which courts are competent and how procedures are structured.<sup>48</sup> This general rule also applies to cases involving EU law, which follows already from the absence of general EU procedural rules.<sup>49</sup> National procedural autonomy means that Member States are, in principle, not required to create new types of legal action beyond those already provided for in their national systems, even when EU rights are at stake.<sup>50</sup>

However, the principle of national procedural autonomy is limited by the principle of effective judicial protection.<sup>51</sup> Article 19(1) subpara. 2 TEU and Article 47(1) of the Charter of Fundamental Rights of the EU (CFR) require Member States to ensure effective judicial protection for violations of rights guaranteed under EU law. This obligation also applies in the context of internal border checks, as such checks are carried

out under EU law, namely the SBC (see Articles 51(1) CFR and 19(1) TEU).<sup>52</sup> Therefore, Member States must, in principle, provide effective judicial protection for individuals subject to those measures. Under the principle of effectiveness,<sup>53</sup> national procedural rules must not make the exercise of EU rights *impossible or excessively difficult*.<sup>54</sup> Whether a procedural rule renders the exercise of a right under EU law *excessively difficult* is assessed “by reference to the role of that provision in the procedure, its progress and its special features viewed as a whole before the various national instances.”<sup>55</sup> If access to judicial protection is *impossible or excessively difficult*, national courts are required to create an additional remedy.<sup>56</sup> In such cases, the

<sup>47</sup> Arnulf, 2018, pp. 1012–1013.

<sup>48</sup> CJEU C-13/68 *Salgoil v Italian Ministry of Foreign Trade*, judgment of 19 December 1968, ECLI: EU:C:1968:54, p. 463; CJEU C-33/76 *Rewe Zentralfinanz eG v Landwirtschaftskammer für das Saarland*, judgment of 16 December 1976, ECLI: EU:C:1976:188 (*Rewe Zentralfinanz*), para. 5.

<sup>49</sup> Biondi & Gentile, 2019, para. 4.

<sup>50</sup> CJEU C-432/05 *Unibet v Justitiekanslern* of 13 March 2007, ECLI:EU:C:2007:163 (*Unibet*), para. 40; CJEU C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council* of 3 October 2013, ECLI:EU:C:2013:625, para. 103.

<sup>51</sup> Sangi & Gärditz, 2024, § 32, para. 6; Jarass, 2021, Article 47 CFR, para. 21.

<sup>52</sup> Jarass, 2021, Article 47(4) CFR.

<sup>53</sup> Even though the general principle of effectiveness and the principle of effective judicial protection are not identical, the differences are small, and for the purposes of this analysis not relevant.

<sup>54</sup> *Rewe Zentralfinanz*, para. 5; CJEU C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* judgment of 9 November 1983, ECLI:EU:C:1983:318, para. 14, CJEU Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, judgment of 14 December 1995, ECLI: EU:C:1995:441, para. 19.

<sup>55</sup> CJEU C-312/93 *Peterbroeck v Belgian State*, judgment of 14 December 1995, ECLI: EU:C:1995:437, para. 14.

<sup>56</sup> *Unibet*, para. 41; CJEU Joined Cases C-924/19 and C-925/19 *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, judgment of 14 May 2020, ECLI:EU:C:2020:367 (*FMS and Others*), paras. 143–144.

national court must declare its competence directly on the basis of Article 47(1) CFR.<sup>57</sup> Article 52(1) CFR allows limitations to the right to effective judicial protection. This provision permits a balancing between national procedural autonomy and the obligation to guarantee effective judicial protection.

The condition of a “serious” infringement, as reaffirmed by the VGH Munich, is in line with the broader case law of the *Bundesverwaltungsgericht* (German Federal Administrative Court), which is the highest court for administrative matters in Germany.<sup>58</sup> The VGH Munich’s approach is therefore not an isolated interpretation, but reflects settled national case law. This alignment with the highest German administrative court makes the potential conflict with EU law all the more pressing. The aim of the condition is to avoid overburdening the administrative courts.<sup>59</sup> The condition is often justified with reference to the principle of national procedural autonomy, which supposedly allows the German legislator to design a legal system in which access to judicial review in administrative law depends on whether the plaintiff’s rights are seriously affected. Legal protection is thus denied where the claim merely seeks an abstract or objective review of the legality of an administrative measure.<sup>60</sup>

<sup>57</sup> *FMS and Others*, para. 146.

<sup>58</sup> For example, *Bundesverwaltungsgericht*, Judgment of 24 April 2024 (6 C 2.22), para. 31.

<sup>59</sup> Decker, 2025, section 113 VwGO, para. 93.

<sup>60</sup> *Verwaltungsgericht Munich*, Judgment of 31.01.2024 – M 23 K 22.3422, para. 30;

This justification is not convincing when assessing the German legal framework under the principle of effective judicial protection. CJEU case law does not distinguish between an abstract review of legality and a serious infringement of rights under EU law. This implies that the CJEU views the principle of effective judicial protection as an obligation to provide judicial protection for every infringement of EU rights, regardless of its severity. This is further supported by the doctrine of direct effect. Since *Van Gend en Loos*, enforcing EU rights also depends on EU citizens, who can invoke EU law before national courts.<sup>61</sup> The doctrine would be pointless if Member States could deny citizens this right by creating procedural rules that require an additional condition of seriousness to exercise their rights under EU law before a national court.<sup>62</sup>

As a result, the current interpretation of “legitimate interest” by the German administrative courts is not compatible with the principle of effective judicial protection. A change in the current case law is necessary and also feasible *de lege lata*. It requires only a shift in jurisprudence, not an amendment of the wording of the law. The courts would merely need to establish a new category of legitimate interest under

Riese, 2024, preliminary note on section 113 VwGO, paras. 30 and 36, and section 113 VwGO, paras. 145 and 146.

<sup>61</sup> CJEU C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, judgment of 5 February 1963, ECLI:EU:C:1963:1, para. 25.

<sup>62</sup> Giegerich, 2024, p. 7.

section 113(1) sentence 4 VwGO for situations where rights guaranteed under EU law are at stake. In the present case, the VGH Munich did provide effective judicial protection (by reference to the risk of recurrence) but missed the opportunity to refer the case to the CJEU to clarify the more fundamental question of whether a “serious infringement” may serve as a valid precondition for judicial review in German administrative proceedings.

## 5. Conclusion

The judgment of the VGH Munich marks an important stance in favour of an area without internal frontiers. It confirms that the reintroduction of internal border controls is the exception, not the rule. In doing so, the court followed large parts of the CJEU’s case law, thereby helping to ensure the effectiveness of the principle of no controls at internal borders. While it is unlikely that this decision alone will prompt a change in the political stance of the German Government, it may prove to be an important step towards a return to compliance with EU law.

The case highlights the structural dependence of EU law enforcement on national courts. The EU’s decentralised enforcement framework relies on national courts as the primary enforcers of Union law.<sup>63</sup> This set-up is necessary to prevent the CJEU from being overwhelmed, but it creates significant challenges. The CJEU has to rely on the national courts’ willingness to refer cases so that it can clarify how

EU law should be interpreted.<sup>64</sup> Moreover, each Member State has its own procedural rules, which can affect access to judicial review. The principle of effective judicial protection is therefore crucial. It sets minimum standards to ensure that EU rights are effectively protected across all Member States. National courts must recognise the importance of that minimum standard, even where doing so may require changes to established national case law.

This structural weakness becomes even more visible when the European Commission does not act as a public enforcer, as is currently the case for internal border controls.<sup>65</sup> The SBC creates a system that is highly dependent on the Commission. Together with the general EU enforcement framework, this produces a situation in which enforcement relies almost entirely on individual litigants before national courts. The Commission’s inaction is primarily a political problem, and reliance on national courts is inherent in the EU system. In politically sensitive areas such as border controls, some political discretion is common, and the Commission’s decision not to act must be understood in that context.

Nonetheless, decentralised enforcement and the Commission’s inaction, taken together, leave unlawful practices by Member States largely unpunished in the area of internal border controls. The VGH Munich

<sup>64</sup> For a discussion of the enforcement difficulties arising after a CJEU judgment, see Salomon, 2024.

<sup>65</sup> And this despite an obligation to act in certain situations; a shortcoming criticized in *NW*, paras. 91–92.

<sup>63</sup> Schütze, 2021, pp. 409–410.

judgment therefore illustrates both the potential and the risks of the EU enforcement system, which are relevant for other potential litigants and national courts in the Schengen area. In this light, it is vital that national courts more generally fully embrace their role as enforcers of EU law.<sup>66</sup>

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<sup>66</sup> A referral of a future case to the CJEU would be an important first step towards securing effective judicial protection in Germany.

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