



## FINAL REPORT B-SOLUTIONS

### “Reopening of cross-border roads

### The case of *Pays Pyrénées Méditerranée*”

**Applicant:** *Pays Pyrénées Méditerranée*

**Title:** Cross-border roads reopening

Maiténa POELEMANS – 30 November 2023

## EXECUTIVE SUMMARY

### THE CONTEXT

On the border between France and Spain, Pays Pyrénées Méditerranée is part of the Pyrénées-Orientales department in the Occitanie/Pyrénées-Méditerranée region. It borders Catalonia and, in particular, the province of Girona, with which it shares more than 110 km, a strong cultural identity and the common use of the Catalan language. The Pays Pyrénées Orientales et south catalan is also a "cross-border living area", marked by tourist and cultural links, commercial relations and, quite naturally, close family ties on both sides of the border.

The main problem is the "temporary and until further notice" ban on traffic on the access roads to authorized secondary crossing points at five sites, in order to reinforce open cross-border passages.

### DESCRIPTION OF THE OBSTACLES

Since the terrorist attacks of 2015, the French State has re-established internal border controls, including with Spain, relying on Articles 25 and 27 of Regulation (EU) 2016/399, the Schengen Borders Code (SBC). On two local roads (Cols de Banyuls et de Manrell - Las Illas) in the Pyrénées Orientales region, where stone blocks have been placed to block traffic between France and Spain, the lives of local residents are still affected at various levels. There are various restrictions: economic, cultural, and social, but also in terms of safety, particularly in view of fires in a region highly exposed to these risks.

### LEGAL PROVISIONS

The obstacle at the French-Spanish border stems from renewed decisions taken at the national level by the French Government to temporarily re-establish internal border controls on its territory, on the basis of Regulation (EU) 2016/399, Schengen Borders Code (SBC). The text promotes the principle of free movement inside the European Union's (EU) internal borders. However, it also provides a framework for restrictions on the basis of articles 25 to 29, allowing States to re-establish internal border controls under strictly defined conditions, notably in the event of a serious threat to public order or internal security (in France's case, a terrorist threat).

## **OUTLINE OF POSSIBLE SOLUTIONS**

This case is eminently political and concerns a cross-border obstacle based on administrative texts, in this case, a prefectural decree. The prefectural decree merely implements successive decisions taken by the French State since 2015 to re-establish internal border controls in order to combat illegal immigration and terrorism, as authorised by the Schengen Borders Code under certain strictly defined conditions. This case occurs at a time when Regulation (EU) 2016/399, Schengen Borders Code (SBC), is being amended to take account of cross-border issues, prioritize alternative measures to border restrictions and intensify cross-border police cooperation.

In addition to the many civil actions taken by concerned citizens, two solutions are available to them, even if they involve the intervention of institutions:

- a. Bring an action before the national court. The latter can use the procedure by which the Court of Justice delivers preliminary rulings on the interpretation of Union law.
- b. Make a complaint to the European Ombudsman

Other proposals are aimed at Member States adopting restrictive measures at the EU's internal borders. They focus, first, on the importance of carefully examining the necessity and proportionality of such restrictions, and, secondly on the need to take account of cross-border issues and the impact of such measures.

There is also a need for alternative measures to restrictions at the EU's internal borders, such as joint patrols between two border states. In general, it is cross-border police cooperation that needs to be improved and developed.

## **PART 1: DESCRIPTION OF THE OBSTACLE IN THE SPECIFIC CONTEXT**

### **I. Presentation of the territory in which the obstacle is located**

*Pays Pyrénées Méditerranée* is part of the *Pyrénées-Orientales* department in the *Occitanie/Pyrénées-Méditerranée* region. It comprises 58 communes grouped into 4 communities of municipalities and has a population of around 110,000. It borders Catalonia and, in particular, the province of Girona, with which it shares more than 110 km, a strong cultural identity and the common use of the Catalan language.

The geographical and cultural proximity of the two territories makes it a space for the development of cross-border projects, as evidenced by the acceptance of the EsCat project by the *Pyrénées-Orientales* department to set up a European integration laboratory under the INTERREG VI programme (POCTEFA

2021-2027). The *Pays Pyrénées Orientales et south catalan* is also a "cross-border living area", marked by tourist and cultural links, commercial relations and, quite naturally, close family ties on both sides of the border.

The region is also marked by a strong historical past. The roads now closed have been crossing points for Spanish refugees during the *Retirada* in 1939, after the Civil War, and in the other direction for people trying to escape the Nazis in the early 1940s. This is a true community of destiny on both sides of the border, which has been severely affected by the "closure"<sup>1</sup> of several border crossing points.

Indeed, the French State followed the example of six Schengen countries - Germany, Austria, Denmark, Norway and Sweden - which in recent years have reintroduced border controls for reasons of national security. Since the terrorist attacks of 2015, the French State has re-established internal border controls, including with Spain, relying on Articles 25 and 27 of Regulation (EU) 2016/399, the Schengen Borders Code. On January 8, 2021, the Prefect of the *Pyrénées-Orientales* issued an order (on the decisions of the French government) prohibiting "temporarily and until further notice" traffic on the access roads to authorised secondary crossing points at five sites in order to "reinforce open checkpoints". The aim is to ensure, on the one hand, "more effective control of open border crossing points" and, on the other hand, "more efficient deployment of internal security forces", which will contribute to "better regulation of cross-border traffic". The order was based, in general, on the terrorist threat that remains "very high" in France and, in particular, on the "continuous" secondary movements of migrants at the French-Spanish border in the *Pyrénées-Orientales*.

To date, the ban is still in force on two local roads (*Cols de Banyuls et de Manrell - Las Illas*) in the *Pyrénées Orientales* region, where stone blocks have been placed to block traffic between France and Spain, affecting the lives of local residents at various levels. The area concerned is the French-Spanish border between the *Pyrénées-Orientales* department and the province of Girona (Catalonia). More specifically, the cross-border roads between the communes of Banyuls-sur-Mer/Espolla and Maureillas Las Illas/ La Vajol (road GI 505) are directly affected.



Banyuls pass road



Manrell pass road



Direct distance from the border crossing



## II. Presentation of the multiple impacts on the cross-border territory

Given the area's strong cultural and historical identity, the primary impact of the continued closure of the Banyuls and Manrell-Las Illas passes is psychological, with most of the inhabitants of the affected municipalities describing a feeling of incomprehension about the infringement of their freedom of movement and the maintenance of a cross-border community of life. These obstacles to movement have

<sup>1</sup> The use of this term reflects the reality. Afterwards, we will talk about a ban on all vehicular and pedestrian traffic, as mentioned in the prefectural decree that gave rise to B-solutions' referral.

certain detrimental effects in an area where crossing the border is both a habit and a necessity, particularly in terms of safety.

From an economic point of view, the restrictions mainly affect the small businesses that characterise the area, particularly in the construction, wine, olive and livestock sectors. The negative effects are characterised by a drop in the number of sales outlets, and consequently in entrepreneurs' sales. It also creates difficulties for cross-border or seasonal workers, who are forced to extend their journeys by often more than forty kilometres, incurring additional costs that are borne by the business owners who are able to do so. More generally, economic relations between communities located on either side of blocked roads tend to weaken, undermining the territorial cohesion of the cross-border area concerned.

From a cultural point of view, the restrictions on passage are also felt in a region with a strong historical, heritage and tourist identity. The declining attendance at museums (Maillol Museum in Banyuls), heritage sites (Romanesque art, medieval past, monuments at the top of the *Col de Manrell* commemorating the Roads to Freedom, etc.), and festivals organised by towns located close to the impacted areas are all factors discouraging initiatives to maintain and develop cross-border cooperation.

The traffic bans on the two passes still closed also impact safety, particularly due to the fires in a region highly prone to these risks. The efforts and actions made in terms of cross-border cooperation are noteworthy and have taken concrete form in a COOPEREM Project (*“Emergency and fire prevention operational coordination”*), between seven partners in the area concerned and, in particular the *Départament d'Interior de la Generalitat de Catalunya*, the *Service Départemental d'Incendie et de Secours des Pyrénées-Orientales* - SDIS66, the *Département des Pyrénées-Orientales*, the *Syndicat Intercommunal à Vocation Unique (SIVU) des Albères*, etc. Funded since 2014 by the Interreg program, its aim is to facilitate cooperation in operational emergency management and fire prevention in a highly vulnerable area, where coordination requires cross-border interventions. In the event of a fire, traffic restrictions at crossing points caused by the presence of rock blocks would prevent fire trucks from reaching fire-affected areas as quickly as possible.

Far from being mere "comfort" restrictions (linked to the commercial or tourist habits or practices of the people living in the affected area), the traffic bans on the Manrell and Banyuls passes, enforced by the laying of rock blocks, have definite socio-economic and safety implications, and undermine cross-border mobility.

## **PART 2: INDICATION OF THE LEGAL OR ADMINISTRATIVE PROVISIONS AT THE ORIGIN OF THE OBSTACLE**

As mentioned above, the cross-border barrier identified is characterised by a ban on pedestrian and road traffic on roads and border crossing points between France and Spain.

Obstacles at borders are most often the result of a malfunction or discrepancy on either side of a border. In this case, the obstacle at the French-Spanish border stems from renewed decisions taken at the national level by the French Government to temporarily re-establish internal border controls on its territory, on the basis of Regulation (EU) 2016/399<sup>2</sup>, Schengen Borders Code. The text promotes the principle of free

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<sup>2</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 (Schengen Borders Code), OJ L 77, 23 March 2016, pp. 1-52.

movement inside the European Union's (EU) internal borders. However, it also frames restrictions on the basis of articles 25 to 29 by providing for the possibility for States to re-establish internal border controls under strictly enumerated conditions.

While two conditions are common to all three derogation regimes: a "serious threat to public order or internal security" and a "temporary" re-establishment of border controls, the Schengen Borders Code distinguishes between foreseeable threats (article 25), immediate or unforeseeable threats (article 28) and exceptional circumstances (article 29).

The majority of national border restriction decisions since 2015 have been adopted on the basis of Article 25 of the Regulation, in the context of the migration crisis, the wave of terrorist attacks, and then the health crisis due to COVID-19. This provision, and more specifically the term "serious threat", has been the subject of clarification and interpretation, particularly in view of the possibilities to extend the restrictive regime offered by the various provisions of the Schengen Borders Code.

On the one hand, according to the Commission, a serious threat is considered foreseeable when the event requiring the reintroduction of internal border controls is itself foreseeable, with impacts that are generally short-lived and highly localised<sup>3</sup>.

On the other hand, the Court of Justice of the EU (CJEU), in its ruling of April 26, 2022, *NW*<sup>4</sup>, examined the conformity of various decrees successively adopted by Austria, providing for the reintroduction of controls at its internal borders, on the basis of Article 25 Schengen Borders Code. The European judge emphasised the "need for a strict interpretation of the exceptions to the principle of free movement of persons"<sup>5</sup> and, with this in mind, required the State extending controls for six months to demonstrate the existence of a "new" serious threat. The new nature of a serious threat is defined as a threat "which is distinct from the threat initially identified"<sup>6</sup>. This is assessed in relation to the "circumstances giving rise to the need to reintroduce border control at internal borders and the events that constitute a serious threat"<sup>7</sup> and "giving rise to the reintroduction of internal border control"<sup>8</sup>.

France's notifications to reintroduce controls at its borders to the European Commission mention a "serious threat". These were first the state of emergency put in place following the Paris attacks, then Nice, and from January 17, 2017 the "persistent terrorist risk" to which was added the situation at external borders, COVID 19, in March 2020, the "continuing terrorist risk" and, no doubt to comply with CJEU case law of 2022, the "new terrorist risk", in the latest notification for a period from November 1, 2023 to April 30, 2024. On July 27, 2022, the *Conseil d'Etat*, seized by a number of migrant aid associations on the conformity of France's extensions of internal border controls, validated the latter, ruling that a six-month renewal of the suspension of free movement on the grounds of the same danger was possible if this

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<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Schengen governance - strengthening the area without internal border control, 16 September 2011, COM (2011) 561 final.

<sup>4</sup> Judgement of the CJEU (Grand Chamber) of 26 April 2022, *NW/Landespolizeidirektion Steiermark, C-368/20*, and *Bezirkshauptmannschaft Leibnitz, C-369/20*, EU:C:2022:298.

<sup>5</sup> G. BACHOUÉ, « Réintroduction des contrôles aux frontières intérieures de l'Union européenne : entre rappel de l'ordre des Etats et anticipation de la réforme du code frontières Schengen », R.A.E 2002/2, p. 323.

<sup>6</sup> Judgement of the CJEU of 26 April 2022, *NW*, point 81.

<sup>7</sup> Article 25 Schengen Borders Code

<sup>8</sup> Judgement of the CJEU of 26 April 2022, *NW*, point 81.

danger, although identical, evolved "in conditions such as to modify its topicality, scope or consistency"<sup>9</sup>. This was deemed to be the case, in particular, because of the "increased risk of terrorist fighters returning from Iraq or Syria due to the security instability in the region"<sup>10</sup>.

These various notifications have naturally had an impact on the French-Spanish border. Thus, following the Paris attacks and based on these notifications to the European Commission by the French State since November 2015, controls have been re-established at various crossing points authorised, on the basis of Article 25 Schengen Borders Code<sup>11</sup>. These crossing points are located in four departments: 19 crossing points in *Pyrénées-Atlantiques*, 1 in Hautes Pyrénées, 2 in Haute-Garonne and 15 in *Pyrénées-Orientales*. The re-establishment of controls means that police forces can be present there 24 hours a day, seven days a week. In January 2021, the French authorities decided to impose a "traffic ban" on 13 crossing points between Spain and France, which was gradually raised until October 30, 2023, when the last closure points in the *Pyrénées-Atlantiques* were reopened. To date, only the Banyuls and Manrell passes remain closed to traffic. They have been closed since January 11, 2021, following a prefectural decree of January 8, 2021, temporarily closing certain authorised crossing points in the *Pyrénées-Orientales* department<sup>12</sup>, with the consequent impediments to free movement on cross-border territory. According to the text of the decree, the aim is to prohibit traffic at these crossing points in order to maintain those that enable better control of flows, due to the lack of manpower of the security forces responsible for border controls, and as a result of increasing irregular migratory flows.

In the current context, citizens' actions (peaceful demonstrations, sending postcards to the Prefect, etc.) have also been set up, notably with the creation of the "*Albères sans frontière*" association, with some 1,200 members to date, including the mayors of the municipalities affected on both sides of the border. A request to repeal the prefectural decree was made on August 4, 2022, but received no response 2 months later, resulting in an implicit rejection of the request. Consequently, an appeal for excess of power was lodged with the Montpellier Administrative Court on November 21, 2022.

### **PART 3: ROADMAP FOR SOLUTIONS TO THE OBSTACLE**

Before going into the presentation of possible solutions, it should be remembered that beyond the cross-border obstacle detailed in this report, freedom of movement is a fundamental principle of European construction. As such, any derogation must be interpreted restrictively, and the notion of public policy presupposes the existence of a real, present and sufficiently serious threat affecting one of the fundamental interests of society.

Regulation (EU) 2016/399, Schengen Borders Code, allows States, only in this case, to re-establish internal border controls envisaged under the terms of Article 2 as an: "activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance" (point 10). The border checks must be "checks carried out at border crossing points,

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<sup>9</sup> Conseil d'État - 10ème - 9ème chambres réunies, 27 juillet 2022, N° 463850, FR:CECHR:2022:463850.20220727.

<sup>10</sup> Point 6 of the case.

<sup>11</sup> European Commission. *Temporary Reintroduction of Border Control*. [https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en)

<sup>12</sup> Prefectural decree PREF/CAB/BSI/2021-008-001 of January 8, 2021.

to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it" (point 11) and the border surveillance means the "surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks" (point 12).

In this text, the mere mention of the "closure of a specific border crossing-point" is envisaged in the event of serious shortcomings by a State in the execution of its external border control, identified in an evaluation report and at the request of the European Commission (recital 29 of Regulation (EU) 2016/399). In the case in point, and regarding the terms of the prefectural order of January 8, 2021, the two border crossing points can be considered as remaining "closed", since the roads of the Banyuls and Manrell passes linking France and Spain are blocked by stone blocks that prohibit the circulation of "all vehicles and pedestrians".

The expert would also like to make another clarification. The order issued by B-solutions is certainly in response to a request from a specific entity (the *Pays Pyrénées Méditerranée*), in a specific context (a prefectural decree banning traffic on cross-border roads between France and Spain), and a specific geographical area (the French-Spanish border between the *Pyrénées-Orientales* department and the province of Girona, Catalonia). The fact remains that since 2015, and even more so during the COVID-19 epidemic, the first reflex of States in times of security or health crises has been to close their internal borders. This report does not claim to provide solutions to all the re-establishment of border controls in the EU, but at the very least to list a number of proposals that could be extended to cases other than the one for which the expert was asked<sup>13</sup>.

## 1. Examining the compliance of measures taken with EU law

### a. In the context of litigation

The CJEU has been asked on several occasions to give preliminary rulings on the interpretation of various texts relating to the Schengen Border Code, the latest of which is Regulation (EU) 2016/399. More specifically, the CJEU has been asked to give preliminary rulings on the interpretation of the provisions relating to internal border controls within the Schengen area, to which it has made important clarifications in particular regarding the fact that they cannot be carried out independently of the behaviour of the person concerned and particular circumstances establishing a risk of harm to public order (Judgment of the CJEU (Grand Chamber) of 22 June 2010, *Aziz Melki*, C-188/10, and *Sélim Abdeli*, C-189/10). Recently, in 2022 (Judgement of the CJEU (Grand Chamber) of 26 April 2022, *NW/Landespolizeidirektion Steiermark*, C-368/20, and *Bezirkshauptmannschaft Leibnitz*, C-369/20), the European judge specified that the serious threats to public order or internal security which justified the re-establishment of internal border controls must also be "new" in the event of such re-establishment being extended.

The contentious solution has already been adopted by some of the inhabitants of the border communities concerned, united in the "*Albères sans frontière*" association. As mentioned above, an appeal for excess

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<sup>13</sup> Especially since, according to figures provided by the Commission in 2021, internal border checks have been reintroduced more than 250 times since September 2015.

European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14 December 2021, COM/2021/891 final.

of power was lodged with the Montpellier Administrative Court on November 21, 2022, requesting the repeal of the prefectural decree of January 8, 2021. Through this action, the administrative judge could submit a preliminary question to the CJEU on the basis of Article 267 of the Treaty on the Functioning of the European Union and Article 19(3)(b) of the Treaty on the European Union. It would enable the European judge to reinterpret Regulation 2016/399 (Schengen Borders Code) with regard to the serious threat, proportionality and necessity of extensions of the re-establishment of internal border controls and the duration thereof. This interpretation would then enable the referring national court to rule on the legality of the prefectural order banning traffic on the Banyuls and Manrell pass roads issued in execution of the notification to the European Commission of the extension of internal border controls from November 1, 2020, to April 30, 2021. It should be remembered, however, that while referral to the Court is most often requested by applicants, it remains conditional on the national court's assessment of its usefulness, and therefore on its will.

b. By referring the matter to the European Ombudsman

Established by the Maastricht Treaty (1992), the European Ombudsman aims to better protect citizens' rights against maladministration in the institutions, bodies and agencies of the EU. The Ombudsman can be contacted by any European citizen, natural or legal person.

The national and regional ombudsmen of the European Network of Ombudsmen can ask the European Ombudsman for written answers to questions concerning EU law and its interpretation, including those arising while handling specific cases.

We should mention that in addition to the road closures at border crossings in the *Pays Pyrénées Méditerranée*, border crossings had also been closed in the *Pyrénées-Atlantiques* and were still closed before October 30, 2023.

It is in this context that the Basque Ombudsman, the Ararteko, referred a question concerning the free movement of people across a bridge linking Spain and France to the European Ombudsman on August 4, 2023<sup>14</sup>. According to the European Ombudsman's communication, a request for information had been sent to the European Commission, as the body responsible for approving border closures that might derogate from the ordinary rules of the Schengen Agreement.

In fact, on October 17, 2023, the Ararteko met with the European Ombudswoman, Emily O'Reilly, to discuss collaboration between the two institutions in the case initiated by the Ararteko concerning the closure of the pedestrian bridge between Irun and Hendaye, which the European Ombudswoman had submitted to the European Commission. The case has now been closed, as the remaining closed crossings in the *Pyrénées Atlantiques*, including the Avenida bridge, were reopened on October 30, 2023, by a decision of the prefecture.

2. Taking cross-border issues into account in the current revision of the Schengen rules

Cross-border impact assessment should be a valuable resource for political decision-makers when adopting legislation<sup>15</sup>. Among the main rules of the Schengen system, the one that interests us is the

<sup>14</sup> European Ombudsman, case opened on 04 August 2023, no. T3/2023/JK

<sup>15</sup> UNFRIED, M., MERTENS, P., BÜTTGEN, N., & SCHNEIDER, H. (2022), "Cross-border Impact Assessment for the EU's border regions.", *European Journal of Law Reform*, (1), pp. 47-67



abolition of internal border controls. Indeed, the consequences are numerous. However, above all, in the context we are dealing with here, this abolition facilitates the movement of people, insofar as it has gradually contributed to the disappearance of barriers, both physical and psychological. It also facilitates the development of cross-border cooperation, helping to create a high degree of cross-border integration and the perception of an "erased" border, from a political and legal point of view or at least in the daily lives of the cross-border population.

Schengen is one of the most important and visible achievements of European integration, with areas now interdependent, cross-border services and cross-border flows of workers, as well as in private and family relationships, in leisure activities and quite simply in the daily lives of citizens who have got into the habit of shopping in the neighbouring country.

But while the main aim is to abolish internal border controls, Articles 25 to 29 of the Schengen Borders Code also allow border controls to be reintroduced in the event of a serious threat to public order or the internal security of a Member State. This reintroduction of controls must be exceptional and temporary. Free movement remains the principle.

However, as already mentioned, large-scale threats have prompted several Member States to reintroduce internal border controls since 2015, in particular, in response to security risks, linked to a massive influx of migrants or following terrorist attacks on European territory, as is the case in the situation studied at the border between France and Spain.

With hindsight, it seems that States have forgotten that re-establishing internal border controls is a measure of last resort and that they do not use alternative measures, even though these would sometimes be sufficient to ensure the high level of security they are seeking. This necessarily has a negative impact on the daily life of inhabitants in border areas.

The limitations of the Schengen legal framework have highlighted the need to reform the rules enshrined in Regulation 2016/399 (Schengen Borders Code). On December 14, 2021, the European Commission presented a proposal to revise the Schengen Border Code, including "the use of effective alternatives to internal border controls, in the form of reinforced and more operational police controls in border regions", while at the same time indicating its desire to ensure "that internal border controls remain a measure of last resort and last only as long as is strictly necessary".

The main provisions of the proposal highlight a central element of the case studied. When re-establishing restrictions at internal borders, the impact of these restrictive measures on the "functioning of cross-border regions" must be taken into account (recital 37). This point is accompanied by instructions: Member States must assess the appropriateness of internal border controls according to the nature of the serious threat identified. This is nothing new: it is a precaution that Member States have already had to take. However, to do so, the text indicates that Member States will have to consider and assess the likely impact of internal border controls on the movement of persons within the area without internal border controls and the functioning of the cross-border regions "the likely impact of such a measure on: movement of persons within the area without internal border control and the functioning of the cross-border regions, taking into account the strong social and economic ties between them" (article 26 §1, b).

This assessment will have to take account of the national definition of "cross-border regions" and will have to be a criterion for the temporary reintroduction and extension of internal border controls, as

certain cross-border flows in travel will be considered essential. Under the terms of article 26 §1 af) ii) of the proposed Schengen Borders Code regulation, the State will have to demonstrate the proportionality of the reintroduction of internal border controls in relation to the serious threat to public order and internal security, taking into account the impact of such a measure on "the functioning of cross-border regions, taking into account the strong social and economic ties between them"<sup>16</sup>.

Taking into account "the specific vulnerabilities of cross-border regions"<sup>17</sup> is becoming a necessity asserted by the EU. The impact of re-establishing controls at the EU's internal borders no longer needs to be demonstrated and it is even more important when it comes to traffic bans on border roads. It is therefore imperative that States take these into account when deciding on traffic restrictions, and when extending them. When examining the amended text of the Schengen Borders Code Regulation, the EU Council proposed adding recital 24a) which states that "The exercise of police or other public powers by the competent authorities of the Member States in their territory, including in their border areas, should not have a disproportionate impact on fluidity of movement across the internal borders, notably by leading to excessive waiting times"<sup>18</sup>. This means that Member States will have to consider the impact of reintroducing border controls and also assess it. This is an aspect that has never appeared before. From now on, the cross-border issue will be part of the national debate: on measures to reintroduce or extend border controls, or on any alternative measures that may be necessary.

### 3. Alternative measures to restrictions at internal borders

Alternative measures already exist and they could be sufficient to ensure a high level of security without the need to re-establish internal border controls, which would have an impact on the cross-border regions concerned. Repeated extensions of controls have revealed the limited use that Member States make of other measures. These include the development of cross-border police cooperation (a) and the use of electronic surveillance systems (b).

#### a. Developing police cooperation and setting up joint patrols

The reality of the negative consequences of the reintroduction of border controls calls for answers, especially when they take the form of bans on movement at certain border crossing points and impact the movement of people. This is particularly true in border regions. The European Commission has stated the urgent need to review and strengthen the rules governing police cooperation. This is why, in 2021, it has proposed the adoption of an "EU Police Cooperation Code" establishing common standards for cooperation between police officers participating in joint patrols and acting on the territory of another Member State. The Code would also establish new rules on the exchange of information between Member States' law enforcement authorities, enabling police officers in one Member State to have access to information available to their colleagues in another Member State, in an equivalent manner and under the same conditions. Member States would have to set up a single point of contact, operational 24/7,

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<sup>16</sup> European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, A9-0280/2023, 27.9.2023, Amendment 106

<sup>17</sup> Amendment 113

<sup>18</sup> Council, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders - General approach, 9 June 2022

adequately staffed and acting as a "one-stop shop" for the exchange of information with other EU countries.

Another of the proposed provisions highlights the need to expand the role of existing Police and customs cooperation centres (PCCCs), turning them into joint police stations that can exchange information, but also plan, support and coordinate joint patrols and other joint operations based on a common risk analysis. In the area concerned, there is a PCCC at Le Perthus.

The deepening of operational police cooperation within the Union touches on issues of Member State sovereignty, making any harmonised legislation in this field highly sensitive. In practical terms, it implies the physical intervention of uniformed and armed police forces from one Member State on the territory of other Member States.

While taking these constraints into account, article 14§3 of the Barcelona Treaty of January 19, 2003, between the French Republic and the Kingdom of Spain, emphasises the importance of promoting joint operations and investigations to combat organised crime and illegal trafficking more effectively. In order to combat migrant smuggling and support the prevention and detection of irregular migration, Member States should resort to targeted joint operations in certain internal EU border areas.

Finally, rather than setting up static controls at internal borders, which presupposes many staff - which is sometimes lacking, as is the case on the Pyrenees border, where the French authorities were motivated to ban traffic at certain border crossing points, including the roads over the Banyuls and Manrell passes - police controls are more flexible and can be more easily adapted to changing risks.

On October 10, 2023, the French Minister of the Interior and Overseas Territories informed his Spanish counterpart of his intention to reopen the four authorised border crossing points in the *Pyrénées-Atlantiques* department, based on the intensification of cooperation in border area control, as evidenced by the increase in the number of joint Franco-Spanish patrols. This was done on October 30, 2023. There is no reason to believe that this intensification will not extend to the eastern part of the Pyrenees and lead to the reopening of the crossing points still closed.

#### b. The use of technical means to monitor borders

An alternative to re-establishing internal border controls would be to carry out surveillance using technical means, including electronic surveillance materials, equipment and systems, in particular drones. It would make up for the lack of manpower or ensure "greater efficiency in the manpower of the internal security forces" (prefectural decree of January 8, 2021) by concentrating them on open border crossing points (in this case, the A9 freeway, the Perthus, Cerbère and the Bourg-Madame international bridge road).

In France, article L.242-5 of the Internal Security Code authorises police and gendarmerie forces to "capture, record and transmit images using cameras installed on drones" to ensure "the surveillance of borders, with a view to combating their irregular crossing". The use of drones is authorised by order of the Prefect but must be strictly necessary for the exercise of the missions, and adapted to each circumstance (perimeter, purpose, proportionality, maximum number of cameras used simultaneously, regarding authorisations already issued in the same geographical area, etc.). In its decision of January 20, 2022 (no. 2021-834 DC), the French Constitutional Council issued an initial reservation to the effect that authorisation "may not, however, without infringing the right to respect for private life, be granted until the Prefect has ascertained that the service cannot employ other, less intrusive means with regard to this

right, or that the use of such other means would be likely to entail serious threats to the physical integrity of the officers".

In addition, as the law specifies, drones may not capture sound, include automated facial recognition processing, or any automated reconciliation, interconnection or linking with other personal data processing.

Lastly, a prefectural authorisation may be granted for a maximum period of three months, renewable subject to conditions, except when it is requested for a gathering and issued only for the duration of the event.

The use of drones to monitor the border crossings in question could be a solution, with less impact on the inhabitants of the border in question, provided that the legal framework for such use is respected, including respect for private and family life. In this regard, the *Conseil d'État's* order of July 25, 2023 (confirming the suspension of an order by the Prefect of *Pyrénées-Atlantiques* authorising the capture, recording and transmission of cameras installed on drones within a precise perimeter and for a specified period) provides valuable clarification on the use of drones. Insofar as the figures did not confirm any increase in border surveillance activity to combat illegal border crossings, or even in migratory flows, the measure was not necessary or proportionate, and the order seriously and manifestly unlawfully infringed the right to respect for private and family life.

While respecting the rules and the right to private and family life the use of technical means can be an alternative to re-establishing border controls, particularly when, due to a lack of personal resources, crossing points are closed to traffic. Article 13§4 of the Schengen Borders Code reform proposal mentions this possibility.

In conclusion, it is important to note that the case studied is eminently political. While the cross-border obstacle under consideration is based on administrative texts, in this case, a prefectural decree, it merely implements successive decisions by the French State, since 2015, to re-establish internal border controls to combat illegal immigration and terrorism, as authorised by the Schengen Borders Code, under certain strictly understood conditions. This does not alter the fact that, in a populated cross-border region, traffic bans on several border roads have a major impact. A solution has been found for the same situation at border crossing points in the *Pyrénées-Atlantiques* region, involving the development of cross-border police cooperation and the creation of joint brigades. It should be remembered that, a few days after the 27th Franco-Spanish summit in Barcelona, the former Prefect of the *Pyrénées Orientales* announced the creation of a joint Franco-Spanish brigade, which would undoubtedly make it possible to re-establish a borderless area, particularly for people living in the border region concerned.

#### **PART 4: FULL LIST OF LEGAL PROVISIONS RELEVANT TO THE CASE**

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 L 77, 23 March 2016, pp. 1-52.

European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14 December 2021, COM/2021/891 final.

European Commission, Proposal for a Council Recommendation on operational police cooperation, 8 December 2021, COM (2021) 780 final.

Judgement of the CJEU (Grand Chamber) of 26 April 2022, *NW/Landespolizeidirektion Steiermark*, C-368/20, and *Bezirkshauptmannschaft Leibnitz*, C-369/20, EU:C:2022:298.

Council of State – 10th – 9th Chambers combined, 27 July 2022, No 463850, FR:CECHR:2022:463850.20220727, Informed to the Lebon Compendium ([Council of State, 10th – 9th combined chambers, 27/07/2022, 463850, Informed into the Lebon – Légifrance Code \(legifrance.gouv.fr\)](#))

Prefectural Order PREF/CAB/BSI/2021-008-001 of 8 January 2021 (not published)

## **PART 5: OTHER RELEVANT ASPECTS**

The Commission is constantly calling for more police cooperation, which it believes is more useful than all border controls. A Commission's report from 23 November 2023<sup>19</sup> listed alternative measures to re-establishing internal border controls, including France's.

For example, France has designated 188 crossing points under Article 27(1)(c) of the Schengen Borders Code, on roads and at cross-border train stations. Compared with the previous periods of internal border controls (October 2022 to April 2023), there were nine fewer designated crossing points in the Pyrenees region.

Exchange of information: All the neighbouring Member States affected by the controls consider that the reintroduced controls should have been a temporary measure.

Alternative measures:

“The controls at the designated crossing points are supplemented by joint police actions. This type of cooperation is very well established with Switzerland and with Germany, with prospects for further intensification of such cooperation and possibly creation of a mixed brigade by the end of the year. In particular with Germany, France has established at the end of 2021, a joint entity to fight irregular migration (based on the trilateral agreement of 22 December 2022 with Germany and Switzerland). The cooperation is specific succession in the region of Strasbourg/Kehl. Discussions are going to intensify such cooperation with Belgium. Also, the French/Italian border benefits from this type of cooperation where a mixed brigade is operating to fight organised cross-border crime and irregular migration. On the Italian side, the police activities focus on key rentals, such as the Ventimiglia train station, to prevent migrants from leaving Italy towards France, and Bardonecchia. During the consultations the French authorities have expressed their interest in reproducing this experience at the Spanish border.”

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<sup>19</sup> Commission Staff Working Document Report from the consultation with the Member States as regards the internal borders controls reintroduced by Denmark, Germany, France, Austria, Norway and Sweden between May and November 2023, SWD(2023) 388 final, Accompanying the document Commission Recommendation on cooperation between the Member States with regard to serious threats to internal security and public policy in the area without internal border controls, C(2023) 8139 final.

Joint patrols already existed on the French-Italian border, but this time the French and Italian police are under a single command. The creation of an unprecedented joint brigade has been announced to step up the fight against smugglers and illegal immigration.

In practical terms, there are at least two French and two Italian police officers working on either side of the border, regardless of the border line, whereas French police officers normally need authorisation to go to the Italian side. And conversely, you cannot come into a foreign country in an armed uniform. As part of a joint brigade, a team is not bound by this obligation, since it is the police officer from the country concerned who is in charge of the patrol. In this way, the pairs can cross the border in both directions without any problems.

Looking at other borders, the report highlights the existence of 15 mixed patrols per month on the roads, while mixed patrols on trains are organised daily at Austria's borders.

The lifting of internal border controls in February 2023 at the land border between Austria and Slovakia was made possible by AGM8 patrols (special units for compensatory operational measures) and targeted actions, both on the traffic lanes at the green border and on the main traffic routes (motorways, railways). These measures were introduced in addition to the regular bilateral patrols with Slovakia and involved border police units as well as traffic police units and the criminal investigation department. In addition, all available technical means (e.g., drones) were used.

## **PART 6: REFERENCES AND ANNEXES**

BACHOUÉ G., 'Reintroduction of controls at the internal borders of the European Union: between a reminder of the order of States and anticipation of the reform of the Schengen Borders Code', *R.A.E* 2002/2, p. 323.

UNFRIED, M., Mertens, P., BÜTTGEN, N., & Schneider, H. (2022). Cross-border Impact Assessment for the EU's border regions. *European Journal of Law Reform*, (1), pp. 47-67. <https://doi.org/10.5553/EJLR/138723702022024001004> Document status and date: Published: 01/04/2022 DOI: 10.5553/EJLR/138723702022024001004.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Schengen governance - strengthening the area without internal border control, 16 September 2011, COM (2011) 561 final.