Comments of DG HOME to the European Ombudsman on a query from the Austrian Ombudsman concerning free movement restrictions and possible discrimination in accessing a pedestrian zone at a border crossing between Austria and Hungary
- Query ref 2023/1/Q

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

Austria has notified the Commission about the temporary reintroduction of internal border controls. Based on the most recent notification, these border controls will be in place until 11 November 2023.

Up-to-date information about the instances of reintroduction of internal border controls are available at our website: https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en

The Commission has received a large number of complaints concerning the closure by the Austrian authorities of its border with Hungary or by setting special prerequisites for entering Austria. All these complaints have been registered under the number Ares(2023)2303269.

II. THE COMPLAINT

On 5 April 2023, the European Ombudsman received a query from the Austrian Ombudsman concerning free movement restrictions and possible discrimination in accessing a pedestrian zone at a border crossing between Austria and Hungary.

The Austrian Ombudsman is currently dealing with many complaints concerning the intention to build a pedestrian zone at the Schattendorf-Agendorf border crossing between Austria and Hungary. It is foreseen that driving through this zone will require a special authorisation, which can be provided only to people having their main residence in Schattendorf or Agendorf. The authorisation costs 160 euros for two years, which may be reimbursed to the requestors as Schattendorf shopping vouchers.

The Austrian Ombudsman says that Hungarian commuters, who do not have their main residence in Schattendorf or Agendorf, may feel discriminated against. Moreover, they would need to take a much longer route to be able to perform their professional activity in Austria.

In view of that, the Austrian Ombudsman asked two questions, replied below.

III. THE COMMISSION'S COMMENTS TO THE COMPLAINANT'S ARGUMENTS

- *Is it compatible with EU law to establish a pedestrian zone at a border crossing municipality in one Member State (Austria) and a specific municipality in the bordering Member State (Hungary) may be authorised to drive provided that they pay a fee?*

In line with Article 22 of the Schengen Borders Code[1], in the Schengen area, the internal borders can be crossed at any point without a border check on persons being carried out, unless such checks have been temporarily reintroduced by the Member State concerned, subject to the conditions set out in the Schengen Borders Code.

Moreover, in line with Article 24 of the Schengen Borders Code, Member States are obliged to remove all obstacles to a fluid traffic flow at road crossing-points at internal borders, in particular any speed limits not exclusively based on road-safety considerations.

However, the Schengen rules do not impose any specific use of the existing road infrastructure. As mentioned, Article 24 of the Schengen Borders Code indeed obliges the Member States to remove all obstacles to a fluid traffic flow at road crossing-points at internal borders, in particular any speed limits not exclusively based on road-safety considerations. However, this provision aimed in particular at ensuring that the border controls facilities are removed from the road crossing points. As such, it does not amount to the obligation to keep the existing cross-border infrastructure open for vehicle traffic, as the Schengen rules are neutral as to the specific use of the existing road infrastructure.

Therefore, if the local authorities, within the limits of their competence, decide to close certain roads in the border localities for cars, such a decision does not amount to an obstacle in a fluid traffic flow at road crossing-points at internal borders. Article 24 of the Schengen Borders Code continues to apply, but to the extent it is relevant in view of the actual use of the road crossing-point as determined by the competent local authorities responsible for the infrastructure. Moreover, the closure of the road for certain types of traffic, does not affect *per se* the freedom of movement, which can be exercised by other means (e.g. bicycle).

However, from the perspective of EU law on the free movement of workers (Article 45 of the Treaty on the Functioning of the EU) if any exceptions to the pedestrian zones are planned to be put in place and driving through this zone will be possible after receiving a special authorisation, such exceptions must be applied on a non-discriminatory basis to all mobile workers, i.e. it must be possible to receive a special authorisation to drive through this zone for all frontier workers regardless of their place of residence (even if they do not reside in a specific municipality). If there are limitations in this respect, Austria must provide explanations with respect to the legitimate objective which this measure aims to achieve and the proportionality and appropriateness of the measure to achieve this objective.

As regards the fee, it is not clear to what extent this is compatible with the decision to transform the road into a pedestrian zone. In particular, it is not clear if the obligation to pay a fee is applicable to all users of the road on the Austrian side or only to the non-Austrian drivers. In case that this fee would be applicable to only certain categories of users, such a fee would appear not to be compatible with EU law on free movement of workers unless it is justified by a legitimate aim which this measure aims to achieve. The measure must be proportionate and appropriate to achieve the legitimate aim. The

[1] 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) (codification), OJ L 77, 23.3.2016, p. 1.

Commission, therefore, has to collect more information with respect to this measure, its aim as well as its justification before it will be able to reply conclusively on this point. However, fees that would be based on the crossing of the internal borders as such would not be compatible with the Schengen rules. This is without prejudice to the possibility to collect fees for the use of the road infrastructure, which are regulated under Directive 1999/62/EC[2]. That Directive further specifies the rules on non-discrimination of Article 18 TFEU by setting out in its Article 7(5) that such fees do not discriminate, directly or indirectly, on the grounds of the nationality of the road user; the Member State or the third country of establishment of the transport operator; the Member State or the third country of registration of the vehicle; or the origin or destination of the transport operation. Since the entry into force of Directive (EU) 2022/362[3], these rules apply also on passenger cars on all European roads.

- *Is it compatible with EU law to reimburse the fee by means of local shopping vouchers issued by the Austrian municipality?*

Any subsidies at the local level to the users of the road infrastructure in the border area are not a Schengen matter, but must comply with the principle of non-discrimination. According to settled case-law, non-discrimination of a fee for the use of the road infrastructure shall also take into account any relief that is granted simultaneously to selected road users (C- 591/17, Austria v Germany).

IV. CONCLUSIONS

The Commission will clarify with the Austrian authorities the nature of the limitations referred to in the received query and the complaints.

[2] Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of vehicles for the use of road infrastructures (OJ L 187 20.7.1999, p. 42)

[3] Directive (EU) 2022/362 of the European Parliament and of the Council of 24 February 2022 amending Directives 1999/62/EC, 1999/37/EC and (EU) 2019/520, as regards the charging of vehicles for the use of certain infrastructures (OJ L 69, 4.3.2022, p. 1)