BlogDUE

The CJEU says no to systematic pushbacks within the EU. A comment to case C-143/22 of the CJEU about the limits of refusing entry to third-country nationals crossing internal EU borders

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SUMMARY: 1. Introduction. – 2. The facts in the main proceedings. – 3. The decision of the CJEU and its implications. – 4. The context of this decision: systematic pushbacks at the French-Italian border. – 5. Ways forward: compliance with this decision.

1. On 21 September 2023, the Court of Justice of the European Union (CJEU) decided the case C-143/22, *Adde and Others*. The CJEU declared the refusal of entry to irregular migrants a violation of EU law if the Directive 2008/115/EC (hereinafter "Return Directive") is not respected when a Member State has reinstated controls at EU internal borders to other EU Member States.

Third-country nationals crossing the French-Italian borders are frequently apprehended and refused entry. Whether this praxis used by the French border police is compatible with EU law was the core question of *ADDE*. The decision answers a preliminary reference by the French Conseil d'État from 24 February 2022 asking the CJEU if France can systematically refuse entry to irregular third-country nationals without having to comply with the Return Directive once it has re-established controls on its internal EU borders. According to the CJEU, the Return Directive applies to any third-country national who has entered the territory of a Member State even without fulfilling the conditions of entry, stay or residence. This includes the scenario of a person who has been apprehended at a border crossing point on the territory of a Member State.

This blog post aims to examine the genesis and context of this decision. Furthermore, it discusses why there might be a risk that the French authorities will not comply with the judgement.

2. The preliminary question arose in proceedings initiated by the Association Avocats pour la défense des droits des étrangers (ADDE) and eight other French migrant rights associations. They were challenging the legality of several provisions contained in the order no. 2020-1733 of 16 December 2020 amending the code on the Entry and Residence of Foreigners and the Right of Asylum (Code de l'entrée et du séjour des étrangers et du droit d'asile – Ceseda) before the French Conseil d'État. The highest French Court requested a preliminary ruling from the CJEU concerning the interpretation of Art. 14 of Regulation (EU)

2016/399, (hereinafter "Schengen Borders Code") in connection with the Return directive.

According to Art. 32 of the Schengen Borders Code, where internal border controls are reintroduced, the relevant provisions of Title II on external borders "shall apply mutatis mutandis". Art. 14 of the Schengen Borders Code deals with the refusal of entry at external borders. It states that "a third-country national who does not fulfil all the entry conditions (…) shall be refused entry to the territories of the Member States". The provision foresees further that the refusal of entry needs to be done via a "substantiated decision stating the precise reasons for the refusal".

The contested French order laid down the procedure for a decision refusing entry to the French territory for third-country nationals entering the territory of Metropolitan France irregularly. This is the case when migrants are crossing an internal land border without being authorised to do so and are discovered in an area between the border and a line drawn 10 km behind that border. Art. L.332-3, which the associations asked to be annulled, foresees the application of the procedure for refusing entry to a third country national at the external borders of the EU to "checks carried out at an internal border in the event of the temporary reintroduction of checks at internal borders (…)".

In a former decision from 27 November 2020, the Conseil d'État annulled a similar provision of the former Ceseda (Art. L. 213-3-1) because it was violating the Return Directive as interpreted by the CJEU in its decision of case C-444/17, *Arib and Others*. That provision allowed to refuse entry to third-country nationals in the case of internal border controls being reinstated temporarily and if migrants "entered the territory of Metropolitan France crossing an internal land border without being authorised to do so and were checked in an area between the border and a line drawn 10 kilometres inside that border."

In *Arib*, the CJEU had clarified that an internal border of a Member State at which border control has been reinstated cannot be equated with an external border for the purposes of the Return Directive (para 61). Art. 2 para. 2 of the Return Directive allows Member States inter alia to not apply this Directive to third-country nationals "who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State (…)". However, as the CJEU decided in *Arib*, this article does not apply to controls at internal borders. The simplified return procedures that Member States can carry out at the external borders of the EU without having to follow all the procedural stages prescribed by the Return Directive must not be applied at the internal borders.

The new provision in the reformed Ceseda did not copy the former provision, judged unlawful by the Conseil d'État. Nevertheless, the Conseil d'État noted in its preliminary reference to the CJEU that the contested new provision Art. 332-3-2 allows a refusal to be issued at the moment of control when internal border controls have been temporarily reinstated (see order of the Conseil d'État of 24 February 2022, No. 450285, 450288, para 12, p. 7).

The Conseil d'Ètat hence decided to submit a preliminary reference question to the CJEU, asking if in the event of the temporary reintroduction of border controls at internal borders foreign nationals arriving directly from the territory

of another Schengen country can "be refused entry, when entry checks are carried out at that border, based on Art. 14 of the Schengen code without the Return Directive being applicable".

The CJEU now should establish, as Advocate General Rantos put it in his opinion (para 26) if, "in the event of temporary reintroduction of border control at internal borders, under the conditions laid down in Chapter II of Title III of the Schengen Borders Code, Art. 14 of that code or the provisions of Directive 2008/115 apply".

3. In its decision from 21 September 2023, the CJEU gave a clear answer to the question of the French Conseil d'État and stuck to its previous decision in *Arib*: When a Member State has reintroduced controls at its internal borders, it still has to comply with the Return Directive.

The CJEU clarified again that different rules apply at internal borders than at EU's external borders. At the external border, Member States can exclude third-country nationals from the scope of the Return Directive if the conditions set out in Art. 2 para 2 of the Return Directive are met (para 35- see more in detail under 2). These conditions only apply to the crossing of an external border of a Member State (para 36). Hence, the cited Art. 2 para. 2 (a) does not allow a Member State which has reintroduced checks at its internal borders to derogate from the common standards and procedures foreseen by the Return Directive (para 37).

The CJEU then recalls specifically the provision in Art. 6 para. 1 of the Return Directive. It obliges Member States that "any third-country national staying illegally on the territory of a Member State" must "be the subject of a return decision (para 41). This decision must identify the country to return to, as stated in a previous ruling case C-69/21, *Staatssecretaris van Justitie en Veiligheid*, (see my discussion of this case on this Blog).

Hence, the Return Directive requires Member States to issue an individual return decision (about the return decision in detail see A. MORTICELLI, *Human Rights of Irregular Migrants in the European Union*, Baden-Baden, 2021, pp. 181-182). Nevertheless, some exceptions are foreseen by Art. 6, paras. 2-5, of the Directive. When an EU Member State has a bilateral agreement that already pre-existed when the Directive entered into force in January 2009 and another Member State takes back the third-country national, it does not have to issue an individual return decision, for instance (see F. SPITALERI, *Il rimpatrio e la detenzione dello straniero tra esercizio di prerogative statali e garanzie sovranazionali*, Torino, 2017, p. 215). France and Italy have signed such a bilateral agreement in Chambery on 3 October 1997. It provides for a simplified procedure of readmission when third-country nationals have been apprehended at the French-Italian border. The Chambery agreement foresees that the authorities of the other country agree to the readmission of the third-country national before it is carried out. This simplified procedure based on the bilateral agreement has not been used much by the French authorities since the migration to the EU spiked in 2015 (see O. PHILIPPE, *Legal Weapons in Action at the French-Italian border*, in *Revue Européenne des Migrations*, vol. 36, n.1, 2020, para 3). The CJEU did not mention the bilateral agreement between France and Italy in *ADDE*, supposedly because it is not in use and the refusals of entry at the

French-Italian border are not carried out following the simplified procedure of the Chambery agreement.

The Return Directive significantly limits the Member States' discretion in exercising border-related powers by proceduralising them (about the adoption of the directive see: S. PEERS, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law*, 4th edn, Oxford, 2016, pp. 443–540). For instance, the Return Directive requires the Member States to initiate a formal procedure when expelling an irregular migrant and give them sufficient time to leave the country: between seven and 30 days according to Art. 7 of the Return Directive.

The application of the common standards and procedures laid down in the Return Directive would hinder the maintenance of "public order and internal security within the meaning of Art. 72 TFEU", argued the French Ministry of the Interior. The CJEU denied the validity of this argument because, if certain conditions contemplated by the Directive are met, detention or even prison sentences are still possible for third-country nationals staying irregularly (para 43-45).

Therefore, the CJEU concluded, where a decision to refuse entry is issued in the case of temporarily reinstated border controls, common standards and procedures provided for by the Return Directive must still be respected.

4. This judgement might be capable of stirring up an extremely difficult situation at the French-Italian border. Associations acting in defence of migrants' rights such as Médecins sans Frontiers have claimed that France has been pushing back irregular migrants at the Italian border for many years. In its written observations to the preliminary reference, the disputing associations stated that between January 2017 and June 2020, the French police refused entry at the French-Italian border to over 131.000 people.

This judgement is important as it should put an end to this unlawful practice of the French border police. However, it is not yet certain that France is willing to change its unlawful behaviour at the French-Italian border.

After the ruling, associations like ANAFÉ asked the French government to take immediate action and to stop the illegal practice of systematic pushbacks. Nevertheless, according to regional media, in the aftermath of the ruling not much has changed at the French-Italian Border: in the week after the ruling, 1400 migrants have been pushed back to Italy at Menton, the first French city at the border to Italy. Furthermore, in an open letter from 13 November 2023, several associations denounced that the French police continues to apply the same methods even after the CJEU's judgement. The associations claim that checks depending solely on the appearance of persons happen at a daily basis at authorised border crossing points and in other border areas. Refusals of entry are still carried out hastily, often on the train platform or in front of or inside the police station, without an interpreter being present and without any individual examination of a person's situation. Both adults and minors are pushed back, and people who are refused entry are often detained without being able to apply for asylum or challenge the detention measure and without access to a lawyer or an association. According to the associations, the border police stated that they had

not received any new guidelines on how to act in accordance with the CJEU ruling.

Thus, the question of compliance with the judgment is crucial. Recent announcements of French political leaders foster the assumption that France wants to continue the pushbacks at its borders as freely as possible. After the recent surge of migrants coming to the Italian isle of Lampedusa, the French Minister of Interior Darmanin said in a meeting with the Italian Minister of Interior that France would not take in even one migrant coming from Lampedusa.

Furthermore, France has a history of not respecting the guidance of the CJEU on how to correctly apply the Schengen Border Code when it comes to the reintroduction of internal border controls. Under Art. 25 of the Schengen Border Code, temporary internal border controls can be extended only exceptionally and under certain conditions, such as a serious threat to public policy or internal security. Like several other EU member States, France has reintroduced border controls on its land borders to other Schengen- countries on 13.11.2015 and renewed the controls every six months since then (on the consequences of the repeated renewal of these internal border controls see S. SALOMON, J. RIJPMA, A *Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in Light of Union Citizenship* in *German Law Journal*, 2021, pp. 1-29). The current controls are foreseen from 1 November 2023 until 30 April 2024 because of "New terrorist threats and external borders situation; internal borders." In a ruling concerning Austria C-368/20 and C-369/20, *NW v Landespolizeidirektion Steiermark*, the CJEU clarified last year that the extension of temporary border controls at the internal borders requires justification and "new reasons ". A simple reiteration of the same threats to justify the controls is not possible. Nevertheless, France continues to do so, supported by a controversial decision from 27 July 2022 of the Conseil d'État. The Conseil d'État denied that the reiteration of the same justification for the internal border's controls' extension – secondary migration in this case- was unlawful. Even if the justification of secondary migration cited by the French government did not represent a new threat, the other reasons given were sufficient to justify a renewed extension of border controls (para 6 on the legality of the decision). The French Conseil d'État hence allowed the status quo of border controls to continue despite a clear judgment of the CJEU. This leads to the conclusion that France's highest Court wants to allow the government to continue border controls as freely as possible. The limitless extension of border controls seriously jeopardises the functioning of the Schengen area (see A.K. MANGOLD, A. KOMPATSCHER, *Das Ende von Schengen*, in *verfassungsblog.de*, 23 February 2023).

In the here-examined court case, the French Conseil d'État now needs to decide about the annulment of the provisions of the Ceseda. Taking seriously the CJEU's answer to the Conseil's preliminary reference requires putting an immediate halt to systematic pushbacks at all French borders. The Return Directive and hence individual procedures of refusals need to be implemented in French law to be in line with EU law.

Should the French Conseil d'État not comply with the CJEU's ruling, the European Commission as guardian of the Treaties must intervene and launch an

infringement procedure. The Commission should stand up for a correct application of the Schengen Border Code and the Return Directive during the extensively used internal border controls. Systematic non-compliance with clear judgements of the CJEU on the subject of border controls is a matter of the rule of law (see J. BORNEMANN, *Reviving the Promise of Schengen*, in *verfassungsblog.de*, 28 April 2022).

Besides, the interinstitutional negotiations for the reform of the Schengen Border Code have recently started. According to the draft report approved by the Committee on Civil Liberties, Justice and Home Affairs in the European Parliament on 8 November 2022, "migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or to internal security" (amendment 19). How the final text deals with the connection of internal border controls and migration is yet to be seen.

In the meantime, the CJEU has made clear in *ADDE* that temporary internal border controls do not end the obligations of EU Member states under the Return Directive: Member States must not systematically refuse entry to third-country nationals.