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cc: Commissioner **Magnus Brunner** and Directorate-General for Migration and Home Affairs (**DG HOME**)

Paris, 1 October 2026

**Re: Formal complaint concerning Italy's and Spain's reintroduction of internal border controls under Regulation (EU) 2016/399; the Commission's failure to discharge its supervisory obligations under Articles 25a, 27 and 27a of the Schengen Borders Code; and self-standing request for the opening of infringement proceedings under Article 258 TFEU against Italy and Spain.**

Dear Sir or Madam,

I am writing to lodge a formal complaint concerning the reintroduction and successive prolongation of internal border controls by Italy and Spain since 1 August 2026, and the European Commission's failure, to date, to discharge the specific supervisory obligations entrusted to it by Regulation (EU) 2016/399, as amended by Regulation (EU) 2024/1717 (hereinafter "the Schengen Borders Code" or "SBC"). By the same letter, I additionally request the Commission to initiate infringement proceedings under Article 258 TFEU against Italy and against Spain.

This complaint sets out the relevant facts (Section I); the breaches of EU law by Italy (Section II); the breaches of EU law by Spain (Section III); the Commission's specific obligations under Articles 27 and 27a SBC (Section IV); the request for the opening of infringement proceedings against Italy and Spain under Article 258 TFEU and the limits of the Commission's discretion in determining it (Section V); and the action requested (Section VI).

## **I. Facts and chronology**

1. Following the events in Ceuta in late July 2026, Italy notified the Commission of its decision to reintroduce internal border controls at air and sea crossing points for arrivals from Spain for the period from 1 August to 1 September 2026. Italy cited a "threat to public policy, internal security, and the management of migration flows due to recent events in the Spanish

autonomous city of Ceuta, resulting from large-scale irregular entries of third-country nationals, with a risk of secondary movements within the Schengen area”<sup>1</sup>.

2. The Commission registered Italy’s notification. It did not publish an opinion or any assessment of whether the measure satisfied the conditions of necessity, proportionality and last resort laid down in Articles 25 and 26 SBC. Nor is there any indication on the public record that the Commission requested additional information under Article 27(4), issued an opinion under Article 27a(2), or initiated consultation under Article 27a(1).

3. On 8 August 2026, Spain notified the Commission of its own reintroduction of internal border controls at air and sea crossing points for arrivals from Italy. Spain cited “large-scale movements of third-country nationals within the Schengen area, including the risk of secondary movements”, using language closely resembling that of Italy’s notification<sup>2</sup>.

4. Public statements by Spanish officials presented Spain’s measure as conditional upon Italy withdrawing its controls. This indicates that Spain’s decision may have been adopted in response to Italy’s conduct rather than on the basis of an autonomous serious threat to Spanish public policy or internal security.

5. The Commission registered Spain’s notification without publishing an opinion or assessment of its compatibility with Articles 25, 26 and 27 SBC. There is similarly no indication on the public record that the Commission requested additional information, issued an opinion under Article 27a(2), or initiated consultation under Article 27a(1).

6. Both measures were subsequently prolonged on substantially unchanged grounds. Italy’s controls were prolonged first for the period from 1 to 16 September 2026 and again, for a third consecutive tranche, for the period from 16 September to 1 October 2026, on wording materially identical to that of the original notification and today, and again today for another 15-day period. Spain’s controls were prolonged for the period from 8 to 22 September 2026. The prolongations therefore maintained an interference with free movement without checks across internal borders over a continuous period of two months in Italy’s case, without any publicly identified new factual basis.

7. At its midday press briefing of 1 September 2026, more than three weeks after Italy’s original notification and more than two weeks after Spain’s, a Commission spokesperson stated only that the Commission, notably Commissioner Brunner, was “in close and regular contact with both Member States”<sup>3</sup>.

8. The President of the Commission had separately confirmed what the Spanish authorities have stated, that “not a single person” who entered Ceuta during the events in question had

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<sup>1</sup> European Commission, “Temporary Reintroduction of Border Control”, current notifications: [https://home-affairs.ec.europa.eu/policies/schengen/schengen-area/temporary-reintroduction-border-control\\_en](https://home-affairs.ec.europa.eu/policies/schengen/schengen-area/temporary-reintroduction-border-control_en)

<sup>2</sup> European Commission, “Temporary Reintroduction of Border Control”, current notifications: [https://home-affairs.ec.europa.eu/policies/schengen/schengen-area/temporary-reintroduction-border-control\\_en](https://home-affairs.ec.europa.eu/policies/schengen/schengen-area/temporary-reintroduction-border-control_en)

<sup>3</sup> European Commission audiovisual service, midday press briefing, 1 September 2026: <https://audiovisual.ec.europa.eu/en/media/video/I-293795>

reached mainland Spain or the rest of the European Union<sup>4</sup>. That fact is difficult to reconcile with the premise that actual or imminent movements from Spain to Italy constituted a serious threat requiring the reintroduction of internal border controls.

9. On 2 June 2026, the Commission issued Opinions under Article 27a(3) SBC on the internal border controls of nine Schengen States (Austria, Denmark, France, Germany, Italy, the Netherlands, Norway, Slovenia and Sweden), whose controls had been prolonged beyond twelve months for the same threat under Article 25a(4) SBC<sup>5</sup>. Those Opinions concerned a different procedural situation and were mandatory in nature. They nevertheless illustrate the substantive assessment required by the Code: examination of the evidence supporting the alleged threat, of the geographical and temporal scope of the controls, of the availability of alternative measures (non-systematic police checks in border areas and other technological and cooperative tools) and of the effect of the controls on free movement and on cross-border regions. In each case the Commission found that effective alternatives were available and recommended phasing out and gradually lifting the controls; that is a finding that the proportionality condition is, on the current facts, generally not satisfied.

10. Reporting citing Spain's National Police indicates that several thousand third-country-national passengers were selected for checks on several hundred flights arriving from Italy<sup>6</sup>. No comprehensive official figure appears to have been published for the total number of EU citizens and third-country nationals exposed to the legal possibility of a check under either measure. Given passenger volumes on air and sea routes between Italy and Spain, the number plausibly runs into the hundreds of thousands.

11. I am an Italian citizen resident in Spain. During the period covered by Spain's notification, I was personally subjected to a border check when travelling from Italy to Spain and from Spain to Italy.

## **II. Italy's breaches of Articles 22, 25, 25a, 26 and 27 SBC**

12. Article 22 SBC establishes the general rule that internal borders may be crossed at any point without border checks on persons, irrespective of their nationality. Article 25 permits a Member State to derogate from that rule only exceptionally, where there is a "serious threat to its public policy or internal security".

13. Under Article 25(2), internal border control may be reintroduced only as "a measure of last resort". Its scope and duration must not exceed what is strictly necessary to respond to the identified threat. The Member State must establish that the measure is necessary and proportionate, taking account of the criteria in Article 26(1).

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<sup>4</sup> Euronews, "Not a single person reached mainland Spain or the rest of the EU, says von der Leyen", 1 August 2026: <https://www.euronews.com/my-europe/2026/08/01/not-a-single-person-reached-mainland-spain-or-the-rest-of-the-eu-says-von-der-leyen>

<sup>5</sup> Commission Opinions of 2 June 2026 on the necessity and proportionality of internal border controls, incl. C(2026) 3554 final (Sweden) and C(2026) 3557 final (Germany), and the parallel opinions of the same date addressed to the other seven States.

<sup>6</sup> <https://www.democrata.es/en/politics/the-controls-on-travelers-from-italy-already-reach-more-than-6-800-people-in-spain/>; <https://www.euronews.com/my-europe/2026/09/05/spain-to-maintain-border-checks-on-arrivals-from-italy-until-22-september>

14. Article 26(1) requires the Member State to assess, in particular the:

- the “appropriateness” of the measure, having regard to the nature of the serious threat identified, and in particular, whether the internal border control is likely to adequately remedy the identified threat, and whether the objective could be achieved through proportionate checks within the territory, the procedure established by Article 23a, police cooperation or other alternative measures;

- the “likely impact” of such a measure on the movement of persons within the Schengen area; and on the affected cross-border regions.

Article 27(1) correspondingly requires the notification to include all relevant data detailing the events constituting the serious threat and the Member State’s assessment of necessity and proportionality.

15. Italy’s publicly stated justification does not identify actual unauthorised movements from Spain into Italy. It refers instead to irregular entry from Morocco into Ceuta and to a prospective “risk of secondary movements”.

16. Ceuta is part of Spain, and the Schengen acquis applies there. Article 41 SBC nevertheless establishes a special regime under which Spain maintains identity and document checks on sea and air connections departing from Ceuta and Melilla for peninsular Spain or other destinations within the Schengen area. The purpose of those checks is precisely to verify whether passengers continue to satisfy the relevant conditions for entry and movement.

17. Article 41 does not make all onward movement legally or practically impossible. It does, however, provide an existing mechanism specifically directed at the risk invoked by Italy. The existence of that mechanism, coupled with the Commission President’s statement that nobody had reached mainland Spain or the rest of the Union, required Italy to explain why controls at Italian internal borders were nevertheless necessary, appropriate and a measure of last resort.

18. Recital 26 SBC confirms that migration and the crossing of external borders by a large number of third-country nationals should not, *per se*, be considered a threat to public policy or internal security. Following the 2024 amendments, Article 25(1)(c) provides that a serious threat may arise from:

“an exceptional situation characterised by sudden large-scale unauthorised movements of third-country nationals *between* the Member States, putting a substantial strain on the overall resources and capacities of well-prepared competent authorities and which is likely to put at risk the overall functioning of the area without internal border control, as evidenced by information analysis and all available data, including from relevant Union agencies”.

19. Italy’s publicly available notification does not expressly state that it relies upon Article 25(1)(c). Nor could the events at the Morocco–Ceuta external border themselves satisfy that provision: Morocco is not a Member State, and entry from Morocco into Ceuta is not a movement “between the Member States”.

20. If Italy intended to rely upon Article 25(1)(c), it was required to establish all the cumulative conditions laid down in that provision. In particular, it had to demonstrate:

- actual or sufficiently evidenced sudden, large-scale unauthorised movements between Member States;
- substantial strain upon the overall resources and capacities of well-prepared Italian authorities;
- a likely risk to the overall functioning of the area without internal border control; and
- support for those conclusions through information analysis and all available data, including relevant data from Union agencies.

A general risk that some persons might subsequently travel from Spain to Italy does not, without further evidence, satisfy those requirements.

21. Moreover, where a Member State reintroduces or prolongs controls because of the situation described in Article 25(1)(c), Article 27(3) requires its necessity and proportionality assessment to include a risk assessment and information concerning the alleged sudden, large-scale unauthorised movements, including information obtained from relevant Union agencies and data analysis from relevant information systems.

22. If Italy did not rely upon Article 25(1)(c), it remained bound to identify some other serious threat to Italian public policy or internal security and to establish, under Articles 25(2), 26(1) and 27(1), that internal border controls were necessary, proportionate and a measure of last resort. The mere fact of large-scale entry at Spain's external border, combined with an unquantified possibility of onward movement, cannot dispense with those requirements. Independently of the substantive conditions in Articles 25 and 26, Italy's conduct discloses a distinct procedural breach of Article 25a. Successive prolongation under Article 25a(3) presupposes that the original threat remains one which "is unforeseeable and requires immediate action" within the meaning of Article 25a(1); it is not a mechanism for the indefinite renewal of a measure whose factual premise has become stable and known. Each prolongation is moreover a separate notification attracting the full requirements of Articles 26(1) and 27(1). The reproduction of substantially identical wording across three tranches, with no publicly identified new data, is itself evidence that no fresh assessment of necessity, proportionality and last resort was conducted for the second and third tranches.

23. The Court of Justice has held that exceptions to the principle of an area without internal border controls must be interpreted strictly and that the right not to be subjected to internal border checks, outside the circumstances permitted by the Treaties and the SBC, gives expression to Article 21(1) TFEU and Article 45(1) of the Charter<sup>7</sup>.

24. In the absence of evidence satisfying the applicable conditions, Italy's reintroduction and prolongation of internal border control are incompatible with Articles 25, 26 and 27 SBC and consequently infringe Article 22 SBC. For EU citizens exercising free movement, including myself, they also constitute an unjustified interference with the rights protected by Article 21(1) TFEU and Article 45(1) of the Charter.

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<sup>7</sup> Joined Cases C-368/20 and C-369/20, *Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, ECLI:EU:C:2022:298, paras 64–66 and 91–97.

### **III. Spain's breaches of Articles 22, 25, 25a, 26 and 27 SBC**

25. Spain's measure must be assessed independently of Italy's. Article 25 requires Spain to establish the existence of "a serious threat to public policy or internal security" in Spain itself and to demonstrate that controls on arrivals from Italy were necessary, proportionate and a measure of last resort.

26. Spain's publicly stated justification refers to "large-scale movements of third-country nationals within the Schengen area, including the risk of secondary movements". It does not expressly identify Article 25(1)(c) as its legal basis.

27. If Spain intended to rely upon Article 25(1)(c), it was required to establish sudden, large-scale and unauthorised movements of third-country nationals *between* Member States, substantial strain upon the overall resources and capacities of the Spanish authorities, and a likely risk to the overall functioning of the area without internal border control. It was also required by Article 27(3) to provide the corresponding risk assessment and supporting information.

28. The events in Ceuta cannot themselves satisfy Article 25(1)(c), because they involved entry from Morocco into Spanish territory rather than unauthorised movements between Member States. Nor does the mere risk that persons might travel onwards transform entry across an external border into a movement between Member States.

29. If Spain did not rely upon Article 25(1)(c), it was still required to identify another serious threat to Spanish public policy or internal security and to comply fully with Articles 25(2), 26(1) and 27(1). The publicly available information does not explain how checking persons arriving in Spain from Italy could remedy a threat resulting from events in Ceuta, why less restrictive alternatives would have been inadequate, or why the measure was appropriately confined in geographical and temporal terms.

30. Public statements presenting Spain's measure as conditional upon Italy withdrawing its controls provide an additional and independent indication that the measure was responsive or retaliatory rather than directed at an autonomous serious threat in Spain.

31. The Court has consistently held that a Member State "may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State" of EU law. If Spain considered Italy's controls unlawful, it was required to pursue the institutional and judicial remedies provided by EU law, including recourse to the Commission or proceedings under Article 259 TFEU; it could not respond by imposing otherwise unjustified internal border controls of its own. The Commission's failure to intervene against Italy could not therefore justify Spain's adoption of otherwise unlawful controls.

32. Spain's reintroduction and prolongation of internal border control accordingly infringe Articles 25, 26, 27 and 22 SBC unless Spain can demonstrate, through the information and assessment required by the Code, an autonomous "serious threat" and compliance with the requirements of necessity, proportionality and last resort. For EU citizens subjected to those controls, including myself, the measure also interferes with the rights protected by Article 21(1) TFEU and Article 45(1) of the Charter.

### **IV. The Commission's specific supervisory obligations under Articles 27 and 27a SBC**

33. The illegality of the measures identified above does not exhaust the subject matter of this complaint. Italy's and Spain's notifications also engaged the Commission's own obligations under the Schengen Borders Code. Once those notifications were received, the Commission was not merely confronted with the discretionary question whether to open infringement proceedings under Article 258 TFEU; it was required to exercise the specific supervisory mechanism established by Articles 27 and 27a SBC. Although the Commission enjoys wide discretion in deciding whether to bring infringement proceedings, that discretion does not extend to compliance with duties imposed directly upon it by the Code. Its failure to discharge the mandatory elements of that supervisory mechanism is therefore legally distinct from, and cannot be subsumed within, its general enforcement discretion under Article 258 TFEU.

34. Article 27(1) requires Member State notifications to contain specified information, including all relevant data detailing the events constituting a serious threat and an assessment of necessity and proportionality under Article 26(1). Where Article 25(1)(c) is relied upon, Article 27(3) requires an additional risk assessment and information concerning the alleged sudden, large-scale unauthorised movements.

35. Article 27(4) provides that the Member State concerned must, upon request, provide the Commission with further information, including information needed to assess possible alternatives under Articles 23 and 23a.

36. Most importantly, Article 27a(2) provides:

“Following the receipt of notifications submitted in relation to the reintroduction or prolongation of border control at internal borders, the Commission *shall*, or any Member State may, without prejudice to Article 72 TFEU, issue an opinion if, based on the information contained in the notification and risk assessment, where appropriate, or any additional information, they have concerns as regards the necessity or proportionality of the planned reintroduction or prolongation of border control at internal borders”.

37. The use of “shall” establishes an obligation distinct from the Commission's discretion under Article 258 TFEU. Once the Commission has concerns regarding necessity or proportionality, the issuance of an opinion is mandatory.

38. Article 27a(2) necessarily also requires the Commission to examine the information submitted sufficiently to determine whether such concerns arise. The discretion involved in making that assessment cannot be understood as permitting the Commission to treat notifications as matters of purely administrative registration. Such an interpretation would deprive Article 27a(2) of practical effect: the Commission could evade the mandatory obligation to issue an opinion simply by declining to assess whether concerns existed.

39. This obligation must be applied consistently with Article 17(1) TEU, the principle of effectiveness and the right to good administration under Article 41 of the Charter. Even where an institution possesses discretion as to the ultimate action to be taken, it must examine relevant information carefully and impartially and explain its treatment of a formal complaint in a manner enabling the complainant to understand its position.

40. Article 27a(4) then provides that, where an opinion under Article 27a(2) or 27a(3) is issued, the Commission “shall establish a consultation process” in accordance with Article 27a(1). Consultation is therefore mandatory following an opinion. The Commission's independent

power to initiate consultation on its own initiative is found in Article 27a(1), not Article 27a(4). Under Article 27a(1), consultation is also mandatory if requested by a Member State directly affected by the controls (what Spain has however failed to demand vis-à-vis Italy's measures).

41. The present notifications disclose several objective grounds that required examination under Article 27a(2):

- they connect controls at internal borders to entry from Morocco into Ceuta, rather than to identified movements *between* Member States;
- they refer to a prospective risk of secondary movements without substantiating and publicly identifying evidence of actual movements on the relevant routes;
- the Commission's President stated that nobody had reached mainland Spain or the rest of the Union from Ceuta;
- Article 41 SBC already requires identity and document checks on relevant departures from Ceuta;
- the public descriptions do not establish substantial strain upon the Italian or Spanish authorities or a threat to the overall functioning of the area without internal border control;
- they do not explain why the alternatives identified in Article 26(1) let. a were inadequate;
- the measures were prolonged on substantially unchanged grounds; and
- Spain's measure appears, on the basis of public statements, to have been adopted in response to Italy's controls rather than to an independently established threat in Spain;
- Italy has now prolonged its controls for a third consecutive tranche on materially identical wording, consuming two of the three months permitted by Article 25a(3), without any publicly identified new factual basis;
- the characterisation of the threat as "unforeseeable" within the meaning of Article 25a(1) is inconsistent with Italy's own description of it, across three notifications, as a "continued" threat.

42. These circumstances are capable, at the very least, of giving rise to concerns regarding necessity and proportionality within the meaning of Article 27a(2). They therefore required the Commission to determine whether the statutory threshold for a mandatory opinion had been met.

43. The short descriptions published on the Commission's website may not reproduce the full notifications (which however remain undisclosed). Member States may also withhold or classify certain information under Articles 27(5) and 35 SBC. The Commission should therefore confirm whether the complete Italian and Spanish notifications contained all the information required by Article 27(1), whether either Member State relied upon Article 25(1)(c), whether Article 27(3) was consequently applicable, and whether any material information was withheld or classified.

44. If the notifications did not contain the information necessary to demonstrate a serious threat and assess necessity, proportionality and alternative measures, that deficiency could not reasonably eliminate concerns under Article 27a(2). On the contrary, the absence of the information which the Code makes mandatory would itself constitute a reason for concern and for seeking additional information under Article 27(4).

45. If the Commission identified concerns regarding either measure, it was required to issue an opinion under Article 27a(2) and, upon issuing that opinion, to establish consultation under Article 27a(4). If it concluded that no concerns arose, it should explain that conclusion in its response to this complaint, addressing the statutory conditions and factual inconsistencies identified above.

46. Article 33(6) SBC separately requires the Commission, at least once per year, to report to the European Parliament and the Council on the functioning of the area without internal border control. That report must include an assessment of the necessity and proportionality of the reintroductions and prolongations of internal border control during the relevant period, as well as the actions taken by the Commission.

47. The Article 33(6) obligation does not substitute for the more immediate mechanism under Article 27a(2). It nevertheless confirms that substantive Commission assessment, and not merely receipt and registration of national notifications, is an integral part of the supervisory framework established by the legislature.

48. The consequence of this failure in the operation of the supervisory framework falls directly on the free movement rights of the individuals affected. Unlike a Member State, which may bring an action under Article 259 TFEU, and unlike the Commission itself, which may bring an action under Article 258 TFEU, an individual EU citizen has no direct means of obtaining a ruling on the compatibility of a Member State's Article 25 SBC measure with EU law otherwise than by first being subjected to a check, then challenging that individual measure before a national court, and then awaiting a reference to the Court of Justice under Article 267 TFEU. That route is neither timely nor certain, and that does nothing for the hundreds of thousands of other travellers subjected to the same measures in the interim. The Commission's supervisory role under the SBC is accordingly the only avenue capable of producing a timely, systematic correction of any Member State's breach of the rights conferred by Article 21(1) TFEU and Article 45(1) of the Charter. Failure to exercise it leaves an entire class of rights-holders - estimated in the hundreds of thousands in the present circumstances - without any practical means of enforcement for as long as it continues. The Commission's obligations under Articles 27 and 27a are therefore particularly important where reciprocal measures affect large numbers of travellers and risk normalising the use of internal border controls for political or retaliatory purposes; a negative precedent for the overall operation of the Schengen system and, more broadly, the respect of the rule of law.

49. The Court of Justice held in Case C-769/22, *Commission v Hungary* (Full Court, 21 April 2026, ECLI:EU:C:2026:326), that the values enshrined in Article 2 TEU - including the rule of law - are *per se* legally binding, and that the obligation "to respect, maintain and promote" those values is addressed to the Member States and to the institutions of the Union alike (paragraph 536 of that judgment). The Commission is one of those institutions and this obligation does not only bind it when it assesses the conduct of others but also to its own conduct. It follows that where the Commission holds a supervisory power conferred precisely in order to secure the observance of binding Union law, the decision whether and when to exercise that power its conduct must be measured against Article 2 TEU.

## **V. The request for the opening of infringement proceedings under Article 258 TFEU and the limits of the Commission's discretion**

50. I also request that the Commission initiate infringement proceedings under Article 258 TFEU against Italy and against Spain in respect of the breaches identified in Sections II and III above. This request is independent of the requests made in relation to Articles 27 and 27a SBC. It does not depend upon the outcome of those requests, and must be answered on its own terms even if the Commission were to consider that it has fully discharged its supervisory obligations under the Code.

51. The Commission is under no duty to initiate proceedings under Article 258 TFEU. It is settled that it enjoys in this respect a discretion which excludes any right for individuals to require it to adopt a particular position, and which correspondingly renders inadmissible any action directed against its refusal to act (Case 247/87 *Star Fruit v Commission*, EU:C:1989:58, paras 11–12; Case C-87/89 *Sonito and Others v Commission*, EU:C:1990:213, para 6). This complaint does not contest this established case law under which the Commission's task under Article 17(1) TEU is one of general supervision, discharged in the general interest and by reference to enforcement priorities that the Commission itself, and not the individual complainant, is institutionally competent to set. It however respectfully submits that this case law cannot be applied mechanically to the present configuration, for four reasons.

52. First, the discretion conferred by Article 258 TFEU is a power entrusted to the Commission but whose exercise remains subject to judicial review, as required by the general principle of effective judicial protection under EU law and codified in Article 47 of the Charter of Fundamental Rights, and Article 19(1) TEU, which are ultimately both expression of rule of law. Article 17(1) TEU provides that the Commission “shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them” and that it “shall oversee the application of Union law under the control of the Court of Justice”. A power conferred in order to secure the observance of Union law cannot coherently be construed as a power which its holder may decline to exercise for no stated reason, in circumstances where no one else is in a position to secure that observance. The words “under the control of the Court of Justice” presuppose that the manner in which that supervisory function is exercised remains susceptible of review.

53. Secondly, the complementarity between ‘individual’ vigilance and ‘institutional’ diligence, which lies at the foundation of the Union legal order, cannot be invoked in a manner which leaves both avenues inoperative. In Case 26/62 *van Gend & Loos*, EU:C:1963:1, the Court held that “the vigilance of individuals concerned to protect their rights amounts to an effective supervision *in addition* to the supervision entrusted by Articles 169 and 170 to the *diligence* of the Commission and of the Member States”. Two features of that paragraph are worth highlighting here. The supervision exercised by individuals exists “in addition to”, and therefore does not displace, the supervision entrusted to the institutions: the two are cumulative avenues contributing to a single enforcement mechanism, each conceived as a guarantee against the failure of the other. And what the Treaty entrusts to the Commission under what are now Articles 258 and 259 TFEU is its “diligence”. The supervision of Member State compliance is entrusted to an institution on the assumption that the latter will be exercising it with diligence.

54. It follows that where the vigilance of individuals is, for structural reasons, incapable of being exercised - as it is in the present case, for the reasons set out at paragraphs 58 and 59 below - the supervision which *van Gend & Loos* treats as cumulative is put into question. The Commission cannot both invoke the availability of individual enforcement in order to justify its own inaction and tolerate a situation in which that enforcement is *de facto* unavailable. That

reading would convert a system of two mutually reinforcing oversight channels into one in which each mechanism refers the citizen to the other, but in which the right conferred by the Treaty can't be effectively be secured.

55. Thirdly, as set out at paragraph 49 above, the obligation to respect, maintain and promote the values of Article 2 TEU binds the Member States as it binds the institutions of the Union. Among those values is the rule of law, which in the Union legal order entails that neither the Member States nor the institutions can avoid review of whether the measures adopted by them are in conformity with the basic constitutional charter constituted by the Treaties (Case 294/83 Parti écologiste “Les Verts” v Parliament, EU:C:1986:166, para 23). That principle governs the acts and the omissions of every institution alike, including the exercise of a discretionary power. Therefore a wide discretion is a discretion whose review is limited in its intensity, but which cannot be excluded from review altogether. Where two Member States maintain, on a reciprocal basis and on openly political grounds, measures which suspend a right conferred by the Treaty upon every Union citizen, and where the Commission is *the only actor* capable of bringing that situation to an end within any meaningful period, a decision not to act prompts some minimal scrutiny under the rule of law.

56. Fourthly, and decisively, the Commission's discretion must be partially constrained where the following conditions are cumulatively satisfied: (i) the alleged breach is systemic rather than individual; (ii) it affects a diffuse interest, that is to say a right held by an indeterminate and very large class of persons in which each holder's individual stake is too small to sustain litigation; and (iii) no individual remedy is accessible or, where formally available, effective. Where those conditions are met, the exercise of the discretion determines whether the right in question exists in practice at all. A discretion operating in that way is not merely wide; it determines whether the right exists in the first place. It must therefore be exercised in accordance with the purpose for which it was conferred, and its non-exercise requires some justification.

57. Each of those conditions is satisfied here. The breach is systemic. It does not consist in an isolated misapplication of the Code in an individual case, but in a general practice: applied without differentiation to every person crossing the affected air and sea routes, maintained over successive periods, prolonged on substantially unchanged grounds, and adopted by two Member States in reciprocal relation to one another.

58. The interest affected is diffuse. The right at stake, to cross internal borders without being subjected to border checks, as an expression of Article 21(1) TFEU and Article 45(1) of the Charter, belongs to every Union citizen. The number of persons exposed to these measures runs, on any plausible estimate, into the hundreds of thousands (paragraph 10 above). Yet the burden borne by each of them is, taken in isolation, minimal: the production of an identity document and a few minutes' delay. No rational person incurs the cost, delay and risk of litigation to vindicate an interest of that magnitude. The asymmetry between the negligible individual stake and the very large aggregate damage to the Union legal order is the defining characteristic of a diffuse interest.

59. No effective individual remedy is available. As explained at paragraph 48 above, a Union citizen has no direct means of obtaining a ruling on the compatibility of a Member State's Article 25 SBC measure with Union law. In practice the routes open to the individual are the following, and each of them is illusory:

- challenging the individual check before a national court: a check at an internal border is, as a rule, not an act susceptible of separate challenge; it is completed within minutes and leaves no continuing legal effect capable of founding an interest in bringing proceedings;
- refusing to present an identity document, incurring a penalty, and contesting that penalty: this is the route which in fact produced the Court's ruling in Joined Cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, EU:C:2022:298, in which the Court held that a Member State may not require a person to present a passport or identity card upon entry through an internal border where the reintroduction of controls is contrary to Article 25(4) SBC. That judgment demonstrates both that the substantive right is real and how it must be vindicated: the citizen obtains access to a court only by first exposing himself to a sanction. A right whose judicial protection is conditional upon the commission of what national law treats as an offence is not effectively protected within the meaning of Article 19(1) TEU and Article 47 of the Charter;
- awaiting a ruling under Article 267 TFEU: even where a reference is made, it produces a ruling years after the events - in *NW* itself, the controls at issue had been in place for years before the Court ruled - whereas the measures complained of here were adopted and prolonged in tranches of thirty and fifteen days, renewed three times in Italy's case. Their temporary form makes them permanent in effect and unreviewable in practice, as they are shorter than any of the procedures supposed to review them.

60. It follows that unless the Commission acts, the persons affected by these controls cannot in practice exercise the freedom of movement which the Treaty confers upon them, and the rights guaranteed by Article 21(1) TFEU and Article 45(1) of the Charter are, for the duration of the measures and for every person concerned, rendered ineffective by the Commission's inaction.. In that situation the discretion under Article 258 TFEU cannot lawfully be exercised to favour inaction without, at the very least, a reasoned justification addressing that consequence.

61. In any event, and independently of everything set out above, should the Commission decide not to act on this complaint, it is required to state the grounds of that decision. Article 17(1) TEU provides that the Commission "shall oversee the application of Union law under the control of the Court of Justice of the European Union". The Treaty thus subjects the supervisory function itself (and not merely the individual acts adopted in the course of it) to judicial control. For such a control to exist, however, some grounds must be given, that is to verify whether the grounds relied upon are lawful, whether the facts on which they rest are accurate, and whether any manifest error has been committed. Where no grounds are given, there is nothing for a court to examine, and the discretion is placed beyond review altogether. The duty to give reasons is therefore the precondition of that control, and not a consequence of it. The Complainant accordingly requests that, should the Commission decide not to pursue this matter, it be informed of the grounds on which that decision rests. In any event, the Commission is required to state the reasons for a decision not to act.

62. The Commission has, in addition, assumed administrative commitments towards complainants in its Communication "EU law: Better results through better application" (OJ C 18, 19.1.2017, p. 10), including the registration and acknowledgement of complaints, the giving of reasons, and the obligation to inform the complainant and afford an opportunity to submit observations before a complaint is closed. Those are rules which the Commission has imposed upon itself and from which it cannot depart without explanation.

63. Nor can it be said that the assessment requested is impracticable or premature. On 2 June 2026 the Commission issued Opinions under Article 27a(3) SBC in respect of nine Schengen States, Italy among them (paragraph 9 above). In each case it examined the evidence supporting the alleged threat, the geographical and temporal scope of the controls, the availability of alternative measures, and the impact on free movement and on cross-border regions; and in each case it concluded that effective alternatives were available and recommended that the controls be phased out and gradually lifted. The Commission therefore possesses both the institutional capacity and a recently articulated methodology for precisely the assessment sought here, and has applied that methodology to Italy itself some six weeks before the notification complained of. It cannot consistently maintain that the same exercise is impracticable when the measure under scrutiny is the one adopted in response to the events in Ceuta.

64. Accordingly, should the Commission decide not to initiate infringement proceedings, I request that it adopt and communicate to me a reasoned decision to that effect. That decision should address, specifically and not in general terms: the systemic character of the practice complained of; the number of individuals affected; the absence of any accessible and effective individual remedy; and the consequences of continued inaction for the rights conferred by Article 21(1) TFEU and Article 45(1) of the Charter. A refusal which is unreasoned, or which is reasoned solely by reference to the existence of a discretion, would satisfy neither the right to good administration guaranteed by Article 41 of the Charter nor the obligation to state reasons which Article 296 TFEU imposes on the legal acts of the institutions; it would preclude any meaningful review of the exercise of that discretion; and it would constitute maladministration within the meaning of Article 228 TFEU, and be the object of a legal action.

## **VI. Requests**

In light of the foregoing, I respectfully request that the Commission:

1. Confirm whether the complete notifications submitted by Italy and Spain complied with Article 27(1), including the requirements to provide all relevant data detailing the events constituting the alleged serious threat and an assessment of necessity and proportionality under Article 26(1);
2. Confirm the precise legal basis invoked by each Member State, including whether either Italy or Spain relied upon the exceptional situation described in Article 25(1)(c);
3. If Article 25(1)(c) was invoked, assess whether the notifications established each of its cumulative conditions, including sudden, large-scale unauthorised movements *between* Member States, substantial strain upon national authorities, and a likely risk to the overall functioning of the area without internal border control;
4. If Article 25(1)(c) was invoked, confirm whether each notification contained the risk assessment and information required by Article 27(3), including information obtained from relevant Union agencies and analysis from relevant information systems;
5. If Article 25(1)(c) was not invoked, identify “the serious threat to public policy or internal security” relied upon by each Member State and assess whether the information submitted established that threat and demonstrated compliance with Articles 25(2), 26(1) and 27(1);

6. Confirm whether Italy and Spain each invoked Article 25a(1) (unforeseeable threat) or Article 25a(4) (foreseeable threat), for each notification and prolongation, and state the date on which each notification was received;
7. Where Article 25a(1) was invoked for the prolongations taking effect on 1 and 16 September 2026, state whether the Commission assessed the continued applicability of the condition that the threat “is unforeseeable and requires immediate action”, and confirm the date on which the three-month maximum under Article 25a(3) will be reached in each case;
8. Where Article 25a(4) was invoked, confirm whether the four-week advance notification requirement was complied with and for which – if any of the - prolongation.
9. Indicate whether the Commission requested additional information under Article 27(4), particularly concerning:
- actual unauthorised movements between Member States;
  - the scale and imminence of the alleged secondary-movement risk;
  - the strain allegedly imposed upon Italian or Spanish authorities;
  - the geographical and temporal scope of the controls;
  - the availability of alternative measures under Articles 23 and 23a;
  - the impact on free movement; and
  - the mitigating measures adopted under Article 26(3);
10. Confirm whether any relevant information was withheld or classified under Articles 27(5) and 35 SBC (confidentiality), while providing as much information as possible concerning the completeness of the notifications without disclosing legitimately protected material;
11. State whether the Commission identified concerns regarding the necessity or proportionality of either reintroduction or prolongation within the meaning of Article 27a(2);
12. If such concerns were identified, issue the opinion required by Article 27a(2) and establish the consultation process required by Article 27a(4);
13. If the Commission concluded that no concerns arose, provide a reasoned explanation addressing the specific factual and legal inconsistencies identified in this complaint, including the distinction between entry from Morocco into Ceuta and unauthorised movements between Member States;
14. State whether either Italy or Spain, as a Member State directly affected by the other’s controls, requested consultation under Article 27a(1), in which case the establishment of a consultation process was mandatory;
15. Include the Italian and Spanish measures in the assessment of necessity and proportionality required by Article 33(6) SBC and report the action taken by the Commission in relation to them;
16. Initiate infringement proceedings under Article 258 TFEU against Italy in respect of the breaches of Articles 22, 25, 26 and 27 SBC identified in Section II above, by addressing to it a letter of formal notice. This request is made on a self-standing basis and not in the alternative to, or in dependence upon, the requests set out at points 1 to 12 above;

17. Initiate infringement proceedings under Article 258 TFEU against Spain in respect of the breaches of Articles 22, 25, 26 and 27 SBC identified in Section III above, by addressing to it a letter of formal notice, likewise on a self-standing basis;

18. In determining those requests, take into account the systemic character of the practices complained of, the diffuse nature of the interest affected, the number of persons concerned, and the absence of any accessible and effective individual remedy, as set out in Section V above;

19. Should the Commission decide not to initiate such proceedings against either Member State, adopt and communicate to me a reasoned decision to that effect, addressing specifically the matters identified at paragraph 65 above;

20. Confirm that any such decision will be adopted and communicated in a form enabling its review, it being understood that I reserve all rights and remedies available to me, including recourse to the European Ombudsman and to the Court of Justice of the European Union under Articles 263 and 265 TFEU; and

21. Provide a substantive and reasoned response to this complaint addressing each of the legal grounds set out above, rather than treating the matter exclusively as an exercise of the Commission's discretion under Article 258 TFEU. A response which justifies the absence of action exclusively as an exercise of that discretion would constitute maladministration, could be brought to the attention of the European Ombudsman, and could form the object of legal action.

I would be grateful for acknowledgment of receipt within the applicable period and for notification of the reference number under which this complaint has been registered. Should the Commission contemplate closing the complaint without further action, I request prior notice setting out the grounds for the proposed closure and an opportunity to submit observations in accordance with the Commission's rules on relations with complainants.

Yours faithfully,

**Alberto Alemanno**

Jean Monnet Professor of European Union Law, HEC Paris, acting jointly with:

Former EU Commissioners:

- **László Andor**, former Commissioner for Employment, Social Affairs and Inclusion
- **Joaquín Almunia**, former Commissioner for Competition
- **Josep Borrell**, former High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission
- **Nicolas Schmit**, former Commissioner for Jobs and Social Rights
- **Sophie in 't Veld**, former Member of the European Parliament

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