JUDGMENT OF THE COURT (Grand Chamber)

22 June 2010 (*)

(Reference for a preliminary ruling – Article 267 TFEU – Examination of whether a national law is consistent both with European Union law and with the national constitution – National legislation granting priority to an interlocutory procedure for the review of constitutionality – Article 67 TFEU – Freedom of movement for persons – Abolition of border control at internal borders – Regulation (EC) No 562/2006 – Articles 20 and 21 – National legislation authorising identity checks in the area between the land border of France with States party to the Convention Implementing the Schengen Agreement and a line drawn 20 kilometres inside that border)

In Joined Cases C-188/10 and C-189/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decisions of 16 April 2010, received at the Court on the same day, in proceedings against

Aziz Melki (C-188/10),

Sélim Abdeli (C-189/10),

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, K. Schiemann, E. Juhász, **T. von Danwitz (Rapporteur)**, J.-J. Kasel and M. Safjan, Judges,

Advocate General: **J. Mazák**,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the order of the President of the Court of 12 May 2010 deciding to apply an **accelerated procedure to the references for a preliminary ruling** in accordance with Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure,

having regard to the written procedure and further to the hearing on 2 June 2010,

after considering the observations submitted on behalf of:

– Mr Melki and Mr Abdeli, by R. Boucq, avocat,

– the French Government, by E. Belliard, G. de Bergues and B. Beaupère-Manokha, acting as Agents,

– the Belgian Government, by C. Pochet, M. Jacobs and T. Materne, acting as Agents, and by F. Tulkens, avocat,

– the Czech Government, by M. Smolek, acting as Agent,

– the German Government, by J. Möller, B. Klein and N. Graf Vitzthum, acting as Agents,

– the Greek Government, by T. Papadopoulou and L. Kotroni, acting as Agents,

– the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

– the Polish Government, by J. Faldyga, M. Jarosz and M. Szpunar, acting as Agents,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the European Commission, by J.-P. Keppenne and M. Wilderspin, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Articles 67 TFEU and 267 TFEU.

2 The references have been made in the course of two sets of proceedings brought against Mr Melki and Mr Abdeli respectively – both of whom are of Algerian nationality – seeking the extension of their detention in premises not falling within the control of the prison service.

Legal context

European Union law

3 Under the preamble to Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290; 'Protocol No 19'):

'The High Contracting Parties,

noting that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, have been integrated into the framework of the European Union by the Treaty of Amsterdam of 2 October 1997,

desiring to preserve the Schengen *acquis*, as developed since the entry into force of the Treaty of Amsterdam, and to develop this *acquis* in order to contribute towards achieving the objective of offering citizens of the Union an area of freedom, security and justice without internal borders,

…

have agreed upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union'.

4 Article 2 of that protocol states:

'The Schengen *acquis* shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or to Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.'

5 The Schengen *acquis* comprises, inter alia, the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed at Schengen (Luxembourg) on 19 June 1990 ('the CISA'), Article 2 of which concerned the crossing of internal borders.

6 Under Article 2(1) to (3) of the CISA:

'1. Internal borders may be crossed at any point without any checks on persons being carried out.

2. However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof.

3. The abolition of checks on persons at internal borders shall not affect the provisions laid down in Article 22, or the exercise of police powers throughout a Contracting Party's territory by the competent authorities under that Party's law, or the requirement to hold, carry and produce permits and documents provided for in that Party's law.'

7 Article 2 of the CISA was repealed as from 13 October 2006, in accordance with Article 39(1) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

8 Under Article 2, points 9 to 11, of that regulation:

'For the purposes of this Regulation the following definitions shall apply: …

9. "border control", means the 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;

10. "border checks", means the checks carried out at border crossing points, 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;

11. "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'.

9 Article 20 of Regulation No 562/2006, entitled 'Crossing internal borders', provides:

'Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.'

10 Article 21 of that regulation, entitled 'Checks within the territory', provides:

'The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

(i) do not have border control as an objective;

(ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;

(iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;

(iv) are carried out on the basis of spot-checks; …

(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents; …'

National law

Constitution of 4 October 1958

11 Article 61-1 of the Constitution of 4 October 1958, as amended by Constitutional Law No 2008-724 of 23 July 2008 on the modernisation of the institutions of the Fifth Republic (JORF of 24 July 2008, p. 11890) ('the Constitution'), provides:

'If, in the course of proceedings before a court or tribunal, it is claimed that a legislative provision prejudices the rights and freedoms which the Constitution guarantees, the matter may be brought before the Conseil constitutionnel [Constitutional Council] further to a reference from the Conseil d'État [Council of State] or the Cour de Cassation [Court of Cassation], which shall rule within a fixed period.

An Organic Law shall determine the conditions for implementing the present article.'

12 The second and third paragraphs of Article 62 of the Constitution provide:

'A provision declared unconstitutional on the basis of Article 61-1 shall be repealed as of the publication of the decision of the Conseil constitutionnel or as of a subsequent date determined

by that decision. The Conseil constitutionnel shall determine the conditions and limits within which the effects produced by the provision may be affected.

No appeal shall lie from the decisions of the Conseil constitutionnel. They shall be binding on public authorities and on all administrative authorities and courts.'

13 Under Article 88-1 of the Constitution:

'The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common pursuant to the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007.'

Order No 58-1067

14 Organic Law No 2009-1523 of 10 December 2009 on the application of Article 61-1 of the Constitution (JORF of 11 December 2009, p. 21379) inserted a new Chapter IIa, entitled 'Priority Questions on Constitutionality', into Title II of Order No 58-1067 of 7 November 1958 on the organic law governing the Conseil constitutionnel. That Chapter IIa provides:

'Section 1

Provisions applicable before the courts and tribunals subject to the authority of the Conseil d'État or the Cour de cassation

Article 23-1

Before the courts and tribunals subject to the authority of the Conseil d'État or the Cour de cassation, a plea alleging that a legislative provision prejudices the rights and freedoms guaranteed by the Constitution shall be submitted in a separate, reasoned document, failing which it shall be inadmissible. Such a plea may be raised for the first time in appeal proceedings. A court or tribunal may not raise the issue of its own motion. …

Article 23-2

The court or tribunal shall rule without delay, by way of reasoned decision, on whether to submit the priority question on constitutionality to the Conseil d'État or the Cour de cassation. The question shall be so submitted if the following conditions are met:

1. The contested provision is applicable to the dispute or to the proceedings, or forms the basis of the action;

2. It has not already been declared constitutional in the grounds or the operative part of a decision of the Conseil constitutionnel, except where there has been a change in circumstances;

3. The question is not devoid of substance.

In any event, where pleas are made before the court or tribunal challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on whether to submit the question on constitutionality to the Conseil d'État or the Cour de cassation.

The decision to submit the question shall be sent to the Conseil d'État or to the Cour de cassation within eight days of its being made, together with the pleadings or the submissions of the parties. It shall not be open to appeal. A refusal to submit the question may be challenged only at the time of an appeal against the decision disposing of all or part of the case.

Article 23-3

Where the question is submitted, the court or tribunal shall stay proceedings until receipt of the decision of the Conseil d'État or the Cour de cassation or, if the matter has been referred to it, of the Conseil constitutionnel. The preparatory inquiries shall not be suspended and the court or tribunal may take the necessary interim or protective measures.

However, proceedings shall not be stayed either where a person is deprived of his liberty by reason of the proceedings, or where the purpose of the proceedings is to bring to an end a measure depriving someone of his liberty.

The court or tribunal may also rule without awaiting the decision on the priority question on constitutionality if law or regulation provides that it is to rule within a fixed period or as a matter of urgency. If the court at first instance rules without waiting and an appeal is brought against its decision, the appeal court shall stay proceedings. It may, however, not stay the proceedings if it is itself required to rule within a fixed period or as a matter of urgency.

In addition, where a stay of proceedings would risk leading to irreparable or manifestly excessive consequences for the rights of a party, the court or tribunal which decides to submit the question may rule on those points which must be decided immediately.

If an appeal on a point of law has been brought where the courts adjudicating on the substance have ruled without awaiting the decision of the Conseil d'État or the Cour de cassation or, if the matter has been referred to it, the decision of the Conseil constitutionnel, any decision on that appeal shall be stayed until a ruling has been given on the priority question on constitutionality. That shall not apply where the party concerned is deprived of his liberty by reason of the proceedings and legislation provides that the Cour de cassation is to rule within a fixed period.'

Section 2

Provisions applicable before the Conseil d'État and the Cour de cassation

Article 23-4

Within a period of three months from receipt of the submission provided for in Article 23-2 or in the last paragraph of Article 23-1, the Conseil d'État or the Cour de cassation shall rule on whether to refer the priority question on constitutionality to the Conseil constitutionnel. A reference shall be made where the conditions laid down in Article 23-2(1) and (2) are met and where the question is new or of substance.

Article 23-5

A plea alleging that a legislative provision prejudices the rights and freedoms guaranteed by the Constitution may be raised, including for the first time on appeal on a point of law, in proceedings before the Conseil d'État or the Cour de cassation. The plea shall be submitted in

a separate, reasoned document, failing which it shall be inadmissible. The court may not raise the issue of its own motion.

In any event, where pleas are made before the Conseil d'État or the Cour de cassation challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on the referral of the question on constitutionality to the Conseil constitutionnel.

The Conseil d'État or the Cour de cassation shall have a period of three months from the date on which the plea is submitted to deliver its decision. The priority question on constitutionality shall be referred to the Conseil constitutionnel where the conditions laid down in Article 23-2(1) and (2) are met and the question is new or of substance.

Where a reference has been made to the Conseil constitutionnel, the Conseil d'État or the Cour de cassation shall stay proceedings until it has made its ruling. That shall not apply where the party concerned is deprived of his liberty by reason of the proceedings and legislation provides that the Cour de Cassation is to rule within a fixed period. If the Conseil d'État or the Cour de cassation is required to rule as a matter of urgency, it is possible for the proceedings not to be stayed. …

Article 23-7

The reasoned decision of the Conseil d'État or the Cour de cassation to refer the matter to the Conseil constitutionnel shall be sent to it together with the pleadings or submissions of the parties. The Conseil constitutionnel shall receive a copy of any reasoned decision of the Conseil d'État or the Cour de cassation not to refer a priority question on constitutionality to it. If the Conseil d'État or the Cour de cassation has not ruled within the periods prescribed in Articles 23-4 and 23-5, the question is submitted to the Conseil constitutionnel. …

Section 3

Provisions applicable before the Conseil constitutionnel […]

Article 23-10

The Conseil constitutionnel shall issue a ruling within three months of the date on which the matter was referred to it. The parties shall be permitted to submit their observations in adversarial proceedings. The hearing shall be public, save in exceptional cases defined in the Rules of Procedure of the Conseil constitutionnel. …'

The Code of Criminal Procedure

15 Article 78-2 of the Code of Criminal Procedure (code de procédure pénale), in the version in force at the material time, provides:

'Senior police officers and, upon their orders and under their responsibility, the police officers and assistant police officers referred to in Articles 20 and 21-1 may ask any person to prove his identity by any means, where one or more plausible reasons exist for suspecting that:

– the person has committed or attempted to commit an offence;

– or the person is preparing to commit a "crime" [most serious criminal offence] or a "délit" [less serious offence];

– or the person is likely to provide information useful for the investigation in the event of a "crime" or a "délit";

– or the person is the subject of inquiries ordered by a judicial authority.

On the public prosecutor's written recommendations for the purposes of the investigation and prosecution of offences specified by him, the identity of any person may also be checked, in accordance with the same rules, in the places and for a period of time determined by the public prosecutor. The fact that the identity check uncovers offences other than those referred to in the public prosecutor's recommendations shall not constitute a ground for invalidating the related proceedings.

The identity of any person, regardless of his behaviour, may also be checked pursuant to the rules set out in the first paragraph, to prevent a breach of public order, in particular, an offence against the safety of persons or property.

In an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. Where that control takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometres from the border. However, on international trains on lines with particular service characteristics the control may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops shall be designated by Ministerial order. Where there is a section of motorway starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20 kilometre line, the control may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order. The fact that the identity check reveals an offence other than the non-observance of the aforementioned obligations shall not constitute a ground for invalidating the related proceedings. …'

The actions in the main proceedings and the questions referred for a preliminary ruling

16 Mr Melki and Mr Abdeli, Algerian nationals unlawfully present in France, were subject to a police control, pursuant to Article 78-2, fourth paragraph, of the Code of Criminal Procedure, in the area between the land border of France with Belgium and a line drawn 20 kilometres inside that border. On 23 March 2010, they were each made the subject of a deportation order from the Prefect and a decision for continued detention.

17 Before the juge des libertés et de la détention (Judge deciding on provisional detention), to which the Prefect had made an application for extension of that detention, Mr Melki and Mr Abdeli disputed the lawfulness of the check made on them and raised the issue of the constitutionality of Article 78-2, fourth paragraph, of the Code of Criminal Procedure, on the ground that that provision prejudices the rights and freedoms guaranteed by the Constitution.

18 By two orders of 25 March 2010, the juge des libertés et de la détention ordered, first, that the question whether Article 78-2, fourth paragraph, of the Code of Criminal Procedure prejudices the rights and freedoms guaranteed by the Constitution be submitted to the Cour de Cassation and, second, that the detention of Mr Melki and Mr Abdeli be extended by 15 days.

19 According to the referring court, Mr Melki and Mr Abdeli claim that Article 78-2, fourth paragraph, of the Code of Criminal Procedure is contrary to the Constitution, given that the French Republic's commitments resulting from the Treaty of Lisbon have constitutional value in the light of Article 88-1 of the Constitution, and that that provision of the Code of Criminal Procedure, in so far as it authorises border controls at the borders with other Member States, is contrary to the principle of freedom of movement for persons set out in Article 67(2) TFEU, which provides that the European Union is to ensure the absence of internal border controls for persons.

20 The referring court considers, first, that the issue arises whether Article 78-2, fourth paragraph, of the Code of Criminal Procedure is consistent both with European Union Law ('EU law') and with the Constitution.

21 Second, the Cour de cassation infers from Articles 23-2 and 23-5 of Order No 58-1067, and from Article 62 of the Constitution, that courts adjudicating on the substance, like itself, are denied, by the effect of Organic Law No 2009-1523 which introduced those articles into Order No 58-1067, the opportunity to refer a question to the Court of Justice of the European Union for a preliminary ruling, where a priority question on constitutionality has been referred to the Conseil constitutionnel.

22 As it takes the view that its decision on whether to refer the priority question on constitutionality to the Conseil constitutionnel depends on the interpretation of EU law, the Cour de cassation decided, in both cases which are pending, to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Article 267 [TFEU] preclude legislation such as that resulting from Article 23-2, paragraph 2, and Article 23-5, paragraph 2, of Order No 58-1067 of 7 November 1958, created by Organic Law No 2009-1523 of 10 December 2009, in so far as those provisions require courts to rule as a matter of priority on the submission to the Conseil constitutionnel of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution?

2. Does Article 67 [TFEU] preclude legislation such as that resulting from Article 78-2, paragraph 4, of the Code of Criminal Procedure, which provides that "in an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are observed. Where that control takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometres from the border. However, on international trains on lines with particular service characteristics the control may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops shall be designated by

Ministerial order. Where there is a section of motorway starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20 kilometre line, the control may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order".'

23 By order of the President of the Court of 20 April 2010, Cases C-188/10 and C-189/10 were joined for the purposes of the written and oral procedures and of the judgment.

The questions referred for a preliminary ruling

Admissibility

24 The French Government contends that the references for a preliminary ruling are inadmissible.

25 As regards the first question, the French Government submits that it is purely hypothetical. That question is based on the premiss that the Conseil constitutionnel, when examining whether a law is consistent with the Constitution, may find it necessary to examine whether that law is consistent with EU law. However, according to the case-law of the Conseil constitutionnel, it is not for the Conseil, in the context of review of the constitutionality of laws, but rather for the ordinary and administrative courts to examine whether a law is consistent with EU law. It follows that, under national law, the Conseil d'État and the Cour de cassation are not obliged to refer to the Conseil constitutionnel questions on the compatibility of provisions of national law with EU law, since such questions are not related to the review of constitutionality.

26 As regards the second question, the French Government contends that a reply to that question would serve no purpose. Since 9 April 2010, Mr Melki and Mr Abdeli have no longer been the subject of any measure depriving them of their liberty and, as from that date, the two orders of the juge des libertés et de la détention have ceased to have any effect. The issue of the compatibility of Article 78-2, fourth paragraph, of the Code of Criminal Procedure with Article 67 TFEU is also irrelevant for the only set of proceedings still pending before the Cour de cassation, given that, as the Conseil constitutionnel recalled in its decision No 2010-605 DC of 12 May 2010, the Conseil maintains that it does not have jurisdiction to examine the compatibility of legislation with EU law, where it is required to review the constitutionality of that legislation.

27 In that regard, suffice it to point out that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-333/07 *Regie Networks* [2008] ECR I-10807, paragraph 46; Case C-478/07 *Budejovicky Budvar* [2009] ECR I-0000, paragraph 63; and Case C-56/09 *Zanotti* [2010] ECR I-0000, paragraph 15).

28 In this instance, the questions referred concern the interpretation of Articles 67 TFEU and 267 TFEU. It is not apparent from the grounds of the orders for reference that the orders issued by the juge des libertés et de la détention in respect of Mr Melki and Mr Abdeli have ceased to

have any effect. Furthermore, it is not obvious that the Cour de cassation's interpretation of how the priority question on constitutionality functions is clearly precluded in the light of the wording of the provisions of national law.

29 Therefore, the presumption of relevance enjoyed by the reference for a preliminary ruling in each of the cases is not rebutted by the objections submitted by the French Government.

30 In those circumstances, the references for a preliminary ruling made in these cases must be declared admissible.

The first question

31 By its first question, the referring court asks, in essence, whether Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, requiring the courts of that Member State to rule as a matter of priority on whether to refer, to the national court responsible for reviewing the constitutionality of laws, a question on whether a provision of national law is consistent with the Constitution, when at the same time the conflict of that provision with EU law is at issue.

Observations submitted to the Court

32 Mr Melki and Mr Abdeli consider that the national legislation at issue in the main proceedings is consistent with EU law, provided that the Conseil constitutionnel examines EU law and, where there is a doubt on the interpretation of that law, makes a reference to the Court of Justice for a preliminary ruling, requesting that the accelerated procedure be applied to that reference pursuant to Article 104a of the Rules of Procedure of the Court of Justice.

33 The French Government is of the opinion that EU law does not preclude the national legislation at issue, since that legislation does not alter or affect the role and the jurisdiction of the national courts in applying EU law. In support of that line of argument, the French Government relies, in essence, on the same interpretation of that legislation as that given – subsequent to the submission of the orders for reference by the Cour de cassation to the Court of Justice – both by the Conseil constitutionnel in its decision No 2010-605 DC of 12 May 2010, and by the Conseil d'État in its decision No 312305 of 14 May 2010.

34 Under that interpretation, the purpose of a priority question on constitutionality cannot be to refer to the Conseil constitutionnel a question on the compatibility of legislation with EU law. It is not for the Conseil, but for the ordinary and administrative courts to examine whether legislation is consistent with EU law, to apply EU law themselves on the basis of their own assessment, and to refer questions to the Court of Justice for a preliminary ruling at the same time as, or subsequent to, the submission of a priority question on constitutionality.

35 In that regard, the French Government contends in particular that, according to the national legislation at issue in the main proceedings, the national court can either rule, under certain conditions, on the substance of the case without awaiting the decision of the Cour de cassation, the Conseil d'État or the Conseil constitutionnel on the priority question on constitutionality, or take the interim or protective measures necessary to ensure the immediate protection of the rights granted to individuals under EU law.

36 Both the French and Belgian Governments claim that the procedural mechanism of the priority question on constitutionality is designed to guarantee to individuals that their request for an examination of the constitutionality of a national provision will actually be dealt with, without its being possible for referral to the Conseil constitutionnel to be precluded on the basis that the provision in question is incompatible with EU law. In addition, referral to the Conseil constitutionnel has the advantage that the Conseil can repeal a law which is incompatible with the Constitution, and that repeal then has an effect *erga omnes*. By contrast, the effects of a judgment of an ordinary or administrative court, which finds that a national provision is incompatible with EU law, are limited to the specific case decided by that court.

37 The Czech Government suggests that the Court reply that it follows from the principle of primacy of EU law that the national court is required to ensure that EU law is given full effect, by examining whether national law is compatible with EU law and by not applying those provisions of national law which are contrary to EU law, without having first to refer the matter to the national constitutional court or another national court. According to the German Government, the exercise of the right to make a reference to the Court of Justice for a preliminary ruling, which is conferred on every national court or tribunal by Article 267 TFEU, must not be obstructed by a provision of national law which makes a reference to the Court of Justice, for an interpretation of EU law, subject to the decision of another national court. The Polish Government is of the opinion that Article 267 TFEU does not preclude legislation such as that covered by the first question referred, given that the procedure laid down in that legislation does not adversely affect the substance of the rights and obligations of national courts resulting from Article 267 TFEU.

38 The Commission considers that EU law, and in particular the principle of primacy of that law and Article 267 TFEU, precludes national legislation such as that described in the orders for reference, where every challenge to the compatibility of a legislative provision with EU law enables the individual to rely on a breach of the Constitution by that legislative provision. In that case, the burden of ensuring that EU law is observed is implicitly but necessarily transferred from the court ruling on the substance of a case to the Conseil constitutionnel. Consequently, the mechanism of the priority question on constitutionality leads to a situation such as that held to be contrary to EU law by the Court in Case 106/77 *Simmenthal* [1978] ECR 629. The fact that the constitutional court may, itself, refer questions to the Court of Justice for a preliminary ruling does not remedy that situation.

39 If, on the other hand, a challenge to the compatibility of a legislative provision with EU law does not enable the individual *ipso facto* to challenge the compatibility of the same legislative provision with the Constitution, such that the court ruling on the substance of a case retains jurisdiction to apply EU law, then EU law does not preclude national legislation such as that covered by the first question referred, in so far as a number of criteria are met. According to the Commission, the national court must remain free, simultaneously, to refer to the Court of Justice for a preliminary ruling any question which it considers necessary, and to adopt any measure necessary to ensure provisional judicial protection of the rights guaranteed under EU law. It is also necessary, first, that the interlocutory procedure for the review of constitutionality does not lead to a stay of the substantive proceedings for an excessively long period and, second, that, at the end of that interlocutory procedure and irrespective of its outcome, the national court remains entirely free to assess whether the national legislative provision is consistent with EU law, to disapply that provision if that court holds that it is contrary to EU law, and to refer questions to the Court of Justice for a preliminary ruling if it considers that to be necessary.

The Court's reply

40 Article 267 TFEU confers jurisdiction on the Court to give preliminary rulings concerning both the interpretation of the Treaties and acts of the institutions, bodies, offices or agencies of the Union and the validity of those acts. The second paragraph of that article provides that a national court or tribunal may refer such questions to the Court, if it considers that a decision on the question is necessary to enable it to give judgment, and the third paragraph of that article provides that the national court or tribunal is bound to make a reference if there is no judicial remedy under national law against its decisions.

41 It follows that, first, while it might be convenient, in certain circumstances, for questions of purely national law to be settled at the time the reference is made to the Court (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 6), national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part (see, inter alia, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 3; Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 44; and Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 88).

42 The Court has concluded therefrom that the existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice (see, to that effect, *Rheinmühlen-Düsseldorf*, paragraphs 4 and 5, and *Cartesio*, paragraph 94). The lower court must be free, in particular if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (Case C-378/08 *ERG and Others* [2010] ECR I-0000, paragraph 32).

43 Second, the Court has already held that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, inter alia, *Simmenthal*, paragraphs 21 and 24; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 73; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 72; and Case C-314/08 *Filipiak* [2009] ECR I-0000, paragraph 81).

44 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements which are the very essence of EU law (see *Simmenthal*, paragraph 22, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20). This would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary (see, to that effect, *Simmenthal*, paragraph 23).

45 Lastly, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration, that a rule of national law is unconstitutional, is subject to a mandatory reference to the constitutional court. The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by EU law from exercising the right conferred on it by Article 267 TFEU to refer to the Court of Justice questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law (see *Mecanarte*, paragraphs 39, 45 and 46).

46 As regards the conclusions to be drawn from the case-law referred to above in relation to national provisions such as those covered by the first question referred, it should be observed that the referring court starts from the premiss that, under those provisions, when considering a question on constitutionality which is based on the fact that the legislation in question is not consistent with EU law, the Conseil constitutionnel also assesses whether that legislation is compatible with EU law. If that is so, where the court ruling on the substance submits the question on constitutionality, it could, before that submission, neither rule on whether the legislation concerned is compatible with EU law, nor refer a question in relation to that legislation to the Court of Justice for a preliminary ruling. Moreover, if the Conseil constitutionnel were to hold that the legislation in question is consistent with EU law, the court ruling on the substance also could not, after the Conseil constitutionnel's decision – which is binding on all judicial authorities – has been delivered, refer a question to the Court of Justice for a preliminary ruling. The same would be true where the plea alleging that a legislative provision is unconstitutional is raised during proceedings before the Conseil d'État or the Cour de cassation.

47 Under that interpretation, the national legislation at issue in the main proceedings would result in the ordinary and administrative national courts being prevented, both before submitting a question on constitutionality and, as the case may be, after the decision of the Conseil constitutionnel on that question, from exercising their right or fulfilling their obligation, provided for in Article 267 TFEU, to refer questions to the Court of Justice for a preliminary ruling. It must be stated that it follows from the principles set out in the case-law cited in paragraphs 41 to 45 above that Article 267 TFEU precludes national legislation such as that described in the orders for reference.

48 However, as is apparent from paragraphs 33 to 36 above, the French and Belgian Governments have advanced a different interpretation of the French legislation covered by the first question referred, relying on, inter alia, the decision of the Conseil constitutionnel No 2010-605 DC of 12 May 2010, and the decision of the Conseil d'État No 312305 of 14 May 2010, which were delivered after the Cour de cassation submitted its orders for reference to the Court of Justice.

49 In that regard, it should be borne in mind that it is for the referring court to determine, in the cases before it, what the correct interpretation of national law is.

50 Under settled case-law, it is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of EU law (Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39; Case C-115/08 *ČEZ* [2009] ECR I-0000, paragraph 138; and Case C-91/08 *Wall* [2010] ECR I-0000, paragraph 70). In the light of the aforementioned decisions of the Conseil constitutionnel and the Conseil d'État, such

an interpretation of the national provisions which introduced the mechanism for review of constitutionality at issue in the main proceedings cannot be ruled out.

51 An examination of the question whether it is possible to interpret the mechanism of the priority question on constitutionality in accordance with the requirements of EU law cannot undermine the essential characteristics of the system of cooperation between the Court of Justice and the national courts, established by Article 267 TFEU, as they result from the case-law cited in paragraphs 41 to 45 above.

52 According to the settled case-law of the Court, in order to ensure the primacy of EU law, the functioning of that system of cooperation requires the national court to be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality.

53 In so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Article 267 TFEU nevertheless requires that that court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law.

54 It should also be observed that the priority nature of an interlocutory procedure for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly (see, to that effect, Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraphs 15 to 20; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 27; and Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 53).

55 To the extent that the priority nature of an interlocutory procedure for the review of constitutionality leads to the repeal of a national law – which merely transposes the mandatory provisions of a European Union directive – on the basis that that law is contrary to the national constitution, the Court could, in practice, be denied the possibility, at the request of the courts ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law, and in particular the rights recognised by the Charter of Fundamental Rights of the European Union, to which Article 6 TEU accords the same legal value as that accorded to the Treaties.

56 Before the interlocutory review of the constitutionality of a law – the content of which merely transposes the mandatory provisions of a European Union directive – can be carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required – under the third paragraph of Article 267 TFEU – to refer to the Court of Justice a question on the validity of that directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory review of constitutionality has itself referred that question to the Court pursuant to the second paragraph of Article 267 TFEU. In the case of a national implementing law with such content,

the question of whether the directive is valid takes priority, in the light of the obligation to transpose that directive. In addition, imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question.

57 **Accordingly, the reply to the first question referred is that** Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

– to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,

– to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and

– to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law.

The second question

58 By its second question, the referring court seeks to know, in essence, whether Article 67 TFEU precludes national legislation which permits police authorities, within an area of 20 kilometres from the land border of a Member State with States party to the CISA, to check the identity of any person in order to ascertain whether he fulfils the obligations laid down by law to hold, carry and produce papers and documents.

Observations submitted to the Court

59 Mr Melki and Mr Abdeli are of the opinion that Articles 67 TFEU and 77 TFEU provide, purely and simply, that there should be no internal border controls and that the Treaty of Lisbon, on that basis, made freedom of movement for persons absolute, irrespective of the nationality of the persons concerned. Accordingly, that freedom of movement precludes a restriction such as that provided for in Article 78-2, fourth paragraph, of the Code of Criminal Procedure, which authorises the national authorities to carry out systematic identity checks in border areas. Furthermore, they seek an order that Article 21 of Regulation No 562/2006 is invalid, on the ground that it infringes in itself the absolute nature of the right to come and go as enshrined in Articles 67 TFEU and 77 TFEU.

60 The French Government contends that the national provisions at issue in the main proceedings are justified by the need to combat a specific type of criminality at border crossings and along borders which present specific risks. The identity checks carried out on the basis of Article

78-2, fourth paragraph, of the Code of Criminal Procedure fully comply with Article 21(a) of Regulation No 562/2006. Their purpose is to establish the identity of a person, either in order to prevent the commission of offences or disruption to public order, or to seek the perpetrators of an offence. Those controls are also based on general information and police experience which have shown the particular benefit of checks in those areas. They are carried out on the basis of police information – coming from earlier police inquiries or from information obtained in the context of cooperation between the police forces of different Member States – which guide the placement and timing of the control. Those controls are not fixed, permanent or systematic. On the contrary, they are carried out as spot checks.

61 The German, Greek, Netherlands and Slovak Governments also propose a negative reply to the second question, pointing out that, even after the entry into force of the Treaty of Lisbon, non-systematic police checks in border areas are still permissible in compliance with the conditions laid down in Article 21 of Regulation No 562/2006. Those governments claim, inter alia, that identity checks in those areas, pursuant to the national legislation at issue in the main proceedings, are distinguishable by their purpose, their content, the way they are carried out and their effect from border control for the purpose of Article 20 of Regulation No 562/2006. Those checks can be authorised pursuant to the provisions of Article 21(a) or (c) of that regulation.

62 By contrast, the Czech Government and the Commission consider that Articles 20 and 21 of Regulation No 562/2006 preclude national legislation such as that at issue in the main proceedings. The checks under that legislation constitute disguised border controls which cannot be authorised under Article 21 of Regulation No 562/2006, given that they are only permitted in border areas and are subject to no condition other than that the person checked be in one of those areas.

The Court's reply

63 As a preliminary point, it should be noted that the referring court has not referred for a preliminary ruling a question on the validity of a provision of Regulation No 562/2006. As Article 267 TFEU does not constitute a means of redress available to the parties to a case pending before a national court, the Court cannot be compelled to evaluate the validity of EU law on the sole ground that that question has been put before it by one of the parties (Joined Cases C-376/05 and C-377/05 *Brünsteiner and Autohaus Hilgert* [2006] ECR I-11383, paragraph 28).

64 In relation to the interpretation sought by the referring court of Article 67 TFEU, paragraph 2 of which provides that the Union is to ensure the absence of internal border controls for persons, it should be pointed out that that article is part of Chapter 1, entitled 'General Provisions', of Title V of the Treaty on the Functioning of the European Union, and that it is apparent from the very wording of that article that it is the Union itself which is the addressee of the obligation which it lays down. Chapter 1 also contains Article 72, which reproduces the reservation contained in Article 64(1) EC, relating to the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

65 Chapter 2 of Title V contains specific provisions on the policy on border checks, and in particular Article 77 TFEU, which is the successor to Article 62 EC. Under Article 77(2)(e), the European Parliament and the Council are to adopt measures concerning the absence of any controls on persons when crossing internal borders. It follows that the provisions adopted on

that basis must be taken into account, in particular Articles 20 and 21 of Regulation No 562/2006, in order to determine whether EU law precludes national legislation such as that in Article 78-2, fourth paragraph, of the Code of Criminal Procedure.

66 The Community legislature implemented the principle of the absence of internal border controls by adopting, pursuant to Article 62 EC, Regulation No 562/2006 which seeks, according to Recital 22 in the preamble to that regulation, to build on the Schengen *acquis*. That regulation establishes, in Title III, a Community scheme on the crossing of internal borders, replacing Article 2 of the CISA as from 13 October 2006. The applicability of that regulation has not been affected by the entry into force of the Treaty of Lisbon. Protocol No 19 annexed thereto expressly provides that the Schengen *acquis* remains applicable.

67 Article 20 of Regulation No 562/2006 provides that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. Under Article 2, point 10, of that regulation 'border checks' means the checks carried out at border crossing points, to ensure that persons may be authorised to enter the territory of the Member States or authorised to leave it.

68 As regards the controls provided for in Article 78-2, fourth paragraph, of the Code of Criminal Procedure, it must be observed that they are carried out not 'at borders' but within the national territory and they do not depend on movement across the border by the person checked. In particular, they are not carried out at the time when the border is crossed. Thus, those controls constitute not border checks prohibited under Article 20 of Regulation No 562/2006, but checks within the territory of a Member State, covered by Article 21 of that regulation.

69 Article 21(a) of Regulation No 562/2006 provides that the abolition of border control at internal borders is not to affect the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that is also to apply in border areas. It follows that controls within the territory of a Member State are, pursuant to Article 21(a), prohibited only where they have an effect equivalent to border checks.

70 The exercise of police powers may not, under the second sentence of that provision, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective; are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime; are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; and, lastly, are carried out on the basis of spot-checks.

71 In relation to the question whether the exercise of the control powers granted by Article 78-2, fourth paragraph, of the Code of Criminal Procedure has an effect equivalent to border checks, it must be held, first, that the objective of the control under that provision is not the same as that of border control within the meaning of Regulation No 562/2006. The objective of that border control, according to Article 2, points 9 to 11, of that regulation, is, first, to ensure that persons may be authorised to enter the territory of the Member State or authorised to leave it and, second, to prevent persons from circumventing border checks. By contrast, the national provision in question relates to checking whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. The possibility for a Member State to provide for such obligations in its national law is not, pursuant to Article 21(c) of Regulation No 562/2006, affected by the abolition of border control at internal borders.

72 Second, the fact that the territorial scope of the power granted by the national provision at issue in the main proceedings is limited to a border area does not suffice, in itself, to find that the exercise of that power has an equivalent effect within the meaning of Article 21(a) of Regulation No 562/2006, in view of the wording and objective of Article 21. However, as regards controls on board an international train or on a toll motorway, the national provision at issue in the main proceedings lays down specific rules regarding its territorial scope, a factor which might constitute evidence of the existence of such an equivalent effect.

73 Furthermore, Article 78-2, fourth paragraph, of the Code of Criminal Procedure, which authorises controls irrespective of the behaviour of the person concerned and of specific circumstances giving rise to a risk of breach of public order, contains neither further details nor limitations on the power thus conferred – in particular in relation to the intensity and frequency of the controls which may be carried out on that legal basis – for the purposes of preventing the practical application of that power, by the competent authorities, from leading to controls with an effect equivalent to border checks within the meaning of Article 21(a) of Regulation No 562/2006.

74 In order to comply with Articles 20 and 21(a) of Regulation No 562/2006, interpreted in the light of the requirement of legal certainty, national legislation granting a power to police authorities to carry out identity checks – a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order – must provide the necessary framework for the power granted to those authorities in order, inter alia, to guide the discretion which those authorities enjoy in the practical application of that power. That framework must guarantee that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks, as evidenced by, in particular, the circumstances listed in the second sentence of Article 21(a) of Regulation No 562/2006.

75 **In those circumstances, the answer to the second question referred is that** Article 67(2) TFEU, and Articles 20 and 21 of Regulation No 562/2006, preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the CISA, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:**

   – **to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,**

   – **to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and**

   – **to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to European Union law.**

   It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of European Union law.

2. **Article 67(2) TFEU, and Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen (Luxembourg) on 19 June 1990, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.**

[Signatures]

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* Language of the case: French.