



# BOFAXE

## Rest in peace, Schengen! (PART 1)

Why German border controls are useless and illegal

“We will therefore extend our temporary internal border controls to all German land borders”. Federal Minister of the Interior Nancy Faeser announced that – after years of controls at the borders with Poland, the Czech Republic, Austria and Switzerland – the borders with France, Denmark, Belgium, Luxembourg and the Netherlands are now also being controlled. The measure, which has been in force in the heart of Europe since 16 September 2024, represents a further departure from the principle of the Schengen Borders Code (SBC) and seals the end of the European idea of freedom of movement. European law is becoming the victim of symbolic politics driven by right-wing electoral successes.

This article shows that the newly introduced border controls violate European law because they are not suitable to fulfil the purpose apparently pursued by Nancy Faeser and are therefore disproportional. This results from the complicated interplay between the SBC, the so-called Dublin III Regulation and the European Convention of Human Rights.

### The Schengen Borders Code

Checks on persons at internal European borders are generally prohibited. This is stipulated in Art. 1 (1) of EU Regulation 2016/399 – Schengen Borders Code (SBC) and intended to facilitate border crossings within the EU and to promote freedom of movement, one of the foundations of the EU. Exceptions to this principle are therefore subject to strict conditions. Art. 25 SBC states that there must be a serious threat to public order or internal security for border controls to be carried out at internal European borders. Border controls in western Germany were already carried out during the 2024 European Football Championship and justified by the increased risk of Islamist attacks due to the significant increase in border traffic. Even if there is a threat to public order, checks may only be carried out for a limited period of time in accordance with Art. 25 (1) SBC, namely for as long as the threat persists. The ECJ confirmed in 2022 with regard to a referral from an Austrian court (NW v. Landespolizeidirektion Steiermark et al.) that Art. 25 SBC must be interpreted narrowly as it is an exceptional provision (para. 66), can only be applied as *ultima ratio* (para. 65) and must also be necessary and proportionate (para. 68). It can also be seen from the decision that the ECJ imposes an obligation on the states to provide reasons, which is all the stronger the longer the border controls last (see para. 79).

### The Dublin III Regulation

Independent of the SBC and (at first glance) relating to a completely different legal matter, EU Regulation 604/2013 – Dublin III Regulation regulates the procedure that must be followed to determine which country is responsible for examining an asylum application. In principle, within the EU, the country whose territory the applicant first entered is responsible for examining the asylum application, as these are considered safe third countries. Usually, these are Greece, Italy, Spain or Bulgaria, because they have an external EU border, and most refugees enter by land. In the case of minors entering the country the legal residence of the family members is decisive, Art. 8 Regulation 604/2013.

However, if someone applies for asylum at a German border, such as the German-Austrian border, it is not immediately clear whether and if so from which safe third country the person has entered Germany, let alone in which country the family members of a minor are currently located. Therefore, it must first be determined to which third country the asylum seekers must be transferred.

### The ECHR

And now the European Convention on Human Rights (ECHR) comes into play, which sets high hurdles for such transfers as part of the Dublin procedure. Specifically, this concerns Art. 3 ECHR, which establishes the prohibition of torture and inhumane treatment. According to Art. 1 ECHR, states are responsible for guaranteeing the rights and freedoms of the Convention. To this end, they must ensure that there is no risk of a violation of Art. 3 ECHR in the safe third country (M.A. and Others v. Lithuania, para. 103; Ilias and Ahmed v. Hungary, para. 129). Furthermore, the transferring state remains responsible for ensuring that there is no risk of inhumane treatment in the country of origin, even in the case of indirect refoulement, i.e. refoulement by the third country (M.A. and Others v. Lithuania, para. 104). The state's responsibility is thus extended. Just last week, Germany was condemned for a violation of the procedural part of Art. 3 ECHR because the national authorities, when transferring a Syrian applicant, did not sufficiently check whether he could undergo a fair asylum procedure in Greece and whether the conditions of accommodation did not violate Art. 3 ECHR, despite an indication from the EU Commission (H.T. v. Germany and Greece, para. 147).

These requirements of the ECHR ensure that the examination sometimes requires lengthy research and that the individual case and the individual fears and risks of the applicant must always be considered. For this purpose, the applicant may enter the country. It is therefore not possible under current law to refuse entry to people applying for asylum. In practice, this examination often takes more than six months, meaning that responsibility for examining the asylum application is transferred to Germany in accordance with Art. 29 (2) Regulation 604/2013 and people remain in Germany until their asylum application has been decided.



# BOFAXE

## Rest in peace, Schengen! (PART 2)

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### — The requirements of Art. 25 SBC are obviously not met

These fundamentals of EU border and refugee policy are important in order to understand that the border controls announced by Nancy Faeser constitute a breach of European law because they are unsuitable for the intended purpose and therefore disproportionate.

According to her [public statements](#), Nancy Faeser refers to the dangers posed by Islamist terrorism and cross-border crime. Although the states enjoy a broad discretion when assessing whether there is a risk to public safety, this does not release them from the obligation to prove that the requirements of the exemption provision are met. Given the generalised and vague nature of the named dangers, it can already be assumed at this point that the Federal Ministry of the Interior has not sufficiently fulfilled its duty to provide reasons. But even if one assumes that this danger does indeed exist and is serious, the requirements of Art. 25 SGK are not met, as the border controls are clearly not suitable for containing Islamist terror: As evaluations by the [renowned professor of security studies Peter R. Neumann](#) show, 90% of the 45 people who have planned and/or carried out an Islamist attack since 2016 were asylum seekers or recognised refugees. At this point, it should be explicitly pointed out that the vast majority of all refugees have not planned or carried out any attacks. However, if there was an attack, it was usually carried out by refugees.

### Low suitability of border controls due to Dublin III

And that brings us back to the Dublin III Regulation. As we have just seen, it is not possible to prevent asylum seekers from entering the country, even with border controls, as a legally compliant examination of responsibility presupposes entry.

This means that 90% of Islamist attacks could not have been prevented by border controls, as these people could not have been refused entry. The statistical findings also weigh heavily in view of the discretion that states have in assessing the suitability of a measure. The Federal Government would have to explain why it assumes, contrary to the clear statistical data, that the risk of terrorism will be reduced. It would have to explain why it assumes that the expected Islamist attacks will have different perpetrators than before.

In addition, according to Neumann's research, most suspected terrorists ([about 83%](#)) first became radicalised in Germany, meaning that they had no plans for an attack when they entered the country. It would therefore be more obvious to try to shorten the Dublin procedure for checking responsibility, carry out a quick asylum check and provide people with a perspective that demonstrably counteracts radicalisation ([Pfundmaira et al.: Pathways toward Jihadism in Western Europe: An Empirical Exploration of a Comprehensive Model of Terrorist Radicalization, p. 58](#)). However, this does not require border controls, but rather a better equipped Federal Office for Migration and Refugees, orderly integration and job offers. Unfortunately, these demands are unlikely to win any elections at present.

### Lack of Proportionality

The limited suitability of border controls alone does not make the measure unlawful. Border controls do not violate European Law if their negative impact is proportionate to the purpose pursued and the suitability of the measure. It goes without saying that defense against terrorism and the establishment and maintenance of public security are important objectives. However, the fact that the state is pursuing important goals cannot be a blank cheque for the choice of unsuitable means. Rather, when pursuing such important goals, the state is obliged to take empirical and statistical truths into account, [Art. 27 \(1\) lit. a SBC](#). However, its margin of discretion allows it not to base its prognosis solely on statistical results, but also to take political considerations into account.

On the other hand, it must be considered that the EU-wide abolition of border controls is one of the EU's achievements and the driving force behind progressive integration. In addition, the German government has decided to immediately impose the [maximum possible duration](#) of border controls of six months. The considerable importance of border freedom in conjunction with the exhaustion of the period of border controls results in a profoundly negative impact of the measure as a whole.

Against the background of the low expected suitability of the border controls and the negative impact, it must be assumed that the measure is disproportionate.

### Conclusion

Border controls cannot adequately fulfil the purpose of pushing back Islamist terrorism. At least not if the Dublin III Regulation is to be complied with. And [despite pressure](#) from the largest opposition parliamentary group in the German Bundestag, the German government has apparently [decided against suspending Dublin III](#). This is to its credit but does not change the fact that the border controls are unlawful. Because Nancy Faeser has also recognised that extensive border controls cause traffic jams, delivery delays and time losses for cross-border traffic, there will only be random [smart controls](#), according to her. It remains to be seen whether this means anything other than racial profiling, i.e. primarily stopping people who appear to be suspected terrorists to the person carrying out the check. It would be a surprise. In view of the border controls that [have been in place](#) throughout the EU for years, the idea of Schengen and Freedom of Movement has [long been dead. But Germany has now buried it.](#)