REPORT
on the Free Movement of Workers in Germany in 2004

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Abbreviations

ArGV	Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer (Arbeitsgenehmigungsverordnung)
AufenthG	Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Federal law on the residence, employment and integration of foreigners in the federal territory)
AufenthV	Aufenthaltsverordnung
AuslG	Ausländergesetz
Az	Aktenzeichen
AZRG	Ausländerzentralregistergesetz (Act on the registry of foreigners)
BaföG	Bundesausbildungsförderungsgesetz
BayVBl	Bayerische Verwaltungsblätter
Banz	Bundesanzeiger
BeschV	Beschäftigungsverordnung
BeschVerfV	Beschäftigungsverfahrensordnung
BFHE	Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofs (Decisions of the Federal Tax Court)
BGBl.	Bundesgesetzblatt (Federal Law Gazette)
BKGG	Bundeskindergeldgesetz (Federal Law on Allowances in respect of Dependent Children)
BR-Drs.	Drucksachen des Bundesrates (Gazette of the Federal Council)
BRRG	Beamtenrechtsrahmengesetz
BSG	Bundessozialgericht (Federal Social Court)
BT-Drs.	Drucksachen des Deutschen Bundestages (Gazette of the Federal Parliamentary Assembly)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
BVerwGE	Collection of decisions of the Federal Administrative Court
DAR	Deutsches Autorecht
DVBl	Deutsches Verwaltungsblatt
DÖV	Die Öffentliche Verwaltung
ECJ	European Court of Justice
EFG	Entscheidungen der Finanzgerichte (Decisions of the Tax Courts)
EURAG	Europäisches Rechtsanwaltsgesetz
EuroAS	Europäisches Arbeits- und Sozialrecht
EZAR	Entscheidungssammlung zum Ausländer- und Asylrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EuGRZ	Europäische Grundrechte-Zeitschrift
FreizügG/EU	Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Act on the general freedom of movement of EU citizens, Freedom of Movement Act/EU)
GBl	Gesetzblatt
GVBl	Gesetz- und Verordnungsblatt

HRG	Hochschulrechtsrahmengesetz
InfAuslR	Informationsbrief Ausländerrecht
IntV	Integrationskursverordung
MRRG	Melderechtsrahmengesetz
NJW	Neue Juristische Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht, Rechtsprechungs-Report
OVG	Oberverwaltungsgericht
SGB	Sozialgesetzbuch (Code of Social Law)
StAG	Staatsangehörigkeitsgesetz (Act on German Nationality)
VBlBW	Verwaltungsblätter für Baden-Württemberg
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht

General Remarks

On July 30, 2004 to control and restrict immigration and to regulate the residence and integration of EU citizens and foreigners the Immigration Act[1] was adopted with the approval of the *Bundesrat*. The Act is based upon the previous Immigration Act, adopted in 2002, which has been declared for formal reasons unconstitutional by the Constitutional Court. The new Immigration Act contains in Article 2 the Freedom of Movement Act in an almost unchanged version (for details see chapter VI).

Concerning the freedom of movement for nationals of the new EU Member States a law has been enacted as to the effects of EU enlargement.[2] A summary of the content of this law has already been given in the report 2002/2003. Details of the law and its implementation are dealt with in chapter VII. The Freedom of Movement Act also deals with the legal status of nationals of the new EU Member States. Although they might not be covered under the transitory regulations by the freedom of movement provisions, nationals of the new EU Member States will be fully entitled to the rights under the Act on Freedom of Movement once they have been admitted for labour under Section 284 para. 1 of the Social Code III.

Based upon the authorization by the Immigration Act a number of important regulations have been enacted which at least partly do also have significant effects on the legal status of EU citizens from the new EU Member States and to third country relatives of EU citizens. The employment regulation of 22 November 2004 (*Verordnung über die Zulassung von neu einreisenden Ausländern zur Ausübung einer Beschäftigung* – regulation on the admission of foreigners entering for the first time, *BGBl*. I, 2937) replaces the previous regulations on the labour permit and exceptions under which a labour permit could be granted as well as on the granting of labour permits for highly qualified foreign experts in the information and communication technology.[3]

A second regulation of 22 November 2004 on the admission and the procedure of foreigners resident in Germany for the purpose of employment (*Beschäftigungsverfahrensordnung*)[4] deals with the admission of foreigners already lawfully resident in Germany for the purpose of employment. Those provisions are in principle not applicable to EU citizens, since EU citizens do not need a labour permit and are therefore by law excepted from these provisions which regulate the procedure and the conditions for receiving a residence permit for the purpose of labour admission. The legal status of nationals of the new EU Member States concerning labour admission is regulated now in Section 284 of the Social Code and Section 12a Arbeitsgenehmigungsverordnung.[5]

The integration regulation of 13 December 2004[6] provides for the procedure and the conditions on integration courses. Unlike the two regulations on admission for labour pur-

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1 See Annex 1 to this report.

2 Gesetz über den Arbeitsmarktzugang im Rahmen der EU-Erweiterung vom 24.4.2004, *BGBl*. I, No. 18, p. 602 (Annex 2).

3 For the text of these regulations see Hailbronner, *AusLänderrecht Kommentar*, vol. I-IV, A 1.2, C 1.1 and C 1.2.

4 Verordnung über das Verfahren und die Zulassung von im Inland lebenden Aus*Länder*n zur Ausübung einer Beschäftigung – Beschäftigungsverfahrensverordnung – of 22.11.2004, *BGBl*. I 2934.

5 See Hailbronner, *AusLänderrecht Kommentar*, C 1 and C 1.3, see Annex 3 and 4 to this report.

6 Verordnung über die Durchführung von Integrationskursen für Aus*Länder* und Spätaussiedler, Integrationskursverordnung, *BGBl*. I, p. 3370; see Hailbronner, *AusLänderrecht Kommentar*, A 1.2

poses the integration regulation is in principle applicable also to foreigners whose legal status is regulated by the Freedom of Movement/EU Act.[7] It has to be noted, however, that this does not mean that the provisions in the Immigration Act providing for some sanctions in case of non-compliance with the obligation to attend integration courses do apply also to EU citizens. Since the Freedom of Movement Act makes reference only to a limited number of provisions of the Immigration Act, the provisions of the Immigration Act concerning a duty to attend integration courses are not applicable to EU citizens.[8]

To implement the Immigration Act the regulation on implementation of the Immigration Act[9] has replaced the previous implementation regulation to the Aliens Act of 1999. The regulation provides for detailed rules on the visa and passport obligations, on entry and residence and on data transmission. The implementation regulation may have effects on EU citizens only in so far as the Freedom of Movement Act refers to particular provisions of the Immigration Act. To that extent the implementation regulations are also applicable to EU citizens (for details see under chapter VII of the report).

Finally, the Federal Ministry of the Interior has passed provisional guidelines for the applications of the Immigration Act and the Freedom of Movement Act. They are not formally binding since under Article 84 of the Basic Law it is up to the *Länder* to execute federal laws. Only with the consent of the Bundesrat the federal government may issue general administrative guidelines. Therefore, the provisional guidelines to the Freedom of Movement Act are only intended as assistance to the *Länder* authorities to apply the new Act. However, it is to be expected that they will be widely used by the alien authorities in the absence of binding administrative guidelines. The provisional guidelines (*vorläufige Anwendungshinweise zum Freizügigkeitsgesetz/EU*) have not been officially published.

7 See Section 2 of the Regulation.

8 See Section 11 of the Freedom of Movement Act.

9 Art. 1 der Verordnung zur Durchführung des Zuwanderungsgesetzes of 25.11.2004, *BGBl.* I 2945; see Hailbronner, *AusLänderrecht Kommentar*, A 1.1.

Chapter I
Entry, Residence, Departure

Entry

The right of third-country spouses of Union citizens to visa-free entry is the subject of a decision of the Administrative Court of Potsdam.[10] The applicant, a national of Kenia, had been entering into Germany without being in the possession of a visa as required under German law. The applicant had referred to the jurisprudence of the European Court in the *MRAX*-case of 25 July 2002[11] and Article 3 of the Directive 68/360 and Article 3 of the Directive 73/148. She argued that in the light of the principle of proportionality a Member State must not refuse entry to a national of a third country being married to a Union citizen trying to enter its territory without disposing of a valid passport or a visa provided that the applicant can prove his/her identity and marriage.

The Administrative Court of Potsdam argued that the applicant cannot rely upon this Decision. The visa procedure was essentially serving as a precedent procedure in order to find out whether the person applying for a visa was in fact entitled to enter Germany. In cases in which it were doubtful whether there was in fact a marital relationship with a Union citizen entitled to free movement, the visa provisions could not be dispensed with. Unlike the case which had been decided by the European Court, the present case was not about the observance of formal rules but on the material conditions upon which a right of entry under Community law could be claimed. A fake marriage was not protected by Community law as could be shown by the requirement to prove identity and the existence of a marriage in any case under the relevant provisions of the Directives 68/360 and 73/148, since in the present case there were substantial indications for a fake marriage which would make it absolutely necessary to insist upon the previous visa procedure.

A case of illegal entry and visa requirements has also been dealt with by the Administrative Appeal Court of Hamburg.[12] Different to the case decided by the Potsdam court the applicant, a national from Togo, had made credible that he had married a Spanish national in 2000 in Lomé/Togo. The marriage had taken place after the expulsion and deportation of the applicant from Germany. In spite of the interdiction to enter Germany following an expulsion and deportation, the applicant had entered Germany through Spain in 2003 and applied for a residence permit.

The Hamburg Court argues on the basis of the European Court's decision of 25 July 2002 that the priority of Community law would overrule the German provisions on illegal entry and residence to issue a residence permit. Since the applicant due to his marriage with an EU citizen was entitled to free movement, his residence in Germany could only be restricted on the basis of a current threat of the public order. The fact that the applicant had been punished for illegal entry in 2000 in Germany and that he had been deported to Togo did not constitute a current threat of the public order in the sense of Community law. The Hamburg Court does not see a contradiction to the jurisprudence of the Federal Administrative Court having decided on 7 December 1999[13] that an EU residence permit is also subject

10 Decision of 6.12.2004, 14 1157/04, *InfAuslR* 2005, 94.
11 C-459/99, *InfAuslR* 2002, 417, 419.
12 Decision of 29.9.2003, *InfAuslR* 2004, 57.
13 Decisions of the Federal Administrative Court, vol. 110, 140.

to the blocking function of an expulsion or deportation order and that therefore an EU citizen cannot claim a residence permit unless the effects of a deportation or expulsion have been terminated. In this case according to the Hamburg Court there were sufficient reasons that the protection of the family as well as the importance of the right of free movement overrides the public interest in terminating the residence. The application for an EU residence permit, therefore, would have to be dealt with and the applicant was entitled to a suspensive effect of his application for an EU residence permit until the authorities had finally decided on his application.

In a publication on transnational police prevention measures against hooligans,[14] *Breucker* deals with the lawfulness of measures against travelling hooligans which had also been the subject of various court decisions. The emphasis of the dissertation is not on EU law but on general constitutional and public international law issues. On the principle of good neighbourhood the author argues that there is a duty of EU states to prevent possible infringements of law violations in another state by measures restricting entry and departure of aliens.

According to the new act on the general freedom of movement EU citizens do not require a visa in order to enter the federal territory or a residence title in order to stay in the federal territory. Dependants who are not EU citizens shall, however, require a visa in order to enter the federal territory if a legal provision stipulates such a requirement. This corresponds to Article 5, para. 2 of the Freedom of Movement Directive. The obligation to require a visa of third-country family relatives is regulated according to the Visa Regulation Nr. 539/201. The administrative guidelines, however, refer correctly to the jurisprudence of the European Court in the *Mrax*-case of 25 July 2002.[15] According to section 2, para. 5, EU citizens, their spouses or partners in life, and their dependant children, who have resided lawfully and continuously in the federal territory for 5 years, are entitled to enter into and stay in the federal territory, irrespective of whether the other requirements pertaining to eligibility for general freedom of movement are fulfilled. For children under 16, this shall apply only if a parent or legal guardian is lawfully resident in the federal territory. The provision is intended to implement the Freedom of Movement Directive (Art. 16, para. 1).

Residence

The principle of reciprocal recognition of driver's licenses[16] prohibits, according to the decision of the Administrative Appeal Court of Baden-Württemberg, that Germany refuses the recognition of a driver's license on the argument that the EU citizen had at the time of issuing the driver's license his permanent residence in the state of reception rather than in the state of issuing the driver's license.[17] The Administrative Court, therefore, has quashed a decision of the Administrative Court which had denied a German driver's license on the basis of an Italian driver's license due to the fact that the Italian driver's license had been acquired during a residence in another EU Member State. The Lower Court has argued that the relevant German provision for the recognition of driver's licenses from EU Member

14 Marius Breucker, *Transnationale polizeiliche Gewaltprävention – Maßnahmen gegen reisende Hooligans*, Würzburg 2003.
15 C 459/99.
16 See Art. 1 para. 2 of the Directive 91/439.
17 Administrative Appeal Court of Baden-Württemberg of 21.6.2004, *NJW* 2004, 3058.

States is not applicable due to the principle of reciprocal recognition laid down in Directive 91/439 of 29 July 1971. Although the Directive would make the reciprocal recognition in Article 7, para. 1, lit. b dependant upon the proof of a permanent residence or the residence as a student in competent EU Member States issuing the driver's license, this provision could not be held applicable. The European Court of Justice in its Decision of 29 April 2004[18] had interpreted the relevant provision so that a Member State could not refuse the recognition of a driver's license issued by another Member State for the mere reason that the applicant did not have an ordinary residence at the time of issuance of the driver's license in the state of residence.[19]

According to Section 5 of the Act on the general freedom of movement, EU citizens entitled to freedom of movement and their dependants do not need anymore a EU-residence permit. They shall be issued a certificate confirming the right of residence in an ex-officio procedure by the competent authority. Dependants who are not EU citizens shall be issued an official EU residence permit. Section 5 para. 3 provides the requirement which have to be fulfilled pertaining to the certificate. The requirements for an entitlement to freedom of movement must be substantiated within reasonable periods. The competent registration office may take account of the information and documents required for substantiation at the time of registration with the said office. The registration office shall then forward the information and documentation to the competent foreigners authority. The registration office shall not process or use the information for any other purposes. If the requirements cease to be met, Section 5 para. 5 provides for a procedure resulting in the loss of the entitlement revocation of the EU residence permit.

Departure

In an article Alber, previously Advocate General at the European Court, and L. Schneider, shortly before the European Court's judgement in the case, discuss the case *Orfanopoulos* and *Olivieri*.[20] The authors review the jurisprudence of the Federal Administrative Court and of the administrative appeal courts based upon a two-stage procedure. In a first stage, the Federal Administrative Court examines whether an expulsion is in accordance with the provisions of the Aliens Act. In a second stage the courts have to examine whether additional requirements under Community law are met. Contrary to this view, some administrative courts and authors have held that the German system of obligatory and regular expulsion cannot be applied at all to Union citizens since under Community law restrictive measures could only be undertaken by way of a discretionary decision taking into account all individual circumstances of each case. Somewhat contrary to the conclusions of Advocate General Stix-Hackl of 11 September 2003 in the *Orfanopoulos* case, the authors argue that the Federal Court's jurisprudence does not violate Community law since one could not consider the German practice of a two-stage examination as an "automatic" expulsion, which would indeed be contrary to Community law.

The Federal Administrative Court, implementing the European Court's judgement in the *Orfanopoulos* case, has decided on 3 August 2004 that expulsion of Union citizens requires

18 *NJW* 2004, 1725.

19 See also ECJ of 11.12.2003, C-408/02 at No 22; *NJW* 2004, 1725.

20 ECJ of 29.4.2004, C-482/01 and C-493/01, *Orfanopoulos, Olivieri/Baden-Württemberg*, *EuZW* 2004, 402.

in any case a comprehensive discretionary decision in which all individual facts and circumstances of each case have to be taken into account. Therefore, provisions of the Aliens Act 1990 providing for obligatory or as-a-rule expulsion could not be applied in the case of Union citizens.

The Court interprets the European Court's decision as a prohibition to apply the relevant provisions on expulsion of the Aliens Act as a legal basis for the expulsion of EU citizens entitled to freedom of movement. EU citizens according to the Federal Administrative Court can only be expelled on the basis of a discretionary decision. Therefore, Section 12 of the Act on residence of EU citizens (valid until the end of December 2004) had to be applied in accordance to the principles developed by the jurisprudence of the European Court on restrictions of freedom of movement. It follows that restrictions will have to be applied restrictively. In any case, the alien authorities and the administrative courts will have to take into account the particular legal status of privileged EU citizens and the overriding importance of the principle of free movement. Expulsion of a Union citizen entitled to free movement, therefore, would require that the individual circumstances of the case indicate a personal behaviour which constitutes a current threat to public order. A real and sufficiently serious danger must apply, which affects a fundamental interest of society.[21] In addition, the lawfulness of an expulsion requires, according to the judgement, that there is a balancing of interest and that the public interest to protect the public order and security is clearly higher than the private interest of a Union citizen to remain in Germany.[22] The Federal Court refers in this connection to the fundamental rights in a part of customary Community law. In addition to the constitutionally guaranteed human rights the principles laid down in the European Convention for the protection of human rights referred to in Art 6 of the Treaty on the European Union were to be considered. The Federal Court refers to various decisions of the European Court of Human Rights on the protection of family and the principle of proportionality. The alien authority could, however, also take into account the reasons for an expulsion laid down in Sections 46-48 of the Aliens Act. The expulsion reasons could not be used in the sense of a presumption in favour of expulsion or in the sense of a generally applicable guideline in favour of an expulsion. The particular provisions on EC law, therefore, were opposed against any automatical decision-making and would require a comprehensive discretionary decision on the legality and appropriateness of an expulsion decision.

The Court also changes its previous decisions on the relevant time for judging the legal and factual situation. Following the European Court's decision, the Court states that expulsion of a Union citizen entitled to free movement could only be based on an actual prognosis of the behaviour of the EU citizen representing an actual threat to the public order. Therefore, the conditions for demonstrating an actual threat would have to be fulfilled at the time of expulsion. Therefore, all new facts in favour of EU citizens have to be taken into account in the Court's decision. In a decision of the same date[23] the Federal Administrative Court has applied the same principle to Turkish workers enjoying an implicit residence right under the Association Treaty between the European Community and Turkey.

With the Federal Court's Decision of 3 August 2004 a previous decision of the Administrative Appeal Court of Baden-Württemberg of 21 July 2004, dealing also with the lawful-

21 See also Section 2 of the new Freedom of Movement Act.

22 "Das private Interesse des Unionsbürgers an seinem Verbleib im Bundesgebiet deutlich überwiegt".

23 Decision of 3.8.2004, 1 C 29/02.

ness of expulsion of EU citizen,[24] has become largely obsolete. The Administrative Appeal Court had to decide upon the expulsion of an Italian national who had committed various offences against his spouse and his children and had become interned in a psychiatric hospital. After release he was again arrested and convicted various times for offences committed in a stage of schizophrenia. The Administrative Court appealed the expulsion by arguing that the expulsion could have been enacted on the basis of the provisions of Section 45, 46 of the Aliens Act. Referring to the European Court's decision in the *Orfanopoulos*-case, the Appeal Court, however, argues that the European Court's decision does not necessarily require a two-stage expulsion procedure. In any case, the lawfulness would have to be examined on the basis of German law. Only in the case that the examination according to German law would not lead to a success of a plaintiff's request, in a second stage an examination of the expulsion order would have to be made taking into account the rules of European Community law on restriction of free movement.

The widely debated issue of applicability of the general provisions of the Aliens Act concerning the expulsion of EU citizens has become obsolete with the entry into force of the Freedom of Movement Act on 1 January 2005. The Freedom of Movement Act does not refer anymore to the expulsion provisions of the Aliens Act. The restrictions of the free movements of EU citizens under the Act can only be made by a special procedure resulting in the loss of the entitlement to entry and residence. Under Section 6 para. 1 a certificate confirming the right of residence under Community law may only be withdrawn and an EU residence permit revoked on grounds of public order, safety or health if the conditions laid down in Section 6 are fulfilled. Criminal convictions may be taken into consideration only in so far as the circumstances pertaining to the said convictions indicate personal behaviour which constitutes a current threat to public order. A real and sufficiently serious danger must apply, which affects a fundamental interest of society.[25] After a permanent, lawful residence in the federal territory for a period of more than 5 years, the loss of the entitlement to entry and residence can only be determined on "particularly serious grounds". These provisions are referred to by the Federal Administrative Court as the sole legal basis for an administrative discretionary decision on the withdrawal of the resident's certificate. According to the Court, however, the provisions of the Freedom of Movement Act would not exclude to quash an expulsion decision against a EU citizen already on reasons of the Immigration Act in cases in which the application of the Immigration Act would be more favourable for a Union citizen.[26]

A German national may be denied the departure into another EU state due to a concrete risk for considerable public interests of the Federal Republic of Germany. This requires as a rule that the circumstances by which the risk is assumed are not dating back too long. With this reasoning the Administrative Appeal Court of Baden-Württemberg by decision of 7 December 2004 has quashed a decision of the Administrative Court of Freiburg by declaring unlawful an order of prohibition to depart against a participant of a demonstration at the world economic summit of Geneva on 21 July 2001. By leaving the Swiss-German border, the German national had been refused the departure on the argument that he would present a security risk for possible participation at violent activities against the summit conference in Geneva. He had been previously recognized for participation in connection with similar ac-

24 *Az* 11 S 535/04.
25 See Section 6 para. 2 of the Freedom of Movement Act.
26 See Section 11 para. 1 S. 3 of the Freedom of Movement Act.

tivities in 1996 in Bonn. The Administrative Appeal Court has acknowledged in principle that the alien authorities or border authorities could interdict German citizen the departure to a neighbouring EU Member State, provided that the conditions for refusing a passport are fulfilled. These conditions were particularly met if substantial public interest of the Federal Republic were endangered by the presence of a German national in another EU Member State. Such interests were also endangered by participation in violent activities since they were suitable to damage the international reputation of Germany. In the present case, however, the border authorities could not rely exclusively on a previous participation of the applicant in a demonstration in 1996 and a subsequent criminal procedure which had been terminated due to the lack of a sufficient reason of guilt. Since the remaining suspicion that the applicant had in fact been guilty was dating back for 5 years, the border authorities could not assume that the applicant would participate again in violent activities.[27]

Alber and Schneider discuss in addition the question to what extent the system of the German aliens law providing for the expulsion of Union citizens, even if they have been grown up in Germany or spent most of their life in Germany, may become obsolete due to the expansion of the scope of application of fundamental freedoms of Union citizens as laid down in the European Charter of Fundamental Rights.[28] The authors suggest that Union citizenship should be interpreted extensively, pointing to the proposal of the European Commission in the right of Union citizens and their family relatives to move freely within the territory of the EU Member States. Contrary to the text of the Union Citizens Directive as it has been adopted by the Council and the European Parliament on 29 April 2004,[29] they argue in favour of an absolute protection against expulsion for Union citizens being in possession of a permanent residence title.

Another issue, which has again become somewhat obsolete in the meantime by the European Court's judgement in the *Orfanopoulos*-case concerns the question whether the legality of an expulsion decision can be judged on the basis of the legal and factual situation at the time of the last administrative procedure. The German administrative courts have applied this rule as an essential element of the Administrative Court Procedure Act in judging the legality of expulsion provisions.[30] This, of course, did not mean that applicants were precluded from submitting new facts or a new evidence in a new application to review a previous decision. The authors argue – in line with the following decision of the European Court of Justice in the *Orfanopoulos*-case – that Community law requires that the legality of an expulsion decision must be determined exclusively on the basis of an actual concrete danger for a fundamental public interest. Therefore, facts and other circumstances in favour of a Union citizen have to be taken into account by administrative courts deciding upon the legality of an expulsion decision. In addition, it is argued that the effectiveness of judicial protection might be somewhat endangered if an applicant is required to institute new administrative proceedings in order to achieve recognition of new facts or other circumstances in favour of an applicant. The Federal Administrative Court, changing its jurisprudence, has obliged ad-

27 Administrative appeal court of Baden-Württemberg of 7.12.2004, 1 S-2218/03.

28 Alber, S. & Schneider. L., Gewitterwolken über dem Aus*Länder*gesetz, *DÖV* 2004, 313-322.

29 Directive 2004/38 of 29 April 2004, *Official Journal* L 229/35, on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

30 Federal Administrative Court of 19 November 1996, *InfAuslR* 1997, 152; of 7 December 1992, vol. 110, 140.

ministrative courts to base their decisions upon the facts and legal situation at the time of the judicial proceedings.

Finally, the authors discuss a third subject of controversy which again has already been decided by the European Court in the *Orfanopoulos*-case. According to a provision of the state of Baden-Württemberg implementing the Federal Administrative Court Procedure Act,[31] the law of Baden-Württemberg has excluded an obligatory administrative review procedure examining the legality and appropriateness of administrative acts by higher administrative authorities as prerequisite for instituting court procedures. This exclusion is considered by some authors as well as by the European Commission as violating Community law.[32] Since in some cases expulsion decisions are made by higher administrative authorities, it is argued that the conditions of Art. 9 para. 1 of the Directive 64/221, providing for a previous administrative review if the appeal concerns only the legality of a decision, are violated if there is no administrative control in case of an expulsion of a Union citizen. The authors take the view that Art. 9 of the Directive 64/221 is intended to compensate eventual protection gaps of judicial proceedings. If an appeal against administrative acts covers only the compatibility with the law, final decisions would require an additional comprehensive examination of all facts and circumstances including considerations of appropriateness, before a final decision subject to judicial review is made.[33] The European Court has decided that Article 9 of the Directive 64/21 excludes a national provision whereby an expulsion order cannot be challenged anymore by reasons of appropriateness rather than legality.

Already in 2002, the Federal Supreme Court has decided that a Greek national who had been deported on the basis of permanent dependence on social assistance and later permitted to return following an agreement between the parties of an administrative court proceeding, may be entitled to damages.[34] The Court discusses in detail the applicable provisions of the German law on damages for actions of civil servants.[35] The Court points out that in case of a clear illegality of a deportation order damages could be claimed since the public servants ordering the execution of the order could have recognised at the time of their decision that the deportation order was lacking a legal basis due to a violation of Community law. A claim for damages, in addition, would not be excluded by the agreement between the parties of the administrative court proceedings on the sharing of costs of the court procedure. This agreement according to the Supreme Court could only cover the expenses arising from the court proceedings. Claims for damages, therefore, could not be included in such an agreement. In addition, the claim for damages was not precluded for the mere reasons that the applicant's attorney might have prevented the actual deportation by a request for interim judicial protection.

The Administrative Appeal Court of Hessen has stated requirements for the expulsion of Union citizens on account of criminal prosecution.[36] According to the Hessian Court a Union citizen must not be expelled on account of a 4 year and 9 months prison sentence for organised human trafficking in connection with other crimes if the aliens authority did not

31 Chapter VIa of the Executing Law to the Administrative Court Procedure Act.
32 See for instance Fritz (ed.), *Gemeinschaftskommentar zum AusLänderrecht*, vol. 2, chapter 2 at 167 of the Aliens Act; see also case C-441/02.
33 *Op. cit.* at p. 320 referring to ECJ of 18 May 1982, No. 115/81 and 116/81, ECJ Report 1982, 1665, *Adoui* and *Cornuaille*.
34 Federal Supreme Court of 12 December 2002, *NVwZ* 2003, 1409.
35 Cf. chapter 839 Civil Code in connection with Art. 34 of the Basic Law.
36 Decision of 9 January 2004, *InfAuslR* 2004, 144.

pay sufficient account to the fact that the Union citizen had not had a criminal record before and after committing the crime until he/she had been imprisoned. The Administrative Appeal Court relies upon Article 18 EC and the European Court's jurisprudence particularly in the *Calfa* case.[37] Although the applicant had only been employed during his four years residence before committing the crime for approximately two years as a worker, freedom of movement for workers were applicable, particularly since the applicant had the intention of taking up employment again after serving his prison sentence. In any case, the applicant could rely upon freedom of movement for non economically active persons under Article 18 EC and the Directive 90/364. Although the crime of organized human trafficking must be considered as a serious crime, the assumption of the alien authorities, the applicant could, after serving his prison sentence, again engage in criminal activities, were not based upon substantial facts.

The question whether Community law and in particular the Directive No. 64/221 on public order restrictions of freedom of movement apply also to Turkish nationals is discussed by the Administrative Appal Court of Baden-Württemberg in a judgement of 27 January 2004.[38] The Court denies the application of the Directive referring to a decision of the Austrian Administrative Appeal Court asking for a preliminary decision of the European Court.[39] According to the Baden-Württemberg Court the principles to apply "as far as possible" in Community law, the principles developed by the European Court for Union citizens and Turkish nationals, cannot be applied to procedural rights for Union citizens granted by the Directive No 64/221 in order to facilitate freedom of movement for workers.

One of the subjects of the 29th Conference of the Society for Comparative Law was devoted to the question of new developments in immigration and asylum law. Various papers and reports delivered during the Conference were dealing with issues of European harmonization of immigration and asylum law, including problems of illegal immigration or particular regimes for admission of highly qualified immigrants.[40]

The new Act on the general freedom of movement for EU citizens contains in Section 6 provisions on the loss of entitlement to entry and residence. Loss of the entitlement to free movement can only be determined, a certificate confirming the right of residence under Community law withdrawn and the EU residence permit revoked on grounds of public order, safety or health if the particular conditions laid down in Section 6 para. 2 and 3 are met. The Act distinguishes between persons enjoying freedom of movement generally and EU citizens after permanent lawful residence for a period of more than 5 years. While in the first case the general conditions developed in the European Court's jurisprudence as to a current threat to the public order are applicable, a EU citizen after 5 years residence can only be expelled respectively the loss of the entitlement be declared "on particularly serious grounds". The Act does not determine what constitutes particularly serious grounds. It is somewhat difficult to interpret this provision because already under the general provisions for EU citizens there must be particularly serious grounds in order to restrict free movement. It will be up to the jurisprudence to develop criteria for the interpretation of the term particularly serious grounds. All further requirements laid down in Section 6 correspond to Community law requirements and previous provisions of the Aufenthaltsgesetz/EWG.

37 See ECJ of 19 January 1999, C-348/96, *EZAR* 810, No 11.
38 10 S 1610/03, *VBlBW* No 8/2004, 308.
39 Decision of 18 March 2003, *InfAuslR* 2003, 217.
40 Eibe Riedel (ed.), *Neuere Entwicklungen im Einwanderungs- und Asylrecht* (new developments in aliens and asylum law), Baden-Baden 2004.

As to the requirement to leave the federal territory, Section 7 of the Freedom of Movement Act provides that EU citizens shall be required to leave the federal territory, if the foreigners authority has indisputably established that no entitlement to entry and residence exists. Dependants who are not EU citizens shall be required to leave the federal territory, if the foreigners authority has unappealably revoked or withdrawn the EU residence permit. A notice of intention to deport shall be served, setting a deadline for departure. Except in urgent cases, a minimum deadline period of 15 days must be set if an EU residence permit or certificate confirming the right of residence under Community law has not yet been issued, while a minimum deadline period of one month shall apply in all other cases.

According to Section 7, para. 2, EU citizens and their dependants who have lost their entitlement to freedom of movement pursuant to Section 6, para. 1 or 3, shall not be permitted to re-enter and stay in the federal territory. The prohibition pursuant to this sentence is subject to a time limit. The time limit begins when the concerned person leaves the federal territory.

It is doubtful whether these provisions meet the requirements for restrictions of the freedom of movement developed in the most recent ECJ jurisprudence. Section 7 states that EU citizens shall be required to leave on the fact that the foreigners authority has indisputably established that no entitlement to entry and residence exists. A statement that no entitlement to entry and residence exists is made dependant upon the proof of the requirements laid down in Section 2.1 including requirements like sufficient means of subsistence or health insurance in case of non-economically active EU citizens. The European Court, however, has repeatedly decided that freedom of movement may still be claimed in spite of non-fulfilment of such requirements under community regulations when the principle of proportionality prohibits terminating measures. Therefore, the Freedom of Movement Act will have to be interpreted in a way excluding a declaration of non-existence or loss of the entitlement if an EU citizen cannot be required to leave under the European Court's jurisprudence. In addition, the Freedom of Movement Directive 2004/38 provides that measures terminating the residence of a EU citizen must not be the automatic consequence of a dependence on social assistance.[41] It will be interesting to see how this provision is implemented in Germany.

41 See 14 para. 4 of the Freedom of Movement Directive.

Chapter II
Equality of Treatment

According to the Aliens Central Registry Act and the provisional guidelines of the Freedom of Movement Act by the Federal Ministry of Interior, information may also be collected from EU-citizens in order to find out whether there are serious reasons of public order, security and health which might exclude the entitlement to freedom of movement. In this connection the number of the document on identity is to be checked. If the information indicates reasons which might justify a denial of the entitlement to freedom of movement like a previous expulsion or deportation or a prohibition of entry the aliens authority will have to examine whether restrictive measures in every individual case are justified taking into account the Community law requirements. In the case of a general prohibition following an expulsion or deportation the aliens authorities have to examine whether the prohibition period must be limited taking into account the European Court's jurisprudence in the case *Adoui & Cornuaille*.[42]

The Freedom of Movement Act does not make an exception for EU citizens concerning the collection of data in the Aliens Central Registry. The Provisional Administrative Guidelines provide that in order to issue a certificate for EU citizens the Aliens Central Registry has to be consulted. It is argued that the registration of personal data is a violation of Art. 12 EC. The Administrative Court of Cologne in a decision of 19 December 2002 has decided to that effect. The Appeal against this decision is pending before the Administrative Appeal Court of Münster.

The Administrative Appeal Court of Baden-Württemberg by a decision of 9 March 2004[43] has decided the question whether two Indian nationals adopted by a German could be treated unequally to EU citizens (Art. 12 EC in connection with Art. 39 EC). The applicants, two adult Indian nationals, had been argued that they were entitled to free movement since as family relatives of a German citizen they could rely upon the freedom of establishment and the freedom to provide services. The Administrative Appeal Court has – in accordance with the jurisprudence of the European Court – refused to apply Community law since the case in question contains no cross-border element which could trigger the application of Community law. The adopted Indians had not been living before in any EU Member State, nor have they been moving together with their German "care parents" from an EU Member State to Germany. Therefore, the denial of a residence permit did not fall within the scope of application of the EU provisions on freedom of movement.

A German university professor, who had been employed as a professor at a German university and later moved to an Austrian university, has filed a judicial complaint against an order to pay back a yearly payment which is regularly paid for civil servants as a sort of an additional yearly gratification. According to the relevant provisions, however, the yearly payment requires that a civil servant had been employed until at least March 31 of the following year in the service of the *Land* (Baden-Württemberg). The Federal Administrative Court has referred the question whether relevant practice based upon Section 12, para. 2 of the Federal law on remuneration of civil servants in connection with Section 3, para. 6 of the

42 Decision of 18 May 1982, Cases 115 and 116/81; see also Federal Administrative Court, vol. 110, 140 ff.

43 11 S 1518/03.

Law on special remunerations, violates Community law.[44] The Federal Administrative Court considered that there might be a violation of Community law in treating unequal times of civil service with a German public employer, while a corresponding service with a public employer in another EU Member State would result in a loss of the right to a yearly remuneration. The Court argues that the provision in question would amount to a unlawful restriction of free movement similar to the cases decided by the European Court in *Graf* [45] and *Terhoeve*[46] or *Osman*.[47]

On the equality of treatment the Act on the residence, economic activity and integration of foreigners in the federal territory (Art. 1 of the Immigration Act) provides in Section 44 for a possibility of participation of foreigners who do not or not longer possess an attendance entitlement to participate at integration courses according to the available number of places on the course concerned. The reference in the Freedom of Movement Act/EU to Section 44, para. 4 indicates that EU citizens are not entitled to attend an integration course. This is considered by some authors as a violation of the equal treatment clause. It is argued that EU citizens might also be interested to attend a language course free of charge. Since a special category of foreigners, repatriate Germans are entitled to attend language courses free of charge, EU citizens were also entitled under this provision to attend language courses. The question arises whether different treatment between third-country nationals on the one hand and EU citizens on the other hand, and EU citizens and repatriate Germans as to the right to attend a course free of charge, may be justified by reasons based upon the obligation to attend a course in the case of third-country nationals which is not applicable to EU citizens due to the privileged legal status of EU citizens, and in the case of repatriate Germans due to the special obligations under the German Constitution to afford repatriate Germans access to German territory and acquisition of German citizenship.

In reaction to the Anker-decision of the European Court of 30.9.2003 a couple of regulations have been amended, in particular the "*Schiffsbesetzungsverordnung*" and the "*Schiffsoffizierausbildungsverordnung*" by Articles 2 and 3 of the Regulation on the amendment of regulations on the training of the seafaring profession (*Verordnung über die Änderung seefahrtsbezogender Ausbildungsverordnungen* of 4 August 2004, *BGBl*. I-2062 ff.). The relevant amendments are in Articles 2 and 3 stating that the certicate of a naval officer which is required under Article 3 of the *Schiffsbesetzungsverordnung* may be acquired by nationals of a Member State of the European Union provided that they fulfil certain requirements under Section 7 para. 1 of the *Schiffsoffizierausbildungsverordnung*.

In addition, Section 2, para. 2 of the *Schiffsbesetzungsverordnung* of 26 August 1998 (*BGBl*. I, p. 2577) has been changed by the following provisions (Art. 2 and 3 of the attached provision).

In my understanding the relevant provisions say that:

1. independent of how big a ship is the captain must be a German national and in possession of a valid German captain's certificate;

44 Gesetz über die Gewährung einer jährlichen Sonderzuwendung in der Fassung des Bundesbesoldungs- und Versorgungsanpassungsgesetzes of 24.3.1997, *BGBl* I, p. 590.
45 ECJ of 27 January 2000, C 190/98, Rec 2000 I, 493.
46 ECJ of 26 January 1999, C 18/95, Rec 1999 I, 345.
47 ECJ of 15 December 1995, C 415/93, Rec 1995 I, 5040.

2. concerning officers of the nautical of technical services Union citizens are treated equal to Germans in the following paragraphs 2-4 by including a clause that one resp. two officers must be either German nationals or Union citizens in possession of a recognised equivalent certificate.

Chapter III
Employment in the Public Sector

Schiller, a practising lawyer, deals in an article with the reservation of public administration for notary publics in Germany.[48] Schiller criticises the view of the European Commission that the exercise of functions of a notary public in the area of voluntary settlement of disputes does not fall within the scope of application of Article 39, para. 4 EC. He pleads for a differentiating analysis of the different functions of a notary public, arguing that Section 39, para. 4 EC applies only if a dispute is terminated by a final decision on the basis of a formal contradictory procedure or if judicial appeal is granted against such a decision or if a dispute is finally settled by a binding decision. On the other hand the functions of a notary public concerning public registers and certificates in heritage law cannot, in his view, be considered as public administration in the sense of Community law. Therefore, Schiller comes to the conclusion that generally speaking the activities of public notaries do not fall under the reservations of Articles 45 and 55 EC.

In reply to an inquiry with the Federal Ministry of Interior concerning employment of EU citizens in the public sector the Ministry has informed me that there are no changes as yet concerning the recommendations given on 20 May 1996 as to the interpretation of the relevant Act on Civil Servants.[49] Both federal laws as well as the corresponding provisions of the *Länder* provide by a general clause that access to public service can only be made dependent upon German nationality if the tasks so require (referring to Art. 48, Sec. 4 of the EEC Treaty).[50] In 1996 the federation and the *Länder* have agreed upon a general catalogue of criteria intended to facilitate to determine those functions which can be reserved to German nationals:

- officials in core activities of the government;
- chancellor offices in the federation and the *Länder* including the offices of the federal chancellor, of the president of the parliaments in the federation and the *Länder* unless the services performed are of a general nature (typing services, translation etc.);
- consulting of constitutional organs or members of constitutional organs;
- leading functions in the public administration of the federation or the *Länder*;
- functions in military or civil defence;
- internal representation of the state including international and supranational organisations;
- preparation of legislation;
- functions concerning basic secret interests and security interests of the state like
  - secret services;
  - nuclear safety;
  - employment with the federal police offices, federal customs offices or the police offices of the *Länder* unless they are of a purely technical nature or if the task to be performed justifies employment of a EU national of another Member State;

48 Gernot Schiller, Freier Personenverkehr im Bereich der freiwilligen Gerichtsbarkeit, *EUR* 2004, 27.

49 Bundesbeamtengesetz as published by law of 31.3.1999, *BGBl.* I, p. 675; Beamtenrechtsrahmengesetz (framework legislation on civil servants) as published by law of 31.3.1999, *BGBl.* I, p. 654.

50 See Sec. 4 para. 2 Beamtenrechtsrahmengesetz, Sec. 7 para. 2 Bundesbeamtengesetz.

- civil servants exercising special executive powers in the area of restrictions of the rights and freedoms of citizens and functions preparing such decisions as long as the activities are not only implementation of legislation provisions or of an only technical nature (chief of organisational units, leading officer with the police etc.);
- civil servants authorised to make decisions in the administration of justice (judicial services, public prosecutors, administration of justice, execution of judgements);
- chiefs of administrations and their representatives unless the tasks of the agency are not only of a scientific, artistic or technical nature;
- civil servants performing control or supervisory functions with regard to other authorities or with regard to legal persons under public law or in order to guarantee the observance of essential public interests (agency controlling, compliance with competition law);
- civil servants making decisions in public services in the area of personnel, budget and organisation;
- civil servants making decisions in the office of the federal attorney for disciplinary matters or comparable institutions in the *Länder*;
- civil servants who perform functions which may rise issues of a collision of interests due to their nationality and the particular duty of loyalty of the state (particularly in the area of nationality, aliens or asylum law).[51]

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51 1. Amtsinhaber im Kernbereich der Staatstätigkeit, z.B.
- Amtsinhaber beim Bundespräsidial- und Bundeskanzleramt, bei den Staatskanzleien der *Länder* und der Bundestags-, Bundesrats- oder den Landtagsverwaltungen, soweit nicht Tätigkeiten der allgemeinen Dienste (z.B. Schreib-, Sprachendienst, etc.) ausgeübt werden,
- Amtsinhaber, die mit der Beratung von Verfassungsorganen oder Mitgliedern von Verfassungsorganen des Bundes oder der *Länder* betraut sind,
- herausgehobenen Funktionen im Leitungsbereich von obersten Bundes- oder Landesbehörden (z.B. Abteilungsleiter, Unterabteilungsleiter).
2. Amtsinhaber auf dem Gebiet der militärischen oder zivilen Verteidigung.
3. Amtsinhaber, deren Aufgabe es ist, den Staat nach außen zu vertreten oder die Interessen des Staates in inter- oder supranationalen Institutionen wahrzunehmen.
4. Amtsinhaber, die Entscheidungen auf dem Gebiet der Rechtssetzung maßgeblich fachlich vorbereiten.
5. Amtsinhaber, deren Funktion grundlegende Geheimhaltungs- und/oder Sicherheitsinteressen des Staates betrifft, z.B.
- Tätigkeiten in den Nachrichtendiensten,
- Tätigkeiten auf dem Gebiet der Reaktorsicherheit,
- Tätigkeiten beim Bundeskriminalamt, Zollkriminalamt oder den Landeskriminalämtern, soweit sie nicht ausschließlich technischer Natur sind oder die wahrzunehmende Aufgabe die Berufung eines Staatsangehörigen der andere EU-Mitgliedstaaten rechtfertigt.
6. Amtsinhaber, die in Bereichen der Eingriffsverwaltung (Eingriff in die Rechts- und Freiheitssphäre) grundlegende Entscheidungen treffen oder diese maßgeblich fachlich vorbereiten, soweit sich die Tätigkeit nicht ausschließlich auf den bloßen Gesetzesvollzug beschränkt oder ausschließlich technischer Natur ist (z.B. Leiter von Organisationseinheiten, Einsatzleiter bei der Polizei etc.).
7. Amtsinhaber, die auf dem Gebiet der Rechtspflege (Gerichtsbarkeit einschl. Staatsanwaltschaften, Justizvollzug, Vollstreckung) Entscheidungen treffen oder diese Entscheidungen maßgeblich fachlich vorbereiten.
8. Leiter von Behörden und deren Stellvertreter, soweit die Aufgaben der Behörde nicht ausschließlich künstlerischer, wissenschaftlicher oder technischer Natur sind.
9. Amtsinhaber, die Aufsichts –oder Finanzkontrolltätigkeiten
- gegenüber anderen Behörden (einschließlich Kommunalaufsicht(oder
- gegenüber juristischen Personen des öffentlichen Rechts oder

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As a general criterion the core of the activity is used. The decision is made by the respective authority responsible for matters or personnel. In particular cases different attribution can be justified on the basis of particular legislative provisions, for example for civil servants elected on the communal level or due to the particularities of special areas (for instance universities).

It is obvious that the catalogue of criteria leaves a substantial amount of discretion. How the discretion is used cannot be examined easily. Not only every land within the federation disposes of its discretionary power, but also within every land there may well be differences in the employment policy of the different ministries.

- zur Wahrung wichtiger öffentlicher Interessen (z.B. Kartellaufsicht)
- wahrnehmen oder Entscheidungen dieser Amtsinhaber maßgeblich fachlich vorbereiten.

10. Amtsinhaber, die Entscheidungen in Querschnittreferaten (Personal, Haushalt, Organisation) treffen.

11. Amtsinhaber, die beim Bundesdisziplinaranwalt oder einer vergleichbaren Einrichtung in den *Länder*n Entscheidungen treffen oder diese Entscheidungen maßgeblich fachlich vorbereiten.

12. Amtsinhaber, bei denen es aufgrund ihrer Funktion zwischen den Rechten und Pflichten aus ihrer Staatsangehörigkeit und dem besonderen Dienst- und Treueverhältnis gegenüber ihrem Dienstherrn zu Interessenkollisionen kommen kann (z.B. im Bereich des Staatsangehörigkeits-, Aus*Länder*- oder Asylrechts).

Bei der Einordnung in die Funktionsgruppen ist auf den Schwerpunkt der Tätigkeit abzustellen. Die Entscheidung über die Einordnung trifft die jeweilige Einstellungsbehörde. Eine von dem Kriterienkatalog abweichende Einordnung kann aufgrund besonderer gesetzlicher Regelungen (z.B. für kommunale Wahlbeamte) oder der Besonderheiten einzelner Verwaltungsbereiche (z.B. Hochschulen) gerechtfertigt sein.

Chapter IV
Family Members

Borrman in an article deals with the rights of third-country national spouses of Union citizens in particular consideration of the problems of fake marriages.[52] The author discusses the European Court's decision in the *Akrich*-case.[53] Taking up the statement of the Court whereby it might constitute an abuse of Community law or rights if privileges of the Community law for migrant workers and their spouses are used in the framework of fake marriages concluded for the purpose to circumvent the rules valid for third-country nationals, the author draws some conclusions concerning the entry and residence of third-country nationals as spouses in a fake marriage. The author relies on the statement of the Court arguing that spouses under these conditions cannot make use of the privileges of family relatives of Union citizens as laid down in the *MRAX*-case.[54]

The residence right of a third-country national married to an EU citizen has been the subject of a judgment of the Administrative Court of Hessen concerning the legal status of a third-country spouse of a Portuguese citizen being suspected of having concluded a fake marriage. The alien authorities had refused to prolong a residence permit to the applicant for reasons of a fake marriage. He applied at the administrative court for suspensive effect of his judicial complaint. The Administrative Appeal Court quashing the decision of the administrative court granted judicial interim protection. The Court argued, even third-country nationals having concluded a marriage exclusively for the purpose of receiving a residence permit could possibly rely upon the Community law provisions on freedom of movement since the relevant provisions of the Aufenthaltsgesetz/EWG were exclusively dependent upon the fact of a marriage with a EU-citizen and the fact of a marriage could not be disputed even in the case of a fake marriage but could only be disputed by a formal separation or judicial decision. In any case, the Appeal Court considers that the decision on the Community law effects of a fake marriage could not be finally decided in a judicial interim procedure but only in a judicial procedure in which all evidence available would be examined. Therefore, for a provisional decision interim protection could not be refused to a spouse arguing that he was entitled to freedom of movement as the spouse of an EU citizen.[55] The decision could be of substantial practical importance concerning the scope of applicability of the new Freedom of Movement Act.

According to a judgment of the Administrative Appeal Court of Hessen of 17 February 2004[56] a relative of a Union citizen applying for a prolongation of an EC residence permit is entitled to file an administrative and judicial appeal with suspensive effect even if there are strong indications that the marriage with the Union citizen had been concluded exclusively for the purpose of a residence permit. The applicant, a national of Bosnia-Herzegowina, had been married to a Portuguese national. He applied in September 2001 for a prolongation of a residence permit granted in 1979. The administrative authorities indicated that following a termination of his residence permit he could be deported. The Administrative Appeal Court quashing a previous decision of the administrative court of first instance decided that his

52 Borrman, A., Rechte drittstaatsangehöriger Ehegatten wandernder Unionsbürger – unter besonderer Berücksichtigung des Problems der Scheinehe, *ZAR* 2004, 61-67.
53 ECJ of 23.9.2003, *Secretary of Home Department/Hacene Akrich,* C-109/01.
54 ECJ of 25.7.2002, C-459/99, *Mrax/Belgium*.
55 Hessischer VGH of 17.2.2004, 9 T 60/04 in *NVwZ-RR* 2004, 792.
56 AuAS 2004, 74, *Az* 9 Tg 60/04.

judicial appeal has suspensive effect regardless of the question whether his marriage did constitute in reality a “sham marriage”.

Chapter V
Follow-up of Recent ECJ-Judgements

For a discussion of the consequences of the ECJ jurisprudence in the *Orfanopoulos*-case see chapter III.

Following the ECJ decision in the *Orfanopoulos*-case[57] the Federal Administrative Court by judgement of 3 August 2004 has decided that Union citizens must not be expelled any more on the basis of the obligatory expulsion provisions of Section 47, paras. 1 and 2. In each case an individual decision is required. The Ministry of Interior of Baden-Württemberg following the ECJ-decision has instructed the responsible alien authorities accordingly. Concerning the ECJ-decision the Ministry of Interior notes that a decision of the Federal Administrative Court is still pending on that subject (in the meantime this decision has been passed) and that the new Directive on the rights of Union citizens does not require an administrative appeal procedure.

Following the European Court's *Orfanopoulos*-decision, the Federal Administrative Court's judgement of 3 August 2004, following the ECJ's decision in the *Orfanopoulos*-case, has decided that in all pending expulsion procedures all administrative procedure becoming pendent until 31 January 2005, the alien authorities with respect to the changed jurisprudence of the Federal Administrative Court are instructed to re-examine expulsion decisions in order to repeat a discretionary decision in cases in which expulsion has been based upon the obligatory expulsion rules of the Aliens Act. Various administrative courts deal with the consequences of this decision in pending judicial procedures.[58]

57 ECJ of 29.4.2004, Case C-493/01 and C-482/01.

58 See Federal Administrative Appeal Court of Baden-Württemberg of 12 October 2004, *InfAuslR* 2005, 134.

Chapter VI
Policies, Texts and Practices of a General Nature with Repercussion on the Free Movement of Union Citizens

German nationality law provides for a privileged treatment of EU citizens intending to acquire German citizenship by naturalization. While in general naturalization is dependant upon renouncement of a previous nationality, EU citizens are privileged in acquiring German nationality without giving up their previous nationality provided that the law of the state of origin grants reciprocal rights to German citizens. There has been a debate on the interpretation of the principle of reciprocity. While some courts have argued that reciprocity requires reciprocal individual rights to naturalization without the need to give up a previous nationality, other courts have taken the view that reciprocity is granted if Germans in another EU state will be naturalized under comparable conditions without being forced to renounce their German nationality. The question which EU states require such conditions had been controversial among the *Länder* of the federal republic. The Ministry of Interior of Baden-Württemberg has interpreted the Federal Administrative Court's decision by announcing a list of countries whose nationals will be naturalized without the requirement of giving up their nationality of origin: Belgium, Finland, France, Greece, Ireland, Italy, Malta, Poland, Portugal, Sweden, Slovakia, Hungary, United Kingdom, Cyprus.

In the case of Belgium, the Ministry notes that in spite of reciprocity Belgian nationals will not be allowed to maintain a Belgian nationality since according to Belgian law they might loose automatically Belgian nationality by acquiring German nationality. In principle, reciprocity is also assumed with respect to the Netherlands and Slovenia, although according to the Ministry there are some restrictions. In the case of the Netherlands reciprocity is granted in the case of Dutch applicants with a German spouse or a same-sex partner as well as in the case of juvenile Dutch applicants acquiring German nationality together with their parents, provided that the mother or the father is adult and living with a German spouse.

In the case of Slovenia reciprocity is only guaranteed in the case of a joint naturalization of juveniles. With respect to 8 EU states (Denmark, Estonia, Latvia and Lithuania, Luxembourg, Austria, Spain, Czech Republic) reciprocity is denied. Therefore, nationals of these EU states may only be naturalized by previous renouncement of their nationality.[59]

The Act on the general freedom of movement for EU citizens (Freedom of Movement Act/EU), passed in connection with the Immigration Act 2004, has entered into force on January 2005. The Freedom of Movement Act has remained almost unchanged since the adoption of the original act of 2002, which has finally been declared unconstitutional for formal reasons by the Constitutional Court. The Act to some extent takes into account the deliberations on a proposed regulation on the rights of EU citizens. However, for obvious reasons the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of 29 April 2004[60] has not been fully taken into account since the adjustment to the Directive would have required more time and would have delayed the adoption of the Immigration Act. Therefore, it is expected that in 2005 a number of provisions of the Freedom of Movement Act will have to be changed.

59 See list of 31January 2005, press release of 31 January 2005.
60 *Official Journal* L 229/35.

The Act on the general freedom of movement of EU citizens (Freedom of Movement Act/ EU) of 30 July 2004 replaces the *EWG-Aufenthaltsgesetz* of 1969 and the Freedom of Movement Regulation of 31 July 1997[61] (*Freizügigkeitsverordnung/EG*). Both the *Aufenthaltsgesetz/EWG* and the *Freizügigkeitsverordnung* had been constantly lagging behind the development in Community law, primarily due to the jurisprudence of the European Court. In particular the *EWG-Aufenthaltsgesetz* had been drafted when freedom of movement had been limited to economically active Union citizens, while the *Freizügigkeitsverordnung/EG* of 1997 tried to take into account the three directives on the right of movement for non-economically active Union citizens. The new law on freedom of movement takes up some of the more recent developments of the proposed regulation on free movement of Union citizens although the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States had not yet been fully taken into account.

An essential element of the new Act is that it purports to provide for a comprehensive regulation of the rights of EU citizens concerning entry and residence. Therefore, the previous technique of referring to the Aliens Act and to use the provisions of the Act only as supplementary provisions has been given up. The Immigration Act does only apply in a number of specifics laid down in Section 11 of the Act.

Applicable are only the following provisions of the Immigration Act:

- Section 3 para. 2: exceptions from the passport obligation;
- Section 11 para. 2: exceptional provision to enter the German territory in spite of a general prohibition due to a expulsion;
- Section 13: crossing of the border;
- Section 14 para. 2: exceptional visa and supplementary passports;
- Section 36: family reunion of those relatives not falling within the scope of application of the general rules on family reunion;
- Section 44 para. 4: the right to participate at integration courses without being subject to an obligation;
- Section 46 para. 2: prohibition to leave Germany;
- Section 50 para. 3-7: duty to leave the territory;
- Section 69: fees for certain official acts;
- Section 74 para. 2: the authority of the federal government to issue binding guidelines;
- Section 77: formalities;
- Section 80: the possibility of juveniles to perform legal acts;
- Section 85: the calculation of times of residence;
- Section 86-88, 90, 91: transfer and protection of data;
- Section 96, 97: illegal trafficking of aliens;
- Section 99: authority to issue regulations.

In addition, the Immigration Act applies in cases in which the Immigration Act is more favourable than the Freedom of Movement Act.[62] Finally, the Immigration Act provisions apply if the alien authority has determined that the entitlement pursuant to the Freedom of Movement Act does not exist or has lapsed. In this case the Residence Act shall apply in the absence of any special provision contained in the Freedom of Movement Act.

61 For text see Hailbronner, *AusLänderrecht Kommentar*, vol. IV, D 1.1.

62 See section 11 § 3 S. 3.

The determination of the scope of application under Section 2 of the Freedom of Movement Act might raise issues as to the compatibility with Community law. Section 2, para. 2 contains a list of different categories of persons entitled to freedom of movement. The list largely corresponds to the different conditions laid down in the respective regulations and directives of the European community, in particular Regulation 1612/68 and other directives and regulations. Non-gainfully employed EU citizens are under Section 2, para. 2, No. 6 entitled to free movement, subject to the requirements of Section 4. Section 4 describes the conditions in accordance with Community law by adequate means of subsistence and adequate health insurance coverage. The question, however, may arise whether under the more recent jurisprudence of the European Court the free movement of EU citizens, although subject under Article 17 EC to certain requirements, can be limited to the category of persons determined in Section 2. The technique of the Freedom of Movement Act results in a division of EU citizens entitled to freedom of movement and EU citizens not entitled to freedom of movement since they are not fulfilling the requirements under the Freedom of Movement Act respectively community provisions on non-gainfully employed EU citizens. However, there are some indications in the Court's jurisprudence that EU citizens, regardless of the fulfilment of such requirements, are still entitled to some protection under Community law, for instance the special requirements for restricting their right to free movement. If the general provisions of the Immigration Act were held to be applicable, a Union citizen could not rely upon the special conditions developed in the European Court's jurisprudence on limitation of the free movement. It has to be noted, however, that Section 11, para. 2 requires that a formal determination is necessary that the entitlement pursuant Section 2, para. 1, or the entitlement pursuant to Section 2, para. 5 does not exist or has ceased to exist in order to apply the general provisions of the Residence Act.[63]

The Civil Appeal Court of Saarbrücken in a decision of 4 November 2004[64] has decided the question whether a Member State is obliged to recognise a drivers licence issued by another state. The Court has applied the Directive 91/439 arguing that a Member State is not entitled to refuse recognition of a drivers licence issued by another Member States on the reason that the foreigner did not have his ordinary residence in the other Member State at the time of issuance of the drivers licence. The examination whether the requirements for a general recognition of drivers licence are fulfilled, according to the Court is exclusively within the competence of the EU Member State issuing the drivers licence.

The author of this report has addressed a letter to the German Football Federation concerning the free movement of football players. The president of the Football Federation has replied that there is presently no statement possible since the executive offices of the German Football Federation have to coordinate their statements concerning the European Commission's suggestions and UEFA's proposals with the German Football League in order to arrive to a common statement.

There are numerous decisions concerning the rights of Turkish nationals. Generally speaking, the German administrative courts follow the jurisprudence of the European Court by applying the principles developed by the European Court for Union citizens on the basis the such rules should be applied as far as possible to the legal status of Turkish nationals entitled to a right of residence under Article 6 ARB 1/80.

63 For details of the Freedom of Movement Act see under the different chapters I, IV, VII.

64 Neue Strafrechtszeitschrift, *NStZRR* 2005, Heft 5, p. 50.

Concerning the residence right of children of a Turkish worker born in Germany, who is entitled to residence under Article 6 ARB 1/10, the Hessian Administrative Appeal Court states that the children of the Turkish worker acquire *ex lege* a residence right according to Article 7 ARB 1/80. This residence right is still valid if the Turkish worker has quit the labour market due to retirement or due to serving a prison sentence. Concerning the applicability of the new *Freizügigkeitsgesetz/EU* the Court, however, states that Turkish workers may not rely upon the special procedural rights of Union citizens according to Section 7, para. 1, sent. 1 of the *Freizügigkeitsgesetz/EU* (providing for instance for special rules concerning the suspensive effect and interim judicial protection.

Chapter VII
EU Enlargement

General observations

In connection with the EU enlargement, a number of legal issues have arisen which have been discussed in regular meetings of the ministries of interior of the *Länder* and the federation. The Federal Ministry of Interior in addition has informed the ministries of interior of the *Länder* in various letters about the outcome of common meetings of the interior ministers and the Federal Ministry of Interior with the Federal Ministry for Economy and Labour.

Germany has decided to make use of the transitory regime provided for in the Accession Treaty.[65] With exception of the citizens of Malta and Cyprus, who enjoy unlimited free movement of workers under the Accession Treaty, the citizens of the other newly acceding states may be restricted by the "*two plus three plus two model*". In a first stage, freedom of movement may be restricted for a period of two years. Such restrictions can be maintained by Member States on the basis of an examination following a report of the Commission for another three years (second stage). Another prolongation is possible for two years in the case of serious disturbances of the labour market (third stage). The Accession Treaty also provides for a possibility to restrict the freedom to provide services with an EU citizen's own workers in certain areas like construction and related economic areas by Germany and Austria to the extent that these states have restricted the access to the labour market according to the "*two plus three plus two model*".

In Germany, citizens of Malta and Cyprus enjoy unlimited freedom of movement since 1 May 2004. Citizens of the other newly acceding states enjoy free movement only subject to the restrictions to the labour market which Germany has enacted in a first stage. This means that the existing provisions on the requirement of a labour permit are still applicable. Workers from the newly acceding states, therefore, as a rule require a labour permit according to the Social Code, vol. III (SGB III), the regulation on labour permits (*Arbeitsgenehmigungsverordnung*) and the Anwerbestoppausnahmeverordnung. In addition, Germany has opted for a restriction of the freedom to provide services by corresponding information to the European Commission. This means that services in the areas of construction business and related economic activities, cleaning of buildings, inventory and public transport means as well as in the decoration business are in principle inadmissible as far as services are provided with a Union citizen's own workers. The restrictions do not deprive these citizens of the newly acceding states of their status as Union citizens. This means that as Union citizens they do not need a visa for entry into the Federal Republic of Germany. In addition, they will receive an EC residence permit since 1 May 2004 (abolished by the Freedom of Movement Act, valid 1 January 2005), provided that all requirements under EC law are met.

Citizens of Eastern Europe enjoy freedom of movement if the legal requirements under EU law are met by

- persons enjoying freedom of establishment;
- persons providing services outside the economic areas subject to restrictions;
- persons receiving services;
- persons providing services in all economic areas who are not engaging foreign workers;
- persons entitled to remain according to the Regulation 1251/70;

65 Part 4, Title 1, Art. 24, with Annexes V, VI, VIII-X, XII-IV.

- retired persons, students and other non-economically active persons under the Regulations 90/364, 90/365, 93/69.[66]

Concerning workers and persons providing services in restricted areas a residence permit may be granted which, however, cannot be considered as declaratory but a constitutive residence permit on a discretionary basis. If a Union citizen from a new Member State receives a working permit, the alien authorities are to exercise discretion whether to grant a residence permit. However, the scope of discretion will as a rule be restricted in such cases to an obligation to grant a residence permit since the purpose of the transitory regime to protect the labour marked has already been taken into account by granting the applicant a labour permit by the labour authorities.

The provision of services in the restricted areas is only admissible if the Federal Agency for Labour has granted permission in the framework of a special procedure (*Werkvertragsverfahren*). This procedure, which is already applied for foreign enterprises and foreign workers performing work on a basis of a special work contract, will be applied also to services in the restricted areas. In this case foreign workers attached to Union citizens are treated equally to other foreign workers. Labour permit is granted in the framework of the previously mentioned procedure by the labour administration following a labour permit of the alien authorities which have to issue an EC residence permit according to their (restricted) discretion.

For the EC residence permit until January 2005 the existing forms were used. Since, however, the existing forms contain a note that a residence permit enjoys an unlimited right of access to the German labour market, the form is with a sticker changing the text of the note indicating that the exercise of an independent employment requires a labour permit.[67]
For seasonal workers the existing procedure is still applicable. Employment is only possible on the basis of contractual agreement between the labour administrations of the respective states. Such agreements have been concluded with Poland, Hungary, Slovak Republic, Czech Republic and Slovenia. Concerning the residence right of seasonal workers it is important to take into account that EU citizens of the newly acceding states may enter without a visa the Federal Republic of Germany in order to take up a seasonal occupation. As citizens of the acceding states they do not need a residence permit due to the limitation of their employment to three months during the calendar year.[68] Seasonal workers, however, have to register their residence if the duration of their stay exceeds one month. It is sufficient if the respective employer submits a list of the seasonal workers to the alien authorities. The list must contain the data required for the registry in the Foreigners Registry A.[69] The alien authorities are not obliged to establish a file for every single seasonal worker. It is sufficient to establish a collective file.

Illegally employed workers may be fined according to Section 404, para. 2 of the Social Code, vol. III. It is not possible to claim free movement of workers since workers not entitled to freedom of movement are subject to a labour permit requirement. However, legally em-

66 Note, however, that these directives have now been abolished by the Union Citizens Directive 2004/38, effective 30 April 2006.

67 "Der Inhaber/die Inhaberin dieser Aufenthaltserlaubnis ist nach Maßgabe des geltenden Rechts freizügigkeitsberechtigt. Zur Ausübung einer unselbständigen Erwerbstätigkeit benötigt der Inhaber/die Inhaberin eine Arbeitserlaubnis."

68 Section 8 para. 2 sent. 1 AufenthG/EWG.

69 Cf. Section 2, para. 1 ,No. 1, lit. c, Aus*Länder*dateienverordnung.

ployed workers do not loose their status as Union citizens if they may rely on other grounds like reception of services.

The Baden-Württemberg Administrative Appeal Court in a decision of 25 June 2004 has dealt with the issue whether Community law is applicable in pending judicial proceedings which had been commenced before the accession is applicable concerning the conditions for expelling the national of a new Member State. The Court argues in analogy to the European Court's recent jurisprudence on taking into account new facts in case of an expulsion that Community law has as well to be taken into account into a judicial proceeding of the lawfulness of an expulsion of a national of a new EU Member State since the time of accession.[70]

The Administrative Appeal Court of Hessen in a judgement of 29 December 2004 has confirmed the right of Czech nationals to rely upon the new Freedom of Movement Act irrespective of whether a person fulfils all the requirements laid down in Sections 2 and 4 of the Act concerning sufficient means of subsistence etc. The Court argues that the law is applicable to all Union citizens including citizens of the new EU Member States. It follows that Czech nationals are only obliged to leave the federal territory if the alien authority has made a binding decision that they are not entitled to freedom of movement under the Act. This would imply as well that an order of an immediate execution is not admissible. It also follows that previous expulsion decisions based upon the law before 1 January 2005 and which are still subject to appeal have lost their legal basis.[71]

Concerning the legal status of nationals of acceding states, the Freedom of Movement Act of 30 June 2004 provides that the provisions are applicable to nationals of acceding states in so far as divergent provisions are applicable in accordance with the Treaty of 16 April 2003 on the extension to the European Union of the new acceding states if employment has been proved by the Federal Employment Agency to be in accordance with Section 284, para. 1 SGB III.

Particular Issues concerning EU Enlargement

Schengen Implementation Agreement

Since the registry for Union citizens for refusal of entry (Art. 96) is not admissible, it is necessary to delete the registry of approximately 60 000 entries through German authorities of citizens of East European states including alias entries. The deletion is organised centrally by the Federal Criminal Office. Measures restricting the free movement of Union citizens may only be enacted under the strict requirements of EC law. The existing automatic limitations of entry for persons notified for refusal of entry cannot be maintained automatically with respect to the person registered on the newly acceding states. It is necessary to examine on an individual basis whether movement of Union citizens may be restricted under the requirements valid for Union citizens. Only to that extent administrative orders and registries for refusal may be maintained and registered in the Central Registry for Aliens (*Ausländerzentralregister*). Support of the implementation of restrictive measures against

70 Decision of 9 September 2004, 13 S 1738/04.
71 Administrative Appeal Court of Hessen of 29.12.2004, *Deutsches Verwaltungsblatt* 2005, 319.

Union citizens' possibilities of registry according to the national system INPOL may be used.
This means that in a singular action the *Bundesverwaltungsamt*, responsible for the Central Registry of Aliens, has been charged to submit the personal data of all concerned EU citizens by mid February 2004 to the alien authorities. The alien authorities on the basis of an individual examination have to examine whether a search warrant under INPOL rules has to be deleted or maintained on the basis of the *Freizügigkeitsgesetz/EU* and whether personal data in the central registry about residence status, warrant for refusal of entry has to be corrected by the order of aliens authorities.[72]

Family reunion

Family reunion to new EU citizens has been regulated until 1 January 2005 by the *AufenthG/EWG* and the Freedom of Movement Regulation (*FreizügigkeitsV/EG*) and since 1 January 2005 by the Residence Act of 30 July 2004.[73] There are no particularities concerning the application of provisions concerning family reunion applicable to Union citizens. Concerning the access to the labour market family relatives are treated according to the law on access to the labour market for citizens of the EU Member States. According to Sec. 285 para. 1 Social Code, vol. III they may be granted a labour permit subject to the priority requirements. Waiting periods are not applicable.

Family relatives of non economically active Union citizens will be granted access to the labour market under the same conditions. This means that the restrictions provided for in the Accession Treaty are applicable for all persons seeking employment in the same way.

Persons deemed as admitted to the German labour market in the sense of the Accession Treaty

According to the Accession Treaty persons are admitted to the labour market after a regular employment of 12 months, provided that they enter into an employment contract with an employer in Germany and they are admitted according to the general provisions of the law on labour permits. Included are not only activities for which a labour permit is granted under the general provisions, but also economic activity which may be exercised without a labour permit under Section 9 of the *Arbeitsgenehmigungsverordnung*. Not admitted to the German labour market are workers who are only temporarily detached on the basis of a contract according to foreign law.

Not admitted to the German labour market are au-pair persons and comparable activities (participants at a voluntary service year),[74] trainees,[75] or persons completing a professional formation.[76] The reason for the exclusion of such activities is that these activities are not characterised by participation in the labour market according to the general working conditions. Therefore, au-pair persons receive the possibility for a limited employment basically for the reasons of improving language knowledge or the general knowledge of a foreign

72 See Sec. 35 Aus*Länderz*entralregistergesetz.
73 See Annex 1.
74 Sec. 9, No. 16, Arbeitsgenehmigungsverordnung.
75 Sec. 9, No. 15 and 17, Arbeitsgenehmigungsverordnung.
76 Sec. 2, para. 1, Anwerbestoppausnahmeverordnung.

country. The same applies for students who are allowed to work without a working permit on a very limited basis.

Issuance of a labour permit

In accordance with Section 284, para. 1, sent. 2, No. 1, Social Code, vol. III, as amended by the Law on accession to the labour market, the citizens of the new Member States will as a rule require a labour permit if the transition regime applies and the employment is subject to a labour permit requirement. This means that the labour permit can only be granted subject to the Anwerbestoppausnahmeverordnung which provides for a limited catalogue of employments for which labour permits may be granted.[77] In all other non restricted areas like consulting or economic activities of IT-specialists services may be provided unlimited without a labour permit. According to Section 284, para. 6 of the Social Code the Residence Act and the corresponding regulations concerning access to the labour market apply if they contain more favourable provisions in applying the provisions of the Social Code and the corresponding regulations; a labour permit/EU is to be considered as approval to the issuance of a residence permit. This would seem to imply that in this case a residence permit/EU is issued according to Section 4, para. 3 of the new Residence Act of 30 July 2004.

The rules of the *Anwerbestoppausnahmeverordnung* are in principle not applicable with respect to non economically active persons or self-employed persons taking up an employment after they have taken residence in Germany. These persons are therefore not subject to these special provisions. They may receive an EU residence permit under the general rules of Section 285, para. 1, Social Code, vol. III in application of the priority rule. In addition, a change of purpose of residence, for instance by a self-employed Union citizen in an employment, may be granted on the basis of Section 285, para. 1, Social Code, vol. III. However, it is noted that a change for purpose of residence must not result in a circumvention of the transition regime by taking up a residence as a non-economically active person in Germany only for the purpose of a subsequent employment. Such purpose can be generally assumed if a Union citizen changes his/her original purpose of residence within the first three months on entry.

In practice, problems will arise as to the applicable criteria whether an economic activity of a new Union citizen is subject to a labour permit. The labour authorities (*Arbeitsagenturen*) are competent to provide binding information. This procedure is also applicable in case of a foreign worker who has been detached to Germany in order to provide services. The question whether the services provided are falling under the restrictions or not, will be decided by the labour authorities.

There will probably be different practices in order to examine whether an economic activity can be qualified as a temporary provision of services or whether a Union citizen uses the freedom to provide services only to circumvent the restrictions on access to the labour market. The General Social Code, vol. IV considers as a decisive criterion for employment the existence of a social insurance obligation.

77 However, according to the immigration law entering into force on January 1, 2005 the same provisions also apply taking up employment in the framework of provision of services in the restricted areas. Therefore, enterprises from the new Member States may only employ their foreign employees in Germany in the framework of the German rules on labour permit unless bilateral agreements on the detachment of workers apply.

The question of the duration of residence arises in various contexts in connection with the requirement of a labour permit. Generally, the alien and labour authorities consider the certificate registration with the communal authorities (*Meldebescheinigung*) as relevant.

Issuance of a certificate for new Union citizens

In general, new Union citizens are treated equal to other non-economically active Union citizens since the Accession Treaty does provide for restrictions only for access to the labour market. This means, that new Union citizens fulfilling the requirements for residence as non-economically active persons receive a certificate under the *Freizügigkeitsgesetz/EU*. New Union citizens not entitled to free movement are in principle entitled to a certificate confirming a right of residence under Community law.

The question of the legal status of new Union citizens who are already in possession of an unlimited residence permit has given rise to some controversy between the *Länder* and the federal authorities. Since they derive their rights for access to the labour market not from European law but from the previous residence permit, they have until January 2005 also received an EC residence permit with an amended text making clear that their right of access to the labour market depends on their residence permit.

The question under what conditions an EU residence permit to a new Union citizen may be granted as an unlimited permit depended until January 2005 on the fulfilment of requirements of the Aliens Act, in particular the requirement of a legal residence of five years. Tolerations are not to be taken into account in the calculation of the five-years-requirement. It must be taken into account, however, that the EU residence permit has been abolished by the Immigration Law of 30 July 2004 since 1 January 2005. This means that the EU residence permits issued to new Union citizens after the accession have lost their relevance after the entering into force of the immigration law. With the implementation of the Union Citizens Directive the EC residence permit of Union citizens will generally loose its relevance since 30 April 2006. Therefore, the alien authorities in deciding whether to issue a settlement permit to a new Union citizen are required to take into account a previous residence and to issue a settlement permit.

New Union citizens subject to restrictions may remain in Germany for a period of three months without having to fulfil any particular purpose. During that time they may look for work. In order to take up employment it is necessary to receive a residence permit. A Union citizen who did not find labour after a period of three months respectively did not receive a permit for employment is in principle obliged to leave Germany. Whether the jurisprudence of the European Court concerning a longer period of time (*Antonissen*) is applicable to new Union citizens is doubtful. Since there is no free access to the labour market it cannot be assumed that the same principles apply to new citizens as to old Union citizens disposing of an unlimited right to look for work.

Contract workers from the new EU Member States may take up employment according to the existing rules and bilateral agreements. The question whether employment contracts are subject to the transitory regime of the Accession Treaty and whether employment needs a labour permit has to be decided by the regional labour agencies (*Regionaldirektionen*). The Federal Labour Office disposes of a list of competent persons.

Sport professionals

As a rule sport professionals are workers and therefore subject to the same provisions as other workers from the new EU Member States to which restrictions concerning the access to the labour market apply. The residence permit of third-country sport professionals is regulated in Section 5, No. 10, *Arbeitserlaubnisverordnung*, while deliberation of a labour permit is derived from Section 9, No. 12, *Arbeitsgenehmigungsverordnung*. Since the *Arbeitserlaubnisverordnung* cannot be applied any more for the new Union citizens, an indirect application leads to the result that sport professionals may take up employment without a labour permit if they have completed 16 years of age, receive a salary amounting to at least 50% of the salary necessary for entry into the obligatory pension insurance and if the competent board association in agreement with the German sports federation certifies the qualification. A labour permit for professionals not requiring these conditions cannot be issued. For persons living in Germany and disposing of a residence permit a labour permit is to be granted according to Sec. 285 para. 1 Social Code, vol. III.

The legal status of third-country nationals

A number of questions arise in connection with the treatment of third-country nationals. A group of pupils from the new Member States comprising also third-country nationals, who dispose of a residence permit in the new Member State and who wish to enter into Germany, are subject to the provisions of the Council Decision of 30 November 1994, which have been implemented into German law.[78] This means that a list of pupils is considered passport surrogate.

If pupils from third-country nationals disposing of a residence permit in Germany want to enter into a new Member State the question arises whether the Council Decision is applicable. There are good reasons to assume that the Council Decision is part of the "*Acquis Communautaire*" and that the new Member States are obliged to implement these Council Decisions in their national law.

Third-country nationals disposing of a residence permit in the new Member States are not as yet entitled to enter into the Schengen contracting states and remain without a visa for up to three months. The issuance of a residence title by a new Member State, therefore, cannot yet be considered as equivalent to a visa. Article 21 of the Schengen Implementation Agreement does not apply to the new Member States. The same is true with regard to Schengen visa according to Article 10 of the Schengen Implementation Agreement. A Schengen visa entitles only to a residence permit in the Schengen area with the exclusion of the new Member States.[79]

Concerning the privileged treatment of certain third-country nationals the labour authorities have been requested to take into account the preference of the new Union citizens. This means that in implementing national law during the transition regime the community preference has to be taken into account according to Section 285, para. 1, Social Code, vol. III. The priority regime does also apply in case of recruitment of third-country nationals from abroad in the second stage of the transition regime.[80] This means, that for instance an

78 See Sec. 14, para. 2, No. 8, Durchführungsverordnung Aus*Länder*gesetz.
79 See Accession Treaty, Art. 3, in connection with Annex 1, Nr. 2.
80 See Sec. 285, para. 3, Social Code, vol. III.

American national leaving in the US asking for a labour permit according to Section 9 *Anwerbestoppausnahmeverordnung* upon a request of a German employer, the employer must submit an offer which is to be published in URES or VAM. The labour administration tries to find other persons looking for work with priority. If there are no applicants of the first stage and it is possible to occupy the vacant job with a new Union citizen, the new Union citizen will receive a labour permit according to Sec. 9 *Anwerbestoppausnahmeverordnung*.

Public order measures against new Union citizens

New Union citizens working illegally can be punished according to Section 404, para. 2, No. 2, Social Code, vol. III. Refusals of entry (*Wiedereinreisesperre*) are only admissible if a Union citizen has been expelled for endangering the public security or order under the conditions applicable to Union citizens generally. A re-entry cannot be made dependent upon paying the cost of a deportation. Since EC law requires a concrete individual danger, a new Union citizen may not be refused entry if the conditions for a current actual threat for the public order or security are not met.

The transitory regime has been enacted for workers form the newly acceding EU states and their relatives. In addition, the law provides for a number of regulations for nationals of other states enjoying freedom of movement on the basis of the EEA Agreement or the bilateral agreement EC and Member States with Switzerland.

A transition regime on freedom of movement for nationals of the newly acceding states is discussed in articles by Fehrenbacher[81] and Westphal/Stoppa.[82] Fehrenbacher discusses the relationship of the transitory restrictions of freedom of movement for workers to Union citizens' right of the nationals of the newly acceding states. While Westphal/Stoppa argue that the transitory regime is only restricting the accession of the EU citizens of the new EU Member States to the labour market, while the right to entry and residence is not restricted, Fehrenbacher rightly points out that this view is not quite correct. While under the European Court's jurisprudence on Union citizenship it is recognised that Article 18 EC provides a right to entry and residence of Union citizens, this right can be determined and restricted according to secondary Community law. Such determinations and restrictions also follow from the new Citizens Directive of 29 April 2004.[83] It follows that in spite of the transitory regime Union citizens may rely upon free movement under Article 18 as long as they are not taking advantage of social assistance. If the conditions of the general right of free movement under Article 18 for non-economically active Union citizens are not met, however, the restrictions under the transitory regime apply. In the absence of freedom of movement for workers the general provisions of the Residence Act 2004 apply. Therefore, Union citizens are obliged to leave German territory if they do not fulfil the requirements under the new Citizens Directive as non-economically active Union citizens or if they are not granted a residence permit for the purpose of employment.

For persons providing services the Accession Treaty provides for a special regime applicable to Austria and Germany. In the area of construction and related economic branches

81 Fehrenbacher, Übergangsregelungen bei der EU-Erweiterung und deren Auswirkungen im Aus*Länder*recht (transitory rules relating to the EU expansion), *ZAR* 2004, 240.

82 Westphal/Stoppa, Die EU-Osterweiterung und das Aus*Länder*recht (EU extension and aliens law), *InfAuslR* 2004, 133.

83 Directive 2004/38, *Official Journal* L 138, 77.

no freedom to provide services is granted for a transitory period. There are no restrictions in other areas like consulting, translation services etc. In branches not subject to a restriction, Union citizens of the new Member States may offer their services as well as enterprises registered in the new Member States by sending their employees without any requirement of a labour permit.[84]

In economic branches subject to restrictions the Accession Treaty allows restrictions for the freedom to provide services in the sense that the employees sent by such enterprises require a labour permit before they and their employers can make use of the freedom to provide services. As far as under the general rules of labour law a labour permit is required for third-country nationals[85] the labour permit may be granted according to the regulation providing for an exceptional granting of a labour permit[86] for foreigners resident abroad only if the requirements for an exception are met.[87] Fehrenbacher, however, notes that according to No. 14 of the Annex to Article 24 of the Accession Treaty a stand-still-clause prohibits any restrictions enacted after the signature of the Accession Treaty. It follows that workers from the new EU Member States will still be eligible for a working permit in the framework of the existing agreements on temporary workers.

The Administrative Appeal of Hesse in a decision of 29 December 2004[88] has dealt with the question whether the new *Freizügigkeitsgesetz/EU* is applicable also for Union citizens irrespective of whether they fulfil the requirements laid down in Sections 2 and 4 of the law concerning their entitlement to freedom of movement. The Hessian Court argues that according to the jurisprudence of the European Court the exclusive criteria for applying European law and the implementing of the *Freizügigkeitsgesetz/EU* is the nationality of one of the EU Member States. Therefore, the scope of applicability of the law could not be made dependent upon whether Union citizens fulfil the criteria laid down in Sections 2 and 4 (for non-economically active citizens, for instance, sufficient resources). This principle, according to the Court, does also apply for nationals of those EU Member States having acceded to the EU on 1 May 2004. According to the Court it follows that Union citizens regardless of whether they are economically active, they are only obliged to leave if the alien authorities have unappealably stated that there is no entitlement to freedom of movement. This means that in any case appeals have suspensive effect. In addition, the alien authorities were not entitled to order the immediate execution of a decision stating that there is no freedom of movement. The Court adds that previous expulsion decisions against Union citizens have lost their legal basis since the entry into force of the new *Freizügigkeitsgesetz/EU* since 1 January 2005.

84 Sozialgesetzbuch (Social Code) III of 24 March 1997, *BGBl.* I, 594, amended by law of 23 April 2004, *BGBl.* I, 602.

85 See chapter IX of the Regulation on Labour Permits (Arbeitsgenehmigungsverordnung).

86 Anwerbestoppausnahmeverordnung.

87 See chapter II et seq. Anwerbestoppausnahmeverordnung.

88 *InfAuslR* 2005, 132.

Chapter VIII
Statistics

In an article on the relevance of the new social legislation in Germany concerning unemployment benefits for foreigners Sieveking[89] reports about the unemployment quota of unemployed foreigners. In 2002 according to a survey of the Federal Employment Agency 61.9 per cent were men and 38.1 per cent were women. 2.3 per cent of all unemployed foreigners were beyond the age of 20 and 9.6 per cent juveniles in the age of 20-25. According to the Federal Employment Agency there were in 2002 500 543 unemployed foreigners in Germany, 382,950 men and 184,493 women. Of these, 101,095 were from EU states and 404,348 from non-EU states.

The newly established Committee of Experts for Immigration and Integration has provided some figures in the yearly report 2004 on immigration and integration.[90] The Committee notes that the data on migration concerning immigration and emigration of EU citizens to Germany does not permit a differentiation according to reasons for migration, for instance distinguishing family reunion or labour migration. Generally speaking, there is a stronger trend for emigration of EU citizens since 1997. While between 1997 and 2002 EU citizens were accounting for 14 per cent of all immigrations to Germany, they were accounting for 19 per cent of all departures. However, the statistical situation may somewhat change with the accession of the new Member States. In 2002 Polish nationals were the largest group of immigrants, primarily due to a large number of seasonal workers.

According to a recent statistic of the Federal Ministry of Interior on foreigners subject to return the following figures can be found concerning Union citizens obliged to leave and subject to deportation.

89 Klaus Sieveking, Hartz IV und die Folgen für Aus*Länder*: Grundsicherung für Arbeitssuchende – Arbeitslosengeld II, in: Barwig et al. (eds.), Baden-Baden- 2004.

90 "Migration und Integation – Erfahrungen, Nutzen, Neues wagen", Jahresgutachten 2004 des Sachverständigenrates für Zuwanderung und Integration.

1. Number of aliens living in Germany and persons obliged to leave,statistical data as of 31 December 2004

Nationality	total number of aliens	persons obliged to leave	of which: expulsion/deportation	toleration	persons entitled to remain
Belgium	21,791	43	40	3	21,748
Denmark	17,965	33	33	0	17,932
Estland	3,775	80	65	15	3,695
Finland	13,110	12	12	0	13,098
France	100,464	216	202	14	100,248
Greece	315,989	412	389	23	315,577
Great Britain	94,586	120	104	16	94,466
Ireland	9,989	12	9	3	9,977
Iceland	1,244	2	2	0	1,242
Italy	548,194	933	848	85	547,261
Latvia	8,844	151	97	54	8,693
Lithuania	14,713	479	386	93	14,234
Luxembourg	6,841	10	10	0	6,831
Malta	332	1	0	1	331
Netherlands	114,087	238	230	8	113,849
Austria	174,047	286	280	6	173,761
Poland	292,109	2,761	2,163	598	289,348
Portugal	116,730	106	92	14	116,624
Sweden	16,172	32	29	3	16,140
Spain	108,276	212	206	6	108,064
Hungary	47,808	197	153	44	47,611
Cyprus	788	0	0	0	788

Source: AZR-Statistik, *Aufhältige und ausreisepflichtige Ausländer in Deutschland zum Stand 31.12.2004*, p. 1-6.

2. Voluntary return, statistical data as of 31 December 2004

Return to	2002	2003	2004	2002-2004
Austria	0	3	0	3
Denmark	0	1	0	1
Estland	21	14	4	39
France	3	0	0	3
Great Britain	5	0	4	9
Poland	43	23	15	81
Sweden	2	3	3	8
Spain	4	0	3	7
Hungary	15	12	15	42

Source: IOM Statistics, 2002-2004.

3. Concerning the *number of deportations* please see Annex I.

Chapter IX
Social Security

The Federal Social Court by decision of 20 October 2004 has decided that EU citizen were entitled to a pension due to unemployment upon fulfilment of the 60th year of age according to Section 337, para. 2, Nr. 1, lit. a, SGB VI although at the relevant date (14 February 1996) the applicant had not been registered at a German agency for unemployment but at a French labour office as looking for labour. The Court's result is generally acknowledged as correct but the reasoning of the Federal Social Court has been criticized.[91] Especially, it has been criticized that the reasoning of the Court is incorrect since the federal court knowing the judgement of the European court of 28 April 2004 in the case *Öztürk*[92] was still maintaining in principle that unemployment in other EU Member States could not be considered as sufficient. Schuler argues that this reasoning is incorrect since the European Court's decision in the case of *Öztürk*. Any other view would amount to a discrimination of an EU citizen making use of his right of freedom of movement within the European Union.[93]

The Federal Finance Court has submitted a request for a preliminary reference to the European Court of Justice as to the question of interpretation of Article 12 EC since the German tax provisions (Section 1, lit. a, para. 1, Nr. 1, Section 10, para. 1, Nr. 1, *Einkommensteuergesetz*) provide that a person resident in Germany cannot deduct maintenance to a divorced spouse resident in Austria, while he would be entitled if she was still resident in Germany.[94]

91 See Decision of the Federal Social Court of 20.10.2004, *Az* B 5 RJ3/04 R; for the criticism see *EuroAS* 2005, p. 15.
92 See 373/02, *EuroAS* 2004, p. 81.
93 See comment *EuroAS* 2005, p 15.
94 Bundesfinanzhof of 22.7. 2003, C-403/03, *EWS* 2004, 336.

Chapter X
Freedom of Establishment, Provision of Services, Students

The recognition of academic degrees and professional certificates according to the German distribution of legislative competence is within the competence of the *Länder*. While the recognition of academic degrees for the purpose of access to the labour market has been regulated by two directives, the right on carrying an academic degree or title is regulated by the university laws of the *Länder*. According to a common decision of the Ministers of Culture of 21 September 2001[95] applicants are entitled to carry academic degrees under certain circumstances by identifying the country of origin. Academic degrees issued by universities from the EU Member States may according to the more recent legislative provisions of the *Länder* be carried without any identifying addition indicating the country of origin.[96]

Almost all more recent university laws of the *Länder* have introduced new provisions in their legislation passed in the last three years. Generally speaking, special provisions have been enacted concerning academic degrees from universities and equivalent academic institutions from the Member States of the European Union. While generally the carrying of academic degrees is dependent upon a special recognition, the laws of the *Länder* provide that academic degrees which have been acquired in EU Member States or the European economic area may be carried in the form provided for by the respective Member State without the need to indicate the university or naming the institution which has awarded the degree. The general provision that an academic degree which has been acquired on the basis of an examination may be carried if the degree has been awarded by a foreign recognised university or equivalent academic institution are also applicable for academic degrees from EU Member States. The privilege therefore applies to the right to carry the degree without notifying that the degree has been awarded by a foreign institution.

95 Vereinbarung der *Länder* der Bundesrepublik Deutschland über begünstigende Regelungen gemäß Ziff. 4 der Grundsätze vom 14.4.2000.

96 See Section 37 of the University Act of Baden-Württemberg.

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