REPORT
on the Free Movement of Workers in Germany in 2006

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CONTENTS

ABBREVIATIONS

ArGV	Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer (Arbeitsgenehmigungsverordnung; Labour Permit Regulation)
ASAV	Anwerbestoppausnahmeverordnung (Recruitment Stop Exceptions Regulation)
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 (Residence Regulation)
AuslG	Ausländergesetz
Az	Aktenzeichen
AZRG	Ausländerzentralregistergesetz (Act on the registry of foreigners)
BaföG	Bundesausbildungsförderungsgesetz
BayVBl	Bayerische Verwaltungsblätter
Banz	Bundesanzeiger (Official Gazette)
BÄO	Bundesärzteordnung
BeschV	Beschäftigungsverordnung (Employment Regulation)
BeschVerfV	Beschäftigungsverfahrensordnung (Employment Procedure Regulation)
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
FEV	Fahrerlaubnisverordnung
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
NStZ-RR	Neue Zeitschrift für Strafrecht – Rechtsprechungsreport
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht, Rechtsprechungs-Report

NZV	Neue Zeitschrift für Verkehrsrecht
OVG	Oberverwaltungsgericht
SGB	Sozialgesetzbuch (Code of Social Law)
StAG	Staatsangehörigkeitsgesetz (Act on German Nationality)
VBlBW	Verwaltungsblätter für Baden-Württemberg
VD	Vorschriftendienst
WiVerw	Wirtschaft und Verwaltung
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht

GENERAL REMARKS

A Bill for the transposition of eleven EU Directives, including the Union Citizens Directive 2004/38, which had been submitted for the first time on 3 January 2006 for comment to the Länder, has been adopted almost unchanged by the Federal Chamber (*Bundesrat*) and the Bundestag, entering into force on 28 August 2007.[1] By Article 2 of the Transposition Act the Freedom of Movement Act of 30 July 2004[2] is changed in order to transpose the provisions of the Union Citizens Directive 2004/38. The amendment of the Freedom of Movement Act has not provoked substantial debate neither in the public nor in the Parliamentary debates. The Bill presented by the Federal Government has been adopted without any substantial changes in the Parliament.

The report 2005 has provided a summary of the major changes suggested by the Bill. The report 2005 has also provided a summary of the evaluation by the Freedom of Movement Act of July 2004 by the federal government and the Länder. The Evaluation Report may have had an influence on further changes.

Following the expiry of the deadline for the transposition of the Directive (30 April 2006) several administrative and social courts have relied by way of direct application or by way of interpreting German domestic law in conformity with community law upon the Union Citizens Directive (see infra for further references). For the pre-expiry time the Administrative Appeal Court of Baden-Württemberg has confirmed its jurisprudence that the Directive does not have any effect on German domestic law and that claimants therefore cannot rely upon the Directive for a permanent residence permit.[3]

Problems relating to the competence of the local authorities for registering of EU citizens have been reported by the Länder. Some Länder complain that it is almost impossible to examine the authenticity of documents submitted by Union citizens in order to obtain the registration certificate. The local authorities responsible for registering the residence of persons are not disposing as a rule of the necessary knowledge to recognise falsifications. In Baden-Württemberg, for instance, there are 1 110 local authorities, which are according to the Freedom of Movement Act responsible for examining documents of Union citizens. Unlike alien authorities, the local authorities are not provided with access to relevant data systems.

The Federal Ministry of Interior on 18 April 2006 in a circular letter has informed the interior ministries of the Länder on the implications of the Union Citizens Directive 2004/38. The Ministry calls the attention of the Länder to a meeting with the European Commission on 30 January 2006, stating that according to the jurisprudence of the European Court individuals may rely upon the provisions of the Directive if the general conditions of direct applicability are met and that the Länder are obliged to directly apply the Directive in the framework of applying the Freedom of Movement Act of July 2004. In particular, the federal government refers to the following provisions which are directly applicable upon the expiry of the time limit for transposing the Directive:

- right of residence for up to three months (Art. 6);
- enlargement of the category of family relatives of non-economically active Union citizens entitled to free movement (Art. 2 no. 2 lit .c, Art. 7 para. 1 lit. d);
  It is noted that the Directive has maintained only for students a restricted term of family relatives (Art. 7 para. 4), while for all other Union citizens including non-economically active Union citizens the definition of family relatives of Art. 2 no. 2 lit. c of the Directive – contrary to Sec. 4, 2. sentence of the Freedom of Movement Act – has to be applied.

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1 Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der EU vom 19.89.2007, BGBl. 2007, I-1970; see E. Huber, Das Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien in der Europäischen Union, NVwZ-RR 2007, 977 ff.

2 BGBl. I-1950, 1986, amended by Art. 3 of the law of 7 December 2006, BGBl. I-2814.

3 Judgment of 14 March 2006, 13 S 220/06, AuAS 2006, 218; for a discussion on the effect of EU-Directives in German aliens and asylum law see Hailbronner, Die Wirkung ausländerrechtlicher und asylrechtlicher EG-Richtlinien vor der Umsetzung ins deutsche Ausländerrecht, ZAR 2007, 6 ff.

Therefore, descendants below 21 who do not receive maintenance as well as parents of spouses who are maintained are entitled to free movement;
- registration certificate for Union citizens, residence card for family members of a Union citizen (Art. 8, 9);
- maintenance of a residence right of family relatives after the death or departure, divorce or dissolution of the marriage of a Union citizen (Art. 12, 13). If the requirements of the Directive are met, the persons keep their status as persons entitled to free movement, documented by the residence card. However, attention is drawn to the fact that according to Art. 12 para. 2, subpara. 3 and Art. 13 para. 2, subpara. 3 of Directive 2004/38 the family relatives remain entitled to free movement exclusively on a personal basis. This means that the persons entitled do not enjoy the privileges of Union citizens with respect to family reunion and protection against expulsion. Therefore, the respective provisions of the Residence Act with regard to family reunion and protection against expulsion are applicable by reference of Sec. 11 para. 2, 3. sentence of the Freedom of Movement Act to the respective provisions of the Residence Act;
- right of permanent residence. Different to the existing wording of the Freedom of Movement Act not only Union citizens and their children and spouses acquire a right of permanent residence, but all family relatives according to the definition of Art. 2 no. 2 (Art. 16 para. 1 and 2 of the Directive 2004/38). With regard to previously existing rights of residents to remain (presently Sec. 2 para. 2 no. 5 of the Freedom of Movement Act by reference to the community law), the following rules have to be applied; since the community law, to which the Freedom of Movement Act refers, has been abolished by the Directive 2004/38, Art. 17 of the Directive has to be applied directly. The circular letter of the Federal Ministry points to the different categories defined in Art. 17 para. 1-4. According to Art. 18 of the Directive family relatives as well are entitled to a residence right on the basis of Art. 12 para. 2, Art. 13 para. 2 (family relatives following death or departure, divorce or dissolution of the marriage of a Union citizen), provided that they fulfil the requirement of a five-year residence. The registration certificate respectively the residence card is to be issued on application as soon as possible. The Federal Printing Office has been instructed to produce a respective form which can be used for Union citizens as well as for third-country national family relatives;
- protection against expulsion (Art. 28 para. 3). The Federal Ministry notes that the requirement for Art. 28 para. 3, that Member States have to define the imperative reasons, will be complied with by the law transposing the directives. As long as there is no legislative determination of imperative reasons, a determination of the loss of a residence right for reasons of public order and security and according to Sec. 6 para. 1 of the Freedom of Movement Act is not possible in the case of Union citizens enjoying the special protection of Art. 28 para. 3 of the Directive.

The circular letter notes in addition that the validity of the registration certificate cannot be restricted and the certificate must not contain an expiry date (contrary to preliminary notes for applying the Freedom of Movement Act of December 2004 issued by the Federal Ministry of Interior). With regard to family relatives of a Union citizen, the Directive provides for a document "residence card of a family member of a Union citizen", which is printed by the Federal Printing Office (Bundesdruckerei) as form no. 31000703. The form complies with the requirements of Art. 11 of the Directive by providing for a validity of five years. The Federal Ministry informs the Länder that as long as the new forms are not yet available, the existing forms on a residence permit/EU can be still used by striking out the term "residence permit" and replacing it by "residence card for family relatives of a Union citizen". With regard to time limits for the issuance of certificates and residence cards, the Federal Ministry refers to Art. 8 para. 2 and Art. 9 para. 2 of the Directive. Union citizens and their family relatives must be given the option to register separately with the alien authorities(rather than with the local authorities at the occasion of registering a residence). The certificate has to be issued immediately, the residence card within a period of six months upon delivery of the necessary information.

CHAPTER I: ENTRY, RESIDENCE, DEPARTURE

A. Entry

The Freedom of Movement Act of 30 July 2004 provides for a right of entry and residence for seven categories of Union citizens, including Union citizens seeking employment or carrying out vocational training, Union citizens are entitled to pursue economic activities and non-gainfully employed EU citizens subject to the requirements described in a specific section of the Act. The amended Freedom of Movement Act 2007 (hereafter Act 2007) is suggesting some changes to this provision, particularly by including the right of entry and residence for Union citizens and their family relatives who have acquired a right of permanent residence; systematically, however, it follows the same pattern as the existing Freedom of Movement Act of July 2004 by defining the right of entry and residence of Union citizens through the attachment to certain categories, like economically or non-economically Union citizens or family relatives subject to further requirements.

The Act 2007, therefore, has not taken up the somewhat different pattern of the Directive which distinguishes between a right of entry and residence for up to three months (Art. 5 and Art. 6) and the right of residence for more than three months, which is subject to certain further requirements. This may give rise to some uncertainty. German administrative courts have examined whether Union citizens entering Germany without a specific intention to pursue economic activities are covered by one of the categories of sec. 2 of the Freedom of Movement Act. The question whether a right of entry and residence arises independently of the attachment to one of the categories described in sec. 2 has occasionally been discussed by German courts since the European Court in the judgment of 17 September 2002[4] has stated that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State may, as a citizen of the Union, enjoy a right of residence by direct application of Art. 18(1) EC. The exercise of that right is subject to the limitations and conditions referred in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitation and conditions are applied in compliance with the general principles of community law and, in particular, the principle of proportionality.

The concept to define the right of entry and residence in a basic provision by attribution to certain categories of persons implies a certain risk that Union citizens might be considered as falling outside the scope of the community provisions on free movement, derived directly from Art. 18 EC if they cannot be attached to one of the categories described in sec. 2 of the Freedom of Movement Act.

The Act 2007, however, in substance takes account of the Union Citizens Directive by including a new paragraph 5, implementing Art. 6 of the Directive 2004/38 by stating that for a right of residence of Union citizens up to three months it is sufficient to posses a valid ID-card or passport. Third country family relatives are equally entitled if they are in possession of a recognised or otherwise admitted surrogate passport provided that they accompany the Union citizen or exercise a right of family reunion.

Implementing Art. 7(3) lit. d of the Directive, the Act 2007 has clarified in a new paragraph 3 of sec. 2 that freedom of movement does not cease when a worker begins a professional formation provided that he/she can show a connection between previous employment and professional training. The connection requirement is not necessary if the worker has become unemployed involuntarily.

Various issues have arisen with regard to the legal system of job seekers dependent on social benefits. The Social Court of Düsseldorf[5] had to decide on the legal status of a Union citizen applying for job seekers' allowances under the Social Code II. The Social Court discusses the criteria for acquiring the legal status as a worker entitled to free movement. The applicant had moved with his family in May 2005 to Germany and had lived in the first three

4 Case C-413/99, Baumbast.
5 Judgment of 26 September 2006, S 24 AS 187/06.

months through the financial assistance of third persons before he had received social assistance benefits since November 2005. In 2005 the applicant had been temporarily employed in May 2005 and from June to October 2005 with a cleaning firm. After that period he was living of social benefits. The Social Court argues that the applicant is not entitled to job seekers' allowances under the modified Social Code II after 1 April 2006, since he did not fulfil the requirements under Sec. 7 para. 1 Social Code II (see also Chapter II on the content of Social Code II). The Court comes to the conclusion that the residence of the applicant was based exclusively upon the purpose of looking for employment. Therefore, he was not entitled to free movement as a worker under Sec. 2 para. 2 no. 1 of the Freedom of Movement Act. However, as a Union citizen, he was entitled to equal treatment under the Social Code XII with regard to social welfare benefits.[6]

B. Residence

The Administrative Court of Hamburg[7] has discussed whether a Union citizen is still entitled to free movement as a worker (Art. 39 EC) in spite of having finished to seriously seek employment. The lower administrative court had argued that the Union citizen is still entitled to free movement since the Union citizen had taken up occasional jobs. The Administrative Appeal Court has rejected this argument. Although a longer period of unemployment due to the voluntary termination of an existing contract did not as such always terminate the status as a worker (referring to Art. 7(3) of the Directive 2004/38), the maintenance of a worker status did require that the Union citizen were in fact seriously looking for employment and be at the disposal of the labour administration to find a new occupation. Activities which a Union citizen had performed during his imprisonment could not be considered as establishing a right of residence as a worker since the status of a worker could only be acquired by performing economic activities forming part of the "economic life" of a Member State.[8]

Finally, the Court states that the Union citizen could not derive a right of entry and residence directly from Art. 18(1) EC since the right of free movement according to Art. 18 were subject to the conditions and limitations in the Treaty and secondary community law. The opposite view that freedom of movement can be claimed by all Union citizens irrespective of whether they fulfil the requirements laid down in Sec. 2 and 4 of the Freedom of Movement Act is taken by the Administrative Appeal Court of Hessen.[9] The Administrative Appeal Court refers to Sec. 1 of the Freedom of Movement Act arguing that according to this provision the Act is applicable to all Union citizens. In addition, the Court refers to the Court's jurisprudence in the *Grzelczyk*-case. It follows in the Court's view that all Union citizens including those of the new Member States are only obliged to leave the federal territory upon a determination of the competent alien authorities on the loss of right of entry and residence. According to the Hessen Court it follows that an administrative order for immediate execution of a decision is unlawful.[10]

The Administrative Court of Ansbach[11] has refused to grant interim protection to a British Union citizen claiming a prolongation of his residence permit. The applicant did, according to the Court, not fulfil the requirement for a right of entry and residence since he did not qualify either as a worker or as a non-economically active Union citizen due to his dependence upon social welfare payments. The Court relies heavily upon the fact that the Union citizen had not reacted to a request to inform the authorities about his registry as a person looking for employment. Instead he had applied for job seekers' benefits according to the SGB II (Social Code Vol. II relating to job seekers' allowances), arguing that he did not dispose of sufficient means of living. Therefore, the applicant in the Court's view was not enti-

6 See also Social Appeal Court of Northrhine-Westphalia of 4 September 2006, L 20 B 73/06 SOER; Social Court Nuremberg, decision of 21 June 2006, S 19 SO 60/06 ER.
7 Judgment of 14 December 2005, 3 Bs 79/05.
8 The Court refers in this connection to ECJ of 31 May 1989, ECJ Reports 1989, 1621, 1645.
9 Judgment of 29 December 2004, 12 TG 3212/04, NVwZ 2005, p. 837.
10 Please not that the Act 2007 amending the Freedom of Movement Act provides for a change of the requirement of an unappealable determination.
11 Judgment of 1 March 2005, AN 19 K04.02597.

tled to a document certifying his entitlement to free movement as a worker. The authorities therefore had correctly requested the applicant to leave Germany since the applicant was not entitled to entry and residence and could therefore be requested to leave Germany.

The Administrative Appeal Court of Hamburg[12] has interpreted the requirement of sufficient health insurance coverage in the Freedom of Movement Act and proposed amendments by the Act 2007. The Freedom of Movement Act of 30 July 2004 had required "adequate health insurance coverage" while the Act 2007 implementing Art. 7 para. 1 lit. c ("comprehensive sickness insurance cover") speaks of sufficient health insurance coverage. According to the Hamburg Administrative Appeal Court health insurance coverage can be considered as sufficient ("*ausreichend*") if it covers the following services: medical and dental treatment, provision of medicine, medical treatment in hospitals, medical services for rehabilitation and services in case of pregnancy and birth. The Court, however, notes that even if a sickness insurance did not provide for comprehensive coverage, it had to be taken into account that according to the Court's jurisprudence the principle of proportionality would have to be applied. Therefore, in case of a temporary visit it would be unproportional to refuse freedom of movement with the argument that the insurance coverage did not apply for medical services in case of rehabilitation and pregnancy.

Right of permanent residence

According to a decision of the Administrative Court of Braunschweig[13] an Italian national staying for five years in Germany, who had previously been expelled on the basis of a "compulsory expulsion provision" under the Aliens Act 1990 contrary to community law enjoys the full protection of Art. 16 para. 1 of the Directive 2004/38. The requirement of a continuous lawful residence of five years has been fulfilled in spite of the exclusion order since according to the Administrative Court only an expulsion decision in accordance with community law will effectively prevent a lawful residence on the territory of a Member State.[14]

The Administrative Appeal Court of Baden-Württemberg has refused an appeal against a decision of the alien authorities refusing to grant a Dutch national a certificate on a right of permanent residence. The Court has argued the Dutch national did not fulfil the requirement of Sec. 2 para. 5 of the Freedom of Movement Act of a continuous lawful residence of five years. It could not be considered as sufficient that the applicant had for some time in the past been five years continuously lawfully resident in Germany. Only if the residence had been continuously lawful for five years *at the time of the entry into force of the Freedom of Movement Act* (1 January 2005), a right of permanent residence had been acquired. The Court also refers in this connection to the Union Citizens Directive arguing that a previous lawful residence which had subsequently been terminated for instance due to an expulsion could not be considered as sufficient. The continuity of the lawful residence had to be deduced from the wording of Sec. 2 para. 5 of the Freedom of Movement Act. The Union Citizens Directive did not require a different interpretation in spite of the formulation "who have resided legally". The purpose of the provision could only be fulfilled if the residence of a Union citizen had been since five years permanently lawful and been continuously lawful at the time of the entry into force of the Freedom of Movement Act.

C. Departure

The Freedom of Movement Act of July 2004 has introduced a new system for termination of residence of EU citizens entitled to freedom of movement. The Act has abolished the expulsion as a main instrument to terminate the residence of foreigners for reasons of public order and security. Section 6 has introduced a special procedure on administrative determination about the loss of a free movement right under sec. 2 para. 1 of the Act. Section 6 provides that administrative authorities repeal and confiscate a certificate on freedom of move-

12 Judgment of 22 March 2005, 3 Bf 294/04.
13 Decision of 2 June 2005, 6 B 181/05.
14 Referring to ECJ of 18 May 1982, C-115/81 and C-116/81.

ment or on an EU residence right or on a permanent residence right or a residence card or permanent residence card in case of third country family relatives. The reasons on which a loss of an EU residence right can be determined are largely corresponding to the Union Citizens Directive and the European Court's jurisprudence on public order. A determination based upon reasons of public health is only admissible if the disease arises within the first three months after entry. Section 6 para. 1 provides that for the same reasons entry can be refused to a Union citizen.

The Act 2007 has largely maintained the existing rules on the determination of a loss of right to entry and residence with two exceptions. One exception relates to the determination of a loss of a right of permanent residence which is only admissible on serious grounds (*schwerwiegende Gründe*). Previously, section 6 para. 3 had provided that after permanent lawful residence in the federal territory for a period of more than five years, the loss of the entitlement to entry and residence can only be determined on "particularly serious grounds". The legislator, therefore, intends to transpose the Directive by copying provisions of the Directive.

With regard to Union citizens and their family relatives who have resided in Germany for the previous ten years and with respect to minors the Act 2007 provides that imperative reasons of public security ("*zwingende Gründe der öffentlichen Sicherheit*") have to be shown. Imperative reasons of public security are only proven if the Union citizen has been sentenced due to one or more intentional criminal offences by a final judicial decision to a sentence of at least five years imprisonment or if, at the occasion of the last criminal conviction, security detention (*Sicherungsverwahrung*) has been ordered, if the security of the Federal Republic is concerned or if the Union citizen or a family relative represents a terrorist danger ("*wenn vom Betroffenen eine terroristische Gefahr ausgeht*").

Other requirements for a determination on the loss of the entitlement to entry and residence largely correspond to the existing Freedom of Movement Act and the Union Citizens Directive. A criminal conviction alone does not constitute sufficient grounds for the decisions or measures specified in sec. 7 para. 1. Only criminal convictions which have yet to be deleted from the federal central criminal register may be taken into consideration, and these only insofar 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.

Section 6 para. 3 largely corresponds to Art. 28 para. 1 requiring Member States to take account of considerations as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. The relevant provision of the Act 2007 transposes this provision into German law.

Another change in the Act 2007 concerns judicial protection and suspensive effect. While the existing legislation requires that EU citizens shall be required to leave the federal territory only if the alien authorities have *indisputably* established that no entitlement to entry and residence exists, the Act 2007 has abolished the requirement of indisputably, primarily based upon the difficulties reported in the Evaluation Report on the Free Movement Act by the Länder.[15] The Act 2007 has abolished the requirement relying upon the Union Citizens Directive arguing that a sufficiently serious danger affecting a fundamental interest of society may be difficult to prove in case of prolonged administrative and judicial proceedings during which the danger assumed by the aliens authorities has not been realised. Since the Union Citizens Directive does not provide for an extended judicial protection, consequently the amended Sec. 7 para. 1 provides for a requirement to leave if the alien authorities have established that no entitlement to entry and residence exists. In case of a determination on the loss of a residence right the alien authorities announce a deportation and set the time limit for voluntary departure. Except in urgent cases the time limit must be at least one month. An applicant has the possibility to ask for interim judicial protection with administrative courts according to Sec. 80 para. 5 of the Administrative Court Procedure Act. A deportation must not be executed before the administrative court has decided on the applica-

15 See Observatory Report 2005 at p. 11.

tion for judicial interim protection, unless the determination on the loss of the right of entry and residence has been ordered for imperative reasons in the sense of Sec. 6 para. 5.

Under Sec. 7 para. 2 Union citizens and their family relatives who have lost their entitlement to freedom of movement pursuant to Sec. 6 para. 1 shall not be permitted to re-enter and stay in the federal territory. The prohibition pursuant to sentence 1 will be limited in time on application. The Act 2007 provides that an application submitted within due time or after three years for lifting the re-entry prohibition has to be decided within a period of six months. The time limit begins with the departure of the person. The new provision implements Article 32 of the Union Citizens Directive providing for a procedure for the lifting of the exclusion order after a reasonable period of time.

Following the entry into force of the Freedom of Movement Act on 1 January 2005, which abolished the instrument of expulsion by replacing it through a determination on the loss of residence rights, a controversy developed within the judiciary whether an expulsion order taken against a Union citizen before 1 January 2005 is still in effect with regard a prohibition of re-entry. The Administrative Appeal Court of Hamburg in a first decision of 22 March 2005[16] has extensively discussed the issue whether an unappealable expulsion order prohibiting re-entry taken before 1 January 2005 is still effective after the entry into force of the Freedom of Movement Act. The Residence Act, applicable for third-country nationals only, entering into force as well on 1 January 2005 as part of the Migration Act, did explicitly provide for a continuing effect of expulsion orders. The Freedom of Movement Act, however, did not contain a similar provision nor did it refer to the relevant clause in Sec. 102 of the Residence Act. The Administrative Appeal Court of Hamburg argues based upon the drafting history of the Freedom of Movement Act[17] and the purpose of the Act that it cannot be assumed that the German legislator wanted to abolish the exclusion effects of valid expulsion orders against Union citizens or third-country nationals who had acquired EU freedom of movement due to the accession of their home countries to the European Union or as family relatives of Union citizens. According to the Court, such a conclusion would be contrary to Sec. 7 para. 2, first sentence of the Freedom of Movement Act, providing that EU citizens and their dependants, who have lost their entitlement to freedom of movement, shall not be permitted to re-enter and stay in the federal territory. It would be contrary to the intention of the legislator if one would assume that in spite of basically identical criteria before and after the Freedom of Movement Act expulsion orders taken until 31 December 2004 would automatically lose their validity without regard to time limits and without the need for a renewed examination, although the old and the new law did provide for exclusion orders in case of serious dangers for public order.[18]

The Court additionally discusses the argument that the legislative basis for an exclusion order against Union citizens is now Sec. 7 para. 2, which, however, is not connected with an expulsion order, but with the determination on loss of entitlement to freedom of movement. Therefore, other administrative courts like the Administrative Appeal Court of Hessen[19] and the Administrative Appeal Court of Berlin-Brandenburg[20] have argued that there is only a legal basis for exclusion effects based on a determination on the loss of the right on entry and residence and therefore expulsion orders against persons entitled to freedom of movement did not have any continuing effect after 1 January 2005. The view that expulsion orders taken under the Aliens Act have lost their effect upon entry into force of the Freedom of Movement Act since 1 January 2005 has also been supported by the Administrative Court of Berlin in a decision of 28 October 2005.[21] The Hamburg Court rejects this argument by stating that a legislative gap had to be closed by an analogous application of Sec. 11 para. 1, 3rd sentence of the Residence Act to Union citizens. According to the general system of the

16 3 Bf 294/04.
17 Cf. Bundestagsdrucksache 15/420, p. 101 f., 105 f.
18 For details see no. 52 ff. of the judgment.
19 Judgment of 29 December 2004, 12 TG 3212/04, DVBl 2005, 319.
20 Judgment of 15 March 2006, 8 S 123.05, InfAuslR 2006, 295.
21 15 A 275.05, InfAuslR 2006, 16 and Gutmann, Die verborgene Altfallregelung für ausgewiesene Unionsbürger, InfAuslR 2005, 125.

Freedom of Movement Act the rules of the Residence Act should be held to be applicable since the Freedom of Movement Act did not provide for specific rules.

In addition, the Hamburg Court discusses the jurisprudence of the European Court in the *MRAX*-case[22] and the *Adoui* and *Cornuaille*-cases.[23] The European Court's jurisprudence in its view did not concern the case of Union citizens or their family relatives who had been expelled by an EU Member State in connection with an exclusion order. Article 32 para. 2 of the Union Citizens Directive also in the Court's view does not provide for a right of re-entry of an Union citizens expelled by a Member State as long as his application for lifting an exclusion order is still under examination. Therefore, the Court concludes that community law could not be relied upon to challenge a continuing effect of expulsion orders against Union citizens and their family relatives entitled to free movement.

The Administrative Appeal Court of Hamburg interprets Art. 32 of the Union Citizenship Directive not only as a procedural possibility but as a substantive criterion restricting the discretion of Member States in deciding on the lifting of exclusion order.[24] A material change in the circumstances has to be assumed in addition to the passing of a certain period of time. If the person in question does not present anymore a concrete danger sufficiently serious to affect the fundamental interests of society, an exclusion order has to be lifted. It is not justified therefore to exclude a foreigner from the federal territory, who had become entitled to free movement, following an exclusion order based upon relatively minor offences.[25] In such cases the discretion of administrative authorities is limited to lift with immediate effect an exclusion order.

In a decision of 14 December 2005 the Administrative Appeal Court of Hamburg[26] has confirmed its previous jurisprudence that an expulsion order before the entry into force of the Freedom of Movement Act did not lose its effect with respect to the exclusion for a specified time limit. If an unappealable expulsion order against a Union citizen does not fulfil the requirements under community law since it has been taken in application of the provisions of the Aliens Act 1990 without properly making an individual discretionary decision, the alien authorities have to examine whether the expulsion order has to be repealed.[27] The alien authorities according to the Administrative Appeal Court may, however, restrict their examination on the expulsion decision on the question of whether an expulsion order could have been lawfully issued as a discretionary decision. If the alien authorities come to an affirmative conclusion as the result of a lawful successive discretionary decision, the expulsion order may be maintained.

In a judgment of 4 September 2007 the Federal Administrative Court has settled the controversial issue of continuing effect of expulsion orders passed under the legislation before entering into force of the Freedom of Movement Act on 1 January 2005. The Court decided that expulsion orders issued under previous legislation are still enforced. However, Union citizens are entitled to request the limitation of such orders by examining whether they are still dangerous for the public order or security, which justifies the continuing effect of such orders.[28]

The Civil Appeal Court of Hamburg in a judgment of 21 November 2005 discusses the question whether a Union citizen who had been unappealably expelled before the entry into force of the Freedom of Movement Act from the federal territory may be punished in case of a re-entry according to Sec. 95 para. 2 No. 1a, 1b of the Residence Act or under Sec. 9 of the Freedom of Movement Act.[29] The Court comes to the conclusion that the Union citizen must not be punished since the provisions of the Residence Act are not applicable to Union citizens unless the Freedom of Movement Act refers explicitly to provisions of the Residence

22 ECJ of 25.7.2002, Case C-459/99, MRAX/Belgium [2002] ECR I-6591.
23 ECJ of 18.5.1982, Case 115/116/81, Adoui and Cornuaille/Belgium [1982] ECR 1665.
24 Judgment of 22 March 2005, 3 Bf 294/04.
25 See also Federal Administrative Court, vol. 110, p. 140.
26 3 Bs 79/05, Zeitschrift für Ausländerrecht 2006, 255; InfAuslR 2006, 305.
27 See also Federal Administrative Court of 3 August 2004, 1 C 30/02, collection of decisions vol. 121, p. 315, 323 f.
28 Press release of 4 September 2007, judgment No. 1 C 21.07.
29 1 WS 212/05, InfAuslR 2006, 118.

Act. Since there is no such reference referring to Sec. 95 para. 2, this provision cannot be applied to a Dutch national having entered Germany contrary to an expulsion order. The Civil Appeal Court discusses the decision of the Administrative Appeal Court of Hamburg of 22 March 2005 stating that the expulsion order is still effective. The Civil Appeal Court comes to the conclusion that only under Sec. 9 of the Freedom of Movement Act a Union citizen could be punished for illegal entry. However, Sec. 9 of the Freedom of Movement Act requires that a Union citizen had entered contrary to Sec. 7 para. 2, 1. sentence of the Freedom of Movement Act following a loss of a right of entry and residence according to Sec. 6 para. 1 of the Freedom of Movement Act. Since this requirement could not be fulfilled and the gap could not be closed by analogy in case of provisions providing for punishment, no legal basis existed to sanction the illegal entry of a Union citizen.

The Administrative Court of Augsburg in a judgment of 28 November 2005[30] interprets Art. 16 para. 2 of the Union Citizens Directive in an expulsion case due to criminal offences. The Court interprets the clause "have legally resided with the Union citizen in the host Member State for a continuous period of five years" as a requirement that the family relative must have lived together with the Union citizen lawfully for a period of five years. In case of a factual separation of a couple before the five-year period, the requirement of Art. 16 para. 2 is not fulfilled according to the Court. On the other hand, the Court notes that presently under Sec. 2 para. 5 of the Freedom of Movement Act spouses and dependent children who have resided lawfully and continuously for five years enjoy a right of entry and residence irrespective of whether the other requirements are fulfilled. The German law, therefore, presently goes beyond the requirements of community law in granting a special protection against expulsion.[31]

The Act 2007 on the amendment of the Freedom of Movement Act does not change in substance the existing legal situation. In Sec. 4a a right of permanent residence is granted to Union citizens and their family relatives "who have resided lawfully and continuously in the federal territory for five years." There is no distinction between Union citizens and family member who are not nationals of a Member State. The Court, therefore, comes on the basis of the existing law to the conclusion that a third-country national family relative had acquired a right of permanent residence in spite of a factual separation from a Union citizen as long as he had not been formally divorced.

The Court also deals with the issue of whether a continuous two-years lawful residence-requirement is fulfilled if the third-country national has applied upon expiry of his previous residence permit too late for a prolongation of an EU residence permit. The Court in the proceedings for an interim protection does not finally decide the question whether the principle of acquired rights of residence applies if at the time of application the applicant had lost his right of free movement under community law.

The Administrative Court of Braunschweig has taken the position that the Freedom of Movement Act is applicable to all Union citizens regardless of the question whether they fulfil the requirements of a right of entry and residence according to the criteria of Sec. 2-4 of the Freedom of Movement Act. The Court relies upon Art. 18 para. 1 and 2 EC and the fact that the German Residence Act does not apply to Union citizens except those provisions in the Freedom of Movement Act referring explicitly to the Residence Act. Therefore the rule that the residence of Union citizens can only be terminated upon a formal determination on the non-existence or loss of a right of entry and residence applies to all Union citizens regardless of whether they fall under any of the categories defined in Sec. 2 of the Freedom of Movement Act.[32]

The consequences of the European Court's jurisprudence on the compatibility of the applicability of expulsion provisions of the Aliens Act 1900 to Union citizens are dealt with by the Administrative Court of Stuttgart in a decision of 19 August 2005.[33] The Union citizen who had been expelled on the basis of the Aliens Act contrary to the procedural require-

30 Au 1 S 05.984.
31 See also the drafting history of the Freedom of Movement Act, BT-Drs. 15/420, p. 103.
32 Judgment of 2 June 2005, 6 B 181/05.
33 2 K 526/05.

ments laid down in Art. 9 para. 1 of the Directive 64/221 had argued that the expulsion order cannot be considered as effective anymore. Since the applicant did not raise an appeal, the expulsion order had become final. Since he did not appeal against the expulsion decision he could not rely upon the requirement of a previous examination by an independent administrative authority according to Art. 9 para. 1 of the Directive 64/221.

The validity of a deportation order following an unappealable expulsion order following a change of the German jurisprudence in accordance with the jurisprudence of the European Court on the legality of expulsions of Union citizens has been the subject of a judgment of the Administrative Court of Karlsruhe.[34] The Court argues that the change of jurisprudence may be considered as a sufficient reason for re-opening a procedure on the lawfulness of expulsion orders as a legal basis for a deportation order. Therefore it has granted interim protection against the deportation order which was based upon an expulsion order in violation of Art. 9 para. 1 of the Directive 64/221 due to the lack of a second independent administrative authority. In the meantime, however, the Administrative Appeal Court of Baden-Württemberg refers to the jurisprudence of the European Court in the case Kühne/Heitz[35] that there is no general obligation of national authorities to re-examine administrative decisions which have become unappealable unless the particular requirements stated by the European Court in the case Kühne/Heitz are fulfilled. Therefore, the Court comes to the conclusion that it is primarily a matter of the national legal order to determine the modalities of a re-examination respectively a duty to repeal a decision which had become unappealable.[36]

The violation of the duty to provide for a second independent examination according to Art. 9 para. 1 Directive 64/221 leads to the invalidity of an expulsion order since the procedural guarantees of Art. 9 para. 1 Directive 64/221 are inseparably connected with the individual rights of Union citizens and are therefore to be treated as indispensable procedural requirements of national procedural requirements of national procedural law.[37]

Protection against expulsion of Union citizens according to Art. 28 para. 3 does not require according to the opinion of the Administrative Court of Düsseldorf[38] a permanent lawful residence of ten years. The Administrative Court follows from the wording of Art. 28 para. 3 and Preamble no. 24 as well as from a systematic comparison with the wording of Art. 16 para. 1 of the Directive that Art. 28 para. 3 requires only a permanent residence of ten years, but does not require the permanent lawfulness of such residence (argument *e contrario*). In addition, the Court considers Art. 28 para. 3 lit. a as directly applicable since its application was not dependent on further conditions and did not require a provision by the national legislator. As to the interpretation of the term "imperative grounds of public security", the Court argues that this term refers to the internal and external security of the state, while violation of penal provisions protecting citizens as private persons against criminal activities are only covered by the term "public order" in the sense of Art. 39 para. 3 EC.

34 Decision of 30 December 2005, 10 K 1854/05, InfAuslR 2006, 175.
35 Judgment of 13 January 2004, case C-453/00, DVBl. 2004, 373, No. 24; see also judgment of 19 September 2006, case C-392/04 and C 422/04, NVwZ 2006, 1277, No. 51.
36 Judgment of 24 January 2007, 13 S 451/06, quashing the decision of the Administrative Court of Stuttgart of 12 October 2005, 6 K 3901/04.
37 Administrative Court of Stuttgart of 7 February 2006, 5 K 5146/04, InfAuslR 2006, 260.
38 Judgment of 4 May 2006, 24 K 6197/04, InfAuslR 2006, p. 356.

CHAPTER II. ACCESS TO EMPLOYMENT

1. Equal Treatment in Access to Employment

No problems are reported concerning equal treatment in access to employment. The Social Code, Book III, on promotion of employment provides for a variety of measures, including assistance of employment agencies, information and consultation, vocational training, social benefits for professional integration etc. The Social Code does not distinguish between German nationals and Union citizens. Entitled are all persons registered as job-seekers respectively as persons seeking vocational training.

2. Language Requirements in the Private Sector

No information is available concerning language requirements relating to the private sector. There is no legislation or administrative practice containing rules on language requirements in the private sector. Whether a private enterprise requires language requirements as a condition for taking up employment is a matter of contractual freedom, subject to rules on prohibition of discrimination. To what extent freedom of movement principles apply according to the somewhat isolated decision of the European Court in the *Angonese*-case (C-281/98) outside professional organizations or associations is somewhat doubtful. Generally speaking, from the absence of literature or newspaper reports one can probably conclude that language requirements do not play a substantial role as a barrier to an open labour market in Germany.

3. Recognition of Diplomas

In Germany there is no general competence of the federation for the recognition of diplomas. Therefore, the transposition of Directive 2005/36/EC on recognition of professional qualifications of 7 September 2005 is within the competence of the federation as well as in the competence of 16 Länder depending on the specific subject.

For handicraft professions the community regulations have been transposed by a federal regulation.[39] The new Directive, however, has not been transposed. Stefan Stork in an article on the new Directive 2005/36/EC discusses the implications of the Directive for the handicraft rules in the Germany and proposes an amended version of the EU/EWR handicraft regulation.[40]

Within the 16 Länder of the Federal Republic of Germany various regulations to transpose EC directives on recognition of diploma have been enacted. It is not possible to give an extensive account of different regulations in different professions by 16 different Länder. As an example the regulation for transposing the EC Directive 89/48/EEC of 21 December 1988 and supplemented by the Directive 92/51/EEC which has been replaced by the Directive 2005/36 of 7 September 2005 may be quoted. The regulation of the state Sachsen-Anhalt is based upon the law on civil servants of 9 February 1998 and deals with the recognition of diplomas for teachers. The diplomas are recognised on the following conditions:

- possession of the nationality of a EU Member State or a contracting state of the EEA or Switzerland,
- knowledge of the German language in writing and speaking,
- the diploma qualifies for a teaching profession in the country of origin in at least one subject,

39 EU/EWR-Handwerksverordnung of 31 October 2006, BGBl. I 2006 No. 50, p. 2407; cf. see also Aberle/Stork, Handwerksordnung, Kommentar, 35. Ergänzungslieferung 2006.

40 For a detailed discussion of the regulation see Stefan Stork, Die neue Rahmenrichtlinie über die Anerkennung von Berufsqualifikationen (RL 2005/36/EG) unter besonderer Berücksichtigung reglementierter Handwerksberufe, WiVerw 2006/3, p. 152.

- the professional formation of the applicant compared to the German university studies and the traineeship programme for the employment as a teacher does no show any substantial deficits with regard to practical experience, scientific capacity, professional knowledge and didactic capacity.

Any deficits may be compensated by proven knowledge or capabilities acquired through the practice as a teacher in the home country. If the applicant does not fulfil these requirements, the recognition can be made dependent upon an acquisition of the necessary knowledge and capacities by the applicant's own choice through either an examination or a training course. A diploma is also considered as equivalent if it is recognised in any other Land of the Federal Republic of Germany for a corresponding teaching profession if the professional training for this teaching profession is recognised in Sachsen-Anhalt.

There are detailed provisions for the examination by which the necessary knowledge and capacity for exercising a teaching job in Sachsen-Anhalt is to be tested. Further provisions deal with the training course, the necessary formalities, the organisation of the examination etc.[41]

Similar regulations exist or are in the process of adoption in other Länder in the area of different categories of civil servants.

For the legal traineeship programme as a *Referendar* it has been reported that a candidate from another EU Member State has for the first time successfully passed the examination for accession to the legal traineeship programme (*Rechtsreferendariat*).[42] According to the regulations in Berlin and Brandenburg, which are similar to the regulations in other Länder, applicants for admission to the legal traineeship programme must pass an examination in order to prove sufficient knowledge of the German legal system supplementing the legal studies in the candidate's home country. The candidate, a Polish national, had studied law at a Polish university and had studied German law at the Europe University Viadrina in Frankfurt/Oder. The individual examination for Union citizens is admissible since March 2006 on the basis of a recommendation of the ministers of justice of the Länder. By establishing a uniform type of individual examination the Länder transpose the judgment of the European Court of March 2003 in the *Morgenbesser*-judgment.[43]

For practising lawyers from other EU Member States who intend to work in Germany, a special examination procedure has also been established according to the law on the activity of European lawyers in Germany.[44] A centralised examination takes place in Berlin by the *Juristische Prüfungsamt* for the Länder Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg-Vorpommern, Niedersachsen, Sachsen-Anhalt and Schleswig-Holstein. Of 91 European practising lawyers who have registered since 1992 for the examination, approximately 50 % have successfully passed the examination. The applicants came from almost all EU Member States, primarily from France, United Kingdom, Spain and Greece. Since 2005 practising lawyers from the new Member States are also participating at the examination. Some of the candidates are German nationals who, following a law study in Germany, have not passed the Second State Examination but have received an admission as a practising lawyer in other EU Member States.

The Administrative Appeal Court of Baden-Württemberg in a decision of 7 July 2005[45] has stated some principles on the admission of Union citizens to the legal traineeship programme in Baden-Württemberg. The applicant, a Polish national, who had successfully finished his law studies in Poland, had argued that he is entitled to the same treatment as ethnic Germans who, under a special law for descendents of ethnic Germans, are admitted in a privileged procedure for legal traineeship in Germany. The Administrative Appeal Court has refused to grant the applicant equal treatment arguing that special provisions laid down in

41 Verordnung zur Umsetzung der EG-Richtlinien zur Anerkennung der Hochschuldiplome im Lehrerbereich (EG-RL-VO Lehrer) of 6 July 2006, DVBl. 2006, p. 404.
42 NJW Aktuell 36/2006, p. XII.
43 Judgment of 13 November 2003, C 313/01, EuZW 2004, p. 61.
44 Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland – EuRAG of 14 March 2000, BGBl I 2000, p. 182, 1349, amended by provision of 7 December 2006, BGBl I 2006, p. 2814.
45 4 S 901/05, DÖV, December 2005, p. 1048.

Sec. 10 of the federal law on dispelled ethnic Germans are not suitable for a comparison according to Art. 12 EC and Art. 39 EC. The Court also discusses the consequences of the *Morgenbesser*-judgment for the practice of examining the compatibility of foreign diploma. According to the Appeal Court the examination has to take place in two steps. In a first step the German authorities have to examine whether the foreign diploma is equivalent. If the comparative examination leads to the conclusion of equivalence the Member State has to recognise the diploma. If the comparison leads to the conclusion that the knowledge and capabilities are only corresponding partially, the receiving Member State may require in a second step proof of compensatory knowledge and capabilities, for instance by an additional trainee programme or practical experiences in the receiving Member State. Since the Directive 89/48 is not applicable to the legal traineeship programme necessary for admission to the Second State Examination, the Appeal Court argues that the competent authorities have to establish an examination procedure in the face of only vague criteria for the examination of equivalence.[46] The administrative authorities also have to take into account that an applicant from another Member State until the end of the traineeship programme and until the admission for the Second State Examination will be able to compensate a certain part of lacking knowledge of German law. Therefore, the level of an admission examination according to the Appeal Court has to be clearly well below the level of what is required at the end of a German law study in the First State Examination.

The Federal Supreme Court in a decision of 13 October 2005[47] had to decide on the right of a Union citizen to temporary performance of medical services in Germany. The licence to practise as a medical doctor and dental doctor (Approbation) of the German national had been terminated for various offences against professional rules in August 2000 by the German authorities. Since 1989 he had also been registered in Belgium as a medical doctor. He was accused of illegal practice of the medical professional for performing some medical services since September 2000 until June 2002 in Germany in various cases. The Supreme Court quashed the punishment for violation of the federal rules since he did not need a German approbation which had been withdrawn for executing his medical services on a temporary basis as a provider of services. The Supreme Court argues that the German rules on requirement of an "Approbation" for medicine are not applicable to Union citizens performing medical services in Germany on a temporary basis if they have been practising medicine lawfully in another Member State. The Supreme Court refers the German authorities to the possibility to inform the competent authorities of the state of residence about facts which may justify a repeal of his licence to practise the medical profession.

The decision of the Administrative Appeal Court of Baden-Württemberg of 7 July 2005[48] has been commented by Deja and Ziern.[49] The two authors point to the difficulties to find out whether a legal diploma of another EU Member State can be considered as equivalent and to what extent compensatory knowledge of the German law must be proven in the examination. The authors refer to a practice of the authorities of the Länder that applicants from EU Member States are admitted to the legal traineeship (*Referendardienst*) if he/she passed at least half of the written examination in the First State Examination. This procedure in the view of the authors does considerably facilitate the procedure by admitting foreign applicants from other Member States who have acquired a law degree to the First State Examination without requiring the same conditions for passing the Examination as required from German applicants. The Administrative Appeal Court has left open the question whether the legislator must make an explicit regulation on the examination of equivalence procedure or whether it is sufficient to establish an administrative practice.[50] They plead for a formal legislation since the question of admission of applicants from other Member States did affect fundamental rights and therefore had to be regulated by law.

46 To the criteria for examining the equivalence see also the article by Vetter/Warneke, Jus 2005, p. 113.
47 3 StR 385/04, EBE BGH 2005, BGH-LS 913/05.
48 4 S 901/05, ZBR 2006, p. 259.
49 ZBR 2006, p. 248.
50 As is reported from some Länder.

In referring to the Kraus-judgment of the European Court[51] the Bavarian Administrative Appeal Court has obliged the Free State of Bavaria to grant the applicant, a German national, the permission to use the academic degree "MBA" (University of Wales). The applicant had attended from 1997 until 1999 a distant learning study by a private German academy which had not been recognised as an institute of higher learning. By a co-operation agreement he had been attributed the academic degree of the University of Wales, although he had never attended, with the exception of one week-end seminar, any courses at the University of Wales. The Bavarian authorities refused to recognise the degree by arguing that the Kraus-judgment is only applicable if a degree has been acquired on the basis of a study at a foreign recognised university in another Member State. The Bavarian Administrative Appeal Court argued, however, that the German authorities are not entitled to challenge the correctness of acquisition of academic degrees by recognised universities registered in another EU Member State. The fact that the private institution of a commercial nature had not fulfilled the conditions for recognition in Germany therefore did not justify a refusal of recognition.

The decision of the Bavarian Administrative Appeal Court has been commented by the author arguing that contrary to the view of the Appeal Court it has not been decided by the European Court that an academic degree of a foreign university must be recognised if the degree has been awarded on the basis of a study at a private commercial institution which does not fulfil the criteria for recognition as an academic institution in the state of residence of the student. From the judgment of the European Court, *Valentina Neri*[52] it can only be concluded that it would be contrary to community law to generally refuse the recognition of degrees which are acquired by co-operation with foreign universities. Therefore, the question of the applicable criteria in case of franchise agreements is yet to be decided.[53]

The criteria for recognition of academic degrees by universities of other EU Member States is within the exclusive competence of the Länder. Therefore, in Germany there are 16 different laws on recognition of foreign academic degrees. Generally speaking, all Länderlegislations have reacted to the Kraus-judgment and a decision of the Federal Administrative Court of 12 November 1997[54] by amended laws and corresponding regulations whereby academic degrees which have been granted by a foreign recognised academic institution authorised to grant such degrees on the basis of an ordinary study of such institution may be used in the form in which they have been granted. A majority of Länder does not require with respect to academic degrees of EU universities that they have to be used by indicating the institution which has granted the degree. In all more recent laws of the Länder there is a clause that the recognition can be refused if the foreign institution is not entitled to grant an academic degree according to the domestic law of the respective country. There is also generally a provision that degrees which may be acquired through payment must not be recognised.

4. Nationality Condition for Captains of Ships

In reaction to the Anker-decision of the European Court of 30 September 2003 a couple of regulations have been amended, in particular the "Schiffsbesetzungsverordnung" and the "Schiffsoffizierausbildungsverordnung" by Art. 2 and 3 of the Regulation on the amendment of regulations on the training of the seafaring profession (Verordnung über die Änderung seefahrtsbezogender Ausbildungsverordnungen vom 4 August 2004, BGBl I, p. 2062 ff.). The relevant amendments are in Art. 2 and 3 stating that the certificate of a naval officer, which is required under Art. 3 of the Schiffsbesetzungsverordnung, may be acquired by na-

51 Judgment of 31 March 1993, C-19/92, Kraus, NVwZ 1993, p. 661.
52 Judgment of 13 November 2003, C-153/02, EuZW 2004, p. 121.
53 K. Hailbronner, Akademische Grade ausländischer EU-Hochschulen im Fernstudienverbund mit deutschen Ausbildungsaktiengesellschaften, EuZW 2007, p. 39.
54 Collection of decisions of the Federal Administrative Court, vol. 105, p. 336; see also Richter/Pierlings, WissR 2003, p. 229.

tionals of a Member State of the European Union provided that they fulfil certain requirements under Sec. 7 para. 1 of the Schiffsoffizierausbildungsverordnung.

CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

1. Working Conditions, Social and Tax Advantages

By an amendment of the Social Code II[55] the requirements for Union citizens to claim job-seekers' benefits have been changed in order to transpose Art. 24 para. 2 in connection with Art. 14 para. 4 lit. b of the Union Citizens Directive. The new provision of Sec. 7 para. 1, 2. sentence provides that foreigners who are entitled to entry and residence exclusively for the purpose of seeking employment as well as their family relatives are not entitled to job-seekers' benefits.[56] The Bill introducing the amendment explains that it is intended to exclude primarily EU citizens making use of their right to free movement for taking up employment in Germany. The wording of the 2nd sentence is, according to the official records, adjusted to Sec. 2 of the Freedom of Movement Act. Only in those cases in which the right of entry and residence is exclusively derived on the purpose of job-seeking the exclusion clause applies. Therefore, Sec. 7 para. 1, 2. sentence does not apply to EU citizens relying upon a different reason to claim free movement. This means that, for instance, persons having reached a status as a worker or as a family relative of an economically active Union citizen are not falling within the scope of application of these provisions.[57]

A more restrictive proposal of the Federal Chamber (*Bundesrat*) suggesting an exclusion of foreigners from access to social benefits looking for work and for persons non-economically active which would have been more in line with Art. 24 para. 2 was not adopted. The federal government argued that the proposed provision although being close to the wording of Art. 24 para. 2 of the Union Citizens Directive would not fit into the system and the terminology of the Social Code II. A group of persons for which the exclusion of job-seekers' benefits for a period of three months would apply could hardly be found. In the practical result the proposed solution would only apply to Union citizens who had become involuntarily unemployed or pregnant students. To make a law for such a small group of persons would create a high amount of administrative work.[58]

The new law on parent money replacing the children allowance[59] has replaced the education allowance (*Erziehungsgeld*) by an allowance for persons having an ordinary residence in Germany, living together with a child in a household and educating or taking care of that child, provided that the applicant is not or only partially employed. A special provision in Sec. 1 para. 7 does provide for special residence requirements for foreigners who are not entitled to free movement under community law.

By the Second Law amending the Second Book of the Social Code of 14 March 2006[60] the rules on entitlement to social benefits as a job-seeker have been amended in making use of the restrictions of the Union Citizens Directive under Art. 24(2) in connection with Art. 14(4)a. According to the amended sec. 7 para. 1, second sentence Social Code II, foreigners, including EU citizens whose right of residence *derives exclusively from the purpose of taking up employment*, are not entitled to job-seeker allowances. According to the drafting

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55 Law of 24 March 2006, BGBl. I, p. 558.

56 Sec. 7 (1): Leistungen nach diesem Buch erhalten Personen, die
- das 15. Lebensjahr vollendet und das 65. Lebensjahr noch nicht vollendet haben,
- erwerbsfähig sind,
- hilfebedürftig sind und
- ihren gewöhnlichen Aufenthalt in der Bundesrepublik Deutschland haben (erwerbsfähige Hilfebedürftige).

Ausgenommen sind Ausländer, deren Aufenthaltsrecht sich allein aus dem Zweck der Arbeitssuche ergibt, ihre Familienangehörigen sowie Leistungsberechtigte nach § 1 des Asylbewerberleistungsgesetzes. Aufenthaltsrechtliche Bestimmungen bleiben unberührt.

57 See BT-Drs. 16/688 of 15 February 2006, p. 13.

58 See BT-Drs. 16/239.

59 Gesetz zum Elterngeld und zur Elternzeit, Bundeselterngeld- und elternzeitgesetz, BGBl. 2006 I of 11 December 2006, p. 2748.

60 Official Gazette I, p. 558.

history of the new provision[61], the legislator wanted to exclude access to social benefits for foreigners entering Germany for the purpose of seeking employment. Contrary to the previous less restrictive provisions which granted an entitlement to every foreigner on the basis of ordinary residence in Germany the access to social benefits under the Social Code II (job seekers' allowances) are excluded explicitly even beyond the time period of three months in accordance with the Union Citizens Directive (Art. 24(2)).

The Social Appeal Court for North Rhine Westphalia[62] relying upon the jurisprudence of the European Court in the cases *Grzelczyk*[63] and *Trojani*[64] has decided whether under German domestic law Union citizens looking for employment are nevertheless entitled to social welfare benefits under the general provisions of the Social Code XII. The Court quashed the decision of the lower court refusing access to social welfare since under sec. 3 of the Free Movement Act Union citizens seeking employment were entitled to a right of entry and residence. As long as their right of entry and residence had not been withdrawn by a decision by the competent authorities, they were entitled under their status as Union citizens to equal treatment under Art. 12 and Art. 18 EC. The Court relies upon European Court's jurisprudence that not only economically active Union citizens but all Union citizens lawfully staying in another Member State were in principle entitled to equal treatment to social welfare systems. Since German law in social welfare did not explicitly exclude access to social benefits under the Social Code XII, every Union citizen could claim equal treatment. A right of residence could only be restricted by making excessive use of such benefits. According to Sec. 22 para. 1 Social Code XII, social welfare may be refused if a foreigner has entered into Germany for the mere intention to receive social welfare. Since this provision requires evidence of an intention to receive benefits, it is seldom applied in administrative practice.

The Court, in addition, deals with the issue whether access to benefits may be excluded. The Court, therefore, comes to the conclusion that a Union citizen entering for the purpose of looking for employment is entitled to social welfare benefits as long as his right of free movement has not been explicitly terminated or repealed.

The Social Appeal Court in a judgment of 3 November 2006[65] has confirmed its jurisprudence in the case of a Polish national who had entered Germany in 2004 and successfully applied for social welfare from 1 December 2005 until 31 March 2006. His application on 6 July 2006 for job seekers' allowances according to SGB II had been rejected after the amendment of the Social Code II. A claim for social welfare under the Social Code XII had also been rejected with the argument that under the Social Code XII persons were not entitled to social assistance who, in principle, were entitled to job-seekers' allowances under SGB II. The amendment of the Social Code II did explicitly intend to exclude foreigners looking for employment from access to all systems of social benefits. Therefore, the applicants as well were not entitled to social assistance under the Social Code XII. The Appeal Court once again has rejected the argument. Although Union citizens from the new Member States who were not yet entitled to full free movement under the accession treaties, they were nevertheless entitled to rely upon the general right of free movement under sec. 2 para. 1 No. 1 of the Freedom of Movement Act as Union citizens looking for employment or for the purpose of professional formation. Therefore under Art. 12 in connection with Art. 18 EC Union citizens staying lawfully in Germany were entitled to equal access to social benefits in spite of the fact that Member States were entitled to restrict the residence right of non-economically Union citizens. A national rule depriving Union citizens from access to social benefits staying lawfully in Germany could not be considered as compatible with community law if an equal rule were not applicable for German nationals in order to obtain access to social assistance. As long as the applicant were in possession of a formal document certifying his right of free movement as a Union citizen the Court were obliged to apply the equal treatment provisions of the Treaty.

61 Cf. Bundesratsdrucksache 550/05; Bundestagsdrucksache 16 (11), 80.
62 Judgment of 4 September 2006, L 20 B 73/06, SOER.
63 ECJ of 20 September 2001, Case C-184/99, ECR I-6193.
64 ECJ of 7 September 2004, Case C-456/02, *Trojani*, ECR I-7573.
65 L 20 B 248/06 AS.

The Social Court of Speyer[66] also deals with the entitlement to job-seekers allowances under Social Code II, following the amendment of the legislation in April 2006. The Court had to decide on the application for job-seekers benefits of a Greek national who had received such benefits since January 2005. On his application for a continuance of such benefits in June 2006, the Social Court has restrictively interpreted the amended provisions. The Court argues that the exclusion of Union citizens, whose right of entry could be derived exclusively from the purpose of looking for employment were not applicable for the applicant who had for the first time entered Germany in summer 2001 in order to take up employment in Germany. Although the applicant according to the facts of the case had never fulfilled the requirements for receiving a residence right under the Regulation 1251/70, the Social Court attributes substantial importance to the fact that the applicant had in fact been uninterruptedly for a period of more than five years in Germany. According to the European Court's jurisprudence a right of residence of a Union citizen could not be terminated by the mere fact of taking advantage of social benefits of the host country. A right of residence could only be terminated on the basis of a thorough examination of all individual circumstances and only on the assumption that a Union citizen was inadequately using the social welfare system. Therefore, the competent authorities were in principle justified to fix a time limit for taking up employment. However, since the applicant had received a certificate in January 2006 according to sec. 5 para. 5 of the Freedom of Movement Act, stating that the certificate could only be repealed after five years of lawful residence for particularly serious reasons of public order, security or health, social courts were bound to certificates on the right of residence for EU citizens. Therefore, access to social benefits for job-seekers could only be refused to Union citizens if the competent authority had examined a repeal of such a certificate.

Similarly, the Social Court of Oldenburg in a decision of 27 April 2006[67] had restrictively interpreted the amended Social Code in the "light of the Union Citizens Directive 2004/38". According to the Social Court the restriction of access to job-seekers allowances could be applied only for those Union citizens who had entered "for the first time Germany with the intention to take up employment and who had immediately upon entry claimed social benefits". The Social Court also relies on the duty of national courts to interpret domestic law in accordance with community law. In its view the European Parliament and the Council of the European Union were "evidently" of the opinion that Art. 24(2) in connection with Art. 14(4) lit. b of the Union Citizens Directive could only be applied to EU citizens who were taking residence for the first time in another Member State. Therefore, this provision could not be applied for Union citizens who had already been staying for a substantial amount of time in the Federal Republic and had been working for some time even if they had in the meantime been returned to their home country.

Questions of direct and indirect discrimination on account of nationality have frequently come up in the context of reforming the social legislation by the so-called Hartz-IV law as well as by reforming the laws on parents' allowances, children allowances and related social legislation.[68] Important legislation on access of foreigners to family allowances, parents' allowances and maintenance allowances[69] has been passed in December 2006. The law makes a distinction between foreigners entitled to freedom of movement and other foreigners. Foreigners entitled to freedom of movement enjoy equal treatment with Germans. As a rule, an application for social benefits is dependent upon an ordinary residence in Germany. Foreigners not entitled to free movement receive social benefits under the law of 13 December 2006 only if they possess either a settlement permit or residence permit which entitles to

66 Judgment of 13 July 2006, S 1 ER 211/06 As, Info also 2006, 224 – 225; see also Trenk-Hinterberger, Info also, 2006, 225.

67 22 AS 263/06 ER.

68 A survey on the recent legislation on the access of foreigners and Union citizens to social benefits is provided by the rapporteur in his commentary Hailbronner, Ausländerrecht, Kommentar, vol. III, C 2.1, Überblick über die sozialrechtliche Stellung von Ausländern in der Bundesrepublik Deutschland, p. 1-57.

69 Gesetz zur Anspruchsberechtigung von Ausländern wegen Kindergeld, Erziehungsgeld und Unterhaltsvorschriften of 13 December 2006, BGBl. of 18 December 2006 I, no. 60, p. 2915.

work unless the residence permit has only been granted for a temporary purpose or for humanitarian temporary reasons.[70]

The most recent piece of social legislation replacing the education allowance by the parents' allowance[71] provides for a claim to parents' allowance if the applicant has an ordinary residence or registered domicile in Germany, living with a child in a common household, taking care of the child himself and is not or only partially working. Therefore, from the wording of the provision it would seem to follow that every Union citizen taking up residence in Germany is entitled to parents' allowance under the conditions of Sec. 1 of the law even if he/she has moved to Germany with the intention to take advantage of the *Elterngeldgesetz*. Difficulties, however, may arise with regard to the amount of parents' allowance which is calculated according to Sec. 2 of the law in the amount of 67% of the income achieved in the last 12 months preceding the birth of the child up to a maximum of € 1 800.-. In cases in which the average income has been below € 1 000.-, the percentage of 67% may be increased up to 100%.[72] It is doubtful whether Union citizens entitled to free movement and enjoying a right to equal treatment may be required under the Union Citizens Directive to provide sufficient recourses for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence, since they may refer to their entitlement to *Elterngeld* which is sufficient to pay for the Union citizens' and children's maintenance at least for the time of the entitlement of the parents' allowance under the new law.[73]

Brinkmann gives a survey on the social rights of Union citizens according to the Union Citizens Directive.[74] Referring to recent decisions of social courts, Brinkmann confirms that only Union citizens looking for the first time (*erstmalig Arbeitssuchende*) are excluded from access to job-seekers' allowances according to Social Code II – regardless of the fact that they are entitled to entry and residence. Union citizens looking for employment after having been employed in Germany are entitled to equal treatment with the consequence of equal access to job-seekers' allowances.

2. Other Obstacles to Free Movement of Workers

A bill has been introduced in the Parliament to change the existing law on compensation for victims of crimes.[75] The existing law excludes persons without German nationality who are only temporarily in Germany and become victims of crimes from compensation according to the law unless they are family relatives of Germans or permanent residents. The bill suggests to include all foreigners who are relatives up to a certain degree with persons permanently resident in Germany and who are only temporarily staying in Germany. In addition, it is suggested to compensate also victims of crimes committed abroad, provided the victim had the regular residence in Germany. It is questionable whether the bill will receive sufficient support in Parliament. Although the existing legislation as well as the bill may raise issues of equal treatment, it does not appear that the community law implication of the law have been considered so far in the parliamentary process.[76]

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70 For details see Sec. 1 para. 3 of Bundeskindergeldgesetz as amended by the Gesetz zur Anspruchsberechtigung von Ausländern wegen Kindergeld, Erziehungsgeld und Unterhaltsvorschuss of 13 December 2006.

71 Gesetz zum Elterngeld und zur Elternzeit (Bundeselterngeld- und elternzeitgesetz, BEEG, of 5 December 2006, BGBl. 2006 I, No. 56 of 11 December 2006, p. 2748.

72 See Sec. 2 para. 2.

73 The minimum of parents' allowance is € 300.- per month, applicable if no income has been achieved in the time before the birth of the child.

74 Gisbert Brinkmann, Soziale Rechte von Unionsbürgern nach der Unionsbürgerrichtlinie, EuroAS 2006, p. 168.

75 Gesetzentwurf zur Ausweitung der Opferentschädigung bei Gewalttaten, BT-Drs. 16/1067 of 28 March 2006.

76 The draft bill does not indicate any community law considerations, see BT-Drs. 16/1067.

CHAPTER IV. EMPLOYMENT IN THE PUBLIC SECTOR

1. Access to Public Sector

1.1 Nationality Condition

In the Observatory report 2004 I have reported the legal situation concerning to the public sector in the federation as well as in the Länder. This information is still valid. 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).[77] 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,
    - 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 judgments),
    - 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).[78]

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

78 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,

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.

1.2. Recruitment Procedures and Requirements

Employment in the public sector is a matter of exclusive competence of the Länder with regard to their civil servants and employees, and of the federation with regard to the federal civil servants and employees. Even with regard to the federation, there is no uniform administrative code or guideline concerning the recruitment procedures. Every ministry of the federation and of the Länder and every local community, district or any other entity endowed with a right of self-administration does in fact enact its own international rules or administrative practices on recruitment of civil servants. Therefore, no information on language requirements, recruitment procedures, specific rules on recognition of professional

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- 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
- 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 Ländern 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-, Ausländer- 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.

experience etc. is available. It would require at least a research of one year with a team of lawyers, social scientists etc. to conduct an examination of the recruitment practices and requirements in the public sector in Germany.

CHAPTER V. MEMBERS OF THE FAMILY

1. Residence Rights

According to Sec. 4 para. 1, 1 sentence of the Freedom of Movement Act, non-economically active Union citizens, however, have to fulfil certain requirements like sufficient health insurance coverage and sufficient means of subsistence. According to the Appeal Court, the lack of these requirements does not automatically lead to a loss of free movement rights.[79] The competent alien authorities, however, may require proof of the fulfilment of the requirements to be substantiated within reasonable period (Sec. 5 para. 3, 1. sentence). If the Union citizen and his family relatives do not react to such a request or if they do not succeed in submitting the necessary documents, the alien authority can determine the non-existence of a right of entry and residence and repeal a residence card of family relatives who are not Union citizens. An obligation to leave the federal territory does only arise if the determination that a right of entry and residence does not exist or has been repealed has become unappealable.[80] Although the existing Freedom of Movement Act does not provide for an explicit procedure for family relatives, the Court comes to the conclusion that a specific determination that family relatives are not entitled to entry and residence is required in order to establish an obligation to leave the federal territory.

The Administrative Appeal Court of Baden-Württemberg discusses extensively the requirements of Art. 10 para. 1 of the Regulation No. 1612/68 concerning the right of family relatives to live together with a Union citizen. The Court comes to the conclusion that the issuance of an EC-residence permit does not require that the family relative is living together with the Union citizen in one common accommodation or is intending to live together with the Union citizen in one common accommodation. Therefore, the requirements in Art. 10 para. 1 of the Regulation No. 1612/68 cannot be interpreted as a requirement to live together with the Union citizen in one common accommodation.[81]

The Administrative Court of Frankfurt in its judgment of 28 December 2006[82] has decided that a third-country national from Cameroun, who is the father of a two-year old son with the nationality of Cameroun as well as potentially of Lithuania, cannot rely upon a status as family relative of a Union citizen. The Court has examined whether the Chen-judgment of the European Court of 19 October 2004[83] supports a claim for an EU-residence right. In distinguishing the pending case from the Chen-case, the Court argues that it is not sufficient that a parent from a third country does in fact exercise care for a child possessing Union citizenship in order to be entitled to free movement. From the context of the European Court's decision it follows according to the Administrative Court that only care in addition with maintenance of the child as part of the personal care justifies a right of residence under community law. Since the applicant did not dispose of any income and would be as well as his son totally dependent on social welfare, he could not claim a residence right based upon the Chen-judgment of the European Court.

The Administrative Court of Ansbach in a judgment of 18 August 2006[84] in the case of a Nigerian national who has recognised his fatherhood for the child of an Italian national, has taken the same view in arguing that the Nigerian national could not rely upon community law for an EU residence right.

In a dispute on the legality of a fee of € 5.- for an administrative decision allowing the applicant, an asylum seeker from Iraq, to leave the assigned residence area, the applicant has relied upon community law to challenge the fee. He argued that he had married according to Islamic rules a national of Lithuania. On 1 March 2005 a common child had been

79 To the same conclusion come Westphal/Stoppa, Die EU-Osterweiterung und das Ausländerrecht, InfAuslR 2004, 133.
80 Note that the draft bill has removed the requirement of unappealability.
81 Judgment of 29 November 2006, 13S 2435/05, InfAuslR 2007, 91.
82 5 L 426/06.
83 ECJ of 19.10.2004, Case C-200/02, Chen/Zhu [2004] ECR I-9925.
84 AN 19 K 06.01397.

born. The Court rejected the argument since the applicant could not rely upon free movement rights of family relatives of Union citizens. His marriage with a Union citizens did not entitle him to freedom of movement since he had not been married lawfully and could therefore not be considered as a spouse in the sense of community law. The common child, on the other hand, did not establish a title for free movement rights since sec. 3 of the Freedom of Movement Act did not provide for a residence right derived from a family relative in the sense of sec. 2 para. 2 no. 7 of the Freedom of Movement Act.

The Administrative Appeal Court of Hamburg in a judgment of 22 March 2005[85] has refused a residence right to a third-country national who had been unappealably expelled following the entry into force of the Freedom of Movement Act and who had relied upon freedom of movement as a spouse of a Union citizen. The Hamburg Court has applied the same principles regarding the continuing effect of expulsion orders in spite of the abolition of an expulsion order and the new German legislation since 1 January 2005 with the following arguments:

> "An automatic invalidity of expulsion orders would amount to a privilege of third-country national spouses and family relatives of Union citizens compared to such persons who at the time of expulsion were already covered by the provisions on freedom of movement and therefore subject to the rules on exclusion order. This would amount to a better treatment of a group of third-country nationals for the mere fact that at the time of expulsion they did not have any entitlement to free movement. The Hamburg Court considers that such privileges would hardly be in accordance with community law."[86]

The Hamburg Administrative Appeal Court, applying by analogy the provisions of the exclusion effect of an expulsion order of the Residence Act (section 11 para. 1, 3. sentence) takes the view that the foreign authorities in deciding on an application for lifting the exclusion order have to be guided by principles of sec. 11 to be interpreted in accordance with the rules of community law. However, the Court does not explicitly refer to the relevant provisions of the Union Citizens Directive.

The Administrative Appeal of Hamburg in its judgment of 22 March 2005[87] deals with the effects of the *Akrich*-decision of the European Court on the residence right of a third-country national spouse.[88] According to the Appeal Court a third-country national spouse of a Union citizen cannot rely upon the right of entry and residence under community law by entering into the territory of the European Union from a third state. The Court relies upon the *Akrich*-judgment by stating that the family relatives of Union citizens are only entitled to free movement when accompanied by Union citizens moving within the European Union. Since the applicants did move from Chile to the United Kingdom and from there to Germany, they were entitled to free movement. The Court considers it as relevant that the applicants did move from Chile to the United Kingdom only during the Court procedure, since for examining the legality of discretionary decisions (application for lifting an exclusion order), the relevant date would be the decision of the Appeal Court.[89] The Court also takes up a statement of the European Court in the *Akrich*-decision that in order to make use of the freedom of movement a third-country national married to a Union citizen must reside lawfully in another Member State before moving to Germany. The Court considers that the residence of the applicant in the United Kingdom on the basis of a tourist visa did establish a lawful residence in the sense of the *Akrich*-decision.

It should be mentioned that the Act 2007 on amendment of the Freedom of Movement Act does not provide for any requirement of a previous residence, lawful or not, in another

85 3 Bf 294/04, see also under I C.

86 Westphal/Stoppa in an article on the effects of third-country nationals who, following the EU enlargement had become Union citizens (InfAuslR 2004, p. 133, 137) have argued for a different view.

87 3 Bf 294/04.

88 ECJ of 23 September 2003, Case C-109/01, Akrich [2003] ECJ Reports I-9607.

89 The Appeal Court refers in this connection to the judgment of the European Court of 29 April 2004 in the case *Orfanopoulos and Oliveri*, ECJ of 29.4.2004, Cases C-482/01 and C-493/01, *Orfanopoulos* [2004] ECR I-5257; see also Federal Administrative Court of 3 August 2004, 1 C 30.02, NVwZ 2005, p. 220 f.

EU Member State in order to be entitled to freedom of movement as a family relative or spouse of a Union citizen. The Hamburg Court could not take into account the subsequent somewhat different interpretation by the European Court of its own judgment in the *Akrich*-case and the *Jun Jing Jia*-decision.[90]

2. Equal Treatment (Social and Tax Advantages)

Family relatives of a Union citizen from a Member State acceding in 2005 to the European Union may claim job seekers' allowances according to SGB II if they have a chance of receiving a labour permit.[91] This has been decided in case of a Polish national who had moved to Germany in October 2005 and applied for job seekers' benefits in February 2006. The spouse of the applicant had registered in 2005 as a self-employed activity which, however, was not sufficient to support the family. The Court argued that as a family relative of a Union citizen the applicant did not yet enjoy full free movement with respect of the access to labour. This restriction, however, did not exclude the assumption that she was available on the labour market and was therefore falling into the scope of application of the provisions 7 and 8 of the Social Code II. To be entitled to job seekers' allowances under SGB II it was probably not sufficient that an applicant had only the theoretical possibility to be granted a labour permit according to the general provisions of the Residence Act;[92] however, the Court held that it was sufficient to be in principle admissible to the labour market. An applicant, in order to receive job seekers' benefits must have at least a realistic chance that the labour authorities would grant a labour permit.[93] If there was no realistic chance of getting an employment permit, the aim to integrate recipients of job seekers' benefits into the labour market could not be achieved.[94] In this case the requirement of being capable to take up employment (*Erwerbsfähigkeit*) in the sense of Sec. 8 para. 2 Social Code II could not be assumed.[95] Since the applicant had received a labour permit for an occupation in a private household she had been able to make credible that she was capable of taking up an employment. The claim was also not excluded by the recent changes of April 2006 whereby job seekers' benefits are not granted for foreigners whose residence right can only be derived from the very purpose of looking for labour. This provision could not be applied to the applicant since she had moved to her husband who had in the beginning taken up a self-employed activity in the assumption that the husband could produce sufficient income to sustain the family.

90 Case C-1/05, judgment of the Court of 9 January 2007.
91 Social Appeal Court Niedersachsen-Bremen of 14 September 2006, L 6 AS 376/06 ER, InfAuslR 2007, p. 21.
92 For a different opinion Social Court of Dessau of 21 July 2005, S 9 AS 386/05 ER, InfAuslR 2006, 29; see also Valgolio, in: Hauck/Noftz, SGB II § 8 no. 20; Brühl, in: Lehr- und Praxiskommentar – SGB II, § 8 no. 35.
93 See also Blüggel, in: Eicher/Spellbrink, SGB II § 8 no. 61.
94 See also Seegmüller, in: Estelmann, SGB II § 8 no. 45.
95 In this sense also Social Appeal Court Berlin-Brandenburg of 13 December 2005, L 25 B 1281/05 ASER; see also Spellbrink, in: Eicher/Spellbrink, SGB II § 7 no. 12.

CHAPTER VI. RELEVANCE/INFLUENCE/FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGMENTS

Following the Court of Justice's decision in the *Beuttenmüller*-case[96] various Länder have passed new legislation concerning the recognition of diplomas on study of three years for teaching professions. Hamburg has amended its law on recognition of teacher diplomas of 21 December 1990[97] by introducing a new provision whereby the competent authorities must examine whether knowledge acquired during a professional practice does cover wholly or partially the required expertise for exercising the teaching profession in the relevant areas. The Free State of Sachsen in December 2006 has passed an amendment to a law transposing Directive 89/48.[98] The main change is similar to the Hamburg legislation. Following a preliminary examination on equivalence, an obligatory examination takes place to find out to what extent practical experience compensates for deficits which in turn have to be taken into account in determining the requirements for acquisition of additional knowledge in a training course or individual examination. A second change introduces the duty to recognise also diplomas and other professional certificates which have been recognised as equivalent by a competent authority in another EU Member State. It is required that the diploma has been acquired within the European Union and has been recognised by a competent authority in this EU Member State as equivalent for the access to a regulated profession.

National Quota for Football Players

To implement the jurisprudence of the European Court following the *Simutenkov*[99] and *Kolpak*-decision[100] the board of the German Football Association (DFB) in a session of 8 July 2005 has decided a number of regulatory amendments in the statutes of the Association. The existing rules of the Association have been changed by abolishing national quota for nationals of countries with which the EU has concluded an agreement providing for equal treatment for nationals of the associated states with regard to working conditions, remuneration and dismissal. In addition, the Association of Football Leagues (*Ligaverband*) has decided for the term 2006/2007 to abolish existing restrictions by certain quota for non-EU football players. The rule has been replaced by the so-called "local player rule" whereby the relevant connection is the training of a football player by a football club or a football association rather than the nationality of a player. The German Football Association notes that there are no direct obligations or rules in force restricting the free movement of nationals of an EU Member State. The Association, however, notes that aspects of promotion of juvenile sport and protection of competition are naturally in a certain conflict to an unlimited freedom from outside the EU/EEA area. The German Football Association is obliged according to the statute of the Association (Sec. 4a) to promote the football sport and its development, particularly by promoting sports activities of the youth. According to Sec. 4 lit. j of the statute, the German Football Association has also to guarantee the integrity of sportive competition and take all the necessary measures for that purpose. The regulation of the German Football Association and the Association of Football Leagues with respect to free movement are attached in annex to this report. The present information is based upon a correspondence of the author of this report with the legal services of the German Football Association.

96 Judgment of 24 April 2004, C-102/02, EWS 2005, 282.
97 Hamburgisches Gesetz- und Verordnungsblatt, p. 281.
98 Gesetz zur Änderung des Gesetzes zur Umsetzung der Richtlinie 89/48/EWG of 16 February 2006, Sächsisches Gesetz- und Verordnungsblatt of 15 March 2006, No. 3.
99 Judgment of 12 April 2005, C-265/03.
100 Judgment of 8 May 2003, C-438/00.

CHAPTER VII. POLICIES, TEXTS AND/OR PRACTICES OF A GENERAL NATURE WITH REPERCUSSIONS ON FREE MOVEMENT OF WORKERS

See also Chapter III with regard to social legislation.

CHAPTER VIII. EU ENLARGEMENT

1. Transitional Arrangements Regarding EU-8

As for the second phase of the transitional agreements with the EU-8 Member States, the federal government has notified that it will maintain restrictions on access of the labour markets until the end of the five-year period following accession until 30 April 2009.[101] According information from the Federal Ministry of Interior, no further circulars for instructions have been given to the Länder. For the mobility of workers from the Member States from Central and Eastern Europe to Germany no further information is available beyond the facts contained in the EU Commission Report published on 8 February 2006. A report of ECAS[102] based on figures of the *Ausländerzentralregister* reports that in 2005 the inflow of migrants from both EU-25 and third countries was on the increase. By the end of 2005, Germany hosted 7.3 million foreign nationals, equalling to 8.9 % of the total population. Intra-European migration was most significant from Italy, Poland and Greece. The most represented EU-8 nationals in Germany are Polish, followed by a considerably lower proportion of Hungarians (49 500), Slovenians (21 200), Czechs and Slovakians.[103] On 31 December 2005, 73 000 Rumanians were residing in Germany (the data refer to all type of migrants and not only to those pursuing a salaried activity). Polish and Rumanian nationals are resident in Germany for around ten years, while for Hungarians and Slovenians the average time is even more (12.1 and 27.7 years respectively).

The Social Court of Düsseldorf in a judgment of 24 January 2005 decided on the interpretation of the freedom to provide services for Polish nationals working in the area of coal mining. The Court has applied a restrictive interpretation of the term "construction business" in the sense of the accession treaties excluded from the right of free movement for providers of services. The Court distinguishes on the basis of a systematic interpretation of the NACE-codes, attributing the coal mining to a separate chapter in the NACE-code, which did not fall under the rules allowing exceptions from the freedom to provide services for Polish nationals.

In the case of a Polish national who had been expelled before the accession of Poland to the European Union, the Administrative Court of Ansbach[104] had to decide whether an unappealable expulsion order had become obsolete by the accession of Poland to the European Union on 1 May 2004. The Administrative Court states that the Polish national had become a Union citizen on 1 May 2004, but had never fulfilled the requirement for a right of entry and residence under community law. In addition, the Court argues that the unappealable expulsion order had not lost its effect due to the change of the legal status of the Polish national. The Court refers to administrative circulars of the Bavarian Ministry of Interior and the Federal Ministry of Interior whereby EU citizens whose expulsion orders have become unappealable before 1 January 2005 are not entitled to entry and residence as long as the exclusion order is still valid.[105]

The Administrative Appeal Court of Hessen in a judgment of 29 December 2004[106] discusses extensively the provisions restricting freedom of movement for citizens of Member States acceding to the European Union on 1 May 2004.[107]

The accession of Poland to the European Union does not exclude according to a decision of the Civil Court of Braunschweig[108] the execution of a prison sentence based upon

101 Bundesanzeiger of 29 April 2006, no. 82, p. 3422.
102 Venabel/Bürska, European Citizen Action Service - Who's Still Afraid of EU Enlargement.
103 Source: www.destatis.de/basis/e/bevoe/bevoetab4/htm.
104 Judgment of 16 March 2006, AN 19 E 06.00965.
105 The Court refers to a letter by the Bavarian Ministry of Interior sent by e-mail on 6 April 2005 to the local alien authorities.
106 12 TG 3212/04, NVwZ 2005, 837.
107 See also Dienelt, Freizügigkeit nach der EU-Osterweiterung, 2004; Westphal/Stoppa, InfAuslR 2004, 133; Fehrenbacher, ZAR 2004, 140; all articles deal with the interim restrictions for citizens of the Member States acceding on 1 May 2004 to the European Union.

offences against the Aliens Act 1990, which had been suspended in 2003 due to the deportation of the national to Poland. The Court states that the right of entry and residence of Polish nationals according to community law does not exclude the execution of suspended sentences on the basis of Sec. 456a para. 2 of the Criminal Procedure Code following the voluntary re-entry into Germany. The status of the Polish national as a Union citizen does not imply a privileged treatment in comparison to other lawfully prosecuted persons in a comparable situation.

2. Transitional Measures for Bulgaria and Rumania

The Bundestag has adopted a law on adjustment of federal legislation as a result of the access of Bulgaria and Rumania to the European Union.[109] Major changes concern the inclusion of nationals of Bulgaria and Rumania into the scope of application of Sec. 13 of the Freedom of Movement Act providing for special rules with regard to the employment of nationals of the new Member States according to Sec. 284 para. 1 Social Code III.[110] The Regulation on granting a labour permit[111] has accordingly been amended by including nationals of Bulgaria and Rumania into the scope of application of the Regulation.[112] Finally, the Third Book of the Social Code[113] has been amended by the clause that residence permits granted to nationals of Bulgaria and Rumania before the date of accession remain valid as residence permit/EU subject, however, to restrictions of the residence permit with regard to conditions for taking up employment. A residence permit authorising for unlimited employment remains valid as a privileged labour permit/EU (*Arbeitsberechtigung*).

Further changes relate to the removal of Rumania and Bulgaria from the list of countries entitling students for an increased rate of maintenance grants for study in those countries. Another provision of the law includes lawyers from Rumania and Bulgaria into the scope of application of the law on activities of European attorneys in Germany.[114]

Nationals of Rumania and Bulgaria are granted after the accession to the European Union the same access to the labour market for occupation requiring a qualified training as nationals of the eight EU Member States which acceded on 14 April 2003. The federation claims competence based upon Art. 74 para. 1 No. 4 of the Basic Law since a uniform federal legislation is considered as necessary in the interest of the federation according to Art. 72 para. 2 of the Basic Law. The interim regime for nationals of Bulgaria and Rumania is basically the same as for nationals of the eight East and Middle European Member States, for which the Federal Republic has made use of the possibility to restrict the access to the German labour market for an interim period of up to seven years. It follows that nationals of Bulgaria and Rumania in order to take up employment in Germany need a residence permit for the purpose of taking up employment according to Sec. 4 para. 3 of the Residence Act. Since the provisions of the Residence Act are in principle not applicable anymore to Union citizens, a special regime applies with regard to the permit to take up employment. Analogous to the existing system, nationals of Bulgaria and Rumania are included into the procedure for granting a labour permit of the *Arbeitsgenehmigungsverordnung* (Sec. 284 para. 1 Social Code III). This means that Bulgarian and Rumanian nationals in the interim period need a labour permit for taking up employment with the local agency for labour.

Before entering Germany, Bulgarian and Rumanian nationals entering Germany for the purpose of taking up employment may receive a labour permit according to the procedural

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108 Decision of 16 June 2005, 50 StVK 497/05.

109 Gesetz zur Anpassung von Rechtsvorschriften des Bundes in Folge des Beitritts der Republik Bulgarien und Rumäniens zur Europäischen Union, BGBl. 2006 I No. 58 of 14 December 2006, p. 2814.

110 For a text of the Social Code relating to the provisions on granting a labour permit see Hailbronner, Ausländerrecht, vol. III, C 1, December 2006.

111 Arbeitsgenehmigungsverordnung of 17 September 1998, for the text see Hailbronner, Ausländerrecht, C 1.5.

112 See Sec. 13 lit. a of the Arbeitsgehmigungsverordnung.

113 Arbeitsförderung, for a text of the relevant provisions see Hailbronner, Ausländerrecht, C 1.

114 Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland of 9 March 2000, BGBl. I , p. 182, 1349, amended by the law of 26 October 2003, BGBl. I, p. 2074.

rules of the *Anwerbestoppausnahmeverordnung*, the *Arbeitsgenehmigungsverordnung* and the bilateral agreements concluded with Bulgaria and Rumania on guest and seasonal workers. As long as the rules of the Residence Act and regulations on access to the labour market contain more favourable provisions, such rules remain applicable according to Sec. 284 para. 3 and para. 6, 1. sentence Social Code III.[115]

The federal government has announced that it will adopt the same transitional measures for workers from Bulgaria and Rumania as have been applied with regard to the nationals of the eight new EU Member States from East and Middle Europe. There is at present no further information available on the number of Rumanian and Bulgarian nationals in Germany. A statistic on Bulgarian and Rumanian immigrants in Germany from 1990 until 2002 distinguishing according to the group of persons (socially insured, seasonal worker, contract worker, guest worker) can be found in a publication of Dietz, Knogler and Vincentz of May 2004.[116] The authors refer to a recent study which concludes that temporary restrictions on the free movement of labour will delay the immigration, but will only have a very small impact on the total inflows in the long run. According to the study, postponing free movement of labour from 2004 to 2014 reduced the migration flow from Bulgaria and Rumania to Germany in the first year after accession only from 47 000 to 44 000, leaving the long-term migrant population of these countries in Germany almost unaffected.[117]

According to press releases of 26 September 2007 the Federal Government has announced a moderate facilitation of granting residence permits for taking up employment for qualified workers from ten new EU-Member States which have acceded in 2004 or later to the European Union. The facilitation applies exclusively for engineers specialised in branches in which there is a labour demand (electronics, mechanics). Starting in November 2007, applicants from the new EU-Member States will not be subject anymore to the procedural requirements whereby a residence permit for taking up employment cannot be granted unless it has been demonstrated that no suitable applicant enjoying privileged access is available. In addition, the Federal Government decided to facilitate the employment of foreigners having completed a university study in Germany. According to the new system, they may receive a labour permit for at least three years following the completion of their studies. The changes do not require any legislative amendments.

Various articles deal with the legal regime for nationals of EU Member States which have acceded recently to the European Union. Felipe Teminng[118] deals with the freedom to provide services and the transitional agreement of the accession treaties. The article particularly discusses the problems of posted workers (*Arbeitnehmerentsendegesetz*) and issues relating to the remuneration of workers according to tariff agreements.

Draganova[119] discusses the integration of Bulgaria into the Common Market with the particularities on the free movement of persons according to the Bulgarian legislation. The article contains some information about the Bulgarian legislation concerning restrictions on freedom of establishment and freedom to provide services and the implications of the Accession Treaty on the existing relations of Bulgaria with the old and new EU Member States.

The Administrative Appeal Court of Berlin-Brandenburg in a decision of 18 October 2005[120] had to decide on the right of entry and residence of an Albanian national that moved in 1990 to Germany and married in 1996 a Czech national. In 1997 he had been expelled from Germany. On 13 December 2004 the Czech spouse of the applicant had taken up resi-

115 For details see BT-Drs. 16/2954.

116 Labour Market Issues in Bulgaria, Rumania, and Turkey, Osteuropa-Institut München, Working Papers No. 254, May 2004, p. 12 and p. 19.

117 Alvarez-Plata/Brücker/Siliverstovs, Potential Migration from Central and Eastern Europe into the EU-15 – An Update-Report for the European Commission, DG Employment and Social Affairs, DIW Berlin, 2003; see also Dietz, Barbara, Ost-West-Migration im Kontext der EU-Erweiterung aus Politik und Zeitgeschichte, 2 February 2004, p. 41 f.

118 EU-Osterweiterung: wie beschränkt ist die Dienstleistungsfreiheit?, RDA 2005, vol. 3, p. 186 f.

119 Cornelia Draganova, Manche Probleme der Liberalisierung des Personen –und Dienstleistungsverkehrs mit Bulgarien unter Berücksichtigung des Assoziierungsabkommens und des neuen Beitrittsvertrags, ZAR 2004, 168 f.

120 8 S 39.05.

dence in Berlin and had received a certificate of free movement. Her husband, serving until that time a prison sentence, had applied in January 2005 for a residence card as a spouse of a Union citizen. The alien authorities had rejected his application relying on the interim provisions restricting freedom of movement for nationals of the new Member States. The Court has rejected this argument by emphasizing that the interim restrictions according to Art. 24 of the Accession Treaty of 16 April 2004 are effective only with respect to the freedom of movement for workers and for the freedom to provide services (Art. 39 and 34 EC). Beyond the scope of application of these provisions freedom of movement can be claimed fully also by Union citizens of the new Member States and their spouses and family relatives.

CHAPTER IX. STATISTICS

I. Financial support for students and pupils (German and Union Citizens living in Germany) in EU Member States

Assistance according to Sec. 5 para. 2-5 BAföG
a. EU Member States (until 2005)

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
EU Member States	8306	7429	6495	6320	6343	6646	7370	9003	10 344	12 665	12 953
Belgium/ Luxembourg	76	80	55	65	62	55	83	79	108	122	122
Denmark	95	85	71	94	125	110	115	190	296	363	363
Estonia						5	7	6	10	17	30
Finland	120	95	79	143	160	210	278	391	486	497	382
France	1492	1270	1168	1010	1068	1095	1264	1613	1850	2366	2211
Greece	106	77	75	62	68	74	75	76	93	85	95
Great Britain	3783	3377	2995	2614	2506	2418	2305	2383	2459	2527	2543
Ireland	480	438	380	371	349	362	386	424	449	491	516
Italy	598	473	463	475	525	562	561	644	770	932	950
Latvia						0	0	4	12	19	16
Lithuania						0	6	9	8	24	37
Malta	5	5	3	4	6	9	12	18	20	24	30
Netherlands	244	226	191	212	248	224	235	286	341	298	337
Austria	345	238	209	172	196	171	416	757	684	895	1101
Poland	36	23	27	21	27	42	75	119	155	265	357
Portugal	63	59	33	40	43	74	60	70	117	151	155
Sweden	259	295	247	318	359	449	508	769	925	1.039	993
Slovakia/Czech Republic	37	31	28	20	25	42	50	78	90	140	183
Slovenia						0	2	3	5	9	11
Spain	645	716	529	744	634	842	1084	1321	1766	2295	2355
Hungary	43	32	21	15	17	28	44	56	61	96	161
Cyprus							4	2	5	10	5

Source: BMBF (Federal Ministry for Education and Science), Ländermeldungen

b. Additional Bologna-states

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Bologna-states	694	540	499	441	425	495	556	743	840	948	1086
Albania						0	1	0	0	1	4
Bosnia-Herzegovina/Croatia	2	4	4	4	6	5	6	7	6	7	8
Bulgaria	8	5	1	1	2	0	1	0	1	17	22
CIS/Russia	258	179	124	104	88	100	126	129	116	200	283
Iceland	7	6	3	7	8	7	13	25	32	43	56
Norway	92	88	81	106	92	128	159	227	275	306	308
Rumania	25	10	3	5	8	10	5	17	21	21	32
Serbia										4	2
Switzer-land/Liechtenstein	302	248	283	214	213	225	214	297	332	304	265
Turkey					8	7	9	14	12	45	106

Source: BMBF (Federal Ministry for Education and Science), Ländermeldungen

II. Financial support for German residents and EU Union citizens who maintain their residence in Germany and attend courses of higher education in trans-border educational institutions (so-called "frontier" students, Grenzpendler)

Country	**Number of persons receiving financial support**					
	2004	**2005**	**2004**	**2005**	**2004**	**2005**
	total number		**students**		**pupils**	
Belgium						
from Northrhine-Westphalia	2	3	2	2	0	1
from Rhineland-Palatinate	1	2	1	2	0	0
Denmark	0	0	0	0	0	0
France						
from Baden-Württemberg	9	2	9	2	0	0
from Saarland	0	0	0	0	0	0
The Netherlands						
from Northrhine-Westphalia	1292	1319	1289	1316	3	3
from Niedersachsen	121	178	121	178	0	0
from Rhineland-Palatinate	0	1	0	1	0	0
Austria						
from Bavaria	105	154	60	91	45	63
from Baden-Württemberg	0	0	0	0	0	0
Poland	0	0	0	0	0	0
Switzerland/Liechtenstein						
from Bavaria	2	0	2	0	0	0
from Baden-Württemberg	85	96	85	96	0	0
Czech Republic/Slovakia	0	0	0	0	0	0
Total	**1617**	**1755**	**1569**	**1688**	**48**	**67**

Source: BMBF (Federal Ministry for Education and Science), Ländermeldungen

III. Union citizens receiving financial support for attending secondary school training or higher education (universities) in the year 2005

		pupils (Sec. 12)				students (Sec. 13)			
country of origin, citizenship	**total number of persons receiving support**	**total**		**monthly number on average**	**amount of support**	**total**		**monthly number on average**	**amount of support**
	number		**%**	**number**	**1000 €**	**number**	**%**	**number**	**1000 €**
EU Member States	**9 025**	**3 362**	**1.0**	**2 022**	**7 636**	**5 663**	**1.1**	**3 823**	**18 999**
Belgium	53	19	0.0	11	47	34	0.0	22	112
Denmark	19	8	0.0	5	23	11	0.0	7	34
Estonia	40	10	0.0	6	22	30	0.0	22	127
Finland	35	11	0.0	6	29	24	0.0	17	89
France	258	83	0.0	52	211	175	0.0	116	565
Greece	1 402	517	0.2	310	1 108	885	0.2	603	2 963
Ireland	32	9	0.0	5	20	23	0.0	17	73
Italy	2 282	1 080	0.3	650	2 358	1 202	0.2	799	3 751
Latvia	133	39	0.0	23	93	94	0.0	63	357
Lithuania	107	32	0.0	20	90	75	0.0	50	280
Luxembourg	6	2	0.0	1	3	4	0.0	3	16
Malta	2	1	0.0	1	3	1	0.0	-	2
Netherlands	268	100	0.0	62	243	168	0.0	113	564
Austria	470	148	0.0	92	411	322	0.1	224	1 116
Poland	1 788	616	0.2	374	1 400	1 172	0.2	811	4 105
Portugal	514	188	0.1	114	400	326	0.1	209	970
Sweden	23	6	0.0	5	24	17	0.0	11	61
Slovakia	75	20	0.0	11	50	55	0.0	36	192
Slovenia	87	36	0.0	20	83	51	0.0	32	150
Spain	531	170	0.1	102	414	361	0.1	238	1 200
Czech Republic	432	115	0.0	66	277	317	0.1	211	1 145
Hungary	171	42	0.0	25	106	129	0.0	85	440
Great Britain	295	110	0.0	60	221	185	0.0	129	681
Cyprus	2	-	-	-	-	2	0.0	2	7
Other EU Member States	**22 159**	**9 085**	**2.8**	**5 337**	**19 402**	**13 073**	**2.6**	**9 008**	**45 845**
Bosnia-Herzegovina	776	284	0.1	165	608	492	0.1	329	1 602
Croatia	1 162	402	0.1	235	927	759	0.1	517	2 412
Bulgaria	168	49	0.0	33	148	119	0.0	85	418
Iceland	18	13	0.0	7	25	5	0.0	5	28
Liechtenstein	-	-	-	-	-	-	-	-	-
Norway	6	4	0.0	2	12	2	0.0	2	7
Rumania	316	110	0.0	61	237	206	0.0	147	765
CIS/Russia	2 198	828	0.3	508	2 338	1 370	0.3	961	5 453
Switzerland	65	21	0.0	12	52	44	0.0	29	132
Turkey	13 345	5 822	1.8	3 379	11 292	7 523	1.5	5 185	25 839

Source: BMBF (Federal Ministry for Education and Science), Ländermeldungen

In 2005, 42 209 foreigners in educational training (25 978 pupils, 16 267 students) received financial support (as compared to 37 978 in 2003). 9 025 students and pupils were from EU Member States including the states acceded in 2004 (Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Czech Republic, Hungary, Cyprus), accounting for 21% of the foreign students and pupils receiving financial support in total. The major part of students and pupils coming from EU Member States was from Italy, amounting to 2 282 persons (in 2003: 2 063) followed by Poland with 1 788 persons, which number increased excessively by over 25% compared to the year 2003 (1 427), and Greece with 1 402 persons in comparison with 1 456 persons in 2003. It is expected that the number of financially aided persons from the newly acceded Member States will perceptibly increase once again.

The financial expenditure for supporting foreign students and pupils has increased in comparison with the last survey by 15% and amounted to roughly 135.5 million Euro in 2005 (federally financed and financed by the Länder) compared to 116.7 million Euro in 2003. Thus, the percentage increase is almost twice as large as the increase in training grants in total (more than 9%) in the same period of time.

The clearly highest quota of financial support with roughly 32% (13 345 students and pupils) of all financially aided foreigners still emerges for Turkey. The quota, however, has continuously decreased in the last years. In 2003, the percentage of Turkish students and pupils receiving financial support amounted to 34%; in 2001 even to 37%. The increase in the total number of financially aided Turkish students and pupils does not reach the number of financially aided persons in total (2.9% compared to 11%). Compared to the last survey, the increase by 11% of financially supported foreign persons was approximately one and a half as high as the increase of the total number of all German and foreign persons receiving support (approx. 7.7%).

Approximately 60% of al foreign students and pupils, that is 25 940 persons, completed an educational training at a higher professional or technical school, academy or university. The percentage of students, thus, has increased by 7% compared to 2003, that of pupils by 18%.

IV. Numbers on Union citizens and purpose of residents

Statistical Data for supplementing the Report on Free Movement of Workers in Germany (2006)

Admission of third-country nationals for employment (2005/2006):
Residence titles in general

Total number	Residence permit (sub II.)	Permit of settlement (sub III.)	Other cases (sub IV.)
1 746 330	1 125 232	546 941	74 157

Residence permit – limited (Aufenthaltserlaubnis):

Total number	Education	Employment	On international law or humanitarian reasons	Family reunification	Other reasons
1 125 232	136 999 (=12,2 %)	71 900 (=6,4%) (68 148: employed; 3 752 self-employed)	149 895 (=13,3 %)	606 188 (=53,9 %)	66 121 (=5,9 %)

Permit of settlement – unlimited (Niederlassungserlaubnis):

Total number	High skilled Persons	3 years self-employed	Other reasons

546 941	1 158	282	545 501

IV. Other cases

Total number	Exempted from holding a residence permit	Application for residence permit
74 157	17 841	56 316

V. Migration from other EU member states to Germany specified by sex (2005/2006):

Residence titles for EU citizens in general

Total number		Residence permit (sub II.)		Permit of settlement (sub III.)		Other cases (sub IV.)	
119 596	female 62 294	12 635	female 9 169	8 393	female 5 876	98 568	female 47 249
	male: 57 303		male: 3 466		male: 2 517		male: 51 320

Residence permit for EU citizens – limited (Aufenthaltserlaubnis):

Total number		Education		Employment		Int'l Law - hum. reasons		Family reunification		Other reasons	
12 635	female 9 169	228	female 146	196	female 38	516	female 288	9 651	female 7 328	588	female 372
	male: 3 466		male: 82		male: 158		male: 228		male: 2 323		male: 216

Permit of settlement for EU citizens – unlimited (Niederlassungserlaubnis):

Total number	Female	Male
8 393	5 876	2 517

Other cases

Total number		Exempted from holding a residence permit		Application for residence permit	
98 568	female 47 249	95 064	female 45 538	3 504	female 1 710
	male: 51 320		male: 49 526		male: 1 795

CHAPTER X. SOCIAL SECURITY

No recent developments have taken place in the field of social security beyond court decisions on particular aspects of Regulation 1408/71 respectively 883/2004.

CHAPTER XI: ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS

The Administrative Appeal Court of Hamburg in its judgment of 22 March 2005 on the continuing effect of unappealable expulsion orders against Union citizens[121] has discussed the scope of application of the freedom to receive services. The question had been raised whether a Union citizen accompanied by his third-country national spouse could claim a right of entry and residence based upon the reception of services in Germany. The Hamburg Court, quoting the jurisprudence of the European Court in the Luisi and Carbone-case[122] and the Cowan-case[123], doubts whether a Union citizen could be held to be entitled to freedom to receive services if he, at the occasion of a temporary visit, receives services which are necessarily connected with any stay at any location to satisfy elementary needs. Otherwise the Directive 90/364/EWG would have been superfluous since every possible stay would be covered by the freedom to provide and receive services. Therefore the provision in Sec. 6 of the Freedom of Movement Act could not be interpreted as granting a right of entry and residence for any Union citizen receiving some kind of services. The right of entry and residence granted to citizens as recipients of services therefore required that the essential and primary object of a residence in the federal territory would consist in the reception of specified services falling under Art. 49 EC. The right of entry and residence, therefore, did not come into existence already by the very fact that at the occasion of a different purpose services were received more or less frequently.

In a judgment of 10 July 2006 the Administrative Appeal Court of Baden-Württemberg discusses the question whether a Union citizen living permanently in another EU Member State and attending university, who in the framework of the ERASMUS-programme is studying for two semester temporarily in Germany, is entitled to social benefits according to the federal law on social assistance to students (*Bundesausbildungsförderungsgesetz – BAföG*). The Court comes to the conclusion that according to Sec. 2 BAföG the temporary attendance of a German university as a time student within the ERASMUS-programme does not constitute an education within the sense of the BAföG since social benefits are only granted for a study if the respective university of professional training institution is located within Germany regardless of the domicile of the student. The attendance of a university abroad is only financed under the special conditions of Sec. 5 and Sec. 6 BAföG which have not been fulfilled in this particular case. The Court also extensively discusses whether this interpretation is in accordance with community law, particularly Art. 7(2) of the Regulation No. 1612/68 and Decision No. 253/2000/EG. The Court comes to the conclusion that community law does not grant an entitlement to access to social benefits for the attendance as a temporary student at a university in another EU Member State.[124]

121 3 Bf 294/04, see also Chapter I and Chapter V.
122 ECJ of 31 January 1984, Case C-286/82 and 26/83, ECJ Reports [1984] I-377.
123 ECJ of 2 February 1989, Case C-186/87, ECJ Reports [1989] I-195.
124 Judgment of 10 July 2006, 7 S 2965/04, VwBl. 2007, 144.

CHAPTER XII. MISCELLANEOUS

Gutmann in an article on the transposition of the Union Citizenship Directive[125] criticises various provisions in the bill on transposing the Union Citizenship Directive. The author criticises that family relatives are still subject to the visa requirement since in his view according to the MRAX-case[126] the Court had decided that a Member State could not refuse to grant a residence permit simply because a visa had expired before applying for a residence permit. The author concludes from the ECJ's jurisprudence that a Member State could not maintain the visa requirement in Sec. 2 para. 3, 2nd sentence of the amended Freedom of Movement Act. The author also criticises the restriction of the right of entry and residence for a period of three months according to Sec. 2 para 5, 1st sentence, since the provision corresponding to Art. 8 Directive 2004/38 was not in accordance with the jurisprudence of the European Court concerning time limits for Union citizens looking for employment. Therefore, the rule laid down in the Bill was at least misleading if not contrary to community law.

Kluth discusses the consequences of a Europeanization of alien and asylum law with particular emphasis on dynamic interpretation of community law.[127] Mallmann, judge at the Federal Administrative Court, gives a survey on the more recent jurisprudence of the Federal Administrative Court on the legal status of Turkish family relatives with regard to the association law.[128] Göbel-Zimmermann discusses the issue of sham marriages and sham parents with regard to the alien and asylum law. The author refers to the bill on the amendment of the Freedom of Movement Act discussing the provision whereby a family reunion may only be admitted if the marriage has not only been concluded for the very purpose of enabling the residence of a spouse in the federal territory. He criticises that the transposition is going beyond the purpose of the Directive.[129]

The question of restrictions of entry of football hooligans during the FIFA-world championship 2006 is discussed by Maor in an article which also deals with the Freedom of Movement Act and the possibilities to restrict the free movement of Union citizens under the Freedom of Movement Act. He comes to the conclusion that according to the criteria of community law individual measures restricting free movement may be difficult. Therefore, it would be preferable to find ad-hoc solutions in co-operation with the authorities of the country of origin.

Maaßen gives a survey on the transposition of 11 directives on asylum and immigration law in Germany.[130]

Family reunion as a right under community law is discussed by Groenendijk who also discusses some issues relating to the Union Citizens Directive, particularly with regard to the scope of application of the Union Citizens Directive vis-à-vis the Family Reunion Directive.[131]

The content of the Union citizenship as social citizenship is discussed by Schönberger with regard to the more recent jurisprudence of the European Court and the criticism raised against the Court's decisions on equal treatment of Union citizens with regard to the access of social benefits.[132]

125 Rolf Gutmann, Fehlerhafte Umsetzung von Richtlinien, InfAuslR 2006, 165.
126 Judgment of 25 July 2002, C-459/99, InfAuslR 2002, 417.
127 Winfried Kluth, Reichweite und Folgen der Europäisierung des Ausländer- und Asylrechts, ZAR 2006, 1 f.
128 Otto Mallmann, Neuere Rechtsprechung zum assoziationsrechtlichen Aufenthaltsrecht türkischer Familienangehöriger, ZAR 2006, 50 f.
129 Ralph Göbel-Zimmermann, „Scheinehen", „Scheinlebenspartnerschaften" und „Scheinväter" im Spannungsfeld von Verfassungs-, Zivil- und Migrationsrecht, ZAR 2006, 81.
130 Hans-Georg Maaßen, Zum Stand der Umsetzung von 11 aufenthalts- und asylrechtlichen Richtlinien der Europäischen Union, ZAR 2006, p. 161.
131 Kees Groenendijk, Familienzusammenführung als Recht nach Gemeinschaftsrecht, ZAR 2006, p. 191.
132 Christoph Schönberger, die Unionsbürgerschaft als Sozialbürgerschaft, ZAR 2006, p. 226.

Hailbronner discusses the effect of the EC directives in aliens and asylum law before transposition into German aliens law.[133]

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133 Kay Hailbronner, Die Wirkung ausländer- und asylrechtlicher EG-Richtlinien vor den Umsetzung ins deutsche Ausländerrecht, ZAR 2007, p. 6.