REPORT
on the Free Movement of Workers in Germany in 2008-2009

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October 2009

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 Aus*Länder*n im Bundesgebiet (Federal law on the residence, employment and integration of foreigners in the federal territory)
AufenthV	Aufenthaltsverordnung (Residence Regulation)
AuslG	Aus*Länder*gesetz
Az	Aktenzeichen
AZRG	Aus*Länder*zentralregistergesetz (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
DRiG	Deutsches Richtergesetz
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 Aus*Länder*- 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 Aus*Länder*recht
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
WissR	Zeitschrift für Recht und Verwaltung der wissenschaftlichen Hochschulen und der wissenschaftspflegenden und –fördernden Organisationen und Stiftungen
ZAR	Zeitschrift für Aus*Länder*recht und Aus*Länder*politik
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht

Introduction

Following the entry into force of the law transposing ten EU directives on immigration and asylum law on 28 August 2007,[1] the federal government has enacted in 2008 a number of regulations facilitating the access of qualified migrants to the German labour market. A substantial part of these regulations was specifically directed towards facilitating access to the labour market to qualified EU-migrants from the EU-8 and EU-2 Member States. The federal government, however, did maintain at the same time the general restrictions under the accession treaties for EU-8 and EU-2 nationals.

The focus of attention in migration law and policy in the Federation and the *Länder* has been clearly on integration issues and residence rights of qualified third-country nationals. Freedom of movement issues have occasionally arisen, particularly in the context of social benefits for job-seeking EU nationals and a registration of Union citizens in the Aliens' Central Registry.[2] Following the European Court's judgment of 16 December 2008 in the case *Huber/Federal Republic of Germany*,[3] the federal government has announced that the implementation of the judgment and its consequences for the Aliens' Central Registry Law will be examined and that personal data of EU citizens will be collected and processed only for the purpose of applying the EU rules on freedom of movement used for the purpose of statistical inquiries.

The issue of expulsion of EU nationals – previously a frequent issue pending before German courts – seems to have been settled. Expulsion issues have arisen in the administrative practice primarily in the connection of residence rights of EU-2 nationals registering for social welfare benefits subsequent to moving to Germany.

With regard to the transposition of the Directive 2005/36 on recognition of professional qualifications there is an abundance of federal and state legislative and administrative rules and practices which will be described briefly under chapter V (employment in the public sector).

1 EU-Richtlinienumsetzungsgesetz of 19 August 2007, *Official Gazette* I, p. 1970.
2 Gesetz über das Ausländerzentralregister of 2 September 1994, amended by law of 19 August 2007.
3 Case C 524/06.

Chapter I
Entry, Residence, Departure

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

The Union Citizens Directive's provisions for workers have been transposed by the law for transposition of directives of the European Union of 18 August 2007,[4] amending the Freedom of Movement Act.

The Administrative Court of Munich has interpreted the term 'sufficient resources' in Sec. 4 of the Freedom of Movement Act (Art. 7 para. 1 b Union Citizens Directive). The Court argues that sufficient resources are proven if such resources are covering the essential needs of a Union citizen. Therefore, the Court considers that a temporary or provisional dependence upon additional social benefits does not justify the refusal to deny a residence right in the light of recitals 10 and 16 of the Union Citizens Directive.[5] According to the Administrative Guidelines of the Federal Ministry of Interior sufficient resources in the sense of Sec. 4 of the Freedom of Movement Act are proven if during the residence of a non-economically active Union citizen no benefits are claimed according to Social Code II (jobseekers allowances) or Social Code XII (social welfare). If a Union citizen subsequent to entry applies for benefits, the alien authorities will consider that as a special reason in the sense of Sec. 5 para. 4 to examine whether the conditions for a right of free movement are still existing. The Administrative Guidelines, however, also emphasise that it is necessary to examine the individual circumstances in every case.[6]

2. SITUATION OF JOB-SEEKERS

The question of access of job-seeking Union citizens to job-seekers' allowances has been once again the subject of controversial jurisprudence. According to Sec. 7, para. 1, second sentence Social Code II, foreigners whose right of residence is derived from the right to seek employment in the Federal Republic of Germany are excluded from jobseekers' allowances under Social Code II (Annex II). According to the explanatory report of the draft bill the legislator attempted to transpose Art. 24, para. 2 in connection with Art. 14, para. 4 of the Union Citizens Directive.[7] The exclusion is also applicable for family relatives of Union citizens.[8] It follows, that according to the legislative intention Union citizens as well as family relatives are excluded from social benefits under the Social Code II as long as they derive their right of residence exclusively from the purpose to seek employment. The compatibility with Art. 18 and 12 EC is controversial among administrative and social courts. A number of social courts have decided that the access of job-seeking Union citizens to job-seekers allowances under Social Code II must not be denied according to community law. Relying upon Art. 12 and 18 EC, it was argued, however, that – contrary to the reasoning of the legislator – access to social assistance under Social Code XII could not be denied. In a literal interpreta-

4 *Official Gazette* 2007 I, p. 1970.
5 Administrative Court of 27 September 2007, M 10 K 06.1564, *ZAR* 2008, 144.
6 See 4.1.2.2–4.1.2.3 Allgemeine Verwaltungsvorschriften des Bundesministerium des Innern, 14.10.2008, www.verwaltungsvorschriften-im-internet.de.
7 Cf. Official Records of the Bundestag, *Bundestagsdrucksache* 16/688, p. 13.
8 *Bundestagsdrucksache* 16/5065, p. 234.

tion of the Social Code, access to social assistance would be excluded. The Social Court of Wiesbaden, however, has interpreted this provision in conformity with community law as not excluding Union citizens from the scope of application of the Social Code XII, discussing extensively the jurisprudence of the European Court in the cases *Trojani* etc.[9]

Other courts like the Social Courts of Reutlingen have held that the exclusion clause restricting free movement of Union citizens in order to take advantage of higher social benefits is justified by the legitimate aim to prevent the overburdening of the social system.[10] The Social Court of Nuremberg by a decision of 18 December 2007[11] has requested a preliminary ruling whether Art. 24 para. 2 of the Union Citizens Directive is in accordance with Art. 12 in connection with Art. 39 EC.[12]

The legal status of Union citizens looking for employment in Germany is in accordance with community law. Union citizens who want to take up employment are under Sec. 2, para. 2, No. 1, entitled to residence without any further requirements. Since job-seeking in Germany is organized by the Federal Agency for Labour, jobseekers looking for employment will usually register with the local branch of the Federal Agency for Labour in order to take advantage of their services. Union citizens who are workers or have been workers in the sense of EC-law are equally entitled to social assistance and job seekers' allowances as German citizens. An exception is made for foreigners in general who have never been working in the Federal Republic of Germany. Persons who have kept their legal status as workers under Sec. 2, para. 3 of the Freedom of Movement Act (unemployment due to illness or accident or voluntary unemployment after employment of more than one year; persons taking up a professional formation connected to their previous employment) are fully entitled. Section 7 does exclude foreigners whose right of residence is exclusively derived from the purpose of job-seeking.

3. DEPARTURE

Various administrative courts have dealt with the question whether a Union citizen or a family relative who does not fulfil the requirements for a residence under Art. 7 of the Directive 2004/38 may be deported under the general provisions of the Residence Act. The law on freedom of movement of Union citizens,[13] enumerates the categories of Union citizens and their family relatives entitled to entry and residence according to the provisions of this law. Section 2, para. 2 enumerates:

1. Union citizens who wish to take up residence in Germany as workers, for the purpose of job-seeking or for the purpose of professional formation;
2. Union citizens, if they are entitled to take a self-employed activity;
3. Union citizens providing services;

9 See for instance Social Court of Munich, judgment of 8 August 2007, S 22 AS 1304/06; and Social Court of Wiesbaden of 15 January 2008, 16 AS 690/07, EuroAS 2008, 56; see also Social Appeal Court of Berlin-Brandenburg of 25.4.2007, L 19 B 116/07 (inapplicable after three months of legal residence).

10 See Social Court of Reutlingen of 29 April 2008, S 2 AS 2952/07; see also Social Appeal Court of Niedersachsen-Bremen of 2 August 2007, L 9 AS 447/07; Social Appeal Court of North-Rhine-Westphalia of 30 January 2008, LE 76/07; Social Appeal of Hesse of 30 April 2008, S 9 AS 59/08.

11 S 19 AS 691/07.

12 For a discussion of the rights of non-economically active Union citizens to equal access to social benefits see Hailbronner, Ansprüche nicht erwerbstätiger Unionsbürger auf gleichen Zugang zu sozialen Leistungen, *ZfS/SGB*, April 2009.

13 Freizügigkeitsgesetz of 30 July 2004, *Official Gazette* I, p. 1950, as amended by the law of 19 August 2007, *Official Gazette* I, p. 1970.

4. Union citizens receiving services;
5. Non-economically active Union citizens under the conditions of Sec. 4 (which basically corresponds to Art. 7 para. 1 b – d);
6. Family relatives under the conditions of Sec. 3 and 4 (corresponding to Art. 7 para. d and Art. 7 para. 2);
7. Union citizens and their family relatives having acquired a right of permanent residence.

The question has been repeatedly raised before administrative courts whether administrative measures terminating the residence (deportation, expulsion etc.) require in any case a previous administrative determination that a right of free movement does not exist anymore, even if the requirements under Art. 7 of the Directive 2004/38 have never been fulfilled. The Hamburg Administrative Appeal Court has decided that an administrative deportation order according to the provisions of the Residence Act against a Union citizen or a family relative of a Union citizen is only admissible if there had been a special administrative determination procedure stating that the conditions for the exercise of a right to freely move are not fulfilled and therefore the person in question is not entitled to rely upon the special provisions of the Freedom of Movement Act of 30 July 2004.[14] Therefore, the Court came to the conclusion that the applicant as the father of a Polish national as certified by a recognition declaration is in principle entitled to rely on the Freedom of Movement Act until the German administrative authorities have determined a formal procedure that the requirements are not fulfilled.[15]

Since this jurisprudence judges upon a basic issue of the scope of applicability of community law with respect to Union citizens and their family relatives who do not fulfil the conditions under the Union Citizens Directive with respect to a residence of more than three months in another EU Member State, it is mentioned in this chapter as well as in chapter VI. The issue is not particularly related to workers but does arise in the general context of freedom of movement for Union citizens. Since frequently in practice no precise distinctions, however, can be made and particularly third-country nationals of Union citizens rely upon freedom of movement of workers, some additional cases will also be reported in chapter VI.

The Administrative Court of Karlsruhe in a controversial judgment of 27 March 2008[16] has decided that the fact that a Union citizen is moving to another EU Member State with the intention to commit minor crimes is still entitled to freedom of movement, unless the administrative authorities had decided in a formal determination procedure that a right of free movement did not exist. In addition, the Court added that such a determination could not be made in this case since the Union citizen in question (national from Lithuania) had only committed minor crimes at the occasion of his stay in Germany. It should be mentioned that the national in case had been moving at an unknown date to Germany in 2005. Due to criminal offences he had been arrested on 30 October 2005 and punished for various thefts and attempted theft to a prison sentence of 12 months. By decision of 23 March 2006 the authorities had determined that the applicant was not entitled to free movement and the applicant was expelled. The decision is in my view of a doubtful legal reasoning. Although it is correct in order to terminate the residence of non-economically active Union citizens the requirements under the Union Citizens Directive must be fulfilled. Therefore, the very fact of a criminal sentence alone may not be considered as sufficient to terminate the residence. How-

14 Administrative Appeal Court of Hamburg of 6 March 2008, 3 Bs 281/07, AuAS 2008, 140.
15 The Court relies upon the literature on the subject, GK-AufenthG, § 11 Freizügigkeitsgesetz/EU, No. 29; Hailbronner, *Ausländerrecht*, § 11 Freizügigkeitsgesetz/EU, No. 38 et seq.
16 5 K 1015/06, NVwZ-RR 2008, 730.

ever, in the present case of a residence for the primary aim to commit minor crimes it is sufficient to show a danger of repetition. In addition, the Court should have dealt with the requirements under the Union Citizens Directive on sufficient resources which cannot reasonably be considered as sufficiently demonstrated by committing minor crimes, even including such crimes which do not give rise to a prison sentence.

The Federal Administrative Court has decided that expulsion orders against Union citizens and their continuing effects of excluding the issue of a residence permit remain valid even after the entry into force of the Freedom of Movement Act on 1 January 2005. However, in order to provide for a possibility to apply the rights of Union citizens under Sec. 32 of the Union Citizens Directive, the Court has decided that the new rules of Sec. 7 para. 4 of the Freedom of Movement Act with respect to the determination of whether a right of free movement exists are by analogy applicable to the duration of a previous exclusion order.[17]

The Administrative Appeal Court of Baden-Württemberg argues that the administrative authorities in their decision on limiting the duration of an expulsion order do not have to comply with the new requirements of Art. 28 para. 2 and para. 3 of the Union Citizens Directive unless those requirements were already applicable at the time of the expulsion order (1 May 2006 referring to the European Court's decision in Polat).[18]

The Administrative Appeal Court of Baden-Württemberg has decided that the term 'imperative grounds of public security' in Art. 28 para. 3 of the Union Citizens Directive must be interpreted restrictively. The term 'public security' has to be distinguished from the term 'public order' which in a wider sense covers all penal provisions of the Penal Code. The term 'public security' according to the Appeal Court means internal and external security covering the existence of the state and its essential public institutions as well as the survival of the population. External security covers the foreign relations, the military security and the peaceful co-existence of peoples (referring to the jurisprudence of the European Court in a variety of cases). Therefore, in order to justify a measure terminating the freedom of movement, it is not sufficient to demonstrate a substantial danger for important public interests unless public security is endangered. The Appeal Court thus interprets the provision in Sec. 6 para. 5 third sentence of the Freedom of Movement Act whereby imperative grounds of public security are endangered in case of a criminal sentence of at least five years imprisonment restrictively. In addition, the authorities have to examine in any case whether the internal or external security of the Federal Republic of Germany is affected.[19]

17 Federal Administrative Court of 4 September 2007, 1 C 21.07, *InfAuslR* 2008, 1.

18 Administrative Appeal Court of 23 July 2008, 11 S 2889/07; cf. ECJ of 4 October 2007, case C-349/06, *Polat*, ECRE 2007 I-08167.

19 Administrative Appeal Court of 29 September 2008, 13 S 2380/07, *InfAuslR* 2008, 439.

Chapter II
Access to Employment

1. EQUAL TREATMENT IN ACCESS TO EMPLOYMENT OUTSIDE THE PUBLIC SECTOR

Under Sec. 3 para. 2 Social Code I everybody participating in the labour market or intending to participate is entitled to use the services of the Federal Agency of Employment. No reports or cases are known restricting assistance of employment agencies to Union citizens and their family relatives.

Following the decision of the European Court of Justice,[20] the Federal Agency has changed its administrative regulations for issuing an employment voucher. Employment vouchers are also granted for services providing employment offers in EU Member States. The Federal Agency for Labour, however, has emphasised that Union citizens who do not have a permanent residence or ordinary domicile within Germany and who want to take up employment on the German labour market under Sec. 30 Social Code I are not entitled to promotional measures for taking up employment according to the provisions of the Social Code III. According to the view of the Federal Agency for Labour the Court's decision of 11 January 2007 is limited to the inadmissibility of a distinction between a provision of services for employment offers in Germany or an employment offer in other EU Member States.[21]

2. LANGUAGE REQUIREMENTS

There is no national legislation providing that in certain sectors of private economic activity there must be a certain level of knowledge of the German language. It is a recognised constitutional principle under German law that the state does not interfere in employment requirements in the private sector. Language requirements, however, may be required for the granting of professional licences to exercise a certain profession or the recognition of professional qualifications. Such language requirements are for instance laid down in the federal and national laws on transposing the Directive 2005/36 of 7 September 2005. Some *Länder* have interpreted the Directive as authorising language requirements for the recognition of professional certificates for instance in regulated medical professions and have therefore included into their laws that in order to receive a certificate a person must prove sufficient knowledge of the German language. Other *Länder* have abolished the language requirement as a requirement for recognition of a professional certificate arguing that under community law language requirements may only be admissible as a condition to exercise a professional activity.

The Federal Social Court in a judgment of 5 February 2008[22] had to decide whether under the general provisions of the illness insurance system describing the catalogue of remunerable services of medical doctors, a psychotherapist was entitled to a special licence to treat patients in the Greek language. An entitlement to a special authorization has been

20 European Court of Justice of of 11 January 2007, case –208/05 *ITC Innovative Technology Centre/Federal Agency for Labour*.
21 This interpretation of the Federal Agency for Labour is provided in a letter to the author of 1 July 2008.
22 B 6 KA 40/06 R.

granted by the lower courts, but refused by the Federal Social Court with the argument that persons who are members of the obligatory illness insurance system were not entitled to be treated by persons speaking the language of their home country.[23]

23 Judgment of 5 February 2008, B 6 KA 40/06 R, *EuroAS* 2008, 120.

Chapter III
Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS

German labour law and agreements between the trade unions and employers guarantee equal working conditions for every worker without distinction as to nationality (or other by law prohibited criteria such as sex, ethnicity etc.). No incidents have been reported in 2008 on discriminatory legislation or practices based upon federal, state, local or regional general agreements between employers and trade unions. In general, trade unions as well as employer unions take care to ensure the non-discriminatory application of the federal and state laws and labour agreements to prevent discrimination on the basis of nationality. Indirect discrimination is frequently discussed with regard to other criteria like sex or age, but to my knowledge not in connection with nationality.

2. SOCIAL AND TAX ADVANTAGES

The provisions of the Social Code I-XII regulating the different areas of social benefits and advantages do not distinguish on nationality. Under Sec. 30, para. 1, the provisions of the Social Code are valid for all persons having their domicile or regular residence in Germany. Under Sec. 30, para. 3, a domicile is defined as a residence under circumstances indicating that the person will not only temporary stay at a certain location or in a certain area.[24]

Generally speaking, German tax law does not distinguish with regard to workers on the basis of nationality. Union citizens who are as workers staying in the Federal Republic are subject to the same tax laws as German citizens or any other third-country national residing as a worker in the Federal Republic of Germany. Indirect obstacles may arise with regard to frontier workers concerning the deduction of expenses and the calculation of a tax rate in relation to income derived in another EU Member State.

The Federal Financial Court in a judgment of 22 July 2008[25] has refused to grant exemption for contributions to a Union citizen living in the Netherlands and working in Germany who had received contribution for his private illness insurance with the Dutch insurance company by his employer. The Federal Financial Court relied upon Sec. 257 para. 2 lit. a, first sentence of the Social Code V, whereby workers who are exempt from the obligatory illness insurance and take up private illness insurance are entitled to a contribution to their private insurance by their employer. In principle, this provision applies also to workers having concluded a private insurance with an insurance enterprise in a different EU Member State. However, the Social Court requires that the insurance enterprise fulfils certain requirements under Sec. 257 para. 2 lit. a, first sentence No. 1-4 of the Social Code V including the requirement that the insurance company does not offer illness insurance services in combination with other insurance services. Since the insurance company in question did not

24 '(3) Einen Wohnsitz hat jemand dort, wo er eine Wohnung unter Umständen innehat, die darauf schließen lassen, daß er die Wohnung beibehalten und benutzen wird. Den gewöhnlichen Aufenthalt hat jemand dort, wo er sich unter Umständen aufhält, die erkennen lassen, daß er an diesem Ort oder in diesem Gebiet nicht nur vorübergehend verweilt.'

25 VI R 56/05, *EuroAS* 2008, 162.

fulfil this requirement, the Court has refused to grant tax exemption. The Court deals with Art. 49 EC and denies an incompatibility with community law, since the principle of separating different branches of insurance services did constitute a sufficient public reason to restrict the freedom to provide services.

3. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS?

No information available.

4. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

4.1. Frontier workers

There have been no reports or courts decisions on legal problems relating to the free movement of frontier workers. Problems have arisen in the past relating to taxation issues.

4.2. Sportsmen/sportswomen

In response to my inquiries (see questionnaire) all major sports organizations on the federal level have been addressed for information on freedom of movement issues. I have not received any information by such organizations except the German Ice Hockey Association. The Football Association has referred to its previous reply to my letter which I have reported in the previous report. The Ice Hockey Association stated that the national Associations are tending to discuss the EU-legal implications relating to free movement and equal treatment in 2009. In general, the German Ice Hockey Association has replied that they do not have sufficient information in this highly complex area ('Im Moment haben wir diesbezüglich einfach nicht hinreichend Detailinformationen zu dieser sehr diffizilen Problematik.') Other organizations have not replied to the questionnaire. In Germany, the state does not intervene into the organization of the sport. Therefore, the regulation of professional sports activities are basically within the autonomous power of the sports organizations on the local, regional, state and federal level. The state on all levels of government is involved in organizing sport activities with regard to the maintenance of public order as well as providing support to organizations since the promotion of sports activities is considered as a matter of public interest. However, that does not mean that the state does claim a competence to intervene by legislation or administrative rules into the autonomy of sports organizations.

4.3. The maritime sector

I refer to my previous report on legislative measures following the European Court's jurisprudence on the requirements of nationality for captains of ships. No further administrative or legislative action has been reported in the meantime. According to my information, no

further measures are considered as necessary to bring German legislation into line with the free movement principles.

4.4. Researchers/artists

The German debate on researchers/artists is exclusively focussed upon the legal status of TCN researchers/artists, particularly relating to the new Directive on researchers. No court decision or administrative action or legislation has been reported during the observation period which could be linked to legal problems relating to free movement of researchers or artists.

With regard to tax discrimination the situation seems to be somewhat unclear. In the past, the tax authorities have imposed withholding tax on fees and expenses arising in connecting with international performances of artists in Germany. Following the European Court of Justice decisions in the cases Gerritse in 2003 and Scorpio in 2006 to the German practices of excluding the deduction of direct expenses for the performance have been successfully challenged. I have previously reported on the administrative regulations by the Federal Ministry of Finance of April 2007, asking the tax authorities to proceed according to the European Court's judgment of 3 October 2006 in the case Scorpio. The judgment of the European Court has been published as an Annex to the Federal Gazette (Bundessteuerblatt, part II), along with the administrative instructions of the Federal Ministry of Finance. The Federal Ministry of Finance generally takes the view that in general German tax rules and regulations are in accordance with free movement principles. In case of European Court judgments such judgments are communicated to the tax authorities with a request to proceed in accordance with such judgments. In general, such communications are considered as administrative request to proceed in accordance with rulings of the European Court of justice.

4.5. Access to study grants

According to the *Bundesausbildungsförderungsgesetz*[26] Union citizens and family relatives of Union citizens are entitled to study grants provided that they have a right of permanent residence or that they retain the status of a worker as students in a study programme related to the previous employment. Spouses and family relatives of Union citizens who are entitled to free movement under Sec. 3 para. 1 and Sec. 4 of the Freedom of Movement Act and who have lost such rights only because they have reached the age of adulthood and do not receive and maintenance from their parents or from a spouse are equally entitled under the same conditions as German nationals to study grants.

26 In the version of 6 June 1983, BGBl. I, p. 645, as amended by law of 23 December 2007, *BGBl*. I, p. 3254.

Chapter IV
Relationship between Regulation 1408/71 and Article 39 and Regulation 1612/68

The relationship between Regulation 1408/71 and Art. 39 and Regulation 1612/68 has not arisen in court decisions or public pronouncements by the Federal Ministry for Labour and Social Affairs.

Chapter V
Employment in the Public Sector

1. ACCESS TO PUBLIC SECTOR

No reforms of the national rules in the Federation and the *Länder* are reported in 2008. Amendments have been made, however, with regard to the rules on professional career (Laufbahn) of civil servants. The laws of professional career of civil servants of the *Länder* provide for rules on access to enter a certain professional career. The *Länder* have, following Directive 2005/36/EC on the recognition of professional qualifications generally adopted new laws stating that the access to a professional career can also be acquired on the basis of Directive 2005/36/EC irrespective of the principle of automatic recognition on the basis of the provisions of Art. 21 et seq. of Directive 2005/36. The details on the acquisition of the ability to enter a professional career (Laufbahnbefähigung) by recognising professional qualifications are provided by the regulations of the *Länder* governments and the different ministries and regional and local authorities of the *Länder*.[27] Basically the *Länder* legislation includes that in most cases access to a professional career in the lower civil service, middle civil service or higher civil service cannot be made dependent upon a German professional certificate. Equally entitled to the access to professional careers are those Union citizens who

a. are in possession of a professional certificate which is to be automatically recognised under Chapter 3 of the Directive 2005/36/EC or
b. the applicant has acquired the necessary qualifications by a previous professional activity in another Member State according to the provisions of Title 3 Chapter 2 of the Directive 2005/36/EC or
c. professional certificates acquired in another Member State entitle to direct access to the public service of the EU Member State of origin and the professional qualification standards of the applicant are at least directly below the qualification standard of Art. 11 of the Directive 2005/36/EC which are required by the applicable legal rules.

1.1. Nationality condition for access to positions in the public sector

No information available.

1.2. Language requirement

Various laws on the civil service of the *Länder* have introduced subsequent to the entry into force of the Directive 2005/36/EC on 20 October 2007 new provisions on the access of Union citizens to the civil service. Generally speaking, such provisions introduce or maintain

27 See for instance Gesetz zur Änderung des Laufbahngesetzes of the city of Berlin of 4 December 2008, *Gesetz- und Verordnungsblatt für Berlin*, vol. 64, No. 31, of 13 December 2008, Sec. 22a; see also Verordnung des Sächsischen Staatsministeriums des Inneren für die Anerkennung von Berufsqualifikationen für die Laufbahn im Freistaat Sachsen (Sächsische Berufsanerkennungsverordnung) of 14 October 2008, *Sächsisches Gesetz- und Verordnungsblatt* of 5 November 2008, No. 15.

the requirement that the applicant must prove sufficient knowledge in the German language in writing or speaking.[28]

1.3. Recognition of professional experience for access to the public sector

Recognition of professional experience as a condition for access to the public sector is regulated by the laws of the Federation and the *Länder* to the extent that professional experience is considered as equivalent to a professional certificate under the Directive 2005/36/EC. There are not differences with regard to the formal recognition of professional experience as a substitute for a professional certificate.

To what extent in a recruitment procedure professional experience is required cannot be examined. Each public agency on all levels of state government may provide professional experience as a condition for participation in a recruitment procedure according to the special needs of a post. It is also literally impossible to find out to what extent points are distributed in recruitment procedures for professional experience in thousands of cities, local agencies, ministries and other public authorities. Generally speaking, every applicant in such a procedure is entitled to address administrative courts in case he/she considers the recruitment procedure as discriminatory. The jurisprudence on equal access to the public service and the fairness of recruitment procedures is highly developed. No cases, however, were published on the issue of discriminatory treatment with regard to recognition of professional experience of Union citizens in other EU Member States.

The Administrative Court of Schwerin on 28 July 2008[29] has challenged the compatibility of Sec. 112a, para. 1 and 2 of the *Deutsche Richtergesetz*, requiring that an EU citizen disposes of the knowledge and capability as it is required in the German legal examination of the first state examination according to Sec. 5, para. 1 of the *Deutsche Richtergesetz*.

2. WORKING CONDITIONS

Every State in the Federal Republic of Germany determines its own rules on salary and grade of civil servants, provided always that the basic constitutional rules on access of every German are complied with. Art. 33 of the Basic Law, however, reserves the constitutional right to be admitted to civil service to Germans.[30] The civil service laws of the *Länder* and of the Federation, however, do not distinguish with regard to equal access between Union citizens and German nationals. Nevertheless, since Art. 33 para. 2 provides only for German national a right of constitutional complaint under this provision, one may argue that the Basic Law to that extent is violating community law. The issue, however, does arise generally in the context of the basic law with regard to a number of fundamental rights which reserve a constitutional guarantee to Germans. In practice, the reservation of the constitutional complaint to German nationals does not have a real influence because Union citizens may equally rely

28 See for instance Beamtengesetz Sachsen-Anhalt, § 20a: 'Die Beherrschung der deutschen Sprache in Wort und Schrift ist Voraussetzung für die Zulassung zur Laufbahn'; see also Verordnung zur Umsetzung der EG-Richtlinien zur Anerkennung der Hochschuldiplome im Lehrerbereich of 6. July 2006 (Sachsen-Anhalt), § 1 Abs. 1 Nr. 2: 'Die Antragstellerin oder der Antragsteller die deutsche Sprache in Wort und Schrift beherrscht'.

29 *Pesla/Justizministerium Mecklenburg-Vorpommern*, Case C-345/08, ABl. EU of 11 October 2008, C 260/9.

30 'Jeder Deutsche hat nach seiner Eignung, Befähigung und fachlichen Leistung gleichen Zugang zu jedem öffentlichen Amte.'

upon other constitutional provisions like the right of equal treatment and the constitutional right of free development of personality.

Chapter VI
Members of the Worker's Family and Treatment of Third Country Family Members

1. RESIDENCE RIGHTS: TRANSPOSITION OF DIRECTIVE 2004/38/EC

1.1. Situation of family members of job-seekers

According to a decision of the Administrative Appeal Court of North-Rhine-Westphalia,[31] a Union citizen possessing the citizenship of two Member States of the European Union and residing in his country of origin in which he/she acquired citizenship by birth is not entitled to rely upon free movement rights for claiming a residence right for his third country spouse. According to the decision of the Court the refusal to grant in such cases a right of entry and residence does not violate community law. The *Metock* judgment – according to the Court's view – did not provide clear rules on that issue. Under No. 85 the Court stated that Art. 3, para. 1 of Directive 2004/38 provides that the Directive is to apply to all Union citizens 'who move to or reside in a Member State other in that of which they are a national, and to their family members'. On the other hand, it is likely that the Court may decide that a dual national cannot be treated differently to a Union citizen who does not possess the nationality of the state in which he/she is residing, although he/she may never have moved from a country of origin to his state of residence. Therefore, I would consider it more likely that the exclusion of a family relative in such cases from the scope of application of community law cannot be upheld.

The Administrative Court of Darmstadt in a decision of 5 June 2008[32] discusses the issue whether a third-country national from Brazil who is married under Spanish law in a homosexual marriage with a Spanish national is entitled to free movement rights under the Union Citizens Directive. The Administrative Court argues that under the Union Citizens Directive a spouse in the sense of Art. 2, No. 2, lit. a of the Directive must be interpreted only as the spouse of a heterosexual marriage. The applicant, however, was entitled to rely upon Art. 2, No. 2, lit. b of the Union Citizens Directive. However, under German law on the registration of a homosexual partnership did not imply equal rights and duties as in the case of a heterosexual marriage. Therefore, according to the Court it is doubtful whether the applicant under German law could rely upon the German legislation on formal registration of a 'partnership'. The Court, however, does not consider it necessary to decide that question since in any case a right of free movement could only be claimed under the condition that the partner of a third-country national relying upon free movement rights was staying with him in the EU Member State of common residence. Since in the present case the Spanish partner was staying in Spain, the applicant could not rely upon free movement rights. The Administrative Court, however, uses the case to argue that the transposition of the Union Citizens Directive in Sec. 3, para. 6 providing that the right of entry and residence of a registered partner is determined by the provisions of the Residence Act rather than by the provisions of the Freedom of Movement Act. These provisions are inapplicable since incompatible with community law. This view is supported by the argument that the Union Citizens Directive does only provide a right of residence but also provides for the application of free movement rights

31 Decision of 17 March 2008, 18 B 191/08, ZAR 2008, 197.
32 5 L 277/08.

under the conditions laid down in the Directive. Therefore, provided that German law does in fact provide for a recognition of homosexual partnership in the sense of the Union Citizens Directive, the Freedom of Movement Act should be held applicable rather than the Residence Act valid for the residence right of third-country nationals in general.

According to a decision of the Administrative Court of Munich[33] a family relative of a Union citizen is entitled to free movement even if he/she does not fulfil the requirements under Sec. 3 of the Freedom of Movement Act for family relatives. Although the Residence Act requires for free movement rights of family relatives that the conditions of Sec. 4 (sufficient resources and insurance) are fulfilled. The Court argues that – contrary to the Freedom of Movement Act and Art. 2, No. 2, lit. d of the Union Citizens Directive 2004/38 – a residence right of a family relative (child born in Germany) cannot be made dependent upon the granting of maintenance by the non-economically active Union citizen. The Court relies heavily upon the judgment of the European Court of 19 October 2004 in the Chen-case[34], whereby the right of residence by a child requires that a person taking care of a child is also entitled to residence. Therefore, according to the Court's view a residence right of the child as a family relative under Art. 8 ECHR cannot be made dependent upon sufficient resources and full sickness insurance. Otherwise, the free movement rights of her mother would be unduly restricted.[35]

1.2. Application of Metock judgment

The Foreign Office of the Federal Republic has amended the administrative regulations for the visa authorities.[36] According to the new guidelines for issuing visa to family relatives of Union citizens it is not required anymore to examine whether family relatives of Union citizens entitled to free movement can prove that they dispose of a basic knowledge of the German language. Following the *Metock* judgment, the German visa authorities will issue visas to family relatives of Union citizens regardless of the previous residence of a family relative and the legality of a previous residence in another EU Member State or a third state. Section 3, para. 1 and 4, para. 1 of the Freedom of Movement Act almost literally repeat the corresponding provisions of Sec. 6, para. 2 and Sec. 7, para. 2 of the Union Citizens Directive. Therefore, it is not considered necessary to make any changes with respect to the wording of these provisions. The administrative courts will interprete relative provisions of the Freedom of Movement Act in accordance with the *Metock* judgment.

The *Metock* judgment, however, did not provide any guidelines as to the criteria for an abuse of free movement rights of third country nationals moving to an EU Member State. The Foreign Office in its non-binding Administrative Guidelines argues that there might be an abuse of rights if a family relative of a Union citizen requests a visa in order to enter Ger-

33 Judgement of 27 September 2007, M 10 K 06.1564, *ZAR* 2008, 144.

34 200/02, *InfAuslR* 2004, 413.

35 In my view the decision is hardly tenable, since the Court has not correctly interpreted the provisions under which non-economically active Union citizens are entitled to freedom of movement. The Union citizen must dispose of sufficient resources and insurance also for minor dependent children (Art. 14 Union Citizens Directive).

36 Visumhandbuch Unionsbürger Freizügigkeit 1.8.2008, as quoted in *ANA-ZAR* 2008, 35.

many with the main purpose to receive a residence right for the country of origin of a Union citizen living in Germany.[37]

1.3. How the problems of abuse of rights are tackled

There are no specific provisions in the Freedom of Movement Act and the Administrative Guidelines regarding the marriages of conveniences etc. Sec. 11 of the Freedom of Movement Act does not refer to Sec. 27, para. 1 a, excluding a family reunion if the marriage or the family relationship has been exclusively been concluded for the purpose to establish a right of entry and residence in the Federal Republic of Germany.[38] One may argue that these principles are applicable also for third-country relatives relying upon free movement rights as family relatives, since the right of free movement for family relatives of a Union citizen from a third country are based upon the same considerations. The Administrative Guidelines to No. 27.1a[39] provide for an examination by the competent authorities, providing that in a concrete case there are facts assuming that in reality no marriage or family relationship is envisaged. Such facts can be derived from contradictory information provided at the time of application or other information at the disposal of the visa or immigration authorities. The Administrative Guidelines provide for a detailed description of the rights of alien authorities to examine an application and requesting further information.[40]

2. ACCESS TO WORK

No issues have been reported in relation to barriers relating to access to work of Union citizens entitled to free movement.

3. THE SITUATION OF FAMILY MEMBERS OF JOBSEEKERS

I have reported under I.2. on the legal problems relating to the exclusion of job seekers under Sec. 7, para. 1, Social Code II. These problems are also relevant for family members of jobseeking Union citizens. The problems arising from the somewhat diverse German jurisprudence on the compatibility of the existing provisions on access to job seeking allowances with equal treatment and free movement principles have not yet been solved. The European Court's judgment of 4 June 2009 in the case *Vatsouras and Koupatantze* has stated that financial benefits facilitating access to the labour market are not falling within the scope of the exclusion clause of Art. 24, para. 2 of the Union Citizens Directive. Therefore, the question

37 Contrary to the view of some German lawyers (see *ANA-ZAR* 2008, 35 – Arbeitsgemeinschaft Ausländer- und Asylrecht des Deutschen Awaltsvereins), the *Metock* judgment does not provide any support for the assumption that under the circumstances described family relatives can rely upon free movement rights.

38 Ein Familiennachzug wird nicht zugelassen, wenn
1. feststeht, dass die Ehe oder das Verwandtschaftsverhältnis ausschließlich zu dem Zweck geschlossen oder begründet wurde, dem Nachziehenden die Einreise in das und den Aufenthalt im Bundesgebiet zu ermöglichen, oder
2. tatsächliche Anhaltspunkte die Annahme begründen, dass einer der Ehegatten zur Eingehung der Ehe genötigt wurde.

39 Allgemeine Verwaltungsvorschriften des Bundesministeriums des Innern zum Aufenthaltsgesetz, zum Freizügigkeitsgesetz/EU und zum Ausländerzentralregistergesetz, 13.10.2008.

40 For a detailed description see No. 27.1a of the administrative guidelines.

arises whether the job seekers allowances provided for under Social Code II are to be determined as such benefits – contrary to the legislative history which clearly speaks for a connection with social assistance. In this case, the exclusion clause of Sec. VII, para. 1, Social Code II would be inapplicable with regard to job seeking Union citizens and their family members.

4. OTHER ISSUES CONCERNING EQUAL TREATMENT (SOCIAL AND TAX ADVANTAGES)

No information available.

Chapter VII
Relevance/Influence/Follow-up of recent Court of Justice Judgments

Following the European Court's decision of 16 December 2008[41] the Federal Ministry of Interior has issued an administrative circular to the Federal Office for Migration and Refugees and to the Federal Administration Office (*Bundesverwaltungsamt*), both offices being in charge of administering the Aliens Central Registry. By circular of 1 February 2009, the offices are requested to collect and process personal data of Union citizens only if such data are necessary for applying community legislation by the competent Germany authorities. In particular, storing and processing of personal data are admissible for the purpose of applying provisions of the Union Citizens Directive 2004/38. The transmission of personal data collected in accordance with these rules is only admissible to such public agencies which are in charge of administering immigration legislation or using such personal data for statistical purposes in an anonymous and impersonal manner. In addition, processing of data is not admissible if a request for access to data is made for reasons of fighting criminality. In particular, group information according to Sec. 12 of the Aliens Central Registry Law is not admissible anymore.

Following the *Raccanelli* judgment, the Labour Court of Bonn by judgment of 19 November 2008 has rejected the claim of Mr. Raccanelli since Mr. Raccanelli has not been regarded by the Court as qualifying as a worker in the sense of EU legislation due to his particular contractual agreement with the Max-Planck-Society. Mr. Raccanelli has filed an appeal with the Labour Appeal Court. The appeal is still pending.

41 Case C-524/06, *Huber/Federal Republic of Germany*.

Chapter VIII
Application of Transitional Measures

The federal government has announced on 16 July 2008[42] that transitional arrangements for EU-8 nationals (third phase: 1 May 2009 until 30 April 2011) and EU-2 nationals from Bulgaria and Romania (second phase: 1 January 2009 until 31 December 2011) will be prolonged. The government decision will be transposed by a decision of the cabinet and publication in the official gazette and on the European level by a communication of the federal government to the Commission before 1 may 2009 for EU-8 nationals respectively before 1 January 2009 for Bulgaria and Romania.

By an amendment of the regulation on labour permits[43] access to the labour market for EU-8 and EU-2 nationals has been facilitated. Union citizens with an academic diploma or a comparable employment as well as their family relatives entitled to free movement will be granted a labour permit without examining the preference clause of the German Residence Act and additional requirements under Sec. 39, para. 2, No. 1 of the Residence Act (disadvantageous effects upon the labour market).[44]

In addition, the amendment provides that EU-8 and EU-2 nationals who have acquired abroad a recognised German school diploma do not need a labour permit for taking up a qualified professional formation in a recognised or comparably regulated profession suitable for training.

Both amendments have entered into force on 1 January 2009. Simultaneously, the previous version providing for a facilitated access to the labour market to EU-8 and EU-2 nationals who have completed a university education in engineering has been repealed.[45]

In the Communication of the Federal Republic of Germany concerning transitional measures in reply to the European Commission's Communication of 18 November 2008[46] the Federal Republic has confirmed the previous announcement that due to serious disturbances of its labour market respectively the danger of such disturbances Germany will maintain until 30 April 2011 national measures to control the access to the labour market. At the same time, Germany has communicated that it will use its possibility to deviate in certain sensitive sectors or provision of services from Art. 49 para. 1 of the EC Treaty and restrict the temporary admission of trans-frontier workers for the whole territory of the Federal Republic of Germany. The Federal government has argued that a prolongation of its transitional measure is particularly necessary under labour market considerations. The decision for prolongation of the transitional measures had been taken in accordance with the social partners as recommended by the European Commission in its Communication of 18 November 2008 and recommended by the Council in its Conclusions of 9 March 2009. In particular, the trade unions have argued against a complete liberalization of the labour market as well as certain employer organizations, such as the Zentralverband des Deutschen Handwerks. The detailed

42 Aktionsprogramm der Bundesregierung, Beitrag der Arbeitsmigration zur Sicherung der Fachkräftebasis in Deutschland.

43 Arbeitsgenehmigungsverordnung of 17 September 1998, *Official Gazette* I, p. 2899, amended by Art. 6 of the law of 7 December 2006, *Offical Gazette* I, p. 2814; 2007 II, p. 127, as amended by law of 10 November 2008, *Official Gazette* I, p. 2210 (see Annex I).

44 For details see Annex I.

45 See Verordnung zur Änderung der Beschäftigungsverordnung of 19 December 2008, *Official Gazette* I, p. 2972, Art. 2.

46 COM (2008) 765.

reasons for the observance of the labour market are laid down in a detailed explanation of expected disturbances differentiating between different branches of the labour market and between the new *Länder* and the old *Länder*. The Communication of the Federal Republic also points out in detail the existing possibilities of access to the labour market and the use of such possibilities with regard to qualified occupation, seasonal workers, labour permits EU after one year of occupation and the new facilitations for academics, persons who have received a primary education at German schools abroad and general facilitations applicable to qualified workers, such as scientist with particular knowledge, persons teaching in special functions as well as specialists and employees with particular professional experience provided that they earn at least a salary in the amount of 64 800.- Euro per year.

Chapter IX
Miscellaneous

Literature

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Annex I

Änderung der Arbeitsgenehmigungsverordnung
(Verordnung vom 10.11.2008, BGBl. I 2008, S. 2210)

§ 12b Fachkräfte aus den neuen EU-Mitgliedstaaten und deren Familienangehörige
Die Arbeitserlaubnis-EU nach § 284 Abs. 3 des Dritten Buches Sozialgesetzbuch wird Fachkräften mit einem Hochschulabschluss oder einer vergleichbaren Qualifikation für eine der beruflichen Qualifikation entsprechende Beschäftigung sowie ihren freizügigkeitsberechtigten Familienangehörigen ohne Prüfung nach § 39 Abs. 2 Satz 1 Nr. 1 des Aufenthaltsgesetzes erteilt.

§ 12c Auszubildende aus den neuen EU-Mitgliedstaaten mit deutschem Schulabschluss
Keiner Arbeitsgenehmigung-EU bedürfen Staatsangehörige nach § 284 Abs. 1 des Dritten Buches Sozialgesetzbuch, die im Ausland einen anerkannten deutschen Schulabschluss erworben haben, für eine qualifizierte betriebliche Ausbildung in einem staatlich anerkannten oder vergleichbar geregelten Ausbildungsberuf.

Annex II

Sozialgesetzbuch (SGB) Zweites Buch (II) – Grundsicherung für Arbeitsuchende – (Artikel 1 des Gesetzes vom 24. Dezember 2003, BGBl. I, S. 2954, zuletzt geändert durch Art. 2 Gesetz vom 22.12.2008, BGBl. I, S. 2959)

§ 7 Berechtigte

(1) Leistungen nach diesem Buch erhalten Personen, die

1. das 15. Lebensjahr vollendet und die Altersgrenze nach § 7a noch nicht erreicht haben,
2. erwerbsfähig sind,
3. hilfebedürftig sind und
4. ihren gewöhnlichen Aufenthalt in der Bundesrepublik Deutschland haben (erwerbsfähige Hilfebedürftige).

Ausgenommen sind

1. Ausländer, die weder in der Bundesrepublik Deutschland Arbeitnehmer oder Selbständige noch auf Grund des § 2 Abs. 3 des Freizügigkeitsgesetzes/EU freizügigkeitsberechtigt sind, und ihre Familienangehörigen für die ersten drei Monate ihres Aufenthalts,
2. Ausländer, deren Aufenthaltsrecht sich allein aus dem Zweck der Arbeitsuche ergibt, und ihre Familienangehörigen,
3. Leistungsberechtigte nach § 1 des Asylbewerberleistungsgesetzes.

Satz 2 Nr. 1 gilt nicht für Ausländer, die sich mit einem Aufenthaltstitel nach Kapitel 2 Abschnitt 5 des Aufenthaltsgesetzes in der Bundesrepublik Deutschland aufhalten. Aufenthaltsrechtliche Bestimmungen bleiben unberührt.

(2) Leistungen erhalten auch Personen, die mit erwerbsfähigen Hilfebedürftigen in einer Bedarfsgemeinschaft leben. Dienstleistungen und Sachleistungen werden ihnen nur erbracht, wenn dadurch

1. die Hilfebedürftigkeit der Angehörigen der Bedarfsgemeinschaft beendet oder verringert,
2. Hemmnisse bei der Eingliederung der erwerbsfähigen Hilfebedürftigen beseitigt oder vermindert werden.

3) Zur Bedarfsgemeinschaft gehören

1. die erwerbsfähigen Hilfebedürftigen,
2. die im Haushalt lebenden Eltern oder der im Haushalt lebende Elternteil eines unverheirateten erwerbsfähigen Kindes, welches das 25. Lebensjahr noch nicht vollendet hat, und der im Haushalt lebende Partner dieses Elternteils,
3. als Partner der erwerbsfähigen Hilfebedürftigen
   a) der nicht dauernd getrennt lebende Ehegatte,
   b) der nicht dauernd getrennt lebende Lebenspartner,
   c) eine Person, die mit dem erwerbsfähigen Hilfebedürftigen in einem gemeinsamen Haushalt so zusammenlebt, dass nach verständiger Würdigung der wechselseitige Wille anzunehmen ist, Verantwortung füreinander zu tragen und füreinander einzustehen,
4. die dem Haushalt angehörenden unverheirateten Kinder der in den Nummern 1 bis 3 genannten Personen, wenn sie das 25. Lebensjahr noch nicht vollendet haben, soweit sie

die Leistungen zur Sicherung ihres Lebensunterhalts nicht aus eigenem Einkommen oder Vermögen beschaffen können.

3a) Ein wechselseitiger Wille, Verantwortung füreinander zu tragen und füreinander einzustehen, wird vermutet, wenn Partner
1. länger als ein Jahr zusammenleben,
2. mit einem gemeinsamen Kind zusammenleben,
3. Kinder oder Angehörige im Haushalt versorgen oder
4. befugt sind, über Einkommen oder Vermögen des anderen zu verfügen.

4) Leistungen nach diesem Buch erhält nicht, wer in einer stationären Einrichtung untergebracht ist, Rente wegen Alters oder Knappschaftsausgleichsleistung oder ähnliche Leistungen öffentlich-rechtlicher Art bezieht. Dem Aufenthalt in einer stationären Einrichtung ist der Aufenthalt in einer Einrichtung zum Vollzug richterlich angeordneter Freiheitsentziehung gleichgestellt. Abweichend von Satz 1 erhält Leistungen nach diesem Buch,
1. wer voraussichtlich für weniger als sechs Monate in einem Krankenhaus (§ 107 des Fünften Buches) untergebracht ist oder
2. wer in einer stationären Einrichtung untergebracht und unter den üblichen Bedingungen des allgemeinen Arbeitsmarktes mindestens 15 Stunden wöchentlich erwerbstätig ist.

4a) Leistungen nach diesem Buch erhält nicht, wer sich ohne Zustimmung des persönlichen Ansprechpartners außerhalb des in der Erreichbarkeits-Anordnung vom 23. Oktober 1997 (ANBA 1997, 1685), geändert durch die Anordnung vom 16. November 2001 (ANBA 2001, 1476), definierten zeit- und ortsnahen Bereiches aufhält; die übrigen Bestimmungen dieser Anordnung gelten entsprechend.

5) Auszubildende, deren Ausbildung im Rahmen des Bundesausbildungsförderungsgesetzes oder der §§ 60 bis 62 des Dritten Buches dem Grunde nach förderungsfähig ist, haben keinen Anspruch auf Leistungen zur Sicherung des Lebensunterhalts. In besonderen Härtefällen können Leistungen zur Sicherung des Lebensunterhalts als Darlehen geleistet werden.

6) Absatz 5 findet keine Anwendung auf Auszubildende,
1. die auf Grund von § 2 Abs. 1a des Bundesausbildungsförderungsgesetzes keinen Anspruch auf Ausbildungsförderung oder auf Grund von § 64 Abs. 1 des Dritten Buches keinen Anspruch auf Berufsausbildungsbeihilfe haben oder
2. deren Bedarf sich nach § 12 Abs. 1 Nr. 1 des Bundesausbildungsförderungsgesetzes oder nach § 66 Abs. 1 Satz 1 des Dritten Buches bemisst oder
3. die eine Abendhauptschule, eine Abendrealschule oder ein Abendgymnasium besuchen, sofern sie aufgrund von § 10 Abs. 3 des Bundesausbildungsförderungsgesetzes keinen Anspruch auf Ausbildungsförderung haben.

Annex III

Bundesgesetz über individuelle Förderung der Ausbildung Bundesausbildungsförderungsgesetz vom 6.6.1983, *BGBl.* I, S. 1983, 645, 1680, zuletzt geändert durch Art. 2a Gesetz vom 20.12.2008, *BGBl.* I, S. 2846

§ 8 Staatsangehörigkeit

1) Ausbildungsförderung wird geleistet

1. Deutschen im Sinne des Grundgesetzes,
2. Unionsbürgern, die ein Recht auf Daueraufenthalt im Sinne des Freizügigkeitsgesetzes/EU besitzen sowie anderen Ausländern, die eine Niederlassungserlaubnis oder eine Erlaubnis zum Daueraufenthalt-EG nach dem Aufenthaltsgesetz besitzen,
3. Ehegatten und Kindern von Unionsbürgern, die unter den Voraussetzungen des § 3 Abs. 1 und 4 des Freizügigkeitsgesetzes/EU gemeinschaftsrechtlich freizügigkeitsberechtigt sind oder denen diese Rechte als Kinder nur deshalb nicht zustehen, weil sie 21 Jahre oder älter sind und von ihren Eltern oder deren Ehegatten keinen Unterhalt erhalten,
4. Unionsbürgern, die vor dem Beginn der Ausbildung im Inland in einem Beschäftigungsverhältnis gestanden haben, dessen Gegenstand mit dem der Ausbildung in inhaltlichem Zusammenhang steht,
5. Staatsangehörigen eines anderen Vertragsstaates des Abkommens über den Europäischen Wirtschaftsraum unter den Voraussetzungen der Nummern 2 bis 4,
6. Ausländern, die ihren gewöhnlichen Aufenthalt im Inland haben und die außerhalb des Bundesgebiets als Flüchtlinge im Sinne des Abkommens über die Rechtsstellung der Flüchtlinge vom 28. Juli 1951 (BGBl. 1953 II S. 559) anerkannt und im Gebiet der Bundesrepublik Deutschland nicht nur vorübergehend zum Aufenthalt berechtigt sind,
7. heimatlosen Ausländern im Sinne des Gesetzes über die Rechtsstellung heimatloser Ausländer im Bundesgebiet in der im Bundesgesetzblatt Teil III, Gliederungsnummer 243-1, veröffentlichten bereinigten Fassung, zuletzt geändert durch Artikel 7 des Gesetzes vom 30. Juli 2004 (BGBl. I S. 1950).