REPORT
on the Free Movement of Workers in Germany in 2010-2011

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October 2011

Contents

ABBREVIATIONS

Allg. VwV	Allgemeine Verwaltungsvorschriften
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 Bundesverwaltungsgericht (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 Ausländer- und Asylrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht

EuGRZ	Europäische Grundrechte-Zeitschrift
FLA	Federal Agency for Labour (Agentur für Arbeit)
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
GMBL	Gemeinsames Ministerialblatt (official journal of the federal government and the federal ministries)
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
WissR	Zeitschrift für Recht und Verwaltung der wissenschaftlichen Hochschulen und der wissenschaftspflegenden und –fördernden Organisationen und Stiftungen
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik
ZIAS	Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht

Introduction

With the expiry of the transition period on 01 May 2011 the restrictions in the present legislation on residents and labour permits for nationals of EU-8 Member States do no longer apply, since Union Citizens of the EU-8 Member States enjoy full freedom of movement for the purpose of taking up employment or self-employed activities.

The legal status of job seeking Union Citizens and the applicability of a restrictive social legislation which prevents access to social assistance for job-seekers continues to dominate the jurisprudence of social courts in 2010/2011. A decision by the Federal Social Court of 19.10.2010 has not yet provided a clear answer as to the applicability of Section 7 para. 1 Social Code II, since the court came to the conclusion that the provision of Section 7 could not be applied to the applicant, a French national, due to the equal treatment provisions of the European Agreement on Social Assistance. Therefore, it is still not yet finally solved whether the opinion of some social courts that the restrictive provision of Section 7 para. 1 is compatible with the EU-principles on free movement of workers an equal treatment, as interpreted by the European Court of Justice in its *Vatsouras* judgment.

A second major issue concerns the scope of applicability of EU free movement principles with regard to third country spouses of German nationals returning from another EU Member State and claiming upon return the applicability of EU law with regard to the applicable principles on family reunion. In two 'Denmark-cases' the Federal Administrative Court in a decision of 16.11.2010 has decided that the applicability of EU freedom of movement for German nationals returning from another EU Member State requires a certain intensity of the movement within the EU. Therefore the court did not consider every short stay in another EU Member State and, in particular, the reception of services during a short period of time in another EU Member State as sufficient to bring a case within the scope of application of EU freedom of movement law.

Chapter I: The worker: Entry, residence, departure and remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

The provisions specific for workers of the Union Citizens Directive 2004/38 have been transposed by the Freedom of Movement Act of 30.07.2004. The relevant provisions of this act have been described in previous reports. The Freedom of Movement Act has not undergone any substantial changes. Minor changes are however enacted in two Acts of Parliament which were adopted in April and June 2011 respectively. The first law, passed in April 2011, implements Council Regulation (EC) No 380/2008 of 18 April 2008 amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals.[1] It makes some changes in § 11 sec. 1 sent. 1 referring to some provisions of the Residence Act which effectively introduce a new legislative authority for the ministry of interior to regulate the details of the issuance of residence cards for family relatives entitled to free movement and the corresponding rules in certificates on permanent residence.[2] A second law is meant to combat forced marriages and was adopted in June 2011. It introduces another reference in § 11 sec. 1 sent. 1 of the Freedom of Movement Act which refer to data managements rules of the Residence Act concerning the collection of data of participants of integration courses which support German language knowledge[3] (the courses do however continue to be non-mandatory for EU citizens under § 44 sec. 3 of the Residence Act, i.e. not EU citizen will be obliged to participate in the language classes and be subject to the data management rules which participation involves).

2. SITUATION OF JOBSEEKERS

As previously reported the provisions on job seekers have been transposed by the highly disputed art. 7 para. 2 nr. 2 of Social Code II (SGB II).

Concerning the situation of job seekers there is in principle a duty to register in order to take advantage of the social benefits provided under SGB II and additional measures facilitating the access to the labour market. There are no specific provisions on the lengths of stay without formalities. The *Antonissen* 'ruling' as well as relevant provisions of the Directive 2004/38, in particular art. 6 and art. 14 (4) are taken into account in the administrative practice. No. 2.2.1.3 of the Administrative Guidelines on the Implementation of the Freedom of Movement Act (Verwaltungsvorschrift = Annex 3) explicitly states that Union Citizens have a right to residence as long as there is a reasonable expectation to find a job, i.e. also after the initial three-month period of unconditional entry and stay has expired. When it comes to the conditions under which job-seekers may stay, the Administrative Guidelines explicitly refer to the *Antonissen* judgment of 26.02.1991. The administrative guidelines moreover specify a

1 OJ 2008 L 114/88.
2 Adopted by law of 12.04.2011, BGBl. I, 2011, p. 610.
3 Adopted by law of 30.06.2011, BGBl. I, 2011, p. 1266.

reasonable expectation to find a job (= the criterion established by the *Antonissen judgment*) as a situation where, based on the qualification of the person concerned and the situation on the labour market, the person concerned will probably be successful with its a job applications. Residence of job-seekers may therefore be denied if he or she does not pursue any serious intention to take up employment.[4]

Legal databases do not report any major court cases on access of EU citizens to the labour market as job-seekers, which indicates that there are no major problems in the day-to-day application of these rules. In early 2011, there was however considerable media coverage of the potential future implications of the economic and financial crisis in Greece, Portugal and Spain, which may motivate young EU citizens to seek work in other EU Member States, including Germany. Most reports were however positive, underlining the good qualification of the people concerned. We will report new developments during the year 2011 in next year's report.

3. OTHER ISSUES OF CONCERN

There is a fairly established jurisprudence, which has been reported in earlier reports, whereby freedom of movement of a Union Citizen can only be denied upon a formal declaration of loss or non-existence of a free movement right lies has been confirmed in 2010/2011 by administrative court decisions.

4. FREE MOVEMENT OF ROMA WORKERS

See also chapter VII.

In reply to a parliamentary request for information on expulsion measures against Roma the Federal Government has noted that the Federal Register on Aliens (Ausländerzentralregister) does not register administrative measures on the basis of ethnic affiliation, since such differentiation would not be admissible under constitutional and administrative law, which prohibits discrimination on grounds of ethnicity or 'race'. Therefore there a no reliable statistical data on the deportation of Roma.

Within the context of the discussion in France and Italy the media tried to identify and report about the situation of Roma from other EU Member States in Germany. They did however not report an extensive relevance of the 'Roma question' within Germany, which indicates that the problem is not acute. As mentioned earlier (see section I.3) the total number of deportations of EU citizens is relatively low (given the size of the German population). While many deported EU citizens come from Bulgaria and Romania, it must be assumed that not all of them are ethnic Roma.

Also, there are no figures available on the voluntary return of citizens of the EU-8-Member-States upon payment of a financial assistance in case of return. As background information it should be noted that there is a programme for the promotion and financial assistance of voluntary return, which is commonly financed by the federal and regional level, but

4 See Allgemeine Verwaltungsvorschriften zum Freizügigkeitsgesetz / EU of 26.10.2009, GMBL, p. 1270; see also Hailbronner, *Ausländerrecht*, Vol. 4, D 1.1.

applies to third-country nationals only and those EU citizens who are victims of forced prostitution and human trafficking. Irrespective of this programme, the local and regional authorities may however decide to sponsor the voluntary return of EU citizens through voluntary and exceptional financial aid can be provided to returning Union Citizens. In its answer to the parliamentary inquiry the Federal Government does however state that it does not hold further information on this practice, which may therefore not be particularly widespread.[5]

With regard to social assistance for Roma there are particular programs by which members of the Roma minority – irrespective of nationality – are entitled to social assistance for facilitating the access to the labour market.[6] Moreover, Roma – like all other EU citizens – may benefit from the various labour market and social assistance projects which all apply irrespective of ethnic origin. More specific integration support measures are not coordinated at federal level. Local communities are competent to deal with local issues, including more practical support institutions and measures for people in need living within their community.

5 BT-Drs. 17/3288, p. 2.

6 See ESF federal program for facilitating access to the labour market for refugees and other persons with a humanitarian residence permit.

Chapter II: Members of the family

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

There has been no particular decisions or incidence giving rise to challenge the definition of family members in sec. 3 (2) of the Freedom of Movement Act which corresponds largely to the relevant provisions of the directive 2004/38. The question of sufficient means of support in particular situations does arise occasionally.[7]

The issue of reverse discrimination was first dealt with in a decision of the Bavarian Administrative Appeals Court. The Bavarian Administrative Appeal Court has explicitly pointed out that a different treatment of a third country national married to a German spouse with regard to acquiring an independent residence right in comparison to a third country national married to a Union Citizen living in Germany does not violate the equal protection clause of the basic law, the German constitution.[8] As background information it should be noted that the German administrative courts as well as administrative instructions orientate themselves at the relevant constitutional court jurisprudence on the subject-matter whereby diverse discrimination does not violate the principle of equality under the basic law.

In a widely discussed case the Federal Administrative Court decided on 30 March 2010 that the privileges of family members of EU Citizens under the Free Movement Directive 2004/38/EC and the corresponding rules of the German Free Movement Act do not extend to EU Citizens which have not exercised their free-movement right within the European Union.[9] More specifically, §§ 18 and 30 of the Residence Act may require the spouses of German citizens, which have not exercised their free-movement right within the European Union, and third-country nationals must show basic knowledge of German *before* applying for a residence permit for purposes of family reunification. The judgment focuses on the compatibility of these German rules with Article 7(2) of the Family Reunion Directive 2003/86/EC[10] as well as the human rights guarantees under the German constitution, Article 8 ECHR and Article 7 Charter of Fundamental Rights.[11] After concluding that neither the Directive nor fundamental rights have been violated the Court proceeds with the analysis whether the reverse discrimination of German citizens in comparison with EU citizens is compatible with equal treatment guarantees. Based on the well-established case-law of the German Constitutional Court and the European Court of Justice it concludes that the German legislator did not violate equal treatment guarantees by opting for 'reverse discrimination'.[12]

7 See the request for a preliminary ruling by the Administrative Appeal Court of Baden-Württemberg (Decision of 20.01.2011, 11 S 1069/10) with respect to a third country national who has after separation from his German spouse a right of care for the common child possessing German nationality.
8 Bavarian Administrative Appeal Court of 03.03.2010, 10 ZB 09.2023, DÖV 2010, 619.
9 Judgment of 30.03.2010, 1 C 8/09.
10 *Ibid*. paras. 21-8.
11 *Ibid*. paras. 31-45.
12 *Ibid*. paras. 57-67.

2. ENTRY AND RESIDENCE RIGHTS

Two judgments of the Federal Administrative Court clarify an issue of the scope of applicability of EU law on free movement of family relatives of Union Citizens with regard to a third-country spouse of a German national. In the so called 'Denmark cases' third-country nationals tried to get within the scope of application of EU law by travelling to Denmark for the purpose of concluding a marriage with a third-country national. Some administrative courts of first instance had argued that since the German national had made use of his free movement rights within the EU, a family relative marrying a German national in Denmark could rely on freedom of movement, resulting in the inapplicability of national requirements for family reunion for spouses of German nationals (in particular: basic knowledge of German).

The Federal Administrative Court in its first judgment of 16.11.2010 resolved the question on the basis of the Residence Regulation (Aufenthaltsverordnung).[13] More importantly, its second judgment of 11.01.2011[14] states that the third country national spouse of a German citizen cannot claim a right to free movement according to the jurisprudence of the ECJ. Under reference to the *Singh* and the *Eind* judgments of the ECJ[15] the Federal Administrative Court argues that the application of the principles established in the ECJ jurisprudence, including the *Metock*-decision,[16] presupposes that the Union Citizen, from which a right of free movement may by derived, must have made use of his right to freedom of movement within the EU to trigger the application of free movement rights for an accompanying spouse. Although the Federal Administrative Court admits that a trans-border situation resulting in the application of EU law on free movement may also exist by making use of the general right of free movement of Union Citizens in the sense of Art. 21 para. 1 TFEU (i.e. free-movement irrespective of work), the court insists that the *effet utile* of the free movement rules would not be affected if a stay of a few days does not result in the application of the *Singh/Eind/ Metock* line of argument. Instead, a certain intensity of the movement within the EU must be required to grant family reunion rights, also considering that EU law does not extend to situations which do not have a tangible cross-border effect.[17] The court therefore does not consider every short-term stay in another EU Member State and, in particular, a short visit for the purpose of concluding a marriage as sufficient to bring a case within the scope of application of EU law. Otherwise the legislative competence of EU Member States to regulate free movement of family relatives to their own citizens would become obsolete. The court does not consider that there is an obligation to request a preliminary ruling of the ECJ due to the legal opinion of the AG Sharpston in the *Ruiz Zambrano* case, since her ideas on the scope of applicability of EU law had already been rejected by the ECJ on an earlier occasion.[18]

The applicability of EU-free movement law was also rejected by the Bavarian Administrative Appeal Court in the case of a dual national who had been born in Germany and never

13 1 C 17/09.
14 1 C 23/09.
15 ECJ of 07.07.1992, case C-370/90; ECJ of 11.12.2007, case C-291/05, *Eind*.
16 ECJ of 25.07.2008, case C-127/08, *Metock*.
17 Para. 13 of the German judgment, also referring to ECJ, Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*.
18 Para. 15 of the German judgment under reference to the opinion of AG Sharpston of 30 September 2010 in Case C-34/09.

made use of free movement rights. The court argues that a third country national as a family relative of a Union Citizen may not rely upon EU law for a residence right if the German spouse also possesses the nationality of another EU Member State, but has always lived in Germany.[19] The decision of the Bavarian Appeal Court is in line with the European Court of Justice in the *McCarthy* case, decided on 5 May 2011,[20] whereby dual nationality of a Union Citizen is in itself not sufficient to make EU law on free movement applicable, if the Union Citizen has never exercised his or her free movement rights.

When it comes to children, the Administrative Appeal Court of Baden-Württemberg raises a whole series of questions with regard to the compatibility of the German law and practice on the scope of application for third-country nationals as family relatives of a Union Citizen entitled to free movement. The applicant, a Japanese national who had married in 1998 in the US a German national, had moved in 2005 together with his German wife and a common child possessing the German as well as the Japanese and US nationality to Germany in order to take up habitual residence. In 2008 the spouses separated and the applicant claimed an EU residence card under the Freedom of Movement Act claiming free movement rights in spite of the separation of his marriage since June 2008. The court requests a preliminary decision of the ECJ on an EU-based right of free movement for a third-country national parent living separately from his spouse in order to maintain the family relationship with the common child if the child uses its free movement right by moving from Germany to another EU Member State. In addition, the court asks whether a third-country national parent of a minor Union Citizen has been considered as family relative in the sense of art. 2 nr. 2 lit. d of the Unions Citizens Directive 2004/38.[21]

The Administrative Appeal Court of Hesse[22] also dealt with the issue of 'Denmark-marriages'. The applicant claiming in this case the applicability of the EU freedom of movement law on the basics of receiving some services another Member State (Denmark) could not rely in the courts view upon EU freedom of movement law in order to get a residence permit for a third-country national spouse upon return to Germany. The court states that marriage in another Member State in itself does not qualify for receiving services since the conclusion of a marriage is to be qualified of a public act by another EU Member State. The court, similarly to the opinion of the Federal Administrative Court discussed earlier, argues in substance that a Union Citizen must have made extensive use of free movement rights.[23]

Another Denmark-Decision has been made by the Bavarian Administrative Appeal Court[24]. The case differs somewhat from the typical Denmark-cases since the applicant had returned with a German national from Denmark and had been living for one year in Germany on the basis of a limited residence permit. Following the separation of the marriage, the spouse, a national from Kirgizstan, argued that she had acquired free movement rights under the Freedom of Movement Act. The court upholds the rejection of a claim for free movement basically on the argument that although being a family relative of a Union Citizen she had not accompanied or followed a Union Citizen in the sense of § 5 sect. 2 2nd sent. of the Free-

19 Decision of 19.02.2010, 10 ZB 09.2584.
20 Case C-434/09.
21 Decision of 20.01.2011, 11 S 1069/10.
22 Decision of 22.01.2010, 3 B 2948/09, EZAR NF 28, Nr. 34.
23 Ein Freizügigkeit vermittelnder, grenzüberschreitender Sachverhalt setzt voraus, 'dass der Unionsbürger mit einer gewissen Nachhaltigkeit von der Freizügigkeit Gebrauch gemacht haben muss', see a.a.O. at. Nr. 20
24 Decision of 11.03.2010, 10 C 10.24.

dom of Movement Act. There's no debate as to the implications of the *Metock*-decision in the judgment. Different to the typical Denmark-cases the marriage has taken in Denmark with a German national who had been in Denmark for professionally activities although the facts of the case do not clarify the length and reasons of the stay.

The residence right of a third-country national family relative of a Union Citizen in 'return cases' is also the subject of a decision of the Administrative Appeal Court of Lower Saxony.[25] The court decision deals with the question whether a third country national who had married a German national in Spain and returned with him to Germany was entitled to receive a residence permit subsequent to the separation of the spouses. The alien authorities refused an independent residence right under § 31 of the Residence Act since the requirement of a two-year uninterrupted lawful stay in Germany had not been fulfilled due to moving to Spain therefore her previous German residence permit had become invalid. Upon return to Germany due to the separation of the spouses the marriage had not lasted the required the period of two years. Principles of free movement within the EU did not support a claim for recognition of the time spent together with her German spouse in Spain. The judgment is in accordance with EU law, in particular Article 13 of the Union Citizenship Directive 2004/38/EC.

The Bavarian Administrative Appeal Court has decided on the issue of loss of an EU residence right as a spouse of a Union Citizen. The applicant, a national from Kosovo, who has been married to a Greek national, had been denied a settlement permit or a prolongation of his residence permit following the return of his former spouse, a Greek national to Greece for a period of 3 years. Following the re-entry of the former spouse the applicant relied upon his previous marriage and stay as a spouse of a Union Citizen. The Bavarian court however rejected the application arguing that following the return of his spouse the applicant had lost his residence permit due to the effect that his spouse had permanently taken up residence in Greece.[26]

The question to what extent provisions of the Residence Act may be applied to Union Citizens is exclusively regulated in § 11 of the Freedom of Movement Act. In principle the rules of the Residence Act are not applicable with exception of some specific provisions to which § 11 refers. The Administrative Appeal Court of Baden-Württemberg discusses whether in the absence of specific procedural provisions the rules of the Residence Act may by applied by an analogy. The court argues that the wording and the purpose of § 11 of the Freedom of Movement Act preclude any recourse to the provisions of the Residence Act by analogy with an exception of those provisions to which § 11 explicitly refers. Therefore the general rule of a competence of the alien authorities in § 71 of the Residence Act cannot be used as a legislative basis for a special competence of the superior alien authorities to enact decisions on loss or non-existence of a right of free movement.[27] It should be noted that this judgment was however overturned on appeal by the Federal Administrative Court in June 2011.[28]

25 Decision of 09.07.2010, 11 ME 71/10, EzAR NF 14 Nr. 16.
26 Bavarian Administrative Appeal Court of 16.04.2010, 10 ZP 09.1051.
27 The Baden-Württemberg legislation provided for a special competence of the Regierungspräsidien under the Aufenthalts- und Asylzuständigkeitsverordnung, AAZuVO, in line with the Residence Act.
28 Judgment of 28. 06. 2011, 1 C 18.10.

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

The *Metock* judgment has been transposed by the administrative instructions to the Freedom of Movement Act (= Annex 3).[29] The administrative instructions make clear that the distinction between a first entry into the union territory and free movement within the EU has been abolished. Therefore, third country national family relatives of Union Citizens may, independent of their previous legal status, claim freedom of movement on the basis of the Union Citizens Directive provided that they can show their status as family relatives of a Union Citizen and demonstrate that they fulfil all the other requirements under the Directive 2004/38. If these conditions are fulfilled, only EU free movement rules apply, i.e. they are treated like Union Citizens.

Directive 2004/38 is dependent upon the condition of having made use of a right of free movement. Therefore family reunion of third country nationals to Union citizens moving into Germany is, according to the administrative rules within Germany, not affected in principle by the *Metock* jurisprudence.[30]

4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCES AND FRAUD

There are no specific substantive or procedural provisions on marriages of convenience and fraud with respect to entry and residence in Germany by Union Citizens. However recently the legislator has passed a general law on prohibition of forced marriages and adopting a special penal provision punishing forced marriages.[31] These provisions do however concern the Residence Act only and do therefore not impact upon the legal status of Union Citizens and their Family Members which are covered by the Freedom of Movement Act (not the Residence Act).

5. ACCESS TO WORK

Family members are entitled to work under the same conditions as Union citizens and German nationals. A family member of a Union citizen is therefore entitled to work irrespective of nationality. No labour permit is required.[32] Third-country family members of German nationals are not entitled to free movement, unless there is a trans-border situation. In this case, third-country family members are entitled to direct access to the labour market under EU rules (on the recent debate about the definition of cross-border situation see section II.2 above).

29 See No. 3.0.3.
30 See, again, No. 3.0.3.
31 See the introduction.
32 See no. 2.2.100 Durchführungsanweisungen zur Arbeitsgenehmigungsverordnung, last update: 5/2011.

6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

The situation of family members of job seekers has in the previous report been dealt with. There are no indications that legal or administrative problems have arisen with the entitlement of family members of job seekers to free access to the labour market under § 3 (1) Freedom of Movement Act.

Chapter III: Access to employment

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

The Social Code III[33] provides a large number of measures to facilitate the access to the labour market including cooperation between employers and employees with the Federal Agency for Labour and a wide of measures on advice, promotion, activation and professional integration into the labour market. These provisions do not distinguish as to the nationality or residence of a worker.

1.1 Equal treatment in access to employment (e.g. assistance of employment agencies).

The Federal Agency for Labour (*Bundesagentur für Arbeit*) provides all assistance irrespective of nationality. The law distinguishes as to the specific measures of assistance between unemployed, persons facing a risk of unemployment and long-time unemployed.[34] The conditions for being entitled to assistance measures are laid down in the law. They do not leave any discretion which may open up possibilities for discriminatory treatment.

1.2 Language requirements

In general there are no language requirements by law in the private sector (see also the 2009/10 report on p. 20-1). Therefore it is up to every employer to require a certain amount of German language skills depending on the specific requirements of the job.

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

There are no specific developments on access to public employment.

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

The law on the status of civil servants[35] requires as a condition of appointment German nationality or nationality of another EU Member State (see the 2009/10 report on p. 21-2 for more details). Exceptions are made on the condition that the specific task to be performed requires German nationality.[36] The law refers to the EU-principles of public service, mirroring the European Court of Justice's case-law on Article 45(4) TFEU.

33 Arbeitsförderung vom 24.03.1997, BGBl. I, p. 594; zuletzt geändert durch Gesetz vom 24.03.2011, BGBl. I, p. 453.
34 See section 16 – 18 SGB III.
35 Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz) vom 17.06.2008, BGBl. 2008 I, p. 1010.
36 See also previous report 2009 at p. 21.

2.2 Language requirements

There is a variety of specific language in different sections (e.g. teachers for specific classes etc.). These are not laid down in general rules however. It is not possible to generally reject a job application for reasons of language requirement unless the job description of a specific assignment says so.

2.3 Recognition of professional experience for access to the public sector

It is in principle within the competence of every Bundesland (region/state) to make rules on recognition of professional certificates for regulated or non-regulated professions transposing the Directive 2005/36/EC. As a rule, the different Länder have enacted a variety of different regulations depending on each profession within the public sector. Some of these regulations do not distinguish between the public and the private sector as far as professional experiences for access to the public sector are required. Generally speaking, the survey of the administrative and juridical practice indicates that the criteria on recognition of professional experience of nationals of other EU Member States are generally complied with (see also the 2009/10 report on p. 22-3).

However it is not possible to examine all legislative and administrative rules of the Länder and the Federation which may be relevant for access to positions in the public sector. Generally speaking, the Länder have adopted regulations about the recognition of professional qualifications of other EU Member States as a condition for entering into the different professional careers of the public service.[37] The regulations state in most cases that for the access to the professional careers of the lower grades and middle grades in the public service[38] a certificate of a certain level of education is required. The regulations, however, in order to take account of equal treatment requirements, consider that the exercise of profession in another EU Member State for three consecutive years or as a part time occupation during a respective time frame in the last ten years must be considered as sufficient practical subject detailed to an examination of each regulation of the respective land or city or district which contain some times quite sophisticated rules on alternative conditions for access to the public sector. There are in general no indications for a discriminatory treatment of nationals of other EU Member States with respect to access to the public sector.

The same is true with respect to the Federal Regulation on access to the professional careers of civil servants in the public service of the Federation.[39] The Bundeslaufbahnverordnung (= Annex 1) contains in different contexts rules on professional experience, for example, with regard to the probation period a full time occupation in the public service of another EU Member State is fully recognized for the probation period.[40] There are rules on the recognition of professional experience in the context of promotion and exceptional recruitment for highly qualified applicants. Irrespective of the general admission criteria is

37 See e.g. Verordnung über die Anerkennung von Berufsqualifikationen anderer Länder der Europäischen Union als Laufbahnbefähigung vom 13.01.2009, Gesetz und Verordnungsblatt Berlin 2009, p. 14.
38 Laufbahn des einfachen und mittleren Dienstes.
39 Verordnung über die Laufbahn der Bundesbeamtinnen und Bundesbeamten – Bundeslaufbahnverordnung, 12.02.2009, BGBl. 2009 I, 284.
40 Section 29 BLV.

considered a professional experience as equivalent to specific diploma or formally certified professional skills.[41] Some of these rules may create difficulties of application when transposed to professional experience acquired in another EU Member State with a completely different structure of civil service.

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

There is public information available in recruitment procedures, which may moreover differ in different regions/states and between different authorities. Most jobs in the public and private sector are announced in newspaper interviews and are nowadays also accessible online through the internet in most cases.

41 See for instance: Art. 27 (1) BLV: 'abweichend von § 17 Abs. 3 bis 5 des Bundesbeamtengesetzes können geeignete Dienstposten mit Beamtinnen und Beamten besetzt werden, die 1. sich in einer Dienstzeit von mindestens 20 Jahren in mindestens 2 Verwendungen bewährt haben. 2. seit mindestens 5 Jahren das Endamt ihrer bisherigen Laufbahn erreicht haben3. in den letzten zwei Beurteilungen mit der höchsten oder zweithöchsten Note ihrer Besoldungsgruppe oder Funktionsebene beurteilt worden sind und 4. ein Auswahlverfahren erfolgreich durchlaufen haben.'

Chapter IV: Equality of treatment on the basis of nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

The respective times of professional activities of a Union Citizen as a civil servant in another EU Member State are according to the respective law of the Länder in principle recognized under equal conditions. The Administrative Appeal Court of Lower Saxony in a judgment of 09.12.2008[42] has obliged the authorities to recognize not only professional experience but also non-professional time of obligatory military service in the Netherlands as equivalent for the calculation of service time determining the pension of civil servants. The court however adds that such times which have been spent by a national of another EU Member State in his home country may be ignored provided that the calculation of the total service time is within the discretion of the employer and if such times of a civil servant may have established according to the law of his home country a claim for an old age pension.[43] Although some provisions of the Beamtenversorgungsgesetz use the term 'Rente der gesetzlichen Rentenversicherung',[44] the court has, in accordance with the jurisprudence of The Federal Administrative Court, stated that such provisions have to be interpreted in accordance with the non-discrimination prohibition of EU law requiring that such terms must be interpreted in an extensive way covering also the pension systems of other EU Member States.[45]

Diplomas are generally taken into account with respect to salary grade and career perspectives under the condition that such diplomas have to be recognized under the applicable EU rules laid down in the Directive 2005/36/EC of 07.09.2005 on the Recognition of Professional Certificates.[46]

In relation to issues like civil servants status, trade union rights, etc. there are no indications that equal treatment has created any problems.

2. SOCIAL AND TAX ADVANTAGES

2.1 General situation as laid down in Art. 7 (2) Regulation 1612/68

The law on transposition of EU legislative requirements relevant to tax law[47] has transposed rules established by the European court of justice with regard to the recognition of situations occurring in other EU Member States by changing 11 laws primarily on tax but also on implementing regulations and procedure. The highly complicated provisions of this legislation generally provides for equal treatment of facts and situations occurring in another EU Mem-

42 5 LC 204/07

43 The court refers to art. 51 (8) Beamtenversorgungsgesetz in connection with the relevant rules of regulation 1408/71; see also Stürmer / Biller, DÖD 2005, 105, 106 ff.

44 See art. 14a (1 Nr. 1) Beamtenversorgungsgesetz.

45 Judgment at nr. 61.

46 See for instance the detail rules in the previously mentioned Verordnung über die Anerkennung von Berufsqualifikation anderer Länder der Europäischen Union als Laufbahnbefähigung vom 13.01.2009 (Gesetz und Verordnungsblatt für Berlin of 27.01.2009, p. 14).

47 Gesetz zur Umsetzung steuerlicher EU-Vorgaben sowie zur Änderung steuerlicher Vorschriften vom 08.04.2010 I, p. 386; see also report 2009, at p. 26.

ber State for taxation. Thus, for instance grants and payments for tax privileged purposes may also be deducted from the national income tax if they have been received from an organization residing within a Member State of the European Union, provided always that the state of residence is providing information according to the directive 77/799.[48]

2.2 Specific issue: the situation of jobseekers

The Social Appeal Court of Northern Westphalia[49] discusses – like many other social courts – the compatibility of § 7 para. 1, 2 (Social Code II) providing for the exclusion of job seeking aliens from social benefits under SGB II with EU law. The court attributes social benefits under the Social Code II, referring to the ECJ judgment in *Vatsouras and Koupatantze,*[50] as financial benefits which are independently of their national attribution to social security or social welfare destined to facilitate access to labour market. Therefore such benefits could not be interpreted as benefits in the sense of art. 24 para. 2 of the Union Citizens Directive. Even if it were to be assumed that social benefits under SGB II would fall within the scope of application of art. 24 section 2, a claim of the applicant could possibly be derived directly from primary community law.[51] The court argues with the ECJ jurisprudence in the case of *Collins* and *Trojani* as well as *Bidar* restrictive rules whereby have to be justified by objective considerations taking into account the requirement of proportionality. Although the court does not take a final decision on the legal issues involved (since it had to decide on a claim for interim protection) the court makes clear that there are substantial doubts as to the compatibility of the exclusion provision of § 7 section 1 SGB II.

A similar legal position is taken by the Social Appeal Court of Baden Württemberg.[52] The court in accordance with many other social courts qualifies the job seeker benefits as a particular benefit which cannot be defined as a social assistance benefit in the sense of art. 24 para. 2 of the Union Citizens Directive. Therefore, the exclusion provision could only be considered applicable if the requirements of the ECJ jurisprudence on equal treatment in granting access to financial benefits for job seeking Union Citizens were fulfilled. Since § 7 para. 1 of Social Code II did not allow Union Citizens to rely upon specific circumstances indicating a specified time of residence or a sufficient connection to the German labour market it could not be considered as compatible with EU law since it would exclude Union Citizens who were seriously seeking a job.

The Social Appeal Court of North Rhine-Westphalia in a decision of 25.03.2010 joins the majority of social courts by challenging the compatibility of § 7 para. 1 sent. 2 SGB II arguing that if an actual connection with the labour market of a job seeking Union Citizen can be made credible, he/she would be entitled to claim social benefits under the Social Code II and to receive interim judicial protection.[53] Similarly, the Social Appeal Court of Lower

48 For further examples see already report 2009, at p. 26.
49 Judgment of 17.05.2011, L 6 AS 356/11 BER.
50 Judgment of 04.06.2009, case C-22/08.
51 The court referring to a number of articles and various decisions, such as Husmann, NVwZ 2009, 652; Heinig, ZESAR 2008, 465, 472.
52 Decision of 25.08.2010, L 7 AS 3769/10 ER-B
53 L7B17/09 ASER.

Saxony-Bremen ruled in a judgment of 26 February 2010 that the provision contradicts the Residence Directive, if we interpret the latter in the light of the ECJ's *Vatsouras* judgment.[54]

Given these differing conclusions the diverse jurisprudence of the social courts has not yet provided a clear answer as the compatibility of § 7 (1) sent. 2 of the Social Code II with EU rules on free movement of workers and equal treatment. A majority of social courts tends to leave this provision inapplicable if certain criteria of connection with the German labour market or integration into Germany are fulfilled. In short: The compatibility of § 7 (1) sent. 2 of the Social Code II with EU rules on free movement and the *Vatsouras* case of the European Court of Justice therefore remains to be decided in the future. Most probably the Federal Social Court will have to deliver his opinion, possibly in combination with another preliminary reference to Luxembourg.

In a judgment of 19.10.2010[55] the Federal Social Court has already decided that, despite § 7 para. 1 SGB II, a French national cannot be excluded from the benefits under the Social Code II as a jobseeker for the reason that he has entered Germany exclusively for the purpose of job-seeking. The court examines the general requirements under § 7 and states that the applicant has taken lawfully his habitual residence in Germany, possessing a certificate on free movement according to section 5 of to the Freedom of Movement Act. The court also states that corresponding to the intention of the Freedom of Movement Act a factual stay is considered to be sufficient as long as an immigration authority did not use its possibility to determine the loss or non-existence of a free movement right according to section 5 para. 5.[56] As to the highly controversial issue of the applicability of § 7 para. 1 sent. 2 and the compatibility of this provision with freedom of movement and the prohibition of discrimination the court does not make a final decision since according to its view § 7 is not applicable to nationals of contracting states of the European Agreement on Social Assistance. According to art. 1 of this agreement[57] the contracting states are obliged to accord nationals of other contracting states who are lawful residents on his territory and do not dispose about sufficient means of existence equal social benefits as his own nationals and under the same conditions as applied to its own nationals. It should be noted however that the argument does not resolve the question of the implementation of the *Vatsouras* case per se, since only nationals from Member States covered by the European Agreement on Social Assistance will benefit from this line of case-law.

In a similar vein, the Social Appeal Court of Bavaria considered whether Union Citizens may claim some degree of social security on the basis of the constitutional guarantee of human dignity in article 1 of the German Constitution read together with the constitution's founding principle of 'social statehood', which the German constitutional court considers to encompass a right to basic social assistance. In interim proceedings (which do not yet constitute a final judgment) it extended social assistance rights taking note of the constitution's guarantees.[58] Again, this line of case-law does however not resolve the question whether social assistance under § 7 SGB II must be extended unconditionally to Union citizens in the light of the *Vatsouras* case.

54 L 15 AS 30/10 B ER.

55 B 14 AS 23/10 R, SozR 4-000

56 Referring also to the legislative materials see BT-Drs. 15/420, p. 106, and the administrative rules of the Bundesagentur für Arbeit, Ziff. 7.2.d.

57 Binding for Germany, France, Belgium, Denmark, Estonia, Greece, Ireland, Iceland, Italy, Luxemburg, Malta, Netherlands, Norway, Portugal, Sweden, Spain, Turkey and Great Britain.

58 Decision of 22.12.2010, L 16 AS 767/10 B.

Chapter V: Other obstacles to free movement of workers

The Administrative Appeal Court of Hamburg has decided that freedom of movement of Union Citizens does not imply an obligation of EU Member States to recognize school qualifications acquired in another EU Member State, taking into account the limited competences of the EU in art. 165 (1) TFEU.[59] Although the decision only deals with the issue of recognition of a school certificate acquired according to the British rules in Spain by a German national, the general issue of school certificates may arise in the context of free movement of workers (family relatives etc.). The court argues that due to the variety of different education systems in the EU Member States and the duty of the European Union to respect the responsibility of EU Member States in the area of education, free movement rights do only cover access to the universities without discrimination. Whether this distinction can be maintained on the background of the ECJ's jurisprudence on Union Citizenship remains to be examined. In the context of free movement of workers a Member State would be obliged to examine the equivalence of a school certificate, mirroring the *Vlassopoulou* line of ECJ cases.[60]

59 Decision of 25.08.2010, 1 Bf 94/10.Z, NVwZ-RR 2010, 9975 – 9976.
60 ECJ, Case C-340/89 [1991] ECR I-2357 – *Vlassopoulou*.

Chapter VI: Specific Issues

1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES),

According to § 30 SGB I the principle of residence applies for all areas of the Social Code unless special rules apply in the respective legislation on social benefits or under EU law or international treaties of the Federal Republic. The principle of territoriality as laid down in § 30 of the Social Code I however has already been modified under constitutional law arguments[61]. It is argued that frontier workers must also be entitled to social benefits under Social Code II (job seeking benefits) following a previous occupation in Germany. Although this argument is based on national constitutional considerations, it should be noted that it means that workers who have previously worked in Germany may 'export' their social benefits to other EU Member States-

2. SPORTSMEN/SPORTSWOMEN

There is no new information available on nationality quotas on transfer fees.

3. THE MARITIME SECTOR

The German rules[62] were changed subsequent to the European courts judgment of 30.09.2003 in the Anker-case.[63] The amendment has opened access to EU citizens for certain functions on ships registered in Germany. EU citizens need to be in possession of a German or recognized foreign certificate of competence or alternatively to demonstrate knowledge of the respective German sea law through participation in training as well as knowledge of the German language before taking up service on a ship.

4. RESEARCHERS/ARTISTS

There are no indications that researchers are not treated equally.

5. ACCESS TO STUDY GRANTS

The law on study grants (= Annex II)[64] follows largely the principles of EU law on non-discrimination. While workers and children of workers have a claim to study grants on the

61 See for instance for the claim of a frontier worker to unemployment benefits, Federal Constitutional Court of 30.12.1999; for a similar decision with regard to the claim to unemployment benefits of a foreign worker, employed in Germany who had taken up residence in another EU member state, Federal Social Court of 17.10.2009, SozR 3-1200, § 30 SGB I Nr. 20.

62 Art. 2 of the Schiffsbesatzungsverordnung and art. 7 of the Schiffsoffizierausbildungsverordnung.

63 Case C-47/02.

64 Bundesausbildungsförderungsgesetz in the version of 07.12.2010, BGBl. I, p. 1952.

same terms as German nationals, other EU citizens acquire a claim upon acquisition of a right of permanent residence as provided for in the Union Citizens Directive. The most recent version of the law does not address EU law issues. Questions of freedom of movement are only indirectly addressed in § 8 of the bill granting 'partners' of Union Citizens the same right as spouses of Union Citizens. The bill explains that in spite of some legal differences between a marriage and a partnership, the aim to support the establishment of a family relationship by granting the spouse of a Union Citizen access to study grants applies equally to a registered same-sex partnership.[65]

For further information see the thematic report on study grants.

6. YOUNG WORKERS

See previous special report.

65 See BT-Drs. 17/1551, p. 24 to art. 8 lit a).

Chapter VII: Application of transitional measures

The expiry of the transition period for the EU-8 Member States on 1 May 2011 requires according to the Federal Government only minor legal changes in the legal rules on residence and labour permit since the existing provisions already referred to the Accession Treaties and the limited validity of the transitions measures. In the statement before the Bundestag, the Federal Government notes that the actual effect of the expiry of the transition regime is of relative importance since already under the existing rules which have been passed in 2007 and 2009 a number of legal possibilities have been introduced in order to grant access to the German labour market for nationals of the EU-8 Member States.[66] With regard to administrative measures the Federal Agency for Labour has been instructed by the Federal Ministry for Labour and Social Affairs to inform all its agencies about the changed regulations and in particular about the abolishment of the requirement to possess a labour permit for nationals of EU-8 Member States. The Federal Government has also noted that the expiry of the transition period will be accompanied by monitoring measures to ensure the compliance with the social standards of the internal market. In this connection a legislative amendment has been adopted in order enable the establishment of a minimum wage for time limited employment contracts.[67] The law provides that the establishment of a minimum wage by a regulation based upon a proposal by employers and trade unions is valid for internal employment relations as well as for Union Citizens dispatched from other EU Member States for a limited time to enterprises seated in Germany.[68]

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS

The date of 30.04.2011 has created some administrative difficulties since enterprises asking early for permission to hire seasonal workers were still subject to a labour permit requirement and fees for hiring seasonal workers while other enterprises could recruit without any limitations EU-8 seasonal workers. Therefore it has been decided to abolish the labour permit already by January 1, 2011 for all nationals of EU-8 Member States with regard to seasonal occupations.

There have been some concerns with regards to the maintenance of social standards as a consequence of the full freedom of movement for nationals of the EU-8 Member States. The proposal to introduce minimum wages for occupations in agriculture and related branches in order to prevent a wage dumping is in principle rejected by the Federal Government. It's noted however that partly seasonal work is included into the scope of application of the law on dispatched workers[69] which, in line with Directive 96/71/EC, provides for preventive and

66 BT-Drs. (official records of the Bundestag) 17/5863 of 18.05.2011, p. 2; see also BT-Drs. 17/5132.
67 In German: Zeitarbeit.
68 See Arbeitnehmerüberlassungsgesetz in the version of 30.04.2011; for a special information leaflet on the occasion of the expiry of the transition period see http:/www.bmas.de/portal/51150/a805 entsendung eu burger.html, available in Polish and English language.
69 Section 4 Nr. 1 Arbeitnehmerentsendegesetz; see also BT-Drs. 17/2645, at p. 5.

reactive measures in order to prevent and combat disrespect for social standards, including 'wage dumping'.

The party 'Bündnis 90/Die Grünen' (the Greens) has blamed the Federal Government for neglecting to introduce substantive legislative changes taking account of the full freedom of movement for nationals of the EU-8 Member States and has introduced a draft bill for adapting German law to freedom of movement.[70] The draft bill argues that it will not suffice to clarify the existing legal situation by some minor legislative changes and administrative orders to the authorities according to the jurisprudence of the ECJ. Therefore it is suggested to change the Residence Act by explicitly deleting references to the Accession Treaties and corresponding rules. In addition the draft bill provides that all times of lawful residence of Union Citizens and their family members have to be recognized in full upon expiry of the transition period in the application of the EU Freedom of Movement Act.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

According to statistics of the federal police in June 2010, 67.333 Bulgarian nationals and 114.848 Rumanian nationals were living in Germany. 15.400 Bulgarian nationals and 32.083 Rumanian Nationals have been living there for more than 8 years. From 2007 until 30.06.2010 in total 150 Bulgarians and 526 Rumanian nationals have been deported from Germany to their home countries.

The expiry of the transitional period for nationals of the EU-8 Member States will have some effects for the situation of foreign seasonal workers in agriculture. In the last years seasonal workers were primarily citizens of the EU-8 Member States. Only an insignificant group of Croatian nationals with 1.5 % in 2009 were working as seasonal workers .[71] More recently the number of seasonal workers from Poland has been reduced in the time period from 2004 until 2009 by 95.700 persons due to the fact that other EU Member States did not maintain restrictions on free movement for Polish workers. The reduction was compensated by an increased recruitment of Romanian nationals who accounted in 2009 for 89.172 seasonal workers (by comparison: 184.241 Polish seasonal workers in 2009). Two thirds of all seasonal workers in 2009 were nationals of EU-8 Member States. Since 01 May 2011 the seasonal worker regime does no longer apply to citizens from Poland and other EU-8-Member States, since they enjoy free access to the German labour market.

70 Entwurf eines Gesetzes zur Anpassung der deutschen Rechtsordnung an die volle europarechtliche Arbeitnehmerfreizügigkeit für die EU-8-Staatsangehörigen, BT-Drs. 17/5777 of 11.05.2011.

71 BT-Drs. 17/2645 of 26.07.2010.

Chapter VIII: Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFUE AND REGULATION 1612/68

The relationship between these legal instruments is being discussed as problematic, although their definitions and fields of application do of course differ. On the relationship between Regulations 1408/71-883/04 and Directive 2004/38 see the next subsection.

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS

In most cases Regulation 1612/68 (and its successor Regulation 492/2011) is treated as a *lex specialis*, also taking account the more generous rules contained in the workers regime. By contrast, there is an emerging debate about the relationship between Regulations 1408/71-883/04 and Directive 2004/38. In the context of the discussion on the implications of the European Court of Justice's *Vatsouras* judgment for access of job-seekers to social assistance under § 7 of the Social Code II (see section 4.2.2 above) a number of courts interpret the inclusion of social assistance into the scope of Regulations 1408/71-883/04 as an indication that the measures are not covered by Article 24(2) of the Residence Directive 2004/38. The argument has in particular been put forward by the Social Law Appeal Courts of Lower Saxony/Bremen,[72] Bavaria[73] and Berlin/Brandenberg[74] in judgments delivered in 2010. As one argument among many, this consideration can however not provide definite answers. The follow-up to the European Court of Justice's *Vatsouras* judgment is still incomplete.

At the conference organised within the framework of this network in June 2011 in the Federal Labour Ministry in Berlin some participants moreover put the question whether social assistance for job-seekers may indeed be covered by Article 70 Regulation 883/2004 in combination with Annex X of the Regulation. If that was the case, the interpretation of Article 24.2 Directive 2004/38 would no longer be decisive in order to determine whether job-seeking Union Citizens can be excluded in line with § 7 of the Social Code II and the European Court of Justice's *Vatsouras* judgment. Instead, a right to social assistance would have to be extended to them on the basis of Regulation 883/2004. We will report about future developments next year.

72 Decision of 26.02.2010, L 15 AS 30/10 B ER, para. 22.
73 Decision of 22.12.2010, L 16 AS 767/10 B ER, para. 57.
74 Decision of 30.11.2010, L 34 AS 1501/10 B ER, L 34 AS 1518/10 B PKH.

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS

The ruling coalition parties have introduced into the Bundestag a draft bill on the implementation of some EU directives on immigration issues. The draft bill is to implement the directive 2008/115/EC on common norms and procedures for the return of illegally staying third-country nationals[75] and directive 2009/52/EC on minimum standards for sanctions and measures against employers employing third-country nationals who are not in possession of a residence permit, sanctions directive[76]. The draft bill does not have any direct implications for free movement since it does apply only to third country nationals. There is a minor change of the Freedom of Movement Act in section 11 para. 1 sent. 1 which however has basically an editorial character.

3.1 Integration measures

There are no specific matters of concern for EU citizens. In particular, they are not obliged to participate in language classes which have been set up for third-country nationals in order to support German language skills.

3.2 Immigration policies for third-country nationals and the Union preference principle

The German Federal Labour Agency does apply the principle of Union preference. Within the general framework of labour market examination under § 39 of the Residence Act, the Federal Agency accepts applications of third-country nationals only if the principle of non-availability of preferred workers is respected. This means, that an availability of work by German nationals as well as of EU nationals or the regional as well as the trans-regional labour market is included in the examination. With regard to employment requiring a high qualification availability of preferred Union citizens is taken into account on a federal level. With regard to less qualified employments the Federal Labour Agency and its local branches will include the EURES Portal into the search for preferred workers to take up the job.

The real-life duration of the examination of the availability of a worker who benefits from the preference principle by the Federal Labour Agency differs according to the profile of the job as well as the extent of efforts to find a preferred worker. As a rule, the examination of the labour market examination is extended to four weeks according to practical experience. In individual cases, the examination procedure may take more or less than four weeks, according to the particularities of the job offer and the profile of the employment.[77]

75 L 348 of 24.12.2008, p. 98.
76 L 168 of 30.06.2009, p. 24.
77 The information is provided by the Federal Labour Agency, available with the autor of the report.

3.3 Return of nationals to new EU Member States

In 2009, a total number of 840 Union Citizens have been deported to their home countries (2007: 834 Union Citizens and 2008: 829 EU citizens).[78] There are also statistics available with respect to Union Citizens who have lost the right of free movement and residence in Germany according to the Freedom of Movement Act. These statistics differentiate between EU Member States. In 2007 on the whole 3.441 decisions have been registered, the largest number from Poland (829), Rumania (429), Lithuania (403) and the Netherlands (404)[79]. Moreover, 228 Union Citizens have been refused entry in 2007. But the numbers have fallen in the years thereafter: in 2008, 15 EU citizens were refused entry, in 2009 the number was 17 and until June 2010 it stood at 4 persons. More recent data are not yet available, but will be included in future reports.

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED

There are no specific organisations or non-judicial bodies to which complaints for violation of community law can be launched within Germany. Any person may however petition the national parliament under Article 17 of the German constitution; similar rules also exist at regional level for the parliaments of the *Länder*.

5. SEMINARS, REPORTS AND ARTICLES

No data available.

78 See BT-Drs. 17/3288, p. 6.
79 BT-Drs. 17/3288, p. 6; the numbers refer to union citizens who do not live in Germany.

Annex I

Verordnung über die Laufbahnen der Bundesbeamtinnen und Bundesbeamten (Bundeslaufbahnverordnung – BLV)

of 12 February 2009, BGBl. 2009 I, p. 284

§ 29
Anrechnung hauptberuflicher Tätigkeiten

(1) Hauptberufliche Tätigkeiten im öffentlichen Dienst eines Mitgliedstaates der Europäischen Union oder bei einer öffentlichen zwischenstaatlichen oder überstaatlichen Einrichtung oder Verwaltung, die nach Art und Schwierigkeit mindestens der Tätigkeit in einem Amt der betreffenden Laufbahn entsprochen haben, werden auf die Probezeit angerechnet.
(2) Weitere hauptberufliche Tätigkeiten können angerechnet werden, wenn die sonstigen Voraussetzungen des Absatzes 1 vorliegen.
(3) Nicht anzurechnen sind hauptberufliche Tätigkeiten, die
1. im Vorbereitungsdienst angerechnet wurden,
2. Voraussetzung für die Zulassung zur Laufbahn sind,
3. nach § 20 des Bundesbeamtengesetzes berücksichtigt wurden oder
4. nach § 28 Absatz 1 des Bundesbesoldungsgesetzes berücksichtigt wurden.
(4) § 19 Absatz 4 gilt entsprechend.

§ 33
Auswahlentscheidungen

(1) Feststellungen über Eignung, Befähigung und fachliche Leistung sind in der Regel auf der Grundlage aktueller dienstlicher Beurteilungen zu treffen. Frühere Beurteilungen sind zusätzlich zu berücksichtigen und vor Hilfskriterien heranzuziehen. Die §§ 8 und 9 des Bundesgleichstellungsgesetzes sind zu beachten.
(2) Erfolgreich absolvierte Tätigkeiten in einer öffentlichen zwischenstaatlichen oder überstaatlichen Einrichtung oder Verwaltung oder in einer Einrichtung eines Mitgliedstaates der Europäischen Union während einer Beurlaubung nach § 9 Absatz 1 der Sonderurlaubsverordnung sind besonders zu berücksichtigen. Langjährige Leistungen, die wechselnden Anforderungen gleichmäßig gerecht geworden sind, sind angemessen zu berücksichtigen.
(3) Liegt keine aktuelle dienstliche Beurteilung vor, ist jedenfalls in folgenden Fällen die letzte regelmäßige dienstliche Beurteilung unter Berücksichtigung der Entwicklung vergleichbarer Beamtinnen und Beamten fiktiv fortzuschreiben:
1. Bei Beurlaubungen nach § 9 Absatz 1 der Sonderurlaubsverordnung zur Ausübung einer gleichwertigen hauptberuflichen Tätigkeit, wenn die Vergleichbarkeit der Beurteilung der öffentlichen zwischenstaatlichen oder überstaatlichen Einrichtung oder der Verwaltung oder einer Einrichtung eines Mitgliedstaates der Europäischen Union nicht gegeben ist,

2. bei Beurlaubungen zur Ausübung einer gleichwertigen Tätigkeit bei Fraktionen des Deutschen Bundestages, der Landtage oder des Europäischen Parlaments,
3. bei Elternzeit mit vollständiger Freistellung von der dienstlichen Tätigkeit und
4. bei Freistellungen von der dienstlichen Tätigkeit wegen einer Mitgliedschaft im Personalrat, als Vertrauensperson der schwerbehinderten Menschen oder als Gleichstellungsbeauftragte, wenn die dienstliche Tätigkeit weniger als 25 Prozent der Arbeitszeit beansprucht.

(4) Haben sich Vorbereitungsdienst und Probezeit um die Zeit eines Grundwehrdienstes oder eines Zivildienstes verlängert, sind die sich daraus ergebenden beruflichen Verzögerungen angemessen auszugleichen. Zu diesem Zweck kann während der Probezeit befördert werden, wenn die sonstigen Voraussetzungen des § 32 vorliegen. In den Fällen des § 12 Absatz 3 und des § 13 Absatz 2 des Arbeitsplatzschutzgesetzes gelten die Sätze 1 und 2 entsprechend.

Annex II

Bundesgesetz über individuelle Förderung der Ausbildung
(Bundesausbildungsförderungsgesetz - BaföG)

of 6. 6.1983 BGBl. I, p. 645, 1680;
last amended by Art. 2a by law of 20.12.2008, BGBl. I, p. 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).

(2) Anderen Ausländern wird Ausbildungsförderung geleistet, wenn sie ihren ständigen Wohnsitz im Inland haben und

1. eine Aufenthaltserlaubnis nach den §§ 22, 23 Abs. 1 oder 2, den §§ 23a, 25 Abs. 1 oder 2, den §§ 28, 37, 38 Abs. 1 Nr. 2, § 104a oder als Ehegatte oder Kind eines Ausländers mit Niederlassungserlaubnis eine Aufenthaltserlaubnis nach § 30 oder den §§ 32 bis 34 des Aufenthaltsgesetzes besitzen,
2. eine Aufenthaltserlaubnis nach § 25 Abs. 3, Abs. 4 Satz 2 oder Abs. 5, § 31 des Aufenthaltsgesetzes oder als Ehegatte oder Kind eines Ausländers mit Aufenthaltserlaubnis eine Aufenthaltserlaubnis nach § 30 oder den §§ 32 bis 34 des Aufenthaltsgesetzes besitzen und sich seit mindestens vier Jahren in Deutschland ununterbrochen rechtmäßig, gestattet oder geduldet aufhalten.

(2a) Geduldeten Ausländern (§ 60a des Aufenthaltsgesetzes), die ihren ständigen Wohnsitz im Inland haben, wird Ausbildungsförderung geleistet, wenn sie sich seit mindestens vier Jahren ununterbrochen rechtmäßig, gestattet oder geduldet im Bundesgebiet aufhalten.

(3) Im Übrigen wird Ausländern Ausbildungsförderung geleistet, wenn

1. sie selbst sich vor Beginn des förderungsfähigen Teils des Ausbildungsabschnitts insgesamt fünf Jahre im Inland aufgehalten haben und rechtmäßig erwerbstätig gewesen sind oder
2. zumindest ein Elternteil während der letzten sechs Jahre vor Beginn des förderungsfähigen Teils des Ausbildungsabschnitts sich insgesamt drei Jahre im Inland aufgehalten hat und rechtmäßig erwerbstätig gewesen ist, im Übrigen von dem Zeitpunkt an, in dem im weiteren Verlauf des Ausbildungsabschnitts diese Voraussetzungen vorgelegen haben. Die Voraussetzungen gelten auch für einen einzigen weiteren Ausbildungsabschnitt als erfüllt, wenn der Auszubildende in dem vorhergehenden Ausbildungsabschnitt die Zugangsvoraussetzungen erworben hat und danach unverzüglich den Ausbildungsabschnitt beginnt. Von dem Erfordernis der Erwerbstätigkeit des Elternteils während der letzten sechs Jahre kann abgesehen werden, wenn sie aus einem von ihm nicht zu vertretenden Grunde nicht ausgeübt worden ist und er im Inland mindestens sechs Monate erwerbstätig gewesen ist.

(4) Auszubildende, die nach Absatz 1 oder 2 als Ehegatten persönlich förderungsberechtigt sind, verlieren den Anspruch auf Ausbildungsförderung nicht dadurch, dass sie dauernd getrennt leben oder die Ehe aufgelöst worden ist, wenn sie sich weiterhin rechtmäßig in Deutschland aufhalten.

(5) Rechts- und Verwaltungsvorschriften, nach denen anderen Ausländern Ausbildungsförderung zu leisten ist, bleiben unberührt.

Annex III

Allgemeine Verwaltungsvorschrift zum Freizügigkeitsgesetz/EU
(FreizügG/EU-AVwV) v. 26. 10. 09, GMBl. 2009, 1270

Administrative Guidelines on the Implementation of the Freedom of Movement Act

2.2.1.3
Unionsbürger haben gemäß Artikel 39 Absatz 3 EGV ein Aufenthaltsrecht zur Arbeitssuche. Nach den ersten drei Monaten, in denen das Aufenthaltsrecht ohnehin keinen zweckgebundenen Voraussetzungen unterliegt (siehe auch Nummer 2.5.1), bleibt das Aufenthaltsrecht bestehen, wenn begründete Aussicht besteht, einen Arbeitsplatz zu finden (EuGH, Urteil vom 26. Februar 1991, Rs. C-292/89 – Antonissen, Artikel 14 Absatz 4, Buchstabe b) Freizügigkeitsrichtlinie). Begründete Aussicht, einen Arbeitsplatz zu finden, kann angenommen werden, wenn der Arbeitssuchende aufgrund seiner Qualifikation und des aktuellen Bedarfs am Arbeitsmarkt voraussichtlich mit seinen Bewerbungen erfolgreich sein wird. Dies ist zu verneinen, wenn er keinerlei ernsthafte Absichten verfolgt, eine Beschäftigung aufzunehmen.

3.0.3
Zur Frage der Reichweite der Familiennachzugsbestimmungen hat der Europäische Gerichtshof in seinem Urteil vom 25. Juli 2008 (Rs. C-127/08 – Metock u. a.) entschieden, dass die Freizügigkeitsrichtlinie drittstaatsangehörigen Familienangehörigen von Unionsbürgern das Recht einräumt, sich bei ihren Familienangehörigen in der EU aufzuhalten. Dieses Recht besteht unabhängig davon, ob sich der Drittstaatsangehörige bereits in einem EU-Mitgliedstaat rechtmäßig aufhält und ob die Eheschließung mit dem Unionsbürger vor oder nach der Zuwanderung in die Gemeinschaft erfolgt ist. Der Europäische Gerichtshof hat seine anders lautende Rechtsprechung (EuGH, Urteil vom 23. September 2003, Rs. C-109/01 – Akrich) ausdrücklich aufgegeben.
Die bisher vorgenommene Unterscheidung hinsichtlich des Familiennachzugs zu Unionsbürgern zwischen einem Erstzuzug in das Gemeinschaftsgebiet und der Freizügigkeit innerhalb der EU ist damit aufzugeben. Für alle drittstaatsangehörigen Familienangehörigen von Unionsbürgern gilt damit unabhängig von ihrer bisherigen aufenthaltsrechtlichen Situation, dass ein Aufenthaltsrecht auf Grundlage der Freizügigkeitsrichtlinie besitzt, wer seinen Status als Familienangehöriger eines Unionsbürgers nachgewiesen hat und die in der Freizügigkeitsrichtlinie aufgestellten Voraussetzungen erfüllt. Nachzuweisen ist außerdem, dass der Unionsbürger von seinem Freizügigkeitsrecht Gebrauch gemacht hat und dass der Familienangehörige diesen begleitet oder ihm nachzieht sowie beim Nachzug zum Nichterwerbstätigen, dass ausreichende Existenzmittel vorhanden sind bzw. ein umfassender Krankenversicherungsschutz besteht.
Als Konsequenz aus dem Urteil ergibt sich, dass der Familiennachzug zu Unionsbürgern ausschließlich auf der Grundlage des Freizügigkeitsgesetzes/EU stattfindet. Dies bedeutet, dass ein drittstaatsangehöriger Familienangehöriger eines Unionsbürgers u. a. keine einfa-

chen deutschen Sprachkenntnisse nachweisen muss. Der Familiennachzug zu Drittstaatsangehörigen und zu eigenen Staatsangehörigen in das eigene Staatsgebiet ist von der Entscheidung des Gerichtshofs grundsätzlich nicht betroffen. Dieser hat klargestellt, dass sich das Freizügigkeitsrecht ausschließlich auf Sachverhalte mit einem grenzüberschreitenden Bezug erstreckt und die Zuständigkeit des nationalen Gesetzgebers, im Übrigen strengere Regelungen des Familiennachzugs zu treffen, davon unberührt bleibt.