REPORT
on the Free Movement of Workers in Germany in 2009-2010

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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 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

The Freedom of Movement/EU Act as amended by law of 18 August 2007 (see previous report 2008 at p. 6) has abolished expulsion of EU citizens entitled to free movement. Administrative measures terminating the residence of an EU citizen (deportation etc.), however, may be taken on the basis of a special administrative procedure in which it is determined whether a Union citizen is entitled to free movement. Various administrative courts have decided that an administrative deportation order may be taken only if there had been a previous special administrative determination procedure under the Freedom of Movement Act, stating that the conditions for the exercise of a right to freely move are not fulfilled anymore 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.[1] However, it is still somewhat controversial whether this special procedure under the Freedom of Movement Act is required in case that a right to free movement under the Directive or sec. 3 para. 1 of the Freedom of Movement Act has never existed since the obligatory requirements for exercising a right to move freely were never fulfilled, for instance in the case of entry for the exclusive purpose of making a living through small-scale criminal behaviour.

The Administrative Appeal Court of Brandenburg has argued from the drafting history of the Freedom of Movement Act/EU that the Act including the need for a particular determination procedure were applicable with respect to Union citizens and their family relatives even in the case of an *a priory* non-existence of the conditions for exercising freedom of movement.[2] This view has been adopted by a majority of administrative courts arguing that according to the jurisprudence of the European Court the conditions and restrictions laid down in the Union Citizens Directive 2004/38 are not constitutive for relying upon a legal status as a Union citizen entitled to free movement within the EU. The administrative courts, therefore, largely apply a concept whereby the Freedom of Movement Act is applicable to all Union citizens irrespective of whether they fulfil the requirements laid down in sec. 2 following the Freedom of Movement Act which largely corresponds to the requirements of the Union Citizens Directive. Therefore, in any case of a restriction of free movement of Union citizens an examination must take place whether the restriction is accordance with the principle of proportionality as applied by the European Court.

However, it is somewhat doubtful whether this principle may be equally applied to third-country national family relatives.[3]

New administrative instructions have been adopted to the Freedom of Movement Act/EU on the basis of Art. 84 para. 2 of the Basic Law by the federal government with the consent of the Bundesrat.[4] The administrative instructions adjust the application of the provisions of the Freedom of Movement Act/EU of 30.7.2004[5] to the more recent jurisprudence of the European Court of Justice and national courts on freedom of movement issues. There are

1 For references see report 2008, at p. 9.
2 See Administrative Appeal Court of Brandenburg of 27.4.2008, 1 K 1189/08, *Neue Justiz* 2008, p. 464; Administrative Court of Sigmaringen of 19.6.2006, 7 K 1190/05.
3 Administrative Appeal Court of Hamburg of 6.3.2008, Bs 281/07, *NVwZ-RR* 2008, 728; see also chapter II 2.
4 Allgemeine Verwaltungsvorschrift zum FreizügG/EU of 26.10.2009, *GMBl*. p. 1270.
5 Gesetz über die Allgemeine Freizügigkeit von Unionsbürgern (FreizügG/EU) of 30.7.2004, *Official Journal* I, p. 1950, amended by law of 26.2.2008, *Official Journal* I, p. 215.

frequent references to the decisions of the European Court on issues of interpretation of the scope of application of the Act, the interpretation of the term 'worker' and rules on entry and departure of Union citizens and their family members.[6]

6 The administrative instructions of 26.10.2009 are available online under www.verwaltungsvorschriften-im-internet.de.

Chapter I
The Worker: Entry, Residence, Departure and Remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

Art. 7 (1a), (3a-d), Art. 8 (3), 14 (4a-b) and Art. 17 have been transposed by the Freedom of Movement Act of 30.7.2004 (Sec. 2: 2-5, Sec. 5: 1-3, Sec. 5a and Sec. 6).[7] The Freedom of Movement Act does not contain specific provisions corresponding to Art. 14 (a-b) of Directive 2004/38. Sec. 2 of the Freedom of Movement Act, however, provides that Union citizens staying in Germany as workers, self-employed persons or for the purpose of seeking employment are entitled to free movement. According to the administrative instructions this applies irrespective of the time limit under the Antonissen-principles of the ECJ.[8]

Art. 24 (2) providing for access to social benefits has been transposed by the Social Code II, Sec. 7 (2) No. 2[9] and Social Code XII, Sec. 23 para. 3.[10] The law on the promotion of professional formation[11] has transposed Art. 24 (2) with regard to student aids or student loans.

2. SITUATION OF JOB-SEEKERS

Following the decision of the European Court of 4.6.2009[12] on the question of entitlement of two Greek citizens to social benefits under the Social Code II, the Court has decided that the exclusion from social benefits under Art. 24 para. 2 of the Union Citizens Directive does not apply for such benefits facilitating access to the labour market. Since the Court has stated that it is within the responsibility of national courts to attribute the character of a social benefit by way of their basic character and purpose and the conditions of entitlement the German federal authorities have argued that the exclusion clause under Sec. 7 para. 1, 2. sent. of the Social Code continues to be applicable with respect to foreigners who are staying in Germany exclusively for the purpose of seeking labour since the social benefits under this clause can be attributed to social assistance in the sense of art. 24 para. 2 of the Directive 2004/38. It is to be expected that the question will again come up for the social courts since it is argued that the view taken by the Federal Ministry for Labour and Social Affairs is not in line with the jurisprudence of the European Court. However, in the drafting history there are good arguments for maintaining the view of the Federal Ministry since unemployment ben-

7 The relevant provisions of the Freedom of Movement Act in English translation can be found in previous reports.

8 No. 2.2.1.3 Allg. VwV-FreizügG/EU referring to ECJ of 26.2.1991, C 292/89.

9 Sozialgesetzbuch 2. Buch (SGB II) - Grundsicherung für Arbeitsuchende - of 24.12.2003, *Official Journal* I, p.2954, as amended by law of 2.3.2009, *Official Journal* I, p. 416, 429, see Hailbronner, *Ausländerrecht*, vol. 4, C 2.1.

10 Sozialgesetzbuch 12. Buch (SGB XII) of 27.12.2003, *Official Journal* I, p. 3022, as amended by law of 22.12.2008, Official Journal I, p. 2955; see Hailbronner, *op. cit*. at C 2.

11 Bundesausbildungsförderungsgesetz (BaFöG) of 6.6.1983, *Official Journal* I, p. 645, 1680, as amended by law of 20.12.2008, Official Journal I, p. 2846; see Hailbronner, *op. cit.* at C 7.

12 Case C-22/08, *Vatsouras*, and case C-23/08, *Koupatantze*.

efits provided for by Sec. 7 para. 1 were explicitly destined to replace the entitlement to social assistance of persons who are in principle still available on the labour market by a special legislation intended to encourage persons to seek employment rather than relying permanently on social assistance systems. The clear purpose to encourage a re-integration into the labour market, on the other hand, could be taken as a major criterion which according to the European Court excludes the application of Art. 24 para. 2 of the Union Citizens Directive. Judged from its practical purpose, social benefits under the Social Code II serve, on the one side, clearly the purpose of enabling the basic standard of living for persons who have lost employment as long as they are available on the labour market. On the other hand, benefits under the Social Code II are intended to maintain the connection of an employed person with the labour market and to prevent persons who have lost their employment to gradually glide into a situation of permanent dependency upon social benefits. An interpretation which would exclude from the scope of application of Art. 24 para. 2 benefits granted to maintain unemployed persons an adequate standard of living simply for the reason that the benefit pursues at the same time the purpose to bring such persons back into the labour market, would deprive Art. 24 para. 2 of every useful meaning and would in effect force Member States to draw a sharp distinction between social welfare purposes and the purpose to encourage persons unable to earn a living due to unemployment to get back to the labour market.

Job-seekers are entitled to entry and residence within Germany as long as there is a reasonable expectation to find an employment. Reasonable expectation according to the administrative instructions is assumed if the jobseeker due to his qualifications and the actual demand on the labour market will presumably be successful in the attempt to seek labour. A reasonable expectation is denied if the Union citizen does not pursue a serious intention to take up employment.[13] There is no legal obligation to register with the FLA. The Union citizen seeking labour is not restricted in any way by the relevant rules of the FLA in the search for employment with respect to the residence requirements. There are no restrictions on residence nor any formalities which have to be complied with under the relevant labour administration rules. Recital no. 9, Art. 6 and Art. 14 of the Directive 2004/38 are more or less literally taken up by the administrative instructions which explicitly refer to the Antonissen-ruling of the European Court. To my knowledge, no cases have ever come up arguing the incompatibility of the rules and practices of the FLA with regard to job-seeking Union citizens with EU law.

3. OTHER ISSUES OF CONCERN

The Administrative Court of Osnabrück has decided that a Rumanian citizen who has been permanently unable to earn a living and who is living since 2000 in Germany has acquired a right of permanent EU freedom of movement irrespective of the fact that the applicant has acquired free movement rights only since the accession of Rumania to the EU on 1.1.2007.[14] The entitlement of new Union citizens to permanent EU residence therefore is not dependent

13 Allg. VwV no. 2.2.1.3.
14 Administrative Court of Osnabrück of 31.8.2009, 5 A 63/09.

upon having spent 5 years within Germany as "Union citizens" according to administrative practice and jurisprudence.[15]

The Administrative Appeal Court of Rheno-Palatia has dealt with the issue of free movement rights for self-employed Union citizens.[16] A citizen from Estonia with an academic degree had been moving in March 2005 to Germany in order to live together with a German national. In April 2006, the authorities adopted a formal declaration that the applicant had lost her free movement rights since she had never seriously looked for employment but had exclusively lived upon social assistance. The applicant reacted by registering for a self-employed activity in the cleaning business. The Administrative Appeal Court confirmed the administrative order for departure arguing that the registered economic activities were not based upon a serious intention to work but had been taken up only under the pressure of the ongoing administrative procedure on the determination of free movement rights. The fact that she had occasionally earned some money for cleaning in the amount of € 200.- – 400.- and were entitled to an Estonian pension in the amount of € 242.- was not sufficient to prove a serious self-employed economic activity or an intention to look for employment.

The Federal Administrative Court has decided that a Union citizen could be expelled for a violation of public order if he/she due to an illness disturbs in a serious manner the public order.[17] The Court, although applying the Directive 64/221, which has been abolished by the Union Citizens' Directive, has clarified an issue which has been controversial among German administrative courts. Some courts had interpreted Art. 4 para. 2 of Directive 64/221 as a prohibition to expel a Union citizen on reasons of illness arising only after taking up residence in another EU Member State. Since Art. 29 para. 2 Directive 2004/38 contains a similar provision, the interpretation by the Federal Court is still of practical importance. The Court argues that this provision does not prohibit an expulsion based upon a serious violation of public order if the violation is caused by an illness.

According to a decision of the Administrative Appeal Court of Berlin-Brandenburg[18] a right of permanent residence for Union citizens under Sec. 4a Freedom of Movement Act (transposing Art. 16 para. 1 Directive 2004/38) does only require that the Union citizen has been permanently lawfully resident for five years before a certificate on a permanent residence right may be issued. However, the Court argues that it is necessary that during the five-year lawful residence the applicant had been entitled to free movement rights. On the other hand, according to the Court, it is not necessary that the five-year lawful residence does immediately precede the application for a permanent residence permit under Sec. 4a. The decision rests upon the doubtful premise that lawful residence for five years is only a time period in which the Union citizen had been entitled to free movement rights (which would require that citizens of new EU Member States would have to prove a five-year lawful residence following the accession to the EU). On the other hand, the Court does not require a continuation of the five-year period of lawful residence with the successive permanent residence entitlement. The German transposition in Sec. 4a seems to require such a continuation ("Unionsbürger... die sich *seit fünf Jahren* ständig rechtmäßig im Bundesgebiet aufgehalten haben").[19] Art. 28 of the Directive 2004/38, whereby the host Member State may not take an

15 See Administrative Instructions of the Interior Ministry of Northrhine-Westphalia of 15.10.2008.
16 Judgment of 2.4.2009, 7 A 11053/08.
17 Federal Administrative Court of 3.12.2008, 1 C 35.07.
18 Judgment of 28.4.2009, 2 B 23.07.
19 See also Administrative Appeal Court of Baden-Württemberg of 13.3.2006, 13 S 220/06.

expulsion decision against Union citizens who have resided for the previous 10 years in the host Member State other than "on imperative grounds of public security, as defined by Member States", has been transposed by the Freedom of Movement Act as requiring a prosecution for one or more crimes to a prison sentence of at least five years or a sentence of permanent detention in connection with a prosecution for a crime, or if the security of the Federal Republic is affected or if the respective person constitutes a terrorist danger for the Federal Republic of Germany.[20] The Administrative Court of Baden-Württemberg has requested a preliminary ruling by the European Court on the issue whether Art. 28 para. 3 of Directive 2004/38 must be interpreted as requiring concrete danger of the internal or external security of the state, security being defined as the existence of the state and its essential institutions, the functioning of the state, the survival of the population as well as external relations and peaceful cooperation between nations.[21] The request for a preliminary ruling reflects a controversy within the jurisprudence of administrative courts. The appeal court doubts whether the transposition is in accordance with EU law. The Court relies upon the jurisprudence of the European Court in the case Campus Oil[22], arguing that the term "public order" has been defined with regard to serious criminality while public security has always been interpreted in a restrictive sense of state security. The Court also raises the issue whether the particular protection against expulsion may be lost if the Union citizen does not have permanently any connection to the host state and has taken up permanent residence in another EU Member State or in a third state. The Court suggests applying by analogy Art. 16 para. 4 of the Directive 2004/38 while it is not possible to apply Art. 16 para. 3 of the Directive.

Basically on the same line the Administrative Court of Darmstadt[23] argues that a spouse of a German national who has moved for the purpose of concluding the marriage to Denmark, does not result in the application of EU freedom of movement entitlement for the third-country spouse.

20 Sec. 6 para. 5 sent. 3: 'Zwingende Gründe der öffentlichen Sicherheit können nur dann vorliegen, wenn der Betroffene wegen einer oder mehrerer vorsätzlicher Straftaten rechtskräftig zu einer Freiheits- oder Jugendstrafe von mindestens fünf Jahre verurteilt oder bei der letzten rechtskräftigen Verurteilung Sicherungsverwahrung angeordnet wurde, wenn die Sicherheit der Bundesrepublik Deutschland betroffen ist, oder wenn vom Betroffenen eine terroristische Gefahr ausgeht.'

21 Decision of 9.4.2009, 13 S 342/09, *NVwZ-RR* 2009, 700.

22 ECJ of 10.7.1984, case 72/83, Rec. 1984, 2727; of 4.10.1991, case C-367/89, *Richardt and les Accessoires Scientifiques*, Rec. 14621; of 29.4.2004, case C-482/01 and C-4937/01, *Orfanopolous* and *Olivieri*, Rec. I 5257.

23 Judgment of 23.10.2009, *InfAuslR* 2010, 67.

Chapter II
Members of the Worker's Family

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

The definition of family members in Sec. 3 (2) corresponds largely to the definition of Art. 2 (2a, c and d) of the Union Citizens Directive. The administrative instructions interpret the requirement of Art. 2 (2 c and d) of granting maintenance in application of the ECJ's ruling in Lebon[24] as actual support which in principle can be determined as means to cover the cost of living of a family relative. This requirement is fulfilled in case of a continuous regular financial support covering at least a part of the living expenses, taking into account the general standard of living in the EU Member State in which the family member is permanently residing. Following the European Court's ruling it is not necessary that the person granted financial support is entitled to such support or is able to defray him-/herself the necessary costs of living. It is also irrelevant whether the family member is entitled to social assistance benefits.[25] Implementing the ECJ-judgment of 19.10.2004[26] the administrative instructions provide exceptionally for a right of entry and residence if an EU citizen is financially supported by a (third-country) family member such as in the case of a juvenile EU citizen receiving assistance by a third-country national parent if assistance is necessary and no public resources are requested.[27]

The issue of reverse discrimination has occasionally come up before German courts in the context of requesting equal treatment with third-country family members of Union citizens from other EU Member States residing in Germany. There is an established case law by the German Constitutional Court as well as the Federal Administrative Court that German nationals and their family members are not entitled to rely upon the right to free movement unless there is a situation which according to the jurisprudence of the ECJ falls within the scope of application of freedom of movement. To define the borderline for the application of free movement rights under EU law, however, has become increasingly difficult due to the fact that the criteria established by the ECJ as to the existence of a trans-border element are not very clear.[28] The Administrative Appeal Court of Northrhine-Westphalia has refused to apply EU law in case of a German national possessing in addition to the nationality acquired by birth on German territory a further nationality of an EU Member State.[29] On the other hand, it is clear from the Court's jurisprudence that a Union citizen born in Germany, who did not acquire German nationality, is entitled to free movement although he/she has never made use of free movement rights. Should he/she, however, decide to option for the additional acquisition of German nationality in application of the new nationality legislation,[30] he/she will lose the entitlement to freedom of movement for his/her spouses and family

24 Judgment of 18.6.1987, C-316/85, Lebon.
25 No. 3.2.2.1. Allg. VwV zum FreizügG/EU.
26 Case C-200/02, *Zhu and Chen* at para. 42.
27 No. 3.2.2.2 Allg. VwV zum FreizügG/EU.
28 Cf. ECJ of 11.7.2002, C-60/00, *Carpenter*; of 14.4.2005, C-157/03, *Commission/Spain*.
29 Higher Administrative Court of Northrhine-Westphalia of 17.3.2008, 18 B 191/0, *EZAR NF* no. 9.
30 Sec. 12 para. 2 StAng as amended by law of 5.2.2009, Official Journal I, p. 258; see Hailbronner/Renner/Maaßen, *StAG*, 5th ed. 2010, Sec. 12.

members due to the exclusive applicability of the Residence Act which provides for family reunification under stricter conditions as in the case of family members of Union citizens entitled to free movement rights.

2. ENTRY AND RESIDENCE RIGHTS

Entry and residence rights of (third-country) family members of Union citizens are exhaustively regulated in the Freedom of Movement Act. The general requirements of the Residence Act (language, skills etc.) are not applicable unless general provisions of the Residence Act are more favourable than the rights under the Freedom of Movement Act.[31]

Several court decisions have dealt with entry and residence rights of third-country national spouses. The Bavarian Administrative Appeal Court has confirmed the decision of administrative authorities to reject the application of EU law to a third-country spouse of a German national if the German spouse possesses dual nationality of another EU Member State, but has never made use of free movement rights.[32] The case concerns a national from Kosovo who had married a German national in 2006 who had been born in Rumania and had moved to Germany in 1990 and naturalized as German citizen in 1993. Her third-country spouse from Kosovo had received in 2007 a residence permit until the relationship had been dissolved. The Court argues that the German/Rumanian national had never made use of free movement rights since at the time of moving to Germany as well as at the time of naturalization Rumania had not been part of the European Union and therefore entry and residence could not be considered as making use of free movement rights. The decision goes along with another administrative appeal court decision which has also denied the application of EU law with respect to a dual nationality Union citizen who has been born in Germany.[33]

A judgment of the Administrative Appeal Court of Baden-Württemberg[34] discusses the question whether a Russian national can claim EU free movement under Art. 21 TFEU as a result of having married a German national in Denmark who had been staying only for a few days in Denmark in order to marry under "unbureaucratic" conditions. The Court states that a short-time visit of up to three months in another EU Member State does not trigger a right to free movement for a third-country national who had been married during that time period in the respective EU Member State. The European Court's argument in the Eind-Case[35] was not applicable since the facts of the case did not reveal a true "return situation" as assumed by the European Court in the Eind-Case. Nobody in his right mind – according to the Court's reasoning - would be prevented from making use of free movement as a result of the assumption that a third-country national who had been married during that visit could not expect to receive a residence permit in the country of origin of the Union citizen. The case indicates the difficulties to apply the European Court's jurisprudence on the scope of application of EU freedom of movement law.

31 Which may be exceptionally the case for family members of German nationals with respect to access to the labour market under Sec. 28 (5) Residence Act.
32 Bavarian Administrative Appeal Court of 19.2.2010, 10 ZB 09.2584.
33 See II 1., Administrative Appeal Court of Northrhine-Westphalia of 17.3.2008.
34 Decision of 25.1.2010, 11 S 2181/09.
35 Judgment of 11.12.2007, case C-291/05.

The same Appeal Court has rejected in a subsequent decision[36] to apply EU law to the family reunion of a third-country national to a German national residing in Germany who has been working in Austria as a frontier worker and therefore making use of his freedom of movement rights as a worker according to Art. 45 TFEU. The judgment, in my view, can be justified since the trans-border aspect does have no connection with the family reunion with a third-country national. Therefore, German national law has been correctly applied.

The administrative instructions of 2009 emphasise that (third-country) family members of Union citizens are entitled to free movement in close connection with the residence of the Union citizen. In case of children a right to care respectively a right to determine the residence of the child is not required as a condition for family reunification. If there are special facts indicating that entry and residence of a child may conflict with foreign laws or court decisions on the right of care, residence may be denied in order to prevent an abuse of freedom of movement.[37]

The Freedom of Movement Act is using the same terminology as Art. 7 (1 d) of the Union Citizens Directive. It follows that German authorities are instructed to apply the same rules of interpretation as prescribed by the ECJ in the Metock-ruling. Third-country family members are, therefore, entitled to freedom of movement in Germany irrespective of whether they have become family members before or after taking up residence in Germany or before or after they have moved with the Union citizen into Germany.[38] It is therefore not necessary to indicate a common accommodation. However, there must be an actual family relationship deserving protection in the sense of general principles of protection of family and marriage.

A legal issue may arise with the provision of Sec. 3 (6) Freedom of Movement Act stating that with respect to entry and residence of a 'partner' of a Union citizen, the principles of the Residence Act on a "partner" of a German citizen apply. The provision refers to same-sex partners under the German legislation granting certain rights to formally registered partners including a right of entry and residence for the partner in analogy to the provisions of spouses of German citizens. Sec. 3 (6) ensures equal treatment according to the principles of the Reed-decision.[39] The provision, however, does exclude the application of the Union Citizens Directive by providing for an analogous application of the principles of the Residence Act. It may be doubtful whether this exclusion is compatible with Art. 2 (2 b) Union Citizens Directive.[40] Since Art. 2 (2 b) requires that the registered partnership is treated equally to a marriage it may be doubtful whether this provision applies since the German legislation does only provide for a limited equal treatment with spouses.

3. 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

36 Judgment of 26.11.2010, 11 S 2482/09.
37 No. 3.1.0 Allg. VwV zum FreizügG/EU.
38 Allg. VwV zum FreizügG/EU no. 3.1.0.
39 ECJ of 17.4.1986, case 58/85, Florence Reed.
40 For incompatibility see Administrative Court of Darmstadt of 5.2.2008, 5 L 277/08.DA.

of nationality. No labour permit is required.[41] 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.

4. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

Family members of job-seekers are entitled to free movement under Sec. 3 (1) Freedom of Movement Act. No legal or practical problems are reported with respect to family members of job-seeking Union citizens.

41 See no. 2.2.100 Durchführungsanweisungen zur Arbeitsgenehmigungsverordnung, last update: 11/2009.

Chapter III
Access to Employment: a) Private sector and b) Public sector

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

General remarks:
It is not very clear what the distinction between private and public sector intends to achieve. Already the meaning of the terms 'private' and 'public' sector used is unclear. Is it intended to make a distinction according to the legal nature of the contract or according to the applicable employment rules, labour law versus civil service law? Or is it intended to draw a distinction in analogy to public procurement law, which uses the functional concept of a public contract. EU law does not distinguish between 'private' and 'public' sector.

Whether Art. 45 applies in all its ramifications to the 'private' sector as well as to the 'public' sector is – in spite of the Angonese-judgment[42] highly doubtful. The Court continues to refer to positions like Walrave and Bosman which have extended freedom of movement principles to private institutions using their autonomous power to regulate employment conditions. From the more recent jurisprudence of the ECJ it follows that – somewhat contrary to the assumption of the questionnaire – there is no general freedom of movement in the 'private sector'.[43]

In any case, it is not possible to examine the 'private' sector with regard to access to employment. Even if only larger enterprises were examined there may be thousands of different employment policies, recruiting instructions etc., which may or may not provide an indication with regard to equal treatment in access to employment. It is to be assumed that the larger the company the smaller the likelihood that employment policies run counter to principles of equal treatment. Mid-size and small employers operating in an area of regional and local affiliation and loyalties may well be more prone to privileged treatment of national or local labour force. However, it is impossible to find out about unequal treatment without a large scale of empirical study on the practices of recruiting and employment.

Since in general there are no legal language requirements in the private sector, it is up to every employer to require a certain amount of German language skills as a condition of employment. German language skills may vary from rudimentary skills in order to work in a supermarket or high language skills in order to be hired as a consultant in a consultancy firm. Once again, empirical studies of the requirement of language skills are clearly outside the possible scope of the Observatory reports.

Access to employment in the 'public' sector if it is interpreted as meaning employment in publicly regulated occupations and civil service may be examined with regard to the criteria mentioned under b.1. – b.3. as far as there exists legislation on the federal level in Germany. It is, however, not possible to examine the issue of language requirements on the state level since in each of the 16 different states there are different laws, regulations and administrative instructions in each of the different areas of the public sector, since it falls within the legislative competence of each Land and each community to prescribe the rules for access to

42 ECJ of 6.6.2000, Case C-281/098, *Angonese*, ECRE 2000, I-4139, para. 34.
43 See also AG V. Trstenjak of 14.4.2010 in the case C-217/08, *Commission//Federal Republic of Germany*, at para. 69 et seq.

employment to public enterprises providing services. Therefore, the issue of language requirements or recognition of professional experience for access to the public sector or nationality conditions for access to positions in the public sector can only be described by examples without attempting to provide a comprehensive description of legal rules and practices on all levels of public administration in Germany.

a.1. Equal treatment in access to employment

a.2. Language requirements

Generally speaking, the legal rules on the different medical professions require sufficient knowledge of the German language in order to communicate with their clients. The Federal Regulation for practicing medicine provide that an applicant in order to receive the admission as a medical doctor (Approbation) must dispose of the required language skills necessary for exercising the medical profession.[44]

According to the case law of the Federal Social Court an insured person is not entitled to reimbursement of costs of an interpreter necessary for medical treatment. The public insurance agencies (Krankenkassen) are therefore not obliged to pursue a recruiting policy which insures that administrative personnel as well as medical personnel are available to all insured persons who are able to communicate in all languages of insured persons. However, under German law there is a possibility to grant a special professional licence for providing medical services in cases of special demand. A Greek psychotherapist working in a private institution in charge of psychological services for foreigners applied in 2000 for a special licence in order to provide psychotherapeutical services for foreigners, arguing that effective treatment of the foreigners in the area could only be guaranteed if the psychotherapist was able to communicate with patients in their mother-tongue. The application for a special licence was rejected on appeal. The applicant filed an appeal with the social courts. The Federal Social court in a judgment of 6.2.2008 upheld the rejection.[45] The decision is of some practical importance for the issue of entitlement of foreigners to communicate with medical personnel able to speak their home tongue. Social courts as well as the administrative authorities deciding in the first instance had argued that insured workers speaking a foreign language should be entitled to a psychotherapeutical treatment in their own language provided that this is necessary from a medical point of view.[46] The Federal Social Court, however, rejected this argument and maintained the previous legal position that the law of the obligatory illness insurance does not take account of insufficient knowledge of the German language from the part of insured persons as well as on the part of persons providing medical services.[47]

44 'Über die für die Ausübung der Berufstätigkeit erforderlichen Kenntnisse der deutschen Sprache verfügt'; Bundesärtzeordnung (BÄO) of 16.4.1987, *Official Journal* I, p. 1218, as amended by law of 30.7.2009, *Official Journal* I, p. 2495.

45 BSG of 6.2.2008, B 6 KA 40/06 R, SGB 05/09, p. 292 and comment by Davy, at p. 296.

46 Social Appeal Court of Bavaria of 21.6.2006, L 12 KA 426/04.

47 For the previous jurisprudence see BSG of 17.10.2007, B 6 KA 31/07 R; of 7.2.2007, B 6 KA 3/06 R; for a critical view see Davy, at p. 297.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

b.1. Nationality condition for access to positions in the public sector

According to Sec. 7 para. 2 of the newly adopted federal law on the status of civil servants[48] the appointment as a "Beamte" requires German nationality or the nationality of another EU Member State. Exception is made under Sec. 7 para. 2 on the condition that the tasks require German nationality.[49] The clause corresponds to previous formulations in the clause of the federation and the Länder on the appointment of civil servants as "Beamte". There is no legislative determination on the conditions which have to be fulfilled to apply the exception clause. There are numerous different practices and administrative rules in the federation and the Länder whether exceptionally only German nationals are to be granted access to the civil service respectively the appointment to be a "Beamter". It may be questionable whether the general clause referring to the requirement of the tasks must be considered as a sufficiently transparent and clear transposition of EU requirements since the legal provision as such does not provide with sufficient clarity as to whether a specific position in the public sector is available to Union citizens of other EU Member States. On the other hand, since the clause has been interpreted by the ECJ in a manner which has not always been very transparent, the legislator would be forced to change the law any time a court judgment states new principles and criteria for interpretation of the exception clause of Art. 45 para. 4 TFEU.

b.2. Language requirements

b.3. Recognition of professional experience for access to the public sector

There are numerous laws and implementing regulations on recognition of professional certificates for regulated or non-regulated professions in transposition of the Directive 2005/36/EC. As an example, the Regulation on non-academic medical professions of Northrhine-Westphalia of 19.1.2009 may be mentioned which does also contain some rules on professional experiences as far as professional experiences are required as a condition for access to the regulated professional irrespective of whether the profession is exercised in the public sector or in the private sector.[50] The Regulation does generally provide for the procedure of examining equivalence of professional certificates. It states that in case of a non-regulated profession in another EU Member State the profession may be exercised if the applicant has practiced the profession in the preceding 10 years for 2 years as a full-time profession and the general certifications or training certificates of the competent authority of another EU Member State certify that

1. the standard of qualification of the applicant is at least directly below the level of Art. 11 Directive 2005/36/EC of the German standards and

48 Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz) of 17.6.2008, Official Journal 2008 I, p. 1010 of 19.6.2008.

49 'Wenn die Aufgaben es erfordern, darf nur eine Deutsche oder ein Deutscher im Sinne des Artikels 116 des Grundgesetzes in ein Beamtenverhältnis berufen werden.'

50 Verordnung zur Durchführung des Berufsanerkennungsverfahrens und zur Regelung der Verwaltungszusammenarbeit nach der Richtlinie 2005/36/EG (Berufsanerkennungsdurchführungsverordnung NRW) of 19.1.2009, Gesetz- und Veordnungsblatt NRW 2009, p. 36, Gliederungsnummer 2102.

2. the applicant has been prepared to the exercise of the respective profession.[51]

A three-year' training course or a special examination on the professional capability may be requested if

1. the duration of training in another EU Member State is considerably lower than the duration of the German training or professional formation in the amount of at least one year or,
2. the professional training or additional professional experience concerns areas which are significantly different from those prescribed under the German rules on the professional training or additional professional formation, or
3. the professional training or professional experiences comprehend one or more regulated professional activities which are not covered by the training manuals of the state of an applicant from another EU Member State.[52]

In any case, the authorities have to examine before they require an additional training course or a suitability test whether the applicant has acquired in the course of professional experience the necessary skills which make up for the difference fully or partially to the German rules.[53]

51 Sec. 2 para. 2: 'Ist der Beruf in einem anderen europäischen Staat nicht reglementiert, darf der Beruf ausgeubt werden, wenn dieser in den vorhergehenden 10 Jahren dort 2 Jahre in Vollzeit ausgeübt wurde und die Befähigungs- oder Ausbildungsnachweise der zuständigen Behörde des anderen europäischen Staates bescheinigen, dass das Berufsqualifikationsniveau des Inhabers zumindest unmittelbar unter dem Niveau nach Art. 11 RL 2005/36/EG der deutschen Ausbildung liegt und der Inhaber auf die Ausübung des betreffenden Berufs vorbereitet wurde.'

52 See Sec. 2 para. 3 of the Regulation of 19.1.2009.

53 'Vor Durchführung eines Anpassungslehrgangs oder einer Eignungsprüfung ist zu prüfen, ob die von der antragstellenden Person im Rahmen ihrer Berufspraxis in einem europäischen Staat oder in einem Drittstaat erworbenen Kenntnisse den wesentlichen Unterschied ganz oder teilweise ausgleichen können', see Sec. 2 para. 3 subpara. 2, 1. sent. of the Regulation of 19.1.2009.

Chapter IV
Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Specific issue: Working conditions in the public sector

Provisions on recognising professional experience for access to the public sector are frequently contained in the regulations of the Länder on recognition of professional qualifications of other EU Member States as a condition for a specific career within the public administration. German civil service law distinguishes between different careers differentiating according to the type of civil service. There is a traditional distinction between services requiring no specific diplomas or professional certificate (einfacher Dienst), the career of requiring professional skills and a diploma certifying such skills (gehobener Dienst) and higher services requiring generally a university study of at least 3-4 years at a university of equivalent institution of higher learning (höherer Dienst). Within the German states the recognition of professional qualifications and other professional requirements for access to the public service in all three careers is regulated by laws and additional regulations adopted on the basis of laws.[54]

As an example, the regulation on careers of Berlin may be mentioned although there may be some distinctions to other German states.[55] According to Sec. 2 of the Regulation, professional qualifications necessary in another EU Member State in order to exercise a certain regulated profession must be recognised as well as a professional certificate necessary in order to be granted access to a career within the public service. According to Sec. 2 para. 2 access to the career in the lower service and middle service requires a proof of professional skills which can be demonstrated either by a special examination or the exercise of the profession in an EU Member State during three following years or as a part-time occupation during a corresponding time frame in the last ten years. According to Sec. 2 para. 5 the actual exercise of a profession which is not regulated in the respective EU Member State, which has been exercised for two years within the last ten years as a full-time profession, is recognised according to Sec. 2 para. 1-4, provided that the proofs of professional qualification certify that the applicant has been trained in the exercise of the respective profession. The clause does not apply if the proof of qualification certifies the successful completion of a regulated professional formation level of Art. 11 lit. b, c, d or e of Directive 2005/36/EC. For the recognition of professional diplomas the Regulation provides for a system of evaluation of equivalence which may result in additional measures by way of a traditional training course or a special examination on the capability to fulfil the tasks of the intended career.

Similarly, the federal legislation[56] on careers contains a number of provisions on the recognition of professional experience for access to the federal civil service. According to Sec. 9, full-time professional employment in the civil service of a Member State of the European

54 Laufbahngesetz; Verordnung über die Anerkennung von Berufsqualifikationen anderer Länder der Europäischen Union als Laufbahnbefähigung, VO Laufbahnbefähigung-EU.

55 VO-Laufbahnbefähigung Berlin of 13.1.2009, Gesetz- und Verordnungsblatt für Berlin of 27.1.2009, p. 14.

56 Verordnung über die Laufbahn der Bundesbeamtinnen und Bundesbeamten, Bundeslaufbahnverordnung of 12.2.2009, Official Journal 2009 I, p. 284 of 13.2.2009.

Union or in a public national institution or administration, which corresponds in instructions and type of tasks to be fulfilled to the activities in an employment in the respective career, are to be recognised for the approbation period which is generally recognised before a person is appointed in the special status as a Beamter.[57]

Sec. 33 of the Bundeslaufbahnverordnung provides that successfully completed activities in a trans-national institution or administration or in a public service of an EU Member State in the framework of a temporary leave according to Sec. 9 para. 1 of the Regulation granting special leave have to be given special consideration in the decision on the capability and professional skills of a civil servant. The Regulation does provide also for promotion respectively change of career, generally requiring the successful completion of a preparatory training course and the acquisition of special professional skills. The relevant provision (Sec. 35) does not explicitly contain rules on EU citizens from other Member States. However, the provision refers to Sec. 25 which states that professional experiences which have been acquired in addition to the legal requirements in order to be appointed as a civil servant must be adequate to the type of tasks to be performed in a new career respectively in a new function within the same career. Based upon the general principles of equal treatment, this means that professional experiences acquired in other EU Member States must be taken into account.

2. SOCIAL AND TAX ADVANTAGES

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

By federal law on the transposition of EU legislative requirements relevant to national tax law[58] a number of tax laws have been amend in order to adjust to the jurisprudence of the European Court with regard to the recognition of situations occurring outside Germany. The previous legislation did grant tax facilitation only with respect to measures promoting the acquisition of real property within Germany. The amended provision extends the tax privileges to buildings which are situated in a Member State of the European Union.[59] In addition, the tax promotion of grants and membership fees in order to promote humanitarian purposes may also be deducted under certain circumstances if such grounds are given to legal person or organisation situated in a Member State of the European Union.[60]

In addition, in the provisions on tax treatment of persons who are members of an obligatory old age insurance scheme EU citizens are equally treated if they are members in an obligatory foreign old age insurance scheme.[61]

57 Sec. 29 and 33 Bundeslaufbahnverordnung see Annex I.
58 Gesetz zur Umsetzung steuerlicher EU-Vorgaben sowie zur Änderung steuerlicher Vorschriften 2010, BGBl. 2010, p. 386.
59 See Sec. 7 para. 5, 1. sent. of the Einkommenssteuergesetz of 8.10.2009, BGBl. I, p. 3366, 3862.
60 See Sec. 10 lit. b of the Einkommensteuergesetz as amended by the law of 8.4.2010.
61 See Sec. 52 of the national income tax as amended by the law of 8.4.2010.

2.2. Specific issue: the situation of job-seekers

The diverse jurisprudence on the access of job-seeking Union citizens to job-seekers allowances under Sec. 7 para. 1, 2. sent. Social Code II has already been described in the report 2008. It is highly controversial within the German jurisprudence whether a provision excluding foreigners and their family members, including Union citizens as long as they derive their right of residence exclusively from the purpose to seek employment from job-seekers allowances under Social Code II is compatible with Union law. Some social courts have decided that access of job-seeking Union citizens to such allowances must not be denied according to EU law. The Social Appeal Court of Northrhine-Westphalia has decided that a job-seeking Union citizen having his ordinary residence in Belgium who had been entitled until the end of 2004 to unemployment benefits according to Social Code II is not entitled to job-seekers allowances under Social Code II if he is moving to Germany in order to take up employment.[62]

In general, German social law is based in all areas of the Social Code on the territoriality principle.[63] Therefore, the provisions on access to social benefits are applicable in general to persons possessing a regular residence or permanent residence within the territory of the Federal Republic of Germany. There is no distinction as to nationality. Therefore, the German law in principle is based upon the theory that access to social benefits and financial support to persons living abroad unless they are frontier workers does not fall within the scope of application of the provisions providing for social assistance in the area of general social law or promotion of taking up employment.

However, exceptions apply with regard to social security as far as the social security provisions in the Regulations 883/04 and 987/09 have to be transposed. Special provisions also apply with regard to frontier workers. Therefore, the provisions on parents allowances[64] in principle provide for a requirement for a permanent residence within the Federal Republic of Germany in accordance with Sec. 30 para. 1 of Social Code No. 1. However, since the parent allowance has to be considered as a family allowance in the sense of Regulation 1408/71. The law is applicable also to frontier workers who take up employment in Germany while maintaining a residence in another EU Member State.[65]

62 Social Appeal Court of Northrhine-Westphalia of 17.9.2009, L 9 AS 4/07, in: EuroAS 2009, p. 160; for further decisions see Hailbronner, Ansprüche nicht erwerbstätiger Unionsbürger auf gleichen Zugang zu sozialen Leistungen, in: ZFSH 4/2009, p. 195.

63 See Sec. 30 Social Code No. 1.

64 Gesetz zur Einführung des Elterngeldes v. 5.12.2006.

65 See explicitly the official reasoning for the bill, Bundestagsdrucksache 16/1889 of 20.6.2006.

Chapter V
Other Obstacles to Free Movement

No specific cases or administrative practices have been reported in the relevant timeframe.

Chapter VI
Specific Issues

1. FRONTIER WORKERS

The issue of taxation of frontier workers has been an ongoing issue in the German taxation law. There have been a number of cases before financial courts which have been described in earlier reports.

2. SPORTSMEN/SPORTSWOMEN

No new developments have taken place with regard to the rules on nationality quotas or treatment of Union citizens. I have referred in my previous report in 2008 that sports organisation do not provide detailed information on their internal rules and practices in an area which is generally considered as highly complex. There are no legal rules or instructions on the level of federal or state government concerning sports activities.

3. THE MARITIME SECTOR

There are no further administrative or legislative developments concerning the application of EU law and similar provisions on agreements with non-EU countries on equal treatment as regards employment and working conditions and in particular pay to seafarers who are EU nationals. According to the general information available, there are no differences regarding employment and working conditions including pay to EU nationals and German nationals in the maritime sector.

4. RESEARCHERS/ARTISTS

As reported earlier, the fiscal authorities of the Federal Republic and the German states generally argue that German tax rules and regulations on the level of the federation as well as on the level of the Länder with regard to taxation of researchers and artists are fully in accordance with free movement principles. European Court judgments are communicated to the tax authorities of the federation and the Länder with requests to proceed in accordance with such judgments. There are no indications from the publicly available information as well as from the legislative rules that EU researchers and artists do not have the same legal status as national researchers or artists.

5. ACCESS TO STUDY GRANTS

There is no discrimination with regard to the access of study grants of EU workers and family members. The relevant provisions of the Bundesausbildungsförderungsgesetz[66] do not make a distinction between German and EU nationals. In particular, there are no residence conditions with regard to EU citizens. The relevant provisions of the BAföG repeat basically the relevant provisions of the Union Citizens Directive granting Union citizens who have been workers before commencement of their professional training as well as their family members equal access to a study grant.

66 Sec. 8 BAföG see Annex II.

Chapter VII
Application of Transitional Measures

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

Since Germany has opted to maintain restrictions on the access of Union citizens from the EU-8 and EU-2 Member States under the accession treaties employment of workers from the new EU Member States requires in principle the issuance of an EU labour permit by the Federal Labour Agency. The legal basis on the conditions for the issuance of such permits and the procedure is laid down in Sec. 284 Social Code III, the Residence Act and various regulations, such as the Arbeitsgenehmigungsverordnung.[67]

The rules which apply with respect to the access of Union citizens from the new Member States do not distinguish between EU-8 and EU-2 Member States with the exception that special bilateral agreements providing for access to professional formation, seasonal occupation and work contracts may be applicable only for particular EU Member States. To that extent, the substantive and procedural rules may have a different scope of application.

In derogation from the general recruitment stop, the Federal Labour Agency recruits foreign workers from the new EU Member States (as well as from other countries) for a temporary, unskilled employment (exception: guest worker procedure) in the following areas:

- Seasonal work,
- Mechanical help for moving entertainment, circus etc.,
- Household assistance,
- Vacation jobs for foreign students,
- Guest worker procedure.

The guest worker procedure enables a residence permit for professional formation for trained personnel from EU Member States, Bulgaria, the Baltic EU Member States, Poland, Rumania, Slovak Republic, Slovenia, Czech Republic and Hungary. Admission of guest workers "in the framework of this programme is possible within the limits of yearly agreed quota independent of the situation of the German labour market (no priority examination).

Admission of personnel in the household is dependent upon a priority examination although experience shows that in practice no domestic labour force is available which is prepared to take up employment under the conditions granted (residence in the household of a person needing care, low remuneration, week-end labour).

Employment for vacation jobs for foreign students is limited in number. A priority examination does take place since the German labour market is supposed to be unaffected by vacation jobs of foreign students. It should be noted that the category mentioned does only apply for such students from EU Member States who take up residence exclusively for the purpose of employment in Germany.

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67 See introduction; for the instructions of the Federal Labour Agency, the regulations and instructions mentioned in the instruction accessible in German under www.arbeitsagentur.de/nn_164862/Navigation/zentral/Veroeffentlichungen/Weisungen/Arbeitgeber/Arbeitgeber-Nav.html.

With regard to seasonal work, a general rule applies whereby the number of foreign seasonal workers admitted for each enterprise is limited. At least 10 % of the demand of seasonal labour must be covered by domestic workers.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

Major legislative changes affecting the legal status of Union citizens, particularly from the EU-8 Member States and Bulgaria and Rumania have been adopted by the law on new instruments for regulating the labour market of 21 December 2008.[68] The law has introduced a number of changes facilitating the access of qualified migrants to the labour market. Based upon the law, the regulation on the conditions for granting a labour permit to Union citizens from the new EU Member States has been changed.[69] A comprehensive set of administrative instructions to apply the regulation has been adopted by the Federal Agency for Labour in November 2009.[70] Simultaneously, instructions for applying the provisions of the Residence Act with regard to the access of persons subject to a labour permit have been changed and adapted to new legislative provisions and policy decisions of the federal government on facilitated access to education and professional training, to qualified employment and to an exceptional admission to the labour market for Union citizens from new EU Member States.[71]

In addition, the regulation on exceptional granting of a labour permit[72] has also been changed. The new instructions, particularly with relevance to frontier workers from Poland and the Czech Republic have been adopted in the regulation and new implementing instructions been adopted by the Federal Agency for Labour in February 2009.[73] New instructions have also been passed with regard to seasonal workers from Poland, Rumania and Bulgaria.[74] Finally, the regulation on access to employment providing the general rules under which foreigners, who are not entitled to free movement may be granted the permission to work was substantially changed by the end of 2008,[75] following the Action Programme of the federal government.[76] New instructions were adopted in February 2009 and November 2009 which have provided a number of relevant rules for Union citizens from new Member States, particularly in the area of professional sportsmen, trainers, building and installation of

68 Gesetz zur Neuausrichtung der arbeitsmarktpolitischen Instrumente of 21.12.2008, Official Journal I, p. 2917.

69 Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer (Arbeitsgenehmigungsverordnung – ArGV) of 17.9.1998, Official Journal I, p. 2899, changed by Art. 7 para. 3 of the Law of 21.12.2008.

70 ArGV – Durchführungsanweisungen, November 2009, SP III-32-5758.1.

71 Aufenthaltsgesetz-Durchführungsanweisungen, Bundesagentur für Arbeit, November 2009, SP-III-325758.1.

72 Anwerbestoppausnahmeverordnung (ASAV) of 17.9.1998, Official Journal I, p. 2893, as amended by the law of 21.12.2008, Official Journal I, p. 2917.

73 ASAV - Durchführungsanweisungen, Bundesagentur für Arbeit, February 2009, SP-III-115758.1.

74 Saisonarbeitnehmer- und Schaustellergehilfen - Durchführungsanweisung zur zwischenstaatlichen Arbeitsvermittlung auf Grund der Vermittlungsabsprachen der Bundesagentur mit den Arbeitsverwaltungen der Herkunftsländer, Bundesagentur für Arbeit, August 2009, SP-III-115752.1.

75 Verordnung über die Zulassung von neu einreisenden Ausländern zur Ausübung einer Beschäftigung, BeschV of 22.11.2004, Official Journal I, p. 2937, as amended by the Regulation of 19.12.2008, Official Journal I, p. 2972.

76 Aktionsprogramm der Bundesregierung - Beitrag der Arbeitsmigration zur Sicherung der Fachkräftebasis in Deutschland of 16.7.2008.

pre-fabricated houses and EU working permits for personnel working in the context of bilateral work contract agreements.[77]

Special rules apply for third-country family members of citizens from EU-8 and EU-2 Member States whose nationals are entitled to freedom of movement only subject to restrictions under the interim regime. Sec. 12a (2) provides for an unlimited access to the labour market of third-country family members (Arbeitsberechtigung-EU) provided that the Union citizen is entitled to a Arbeitsberechtigung and the family member has a common household with the Union citizen in Germany. The access to the labour market is independent of the duration of the stay of the family member in Germany.[78]

77 BeschV - Durchführungsanweisungen, Bundesagentur für Arbeit, November 2009, SP-III-32-5758.1.

78 See Sec. 12a (2) Arbeitsgenehmigungsverordnung and Durchführungsanweisung no. 2.12a.210 zur Arbeitsgenehmigungsverordnung, last update: 11/2009.

Chapter VIII
Miscellaneous

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

The administrative authorities and the Federal Ministry for Labour and Social Affairs apply Regulations 1408/71 as *lex specialis* in relation to Art. 7 para. 2 of the Regulation 1612/68. Therefore, in principle as far as the Regulation 1408/71 is applicable, the Regulation 1612/68 cannot be applied. However, Art. 7 para. 2 of the Regulation 1612/68 can be applied as a general clause of the European social law covering all social benefits in a comprehensive sense.

With regard to social assistance the following principles are applicable in case of Union citizens claiming social assistance: Regulation 1408/71 is in principle not applicable in the area of social assistance according to Art. 4 para. 4. Exceptions are made for social benefits insuring basic social standards for old people and in case of partial invalidity (Leistungen der Grundsicherung im Alter und bei Erwerbsminderung). Such benefits are granted as benefits falling into the area of social assistance exclusively in the country of residence and according to the national law in the country of residence.[79] For other social assistance benefits Art. 7 para. 2 of Regulation 1612/68 is applicable whereby persons qualifying as workers receive the same amount of social assistance as German nationals. In this case equal treatment is fully applicable. No recourse needs to be made to the general clause of Sec. 23 Social Code XII regulating the access of foreigners in general to social benefits. Union citizens do not qualify as workers but are only for the purpose of job-seeking not entitled to social assistance benefits since the rules of Social Code II are applicable.[80]

With regard to the social benefits of disabled persons the rules of Social Code IX are applicable. The rules do not distinguish as to nationality. They require, however, that the respective person has its regular residence or an occupation lawfully within the Federal Republic of Germany. Cases or problems have been reported indicating a discriminatory treatment of Union citizens within the scope of application of Social Code IX.

In the area of social security of migrant workers of nationals of EU Member States the new EC Regulations 883/2004 and 987/2009 had to be transposed by 1 May 2010. Substantial amendments include:

- job-seeking benefits may be exported for the purpose of job-seeking for 2-6 months in another EU Member State
- for migrant workers seeking for a job in another EU Member State the benefits will be directly paid by the authorities responsible for granting the social benefits (rather than the authority in the country of actual residence)
- frontier workers may register in the country of residence as well as in the former country of occupation.

79 See Art. 10a in connection with Annex II A.

80 See Sec. 23 para. 3, 1. sent. Social Code XII, transposing the Union Citizens Directive 2004/38.

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

No cases or rules have been reported.

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

3.1. Integration measures

There are no special rules or administrative measures concerning EU nationals. EU nationals are exempt from the obligatory integration measures, such as integration courses and language courses. However, within the available resources they may attend such courses and other integration measures. In principle, the programmes of the German states with regard to integration policies as far as they are on a voluntary basis do not distinguish between EU nationals and third-country nationals.

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 Sec. 39, 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 duration of the examination by the Federal Labour Agency is different 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.[81]

81 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

There is no information on return of nationals to new EU Member States. Since Germany did not open up its labour market to nationals of new EU Member States, no significant return movements can be observed.

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.

5. SEMINARS, REPORTS AND ARTICLES

In a study of the Institute for Labour Market and Employment Research the migration from the EU-8 Member States to Germany has been analysed. The study comes to the conclusion that the gross-national product has been raised as a result of the enlarged EU-8 since 2004 by 0.2 %. It is envisaged that the gross-national product could be raised once again by approx. the same percentage while the negative effects to the labour market would be insignificant.[82]

82 For the study of the IAB see http://docu.iab.de/kurzber/2009/kb0909.pdf.

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.