Conformity Study for Germany
Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

milieu
ENVIRONMENTAL LAW & POLICY

THE UNIVERSITY OF EDINBURGH

This National Conformity Study has been prepared by Milieu Ltd. in consortium with the Europa Institute, Edinburgh University under Contract No JLS/2007/C4/004-30-CE-0159638/00-31. The actual conformity checking was carried out in Germany by Ludwig Krämer and Lukas Rass-Masson and was concluded on 1 August. The study does not take into account any subsequent changes in EU law and national legislation and/or administrative practice.

Milieu Ltd. (Belgium), 29 rue des Pierres, B-1000 Brussels, tel: 32 2 506 1000; Fax 32 2 514 3603; e-mail: sophie.vancauwenbergh@milieu.be; web address: www.milieu.be

ANALYSIS OF THE LEGISLATION TRANSPOSING DIRECTIVE 2004/38/EC ON FREE MOVEMENT OF UNION CITIZENS

TABLE OF CONTENTS

EXECUTIVE SUMMARY

1. Introduction

Germany consists of a central federal government and is composed of 16 federal states, the *Länder*, with their own governmental and administrative structures. The German legal system is based on codification. The German Constitution, the Basic Law (Grundgesetz), determines which issues fall within federal jurisdiction and which within the jurisdiction of the *Länder*. Each Land has its own Constitution and government. Respect of the Basic Law by all federal and regional authorities is guaranteed by the Federal Constitutional Court ("Bundesverfassungsgericht"). Federal law prevails over regional law. International, European or Community laws are superior to national law.

2. Introduction to the main particularities of the German legal system relating to the transposition of the Directive 2004/38

Measures transposing Directive 2004/38 are mainly adopted at the federal level, as exclusive legislative competence of the Federation, or as concurrent legislative competence, with the participation of the Länder in the legislative and implementation process.

Transposition is the result of the adoption of two federal laws. A first partial transposition was obtained through the adoption of the FreizügG/EU as per Article 2 of Gesetz vom 30.7.2004 (Zuwanderungsgesetz), which entered into force on 1st of January 2005. Second part of transposition is the result of the Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union of 19 August 2007, which entered into force on 28 August 2007.

Important particularities of the German legal system relating to the transposition of the Directive are on one hand the fact that Community Law terms, as *e.g.* the term "employee", which were defined by ECJ and their factual conditions, are generally presupposed and not modified by the FreizügG/EU, as precise the motivation of the law[1] and the administrative application guidance[2].

On the other hand, whenever the law uses a non-binding formulation, especially by using the term "may", this means that the competent executive administration has to take an "Ermessensentscheidung", a "discretionary decision". A specific feature of these discretionary decisions is that the administration is neither free to use this discretion, nor is limited in the use of this discretional power. On the contrary, in order to take discretional decisions, the administration has to take into account the specific factual situation and has to use its discretion in a way that conforms to legal and constitutional rules. This means that in principle, the administration has to take those decisions in conformity with Community Law, since the Constitution confers legal effect to international and European law. Furthermore, under application of the principle of equal treatment of Article 3 of the Basic Law, once the administration has used its existing discretion in a certain way, it has to act the same way for each comparable factual situation.

Legality and constitutionality of administrative acts are guaranteed by Courts. Main competent judicial authorities regarding implementation of Directive 2004/38/EC are the "Verwaltungsgerichte", administrative courts of first instance, with possibility of appeal before the "Oberverwaltungsgerichte" or the "Verwaltungsgerichtshöfe" (Administrative Courts). These courts are competent at the regional level and are bound by the rulings of the "Bundesverwaltungsgericht", the Federal Administrative

[1] Cf. Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz), 07.02.2003, Drucksache 15/420, p. 102.

[2] Cf Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 356.

Court, which ensures respect and common interpretation of Federal law. Interpretation and correct application of the Federal Constitution is the competence of the Federal Constitutional Court. Interpretation and correct application of the regional constitutions is the competence of the different constitutional courts of the Länder. European Law has to be taken in account by all Courts and can justify the non-application of national or regional laws or regulations.

3. Conclusions on the legal analysis of the transposing measures for Directive 2004/38

a. Overview of how the requirements have been transposed

Transposition is the result of the adoption of two federal laws. A first partial transposition was obtained by the adoption of the FreizügG/EU as per Article 2 of Gesetz vom 30.7.2004 (Zuwanderungsgesetz), entered into force on 1st of January 2005. It was completed by the adoption of the Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union of 19 August 2007 (Richtlinienumsetzungsgesetz), whose entry into force was 28 August 2007. The second bill could not be passed earlier due to the anticipated elections that were hold in 2005 and that interrupted the already started legislative process.

These two acts enacted or amended the three following acts, which are particularly important for purposes of transposition of Directive 2004/38/EC:

- The main transposing act is the "Gesetz über die allgemeine Freizügigkeit von Unionsbürgern" (Freizügigkeitsgesetz/EU - FreizügG/EU), - Act on the General Freedom of movement for EU Citizens - [3].
- The two other important transposing instruments are the "Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet" (Aufenthaltsgesetz – AufenthG), - Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - [4], and the "Aufenthaltsverordnung" (AufenthV), - Ordinance Governing Residence - [5].

The two acts were accompanied by particularly important administrative guidelines. These are the "Vorlaüfige Anwendungshinweise"[6] and the "Anwendungshinweise"[7]. These guidelines are especially important, because execution of the concerned federal acts is mainly a competence of authorities of the Länder. These guidelines give important indications about how the federal and regional administrations have to interpret and to apply the federal acts, but cannot guarantee a uniform application. For this reason, these administrative guidelines do not allow assessing the correctness of the transposition, but they give clear precisions on usual administrative practice.

[3] Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU - FreizügG/EU; "Freizügigkeitsgesetz/EU vom 30. Juli 2004 (BGBl. I S. 1950, 1986), zuletzt geändert durch Artikel 7 des Gesetzes vom 26. Februar 2008 (BGBl. I S. 215)»; Act on the General Freedom of movement for EU Citizens.

[4] Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG); "Aufenthaltsgesetz in der Fassung der Bekanntmachung vom 25. Februar 2008 (BGBl. I S. 162), zuletzt geändert durch Artikel 2 Abs. 3 des Gesetzes vom 13. März 2008 (BGBl. I S. 313)"; Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory.

[5] Aufenthaltsverordnung (AufenthV); "Aufenthaltsverordnung vom 25. November 2004 (BGBl. I S. 2945), zuletzt geändert durch Artikel 1 der Verordnung vom 8. Mai 2008 (BGBl. I S. 806)»; Ordinance Governing Residence.

[6] Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004.

[7] Hinweise zu den wesentlichen Änderungen durch das Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 19. August 2007 (BGBl. I S. 1970), (Hinweise zum Richtlinienumsetzungsgesetz), Stand: 02.10.2007.

b. Conformity problems and complete and accurate transposition

Requirements of Directive 2004/38 are mainly correctly transposed. This is especially the case for the most important requirements that are directly related to the right of entry or residence. Transposition is less accurate concerning procedural safeguards and related rights.

The Zuwanderungsgesetz from 2004 abolished the need of residence documents for Union citizens and provided a right of permanent residence, but only for a limited number of categories of persons.

The Richtlinienumsetzungsgesetz from 2007 extended the right of permanent residence; provided specific rules for the retention of the right of residence; adapted the definition of family members; clarified the strengthened protection from expulsion for some Union citizens and detailed the administrative proceedings, particularly in regard to the documents authorities may ask for.

However, several conformity issues do exist, due principally to ambiguous transposition. These issues concern largely the situation of family members, equal treatment of Union citizens and general provisions concerning residence documents as well as the procedural safeguards. Regarding procedural safeguards, conformity issues appear, particularly in the case of restrictions on the right of entry and the right of residence on grounds of public policy or public security.

1. transposition issues related to situation of family members

Concerning the situation of ***family members***, a first conformity issue appears regarding the definition of family members and, more specifically, registered partnerships **(Article 2(2) (b))**. Germany does indeed generally treat registered partnership as equivalent to marriage[8], but does not do so for free movement of Union citizens. There would be non-conformity if the interpretation of the Directive supposes that a Member State which treats registered partnerships in principle as equivalent to marriage, and especially in its general immigration legislation, would be compelled to treat registered partnerships as equivalent to marriage for the purpose of free movement of Union citizens.

Another more serious conformity issue concerns the ***facilitation of entry and residence for other family members and partners*** **(Articles 3(2) (a)** and **3(2) (b))**. Germany has taken no specific transposition measure, and the only existing rule gives the exceptional possibility to accord a right of residence to other family members in case of "particular hardship", which is used to grant an exceptional right of entry and residence for humanitarian purposes. Furthermore, there might only be a particular hardship for the situation where serious health grounds strictly require the personal care of the family member by the Union citizen, but this is certainly not a general facilitation of entry and residence for dependants or members of the household[9]. There is moreover, no facilitation for the partner with whom the Union citizen has a durable relationship, duly attested.

Regarding the ***right of entry for third country family members***, the requirement to grant to these family members facilities to obtain visas **(Article 5(1) second subparagraph)**, since transposition is only reflected in administrative guidelines.

2. transposition issue related to equal treatment

Concerning ***equal treatment***, there is no specific transposition of **Article 24(1)**. Equal treatment could be obtained through the application of Article 12 of the EC Treaty, which is directly applicable in

[8] See § 11 (1) LPartG and § 27 (2) AufenthG.

[9] See Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p 149-150. This administrative guideline is very stringent and indicates that "particular hardship" should be interpreted in a very restrictive way.

Germany, to which German courts can refer and that must be respected by legislative and executive authorities. German Courts are generally very respectful of the principle of non discrimination, as shows for example the frequent recourse to ECJ on interpretation issues concerning European citizenship.[10] However as there is no specific transposition, Germany has not correctly transposed the Directive. Concerning Article 24(2) however, which is probably the most important application of the principle of equal treatment and which provides an important exception to this principle, German legislation is mainly in accordance with the Directive.

3. transposition issues related to general provisions concerning residence documents

An important conformity issue in practice is related to **Article 25** of the Directive and ***the general provisions concerning residence documents***. There is indeed no direct transposing provision in the German legislation. However, no legislation has been identified requiring the possession of one of these documents as a precondition for the exercise of a right or the completion of an administrative formality. The legislation analysed included main acts and main case law relevant to this situation. However, in order to avoid any abusive administrative practice, it would be necessary to have an explicit legislative text imposing the respect of the present article. This Article is very important in practice, and there should be a clear legal indication for all authorities that possession of a registration certificate, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

4. transposition issues related to the loss of right of entry and residence

Concerning the ***loss of the right of entry and residence*** **(chapter VI and Article 14)**, German legislation is ambiguous and several conformity issues appear. Difficulties are mainly due to the fact that German legislation does not provide all specific conditions laid down by the Directive. However, a decision pronouncing the loss of the right of entry or residence is in every case a discretionary decision. This gives a certain latitude to administration, and it will be necessary to verify how the authorities use their discretionary power, and how strictly the Courts control this use in relation with the Community law restrictions.

Firstly, concerning **Article 14(2) second subparagraph** providing that ***verifications can only be carried out in specific*** cases, there is no such clear indication in German legislation that verifications can only be carried out in specific cases where there is a reasonable doubt, and that they shall not be carried out systematically. Furthermore, concerning **Article 14(3)** German legislation does not explicitly transpose the provision stating that ***recourse to social assistance shall not automatically lead to an expulsion measure***. However, there is no such explicit automatic consequence in law.

Moreover, concerning **Article 27(2)** there is no explicit legal ***prohibition of justifications that are isolated from the particular case or that rely on considerations of general prevention***, but respect of this provision should theoretically result from a correct use of the discretionary power by the administration. Lastly, concerning ***definition of serious threat*** **(Article 27(2) second subparagraph)**, German legislation does not states that the danger must be present.

[10] Cf. *e.g.* the cases *Morgan*, C-11/06, and *Bucher*, C-12/06, 23/10/2006, *Tadao Maruko*, C-267/06, 01/04/2008, *Grunkin and Paul*, C-353/06, pending, and *Huber*, C-524/06, pending.

5. transposition issues related to procedural safeguards

Another serious conformity issue concerns the ***procedural safeguards*** **(Articles 30-31 of the Directive)** guaranteed by the Directive. German legislation contains indeed several gaps in transposition. It does not clearly provide the possibility of Article 31(4) of the Directive for excluded persons to submit his/her defence in person. However, an application filled in order to contest the interim enforcement of an expulsion measure suspends interim enforcement and thus gives the concerned persons the possibility to submit his/her defence in person at least until decision on interim enforcement is taken. The court then has to take a decision about the interim enforcement in consideration of the particular interest of the individual to have a suspension of the expulsion measure on the one hand, especially in order to respect the fundamental right of effective guarantee of judicial review, and of the public interest of the interim enforcement on the other hand. Logically, this person could only be expelled pending the redress procedure when his appearance may cause serious troubles to public policy or public security.

Moreover, German legislation does not state that notification has to be taken in such a way that the concerned persons are able to comprehend its content and the implications for them, nor that the persons concerned shall be informed "in full" of the grounds on which the decision is taken, but only on "main grounds". However, German legislation clearly provides the obligation to justify all administrative acts, so that this non-conformity might seem less important.

A last conformity issue is related to the fact that German legislation does not clearly state that the redress procedure has to ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28 of the Directive.

However, concerning these procedural safeguards, it should be noted that German Courts are generally respectful of elementary procedural rights guaranteed by European or Community law, as well as by Article 19 of the Basic Law which provides the fundamental right of effective guarantee of judicial review. However, both the absence of clear legal indications, and the very common use of interim enforcement orders in practice, could constitute a non sufficient transposition.

c. Conclusions

In summary, German authorities made, in general, an accurate transposition which is respectful of the aim and spirit of the Directive. Most remaining transposition issues are due to ambiguous transpositions, which can be clarified by German Courts. Other cases of non-transpositions would only be a direct cause of infringement if federal or regional regulations or legislations or an abusive administrative practice would attempt to the rights guaranteed by the Directive. This aspect could not be attested so far. Other non-transpositions appear for those articles of the Directive which provide for "facilitation", and which can be considered as less stringent, and non-transposition might be less problematic.

i. Summary of conformity problems

The summary of conformity problems gives a quick overview of conformity problems, with exception of minor conformity issues.

1. Non conformity due to gaps or incomplete transposition

a. Non-transposition

- Article 5.4: Opportunity to obtain necessary travel documents or to corroborate or prove the right of free movement or residence in case where individual does not have the necessary travel documents.

Germany has taken no transposition measure.

- Article 8.4: Specific amount of resources.
  There is no precise definition of "sufficient resources" in German legislation, indicating specially that no fixed amount may be laid down.
- Article 17.1 (c), last paragraph: Definition of periods of employment.
  There is no definition of the term "periods of employment" in German legislation.
- Article 24.1: Equal treatment.
  There is no specific transposition measure providing equal treatment.
- Article 25.1: General provisions concerning residence documents.
  There is no legislation which provides that possession of residence documents may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.
- Article 27.3: Information concerning previous police records.
  German legislation does not transpose this Article.

b. Incomplete transposition

- Article 3(2) (a): Facilitation of entry and residence for other family members.
  This article is incompletely transposed, as Germany only provides the exceptional possibility of according a right of residence in order to avoid a particular hardship. This might cover the situation where serious health grounds strictly require the personal care of the family member by the Union citizen, but is certainly not a facilitation of entry and residence for dependants or members of the household.
- Article 3(2) (b): Facilitation of entry and residence for partners.
  This article is incompletely transposed, since Germany has no specific measure for the partner with whom the Union citizen has a durable relationship, duly attested. There could only be a very partial transposition for registered partnerships, as Germany assimilates Union citizens to Germans in this case.
- Article 3.2 (b), last paragraph: Extensive examination of personal circumstances of other family members and partners.
  Application of general administrative rules gives the authorities the obligation to examine if conditions laid down in any legislation are fulfilled, and to justify any deny of right, but do not oblige the administration to undertake an "extensive" examination of the personal circumstances. On this point the directive is not entirely transposed.
- Article 4.1: Right of exit.
  No legislation provides a right of exit, even if the only existing restriction is the obligation to hold a passport or passport substitute.
- Article 4.2: Prohibition of visa formality.
  No exit visa or equivalent formality is imposed by German legislation. However there is no disposition prohibiting the possibility of such formalities.
- Article 5.2: Facilitation to obtain visas.
  Facilitation to obtain visas is only provided by a non-public administrative guidance.
- Article 8.3, 3rd indent: Administrative formalities for students.
  Germany does not clearly prohibit that the declaration of students must not refer to any specific amount of resources, even if there is no legislation fixing a specific amount of resources.
- Article 8.5 (e) and (f): Documents Member States may require for the registration certificate to be issued to family members of Union citizens in cases falling under Article 3(2)(a) and Article 3(2)(b).
  Germany has incompletely or ambiguously transposed Articles 3(2) (a) and 3(2) (b), and does not specifically transpose Articles 8.5(e) and (f). Transposition through existing general law is incomplete.

- Article 14.2, last paragraph: Verification if conditions of freedom of movement are fulfilled.
  There is no clear indication that verifications can only be carried out in specific cases, where there is a reasonable doubt, and that they shall not be carried out systematically.
- Article 14.3: Expulsion measure and recourse to the social assistance system.
  Even if it is not certain that recourse to social assistance does automatically lead to an expulsion measure, German legislation does not provide an explicit prohibition of this situation.
- Article 21: Continuity of residence.
  There are no specific transposition measures; especially the term "continuity of residence" is not defined.
- Article 24.2: Equal treatment.
  Concerning the right of support for studies or educational training, the Directive includes persons who retain the status of workers in order to grant them benefit of this support. German legislation does not clearly apply to this category of EU-citizens. Through the principle of use of interpretation conforming to EC law, the transposition may however be correct. Otherwise, German legislation transposes correctly the Directive.
- Article 27.2, last paragraph: Definition of serious threat and prohibition of justifications that are isolated from the particular case or considerations of general prevention.
  German legislation does not specify that the danger must be present, and does not explicitly prohibit justifications that are isolated from the particular case or that rely on considerations of general prevention.
- Article 29.1: Definition of diseases justifying measures restricting freedom of movement.
  German legislation does not precisely define the term of "public health".
- Article 29.3: Medical examination.
  Germany has not used the possibility of Article 29(3) to require a medical examination.
- Article 30.1: Notification of decisions.
  German legislation does not specify that notification has to be taken in such a way that the concerned persons are able to comprehend its content and the implications for them.
- Article 30.2: Notification of decisions.
  German legislation does not specify that the persons concerned shall be informed "in full" of the grounds on which the decision is taken, but only on "main grounds".
- Article 31.3: Procedural safeguards concerning examination of the legality and the proportionality of the decision.
  German legislation does not clearly specify that the redress procedure has to ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28 of the Directive.
- Article 31.4: Possibility for an excluded person to submit its defence in person.
  German legislation does not specifically provide the possibility for excluded persons to submit its defence in person.

2. Incorrect or imprecise/ambiguous transposition

a. Incorrect transposition

- Article 7.3(a): Retention of the status of worker.
  German legislation refers to the "retention of the right of residence", whereas the Directive clearly speaks not of the right of residence but of the status of worker.
- Article 7.4: Facilitation of entry and residence for other family members of students.
  Germany facilitates entry and residence of family members other than the core family members of students in a very insufficient way, as such entry and residence requires a particular hardship.
- Article 10.2(e) and (f): Documents Member States may require for the residence card to be issued to family members of Union citizens in cases falling under Article 3(2)(a) and Article 3(2)(b).

Germany has incompletely or ambiguously transposed Articles 3(2) (a) and 3(2) (b), and does not specifically transpose Articles 8.5(e) and (f). Transposition through existing general law is incomplete.

- Article 13.2(a), (b) and (c): Retention of the right of residence in the event of divorce, annulment of marriage or termination of registered partnership.
  German transposition is incorrect, as it only refers to spouses, whereas the Directive refers to "family members".
- Article 40: Delay for transposition.
  Transposition was completed on 28th August 2007.

b. Imprecise/ambiguous transposition

- Article 2(2) (b): Definition of "partner".
  There remains a doubt as to the obligation for Germany to include the partner with whom the Union citizen has contracted a registered partnership in definition of family members. Germany does indeed generally treat registered partnership as equivalent to marriage, but does not do so for free movement of Union citizens.

SUMMARY DATASHEET

1. Transposing legislation

Transposition is the result of the adoption of two federal laws. A first partial transposition was obtained by the adoption of the FreizügG/EU as per Article 2 of Gesetz vom 30.7.2004 (Zuwanderungsgesetz), entered into force on 1st of January 2005. It was completed by the adoption of the Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union of 19 August 2007 (Richtlinienumsetzungsgesetz), who entered into force on 28 August 2007.

For purposes of transposition of Directive 2004/38, three important legislations were created or amended by those two acts:

- The main transposing act is the "Gesetz über die allgemeine Freizügigkeit von Unionsbürgern" (Freizügigkeitsgesetz/EU - FreizügG/EU), - Act on the General Freedom of movement for EU Citizens - [11].
- The two other important transposing instruments are the "Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet" (Aufenthaltsgesetz – AufenthG), - Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - [12], and the "Aufenthaltsverordnung" (AufenthV), - Ordinance Governing Residence -.[13]

Specific dispositions that are relevant for the transposition of the Directive are included in the following acts:

- Grundgesetz für die Bundesrepublik Deutschland (GG);
- Bundesgesetz über individuelle Förderung der Ausbildung (Bundesausbildungsförderungsgesetz - BAföG);
- Verordnung über die Zulassung von neueinreisenden Ausländern zur Ausübung einer Beschäftigung (Beschäftigungsverordnung - BeschV);
- Verordnung über das Verfahren und die Zulassung von im Inland lebenden Ausländern zur Ausübung einer Beschäftigung (Beschäftigungsverfahrensordnung - BeschVerfV);
- Bürgerliches Gesetzbuch (BGB);
- Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB);
- Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG);
- Gesetz über die Eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz - LPartG);
- Melderechtrahmengesetz (MRRG), in combination with regional legislation;
- Gesetz über Ordnungswidrigkeiten (OWiG); Passgesetz (PassG);
- Verordnung zur Durchführung des Passgesetzes (Passverordnung - PassV);
- Gesetz über Personalausweise (PersAuswG);
- Sozialgesetzbuch (SGB) Zweites Buch (II);
- Sozialgesetzbuch (SGB) Drittes Buch (III);

[11] Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU - FreizügG/EU; "Freizügigkeitsgesetz/EU vom 30. Juli 2004 (BGBl. I S. 1950, 1986), zuletzt geändert durch Artikel 7 des Gesetzes vom 26. Februar 2008 (BGBl. I S. 215)"; Act on the General Freedom of movement for EU Citizens.

[12] Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG); "Aufenthaltsgesetz in der Fassung der Bekanntmachung vom 25. Februar 2008 (BGBl. I S. 162), zuletzt geändert durch Artikel 2 Abs. 3 des Gesetzes vom 13. März 2008 (BGBl. I S. 313)"; Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory.

[13] Aufenthaltsverordnung (AufenthV); "Aufenthaltsverordnung vom 25. November 2004 (BGBl. I S. 2945), zuletzt geändert durch Artikel 1 der Verordnung vom 8. Mai 2008 (BGBl. I S. 806)"; Ordinance Governing Residence.

- Sozialgesetzbuch (SGB) Fünftes Buch (V);
- Sozialgesetzbuch (SGB) Achtes Buch (VIII);
- Sozialgesetzbuch (SGB) Zwölftes Buch (XII);
- Verwaltungsgerichtordnung (VwGO), in combination with regional legislation;
- and Verwaltungsverfahrensgesetz (VwVfG), in combination with regional legislation.

2. Assessment of the transposition

The following conformity issues exist for Germany. They are organized pursuant to the type of conformity issues and then presented in the order of the Directive's articles.

a) Incomplete transposition or non-transposition

i. Non-transposition

Article 5.4: Opportunity to obtain necessary travel documents or to corroborate or prove the right of free movement or residence in case where individual does not have the necessary travel documents.	There is no transposition measure.
Article 8.4: Specific amount of resources	There is no precise definition of "sufficient resources" in German legislation, indicating that no fixed amount may be laid down.
Article 17.1 (c), last paragraph: Definition of periods of employment.	There is no definition of the term "periods of employment" in German legislation.
Article 24.1: Equal treatment	There is no specific transposition measure providing equal treatment.
Article 25.1: General provisions concerning residence documents	There is no legislation providing that possession of residence documents may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.
Article 27.3: Information concerning previous police records.	German legislation does not transpose this Article.

ii. Incomplete transposition

Article 3.2 (a): Facilitation of entry and residence for other family members	This article is very incompletely transposed, as Germany only provides the exceptional possibility of according a right of residence in order to avoid a particular hardship. This might cover the situation where serious health grounds strictly require the personal care of the family member by the Union citizen, but is certainly not a facilitation of entry and residence for dependants or members of the household.
Article 3.2 (b): Facilitation of entry and residence for partners	This article is very incompletely transposed, because Germany has no specific measure for the partner with whom the Union citizen has a durable relationship, duly attested. There could only be a very partial transposition for registered partnerships, as Germany assimilates Union citizens to Germans in this case.
Article 3.2 (b), last paragraph: Extensive examination of personal circumstances of other family members and partners	Application of general administrative rules gives the authorities the obligation to examine if conditions laid down in any legislation are fulfilled, and to justify any deny of right, but do not oblige the administration to undertake an "extensive" examination of the personal

	circumstances. On this point the Directive is not entirely transposed.
Article 4.1: Right of exit	No legislation provides a right of exit, even if the only existing restriction is the obligation to hold a passport or passport substitute.
Article 4.2: Prohibition of visa formality	No exit visa or equivalent formality is imposed by German legislation. However there is no disposition prohibiting the possibility of such formalities.
Article 5.2, last paragraph: Facilitation to obtain visas	Facilitation to obtain visas is only provided by a non-public administrative guidance.
Article 8.3, 3rd indent: Administrative formalities for students	Germany does not clearly prohibit that the declaration of students has not to refer to any specific amount of resources, even if there is no legislation fixing a specific amount of resources.
Article 8.5 (e) and (f): Documents Member States may require for the registration certificate to be issued to family members of Union citizens in cases falling under Article 3(2) (a) and Article 3(2) (b).	Germany has incompletely or ambiguously transposed Articles 3(2) (a) and 3(2) (b), and does not specifically transpose Articles 8.5(e) and (f). Transposition through existing general law is incomplete.
Article 14.2, last paragraph: Verification if conditions of freedom of movement are fulfilled	There is no clear indication that verifications can only be carried out in specific cases, where is a reasonable doubt, and that they shall not be carried out systematically.
Article 14.3: Expulsion measure and recourse to the social assistance system	Even if it is not certain that recourse to social assistance does automatically lead to an expulsion measure, German legislation does not provide an explicit prohibition of this situation.
Article 21: Continuity of residence	There are no specific transposition measures. In particular, the term "continuity of residence" is not defined.
Article 24.2: Equal treatment.	Concerning the right of support for studies or educational training, the Directive includes persons who retain the status of workers in order to grant them benefit of this support. German legislation does not clearly apply to this category of EU-citizens. Through the principle of use of interpretation conforming to EC law, the transposition may however be correct. Otherwise, German legislation transposes correctly the Directive.
Article 27.2, last paragraph: Definition of serious threat and prohibition of justifications that are isolated from the particulars case or considerations of general prevention	German legislation does not explicitly precise that the danger must be present, and does not prohibit justifications that are isolated from the particular case or that rely on considerations of general prevention.
Article 29.1: Definition of diseases justifying measures restricting freedom of movement	German legislation does not precisely define the term of "public health".
Article 29.3: Medical examination.	Germany has not used the possibility of Article 29(3) to require a medical examination.
Article 30.1: Notification of decisions	German legislation does not specify that notification has to be taken in such a way that the concerned persons are able to comprehend its content and the implications for them.
Article 30.2: Notification of decisions	German legislation does not specify that the persons concerned shall be informed "in full" of the grounds on which the decision is taken, but only on "main grounds".
Article 31.3: Procedural safeguards concerning examination of the legality and the proportionality of the decision	German legislation does not clearly specify that the redress procedure has to ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28 of the Directive.

Article 31.4: Possibility for an excluded person to submit its defence in person	German legislation does not explicitly provide the possibility for excluded persons to submit its defence in person.

b) Incorrect or imprecise/ambiguous transposition

iii. Incorrect transposition

Article 7.3(a): Retention of the status of worker.	German legislation refers to the "retention of the right of residence", whereas the Directive clearly speaks not of the right of residence but of the status of worker.
Article 7.4: Facilitation of entry and residence for other family members of students	Germany facilitates entry and residence of other family members than the core family of students in a very insufficient way, as such entry and residence requires a particular hardship.
Article 10.2(e) and (f): Documents Member States may require for the residence card to be issued to family members of Union citizens in cases falling under Article 3(2)(a) and Article 3(2)(b).	Germany has incompletely or ambiguously transposed Articles 3(2)(a) and 3(2)(b), and does not specifically transpose Articles 8.5(e) and (f). Transposition through existing general law is incorrect.
Article 13.2(a), (b) and (c): Retention of the right of residence in the event of divorce, annulment of marriage or termination of registered partnership	German transposition is incorrect, as it only refers to spouses, whereas the Directive refers to "family members".
Article 40: Delay for transposition	Transposition was completed on 28th August 2007.

iv. Imprecise/ambiguous transposition

Article 2(2)(b): Definition of "partner"	There is doubt regarding the obligation of Germany to include the partner with whom the Union citizen has contracted a registered partnership in definition of family members. Germany does generally treat registered partnership as equivalent to marriage, but does not do so for free movement of Union citizens.

c) Minor instances of non-conformity

Article 5.5: Registration within three months	In general, this article is correctly transposed, but the Land of Rheinland-Pfalz requires a registration "without culpable delay", what is not with certainty "a reasonable period of time".

ABBREVIATIONS USED

- Art: article
- Cf: confer
- Abs.: Absatz (subparagraph)
- Nr.: number
- ECJ: European Court of Justice
- TEC: Treaty establishing the European Community
- BMI: Bundesministerium des Innern (Federal Ministry of Interior)

1 INTRODUCTION

This conformity study analyses in detail the provisions of Directive 2004/38/EC on the free movement of EU citizens in its consolidated version, and it compares it with the legislation in place in Germany.

Directive 2004/38/EC repealed the earlier Directives on free movement of persons (Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as from 30 April 2006.

EU citizenship gives every Union citizen the right to move and to reside freely within the territory of the Member States. The facilitation and promotion of this right, which is at the same time one of the fundamental freedoms of the internal market, is the objective of Directive 2004/38/EC. A second objective of Directive 2004/38/EC was to codify and review the various pieces of legislation and case-law dealing with this issue.

Free movement as a fundamental freedom of the internal market

Free movement is one of the fundamental freedoms of the internal market and can therefore only be restricted in a limited number of pre-determined circumstances. Thus, national legislation cannot adopt more restrictive legislation than provided for in the Directive.

Directive 2004/38/EC introduces, on the one hand, a uniform approach regarding the formalities that Member States can impose upon EU citizens residing in their territory. These formalities are expressly established in the Directive and restricted in function of the duration of the stay in the Member States.

- For a stay of less than three months, the only formality a Member State can impose is the presentation of a valid passport or national identity card.

- For residence of more than three months, a Member State can only require the EU citizen to register in the population register of the place of residence. This registration needs to be validated immediately if a certain number of conditions are complied with. The Member State can only require the EU citizen to present proof that he/she is a worker, self-employed person, student or has sufficient resources not to become a burden upon the social security system of the Member State. Member States cannot lay down a fixed amount of what they consider to be "sufficient resources", but must always take into account the personal situation of the person concerned. Family members of the EU citizen will have to present an identity document and proof of the family link to an EU citizen.

- After five years of continuous residence in a Member State, an EU citizen obtains a right to permanent residence. The host Member State shall issue a document certifying permanent residence. A permanent resident has the right to be treated equally to a national of the Member State.

On the other hand, the Directive also determines and clarifies the only acceptable reasons for restriction of the free movement of citizens by Member State authorities, namely for reasons of public order, public security and public health. (For the interpretation and conditions of such exceptions, it is important to rely upon the case-law of the Court of Justice.)

These measures guarantee a strong protection against expulsion for EU citizens who have been long-term residents in another Member State. Such measures need to be proportionate and shall always look at the personal conduct of the individual concerned which must represent a "genuine, present and

sufficiently serious threat affecting one of the fundamental interests of society". In addition, the Directive establishes some procedural safeguards in case an expulsion decision is considered.

1.1 OVERVIEW OF THE LEGAL FRAMEWORK IN GERMANY

Germany consists of a central federal government and 16 federal states, the *Länder*, with their own governmental and administrative structures. The Germany legal system is based on codification. The German Constitution, the Basic Law (Grundgesetz), determines which issues fall within federal jurisdiction and which within the jurisdiction of the *Länder*. Each Land has its own Constitution and government. Respect of the Basic Law by all federal and regional authorities is guaranteed by the Federal Constitutional Court ("Bundesverfassungsgericht").Federal law prevails on regional law. International, European or Community laws are superior to national law.

1.2 FRAMEWORK FOR TRANSPOSITION & IMPLEMENTATION OF DIRECTIVE 2004/38/EC IN GERMANY

1.2.1 Distribution of competences according to the national Constitution

Distribution of competences is mainly the result of Articles 70 to 74 of the Grundgesetz (the Basic Law). The distribution of competences was reformed in 2006, by the so called Föderalismusreform (federalism reform). The entry into force of the Act amending the Basic Law from 28th August 2006[14] was 1st September 2006.

According to Article 70 (1), the Länder shall have the right to legislate insofar as the Basic Law does not confer legislative power on the Federation. Article 70 (2) provides a distinction between exclusive and concurrent legislative powers.

Pursuant to Article 71, "on matters within the exclusive legislative power of the Federation, the Länder shall have power to legislate only when and to the extent that they are expressly authorised to do so by a federal law".

Article 72 disposes firstly that "on matters within the concurrent legislative power, the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law", and secondly that "[on specified matters] the Federation shall have the right to legislate if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest".

Concerning Directive 2004/38, there is on the one hand an exclusive legislative power of the Federation, as this matter concerns "freedom of movement, passports, matters relating to the registration of residence or domicile and to identity Cards, immigration, emigration, and extradition" (Article 73 (1) 3. GG). On the other, there is also a concurrent legislative power, as this matter concerns "the law relating to residence and establishment of aliens" (Article 74 (1) 4. GG).

Furthermore, for the implementation of Federal Laws and Federal administration, Article 83 GG disposes that "the Länder shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit". Article 84 (1) confirms this principle, by providing that in cases "where the Länder execute federal laws in their own right, they shall regulate the establishment of the authorities and their administrative procedure", but allows a derogation "in exceptional cases due to a particular need", where the Federation may rule the administrative procedure by Federal regulation

[14] *Gesetz zur Änderung des Grundgesetzes (Artikel 22, 23, 33, 52, 72, 73, 74, 74a, 75, 84, 85, 87c, 91a, 91b, 93, 98, 104a, 104b, 105, 107, 109, 125a, 125b, 125c, 143c) vom 28. August 2006.* in: BGBl. 2006 I S. 2034.

with no possibility of deviance for the Länder. Article 84 (2) authorises the Federal Government, with the consent of the Bundesrat, to issue general administrative rules.

The result of this constitutional framework for Directive 2004/38/EC is as follows:

- Immigration, emigration and extradition, are exclusive legislative power of the Federation.
- The law relating to residence and establishment of aliens is considered as rendering federal regulation necessary in the national interest, pursuant to Article 72 GG, and the Federation has very largely exercised its legislative power by enacting several laws that cover *de facto* the whole statute of aliens. As a result there is little space for regulation by the Länder[15].
- Matters relating to the registration of residence or domicile and to identity Cards has become exclusive Federal legislative power after the Föderalismusreform. For registration, a federal act is in preparation.[16] For the moment this matter is governed by a federal framework law, the Melderechtsrahmengesetz,[17] and regional law in every Land.
- Administrative proceedings and procedures are mainly covered by federal regulations, with regional regulations completing those regulations on subsidiary points. For the purpose of the transposition of Directive 2004/38/EC, federal regulations provide almost all pertinent dispositions.
- Execution of the federal law is mainly a part of the competences of the Länder. Federal authorities may however provide indications, and can control correct execution of federal law by the regional authorities.

Legality and constitutionality of administrative acts are guaranteed by Courts. Main competent judicial authorities are the "*Verwaltungsgerichte*", administrative courts of first instance, and the hierarchically superior "*Oberverwaltungsgerichte*" or "*Verwatungsgerichthöfe*" (Administrative Courts), organised in each Land with competence for this Land. These judges are bound by the rulings of the "*Bundesverwaltungsgerichts*", the Federal Administrative Court, ensuring respect and common interpretation of Federal law. Interpretation and correct application of the Federal Constitution is competence of the Federal Constitutional Court, interpretation and correct application of the regional constitutions is competence of the different constitutional courts of the Länder. International and European Law have to be taken into account by all Courts and can justify the non-application of national or regional laws or regulations.

1.2.2 General description of organisation of national authorities implementing Directive 2004/38/EC Germany

Organisation of national authorities implementing Directive 2004/38/EC in Germany is quite complicated and this sections aims to give a simple overview of German organisation.

Legal competence is in principle either an exclusive federal power, or a concurrent legislative power. This means that the federal legislation is voted by the Bundestag, the first chamber (whose members are directly elected by the German people), with in some cases the approval of the Bundesrat, the second chamber (whose members are nominated by the governments of the Länder). As execution of

[15] Cf. Dr. R. Schliedermaier, Dr. M. Wollenschläger, *Handbuch des Ausländerrechts der Bundesrepublik Deutschland*, 2007, nr. 225, p. 34-35.

[16] Cf. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Gisela Piltz, Jens Ackermann, Christian Ahrendt, weiterer Abgeordneter und der Fraktion der FDP (Drucksache 16/7205), *Stand der Reform des Melderechts sowie Einführung des Datenaustauschformats X-Meld*, Deutscher Bundestag, Drucksache 16/7383, 16. Wahlperiode, 03. 12. 2007.

[17] Melderechtrahmengesetz (MRRG); "Melderechtsrahmengesetz in der Fassung der Bekanntmachung vom 19. April 2002 (BGBl. I S. 1342), zuletzt geändert durch Artikel 26b des Gesetzes vom 20. Dezember 2007 (BGBl. I S. 3150)"; Registration Framework Law.

federal laws and administrative procedure are mainly competence of the Länder, regional parliaments have some legislative power in those areas too.

The main ministry responsible for implementation and application of the Directive 2004/38/EC is the Ministry of the Interior. This is due to the fact that each Land has its own Ministry of the Interior. This means that the Federal Ministry of the Interior (*Bundesinnenministerium*) shares its competence with the different regional ministries.[18] For correct coordination of policies, these ministries have a common conference, the "*Ständige Konferenz der Innenminister und -senatoren der Länder*", shortly the "*Innenministerkonferenz* (IMK)", conference of ministers of the interior. The federal minister of the interior participates in this conference, which is usually organised twice a year. Other ministries with powers on the implementation and application of Directive 2004/38/EC are the "*Auswätiges Amt*", the Federal Ministry of Foreign Affairs, especially for attribution of visas, and the "*Bundesministerium für Arbeit und Soziales*", the federal Ministry for Labour and Social Affairs, especially for all social rights related points of the Directive.

The main federal agencies dealing with implementation of Directive 2004/38/EC are the "*Bundesagentur für Arbeit*", the Federal Agency for Labour, which deals with some work related issues, and the "*Bundesamt für Migration und Flüchtlinge*", the Federal Agency for Migration and Refugees. Their mission relating to the implementation of the Directive is, however, limited, even if the generally annual "*Migrationsbericht*" (Migration Report) prepared by the *Bundesamt für Migration und Flüchtlinge* contains useful information about EU- migration.

Other federal authorities dealing with implementation of the Directive are mainly embassies and consulates, in coordination with Federal Ministry of the Interior, and the "*Bundespolizei*", the Federal Police, depending on Federal Ministry of the Interior, which is competent for border control.

In practical terms, the most relevant authorities (as Union citizens in most cases will have to contact these authorities) are at regional or municipal level, since execution of federal law is in principle competence of the Länder. Firstly there are the "*Meldebehörden*" (Registration Offices), or the "*Bürgerstellen*" (Citizen Offices), which are the "competent authority" where Union citizens and their family members have to register. These are also the competent authorities for Germans who have to register. Secondly, an important function is accorded to the "*Ausländerbehörden*" (Foreigners offices) which are competent for the verification of the right of residence and which generally issue the residence documents There are specific rules in the FreizügG/EU concerning the communication and coordination between those different authorities. Another significant authority is the "*Sozialamt*", Social Office, frequently named differently on municipal level, which is competent for social law related administrative proceedings.

As a result of this administrative framework, the situation is quite complex and requires a particularly accurate legal transposition in order to avoid any abusive or discriminatory administrative practice, due to regional or municipal interpretation differences.

[18] Innenministerium des Landes Baden-Württemberg, Bayerisches Staatsministerium des Innern, Senatsverwaltung für Inneres des Landes Berlin, Ministerium des Innern des Landes Brandenburg, Senator für Inneres und Sport der Freien und Hansestadt Bremen, Behörde für Inneres der Freien und Hansestadt, Hamburg, Hessisches Ministerium des Innern und für Sport, Innenministerium des Landes Mecklenburg-Vorpommern, Niedersächsisches Innenministerium, Innenministerium des Landes Nordrhein-Westfalen, Ministerium des Innern und für Sport des Landes Rheinland-Pfalz, Ministerium für Inneres und Sport des Saarlandes, Sächsisches Staatsministerium des Innern, Ministerium des Innern des Landes Sachsen-Anhalt, Innenministerium des Landes Schleswig-Holstein, Thüringer Innenministerium.

2 LEGAL ANALYSIS OF THE TRANSPOSING MEASURES FOR DIRECTIVE 2004/38/EC

The main transposing act is the "Gesetz über die allgemeine Freizügigkeit von Unionsbürgern" (Freizügigkeitsgesetz/EU - FreizügG/EU), - Act on the General Freedom of movement for EU Citizens.

The two other important transposing instruments are the "Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet" (Aufenthaltsgesetz – AufenthG), - Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory - , and the "Aufenthaltsverordnung" (AufenthV), - Ordinance Governing Residence - .

All these instruments are federal law. They are not framework laws, but in most cases the only applicable legislation. In some specific cases, regional law completes these regulations. In theory, the Länder are particularly competent in principle for the execution of federal laws in their own right. In some exceptional cases, other federal or regional regulations apply.

Transposition is the result of the adoption of two federal laws. A first partial transposition was obtained by the adoption of the FreizügG/EU as per Article 2 of Gesetz vom 30.7.2004 (Zuwanderungsgesetz), entered into force on 1st of January 2005. It was completed by the adoption of the Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union of 19 August 2007 (Richtlinienumsetzungsgesetz), whose entry into force was 28 August 2007. The second bill could not be passed earlier due to the anticipated elections that were held in 2005 and that interrupted the already started legislative process.

The second law was prepared after an evaluation of the first one. The result of this evaluation is published as "*Bericht zur Evaluierung des Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)*" , [19] and gives an indication of the problems met in practice under application of the first law and how these problems should be resolved by passing of a second law.

The *Richtlinienumsetzungsgesetz* from 2007 extended the right of permanent residence, provided specific rules for the retention of the right of residence, adapted the definition of family members, clarified the strengthened protection from expulsion for some Union citizens and detailed the administrative proceedings, particularly in regard to the documents authorities may ask for.

The intentions of these two acts demonstrate very interesting details as to how they have to be interpreted. In particular, they clearly indicate that terms used by the Directive and the national legislation, which are not defined by the national legislation, are meant to be interpreted in conformity with the Community sense of this terms.[20]

[19] Bundesministerium des Innern, *Bericht zur Evaluierung des Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)*, July 2006, available under: http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Themen/Auslaender_Fluechtlinge_Asyl/DatenundFakten/Evaluierungsbericht_zum_Zuwanderungsgesetz,templateId=raw,property=publicationFile.pdf/Evaluierungsbericht_zum_Zuwanderungsgesetz.pdf

[20] Cf. Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz), 07.02.2003, Drucksache 15/420, p. 102; and Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 356.

These two acts were accompanied by particularly important administrative guidelines. These are the "*Vorlaüfige Anwendungshinweise*"[21] and the "*Anwendungshinweise*".[22] These guidelines are particularly important, because execution of the concerned federal acts is mainly a competence of authorities of the Länder. These guidelines give important indications as to how the federal and regional administration has to interpret and to apply the federal acts, but they cannot guarantee a uniform application of its indications. For this reason, these administrative guidelines do not suffice for transposition, but they give clear precisions on usual administrative practice.

As the transposition is very recent, there is not yet much national case law, especially from higher and supreme courts ("*Oberverwaltungsgerichte*" or "*Verwatungsgerichthöfe*" and the "*Bundesverwaltungsgericht*").

2.1 Definitions, family members and beneficiaries

Definitions: the concept of family members (Article 2)

In general definitions have been correctly transposed. However two conformity issues appear concerning the definitions.

"Partner" (Article 2(2)(b))

There is ambiguity as to the obligation for Germany to consider the partner with whom the Union citizen has contracted a registered partnership as a "family member".

Germany does normally treat registered partnerships as equivalent to marriage. § 11 (1) LPartG allows exceptions to this principle. FreizügG/EU is such an exception, because definition of family members clearly does not include registered partners. However, § 27 (2) AufenthG contains a large assimilation of partnerships to marriage for the purpose of subsequent immigration of family members. For the purpose of § 4 FreizügG/EU (concerning right of residence for non-gainfully employed persons) partners have the same rights as spouses. This is another indication that German legislation considers registered partnerships as equivalent to marriages.

§ 3 (6) FreizügG/EU however, gives partners of Union citizens only the same rights as those conferred to Germans in this context, but not those conferred to spouses of Union citizens. There could be a possible infringement if the Member State considering registered partnerships as equivalent to marriage for the purpose of its national legislation (in particular its immigration legislation, but not including free movement of Union citizens) would have the obligation to consider whether registered partnerships are equivalent to marriage for the specific "Union immigration" legislation and the transposing national rules.

However, German legislation, which grants the possibility of obtaining permission of residence for registered partners of Germans, is in accordance with the ECJ Case "Florence Reed".[23] Germany does not refuse to grant this advantage to Union citizens which do not have the German nationality. Subsequent immigration of registered partners of Union citizens is highly facilitated (see analysis of transposition of Article 3(2) below for more details).

[21] Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004.
[22] Hinweise zu den wesentlichen Änderungen durch das Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 19. August 2007 (BGBl. I S. 1970), (Hinweise zum Richtlinienumsetzungsgesetz), Stand: 02.10.2007.
[23] C 59/85, 17.4.1986.

However, there are some important differences between Union citizen's spouses or partners, as the partners have to get a residence permit, and have to respond to specific integration requirements.

The term "Lebenspartner" is meant to be the one defined by § 1 (1) 1 LPartG,[24] or, according to German rules of Private International Law, any equivalent foreign partnership that is officially recognised.

German legislation is in accordance with the current interpretation of EC law. If EC law changes, however, in order to have a larger assimilation of civil partnerships to marriage, such assimilation seems appropriate in the German context, and Germany would probably have to treat registered partnerships as equivalent to marriage. The current situation in Germany also leads to a risk of discrimination.[25]

Host Member State (Article 2(3))

Germany does not clearly define the term "Host Member State". However, FreizügG/EU regulates entry into and residence in Germany of Union citizens and their family members. The territorial scope is a consequence of the absence of any precision or limitation, which means that the legislation applies to whole territory of the Germany. Providing that "Host Member State" is meant by the Directive to be Germany for German legislation, this could constitute an effective transposition.

Beneficiaries and facilitation of the right of entry and residence (Article 3)

Article 3(1), providing that the Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members (as defined in point 2 of Article 2) who accompany or join them has been correctly transposed. § 2 (1) FreizügG/EU disposes that Union citizens entitled to freedom of movement and their family members shall have the right to enter and reside in the Federal territory pursuant to the FreizügG/EU. However, there are deficiencies in the transposition of "other family members" as per Article 3(2) of the Directive.

Regarding Article 3(2)(a) on other dependants and members of the household, there is no specific transposing measure. However, under general immigration legislation, § 36 (2) AufenthG gives German authorities the possibility to grant a residence permit in some specific cases. This decision is a discretionary decision (Ermessensentscheidung). The authorities should consider European law in order to correctly take such decisions. However, it will have to be checked whether in light of § 36 entry and residence are really facilitated or not, and if § 36 so is a sufficient transposition of Article 3.3(a). The conditions laid down in this rule are, however, very strict ("particular hardship") and first interpretation guidance of federal Ministry does not contain any specific facilitation for Union-citizens. The facts that § 36 (2) AufenthG is extremely restrictive, and that there is no specific facilitation for Union citizens family members lead to a non transposition of Article 3(2). § 36 may apply in cases where "serious health grounds strictly require the personal care of the family member by the Union citizen", but logically cannot apply to family members who simply are "dependants or members of the household of the Union citizen having the primary right of residence", because this last case is not a "particular hardship". This disposition is motivated by humanitarian reasons, and not the idea of facilitation of entry and residence of persons mentioned in Article 3(2).

Regarding Article 3(2)(b) on durable relationships, there is no specific or general rule applying to durable relationships (other than registered partnerships), in order to facilitate entry and residence. For registered partnerships, as far as this Article is meant to apply (because Germany does not consider them as equivalent to marriage) the situation is as follows:

[24] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 361.
[25] See the ECJ case *Tadao Maruko,* C-267/06.

§ 3 (6) does not cover all categories of Union citizens. The following categories are not covered: partners of non-economically active Union citizens (§ 2 (2) 5. FreizügG/EU) and partners of citizens who have acquired the right of permanent residence (§ 2 (2) 5 FreizügG/EU; unless in this last case they still meet one of the conditions laid down in § 2 (2), nos. 1 to 4, in which case those partners are still covered by § 3(6) FreizügG/EU). For partners of non-economically active Union citizens, § 4 provides a right of residence as long as they have sufficient resources and sufficient sickness insurance, with no distinction drawn between third country nationals and family members who are nationals of a Member State.

All other categories of Union citizens (workers, jobseekers, persons on vocational training, self-employed persons, service providers and Union citizens as the recipients of services) are assimilated to Germans. This way Germany facilitates entry and residence of those citizens' partners (including third country nationals). However, this disposition only applies to registered partnerships, because the term "Lebenspartner" is as as defined by § 1 (1) 1 LPartG, or any equivalent foreign partnership that is officially recognised.

As a consequence, other types of durable relationships (registered partnerships not officially recognised, unregistered partnerships, etc.) are not covered by the German legislation and there is no facilitation. The general rules on immigration will apply. Therefore, the German transposition is incomplete.

Regarding the obligation for Germany to undertake an extensive examination of the personal circumstances and to justify any denial of entry or residence to these people under Article 3.2, second subparagraph, this obligation has not entirely been transposed. Application of general administrative rules (especially §§ 37 and 39 VwVfG) gives the authorities the obligation to examine whether conditions laid down in any legislation are fulfilled, and to justify any denial of right. These obligations concern only written or electronic administrative acts. As however, pursuant to § 37 (2) VwVfG, a verbal administrative act must be confirmed in writing or electronically when there is justified interest that this should be done and the person affected requests this immediately. This conformity issue seems minor. The examination of "particular hardship" leads to an examination of personal circumstances. German authorities therefore would have to examine personal circumstances and justify any denial of entry or residence. As the decision is a discretionary decision, administration has to undertake an examination of the personal circumstances. However, application of general administrative rules does not oblige the administration to undertake an "extensive" examination of the personal circumstances. Use of discretionary power is indeed possible even without an "extensive" examination of the circumstances. A quick examination might be sufficient. As the Directive insists on the necessity of an "extensive" examination, it would be necessary in the German context to foresee explicitly a legal obligation for administration to proceed to such an "extensive" examination. On this point the Directive is not completely transposed. Furthermore German legislation does not cover all cases under Article 3(2), especially for partners with whom the Union citizen has a durable relationship, duly attested, but that is not officially recognised.

2.2 Rights of exit and entry (Articles 4-5)

Right of exit (Article 4)

Two conformity issues can be observed. They are both due to the fact that Germany does not explicitly provide the rights guaranteed by the Directive. However the Directive may implicitly be transposed, as there are apparently no national measures violating Article 4.

Under Article 4(1), providing the right to leave the territory of a Member State to travel to another Member State, there is no specific transposition measure in German law.

However, the only restriction under German law regarding the right of exit is the obligation to hold a passport or passport substitute. For Union citizens and their family members this is consequence of § 8 FreizügG/EU. For Germans it is a consequence of § 1 PassG, in combination with Article 2 GG (free development of personality). No restrictions have been established in other legislation. Case Law recognises this right in reference to constitutional provisions.[26] This situation could be considered as a correct transposition of the Directive, especially by using an *a contrario* argument. This right can indeed only be restricted by legal provisions. However there is no legislation providing explicitly a right of exit, and transposition would only come from general constitutional provisions or case law. This seems insufficient considering the fact that Article 4(1) of the Directive creates a right for Union citizens. This right should explicitly be recognized by German legislation. Therefore, Article 4.1 is not correctly transposed.

Under Article 4(2), providing that no exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies, there is no specific transposition measure in German legislation.

No exit visa or equivalent formality is imposed by German legislation. However, there is no disposition prohibiting the possibility of such formalities. This situation could be considered as a correct transposition of the directive, especially by using an *a contrario* argument. The situation is the same for family members having the nationality of a Member State and third country nationals.

Right of entry (Article 5)

Article 5(1) provides a right of entry for Union citizens and first sub-paragraph of Article 5(2) providing a right of entry for family members of Union citizens who are not nationals of a Member State, which are the most important provisions about the right of entry, are correctly transposed . However the following Articles are either incorrectly transposed or not transposed at all.

Under Article 5(2), second sub-paragraph:

The facilitations to obtain the necessary visas are apparently indicated in the "Visumhandbuch" of 10.11.2006, which provides that during the procedure concerning the issuance of a visa for third country national family members of Union citizens the embassies and consulates shall grant such persons every facility to obtain the necessary visas. The family members shall be advised first, especially about the visa requirement and the necessary documents. In the context of the local conditions their applications shall be immediately accepted, verified and decided. This "Visumhandbuch" is an administrative guidance common to the Ministry of the Interior and the Ministry of Foreign Affairs. However this guidance is not public. So, even if this edict contains measures in order to grants facilities to obtaining the necessary visas, it could not be a correct transposition, because administration cannot be forced to respect this "Visumhandbuch" and because this "Visumhandbuch" can be very easily modified by the administration. Only the obligation to issue visas free of charges is clearly transposed.

[26] See *e.g.* Bundesverwaltungsgericht (BVerwG), Urteil vom 25. 7. 2007 - 6 C 39. 06.

Under Article 5(3) providing that the host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State and providing that they present the residence card provided for in Article 10 of the Directive, transposition only results from administrative guidance. This guidance is the "Merkblatt der Bundespolizeidirektion vom 13.10.2006 über die Verpflichtung zum systematischen Abstempeln der Reisedokumente von Drittausländern beim Überschreiten der Außengrenze unter Berücksichtigung der VO (EG) Nr. 562/2006". It indicates that a stamp mark shall not be placed on the border crossing papers of: a) Union citizen as well as citizen of Norway, Iceland, Lichtenstein and Switzerland, b) Third country nationals, who exercise the so-called derived right of free movement, by accompanying or joining as family members a national of under 2a specified countries and present a residence document of an under 2a specified state or the residence card pursuant to article 10 of the Directive 2004/38/EG. There is no legal or otherwise binding rule that transposes this point. By using an *a contrario* argument however, Regulation 562/2006 is a sufficient transposition measure.

Under Article 5(4), providing that where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence. But here is no rule that provides the possibility provided for in this Article. German authorities do refer to the fact that the Federal police already provide this opportunity. However, the opportunity is a right given to Union citizens and their family members by the Directive which is not sufficiently ensured by this practice.

Under Article 5(5) providing that the Member State may require the person concerned to report his/ her presence within its territory within a reasonable and non-discriminatory period of time, transposition is not absolutely complete.

§§11 and 16 MRRG concerning registration about general obligations to register and special obligation to register in hotels, hospitals, nursing homes and similar facilities are completed for the moment by Länderrecht, *i.e.* at the regional level. As a result of the federal system's reform, a National law should is in preparation[27]. The period to register is generally from one to two weeks, with exception of Rhineland-Palatinate, where it has to be unverzüglich", what means "without culpable

[27] Cf. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Gisela Piltz, Jens Ackermann, Christian Ahrendt, weiterer Abgeordneter und der Fraktion der FDP (Drucksache 16/7205), *Stand der Reform des Melderechts sowie Einführung des Datenaustauschformats X-Meld*, Deutscher Bundestag, Drucksache 16/7383, 16. Wahlperiode, 03. 12. 2007.

delay"[28]. The sanction is generally a fine of 500€, 1000€ in North Rhine Westphalia, and 2500€ in Saxony-Anhalt. Bavaria, Hamburg and Hesse do not fix a maximum amount, what means in application of § 17 OWiG, the maximum fine is 1000€. In every case the sanction is the same for Germans as for foreigners. If the offence is due to negligence, and is not intentional, the fine is maximum the half of the fixed amount. All these registered requirements and sanctions are non-discriminatory. However, sanctions can seem disproportionate. The only possible minor infringement is due to the situation in Rheinland-Pfalz, where the registration must be done "without culpable delay". However, as a new national legislation is in preparation, it will be important to check if the new legislation is in accordance with the Directive. Information that has to be provided during this registration is information about identification of personal identity and proof of the new habitation. Identical information is required from Germans and Union citizens for this registration.

2.3 Right of residence

2.3.1 Right of residence for up to three months (Article 6)

Article 6 grants an initial right of residence for up to three months without any conditions except holding a valid identity card or passport.

[28] Table concerning delay for registration and sanctions:

Baden-Würtemberg:	§ 15 MG, BW: 1 Wo; § 36: 500€	§ 15 MG, BW: 1 Week; § 36: 500€
Bayern:	§ 13 MeldeG, BY: 1 Wo § 35: „mit Geldbuße …"	§ 13 MeldeG, BY: 1 Week § 35: „with a fine …"
Berlin:	§ 11 MeldeG, BE: 2 Wo; § 30: 500€	§ 11 MeldeG, BE: 2 Weeks; § 30: 500€
Brandenburg:	§ 12 BbgMeldeG, BB: 2 Wo; § 34: 500€	§ 12 BbgMeldeG, BB: 2 Week; § 34: 500€
Bremen:	§ 13 MG, HB: 2 Wo; § 35: 500 €	§ 13 MG, HB: 2 Weeks; § 35: 500 €
Hamburg:	§ 12 HmbMG, HH: 1 Wo; § 36: „Geldbuße"	§ 12 HmbMG, HH: 1 Week; § 36: „fine"
Hessen:	§ 13 HMG, HE: 1 Wo; § 38: „Geldbuße"	§: 13 HMG, HE: 1 Week; § 38: „fine"
Mecklenburg-Vorpommern:	§ 13 LMG, MV: 1 Wo; § 37: 500 €	§ 13 LMG, MV: 1 Week; § 37: 500 €
Niedersachsen:	§ 9 NMG, NI: 1Wo; §§ 37,38: 500€	§ 9 NMG, NI: 1Week; §§ 37,38 500€
Nordrhein-Westfalen:	§ 13 MG NRW : 1 Wo.; § 37: 1000€	§ 13 MG NRW : 1 Week.; § 37: 1000€
Rheinland-Pfalz:	§ 13 MG, RP: unverzüglich; § 36: 500€	§ 13 MG, RP: without culpable delay; § 36: 500€
Saarland:	§ 13 MG, SL: 1 Wo; § 39: 500€	§ 13 MG, SL: 1 Week; § 39: 500€
Sachsen:	§ 10 SächsMG, SN: 2 Wo; § 35: 500€	§ 10 SächsMG, SN: 2 Weeks; § 35: 500€
Sachsen-Anhalt:	§ 9 MG LSA, ST: 1 Wo; § 37: 2500€	§ 9 MG LSA, ST: 1 Week; § 37: 2500€
Schleswig-Holst:ein:	§ 11 LMG, SH: 2 Wo; § 31: 500€	§ 11 LMG, SH: 2 Weeks; § 31: 500€
Thüringen:	§ 13 ThürMeldeG94, TH: 1 Wo; § 34: 500€	§ 13 ThürMeldeG94, TH: 1 Week; § 34: 500€

Article 6 is correctly transposed by §§ 2 (5) 1 and 2 FreizügG/EU which provide that for a residence by Union citizens of up to three months, the possession of a valid identity card or passport shall be sufficient and that Family members who are not Union citizens shall have the same right where they are in possession of a recognised or otherwise approved passport or passport substitute and where they accompany or join the Union citizen.

Concerning jobseekers, § 2 (2) no. 1 FreizügG/EU provides the right of residence for more than three months to jobseekers, as well as to workers or persons on vocational training. This means that EU citizens who can justify that they are jobseekers have the right of residence for more than three months in Germany.

2.3.2 Right of residence for more than three months (Article 7-13)

(a) General conditions under Article 7

Article 7 providing a right of residence for more than three months is mainly correctly transposed by § 2 (2) FreizügG/EU, which provides a right of freedom of movement for:
1. Union citizens who wish to reside in the Federal territory as employees or for the purposes of seeking employment or carrying out vocational training;
2. Union citizens who are entitled to pursue an independent economic activity (established self-employed persons);
3. Union citizens who, without taking up residence in the Federal territory, wish to render services as self-employed persons pursuant to Article 50 of the Treaty establishing the European Community (service providers), provided that they are entitled to provide the services concerned;
4. Union citizens as the recipients of services;
5. Non-economically active Union citizens, subject to the requirements of § 4, (1 Non-economically active Union citizens, their family members and partners in life who accompany or join the Union citizen shall possess the right pursuant to § 2) if they have sufficient sickness insurance cover and sufficient resources.);
6. Family members, subject to the requirements of §§ 3 and 4;
7. Union citizens and their family members who have acquired the right of permanent residence.

A first conformity issue appears in relation with Article 7(3)(a), as the German act refers to the "retention of the right of residence", whereas the Directive clearly speaks not of the right of residence but of the status of worker. For this reason, Transposition appears for be incorrect. All specific protections linked to the status of worker are, however, effectively guaranteed by German legislation, and especially the protection from expulsion, as expulsion is possible only if the right of entry or residence is lost. Otherwise, the legislation concerns "reduction of earning capacity". This applies certainly to the case of a person "temporarily unable to work", but even in the case of a person who, without being totally unable to work, has a loss of income due to an illness or an accident, or who is unable to have a full-time economic activity. On this point transposition is correct.

A second conformity issue concerns Article 7(4), limiting the scope of family members of students and providing application of Article 3(2) for the other family members. However, this conformity issue is, in fact, a consequence of the non-transposition of Article 3(2). Concerning the first part of Article 7(4), Germany provides the same restrictions as those provided for by the Directive. For second part, there is no transposing provision. This means that the transposition could only come from § 36 (2) AufenthG, with same critics as those under Article 3(2)(a) (cf. *supra*). Second part of Article 7.4 is consequently not transposed, as § 36 (2) AufenthG is not a sufficient transposition of Article 3(2).

(b) Administrative formalities for Union citizens (Article 8)

Articles 8(1) and 8(2) are correctly transposed, even if the German system is particular. In order to avoid too many administrative procedures for Union citizens and competent authorities, the only registration for Union citizens is the general registration as under Article 5(5). This registration is the only strictly necessary registration. For a residence longer than three months, the competent authority can simply ask the Union citizen to accredit that he fulfils the residence requirements. This does not mean that there is a need of a second registration. Furthermore, the information and documents required for substantiation can be produced during the first registration. This means that the EU citizen has to register within up to two weeks, under the same conditions as German nationals. This first registration is limited to the reporting of the EU citizen's presence (see Article 5(5) for more details). There is no obligation to produce specific documents attesting the right of residence if the period of residence is longer than three months at this moment. Identity and nationality of the EU citizens are, however, known by the competent authority after this first registration. If the EU citizens resides more than three months, the competent foreigners' authority may require the EU citizen to produce the documents attesting his/her right of residence within three months after his/her arrival in Germany. Thus, there is no second registration, but instead, verification whether the EU citizen fulfils the requirements of his/her right of residence. If requested, the deadline for the response to this verification, which is meant to be (quasi-)systematic, is three months after arrival in Germany. This verification can be avoided by the EU citizen if he/she produces the necessary documents with his/her first registration. Otherwise he/she will have to produce those documents upon request of the competent authority within the three months deadline after his/her arrival.

The deadline of three months set out in Article 8(2) is respected by the period of three months in which requirements must be substantiated. Deadline for registration is indeed one or two weeks, as for nationals. Another registration is not necessary, in order to avoid too many administrative procedures for Union citizens. Particular requirements for Union citizens (i.e. proof of meeting the condition) that do not exist for Germans can be produced during a period of three months. On the first registration, only the same documents as for Germans are required (especially ID card and proof of the residence). A registration certificate is issued immediately pursuant to § 5(1) FreizügG/EU. As there is no particular registration for Union citizens and their family members, there are no specific sanctions for non-respect of such an obligation. However general sanctions for non-respect of registration obligation apply as under Article 5.5. As far as EU law provides an exception for jobseekers not to report presence necessarily during the first three months of residence, Germany does not correctly transpose this point, as there is no exception in German law for the registration of jobseekers.

Concerning Articles 8(3), 8(4) and 8(5), the transposition is not complete.

Under Article 8(3) about the documents the competent authority may require, transposition is almost complete, as Germany only requires a valid identity card or passport, and where appropriate, confirmation of engagement from the employer or a certificate of employment, proof of the independent economic activity, proof of sufficient sickness insurance cover and sufficient resources, or substantiation of these last conditions for students presenting confirmation that he or she is attending a college of higher education or another educational establishment in the Federal territory.

Students do not have to bring the proof of the fulfilment of the condition of sufficient resources and sickness insurance. They are only required to accredit the fact that they are fulfilling those conditions. A declaration would generally be sufficient even if there is no further definition of how the fulfilment of the conditions can be accredited. For the fulfilment of the condition of sufficient resources, a declaration is considered as sufficient by the administrative practice, and has not to refer to a specific

amount of resources.[29] There is however, no clear prohibition of the requirement to refer to any specific amount of resources in the declaration. This article is only partially transposed

Under Article 8(4) providing that Member States may not lay down a fixed amount which they regard as "sufficient resources", but must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State, there is no disposition providing that an authority should not lay down a fixed amount which it regards as sufficient resources.

However, there is no longer any specific amount of resources that is considered sufficient by law. This was the case with § 8 (3) 1 Freizügigkeitsverordnung/EG, but this Article has been abolished. Administrative practice clearly gives the obligation of an examination of personal situation.[30] It also makes clear that this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance.[31] In Germany, this amount depends on regional factors, and so is different from one Land to another.[32]

Furthermore, the fact that there is no precise definition of "sufficient resources" means that Germany refers on this point to Community interpretation. However as there is no clear disposition, there is no sufficient transposition.

There are no specific transposition measures on Article 8(5)(e) and (f) relating to the documents Member States may require for the registration certificate to be issued to family members of Union citizens in cases falling under Article 3(2)(a) and Article 3(2)(b). This is a logical consequence of the fact that there are no specific transposition measures for Article 3(2)(a) and 3(2)(b) (cf. *supra*). Otherwise, Article 8(5) concerning the documents Member States may require for the registration certificate to be issued to family members of Union citizens is correctly transposed by Germany, as Germany only requires a recognised or otherwise approved passport or passport substitute, and where appropriate proof of the family relationship, proof of the existence of the registered partnership, and the registration certificate of the Union citizen whom the family members are accompanying or joining.

(c) Family members who are not nationals of a Member State (Articles 9-11)

- **Administrative formalities (Article 9)**

Article 9(1) provides that a Member State shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months. This provision is correctly transposed by § 5 (2) FreizügG/EU disposing that family members entitled to freedom of movement who are not Union citizens shall be issued with a Residence card of a family member of a Union citizen. For a residence of less than three month, a residence card is not required – but they will have to register under 5.5 (See above under Article 8).

[29] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 365.
[30] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 362.
[31] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 362.
[32] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 362.

The deadline for submitting the residence card application of not less than three months from the date of arrival, provided by Article 9(2) of the Directive is respected by the period of three months in which requirements must be substantiated (See above under Article 8).

Concerning Article 9(3) about possible sanctions for failure to comply with the requirements to apply for a residence card, as there is no particular registration for Union citizens and their family members, there are no specific sanctions for non-respect of such an obligation. However general sanctions of non-respect of register obligation apply as under Article 5.5 (cf. *supra* Article 5.5).

- **Issue of residence cards (Article 10)**

Overall, Article 10 providing that the right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application, that certificate of application for the residence card shall be issued immediately. As regards documents that may be required by the Member State for the issuance of this residence card, is mainly correctly transposed. This transposition results from § 5 (2) FreizügG/EU, providing that family members entitled to freedom of movement who are not Union citizens shall be issued with a Residence card of a family member of a Union citizen that shall be valid five years ex officio within six months of said family members furnishing the necessary information. Also, the family member shall immediately receive a certificate that the necessary information has been furnished. The transposition is correct, as the terms "submit the application" in the Directive mean that the applicant should have furnished all necessary documents to the authorities so that they are enabled to consider the application. Thus, Germany has correctly transposed this Article, as German legislation provides that the residence card shall be issued within 6 months from "submission of the relevant information". A certificate that the necessary information has been furnished is delivered immediately.

Conformity issues concern Article 10(2)(e) and (f), as a consequence of the non-transposition of articles 3(2)(a) and (b). There are indeed no specific transposition measures on these points. This is a logical consequence of the fact there are no specific transposition measures for Article 3(2)(a) and 3(2)(b) (cf. *supra*). Concerning Article 10(2)(e), AufenthG applies, and especially § 82 (1) AufenthG which provides a general obligation for the foreigner to produce all required documents and evidence which are necessary in order to correctly assess his/her demands. Thus, the foreigner has to prove his/her family links and the circumstances justifying that his residence is necessary to avoid a particular hardship. § 82 (1) AufenthG is comprehensive enough to include the documents required under Article 10(2)(e). Under the Residence Act however, the competent authorities may ask for all necessary documents, without any limitation of the type of documents authorities may ask for. This means that they can ask for more documents, and that transposition is not correct on this point.

Otherwise Article 10(2) about the documents Member States may require for the residence card to be issued to third country nationals family members of Union citizens is correctly transposed by Germany. Germany only requires a recognised or otherwise approved passport or passport substitute, and where appropriate proof of the family relationship, proof of the existence of the registered partnership, and the registration certificate of the Union citizen whom the family members are accompanying or joining.

- **Validity of residence cards (Article 11)**

Article 11 providing that the residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years and that the validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member

State or a third country is correctly transposed by § 5(2) FreizügG/EU in application of which the general validity of the residence card is five years. However, there are exceptions, due to the fact that the validity shall ("soll") be five years. This means that in justified cases, the validity period can be different. This is specifically the case if the envisaged period of residence of the Union citizen is less than five years,[33] and administrative guidelines take this specific situation into account.[34] § 5(5) FreizügG/EU transposes correctly all exceptions.

Concerning temporary absence not exceeding six months a year, Germany provides that continuous residence, and hereby the right of residence and the validity of the residence card (since these are linked under the German provision), are not affected by an absence not exceeding six month a year. This absence does not necessarily have to be temporary. Concerning absence due to military service, Germany provides that validity of the residence card is not affected by an absence, without limitation of duration, for the purpose of military service or alternative community service. Concerning absence of a maximum of 12 consecutive months for important reasons, Germany provides this exception and the list of examples laid down in the directives. Those examples are literally or very closely transposed by use of synonyms ("Niederkunft" = "Entbindung" = childbirth). In case of posting in another country, there is no distinction between Member States or third countries, so that this exception applies in both cases.

(d) Retention of the right of residence by family members in the event of death, departure, divorces, annulment or termination of partnership

- **Retention of the right of residence in the event of death or departure of the Union citizen (Article 12)**

Article 12 is correctly transposed. Concerning Article 12(1), since this article does not confer any specific rights to family members who are nationals of a Member State and who have to meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1) transposition of this article results from transposition measures for Article 7(1) (*cf. supra* for more details).Concerning Article 12(2), providing that the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death, transposition results from § 3(3) FreizügG/EU which provides the retention of the right of residence in case of death of the Union citizen if the family member have been residing as family member for at least one year and, pursuant to second subparagraph of Article 12(2), fulfils the conditions laid down for Union citizens. However, if the family member does not fulfil those conditions, but is a family member of another Union citizen residing in Germany, he can derives his right of residence from this Union citizen's right of residence in application of § 2 (2) 6. This could be a possible minor transposition issue, because in this case the German law will be establishing that the right of residence is a derived right whereas the Directive states that "such family members shall retain the right on a personal basis" even in this particular case. Furthermore, there is no definition of "sufficient resources", explanations under Article 8(4) apply mutatis mutandis.

The requirement that such family members shall retain their right of residence exclusively on a personal basis is correctly transposed by §(3)2 FreizügG/EU providing that § 3 (1) and (2) (concerning right of residence of family members) does not apply to such family members. This means that those family members cannot be accompanied or joined by other family members pursuant to FreizügG/EU,

[33] Cf. Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz), 07.02.2003, Drucksache 15/420, p. 104

[34] Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 365.

but only pursuant to AufenthG (general immigration rules). Consequently, such family members retain their right of residence exclusively on a personal basis.

Article 12(3) states that the Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality. However, this is only the case if the children reside in the host Member State and are enrolled at an educational establishment for the purpose of studying there until the completion of their studies. This is transposed by § 3 (4) FreizügG/EU, which conforms to Article 12.3. The only difference is that the Directives uses the term "enrolled" ("eingeschrieben") at an educational establishment, whereas the German legislation uses the term "attend" ("besuchen") an educational establishment, what means that the children not only has to be enrolled, but must actually attend the educational establishment. Practically there is no real difference, because the proof that he or she is attending an educational establishment is provided by a certificate of enrolment issued by the educational establishment.[35] However, German formulation gives the possibility to avoid fraud. For all this reasons, the transposition seems correct.

- **Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership (Article 13)**

Article 13 is mainly correctly transposed. Concerning Article 13(1), this article does not confer any specific right to family members who are nationals of a Member State and who have to meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1) transposition of this article results from transposition measures for Article 7(1) (*cf. supra* for more details).

Concerning Article 13(2) providing that divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State a first conformity issue appears. German transposition is incorrect, as it only refers to spouses, whereas the Directives refers to "family members". Therefore, German legislation is more restrictive than the Directive. Concerning the different specific conditions, German transposition is correct.

Under Article 13(2)(a) providing the condition that prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State, § 3 (5) 1 1. FreizügG/EU transposes correctly both delays.

Under Article 13(2)(b) providing the condition that by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children, § 3 (5) 1 2. FreizügG/EU provides the condition that the spouse has been allocated parental custody of the Union citizen's children by virtue of an agreement between the spouses or by a court order. This is mainly a correct transposition, but as it only refers to spouses, whereas the Directives refers to "family members", German legislation is more restrictive than the Directive and German transposition incorrect.

Under Article 13(2)(c) providing the condition that retention of right of residence is warranted by particularly difficult circumstances, such as having been a victim of domestic violence during the marriage or registered partnership, § 3 (5) 1 3. FreizügG/EU provides the condition that such retention is necessary in order to avoid special hardship, particularly because the spouse cannot be expected to continue the marriage due to the infringement of his or her legitimate interests. The German formulation gives the possibility of retention of the right of residence in specific circumstances. Furthermore, the general formulation of §3 (5) 1 3 certainly includes the example provided in the

[35] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 365.

Directive. German legislation does, however, apply exclusively to the spouse, and not to all family members. This is a case of incorrect transposition.

Under Article 13(2)(d) providing the condition that by agreement between the spouses or partners referred to in point 2 (b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required. § 3 (5) 1 4. FreizügG/EU envisages the situation whereby the spouse has been granted the right of access to the minor child in the Federal territory only, by virtue of an agreement between the spouses or by a court ruling. Thus, if the right to access the minor child is granted under the condition that this access must only be in the Federal territory, so the spouse who is not Union citizen retains his right of residence. The limitation can be a result of a court order (as in the Directive) or of an agreement between the spouses. There is no explicit transposition of the condition of "for as long as required", but this condition is implicitly transposed, as the right of access to the minor child in the only Federal territory is a limitation of personal freedom that can be imposed only "as long as is required".

Pursuant to Article 13(2) second subparagraph, the spouse always has to meet the conditions applicable to Union citizens. Furthermore, concerning Article 13(2) last subparagraph, stating that such family members shall retain their right of residence exclusively on a personal basis, is correctly transposed by §(3)2 FreizügG/EU, providing that § 3 (1) and (2) (concerning right of residence of family members) does not apply to such family members. This means that those family members cannot be accompanied or joined by other family members pursuant to FreizügG/EU, but only pursuant to AufenthG (general immigration rules). This means that such family members retain their right of residence exclusively on a personal basis.

FreizügG defines itself the term of family members, and only refers to relatives, ("Verwandte" = §1589 BGB), but not to family-in-law ("Schwäger" = §1590 BGB). Thus, § 1590 remains without interest for the application of the FreizügG, and especially § 1590 (2), setting forth that affinity remains after termination of the marriage, does not apply.

2.3.3 Retention of the right of residence (Article 14) and Article 15(2))

(a) General aspects

Conformity issues concern Article 14(2) and 14(3). Article 14(1) providing that Union citizens and their family members shall have the right of residence provided for in Article 6 (residence for up to three month), as long as they do not become an unreasonable burden on the social assistance system of the host Member State, is correctly transposed as the only condition for a residence of up to three months pursuant to § 2 (5) FreizügG/EU is the possession of a valid identity card or passport. There is no other limitation of this right of residence, with exception of those provided under chapter VI of the Directive. This means that this right cannot be restricted by the use of the German social assistance system. Furthermore, the access to the social assistance system is restricted in a way that makes it very improbable that Union citizen or their family members could become an unreasonable burden during a stay of up to three months.

Article 14(2) states that Union citizens and their family Members shall have the right of residence provided for in Articles 7, 12 and 13, as long as they meet the conditions set out therein. Moreover, in those specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically. This Article is incompletely transposed in the last part

Concerning the first subparagraph, § 5 (5) FreizügG/EU provides that should the requirements pertaining to the entitlement pursuant to § 2 (1) cease to be met within five years of the person concerned establishing permanent residence in the Federal territory, the loss of the entitlement pursuant to § 2 (1) may be declared. Consequently, the certificate confirming the right of residence under Community law withdrawn and the residence card revoked. This is a correct transposition, as the loss of the right of residence pursuant to § 2 (1), that contains the right of residence provided for in articles 7, 12 and 13, can only be declared, apart from exceptions pursuant to chapter VI, when the requirements of this right are no longer met. This conforms to the Directive. As long as Union citizens and their family members meet the conditions set out in § 2 (1), the loss of the right of residence cannot be declared, and the right of residence is necessarily maintained. Even if the conditions are not met, the withdrawal is not automatic as the loss of right only "may be declared".

Concerning the second subparagraph, the term "special circumstances" used by German legislation is broader than the term "specific cases where there is a reasonable doubt" used by Article 14(2) second subparagraph. For this reason, German legislation does not entirely transpose the Directive. The Directive clearly indicates a more stringent condition for the possibility of verification than the condition used by German legislation. Furthermore the administrative guideline indicates that those circumstances apply especially when an unemployed Union citizen or his family members have recourse to the social assistance system.[36] In such a situation it could seem appropriate to consider that there is a reasonable doubt as to whether the condition of sufficient resources is fulfilled. Recourse to the social assistance system is an indication that the concerned persons have either no sufficient health insurance cover, or no sufficient resources. Otherwise they would not need any recourse to the social assistance system. Such verifications can also be necessary in order to prevent abuse of rights. But as the decision declaring the loss of right is a discretionary decision, in principle it cannot be systematic, as specific circumstances should be considered in order to make a correct use of the discretionary power.

Another circumstance could be the extension of a "limited residence card for family members", *i.e.* a residence card whose duration of validity was limited in time.[37] In this case there might be a reasonable doubt as to whether the conditions, that were limited in time, are still fulfilled. Limitation of duration of validity of the residence card is indeed an exception, and must be justified by particular factual circumstances. Such circumstances may either be due to the intention of the concerned persons to reside only for a limited period of time, or if it seems that the conditions for the right of residence are only fulfilled for a limited period of time.

There is, however, no clear indication that these verifications can only be carried out in specific cases where there is a reasonable doubt, and that they shall not be carried out systematically. Even if there is apparently no such systematic verification, German legislation does potentially allow for such practice, and cannot be considered as in accordance with the Directive.

Under Article 14(3), providing that an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State, German legislation does not attach any direct effect to the Union citizen's recourse to the social assistance system. But neither does it clearly indicate that recourse to the social system must not systematically lead to an expulsion measure. Such recourse is never a direct ground of expulsion, as the expulsion is based on the discretionary decision of § 5 (5) FreizügG/EU. Thus, the direct ground of expulsion is the decision declaring the loss of the right of residence, which is

[36] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p. 367.

[37] cf. Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz), 07.02.2003, Drucksache 15/420, p. 104.

necessarily taken after an evaluation of the specific factual circumstances. Legally, the expulsion is not an automatic consequence of the recourse to the social assistance system.

However, concerning the right of unemployed Union citizens and their family members, the right of residence is limited by § 4 FreizügG/EU (need of sufficient resources and health insurance). Here, recourse to the social assistance system can have consequences for those persons. As explained *supra* under Article 14(2), recourse to the social assistance system can justify a control by administration in order to check if the conditions of the right of residence are still fulfilled. If this is not the case, the loss of the right of residence can be declared by application of § 5 (5) FreizügG/EU. This declaration would not be an automatic consequence of the recourse to the social assistance system, but would technically be a consequence of the non-fulfilment of the conditions of § 4 (sufficient resources and health insurance). Furthermore, the decision under § 5 (5) is a discretionary decision, which means that the authorities would have to check in every case if the loss of the right of residence is justified, and that the authorities are not obliged to declare the loss of the right of residence. However, there are no clear legal guarantees prohibiting administrative practice that would lead to expulsions *de facto* as an automatic consequence of the recourse to the German social assistance system. So even if it is not certain that recourse to social assistance does automatically lead to an expulsion measure, German legislation does not provide an explicit prohibition of this situation, and should be considered as not correctly transposing the Directive on this point.

Under Article 14(4), providing that an expulsion measure may in no case be adopted against Union citizens who are workers, self-employed persons, or under some circumstances job seekers and their family members, correct transposition is the consequence of the fact that pursuant to § 7 (1) FreizügG/EU, the condition of an expulsion is the existence of a decision establishing that no entitlement to entry and residence exists. § 7 (1) can never apply to those categories of persons (as long as they are workers, self-employed, job seekers), since they meet the conditions laid down by § 2 (2) 1 and 2 and are therefore entitled to the right of freedom of movement and cannot be expelled. This means that there is no explicit prohibition of expulsion measure for those persons, because it is impossible to consider that they have lost their right of residence. Implicitly, an expulsion measure is strictly impossible.

(b) Article 15(2)-(3) expiry of document not a ground for expulsion

Under Article 15(1), providing that the procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health, transposition is implicit. The procedure restricting free movement of Union citizens and their family members is indeed generally the same for § 5 (5) (transposing Article 14) and § 6 (1) (transposing chapter VI). Paragraph 7 concerning the requirement to leave the Federal territory applies to both sections. For transposition of Article 15, see below under Articles 30 and 31.

Under Article 15(2), providing that expiry of the identity card or passport (on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card) shall not constitute a ground for expulsion from the host Member State is transposed by § 6 (7) FreizügG/EU. This provides that in case where a passport, ID, or passport substitute become invalid (this especially covers the situation when it expires) this situation cannot constitute a ground for termination of the holder's residence, and cannot constitute a ground for expulsion.

Under Article 15(3), providing that the host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies, transposition is a result of § 7(2) FreizügG/EU disposing that the ban entry only applies when persons lost the right of residence based on § 6 (1) (transposing chapter VI). *A contrario*, loss of the right of residence based on § 5 (5) (fact that the conditions of the right of residence are no longer fulfilled) cannot justify a ban on entry, but only the obligation to quit the Federal territory, based on § 7 (1) FreizügG/EU.

2.4 Right of permanent residence

2.4.1 General rule for Union citizens and their family members (Article 16: eligibility)

The provisions of Article 16(1) and (2) providing that Union citizens who have resided legally for a continuous period of five years in the host Member State and family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years shall have the right of permanent residence are correctly transposed by § 4a (1) FreizügG/EU. § 4a (1) FreizügG/EU disposes that Union citizens, their family members and life partners who have resided legally and continuously in the Federal territory for five years shall be entitled to enter into and stay in the Federal territory, irrespective of whether the other requirements stipulated in § 2 (2) are fulfilled (right of permanent residence). There is, however, a doubt whether Article 2(2)(b) is correctly transposed in Germany, as German Immigration legislation does not treat registered partnerships as equivalent to marriage, and as a consequence, excludes registered partners from the general regime applying to spouses. Therefore whenever the Directive grants a right for family members, including the family members of the partner, German legislation only refers to the family members of the EU citizen and his/her spouse. The correctness of this approach depends on the analysis of transposition of Article 2(2)(b) (*cf. supra).*

Article 16(3) provides that Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. This provision is correctly transposed by § 4a (6) FreizügG/EU and all exceptions are correctly transposed. Concerning temporary absence not exceeding six months a year, Germany provides that continuous residence, and hereby the right of residence and the validity of the residence card, are not affected by an absence not exceeding six month a year. This absence does not necessarily have to be temporary. Concerning absence due to military service, Germany provides that validity of residence card is not affected by an absence, without limitation of duration, for the purpose of military service or alternative community service. Concerning absence of a maximum of 12 consecutive months for important reasons, Germany provides this exception and the list of examples laid down in the Directives. Those examples are literally or very closely transposed by use of synonyms ("Niederkunft" = "Entbindung" = childbirth). In case of posting in another country, there is no distinction between Member States or third countries, so that this exception applies in both cases.

Article 16(4) providing that once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years is transposed by § 4a (7) FreizügG/EU indicating that absence for a reason which is per se not of a temporary nature for more than two consecutive years shall result in loss of the right of permanent residence. German legislation is more favourable, because an absence from the Federal territory for a period exceeding two consecutive years is a cause of the loss of the right of permanent residence only if the absence is per se not of a temporary nature.

2.4.2 Acquisition of the right of permanent residence for workers/self employed persons and their family members (Article 17)

Overall, Article 17 is correctly transposed by § 4a (2) to (4) FreizügG/EU.

Under Article 17(1)(a), providing that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension. It also includes workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.

Transposition results from § 4a (2) 1 1. FreizügG/EU. Both delays are exactly transposed (three years of continuous residence and at least the preceding twelve month of employment in the German territory). The right of permanent residence is guaranteed in the two cases provided by the Directive. First when the concerned person reaches the age of 65 years, which is less than the age laid down by the German law for entitlement to an old age pension (67 years, § 35 SGB VI). Secondly, when a person ends his employment under an early retirement scheme. The age condition of 60 years applies if the law of the host Member State does not grant the right to an old age pension. However, Germany does grant the right to an old age pension to all categories of self employed persons. Some categories of self-employed people must take out old age pension insurance (c.f. § 2 SGB VI). The other categories have the right pursuant to § 7 SGB VI to take old age pension insurance voluntarily.

Article 17(1)(b), provides that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work. Moreover if such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence. Article 17 (1) (b) is correctly transposed by § 4a (2) 1 2. FreizügG/EU. § 4a (2) 1 2. a) provides a right of permanent residence for people stopping their employment due to a total occupational disease which has resulted from an accident at work or an occupational disease and which entitles the concerned person to a pension from an institution, *i.e.* a benefit payable in full or in part by this institution without any condition of length of previous residence. § 4a (2) 1 2. b) provides a right of permanent residence for people stopping their employment (what seems equivalent to "giving up their gainful employment") due to a total occupational disease after having been resident in German territory for at least two years.

Under Article 17(1)(c), providing that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons. These persons, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.§ 4a (2) 1 3. transposes this provision. § 4a (3) 1 3. disposes that Union citizens shall possess the right of permanent residence prior to the period of five years elapsing, if after having been continuously employed in the Federal territory for three years, they subsequently take up employment in another Member State of the European Union, retain their place of residence in the Federal territory and return to said residence at least once a week. § 4a (3) 1 3. also states that for the purposes of acquisition of the right pursuant to numbers 1 and 2 (transposing Article 17(a) and (b)), times of employment in another Member State of the European Union shall be deemed to constitute times of employment in the Federal territory. The only conformity issue concerns the last sentence of article 17(1)(c). There is indeed no exact definition of "periods of employment" in German legislation or regulation. Normally this term should be interpreted in order to refer to Community definition of this term.[38] However, as far as there is no explicit transposition measure, the transposition is not complete.

[38] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p.392.

Article 17(2) is transposed correctly by§ 4a (2) 2. FreizügG/EU. The Article provides ,that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by the worker's or the self-employed person's spouse or partner (as referred to in point 2(b) of Article 2) if this spouse or partner is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person. If the spouse is German, the condition as to length of residence does not apply. If the spouse lost the German nationality by marriage to the Union citizen, (as was automatically the case until the 31 March 1953), the condition as to length of residence does not apply.

Under Article 17(3), providing that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State, if the worker or self-employed person has acquired the right of permanent residence in that Member State, § 4a (4) FreizügG/EU provides a correct transposition. It states that the family members of a Union citizen who acquired the right of permanent residence pursuant to sub-§ 2 or prior to his or her death shall also possess the right of permanent residence if they were already continuously resident with the Union citizen upon the latter acquiring the right of permanent residence. § 4a (4) refers to § 4a (2), that is transposing Article 17(3). § 4a (4) applies to all family members irrespective of their nationality. They have the right of permanent residence if they were continuously residing with the Union citizen when this Union citizen acquired the right of permanent residence pursuant to § 4a (2).

Under Article 17(4), providing that if the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years, or the death resulted from an accident at work or an occupational disease, or the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person, effective transposition is the result of § 4a (3) FreizügG/EU. This law disposes that Family members of a deceased Union citizen pursuant to § 2 (2), nos. 1 to 3, who were continuously resident with the deceased at the time of the latter's death, shall possess the right of permanent residence. However, these are certain conditions attached to this: if the Union citizen had been continuously resident in the Federal territory for a period of at least two years at the time of his or her death; if the Union citizen died as a result of an accident at work or an occupational disease if the surviving spouse of the Union citizen is a German within the meaning of Article 116 of the Basic Law or lost this legal status as a result of entering into marriage with the Union citizen prior to 31 March 1953.

2.4.3 Acquisition of the right of permanent residence by certain family members who are not nationals of a MS (Article 18)

Article 18 providing that the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State is correctly transposed § 4a (5) FreizügG/EU. This law provides a right of permanent residence for family members who are not national of a Member State and who resided in Germany in application of § 3 (3) to (5), transposing Articles 12 and 13, if they have resided in Germany five years legally and continuously.

2.4.4 Documents certifying permanent residence for Union citizens (Article 19)

Article 19 about the obligation for the Member States to issue a document certifying permanent residence of Union citizens upon application and as soon as possible, is correctly transposed by § 5 (6) FreizügG/EU, providing that Union citizens shall be provided with a certificate confirming their right

of permanent residence forthwith, upon due application. There is no precision about the verification of duration, but this verification is necessary to assess whether the Union citizen has a right of permanent residence that may be confirmed. It is implicit that this verification has to be carried out in practice. The certificate is to be issued forthwith, which clearly means that it is issued as soon as possible, so this is a more favourable transposition.

2.4.5 Permanent residence card for family members who are not nationals of a MS (Article 20)

Article 20(1) about the obligation to issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application, is correctly transposed by § 5(6) FreizügG/EU. This law states that a permanent residence card shall be issued to family members who are entitled to permanent residence but who are not Union citizens within six months of a corresponding application being filled. This permanent residence card has no limitation of validity, what means that it does not to have to be renewed. The formulation of German legislation differs on this point from the one used for transposition of Article 10(1), as § 5 (6) FreizügG states that the deadline is "within six months of application being filled", whereas § 5 (2) transposing Article 10(1) uses the expression "within six months of said family members furnishing the necessary information".

Article 20(2) about the obligation of family members to submit the application before the residence card expires and the possibility to envisage sanctions for the failure to the requirement to apply for a permanent residence card are not transposed by German law. This means that German legislation is more favourable on this point.

Article 20(3), providing that interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card, is transposed in a more favourable way. Pursuant to § 4a (7) FreizügG/EU, an absence from the Federal territory for a period exceeding two consecutive years is a cause of the loss of the right of permanent residence only if the absence is per se not of a temporary nature.

2.4.6 Continuity of residence (Article 21)

Article 21 providing that for the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State and that continuity of residence is broken by any expulsion decision duly enforced against the person concerned, is not transposed.

Concerning the first sentence, there are no specific measures about the means of proof that may be used to attest the continuity of residence. General rules about the means of proof that may be required and that may be used, and specially § 26 VwVfG, should apply. In practice, under correct application of this provision, continuity of residence may be attested by any means of proof in use in Germany. However, German provisions only give the administration the right to ask for every means of proof, whereas the Directive provides a right to the EU-citizen to prove its residence by any means of proof. Such a right does not exist in German legislation. It therefore seems necessary to clearly indicate that continuity of residence may be attested by any means of proof in use in Germany, in order to avoid an abusive administrative practice or conflicts with potentially different federal or regional legislation or regulation. On this point transposition is incomplete.

Concerning the second sentence, there is no specific definition of "continuity of residence", and consequently no specific rule applying to Union citizens and their family members in order to break continuity of residence by any expulsion decision duly enforced. However, it seems reasonable to consider that the official interpretation and administrative practice consider that to be the case. In every case, there seems to be no evident infringement, because another interpretation, which understands that continuity of residence is not broken, would be a more favourable situation and not

be contrary to the Directive. Furthermore, as there is no legal definition of the term "continuity of residence", this term should be interpreted in order to refer to Community definition of this term.[39]

2.5 Common provisions (Articles 22-26)

2.5.1 Territorial scope (Article 22)

Article 22 about the territorial scope covering the whole territory of the host Member State and the prohibition of specific restrictions to freedom of movement of Union citizens and their family members, is correctly transposed. For Article 22(1), transposition is the result of § 1 FreizügG/EU, as it provides that FreizügG/EU regulates entry into and residence in Germany of Union citizens and their family members. The territorial scope is a consequence of the absence of any specification or limitation, which means that the legislation applies to whole territory of the Federal Republic of Germany. Any territorial restriction for Union citizens and their family members would be illegal. For Article 22(2), there is apparently no specific territorial restriction imposed on the right of residence of Union citizens and their family members.

2.5.2 Related rights (Article 23)

Article 23 about the right to take up employment or self employment in the host Member State is correctly transposed, mainly by the direct applicability of Article 39 TEC in Germany. Furthermore, § 284 SGB III, § 39 (6) AufenthG, §§ 38, 41 BeschV, which cover specific measures attempting to this right, concern only the situation of the new Member States, and the restrictions are linked to the necessity that those restrictions must have been foreseen by the transitional accords.

2.5.3 Equal treatment (Article 24)

Article 24 about equal treatment for Union citizens residing on the basis of the Directive in the territory of the host Member State with the nationals of that Member State is a complicated conformity issue.

There is indeed no specific transposition of Article 24(1). However, equal treatment could be obtained under application of Article 12 TEC, which is actually directly applicable, to which German courts can refer and that must be respected by legislative and executive authorities, or by the possibility to confer direct effect to this article of the Directive. German Courts are generally very respectful of the principle of non-discrimination, as shown by the frequent recourse to ECJ on interpretation issues concerning European citizenship.[40] In practice, the right of equal treatment might seem well respected by Germany overall. However, as there is no specific transposition, and transposition would only result from the EC treaty, case law or practice, Germany cannot be considered as having correctly transposed the Directive on this point.

There is indeed a constant risk of unequal treatment. This can be demonstrated by the fact that that there is an important distinction for constitutional rights between the so called "Deutschengrundrechte", ("Germans' fundamental rights") and "Jedermannsgrundrechte", ("everyone's fundamental rights"). This is the case in the area of free movement for Article 11 GG, which provides the right of free movement within the German territory for Germans. As a consequence, in case of violation of this right, a constitutional claim can be presented by any German citizen. However, if a Union citizen's right to freely move in German territory was effected, it is not certain that he could refer to the Constitutional Court. This is a case where equal treatment would not

[39] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p.392.
[40] Cf. *e.g.* the cases *Morgan*, C-11/06, and *Bucher*, C-12/06, 23/10/2006, *Tadao Maruko*, C-267/06, 01/04/2008, *Grunkin and Paul*, C-353/06, pending, and *Huber*, C-524/06, pending.

be granted by Germany, as a consequence of constitutional law. To avoid such situations of non-equal treatment, an explicit transposition would be necessary.

In practice, the risk of unequal treatment is minor, as EU citizens might always rely on the provisions of the EC treaty, or even on other provisions of the Basic Law, especially Article 2(1) GG. Theoretically, a difference of situation however always persists. The rights provided for by Article 2(1) GG "may be interfered with only pursuant to a law". Yet limitation of right of movement pursuant to Article 11 GG, in a more restrictive way, "may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a Land, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime." Thus, a legal limitation of the right of free movement within the German territory which would be contrary to Article 11 GG does not necessarily violate Article 2(1) GG.[41] This situation remains theoretical but the expert's view is that this situation would not occur in practice. If it did, EU citizens would not benefit from an equal treatment.

Another conformity issue could be the general processing of personal data of foreign citizens of the Union in a central register of foreign nationals (Ausländerzentralregister, AZR). A case is pendant before the ECJ in order to determine if this is compatible with the prohibition of discrimination on grounds of nationality against citizens of the Union who exercise their right to move and reside freely within the territory of the Member States.[42]

Article 24.2 concerns the possible restrictions a Member State can provide for the entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b); the restriction prior to acquisition of the right of permanent residence; the possibility to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. On these matters, German legislation seems to be almost in accordance with the Directive. This is probably the most important application of the principle of equal treatment and which provides an important exception to this principle, The option provided for in Article 24(2) not to confer entitlement to social assistance in some cases is used by Germany. German social legislation indicates the following restrictions or specific provisions for aliens:

- § 7 SGB II restricts the right of social assistance in case of unemployment during the first three months of residence of the foreigner who is neither worker nor self-employed, nor service provider, and their family members. For job seekers and their family members, this restriction applies without any limitation in time, *i.e.* that job seekers have no right to assistance in case of unemployment even after a period of three months.
- § 63 SGB III gives a right of support of vocational training to: Union citizens and other foreigners having a right of permanent residence; family members of Union citizens even if they have not yet acquired a right of permanent residence; Union citizens having been employed in Germany and starting a vocational training linked to this employment.
- § 5 SGB V provides an exemption to the obligation to take public health insurance for Union citizens and their family members residing in application of § 4 FreizügG/EU/ EU for whom the existence of sufficient resources and health insurance is a condition of the right of residence. *A contrario* all other categories of Union citizens have to take such insurance, the same rules and exceptions as for Germans apply.
- § 6 SGB VIII provides the right to have youth assistance for all foreigners legally residing in Germany.

[41] See J.-H. Strunz, *Die Freizügigkeit der Personen in der Europäischen Union*, LIT Verlag, Münster, 2004, p. 198 ff.
[42] C-524/06, Huber, pending.

- § 23 SGB XII provides the right to have social assistance to foreigners residing legally in Germany without restriction, unless the foreigner entered Germany with the purpose of getting social assistance or as a job-seeker.
- § 8 BAföG gives a right of support for studies or educational training to: Union citizens and other foreigners having a right of permanent residence; family members of Union citizens even if they have not yet acquired a right of permanent residence (this provision is including all categories of Union citizens that have a personal right of entry and residence, as it refers to § 3(1) FreizügG/EU which refers to § 2(2)1. to 5. FreizügG/EU, providing a right of freedom of movement to workers, job seekers, self employed persons, service providers, recipients of services and non economically active Union citizens); Union citizens having been employed in Germany and starting an educational training linked to this employment. This is the only point where a conformity issue appears. The Directive provides a right of support studies to workers, self-employed persons, and persons who retain such status. These persons are not directly and explicitly covered by BAföG. However, these persons benefit from the principle of non-discrimination conforming to Article 12 TEC, which is directly applicable in Germany. This means that they should be treated equally to Germans, which have a right of support studies pursuant to § 8 (1) 1. BAföG. As the term of "worker" has to be interpreted conforming to EC Law, in every situation in which the EU citizen retains his/her status of worker, this citizen must be considered as a worker by German authorities. In practice those persons should be able to obtain the maintenance aid for studies or vocational training. However, as this possibility is not clearly indicated in German law, the transposition on this point is not complete.

The German social system is almost in conformity with the Directive. Furthermore, the foreseen restrictions make it quite improbable that a Union citizen would be an unreasonable burden for the German social system during his first three months of residence. The Directive is correctly transposed concerning Article 24(2) Moreover, German Courts are restrictively interpreting limitation of the entitlement to social assistance. For example a Union citizen who has been residing for a long term period in Germany, left German territory, and then came back in order to seek employment, is not excluded from the social assistance system.[43] The Court, after referring to a controversy on the possibility to exclude job-seekers from the social assistance system, as this would be contrary to EC law, decided that in every case it appeared that it is not compatible with Article 12 TEC to exclude job-seekers who have strong connections to Germany. Moreover, this was particularly relevant to those job-seekers who are not entering Germany for the first time, but only return after a previous residence in Germany. In the specific case, the applicant was born in Germany in 1982 and lived there continuously until 1998, when she left Germany to go back to the country of her nationality, before returning to Germany in 2006.

Germany has taken measures in order to avoid fraud by job-seekers, especially § 64 SGB II referring to § 319 SGB III, which provides specific obligations about information and verifications that persons have to provide or accept if they are receiving social maintenance, in order to determine if they are abusing of the right, or if they are committing fraud. Such fraud is subject to sanctions, as for example a fine of up to 5000€ if the person does not correctly inform the competent authority (§ 63 SGB III).

2.5.4 General provisions concerning residence documents (Article 25)

Under Article 25(1) providing that possession of residence documents may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof, there is no direct transposition measure. There is apparently no evident legislation making of the possession of one of the mentioned documents a precondition for the exercise of a right or the completion of an administrative formality.

[43] Landessozialgericht (LSG) Baden-Württemberg, Beschluss vom 17.9.2007 – L 7 SO 3970/07 ER-B, NVwZ-RR 2008, p. 209-210.

The legislation analysed included main acts and main case law relevant to this situation. However, in order to avoid any abusive administrative practice, it would be necessary to have an explicit legislative text imposing the respect of the present Article. This Article is very important in practice, and there should be a clear legal indication for all authorities that possession of a registration certificate, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

The expression "under no circumstances" makes it very clear that this Article is very important and that there is a special need of transposition of the Article in order to respect the rights of Union citizens and their family members. There is a high risk that in practice, administration and authorities use registration documents as a precondition of right or the completion of administrative formalities, because such registration documents are often an easier mean of proof than the alternatives. These are official documents, and the risk of falsification is low, whereas other means of proof (such as bills or rent-contracts) are often private and present a higher risk of falsification. Verification of authenticity of registration documents is also easier than verification of private documents. As very many administration and authorities are involved on a federal, regional and communal level, there is an absolute need for a clear federal transposition of this provision. This is not the case, in our views, this constitutes an important conformity issue.

2.5.5 Checks (Article 26)

Article 26 about the possibility for Member States to carry out checks on compliance with any requirement deriving from their national legislation for non-nationals to always carry their registration certificate or residence card (provided that the same requirement applies to their own nationals as regards their identity card), is correctly transposed by § 8 FreizügG/EU. This law obliges Union citizens and their family members to carry a passport or passport substitute and to deliver it for inspection when they enter or leave the German territory. This is equivalent to § 1 PassG which applies to German nationals. Furthermore, Union citizens are obliged to hold these documents for the duration of their residence and to present them for control measures or to hand them over to the competent authority if an expulsion order is ruled against them. This is equivalent to § 1 PersAuswG and §§ 7,8 PassG applicable to German nationals.

In the event of failure to comply with this requirement, the possibility of imposing the same sanctions as those imposed on their own nationals for failure to carry their identity card, § 10 FreizügG/EU provides sanctions. These sanctions are identical to those for Germans when they do not fulfil the obligations concerning pass or identity card duties (a fine of up to 2500 €, § 25 PassG; a fine of up to 1000 €, § 5 PersAuswG with § 17 OWiG).

2.6 Restrictions on the right of entry and residence on grounds of public policy, public security and public health

2.6.1 General principles (Article 27)

Overall, Article 27 about general principles concerning restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health, is correctly transposed by § 6 FreizügG/EU.

The possibility to restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health provided by Article 27(1) is used by Germany. § 6(1) FreizügG/EU disposes that without prejudice to the possibility to declare the loss of the right of entry and residence if the conditions of this right are no longer fulfilled, loss of this right can only be declared, the certificate confirming the right of

residence under Community law or confirming the right of permanent residence withdrawn and the residence card or permanent residence card revoked on grounds of public policy, public security or public health (Article 39 (3), Article 46 (1) of the Treaty on the European Community). The prohibition that these grounds shall not be invoked to serve economic ends is transposed by § 6 (6) FreizügG/EU, providing that decisions or measures concerning the loss of the right of residence or of the right of permanent residence must not be undertaken for economic ends.

Under Article 27(2), providing that measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned and that previous criminal convictions shall not in themselves constitute grounds for taking such measures, transposition resulting from § 6 (1) and (2) FreizügG/EU. Indeed, measures taken under § 6 (1) are a discretionary decision, which means that the competent authority will have to check in every particular case whether the conditions of a loss of the right of residence or entry are fulfilled. The principle of proportionality is a general principle of German law, and has especially to be respected for the correct use of discretionary power. Furthermore, the FreizügG/EU contains some interpretation guidelines in order to take such a decision. Under § 6 (2) FreizügG/EU, a criminal conviction alone is not a sufficient ground. It will however, be necessary to control how the administration uses this discretionary authority. The obligation to base the measures only on the personal conduct of the individual concerned is expressly transposed by § 6(2) only in relation to criminal convictions, where such precision was necessary to avoid abusive administrative practice. However, in general, this obligation is implicit since measures taken under § 6 (1) FreizügG/EU are discretionary decisions.

Under Article 27(2) second subparagraph, providing that the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, § 6 (2) which transposes this point, only states that the personal conduct of the individual must represent a real and sufficiently serious danger. It is not established that this danger must be present. Furthermore, there is no transposition of the second sentence providing that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted. Even if there is apparently no direct infringement of this disposition in German legislation, it would be necessary to transpose this point in order to avoid any abusive administrative practice and ensure that EU citizens know their rights in case of appeal since this can be used as a ground to contest a decision.

However, the fact that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted, could be guaranteed by § 6 (1) FreizügG/EU. This national provision states that without prejudice to the possibility to declare the loss of the right of entry and residence if the conditions of this right are no longer fulfilled, loss of this right can only be declared, the certificate confirming the right of residence under Community law or confirming the right of permanent residence withdrawn and the residence card or permanent residence card revoked on grounds of public policy, public security or public health (Article 39 (3), Article 46 (1) of the Treaty on the European Community). This is a discretionary decision and it always has to take in consideration the particular circumstances of each case. It will be however, necessary to control how the administration uses this discretionary authority. As long as there is no clear legal indication limiting the power of administration, the transposition is not complete.

However, the Federal Administrative Court (Bundesverwaltungsgericht) has in an important judgement confirmed its jurisprudence to ECJ's rulings in the Orfanopoulos and Oliveri cases[44]. In these cases the ECJ ruled that national legislation which requires national authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the German Law on narcotics, where the sentence has not been suspended is contrary to EC law. The Federal Administrative Court clearly

[44] C-482/01, and C-493/01, 29/04/2004.

indicated, by references to most relevant ECJ cases, that it is willing to respect and to make respect Community law in the area of restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health.[45] It specifically ruled that custodial penalty may justify an expulsion measure only if there is a genuine and present threat affecting public order. It also decided that measures restricting freedom of movement under public order, security or health must be interpreted conforming to the EC law requirements and the jurisprudence of the ECJ. Exceptions to the freedom of movement must be interpreted in a stringent way. The particular importance of the privileged legal status of some categories of Union citizens and of the pre-eminence of the principle of free movement has to be taken into account for each restriction on the right to freedom of movement. The Court pursues by evoking the specific criteria that are necessary to take such measures, in reference to the requirements set down down by the ECJ. In particular, the individual fundamental rights have to be respected, and in cases where they might enter into conflict with considerations of public interest, they shall receive a particular importance. Furthermore, previous custodial penalties, and the facts on which such penalties were based, may not be used as a presumption when making the decision in any way which would underline any automatically of the decision-taking procedure. The Court also specified that the moment which has to be taken into account in order to evaluate the legality of the expulsion order in case of judicial review, is the date of the decision of the judges. Finally, the Court defined the procedural safeguards, and especially the factual and legal points that German judges have to consider in order to take their decision (on this point, see below under Articles 30 and 31).

Under Article 27(3) as regards a possible request to the Member State of origin (and, if need be, other Member States), to provide information concerning any previous police record about the person concerned, there is apparently no transposition measure for this Article in German legislation. This would constitute a conformity issue if this Article was not considered optional.

Under Article 27(4), providing the obligation to allow any person to which Germany issued the passport or identity card that is expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality, even if the document is no longer valid or the nationality of the holder is in dispute, transposition is the result of Article 3 (2) of the protocol no. 4 of the ECHR from 16.9.1963. This states that no one shall be deprived of the right to enter the territory of the state of which he is a national, in combination with Article 25 GG conferring direct effect to international law. A conformity issue could only appear if the nationality of the holder is in dispute, as Germany has not taken any measure treating directly with this problem.

2.6.2 Protection against expulsion (Article 28)

Article 28 about the specific protections against expulsion is correctly transposed.

Under Article 28(1), providing that before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin, is almost literally transposed by § 6 (3) FreizügG/EU. This law provides an identical non-exhaustive list.

Under Article 28(2), providing that an expulsion decision against Union citizens or their family members, (irrespective of nationality and who have the right of permanent residence on its territory), is only possible on serious grounds of public policy or public security, correct transposition results from § 6 (4) FreizügG/EU. This law refers to § 6 (1) FreizügG/EU concerning expulsion on the grounds of public policy, public security or public health, in order to provide that following acquisition of the right of permanent residence, such decisions may be taken on serious grounds only.

[45] Bundesverwaltungsgericht (BVerwG), Urteil vom 3.8.2004 – 1 C 30/02, NVwZ 2005, p. 220 – 224.

An expulsion measure on grounds of public health can only be taken during the first three months of residence, and so is totally irrelevant for persons having acquired a right of permanent residence. § 6 (4) necessarily refers to grounds of public policy and public security, which have to be serious in order to justify an expulsion measure.

Under Article 28(3), providing that an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they have resided in the host Member State for the previous 10 years, or are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989, transposition is resulting from § 6(5) FreizügG/EU. This provision disposes that in the case of Union citizens and their family members who have been resident in the Federal territory in the past ten years and in the case of minors, a loss of entitlement pursuant to § 6 (1) FreizügG/EU may be declared on imperative grounds of public safety only. But this shall not apply to minors where loss of the right of residence is necessary for the best interests of the child.

2.6.3 Public health (Article 29)

German legislation has transposed the Directive on the point of limitation of right of residence on grounds of public health very concisely. In practice, such restrictions are rare. Concerning the transposition, German legislation does not precisely define the term "public health". Article 29(1) defines diseases justifying measures restricting freedom of movement as being the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State. FreizügG/EU does not precisely define the term public health either. Therefore, it should refer to the Community definition of this term.[46] Furthermore, IfSG provides the main measures Germany has taken in order to prevent epidemic and contagious diseases. This Act applies to Germans and Aliens, but does not allow expulsion measures for foreigners. Germany has also signed the International Health Regulations 2005 of the World Health Organisation from 23 may 2005, but has not yet taken the necessary implementation measures concerning the control of travellers. In order to determine whether Germany has correctly transposed this Article, it will be necessary to control the precise application of this exception, and more specifically, to control the correct definition of diseases justifying restrictions. If the diseases justifying expulsion measures are only the diseases defined by the World Health Organisation and/or by German legislation applying to Germans, mainly the IfSG, the transposition would be correct. However there is no clear legal transposition of Article 29.1.

Otherwise, the right provided for by Article 29(2), providing that diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory - is correctly transposed by § 6 (1) 3 FreizügG/EU, disposing that loss of the entitlement on grounds of public health can only be declared if the illness concerned arises within the first three months after entering the Federal territory.

Furthermore, Germany has not used the possibility of Article 29(3) to require a medical examination. On this point German legislation seems more favourable than the Directive. At present the specific medical requirements Germany can ask from Union citizens and their family members are identical to those applying to Germans. As Article 29(3) is a guarantee for the citizen when Germany requires a medical examination, transposition might seem necessary, especially regarding the obligation to undertake those examinations free of charges, and not as a matter of routine.

[46] Cf. Vorläufige Anwendungshinweise des Bundesinnenministeriums zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/EU, Stand: 22. Dezember 2004, p.392.

2.6.4 Expulsion as a penalty or legal consequence (Article 33)

Moreover, there is no direct violation of Article 33 in German legislation, providing that an expulsion order may not be issued automatically as a penalty or legal consequence of a custodial penalty. Neither is there a direct transposition providing that an expulsion order may not be issued as a penalty of a custodial penalty.

German legislation is as follows:

- StGB does not contain any expulsion measure as additional penalty (c.f. §§ 44,45 StGB).
- Expulsion as a legal consequence of a penalty, as in §§ 53-55 AufenthG, does not apply to Union citizens and their family members to whom FreizügG/EU applies. This is a consequence of the fact that § 11 (1) FreizügG/EU about the application of the AufenthG to Union citizens and their family members does not refer to those provisions. Furthermore, the Bundesverwaltungsgericht has confirmed the fact that expulsion of persons entitled to freedom of movement under EC law shall not be taken under the provisions of the AufenthG which lead to an automatic expulsion without any regard to the specific circumstances of the situation, but that such expulsion measures may only be taken as "discretionary decisions", what means that the competent authority has to examine the particular circumstances of the case in order to determine whether all specific requirements, including those pursuant to EC law, are fulfilled.[47]
- § 6 (5) 3 FreizügG/EU links the expulsion of a ten-years resident to any sentence to prison or of youth custody of at least five years or the fact that preventive detention has been decided in connection with the most recent conviction without possibility of appeal, to the necessity that the security of Germany is affected or the person concerned poses a terrorist threat. The administrative guideline does not include any further definition of those terms, but specifies that even in the case where exists such an imperative ground of public security, the expulsion measure must be taken by a discretionary decision, which leads to the necessity of verification of the particular circumstances of the case.[48]

This means that theoretically , there is never an automatic expulsion of a Union citizen or his family members as a penalty or legal consequence of a custodial penalty. However such a practice is not clearly prohibited, which might be a ground for incorrect transposition of the Directive. However, as the Directive refers to "legal consequences", the risk of violation of this article is limited, as such "legal consequences" are not taken as easily as *e.g.* administrative practice. The need for a clear legal prohibition of such measures is not as stringent as for other articles of the Directive. The non-conformity on this point seems minor.

Concerning Article 33(2), providing specific requirements if an expulsion order as in Article 33(1) is enforced more than two years after it was issued, as there is no transposition of § 1, there is no need for transposition of § 2.

2.7 Procedural safeguards against decisions restricting free movement (Article 15, and Articles 30-31)

Article 15.1, Article 30 and Article 31 are procedural safeguards. These three articles envisage certain procedural protections that apply when decisions are taken to restrict the free movement of EU citizens and their family members. Article 15 makes reference to the procedural guarantees actually contained in Articles 30 and 31.

[47] Bundesverwaltungsgericht (BVerwG), Urteil vom 3.8.2004 – 1 C 30/02, NVwZ 2005, p. 220 – 224.

[48] Cf. Hinweise zu den wesentlichen Änderungen durch das Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 19. August 2007 (BGBl. I S. 1970), (Hinweise zum Richtlinienumsetzungsgesetz), Stand: 02.10.2007, p.88; Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, 23.04.2007, Drucksache 16/5065, p. 211.

2.7.1 Notification of decisions (Article 30)

Concerning Article 30, the transposition is incomplete. Germany has only taken a specific transposition measure concerning Article 30(3), and this Article is the only one which seems to be correctly transposed. Otherwise, general German administration and procedure rules apply.

Under Article 30(1), providing that persons shall be notified in writing, and in such a way that they are able to comprehend the decision pronouncing the loss of right of free movement, transposition by § (6) FreizügG/EU, and general administrative law, especially §§ 23 (1), 39 (1) VwVfG is incomplete. There is an effective transposition for the written form, but no transposition concerning the necessity to provide a notification that the individual is able to comprehend. Any decision taken under § (6) 1 transposing Article 27.1 must be notified in writing (§ 6 (8) FreizügG/EU). This notification does not have to be translated into the foreigner's language, as the principle is the use of German as language of administrative procedure (§ 23 (1) VwVfG). However, the fact that the concerned person has to be heard before the taking of the decision (§ 6 (8) FreizügG/EU), and the obligation to justify this decision in application of § 39 (1) VwVfG, may give sufficient guaranties that the person is able to comprehend the content of the decision and its implications for him. There is no explicit transposition on this point, and German legislation does not clearly guarantee that persons must be informed in such a way that they are able to comprehend the content of the decision.

Under Article 30(2), providing that the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security, transposition by general administrative law, especially § 39 (1) VwVfG, is incomplete. Application of general administrative rules gives the authorities the obligation to examine whether the conditions laid down in the law are fulfilled, and to fully justify any deny or restriction of the right. The necessity to justify the decision in writing is not restricted by a possible exception, such as "substantial public interests". This limitation only exists for the hearing of the concerned person (§ 28 (3) VwVfG). German legislation appears more favourable on this point. However, the Directive obliges to inform "in full", whereas German legislation provides an information on "main grounds". On this point, transposition is incomplete.

Under Article 30(2), providing that the notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State, and that, save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification, transposition is resulting from § 7 (1) FreizügG/EU and § 58 VwGO. In application of the general rules, the notification of the decision must clearly indicate the possibility to lodge an appeal, the competent authority or court, and the time limit for the appeal. The notification shall also announce the threat of an expulsion measure, and fix a deadline for the voluntary departure. This deadline shall be at a minimum of one month, except in urgent cases, conforming to the Directive. German legislation does not specifies that urgency has to be "duly substantiated". This condition appears being implicitly transposed, as urgency must necessary be substantiated.

2.7.2 Procedural safeguards under Article 31

Article 31 about procedural safeguards is only partially transposed.

Under Article 31(1), providing the right of access to judicial and where appropriate, administrative redress procedures, general German administrative rules, mainly Article 19 GG and §§ 40 (1), 42 VwGO, give the possibility to appeal against any administrative decision. This includes a decision taken against a Union citizen or his family members on the grounds of public policy, public security or public health. There is indeed no such restriction.

Under Article 31(2), providing the possibility to apply for an interim order to suspend enforcement of the decision restricting the right of free movement, Germany has correctly transposed this Article by § 7 (1) 5 FreizügG/EU. A requirement to leave the Federal country is in principle enforceable once the concerned administrative decision is taken. The condition that the concerned administrative decision has to be final, *i.e.* that the time limit for the appeal has expired or a definitive court judgement has confirmed this decision, has been abolished by the Richtlinienumsetzungsgesetz from 2007. So even if in principle an application for appeal or judicial review has suspensive effect (§80 (1) VwGO), this is not the case if an interim order to enforce that decision was taken by the competent authority in some specific cases, especially in the case where this interim enforcement is based on public interest (§80 (2) 4. VwGO), or if a legal rule provides an exception. However, such an interim order can be contested (§ 80 (5) VwGO) whether the interim enforcement is a consequence of an administrative decision or of a legal rule (such as particularly § 84 AufenthG). If an application is filed in order to contest such an interim enforcement, the removal from Federal territory cannot take place until the decision about this interim order is taken (§ 7 (1) 4 FreizügG/EU). There is no limitation of this suspension of the interim enforcement order.

As a consequence, transposition is correct. It is however, necessary to note that German legislation has become more stringent with the Richtlinienumsetzungsgesetz from 2007 than it was with the Zuwanderungsgesetz from 2004. In 2004, decisions restricting right of entry or residence had to be final before being enforced.[49] This is no longer the case, and Germany has modified its legislation in order to permit interim enforcement of these decisions under direct reference to the Directive.[50] Conditions laid down in Article 31(2) are however, correctly transposed by Germany.
Under Article 31(3) about the obligation to guarantee that the redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based and that they shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28, general administrative rules, especially §§ 68, 114 VwGO and § 24 VwVfG apply. The result is a complex procedural framework. Two redress procedures are possible under German law, a first extrajudicial procedure ("Widerspruchverfahren"), necessary anterior to the judicial review procedure ("Klageverfahren"). The preliminary procedure leads to a verification of the legality and the expediency of the administrative act (§ 68 VwGO), whereas the judicial procedure only provides in principle the verification of legality of the administrative act (§ 114 VwGO). Before entry into force of Directive 2004/38, the absence of the preliminary procedure, the only one ensuring verification of the expediency, constituted a cause of irregularity of the procedure, and the administrative act was necessarily void.[51]

However, Article 31(3) makes no distinction between the type of redress procedures, and could be considered a requirement for each redress procedure, extrajudicial and judicial, to examine legality, expediency, and proportionality. It would in this case be necessary to check if the judicial redress procedure does grant a sufficient verification of the administrative act. Traditionally, the Courts are only allowed to verify the legality of an administrative act for whom the administration was authorised to act after its discretion (§ 114 VwGO).[52] This legality however, includes considerations of necessity and proportionality of the administrative act. Thus, proportionality is examined at least indirectly by courts. The expediency or the convenience should be taken into account in order to determine whether

[49] Cf. e.*g.* Verwaltungsgerichtshof (VGH) Kassel, Beschluss vom 29.12.2004 – 12 TG 3212/04, NVwZ 2005, p. 837-838.
[50] Cf. Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz), 07.02.2003, Drucksache 15/420, p. 103.
[51] Cf. Bundesverwaltungsgericht (BVerwG), 6.10.2005, BVerwGE 124, 243 ff..
[52] Cf. *Dolde Porsch* in: Schoch/Schmidt-Aßmann/Pietzner (Herausgeber), Kommentar zur Verwaltungsgerichtsordnung (VwGO), § 68 Rn. 36a, mit Hinweisen.

the administrative decision is proportional or not. And the Bundesverwaltungsgericht has decided that the EC law requirements concerning the restrictions to the freedom of movement have to be verified by courts.[53] This solution was confirmed in 2007 by the Court, which furthermore stated that the judges have to verify not only the legality of the administrative act, but also the facts and the circumstances on which this act is based.[54] But the Court specified this obligation in reference to Directive 2004/38, and not any German legislation. This means that German legislation does not clearly indicate that the judicial redress procedure has to verify expediency of the administrative act. Furthermore it does not explicitly dispose for any of the redress procedures that they have to insure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28 of the Directive. However, a redress procedure is still compulsory in application of § 68 (1) VwGO. This procedure must reconsider the legality and the convenience of the decision. The decision must be reconsidered entirely, which means that all grounds of this decision must be reconsidered. As the absence of the disproportionate character of the decision is one of its legal conditions, it should also be reconsidered. Furthermore, the competent authority has the obligation to investigate ex officio the facts and circumstances on which the decision is based (§ 24 (1)VwVG), even if it is favourable to the concerned person (§ 24 (2) VwVG). However, the Directive insists explicitly on the necessity of examination of proportionality. Even if proportionality is part of the examination, courts must undertake pursuant to § 114 VwGO, so it seems necessary to have an explicit transposition, in order to guarantee a degree of verification that corresponds to the high standard the Directive imposes to Member States on this point. Transposition is therefore incorrect.

Under Article 31(4) about the right of any excluded person to submit his/her defence in person, except when his/her appearance may cause serious threat to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory, there are no specific transposition measures in German legislation, even if Article 19 GG guarantees the fundamental right of effective guarantee of judicial review. As an expulsion measure can be enforced before the decision retiring right of residence is final (cf. *supra* Article 31.2), it is necessary to give the possibility to the concerned individual to submit his defence in person. Germany does not explicitly do so. Transposition could however, result from general rules, especially the right of effective recourse to the courts, as the prevention of submitting defence in person would be contrary to this right. In order to take an interim enforcement, the administration has however already to ensure that this right is respected (see explanations under Article 31.2). Therefore explicit transposition of Article 31.4 seems necessary.

2.7.3 Exclusion orders (Article 32)

Article 32 about the duration of exclusion orders is correctly transposed by § 7 (2) FreizügG/EU.

Under Article 32(1), providing that an application for lifting of the exclusion order may be submitted after a reasonable period, or in every case after three years, and that the decision on this application shall be reached within six months of its submission, transposition results from § 7 (2) 4 FreizügG/EU. This law disposes that an application for the ban to be lifted which is filled after a reasonable period or after three years shall be decided upon within six months. In order to evaluate whether a reasonable period has expired before the extinction of a period of three years, it is necessary to take into account the specific circumstances of the case.

The Bundesverwaltungsgericht has specified several points concerning the period of time after which the concerned person can apply for lifting of the ban on entry.[55] Firstly, it decided that § 7 (2) is applicable to bans on entry taken before the entry into force of the FreizügG/EU or Directive 2004/38. This means that if those bans on entry were meant to persist for more than three years, § 7 (2)

[53] Bundesverwaltungsgericht (BVerwG), Urteil vom 3.8.2004 – 1 C 30/02, NVwZ 2005, p. 220 – 224.
[54] Bundesverwaltungsgericht (BVerwG), 9.8.2007 1 C 47.06, ZAR 2007, p. 406 ff.
[55] Bundesverwaltungsgericht (BVerwG), Urteil vom 4.9.2007 – 1C 21/07, NVwZ 2008, P. 82-84.

immediately applies to those bans on entry in order to give the possibility to apply for lifting of those bans before at maximum three years. Secondly, the Federal Administrative Court specified when a reasonable period of time has expired before the period of three years. The competent authorities have to take into account the grounds on which the person was excluded and the specific preventive effect that resulted in the termination of the expulsion. It has to be verified for the sake of public interest that the particular circumstances still justify the expulsion. The personal attitude of the individual after the expulsion measure is also a determinant. The most important specific personal circumstances, such as how long the individual concerned has resided in Germany, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin are especially important for the administration to take its decision. Finally, the Court decided that no further conditions might be added in order to establish whether the application must be accepted or not. Moreover, the authorities cannot make payment for certain duties, such as the costs of the expulsion measure, which is a precondition for the verification of the application.

Under Article 32(2), providing that the persons applying for the lifting of their exclusion order shall have no right of entry to the territory of the Member State concerned while their application is being considered, transposition results from § 7 (2) FreizügG/EU. This law indicates that Union citizens and family members who have lost their entitlement to freedom of movement on the grounds of public order, public security or public health shall not be permitted to re-enter and residence in the Federal territory. This means that ban on entry is a legal consequence of the loss of the right of residence based on § 6. This ban is not affected by an application for the ban to be lifted, unless of course this application is successful. During the procedure the ban is maintained. There is no legislation disposing the contrary.

2.8 Final provisions (Chapter VII)

Final provisions are correctly transposed, with exception of Article 40, as a consequence of late transposition. A first partial transposition was obtained by the adoption of the FreizügG/EU as per Article 2 of Gesetz vom 30.7.2004 (Zuwanderungsgesetz), whose entry into force was 1st of January 2005. The second part of transposition is the result of the Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union of 19 August 2007, whose entry into force was 28 August 2007. Consequently the Directive was not transposed in time.

2.8.1 Publicity (Article 34)

As regards the obligation for the Member State to disseminate information, the experts did not find any information about German publicity measures.

2.8.2 Abuse of rights (Article 35)

Germany does not use directly this option for Union citizens and their family members. In particular, § 27 (1a) AufenthG, providing specifically the possibility to refuse subsequent immigration of spouses in case of marriages of convenience or forced marriages, does not apply. However abuse of rights can always be sanctioned, especially as marriages of convenience are not valid marriages.

2.8.3 Sanctions (Article 36)

Article 36 about the possibility for Member States to lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of the Directive is correctly transposed, as the specific sanctions provided by §§ 9 and 10 FreizügG/EU are identical to comparable breaches for Germans. Thus, a person who enters or resides in the Federal territory in contravention of a ban on entry, shall be punishable with up to one year's imprisonment or a fine (§ 9 FreizügG/EU), which is comparable to the fine when Germans leave the country while such exit has been forbidden (§ 24

PassG, penalty = 1 year imprisonment or fine). The non-respect of the obligations concerning passport duties of Union citizens and their family members is subject to fines up to 2500€ or 1000€ (§ 10 FreizügG/EU). This is equivalent to the sanctions which apply to Germans when they do not respect passport or identity card duties (fine of up to 2500 €, § 25 PassG; fine of up to 1000 €, § 5 PersAuswG in combination with § 17 OWiG).

2.8.4 More favourable provisions (Article 37)

Article 37 is correctly transposed, as on the one hand, FreizügG/EU contains some measures that are more favourable than the Directive, and on the other hand, § 11 (1) 5 FreizügG/EU disposes that general immigration legislation shall also apply if it establishes a more favourable legal status than the specific Union citizens immigration legislation that results from FreizügG/EU.

BIBLIOGRAPHY:

- K. Breitkreuz, B. Franßen-de la Cerda, Chr. Hübner, *Das Richtlinienumsetzungsgesetz und die Fortentwicklung des deutschen Aufenthaltsrecht*, ZAR 2007, p. 341-347, p.381-389.
- D. Cernota, *Der Evaluationsbericht zum Zuwanderungsgesetz,* ZAR 2006, p. 388-392.
- K. Dienelt, *Freizügigkeit für Familienangehörige nach der EU-Osterweiterung,* ZAR 2004, p. 393-397.
- R. Fritz und a., *Gemeinschaftskommentar zum Aufenthaltsgesetz,* Luchterhand, 2007.
- K. Groenendijk, *Europäische Entwicklungen im Ausländer- und Asylrecht im Jahr 2006,* ZAR 2007, p. 320- 325.
- H. Groß, *Das Gesetz über die allgemeine Freizügigkeit von Unionsbürgern,* ZAR 2005, p. 81-86.
- H. Groß, *Die Umsetzung der EU-Freizügigkeitsrichtlinie im deutschen Recht,* ZAR 2006, p. 61-64.
- K. Hailbronner, *Neue Richtlinie zur Freizügigkeit der Unionsbürger,* ZAR 2004, p. 259-265.
- K. Hailbronner, *Die Unionsbürgerrichtlinie und der ordre public, ZAR* 2004, p. 299-305.
- H. Heinhold, *Aktuelle Rechtsprechuung zur Abschiebungshaft,* ZAR 2006, p. 360-366.
- B. Huber, *Handbuch des Ausländer- und Asylrechts*, Beck-Verlag, München, 2006.
- B. Huber, *Das Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der EU,* NVwZ 2007, p. 977-985.
- A. Kloesel, R Christ, O. Häußer, *Deutsches Aufenthhalts- und Ausländerrecht,* Kommentar, Verlag Kohlhammer, 5. Auflage, 2007.
- H.-G. Maaßen, *Zum Stand der Umsetzung von elf aufenthalts- und asylrechtlichen Richtlinien der EU,* ZAR 2006, p. 161-167
- R. Marx, *Aktuelle Entwicklungen im gemeinschaftsrechtlichen Ausweisungsschutz,* ZAR 2007, p. 142-149.
- E. Néraudau-d'Unienville, *Ordre public et droit des étrangers en Europe, La notion d'ordre public en droit des étrangers à l'aune de la construction européenne,* Bruylant, Brussels, 2006.
- R. Schliedermaier, M. Wollenschläger, *Handbuch des Ausländerrechts der Bundesrepublik Deutschland*, 2007.
- F. Schoch/ E. Schmidt-Aßmann/ R. Pietzner (Herausgeber), *Kommentar zur Verwaltungsgerichtsordnung (VwGO)*.
- Chr. Schönberger, *Die Unionsbürgerschaft als Sozialbürgerschaft*, ZAR 2006, p. 226-231.

- B. Schulte, *Soziale Grundrechte in Europa, Auf dem Weg zur Charta der Grundrechte der Europäischen Union,* Asgard – Sankt Augustin, 2001.

- T. Storey, Chr. Turner, *Unlocking EU Law,* Hodder Arnold, 2005.

- Chr. Storr und a., *Kommentar zum Zuwanderungsgesetz, Richard Boorberg Verlag,* 2005.

- J.-H. Strunz, *Die Freizügigkeit der Personen in der Europäischen Union,* LIT Verlag, Münster, 2004.

- I. Ward, *A Critical Introduction to European Law,* 2nd edition, LexisNexis UK, 2003.

- H.-P. Welte, *Die beschränkte Reduktion des Suspensiveffekts nach § 84 II 1 AufenthG,* ZAR 2007, p. 283-284.

- F. Wollenschläger, *Grundfreiheit ohne Markt, Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime,* Mohr Siebeck, 2007.

ANNEX I: Table of concordance for Directive 2004/38/EC

ANNEX II: List of relevant national legislation and administrative acts

Main transposing legislation:

- Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU - FreizügG/EU; "Freizügigkeitsgesetz/EU vom 30. Juli 2004 (BGBl. I S. 1950, 1986), zuletzt geändert durch Artikel 7 des Gesetzes vom 26. Februar 2008 (BGBl. I S. 215)»; Act on the General Freedom of movement for EU Citizens.
- Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG); "Aufenthaltsgesetz vom 30. Juli 2004 (BGBl. I S. 1950), zuletzt geändert durch Artikel 1 des Gesetzes vom 19. August 2007 (BGBl. I S. 1970)"; Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory.
- Aufenthaltsverordnung (AufenthV); "Aufenthaltsverordnung vom 25. November 2004 (BGBl. I S. 2945), zuletzt geändert durch Artikel 1 der Verordnung vom 8. Mai 2008 (BGBl. I S. 806)»; Ordinance Governing Residence.

Other relevant legislation:

- Grundgesetz für die Bundesrepublik Deutschland (GG); "Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, zuletzt geändert durch das Gesetz vom 28. August 2006 (BGBl. I S. 2034)"; Basic Law for the Federal Republic of Germany.
- Bundesgesetz über individuelle Förderung der Ausbildung (Bundesausbildungsförderungsgesetz - BAföG); "Bundesausbildungsförderungsgesetz in der Fassung der Bekanntmachung vom 6. Juni 1983 (BGBl. I S. 645, 1680), zuletzt geändert durch Artikel 1, 15, 16 u. 18 Nr. 1 des Gesetzes vom 23. Dezember 2007 (BGBl. I S. 3254)"; Federal Training Assistance Act.
- Verordnung über die Zulassung von neueinreisenden Ausländern zur Ausübung einer Beschäftigung (Beschäftigungsverordnung - BeschV); "Beschäftigungsverordnung vom 22. November 2004 (BGBl. I S. 2937), zuletzt geändert durch Artikel 1 der Verordnung vom 28. Juni 2007 (BGBl. I S. 1224)"; Employment Ordinance.
- Verordnung über das Verfahren und die Zulassung von im Inland lebenden Ausländern zur Ausübung einer Beschäftigung (Beschäftigungsverfahrensordnung - BeschVerfV); "Beschäftigungsverfahrensordnung vom 22. November 2004 (BGBl. I S. 2934), geändert durch Artikel 7 Abs. 5 des Gesetzes vom 19. August 2007 (BGBl. I S. 1970)" ; Employment Procedure Ordinance.
- Bürgerliches Gesetzbuch (BGB) ; "Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), zuletzt geändert durch Artikel 1 des Gesetzes vom 13. März 2008 (BGBl. I S. 313)" ; German Civil Code.
- Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB); "Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. 2494; 1997 I S. 1061), zuletzt geändert durch Artikel 3 Abs. 6 des Gesetzes vom 21. Dezember 2007 (BGBl. I S. 3189)"; Introductory Act to the German Civil Code.
- Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG); "Infektionsschutzgesetz vom 20. Juli 2000 (BGBl. I S. 1045), zuletzt geändert durch Artikel 2 des Gesetzes vom 13. Dezember 2007 (BGBl. I S. 2904)" ; Law on Prevention of Infections.
- Gesetz zu den Internationalen Gesundheitsvorschriften (2005) (IGV) vom 23. Mai 2005 ; "Gesetz zu den Internationalen Gesundheitsvorschriften (2005) (IGV) vom 23. Mai 2005 vom 20. Juli 2007 (BGBl. 2007 II S. 930)"; Law on International Health Regulations 2005.
- Gesetz über die Eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz - LPartG); "Lebenspartnerschaftsgesetz vom 16. Februar 2001 (BGBl. I S. 266), zuletzt geändert durch Artikel 2 des Gesetzes vom 21. Dezember 2007 (BGBl. I S. 3189)"; Act on the Registered Life Partnership.
- Melderechtrahmengesetz (MRRG); "Melderechtsrahmengesetz in der Fassung der Bekanntmachung vom 19. April 2002 (BGBl. I S. 1342), zuletzt geändert durch Artikel 26b des

Gesetzes vom 20. Dezember 2007 (BGBl. I S. 3150)"; Registration Framework Law; + Landesrecht (cf. Article 5.5)

- Gesetz über Ordnungswidrigkeiten (OWiG); "Gesetz über Ordnungswidrigkeiten in der Fassung der Bekanntmachung vom 19. Februar 1987 (BGBl. I S. 602), zuletzt geändert durch Artikel 2 des Gesetzes vom 7. August 2007 (BGBl. I S. 1786)"; Administrative Offences Act.
- Passgesetz (PassG); "Paßgesetz vom 19. April 1986 (BGBl. I S. 537), zuletzt geändert durch Artikel 1 des Gesetzes vom 20. Juli 2007 (BGBl. I S. 1566, 2317)"; Passport Law.
- Verordnung zur Durchführung des Passgesetzes (Passverordnung - PassV); "Passverordnung vom 19. Oktober 2007 (BGBl. I S. 2386)"; Ordinance on Implementation of Passport Law.
- Gesetz über Personalausweise (PersAuswG); "Gesetz über Personalausweise in der Fassung der Bekanntmachung vom 21. April 1986 (BGBl. I S. 548), zuletzt geändert durch Artikel 2 des Gesetzes vom 20. Juli 2007 (BGBl. I S. 1566)"; Act on Identity Cards.
- Sozialgesetzbuch (SGB) Zweites Buch (II); "Zweites Buch Sozialgesetzbuch - Grundsicherung für Arbeitsuchende - (Artikel 1 des Gesetzes vom 24. Dezember 2003, BGBl. I S. 2954), zuletzt geändert durch Artikel 2 des Gesetzes vom 10. Oktober 2007 (BGBl. I S. 2329)"; Social Code, Second Book.
- Sozialgesetzbuch (SGB) Drittes Buch (III); "Drittes Buch Sozialgesetzbuch - Arbeitsförderung - (Artikel 1 des Gesetzes vom 24. März 1997, BGBl. I S. 594), zuletzt geändert durch § 22 Abs. 4 des Gesetzes vom 12. Dezember 2007 (BGBl. I S. 2861)"; Social Code, Third Book.
- Sozialgesetzbuch (SGB) Fünftes Buch (V); "Fünftes Buch Sozialgesetzbuch - Gesetzliche Krankenversicherung - (Artikel 1 des Gesetzes vom 20. Dezember 1988, BGBl. I S. 2477), zuletzt geändert durch § 22 Abs. 7 des Gesetzes vom 12. Dezember 2007 (BGBl. I S. 2861)"; Social Code, Fifth Book.
- Sozialgesetzbuch (SGB) Achtes Buch (VIII); "Achtes Buch Sozialgesetzbuch - Kinder und Jugendhilfe - (Artikel 1 des Gesetzes vom 26. Juni 1990, BGBl. I S. 1163) in der Fassung der Bekanntmachung vom 14. Dezember 2006 (BGBl. I S. 3134), geändert durch Artikel 2 Abs. 23 des Gesetzes vom 19. Februar 2007 (BGBl. I S. 122)"; Social Code, Eighth book.
- Sozialgesetzbuch (SGB) Zwölftes Buch (XII); "Zwölftes Buch Sozialgesetzbuch - Sozialhilfe - (Artikel 1 des Gesetzes vom 27. Dezember 2003, BGBl. I S. 3022), zuletzt geändert durch Artikel 5 des Gesetzes vom 23. Dezember 2007 (BGBl. I S. 3254)"; Social Code, Twelfth Book.
- Verwaltungsgerichtordnung (VwGO); "Verwaltungsgerichtsordnung in der Fassung der Bekanntmachung vom 19. März 1991 (BGBl. I S. 686), zuletzt geändert durch Artikel 13 des Gesetzes vom 12. Dezember 2007 (BGBl. I S. 2840)"; Administrative Courts Ordinance.
- Verwaltungsverfahrensgesetz (VwVfG); "Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), geändert durch Artikel 4 Abs. 8 des Gesetzes vom 5. Mai 2004 (BGBl. I S. 718)"; Law on Administrative Proceedings.

ANNEX III: Selected national case law

- Landessozialgericht (LSG) Baden-Württemberg, Beschluss vom 17.9.2007 – L 7 SO 3970/07 ER-B, NVwZ-RR 2008, p. 209-210.
- Bundesverwaltungsgericht, Urteil vom 9.8.2007 – 1 C 47/06, ZAR 2007, p. 406-410.
- Bundesverwaltungsgericht, Urteil vom 4.9.2007 – 1C 21/07, NVwZ 2008, P. 82-84.
- Bundesverwaltungsgericht (BVerwG), Urteil vom 25. 7. 2007 - 6 C 39. 06.
- Oberlandesgericht München, Beschluss vom 21.6.2007 – 34 Wx 63/07, FGPraz 2007, p. 246-247.
- Oberlandesgericht (OLG) Karlsruhe, Beschluss vom 8.1.2007 – 1 AK 54/06, NStZ 2007, p. 413.
- Bundesverwaltungsgericht (BVerwG), 6.10.2005, BVerwGE 124, 243 ff.
- Verwaltungsgerichtshof (VGH) Kassel, Beschluss vom 29.12.2004 – 12 TG 3212/04, NVwZ 2005, p. 837-838.
- Bundesverwaltungsgericht (BVerwG), Urteil vom 3.8.2004 – 1 C 30/02, NVwZ 2005, p. 220 – 224.