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CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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**Obstacles to the right of free  
movement and residence for EU  
citizens and their families:  
Country report for Germany**

**Study for the LIBE and PETI Committees**





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS  
PETITIONS**

# **Obstacles to the right of free movement and residence for EU citizens and their families: Country report for Germany**

## **STUDY**

### **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE and PETI Committees, analyses the current status of transposition of selected provisions of Directive 2004/38/EC in Germany and identifies the main persisting barriers to free movement for EU citizens and their family members in German national law and practice. The study also examines discriminatory restrictions to free movement, measures to counter abuse of rights and refusals of entry and residence rights, in addition to expulsions.

## **ABOUT THE PUBLICATION**

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## LIST OF ABBREVIATIONS

<b>CEPS</b>	Centre for European Policy Studies
<b>Cf</b>	Confer
<b>CJEU</b>	Court of Justice of the European Union
<b>EP</b>	European Parliament
<b>FRA</b>	EU Agency for Fundamental Rights
<b>FreizügG/EU</b>	Law on General Freedom of Movement of EU Citizens
<b>TFEU</b>	Treaty on the Functioning of the European Union

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## EXECUTIVE SUMMARY

Generally speaking, **Directive 2004/38/EC has been transposed accurately** into German law. However, despite recent amendments to the relevant legislation at national level<sup>1</sup>, **a few (minor) transposition issues remain.**

These relate, in the main, to the **lack of specific rules** regarding the obligation to facilitate entry and residence for other family members and partners (Article 3(2) Directive 2004/38/EC) and, with respect to students, for dependent direct relatives in the ascending lines and those of his/her spouse or registered partner (Article 7(4) sentence 2 Directive 2004/38/EC). Issues are also noted in transposition of the obligation to facilitate entry visas for third country family members (Article 5(2) Directive 2004/38/EC). In most of these cases, however, national law may be interpreted/is applied in line with EU law requirements.

**Legal clarifications would be useful** at national level for Article 14(3) Directive 2004/38/EC (prohibition of automatic expulsion) and Article 14(4) Directive 2004/38/EC (prohibition of expelling economically active persons and jobseekers for economic reasons). Despite the lack of specific rules, however, the legal framework is in line with EU law requirements.

In addition, some controversy has arisen as to whether or not the **ban on re-entry in cases of fraudulent behaviour** is in line with Article 15(3) Directive 2004/38/EC.

Despite the largely accurate transposition of Directive 2004/38/EC, both the European Parliament (EP) petitions concerning Germany and the Your Europe Advice Quarterly Reports reflect **practical obstacles** with respect to free movement and residence rights in Germany. The author highlights that both sources are based on complaints by citizens, that are then checked (but not necessarily investigated and verified) by ECAS, the Commission and the EP if they raise concerns in relation to the possible violation of EU law. The issues raised in the complaints on Germany are small in number and concern specific cases that result mainly from the incorrect application of national law. Hence, it is not possible to understand how widespread the issues are; the author could not detect a structural implementation deficit on the basis of these complaints.

Specific examples of practical obstacles to entry and residence (Articles 3(2) and 7(2) Directive 2004/38/EC), and obtaining visas for certain relatives (Article 5(2) Directive 2004/38/EC) have been reported to be linked to information deficits and extensive formal requirements. Further entry and residence obstacles concern inter alia a non-application of the visa exemption, a general prohibition on the use of the accelerated procedure for family members of EU citizens, fees, delays and requests for extra documentation, and visa denial on invalid grounds. Difficulties in obtaining residence cards for family members have also been reported.

With regard to **discrimination**, all transitional measures for citizens from Bulgaria, Romania and Croatia in Germany have expired, and **registered partnerships of same-sex couples** have been included in the free movement regime. **Measures to combat**

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<sup>1</sup> Amending Law of 21 January 2013 (*Article 1 G zur Änderung des FreizügG/EU und weiterer aufenthaltsrechtlicher Vorschriften*), BGBl. I, p. 86; Amending Law of 2 December 2014 (*Article 1 G zur Änderung des FreizügG/EU und weiterer Vorschriften*), BGBl. I, p. 1922.

**abuse of rights** were added to the national legislation in 2013/2014, and include the possibility of withdrawing the right to residence and the ability to issue re-entry bans in cases of falsified documents or fraudulent statements. **Refusal of entry or residence and expulsions** of EU citizens seem to be applied only rarely in practice.

Finally, it may be observed that intra-EU free movement of persons has created controversy in recent years, particularly in the context of **access of jobseekers and economically inactive persons to social benefits**<sup>2</sup>.

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<sup>2</sup> Final report of the Committee of State Secretaries on legal issues and challenges in the field of social assistance claims by nationals of the EU Member States, Conclusions, BT-Drs. 18/2470, available at: [http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2014/abschlussbericht-armutsmigration.pdf;jsessionid=F4E1653403B822CE6A3FD3C6C01B8994.2\\_cid373?\\_blob=publicationFile](http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2014/abschlussbericht-armutsmigration.pdf;jsessionid=F4E1653403B822CE6A3FD3C6C01B8994.2_cid373?_blob=publicationFile), p. 5.

# 1. OVERVIEW OF THE TRANSPOSITION OF DIRECTIVE 2004/38/EC AND RECENT DEVELOPMENTS

## KEY FINDINGS

- Directive 2004/38/EC has been **almost entirely transposed** into national law. The key piece of legislation with respect to entry and residence is the Law on General Freedom of Movement of EU Citizens (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern* – abbreviated: FreizügG/EU).
- Since 2008, **improvements** may be noted in the transposition of Article 35 Directive 2004/38/EC (**abuse of rights** of free movement), and the **equal treatment** of registered partnerships of same-sex couples and marriage.
- Despite amendments in 2013 and 2014 to the German law on free movement of EU citizens, there is **no specific transposition** of the obligation to facilitate **entry and residence** (Articles 3(2) and 7(2) Directive 2004/38/EC), or to facilitate obtaining visas for certain relatives (Article 5(2) Directive 2004/38/EC). In most of these cases, however, national law may be interpreted/is applied in line with EU law requirements.
- Article 14(3) Directive 2004/38/EC (prohibition of **automatic expulsion** for recourse to the German social assistance system) and Article 14(4) Directive 2004/38/EC (**prohibition of expelling** economically active persons and jobseekers **for economic reasons**) have not yet been explicitly transposed in German legislation.

## 1.1. Transposition context

Directive 2004/38/EC has been mainly **transposed** by one federal law, the Law on General Freedom of Movement of EU Citizens (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern* – abbreviated: *FreizügG/EU*)<sup>3</sup>. It entered into force on 1 January 2005 and was last modified on 22 December 2015<sup>4</sup>. **Administrative guidelines** have also been adopted<sup>5</sup>.

<sup>3</sup> Wollenschläger, F., 'A new Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for shifting the Economic Paradigm of European Integration' [2011] *European Law Journal* (ELJ) 17, 1 ff.; idem, 'Protection of fundamental rights and citizenship' in Hatje, A./Müller-Graff, P.-C. (eds) *Encyclopedia of European Law*, Vol.1: European organisational and constitutional law ('*Grundrechtsschutz und Unionsbürgerschaft*' in Hatje, A., Müller-Graff, P.C. (eds) *Enzyklopädie Europarecht*, Vol. 1: *Europäisches Organisations- und Verfassungsrecht*) (2014) § 8 para. 116 ff.; idem, *Fundamental freedom without market. The emergence of citizenship in the European Union free movement regime (Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime)* (Mohr Siebeck, Tübingen, 2007).

<sup>4</sup> Law on General Freedom of Movement of EU Citizens of 30 July 2004 (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern*), BGBl. I, p. 1950, 1986, last modified by Amending Law of 22 December 2015 (*Article 6 G zur Änderung des Zwölften Buches Sozialgesetzbuch und weiterer Vorschriften*), BGBl. I, p. 2557.

<sup>5</sup> General administrative guidelines to the FreizügG/EU (*Allgemeine Verwaltungsvorschriften zum FreizügG/EU*) of 26 October 2009, GMBL. p. 1270. An updated version has been passed by the government, and is awaiting the consent of the Bundesrat (Länder chamber), cf. BR-Drs. 535/15, the text is available at: <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>; in this study, the new guidelines are referred to (although not yet in force).

#### 1.1.1. Transposition overview as assessed by the European Parliament and the Commission in 2008

Germany was not one of the Member States selected for in-depth analysis by either the EP Comparative study on the application of Directive 2004/38/EC or the Centre for European Policy Studies (CEPS) study 'Dilemmas in the implementation of Directive 2004/38 on the right of citizens and their family members to move and reside freely in the EU'. The following conclusions, therefore, rely on the 2008 Commission report on the transposition of Directive 2004/38/EC.

The Commission's 2008 report considered the transposition of Directive 2004/38/EC in Germany to be **largely complete and correct**, even identifying some cases of more favourable treatment. However, **several gaps and inaccuracies existed**, and the Commission initiated infringement proceedings against Germany for its failure to meet the deadline to communicate the text of the provisions of national law adopted to transpose the Directive<sup>67</sup>.

The key issues raised in the 2008 report were:

- The treatment of 'other family members' (Article 3(2) of Directive 2004/38/EC) was not fully transposed, including the fact that a number of categories of partners were not covered<sup>8</sup>.
- The treatment of registered partnerships (Article 2(2) (b) of Directive 2004/38/EC)<sup>9</sup>.
- No explicit facilitation of third country national family members to obtain entry visas (Article 5(2) of Directive 2004/38/EC)<sup>10</sup>.
- An ambiguous definition of the concept of 'sufficient resources' (Article 7(1) (right of residence for more than three months) and Article 8(3) (administrative formalities for Union citizens for the issuance of a registration certificate) of Directive 2004/38/EC)<sup>11</sup>.
- Incorrect transposition of Article 7(3) (the retention of the status of worker or self-employed person) in that German legislation referred to the retention of the right of residence instead of the retention of the status of worker.
- Article 7(4) (right of residence of family members for more than three months) of Directive 2004/38/EC, where a number of categories of partners were not covered<sup>12</sup>.
- Residence cards issued to third country national family members were not compliant with the explicit formulation in Article 10(1) of Directive 2004/38/EC (i.e. 'Residence card of a family member of a Union citizen')<sup>13</sup>.
- No explicit exclusion of expulsion as an automatic consequence of recourse to the social assistance system (Article 14(3) of Directive 2004/38/EC)<sup>14</sup>. In addition, there is no specific provision in German national law transposing Articles 14(4) (a) and (b) of Directive 2004/38/EC. However, the legislation explicitly grants an unconditional (in terms of economic criteria) right to residence to economically active persons and

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<sup>6</sup>European Commission, Report on the application of 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, COM(2008) 840 final, p. 12 (second table in Annex).

<sup>7</sup> Ibid., p. 3.

<sup>8</sup> Ibid., p. 4.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., p. 5.

<sup>11</sup> Ibid., p. 6.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid., p. 7.

thus corresponds with Article 14(4) (a) of Directive 2004/38/EC<sup>15</sup>.

- The requirement that the verification of the conditions of residence should not be carried out systematically (Article 14(2) of the Directive) is reflected in the legislation through § 5(3) FreizügG/EU which authorises the verification of residence conditions only for specific reasons. The wording of § 5(3) FreizügG/EU thus seems to prohibit a systematic control<sup>16</sup>, which is also confirmed by legal literature on this issue<sup>17</sup>. Moreover, the **administrative guidelines** to the FreizügG/EU (No. 2.7.2.4) clearly state that an examination may only be carried out in specific cases, but not systematically or without a specific occasion; as examples for the latter, the guidelines mention substantiated doubts regarding the fulfillment of the conditions of the right to free movement or for fraudulent behaviour<sup>18</sup>.
- Absence of clear and strict guidelines for the exercise of judicial and administrative discretion regarding restrictions to the right to free movement in national law (Articles 27 and 28 of Directive 2004/38/EC)<sup>19</sup>.
- No transposition of Article 35 (measures to counter abuse of rights of free movement) of Directive 2004/38/EC<sup>20</sup>.

### 1.1.2. What has changed since

In 2013 and 2014 there were two major legislative changes regarding the freedom of movement of EU citizens in Germany.

On 21 January 2013, in order to reduce the costs of bureaucracy as well as to 'completely transfer into the FreizügG/EU single provisions of Directive 2004/38/EC which have not yet been transposed in an appropriate way' the German legislator adopted a law amending the FreizügG/EU and other provisions on the right to residence<sup>21,22</sup>. The most important amendments concerned the transposition of Article 35 of Directive 2004/38/EC (**abuse of rights**), the **equal treatment of registered partners with spouses** of an EU citizen, and abolishment of the practice of issuing a **certificate** for EU citizens declaring their right to residence under Article 8(1) of Directive 2004/38/EC<sup>23</sup>.

In addition, on 8 **January 2014**, the Federal government established a **Committee** of State Secretaries 'on legal issues and challenges in the field of social assistance claims by nationals of the EU Member States'. The committee analysed the impact of free movement of EU citizens on Germany, proposing **measures to fight abuse** and to provide financial support to local authorities specifically affected<sup>24</sup>. These proposals have been adopted by the national

<sup>15</sup> §§ 2(2) no. 1, 2, 3 and 4a FreizügG/EU.

<sup>16</sup> The senior expert adds that this assessment might be at the margins of what is permissible and that the framework of German legislation and administrative guidelines may allow more leeway for systematic action than might be permissible under EU law.

<sup>17</sup> Dienelt, K., in Bergmann, J., Dienelt, K. (Eds) *Ausländerrecht* (2016) § 5 FreizügG/EU para. 49; cf. further Geyer, F., in Hofmann, R. (ed), *Immigration Law (Ausländerrecht)* (2nd edition 2016) § 5 para. 9; Kurzidem, C., in Kluth, W., Heusch, A. (Eds), *Immigration Law (Ausländerrecht)* (2015) § 5 FreizügG/EU para. 11 f.

<sup>18</sup> General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, p. 28, available at <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>.

<sup>19</sup> European Commission, Report on the application of 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, COM(2008) 840 final, p. 8 (second table in Annex).

<sup>20</sup> Ibid., p. 9.

<sup>21</sup> Draft law amending the FreizügG/EU and other laws on residence, BT-Drs. 17/10746, p. 1.

<sup>22</sup> Amending Law of 21 January 2013, BGBl. I, p. 86; Tewocht, H., 'The new rules of free movement law/EU' ('*Die Neuregelung des Freizügigkeitsgesetzes/EU*') ZAR 2013, 221 ff.

<sup>23</sup> Draft law amending the FreizügG/EU and other laws on residence, BT-Drs. 17/10746, p. 1.

<sup>24</sup> Final report of the Committee of State Secretaries on legal issues and challenges in the field of social assistance claims by nationals of the EU Member States, Conclusions, available at:

legislator, in **amendments** to the FreizügG/EU, the Social Security Code V (*Sozialgesetzbuch V*) and the Law on Income Tax (*Einkommenssteuergesetz*)<sup>25</sup>. The key amendments were the specification of the conditions of EU jobseekers' residence rights and the introduction of the possibility of issuing a **ban on re-entry** in cases of fraud and fraudulent family reunification.

The following transposition issues highlighted in the Commission's 2008 report have been addressed:

- Article 35 of Directive 2004/38/EC (**abuse of rights**) has been transposed (withdrawal of the right of entry and residence and ban on re-entry and residence)<sup>26</sup>. However, this has given rise to concerns regarding Article 15(3) of Directive 2004/38/EC (see section 4 below).
- With the deletion of § 3(6) FreizügG/EU (after 29 January 2013) and the **inclusion of registered partnerships**, equal treatment has been granted to registered partnerships of same-sex couples and marriage with respect to freedom of movement of EU citizens according to Article 2(2)(b) of Directive 2004/38/EC.

The wording of **jobseekers'** right to residence has been amended. According to the legislation, they now enjoy an **unconditional right to residence for six months**, after which they are entitled to residence only if 'they can **provide evidence** that they are continuing to **seek employment** and that they have a **genuine chance of being employed**'<sup>27</sup>. This **new and stricter provision** was transposed in **2014**<sup>28</sup>, changing the previous right of jobseekers to residence without any further conditions. While this amendment has been widely welcomed<sup>29</sup>, some critics claim that the wording of the legislation implies a systematic control of the fulfillment of the residence requirements for jobseekers after six months, in violation of the clear intention of Article 14(2) of Directive 2004/38/EC and § 5(3) FreizügG/EU<sup>30</sup>. Contrary to a petition to the EP, this amendment does not mean an automatic expulsion after six months<sup>31</sup>. In fact, the Court of Justice of the European Union (CJEU) held in the *Antonissen* case that a Member State may require a EU citizen who entered the Member State to seek work to leave if he has not found employment there after six months, 'unless the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged'<sup>32</sup>.

**Some transposition issues** highlighted by the Commission's 2008 report **persist**. Even if the transposition issues exist, national law must be interpreted in line with the requirements

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[http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2014/abschlussbericht-armutsmigration.pdf?jsessionid=F4E1653403B822CE6A3FD3C6C01B8994.2\\_cid373?\\_blob=publicationFile](http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2014/abschlussbericht-armutsmigration.pdf?jsessionid=F4E1653403B822CE6A3FD3C6C01B8994.2_cid373?_blob=publicationFile), p. 5 ff.; Interim report of the Committee of State Secretaries on legal issues and challenges in the field of social assistance claims by nationals of the EU Member States, available at : [http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a813-zwischenbericht-ausschuss-sicherungssysteme-eu.pdf?\\_blob=publicationFile&v=2](http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a813-zwischenbericht-ausschuss-sicherungssysteme-eu.pdf?_blob=publicationFile&v=2) (German version)and <http://www.bmas.de/EN/Services/Publications/a813e-zwischenbericht-en.html> (English summary).

<sup>25</sup> Amending Law of 2 December 2014, BGBl I, p. 1922.

<sup>26</sup> § 2(7) FreizügG/EU and § 7(2) sentence 2–4 FreizügG/EU.

<sup>27</sup> § 2(2) no. 1a FreizügG/EU.

<sup>28</sup> Amending Law of 2 December 2014, BGBl. I, p. 1922.

<sup>29</sup> E.g. Deutscher Landkreistag, Statement on draft law amending FreizügG/EU and other provisions of 22 September 2014, BT-Ausschussdrucksache 18(4)164 C, p. 3.

<sup>30</sup> § 2(2) no. 1a FreizügG/EU. Der Paritätische Gesamtverband, Statement on draft law amending FreizügG/EU and other provisions of 22 September 2014, BT-Ausschussdrucksache 18(4)164 B, p. 8; Bundesarbeitsgemeinschaft der freien Wohlfahrtspflege, Statement on draft law amending FreizügG/EU and other provisions of 22 September 2014, BT-Ausschussdrucksache 18(4) 162, p. 2.

<sup>31</sup> Petition No. 2398/2014 to the European Parliament.

<sup>32</sup> CJEU Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-00745.



of EU law<sup>33</sup>, so that a transposition issue does not necessarily result in a conflict with substantive standards of EU law.

- Article 3(2) of Directive 2004/38/EC (entry and residence rights of family members and partners) has not been specifically transposed into the Law on free movement of EU citizens (see section 1.2 for more detail).
- Article 5(2) of Directive 2004/38/EC (visas for family members) has not been specifically transposed aside from the issuance of visas free of charge and the exemption to the visa obligation for those holding a valid residence card (see section 2.2 for more detail).
- National law does not explicitly exclude expulsion as an automatic consequence of recourse to the social assistance system, as stipulated by Article 14(3) of Directive 2004/38/EC (see section 2.1.2 for more detail).
- Article 7(3) of Directive 2004/38/EC has not been transposed in a single and comprehensive rule, since German national law only provides for the retention of the right of entry and residence for former workers, but not of the status of worker as such<sup>34</sup>. Generally speaking, the term 'worker', when used in national law, is to be understood in line with the EU concept<sup>35</sup>. The issue has to be assessed with regard to specific provisions e.g. for access to social assistance for jobseekers, EU law requirements are respected<sup>36</sup>. Insofar, § 7(1) sentence 2 Nr. 1 explicitly refers to persons who enjoy a right to free movement as worker.
- Article 7(4) sentence 2 of Directive 2004/38/EC has not been specifically transposed into German national law, since entry and residence for dependent direct relatives of a student in the ascending lines and those of his/her spouse or registered partner is not specifically facilitated.
- The issues with Article 14 of the Directive (retention of residence rights) also persist in so far as the legislation still does not explicitly guarantee exclusion of expulsion as an automatic consequence of recourse to the social assistance system<sup>37</sup>. In addition, there is no specific provision in German national law transposing Articles 14(4) (a) and (b) of Directive 2004/38/EC. Nonetheless, German law does not explicitly foresee such consequences and, in view of the obligation to interpret/apply national law in line with EU law requirements<sup>38</sup>, discretion granted to national authorities must be exercised in line with the requirements of EU law.

The definition of the notion of '**sufficient resources**' within the meaning of Article 7(1) and Article 8(3) of Directive 2004/38/EC is still **unclear** in German national law, in particular in terms of non-contributory benefits. Although the notion of 'resources' has not been defined in the FreizügG/EU itself, it is described in the explanation of the legislator<sup>39</sup>, as well as in the **administrative guidelines** to the FreizügG/EU (No. 4.1.2.1)<sup>40</sup>. In German law, resources comprise all legal sources of income and assets with a financial value, in particular alimony payments from family members or third parties, scholarships, grants for education or

<sup>33</sup> Wollenschläger, F., in Dreier, H. (Ed) *Grundgesetz Vol. 2* (3rd edition 2015) Article 23 para. 38.

<sup>34</sup> § 2(3) FreizügG/EU.

<sup>35</sup> Brinkmann, G., in Huber, B. (ed.), *Residence Act (Aufenthaltsgesetz)* (1st edition 2010), § 2 para. 7; Frings, D., *Social justice for immigrants (Sozialrecht für Zuwanderer)* (Nomos, Baden-Baden, 2008) 63.

<sup>36</sup> § 7(1), Social Security Code II (*Sozialgesetzbuch II*) and Social Court of First Instance of Frankfurt (Sozialgericht Frankfurt), Decision of 13 June 2014 – S 32 AS 620/14 ER, para. 24.

<sup>37</sup> *Ibid.*, p. 7.

<sup>38</sup> Wollenschläger, F., in Dreier, H. (Ed) *Grundgesetz Vol. 2* (3rd edition 2015) Article 23 para. 38.

<sup>39</sup> BR-Drs. 22/03.

<sup>40</sup> Draft law in order to control and restrict immigration and to regulate residence and integration of EU citizens and foreigners (Law on immigration), BT-Drs. 15/420, p. 103; General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, p. 28, available at <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>.

(re-)training, unemployment benefits, widow and orphan pensions, old-age pensions (including early retirement), disability pensions or any other contributory benefits financed by public funds. The latter reference to contributory benefits is not reflected in Directive 2004/38/EC, making it unclear whether or not non-contributory unemployment benefits according to Social Code II (*Sozialgesetzbuch II*) and other non-contributory benefits must also be considered resources within the meaning of § 4 FreizügG/EU in order to comply with EU law<sup>41</sup>. The **planned amendments** to the administrative guidelines of the FreizügG/EU will explicitly exclude non-contributory unemployment benefits under the Social Code II (*Sozialgesetzbuch II*) from consideration as resources within the meaning of § 4 FreizügG/EU<sup>42</sup>. This is a reasonable and consequent follow-up of the CJEU's interpretation of Article 24(2) of Directive 2004/38/EC (equal treatment) in the *Dano* case<sup>43</sup>.

In line with **Article 8(4) Directive 2004/38/EC**, German national law does not determine a fixed amount which may be regarded as 'sufficient resources'. According to the administrative guidelines to the FreizügG/EU, and in compliance with the Directive, the authorities are obliged to take into account all personal circumstances of the person concerned<sup>44</sup>. At local level, however, examples of incorrect administrative guidelines have been identified, e.g. the guidelines of the city of Hamburg stipulate that proof of sufficient resources is the minimum amount of the standard rate for unemployment benefits under Social Code II (*Sozialgesetzbuch II*) plus rent for accommodation<sup>45</sup>. Since the latter guidelines go further than the threshold below which a person is eligible for social assistance, this is not in line with the Directive.

According to the legislation, the competent authority may request prima facie evidence of sufficient resources and comprehensive sickness insurance after three months of residence<sup>46</sup>. However, according to the administrative guidelines to the FreizügG/EU<sup>47</sup>, this should be limited to particular cases, thereby creating uncertainty about the fulfilment of the economic criteria. It is also assumed that an EU citizen is in possession of sufficient resources as long as he/she does not apply for social assistance under Social Code II and XII (*Sozialgesetzbuch II und XII*)<sup>48</sup>. In practice, it might be difficult to establish prima facie evidence, especially if parts of the living costs are obtained in cash, but no specific examples were identified<sup>49</sup>. Since the administrative guidelines to the FreizügG/EU do not include a list of eligible

<sup>41</sup> Brinkmann, G., in Huber, B. (ed.), *Residence Act (Aufenthaltsgesetz)* (1st edition 2010), § 4 para. 8; Oberhäuser, T., in Hofmann, R. (ed), *Immigration Law (Ausländerrecht)* (2nd edition 2016) § 4 para. 6. Disagreeing Hailbronner, K., in idem (ed), *Immigration Law (Ausländerrecht)* (93th edition 01/2016) § 4 para. 5.

<sup>42</sup> General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, p. 28, available at <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>.

<sup>43</sup> ECJ, Case C-333/13, ECLI:EU:C:2014:2358 – *Dano*, para. 63.

<sup>44</sup> No. 4.1.2.3. General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, available at: <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>, p. 29.

<sup>45</sup> Guidelines of the Free and Hanseatic City of Hamburg, specialized instruction according to § 45 para. 2 District Administrative Law of the Ministry of Home Affairs on the Foreigners Act Freie und Hansestadt Hamburg, (*Fachanweisung nach § 45 Abs. 2 Bezirksverwaltungsgesetz der Behörde für Inneres zum Ausländerrecht*), no. 2/2013, available at: <http://www.hamburg.de/contentblob/3893784/data/weisung-2-2013.pdf>.

<sup>46</sup> § 5(2) FreizügG/EU, together with § 5a(1) no. 3 FreizügG/EU; European Parliament, Comparative study on the application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels, March 2009, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI\\_ET%282009%29410650\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET%282009%29410650_EN.pdf), p. 185.

<sup>47</sup> No. 4.1.2.3. of the administrative guidelines to the FreizügG/EU.

<sup>48</sup> No. 4.1.2.2. General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15,, available at: <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>, p. 29.

<sup>49</sup> Pfersich, A., 'Comment on Federal Administrative Court, Decision of 16 July 2015, BVerwG 1 C 22.14' ZAR 2015, 401, 401.



documents, the authorities have **considerable discretion** to decide on a case-by-case basis and with respect to the principle of proportionality<sup>50</sup>.

Other issues include the fact that **residence cards** of family members of EU citizens are still not called 'Residence card of a family member of a Union citizen' as stipulated by Article 10(1) Directive 2004/38/EC but remain labelled a 'residence card' (see section 2.2 for more detail).

The rules on the **expulsion** of EU citizens on grounds of public policy, public security or public health have not been amended since 2008. The legislation, however, reflects the guidelines given by Article 27(f) of Directive 2004/38/EC and the text of the existing administrative guidelines also gives further guidance on the exercise of administrative discretion<sup>51</sup>.

As well as these legislative amendments, the free movement of EU citizens has been a frequent topic of **court rulings**, also leading to references to the CJEU, among them the key cases of *Dano*<sup>52</sup>, *Alimanovic*<sup>53</sup> and *García-Nieto*<sup>54</sup>.

As a consequence of these changes to the legal framework, the **administrative guidelines** to the FreizügG/EU will be **adapted shortly**<sup>55</sup>.

## 1.2. Current transposition status

### 1.2.1. Overall assessment of the current transposition status in Germany

Directive 2004/38/EC has been **almost entirely transposed** into national law. Despite amendments to the German law on free movement of EU citizens in 2013 and 2014, **some transposition issues remain** (see section 1.1.2 above)<sup>56</sup>.

### 1.2.2. Additional conditions in law or practice for family members (especially third country national family members) to exercise their free movement rights

The main issue in the transposition of Directive 2004/38/EC still concerns Article 3(2)(a) of Directive 2004/38/EC, which requires Member States to **facilitate entry and residence for other family members. No specific transposition yet exists** in Germany. For this group, only § 36(2) German Law on Residence (*Aufenthaltsgesetz*) gives German authorities the option to grant a residence permit in order to avoid a particular hardship. Some academics claim that the strict conditions of the legislation mean that the right to residence/entry has not been facilitated, in particular with regard to recital 6<sup>57</sup>. Others argue that the

<sup>50</sup> Pfersich, A., 'Comment on Federal Administrative Court, Decision of 16 July 2015, BVerwG 1 C 22.14' ZAR 2015, 401, 401.

<sup>51</sup> § 6 FreizügG/EU and General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, available at : <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>, p. 48 ff.

<sup>52</sup> CJEU, Case C-333/13, ECLI:EU:C:2014:2358 – Dano.

<sup>53</sup> CJEU, Case C-67/14, ECLI:EU:C:2015:597 – Alimanovic.

<sup>54</sup> CJEU, Case C-299/14, ECLI:EU:C:2016:114 – García-Nieto.

<sup>55</sup> General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, available at : <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>.

<sup>56</sup> Groenendijk, K., Guild, E., Cholewinski, R., Oosterom-Staples, H., Minderhoud, P., Mantu, S., Fridriksdottir, B., European Report on the Free Movement of Workers in Europe in 2012–2013, p. 14.

<sup>57</sup> CJEU Case C-83/11, ECLI:EU:C:2012:519 – Rahman, para. 21 f. ; Tewocht, H., in Kluth, W., Heusch, A. (Eds), Immigration Law (*Ausländerrecht*) (2015) § 36 Aufenthaltsgesetz para. 12 f. and § 3 FreizügG/EU para. 18 ;

transposition is correct, stating that § 36(2) Law on Residence must be interpreted in light of the mentioned EU law requirements<sup>58</sup>. No other additional conditions in law or practice were identified for family members (especially third country national family members) to exercise their free movement and residence rights.

### 1.2.3. Germany's approach towards the partners of EU citizens

With the deletion of § 3(6) FreizügG/EU (in 2013) and the inclusion of registered partnerships<sup>59</sup>, equal treatment is granted to registered partnerships of same-sex couples regarding freedom of movement of EU citizens according to Article 2(2)(b) of Directive 2004/38/EC<sup>60</sup>.

However, Article 3(2) (b) of Directive 2004/38/EC has not been specifically transposed into German national law. **Durable relationships are not mentioned** in German national law, **nor does any facilitation of entry or residence** for such durable relationships exist. Again (cf. 1.2.2.), as mentioned above, the right to residence may be interpreted in light of the mentioned EU law requirements, albeit this should be specified in the legislation<sup>61</sup>.

### 1.2.4. Germany's implementation of the Metock ruling

With regard to the right of residence of third country national family members, no specific conditions (such as those dealt with in the CJEU **Metock case**), have been detected in German national law or practice. No. 3.0.3 of the administrative guidelines to the FreizügG/EU makes explicit reference to the *Metock* case and reflects the CJEU's ruling that third country national family members shall not be required to have lawfully resided in another Member State in order to obtain the right of residency in Germany<sup>62</sup>.

### 1.2.5. Requirements for obtaining the right of residence beyond those contained in Articles 7(1) and 7(2) Directive 2004/38/EC

German national law does not make the right of residence dependent on any additional criteria which are contrary to the provisions of Articles 7(1) and 7(2) of Directive 2004/38/EC. There are no additional requirements to those listed in the Directive in order to obtain the right of residence.

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Dienelt, K., in Bergmann, J., Dienelt, K. (Eds) *Ausländerrecht* (2016) § 3 FreizügG/EU para. 29; Oberhäuser, T., in Hofmann, R. (Ed), *Immigration Law (Ausländerrecht)* (2016) § 2 FreizügG/EU para. 32 and § 3 FreizügG/EU para. 18.

<sup>58</sup> Schönberger, C., Thym, D., 'National Report on Germany' in Neergaard, U., Jacqueson, C., Holst-Christensen, N. (eds) *Union Citizenship – Congress publications of the XXVI FIDE Congress in Copenhagen Vol. 2*, 569.

<sup>59</sup> § 3(2) FreizügG/EU.

<sup>60</sup> Tewocht, H., in Kluth, W., Heusch, A. (eds), *Immigration Law (Ausländerrecht)* (9th edition 11/2015) § 3 FreizügG/EU para. 3. Equal treatment has been granted to registered partnerships in national jurisprudence even before 2013: Administrative Court of First Instance Darmstadt (Verwaltungsgericht Darmstadt), Decision of 5 June 2008, 5 L 277/08.DA, para. 22.

<sup>61</sup> Cf. Dienelt, K., in Bergmann, J., Dienelt, K. (Eds) *Ausländerrecht* (2016) § 3 FreizügG/EU para. 29.

<sup>62</sup> General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, available at: <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>, p. 21.

1.2.6. Conditions attached to the right of permanent residence beyond Article 16  
Directive 2004/38/EC

Article 16 of Directive 2004/38/EC was correctly transposed into German national law<sup>63</sup>. There are no other additional conditions attached to the right of permanent residence beyond those already stipulated by the Directive.

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<sup>63</sup> § 4a FreizügG/EU.

## 2. DIRECTIVE'S IMPLEMENTATION: DESCRIPTION OF THE MAIN PERSISTING BARRIERS

### KEY FINDINGS

- In terms of the right to **entry**, EU citizens and their family members do not face legal barriers in Germany, except for the aforementioned issue of facilitation. The EP petitions concerning Germany and the Your Europe Advice Quarterly Reports reflect some **practical barriers** resulting from the **incorrect application** of national transposing law (which itself correctly transposes EU law), a **lack of information** about the type of visa needed, a non-application of the visa exemption, fees, **delays** and the request for **extra documentation**, and visa denial on invalid grounds. Further obstacles stemmed from difficulties in obtaining residence cards for family members. Finally, barriers such as **information deficits** are also reported in areas in which specific legal rules facilitating entry and residence, and obtaining visas for certain relatives are lacking.
- No substantial barriers exist regarding the right to **residence** for EU citizens and their family members. However, some minor **uncertainties** have been identified in the treatment of jobseekers after six months of residence. Some complaints have been made relating to **practical obstacles**, notably the refusal to accept foreign bank accounts or alimony payments of family members or third persons as proof of sufficient resources. These examples concern single cases therefore it is not possible to understand how widespread the issues are. Obstacles relating to the issue of (declaratory) certificates confirming the right to residence of EU citizens (e.g. extensive delays and excessive administrative formalities) were eliminated once the certificates themselves were abolished.
- As clarified by recent judgments of the CJEU, the exclusions of economically inactive EU citizens and their family members to **access social assistance benefits** are **in line with EU law**. However, according to recent and controversial judgments of the Supreme Social Court (*Bundessozialgericht*) national constitutional law **requires a more favourable treatment**.
- Further practical barriers to accessing social assistance/security identified were **delays** in processing claims, **information deficits** and **insufficient communication and cooperation** between national authorities and between institutions from other Member States.

### 2.1. Main barriers for EU citizens

#### 2.1.1. Entry

**No barriers** to the right to entry of EU citizens to Germany can be detected in German **national law**. The legislation explicitly states that EU citizens do not need an entry visa<sup>64</sup>.

<sup>64</sup> § 2(4) sentence 1 FreizügG/EU.

This finding is confirmed by the EP **petitions** concerning Germany for the period of 2012–2014. With no petition concerning Germany in 2012, the few examples referring to Germany in the 2013 and 2014 overviews address specific cases where national authorities failed to correctly apply national law (which itself correctly transposes EU law). The Your Europe Advice Quarterly Report 1/2013<sup>65</sup> mentions that ‘some cases concerning the behaviour of German custom authorities during the transit of Belgian and Spanish citizens in a German airport were reported, i.e. excessive administrative formalities, breach of law, violence, humiliating procedures. In the first case a return ticket was required from the EU citizen’. The latter cases of ‘violence’ and ‘humiliating procedures’ are not specified any further. No further evidence was identified at national level (i.e. case law, information provided by NGOs, etc.) of similar barriers, therefore no generalisation of incorrect implementation of the Directive is possible.

### 2.1.2. Residence

As mentioned above (see section 1.1.2.), the former **registration** requirement for citizens staying more than three months – which is optional under Article 8(1) of Directive 2004/38/EC – was **abolished**<sup>66</sup>. The practice of issuing (declaratory) **certificates** confirming the right to residence of EU citizens no longer exists, thereby removing the practical barriers of extensive delays and extensive administrative formalities identified in some Your Europe Advice Quarterly Reports<sup>67</sup>. While this development is welcome for workers and other economically active persons as a means of reducing bureaucracy and administrative costs, it may also entail legal **uncertainty for economically inactive persons** whose right to residence is dependent on open criteria (especially sufficient resources)<sup>68,69</sup>.

Some Your Europe Advice Quarterly Reports raise **concerns** about the **interpretation of ‘sufficient resources’** in order to obtain residency for more than three months in Germany, mentioning some examples of practical barriers such as rejection of foreign bank accounts in order to prove sufficient resources<sup>70</sup>. However, it is not clear whether this is a recurring problem as no additional evidence (e.g. in national case law, etc.) was identified, which may either be the result of underreporting or of the fact that those are isolated cases. A **lack of clarity** has also been reported on whether the income of the non-EU family member may be taken into account when considering if the EU spouse has **sufficient resources**, despite the fact that the definition of ‘sufficient resources’ provided by the administrative guidelines (see section 1.1.2 above) shows that alimony payments of family members or third persons qualify as resources without any distinction between EU and non-EU family members<sup>71</sup>.

<sup>65</sup> Your Europe Advice, Quarterly Feedback Report no. 3, Quarter 1/2013, p. 17 f.

<sup>66</sup> Article 1 no. 5 Law of 21 January 2013, BGBl. I, p. 83.

<sup>67</sup> Your Europe Advice, Quarterly Feedback Report no. 3, Quarter 1/2013, p. 6; Your Europe Advice, Quarterly Feedback Report no. 4, Quarter 2/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 5, Quarter 3/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 6, Quarter 4/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 7; Your Europe Advice, Quarterly Feedback Report no. 10, Quarter 4/2014, p. 4; Your Europe Advice, Quarterly Feedback Report no. 11, Quarter 1/2015, p. 4; Your Europe Advice, Quarterly Feedback Report no. 13, Quarter 3/2015, p. 4.

<sup>68</sup> Draft law amending the FreizügG/EU and other laws on residence, BT-Drs. 17/10746, p. 11, and Thym, D., ‘Union citizens freedom and right of residence’ (*Unionsbürgerfreiheit und Aufenthaltsrecht*) ZAR 2014, 220, 222.

<sup>69</sup> Thym, D., ‘Union citizens freedom and right of residence’ (*Unionsbürgerfreiheit und Aufenthaltsrecht*) ZAR 2014, 220, 222; Groenendijk, K., Guild, E., Cholewinski, R., Oosterom-Staples, H., Minderhoud, P., Mantu, S., Fridriksdottir, B., European Report on the Free Movement of Workers in Europe in 2012–2013, p. 16.

<sup>70</sup> Your Europe Advice, Quarterly Feedback Report no. 4, Quarter 2/2013, p. 22.

<sup>71</sup> Your Europe Advice, Quarterly Feedback Report no. 3, Quarter 1/2013, p. 18; Your Europe Advice, Quarterly Feedback Report no. 4, Quarter 2/2013, p. 22.

### 2.1.3. Access to social security and healthcare

#### **Access to social security**

The main practical barrier for EU citizens in accessing social assistance results from a developing and sometimes incoherent jurisprudence on this issue, especially with regard to access to social assistance for jobseekers according to Social Code II (*Sozialgesetzbuch II*) and to social assistance for persons unable to work according to Social Code XII (*Sozialgesetzbuch XII*). This **legal uncertainty** may be detrimental to applications for these benefits made by EU migrants.

German law limits access to social assistance for economically inactive EU citizens, e.g. to social assistance for **jobseekers** and to social assistance for **persons unable to work**. In January 2014, the **European Commission raised objections** to these exclusions<sup>72</sup>.

Firstly, the legislation excludes foreign nationals (including EU nationals) who are not workers or self-employed persons and who do not enjoy the right of freedom of movement under § 2(3) of the FreizügG/EU, and their family members, from **access to social assistance for jobseekers** for the **first three months** of their residence<sup>73</sup>. The CJEU states that this benefit constitutes social assistance within the meaning of Article 24(2) of Directive 2004/38/EC. As this Article explicitly allows for an exclusion during the first three months of stay of an economically inactive EU citizen, **this exclusion is, therefore, in line** with both the provisions of the Directive, and, as confirmed by the CJEU in *García-Nieto*, EU primary law<sup>74</sup>.

Secondly, the legislation excludes from access to **social assistance for jobseekers** those EU citizens whose right to reside in Germany is based solely on the fact that they are looking for employment<sup>75</sup>. Again, Article 24(2) of Directive 2004/38/EC explicitly allows for such exclusion. In *Alimanovic*, the CJEU has ruled that the situation of former workers now looking for a new job is exclusively and proportionately governed by Article 7(3)(b) and (c) of Directive 2004/38/EC and that no doubt exists with regard to the conformity of Article 24(2) of Directive 2004/38/EC with EU primary law<sup>76</sup>. For first-time jobseekers, the CJEU has only ruled on the **conformity of the exclusion from access to social assistance** for the first three months **with EU (primary) law** in *García-Nieto* (see above). Although AG Wathelet has expressed the opinion in the cases *Alimanovic* and *García-Nieto* that an exclusion of first-time jobseekers beyond the first three months of residence would be in line with EU law, this is open to debate<sup>77</sup>.

Thirdly, the legislation excludes from access to **social assistance for persons being unable to work** those EU citizens, and their families, who entered Germany solely to gain access to social assistance, or whose right to reside in Germany is based solely on the fact that they are looking for employment<sup>78</sup>.

<sup>72</sup> Fóti, K., in Eurofund (ed) *Social dimension of intra-EU mobility: Impact on public services* (2015) 34, available at: [http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1546en\\_3.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1546en_3.pdf).

<sup>73</sup> § 7(1) sentence 2 no. 1 of the Social Code II.

<sup>74</sup> CJEU, Case C-333/13, ECLI:EU:C:2014:2358 – Dano, para. 63; Case C-67/14, ECLI:EU:C:2015:597 – Alimanovic, para. 44 ff.; Case C-299/14, ECLI:EU:C:2016:114 – García-Nieto, para. 37, 36 ff., 53 and 46 ff.

<sup>75</sup> § 7(1) sentence 2 no. 2 of the Social Code II; Wollenschläger, F., Ricketts, J., 'Jobseekers' Residence Rights and Access to Social Benefits: EU Law and its Implementation in the Member States' [2014] FMW – Online Journal on Free Movement of Workers within the European Union No. 7, 8 ff.

<sup>76</sup> ECJ, Case C-67/14, ECLI:EU:C:2015:597 – Alimanovic, para. 48 ff.

<sup>77</sup> GA Wathelet, Case C-67/14, ECLI:EU:C:2015:210 – Alimanovic, para. 98 and Case 299/14, ECLI:EU:C:2015:366 – García-Nieto, para. 73 ff.

<sup>78</sup> § 23(3) sentence 1 Social Code XII.



The German Supreme Social Court (*Bundessozialgericht*) has recently **mitigated these exclusions** by granting economically inactive EU citizens whose residence has become stable (which is usually assumed after a stay of six months) access to social assistance in view of the **constitutional guarantee of a minimum subsistence level** (inter alia in the *Alimanovic* case referred to the CJEU)<sup>79</sup>. This jurisprudence – which (probably) goes beyond the requirements of the Directive – is a source of controversy and has been questioned by some lower courts<sup>80</sup>. Therefore, **legal uncertainty** exists for EU citizens in terms of access to social assistance.

Finally, even if the legislation seems to suggest that **economically inactive persons other than jobseekers are unconditionally entitled to social assistance** under Social Code II after a stay of three months<sup>81</sup>, the German Supreme Social Court has ruled that such an entitlement **depends on the existence of a right to residence**<sup>82</sup>. This corresponds to Article 24(1) of Directive 2004/38/EC, as the CJEU has confirmed in *Dano*<sup>83</sup>, *Alimanovic*<sup>84</sup> and *García-Nieto*<sup>85</sup>. Nevertheless, the wording of the legislation could be clarified. This exclusion is mitigated by the aforementioned access to social assistance under Social Code XII.

The Your Europe Advice Quarterly Reports identified practical barriers in accessing social assistance/security, such as **delays** in processing family benefit claims<sup>86</sup>, **difficulties in obtaining the necessary and correct information**<sup>87</sup>, and the **absence of communication and cooperation** between national authorities<sup>88</sup> and with other Member States<sup>89</sup>. The information deficit is also highlighted by national NGOs such as

<sup>79</sup> German Supreme Social Court (*Bundessozialgericht*), Decision of 3 December 2015, B 4 AS 44/15 R, para. 36 ff.; Decisions of 20 January 2016, B 14 AS 15/15 R and B 14 AS 35/15 R, Press Release no. 1/16 of the German Supreme Social Court referring to social assistance for jobseekers.

<sup>80</sup> Kanalan, I., 'Taking the human right to a minimum subsistence seriously - social security rights of EU citizens' ('*Das Menschenrecht auf das Existenzminimum ernst genommen – Sozialleistungsansprüche von Unionsbürger\_innen*') Verfassungsblog of 1 March 2016, available at: [http://verfassungsblog.de/das-menschenrecht-auf-das-existenzminimum-ernst-genommen-sozialleistungsansprueche-von-unionsbuerger\\_innen/](http://verfassungsblog.de/das-menschenrecht-auf-das-existenzminimum-ernst-genommen-sozialleistungsansprueche-von-unionsbuerger_innen/); Wilksch, F., 'The BSG and the livelihood of jobseekers and economically inactive Union citizens' ('*Das BSG und die Existenzsicherung arbeitssuchender und wirtschaftlich inaktiver Unionsbürger\*innen*') Juwiss-Blog, available at: <https://www.juwiss.de/89-2015/> and <https://www.juwiss.de/90-2015/>; Social Court of Second Instance Rheinland-Pfalz (*Landessozialgericht Rheinland-Pfalz*), Decision of 11 February 2016, L 3 AS 668/15 B ER, para. 22 ff.; Social Court of First Instance Dortmund (*Sozialgericht Dortmund*), Decision of 11 February 2016, S 35 AS 5396/15 ER, para. 23 ff.; Social Court of First Instance Berlin (*Sozialgericht Berlin*), Decision of 11 December 2015, S 149 AS 7191/13, para. 26 ff.

<sup>81</sup> § 7(1) sentence 2 no. 1 Social Code II.

<sup>82</sup> German Supreme Social Court (*Bundessozialgericht*), Decision of 3 December 2015, B 4 AS 44/15 R, para. 19 ff.; cf. also Decisions of 20 January 2016, B 14 AS 15/15 R and B 14 AS 35/15 R, Press Release no. 1/16 of the German Supreme Social Court referring social assistance for jobseekers.

<sup>83</sup> ECJ, Case C-333/13, ECLI:EU:C:2014:2358 – *Dano*. Cf. on *Dano* Wollenschläger, F., 'No benefits for non-working EU citizens? Limited scope of the CJEU judgment in *Dano* from 11.11.2014' ('*Keine Sozialleistungen für nichterwerbstätige Unionsbürger? Zur begrenzten Tragweite des Urteils des EuGH in der Rs. Dano vom 11.11.2014*') NVwZ 2014, 1628 ff.

<sup>84</sup> ECJ, Case C-67/14, ECLI:EU:C:2015:597 – *Alimanovic*.

<sup>85</sup> ECJ, Case C-299/14, ECLI:EU:C:2016:114 – *García-Nieto*.

<sup>86</sup> Your Europe Advice, Quarterly Feedback Report no. 9, Quarter 3/2014, p. 5; Your Europe Advice, Quarterly Feedback Report no. 10, Quarter 4/2014, p. 4; Your Europe Advice, Quarterly Feedback Report no. 11, Quarter 1/2015, p. 4; Your Europe Advice, Quarterly Feedback Report no. 12, Quarter 2/2015, p. 4; Your Europe Advice, Quarterly Feedback Report no. 13, Quarter 3/2015, p. 4; Your Europe Advice, Quarterly Feedback Report no. 14, Quarter 4/2015, p. 5.

<sup>87</sup> Your Europe Advice, Quarterly Feedback Report no. 6, Quarter 4/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 7.

<sup>88</sup> Your Europe Advice, Quarterly Feedback Report no. 4, Quarter 2/2013, p. 8; Your Europe Advice, Quarterly Feedback Report no. 5, Quarter 3/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 6, Quarter 4/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 7.

<sup>89</sup> Your Europe Advice, Quarterly Feedback Report no. 14, Quarter 4/2015, p. 4.

'Arbeiterwohlfahrt München', which highlights an increasing need to provide advice to EU migrants, including for lack of information<sup>90</sup>.

### **Healthcare**

German healthcare is an insurance-based system within which both private and public insurance exists. For EU citizens residing in Germany, no legal barriers were detected in access to healthcare.

The **Eurofund** report 'Social dimension of intra-EU mobility: Impact on public services' (2015) refers to factual problems regarding access to healthcare:

'The country report on Germany echoes this situation, saying that **many Romanians and Bulgarians** living in Germany **do not have health insurance**, including many self-employed people and those working on the black market. In such cases, these individuals have only limited access to **emergency medical care**. Some are also treated by volunteer doctors at clinics if they become ill'<sup>91</sup>.

The Your Europe Advice Quarterly Reports identify further **practical obstacles**, such as a German insurance company's **refusal to recognise the European health insurance card** of a young Italian citizen studying in Germany and asking her to apply for private insurance<sup>92</sup>. This, however, concerns the transposition of Regulation (EC) No. 883/2004 and is not, therefore, the focus of this report.

#### **2.1.4. Others**

The following **practical barriers are frequently listed** in the Your Europe Advice Quarterly Reports:

- EU citizens face difficulties in the recognition of their professional qualifications<sup>93</sup>.
- Difficulties regarding the registration of vehicles<sup>94</sup>.
- Problems with the recognition of driving licences<sup>95</sup>.
- Delays in money transfers from bank accounts<sup>96</sup>.
- Difficulties regarding access to education (permanent residence requirement to be entitled to a student allowance even though the applicant is the spouse of a German citizen)<sup>97</sup>.
- Double taxation (cross-border workers)<sup>98</sup>.

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<sup>90</sup> Migration and Labour Information Centre, Annual Report 2015 (*Infozentrum Migration und Arbeit, Jahresbericht 2015*), 28 March 2016, available at: [https://www.awo-muenchen.de/fileadmin/user\\_upload/IMA\\_Jahresbericht\\_2015.pdf](https://www.awo-muenchen.de/fileadmin/user_upload/IMA_Jahresbericht_2015.pdf), p. 5 ff.

<sup>91</sup> Fóti, K., in Eurofund (ed) *Social dimension of intra-EU mobility: Impact on public services* (2015) 52, available at: [http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1546en\\_3.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1546en_3.pdf).

<sup>92</sup> Your Europe Advice, Quarterly Feedback Report no. 6, Quarter 4/2013, p. 28.

<sup>93</sup> Your Europe Advice, Quarterly Feedback Report no. 3, Quarter 1/2013, p. 6; Your Europe Advice, Quarterly Feedback Report no. 4, Quarter 2/2013, p. 8; Your Europe Advice, Quarterly Feedback Report no. 5, Quarter 3/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 6, Quarter 4/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 7; Your Europe Advice, Quarterly Feedback Report no. 14, Quarter 4/2015, p. 5.

<sup>94</sup> Your Europe Advice, Quarterly Feedback Report no. 3, Quarter 1/2013, p. 6; Your Europe Advice, Quarterly Feedback Report no. 4, Quarter 2/2013, p. 8; Your Europe Advice, Quarterly Feedback Report no. 6, Quarter 4/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 7.

<sup>95</sup> Your Europe Advice, Quarterly Feedback Report no. 4, Quarter 2/2013, p. 8; Your Europe Advice, Quarterly Feedback Report no. 6, Quarter 4/2013, p. 7.

<sup>96</sup> Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 7.

<sup>97</sup> Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 7 and p. 51.

<sup>98</sup> Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 7; Your Europe Advice, Quarterly Feedback Report no. 9, Quarter 3/2014, p. 5.



There is no evidence, however, that these issues point to a more generalised incorrect implementation of the Directive. Many, in fact, do not fall within the scope of Directive 2004/38/EC, but are regulated by other EU law instruments.

## 2.2. Main barriers for family members of EU citizens

### 2.2.1. Entry

As mentioned above (section 1), Germany has **not enacted specific legislation to facilitate obtaining visas** for family members according to Article 5(2) of Directive 2004/38/EC aside from issuing visas free of charge as well as the exemption to the visa obligation for those holding a valid residence card. In its 2008 Report, the Commission mentioned that Germany '**seem[s] to ensure the facilitation in practice**'<sup>99</sup>. In addition, the draft updated administrative guidelines ask the embassies to take all necessary steps to facilitate the visa obtaining process for the EU family members<sup>100</sup>. Nevertheless, the legal requirement is missing from the legislation and some issues have been pointed out in practice (cf. below).

The Your Europe Advice Quarterly Reports list some **practical barriers** to the right to entry of family members of EU citizens to Germany. These are a **lack of information** about the type of visa needed, the **unfriendly attitude** of some diplomatic representations and providers of consular services for visa applications, **fees** for visa applications<sup>101</sup>, **delays**, requests for **extra documentation**<sup>102</sup>, **visa denial on invalid grounds**<sup>103</sup> and a general **prohibition** on the use of the **accelerated procedure** for family members of EU citizens<sup>104</sup>. It has also been reported that 'citizens have continued to receive **confusing information** from embassies and consulates abroad or border officers regarding the obligation to obtain a visa and the type of entry visas their non-EU spouses/family members need'<sup>105</sup>. Finally, examples have been reported of non-EU family members who were granted a residence card in another Member State, but who were obliged to apply for a national visa in order to enter Germany<sup>106</sup>.

It should be noted that there is no evidence at national level (i.e. case law, information provided by NGOs, etc.) to indicate that the results of the Quarterly Reports describe a more generalised incorrect implementation of the Directive. Therefore, it cannot be assessed how widespread these issues are.

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<sup>99</sup>European Commission, Report on the application of 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, COM(2008) 840 final, p. 5.

<sup>100</sup> Point 2.4.4 of the General administrative guidelines to the FreizügG/EU (*Allgemeine Verwaltungsvorschriften zum FreizügG/EU*) of 4 November 2015, not in force yet, available at : <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>.

<sup>101</sup> Your Europe Advice, Quarterly Feedback Report no. 11, Quarter 1/2015, p. 17.

<sup>102</sup> Your Europe Advice, Quarterly Feedback Report no. 11, Quarter 1/2015, p. 29.

<sup>103</sup> Your Europe Advice, Quarterly Feedback Report no. 3, Quarter 1/2013, p. 6; Your Europe Advice, Quarterly Feedback Report no. 4, Quarter 2/2013, p. 7; Your Europe Advice, Quarterly Feedback Report no. 5, Quarter 3/2013, p. 6; Your Europe Advice, Quarterly Feedback Report no. 6, Quarter 4/2013, p. 6 f.; Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 6.

<sup>104</sup> Your Europe Advice, Quarterly Feedback Report no. 11, Quarter 1/2015, p. 20; Your Europe Advice, Quarterly Feedback Report no. 13, Quarter 3/2015, p. 17.

<sup>105</sup> Your Europe Advice, Quarterly Feedback Report no. 13, Quarter 3/2015, p. 13.

<sup>106</sup> Your Europe Advice, Quarterly Feedback Report no. 13, Quarter 3/2015, p. 16.

### 2.2.2. Residence

With respect to residence, cases of requests of additional documentations have been reported. For example, a migration authority was reported for requesting in their guidelines **additional documents** to prove the legal residence of the accompanying family member of a Union citizen (this is only examined only in single cases, though), which are not mentioned as requirements in § 5a FreizügG/EU transposing Article 10(2) of Directive 2004/38/EC<sup>107</sup>. In some cases, **difficulties in obtaining residence cards for family members** have been reported<sup>108</sup>. For example, it has been reported that a non-EU (unmarried) partner of an EU citizen and their children, also EU citizens, residing in Germany, wanted to renew her residence card, but faced extensive requirements to verify her right to stay, such as a payment into the German pension scheme for a substantial amount of time<sup>109</sup>.

### 2.2.3. Access to social security and healthcare

Family members are treated in the same way as Union citizens for access to social security and healthcare (see section 2.1.3 above for details). No specific barriers have been identified.

### 2.2.4. Others

See section 2.1.4 above.

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<sup>107</sup> Information of Aliens Office of the city of Berlin, available at: <https://service.berlin.de/dienstleistung/324282/>.

<sup>108</sup> Your Europe Advice, Quarterly Feedback Report no. 11, Quarter 1/2015, p. 4.

<sup>109</sup> Your Europe Advice, Quarterly Feedback Report no. 11, Quarter 1/2015, p. 25.

### 3. DISCRIMINATORY RESTRICTIONS TO FREE MOVEMENT

#### KEY FINDINGS

- Discrimination based on **nationality**: No discrimination based on nationality with respect to the exercise of free movement rights has been identified. All transitional measures regarding citizens from Bulgaria, Romania and Croatia in Germany have expired.
- Discrimination based on **civil status/sexual orientation**: With the inclusion of registered partnerships of **same-sex couples** in § 3(2) FreizügG/EU, equal treatment with marriage is guaranteed to EU citizens living in same-sex registered partnerships with respect to freedom of movement.
- Discrimination based on **ethnic or racial origin**: No specific discrimination in the exercise of their free movement rights has been identified within the scope of this study.

#### 3.1. Discrimination based on nationality

**Transitional measures** for EU citizens from Bulgaria and Romania were in force until 1 January 2014<sup>110</sup>. For EU citizens from Croatia, transitional restrictions of free movement were applied until 1 July 2015<sup>111</sup>. Given the expiry of such restrictions, no persistent recurring barriers in accessing employment can be identified for Romanian and Bulgarian nationals in Germany.

Despite the end of the transitional measures, one complaint has been reported in the Your Europe Advice Quarterly Reports: 'The husband of a Bulgarian citizen living in Germany since September 2012 joined her in January 2014 to look for a job. The German employment agency refused to register him as a jobseeker on the grounds that he was not registered in an equivalent agency in Bulgaria. He was told to come back in a few months when he had learned some German'<sup>112</sup>.

**No discrimination based on nationality** has been identified regarding the exercise of free movement rights.

Observing the **political debate** in Germany about the immigration of EU citizens, it seems that there is a specific focus on citizens coming from **Romania and Bulgaria**, in particular in

<sup>110</sup>European Parliament, Dilemmas in the implementation of Directive 2004/38 on the right of citizens and their family members to move and reside freely in the EU, February 2009, available at: [http://www.europarl.europa.eu/RegData/etudes/note/join/2009/410669/IPOL-LIBE\\_NT\(2009\)410669\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2009/410669/IPOL-LIBE_NT(2009)410669_EN.pdf), p. 14; European Parliament, Comparative study on the application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels, March 2009, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI\\_ET%282009%29410650\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET%282009%29410650_EN.pdf), p. 221 f.

<sup>111</sup> Press release of the Federal Ministry of Labour and Social Affairs of 17 June 2015, available at: <http://www.bmas.de/DE/Presse/Pressemitteilungen/2015/freizuegigkeit-volle-oeffnung-arbeitsmarkt-kroatien.html>.

<sup>112</sup> Your Europe Advice, Quarterly Feedback Report no. 7, Quarter 1/2014, p. 54.

the debate on 'poverty immigration'<sup>113</sup>. For example, the Deutsche Städtebund in 2013 warned that Romanian and Bulgarian citizens 'often have only bad education and training as well as the fact that they are lacking in or have insufficient language skills' which causes problems in their integration process<sup>114</sup>. This focus was criticised by German NGOs, such as the Deutsche Caritasverband e.V. and Der Paritätische Gesamtverband<sup>115</sup>. The 2015 annual report of the Arbeiterwohlfahrt München gives examples of **discrimination against EU citizens from Romania and Bulgaria in practice**, for example in the housing market<sup>116</sup>.

The Eurofund report 'Social dimension of intra-EU mobility: Impact on public services' (2015) claims that inequalities exist among EU citizens regarding **wages**: 'Wages in Germany follow a similar pattern; in fact, the wages of EU-10 citizens are not only lower than those of Germans but also of other EU mobile citizens. This is all the more remarkable since Germany has a sizeable Italian population, which in many respects shows some similar labour market and other characteristics as EU-10 citizens. The country study on Germany, referring to Elsner and Zimmermann (2013), notes that the lower wage seems to be due at least in part to the young age of the mobile EU-10 citizens and possibly also to the fact that the professional and educational attainment gained in the home country may be uncompetitive in the German labour market. Average wages for most mobile EU-10 citizen groups are well below 50% of those of Germans and are also significantly lower than those received by citizens of other Member States (about 87% of the German average)'<sup>117</sup>.

The issue of fair wages and working conditions is also raised by NGOs<sup>118</sup>. To combat this problem, a programme called 'Faire Mobilität' was set up in 2011 by the German Confederation of Trade Unions (DGB). In 2014, they successfully acted on behalf of 50 Romanian construction workers who had not been paid for weeks by their employer<sup>119</sup>.

However, the issue of wages and working conditions – like the other examples of discrimination given above – fall outside the scope of Directive 2004/38/EC. It may, however, have an impact on an EU citizen's motivation to exercise her/his right to free movement.

### 3.2. Discrimination based on civil status/sexual orientation

With the inclusion of registered partnerships of same-sex couples in § 3(2) FreizügG/EU, equal treatment with marriage is guaranteed to EU citizens living in a same-sex registered

<sup>113</sup> Fóti, K., in Eurofund (ed) *Social dimension of intra-EU mobility: Impact on public services* (2015) 6, available at: [http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1546en\\_3.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1546en_3.pdf); Welte, H.-P., 'The loss of rights or non-existent determination after an unsuccessful job search' ('Rechtsverlust- oder Nichtbestehensfeststellung nach erfolgloser Arbeitssuche') ZAR 2014, 190.

<sup>114</sup> German Association of Cities, Position paper of the German Association of Cities on immigration issues of Romanians and Bulgarians (*Deutscher Städtebund, Positionspapier des Deutschen Städtetages zu den Fragen der Zuwanderung aus Rumänien und Bulgarien*) of 22 January 2013, 5 April 2016, available at: [http://www.staedtetag.de/imperia/md/content/dst/internet/fachinformationen/2013/positionspapier\\_zuwanderung\\_2013.pdf](http://www.staedtetag.de/imperia/md/content/dst/internet/fachinformationen/2013/positionspapier_zuwanderung_2013.pdf)

<sup>115</sup> Press release of Der Paritätische Gesamtverband of 27 August 2014, available at: <http://www.der-paritaetische.de/pressebereich/artikel/news/sozialleistungen-fuer-eu-zuwanderer-paritaetischer-kritisiert-populistische-attituede-des-regieru>; Press release of Deutscher Caritasverband e.V. of 27 August 2014, available at: <http://www.caritas.de/fuerprofis/presse/pressemitteilungen/begriff-der-armutszuwanderung-diffamiert>.

<sup>116</sup> Migration and Labour Information Centre, Annual Report 2015 (*Infozentrum Migration und Arbeit, Jahresbericht 2015*), 28 March 2016, available at: [https://www.awo-muenchen.de/fileadmin/user\\_upload/IMA\\_Jahresbericht\\_2015.pdf](https://www.awo-muenchen.de/fileadmin/user_upload/IMA_Jahresbericht_2015.pdf), p. 8.

<sup>117</sup> Fóti, K., in Eurofund (ed) *Social dimension of intra-EU mobility: Impact on public services* (2015) 27, available at: [http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1546en\\_3.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1546en_3.pdf).

<sup>118</sup> Press releases of the European Migrant Workers Union, available at: <http://www.migrant-workers-union.org/index.php/de/aktuellesemwu>.

<sup>119</sup> Deutscher Gewerkschaftsbund (DGB), overview of cases, March 2014, available at: <http://www.faire-mobilitaet.de/erfolge/++co++3e123b90-c8bd-11e3-9e50-52540023ef1a>.

partnership with regard to freedom of movement (Article 2(2) (b) of Directive 2004/38/EC). Notwithstanding the fact that same sex marriage is not foreseen in German law, same-sex couples married abroad are equated to same-sex registered partnerships and consequently enjoy free movement rights<sup>120</sup>. There is no difference in treatment between EU citizens/ their family members and German nationals in exercising their free movement rights in Germany.

### 3.3. Discrimination based on ethnic/racial origin

While a considerable number of **EU citizens from Bulgaria and Romania** moving to Germany are of **Roma origin** and the issues mentioned under section 3.1. also concern these persons, **no discrimination** based on ethnic/racial origin can be observed in the exercise of their free movement rights.

With regard to **media** and society, the 2014 Annual Report of the EU Agency for Fundamental Rights (FRA) refers to surveys reflecting anti-Roma prejudice<sup>121</sup>. The report draws attention to the fact that in 'Member States with advanced and efficient social protection schemes, such as Germany, **anti-Roma prejudice can be reinforced by media reports** of allegations of misuse of the social welfare systems by foreign nationals, including those with Roma origin, dubbed 'benefit tourism'. The judgment of the Court of Justice of the European Union (CJEU) in the ***Dano v. Jobcenter Leipzig*** (C-333/13) case is relevant to this sensitive issue since it refers to the right of EU Member States to refuse social benefits to economically inactive EU citizens from abroad who exercise their right to freedom of movement solely to obtain another Member State's social assistance'<sup>122</sup>.

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<sup>120</sup> FRA: Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU Comparative legal analysis Update 2015, 2015, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/protection\\_against\\_discrimination\\_legal\\_update\\_2015.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/protection_against_discrimination_legal_update_2015.pdf), p. 83.

<sup>121</sup> FRA: challenges and achievements in 2014 (Annual Report 2014), 10 April 2016, available at: [http://fra.europa.eu/sites/default/files/fra-annual-report-2014\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-annual-report-2014_en.pdf), p. 72.

<sup>122</sup> Ibid, p. 73.

## 4. MEASURES TO COUNTER ABUSE OF RIGHTS

### KEY FINDINGS

- With the **2013 and 2014 amendments** to the FreizügG/EU, Germany finally made use of the option of Article 35 of Directive 2004/38/EC and introduced **measures to combat the abuse of rights**.
- These measures include the possibility of **withdrawing the right to residence** (§ 2(7) FreizügG/EU), as well as **issuing re-entry bans** (§ 7(2) sentences 2–4 FreizügG/EU) in cases of use of **falsified documents or fraudulent statements**.
- The compliance of re-entry bans according to § 7(2) sentences 2–4 FreizügG/EU with Article 15(3) of Directive 2004/38/EC is subject to debate.

Article 35 of Directive 2004/38/EC allows 'Member States (to) adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31'.

In order to combat the abuse of the right to free movement, the German legislator has recently amended the FreizügG/EU (in 2013 and in 2014).

Firstly, in **2013**, the option was introduced for the German migration authorities to **declare the right to free movement non-existent** for the following cases:

- the conditions to be fulfilled for acquiring a right to residence have been fabricated, by giving false information or using falsified documents<sup>123</sup>;
- a family member of an EU citizen does not accompany that citizen for the purposes of family reunification<sup>124</sup>.

While **marriages of convenience** are not explicitly referenced in the latter provision, it becomes clear from the reasoning of the legislator that such cases should be addressed by this amendment<sup>125</sup>.

In **2014**, the possibility of **issuing re-entry bans** has been introduced for cases where false information or falsified documents have been used, or where no family reunification was intended<sup>126</sup>. According to the legislation, such a re-entry ban must be issued in particularly severe cases, particularly for repeated fraud with regard to the conditions of the right to residence<sup>127</sup>. The re-entry ban must be of limited duration<sup>128</sup>. The duration must be determined according to the circumstances of the individual case, but will not exceed five years<sup>129</sup>. The legislation grants the option to apply for a revocation or shortening of the re-entry ban, upon which the authority must decide within six months<sup>130</sup>.

<sup>123</sup> § 2(7) sentence 1 FreizügG/EU.

<sup>124</sup> § 2(7) sentence 2 FreizügG/EU.

<sup>125</sup> Draft law amending the FreizügG/EU and other laws on residence, BT-Drs. 17/10746, p. 9.

<sup>126</sup> § 7(2) sentences 2 ff. FreizügG/EU.

<sup>127</sup> § 7(2) sentence 3 FreizügG/EU.

<sup>128</sup> § 7(2) sentence 5 FreizügG/EU.

<sup>129</sup> § 7(2) sentence 6 FreizügG/EU.

<sup>130</sup> § 7(2) sentence 7 FreizügG/EU.

**Controversy** has arisen over the compliance of this measure with Article 15(3) of Directive 2004/38/EC<sup>131</sup>. The provision reads: 'The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies', i.e. with regard to restrictions to free movement on grounds other than public policy, public security or public health. While some argue that Article 35 of Directive 2004/38/EC constitutes a preceding *lex specialis vis-à-vis* Article 15(3) of Directive 2004/38/EC and differentiates between 'restrictions' within the meaning of Article 15(1) of Directive 2004/38/EC and 'withdrawals' within the meaning of Article 35 of Directive 2004/38/EC and § 2(7) FreizügG/EU, other authors see a conflict with the wording of Article 15(3) of Directive 2004/38/EC<sup>132</sup>. Other concerns relate to the claimed **lack of procedural safeguards** in the context of the measures listed under Article 35 of Directive 2004/38/EC (restrictions on grounds of public policy, public security or public health, Articles 27 ff. of Directive 2004/38/EC)<sup>133</sup>. The **European Commission** intends to examine this amendment<sup>134</sup>.

Since the introduction of § 2(7) FreizügG/EU, there have only been **six related court proceedings** in Germany<sup>135</sup>. Successful claims have relied upon false evaluation of the facts and circumstances, but not upon disproportionality<sup>136</sup>. The EU law issue mentioned above has not been addressed by the German law courts. These cases only related to marriages of convenience as an abuse of the right to free movement, the consequences of which was termination of the right to residence. The EP petitions concerning Germany, and the Your Europe Advice Quarterly Reports, do not point to any examples of problems in this regard.

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<sup>131</sup> Agreeing : Thym, D., Statement on draft law amending FreizügG/EU and other provisions of 22 September 2014, BT-Ausschussdrucksache 18(4)164 F, p. 9. Disagreeing and also referring to Article 20 TFEU : Welte, H.-P., 'The loss of rights or non-existent determination after an unsuccessful job search' (*'Rechtsverlust- oder Nichtbestehensfeststellung nach erfolgloser Arbeitssuche'*) ZAR 2014, 190, 193; further opinions from Dienelt, K., in Bergmann, J. & Dienelt, K. (eds), Immigration Law (*Ausländerrecht*) (11th edition 2016) § 7 FreizügG/EU para. 41 ff.

<sup>132</sup> Thym, D., Statement on draft law amending FreizügG/EU and other provisions of 22 September 2014, BT-Ausschussdrucksache 18(4)164 F, p. 9.

<sup>133</sup> Dienelt, K., in Bergmann, J. & Dienelt, K. (eds), Immigration Law (*Ausländerrecht*) (11th edition 2016) § 7 FreizügG/EU para. 41 ff.

<sup>134</sup> Fóti, K., in Eurofund (Ed) *Social dimension of intra-EU mobility: Impact on public services* (2015) 34, available at: [http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1546en\\_3.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1546en_3.pdf).

<sup>135</sup> Administrative Court of First Instance Ansbach (*Verwaltungsgericht Ansbach*), Decision of 8 March 2013, AN 14 K 12.02227; Administrative Court of First Instance Munich (*Verwaltungsgericht München*), Decision of 27 August 2013, M 12 K 13.2363; Federal Administrative Court (*Bundesverwaltungsgericht*), Decision of 25 March 2015, 1 C 18/14; Administrative Court of First Instance Würzburg (*Verwaltungsgericht Würzburg*), Decision of 27 April 2015, W 7 K 14.533; Administrative Court of First Instance Berlin (*Verwaltungsgericht Berlin*), Decision of 12 May 2015, 29 K 232.14; Administrative Court of First Instance Berlin (*Verwaltungsgericht Berlin*), Decision of 4 December 2015, 28 K 352.13 V.

<sup>136</sup> Administrative Court of First Instance Berlin (*Verwaltungsgericht Berlin*), Decision of 4 December 2015, 28 K 352.13 V.



## 5. REFUSAL OF ENTRY OR RESIDENCE AND EXPULSIONS OF EU CITIZENS AND THEIR FAMILY MEMBERS

### KEY FINDINGS

- Chapter VI of Directive 2004/38/EC is **correctly transposed** into German national law.
- Although limited, **the official data published** on the numbers of refusal of entry or residence and expulsion of EU citizens suggests that these measures are **rarely applied in practice**.

### 5.1. Refusal of entry or residence

**Almost no official data** are published in Germany on the numbers of refusals of entry, withdrawals of residence rights or expulsions of EU citizens. Limited data is available (see below and Annex II). This section will first focus on the legal basis for refusals of entry or residence and expulsion measures in German national law.

Three different national legal provisions allow the local migration authorities to withdraw an EU citizen's right to entry and residence (so-called *Verlustfeststellung*).

Firstly, the competent authorities may **withdraw the right to entry and residence** during the first five years after entry if the requirements of this right have never been met or are no longer met<sup>137</sup>. This provision chiefly concerns the **economic criteria** of residence, but also the (economic) status of a person.

Secondly, since 2013 the right to free movement may be **declared non-existent** if the **conditions** to be fulfilled for acquiring a right to residence have been **fabricated**, by giving false information or using falsified documents<sup>138</sup>, or where a family member of an EU citizen does not accompany that citizen for the purposes of family reunification<sup>139</sup>.

Thirdly, a withdrawal may be issued on the **grounds of public policy, security or health**<sup>140</sup>. This provision reflects the **strict limits** stipulated for in Articles 27 of Directive 2004/38/EC<sup>141</sup>. For instance, § 6(2) sentence 1 FreizügG/EU emphasises that criminal convictions do not in themselves constitute grounds for taking such measures. § 6(3) FreizügG/EU requires the immigration authority to consider, in its decision, the length of time the individual concerned has resided on its territory, her/his age, state of health, family and economic situation, social and cultural integration in Germany and the extent of his/her links with the country of origin.

In relation to Article 14(1) of Directive 2004/38/EC (**retention of the right of residence**), German national law allows for a **withdrawal of the right to residence**

<sup>137</sup> § 5(4) FreizügG/EU.

<sup>138</sup> § 2(7) sentence 1 FreizügG/EU.

<sup>139</sup> § 2(7) sentence 2 FreizügG/EU.

<sup>140</sup> § 6(1) sentence 1 FreizügG/EU.

<sup>141</sup> Kießling, A., 'The right of free movement and its limitations after ten years of residence in the host Member State' ('Das Recht auf Freizügigkeit und seine Schranken nach zehn Jahren Aufenthalt im Aufnahmemitgliedstaat') EuR 2015, 641 ff.



(*Verlustfeststellung*) and (where applicable) a **withdrawal of the residence card** (*Aufenthaltskarte*) if the residence criteria are no longer met (or have never been met), allowing considerable administrative discretion<sup>142</sup>. Authorities must consider whether a person's access to social assistance constitutes 'an unreasonable burden on the social assistance system', a consideration which is in line with the Directive<sup>143</sup>. On the definition of 'unreasonable burden', however, German legal literature is divided as to whether the burden relates to the social assistance system as a whole, or whether the burden is caused, or likely to be caused, by the claimant's access to the social benefit<sup>144</sup>. This issue has not yet been satisfactorily agreed.

Once the right to entry and residence has been withdrawn, the persons concerned are **obliged to leave Germany**<sup>145</sup>. A **deadline** for leaving the country accompanies the written withdrawal **notice**<sup>146</sup>, together with an explanation of the authorities' right to expel the person after that date.

German authorities may also **refuse entry** on grounds of **public policy, security or health**<sup>147</sup>.

In addition, persons losing their right to residence on the grounds of public policy, security or health are **banned from re-entry** by law<sup>148</sup>. The same consequence may be ordered in cases of **fraud and fraudulent family reunification** (see section 4 above for more details). In both cases the duration of the ban from re-entry must be limited in time<sup>149</sup>. Finally, the legal framework has been clarified with regard to the **right to re-entry after expulsion**. Whereas under the former FreizügG/EU the duration of the validity of a re-entry ban following an administrative expulsion measure was determined upon application only<sup>150</sup>, the current law, as amended in 2014, stipulates a determination ex officio<sup>151</sup>. This is **in line with the CJEU's jurisprudence**<sup>152</sup>.

As stipulated by Directive 2004/38/EC in its Chapter VI, German national law also includes the **procedural and judicial safeguards** for restrictive measures on the grounds of public policy, public security or public health. The requirements of Articles 30 to 33 of Directive 2004/38/EC correspond to the requirements in the legislation<sup>153</sup> in connection with specific provisions of the German Law on Administrative Procedure (*Verwaltungsverfahrensgesetz*) and the Law on Administrative Court Procedures (*Verwaltungsgerichtsordnung*), as well as the administrative guidelines to §§ 6(8) and 7(2) sentence 8 FreizügG/EU.

<sup>142</sup> § 5(4) FreizügG/EU.

<sup>143</sup> Tewocht, H., in Kluth, W., Heusch, A. (eds), *Immigration Law (Ausländerrecht)* (9th edition 11/2015) § 4 FreizügG/EU, para. 10.

<sup>144</sup> Raschka, J., 'The entitlement of EU citizens to access social services due to the recent CJEU case law' (*'Anspruch von Unionsbürgern auf Zugang zu Sozialleistungen nach der jüngsten Rechtsprechung des EuGH'*) ZAR 2015, 331, 333 f; In favour of the latter: Thym, D., 'The Return of the "market citizen"- regarding the exclusion of non-working age EU citizens from Hartz IV benefits' (*'Die Rückkehr des "Marktbürgers" - Zum Ausschluss nichterwerbsfähiger EU-Bürger von Hartz IV-Leistungen'*) NJW 2015, 130, 132.

<sup>145</sup> § 7(1) sentence 1 FreizügG/EU.

<sup>146</sup> § 7(1) sentence 2 FreizügG/EU.

<sup>147</sup> § 6(1) sentence 2 FreizügG/EU and Welte, H.-P., 'The travel ban-an instrument for restricting freedom of movement' (*'Das Einreiseverbot - ein Instrument zur Beschränkung der Freizügigkeit'*) ZAR 2013, 330.

<sup>148</sup> § 7(2) sentence 1 FreizügG/EU.

<sup>149</sup> § 7(2) sentences 5 f. FreizügG/EU.

<sup>150</sup> Groenendijk, K., Guild, E., Cholewinski, R., Oosterom-Staples, H., Minderhoud, P., Mantu, S., Fridriksdottir, B., *European Report on the Free Movement of Workers in Europe in 2012-2013*, p. 28.

<sup>151</sup> § 7(2) sentence 5 FreizügG/EU.

<sup>152</sup> CJEU, Case C-297/12, ECLI:EU:C:2013:569 – Filev and Osmani, para. 25 ff.

<sup>153</sup> §§ 6(8) and 7(2) sentence 8 FreizügG/EU.

The EP petitions concerning Germany and the Your Europe Advice Quarterly Reports provide no examples of problems with this aspect of the national law, and the number of court proceedings on withdrawal of the right of entry or residence of EU citizens is quite limited. A database search (juris) identified **26 cases** in the last three years related to measures taken under § 5(4) FreizügG/EU (**residence criteria**), not all of which deal specifically with withdrawal. Judgments reflect the **limits of the margin of administrative discretion**. For example, the Administrative Court of First Instance of Regensburg held that the administrative authorities, in withdrawing residence rights of EU citizens according to § 5(4) FreizügG/EU, are always required to consider the overall situation of the citizen and balance all facts of the individual case<sup>154</sup>. In this case, the complainant had been successful, as the administrative authority had failed to consider existing problems with regard to re-integration of EU citizens in his home country based on health grounds and his inability to work<sup>155</sup>.

Often, only incidental information is available; for example, the **number of withdrawals is extremely small** and a withdrawal does not necessarily lead to the departure of the person concerned<sup>156</sup>. In addition, court procedures on withdrawals occur infrequently<sup>157</sup>.

In an answer of 26 August 2015 to a request by Members of Parliament, the German government has stated that as of 30 June 2015:

- 2,457,553 EU and EEA citizens were registered in the central register of foreigners (without a residence status).
- Among them the following number of persons were obliged to leave Germany: 1,321 persons with Polish nationality, 1,246 persons with Bulgarian nationality and 1,192 persons with Croatian nationality<sup>158</sup>.

In a further answer of 20 December 2013 to a request by Members of Parliament, the German government has stated that, for the period of January to October 2013, **1,329 EU citizens** were subjected to withdrawals of residence (538 for not fulfilling the residence criteria, 791 on grounds of public policy, security or health) of whom 497 (155 and 342, respectively) left Germany in the same period<sup>159</sup>.

For 2012, the numbers amounted to 1,659 (725/934) and 993 (310/683)<sup>160</sup>.

In a further answer of 18 February 2016 to a request by Members of Parliament, the German government has stated that in 2015, there were 1,932 withdrawals of residence rights for EU citizens according to the central register of foreigners (*Ausländerzentralregister*), principally nationals of Romania (722), Poland (338) and Bulgaria (218)<sup>161</sup>.

<sup>154</sup> Administrative Court of First Instance of Regensburg (*VG Regensburg*), Decision of 14 February 2014, RO 9 S 14.110, para. 36.

<sup>155</sup> Administrative Court of First Instance of Regensburg (*VG Regensburg*), Decision of 14 February 2014, RO 9 S 14.110, para. 37.

<sup>156</sup> Thym, D., 'Union citizens freedom and right of residence' (*Unionsbürgerfreiheit und Aufenthaltsrecht*) ZAR 2014, 220, 223 referring to the numbers published in BT-Drs. 17/13322, p. 19–21 and BT-Drs. 18/223, p. 22 f.; Schönberger, C., Thym, D., 'National Report on Germany' in Neergaard, U., Jacqueson, C., Holst-Christensen, N. (Eds) *Union Citizenship – Congress publications of the XXVI FIDE Congress in Copenhagen Vol. 2*, 569, 570 f.

<sup>157</sup> Weselski, S., 'The European Union, free movement and the German social benefit system' (*Die Europäische Union, die Freizügigkeit und das deutsche Sozialleistungssystem*) NZS 2015, 453, 455.

<sup>158</sup> Answer of the German government of 26 August 2015 to a request by Members of Parliament, BT-Drs. 18/5862, p. 33.

<sup>159</sup> Answer of the German government of 20 December 2013 to a request by Members of Parliament, 18/223, p. 22.

<sup>160</sup> Answer of the German government of 20 December 2013 to a request by Members of Parliament, BT-Drs. 18/223, p. 23.

<sup>161</sup> Answer of the German government of 18 February 2016 to a request by Members of Parliament, BT-Drs. 18/7588 (preprint), p. 38.

## 5.2. Expulsions of EU citizens and their family members

The enforcement of the obligation to leave the country is mainly carried out under the provisions of §§ 57 ff. German Law on Residence (*Aufenthaltsgesetz*)<sup>162</sup>. The administrative guidelines explicitly state that the principles of EU law regarding the restrictions on the freedom of movement of EU citizens must be considered, which may lead to the provisions being more strictly interpreted<sup>163</sup>.

According to Article 14(3) of Directive 2004/38/EC '(a)n 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.' While there is **no explicit transposition** of this provision in German national law, nor is there any provision ordering expulsion as an automatic consequence of recourse to the social assistance system, No. 5.3.2. of **the administrative guidelines** to the FreizügG/EU explicitly **reflects the provision**<sup>164</sup>. Also, as mentioned in section 5.1 above the **authorities have discretion** regarding the withdrawal of the right to residence (*Verlustfeststellung*) and (where applicable) withdrawal of the residence card (*Aufenthaltskarte*) where residence criteria are no longer met (or have never been met), a discretion which must be exercised in line with the requirements of the Directive<sup>165</sup>. Article 14(3) of Directive 2004/38/EC is, therefore, **respected under the current legal regime and correctly applied in practice**. EU citizens may not be expelled from Germany solely on the ground that they apply for social assistance, although such an application might trigger an examination of their fulfilment of the residence criteria<sup>166</sup>. An expulsion measure can only be justified if all circumstances of the individual case have been considered by the authorities, including the (individual or overall) burden on the social assistance system (as discussed above). Nevertheless, a clarification in the legislation would be useful. The author believes that in any case it would not provide complete **legal certainty** since a proportionality assessment is required in each case. There is no evidence of expulsions on purely economic grounds. Since expulsions constitute the consequence of a withdrawal of the right of residence of EU citizens, the reasons for such withdrawal (see section 5.1.) will usually correspond to the reasons for the expulsion itself.

The German government stated on 18 February 2016, in response to a request by Members of the Parliament that according to statistics of the Federal Police Department, **773 Union citizens were expelled in 2015**<sup>167</sup>. It further stated on 26 August 2015 (also in response to a request by Members of Parliament) that **173 EU citizens with Romanian nationality** have been expelled in the first six months of 2015. Since Romanian citizens are the only EU nationality among the top 15 countries of origin and the lowest figure in this table is 87, it may be concluded that the number of expulsions of persons from other EU Member States is less than 87 (per Member State of origin)<sup>168</sup>. **No specific data** are available with respect to the group of third country national family members of EU citizens.

<sup>162</sup> No. 7.1.3. General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, p. 57, available at: <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>.

<sup>163</sup> No. 7.1.5. of the administrative guidelines to the FreizügG/EU.

<sup>164</sup> General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, p. 40, available at: <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>.

<sup>165</sup> § 5(4) FreizügG/EU.

<sup>166</sup> General administrative guidelines to the FreizügG/EU, BR-Drs. 535/15, p. 39, 42, available at: <http://dipbt.bundestag.de/dip21/brd/2015/0535-15.pdf>.

<sup>167</sup> Answer of the German government of 18 February 2016 to a request by Members of Parliament, BT-Drs. 18/7588 (preprint), p. 44.

<sup>168</sup> Answer of the German government of 26 August 2015 to a request by Members of Parliament, BT-Drs. 18/5862, p. 37.

## 6. CONCLUSIONS

Overall, Directive 2004/38/EC has been mostly **accurately transposed** in Germany, with improvements put in place since the Commission's 2008 report.

However, there are **no specific measures to facilitate entry and residence for other family members** within the meaning of Article 3(2)(a) of Directive 2004/38/EC or for a partner with whom the Union citizen has a durable relationship (Article 3(2)(b) of Directive 2004/38/EC). Nor has Germany enacted specific legislation to facilitate obtaining visas for family members according to Article 5(2) of Directive 2004/38/EC. In most of these cases, however, national law may be interpreted/applied in line with the requirements of EU law. A final point of dispute and discussion is the compliance of the **ban from re-entry** in cases of fraudulent behaviour with Article 15(3) of Directive 2004/38/EC.

Article 14(3) of Directive 2004/38/EC, according to which '(a)n **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', and Article 14(4) of Directive 2004/38/EC regarding the prohibition of expelling economically active persons and jobseekers for **economic reasons**, may **require clarification**, although there is no current deficit in the application of these aspects of the Directive.

The overall accurate transposition of Directive 2004/38/EC does not mean that no **practical obstacles exist**. The EP petitions concerning Germany, and the Your Europe Advice Quarterly Reports, reflect examples of such practical barriers in single cases. These relate, in the main, to the **incorrect application of national transposing law** (which itself correctly transposes EU law). **No structural implementation deficit** may, however, be assumed.

The **lack of specific legal rules facilitating entry and residence** (Articles 3(2) and 7(2) of Directive 2004/38/EC), as well as obtaining visas for certain relatives (Article 5(2) of Directive 2004/38/EC), have resulted in **practical barriers**, such as information deficits, a general prohibition on the use of the accelerated procedure for family members of EU citizens or extensive formal requirements, being reported. Obstacles with respect to obtaining residence cards for family members have also been reported. With regard to access to social assistance/security, the Your Europe Advice Quarterly Reports identify delays in processing claims, information deficits and insufficient communication and cooperation between national authorities and also with institutions from other Member States.

All transitional measures in Germany for citizens from Bulgaria, Romania and Croatia have expired, and **registered partnerships of same-sex couples** are now also recognised by the free movement regime. Measures to combat an **abuse of rights** were included in national legislation in 2013/2014, including the possibility for **withdrawal of the right to residence**, as well as the power to issue **re-entry bans** in cases of falsified documents or fraudulent statements. **Refusal of entry or residence and expulsion** of EU citizens seem to be applied only **rarely in practice**.

## ANNEX I: TRANSPOSITION OVERVIEW TABLE

**Table 1: Transposition Overview**

Directive's provisions	National provisions	Assessment	Changes since 2008
<p>Article 3(2) Beneficiaries:</p> <ul style="list-style-type: none"> <li>Family members</li> <li>Partners</li> </ul>	<p><b>§ 36(2) Law on Residence and § 3 Abs. 6 FreizügG/EU</b></p>	<p><b>Incomplete transposition</b></p> <p>The legislation does not provide any rule applying to durable relationships (other than registered partnerships) for the exercise of the right to entry and residence. Moreover, the legislation does not clearly provide for the facilitation of entry or residence for dependants or members of the household of the Union citizen.</p> <p>However: § 36(2) Law on Residence gives German authorities the option to grant a residence permit in order to avoid a particular hardship; this provision may be interpreted in line with Directive.</p>	<p><b>No change since the 2008 Commission report (except for same-sex couples, that are now recognised free movement rights)</b></p>
<p>Articles 5(1) and 5(2) Right of entry</p> <ul style="list-style-type: none"> <li>No entry visa or equivalent formality may be imposed on Union citizens</li> <li>To facilitate granting third country family members the necessary entry visas</li> </ul>	<p><b>For Article 5(1): No. 5.1.2. administrative guidelines to FreizügG/EU and § 2 (3) 5 FreizügG/EU</b> <b>For Article 5(2): § 2 (3) 4 and 6 FreizügG/EU</b></p>	<p><b>Incomplete transposition</b></p> <p>Article 5(1) has been effectively transposed. However, the transposition of Article 5(2) is incomplete as the requirement to provide an accelerated procedure is not reflected in German legislation. On the other hand, it does foresee</p>	<p><b>No change since the 2008 Commission report</b></p>

Directive's provisions	National provisions	Assessment	Changes since 2008
		visas to be issued free of charge as well as the exemption to the visa obligation for those holding a valid residence card. Moreover, the practice is considered in line with Directive.	
Article 6 Right to residence up to three months without any conditions or any formalities other than an ID	<b>§ 2 (5) 1 and 2 FreizügG/EU</b>	<b>In line with Directive</b>	<b>No change since the 2008 Commission report</b>
Articles 7(1) and 7(2) Right to residence more than three months for EU citizens and their family members based on employment, sufficient resources or student status	<b>§ 2 (2) FreizügG/EU</b>	<b>In line with Directive</b>	<b>No change since the 2008 Commission report</b>
Article 14 Retention of residence rights as long as they do not become an unreasonable burden on the social assistance system	<b>§ 2, §5, §6 FreizügG/EU</b>	<b>Incomplete transposition</b> While the legislation provides 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 purposes' and it does not attach any direct effect to the Union citizen's recourse to the social assistance system, the national law does not explicitly exclude expulsion as an automatic consequence of recourse to the social assistance system, as stipulated by Article 14(3) of	<b>No change since the 2008 Commission report</b>

Directive's provisions	National provisions	Assessment	Changes since 2008
		<p>Directive 2004/38/EC. Next to the fact that German law does not foresee such consequences, in view of the obligation to interpret/apply national law in line with EU law requirements, discretion granted to national authorities must be exercised in line with the requirements of EU law.</p> <p>German law foresees that verification of residence requirements is done only when there is a specific occasion (see more in section 1.1), which, according to the author, effectively excludes systematic control.</p>	
Article 16 Right of permanent residence	<b>§ 4a FreizügG/EU</b>	<b>In line with Directive</b>	<b>No change since the 2008 Commission report</b>
Article 24(1) Equal treatment	<b>No general transposition in national law due to wide scope of application; for social assistance: § 7 SGB II</b>	<p><b>In line with Directive</b></p> <p>According to the author of the report, the transposition can be considered in line with the directive, if one does not demand a literal transposition in view of wide scope and general nature of the provision. Indeed, the Constitution guarantees that all people must be treated equally, which the Constitutional Court interpreted as applying to non-nationals as well</p>	<b>No change since the 2008 Commission report</b>



Directive's provisions	National provisions	Assessment	Changes since 2008
		(the ruling of the BVERFG of 7 February 2012 (1 BvL 14/07)). This is in line with the position adopted by Germany.	
Article 27 Restriction on the freedom of movement and residence of Union citizens and their family members, on grounds of public policy, public security or public health	<b>§ 6 FreizügG/EU</b>	<b>In line with Directive</b> The legislation provides for restriction to the freedom of movement and residence of EU citizens and their family members on grounds of public policy, public security or public health. Those measures cannot be undertaken for economic purposes. Article 27(1) and (4) have been correctly transposed. The same is true for Article 27(2) despite the slight difference in the wording.	<b>No change since the 2008 Commission report</b>
Article 28 Protection against expulsion	<b>§ 6(3), (4) and (5) FreizügG/EU</b>	<b>In line with Directive</b>	<b>No change since the 2008 Commission report</b>
Article 35 Abuse of rights	<b>§ 2(7) FreizügG/EU, § 7(2) sentences 2–4 FreizügG/EU</b>	<b>In line with Directive</b>	<b>New national provision using the option of Article 35</b> (introduction of measures to combat the abuse of rights including the possibility of withdrawing the right to residence as well as issuing re-entry bans in cases of use of falsified documents or fraudulent statements)



## ANNEX II: DATA ON REFUSALS AND EXPULSIONS

**Table 2: Data on refusal of entry, refusal of residence and expulsions**

Data	2012	2013	2014	2015 if available	Reasons
Refusal of entry	N/A	N/A	N/A	N/A	N/A
Refusal of residence	1,659 (725/934)	1,329 (538/791/N/A)	2,277 (1,650/536/7)	N/A	The first number in brackets concerns the economic residence criteria, the second grounds of public policy, security or health, the third grounds of fabrication of false information/using falsified documents or false family reunification
Expulsion	Unknown	Unknown	Unknown	773	Unknown

**Source:** information provided in section 5; 2014 data provided by German Federal Statistical Office (with reservations)

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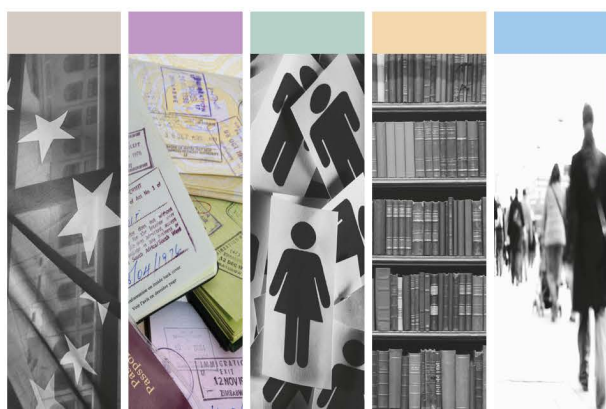
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