

Social Security for Third-Country Nationals in Germany: Study by the German National Contact Point for the European Migration Network (EMN)

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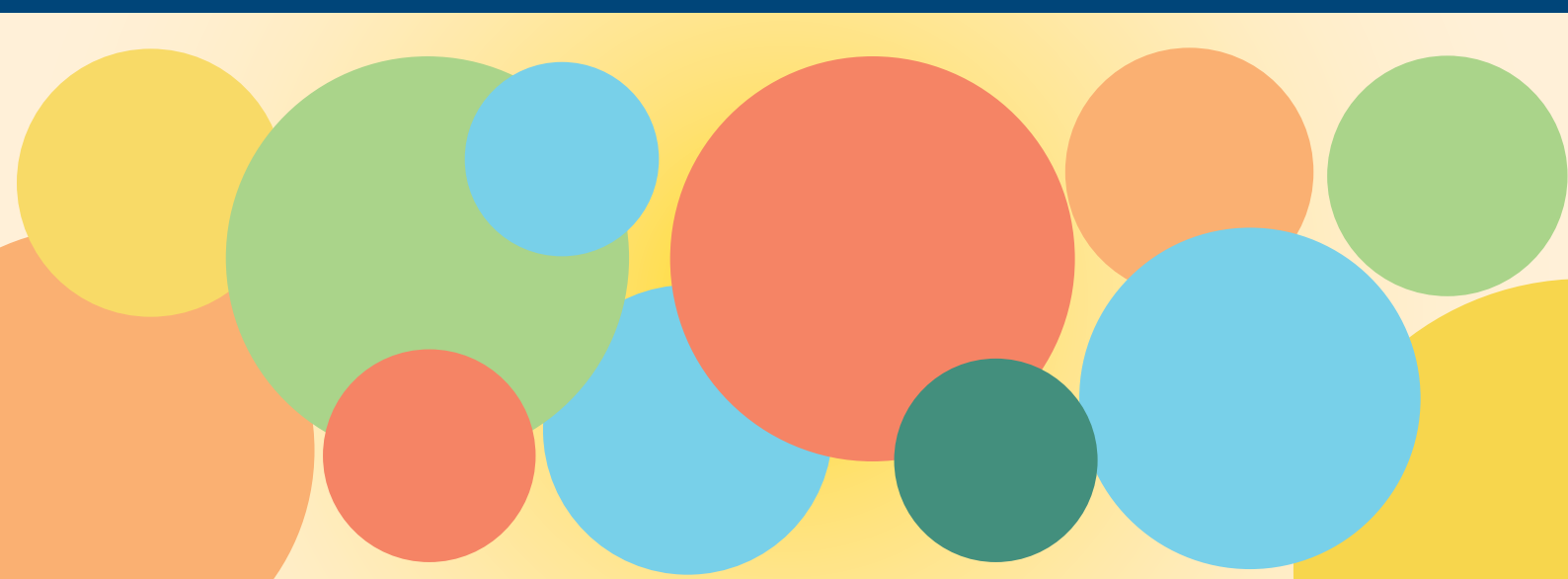


Social Security for Third-Country Nationals in Germany

Study by the German National Contact Point
for the European Migration Network (EMN)

Working Paper 57

Andreas Müller
Matthias M. Mayer
Nadine Bauer



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Federal Office for Migration and Refugees 2014

Abstract

This work describes third-country nationals' access to social security benefits in Germany. It was drafted by the National Contact Point for the European Migration Network (EMN), located at the Federal Office for Migration and Refugees, as Germany's contribution to a European comparative study of third-country nationals' access to social benefits.

The study illustrates the structure and functioning of contribution-financed statutory social insurance as well as tax-financed social welfare systems in Germany. While the benefits of social insurance (statutory pension insurance and unemployment insurance, partially statutory health insurance) provide usually temporary coverage commensurate to social status calculated as a percentage of earned income, basic security benefits should ensure a sociocultural minimum living income.

The study analyses the conditions under which third-country nationals receive access to individual social benefits as well as the consequences of social security dependence for one's residence status. In general, neither statutory social insurance nor the social welfare system differentiate between third-country nationals, EU citizens and German nationals, rather they guarantee the most equal access possible to social benefits. Access to social benefits is partially excluded for third-country nationals; however, in those cases, where access is provided, claiming basic security benefits can result in consequences to the residence status, depending on the residence title.

In the context of increasing cross-border mobility, the portability of social benefit claims poses a migration-specific challenge for modern welfare states. In order to provide legal stability in this area and prevent the mobility-based loss of insurance claims, Germany has concluded a number of bilateral social insurance agreements with third countries.

The social coverage of third-country nationals is practically depicted in three case studies that link various social emergencies with different residence conditions.

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1 Introduction

A significant part of the basis of the legitimacy of modern welfare states lies in protecting their citizens against social distress. However, this poses the question of how everyone residing within a national territory, regardless of nationality, should be protected against social distress, particularly in states marked by continuous immigration. Yet, immigration is not only significant to the benefits aspect of social security systems – in the face of demographic change and a shifting ratio of contributors to and recipients of social security within the host society, it also plays an important role in financing social security systems.

In this context, including immigrants in social security systems is crucial for their effectiveness. This work describes the social security systems of Germany with a particular focus on inclusion of third-country nationals.¹ Following an overview of the areas of the social security system in Chapter 2, the interplay between social security and residence law will be described in Chapter 3. Chapter 4 describes the administrative practices associated with third-country nationals applying for social security benefits. Chapter 5 addresses the coordination between the social security systems of various welfare states through international agreements, the portability of social security benefits and the specific issue of migration between welfare states. In closing, Chapter 6 discusses the options available to third-country nationals for claiming social security benefits, as well as its consequences to continued residence in the form of three fictional case studies. The same case studies are used in all national reports in order to ensure the highest degree of comparability between the studies furnished by each Member State.

¹ Not included are benefits granted under the Asylum Seekers Benefit Act (AsylbLG) to asylum seekers, foreigners with exceptional leave to remain, and persons with an enforceable obligation to depart and their family members. These were already discussed in the EMN study on the organisation of reception facilities for asylum seekers (Müller 2013).

1.1 Goals

The goal of the study is to highlight the political and administrative organisation of social security for third-country nationals (not including those eligible under the Asylum Seekers Benefits Act – AsylbLG). The legal framework, administrative practices and discretionary powers involved in granting social security benefits will be discussed, along with how options for accessing the social security system differ between third-country nationals and German citizens.

This report is the German contribution to the EMN study titled “Migrant access to social security and healthcare: policies and best practices”. The study is being conducted in all EU Member States and Norway under joint parameters. The results of the national studies will then be compiled into a comparative synthesis report on the administrative and political practices associated with the social protection of third-country nationals across Europe. The outcome of the study will be made available to policymakers on the European and national level. In doing so, the study should contribute to acknowledging of the specific situation of third-country nationals in European welfare states.

1.2 Definitions

Social security

The term “social security” refers both to the institutions protecting individuals against collective risks and to the idea that members of a political community are entitled to security based on their membership (Kaufmann 2001). The first definition of this term is primarily used in this work. This gives it a broader meaning than the terms “social insurance” and “welfare state”, since it does not specify how individuals are protected against social risks.

Third-country nationals

According to Article 2, Section 6, of the Regulation (EC) No. 562 (Schengen Borders Code), third-country nationals are persons who are not EU citizens² according to Article 20 of the Treaty on the Functioning of the European Union (TFEU) and do not have the right to freedom of movement as defined in Article 2, Section 5, of the Schengen Borders Code. Nationals of member states of the European Free Trade Association (EFTA), i.e., Norway, Iceland, Liechtenstein and Switzerland, are not third-country nationals according to this definition (cf. EMN 2012).

Social security benefits

The term refers to any kind of monetary, non-monetary benefits or services a person receives due to a defined emergency regardless of any additional requirements that must be met in order to claim it. Social security benefits include both contribution-financed benefits provided by a social insurance agency and tax-financed benefits provided by the state.

Contribution-based social security benefits

These social security benefits can be traced back to Bismarck's social legislation from the late 19th century.³ Receiving benefits from social insurances is – with regard to pension insurance – contingent upon prior contribution periods (1); they are partially financed by contributions from employed persons and of the employers respectively (2) and their amounts are mostly proportional to the contributions made (equivalence principle) (3). Benefits are thus usually linked to periods of past employment; their amounts are usually based on the income from that previous employment. Accordingly, the goal of this kind of social policy is not to prevent poverty and social distress, but primarily to – usually temporarily – preserve economic status in times of unemployment (Bonoli 1997: 357; Weir 2001: 16433). In Germany, this includes the contribution-financed benefits from statutory social insurance.

Tax-financed social security benefits

These social security benefits are usually granted universally upon need (1); they are financed by general tax revenue (2) and have a standard benefit level (3). These benefits are accordingly intended to prevent poverty and other social distress. Welfare states that primarily offer tax-financed benefits are also called Beveridge⁴ states (Bonoli 1997: 357). This term is traced back to British social legislation from the 1940s (Flora et al. 1998: 19). In Germany, these benefits are primarily provided by tax-financed social welfare systems.

1.3 Methods

The report is primarily based on existing research as well as on relevant legal texts. The later ones primarily include the German Social Code (SGB), the Residence Act (AufenthG), the Federal Parental Allowance and Parental Leave Act (BEEG), the Income Tax Act (EStG) and the Federal Child Allowance Act (BKGG). Below the legal level, the report uses an array of operating instructions, administrative guidelines and aids for employees of various social insurance agencies. Another important source is the “Social Security Overview” (Bundesministerium für Arbeit und Soziales 2013) published by the Federal Ministry of Labour and Social Affairs (BMAS) each year.

2 An EU citizen is a person who has citizenship in a Member State of the European Union. EU citizenship is supplemental to national citizenship but does not replace it.

3 Under former chancellor Otto von Bismarck, health insurance was introduced in the German Reich in 1883, accident insurance in 1884 and statutory pension insurance in 1889. Unemployment insurance was introduced in the Weimar Republic in 1927.

4 The term comes from the British economist and politician Henry Beveridge, who was deeply involved in building Great Britain's social security system after World War II.

2 Migration in the German Welfare State – Institutional Requirements

Social and economic distress is prevented in Germany by a heavily regulated and partially state-organised institutional framework that has been developed over time and expanded through a number of reforms. The central components of this system are legal provisions used to determine claims for public assistance. However, the inclusion of third-country nationals in the German social policy depends on the interplay between welfare state and immigration policy.

In order to illustrate this link, this chapter first provides an overview of the social security system in Germany before highlighting the relationship between welfare state and immigration policy.

2.1 Social security in the German welfare state

Protection against social distress was institutionalised as a duty of the state following industrialisation. However, developed welfare states differ drastically in regard to how and how much social security benefits are provided. Multiple models have been developed in comparative welfare state research in order to analyze these differences (for an overview, see Bonoli 1997). For this study, it is recommended to resort to the distinction between Beveridgean and Bismarckian systems, as these can not only be used to compare different welfare states, but also to classify the provision of various social security benefits within a single welfare state.⁵ Furthermore, the options avail-

5 There are also other classification systems, in particular the one developed by Esping-Andersen (1990) that distinguishes liberal Anglo-Saxon, from social democratic Scandinavian and conservative continental European welfare states. Due to its primarily comparative focus and convergence processes between different types of welfare states that have been observed during recent years (Fehmel 2012), this study does not use this model.

able to third-country nationals to access Bismarckian contribution-based social security benefits differ from those to tax-financed social security benefits under the Beveridge principle, as will be shown in Chapter 3. For this reason, the German welfare state is described using the analytical distinction between tax-financed and contribution-financed social security benefits.

While this distinction is used above all to compare national welfare states, the distinction between tax- and contribution-financed social security benefits can also be applied on the level of individual social security benefits. This seems particularly useful in studying the inclusion of immigrants in social security systems, since – as will be illustrated in the following chapters – the residential status of third-country nationals affects the possibility and consequences of claiming benefits differently, depending on whether such benefits are tax-financed or contribution-financed. In this respect, this distinction has a greater additional analytical value than the orientation on the classification by Esping-Andersen (1990) commonly used in migration research.

2.1.1 How social security works in Germany⁶

The core of the German social security system is, first, a contribution-based statutory social insurance with its five branches: health insurance, long-term care insurance, pension insurance, accident insurance and unemployment insurance. Second, a tax-financed social welfare system grants benefits based on means testing regardless of contributions. These include inter alia basic benefits for employment seekers, which

6 This section is based on the guide “Your Social Security Rights in Germany” (KOM 2012) released as part of the Mutual Information System for Social Protection (MIS-SOC).

has developed from social benefits (Sozialhilfe) and unemployment aid (Arbeitslosenhilfe), social welfare benefits, and housing allowances. In addition, child allowances are another kind of social policy instrument which is tax financed but nevertheless provided independently from individual need.

However, the protective function of the social insurance system is linked to the employment status of contributors. This is generally referred to as an employment-based social insurance system consisting in close conjunction between statutory social insurance and what is known as the “standard employment relationship”. Only those whose employment history is characterised by such a standard employment relationship can fully benefit from the social insurance system (Vobruba 1990). A standard employment relationship is defined as continuous employment subject to contributions to social insurance with stable or increasing pay. Social insurance only provides its full protection during intermittent interruptions in the standard employment relationship. However, the inverse also applies: the less a person’s employment history reflects the standard employment relationship, the less protection is provided by social insurance. Thus the amount of pension claims depends on the contributions made to pension insurance, just as the protection of unemployment insurance can only be utilised for a limited period of time. Flexible, low-paying or intermittent forms of employment therefore tend to be excluded from the protection of social insurance, since the insurance benefits can fall below the minimum living wage.⁷

Unemployment benefits (Arbeitslosengeld – ALG) provided by the unemployment insurance pursuant to the Third Book of the Social Code amount to 60% of prior net income for those unemployed without children and 67% of prior net income for those unemployed with children. The claiming period depends on age and length of employment prior to unemployment. Those who have made contributions to unemployment insurance for at least 12 months are entitled to ALG for a period of six months; an insurance period of 24 months increases the possible claiming period to 12 months. Those over 50 years of age who have made contributions to unemployment insurance for at least

30 months prior to unemployment may receive ALG for up to 15 months. The maximum continuous claiming period for ALG is 24 months for those aged 58 or older who have made contributions to unemployment insurance for at least 48 months prior to unemployment (Bundesministerium für Arbeit und Soziales 2013: 29).

The requirement for claiming pension insurance benefits is a minimum insurance period of five years (qualifying period), during which contributions have been made. Periods of private domestic care for close relatives and child-rearing are also taken into account in the qualifying period. Those completing the qualifying period and who have reached retirement age may claim a standard pension. Retirement age will be gradually increased to 67 years by 2029. The amount of the pension is calculated from the length of insurance coverage, employment pay compared to the average income level, and the current national average contribution to pension insurance. It is possible to go into retirement before reaching the statutory retirement age, albeit with deductions (Bundesministerium für Arbeit und Soziales 2013: 111-128).

In contrast to statutory unemployment and pension insurance, non-cash benefits can be immediately claimed from statutory health insurance providers in the event of illness (without any prior minimum qualifying periods). In the event of illness, health insurance covers the cost of necessary medical care regardless of the amount of contributions or income.

With few exceptions, even those without income are required to carry statutory health insurance (for details, see Section 3.1).

In addition to medical care, statutory health insurance agencies provide compensation for lost income during periods of prolonged illness in the form of a sickness allowance. While an employer is required to continue paying the previously received wage in full for the first six weeks, the health insurance agency begins providing the sickness allowance after this period. The amount of this sickness allowance is between 70% and 90% of the previous regular income and is provided for a maximum of 78 weeks within a three-year period. The equivalence principle is once again in effect in regard to such cash benefits.

⁷ In such cases, additional tax-financed benefits for supplementing basic income can usually be claimed.

The focus on employment not only results from the dependency on prior periods of contribution, it also manifests itself in administrative processes: upon being hired, the employer registers the employee with the social insurance agency. The employee is first registered with the health insurance provider, which in turn forwards the registration to long-term care insurance, pension insurance and unemployment insurance providers. The self-employed must register themselves with the appropriate health insurance provider. Except for a few occupations (e.g., public officials, judges and soldiers), all employees whose income does not exceed an annually defined upper threshold are required to enter the insurance scheme.

For those whose social insurance coverage is insufficient to cover basic needs or whose employment is not subject to statutory social insurance contributions and are therefore excluded from insurance protection, there is a social welfare system that is designed to provide a sociocultural minimum living wage. This system is anchored in German Basic Law and is based on the constitutional principle of human dignity in combination with the principle of the welfare state (Article 1, Subsection 1, and Article 20, Subsection 1, GG). In this system, basic security benefits for employment seekers (unemployment benefits II – ALG II) is provided for those who are able to work but do despite intensive efforts not manage to find employment or whose income is despite employment too low to secure their livelihood. Supplementary benefits for employment seekers can be provided as well if claims for unemployment benefits from the unemployment insurance are insufficient to sustain one's livelihood. This can occur when, e.g., periods of previous employment are insufficient to establish insurance protection, or when income subject to social insurance contribution was so low prior to unemployment that benefits under ALG fall below the sociocultural minimum living wage.

For those unable to work who do not live in a common household with a person able to work, there is a social welfare system also designed to provide a sociocultural minimum living wage in the form of social welfare benefits. The sociocultural minimum living wage is determined by the income and consumption sample. Here, consumption patterns of low income households are analysed and standardized need levels are determined by age and domestic situation: a single adult or a single parent receives a standard payment

of €391 per month (1 January 2014) in addition to costs for adequate housing. Furthermore, one-time benefits can be provided for special expenditures, such as the initial furnishing of an apartment. Additional payments can be provided for certain groups (e.g., children, single parents, pregnant women) to cover additional specific needs. The basic security benefits for a) persons over 65 and for b) persons over 18 having a permanent completely reduced earning capacity whose claims to statutory pension benefits fall below the sociocultural minimum living wage is also covered by social welfare, based on the principle of subordination: basic security benefits and social benefits are only provided to employment seekers when all other means of securing a minimum living wage are exhausted and any existing wealth has been depleted (up to exemption limits).

2.1.2 Organisation

Social security benefits in Germany are provided by the state and by non-state providers. Tax based social security benefits, in particular benefits for securing a means of subsistence, are usually provided by the state/municipal bodies, while social insurance is provided by non-state public entities. However, their organisation, financing and services are subject to heavy standardisation by the German Social Code (Boeckh et al. 2006: 192-194).

Statutory pension insurance is provided by the national branch Deutsche Rentenversicherung Bund, Deutsche Rentenversicherung regional providers, Deutsche Rentenversicherung Knappschaft-Bahn-See, and the social insurance provider for agriculture, forests and horticulture as the agricultural pension insurance provider.

Statutory health insurance is provided by 134 health insurance agencies. These are organised either on the national (the majority) or the regional levels. Aside from some company health insurance funds only accessible to a specific company's employees, health insurance providers may be chosen freely. Each health insurance provider is organisationally linked to a long-term care insurance provider independently responsible for providing benefits when long-term care is required. All persons with statutory health insurance are automatically insured with the corresponding long-term care insurance provider.

Statutory accident insurance is provided by the employer's mutual insurance associations, the social insurance provider for agriculture, forests and horticulture as the agricultural employer's mutual insurance association and public accident insurance providers. Statutory unemployment insurance is organised by the Federal Employment Agency (BA). The BA is divided into a headquarters, regional offices and the local employment agency offices. Unemployment insurance covers all employees (wage and salary), trainees/apprentices and disabled youths.

These insurance providers operate autonomously in the various branches of social insurance, using self-governing bodies (representative committees and boards/councils) comprised as a rule equally of representatives of employers and policyholders.⁸

Social insurance providers are subject to the oversight of the proper state authorities. Providers directly under federal control, who cover more than the territory of one Land are in general overseen by the Federal Insurance Office. Agencies under Länder control are overseen by the federal Land in which they are headquartered. The Federal Ministry of Labour and Social Affairs and, in part, the Federal Insurance Office provide oversight for any basic and cross-sectional tasks carried out by the Deutsche Rentenversicherung Bund.

2.1.3 Financing

The social security system is financed through social insurance contributions by employers and employees, as well as through general tax income.

Persons with more than marginal employment⁹ are obligated by law to make contributions to statutory health, long-term care, unemployment and pension insurance. The amount of the contributions is a certain

percentage of overall income. Employees and employers share the cost of contributions to social insurance, whereby the percentage of contributions differs between social insurance branches. The contributions to the accident insurance are provided entirely by the employer.

Unlike statutory social insurance, the social security benefits provided by social support and welfare systems are completely financed by taxes; this pertains to benefits whose amount and right to claim is not tied to periods of previous employment which include basic security benefits for employment seekers, social benefits, and child and housing allowances. Even parental allowance provided during parental leave after a child's birth is based on regular income earned, though financed through taxes.

However, it must be noted that the distinction between contribution- and tax-financed social security benefits can be misleading, since statutory social insurance benefits are also tax subsidised if the social insurance agencies' funding acquired by contributions is insufficient to provide benefits to those eligible – or if the social insurance is assuming special tasks. A prime example of this is the federal pension insurance subsidy financed by general tax income and “intended to compensate for [...] duties assigned by legislators for which there is no contribution-based funding” (Boeckh et al. 2006: 190). Federal subsidies totalled Euro 65.6 million in 2012 (Deutsche Rentenversicherung 2013), meaning approx. one-quarter of statutory pension insurance funding was provided by federal subsidies. This formed 21.4% of the Federal Government's total planned expenditures for the year 2012.

In addition to federal subsidies, legislators required the Federal Government to make a federal guarantee to provide any additional funding required in the event that the pension insurance were unable to meet its payment obligations with its own funding (Section 214, Subsection 1, SGB VI).

While the amount of pension payments is determined by the amount and duration of contributions made, pension payments are not paid from reserve funds generated by previous contributions, but from ongoing contributions in a pay-as-you-go system.

8 With unemployment insurance, representatives of public entities are also included among the employer and policyholder representatives. The self governing bodies of the social insurance provider for agriculture, forests and horticulture are comprised of employers, policyholders and in addition by the self employed who do not have employees themselves.

9 Marginal employment refers to those earning less than €450 per month (as of 01 January 2013).

2.2 Link between immigration policy and social policy

Generally, claiming social security benefits is not tied to nationality or residence title, regardless of whether the benefits are financed from contributions or taxes. Notwithstanding, third-country nationals are – under specific preconditions and dependent upon their residence title – subject to specific exclusions from benefits or their benefit claim is restricted to specific kinds of benefits (Section 23, Subsection 1 SGB XII). In addition, claiming child and parental allowances¹⁰ is excluded (see chapter 3). The German Social Code is not applicable to asylum seekers, civil war refugees and other persons with temporary residence titles on humanitarian grounds, persons with exceptional leave to remain, persons with an enforceable obligation to depart – though the threat of deportation is still not or not any more enforceable – and their family members. Instead; their vital needs¹¹ are being covered by the Asylum Seekers Benefit Act (AsylbLG) since 1993.

While residential status has only in cases defined by the Social Code impact on claiming social security benefits, the opposite cannot be said. Obtaining a residence title generally requires “that the foreigner’s livelihood is secure” (Section 5, Subsection 1, Sentence 1, Number 1, AufenthG). According to Section 8, Subsection 1, AufenthG, this condition must also be met when extending a residence permit. This requirement makes in particular claiming tax-financed basic security benefits problematic, since it can possibly conflict with extending a residence title. If social benefits are claimed, it can also lead to expulsion at the discretion of the Foreigners Authority (Section 55, Subsection 2, Sentence 1, Number 6, AufenthG). On the contrary, claiming contribution-financed social security benefits is not an issue, since they are funded by the beneficiaries’ own contributions. The German Residence Act defines securing livelihood as follows: “A foreigner’s livelihood is secure when he or she is able to earn their living, including adequate health insurance coverage,

without recourse to public funds. For the purposes of this definition, such funds do not include child benefits, children’s allowances, child-raising benefits, parental allowances, and educational and training assistance in accordance with Book Three of the Social Code, the Federal Education Assistance Act or the Upgrading Training Assistance Act, and public funds based on own contributions or granted in order to enable residence in Germany” (Section 2, Subsection 2, AufenthG).

Beneath the statutory level, the connection between social policy and integration policy is subject of political measures, particularly in the health and long-term care sectors. Access by third-country nationals to social security benefits may not be explicitly addressed, but improvement in services provided for those with a migration background, is. The Federal Government’s National Action Plan – Integration, for example, emphasises that long-term care insurance benefits should be better tailored to the needs of people with immigration record (Bundesregierung 2012: 169). The Federal Government’s commissioner for integration has a similar view, criticising that, “There are indications that migrants with foreign nationalities and/or little knowledge of German are informed less about benefits and claim long-term care insurance benefits less often than actually needed” (Beauftragte der Bundesregierung für Migration 2012: 328; cf. also Kohls 2012: 5).

Regarding measures on inclusion into the labour market, the Federal Employment Agency, for example, offers special labour market development programmes for persons with migration backgrounds (Bundesministerium für Arbeit und Soziales 2013: 27). However, these programmes do not aim to ensure social protection in the event it cannot be provided independently, i.e., through the labour market, rather they seek to ensure better integration into the labour market in order to reduce dependency on transfer benefits. These programmes are not just reserved for third-country nationals, but to all persons with migration backgrounds available to the German labour market, regardless of nationality.

Particular migration-specific challenges arise primarily with regard to the possibility of preserving entitlements for benefits from the social security system of one country after immigrating to another country or

10 An exception is claiming parental/child allowance by third-country nationals with certain residence titles (Section 1, Subsection 3, BKGG and Section 1, Subsection 7, BEEG).

11 The amount of standard benefits under the AsylbLG is calculated according to the foundations for the regulations in SGB II and SGB XII (BVerfG of 18 July 2012, 1 BvL 10/10, 1 BvL 2/11).

returning to the country of origin. This phenomenon occurs regardless of nationality and can affect migrating Germans as well as EU citizens and third-country nationals alike.

The portability of social security claims was already addressed in 2007 in the Federal Government's National Integration Plan (NIP), which has since been continued in the form of the National Action Plan – Integration (NAP-I). Aside from relevant EU provisions designed to secure the portability of social security benefits as well as pension claims, Germany has concluded bilateral agreements with a number of states in order to – besides adding up insurance periods for meeting the minimum insurance period required by the statutory pension insurance – avoid redundant social security obligations (see also Chapter 5).

2.3 Planned changes to social security benefits eligibility

Need for the reform of social security is mainly perceived in relation to benefits for asylum seekers. This need for reform originates from the decision of the Federal Constitutional Court (BVerfG) of 18 July 2012. With this sentence the BVerfG declared the amount of the benefits granted under Section 3 AsylbLG unconstitutional and demanded the legislator to find a new regulation for securing the minimum subsistence. According to the coalition agreement (CDU et al. 2013: 110) the requirements of the BVerfG shall be implemented speedily. Especially the levels of benefits shall be calculated in the future in a transparent way, reality oriented tailored to the needs way and they shall be regularly adjusted. For the time until the new regulation will come into force the BVerfG adopted a transitory regulation. This transitory regulation is implemented by the Länder since August 2012 so that even today reasonable provisions just below the level of SGB II/SGB XII are safeguarded.

Furthermore, CDU, CSU and SPD agreed in the context of the coalition agreement to regulate more precisely the eligibility criteria and the exclusion clauses for the basic security benefits for job seekers (EU citizens) according to the rulings of the European Court of Justice (CDU et al 2013: 108). These changes and specifications might have consequences for third-country nationals' access to the social security system as well.

3 Requirements for Third-Country Nationals Claiming Social Security Benefits

Except for some provisions of European law and a series of international agreements, national law and thus comprehensive, special regulations for foreigners through various pieces of social legislation apply to third-country nationals. Third-country nationals are not treated as a homogeneous group. While social security benefits can generally be claimed regardless of nationality, peculiarities can arise from the specific nationality, the type and purpose of the granting of residence as well as the length of residence.

German social law includes the social insurance systems, support benefits and the social welfare system. The social insurance systems consist of health insurance (SGB V), pension insurance (SGB VI), unemployment insurance (SGB III), accident insurance (SGB VII) and long-term care insurance (SGB XI). The study focuses on the first three legal foundations of the social insurance systems.¹²

There are also support benefits, which include family benefits such as child allowance (Income Tax Act – EstG, BKGG) and parental allowance (BEEG).¹³

Social welfare benefits, also known as minimum basic security benefits (SGB II, SGB XII, AsylbLG) (Frings 2008: Rn 3, 4) serve as the lowest safety net of the German social system.

¹² Unless otherwise explicitly stated, the statements in this chapter refer to the Overview of the Social Security System in Germany (Bundesministerium für Arbeit und Soziales 2013) published by the BMAS as well as the “Your social security rights in Germany” (KOM 2012) by the European Commission.

¹³ This includes the Advance Child Support Act (UVorschG - Unterhaltsvorschussgesetz), which is not addressed in this study.

What all social security benefits have in common is that they are only available to people with a certain relationship to German territory. Section 30, Subsection 1, SGB I, provides the general rule, according to which the Social Code only applies to persons who have their domicile or usual place of residence in the Federal Territory. Most benefit claims filed by immigrants are measured by this requirement. Exemptions from the domicile or usual residence requirement can be found in EU law as well as individual social laws (Frings 2008: recital 5 and 7)

Third-country nationals require a residence title to enter and reside in Germany (Section 4, Subsection 1, AufenthG). Exemptions to this can be found in EU law or made by legal regulation.

The issuance of a residence title usually requires a foreigner’s livelihood to be secure (Sections 5, Subsection 1, Numbers 1, 9, Subsection 2, Number 2, in conjunction with Section 2, Subsection 3, AufenthG) and that there are no grounds for expulsion (which include criminal acts, drug addiction, and claiming of benefits under SGB XII for oneself or a family member).

The study addresses the residence titles “settlement permit”, “residence title for employment reasons”, and “residence permit for family reasons”.¹⁴

Aside from requirements relating to residence law, the close connection between the social security systems and employment status also affects foreigners (Frings 2008: recital 8).

¹⁴ Since the Asylum Seekers Benefit Act provides an independent security system for asylum seekers, those with exceptional leave to remain, and other persons with uncertain residence status, social security benefits under this law are not addressed here.

Subject to differing provisions in the Social Code (Section 27 SGB II), third-country nationals have the same claim to social security benefits as Germans, provided their domicile or usual residence is in Germany (Sec-

tion 30, Subsection 1 and 3, SGB I). Social security benefits based on own contribution payments are protected as property.

Table 1: Overview of social security system and its coverage of third-country nationals

Social Security Benefits	Benefits and Programmes	Financing	Access for Third-Country Nationals
Non-cash benefits during illness	Examinations for early detection of illness	Contribution-financed, contribution varies depending on insurance. General contribution percentage is 15.5% of a policyholder's income subject to contribution. Employees provide 8.2% of their pay, employers pay 7.3%.	Persons, who have their domicile or usual residence in Germany, receive health insurance coverage according to the provisions for statutory and private health insurance. Membership in the statutory health insurance (GKV) is contingent upon fulfilment of specific criteria. Employment, which is subject to mandatory social insurance, claiming unemployment benefits or – under certain conditions – unemployment benefits II leads to compulsory health insurance. Spouses and children of policyholders are under certain circumstances covered by health insurance as well. Voluntary health insurance is possible upon first employment in Germany and after previous statutory or family insurance (for details see the provisions in the text below).
	Medical care		
	Medication, remedies and aids		
	Dental treatment		
	In-home nursing and household help		
	Hospital care		
Cash benefits during illness	Sickness allowance totalling 70% of regular income earned	Contribution-financed, contribution varies depending on insurance. General contribution percentage is 15.5% of policyholder income subject to contribution. Employees provide 8.2% of their pay, employers pay 7.3%.	While claiming cash benefits during illness, coverage by the statutory health insurance is preserved.
Maternity and paternity	Medical care and midwife support during pregnancy and after birth	Contribution-financed, contribution varies depending on insurance. General contribution percentage is 15.5% of policyholder income subject to contribution. Employees provide 8.2% of their pay, employers pay 7.3%.	
	Supply with medication, bandaging, remedies and aids		
	Childbirth		
	In-home nursing		
Family benefits	Household help	Tax-financed	It is generally possible to claim child/parental allowances, but it is linked to specific residence conditions (see Section 3.4).
	Child allowance		
Disability benefits	Parental allowance	Financed by contributions to statutory pension insurance. The amount of contributions is 18.9%. Contributions are made equally by employer and employee.	Yes, the insurance requirement is determined by income and family situation regardless of nationality.
	Rehabilitation measures		
Retirement and old-age benefits	Retirement due to inability to work/reduced ability	Financed by contributions to statutory pension insurance. The amount of contributions is 18.9%. Contributions are made equally by employer and employee.	Yes, the insurance requirement is determined by income and family situation regardless of nationality.
	Standard pension		
Survivors' benefits	Early retirement	Financed by contributions to statutory pension insurance. The amount of contributions is 18.9%. Contributions are made equally by employer and employee.	Yes, the insurance requirement is determined by income and family situation regardless of nationality.
	Widow and widower pension		
	Pension splitting		
	Orphan's annuity		

On-the-job accident and occupational illness benefits	Treatment	Financed by employer contributions to statutory accident insurance. The percentages are set by employer's liability insurance associations based on income and existing risk of injury in individual trades.	Yes, the insurance requirement is determined by income and family situation regardless of nationality
	Benefits for participating in the work force		
	Benefits for participating in community life		
	Long-term care benefits		
	Injury allowance and transition allowance		
	Retirement pension		
	Survivors' annuity		
	Severance payment Death benefit		
Unemployment benefits	Unemployment benefits from the unemployment insurance	Financed by contributions to statutory unemployment insurance. The contributions total 3.0% of pay. Contributions are made equally by employer and employee.	Yes, the insurance requirement is determined by income regardless of nationality; exceptions apply with regard to the provision of vocational training.
	Basic security benefits for employment seekers (unemployment benefits II)	Tax-financed	Yes, but residence title may not be renewed depending on residential status. Third-country nationals who are neither employed nor self-employed, and foreigners, whose rights of residence is derived from the purpose of seeking employment, and their family members are excluded.
Minimum living wage	Social benefits	Tax-financed	Yes, but Section 23 Subsection 1 SGB XII provides benefits only to foreigners without consolidated residence status (Section 23 Subsection 1 Sent. 4 SGB XII). It provides only those mandatory benefits specified by Section 23 Subsection 1 Sent. 1 SGB XII. Other benefits can only be provided on a discretionary basis. Due to Section 21 SGB XII social benefits can be provided only for those foreigners unable to work of above the age of 65. Only social benefits for old aged persons and for handicapped can be provided irrespective of the residence status and are thus not subject to any exclusion. Depending on the residence status, claiming social benefits may prevent the residence permits from being extended. Also, claiming social benefits may result in a discretionary expulsion. Foreigners, whose right of residence is derived from the purpose of seeking employment or who entered the country in order to claim social benefits, and their family members are excluded. Those eligible for benefits under the Asylum Seekers Benefit Act are also excluded. Yet even those who are subject to the exclusion clause provided by Section 23 Subsection 3 Sent. 1 SGB XII receive medical emergency treatment pursuant to Section 23 Subsection 3 Sent. 2 SGB XII.
Long-term care benefits	Non-cash benefits	Financed by contributions to statutory long-term care insurance. Contributions total 2.05% of pay. Contributions are made equally by employer and employee.	Yes, the insurance requirement is determined by income and family situation regardless of nationality.
	Cash benefits		

3.1 Benefits during illness

Claim to non-cash benefits during illness

The entire resident population is generally required to carry coverage against illness. Those, who do not have any other coverage for illness, are subject to mandatory insurance with a statutory or private health insurance provider.

As a basic principle, domicile or usual residence in Germany is required, as for all social security benefits (Section 30 SGB I).

Policyholders

Pursuant to Section 5, Subsection 1, Number 1 SGB V, employees must be covered by statutory health insurance if their regular gross income is more than Euro 450 per month and does usually not exceed a specific upper threshold per year – a.k.a. annual income threshold. The general annual income threshold for 2013 is Euro 52,500 (for 2014: Euro 53,550), corresponding to 75% of the annual contribution assessment threshold (West) for pension insurance for blue-collar and white-collar workers. The GKV¹⁵ Financing Act reregulated the insurance exemption for employees with pay above the mandatory insurance threshold. Since 31 December 2010, those exceeding the annual income threshold one time are once again exempt from having to carry insurance.

Aside from employees, the following groups are also required to carry insurance under Section 5, Subsection 1, Number 2-12, SGB V:

- Students at state and state-recognised universities
- Second-chance education interns and trainees/apprentices
- Retirees who fulfil a minimum insurance period (see below)
- Disabled persons employed in a recognised workshop or participating in vocational development programs
- Unemployed persons receiving unemployment benefits I or – under certain requirements – unemployment benefits II
- Agricultural entrepreneurs
- Family members working on a regular basis for agricultural entrepreneurs if they are at least 15 years old or are employed as trainees/apprentices in the company
- Artists and writers according to the Artists Social Insurance Act.

Regarding health insurance for retirees, the following applies: Persons with a claim for statutory pension benefits are covered by the health insurance for retirees if they have spent at least 9/10ths of the second half of a retiree's working life (time frame) between first employment and claiming pension benefits as either a policyholder of statutory health insurance or as a dependent on another's plan (cf. Section 5, Subsection 1, Number 11, SGB V). This is based on the second half of their working life; i.e. the period that precedes the coverage by health insurance as a retiree (time frame). The time frame ends on the day the pension claim becomes valid.

Marginally employed persons (working mini-jobs) are not required to carry insurance (Section 7, SGB V).

The following persons may voluntarily join statutory health insurance within three months:

- Persons who take up employment in Germany for the first time and who are exempt from statutory health insurance (employees whose annual income lies above the annual income threshold)
- Persons, who move their usual residence to Germany, can voluntarily enter the statutory insurance if they fulfil the required minimum preceding insurance periods
- The severely disabled (under certain requirements)
- Persons, of whom the statutory health insurance expires by law without a prior-ranking insurance obligation immediately following up, for example as employees or as dependents, are covered by

¹⁵ Statutory Health Insurance (Gesetzliche Krankenversicherung – GKV).

health insurance providers as voluntary policy holders (continuing insurance pursuant to Section 188 Subsection 4 SGB V). If they declare to leave their health insurance provider within a given time frame, this becomes valid only, if they can prove an alternative coverage against illness.

Persons voluntarily joining statutory health insurance, e.g., employees with pay above the annual income threshold, and the self-employed, can also take out a health insurance policy through a private insurance provider.

Since 1 April 2007, persons with no other claim to coverage in the event of illness who were previously enrolled in the statutory health insurance are required to have statutory health insurance (Section 5, Subsection 1, Number 13, SGB V – so-called subordinate compulsory insurance). They become compulsory holders of their previous statutory health insurance provider or its legal successor effective the first day in-country without other coverage in the event of illness, at the earliest on 1 April 2007. The same applies to those who have until now not been member of a statutory or private health insurance and who are required to have statutory health insurance.

Under Section § 193, Subsection 3, Sentence 1, Insurance Contract Act (VVG), as of 1 January 2009, every person residing in Germany is required to take out a private health insurance policy if they are not covered by statutory health insurance or are otherwise insured. Inpatient and outpatient treatment must be covered by this policy; the deductible cannot exceed Euro 5,000 per calendar year.

Not required to have statutory health insurance and thus required to have private health insurance are, in particular, those who are self-employed on a regular basis – if they were not previously enrolled in statutory health insurance.

Family insurance

Children, spouses and registered partners of policy holders are insured without having to pay contributions, if they have their domicile or usual residence in Germany and if their monthly income does not regularly exceed a certain threshold (for 2014: Euro 395 per month). For the marginally employed, the monthly threshold is Euro 450. Another precondition for fam-

ily insurance is, that the dependents are not subject to compulsory insurance for another reason, and that they are not without insurance or waived from the requirement to hold a compulsory insurance.

Special case: age 55 and above

Persons who have reached the age of 55 gain access to the statutory health insurance under special conditions (Section 6 Subsection 3a SGB V). Persons not being covered by statutory health insurance, who are 55 or older, are exempt from the health insurance (Section 6 Subsection 3a SGB V), i.e. they do not become policy holders of a statutory health insurance provider, even if they fulfil a requirement that would usually subject them to compulsory insurance (for example taking up employment), if they:

- Have not been covered by compulsory health insurance for five years before they would have become obligated to hold an insurance (time frame) and
- If they have been without insurance for two and a half year during this five year period (for example if their annual income was above the threshold or as a civil servant), if the insurance obligation has been waived, or if they were full-time self employed

The last condition however cannot be fulfilled by persons, who have been living abroad in non-EU countries, or if they return to Germany after a longer absence, so that the above mentioned exceptions from compulsory insurance are not applicable.

The provisions of Section 6 Subsection 3a SGB V also pertain to the spouses of civil servants, self employed or employees not subject to compulsory insurance, if they become subject to compulsory insurance after the age of 55 and have not been compulsory insured before.

Contribution percentage

Since January 2009, a standard general and a reduced contribution percentage apply nationwide to statutory health insurance.

The general contribution percentage, which applies to, e.g., contributions from pay and pension, is 15.5%. This share consists of a contribution percentage of 14.6%, half of which must be paid by both employer and employee or pension insurance provider and retiree, plus

a 0.09 contribution percentage points that are only paid by health insurance policyholders. On 26 March 2014, the federal cabinet agreed on a draft act to further develop the financial structure and quality of the statutory health insurance (GKV-financial structure and quality development act – GKV-Finanzstruktur- und Qualitäts-Weiterentwicklungsgesetz, GKV-FQWG). According to the draft, from 1 January 2014 on the contribution package financed by employees and employers shall be reduced from 15.5% to 14.6%. Furthermore, the draft adheres to the locking up of employers' contributions at 7.3%, and it introduces additional contributions independent of one's income, which will entail the previously contribution share of 9% that was attributed to policyholders.

The reduced contribution percentage is 14.9%. This reduced contribution percentage applies to statutory health insurance policyholders who cannot claim sickness allowance. These include certain groups (e.g., early retirees under Section 50, Subsection 1, Sentence 1, Number 3, SGB V, employees in the release period for partial retirement) and voluntary policyholders who have waived claims to sickness allowance. This contribution percentage also includes the 0.9% due from policyholders. The contributions are calculated from income subject to contribution and are placed into the health fund along with tax money.

Claim to cash benefits during illness

Employees unable to work due to illness have a claim to continued pay in Germany regardless of the weekly or monthly work hours required. This claim to continued pay is only valid if the employment relationship has existed for four uninterrupted weeks.

In the event of a no-fault inability to work due to illness, the employer usually continues the pay for the first six weeks of disability (continued pay in the event of illness, Section 3, Subsection 1, Continued Pay Act – EntgFG).

Sick persons not or no longer receiving pay from their employer may claim sickness allowance provided by their health insurance provider. This allowance is 70% of regular income earned, but only up to a maximum of 90% of the regular net income earned.

However, sickness allowance can be paid for the same illness for a maximum of 78 weeks over a period of three years. After this three-year period elapses, pay-

ment over another three-year period can be considered under certain circumstances.

Claiming other benefits, such as pensions for reduced earning capacity or disability, or foreign benefits, will result in the discontinuation or curtailment of the sickness allowance.

Minimum residence period

There is generally no minimum residence period in Germany for claiming health insurance benefits if the general requirements (e.g. usual residence in Germany) are met. A special case applies for the subordinate compulsory insurance under Section 5, Subsection 1, Number 13, SGB V. According to Section 5, Subsection 11, Sentence 11 SGB V, third-country nationals are only subject to the compulsory insurance according to the aforementioned regulation if they have a settlement permit or residence permit issued for more than 12 months. In this regard, issuance of the residence title must not be dependent on a secured livelihood (Section 5, Subsection 1, Number 1, AufenthG).

Since the issuance of a residence title is usually based on a secured livelihood (and with health insurance thereby covered for, cf. Sections 5, Subsection 1, Numbers 1, 9, Subsection 2, Sentence 1, Number 2, AufenthG), also in the case of residence permit issued for longer periods, it will usually not happen that subordinate compulsory insurance pursuant to Section 5, Subsection 1, Number 13, SGB V is required (Just 2012: 68).

Therefore, the insurance requirement under Section 5, Subsection 1, Number 13, SGB V only pertains to third-country nationals who are due to special legal regulations exempt for the obligation of a secured livelihood, e.g., family members of German nationals.

Migration-specific requirements

Insofar as migration-specific requirements have to be met to claim benefits in case of illness, these are specified under "Minimum residence period".

Portability of social security benefits

In accordance with the general provisions of statutory health insurance, third-country nationals can seek treatment in other EU countries if they are residing there temporarily and treatment during the stay is necessary for medical reasons.

3.2 Retirement benefits

General requirements

Insured persons who have reached the standard retirement age and fulfilled the general five-year qualifying period can claim a standard pension (Section 35 in conjunction with Section 50, Subsection 1, Number 1, SGB VI), with a standard retirement age being 65. It will be gradually increased to 67, starting with those born in 1947.

Employees and employers each generally pay half of the applicable percentage for pension contributions (18.9% since 1 January 2013). How high the contribution is, depends on an employee's pay up to the contribution assessment threshold of currently Euro 5,950 per month in the original federal Länder and Euro 5,000 in the new federal Länder.

Minimum residence period

Child-rearing periods under Section 56, Subsection 1, SGB VI, are only included in calculating pension claims if the rearing took place in Germany (Frings 2008: recital 162). Further special provisions for third-country nationals do no longer exist.

Minimum contribution period

The minimum contribution for claiming retirement benefits is the same for Germans and foreigners. These requirements are described under "General requirements".

Migration-specific requirements

Insofar as migration-specific requirements for claiming retirement benefits exist, these are described under "Minimum residence period" and "Portability".

Portability

If foreigners leave the Federal Territory before they have been paying contributions for five years, they can have their own share of the pension contributions, which have already been made, paid out; however their employers' contributions will not be paid out. According to the Federal Constitutional Court, protected property under Article 14 GG only refers to one's own contributions, not to those made by an employer. Under Section 210, SGB VI, pay-out occurs two years after departure (Frings 2008: recital 162).

3.3 Maternity and paternity benefits

General requirements

All women with claim to non-cash health insurance benefits can also claim non-cash benefits during pregnancy and after childbirth.

Female health insurance policyholders receive a maternity allowance during the statutory protection term and for the day of birth if they are entitled to sickness allowance in case of an inability to work, or if they are not receiving their regular pay due to the protection terms.

The legal foundations for this are found in the Maternity Leave Act (for women who are employed) as well as in the German Social Code V (specifically Sections 24c-24i SGB V). Even the Act on Health Insurance for Farmers contains regulations regarding maternity allowance.

Non-cash maternity benefits include (Section 24c, SGB V):

- Medical care and midwife assistance during pregnancy and after childbirth
- Midwife assistance
- Medications, bandaging, remedies and aids
- Assisted childbirth
- In-home nursing
- Household help

Maternity allowance is paid for six weeks before and eight weeks after childbirth (12 weeks for premature and multiple births). For premature births, the protection period after childbirth is extended by the number of days that could not be claimed prior to the birth. Maternity allowance is based on income, but is capped at Euro 13 per calendar day. The employer pays any difference between maternity allowance and the actual pay. Female employees who themselves are not enrolled in statutory health insurance (e.g., those with private insurance or enrolled as dependents on another statutory health insurance plan), receive a maternity allowance totalling Euro 210, paid by the Federal Government.

Minimum residence period

The required minimum residence period derives from the provisions for benefits during illness as described in Section 3.1.

Minimum contribution period

The required minimum contribution period derives from the provisions for benefits during illness as described in Section 3.1.

Migration-specific requirements

Nationality does not play a role in maternity leave. Only the place of employment must generally be in Germany.

Portability

The provisions regarding portability are identical to those described in Section 3.1 for benefits during illness.

3.4 Family benefits: child allowance and parental allowance

General requirements

Persons residing or usually residing in Germany can typically claim child and parental allowance for biological or adopted children as well as a spouse's children (stepchildren) under the following requirements. The definitions under Section 30, Subsection 3, SGB I, apply for the provisions "residence/domicile" and "usual residence". Child allowance can also be claimed for grandchildren living in the household or foster children.

Child allowance

According to Section 62 in conjunction with Section 32, Subsections 1 and 2, EStG, child allowance can usually be claimed for all the aforementioned children:

- Until the age of 18, regardless of the parents' or the child's income (Section 32, Subsection 3, EStG).

Once a child has crossed this age threshold, child allowance can continue to be claimed if the child:

- has not yet reached the age of 21, is not employed in Germany or another EU/EEA-Member State, or Switzerland, and is registered with the respective employment agency as seeking employment (Section 32, Subsection 4, Number 1, and Sentence 2, EStG),

- has not yet reached the age of 25 and is attending university or a vocational school, or is in a transition period of at most four months between two stages of education, or is volunteering in terms of Section 32, Subsection 4, Sentence 1, Number 2, d, EStG, or cannot enrol in or continue vocational training due to a lack of training position (Section 32, Subsection 4, Number 2, EStG); or
- beyond the age limit, if the child is unable to provide for him-/herself due to a physical, mental or psychological disability occurring before the age of 25 (Section 32, Subsection 4, Number 3, EStG).

Child allowance totals Euro 184 for each of the first two children, Euro 190 for the third child and Euro 215 for each additional child.

Parental allowance

Parental allowance is paid to the mother and/or father, provided the parents live with their child in a single household and care for and raise their child themselves. The parent receiving a parental allowance can work part-time up to 30 hours per week (Section 1, Subsections 1 and 6, BEEG). Parental allowance can be paid until the child is 14 months old.

Spouses or partners caring for the child (even if the child is not theirs) can also receive a parental allowance under the same conditions. This also applies to third-degree relatives in the event the parents cannot care for their child themselves due to hardship (illness, disability or death of parents; Section 1, Subsection 4, BEEG).

Parental allowance can also be paid for up to 14 months for adopted children and for the purpose of adopting a child (Section 1, Subsection 3, BEEG). This 14-month period begins when the child is adopted into the household, and eligibility ends when the child reaches 8 years of age. A parent must claim a parental allowance for at least two months (minimum claiming period) and can claim it for a maximum of 12 months. Both parents generally have joint claim to a total of 12 monthly payments for which each are eligible for the child's first months. Parents can claim two additional monthly payments if both are claiming parental allowance and their income is reduced for at least two months while receiving the allowance (partner months). Single parents can receive a parental allowance as replacement income for up to 14 months by

themselves (cf. for all of this, Section 4, Subsections 2 and 3, BEEG).

Parental allowance generally replenishes 67% of lost net adjusted income (Section 2, Subsection 1, BEEG). For net income exceeding Euro 1,200 before childbirth, the replenishment rate gradually falls to 65%. For low-income parents, the replenishment rate can be up to 100%. Parental allowance totals at the most Euro 1,800 per month. Unemployed parents receive a minimum amount of Euro 300 (Section 2, Subsection 4 BEEG). Families with multiple young children can receive a sibling bonus of 10% (but at least Euro 75 per month) of the entitled parental allowance (Section 2a, Subsection 1, BEEG).

Minimum residence period

The required minimum residence period for claiming parental allowance and child allowance by third-country nationals is described under “Migration-specific requirements”.

Minimum contribution period

For claiming parental allowance and child allowance, no minimum contribution periods are required.

Migration-specific requirements

Third-country nationals can only claim child allowance (Section 62, Subsection 2, Number 1 and 2, EStG) and parental allowance (Section 1, Subsection 7, Number 1 and 2, BEEG) if they:

- have a settlement permit; or
- have a residence permit allowing employment, unless they
 - a) are residing in Germany for educational purposes under Section 16 or Section 17 AufenthaltG; or
 - b) are residing in Germany for employment purposes under Section 18, Subsection 2, AufenthaltG and the consent of the Federal Employment Agency can only be granted for a certain maximum period according to the Employment Ordinance (BeschV); or
 - c) have been issued a residence permit pursuant to Section 23, Subsection 1, AufenthaltG due to

war in their country of origin or under Sections 23a, 24, 25, Subsections 3 to 5, AufenthaltG (counter-exception in Section 1, Subsection 7, Number 3, BEEG/Section 62, Subsection 2, Number 3, EStG).

Accordingly, third-country nationals who have been issued a temporary residence permit that cannot be extended cannot claim family benefits (e.g., au pairs [Section 12, BeschV], seasonal workers [Section 15a, BeschV], and carniés’ assistants [Section 15b, BeschV]). Both child and parental allowances are a public benefit considered to be income in terms of Section 2, Subsection 3, AufenthaltG, that may be used to secure a livelihood (Section 2, Subsection 3, Sentence 2, AufenthaltG). Consequently, claiming this benefit will not affect the right of residence negatively (Frings 2008: recital 238 and recital 262).

Portability

German child allowance and parental allowance fall within the factual scope of application of the Regulation (EC) No. 883/2004 of the European Parliament and of the Council for the coordination of social security schemes to employed persons and their families moving within the Community. Both, child and parental allowance are family benefits in terms of Article 4, Subsection 1, Letter h, of the Regulation, therefore citizens of the Union can also be entitled to a child allowance in Germany for their children who are living in another EU/EEA-State or Switzerland.

Turkish nationals

Turkish nationals and their family members can claim parental allowance under the same requirements as Germans, provided the relevant association agreement with the EEC can be applied.

3.5 Unemployment benefits

3.5.1 Unemployment benefits

General requirements

Employees can claim unemployment benefits I if they:

- are unemployed; and
- are registered as unemployed with the proper employment agency; and

- are available for work placement (i.e., able and willing to accept any reasonable employment) and are themselves actively attempting to end their unemployment; and
- have completed the qualifying period (see Section 137, Subsection 1, and Section 138, Subsection 1, SGB III).

Those, who have had employment subject to social insurance contributions for at least 12 months during the last two years before registering as unemployed, have completed the qualifying period (Section 142, Subsection 1, SGB III).

The amount of unemployment benefits totals: 60% of compounded net income (Section 149, Number 2, SGB III)

67% for those eligible with at least one child (Section 149, Number 1, SGB III).

The maximum period during which unemployment benefits I can be claimed is based on the following scheme (Section 147, Subsection 2, SGB III):

Table 2: Claim period for ALG I

According to mandatory insurance status with a total duration of at least ... months	And after reaching the age of months
12		6
16		8
20		10
24		12
30	50	15
36	55	18
48	58	24

Minimum residence period

A minimum residence period results from the general claim requirements (please see above).

Minimum contribution period

A minimum contribution period results from the general claim requirements (see table above) that are the same for Germans and foreigners. The qualifying period requirement means that most seasonal workers cannot claim unemployment benefits despite making contributions to unemployment insurance (Frings 2008: recital 148).

Migration-specific requirements

Unemployment benefits under SGB III generally require availability on the German labour market (see “General requirements” above). Foreigners who no longer have a work permit and cannot receive such a permit, cannot claim benefits if they become unemployed. Availability also does not exist once a person no longer resides in Germany (Frings 2008: recital 151 and 152).

Explanations for selected residence titles:

- Third-country nationals with a residence permit for specific employment under Section 18, AufenthaltG, can claim unemployment benefits once that employment has ended, whether through expiration of a temporary contract or termination of an existing employment relationship, if a required period of previous employment has been fulfilled. However, the residence permit is usually voided under Section 12, Subsection 2, AufenthaltG, if it was issued based on existing employment, or if it expires. Claims to unemployment benefits under SGB III are then invalid due to a lack of availability on the labour market, even if the foreigners remain in Germany (Frings 2008: recital 413).
- Third-country nationals with a residence title for research (Section 20, AufenthaltG): Claims for unemployment benefits cannot be made with a residence permit for research, since the researchers are not available to the labour market due to the restricted work permit (Section 20, Subsection 4, AufenthaltG). Only once another residence permit is issued, e.g., through marriage (Sections 28, 30, AufenthaltG), claims can be asserted on the contributions made during research (Frings 2008: recital 422).

Portability

Since 1 June 2003, Regulation 859/2003 in conjunction with Article 69, Regulation 1408/71, states that claims for unemployment benefits by third-country nationals can be taken to another EU Member State for a period of three months in order to seek employment.

3.5.2 Basic security benefits for employment seekers (unemployment benefits II/social security allowance)

Basic security benefits for employment seekers is a demand-oriented and needs-based social welfare benefit whose amount is set at social benefits level and ensures a sociocultural minimum living income.

Basic security benefits for employment seekers take a household-based approach. This means that, aside from the person eligible for benefits who is able to work, family members who cannot work and are dependent upon this person, receive benefits in the form of a social security allowance as needed in order to secure a livelihood.

General requirements

The basic requirements for claiming unemployment benefits II are, according to Section 7, Subsection 1, SGB II:

- Age 15 to age limit (between 65 and 67, Section 7a, SGB II)
- Ability to work in terms of Section 8, Subsection 1, SGB II.
 - As persons able to work, the provisions consider everyone who is not, for reasons of illness or temporary disability prevented from working at least three hours per day under ordinary general labour market conditions for the foreseeable future.
- In need in terms of Section 9, SGB II.
 - Persons who cannot or cannot sufficiently secure a livelihood with eligible income or wealth and cannot receive the necessary help from others, specifically family members or other social security benefit providers, are considered in need. The latter can be the case if there is a claim to unemployment benefits, but which is below the sociocultural subsistence level; i.e., if the amount of unemployment benefits I plus child allowance and other income from dependents is less than required according to SGB II and any existing wealth is below the exemption limit according to Section 12, SGB II, supplemental benefits can be claimed under SGB II (Frings 2008: recital 148).

- The usual residence must be in the Federal Territory.

On the one hand, the necessary livelihood is provided according to nationally standardized average needs (SGB II)/[standardised needs levels] (SGB XII); on the other hand, allowances for housing and heating are provided at the amount of the actual expenditures, provided they are reasonable. The authoritative normal requirement covers the costs of food, clothing, personal hygiene, furniture, household energy exclusive of the portions which are allotted to heating and the generation of domestic hot water and personal daily needs in a lump sum. Additional needs (pregnancy, single parent, etc.) and other specific benefits can also be met/provided. Securing a specific sociocultural minimum living wage for children, youths and young adults was reformed on 1 January 2011 (known as the education and participation package). This included in particular requirements for school excursions and field trips, school supplies, student development, collective lunches, sports, culture and recreation as well as, under certain conditions, support for learning.

Basic security benefits for employment seekers are generally provided indefinitely, provided the claim requirements are met. However, approval is usually only given for six-month periods, after which the claim must be substantiated again.

As part of the basic security benefits for employment seekers, the contributions to statutory health and nursing insurance are covered by the Federal Budget (Section 251, Subsection 4, SGB V).

Minimum residence period

Foreigners, who are neither employed nor self-employed, and their family members cannot receive any benefits according to SGB II for the first three months of their residence (Section 7, Subsection 1, Sentence 2, Number 1, SGB II). Even after the first three months they do not necessarily have a claim for social benefits according SGB II.

Foreigners, whose right to residence is solely for the purpose of seeking employment, and their family members cannot, as a basic principle, claim any social benefits according to SGB II even after the first three months of their residence.

Minimum contribution period

Claiming unemployment benefits II/social security allowance is not contingent upon minimum contribution periods.

Migration-specific requirements

For claiming unemployment benefits II, it is required that the applicant is able to work (see “General requirements” above).

Foreigners are only able to work if they are permitted or can obtain permission to do so. The legal possibility to assuming employment subject to consent under Section 39, AufenthaltG is sufficient (Section 8, Subsection 2, SGB II).

Foreigners’ ability to work is therefore not only determined by physical ability (under Section 8, Subsection 1, SGB II, same as for Germans), but also by legal permission (under Section 8, Subsection 2, SGB II; Blüggel 2013: 53).

According to Section 8, Subsection 2, Sentence 2 SGB II, the abstract general possibility of obtaining a work permit is sufficient (Fahlbusch 2013: 12), i.e., possessing a work permit is not required in order to claim unemployment benefits II. Third-country nationals with subordinate labour market access are thus able to work in terms of SGB II (Fahlbusch 2013: 12). This is not contingent upon the possibility of obtaining a work permit with regard to the labour market situation.

Ultimately, only tourists and foreigners explicitly prohibited from employment by immigration law are unable to work in terms of SGB II (Fahlbusch 2013: 12). Additionally, Section 7, Subsection 1, Sentence 2, Number 1-3, SGB II, provides three reasons for which foreigners can be excluded from claiming benefits under SGB II. Three groups of persons cannot receive any benefits:

- Foreigners neither employed nor self-employed and their family members cannot receive any benefits under SGB II for the first three months of their residence (Section 7, Subsection 1, Sentence 2, Number 1, SGB II).
- Foreigners whose right of residence stems exclusively from the purpose of seeking employment

and their family members (Section 7, Subsection 1, Sentence 2, Number 2 SGB II);

- Those eligible for benefits under Section 1, AsylbLG (Section 7, Subsection 1, Sentence 2, Number 3 SGB II).

In practice, exclusion under Section 7, Subsection 1, Sentence 2, Number 2, SGB II, only pertains to newly arriving members of the original and new EU Member States “seeking employment” who have no other right of residence, e.g., as a family member, employee, self-employed person, etc. and who are also not considered “eligible to remain” because they have already worked here. Exclusion also theoretically pertains to graduates from countries outside the EU with a residence permit for seeking employment (Section 16, Subsection 4, AufenthaltG). Nevertheless, these individuals must show a secured livelihood in order to obtain a residence permit. Students who have finished their studies are allowed to assume employment during a job-seeking period.

Consequences of claiming unemployment benefits II

Claiming benefits under SGB II is not grounds for discretionary expulsion under Section 55, AufenthaltG. However, it usually conflicts with having a residence permit renewed, because the foreigner’s livelihood is not secured (Section 5, Subsection 1, in conjunction with Section 2, Subsection 3, AufenthaltG). Exceptions to this can include family members of German nationals, spouses and partners of foreigners according to Section 30, Subsection 1 AufenthaltG, a child born in the Federal Territory and young returners (Frings 2008: recital 181).

Portability

Claiming unemployment benefits II requires the applicant’s usual residence to be in the Federal Territory (Section 7, Subsection 1, Sentence 1, Number 4, SGB II). The usual residence under Section 30, Subsection 3, Sentence 2, SGB II, is where a person resides under circumstances that indicate that the residence in this location or area is not just temporary. A function of the criterion “usual residence in Germany” is the limitation of eligibility for benefits to the territory of the Federal Republic of Germany. This regulation corresponds to Section 24, SGB XII, which excludes Germans living abroad from claiming benefits (Brandmayer 2013: 5 and 7).

Turkish nationals

Beside Germany and 17 other States, Turkey is a member of the European Convention on Social and Medical Assistance (ECSMA) as of 11 December 1953 (BGBl. 1956 II, pp. 563, 564), by which the contracting parties undertake to ensure that nationals of the other contracting parties who are lawfully present in its territory, and who are without sufficient resources, shall be entitled equally with its own nationals to social and medical assistance (Article 1 ECSMA). In December 2011, Germany made a reservation in accordance with Article 16, Letter b, Sentence 2 ECSMA which concerns, inter alia, benefits according to SGB II so that the claim to equal treatment under Article 1 ECSMA does not apply to these. The exclusion of Section 7, Subsection 1, Number 1 SGB II does not apply to the subsequent immigration of third-country nationals who are joining German nationals (Judgment of the Federal Social Court of 30 January 2013, reference number B 4 AS 37/12 R) so that the exclusion from claiming benefits under SGB II during the first three months of residence (Section 7, Subsection 1, Sentence 2, Number 1, SGB II) cannot be applied to Turkish family members of German nationals who were issued a residence permit under Section 28, AufenthaltG.

3.6 Minimum income for those unable to work

Social benefits

Those residing in Germany who cannot secure a livelihood by their own means (income and wealth) or ability (through labour) or help from a third party can claim social subsistence benefits (Section 27, SGB XII).

Social welfare law is divided into seven areas, each regulating benefits in certain circumstances. The benefits cited here are part of a tax-financed system of demand-oriented and needs-based benefits to secure a decent existence for those in need who are unable to work and cannot obtain sufficient or any income in order to cover the needs of their family (household community, and committed union, respectively), or cannot obtain the necessary help from others. In particular, persons who have not yet reached the age which corresponds to the standard retirement age under the statutory retirement pension scheme (for those born between 1947 and 1964, the retirement age has been raised from 65 to 67), who cannot secure

their own livelihood and are temporarily unable to work, receive benefits to aid in subsistence. Persons who have reached the standard retirement age, as well as persons aged 18 to the age which corresponds with the standard retirement age, who are fully disabled for medical reasons receive basic security benefits in old age and for reduced earning capacity. Persons in need who are able to work do not receive any subsistence benefits under the social assistance scheme; they can, however, apply for basic security benefits for employment seekers (unemployment benefits II/social security allowance, see above).

Every member of an eligible household can apply for social welfare individually. The resulting total amount increases in correspondence to the number of persons in need living in the same household. The income and wealth of the person in question and their cohabitating spouse or partner are included in the calculation of benefits.

The generalized social subsistence benefits – so-called standardized needs – are established according to federal law on the basis of empirically obtained average spending for consumption and, regarding adults, are deducted on their position within their household. Regarding minors, they are differentiated according to the minor's age (thereby, six standardized needs levels are established). For 2014, the following standardized needs levels are applicable nation-wide:

- normal requirement for solitary persons or single parents (standardized needs level 1): Euro 391;
- if living together, normal requirement for each spouse or partner: Euro 353 (standardized needs level 2);
- for an adult not living alone nor with a spouse, partner or in a cohabitation: Euro 313 (standardized needs level 3);
- for an adolescent starting at the age of 15 up to reaching the age of 18: 296 Euro (standardized needs level 4);
- for children starting at the age of 7 up to reaching the age of 14: 261 Euro (standardized needs level 5);
- for children up to reaching the age of 6: 229 Euro (standardized needs level 6).

The standardized needs levels are supplemented by:

- additional requirements for specific life situations (e.g., single parents, pregnant women, persons with additional nutritional requirements due to certain illnesses);
- one-time benefits not included in the compounded standard rate, such as to purchase a wardrobe, including during pregnancy and after childbirth, as well as to set up an apartment, including appliances;
- education and participation package for children and youths, in particular requirements for school excursions and field trips, school supplies, student development, collective lunches, sports, culture and recreation as well as, under certain conditions, learning development.

Minimum residence period

For claiming social benefits, no minimum residence period is required.

Minimum contribution period

For claiming social benefits, no minimum contribution period is required.

Migration-specific requirements

Foreigners actually residing in Germany must be given aid for subsistence, illness, pregnancy and motherhood, as well as nursing aid (Section 23, Subsection 1, Sentence 1, SGB XII). Foreigners have a legal right to the cited benefits.

Foreigners with a definite or indefinite residence title “who will presumably reside in the Federal Territory permanently” also have the same claim to all benefits under SGB XII as Germans (Section 23, Subsection 1, Sentence 4, SGB XII).

Foreigners with a presumably temporary right of residence (possibly with a residence title under Section 18, AufenthG) receive benefits under Chapters 6, 8 and 9 of SGB XII (i.e., integration assistance for the disabled, assistance in overcoming special social difficulties, and aid in other circumstances) as discretionary benefits only (Section 23, Subsection 1, Sentence 3, SGB XII). Foreigners whose right of residence is solely for the purpose of seeking employment have no claim to social benefits (Section 23, Subsection 3, SGB XII). Foreigners entering to obtain social benefits also have no

claim to social benefits (Section 23, Subsection 3, SGB XII). However, even in such instances, granting social benefits as a discretionary benefit must be reviewed according to the constitutional interpretation of the right to benefits (Article 1, GG). This is also necessary with regard to the equal treatment of those eligible under the AsylbLG, who in such instances can at least claim the irrefutable benefits under Section 1a AsylbLG (Frings 2008: recital 214). In case law, persons in need are in parts accorded a right to receive emergency supply, even if they entered solely for the aforementioned purposes. Emergency supply comprises travel costs and provisions for return; in individual cases, subsistence benefits are accorded in cases in which return is unacceptable. The right to receive emergency supply according to SGB XII, also, requires that the foreigners in question are unable to work, or are beyond the age of 65, respectively, so that, according to Section 21 SGB XII, the benefits scheme of SGB II does not apply to them. SGB XII is not intended to absorb all those persons to whom the exemption of benefits under SGB II applies. The legal position is different in case health support according to SGB XII is needed, as such benefits are not covered by the exemption clause of Section 21 SGB XII. Hence, foreigners to whom the exemption clause of Section 7, Subsection 1, Sentence 2, SGB II applies, and who are not health insured, can receive medical emergency support.

Consequences of claiming social benefits

Claiming social benefits for oneself as well as for family members is grounds for discretionary expulsion pursuant to Section 55, Subsection 2, Number 6, AufenthG, upon which the Foreigners Authority has to decide. Family members claiming benefits can only be taken into consideration if they do not possess their own, independent right of residence.

- Expulsion for claiming social welfare is excluded for:
 - those with a settlement permit or an EU permit for permanent residence,
 - foreigners with a residence permit who moved to Germany as minors or were born in Germany if they have been legally residing in Germany for five years,
 - spouses and partners of Germans,
 - minors.

For the remaining instances, the length of previous residence, family circumstances and possible obstacles to deportation must be taken into consideration when deciding on deportation (Section 55, Subsection 3, AufenthaltG).

Normally, a discretionary decision in favour of expulsion is only correct if the period of residence has not been long and there are no close family ties. However, claiming social benefits as grounds for deportation usually conflicts with renewing a residence permit (Frings 2008: recital 222).

Portability

Requirement for claiming social benefits is actual residence in the Federal Republic of Germany. Foreigners living abroad cannot receive aid (Groth 2013: 3).

Turkish nationals

The European Convention on Social and Medical Assistance (ECSMA) prohibits the deportation of Turkish nationals and their family members for claiming social welfare.

3.7 Coverage for self-employed

Persons with a residence permit for self-employment (Section 21, AufenthaltG) can usually only voluntarily insure themselves against illness. Mandatory membership in statutory health insurance for persons without insurance protection under Section 5, Subsection 1, Number 13, SGB V, is not considered for these individuals. They are exempted from the insurance requirement according to Section 5, Subsection 11, SGB V, because their residence title is contingent upon a secured livelihood.

Self-employed persons above the age of 45 must show that they have adequate retirement provisions upon entry.

Benefits under SGB II cannot be granted, since the residence permit for self-employment does not include a work permit. While it is generally possible to claim social benefits under SGB XII, doing so runs afoul of residence requirements. Under Section 7, Subsection 2, AufenthaltG, the residence permit can be made temporary after the fact or no longer renewed upon expiration.

The self-employed can claim child and parental allowances. This does not apply for accompanying spouses (Section 21, Subsection 3, AufenthaltG).

Foreigners with a (limited) resident permit for the purpose of self-employment, who will probably reside permanently in the Federal Territory, i.e. persons for whom, based on a prognostic assessment, one can assume that their residence status is stable according to Section 23, Subsection 1, Sentence 4, SGB XII, can claim integration assistance and other benefits in special circumstances under SGB XII; the restrictions under Section 23, Subsection 1, Sentence 1 SGB XII do not apply to this group of people.

3.8 Family unification

3.8.1 Family members of German nationals

The residence permit for family reasons allows unrestricted employment (Section 27, Subsection 5, AufenthaltG).

Social insurance benefits (health, pension and unemployment insurance) can be claimed in full (Frings 2008: recital 583).

Basic security benefits for employment seekers: benefits can generally be claimed under SGB II (for exceptions, see Section 7, Subsection 1 SGB II).

Family benefits: family members of German nationals can also claim all family benefits (Frings 2008: recital 583, 584).

3.8.2 Family members of foreigners

The residence permit for family reasons (families joining foreigners) allows unrestricted employment after the Act to Improve the Rights of Foreigners Eligible for Protection and Foreign Workers went into force (Section 27, Subsection 5, AufenthaltG). This was different before the law and contingent upon certain strict requirements.

Basic security income for employment seekers: benefits can be claimed under SGB II by third-country nationals who are family members of third-country nationals during the first three months of their stay,

provided that they are employees or self-employed; in all other cases, employment seekers are excluded from making claims according to Section 7, Subsection 1, Sentence 2, Number 1, SGB II. In general, the said exemption is not of big relevance for spouses of third-country nationals as for family reunification, they must provide evidence that livelihood is secured.

Family benefits: claims to family benefits depend on the work permit. Since family members of foreigners are authorised to work under Section 27, Subsection 5, AufenthG, family benefits can be claimed from the start.

3.9 Persons with settlement permits

The settlement permit and the EC long-term residence permit (EU permit for permanent residence after 1 December 2013) always include a work permit (Sections 9, Subsection 1, and 9a, Subsection 1, AufenthG).

Persons with a settlement permit are entitled to social security benefits to the same degree as Germans.

While it is still possible under Section 56, Subsection 1, Number 1, in conjunction with Section 55, AufenthG, to be deported in the first five years after receiving a settlement permit, it is only possible on serious grounds relating to public safety and order. Claiming benefits under SGB XII is not included here.

4 Administrative Practices for Third-Country Nationals Claiming Social Security Benefits

4.1 Discretionary criteria and deciding factors

Various discretionary criteria play a role in the administrative practice for third-country nationals claiming social security benefits, whereby these are usually clearly defined.

Primary residence in the Federal Territory

A person must reside or usually reside in the Federal Republic pursuant to Section 30, Subsection 1, SGB I (see also Chapter 3).

Entering Federal Territory with the intent of obtaining social benefits

If claiming social welfare is the reason for entry or if the right to residence is solely for the purpose of seeking employment, this benefit cannot be claimed under Section 23, Subsection 3, SGB XII. This also applies to family members. The restrictions implemented by Section 23, Subsection 3, SGB XII, generally apply to all types of social welfare (Classen 2013: 10).

Social benefits cannot be claimed in cases where the intent to claim was decisive for the decision to enter. The same applies if the decision to enter was based on various reasons and if the purpose to claim social benefits was at least formative for the decision to enter. Section 23, Subsection 3, SGB XII does, however, not apply if the goal of obtaining social welfare benefits is subordinate to other purposes. Furthermore, intent does not exist in cases where a person negligently appraised his or her need for help and the possibility to help him- or herself (Coseriu 2009: 9). If entry was not solely or primarily (intentionally) to obtain social benefits – and the residence permit status of the third-country national is stable, so that it can be expected

that he or she will reside permanently in Germany – he or she can claim social benefits under the same conditions as German citizens (Section 23, Subsection 4, SGB XII, see also Section 3.6).

Yet even if the intent behind entry was to obtain social benefits, it cannot simply be withheld, rather the decision must be made to pay out social benefits according to the constitutional interpretation of right to benefits (Article 1, GG; Frings 2008: 214).¹⁶ Section 1, SGB XII, must be observed here, according to which social benefits is intended to provide a decent existence. This discretionary review is also made necessary by the required equal treatment of persons eligible for benefits under the AsylbLG, since this group can at least receive benefits under Section 1a, AsylbLG (Frings 2008: 214).

Case law entitles persons in need in part to obtain an emergency supply, even if they entered for the aforementioned reasons. The emergency supply covers travel costs and fares for the return to their country of origin. In particular cases, persons are entitled to benefits to cover their subsistence insofar as they are imperative for reasons such as unreasonableness of return. Such an entitlement to emergency supply for covering subsistence till departure can only be considered for foreigners who are either unable to work or older than 65 years (Section 21 SGB XII). The discretionary decision is based on the overall circumstances (e.g., family members eligible to remain such as children, children in need of care, family members

¹⁶ BVerwG of 14 March 1985, BVerwGE 71, 139; BVerwG of 10 December 1987, BVerwGE 78, 314; VG Ansbach of 31 August 2004, AN 15 E 04.01846; OVG Berlin, ruling of 22 April 2003, NDV-RD 2003, 77ff.; VGH Munich, ruling of 20 December 2004, 12 CE 04.3232.

in need of care, pregnant partners, fathers of children) and other factors (e.g., previous length of residence, temporary claiming of benefits, state of health, ability to travel, risks in country of origin; Classen 2008: 36-39; 2011: 8).

4.2 Guidelines and other supporting measures

When it comes to social security benefits for third-country nationals, the various providers generally do not have any special aids or instructions exclusively addressing the topic of access by third-country nationals. Rather, information pertaining to this matter is found in the form of individual points in the general guidelines and operating instructions. An exception to this is the Federal Employment Agency, which, besides overviews assigning benefit claims under SGB II and XII to specific residence titles, provides manuals for its case officers and brochures in English, Russian and Turkish for applicants and beneficiaries of social security benefits. If necessary, documents provided by applicants are translated and interpretation is provided at the BA's expense. Staff members also receive training that addresses access to social security benefits by third-country nationals.

Important forms are usually provided in other languages. Interpreters are not employed nationwide, however certain facilities can be provided with supporting measures, such as interpreters, for a limited period of time as part of projects on intercultural openness.

4.3 Effects of claiming social security benefits on residence status

Expulsion/extension of residence title

Claiming social benefits is grounds for discretionary expulsion pursuant to Section 55, Subsection 2, Number 6, AufenthG, that must be decided at the discretion of the Foreigners Authorities; this only applies to family members claiming benefits if they do not have their own, independent right of residence (BVerwG of 28 September 2004, NVwZ 2005, 460 f.).

Under Section 87, Subsection 2, Number 3, AufenthG, (87.2.3.7.1 General Administrative Regulations for Residence Act – AVwV AufenthG), social welfare providers

are obliged to notify the proper Foreigners Authority of the existence of grounds for discretionary expulsion pursuant to Section 55, Subsection 2, Number 6, AufenthG, i.e., if a foreigner claims social benefits for him-/herself, his/her family members or for others in the household (Section 27, Subsection 3, Section 31 Subsection 2, Sentence 3, Section 35 Subsection 3, Number 3, AufenthG). This notification requirement does not apply if the claiming of social benefits is not relevant to residence law, e.g., for persons with a settlement permit (Winkelmann 2013: 22).

When making the discretionary decision, a review is also required of whether or not a less drastic course of action can be considered instead of expulsion, such as an official warning, reducing the duration of a residence title after the fact, not extending it, revoking it or rescinding it (Bauer 2013: 71). Expulsions for claiming social benefits are very rare; usually the course of action taken is not to extend the residence title (Classen 2013: 13).

Deportation solely for claiming social welfare is excluded for homeless foreigners and those with a settlement permit, as well as those with a residence permit whose extension is not contingent upon livelihood being secured (55.2.6.3.1.5 AVwV AufenthG). According to Section 56, Subsection 1, AufenthG, the following foreigners enjoy special protection from expulsion, i.e., they can only be deported on serious grounds relating to public safety and order: Persons who

1. have a settlement permit and have been legally residing in the Federal Territory for at least five years,
2. have an EC long-term residence permit,
3. have a residence permit and were born in the Federal Territory or entered the Federal Territory as a minor, and have been legally residing in the Federal Territory for at least five years,
4. have a residence permit, have been legally residing in the Federal Territory for at least five years, and live with a person described in No. 1 or 2 as a spouse or partner.

During the discretionary review, the reason for depending on social benefits, as well as the duration and amount of benefits must be taken into consideration.

Ongoing subsistence benefits due to self-inflicted need are rated differently than, e.g., temporary stockpiling payments or marginal, one-time assistance under special circumstances. In addition, exercising this discretion also requires a differentiation between those receiving help and family or household members: given otherwise equal requirements, only the expulsion of the person receiving aid is usually considered – unless that person is a minor (Bauer 2013: 56; BVerwG, ruling of 18 December 1984 – 1 C 19/81 – EZAR 223 No. 10).

Furthermore, under Section 55, Subsection 3, AufenthaltG, the length of previous residence, family ties and the requirements for excluding deportation listed in Section 60a, Subsections 2 and 2b, AufenthaltG, must be considered when making a discretionary decision (Bauer 2013: recital 74-77).

Claiming unemployment benefits II is not grounds for deportation. However, it is possible that the residence title will not be extended (see also Section 3.5.2).

Naturalisation

Third-country nationals must be able to secure their own livelihood as well as those of family members for whom they are responsible for providing (and meet other criteria listed in the Nationality Act – StAG) in order to be eligible for naturalisation. Naturalisation thus conflicts with claiming benefits under SGB II or SGB XII according to Section 10, Subsection 1, No. 3, StAG, or when a livelihood cannot be secured without resorting to these benefits.

Family unification

A residence permit for family unification can be denied if the person to whom the family is moving is claiming benefits under SGB II or SGB XII to provide for other family members or other household members (Section 27, Subsection 3, Sentence 1, AufenthaltG). 27.3.2 AVwV AufenthaltG specifies that these requirements are also met if there is a claim for benefits under SGB II or SGB XII without family unification. In this context, the general requirement for issuance under Section 5, Subsection 1, Number 1, AufenthaltG must be respected, which requires a residence title generally not to be issued if the livelihood of the family members moving to Germany is not secured (27.3.7 AVwV AufenthaltG; for a general discussion on family unification in Germany, see Kreienbrink/Rühl 2007). The crucial factor is not the actual claiming of benefits, rather

that the third-country national would have claim to these benefits (Dienelt 2013: recital 71).

However, family unification cannot be absolutely or typically denied, even if the person already residing in Germany is claiming social security benefits. Rather, denial falls within the discretion of the proper authorities; this ensures that Article 8, European Convention on Human Rights (ECHR) and Article 6, GG, are taken into consideration. Above all, the circumstances listed in Section 55, Subsection 3, AufenthaltG, e.g., status and length of residence of a person already residing in Germany, must be reviewed when making the discretionary decision (Dienelt 2013: recital 73, 74).

What must also be reviewed is whether or not it can be assumed that the foreigner already residing in Germany will be sustainably able and willing to support after the unification persons living in the Federal Republic who have thus far subsisted on public benefits, thereby reducing the total amount of public benefits provided (27.3.4 AVwV AufenthaltG). If public expenditure can be reduced through family unification, this argues in favour of allowing the unification (Dienelt 2013: recital 74).

5 External Dimensions of Social Security

5.1 Bilateral agreements

The Federal Republic has concluded international social insurance agreements with various third countries designed to co-ordinate social security systems. Most of these agreements pertain to health insurance, accident insurance and pension insurance. There are both agreements covering multiple branches of social insurance as well as agreements only pertaining to one branch. Some agreements fully regulate the co-ordination of social security systems (a.k.a. comprehensive agreements). However, other agreements, only address

a partial aspect of co-ordination, such as posted workers (Petersen 2008: recital 1, 2). An overview of the agreements and their scopes can be found in Table 3.

An agreement on pension insurance was signed with Uruguay on 8 April 2013; however the agreement has not yet taken effect. Aside from this, the Federal Republic is currently undergoing negotiations regarding bilateral agreements with Algeria, Argentina, the Philippines and the Russian Federation (as of January 2014).

Table 3: Overview of bilateral agreements with third countries regarding social security

Country	In effect since	Scope*
Australia	01 January 2003	PI, Delegate agreement
Bosnia-Herzegovina	01 September 1969	HI, PI, AI, UV, CA
Brazil	01 May 2013	PI, AI
Chile	01 January 1994	PI
People's Republic of China	04 April 2002	Delegate agreement
India	01 October 2009	Delegate agreement**
Israel	01 May 1975	HI, PI, AI
Japan	01 February 2000	PI
Canada	01 April 1988	PI
Kosovo	01 September 1969	HI, PI, AI, UI, CA
Morocco	01 August 1986	HI, PI, AI
Macedonia	01 January 2005	HI, PI, AI
Montenegro	01 September 1969	HI, PI, AI, UI, CA
Republic of Korea	01 January 2003	PI
Serbia	01 September 1969	HI, PI, AI, UI, CA
Tunisia	01 August 1986	HI, PI, AI, CA
Turkey	01 November 1965	HI, PI, AI, CA
USA	01 December 1979	PI

Notes:

* Social insurance agreements have different scopes, i.e., health (HI), pension (PI), accident (AI), unemployment insurance (UI) and child allowance (CA).

** Delegate agreements ensure that redundant insurance and thus redundant contributions are avoided for employees who are temporarily sent by their company to the other contract state.

5.2 Contents of bilateral agreements

Scope of social legislation in delegating countries

For the persons affected, the agreements mostly place stays in the other contract state or even abroad in general on equal footing with a stay in Germany (a.k.a. territorial equivalence). This also includes third-country nationals in the newer agreements. The territorial equivalence principle is one of the core principles in co-ordinating social insurance systems (Petersen 2008: recital 51-53).

The basic rule in the co-ordination of social security systems assumes that the insurance requirement is based on the law of the state in whose territory the employee or self-employed person is working (Petersen 2008: recital 59).

Moreover, the agreements entail which are referred to as delegate regulations; these take effect when a domestic employment relationship that was previously initiated, continues during residence in the contract state. The delegate regulations should ensure that the affected parties do not lose their domestic insurance protection while temporarily abroad. The regulations also attempt to counteract unfair competition by continuing to provide insurance protection. In most cases, this should be reached by temporarily limiting the continued applicability of domestic law when residing in the other contract state (Petersen 2008: recital 60).

Equal Treatment

Nearly all of the comprehensive agreements are designed to place nationals from the contracting state on an equal footing with the other contracting state's own nationals in the application of legal provisions falling under the agreement – provided they usually reside in one of the two contracting states (Petersen 2008: 40). Most of them – especially the newer agreements – stipulate that benefits to nationals of a contracting state must be provided in the same fashion as for its own nationals during stays in a third country (Petersen 2008: 41).

Equating the citizens of the other contracting state and other beneficiaries residing in-country with ones own is, however, not the primary purpose of the agreements, for this equivalence is already broadly realised by national German law. The actual additional value of the agreements with regard to equal treatment when providing benefits is when beneficiaries are residing abroad. However, national law still stipulates some restrictions in this respect (e.g., Section 97, SGB VII, with regard to accident insurance; Petersen 2008: recital 44, 45).

Equal treatment through the agreements also takes effect in the norms regulating access to domestic social security systems, provided these differ according to nationality. This is only the case for pension insurance when insurance is voluntarily taken out for stays abroad (Section 7, Subsection 1, Sentence 2, SGB VI). Usually, however, the agreements do not guarantee full equal treatment, rather they link voluntary access to pension insurance to a specific number of previous contributions (Petersen 2008: recital 46).

Exporting social security benefits

The agreements also co-ordinate the recognition of insurance periods as well as the preservation/maintenance of benefit claims obtained. If national claims to benefits require a specific duration of membership in an insurance system (qualifying period), insurance periods that can be credited toward benefits claims in the other contracting state are taken into consideration. Totalling the insured periods in order to be eligible to claim benefits is another primary principle of the agreements. For long-term benefits, this is the most important one, since they usually require longer qualifying periods. Crediting insurance periods is also effective for short-term benefits, as well as for obtaining insurance entitlements (Petersen 2008: recital 64). Migrant workers can also assert acquired claims if they have left the area of the state obliged to provide the benefits and are living in their country of origin (principle of maintaining acquired benefits claims; Petersen 2008: recital 87, see also Chapter 3).

6 Case Studies

In order to ensure comparability between the German welfare state and the situation in other EU Member States, the following fictional case studies show the possibilities third-country nationals have for claiming social security benefits, as well as the consequences on their residence status. The scenarios for the case studies were provided by the joint study specifications on which the study is based.

6.1 Case study 1

Tho will receive benefits in Germany from statutory unemployment insurance in the form of unemployment benefits (ALG). The amount of ALG will total 60% of his regular net income until his child is born, then ALG will increase to 67% of his regular net income. He can claim ALG for 12 months at the most. If ALG turns out to be so low that the total household income is below the sociocultural minimum living wage, Tho can apply for additional funding in the form of basic security benefits for employment seekers (unemployment benefits II/social security allowance). When indicated, Tho can receive housing allowances in addition to unemployment benefits, thereby avoiding having to make resort to the basic security income. The entitlement for housing allowances depends on the number of family members, the available income, and the costs of rent.

Tho and Lien, a married couple holding Vietnamese citizenship, aged 28 and 30, moved to your (Member) State 10 years ago. They hold long-term residence permits. Tho has worked in a car manufacturing company for the last 8 years, paying obligatory insurance contributions throughout this time. Lien has worked as a chef in the restaurant of a large hotel, also paying obligatory insurance contributions, for the last 2 years. Tho and Lien are expecting the birth of their first child in 6 weeks' time. Last week, the car manufacturing company where Tho works announced that they were making him redundant. Faced with the loss of Tho's income at a time when

Lien would need to take time off work, following the birth of their child, Tho decided to apply for unemployment benefits while Lien applied for maternity benefits.

In addition, Tho can apply for parental allowance. Tho can decide to initially receive parental allowance to compensate for the loss of income, and only subsequently claim unemployment benefits, in order to avoid that the latter is credited against parental allowances.

Insofar as Tho claims unemployment benefits II in addition to parental allowance, due to his occupation prior to birth, according to Section 10, Subsection 2 BEEG, parental allowance will not be credited against unemployment benefits in the amount of the parental allowance exemption, to a maximum of Euro 300 per month. In sum, Tho can claim the parental allowance exemption in addition to unemployment benefits II.

With the birth of their child, the parents will receive a child allowance of Euro 184 per month until the child is 18 years old, or until the child is 25 years old if he/she will still be going to school, graduates, or spends a year in voluntary social or environmental conservation service, or in the federal volunteer service. Parents of disabled children continue to receive a child allowance even after the child's 25th birthday. At the same time, the change in size of the household also changes the level calculated as the sociocultural minimum living wage, so that once the child is born, another review will have to be made regarding the extent to which basic security benefits for employment seekers/subsistence aid can be claimed.

Lien will receive a maternity allowance for the first eight weeks after childbirth that matches her previous pay. Of that, Euro 13 are provided by the health insurance, with the difference being paid by her employer. If Lien claims maternity leave, she will receive between 65% and 100% of her net income – at least Euro 300 and at the most Euro 1,800 – as her parental allowance

for the next 12 months.¹⁷ Since both have an EC long-term residence permit that is tantamount to a settlement permit, claiming social security benefits will have no consequences to their residence status.

6.2 Case study 2

It is assumed that Jasmine has a residence permit for employment purposes pursuant to Section 18, AufenthG, therefore Jasmine can claim a child allowance for her child living in Germany and, upon filing, receives Euro 184 per month from the family benefits office of the proper employment agency for her child in Germany. She cannot receive a child allowance for the child living in the Philippines. Furthermore, she can supplement her income with additional unemployment benefits II/social security allowances if the income, along with any existing wealth, is insufficient in securing the livelihood of herself and her child. If necessary, Jasmine can receive housing allowances supplementary to unemployment benefits thereby avoiding having to make recourse to unemployment benefits II/social security allowances. The entitlement for housing allowances depends on the number of family members, the available income, and the costs of rent.

Jasmine is a single parent, aged 29, holding Filipino citizenship, who moved to your (Member) State two and a half years ago. She has a 2-year old child (also holding Filipino citizenship) that lives with her and another child aged five that lives in the Philippines with Jasmine's mother. She holds a temporary/salaried worker residence permit that has been renewed once. Jasmine has worked as a nurse in a residential day-care unit in your (Member) State for two and a half years. She sends a small amount of money every month to the Philippines to help support her daughter. Last month, Jasmine's employer announced significant cuts in staff salaries in response to budget reductions. Faced with a significantly reduced income, Jasmine has moved into a hostel as she can no

¹⁷ Since Lien would have less money to spend in case she received parental allowances than if she continued her full-time job, while Tho could step in to care for the child without loss of income due to his unemployment, it can be advisable that in such constellations, the working parent does not seek parental allowance.

longer afford to rent private accommodation. She has also been forced to halve the amount of money she sends to her family in the Philippines every month. She has decided to apply for family benefits and guaranteed minimum resources.

Additionally, claiming unemployment benefits with a temporary residence title as in the case above can have consequences on one's residence status. Just as with its issuance, the extension of the residence permit is contingent upon livelihood being secured, which – except for child and parental allowances – is not the case if tax-financed social security benefits such as those under SGB II and XII are claimed (Section 5, Subsection 1, Sentence 1, Number 1, in conjunction with Section 2, Subsection 3, Sentences 1 and 2, AufenthG; see also Chapter 3.5.2).

6.3 Case study 3

It is assumed that Senghor has since been issued a (permanent) settlement permit according to Section 9 or Section 19, AufenthG. It is also assumed that Senghor's mother was issued a residence permit for hardship according to Section 36, Subsection 2, AufenthG. Claiming social security benefits unfolds as follows for Senghor: once a physician determines he is unable to work due to an on-the-job accident, he will receive an injury benefit from accident insurance totalling 80% of his previous gross income, however not greater than his previous net income, until such a time as is determined that he is permanently unable to work, but at the most for 78 weeks. In the event that his ability to work is reduced by 20% or more over 26 weeks after the insurance case has occurred, he can claim a disability pension. If he is completely unable to work, Senghor will receive an annuity totalling two-thirds of his annual pay. With a reduced ability to work of more than 20%, he will receive a percentage of a full pension corresponding to the severity of his reduced earning capacity.

Senghor is a high-skilled worker from Senegal. He arrived in your (Member) State six years ago with a temporary residence permit arranged through the IT company that employed him. Senghor is single and does not have children, but has recently succeeded in bringing his elderly mother to the country on the basis of family reunification. Aged 80, his mother is

entirely dependent on Senghor's income. Last week, Senghor suffered an accident at work that left him incapable of carrying out the work for which he was employed for a period of 3 years. He decided to apply for invalidity benefits, sickness benefits, family benefits and benefits in respect of accidents at work and occupational diseases.

A sickness allowance will not be provided in this instance, since his accident insurance will provide an injury benefit instead; family assistance payments will only be provided in Germany upon the death of the policyholder and only if there is no survivors' annuity (Section 63, Subsection 1, Number 4 in conjunction with Section 71, SGB VII). This is not the case here.

There will be no consequences to Senghor's residence status, since his settlement permit does not have to be renewed. The situation for Senghor's mother, however, is different if the household income available to Senghor and his mother after the loss of income is below the sociocultural minimum living wage and she therefore files for basic social benefits for cases of age or reduced earning capacity. In this instance, she may face discretionary expulsion by the proper Foreigners Authority for claiming social benefits. In practice, however, this kind of situation will likely not result in deportation; rather her residence permit would not be renewed. However, consequently, it would have to be reviewed whether or not her residence could actually be terminated given her advanced age and the hardship previously acknowledged. If necessary, Senghor can receive housing allowances in addition to sickness benefits, and disability pension, respectively, thereby avoiding having to make recourse to her basic social benefits. The entitlement for housing allowances depends on the number of family members, the available income, and the costs of rent.

7 Conclusion

Social security in Germany is ensured by a welfare state that has developed over time. Its central social security systems are contribution-financed statutory social insurance and a tax-financed social welfare system, with statutory social insurance taking precedence. This, however, requires continuous full-time employment interrupted only by temporary periods of claiming benefits. The following applies for the area of social insurance: the more employees earn, the better they are protected by statutory social insurance. Since the protection provided depends on employment, persons in atypical employment relationships are less well protected by the insurance system. In contrast to statutory social insurance, the social welfare systems financed by general tax revenue ensure the sociocultural minimum living wage. Only individual need, and not the duration of previous employment, is decisive for claiming these social security benefits.

Statutory social insurance does not differentiate between third-country nationals, EU citizens and German nationals; rather it offers them the most equal access to social security benefits possible.

Referring to third-country nationals covered in this study, claiming basic security benefits for employment seekers can be problematic for persons with temporary residence titles looking to have it renewed. Also, claiming social benefits has consequences for one's residence status, since this constitutes grounds for discretionary expulsion – although in most cases, the residence title will not be renewed instead.

It can be supposed that this promotes the willingness to take less favourable job offers, since the looming dependence on basic security benefits can not only have economic, but also residential consequences. Persons with a settlement permit, on the other hand, face no consequences to residence whatsoever for claiming social security benefits.

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Abbreviations

ALG	Arbeitslosengeld (Unemployment Benefits)
AsylbLG	Asylbewerberleistungsgesetz (Asylum Seekers Benefits Act)
AufenthG	Aufenthaltsgesetz (Residence Act)
AVwV AufenthG	Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz (General Administrative Regulations for Residence Act)
BA	Bundesagentur für Arbeit (Federal Employment Agency)
BEEG	Bundeselterngeld- und Elternzeitgesetz (Federal Parental Allowance and Parental Leave Act)
BeschV	Beschäftigungsverordnung (Employment Ordinance)
BKGG	Bundeskindergeldgesetz (Federal Child Allowance Act)
BMAS	Bundesministerium für Arbeit und Soziales (Federal Ministry of Labour and Social Affairs)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
ECSMA	European Convention on Social and Medical Assistance
EFTA	European Free Trade Association
ECHR	European Convention on Human Rights
EntgFG	Entgeltfortzahlungsgesetz (Continuation of Remuneration Act)
EStG	Einkommensteuergesetz (Income Tax Act)
GG	Grundgesetz (Basic Law)
GKV	Gesetzliche Krankenversicherung (Statutory Health Insurance)
MISSOC	Mutual Information System on Social Protection
NAP-I	National Action Plan - Integration
NIP	National Integration Plan
SGB	Sozialgesetzbuch (Social Code)
SGG	Sozialgerichtsgesetz (Social Court Act)
StAG	Staatsangehörigkeitsgesetz (Nationality Act)
TFEU	Treaty on the Functioning of the European Union
VVG	Versicherungsvertragsgesetz (Insurance Contract Act)

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