

***Factual analysis of Member States
Investors' Schemes granting
citizenship or residence to third-
country nationals investing in the
said Member State***

***Deliverable B.II Investors' Residence
Schemes in Germany***

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I. GENERAL BACKGROUND

■ *Legal background*

The basic legal text with regard to investment schemes in Germany is the federal Residence Act (*Aufenthaltsgesetz*)¹, which contains the main rules regarding residence rights. The implementation of this Act is laid down in the Residence Decree (*Aufenthaltsverordnung*)² and the General Residence Act Implementation Instruction (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*)³, issued by the Federal Ministry of the Interior. Other relevant legal texts are the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*)⁴ and the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*)⁵. These last legislative texts provide the general rules for the administrative framework concerning the granting of residence rights. It should be noted that the Administrative Procedure Act is legislation of the Länder. Each Land has its own Administrative Procedure Act, which is, however, identical to the Administrative Procedure Acts of the other Länder and of the federal level. Therefore, this report references the federal version of the Administrative Procedure Act.

The Residence Act does not include special provisions for attracting third country nationals as investors. However, **Section 21 of the Residence Act**⁶ includes rules concerning the granting of residence rights to third country nationals, who want to pursue an economic activity as a self-employed person. These rules are not specifically aimed at investors and attracting investments. Yet, due to its broad scope and its implementations, Section 21 of the Residence Act could provide a legal framework for the facilitation of residence by investors.

The key provision is Section 21(1) and (4) of the Residence Act, which sets the basic conditions for granting a temporary residence permit.

Section 21 Residence Act – Self-Employment

(1) A foreigner may be granted a temporary residence permit for the purpose of self-employment if

- 1. an economic interest or a regional need applies,*
- 2. the activity is expected to have positive effects on the economy and*

¹ Residence Act, *Aufenthaltsgesetz* (**Residence Act**), in the version of the publication of 25 February 2008 (BGBl. I p. 162), most recently amended by act of 8 March 2018 (BGBl. I p. 342), available at: https://www.gesetze-im-internet.de/aufenthg_2004/BJNR195010004.html#BJNR195010004BJNG000101310.

² Residence Decree, *Aufenthaltsverordnung* (hereafter, **Residence Decree**), adopted on 25 November 2004 (BGBl. I S. 2945), most recently amended by Decree of 1 August 2017 (BGBl. I S. 3066), available at: <https://www.gesetze-im-internet.de/aufenthv/BJNR294510004.html#BJNR294510004BJNG000100000>.

³ General Residence Act Implementation Instruction, *Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz* (**AufenthGAVwV**), adopted on 26 October 2009 (GMBL p 878), available at: http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_26102009_MI31284060.htm.

⁴ Administrative Procedure Law, *Verwaltungsverfahrensgesetz* (**VwVfG**), in the version of the publication of 23 January 2003 (BGBl. I p.102), most recently amended by act of 18 July 2017 (BGBl. I p. 2745), available at: https://www.gesetze-im-internet.de/vwvfg/inhalts_bersicht.html.

⁵ Code of Administrative Court Procedure, *Verwaltungsgerichtsordnung* (**VwGO**), in the version of the publication of 19 March 1991 (BGBl. I p. 686), most recently amended by act of 8 October 2017 (BGBl. I p. 3546), available at: <https://www.gesetze-im-internet.de/vwgo/BJNR000170960.html#BJNR000170960BJNG000101308>.

⁶ The Residence Act was adopted by the Act of 30 July 2004 (BGBl. I S. 1950), which also included Section 21. Since then, Section 21 was amended by the Act of 19 August 2007 (BGBl. I p. 1970), the Act of 20 December 2008 (BGBl. I p. 2846) and the Act of 01 June 2012 (BGBl. I p. 1224). It should be noted that the original 2004 version of Section 21 Residence Act included an assumption that when 1 million EUR was invested and ten employment places were created, an economic interest existed. The subsequent amendments lowered this assumption threshold: first, to 500,000 EUR and five employment places, later, to 250,000 EUR and five employment places. Eventually, this assumption threshold was removed from Section 21.

3. *the foreigner has personal capital or an approved loan to realise the business idea.*

Assessment of the prerequisites in accordance with sentence 1 shall focus in particular on the viability of the business idea on which the application is based, the foreigner's entrepreneurial experience, the level of capital investment, the effects on the employment and training situation and the contribution to innovation and research. The competent bodies for the planned business location, the competent trade and industry authorities, the representative bodies for public-sector professional groups and the competent authorities regulating admission to the profession concerned must be involved in examining the application.

(...)

(4) The period of validity of the temporary residence permit shall be limited to a maximum of three years. By way of derogation from Section 9(2), a permanent settlement permit may be issued after a period of three years, if the foreigner has successfully carried out the planned activity and adequate income ensures the subsistence of the foreigner and the dependants living with him as a family unit and whom he is required to support.

It should be noted that the text of Section 21 of the Residence Act was amended in 2012. Before the amendment, the text explicitly set out that, when assessing the economic interest of granting a temporary residence permit, the competent authority had to assume that an economic interest generally exists when EUR 250,000 is invested and five employment places are created. This assumption, with explicit reference to a specific amount of investment was removed from the text of Section 21 of the Residence Act, by the amending law of 1 June 2012⁷. This amendment act also transposes the EU Blue Card Directive⁸. The preparatory documents for this act explain that the reason for removing the assumption is to enhance flexibility and to allow the competent authority to have a greater discretion to decide.

Secondly, the assumption caused confusion to prospective candidates for the Section 21 scheme. Prospective candidates had the image that the assumption if EUR 250.000 is invested an economic interest exists, was a real requirement for being granted with a temporary residence permit. This led to numerous cases where applications were pulled out⁹. A third reason, according to the preparatory documents, the level of turnover should not be a criterion for granting residence rights. More relevant are the sector, the business concept and the regional conditions¹⁰. It can be concluded that the general tendency of approach during the preparatory works for the 2012 amending law was to attract skilled workers to Germany¹¹.

In this regard, it should be noted that the General Residence Act Implementation Instruction, issued in 2009 (and not amended since then) still includes a reference to the assumption that an economic interest exists when EUR 250,000 is invested and when five employment places are created¹². This assumption

⁷ Act transposing the Directive on highly qualified employment for third-country nationals, *Gesetz zur Umsetzung der Hochqualifizierten-Richtlinie der Europäischen Union (2012 Act)* adopted on 1 June 2012 (BGBl. I p. 1224), available at: https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl112s1224.pdf%27%5D_1525871727722.

⁸ Council Directive (EC) No 2009/50 of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

⁹ Information based on the stakeholder consultation with representatives of the Federal Ministry of the Interior on 30 May 2018.

¹⁰ BUNDESRAT, *Empfehlung zum Entwurf eines Gesetzes zur Umsetzung der Hochqualifizierten Richtlinie der Europäischen Union, Drucksache 848/1/11*, p. 16-17, available at: <http://dipbt.bundestag.de/dip21/brd/2011/0848-1-11.pdf> (last consulted on 4/5/2018).

¹¹ See for instance: BUNDESTAG, *Plenarprotokoll 17/162*, p. 19252A - 19264D, available at: <http://dipbt.bundestag.de/dip21/btp/17/17162.pdf#P.19252> (last consulted 4/5/2018).

¹² Point 21.1.4 AufenthGAVwv

was to be considered as a binding guideline for the competent authorities. However, due to the **change in the primary legislation**, the provision including the assumption in the General Residence Act Implementation Instruction, which is secondary legislation, has lost its legal effect. Therefore, no assumption regarding a certain investment level has to be taken into account in the assessment of the existence of an economic interest¹³.

Taking into account the wording of Section 21 of the Residence Act, the guidelines in the General Residence Act Implementation Instruction and the parliamentary preparations, it appears that Section 21 is designed to enable and to facilitate emigration of skilled entrepreneurs, who could contribute to the German economy by introducing innovative business ideas or by establishing successful businesses¹⁴. This objective becomes, in particular, apparent in the first two points of the first subparagraph, which require an economic interest or a regional need and that the business activity is expected to have positive effects on the economy. In order to determine whether a regional interest exists, the competent authority has to take into account the needs of a specific region. In particular, the competent authority has to consider the economic underdevelopment of that region and in which manner the new business could provide new changes for the economic development of that region¹⁵.

On the basis of the above, it can be concluded that the scheme in Section 21 is not designed to attract money by itself or to exchange citizenship or residence rights for an investment. Rather, the scheme's main purpose is attracting the (skilled) foreigner himself. For this reason, the German investment scheme could be considered more as an entrepreneurial residence programme than a pure investment scheme¹⁶. The level of investment provided by the third country national is only an element in the assessment of his business plans and of the probability of his business success¹⁷.

■ *Competent authorities*

The competent authorities for granting temporary residence permits are the *Ausländerbehörden* or **foreigners offices** (FO)¹⁸. The FOs are organised locally: in each county (*Landkreis* and *Kreisfreie Stadt*) a foreigner's office is established. The FOs are Länder authorities and fall under the authority of the Länder. As a consequence, for certain administrative aspects (such as the course of the procedure, the documents needed, the appeal and supervision) and the internal organisation, administrative law of the Länder is applicable. A further consequence of this local organisation is that for the supervision to the FOs, for the whole of Germany around 500 different authorities have competence¹⁹. Since these supervisory authorities fall under the competency of the Länder, the federal government has no competence or insight to the practical implementation of these supervisory authorities.

However, it is important to note that the legislation with regard to the residence of foreigners is federal. Moreover, the General Residence Act Implementation Instruction is issued at federal level and applies to all foreigners' offices in Germany. As such, the implementation with regard to the substantial aspects of Section 21 of the Residence Act, should take place in a general uniform manner²⁰.

The nature of the provision under Section 21 of the Residence Act is highly discretionary. The wording of the provision stipulates only that the competent authority may grant a temporary residence permit for

¹³ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

¹⁴ See A. Dietz, 2017, *Ausländer- und Asylrecht*, 2e Auflage, Nomos, Baden-Baden, p. 49-50.

¹⁵ Point 21.1.3 *AufenthGAVwV*.

¹⁶ J. Džankić, 2015, 'Investment-based citizenship and residence programmes in the EU', p. 19., available at: http://cadmus.eui.eu/bitstream/handle/1814/34484/RSCAS_2015_08.pdf

¹⁷ See below, under Section II.2 for the information on the assessment of the business plans, including the level of investment.

¹⁸ Section 71(1) Residence Act.

¹⁹ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

²⁰ Information confirmed through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

the purpose of the pursuit of an economic activity as a self-employed person, when there is an economic or regional interest and when positive effects for the economy are expected. Because of its open and vague wording, Section 21 Residence Act is to be considered as a discretionary norm (*Ermessensvorschrift*). Therefore, **the competent authority has a wide discretion to interpret the conditions for granting the residence rights**. This wide interpretational range is, however, limited by the General Residence Act Implementation Instruction, which includes more detailed guidelines with regard to the grounds and the reasons that are to be taken into consideration in the assessment²¹. These guidelines have a binding effect for the competent authorities as further explained in point 1.1 of Section II below.

It should be noted that third country nationals, who do not yet have the right to reside in Germany, can send their application to a diplomatic mission when applying for a visa abroad. The diplomatic mission will not decide on the Section 21 residence rights but will pass the application over to the competent FO as further explained in point 1.1 of Section II below.

²¹ Points 21.1.1 to 21.1.5.5 AufenthGAVwV.

II. PROCEDURES, COMPETENT AUTHORITIES AND APPLICABLE CRITERIA

1 APPLICATION PHASE

1.1 PROCEDURES

Conditions and procedure to obtain a temporary residence or a settlement permit

The Residence Act, the Residence Decree and the General Residence Act Implementation Instruction do not explicitly lay down provisions, which set out the procedures for granting a temporary residence permit for third country nationals. However, on the basis of the provisions of the Residence Act and derived from information provided by different FOs of different Länder, a general outline of the procedures can be found.

The Residence Act sets as a general precondition for the legal residence of a third country national on the German territory, the possession of a residence title (*Aufenthaltstitel*). Section 4 of the Residence Act distinguishes between the **different types of residence titles**. For the purposes of this report, the relevant type of title is the **temporary residence permit** (*Aufenthaltserlaubnis*) and the **settlement permit** (*Niederlassungserlaubnis*), the duration of which is not limited in time. Further residence titles of Section 4 include the visa, the EU-Blue card and the ICT-card.

For Section 21 of the Residence Act, for the exercise of economic activities as a self-employed (which can require a certain investment), a third country national can be granted either a temporary residence permit²² or a settlement permit²³. In any case, a third country national who wants to invest in Germany by pursuing an economic activity as a self-employed has to **first apply for a temporary residence permit**. Only **after three years and when the economic activity as a self-employed is successfully carried out**, a settlement permit can be granted.

i. The temporary residence permit for the purpose of an economic activity as a self-employed

The right of residence for self-employed persons, pursuant to Section 21 of the Residence Act, is a specific type of the temporary residence permit. Section 7 of the Residence Act specifies that the temporary residence permit is a residence title which duration is limited in time. In the case of the temporary residence permit for self-employed, the **permit valid for maximum three years and cannot be renewed**²⁴. Furthermore, the permit is **issued only for a specific purpose**²⁵. The validity of the permit is conditional on the existence of the purpose. In the case of the temporary residence permit of Section 21, the purpose is the exercise of economic activities as a self-employed person. As such, the **permit will cease to exist if the exercise of economic activities as a self-employed ceases or becomes impossible**.

■ Who can apply for a residence permit and Conditions for granting residence to investors

The **personal scope of application** for the temporary residence permit for self-employed persons includes all third country nationals, who are eligible for the residence title who want to start a business as a self-employed or who run already a foreign business and want to establish a German branch.

²² Section 21(1) Residence Act.

²³ Section 21(4) sentence 2 Residence Act.

²⁴ Section 8(2) and Section 21(4) sentence 1 Residence Act.

²⁵ Section 7(2) Residence Act.

In order to acquire the temporary residence permit, the candidate must fulfil the general eligibility criteria for the residence title, as laid down in Section 5 (1) and (2) of the Residence Act and the specific criteria for the temporary residence permit for a self-employed economic activity, as laid down in Section 21 of the Residence Act.

Section 5 Residence Act – General prerequisites for granting residence titles

(1) The granting of a residence title shall generally presuppose

1. that the foreigner's subsistence is secure;

1a. that the foreigner's identity is established and if he is not entitled to return to another state, his nationality is established,

2. that there is no public interest in expelling the foreigner,

3. that, if the foreigner has no entitlement to a residence title, the foreigner's residence does not compromise or jeopardise the interests of the Federal Republic of Germany for any other reason and

4. that the passport requirement pursuant to Section 3 is met.

(2) The granting of a temporary residence permit, an ICT Card, a permanent settlement permit or an EU long-term residence permit shall further presuppose that the foreigner

1. has entered the country with the necessary visa and

2. has already furnished the key information required for granting the title in his visa application.

(...)

Section 5 of the Residence Act sets out the general prerequisites, which have to be fulfilled in order to acquire a residence title. These general prerequisites for granting a residence title include requirements having regard to security and public order considerations. In this light the candidate's identity²⁶ has to be established and the candidate must have entered the country with the necessary visa. Further, there may not be a public interest in expelling the candidate and the foreigner's residence does not compromise or jeopardise the interests of the Federal Republic of Germany for any kind of reason. The reasons to determine if there is a public interest to expel the third country national have regard to the protection of the public safety and are set out by Section 54 Residence Act²⁷. Another important condition is that the candidate's subsistence must be secure. This condition is in line with other conditions, which require that the foreigner has the economic means to provide a living for himself and his family members²⁸.

Section 21 Residence Act – Self-Employment

(1) A foreigner may be granted a temporary residence permit for the purpose of self-employment if

1. an economic interest or a regional need applies,

²⁶ If the candidate is not entitled to return to another state, it is required that also his nationality can be established. See Section 5(1) nr. 1a Residence Act.

²⁷ See below under Point 4. Due diligence and security considerations.

²⁸ See below.

2. *the activity is expected to have positive effects on the economy and*
3. *the foreigner has personal capital or an approved loan to realise the business idea.*

Assessment of the prerequisites in accordance with sentence 1 shall focus in particular on the viability of the business idea on which the application is based, the foreigner's entrepreneurial experience, the level of capital investment, the effects on the employment and training situation and the contribution to innovation and research. The competent bodies for the planned business location, the competent trade and industry authorities, the representative bodies for public-sector professional groups and the competent authorities regulating admission to the profession concerned must be involved in examining the application.

(...)

(3) Foreigners older than 45 should be issued a temporary residence permit only if they possess adequate provision for old age.

(4) The period of validity of the temporary residence permit shall be limited to a maximum of three years. By way of derogation from Section 9(2), a permanent settlement permit may be issued after a period of three years, if the foreigner has successfully carried out the planned activity and adequate income ensures the subsistence of the foreigner and the dependants living with him as a family unit and whom he is required to support.

The specific requirements for granting the temporary residence permit for the purpose of an economic activity as a self-employed person relate directly to the aim of this scheme: to attract entrepreneurs with innovative and successful business plans, who could contribute therefore to the German economy. Therefore, it is required that there is an economic reason for granting the temporary residence permit or there is a regional need for granting the temporary residence permit. The existence of a regional interests has regard to the economic situation of a specific region and how the foreigner's business plans are addressed to the situation, as well as how it could contribute to these regional needs²⁹. Further, Section 21 Residence Act requires that the economic activity is expected to have positive effects on the economy and the candidate has the personal capital or an approved loan to realise the business idea, which he wants to pursue with his economic activities as a self-employed³⁰. For candidates above 45 years of age, an additional condition is in place: the candidate can only be granted a temporary residence permit for the purpose of self-employment when he possesses the necessary means for securing subsistence when the person is of old-age, such as a pension³¹.

■ ***Procedural stages***

Since the possession of a residence title is a general precondition for legal residence on the German territory, the third country national must already have a visa or another residence title to apply for the temporary residence permit for the purpose of self-employment. This gives the candidate third country national two possibilities to apply for the Section 21 temporary residence right: (i) the application on the German territory, before the FO, when the candidate has already a residence title; or (ii) the application abroad, at one of the German diplomatic missions.

When the candidate is in the possession of a residence title, he can apply for the Section 21 temporary residence permit at the FO. In this context, it is important to note that the candidate has to make the

²⁹ See above under General Background.

³⁰ Section 21(1) Residence Act.

³¹ Section 21(3) Residence Act.

application a sufficient time (not further specified) before his residence title expires³², taking into consideration the long duration (several months³³) of the process of granting the residence permit. The candidate has to choose the FO of the locality, where he is domiciled or where he wants to pursue his economic activity³⁴. Since the FO is a local authority, falling under the competence and authority of the Länder, the Länder legislation applies. As a consequence, the rules on which documents are required, on certain procedural aspects and on the competent supervision authority can differ between the Länder.

The other possibility is that the candidate submits the application abroad, before a diplomatic representation, together with the application for a visa. Together with the application for a visa, the candidate will send the diplomatic representation also the application for the Section 21 temporary residence permit (and the necessary documents of proof). The diplomatic representation will make a decision on granting the visa and will send the Section 21 application to the locally competent FO. It is this FO that will be competent to decide on granting the Section 21 temporary residence permit. The procedure from abroad allows the candidate to go through the application process in a timely manner, and to receive the temporary residence permit before the visa expires³⁵.

The physical appearance of the candidate is not a requirement under the Residence Act. Therefore, it is the competent authority that decides whether physical appearance during the application procedure is required. When the candidate applies from abroad, before a diplomatic mission, he must appear in person since this is a condition for the visa procedure. In the procedure where the candidate applies before the FO, whether the applicant's physical appearance is required depends on each individual FO. According to the information provided by the Ministry of Interior³⁶, the FOs do request the personal appearance, in order to talk over the candidate's business plans and business ideas. For instance, the Berlin FO states on its website that personal appearance is required³⁷.

In submitting his application, the candidate must cooperate with the authorities and, thus, must **provide the competent authorities with the necessary proof regarding the conditions of Sections 5 and 21 of the Residence Act**³⁸. In particular, the candidate has to provide proof in relation to the proposed economic activity as self-employed. As such, the candidate has to provide the FO with documents of proof, such as the business plan³⁹, the financing and the candidate's intention to make an investment⁴⁰. The FO is required to set the candidate a suitable deadline, in order to allow the candidate to provide all necessary proof⁴¹.

³² See Land of Baden-Württemberg, n.d., *Aufenthaltserlaubnis zur Ausübung der selbständigen Tätigkeit beantragen*, viewed 7 May 2018, https://www.service-bw.de/web/guest/leistung?p_p_id=details_WAR_suchegui&p_p_lifecycle=0&p_p_col_id=column-3&p_p_col_pos=3&p_p_col_count=4&p_r_p_-358194435_id=83&p_r_p_-358194435_t=leistung&p_r_p_-358194435_title=Aufenthaltserlaubnis+zur+Ausuebung+der+selfstaendigen+Taetigkeit+beantragen&_details_WAR_suche_gui_tab=0&p_r_p_-358194435_plz=72076-72074-72072-72070#sb-id-toc-block8 and Landkreis Würzburg (in Bavaria), n.d., *Aufenthaltserlaubnis; Beantragung und Verlängerung*, viewed 7 May 2018, <https://www.landkreis-wuerzburg.de/Auf-einen-Klick/Aktuelles/Asyl-im-Landkreis/index.php?object=tx%7C2680.2&ModID=10&FID=2680.235.1>

³³ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

³⁴ On the basis of the domicile principle (*Wohnsitzprinzip*), pursuant to Section 3(1), No 3, letter a VwVfG.

³⁵ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

³⁶ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

³⁷ See the Berlin FO, n.d. *Aufenthaltserlaubnis zur selbstständigen oder freiberuflichen Tätigkeit - Erteilung* <https://service.berlin.de/dienstleistung/305249/>, viewed 30 May 2018.

³⁸ Section 5(2) sentence 1 nr. 2 and Section 82 Residence Act.

³⁹ No global information is available on the requirement of a business plan. The reason for this is the lack of a global overview on the approaches of the locally organized FOs with regard to the procedures to grant the residence titles. The basic information available is that a business plan is required (see on the websites of the FOs of Berlin, Baden-Württemberg, footnote 41).

⁴⁰ See Land of Baden-Württemberg, n.d., Landkreis Würzburg (in Bavaria), n.d. and see also on the Land of Berlin, n.d., *Aufenthaltserlaubnis zur selbstständigen oder freiberuflichen Tätigkeit - Erteilung* (information on Residence for the purpose of economic activities as a self-employed), viewed 8 May 2018, <https://service.berlin.de/dienstleistung/305249/>

⁴¹ Section 82(1) sentence 2 Residence Act.

On the basis of the proof, the FO has to check whether the conditions of Section 21 of the Residence Act are met and whether **the temporary residence permit can be granted**⁴². As mentioned above, the FO has a broad discretion to determine if these conditions are met. The FO must, however, take into account the **binding assessment guidelines**, which are provided in the Residence Act and in the General Residence Act Implementation Instruction⁴³. These binding guidelines include the following elements, which are to be considered:

- the viability of the business idea;
- the entrepreneurial experience of the applicant;
- the level of capital investment;
- effect on employment;
- contribution to training and research.

It should be noted that due to the competence of the locally organised FOs, the manner how these elements or proof are assessed, differs widely between the different FOs in the different Länder. For this reason, it is not possible to have a global overview of the approach to how these elements are assessed⁴⁴.

The FO must also **involve the trade and business bodies (TBB)**, such as the chamber of commerce or the professional chambers⁴⁵. The TBB advise the FO on the technical or specialised aspects of the above-mentioned points of consideration. At the end, the FO decides whether the candidate will be granted a temporary residence permit. Pursuant to the general principles of administrative law, this **decision must be duly motivated**⁴⁶. In particular, when the FO decides to refuse to grant a temporary residence permit, it has to inform the candidate in writing, including information on the legal remedies against the decision⁴⁷.

The **length of the decision procedure** differs between the FOs of the different Länder and even within a Land. According to the information provided by the Ministry of the Interior, the procedure for granting a temporary residence permit will last **several months**⁴⁸. It should also be noted that the general principles of administrative law apply and thus the decision has to be made **within a reasonable time limit**.

- **Application fee**

According to the Residence Decree, the candidate has to pay an **administrative fee of EUR 100** if he is granted with a temporary residence permit⁴⁹. It should be noted that the amount of the administrative fee was EUR 110 before 1 September 2017. This amount was lowered by an act of 13 July 2017⁵⁰.

ii. Settlement permit for the purpose of an economic activity as a self-employed

⁴² Section 79(1) sentence 1 Residence Act.

⁴³ Section 21(1) sentence 2 Residence Act and Point 21 AufenthGAVwV.

⁴⁴ Information based on the stakeholder consultation with representatives of the Federal Ministry of the Interior on 30 May 2018.

⁴⁵ Section 21(1) sentence 3 Residence Act and Point 21.1.6 AufenthGAVwV.

⁴⁶ Section 39(1) VwVfG.

⁴⁷ Section 77(1) sentence 1 Residence Act.

⁴⁸ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

⁴⁹ Section 69 Residence Act and Sections 45 sentence 1 nr. 1 Residence Decree.

⁵⁰ Section 45 sentence 1 nr. 1 b) Residence Decree was amended by Article 2 of the Act of 13 July 2017 (BGBl.I p. 2350), which provision went into force on 1 September 2017, available at: https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl117s2350.pdf%27%5D_1531409125859

A third country national who has been holding a temporary residence permit for the purpose of an economic activity as a self-employed for at least three years, is entitled, under Section 21(4) of the Residence Act, to a **settlement permit**. As mentioned above, the settlement permit is a residence title, which is **not limited in time**⁵¹. The conditions for granting a settlement permit for the purpose of an economic activity as a self-employed are specifically laid down under Section 21(4) of the Residence Act (*lex specialis*). These rules derogate explicitly from the *lex generalis* under Section 9(2) of the Residence Act⁵². When the third country national applies for a settlement permit under Section 21(4) of the Residence Act, he is required to have successfully carried out the planned economic activity and to have an adequate income ensuring his subsistence and the subsistence of his family members depending on him.

■ *Procedural stages*

Regarding **procedural aspects of the application** for a settlement permit for the purpose of an economic activity as a self-employed, the rules for the temporary residence permit apply *mutatis mutandis*. Relevant differences are the personal scope of application the documents of proof and its assessment.

■ *Who can apply for a residence permit and Conditions for granting residence to investors*

The first relevant difference is the **personal scope of application**: a settlement permit can only be granted to persons who already hold a temporary residence permit for at least three years. The conditions for a residence title, as laid down in Section 5 of the Residence Act also apply.

The second difference with the procedure for the settlement residence concerns the **conditions and proof required**. The third country national must provide the FO with proof that the economic activity has been successfully carried out. To this end, the third country national must provide documents concerning his average income on the basis of the economic activity and proof of the business results of the activity. In order to assess the proof, the FO may seek the advice of the TBB. The FO may also decide that economic activity is successfully carried out when the business has created extra employment places and has generated profits⁵³. In addition, the third country national must prove that the activity provides him and his family an adequate income, which ensures their subsistence.

It is noted that in any case, the general principle whereby the applicant must cooperate with the authorities applies here too⁵⁴.

The procedure for granting a settlement permit also lasts several months. According to the stakeholders interviewed, the procedure will last around **three months**⁵⁵.

■ *Application fee*

The applicant has to pay an **administrative fee of EUR 124** if he is granted with a settlement permit⁵⁶. It should be noted that the amount of the administrative fee was EUR 150 before 1 September 2017. This amount was lowered by an act of 13 July 2017⁵⁷.

⁵¹ Section 9(1) sentence 1 Residence Act.

⁵² Under Section 9(2) Residence Act, the third country national is required, among others, to hold a temporary residence permit for minimum 5 years, they have sufficient command of German and to have a basic knowledge of the German political and social system and of the German way of life.

⁵³ Point 21.4 AufenthGAVwV.

⁵⁴ Section 82 Residence Act.

⁵⁵ Information based on the stakeholder consultation with representatives of the Federal Ministry of the Interior on 30 May 2018.

⁵⁶ Section 69 Residence Act and Section 44 Residence Decree.

⁵⁷ Section 44 Residence Decree was amended by Article 1 of the Act of 13 July 2017 (BGBl.I p. 2350), which provision went into force on 1 September 2017, available at:

Legal remedies contesting the decision of the FO

The normal administrative law **legal remedies** are open to third country nationals seeking to contest a decision refusing to grant a temporary residence/settlement permit⁵⁸. The FO's decision not to grant the temporary residence/settlement permit is a decision of an administrative nature. Therefore, the third country national can appeal this decision before an administrative court. However, before the judicial appeal, the third country national must first make a prior administrative appeal **before the hierarchical supervising authority** of the FO (*Vorverfahren* or *Widerspruchsverfahren*)⁵⁹. The supervisory authority has to check whether the decision of the FO is lawful and appropriate⁶⁰. The FO's hierarchical supervising authority is, depending on the Land, the governmental district (*Regierungsbezirk*) or the Land's Ministry of the Interior⁶¹. When the prior administrative appeal is not satisfactory, the third country national can make a demand to the **administrative court**, to order the FO to grant the temporary residence/settlement permit (*Verpflichtungsklage*)⁶². As a consequence of the discretionary nature of Section 21 of the Residence Act, the administrative court has to check the lawfulness of the decision, by checking whether the FO abused of its discretion to decide whether the conditions for granting the permit are fulfilled. The court must check that no fundamental rights were violated and that the decision respects the principle of proportionality.

The FO's decision concerning the granting of a temporary residence/settlement permit can be **contested by a hierarchical supervising authority**. If this hierarchical supervising authority is of the opinion that the decision of the FO to grant the temporary residence/settlement permit is problematic, this authority may revoke or withdraw the FO's decision⁶³.

For the appeal before the administrative court, the applicant has to pay the legal costs of EUR 438⁶⁴. These costs do not include the cost of legal representation or assistance by a lawyer. Section 154 VwGO stipulates that when the court has made its decision, the losing party bears the costs of the procedure.

1.2 COMPETENT AUTHORITIES AND NON-PUBLIC BODIES

On the basis of Section 71(1) of the Residence Act, **the competent authority for the decision to grant a residence and settlement permit is the FO**. The FO processes all steps of the procedure.

As previously mentioned, the FO must involve the **trade and business bodies (TBB)** in the procedure of granting a temporary residence permit for the purpose of an economic activity as a self-employed⁶⁵. The TBB provide specialised and technical advice on the business plan and on its financing provided by the candidate for the temporary residence permit. In particular, for the matters for which the FO lacks the necessary knowledge and competencies⁶⁶. In the procedure for the settlement permit, the TBB may be involved, in order to give their technical advice for the question if the planned economic activity is successfully carried out⁶⁷.

https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl117s2350.pdf%27%5D_1531409125859

⁵⁸ Section 40 VwGO; see also A. Dietz (2017), p. 67-68.

⁵⁹ Section 68(2) and 73(1), no 1 VwGO.

⁶⁰ Section 68(1) VwGO.

⁶¹ See A. Dietz (2017), p. 62.

⁶² Section 42(1) VwGO; *ibid*, p. 68.

⁶³ See below, under Section II.3 – Residence phase.

⁶⁴ Calculated on the Basis of Section 52(2) GKG, No 5110 Annex I GKG and Annex II GKG; see also See A. Dietz (2017), p. 70.

⁶⁵ Section 21(1), sentence 3 Residence Act; see above.

⁶⁶ A. Dietz (2017), p. 50.

⁶⁷ Point 21.4 AufenthGAVwV; see above.

Since the Residence Act does not explicitly stipulate what the legal consequences of the involvement of the TBB are, it follows that the FO is not bound by the advice of the TBB. However, when the FO decides not to follow the decision of the TBB, it has to duly motivate this decision⁶⁸. In practice, there are no known cases where the FO decided not to follow the advice of the TBB⁶⁹. Nonetheless, since the decision to grant a temporary residence/settlement permit is a discretionary decision, it can be considered as misuse of discretionary power when the FO does not give sufficient consideration to the advice of the TBB. Consequently, not taking into consideration the TBB's advice could lead to the unlawful granting or refusal of granting of temporary residence/settlement permit and to the withdrawal of the permit as explained in point 1.3 below.

The Residence Act specifies that **the TBB include the competent bodies for the planned business location, the competent trade and industry authorities, the representative bodies for public-sector professional groups and the competent authorities regulating admission to the profession concerned**⁷⁰. Furthermore, Section 21(1) of the Residence Act specifies that only the locally competent bodies are to be involved. As such, the scope of Section 21(1) includes self-organised public bodies that represent and organise businesses, entrepreneurs and specific professionals⁷¹. This covers the local Chambers of Commerce and Industry (*Industrie- und Handelskammer*), the Chambers of Craft Trades (*Handwerkskammer*) and the Professional Chambers (for instance the Chamber of Engineers, Architects, etc.). Depending on the activity the candidate wants to pursue, the FO has to contact the relevant TBB, which is the body competent for the relevant economic activity. For instance, when the candidate wants to pursue a specific activity in crafts, the FO must involve the Chambers of Craft Trades. For all other cases, where no specific body exists for the activity, the Chambers of Commerce and Industry, are involved.

As public bodies, the local trade and business authorities fall under the administrative supervision of the governments of the Länder.

The Residence Act does not provide for the involvement of non-public bodies. Candidates can ask for the advice of non-public bodies, such as lawyers or NGOs, yet these bodies cannot act on behalf of the candidates, when the competent authority asks the physical appearance⁷².

1.3 MONITORING OF THE PROCEEDINGS AND THE AUTHORITIES INVOLVED

With regard to the residence and settlement permits granted pursuant to Section 21 of the Residence Act, no provision could be identified which puts in place special monitoring mechanisms or procedures.

As mentioned under point 1.1 the FOs are executive bodies, falling under the supervisory competence of the Länder. Therefore, the **monitoring of the FOs' decisions is done by the immediate hierarchical higher authorities** (the Länder Governments or the Government Districts). The Administrative Procedure Act provides two *lex generalis* scrutiny mechanisms, which also apply to the decision of the FOs.

The first scrutiny mechanism is the annulment or withdrawal of an unlawful administrative act (*Rücknahme eines rechtswidrigen Verwaltungsaktes*). This allows the supervisory authority to withdraw unlawful administrative acts, such as the granting of a temporary residence/settlement permit

⁶⁸ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

⁶⁹ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

⁷⁰ Section 21(1) sentence 3 Residence Act.

⁷¹ Point 21.1.6 AufenthGAVwV

⁷² Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

where the conditions are not met, even after the time-limits for legal remedies have expired⁷³. The supervisory authority is, however, obliged to provide the affected person with a financial compensation of the financial losses of the withdrawal, if this person had legitimate expectations arising from the existence of the act. Nevertheless, this is only the case insofar as the affected person's legitimate expectation merits protection, in the light of public interest⁷⁴. In the context of the granting of a temporary residence/settlement permit, the possibility of withdrawal can be relevant when the FO exceeds the discretionary range for interpretation of the conditions in Section 21. Abuse of discretion must be seen as unlawful and, thus, the relevant decisions can be annulled. Consequently, the possibility of withdrawal, allows the supervisory authority to scrutinise how the FO applies the conditions for granting a temporary residence/settlement permit.

The second scrutiny mechanism is the revocation of a legal administrative act (*Widerruf eines rechtmäßigen Verwaltungsaktes*). The supervisory authority may revoke such acts if it considers that due to changed circumstances the act's effects are contrary to the public interest⁷⁵. In addition, the supervisory authority can revoke the administrative act if it could cause serious harm to the public welfare⁷⁶. As is the case for the withdrawal of an administrative act, the revoking authority is obliged to compensate the financial losses suffered by the revocation, if the affected person had legitimate expectations arising from the existence of the administrative act⁷⁷. The possibility to revoke an administrative act, allows the supervisory authority to have a scrutiny in the cases where the granting of a temporary residence/settlement permit would be against public interest or public welfare.

Since the decision to grant a temporary residence/settlement permit is made by the FOs, which are locally organised authorities under the Länder, no federal caps on the number applicants are in place. No information is available on the existence of caps on the local or Länder level.

1.4 INFORMATION ON APPLICATIONS

Under the Residence Act, there is no obligation to disclose statistical information on successful applicants for the temporary residence/settlement permit under Section 21 of the Residence Act. This follows from the fact that the temporary residence/settlement permit for the purpose of an economic activity as a self-employed is not considered as a *sui generis* residence title for specific individual cases.

The Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge, BAMF*) publicises every year, in its publication *Bundesamt in Zahlen*, the statistics with regard to migration in Germany⁷⁸. These yearly statistical publications include all third country nationals who have received the right of residence in Germany. Besides the numbers on the temporary residence permits, these statistics also incorporate numbers on the settlement permits, the EU-residence permits, the permissions to remain pending the asylum decision (*Aufenthaltsgestattung*) and the temporary suspension of deportations (*Duldung*)⁷⁹. The table below - in the column "Total no. of requests for residence" - presents the total number of third country nationals who were granted the right of residence in Germany. No data exist on the number of applications that are turned down disaggregated by the ground on which residence is applied for⁸⁰.

⁷³ Section 48(1) VwVfG.

⁷⁴ Section 48(3) VwVfG.

⁷⁵ Section 49(2) no 3 VwVfG.

⁷⁶ Section 49(2) no 5 VwVfG.

⁷⁷ Section 49(6) VwVfG.

⁷⁸ For the statistics of 2016: see BAMF, 2017, *Das Bundesamt in Zahlen 2016: Asyl, Migration und Integration*; the *Bundesamt in Zahlen* publications for the previous years can be found at:

<http://www.bamf.de/DE/Infothek/Statistiken/Asylzahlen/BundesamtInZahlen/bundesamt-in-zahlen-node.html> (last consulted 2 May 2018)

⁷⁹ BAMF, 2017, p. 80.

⁸⁰ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

With regard to the temporary residence permits, the statistics published in *Bundesamt in Zahlen* distinguish between the different types of temporary residence permits for the purpose of the pursuit of an economic activity in Germany (Sections 18 to 21 of the Residence Act). This incorporates also the number of temporary residence permits granted for the purpose of self-employment under Section 21 of the Residence Act⁸¹. It should be noted that the statistics regarding Section 21 of the Residence Act only include the numbers of the granted temporary residence permits. The number of successful settlement permits of Section 21(4) is not given in this publication. The number of Section 21 temporary residence permits granted are listed in the column “No. of successful applications”. Furthermore, neither *Bundesamt in Zahlen* nor the German Statistical Service publications indicate the number of applications for a Section 21 temporary residence permit. The stakeholders consulted were unable to provide this information. Consequently, it is not possible to determine the number of turned down applications.

Year	Total no. of requests for residence	No. of requests for residence by investors	No. of successful applications	No. of turned down applications	Sources
2012	305.595	N/A	1.358	N/A	BAMF, 2013, <i>Das Bundesamt in Zahlen 2012</i> , p. 74 and BAMF, 2017, <i>Das Bundesamt in Zahlen 2016</i> , p. 80 and p. 84.
2013	362.984	N/A	1.690	N/A	BAMF, 2014, <i>Das Bundesamt in Zahlen 2013</i> , p. 76 and BAMF, 2017, <i>Das Bundesamt in Zahlen 2016</i> , p. 80 and p. 84.
2014	518.802	N/A	1.781	N/A	BAMF, 2015, <i>Das Bundesamt in Zahlen 2014</i> , p. 78 and BAMF, 2017, <i>Das Bundesamt in Zahlen 2016</i> , p. 80 and p. 84.
2015	1.125.419	N/A	1.782	N/A	BAMF, 2016, <i>Das Bundesamt in Zahlen 2015</i> , p. 79 and BAMF, 2017, <i>Das Bundesamt in Zahlen 2016</i> , p. 80 and p. 84.
2016	673.217	N/A	1.733	N/A	BAMF, 2017, <i>Das Bundesamt in Zahlen 2016</i> , p. 80 and p. 84.
2017	not yet available	N/A	not yet available	N/A	not yet available

1.5 INFORMATION ON APPLICATIONS BY FAMILY MEMBERS

■ *Measures concerning residence permits granted to family members*

On the basis of the constitutional principle of the protection of family and marriage life, the Residence Act grants the third country national’s family members that are also third country nationals the right to

⁸¹ BAMF, 2017, p. 84 and 92.

receive a specific residence title⁸². This residence title is accessory to the residence title granted on the basis of Section 21. From this follows that the residence title for family members ceases to exist when the principal residence title of Section 21 ends. The Residence Act makes a distinction between the rights of spouses and the rights of minor children of the third country national.

The spouse of a third country national, who possesses a temporary residence permit for two years and who is expected to stay at least one year on the German territory, can be granted an accessory residence permit⁸³. It is further required that the marriage existed in the point in time when the third country national was granted the temporary residence permit. If the third country national is in the possession of a permanent settlement permit, the spouse has in any case the right to be granted an accessory temporary residence permit⁸⁴. In addition to these first requirements, the Residence Act also requires that the spouse can communicate in the German language at least on a basic level⁸⁵.

Furthermore, the Residence Act provides for the granting of a temporary residence permit to the third country national's minor, unmarried children, if the third country national has a temporary residence permit and the right of care and custody of the child⁸⁶. Unlike spouses, the children of a third country national, who is granted a Section 21 temporary residence permit, are automatically entitled to a residence permit from the moment of the parent's entitlement.

As an exception and in order to avoid particular hardship, third country national family members who are dependent on a third country national, who is granted a temporary residence permit, can obtain a residence permit⁸⁷. Section 36(2) of the Residence Act provides the FO with considerable discretion, in which the FO has to take humanitarian reasons into account⁸⁸. In particular, since the Residence Act does not provide a definition of which persons are to be considered as dependants.

■ *Statistical data on the number/percentage of **successful** applications for residence permits for family members*

The *Bundesamt in Zahlen* publication only provides data about the number of accessory residence permits granted to family members. However, no data could be found about the number of accessory residence permits granted on the basis of Section 21 of the Residence Act.

Year	Number/Percentage of successful applications for residence permits for family members	Source
2012	54.816	BAMF, 2016, <i>Das Bundesamt in Zahlen 2015</i> , p. 94.
2013	56.046	ibid.
2014	63.677	ibid.
2015	82.440	ibid.
2016	105.551	ibid.
2017	not yet available	ibid.

The table above presents the total number of **all** accessory residence permits granted to family members without distinguishing between the grounds upon which the principal residence rights are granted.

⁸² Section 27(1) Residence Act.

⁸³ Section 30(1) No 3 letter e Residence Act.

⁸⁴ Section 30(1) No 3 letter a Residence Act.

⁸⁵ Section 30(1) No 2 Residence Act and Point 30.1.2.3.4.2 AufenthGAVwV.

⁸⁶ Section 32(1) Residence Act and Points 32.0.2.1 and 32.0.2.2 AufenthGAVwV.

⁸⁷ Section 36(2) Residence Act.

⁸⁸ A. Dietz (2017), p. 61-62.

2 TYPE OF INVESTMENT⁸⁹

Type of investment required	Applicability of financial threshold	Procedure to verify the fulfilment of the investment criterion	Competent authorities and non-public bodies
Business investment, by exercising an economic activity as a self-employed, which serves economic or regional interests ⁹⁰ .	<ul style="list-style-type: none"> ■ No fixed financial threshold under primary legislation. ■ EUR 100 fee for the application for a temporary residence permit⁹¹. ■ EUR 124 fee for the application for a settlement residence permit⁹². ■ EUR 438 for the legal costs of the appeal before the administrative court (legal remedy against the decision not to grant a temporary residence/settlement permit)⁹³. 	<ul style="list-style-type: none"> ■ The FO assesses the business investments in the procedure phase, where the FO has to decide on the application to grant the temporary residence permit. ■ An assessment of the business investments is carried out in the procedure for granting the temporary residence permit and eventually after three years, during the procedure for granting the settlement permit. In this last procedure, the FO checks whether the business investment is successful⁹⁴. ■ The candidate third country national has to provide proof of his financing and his capital investment⁹⁵, by means of a capital requirements planning and a financing plan⁹⁶. <p>A business investment does not require a cash payment.</p>	The FOs decide on the application with the involvement of the relevant TBB ⁹⁷ as described in point 1.2 above.

⁸⁹ For the purposes of this Table, the term ‘investment’ covers any pecuniary disbursement required as part of the process for obtaining residence under the investors’ residence scheme.

⁹⁰ Section 21(1) Residence Act.

⁹¹ See Section II.1 – Type of investment, above.

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ Section 21(4) Residence Act.

⁹⁵ Section 21(1) sentence 2 and 3 Residence Act and Points 21 and 21.1.6 AufenthGAVwV.

⁹⁶ See Land of Baden-Württemberg, n.d., *Aufenthaltslaubnis zur Ausübung der selbständigen Tätigkeit beantragen*, viewed 7 May 2018 https://www.service-bw.de/web/guest/leistung?p_id=details_WAR_suchegui&p_p_lifecycle=0&p_p_col_id=column-3&p_p_col_pos=3&p_p_col_count=4&r_p_-358194435_id=83&r_p_-358194435_t=leistung&p_r_p_-358194435_title=Aufenthaltslaubnis+zur+Ausuebung+der+selbstaendigen+Taetigkeit+beantragen&details_WAR_suchegui_tab=0&r_p_-358194435_plz=72076-72074-72072-72070#sb-id-toc-block8 and Berlin FO, n.d. *Aufenthaltslaubnis zur selbständigen oder freiberuflichen Tätigkeit - Erteilung* <https://service.berlin.de/dienstleistung/305249/>, viewed 30 May 2018.

⁹⁶ Section 82 Residence Act.

⁹⁷ Section 21(1) sentence 3 Residence Act.

3 RESIDENCE PHASE

Residence permit	Procedure	Competent authorities and non-public bodies	Renewal of the residence permit
<p>Temporary residence permit and eventually settlement permit</p>	<p>The temporary residence permit does not require checks on the fulfilment of the residence criterion. A check could take place, several months before the date when the temporary residence permit expires (after three years) and when the third country national has decided to apply for an (unlimited) settlement permit. In that case a check on the success of the economic activity will be carried out⁹⁸ and the third country national must provide proof of his average income from the economic activity and proof of the business results of the activity. In addition, the third country national has to give proof that the activity provides him and his family an adequate income, which ensures their subsistence.</p> <p>The Residence Act does not require physical presence of the investor during the duration of the temporary residence permit. However, when the candidate applies abroad for the Section 21 temporary residence permit, in the context of the visa application procedure before a diplomatic mission, the candidate's physical appearance is required for the visa application. In the case when an application for granting a temporary residence permit is made in the German territory at an FO, the physical appearance could also be required. This depends on the procedural policy of each individual FO. The main reason for the required personal appearance is to allow the FO to ask the candidate about his business plans⁹⁹.</p> <p>No checks on the success of the activity are carried out after the settlement permit is granted. The settlement permit is not limited in time.</p> <p>The possession of a residence title in itself does not require that the applicant has to stay on the German territory. However, pursuant to Section 51(1) No 6 and 7 of the Residence Act, the residence title will expire when the third country national has left the territory for over six months or when the third country national has left the territory</p>	<p>The FO is obliged to involve the TBB in the procedure of granting a temporary residence permit. The purpose of the involvement of the TBB is to provide specialised and technical advice on the business plan and on its financing provided by the candidate for the temporary residence permit. In particular, in the matters for which the FO lacks the necessary knowledge and competencies¹⁰⁴.</p> <p>In the procedure for the settlement permit, the TBB may be involved, in order to give their technical advice for the question if the planned economic activity is successfully carried out¹⁰⁵.</p>	<p>The temporary residence permit expires after three years and cannot be renewed¹⁰⁶. When the permit expires the third country national can only apply for a permanent settlement permit.</p> <p>The settlement permit is not limited in time. Therefore, no renewal procedure is necessary¹⁰⁷.</p>

⁹⁸ Section 21(4) Residence Act.

⁹⁹ See above Section II.1 – Application phase and II.2 – Type of Investment.

¹⁰⁴ A. Dietz (2017), p. 50.

¹⁰⁵ Point 21.4 AufenthGAVwV; see above.

¹⁰⁶ Section 8(2) and Section 21(4), sentence 1 Residence Act.

¹⁰⁷ for Section 9(1) Residence Act.

Residence permit	Procedure	Competent authorities and non-public bodies	Renewal of the residence permit
	<p>for a reason which is not of a temporary nature. The FO may grant a longer period than the six months to leave the territory, if the third country national intends to leave the territory for reasons of a temporary nature and he is in possession of a permanent settlement permit, or if his stay outside of the territory serves national interests¹⁰⁰. The permanent settlement permit of a third country national who has lawfully resided in the German territory for at least 15 years will not expire in the case of a stay abroad longer than six months or in the case of a stay abroad of a non-temporary nature, if the aforementioned person's subsistence is secure and there is no public interest in expelling that person¹⁰¹.</p> <p>Neither the Residence Act nor the General Residence Act Implementation Instruction provide for systematic checks by the competent authorities on the fulfilment of the requirements of Section 51 of the Residence Act. When the FO establishes that a third country national left the territory permanently, the FO has the burden of proof¹⁰². In particular, the FO has to prove that there are objective reasons that the foreigner has left the territory permanently. This could apply when the foreigner has sold his house and has ended his employment or economic activity¹⁰³.</p>		

4 DUE DILIGENCE CRITERIA AND SECURITY CONSIDERATIONS

Due diligence and security considerations	Procedure to verify due diligence and security considerations	Competent authorities and non-public bodies	Ex-post checks
Section 5(1) of the Residence Act provides as general conditions for granting a residence title that (i) there is no public	The FO will check the requirements of Section 5(1) Residence Act together with all other requirements for a Section 21 temporary residence/settlement permit. This follows from the fact that the requirements of Section 5(1) are basic conditions for granting a residence title.	The FO assesses and decides on the conditions of Section 5(1) Residence Act.	If the temporary residence/settlement permit is refused for the reason that one of the conditions of Section 5(1)

¹⁰⁰ Section 51(4) Residence Act.

¹⁰¹ Section 51(2) Residence Act.

¹⁰² Deutscher Bundestag, 2012, *Fragen zum Erlöschen des Aufenthaltstitels, § 51 Aufenthaltsgesetz*, p. 4, available at: <https://www.bundestag.de/blob/418400/0997298573f2d910cf08914489b69410/wd-3-326-12-pdf-data.pdf>

¹⁰³ Point 51.1.5 AufenthGAVwV.

Due diligence and security considerations	Procedure to verify due diligence and security considerations	Competent authorities and non-public bodies	Ex-post checks
<p>interest in expelling the applicant and (ii) that the foreigner's residence does not compromise or jeopardise the interests of the Federal Republic of Germany for any reason. In Section 21 no specific public security requirements are set out.</p> <p>Neither the Residence Act, nor the Central Foreigners Registry Act¹⁰⁸ requires the FO to carry out prior checks of the origin of the money invested.</p>	<p>(i) The requirement that there is no public interest to expel the third country national has regard to the protection of the public safety¹⁰⁹. Section 54 Residence Act provides a list of reasons that can be considered as interests to expel. Among others, this list includes earlier incontestable convictions with a sentence of at least one-year imprisonment; the person is a threat to the free democratic order or the security of Germany, which especially is assumed if the person was a member of a terrorist organisation. In its assessment of the interests to expel, the FO has a certain degree of discretion¹¹⁰. Yet, the FO can only consider actual threats to public safety¹¹¹. Furthermore, the FO's discretionary range of assessment is limited by the third country national's legitimate interests, such as a strong relationship with the Federal Republic of Germany or family relations¹¹². However, the third country national's legitimate interests are only considered in the procedure for the settlement permit. The FOs have access to the Central Foreigners Registry (<i>Ausländerzentralregister</i>), which the FOs have to consult in the procedure on an application for a residence title. The Central Foreigners Registry contains information relating to whether a foreigner could be suspected of planning or having committed terrorist crimes¹¹³ or serious violent offences endangering the state¹¹⁴. Moreover, the Central Foreigners Registry also includes information on foreigners signaled with regard to these terrorist crimes. The Federal Criminal Agency, the Länder police forces and other Police services have to transfer, immediately from the moment they have knowledge, the mentioned information into the Central</p>		<p>Residence Act are not fulfilled, the third country national has the possibility to seek the legal remedies of administrative law against the decision of the FO. First of all, the third country national can file an appeal before the administrative court¹¹⁸. In the course of this procedure, the third country national can file an appeal before the supervision authority of the FO (the government districts or the governments of the Land)¹¹⁹.</p> <p>There is no information about the existence of</p>

¹⁰⁸ Central Foreigners Registry Act, *Gesetz über das Ausländerzentralregister*, adopted on 2 September 1994 (BGBl. I p. 2265), most recently amended by 17 July 2017 (BGBl. I p. 2615), available at: <https://www.gesetze-im-internet.de/azrg/BJNR226500994.html#BJNR226500994BJNG000300000>.

¹⁰⁹ Point 5.1.2.2 AufenthGAVwV.

¹¹⁰ Point 5.1.2.1 AufenthGAVwV.

¹¹¹ Point 5.1.2.2 AufenthGAVwV.

¹¹² Point 5.1.2.4 AufenthGAVwV.

¹¹³ Section 2(1a) no 7 Central Foreigners Registry Act.

¹¹⁴ Section 2(1a) no 7a Central Foreigners Registry Act.

¹¹⁸ Section 40 VwGO.

¹¹⁹ Section 68(2) and 73(1), no 1 VwGO.

Due diligence and security considerations	Procedure to verify due diligence and security considerations	Competent authorities and non-public bodies	Ex-post checks
	<p>Foreigners Registry¹¹⁵. For this reason, if the mentioned information comes to the knowledge of the police services, on the basis of the Europol Database or of SIS, they have to transfer this information into the Central Foreigners Registry. For the purposes of criminality checks, the FO has unlimited access to the criminal records in the Federal Criminal Register¹¹⁶. It should be noted that the Federal Criminal Register also includes information on convictions that are issued abroad.</p> <p>(ii) The condition that the foreigner's residence may not compromise or jeopardise the interests of the Federal Republic of Germany includes all public interests. This condition applies in particular to persons who are not in the possession of the necessary financial and economical means for maintaining life sustenance and who, therefore, do form a burden on the German social security system¹¹⁷.</p>		cases of corruption or fraud with regard to the Section 21 scheme.

¹¹⁵ Section 6(1) no 4 Central Foreigners Registry Act.

¹¹⁶ Point 5.1.2.3.1 AufenthGAVwV.

¹¹⁷ Points 5.1.3 and following AufenthGAVwV.

III. RIGHTS GRANTED BY THE PERMITS

1 RIGHTS GRANTED TO INVESTORS

As a general constitutional principle, foreigners have all fundamental rights, except for the fundamental rights that the Basic Law¹²⁰ reserves to Germans¹²¹. Fundamental rights that are reserved to Germans are the political rights, the right of free movement in and to enter Germany¹²² and the right to work or to pursue an economic activity¹²³. However, by a legislative act, specific rights can be conferred on foreigners. For instance, the right to work or to pursue an economic activity is granted to third country nationals by the Residence Act.

On the basis of Section 4(2) sentence 1 of the Residence Act, a third country national can be granted the right to work or to pursue an economic activity. More specifically, Section 21 of the Residence Act grants third country nationals **the right to pursue an economic activity as a self-employed**¹²⁴. It should be noted that the right to pursue an economic activity is purpose-bound. This has as a consequence that the title from Section 21 allows the third country national only to pursue an activity as a self-employed. It does not give him the right to work as an employee or in another work relation¹²⁵.

Social rights are not considered as fundamental rights under the Basic Law. Therefore, these rights are not automatically granted to third country nationals. The right to receive social security (*Sozialversicherung*) depends on whether the person is working as an employee or as a self-employed person on the territory of Germany¹²⁶. The temporary residence/settlement permit of Section 21 entitles the third country national to pursue an economic activity and makes him eligible to receive social security. Third country nationals with residence rights under Section 21 are excluded from receiving social assistance (*Sozialhilfe*)¹²⁷. The reason is that the temporary residence/ settlement permit of Section 21 presumes an economic activity that secures the third country national's subsistence. In this light, it should, however, be noted that Section 5, in connection with Section 2(3) of the Residence Act makes the granting of a residence title conditional on securing subsistence, including sufficient health insurance coverage, without recourse to public funds. Therefore, a third country national cannot apply for a temporary residence/settlement permit, if he is relying on social security or social assistance for his income.

Since the Section 21 residence right is for the purpose of the pursuit of an activity as a self-employed, no measurements apply for working conditions, including pay and dismissal as well as health and safety at the workplace. Equal treatment regarding the freedom of association and affiliation and membership of an organisation representing workers or employers is guaranteed by Article 9(3) of the Basic Law. Access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing as provided by national law has not been explicitly laid

¹²⁰ Basic Law, *Grundgesetz* (hereafter **Basic Law**), enacted on 23 May 1949 (BGBl. P. 1), most recently amended by Act of 13 July 2017 (BGBl. I p. 2347), available in an English version at: https://www.gesetze-im-internet.de/englisch_gg/index.html.

¹²¹ See A. Dietz, 2017, p. 31-32.

¹²² There is no fundamental right to enter and to reside in Germany, except for Germans (Article 11(1) Basic Law and Section 4(1) Residence Act); see also A. Dietz, 2017, p. 32.

¹²³ Article 12(1) Basic Law.

¹²⁴ See also Point 4.2.3.3 AufenthGAVwV.

¹²⁵ Point 4.2.1.1 AufenthGAVwV.

¹²⁶ Principle of territoriality; see Section 3 Social Code IV: Common Provisions on Social Security, *Sozialgesetzbuch Viertes Buch: Gemeinsame Vorschriften für die Sozialversicherung* (hereafter SGB IV), in the version of the publication of 12 November 2009 (BGBl. I p. 3710, 3973; 2011 I p. 363), most recently amended by Act of 30 June 2017 (BGBl. I p. 2143), available at: <http://www.sozialgesetzbuch-sgb.de/sgbiv/1.html>.

¹²⁷ See Section 23 Social Code XII: Social Assistance, *Sozialgesetzbuch Zwölftes Buch: Sozialhilfe* (hereafter SGB XII), most recently amended by Act of 17 August 2017 (BGBl. I p. 2143), available at: <http://www.sozialgesetzbuch-sgb.de/sgbxii/23.html>.

down in the national legislation. However, there are no indications that in practice access to goods and services and the supply of goods and services is restricted for persons who possess a temporary residence/settlement permit for the purpose of the pursuit of an activity as a self-employed.

2 RIGHTS GRANTED TO THE INVESTORS' FAMILY MEMBERS

Third country national family members benefit from the same rights mentioned in point 1 above. The family members are also entitled to pursue an economic activity¹²⁸. This right to pursue an economic activity is of a general nature and is granted to all persons holding a residence title for family members.

With regard to the right to social security the above-mentioned principles apply *mutatis mutandis* if the family member is pursuing an economic activity. Unlike the third country national candidates, the family members with accessory residence permits are, in principle, entitled to receive social assistance¹²⁹.

3 OTHER BENEFITS

The temporary residence/settlement permit of Section 21 does not entitle the third country national or his family members to other rights than those mentioned in points 1 and 2 above. In addition, the Section 21 scheme does not give entitlement to a special tax treatment.

¹²⁸ Section 27(5) Residence Act.

¹²⁹ Section 23 SGB XII.

IV. INTERACTION BETWEEN RESIDENCE AND CITIZENSHIP SCHEMES

The Section 21 temporary residence/settlement permit in itself does not give a special direct right to naturalisation. However, foreigners (both third country nationals and EU citizens) can acquire German nationality on the basis of their legal and ordinary residence on the German territory. The rules on naturalisation are set out in the Nationality Act¹³⁰.

As a basic rule, a person can obtain German nationality by naturalisation after eight years of legal and ordinary residence in Germany. As a consequence of the required eight years of legal residence, a third country national, with the right of residence pursuant to Section 21, will only become eligible for citizenship after he has been granted with the settlement permit of Section 21(4). This means that the third country national is required to have successfully carried out the business activity planned, in order to be able to reside for eight years on the German territory on the ground of a settlement permit.

In addition to the legal and ordinary residence condition, a foreigner has to be, firstly, able to ensure his own subsistence and that of his dependant family members¹³¹; secondly, the foreigner has to have a sufficient command of the German language¹³²; and, thirdly, the foreigner must renounce his previous nationalities¹³³. This last requirement follows the basic principle of German nationality law, according to which persons (except EU citizens) can only possess one nationality. The obligation to renounce the previous nationality can only be waived in exceptional cases, such as where the law of the foreign state does not allow the renunciation of citizenship or where this would constitute special hardship¹³⁴.

Considering the requirements to give up the previous nationalities and of eight years' legal residence, the Section 21 scheme could be considered as not a very easy and low-level way for investors to acquire German nationality in exchange for an investment.

No data on the relation between the Section 21 temporary residence/settlement permit and the acquisition of German nationality could be identified. Neither *Bundesamt in Zahlen* publications, nor the German Statistical Service provide such data.

¹³⁰ Nationality Act, *Staatsangehörigkeitsgesetz* (hereafter, **Nationality Act**), most recently amended by act of 11 October 2011 (BGBl. I p. 2218), 8 March 2018 (BGBl. I p. 342), available at: <https://www.gesetze-im-internet.de/rustag/BJNR005830913.html>.

¹³¹ Section 10(1) No 3 Nationality Act.

¹³² Section 10(1) No 6 Nationality Act.

¹³³ Section 10(1) No 4 Nationality Act.

¹³⁴ See Section 12 Nationality Act.

V. ECONOMIC AND FINANCIAL EFFICIENCY OF RESIDENCE PERMITS FOR FOREIGN INVESTORS

Neither Section 21 nor other provisions of the Residence Act lay down a mechanism for monitoring the economic impact of the temporary residence/settlement permit for the purpose of an economic activity as a self-employed.

Information on the economic impact of the Section 21 temporary residence/settlement permit is very scarce¹³⁵. A 2015 study by the BAMF only concluded that there was an increase in the number of self-employed persons who entered Germany since the 2012 amendment, which removed the investment level requirement of EUR 250.000¹³⁶. However, the BAMF study only concluded that it is impossible to draw a causal relationship between these facts¹³⁷. In this light, it should be noted that one of the reasons for the 2012 amendment was to improve the possibility to give temporary residence permits for skilled self-employed persons. In particular, it was deemed that the assumption concerning the EUR 250,000 investment threshold was confusing potential candidates for the Section 21 scheme, which led to a limited number of applications¹³⁸. This could also give an indication that before the amendment, the economic effects were not considered as sufficient, since the number of persons applying under Section 21 was too low.

On the basis that an administrative fee is to be paid to the FO for the issuing of a temporal residence permit, it is possible to calculate at least part of the financial effects in the context of the Section 21 scheme. Because the Länder have the administrative competence on the FOs, the financial benefits of these fees are allocated to the budget of each individual Land. The income for granting of a temporal residence permit earned on a global level for all Länder can be calculated by multiplying the fee of EUR 110 with the number of granted temporal residence permits (see table). It is important to note that since September 2017, the level of the administrative fee is lowered to EUR 100¹³⁹. For the reason, that there are no data available on the number of successful grants of a temporal residence permit is published for 2017, it is not possible to calculate the income from it. Since there are no numbers available about the settlement permits granted under the residence scheme, it is not possible to measure the income received for the applicable administrative fee of EUR 124¹⁴⁰. The data on the income from administrative fees for the granting of a temporal residence permit is the only quantitative information on the financial effects of the scheme available.

Year	No. of successful grants of a temporal residence permit	Level of the administrative fee to be paid upon the issuing of a temporal residence permit	Total income received on basis of the administrative fee for granting the temporal residence permits
2012	1.358	EUR 110	149.380
2013	1.690	EUR 110	185.900
2014	1.781	EUR 110	195.910
2015	1.782	EUR 110	196.020

¹³⁵ Information gathered through consultation with national stakeholder (representatives of the Federal Ministry of the Interior, competent authority, 30 May 2018).

¹³⁶ M. Vollmer, 2015, *Mobility Rules for Investors, Business Owners and other Business People in Germany*, p. 56, viewed 2 May 2018, https://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/Studien/wp61-enn-mobilitaetsbestimmungen-investoren-deutschland.pdf?__blob=publicationFile.

¹³⁷ *ibid.*

¹³⁸ See above under Section I.

¹³⁹ Section 45 sentence 1 nr. 1 b) Residence Decree was amended by Article 2 of the Act of 13 July 2017 (BGBl.I p. 2350), which provision went into force on 1 September 2017, available at: https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl117s2350.pdf%27%5D_15314_09125859

¹⁴⁰ Section 69 Residence Act and Section 44 Residence Decree.

Year	No. of successful grants of a temporal residence permit	Level of the administrative fee to be paid upon the issuing of a temporal residence permit	Total income received on basis of the administrative fee for granting the temporal residence permits
2016	1.733	EUR 110	190.630
2017	<i>not yet available</i>	EUR 100	<i>not yet available</i>

Since the decision is made by the local FOs and the supervision is done by the Länder, the federal Ministry of the Interior does not hold data on the economic effects at the regional level. Therefore, it is for this reason also not possible to have a global overview of the economic effect of the Section 21 scheme in Germany.