FlüchtlingsRAT

NRW e.V.

Confronted with a refused asylum application. What to do?



Legal bases and strategies on how to handle notices of refusal and threats of deportation.

FlüchtlingsRAT

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DO YOU SUPPORT REFUGEES WHO ARE CONFRONTED WITH A REFUSED ASYLUM APPLICATION?

DID YOU APPLY FOR ASYLUM BUT THE APPLICATION WAS REFUSED?

This Info-Handbook instructs those, whose asylum applications were refused by the Federal Agency of Migration and Refugees (BAMF), about the possibilities on how to react against this refusal.

This booklet focuses on how to handle so-called contentual rejections, which include so-called "simple" refusals of the asylum applications (Ablehnung) as well as those refusals as so-called "obviously unfounded" (Ablehnung als "offensichtlich unbegründet"). Confusion is often caused by a second form of refusal which results from the lack of jurisdiction of BAMF to even execute the asylum procedure (in so-called "Dublin-cases" ("Dublin-Fälle") and in cases where the person concerned has already received international protection by another state of the European Union). That is why the type of the "formal decision" is also briefly discussed in this booklet.



The booklet also instructs on the right to appeal against the negative decision by BAMF, the respective deadlines and peculiarities that should be paid attention to. Furthermore, it instructs about what possibilities to obtain the right to stay or a temporary suspension of deportation (Duldung) exist when confronted with a refused asylum application and when - in addition - the right to appeal is exhausted. At the end, you will find a list of further options that could possibly prevent an (imminent) deportation.



1. WHAT IS A REFUSED ASYLUM APPLICATION?

There are two forms of refusal by BAMF. A distinction is made between a **formal and a contentual refusal**. In the following, the type of formal decision will be outlined. When dealing with a **formal decision**, it means that Germany is not responsible for the asylum procedure and that the asylum application is inadmissible and will be refused (§ 29 AsylG).

1.1. FORMAL DECISION: INADMISSIBLE ASYLUM APPLICATION

A **formal decision** implicates a rejection, because the asylum application is **inadmissible**. These are mostly cases, in which the person concerned already received international protection by another EU member state¹ (§ 29 Abs. 1 Satz 2 AsylG) or cases, in which the Dublin III Regulation applies: so called "Dublin-cases" ("Dublin-Fälle")².

In "Dublin-cases" ("Dublin-Fällen") BAMF will not examine, whether the person concerned should get

¹ In this case the person concerned has no right to appeal.

 $^{^2\,}$ The Dublin III Regulation regulates which member state is responsible for the asylum procedure. Find the Dublin III Regulation here.

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protection in Germany or not. When a "Dublin-case" is identified (for example if fingerprints match the *Eurodac*³ database), Germany will make a request to the responsible member state to receive the person concerned. It is BAMF's responsibility to secure the return. BAMF will sometimes ask Federal Police Force for support and is often offered administrative assistance by the local immigration authority (lokale Ausländerbehörde).

The deadline for the transfer is six months after the requested member state⁴ has consented to receive the person back or a "fiction of consent" is in place. In case of absconding or imprisonment, the time limit for the transfer is extended to 12 or 18 months. If the person cannot be returned in time, Germany, represented by BAMF, is put in charge of the asylum procedure. In practice, however, attempts are often continuously made by German authorities for returning the person, because there is no subjective right to have the asylum procedure processed by German authorities. Germany, represented by BAMF, can also make use of the so-called sovereignty clause and assume an asylum

³ With the help of the Eurodac-Identification system a Europe-wide comparison of the asylum seekers fingerprint is conducted.

⁴ *Dublin III-States*: EU-States, Switzerland, Norway, Iceland, Liechtenstein

application (especially asylum applications of vulnerable groups) despite the official responsibility of another member state.

Therefore, reasons must be declared as early as possible (by the person concerned, his/her lawyer or the legal counselling centre) that can prove the asylum seeking persons' vulnerability.

Deadline to appeal: There is a possibility to appeal against a Dublin-notice. The lawsuit (Klage) must be filed within **one week** as of the **date of notification** (date of the postmark) at the local administrative court (Verwaltungsgericht). The appeal has **no suspensive effect**. Therefore, an additional **emergency appeal** (Eilantrag)⁵ has to be filed **within one week** (also at the local administrative court) to be able to stay in Germany until court determination. Only if the emergency appeal (Eilantrag) is approved, the person concerned is protected from a Dublin-return during trial.

Please note: Since the date of the postmark is crucial for the respective deadlines, it is advised to **keep the envelopes**!

⁵ Emergency appeal indicates an appeal of summary examination in the consideration of consequences.

1.2. CONTENTUAL DECISION: REFUSED ASYLUM APPLICATION

A **contentual refusal** indicates a negative ruling after examining the content of the asylum application.

After examining the content of the application, BAMF determines whether the person concerned is entitled to one of the four protection statuses according to German Asylum Law or the German Residence Act (recognition of asylum status according to Art. 16a GG, recognition of refugee status according to § 3 Abs. 1 AsylG, subsidiary protection according to § 4 Abs. 1 AsylG or protection against deportation according to § 60 Abs. 5 or 7 AufenthG). A distinction is made between a "simple" refusal and an "obviously unfounded" refusal (Ablehnung als "offensichtlich unbegründet"). These two forms of refusal are explained in the following.

1.2.1. "SIMPLE" REFUSAL

Criteria: An asylum case is refused as a "simple" refusal ("einfache Ablehnung"), if the conditions to be granted asylum status, refugee status, subsidiary protection or protection against deportation are not fulfilled *or* if there are doubts existing about the credibility of the person.

The notice of refusal by BAMF goes hand und hand with a deportation order indicating the destination country and the deadline for a "voluntary departure"⁶. The deadline to leave the country "voluntarily" is **one month**. The person can be deported as of the date of expiry of this deadline, not earlier. Furthermore, the person concerned can file a suit against the negative decision, to let the court review potential reasons for humanitarian protection.

Deadline to appeal: The lawsuit (Klage) must be filed in writing or orally declared for recording at the local administrative court (Verwaltungsgericht) within two weeks as of the day of notification of the refusal (date of the postmark). The appeal has suspensive effect. This means that the person concerned cannot be deported after having filed a lawsuit and until the court has decided upon the appeal. The statement of claim (Klagebegründung) may be handed in later, within 30 days. It is advised to involve legal counselling or a lawyer for framing the statement of claim.

⁶ The so called "voluntary departure" means the compliance of a rejected person to leave the country as ordered by the authorities.

Please note: Upon consultation with the local court it might be possible to hand in the statement of claim later than 30 days after the lawsuit has been filed.

Since the date of the postmark is crucial to the respective deadlines, it is advised to **keep the envelopes**!

1.2.2. REFUSAL AS "OBVIOUSLY UNFOUNDED" ("OFFEN-SICHTLICH UNBEGRÜNDET")

Criteria: The application for asylum is denied, if the conditions to be granted the asylum status, the refugee status, subsidiary protection or a protection against deportation are "obviously" not fulfilled. The decision that these conditions are "obviously" not met is made in particular for persons from the so-called "safe countries of origin" ("sichere Herkunftsstaaten") according to § 29a AsylG⁷. Further reasons for this type

⁷ A country is declared safe, if the assumption exists that neither persecution nor inhumane or humiliating punishment takes place in this country. The list of the so-called "safe country of origin" can be found in **addendum (Anlage) II to § 29a AsylG**. Currently, the following countries, next to all EU-States, are declared "safe countries of origin": Albania, Bosnia and Herzegovina, Ghana, Kosovo, Montenegro, Macedonia, Senegal and Serbia. Flüchtlingsrat NRW criticizes the concept of "safe countries of origin", since it limits individuals'

of refusal can be identity fraud, as well as extremely contradictory or non-substantiated reasons which were put forward at the asylum application interview. The notice of refusal by BAMF, goes hand in hand with a deportation order indicating the destination country. The deadline for "voluntary departure" ("freiwillige Ausreise") is **one week**.

Deadline to appeal: The lawsuit (Klage) must be filed in writing or orally declared for recording at the local administrative court (Verwaltungsgericht) within one week as of the day of notification of the refusal (date of the postmark). The lawsuit does not have suspensive effect, therefore an additional emergency appeal (Eilantrag) must be filed at the local administrative court, to protect the person from deportation. Only if the emergency appeal (Eilantrag) is accepted, the person concerned is allowed to stay in Germany during trial and cannot be deported. The statement of claim (Klagebegründung) can be handed in within 30 days. It is advisable to get legal support for filing the statement of claim.

fundamental right to asylum and since the classification of certain countries as "safe" is often politically arbitrary.

Please note: Upon consultation with the local court it might be possible to hand in the statement of claim later than 30 days after the lawsuit has been filed.

Since the date of the postmark is crucial for the respective deadlines, it is advised to **keep the envelopes**!

2. GENERAL INFORMATION:

If the person concerned is unable to find legal support by a lawyer in the short term, it is advised to seek a **counselling centre** and if possible to **file a lawsuit independently**. Independent counselling centres in NRW can be found <u>here</u>.

Funding for legal assistance (Prozesskostenhilfe) can be requested at the local Administrative Court (Verwaltungsgericht). Furthermore, some local welfare organisations and refugee support initiatives have the possibility to provide financial support. Lastly, PRO ASYL operates a fund for legal assistance which supports refugees on a case-by-case basis⁸.

⁸ For further information, please contact: info@frnrw.de.

If the decision of the Administrative Court is negative, there is the possibility for the person concerned to file an appeal to the Higher Administrative Court (Oberverwaltungsgericht). To file this kind of appeal, a lawyer must be involved, who first has to request an approval to appeal. This request must first be accepted.

3. SUBSEQUENT ASYLUM APPLICATION (ASYLFOLGE-ANTRAG)

The filing of a subsequent application for asylum (Asylfolgeantrag) at BAMF can be useful, if circumstances changed in the country of origin, so that new reasons can be invoked to receive one of the four protection statuses⁹.

Please note: A follow-up asylum application protects from deportation as long as BAMF has not decided upon the application. Yet, immigration authorities will only take this into consideration, if there is a written

⁹ The four protection status are: recognition as asylum seeker according to article 16a GG, recognition as accepted refugee according to § 3 Abs. 1 AsylG, subsidiary protection according to § 4 Abs. 1 or the declaration as prohibition of deportation according to § 60 Abs. 5 or 7 AufenthG.

confirmation by BAMF that a subsequent asylum application has been made. Therefore, it should be ensured that such a confirmation for the subsequent application is issued by BAMF.

Two-step review of a subsequent asylum application by BAMF: At a personal visit at the responsible BAMF branch office (where the initial application had been filed) the reasons which could lead to a recognition must be indicated. In a first step, BAMF proofs whether legal grounds exist to reopen the procedure.

If BAMF rejects to conduct another asylum procedure due to lack of plausible reasons or due to belated enforcement of the right to file a subsequent asylum application (see deadlines below), the immigration authority can start deportation measures anew.

If BAMF agrees on reopening the asylum procedure, the Federal Office will in - a second step - examine whether the conditions for receiving one of the four protection statuses are fulfilled. If the subsequent asylum application is examined in terms of its content and rejected, the legal remedies mentioned above are possible (as seen on page 8).

Deadline: A follow-up application has to be filed within three months from the time the person concerned came to know about new circumstances. This includes



legal changes that are believed to be known. New circumstances can arise, if a new law was passed in the country of origin, which for instance discriminates certain social groups.

Please note: To file this kind of application, a lawyer is not mandatory. Notwithstanding, it would be useful to seek legal assistance for prior consulting.

On the basis of various communication channels (fax to the immigration authorities, postal delivery to the applicant) it is possible that the local immigration authority gets informed about the rejection notice slightly earlier than the applicant himself. Therefore, the applicant should ask BAMF repeatedly about the presence of such a notice.

4. DEPORTATION (THREAT) AFTER THE RIGHT TO APPEAL IS EXHAUSTED

If the appeal is rejected by the court, the threat of deportation (Abschiebungsandrohung) will come to life again with the respective deadlines for a "voluntary departure" ("freiwillige Ausreise") (see page 8). It's the date of notification that is decisive (date of the postmark on the envelope). Once the



deadline of "voluntary departure" has expired, a deportation of the person concerned is possible.

Legal basis for deportation: Legally spoken, deportation indicates the "implementation by force of the obligation to leave" (§ 58 AufenthG). Immigration authorities can only conduct deportations once the socalled "enforceability of the obligation to leave" (Vollziehbarkeit der Ausreisepflicht) is at place; for instance after the deadlines for the "voluntary departure" have expired. Usually local immigration authorities (lokale Ausländerbehörde) are responsible for deportations, if necessary supported by the police force of NRW (NRW Landespolizei).

From accommodation facilities of the federal state of NRW (EAEs and ZUEs), deportations are conducted by the so-called central immigration authorities (Zentrale Ausländerbehörde, ZAB), in particular ZAB Bielefeld.

As a consequence of the deportation, a re-entry ban to Germany (Wiedereinreisesperre) is issued (§ 11 AufenthG). A re-entry ban will not be issued, if the person concerned left Germany "voluntarily", unless the application for asylum was rejected as "obviously unfounded" ("offensichtlich unbegründet") or the reopening of a subsequent asylum application (Asylfolgeantrag) has gotten repeatedly rejected by BAMF. **Please note:** Deportations (Abschiebungen) are no longer announced! People concerned are not being informed about the date in advance! Under specific circumstances, the administrative detention prior to deportation (Abschiebungshaft) can be mandated to secure deportation.

A person must not be deported, if impeded by factual reasons, legal reasons, humanitarian reasons or urgent personal reasons. In such cases a temporary suspension of deportation (Duldung) will be issued (see page 17 f.).

Detention prior to deportation: The administrative detention prior to deportation (Abschiebungshaft) is regulated in § 62 AufenthG. This measure intends to – taken as last resort – secure and prepare the deportation. If the person can be deported with less restrictive measures, the detention of asylum seekers prior to deportation is inadmissible (§ 62 Abs. 1 AufenthG). Ultimately, the detention of migrants prior to their deportation is highly problematic as they did not commit any crime. Flüchtlingsrat NRW demands the abolishment of the detention prior to deportation!

5. WHAT CAN YOU DO AFTER YOUR ASYLUM APPLICATION WAS REFUSED AND AFTER A NEGATIVE COURT DECISION?

Below, the possibilities and conditions for receiving a residence permit (Aufenthaltsrecht) or a temporary suspension of deportation (Duldung) will be outlined. The local immigration authorities (Ausländerbehörde) are responsible for issuing the temporary suspension of deportation (Duldung) or a residence permit (Aufenthaltserlaubnis). To prove whether some of these options are at hand, legal support should be contacted.

Please note: The following list shows legal possibilities to obtain a right to stay (Bleiberecht) or a temporary suspension of deportation (Duldung). However, the list is not meant to replace the work of counselling centres or legal experts.

5.1. TEMPORARY SUSPENSION OF DEPORTATION ("DULDUNG")

Temporary suspension of deportation (Duldung) according to § 60a AufenthG):

A person must not be deported, if impeded by factual reasons, legal reasons (including international law), humanitarian reasons or urgent personal reasons. Furthermore, a deportation cannot be executed if it is of public interest that the person concerned remains in Germany (for example as a witness in a criminal procedure). Reasons for a temporary suspension of deportation (Duldung) are, among other reasons, missing identity documents or urgent medical conditions, which justify the impracticality to travel. Since 06.08.2016 (Integrationsgesetz) starting a stateapproved occupational training is another legal reason for receiving a temporary suspension of deportation (Duldung):

Temporary suspension of deportation for occupational training (§ 60a Abs. 2 S. 4 AufenthG):

According to § 60a Abs. 2 S. 4 AufenthG, a stateapproved or comparably regulated occupational training in Germany necessarily leads to a temporary suspension of deportation for an occupational training (Ausbildungsduldung). This status is issued by the local immigration authority. Certain conditions must be fulfilled, such as a training contract¹⁰. In a decree from 12th December 2016, the federal state government of NRW clarifies how the temporary suspension of deportation for occupational training (Ausbildungs-duldung) should be implemented.

Employment itself does **not** protect from deportation. To be protected, the person must be employed as a trainee in the framework of an occupational training. After having completed the occupational training, and in case the person takes up employment within this field afterwards, a residence permit (Aufenthaltserlaubnis) for two years **has to** be granted (§ 18a Abs. 1a AufenthG).

 $^{^{10}}$ PRO ASYL has published comprehensive information on this topic, that can be found <u>here</u>.

You can also find a valuable information booklet of Paritätische Gesamtverband <u>here</u>.

5.2. RIGHT TO STAY FOR THE PURPOSE OF EMPLOYMENT

Residence permit (Aufenthaltserlaubnis) for "qualified" persons with a temporary suspension of deportation (qualifizierte Geduldete) for the purpose of employment (§ 18a Abs. 1 AufenthG):

A person with a temporary suspension of deportation (Duldung), who has completed a qualified occupational training in a state-approved or comparably regulated occupation, or who possesses a university degree, **can** be granted a residence permit (Aufenthaltserlaubnis) for employment within the field of qualification for a period of 2 years.

5.3. RIGHT TO STAY ON HUMANITARIAN GROUNDS

Residence permit (Aufenthaltserlaubnis) according to § 25 Abs. 5 AufenthG:

A residence permit (Aufenthaltserlaubnis) can be issued by the local immigration authority (Ausländerbehörde), if a departure is impossible for legal or actual reasons **and** these reasons are expected to stay valid in foreseeable future. If the deportation has been suspended for 18 months already, a residence permit **shall** be issued (as a rule). This type of residence



permit can be granted, if the reasons for the suspension of deportation (Duldungsgründe) still remain and the person concerned is not himself/herself responsible for not leaving the country.

Residence permit (Aufenthaltserlaubnis) according to § 25a AufenthG:

Children and juveniles under the age of 21, who are well integrated and who have been living in Germany for at least 4 years (without interruption) **can**, under certain circumstances, be granted an official residence permit (Aufenthaltserlaubnis) by the local immigration authority (Ausländerbehörde). Therefore, a successful school attendance of 4 years or starting an occupational training after school is necessary. Under certain circumstances, this type of residence permit can also lead to a right to stay for the parents, spouses or life partners, siblings and minor children of the person.

Residence permit (Aufenthaltserlaubnis) according to § 25b AufenthG:

There is a possibility for adults to receive a residence permit (Aufenthaltserlaubnis) due to so-called "sustainable integration" ("nachhaltige Integration"). This applies to individuals who have legally been living in Germany for at least 6 years without interruptions (those who have minor children), or for at least 8 years without interruptions (those who don't have children or who have children of full age). Further necessary conditions that need to be fulfilled are a successful integration and the ability to secure one's livelihood to a big extent (more than 50 percent).

5.4. OTHER RIGHTS TO STAY FOR FAMILY-RELATED REASONS:

By marrying a German citizen or a foreigner who has residence permit for Germany, a residence permit (Aufenthaltserlaubnis) for family-related reasons according to § 27 AufenthG might be an option. For this, necessary paperwork must be presented, such as passports. In practice, people are often deported before their weddings take place, especially if the deportation has been suspended due to missing identity documents. In those cases, an independent refugee counselling centre should be visited in advance.

Giving birth to a German child or giving birth to a child with a residence permit can also lead to a residence permit for the "unsecured" parent. In order to discuss those possibilities, an independent refugee counselling centre should be visited.

5.5. HARDSHIP CASE APPLICATION ("HÄRTEFALLANTRAG")

In so called cases of hardship (Härtefällen), the relevant immigration authority **can** issue a permit of residence upon request by the NRW commission for cases of hardship (Härtefallkommission) according to § 23a AufenthG.

Find further information here.

A case of hardship can only be considered by the commission, if the person concerned is obligated to leave Germany, and if all other legal remedies are exhausted, and, in addition, if good performances of integration can be proved. An application for a case of hardship us usually rejected, if the applicant has committed serious crimes. The federal states in Germany deal differently with cases of hardship in cases in which serious crimes were committed. Hence, one should inform oneself in advance, if a crime offense exists. A hardship case application usually protects the person concerned against the deportation until a decision is made by the commission. However, there is no legal guarantee behind this.

Please note: Find further relevant information (in Geman) on the application procedure at the NRW commission for cases of hardship via the following link: http://www.vonloeper.de/pdf/heinhold/nrw/Merkbla tt_Haertefallkommission_NRW.pdf

5.6. PETITION COMMITTEE (PETITIONSAUSSCHUSS) OF NRW

In exceptional cases, a positive decision by the NRW Petition Committee (Petitionsausschuss) might lead to a right to stay. Filing a petition with the committee does not guarantee a suspension of deportation while decision-making, yet usually immigration authorities suspend their attempts to deport the person concerned. Besides, the recommendations by the Petition Committee not legally binding. are Nevertheless, they are often adopted. See further information about the work of the Petitions Committee here.

5.7. FURTHER OPTIONS TO ACT AGAINST (THE THREAT OF) DEPORTATIONS

Church asylum (Kirchenasyl):

To prevent deportations, church asylum (Kirchenasyl) provides potential assistance in specific cases. Especially in Dublin-cases, church asylum provides an opportunity to hinder a transfer of the individual in exceptional cases and to ensure that Germany assumes the asylum procedure via the sovereignty clause. In order to get the right to stay with the help of church asylum, usually the existence of a legal perspective to stay is important.

Please note: The person concerned and his/her location during church asylum must be registered with the local immigration authority (Ausländerbehörde) and BAMF, otherwise the person will be considered gone underground illegally. Information and contacts here.

Advisory commissions (Ausländerrechtliche Beratungskommissionen):

In some cities of NRW there are local advisory commissions for cases of hardship, also called local



hardship case commissions ("lokale Härtefallkommissionen"), for instance in Cologne. They come together as a board in order to discuss final legal options for cases of hardship.

Solidarity support actions:

Public declarations of solidarity, for example in front of refugee shelters, reach attention and give clear signals of social support. Petitions, for instance, can also be useful to put pressure on decision-makers (NRW parliament and German Parliament). There are cases in which planes that had deportees on board couldn't take off, because some of the passengers refused to sit down in order to stop the plane from taking off. Since it is a regular airline with regular passengers, it is the pilot's final decision whether to start or deny the takeoff, if he/she is concerned with security risks.

Inform deportation monitoring and (legal) assistance at the airport:

Deportations are subject to the provisions of the Police Act (Polizeigesetz) as well as to the regulatory Authorities Act (Ordnungsbehördengesetz) of the state of North Rhine-Westphalia. Accordingly, actions by the authorities have to respect the so-called principle of proportionality. It has to be respected for example in



cases in which mobile phones are taken away or persons are detained at the airport. There is a contact person who monitors deportations at Dusseldorf Airport (Abschiebungsbeobachtung).

Contact: Airport Deportation Monitoring (Abschiebungsbeobachtung), Central Building East, room 4031, 40474 Dusseldorf, Contact person: Dalia Höhne, phone: 0211 9513 300, E-Mail: d.hoehne@diakonie-rwl.de.

Inform supporters and legal assistance:

In cases of deportation, the person concerned should contact his/her supporters immediately. Additionally, legal assistance may be helpful, especially under unlawful circumstances. Among other, pregnancy or an illness, that is verified by a medical certificate, can temporarily stop the deportation.

On-site supporters do not only show solidary, but also exercise vigilance. They can monitor violations of human rights and procedural mistakes, as well as call legal support if necessary.

However, given the fact that most deportations take place early in the morning, it is hard to get in contact with legal support before being deported. That is why one should set agreements about how to proceed in the case of imminent deportation. If there are no alternatives to prevent deportation, it is important to stay in contact with supporters (and, if necessary, also with legal assistance) after arriving at the country of destination. This is the only possibility to prove whether the deportation was unlawful or human rights or other statutory provisions were violated. Therefore, it should be clarified in advance, who is going to pay for additional legal assistance. A helpful overview of organizations who operate in the respective countries of origin can be found <u>here</u>.

Support by pro-refugee organizations ensures a better assessment of the current situation on site.

Involvement in the working group (AG) "NRW gegen Abschiebung!"

In this recently created NRW-wide working group (Arbeitsgemeinschaft, AG) "NRW against deportation!" (AG: "NRW gegen Abschiebung!") anyone interested can get involved in a number of ways to take action against deportations. The focus of the working group is the creation of networks and coalitions against deportations, as well as on the dissemination of information and campaigning.

Contact: E-Mail: ag-frnrw@free.de.



Inform yourself and others:

By informing yourself and others, as well as by supporting campaigns you create sensibility for the topic of deportation. At the same time, you show solidarity with people confronted with deportations.

You can also inform Flüchtlingsrat NRW about deportations in your region to support the organisations' press and advocacy work.

Contact: E-Mail: info@frnrw.de or phone (+49) 0234 587 315 60.



6. IMPRINT

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Mit freundlicher Unterstützung durch Eva Spiekermann und Julia Scheurer.