



# GMS Flash Alert

Immigration Edition

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## Germany – New Laws, Updated Rules if No-Deal Brexit

In anticipation of a "no-deal" Brexit, the federal government in Germany has published a draft law of the Brexit Residence Transition Act<sup>1</sup> to transfer freedom of movement rights to the country's residency law following the withdrawal of the United Kingdom of Great Britain and Northern Ireland (hereafter "U.K.") from the European Union. (For related coverage, see GMS [Flash Alert 2019-073](#), 9 April 2019.)

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### WHY THIS MATTERS

The objective of the draft law is to enable all British nationals and their (non-EU national) family members – currently residing in the territory of the Federal Republic of Germany and thus still entitled to freedom of movement – to receive the appropriate residence permission for their continued stay in Germany in the event of a no-deal Brexit. In addition, it establishes the requirements under the country's residence law for these persons to have continuous/uninterrupted access to the German labour market.<sup>2</sup>

The measures that are planned should help ease the concerns of U.K. citizens living and working in Germany – as well as their German employers – in the event of a no-deal Brexit, and aim to help clarify their status and rights following Brexit.

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### Current Context

At the EU Special Summit on 10-11 April 2019, the U.K. was granted a further postponement of Brexit. 31 October 2019 is the new deadline for the U.K.'s exit from the EU. By having extended the deadline to this date, the EU had given British policy-makers more time to clarify the important questions surrounding the ratification of the withdrawal agreement and the future shape of the relationship with the EU.

The most controversial topic is still the so-called "backstop" – a fall-back solution for the British province of Northern Ireland, which borders the Republic of Ireland, an EU member state. This topic (though not this topic alone), seems to be the stickiest one in getting a new withdrawal agreement that is acceptable to both the EU and the United Kingdom.

In a recent letter to the president of the EU Council, British Prime Minister Boris Johnson brought up the "backstop" again and reiterated the British position.<sup>3</sup>

## Legal Situation after a No-Deal Brexit

In the event of a "hard" Brexit, the United Kingdom's membership of the EU ends automatically. From the date of withdrawal, the country would be a third country in relation to the EU and the EU rules ("acquis") would no longer apply to the United Kingdom. This would have far-reaching consequences for citizens, business, and administration.

Individuals who are generally permitted to reside in Germany on the basis of the EU's right of free movement and those in Germany under a generally permitted stay (§ 2 (1), (2), (4) General Freedom of Movement of Union Citizens for the Federal Territory<sup>4</sup>) are then subject to authorization according to § 4 (1) Sentence 1 of the Residence Act.<sup>5</sup> Therefore, British citizens<sup>6</sup> who wish continuously remain in Germany starting 1 November 2019, will have to go through the standard immigration process and apply for a residence permit. This will also be the case for those entering Germany for the first time on 1 November 2019 or later.

Residence permissions exist under Germany's immigration rules in various forms, for individuals living in Germany already: *Aufenthaltserlaubnis* ("residence permit"), *Blaue Karte EU* ("EU Blue Card"), *Niederlassungserlaubnis* ("settlement permit"), and *Erlaubnis zum Daueraufenthalt-EU* ("EU long-term residence permit"). The national D visa and the Schengen visa also grant residence permission under § 4 I 1 AufenthG, but can only be granted to non-EU/EEA nationals living abroad. The same applies for the permit categories *ICT-Karte* ("ICT Card") and *Mobiler-ICT-Karte* ("Mobile ICT Card").

Obtaining an *ICT-Karte/Mobiler-ICT-Karte* requires entering Germany with a national D visa for that purpose, so British intra-corporate transferees or their dependents utilizing the freedom of movement for the intra-corporate transfer will not be able to obtain the national D visa without leaving Germany.

## Brexit Residence Transition Act and Process for Enactment

Germany's federal government (*Bundesregierung*) has taken action to be prepared. On 31 July, the Federal Cabinet passed the Brexit Residence Transition Act (hereafter "the Act"). It provides for all British citizens and their family members to be granted a residence permit in Germany. After initial discussions in the legislature's upper house, the Federal Council (*Bundesrat*), a revised version was published by the legislature's lower house (the *Bundestag*). It is now subject to the following parliamentary proceedings:

- Decision by the *Bundestag*, once the federal government has provided its counter-statement to the feedback from the Federal Council.
- Final approval process by the Federal Council after the *Bundestag's* decision.
- Issuance of the Act by the country's president (*Bundespräsident*) and publication of the Act in the Federal Law Gazette (*Bundesgesetzblatt*).

The timeline is very tight and thus, the Act regulates that it shall become effective on the day on which the U.K. exits from the EU (Art. 2 (1) Sentence 1 of the Act).

## Regulations of the Act

The Act defines the regulations pertaining to U.K. nationals who wish to obtain the necessary residence permission, as follows.<sup>7</sup>

### **Should British nationals and their families at the time of the no-deal Brexit...**

- 1. ... have a permanent right of residence under § 4a of the Act on the General Freedom of Movement for EU Citizens (*Gesetz über die allgemeine Freizuegigkeit von Unionsbürgern*), a settlement permit under § 9 of the Residence Act shall be issued.**

The requirements of the permanent right of residence according to § 4a of the Act on the General Freedom of Movement of EU Citizens differ from the requirements of the settlement permit under § 9 of the Residence Act. To obtain the settlement permit under § 9 of the Residence Act, the applicant has to meet several requirements, whereby the Act waives all of them except the following:

*Reasons of public safety or order, taking into account the seriousness or nature of the violation of public safety or order or the danger emanating from the foreigner, taking into account the duration of the previous stay and the existence of ties within the territory of the Federal Republic, shall not conflict with the issuance of the permit.*

Alternatively, an EU long-term residence permit may be obtained, but not on the basis of this transition clause. All requirements for that type of permit need to be attained and proven.<sup>8</sup>

- 2. ... have a right of residence in accordance with § 2 or § 3 of the Act on the General Freedom of Movement for EU Citizens and fulfil the requirements for a residence permission for training (at school, university, or as vocational training), gainful employment, and family reunion, such a residence permit shall be issued.**

Insofar as the Residence Act grants the authorities discretion concerning the issuance of the required residence permits, this discretion is suspended when British nationals submit their applications.

Only the basic requirements for a residence title as stipulated in § 5 have to be attained, in particular, secured livelihood including sufficient health insurance coverage.

This beneficial regulation is especially relevant for British nationals who are employed in Germany.

In general, the German system of immigration for work purposes is focused on the immigration of highly-qualified nationals. What that means, basically, is that the individual should be in possession of at least a university degree or a specialized knowledge that brings value to the company in order to obtain a work and residence permit.

However British nationals who are employed – as far as they secure their livelihood themselves – shall be able to obtain work and residence permission for work purposes regardless of their qualification. In order to facilitate access to the German labour market, a revision of § 26 of the Employment Ordinance is planned that would dispense with the need to obtain approval by the Federal Employment Agency in order to get a work and residence permit. The latter revision has not been published in a full draft yet, but was announced on the occasion of the Act's drafting.

**3. ... have a right of residence in accordance with § 2 or § 3 of the Act on the General Freedom of Movement for EU Citizens and do not meet the requirements for a residence permission for training (at school, university, or as vocational training), gainful employment and family reunion, a residence permit under the new regulation deriving from the Act shall be issued.**

Section 101a (3) creates a transitional regulation that transfers the rights of the aforementioned group of persons in accordance with the Freedom of Movement into the Residence Act. Section 7 (1) sentence 3 provides the possibility of obtaining a residence permit in justified cases for residence purposes which are not specified by law. As per a general exemption, any residence permit issued under § 101a (3) in conjunction with Sec. 7 (1) Sentence 3 of the Residence Act must grant unrestricted labour market access.<sup>9</sup> The difference between residence titles issued on the basis of Sec. 101a (2) and residence permits issued on the basis of Sec. 101a (3) of the Residence Act is that for the latter regulation, secured livelihood, including sufficient health insurance coverage, does not have to be proven.<sup>10</sup>

The following scenarios for the granting of such a residence permit are conceivable:

- Persons who are economically inactive, such as pensioners.
- Employed persons who have neither a fully secure livelihood nor sufficient health insurance coverage, do not fulfil the general conditions for granting a residence permission.
- In cases of involuntary unemployment, if the previous employment had lasted for less than one year, the residence permit shall be limited to six months.
- Family members who do not belong to the “core family” within the meaning of the “right of residence,”<sup>11</sup> in particular children who have already reached the age of 18, but not yet 21. If they are entitled to maintenance, then, also children above the age of 21 are entitled to receive this residence permission.

**4. For all the above-mentioned cases, a “Fiktionsbescheinigung” in accordance with Sec. 81 (4) of the Residence Act shall be issued upon application for a residence permit.**

The Fiktionsbescheinigung is a declaratory document proving the lawfulness of the individual’s stay in Germany, though it is not a “category of residence” title. Usually, the above-mentioned regulation is applied in cases where the renewal of the actual residence permit has already been applied for before its expiry, but the final decision has not yet been taken by the time of the permit’s expiry. The continuation of the residence permit is provided for by law and the interim permit serves as a corresponding proof. With this regulation, British nationals and their family members would only be entitled to a Fiktionsbescheinigung issued under Sec. 81 (3) of the Residence Act. Such a Fiktionsbescheinigung would only prove the individual had filed the application for a residence title in line with the law without having a prior one. British nationals and their families shall file the application for their residence permission during the transition period after Brexit (see under “Brexit Residence Transition Ordinance”).

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## KPMG NOTE

Travelling in the Schengen Area will not be possible with the Fiktionsbescheinigung, which will only permit leaving and re-entering Germany from a non-Schengen member state. Under EU law, the Fiktionsbescheinigung issued based on Sec. 81 (4) of the Residence Act has the same effects as a national visa or long-term residence title with regard to travelling in the Schengen Area.<sup>11</sup> However, this requires using the Fiktionsbescheinigung based on Sec. 81 (4) of the Residence Act **in conjunction with an expired visa or long-term residence title.**

All those affected will be required to apply for a residence permit before the end of the transition period at their local foreigner's authority. They will also be required to register with the resident's registration office responsible for their place of residence for their ongoing residency, if they have not already done so.

## Amendment of the Employment Ordinance ("Beschaeftigungsverordnung")

For stays for the purpose of employment, the existing regulations of the Employment Ordinance should be amended in the event of a no-deal Brexit. A corresponding drafted amendment had been agreed which would have come into effect on the day of the withdrawal.<sup>13</sup> However, although movement on this amendment had stopped, the amendment process will be restarted due to the shift in the date of Brexit that took place in April 2019.

By amending § 26 of the Employment Ordinance, the amendment is intended to grant British nationals who live in Germany at the time of Brexit continued access to the labour market regardless of their qualifications and without the requirement of the Federal Employment Agency's approval. This should apply to all other British nationals for the period until 31 December 2019.

From 1 January 2020 to 31 December 2020, British nationals who are not living in Germany at the time of Brexit should receive the same access to the labour market as nationals of other major trading partners, such as the United States of America, Japan, Australia, or Canada. The Federal Employment Agency must approve the employment, whereby the comparability of working conditions would be reviewed and an assessment made as to whether unemployed German candidates with a similar education are available for the position in Germany.

As of 1 January 2021, another revised version of Sec. 26 of the Employment Ordinance would have come into force regulating that:

- in principle the Federal Employment Agency would need to perform checks on the comparability of working conditions as well as the availability of eligible German candidates,
- the Federal Employment Agency's involvement would be waived provided that the British national utilized his or her "freedom of movement" on the exit date.

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### KPMG NOTE

The second draft for an amendment of the Employment Ordinance has not been published yet and it has also not been officially confirmed that the contents are identical with those from the first draft that were approved.

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## Brexit Residence Transition Ordinance

In order to avoid complications around British nationals who are already staying in Germany prior to 1 November 2019 and are entitled to reside in Germany due to their rights deriving from the EU Freedom of Movement, Germany's federal government is planning an initial transition period. During this time, British citizens and their family members who previously had the right of free movement will be able to continue living and working in Germany as before.

For this transitional period, the "Brexit Residence Transition Ordinance"<sup>14</sup> shall come into effect on the first day after the withdrawal of the U.K. and shall stay in effect for a period of three months provided that the persons concerned do not require a residence permit for Germany. A draft of this law has not been made available to the public yet.

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As per the applicable regulation of Sec. 99 (4) Sentence 1 of the Residence Act, such a statute does not require approval from the Federal Council and can be executed by the Ministry of the Interior, for Building, and the Community directly. Therefore, it is unlikely that the detailed contents will become known to the public before it is published.

## Coming into Effect

The Brexit Residence Transition Act shall enter into force on the date of the withdrawal of the U.K. from the EU, if no withdrawal agreement within the meaning of the second sentence of Art. 50 (2) of the Treaty on European Union has entered into force.

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## KPMG NOTE

The Brexit Residence Transition Act is a starting point to create legal certainty for all British nationals and their families who are currently living in Germany in case of a no-deal Brexit. It is apparent that the federal government intends to provide an option for every British citizen in Germany to obtain a residence permit.

In situations where the persons concerned fully meet the requirements of the regulation on EU Freedom of Movement, but not the stricter immigration requirements applicable to third-country nationals, such persons are going to be able to obtain a residence permit for their continued stay in Germany.

The KPMG International member firm in Germany is closely monitoring the developments on Brexit and the relevant regulations for British nationals and will endeavor to report on any updates.

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## FOOTNOTES:

- 1 For more information on German draft law Brexit Residence Transition Act (*Entwurf eines Gesetzes zur Überleitung von Freizügigkeitsrechten in das Aufenthaltsrecht infolge des Austritts des Vereinigten Königreichs Großbritannien und Nordirland aus der Europäischen Union*), click [here](#).
- 2 For the announcement on the publication by the Federal Foreign Office of the Brexit Residence Transition Act ("Rechtssicherheit für alle britischen Staatsangehörigen in Deutschland") (in German), click [here](#).
- 3 See D. Boffey and H. Stewart, "[Brexit: dismay in Brussels as Boris Johnson finally reveals plan](#)," *The Guardian* (online) (3 October 2019). Please note that this is a third party (non-KPMG, non-governmental) website. Provision of the link does not represent an endorsement of this site by KPMG.
- 4 For the *Act on the General Freedom of Movement for EU Citizens* (in German and in English), click [here](#).
- 5 For the *Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory* (in German and in English), click [here](#).
- 6 The Brexit Residence Transition Act defines British nationals as follows: *British nationals are nationals of the United Kingdom Great Britain and Northern Ireland as defined in the New Government Declaration of the United Kingdom of Great Britain and Northern Ireland of 31 December 1982 on the definition of 'nationals' in conjunction with the declaration No 63 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.*

## FOOTNOTES (cont'd):

7 The requirements are as follows:

- Residing in Germany with a residence permit for five years;
- Livelihood and that of his dependents to whom he is responsible is secured by fixed and regular income;
- Sufficient knowledge of the German language (Level B1);
- Basic knowledge of the legal and social order and the living conditions in the federal territory;
- There are no reasons to oppose public security or public order, taking into account the seriousness or nature of the violation of public security or public order or the danger emanating from the foreigner, taking into account the duration of the previous stay and the existence of ties within the territory of the Federal Republic; and
- Sufficient accommodation for him/herself and his/her family members living with him/her in a family community.

8 The requirements are as follows:

- Residing in Germany with a residence permit for five years;
- Livelihood and that of his dependents to whom he is responsible is secured by fixed and regular income;
- Sufficient knowledge of the German language (Level B1);
- Basic knowledge of the legal and social order and the living conditions in the federal territory;
- There are no reasons to oppose public security or public order, taking into account the seriousness or nature of the violation of public security or public order or the danger emanating from the foreigner, taking into account the duration of the previous stay and the existence of ties within the territory of the Federal Republic; and
- Sufficient accommodation for him/herself and his/her family members living with him/her in a family community.

9 This is regulated in Sec. 101a (3) Sentence 4 of the Residence Act.

10 Sec. 101a (3) Sentence 2 of the Residence Act.

11 According to the Residence Act, only the spouses and minor children belong to the “core family.”

12 Art. 2 No. 16 of EU Regulation No. 2016/399 in conjunction with Art. 21 (1) of the Convention Implementing the Schengen Agreement (“CISA”).

13 The Federal Council gave its consent on April 12, 2019, but the process of publishing the amendment law was stopped; for more details (in German) from the Federal Council, click [here](#).

14 See (in German) foreshadowing guidance from the Federal Ministry of the Interior, for Building, and Community (*Bundesministerium des Innern, für Bau und Heimat*) by clicking [here](#).



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