

KINGSLEY NAPLEY

WHEN IT MATTERS MOST

IMMIGRATION

Fly In Fly Out - Germany

Transcript

Hello and welcome. My name is Ilda and I'm a partner in the Immigration Department at Kingsley Napley. As you know that with effect from the 1st of January 2021, British citizens now traveling into Europe are deemed as third country nationals, meaning that UK law firms who regularly send British national lawyers to provide advice to their clients in Europe will first need to check whether work permission is required in advance of their travels. This is because every country in Europe has their own immigration rules. Equally, they should check whether there is any requirement to register with the local law society.

To that end, I'm very delighted to say that I have Dieter Kohlfürst, a immigration attorney specializing in German immigration law with me and my colleague, Jessica Clay, a partner in our regulatory department, to answer questions in relation to the position of British lawyers traveling into Germany on what I call a fly in, fly out basis, a FIFO. And then I will turn to my colleague Jessica to answer the position in relation to what, if any, should the lawyers be thinking of from a regulatory perspective.

So firstly, I'm going to turn to my colleague Dieter.

Firstly, I want to thank you very much for your time today and for sharing your expertise.

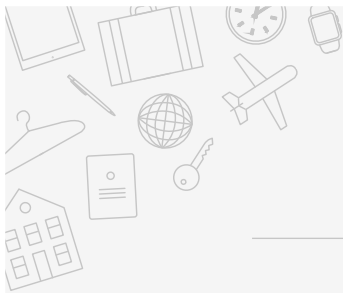
Thank you for having me.

It's a pleasure. Thank you.

So the first question I have for you is do you have any top tips for UK law firms that need to send UK lawyers into Germany for short term trips?

I have three tips, actually.

Number one, be aware of the exact activities the UK lawyers will be performing in Germany as this determines if a work permit for Germany and subsequently a visa with work authorization would be required or not.



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Number two, know the exact duration that the UK lawyer will be staying in Germany in particular if he or she will be staying in Germany for more than 90 days in any 180 day time period.

Tip number three, be mindful that the European Union will introduce the ETA's travel authorization system. Currently, the intended start date is mid 2025 under the ETA's travel authorization system. All Schengen visa exempt nationals traveling to any of the participating third European countries, including Germany, will need to obtain a travel authorization before entry with a valid its travel authorization. You can enter these third European countries as often as you want for short term stays of up to 90 days. In any 180 day period.

Each travel authorization will be valid for up to three years or until the passport expires, whichever comes first. If you get a new passport, you need to get a new ETA travel authorization.

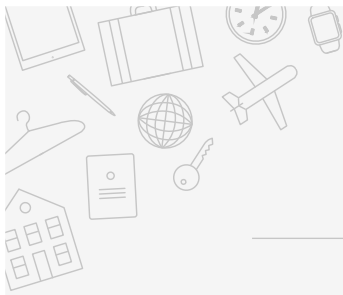
So thank you.

The second question I have for you is assuming the British national lawyer will only be in Germany to visit their client and will not provide any advice, what is the maximum amount of time they can spend in Germany as a visitor?

Under the Schengen visa waiver scheme, British nationals are permitted to enter Germany visa free and can stay in Germany for up to 90 days in any 180 day time period.

In general, foreign nationals are not allowed to perform work activities in Germany. The activities visiting a client in Germany and not providing any advice are not qualified as work, and are covered under a work permit exemption for Germany according to the following regulations.

On the one hand, we have paragraph 16 number two employment ordinance and on the other hand we have Article 142 Annex 21, number eight of the TCA. The TCA being the Trade and Cooperation agreement between the EU and the UK.



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Activities of business visitor according to paragraph 16 number two employment ordinance, this provision allows foreign business visitors employed with a foreign company amongst others, to participate in meetings with German business partners, promote sales or services through presentations to potential clients, conduct business negotiations, participate in contract negotiations and conclusion of contracts, supervise the performance of contracts, or participate at conferences without requiring a work permit for Germany.

These activities are allowed for a total of 90 days within a time period of 180 days, whereby the foreign business visitor must keep his or her residence on board. Activities of business visitors, according to Article 142, Annex 21, number eight of the TCA, these regulations allow short term business visitors to attend meetings and conferences or to engage in consultations with business associates in Germany without the requirement of a work permit. Such activities in Germany are permitted for up to 90 days in any six months time period.

So to summarize, we have two work permit exemption regulations available under which British lawyers can visit a client in Germany without providing any legal advice and the maximum time they can spend in Germany is 90 days in any 180 day time period.

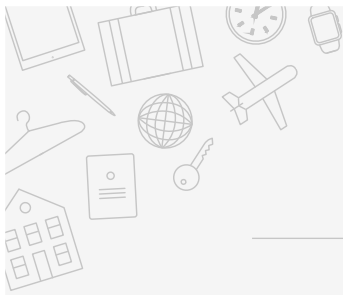
Thank you, Dieter.

The next question I have for you is will they be issued with a visitor visa on arrival at port?

As already said that first days of up to 90 days within a time period of 180 days, British nationals do not require a Schengen visa for Germany as they fall under the Schengen visa waiver scheme and can enter Germany visa free.

If the UK lawyer intends to stay in Germany for more than 90 days, he or she will require a national visa for Germany. Such national visa cannot be issued on arrival at port but must be applied for in advance at the German Embassy London.

Thank you.



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The next question is will the position be different if they are intending to see their clients in order to provide chargeable advice? And that could also include things like preparing legal documents, even if it only is for a few days.

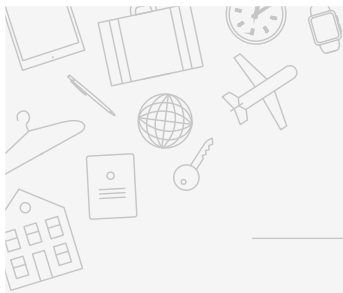
It does not matter if the providing of chargeable advice in Germany is only carried out for a few days. Rather, the question is if the providing of chargeable advice in Germany is permitted under a work permit exemption, or it is to be qualified as work, thus requiring a work permit. The activities providing chargeable advice to a client in Germany, including preparation of legal documents, are not permitted under the work permit exemptions of paragraph 16, number two, Employment ordinance or Article 142, Annex 21, Number eight of the TCA.

As mentioned before, these regulations contain a list of activities which are permitted by business travelers to Germany. However, providing consultancy services, technical services or other services of any kind are not considered as standard business travel activities. Providing chargeable advice in Germany to a client, including the preparation of legal documents is to be considered as the provision of a legal service. As the provision of a legal service in Germany is to be qualified as work, a German work permit and subsequently a visa for Germany with work authorization will be required.

The legal basis for such a visa with work authorization to provide legal services in Germany can be number one, paragraphs 19 C Section 1 German Residents Act and 26 Section one of the German Employment Ordinance. This is our so-called best friends provision. Under this best friends provision, the German work permit can be issued to certain privileged foreign nationals, including British nationals employed with an employer in the UK and coming to Germany in fulfillment of the contractual obligation of the UK employer towards a German client or customer.

It is not required that a UK employer has an entity in Germany. Such work permit can be issued for any kind of work in Germany, including providing legal advice directly at a German client or customer and does not have any time limitation.

Legal basis number two is paragraph 19, C Section one German Residence Act and paragraph 29, Section five Employment ordinance in conjunction with Article 143,



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Annex 22 of the TCA. Under these regulations, a work permit for Germany can be issued for contractual service suppliers based in the UK to perform legally advisory services in Germany. These permitted legal advisory services are in respect of public international law and home jurisdiction law, hence British law.

The maximum duration to provide such legal advisory services in Germany is a cumulative period of 12 months or duration of the contract, whichever is less. So there are provisions available in German immigration law under which a visa with work authorization for British lawyers can be obtained.

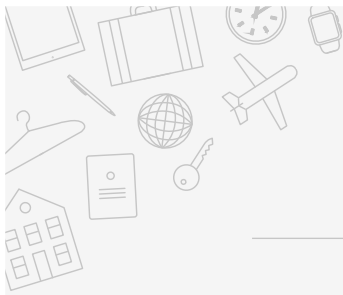
Thank you, Dieter.

But what happens if the lawyer regularly needs to travel? Say every other week to Germany in order to see a client or client so they can complete a project. Would that be a problem?

Well, first of all, you would need to determine the exact duration of the stay of the UK lawyer in Germany for the project and also take into account any at a time. The UK lawyer spent in the Schengen area in the last 180 days, for example, on holidays.

This is to know how many Schengen days the UK lawyer actually has available for the project. If the state of the UK lawyer in Germany to provide legal services within the project is for up to 90 days in any 180 day time period, then a Schengen visa with work authorization is required. Within applying for this Schengen visa with work authorization, previous stays in the Schengen area or in Germany are also counted.

If to stay of the UK lawyer to complete a project in Germany is for more than 90 days in any 180 day time period, then the national visa with work authorization is required. Within a national visa, previous stays in the Schengen area or in Germany are not counted. This Schengen visa or national visa with work authorization must be applied for at the German Embassy London respectively at the service provider TLS contact before traveling to Germany.



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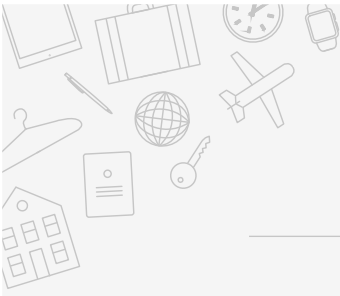
Thank you.

If a work permit is required, how quickly can it be obtained and is it something that must be applied for in advance of their travel, which I think you've just answered but if the work permit is required, what's the timeline we are looking at?

Well, as I already mentioned earlier, to provide legal services in Germany, the UK lawyer will require a Schengen visa or a national visa with work authorization, and the appropriate visa must be obtained before traveling to Germany. From a technical perspective, to apply for a visa, an appointment must be scheduled at the German Embassy London respectively, the service provider TLS contact. It is possible to obtain the work permit for Germany separately and in a separate procedure directly at the German Employment agency. This procedure is called pre ordered inquiry. The processing times for the pre ordered inquiry are about 4 to 5 weeks after submitting the application at the German Employment agency. The advantage of the pre ordered inquiry is to have a work permit already available before the subsequent visa procedure at the German Embassy London. This generally helps the visa procedure to a processing time of somewhere around two weeks after attending the scheduled personal appointment. However, if timing is tight, we are advised to skip this pre ordered inquiry and to apply for the Schengen visa or national visa with work authorization directly at the German Embassy in London or the service provider TLS contact. The German Embassy then internally reaches out to the German employment agency to obtain the approval to the work of the British lawyer in Germany. After the German employment agency has given its approval, the German Embassy in London can issue the visa with work authorization. In this scenario, the processing times are somewhere around 4 to 6 weeks after attending the scheduled person appointment at the German Embassy london or the service provider TLS contact.

Thank you, Dieter.

I know that in practice, sometimes we all know that things don't always go to plan and there are all these sudden announcements or arrangements to be made. So my last question to you is what can you do if all else fails?



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Well, as you know, it is not advisable to perform work activities in Germany without having a respective visa with work authorization in place. In particular, as we are seeing the German Embassy London becoming more sensitive to so-called business trips to Germany and even issuing travel bans to Germany, if they are of the opinion that the British national performed work activities in the past without having had a visa work authorization. If the activities of the UK lawyer in Germany require a visa with work authorization and it cannot be obtained in time before the intended travel, then there are two options. Try and reschedule the intended travel dates to Germany to allow sufficient processing times at the German Embassy London and in the meantime, try and make use of virtual meetings on MS teams or Zoom as much as possible.

I know that this is a tip which somebody gives from behind the desk, and in practice it can be difficult, but these are my best options I can come up with.

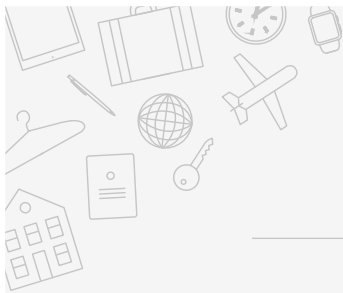
Thank you very much.

I know that it's not easy always having obviously worked in a law firm myself, things come up quickly and you have to plan quickly, but I think the advice that you've given them, the top tips are very sound. Thank you.

I now turn to my colleague, Jessica, where we will cover certain points to consider when traveling, but from a regulatory perspective. So, Jessica, again, thank you very much for your time. The first question I have for you is what is the regulatory position now for UK solicitors wishing to fly in and fly out of Germany?

Thanks, Ilda.

As you said, our focus is on this is the regulatory perspective, but my understanding at the current point in time is that UK lawyers advising in Germany in respect of UK law and or international law on a fly in fly out basis, are continuing to do so in a bit of a legal vacuum and this is on the basis that there still seems to be no provision in law, either expressly permitting or prohibiting temporary practice. So fly in, fly out basis is a good example of that.



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However, in light of Germany's commitments under the EU and UK Trade and Cooperation Agreement, home title practice on a fly in fly out basis by UK lawyers is expected to be permitted. But all we can really be doing at this stage is to keep a close eye on all the local bar associations in Germany, see how they act, and if that's in accordance with those commitments. But we must remember that we do know in practice that U.S. lawyers have been providing legal services in Germany on this temporary basis, so fly in fly out for quite some time now.

And as far as we aware, no enforcement action has been taken against them. So I should add as well that UK lawyers can still represent clients in mediation proceedings, for example, in Germany on a fly in fly out basis, as that's covered by a civil procedure code instead.

But I think in summary, it's important to say that the regulatory framework in Germany is quite complex when compared to other EU jurisdictions, particularly around the definition of reserved legal activities, which is very wide ranging and far reaching. So it may just be a case at the moment that we need to monitor this on an ongoing basis and as we would say, watch this space.

Thank you, Jessica.

One more question, please.

Will help LPP apply?

So the concept of legal privilege as such does not exist in Germany in the same way that it does in England and Wales, for example, as a jurisdiction. The relationship between lawyers and their clients is instead in Germany protected by a number of professional confidentiality regulations. So in the absence of the expressed consent of their client or mandatory legal requirement of disclosure, lawyers are prohibited from disclosing any confidential information or documents obtained in the course of their professional activities.



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These principles of confidentiality apply to European lawyers but there's no clear guidance as to whether they will also apply to foreign lawyers practicing in Germany which would include UK lawyers. There is potential that these principles will apply to UK lawyers and other foreign lawyers, but only to the extent that those individuals are permitted to provide legal services in Germany, so that goes back to the scope of practicing rights that I spoke about earlier.

Thank you.

We have now come to the end of this session. I wanted to thank Jessica and Dieter for both for their time and thank you to all of you who have taken the time to listen to our session.

We hope that you found it helpful. Our contact details will be available as well if there are any additional questions that you may have or want to ask.

So thank you again.