Country Guide
Germany

Prepared by

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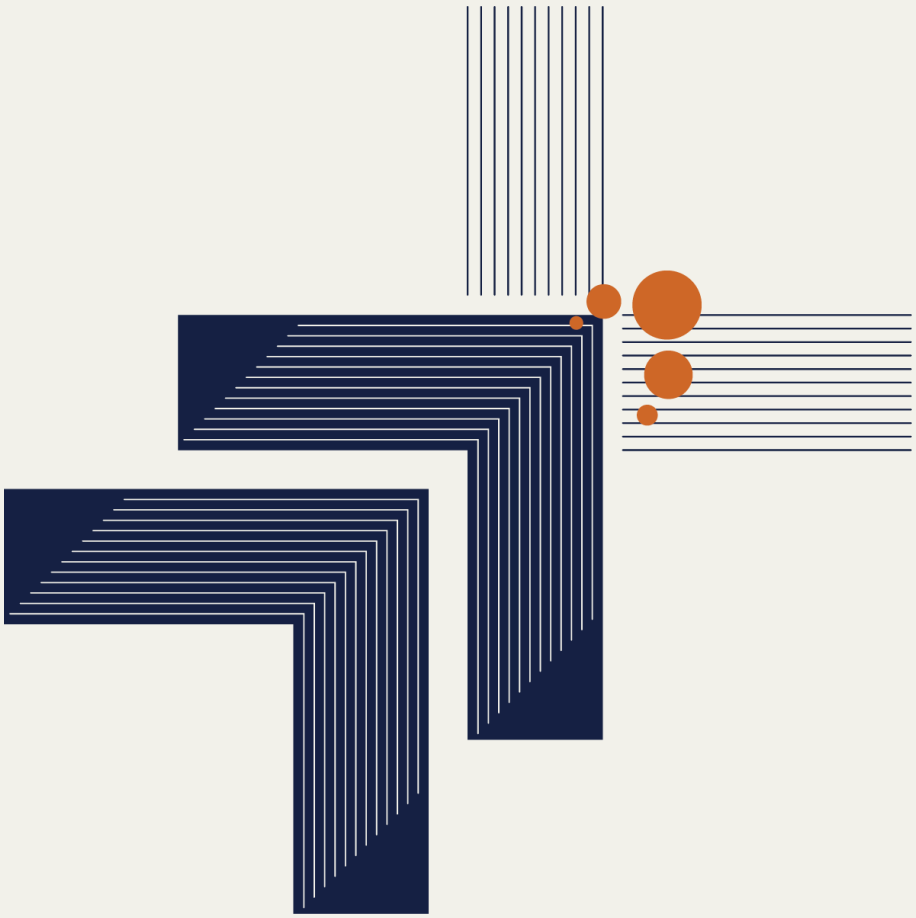

Doing business in Germany

Contents

Overview

A Q&A guide to doing business in Germany.

This Q&A gives an overview of key recent developments affecting doing business in Germany as well as an introduction to the legal system; foreign investment, including restrictions, currency regulations and incentives; and business vehicles and their relevant restrictions and liabilities. The article also summarises the laws regulating employment relationships, including redundancies and mass layoffs, and provides short overviews on competition law; data protection; and product liability and safety. In addition, there are comprehensive summaries on taxation and tax residency; and intellectual property rights over patents, trade marks, registered and unregistered designs.

1. What are the key recent developments affecting doing business in your jurisdiction?

The current German Government was formed in March 2018. The elected Cabinet of the so-called grand coalition consists of the two major contemporary parties in Germany. Nine ministers come from the ranks of the conservative parties CDU and CSU. Six ministers come from the social-democratic party SPD. Angela Merkel (CDU) was re-elected as Chancellor and after her previous elections in 2005, 2009 and 2013, and is now serving her fourth consecutive term in office. The next election to the German Federal Parliament (*Bundestag*), which decides on the next Chancellor, is scheduled for 2021.

Legal system

2. What is the legal system based on (for example, civil law, common law or a mixture of both)?

Germany's legal system is based on civil law. It consists of a legislature and an independent judiciary. Legislative power resides at both the federal (*Bund*) and the state (*Land*) level. The constitution presumes that all legislative power remains at the state level unless otherwise provided. Many fundamental matters of administrative law fall within the jurisdiction of the individual federal states.

Foreign investment

3. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

In principle, the German market is open for investments of any kind. However, the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*) (Ministry) has powers to review, prohibit or restrict a transaction for reasons of public order or security.

Investors from outside the EU who acquire 10% or 25% or more of the shares of voting rights in a German enterprise, irrespective of its business, can be subject to examination by the Ministry (without being required to make a notification to it). The threshold depends on the activities of the German enterprise. If this is active in certain critical infrastructures, in the development or production of certain military or IT-security items, the threshold is 10%. For all other companies the threshold is 25%. In this context, an "acquisition" means both an acquisition of assets or shares and it does not matter whether the investor acquires the voting rights directly or indirectly. The calculation of the voting rights will also include third-party-rights where either:

- The investor holds at least 10% or 25% of the voting rights in the third party.
- The investor has concluded an agreement on the joint exercise of voting rights with the third party.

In addition, acquisitions by EFTA or EU residents (who in principle benefit from the free movement of capital and establishment) are subject to examination if there are indications relating to an abusive approach or a "circumvention transaction". This will be the case if the direct purchaser is an acquisition vehicle registered or based in the EU and has no operative business.

Several civil sectors are partially seen as "critical" sectors. Foreign investments in these sectors may be subject to a notification requirement. This applies to non-EU or EFTA companies active in certain further defined critical infrastructures in one of the following sectors:

- Energy.
- Information technology and telecommunications.
- Transport and haulage.
- Health.
- Water.
- Nutrition.
- Finance and insurance.

In addition, the following companies may also be considered "critical", making it necessary for the Ministry to assess further in the case of such an investment:

- Domestic companies that produce industry-specific software for one of the above sectors.
- Operators of cloud computing services.

Furthermore, the following companies will also be regarded as "critical":

- German companies entrusted with organisational measures in accordance with section 110 of the Federal Telecommunications Act.

- Companies that develop or have developed telecommunications monitoring equipment in case they serve the implementation of measures required by law.
- Operators of telematics infrastructure approved pursuant to section 291(b), para 1(a) or 1(e) of the Fifth Social Security Statute Book.

If the Ministry concludes that the acquisition constitutes a sufficiently serious threat to public order or security, it can (with the approval of the Federal Government) prohibit or restrict the investment within five years after conclusion of the acquisition contract. However, if the Ministry should obtain positive knowledge of such an agreement beforehand, it must decide whether to initiate the examination procedure and inform the acquirer and the domestic company within three months. To obtain prior legal certainty, an investor can apply for a clearance certificate from the Ministry.

Special rules apply in the various defence and cryptology-related sectors. Foreign investors (including EU-investors) must report to the Ministry any acquisitions of 10% or more of the shares of voting rights with regard to enterprises that produce or develop any of the following:

- Goods subject to Part B of the German War Weapons Control Act.
- Certain IT-security products.
- Specially designed motors or gears for combat tanks and other armoured military vehicles.
- Certain goods subject to Part I Section A of the German Export Control List (Annex AL, *Ausfuhrliste*).

The Ministry can review and prohibit or restrict these types of transactions. In these sectors, the Ministry can prohibit transactions or issue orders by itself (without the consent of the Federal Government).

The validity of the purchase contract depends on the approval of the Ministry, which can prohibit the acquisition to protect vital national security interests.

Under the anti-trust laws of Germany and the EU, the acquisition of shares in a German enterprise may require clearance from the Federal Cartel Office (*Bundeskartellamt*) and/or the European Commission.

Please note that the rules on foreign direct investment are currently under review. The legislator aims to introduce further restrictions with a view to implementing the EU Screening Regulation by October 2020.

4. Are there any restrictions on doing business with certain countries or jurisdictions?

The EU has enacted a number of sanctions or restrictive measures within the framework of its Common Foreign and Security Policy, and subsequently through various regulations both against third countries (for example, Iraq, Iran, North Korea, Russia, Syria and Venezuela) and/or non-state entities and individuals (such as terrorist groups and terrorists). As with all

other EU member states, these EU regulations are directly applicable in Germany. These sanctions or restrictive measures (the two terms are used interchangeably) have frequently been imposed by the EU in recent years, either on an autonomous EU basis or by implementing binding resolutions of the UN Security Council. They can comprise (among other things):

- Arms embargoes.
- Specific or general trade restrictions (import and export bans).
- Financial restrictions, including restrictions related to the capital market.
- Restrictions on admission (visa or travel bans).
- Restriction on services.

The most comprehensive sanctions are currently imposed on Iran, North Korea and the Crimea Region of Ukraine.

An updated list of country-specific sanctions and restrictive measures in force is available at http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

A consolidated list of persons, groups or entities targeted by EU financial sanctions is available at https://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions_en.

5. Are there any exchange control or currency regulations?

Germany does not restrict the export or import of capital, except for restrictions on transactions based on sanctions or restrictive measures or national legislation (see Question 4).

For statistical purposes only, every individual or corporation residing in Germany must report to the German Federal Bank (Deutsche Bundesbank), subject only to certain exceptions, any payment received from or made to an individual or a corporation resident outside Germany, if the payment exceeds EUR12,500 (or the corresponding amount in other currencies).

In addition, residents must submit reports on claims against or liabilities to non-resident individuals or corporations amounting to more than EUR5 million per month. Also, there is a reporting obligation for claims against or liabilities to non-residents arising under derivative financial instruments and exceeding EUR500 million per quarter. Further reports must be made with regard to the value of assets of non-resident companies in which a certain proportion of shares or voting rights are attributed to the resident (10% or more) or to one or more non-resident companies controlled by the resident (more than 50%).

Moreover, a resident must report the value of its non-resident branch offices and permanent establishments. Likewise, residents must report the value of the assets of resident companies in which a certain proportion of shares or voting rights is held by a non-resident (10% or more) or by one or more resident companies controlled by a non-resident (more than

50%). This reporting obligation also applies to the value of the non-resident's resident branch offices and permanent establishments.

6. What grants or incentives are available to investors?

Investment incentives are provided by the German federal government, the German federal states and the EU. The incentives include, for example, cash incentives, interest-reduced loans, public guarantees, labour-related incentives and R&D incentives. While some programmes specifically target small and medium sized enterprises (SMEs), investment incentives are, in general, available to all investors if the investment is beneficial for the German economy. However, the programmes may require companies to have a registered seat or management in Germany.

The most important German institution for financing investments is the KfW Banking Group (*Kreditanstalt für Wiederaufbau, KfW*) (http://www.kfw.de) the nationally operating development bank of Germany owned by the Federal Republic and the federal states. It makes available a number of different financing tools such as promotional loan programmes, mezzanine financing and private equity. In addition to the KfW, the German federal states have their own development banks that finance projects within their respective state boundaries.

More information on incentive programmes in Germany is available at Germany Trade and Invest (http://www.gtai.de/GTAI/Navigation/EN/Meta/about-us.html), a German limited liability company fully owned by the Federal Republic of Germany. This is an official and up-to-date site promoted by the Ministry for Economic Affairs and Energy, providing information about investment opportunities in Germany and general investment conditions.

The Ministry for Economic Affairs and Energy website (http://www.bmwi.de/Navigation/EN/Home/home.html) provides information about the German economy in general, as well as about key issues such as energy, foreign trade and technology.

Business vehicles

7. What are the most common forms of business vehicle used in your jurisdiction?

In Germany, two types of corporations are commonly used:

- The stock corporation (*Aktiengesellschaft, AG*), comparable to the English public limited company (plc).
- The limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*), comparable to the English private limited company (Ltd).

They both have the benefit of limited liability for their shareholders. The GmbH is the legal form most commonly used in Germany, including by foreign investors. This is mainly be-

cause the corporate governance of a GmbH is significantly easier to handle and the capital maintenance rules are less strict compared to an AG.

In addition, several forms of partnerships exist and it is possible to set up a trust (*Stiftung*). Such business vehicles have, however, a rather complex corporate governance structure and some of them expose their members to unlimited liability.

8. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, what are the main registration and reporting requirements?

Registration and formation

A GmbH can be set up by at least one shareholder by notarising its articles of association. It comes into force on its registration with the competent commercial register (*Handelsregister*) that is kept at the competent local court. The commercial register contains information on the company's key details, for example:

- Company name.
- Share capital.
- Object of the company.
- Information about managing directors.
- Existence of domination agreements and profit and loss transfer agreements.
- The articles of association.
- Shareholders' list.

Commercial registers are centrally accessible through the common register portal of the German federal states (*http://www.handelsregister.de*). Information is available on payment of a fee.

Reporting requirements

A GmbH is obliged to file its financial statements with the German Federal Gazette (*Bundesanzeiger*), which will publish them. Depending on the size of the GmbH (determined based on its total assets, sales revenues and number of employees), reporting requirements vary significantly. A small GmbH does not have to have its accounts audited. An auditor is appointed by the general meeting for one business year.

Share capital

A GmbH must have a minimum registered share capital of EUR25,000. There is no maximum share capital.

Non-cash consideration

Shares in a GmbH can be issued for consideration in cash or in kind.

Rights attaching to shares

Restrictions on rights attaching to shares. The corporate governance regime of a GmbH is more flexible than that of an AG. Therefore, the articles of association of a GmbH can attach special rights to certain shares or restrict rights attached to other shares within a certain legal frame. Restrictions on shareholder rights can also result from a violation of mandatory obligations. An AG is, for example, obliged to report the reaching of certain shareholding thresholds in a GmbH. A violation of this obligation has, in particular, the effect that the AG cannot exercise its shareholder rights in the GmbH.

Rights attaching to shares. Certain fundamental rights are attached to shares of a GmbH by statutory law, for example the right to dividends and proceeds of liquidation, the right to vote on shareholders' resolutions and certain control and management rights.

9. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, outline the management structure and key liability issues.

Management structure

In principle, two decision-making bodies exist in a GmbH: the managing director(s) as the executive management, and the general meeting as the shareholders' forum. The general meeting decides all essential issues regarding the GmbH by law and certain decisions require a qualified majority of votes representing three quarters of the company's share capital. This is, for example, the case for resolutions amending the articles of association and changing the registered share capital. In such cases, 25% of the share capital plus one share constitute a blocking minority.

Further, the shareholders can decide on a catalogue of business measures which require their prior consent. They can also issue binding instructions to the managing directors by way of a shareholders' resolution. The general meeting of the GmbH is in principle also responsible for the appointment, revocation and replacement of its managing directors.

Management restrictions

Managing directors have to be individuals. The appointment of a legal entity as a managing director is not possible. They do not need to be German or European citizens as long as they are generally able to enter German territory. There are no legal restraints on the managing directors' term of office.

Directors' and officers' liability

The managing directors of a GmbH are bound by duties of care to the company. Formal approval of the actions of the managing directors by shareholders' resolution generally relieves the managing director from known liability. To protect managing directors against personal liability, directors and officers (D&O) insurance can be taken out.

Parent company liability

As a general rule, a parent company is not liable for the obligations of a GmbH. However, there is some case law on the piercing of the corporate veil of a GmbH, resulting in the liability of the parent company. The requirements governing the liability of the parent company in such cases are rather high. The parent company may also be liable to its subsidiary on the basis of tort law. The most common event triggering liability of the parent company under tort law is the destruction of the existence of the GmbH.

Employment

Laws, contracts and permits

10. What are the main laws regulating employment relationships?

German labour and employment relations are regulated by statutory legislation (which in part transforms EU-regulations into applicable national laws), case law, collective bargaining agreements (*Tarifverträge*), works agreements (*Betriebsvereinbarungen*) and individual employment contracts. There is no single unified labour and employment code. Instead statutory regulations are spread over numerous statutes, including the:

- German Civil Code (*Bürgerliches Gesetzbuch, BGB*) regulating among other things the general principles of employment contracts, such as notice periods.
- Act on Protection Against Dismissal (*Kündigungsschutzgesetz, KSchG*).
- Federal Vacation Act (*Bundesurlaubsgesetz, BUrlG*).
- Act on Working Hours (*Arbeitszeitgesetz, ArbZG*).
- Act on Continued Remuneration (*Entgeltfortzahlungsgesetz, EFZG*), regulating sick pay.
- Minimum Wage Act (*Mindestlohngesetz, MiLoG*).
- Act on Temporary Employment (*Arbeitnehmerüberlassungsgesetz, AÜG*), regulating employee leasing.
- Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*), regulating codetermination of works councils.
- Act on Collective Bargaining Agreements (*Tarifvertragsgesetz, TVG*).

Since 2015, the Minimum Wage Act (subject to rare exceptions) has provided for a cross-sectoral minimum wage in Germany (which is currently EUR9.35 per hour). In 2017, the admissibility requirements for temporary work were considerably tightened. Since 1 April 2017 employees can be leased under an agreement for temporary work only for up to 18 consecutive months in each individual case. Certain exceptions exist under collective bargaining agreements and works agreements.

Apart from written codes and statutes, labour and employment law has strongly been influenced by case law, in particular of the Federal Labour Court (*Bundesarbeitsgericht, BAG*), but increasingly also of the European Court of Justice (*Europäischer Gerichtshof, EuGH*).

In principle, these laws also apply to foreign employees working permanently in Germany. Even though it is possible to choose the application of foreign laws, such choice of law cannot deprive employees of the protection given to employees by such provisions of German labour law that cannot be derogated from even by mutual agreement. Most of the regulations in the statutes mentioned above are mandatory and apply regardless of any choice of law.

For several industries (for example, the construction, electrical and personal care industries) these or at least some of these mandatory laws also apply to:

- Foreign employees who are employed by a foreign employer but are temporarily working in Germany (see the German Act on Posting of Workers, *Arbeitnehmer-Entsendegesetz, AEntG*).
- Employees of a German employer who are only appointed in a foreign country for a limited period of time only.

11. Is a written contract of employment required? If so, what main terms must be included in it? Do any implied terms and/or collective agreements apply to the employment relationship?

While not required, employment agreements are usually in written form. If no written contract is concluded, the employer is required to provide the employee with a summary of the key terms and conditions of employment in written form (section 2, Act on Documentation of Employment Terms (*Nachweisgesetz, NachwG*)).

If both the employer and the employee are bound by collective bargaining agreements, the terms and conditions of such agreements apply as a minimum standard. The parties may agree on more beneficial terms of employment at any time. For employees who are not members of a trade union but whose employer is a member of the employers' association, the employment contracts regularly contain reference clauses to the relevant collective bargaining agreements in order to treat employees equally in the end.

Similar to collective bargaining agreements, works agreements entered into by the employer with the local, company, or group works councils which establish minimum standards also apply to all employees, except for certain managerial employees (*leitende Angestellte*).

12. Do foreign employees require work permits and/or residency permits?

In principle, foreign employees require a residency permit, including a work permit. However, on 1 March 2020, the Skilled Employee Immigration Act (*Fachkräfteeinwanderungsgesetz*) entered into force. As a consequence, foreign employees only require a residency permit to be permitted to work in Germany, provided that no law provides for a restriction or a prohibition. It takes between four and eight weeks to obtain a residency permit; for certain skilled employees there is the possibility of an accelerated procedure. A small fee of approximately EUR100 is payable, and lawyers' fees may be incurred for legal advice. In particular, the following employees do not require a work permit:

- EU/EEA citizens (no residency permit required).
- In general, citizens of Switzerland (entitlement to a (declaratory) residency permit in case of employment of more than three months).
- Foreign persons with an unrestricted residency permit (no further residency permit required).

From 1 March 2020, foreign employees may only be employed if the employee possesses a residency permit, provided that there is no working restriction or prohibition. Employers are obliged to check whether a foreign employee has a residency permit and must keep a copy of it. Furthermore, an employer has to inform the competent Aliens Authority (*Ausländerbehörde*) within four weeks of becoming aware that the employment of a foreign employee has been terminated prematurely.

A residency permit is not required for certain types of work if the work lasts for less than 90 days within any 180-day period, for example:

- Managerial employees to whom a registered commercial power of attorney (*Prokura*) has been granted, or who work in the German division of international companies at board level (*Vorstandsebene*) or on the executive board (*Geschäftsleitung*).
- Managing directors of a limited liability company (GmbH) or board members of a stock corporation (AG).

Termination and redundancy

13. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

In business units (*Betriebe*) with five or more employees, a works council can be elected. The works council has significant rights to information, supervision, and consultation, as well as co-determination in relation to financial, personnel and social matters. Further, a general (at company level) or group works council (at group level) can be established. In companies with more than 100 employees, an economic committee (*Wirtschaftsaussschuss*) has to be established; the economic committee has certain (additional) information rights in relation to economic matters. In particular in stock corporations and limited liability companies with at

least 500 employees, employees can also be entitled to elect representatives to the employer's supervisory board.

In cases of mass redundancy and other material changes of business (for example, restructurings, changes of work methods, and relocations), the works council of an employer with more than 20 employees has a co-determination right if a significant part of the staff is affected. In such cases, the works council has consultation rights and the employer must try to reach an agreement on a reconciliation of interests (*Interessenausgleich*) before implementing the measures. Also, the works council has a co-determination right with regard to compensation for the adverse economic effects the measures could have on employees, which would be set out in a social plan (*Sozialplan*). Usually, the mere disposal of assets, business units or shares in the employer results only in information rights. Any related restructuring at business unit level may, however, be subject to co-determination as outlined above.

14. How is the termination of individual employment contracts regulated?

In general, in business units with more than ten employees, a valid notice of termination requires a justification on social grounds once the employment in question has lasted more than six months. This means that one of the following must apply within the meaning of the Act on Protection Against Dismissal in order to justify a dismissal:

- Certain personal reasons (such as permanent inability to work).
- A certain kind of misconduct.
- Operational grounds (such as redundancies).

Also, if there is a works council, it must be heard in good time before notice of termination is issued. Any notice of termination must be in written form.

In general, notice periods must be observed for dismissals. The statutory minimum notice period after a probationary period, if any, for an employer is four weeks, effective on the 15th or at the end of a calendar month. It increases along with the length of service of the employee (up to seven months to the end of a calendar month after a seniority of 20 years). Longer notice periods may be agreed in the individual employment contract.

For notices of termination issued by the employee, the notice period is four weeks effective as of the 15th or the end of the month, unless otherwise agreed (which is regularly the case). Only in very limited cases it is possible to dismiss an employee with immediate effect for good cause.

The employee can, within three weeks after receiving a notice of termination, file a claim for invalid dismissal with the competent labour court, for which the only remedy is reinstatement (other than in limited circumstances where the employment may be dissolved). This means that dismissal without legally accepted reasons as stated above is not effective, so that the employment continues if the employee wins his or her case. If, instead, the termination is justified on social grounds and formally correct, the employment ends without any severance payment claim (except for cases of mass redundancy with a social plan). In practice, however,

the parties regularly conclude a settlement agreement during the court proceedings, whereby the employment is terminated against payment of a negotiated severance payment.

15. Are redundancies and mass layoffs regulated?

If an employment relationship is terminated owing to redundancy and the employees are protected under the Act on Protection Against Dismissal (*see Question 14*), the employees affected must be selected on the basis of the following social criteria:

- Duration of service.
- Age.
- Maintenance obligations to immediate family members.
- Disability.

In general, employees with weaker claims to protection under these social criteria must be dismissed first. In the case of mass redundancy of a certain dimension (depending on the staff numbers), the works council has certain co-determination and consultation rights and can also demand that a social plan be set up, providing for severance payments and other social protection mechanisms. Also, if a certain number of employees are made redundant, the employer must notify the labour agency before issuing notices of dismissal, otherwise the dismissals are invalid.

Tax

Taxes on employment

16. In what circumstances is an employee taxed in your jurisdiction and what criteria are used?

Employees whose residence or usual place of abode is in Germany, are considered tax residents and taxed on their worldwide income.

All other employees are only taxed on income arising from their employment in Germany. However, most German double tax treaties provide that the employee's home jurisdiction can tax the employee if all of the following apply:

- Presence in Germany does not exceed 183 days in any 12-month period (some treaties refer to the calendar year or tax year).
- Remuneration is paid by or on behalf of an employer who is not resident in Germany.
- The remuneration is not borne by a German permanent establishment of the employer (foreign company).

17. What income tax and social security contributions must be paid by the employee and the employer during the employment relationship?

Tax resident employees

Individuals tax resident in Germany are taxed on their worldwide income. The income tax rate ranges from 14% to 45% (for 2020). There is an initial general tax-free amount of EUR9,408 for individuals and EUR18,816 for married couples (for 2020). There is an additional tax-free amount of EUR1,000 (for 2020) for all employees. Depending on the personal situation, taxable persons can claim various deductions (such as child allowance).

In addition to the income tax, a "solidarity surcharge" of 5.5% on the tax is levied. Members of certain religious organisations must also pay an additional church tax.

In general, all employees must pay social security contributions for the following schemes in total:

- Unemployment insurance.
- Pension insurance.
- Health insurance.
- Long-term nursing care insurance.

Employees must pay about 20% of their gross annual salary into these social security schemes. The gross annual salary is, however, capped (in 2020) at:

- Unemployment insurance and pension schemes: EUR82,800 in the western federal states, and EUR77,400 in the eastern federal states.
- Health insurance and long-term nursing care insurance: EUR56,250.

Non-tax resident employees

Non-tax residents are taxed on their German source income only. The tax rate for non-tax resident employees is, in principle, the same as for tax resident employees, but there are special provisions for non-tax resident employees, including:

- Expenses can only be deducted if they are related to German source income.
- Special expenses, such as certain insurance payments, which cannot be deducted from the taxable income.

There is, in principle, no difference between non-tax resident and tax resident employees in relation to social security contributions (*see above, Tax resident employees*). However, potential exceptions for certain social security branches could apply on a case-by-case basis.

Employers

Employers must withhold tax (income tax, solidarity surcharge and church tax) and social security contributions on behalf of their employees.

In addition to the employee's contributions, the employer must pay social security contributions of about another 20% (in 2020) of the employee's gross salary (capped at the same thresholds as the employee's contributions) (*see above, Tax resident employees*).

The employer must also pay for statutory work-related accident insurance. Accident insurance and special share in the costs arise for each employee, but are only payable by the employer.

Business vehicles

18. When is a business vehicle subject to tax in your jurisdiction?

Tax-resident business

A corporation is tax resident if it has a registered seat or place of management in Germany. Special provisions apply to business partnerships which are treated as tax transparent for German tax purposes.

Non-tax-resident business

Non-tax-resident corporations are subject to limited tax liability on their German source income (for example, income received from a German permanent establishment).

19. What are the main taxes that potentially apply to a business vehicle subject to tax in your jurisdiction (including tax rates)?

Corporate income tax

Corporations are subject to corporate income tax at 15% plus a solidarity surcharge of 5.5% on this.

Income tax

The income tax rate for individuals conducting business (including through a partnership) in Germany varies between 14% and 45% plus a solidarity surcharge of 5.5% on this. Church tax may also apply (if applicable).

Trade tax

Trade tax rates regularly vary between 7% and 17.15% depending on the municipality to which the trading income is to be allocated.

Value added tax (VAT)

The standard rate of VAT is 19% (reduced rates are 7% and 0%).

Dividends, interest and IP royalties

20. How are the following taxed:

- Dividends paid to foreign corporate shareholders?
- Dividends received from foreign companies?
- Interest paid to foreign corporate shareholders?
- Intellectual property (IP) royalties paid to foreign corporate shareholders?

Dividends paid

Dividends paid to foreign corporate shareholders are subject to 25% withholding tax, plus a 5.5% solidarity surcharge on this.

Subject to compliance with the German Anti-Treaty/Directive Shopping Rules, withholding tax can be further reduced by domestic law, Directive 90/435/EEC on the taxation of parent companies and subsidiaries or a tax treaty

Dividends received

Dividends a corporation receives from foreign companies are – in case of a shareholding of at least 10% in the domestic or foreign corporation at the beginning of the assessment period, regularly 95% tax exempt.

For trade tax purposes, the 95% tax exemption only applies in case of a shareholding of at least 15% in the domestic or foreign corporation at the beginning of the assessment period (usually calendar year). A tax treaty may lower the 15% threshold.

Individuals receiving dividends as business income benefit from the partial-income privilege, that is, only 60% of the dividends are taxed. For trade tax purposes, dividends are tax exempt if the above conditions are met. Individuals receiving dividends as non-business income are, in principle, subject to 25% withholding tax plus a 5.5% solidarity surcharge on these dividends. Church tax may also apply (if applicable).

Interest paid

Generally, there is no withholding tax on interest payments on plain vanilla loans to non-residents. However, there are some exceptions, one being if the debtor is a German branch of a bank or financial services institution, and another for interest which is profit-related.

IP royalties paid

Subject to an applicable treaty or Directive 2003/49/EC on interest and royalty payments (Interest and Royalty Directive), IP royalties paid to non-resident corporate shareholders are subject to withholding tax at a rate of 15% plus a solidarity surcharge of 5.5% on this.

Groups, affiliates and related parties

21. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)?

Under the interest barrier rules, the deduction of net interest expenses (balance of interest expenses and earnings) is limited to 30% of the relevant taxable earnings before interest, taxes, depreciation and amortisation (EBITDA). However, this 30% limitation on tax EBITDA will not apply if any of the following conditions are applicable:

- Where net interest expenses are less than EUR3 million.
- Where the company does not belong to a group (No-Group Exemption).
- Where the company belongs to a group and the equity ratio of the company is no lower than 2% compared to the overall ratio for the whole group (Equity-Ratio Exemption).

Corporations must fulfil further conditions (that is, no detrimental shareholder financing to apply the No-Group or the Equity-Ratio Exemption).

There is currently a pending legal proceeding at the German Federal Constitutional Court in relation to the potential unconstitutionality of the interest barrier rule.

22. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

Controlled foreign company rules will only apply if both:

- More than 50% of the capital of the foreign company is held by German residents (or in the case of portfolio income, 1% is held by a German resident).
- The income of the foreign company is regarded as passive income and is subject to low tax (that is, effectively taxed at a rate less than 25%).

The controlled foreign company rules do not apply if the taxpayer can prove that the controlled foreign company is resident in an EU or EEA member state and meets certain substance requirements.

New rules are suggested to be implemented.

23. Are there any transfer pricing rules?

The transfer price must be determined on an arm's-length basis. The standard transfer pricing methods are the comparable uncontrolled price method, the resale price method and the cost-plus method.

Customs duties

24. How are imports and exports taxed?

Goods which are in free circulation within the EU are not subject to customs duties. Imports from outside the EU are subject to customs duties almost exclusively on an ad valorem basis.

Due to the interim arrangements for Brexit, there are no changes in respect of the UK at least until 31 December 2020.

Double tax treaties

25. Is there a wide network of double tax treaties?

Germany has double tax treaties with about 100 countries including the US and all European countries.

Competition

26. Are restrictive agreements and practices regulated by competition law? Is unilateral (or single-firm) conduct regulated by competition law?

As in many jurisdictions, competition law in Germany can be divided into four main branches governed by specific legal regimes according to the Act Against Restraints of Competition (*ARC, Gesetz gegen Wettbewerbsbeschränkungen, GWB*):

- The prohibition of anti-competitive agreements (cartels).
- The prohibition of abuse of a dominant position.
- Merger control.
- Private enforcement.

Therefore, under certain conditions the ARC outlaws concerted practices as well as unilateral conduct. The Federal Cartel Office (FCO) (*Bundeskartellamt*) is the German competition authority that deals with such behaviour.

Competition authority

The FCO prosecutes anti-competitive market behaviour (there are also regional antitrust authorities for purely regional cases). The FCO can impose significant fines for breaches of the cartel prohibition. From a procedural and enforcement perspective, the still growing importance of private (in contrast to administrative) enforcement of German competition law is noteworthy, in particular in the context of cartel damage claims.

The ARC contains specific provisions which aim to facilitate such claims, for example, even decisions of the European Commission and those of competition authorities of other EU Member States have binding effect on cartel damage claims in Germany.

The 9th amendment to the ARC has implemented Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the Member States (Antitrust Damages Directive) and brought various substantive and procedural legal changes to further facilitate damages claims.

Initial information on competition law rules and the FCO's practices is available at http://www.bundeskartellamt.de.

Restrictive agreements and practices

Section 1 ARC contains a prohibition of cartel agreements (cartel ban). As the cartel ban was fully harmonised with Article 101 of the Treaty on the Functioning of the European Union (TFEU) in 2005, agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, are prohibited.

The cartel ban does not differentiate between horizontal and vertical agreements. According to section 2 ARC, the European block exemption regulations also apply.

In case of breaches of the cartel ban, the Act provides for fines of up to 10% of the entire group turnover of the undertakings concerned.

Unilateral conduct

German competition law aims to outlaw anti-competitive market behaviour in the form of abuse of a dominant market position. According to the ARC there is a (rebuttable) presumption of market dominance if an undertaking has a market share of at least 40%. Further, the ARC also provides for a dominance test for oligopolies. Certain forms of discriminatory behaviour are prohibited for dominant enterprises. The Act sets out a non-exhaustive list of prohibited behaviour, including:

- Directly or indirectly impairing other undertakings in an unfair manner, or treating equal undertakings unequally without any objective justification.
- Demanding payment or other business terms which differ from those which would very likely arise if effective competition existed.
- Demanding less favourable payment or other business terms than the dominant undertaking itself demands from similar buyers in comparable markets, unless there is an objective justification for such differentiation.
- Refusing access to essential facilities in return for reasonable fees.
- Asking for unjustified advantages without objective justification.

There are also provisions which outlaw the abuse of "relative market power" in relation to dependent firms.

The proposed tenth amendment to the ARC (ARC Draft Bill) adapts the current law to progress and changes in respect of digitalisation. It is likely to enter into force at the end of 2020.

The ARC Draft Bill transposes the ECN+ Directive into German law; it is intended to strengthen the competition authorities of EU Member States, in particular regarding their investigative powers.

However, the ARC Draft Bill, which is also referred to as the ARC Digitalisation Act, goes much further. It is intended to create a "digital regulatory framework" and to modernise the ARC to face the challenges in digital markets. As regards the abuse of dominance, the ARC Draft Bill provides for new, far-reaching powers to intervene in companies "with overwhelming importance for competition across multiple markets".

27. Are mergers and acquisitions subject to merger control?

The Act Against Restraints of Competition regulates merger control, including jurisdictional and procedural aspects. However, the European Commission has jurisdiction if the proposed transaction has a Community dimension, as set out in Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation).

The Act prescribes a mandatory filing of transactions before their implementation depending, among other things, on the parties' turnover and whether the merger has domestic effect in Germany. In particular, to fall within the scope of German merger control, a concentration must meet all of the following thresholds in the financial year preceding the concentration:

- The combined worldwide turnover of all undertakings concerned exceeds EUR500 million;
- One participating undertaking had turnover exceeding EUR25 million in Germany.
- At least one other undertaking had turnover in Germany exceeding EUR5 million.

In addition to the above thresholds, an alternative size-of-transaction threshold applies. This threshold was already introduced in 2017 to cope with the phenomenon of the digital economy and business models which lead to transactions with a potential effect on competition but where the turnover of the target is (still) very low, so that it would escape merger control. Since then, a concentration has also been subject to German merger control if (only) the first two of the three thresholds above are met and both:

- The value of the consideration for the merger is more than EUR400 million.
- The target company is active to a considerable extent in Germany.

According to the ARC Draft Bill, three major changes are planned for German merger control:

- The second domestic turnover threshold for the notification obligation is to be increased from EUR5 million to EUR10 million. The rationale behind this is to reduce

the number of merger control notifications by around 20%, especially in cases that do not give rise to impediments to effective competition. The new resources gained thereby are to be used for cases which are more problematic and therefore require extensive examination.

- In the case of complex main examination proceedings (known as Phase II proceedings), the examination period is extended from four to five months. This change is in alignment with the procedural rules of other countries and takes the complexity of the examination into account.
- The ARC Draft Bill gives the FCO the power to oblige companies to notify each acquisition of a company whose turnover exceeded EUR2 million in the past financial year. As a prerequisite for this, there have to be indications that future mergers may restrict competition on the relevant market. In doing so, the German legislator is trying to improve control over corporate strategies to expand and develop strong cross-market positions, and in particular to regulate "killer acquisitions".

Possible exemptions from merger control can apply, for example, a *de minimis* clause for the sale of undertakings with a small group turnover. This exception, however, does not apply in the context of the value-based threshold.

Foreign-to-foreign acquisitions are subject to the merger control laws if the thresholds set out above are met. In this case, it is hardly possible to argue that the transaction has no domestic effect, at least if the target company is active in Germany to a certain extent or the participating undertakings are competitors in the German domestic market. At the end of 2014, the FCO issued a guidance document on the domestic effect test. The paper outlines the circumstances where the FCO deems a transaction not to have a domestic effect (they should be considered on a case-by-case basis).

Being harmonised with EU competition law, the substantial test during merger control proceedings is whether the transaction will significantly impede effective competition, in particular if it creates or strengthens a dominant market position.

Infringing the prohibition on the implementation of transactions before clearance by the FCO (gun-jumping prohibition) is subject to fines of up to 10% of the total worldwide group turnover, and can lead to nullity of the transaction (civil law related risk). Various cases in the past have shown that the FCO vigorously enforces the gun-jumping prohibition.

Intellectual property

28. Outline the main IP rights in your jurisdiction.

Patents

Definition and legal requirements. To merit protection under the Patent Act (*Patentgesetz, PatG*) or the European Patent Convention (EPC), an invention must be:

- Novel.
- Involve inventive step.
- Susceptible of industrial application.

The right holder is entitled to use, license or prevent others from using the patent.

Registration and substantive examination. An application must be submitted to the German Patent and Trade Mark Office (*Deutsches Patent- und Markenamt, DPMA*) or the European Patent Office (EPO). It is strongly recommended to instruct a patent attorney to draft the patent application in order to obtain proper protection.

Further detailed information on the procedure can be obtained at the DPMA (http://www.dpma.de) or the EPO (http://www.epo.org).

Enforcement and remedies. The patent right can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

- Injunctive relief (permanent or preliminary).
- Rendering of accounts.
- Damages.
- Destruction of infringing items.
- Recall of products.

Patents enjoy a presumption of validity in enforcement proceedings (no invalidity defence available). The validity must be challenged in separate nullity proceedings before the German Federal Patent Court (*Bundespatentgericht, BPatG*).

Term of protection. Patent protection is granted for 20 years from the date of filing, provided that an annual patent renewal fee is paid. The term of protection is not renewable (except for cases where there is a supplementary protection certificate).

Utility models

Definition and legal requirements. In addition to a patent, an invention can be protected as a utility model under the Utility Model Act (*Gebrauchsmustergesetz, GebrMG*). The requirements for protection are basically the same as for patents. The annual fees are lower than those for patents.

Registration and formal examination. Protection can be obtained by mere registration and examination by the DPMA (no substantive examination).

Enforcement and remedies. Enforcement and remedies of a utility model are similar to those for a patent (see above, Patents). However, utility models do not enjoy a presumption of validity in enforcement proceedings, that is, the defendant may raise an invalidity defence.

Term of protection. Utility model protection is granted for ten years from the date of filing, provided that a renewal fee is paid (after three, six and eight years).

Trade marks

Definition and legal requirements. The German Trade Mark Act (Markengesetz, MarkenG) protects words, pictures, letters, numbers, acoustic signs, three-dimensional designs, colours and combinations of colours. To be registered as a trade mark, a mark must:

- Be sufficiently distinctive.
- Not exclusively describe a product.
- Not mislead the consumer.
- Not be a public sign.

The right holder is entitled to use, license or prevent others from using the trade mark.

Registration and (limited) substantive examination. An application, together with the prescribed fee, must be submitted to the DPMA.

Enforcement and remedies. Trade marks can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

- Injunctive relief (permanent or preliminary).
- Rendering of accounts.
- Damages.
- Destruction of infringing items.
- Recall of products.

Term of protection and renewability. A trade mark is protected for ten years from the date of the application, with unlimited extensions of ten years.

Community trade marks. In addition to national trade marks, Community trade marks (CTM) can also be enforced in Germany. A CTM is a trade mark that is valid across the EU, registered with the European Union Intellectual Property Office (EUIPO) (https://euipo.europa.eu/ohimportal/en) in accordance with the provisions of the CTM Regulations. The term of protection and renewability are similar to those for German trade marks.

Registered designs

Definition. Two-dimensional patterns and three-dimensional designs are aesthetic creations and can be protected under the Design Act (*Designgesetz, DesignG*) provided:

- They have individual character.
- The design is new.

The right holder is entitled to use, license or prevent others from using the registered design.

Registration and formal examination. A design must be registered at the DPMA.

Enforcement and remedies. Design rights can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

- Injunctive relief (permanent or preliminary).
- Rendering of accounts.
- Damages.
- Destruction of infringing items.
- Recall of products.

Term of protection and renewability. Protection can be extended for up to a maximum of 25 years as of the date of application.

Registered Community Designs (RCD)

Definition and legal requirements. A RCD is the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation. A RCD is valid across the EU. RCDs are protected, provided:

- The design is new.
- The design has individual character

Registration and formal examination. A RCD must be registered with the EUIPO.

Enforcement and remedies. RCD are protected against similar designs even when the infringing design has been developed in good faith, that is, without knowledge of the existence of the earlier design.

A RCD can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

- Injunctive relief (permanent or preliminary).
- Rendering of accounts.
- Damages.
- Destruction of infringing items.
- Recall of products.

Term of protection and renewability. A RCD is initially valid for five years from the date of filing and can be renewed for consecutive terms of five years up to a maximum of 25 years.

Unregistered Community Designs (UCD)

Definition and legal requirements. Under the Community Design Regulation of 2002, registered and unregistered designs are protected, provided:

- They have individual character.

- The design is new.
- The design has been made publicly available.

Enforcement and remedies. UCD grant the right to prevent commercial use of a design only if that design is an intentional copy of the protected one, made in bad faith, that is, with knowledge of the existence of the earlier design.

UCD can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

- Injunctive relief (permanent or preliminary).
- Rendering of accounts.
- Damages.
- Destruction of infringing items.
- Recall of products.

Term of protection. Protection is granted for three years as of the date on which the design is first made publicly available. This period is not renewable.

Copyright

Definition and legal requirements. The German Copyright Act (*Urheberrechtsgesetz, UrhG*) protects a creative work as an immaterial asset, independent of its embodiment. The work must be a personal, intellectual creation by the author and can be literary, scientific, artistic, and so on. The right holder is entitled to use, license or prevent others from using the copyrighted work.

Protection. Copyright protection subsists automatically, without any registration requirements.

Enforcement and remedies. Copyrights can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

- Injunctive relief (permanent or preliminary).
- Rendering of accounts.
- Damages.
- Destruction of infringing items.
- Recall of products.

Term of protection and renewability. Copyright lasts for 70 years after the death of the creator.

Confidential information

Definition, legal requirements and protection. Industrial espionage and breach of confidentiality obligations by an employee can be punished by measures of civil and criminal law

under the Trade Secret Protection Act (*Gesetz zum Schutz von Geschäftsgeheimnissen*) implementing Directive 2016/943/EU on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure (Trade Secrets Directive) into German law until 9 June 2018.

There is no protection for confidential information as such, even if the document concerned is labelled confidential. Confidentiality must be ensured by contractual means (non-disclosure agreements).

Term of protection. Protection of confidential information ends in any of the following circumstances:

- Termination of the agreed contractual provision.
- When protected information is disclosed by another source.
- When the need of, or interest in, maintaining confidentiality no longer exists for other reasons.

Marketing agreements

29. Are marketing agreements regulated?

Agency

Agency arrangements are governed by the Commercial Code (*Handelsgesetzbuch, HGB*), which implements Directive 86/653/EEC on self-employed commercial agents. The Code contains a number of mandatory provisions to protect commercial agents.

These mandatory provisions cover minimum notice periods for indefinite-term agency contracts. The minimum notice periods may vary from one to a maximum of six months depending on the duration of the agency contract.

Also, the commercial agent is entitled to commission as soon and in so far as the customer of the commercial agent's principal has completed the transaction.

Mandatory provisions also exist on the validity of post-termination restrictions and an indemnity claim accruing to the agent. The latter is limited to the average of the annual commission payments received by the commercial agent during the last five years of the agreement. If the commercial agent is acting in the European Economic Area (EEA), the indemnity claim cannot be excluded, not even through choice of law or jurisdiction or a combination of both.

Distribution

Under German law there are no provisions specifically regulating distribution agreements. The distributor is usually integrated into the supplier's sales organisation and is therefore to a certain extent comparable to a commercial agent. According to case law, some of the provisions in the Commercial Code for commercial agents apply analogously to distribution agree-

ments. This applies especially to any indemnity claim after termination of the distribution agreement, if the distributor is integrated into the sales organisation of the supplier in a manner comparable to a commercial agent, and if the distributor is under the (also indirect) contractual obligation to provide customer data to the supplier to such an extent that the supplier may immediately and automatically use the advantages of the customer data obligation to provide customer data to the supplier on termination of the distribution agreement.

Distribution agreements are also subject to the Act Against Restraints on Competition, which has been largely harmonised with EU competition law, and which for example, restricts arrangements regarding fixed sale prices or arrangements restraining the sale to customer groups or into territories.

German law on standard business terms and agreements is more strictly regulated than often required by EU law and also applies (in principle) to business relationships between professionals. Therefore, irrespective of a distributor's integration into a supplier's sales organisation, there are restrictions on contractual freedom which can be surprising from the perspective of other jurisdictions. Detailed legal advice is usually necessary where form agreements are used that are intended to govern, for example, the long-term supply of goods. This is the case even if the agreement is intended to be negotiated in detail by the parties, since the requirements set by German case law with regard to such negotiations are onerous and, arguably, unclear.

Franchising

There is no specific legislation governing franchising in Germany. However, depending on the design of the franchise, some provisions of the Commercial Code for commercial agents (for example, termination and indemnity claims) may also apply analogously to franchise agreements. A large number of court rulings provide information on contractual practices. Before a franchise agreement is concluded, the franchisor is especially obligated to give the potential franchisee accurate information, including experiences gained from its existing franchise system, enabling the franchisee to analyse the risks and potential rewards of entering into the franchise. Failure to provide correct information may result in a claim for damages accruing to the franchisee.

The existing court rulings also show that the requirements for valid termination of a franchise for good cause are extremely onerous, especially if the franchise agreement involved considerable investments. Like distribution agreements, franchise agreements are governed by the Act Against Restraints of Competition and EU competition law, with the exceptions resulting from the *Pronuptia* ruling of the European Court of Justice (ECJ).

E-commerce

30. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)?

While various EU directives and regulations have resulted in a degree of harmonisation of e-commerce law at European level, German legislators have taken further steps to strengthen the position of consumers and to protect their interests. The three most relevant statutes on e-commerce are as follows:

The Civil Code contains provisions on distance selling. Enterprises using the internet to sell goods or services online have special information duties, and goods purchased electronically can be returned within 14 days without cause by private customers. There are detailed rules on whether the use of e-mail or electronic signature is sufficient to satisfy certain formalities. Although the legal framework exists, electronic signatures are not widely accepted in Germany.

The Telemedia Act (*Telemediengesetz, TMG*) covers the main legal aspects of information services, in particular electronic commerce. Among other things, it regulates e-commerce and other online service providers' information duties. There are also rules for limiting provider liability, for example for user-generated content. Similarly, the Act contains the most relevant regulations regarding data protection on websites, including online stores and social media platforms.

The Trust Services Act (*Vertrauensdienstegesetz, VDG*) serves as a complement and specification for Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation) and, together with the eIDAS Regulation provides for the technical and legal framework for electronical identification schemes and trust services, including electronic signatures, as well as the relevant certification of services and procedures.

Advertising

31. Outline the regulation of advertising in your jurisdiction.

There is no single unified regulation on advertising in Germany. Instead, regulations are spread over numerous statutes.

Regulations governing advertising activities are set out in the Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb, UWG*) that prohibits unfair business practices which are likely to have a noticeable adverse effect on the interests of competitors, consumers or other market participants. The UWG contains examples of unfair business practices (sections 3 to 7), which includes:

- Encroaching on the consumer's freedom of choice through undue influence.

- Surreptitious advertising.
- Discrediting goods and services provided by competitors.

In relation to the UWG:

- Section 3(3) refers to a blacklist of 30 business practices which are considered unfair and detrimental on their own.
- Section 3 a) prohibits the breach of any laws which regulate market behaviour, including regulatory provisions on product safety.
- Section 4 prohibits (among other things) the discrediting of goods and services provided by competitors as well as the imitation of competitors' products.
- Section 4 a) prohibits aggressive commercial practices against consumers.
- Section 5 and 5 a) prohibit misleading advertising.
- Section 6 provides for certain restrictions on comparative advertising.
- Section 7 provides for restrictions on unsolicited advertising.

Advertising is also regulated in sector-specific statutes. The most important regulations governing advertising activities are the:

- Healthcare Sector Advertising Act (*Gesetz über die Werbung auf dem Gebiet des Heilwesens, HWG*) and the Advertising Guidelines enacted by the respective State Pharmacy Chamber.
- Food and Feed Code (*Lebensmittel, Bedarfsgegenstände und Futtermittelgesetzbuch, LFBG*) which prohibits disease-related advertising claims.
- Price Indication Act (*Preisangabenverordnung, PAngV*) which sets out transparency requirements regarding price indications.
- Regulation (EC) 1924/2006 on nutrition and health claims made on foods (Nutrition and Health Claims Regulation).
- Broadcasting and Telemedia Treaty (*Rundfunkstaatsvertrag, RStV*) entered into between the federal states, which sets out regulations on advertisements for public and commercial broadcasting (among other things).
- Advertising Guidelines of the State Media Authorities, which further clarify the provisions of the Broadcasting and Telemedia Treaty governing sponsorship and advertising opportunities for commercial broadcasters.
- State Treaty on Gambling (*Glücksspielstaatsvertrag, GlüStV*) which sets out regulations on advertisements for public gambling.
- Youth Protection in the Media Treaty (*Jugendmedienschutzstaatsvertrag, JMStV*)

Advertising is also indirectly regulated by data protection regulations, if personal data is used for advertising purposes.

Data protection

32. Are there specific statutory data protection laws? If not, are there laws providing equivalent protection?

Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR)) largely harmonises data protection law at EU level. The GDPR became directly applicable on 25 May 2018 and does not require transposition into member state law (unlike the prior EU data protection directive).

Although directly applicable in all EU member states, the GDPR does not provide for full harmonisation: it leaves room for national laws to some extent in some areas (for example, for data protection relating to employees or the processing of health data). Therefore, businesses will have to assess on a case-by-case basis whether the GDPR and/or specific national laws (on federal or state level) need to be met when doing business in Germany. While at least the major German data protection laws have already been adapted to the GDPR, there still remains some legal uncertainty regarding the application of national data protection law in the light of the GDPR. The main statutes are:

- GDPR.
- Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*) and several other federal Acts, including the Social Security Code (*Sozialgesetzbuch, SGB*; stipulating, *inter alia*, a limitation of outsourcing to non-EU IT providers) or the Telecommunications Act (*Telekommunikationsgesetz, TKG*).
- Various general state acts (*Landesdatenschutzgesetze*) and state-level privacy laws for certain industries (for example, state hospital laws or state hospital data protection laws, such as the Bavarian hospital law (*Bayerisches Krankenhausgesetz, BayKrG*), which imposes limitations on hospitals on outsourcing the processing of patient data).

As a general rule, any processing of personal data is only permitted if either a statutory justification exists, or the consent of the data subject has been granted. The grant of consent must be clear and fairly detailed and based on the free decision of the data subject. Specific processing situations (for example, transfers of personal data outside the EU, or processing health or other sensitive data) may be subject to further restrictions.

As data protection law is relevant whenever personal data is concerned, it has to be observed throughout all industries and in various contexts, and plays a major role in legal compliance. Therefore, it includes but is not limited to IT outsourcing, e-commerce, online social communities and direct marketing. Also, the transfer of personal data within international groups of companies has become a major challenge for corporate compliance. With considerable accountability and documentation obligations as well as potential administrative fines of up to EUR20 million or up to 4% of the total worldwide annual turnover of the preceding fi-

nancial year, whichever is higher, data protection compliance needs to be a core element and requires early top management attention when planning to expand a business into Germany.

The applicability of the GDPR does not necessarily require any form of establishment in Germany or the EU. With its extraterritorial reach, the GDPR also applies in case non-EU businesses offer goods or services to data subjects located in the EU, or monitor the behaviour of data subjects located in the EU.

Product liability

33. How is product liability and product safety regulated?

Civil liability for defective products in Germany is, in principle, fault-based and can result from a breach of contract, a tort, or a breach of statutory safety provisions. However, fault is generally presumed if a defect is proven and the burden of proof lies with the manufacturer to rebut this presumption. As an exception, strict liability is provided for in the Product Liability Act (*Produkthaftungsgesetz, ProdHaftG*), which implements Directive 85/374/EEC on liability for defective products (1985 Product Liability Directive).

A seller (who is not necessarily the manufacturer) will be liable to the buyer for subsequent performance (remediation or subsequent delivery) regardless of fault if the product is defective, lacks the agreed qualities, or does not display the qualities usually expected of such a product within the warranty period (generally two years; five years for building materials which have caused the defectiveness of a building). However, as a rule, a seller who is not the manufacturer will not be liable for damages caused by a product defect since the element of fault is missing. Furthermore, any damage claim against the seller must also be brought within the warranty period.

Non-contractual liability of the manufacturer of a product may arise out of the improper design or manufacture of the product, the provision of incomplete or incorrect instructions as to use and insufficient product monitoring. Claims for damages in this regard become statute-barred within three years after the end of the year in which the injured obtains knowledge (or should have obtained knowledge without showing gross negligence) of the damage, the circumstances giving rise to a claim, and the identity of the debtor. Notwithstanding knowledge, in case of non-bodily injury a claim for damages will become statute-barred ten years after it arose and in any event a maximum limitation period of 30 years after the date when the breach of duty occurred applies.

A party that purports to be the manufacturer of a product, in particular by using its brand on the product, is also deemed to be the manufacturer under the Product Liability Act. The same applies to an importer to the EEA. Compensation for personal injury and material damage caused by a defective product, but not the cost of repair to the product itself, can be claimed in tort. If safety risks of a product are discovered, there is an obligation on the manufacturer to at least warn the product user of such risks. A warning is deemed to be sufficient if it can be expected that the product user will observe it. This is particularly assumed in the case of non-consumers. As a rule, the manufacturer does not have to bear any costs of reme-

diating measures. If issuing such a warning is deemed to be insufficient (which is particularly likely in the case of dangerous consumer products) an obligation to recall the product may arise.

Individuals (for example, members of a board of directors or responsible quality engineers) can be personally liable under both tort and criminal law if their individual responsibility for the defect and damage can be established, particularly in circumstances where personal injury or death have occurred as a result of improper product manufacturing or insufficient monitoring of product safety. Public authorities of the German federal states are responsible for monitoring the safety of products and equipment and can check their safety and compliance with harmonised product standards by obtaining samples of them as provided for under the Product Safety Act (*Produktsicherheitsgesetz, ProdSG*) and other product-specific legislation. The market surveillance authorities are entitled to order the stop of the sale of defective products or equipment or even to order a recall if it is deemed that the products pose a serious risk. The manufacturer, importer or seller who identifies a product safety risk must inform the competent market surveillance authority under the applicable EU directives and regulations.

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Noerr stands for excellence and an entrepreneurial approach. With highly experienced teams of strong characters, Noerr devises and implements solutions for the most complex and sophisticated legal challenges. United by a set of shared values, the firm's 500+ professionals are driven by one goal: our client's success. Listed groups and multinational companies, large and medium-sized family businesses as well as financial institutions and international investors all call on the firm.

Entrepreneurial thinking

Noerr's advisors make their clients' challenges their own and are always thinking one step ahead. In doing so, they assume responsibility and are at liberty to make their own decisions. The firm is committed to always going the extra mile for its clients and to resolving complex matters with the perfect mix of experience, excellence and sound judgement.

Innovative solutions

In complex and dynamic markets new approaches are regularly required – and delivered by experts who bring both the know-how and the necessary passion. This is precisely what Noerr excels at: implementing integrated and innovative solutions in the most efficient way.

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As one of the top European law firms, Noerr is also internationally renowned. With offices in eleven countries and a global network of top-ranked "best friends" law firms, Noerr is able to offer its clients truly cross-border advice. In addition, Noerr is the exclusive member firm in Germany for Lex Mundi, the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.

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