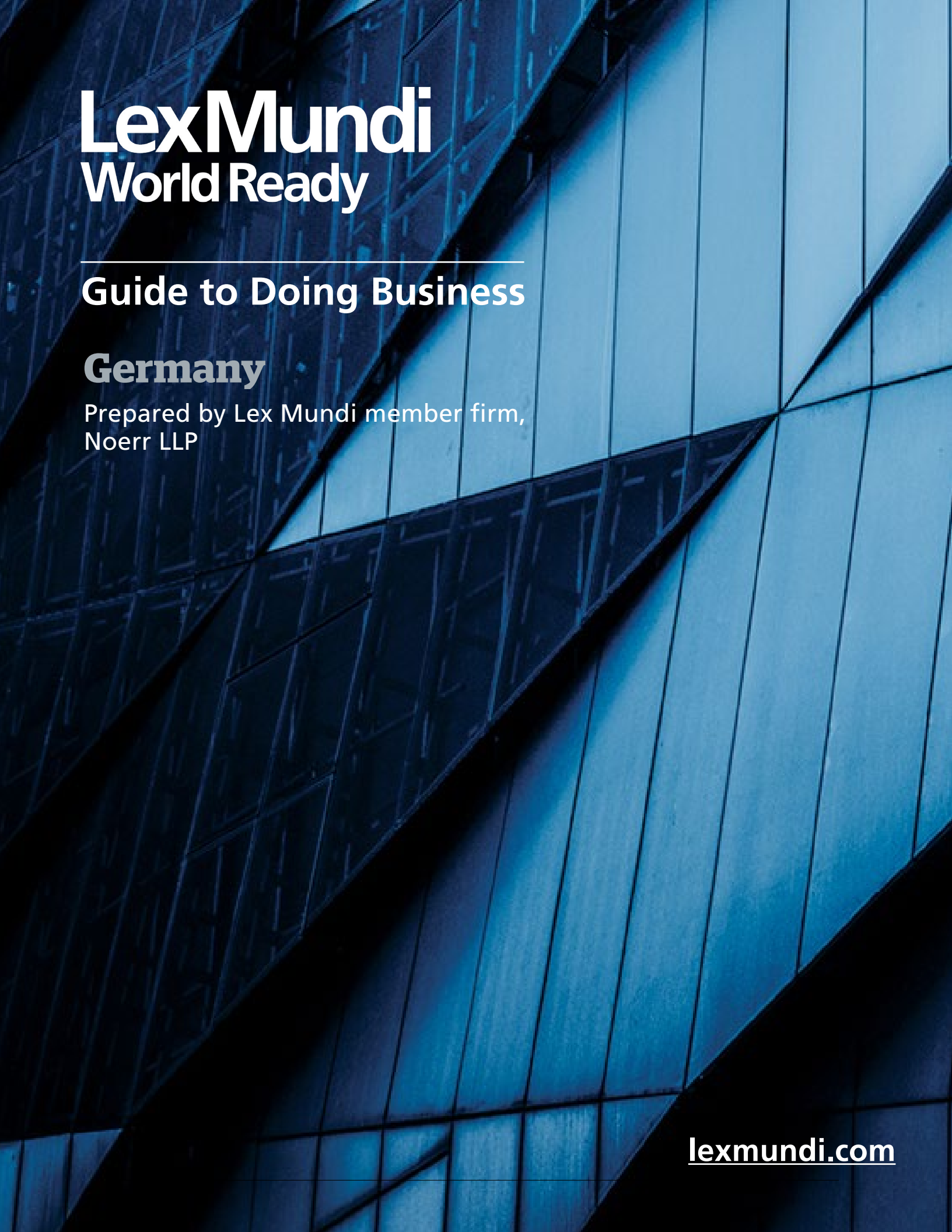

Lex Mundi World Ready

Guide to Doing Business

Germany

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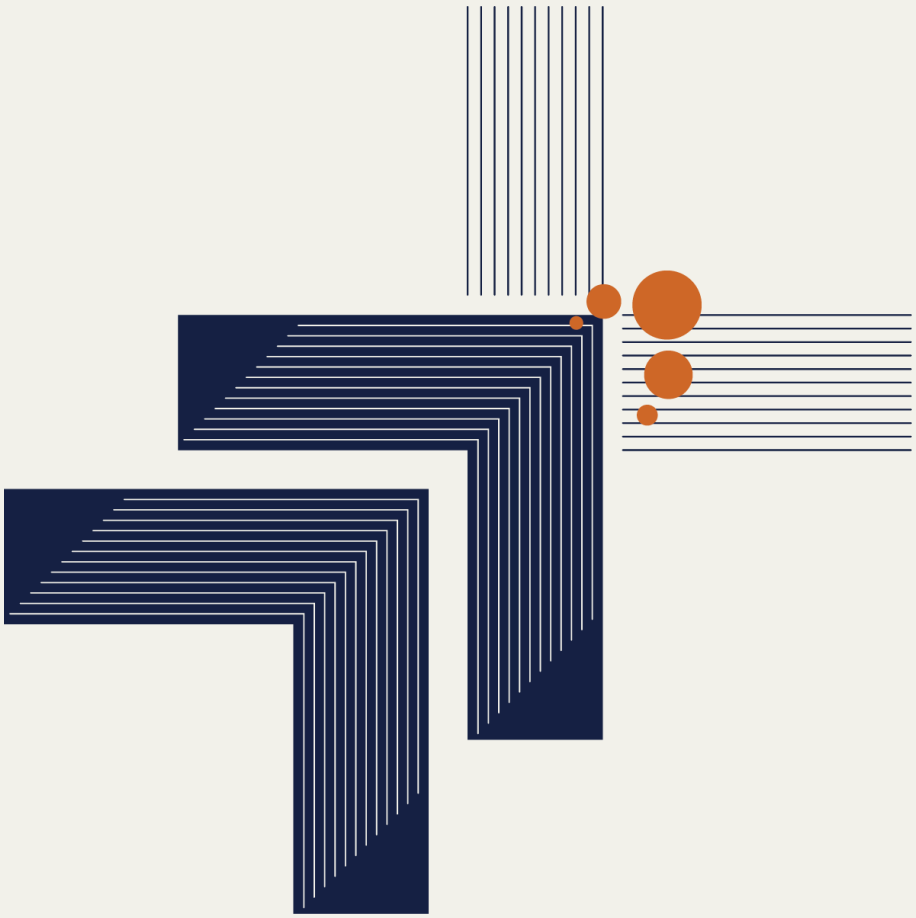

Doing business in Germany

Contents

Overview

A Q&A guide to doing business in Germany.

This Q&A give 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, trademarks, registered and unregistered designs.

1. What is the general business, economic and cultural climate in your jurisdiction?

Economy and dominant industries

In terms of GDP, Germany's economy is the largest in Europe and the fourth largest in the world. Important economic sectors are services (70.4%), industry (22.9%) and construction (6%). The automotive, commercial vehicle, electrical engineering, mechanical engineering and chemical industries are considered to be the most competitive German industry sectors worldwide. Business software and the insurance industry (especially reinsurance) are also considered to be internationally significant.

Population and language

Approximately 83.1 million people live in Germany (as of 30 May 2020). The main language used is German. Where European law is applicable, petitions and documents may be filed in court in any official or court language of any EU member country.

Business culture

In professional life in Germany, it is expected to attend meetings well prepared. Discussions are businesslike, and small talk is brief. German companies are less hierarchical than in many other countries. Supervisors delegate responsibility for tasks and projects to their employees. Work and private life are separate.

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

Key business and economic events

Germany is the world's leading location for trade fairs with an international focus. Five of the ten largest trade fair companies in the world come from Germany. The largest trade fairs are the IAA, the CeBIT and the Hannover Messe.

Political events

After the Bundestag elections in September 2021, there was a change of government: Under the leadership of Chancellor Olaf Scholz (SPD), a coalition of Social Democrats, Greens and Liberals formed for the first time in December 2021. This ended the era of Angela Merkel (CDU), who had governed the country for 16 years with various coalitions. Major changes in economic politics are to be expected.

Legal system

3. What is the general legal system in your jurisdiction?

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

4. Are there any restrictions on foreign investment, ownership or control?

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

Investors from outside the EU who acquire a certain amount of the shares of voting rights in a German enterprise, irrespective of its business, can be subject to examination by the Ministry (without necessarily being required to make a notification to it). The applicable threshold depends on the activities of the German enterprise. If this is active in certain critical infrastructures, in the development of software for critical infrastructures, in the cloud computing services, the media or the telecommunication sector or in the development or production of certain dual use products, the threshold is 10%. For target companies active in the health and the emerging technologies (autonomous driving, artificial intelligence, robotics, semiconductors, specific military goods) sector, the threshold is 20%. 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 also includes third-party rights where either

- the investor holds at least 10% or 20% of the voting rights in the third party; or
- the investor has concluded an agreement on the joint exercise of voting rights with the third party.

Deviating thresholds apply for the acquisition of additional voting rights in case the acquirer has purchased voting rights before.

Additionally, it is sufficient for the acquirer to acquire a voting share below the threshold level under certain circumstances.

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 law comprises 26 further specific case groups. Companies covered by these case groups are considered “critical” and their acquisition must also be notified to the Ministry. These case groups cover companies for which the aforementioned thresholds apply, that is companies developing software for critical infrastructures, providing cloud computing services, developing and producing certain dual use products or that are active in the media, the telecommunication, the health or the emerging technologies (autonomous driving, artificial intelligence, robotics, semi-conductors, specific military goods) sectors.

If the investment falls within the scope of the mandatory notification, the law prohibits the closing of the transaction for the duration of the mandatory investment screening procedure. If the transaction is closed without the Ministry’s approval, the penalties are severe: imprisonment for up to five years or a fine.

If the Ministry concludes that the acquisition constitutes a sufficiently serious interference to public order or security, it can prohibit or restrict the investment within five years after conclusion of the acquisition contract. However, if the Ministry obtains 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. Within a preliminary examination phase of two months, the Ministry has to decide whether to issue the clearance certificate applied for or to open a formal investigation. The formal investigation may take up to four months. The Ministry may extend this four month period by three months if the case at hand is legally or factually particularly complicated. Further, the four month period is suspended if and as long as the Ministry negotiates with the investor about a mitigation agreement.

Special rules apply in the 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 I, section A of the German Export Control List (Annex AL, Ausfuhrliste; companies are also covered in case they can actually dispose the aforementioned goods)
- Goods for defence purposes covered by a patent or a utility model as classified in accordance with the Patent Act or the Utility Model Act
- Certain IT-security products
- Certain critical defence facilities

The Ministry can review and prohibit or restrict these types of transactions. 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.

5. Are there any restrictions or prohibitions on doing business with certain countries, jurisdictions, entities, organisations or individuals?

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 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.

6. Are there any exchange control or currency regulations or any registration requirements under anti-money laundering laws?

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 5).

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 EUR 12,500 (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 EUR 5 m per month. Also, there is a reporting obligation for claims against or liabilities to non-residents arising under derivative financial instruments and exceeding EUR 500 m 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.

7. What grants or incentives are available to investors?

Investment incentives are provided by the federal German Government, the German federal states and the EU. The incentives include, for example, cash incentives, interest-reduced loans, public guarantees, labour-related incentives and research and development (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, www.kfw.de), the nationally operating development bank of Germany owned by the Federal Republic of Germany 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

8. What are the most common forms of business vehicles 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. This is mainly because the corporate governance of a GmbH is easy 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). However, such business vehicles have a rather complex corporate governance structure and some of them expose their members to unlimited liability.

Foreign companies organised under the laws of EU member states are not uncommon in Germany. This particularly relates to a Dutch limited liability company (naamloze vennootschap, NV) or a Dutch private company with limited liability (besloten vennootschap met beperkte aansprakelijkheid, BV). Legal frameworks from at least two EU member states apply to such business vehicles, so their governance regime is more complex.

9. What are the main formation, registration and reporting requirements for the most common corporate business vehicle used by foreign companies in your jurisdiction?

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 registration process usually takes a couple of weeks to be completed and requires the involvement of a German notary. 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

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. The German Federal Gazette is an online database. Costs for filings are low. Depending on the size of the GmbH (determined based on its total assets, sales revenues and number of employees), reporting requirements vary. 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 EUR 25,000.

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 result from mandatory obligations. An AG is, for example, obliged to report the reaching of certain shareholding thresholds in a GmbH. A violation of this obligation means 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.

10. 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

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 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 must be individuals. The appointment of a legal entity as a managing director is not possible. The managing directors 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.

Environment

11. What are the main environmental regulations and considerations that a business must take into account when setting up and doing business in your jurisdiction?

Environmental law comprises all norms designed to protect the environment. The protective laws related to installations, environmental media and substances (pollution control law, water law, soil protection law, waste law, chemicals law) make up the core environmental laws. The applicable law will depend on the activity carried out by the respective company.

There is still no unified environmental code, despite being in the planning stages for years. Instead, statutory regulations are spread over numerous statutes, including the:

- Federal Emission Control Act (Bundesimmissionsschutzgesetz, BImSchG)
- Federal Water Act (Wasserhaushaltsgesetz, WHG)

- Federal Nature Conservation Act (Bundesnaturschutzgesetz, BNatschG)
- Federal Soil Protection Act (Bundesbodenschutzgesetz, BBodSchG)
- Environmental Impact Assessment Act (Umweltverträglichkeitsprüfungsgesetz, UVPG)
- Closed Substance Cycle and Waste Management Act (Kreislaufwirtschaftsgesetz, KrWG)

Federal law is often supplemented by state law. In addition, European environmental law has become very important in recent years. Numerous EU directives and regulations have far-reaching effects on national environmental legislation. This is particularly evident in the field of climate change law. Notably, the Greenhouse Gas Emissions Trading Act (Treibhausgas-Emissionshandelsgesetz, TEHG) may require companies to purchase CO_2 certificates.

The company and/or its management are potentially liable for environmental damages under the Criminal Code (Strafgesetzbuch, StGB). This includes administrative offences (Ordnungswidrigkeiten) under the Environmental Liability Act (Umwelthaftungsgesetz) and the Environmental Damages Act (Umweltschadensgesetz).

Employment

Laws, contracts and permits

12. 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 co-determination 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 EUR 9.60 per hour, which will increase from 1 January 2022 to EUR 9.82 and from 1 July 2022 to EUR 10,45). 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 for up to 18 consecutive months in each individual case only. 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 aforementioned statutes 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

13. Is a written contract of employment required?

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).

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

In principle, foreign employees require a residency permit, including a work permit. Based on the Skilled Employee Immigration Act (Fachkräfteeinwanderungsgesetz) which entered into force on 1 March 2020, foreign skilled 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 (although for certain skilled employees there is the possibility of an accelerated procedure). A small fee of approximately EUR 100 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 nationals with an unrestricted residency permit (no further residency permit is required)
- British nationals who already lived in Germany before 31 December 2020 may continue to work without any temporal limitation without a work permit being required (British nationals moving to Germany after 31 December 2020 are treated as third-country nationals)

From 1 March 2020, foreign employees can 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 must 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

15. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as changes in control, 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) must be established. The economic committee has certain additional information rights in relation to economic matters (for example, in case of a direct change of control, if the company does not have an economic committee, an existing works council would need to be informed instead). 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 workforce 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. However, any related restructuring of the business may be subject to co-determination (see above).

16. How is the termination of individual's employment 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)
- Certain kinds 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 service 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 is it 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). However, in practice the parties regularly conclude a settlement agreement during the court proceedings, whereby the employment is terminated against payment of a negotiated severance payment.

17. Are redundancies and mass termination regulated?

If an employment relationship is terminated owing to redundancy and the employees are protected under the Act on Protection against Dismissal (see question 16), 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 is to 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

18. In what circumstances is an employee taxed in your jurisdiction?

The concept of tax residence is recognised under German income tax law as follows:

- Employees whose domicile or usual place of abode is in Germany, are considered as tax residents and are taxed on their worldwide income.
- All other (non-tax resident) employees are only taxed on their German source income arising from their employment in Germany. However, most German double tax treaties provide that only the employee's home jurisdiction is eligible to tax the employee's German source employment income if all of the following prerequisites are fulfilled:
  - The presence in Germany does not exceed 183 days in any 12-month period (some treaties refer to the calendar year or tax year).
  - The 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 (foreign) employer.

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

Tax resident employees

Tax resident employees are subject to income tax on their worldwide income. The income tax rate ranges from 14% to 45% (for 2022) depending on the underlying taxable income (progressive income tax rate). There is a general tax-free amount of EUR 9,984 for individuals and EUR 19,968 for married couples (for 2022).

In addition to the income tax, a "solidarity surcharge" of 5.5% is levied as an ancillary surcharge. As from 2021 onwards, no solidarity surcharge is due if the annual income tax does not exceed EUR 16,956 for individuals and EUR 33,912 for married couples.

Depending on the individual situation, members of religious organisations are obliged to pay church tax in addition to their personal income tax.

In general, all employees must pay approximately 20% of their gross annual salary into social security contributions for the following schemes:

- Unemployment insurance
- Pension insurance
- Health insurance

- Long-term nursing care insurance

The social security contribution schemes are capped at specific thresholds, depending on the employee's gross annual salary:

- Unemployment insurance and pension insurance: EUR 84,600 in the western federal states, and EUR 81,000 in the eastern federal states
- Health insurance and long-term nursing care insurance: EUR 58,050

Non-tax resident employees

Non-tax residents are only taxed on their German source income. Apart from that, there is, in principle, no difference between tax resident and non-tax resident employees with respect to income taxes and social security contributions (see above, tax resident employees).

Employers

Employers must withhold wage taxes (as advanced withholding payments) for the employee's income tax, solidarity surcharge and church tax (if applicable) as well as for the social security contributions on behalf of their employees.

In addition to the employee's contributions, the employer must pay social security contributions of approximately another 20% (in 2022) of the employee's gross salary (capped at the same thresholds as the employee's contributions) (see above, tax resident employees).

Business vehicles

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

The concept of tax residence is recognised under German tax law for the taxation of business vehicles.

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. As a consequence of being tax resident, the corporation is generally subject to tax in Germany with its worldwide income (subject to limitations by virtue of double tax treaties).

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). A non-tax-resident business can also become subject to a limited tax liability from German source income in case no German permanent establishment exists, for example, in cases where income is generated through German situated real estate (either through rental income or capital gains).

21. What are the main taxes that potentially apply to a business vehicle subject to tax in your jurisdiction?

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%.

Corporate income tax

Corporations are subject to corporate income tax at a rate of 15% plus a solidarity surcharge of 5.5%. Quarterly advance payments are due on 10 March, 10 June, 10 September and 10 December.

Trade tax

In addition to income tax or corporate income tax, a municipal trade tax is levied. Trade tax rates regularly vary between 7% and 17.15% depending on the municipality where the taxpayer's business is located. Quarterly advance payments are due on 15 February, 15 May, 15 August and 15 November.

Value added tax (VAT)

VAT is generally levied on services and deliveries rendered by German entrepreneurs (regardless of their legal form). The standard German VAT rate is 19% (a reduced rate of 7% as well as VAT exemptions may apply in specific cases). Preliminary VAT returns are filed on a monthly or quarterly basis by the 10th day of the following month and combined in an annual VAT return.

The annual tax returns for income tax, corporate income tax, trade tax and VAT have to be filed until 31 July of the year which follows the respective tax year. A filing extension may apply in cases where the annual tax returns are prepared by a professional tax advisor. Any tax payments (other than prepayments) are generally due within one month after a tax assessment notice has been issued by the competent tax office.

Dividends, interest and IP royalties

22. 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.

Subject to compliance with the German Anti-Treaty/Directive Shopping Rules, withholding taxes can be further reduced by domestic law, Directive 2003/123/EC amending Directive 90/435/EEC on the taxation of parent companies and subsidiaries (Amended Parent-Subsidiary Directive) or a double tax treaty.

Dividends received

Dividends received by a corporation from a domestic or foreign corporation are generally 95% tax exempt (in case of a shareholding of at least 10% in the domestic or foreign corporation at the beginning of the assessment period).

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 the calendar year).

Individuals receiving dividends as a business income benefit from the partial-income exemption, that is, only 60% of the dividends are taxed. Dividends received by individuals as non-business income are, in principle, subject to a 25% withholding tax plus 5.5% solidarity surcharge and church tax (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 reductions under an applicable double tax 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 solidarity surcharge of 5.5% thereon.

Groups, affiliates and related parties

23. 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 interest income) is generally limited to 30% of the relevant taxable earnings before interest, taxes, depreciation and amortisation (EBITDA). However, the limitation on net interest deduction does not apply if any of the following exemptions apply:

- Where net interest expenses are less than EUR 3 m (de-minimis exemption)

- 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 equity 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 before the German Federal Constitutional Court in relation to the potential unconstitutionality of the interest barrier rule.

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

Substantial amendments to the currently applicable controlled foreign company rules came into force 1 January 2022 as a result of the implementation of the ATAD regime into German tax law. The new rules are briefly outlined hereunder.

Controlled foreign company rules may apply to a German tax resident if the following preconditions are fulfilled:

- A German tax resident controls a foreign company, that is, if more than half of the voting rights or more than half of the shares in the nominal capital of the foreign company are directly or indirectly attributable to the taxpayer, alone or together with his related parties.
- The income of the foreign company is regarded as passive income and is subject to a low-tax regime (that is, effectively taxed at a rate of 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.

25. Are there any transfer pricing rules?

Yes. Following the principles of the OECD guidelines and recommendations, transfer prices must be determined on an arm's-length basis from a German tax perspective. In general, the standard transfer pricing methods accepted under German tax law are the comparable uncontrolled price method, the resale price method and the cost-plus method. Specific documentation requirements must be fulfilled for cross-border transactions between affiliated companies (in particular as regards to the applied transfer prices, as well as a function-and-risk analysis), subject to certain business volume thresholds. Penalties may be levied in case of a failure to comply with the documentation requirements.

Custom duties

26. 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 (including the UK as of 1 January 2021) are subject to customs duties almost exclusively on an ad valorem basis.

Double tax treaties

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

Yes. Germany has a wide network of double tax treaties with about 100 countries including the US and all European countries.

Competition

28. 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. As there is no exemption for foreign companies doing business in Germany, the ARC is applicable to all foreign entities. 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 www.bundeskartellamt.de.

Restrictive agreements and practices

Section 1 of the 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 of the 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.

While restrictive agreements and practices are generally considered to be administrative offences, such conduct may also constitute a criminal offence according to new case law, in particular in the context of horizontal and vertical price agreements in public tenders (bid rigging) regularly violate sections 263 and 298 of the German Criminal Code.

Unilateral conduct

German competition law aims to outlaw unilateral 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
- Requesting payment or other business terms which differ from those which would very likely arise if effective competition existed
- Requesting 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 10th amendment to the ARC adapts the current law to progress and changes in respect of digitalisation. It entered into force on 19 January 2021.

The 10th amendment to the ARC transposed 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 10th amendment to the ARC, 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, with the introduction of section 19a of the ARC, the FCO gained a new and far-reaching tool to prohibit companies that are of "paramount cross-market significance for competition" from engaging in anti-competitive practices.

Under the new anti-abuse provision, the FCO can declare a paramount cross-market significance for competition, to then prohibit certain abusive conduct. The FCO initiated proceedings against all four GAFA companies (Google, Apple, Facebook (now Meta) and Amazon) already within five months after entry into force of the provision.

29. Are mergers and acquisitions subject to merger control?

The ARC 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 EUR 500 m.
- One participating undertaking had turnovers exceeding EUR 50 m in Germany.
- At least one other undertaking had turnovers exceeding EUR 17.5 m in Germany.

In addition to the above thresholds, an alternative size-of-transaction threshold applies. This threshold was 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:

- Consideration for the acquisition exceeds EUR 400 m.

- Target company has substantial operations in Germany.

A concentration within the meaning of the ARC exists in the following four cases:

- Acquisition of all or of a substantial part of the assets
- Acquisition of direct or indirect control
- Acquisition of shares or voting right when they reach for the first time 25% or 50%
- Acquisition of material competitive influence

Under German law, acquisition of control is generally interpreted in the same way as under the Merger Regulation. As there is no exemption, the ARC is applicable to foreign entities doing business in Germany, including foreign to foreign transactions if they have a domestic effect in Germany (section 185, ARC). The FCO also published guidance on domestic effects in merger control which provides further orientation.

There are two major differences to the Merger Regulation:

- First, the acquisition of shares or voting rights of only 25% is always notifiable.
- Second, even acquisitions below 25% can be notifiable if a material competitive influence is acquired.

With the 10th amendment to the ARC coming into effect, three major changes for German merger control took place:

- The first domestic turnover threshold for the notification obligation was increased from EUR 25 m to EUR 50 m, while the second domestic turnover threshold was increased from EUR 5 m to EUR 17.5 m. The rationale behind this is to reduce the number of merger control notifications by around 30%, 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 was 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 FCO now has the power to obligate undertakings to notify each acquisition of a company whose turnover exceeded EUR 2 m within the past financial year. As a prerequisite for this, there must 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 so called “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. With the 10th amendment to the ARC, the de minimis threshold was raised from EUR 15 m to EUR 20 m. However, this exception does

not apply in the context of the value-based threshold. Besides, there are industry exemptions for banks, financial institutions and insurance companies that may acquire the shares of a target (up to 100%) for the purpose of re-selling those shares, provided that the bank sells the shares within one year and does not exercise any voting rights.

Foreign-to-foreign acquisitions are subject to the merger control laws if the thresholds set out above are met. In this case, it is not really 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.

Anti-bribery and corruption

30. Are there any anti-bribery or corruption regulations affecting business in your jurisdiction?

The major provisions on combatting bribery and corruption are laid down in the Criminal Code (Strafgesetzbuch, StGB). Anti-bribery rules under German law relate to different functions of the recipient, public officials, employees or agents of private business, healthcare professionals, members of legislative assemblies or members of workers councils. In general, German law applies also to foreign bribery.

Unlike other countries, Germany does not have a centralised anti-corruption agency. Investigations are conducted by regular state prosecutors and police forces, with respect to tax fraud by the tax investigation service. However, state prosecutors and police have created specialised units or centralised investigations. State prosecutors and tax investigators are obliged to share information on suspicion of bribery.

Under current German legislation, only individuals can be held criminally liable.

However, under the current legal situation, corporations can be subject to regulatory investigations and sanctions. Those fines that may be imposed on corporations can be quite severe. The statutory maximum of these fines is EUR 10 m. Any proceeds obtained by the company through bribery will be taken into account when calculating the regulatory fine. If the profit generated by the offence is higher, the fine may exceed this maximum up to the actual earnings that benefitted the entity. Such corporate fines may also be imposed on legal entities

if the senior management member failed to meet their supervisory obligations which were necessary to prevent bribery committed by employees or agents. According to recent federal jurisdiction, compliance measures may mitigate the fine.

German criminal law allows the forfeiture (disgorgement) of the proceeds the company obtained from the corruptive conduct. Expenses cannot be deducted, including the bribe itself. However, a regulatory fine cannot be imposed in addition to forfeiture. In addition, corporations are to be excluded from public tenders for a term of five years if they have been fined for bribery or if a member of the executive board has been convicted for bribery. However, it can be a defence for a company to demonstrate that it has gone through a successful "self-cleaning" process, meaning that its compliance efforts were strengthened, damages were compensated for and the company co-operated with the law enforcement agencies.

Bribery of public officials. German criminal law prohibits the offering, promising or granting of anything of material or immaterial value to public officials, if such official is requested to or rewarded for performing or omitting to perform any activity falling within their function of duties. This is irrespective of whether such duties are violated or not. The regular punishment is imprisonment for up to three years and/or a fine. Public officials are German civil servants, judges or soldiers, employees of governmental institutions or persons entrusted with public functions irrespective of the organisational form of the entity. Therefore, employees of state-owned or state-controlled companies may also qualify as public officials if they exert public powers. This may apply to companies in the utilities or transportation sector or to hospitals. Facilitation payments will also be regarded as illegal. This does also apply to bribery of public officials of the EU or their organisations.

If public officials are expected to violate their public duties or to exert discretionary powers, the punishment is imprisonment for up to five years and or a fine. In this case, bribery of public officials of a foreign state is also a criminal offence.

There is also a comparable criminal provision for bribing law makers and members of legislative assemblies. This will include the purchase of a vote in an election or ballot in parliament or offering, promising or granting of a benefit for any activity in connection with the mandate in parliament. Political donations are explicitly exempt, as are contributions admitted by applicable parliamentary rules. Usual lobbying activities, including reasonable hospitality are always admissible.

Bribery in business. Offering, promising or granting a benefit to an employee or an agent of a business (but not to consumers or business owners) in consideration for undue preferential treatment in the purchase of goods or services constitutes bribery in business. In particular, sales related to commissions paid to employees of customers are generally prohibited. However, contributions with the mere purpose of maintaining good business relations are admitted.

Healthcare sector. German criminal law also provides for specific offences of bribing of healthcare professionals. This means that offering, promising or granting a benefit to a healthcare professional for the prescription of drugs or medical devices, their purchase for immediate application or referrals for treatment or examination are not allowed. This strict rule

can affect co-operations between pharmaceutical companies and healthcare providers or bundling models in the distribution of pharmaceuticals or medical devices.

Rules for hospitality. Moderate hospitality is generally accepted. This applies to both public officials as well as employees or agents of a business. Particular care is required when public officials are concerned. Anti-corruption guidelines of public authorities, usually available relating to the internet, contain restrictive rules on the acceptance of gifts, hospitality or invitations to events. Although these anti-corruption guidelines only have effect in relation to governmental authorities and public officials, a violation of these rules may be seen as a red flag indicator for illegal purposes. In the private sector hospitality is treated more generously. Usual invitations for business lunches are admitted, and even other kinds of hospitality when related to business purposes. Hospitality of a purely private nature, in particular to cultural and sports or leisure activities are not generally prohibited but associated with certain risks, in particular if the monetary value is high.

Intellectual property

31. Outline the main IP rights that are recognised 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
- Be 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 (www.dpma.de) or the EPO (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.

European Union trade marks. In addition to national trade marks, European Union trade marks (EUTM) can also be enforced in Germany. An EUTM 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 EUTM 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 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 (RCDs)

Definition and legal requirements. 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. RCD is valid across the EU. RCDs are protected, provided:

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

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

Enforcement and remedies. RCDs 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.

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. 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 (UCDs)

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. UCDs 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.

UCDs 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 (Trade Secrets Directive) into German law.

There is no protection for confidential information as such, even if the document concerned is labelled confidential. Confidentiality must be ensured by appropriate confidentiality measures (that is, non-disclosure agreements, regulated access, including technical measures).

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

32. 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 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 agreements. 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

33. Are there any laws regulating e-commerce?

The most relevant law for e-commerce is the German Civil Code (Bürgerliches Gesetzbuch, BGB) which, among other things, governs the conclusion and performance of contracts.

The German Civil Code contains provisions on "distance contracts", for example, contracts which are concluded online, by e-mail or via an app. Especially with regard to the B2C space, these provisions provide that an e-commerce site must fulfil certain requirements when addressing consumers, such as:

- The e-commerce offering needs to display certain information in a transparent way, for example, information regarding properties of the goods sold, the terms of a subscription, the price, shipping costs and restrictions.
- In case of sales and several other contract types, consumers have a right of withdrawal. For online sales of goods, this means that a private consumer generally may return goods without cause within 14 days after receipt (certain exceptions apply, for example, for custom-made goods).
- Additional costs for payment methods can only be charged under certain circumstances, in particular if another commonly-used payment method is available free of charge.

The German Civil Code also sets standards for general terms and conditions. Especially with regards to terms and conditions used in B2C contracts, the German Civil Code sets rather strict standards. For example, clauses concerning the limitation of liability and dispute resolution procedures (like arbitration clauses), which are frequently used in other jurisdictions, should be checked for compliance with German law.

The Telemedia Act (Telemediengesetz, TMG) governs many aspects of information services. In particular, information services, such as e-commerce offerings, must provide certain information regarding the provider. E-mails with commercial content must be clearly

recognisable. The limitation of the provider liability for user-generated content set out in the Telemedia Act also is an important basis of the internet economy.

Electronic signatures are not yet widely used in Germany. However, the German Civil Code regulates which type of an electronic signature is sufficient to replace a conventional document form. The Trust Services Act (Vertrauensdienstegesetz, VDG) serves as a complement and specification for Regulation (EU) 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.

34. Are online platforms regulated in relation to their use for marketing/sales purposes?

The Online Platforms Regulation ((EU) 2019/1150) is directly applicable in Germany and governs online intermediation services (online marketplaces) and online search engines. For example, the general terms and conditions of online marketplaces for business users who are using the marketplace to offer services or goods must be transparent. They must set out the main parameters for rankings as well as the reasons for the relative importance of those main parameters as opposed to other parameters and must inform of any differentiated treatment (for example, for products which are offered by the provider of the online marketplace). An online marketplace must also provide for an internal system for handling the complaints of business users and offer mediation.

Data protection regulations must also be considered, particularly with regard to marketing/sales activities which use personal data.

Advertising

35. How is advertising regulated 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 especially 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, including:

- 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, including direct marketing via e-mail or SMS.
- 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.

36. How are sales promotions regulated in your jurisdiction?

Except for specifically regulated product/service sectors, for example, health-related products, sales promotions can be freely designed provided they are not misleading or aggressive. Price draws and competitions are generally permissible provided the respective terms and conditions for participation are clear and transparent. Outside of the health sector it is also permissible to provide free gifts in sales promotions.

Data protection

37. Are there specific 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 (among others, this applies to the data protection related provisions in the various state-level hospital laws (see below). The main statutes are as follows:

- GDPR
- Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) and several other federal Acts, including the Social Security Code (Sozialgesetzbuch, SGB, stipulating, among others, a limitation of outsourcing to non-EU IT providers for social security authorities) or, as of 1 December 2021, the Telecommunication Telemedia Data Protection Act (Telekommunikation-Telemedien-Datenschutz-Gesetz, TTDSG), regulating, among others, the telecommunications secrecy as well as the use of cookies and similar technologies on websites and apps.
- 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. German and EU data protection law does not differentiate between consumers and non-consumers so that the requirements on the processing of personal data generally apply to the processing of any data of natural persons by a company, irrespective of whether that natural person acts in a personal or business context.

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 EUR 20 m or up to 4% of the total worldwide annual turnover of the preceding financial 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

38. How are product liability and product safety regulated?

Civil liability for defective products in Germany based on the provisions of the Civil Code (Bürgerliches Gesetzbuch, BGB) 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 (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, or 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 remediating 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 Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products, 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.

Regulatory authorities

39. What are some of the key regulatory authorities relevant to doing business in your jurisdiction?

Competition

Main activities. The Bundeskartellamt (Federal Cartel Office) in Bonn is an independent competition authority whose task is to protect competition in Germany.

The main task of the Bundeskartellamt is to apply and enforce the Act against Restraints of Competition (GWB) with a view to protecting competition in Germany. Its tasks include:

- Implementing the ban on cartels
- Merger control
- Control of abusive practices of dominant or powerful companies
- Review of procedures for the award of public contracts by the Federation (since 1999)
- Consumer protection

(www.bundeskartellamt.de/)

Product Safety

Main activities. Market surveillance is, in principle, a task of the German federal states (Bundesländer). Some of them have concentrated competences for non-food consumer products in a central authority for the whole federal state, others have several authorities for the districts of the federal state. The main task of the market surveillance authorities is the collection and evaluation of information in order to identify defect focal points and product flows, and the establishment and implementation of market surveillance programmes on the basis of which the products are checked. The market surveillance authorities must take the necessary measures if they have reasonable grounds to suspect that a product does not comply with the statutory safety requirements.

(https://ec.europa.eu/docsroom/documents/45526, provides a list of national market surveillance authorities; indicating for the German federal states only the respective highest state authority)

Data protection

Main activities. There are several data protection authorities at the federal and state level which are responsible for monitoring the application of the GDPR and other data protection laws. Such authorities may act on their own initiative (for example, random checks at randomly selected companies) or following data subjects' complaints. They are also active in promoting public awareness on data protection issues as well as in providing advice, such as by publishing

general guidance. These authorities also have the power to enforce data protection law, for example, by carrying out investigations, issuing orders to amend/cease certain processing activities or by imposing fines (see question 37).

A list of all German data protection authorities is available at www.bfdi.bund.de/DE/Infothek/Anschriften_Links/anschriften_links-node.html (only available in German).

Other considerations

40. Is there anything else that is important relating to doing business in your jurisdiction?

Not applicable.

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