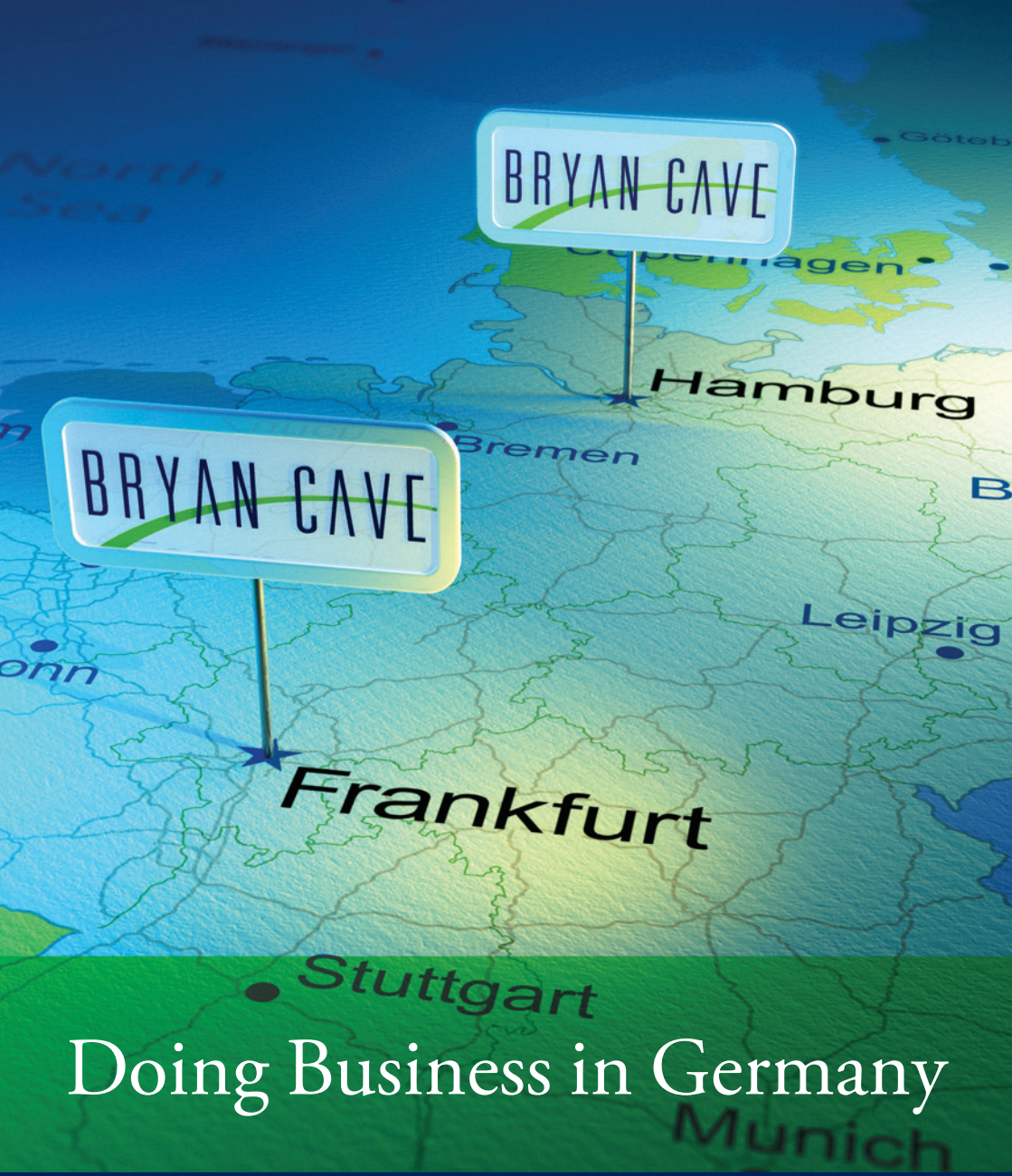

Doing Business in Germany

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Contents

Introduction

About this Guide

This guide provides a general overview of the law applicable to businesses operating in Germany and in particular, guidance on legal matters to any non-Germany entity wishing to do business in the UK.

The information contained in this guide is correct as of 1 February 2015. The information is general in nature and is intended to provide an overview of the relevant law and legal issues. It does not constitute legal advice with respect to any specific matter or set of facts. Professional advice should always be obtained before applying any information contained herein to particular facts and circumstances.

Whether you are trading in Germany for the first time, expanding your existing German business or seeking a trading relationship with an existing German business, Bryan Cave can advise you.

Contact Us

We welcome the opportunity to discuss any of the issues raised in this guide or any other questions you might have. If you would like to know more, please get in touch with your usual Bryan Cave contact or any of the Bryan Cave lawyers in Germany listed on the final pages of this guide.

About Bryan Cave LLP

Bryan Cave LLP (www.bryancave.com) has a diversified international legal practice. The firm represents a wide variety of business, financial, institutional and individual clients, including publicly held multinational corporations, large and mid-sized privately held companies, partnerships and emerging companies. Aided by extensive investments in technology, Bryan Cave's more than 1,000 lawyers across the US, the UK, Continental Europe and Asia serve clients' needs in the world's key business and financial markets.

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Germany

Germany is a federal, parliamentary democratic republic of sixteen states (*Bundesländer*). The capital and largest city is Berlin (3.5 million inhabitants). The second largest city is Hamburg (1.8 million inhabitants), one of the world's most important and heavily industrialized areas in Germany with one of the world's most thriving ports. Thereafter follows Munich (1.4 million inhabitants), Cologne (1 million inhabitants) and Frankfurt (700,000 inhabitants). Frankfurt is recognized as a principal centre for finance in continental Europe, home to one of the world's most important stock exchanges.

The Euro (€) is the official currency of the EU and is used in 19 of the 28 Member States including Germany.

Germany has a civil or statute law system that is based on Roman law with some references to Germanic law and with an overlay of certain EU legislation. Legislative power is divided between the federation and the state level. The Basic Law presumes that all legislative power remains at the state level unless otherwise designated by the Basic Law itself.

As explained below, some EU laws will be automatically applicable in any EU Member State. Other EU laws are required to be implemented into local law by the legislative authority in the EU Member State.

The European Union

The European Economic Community, subsequently known as the European Community (the "EC") and now known as the European Union (the "EU"), was established in 1957 by the Treaty of Rome. The Treaty of Rome, as amended and supplemented by subsequent treaties, is now known (subsequent to the Treaty of Lisbon 2009) as the Treaty on the Functioning of the European Union ("TFEU") and provides the organisational and functional details of the EU as well as most of the substantive provisions of EU primary law. There remains in effect the Treaty on European Union (the Maastricht Treaty), as amended and supplemented by subsequent Treaties, which essentially sets out the objectives and principles of the EU and provides for the Common Foreign and Security Policy.

The EU is now a union of 28 independent countries, each a "Member State". The European Economic Area (the "EEA") was established on 1 January 1994 among the Member States of the EU, Iceland, Lichtenstein and Norway. Membership of the EEA allows Iceland, Lichtenstein and Norway to participate in the European single market and the free movement of goods and services, subject to certain requirements. Switzerland is not a member of either the EU or the EEA.

The Euro (€) is currently the currency of 19 of the 28 Member States of the European Union.

The EU decision making process involves three main institutions:

- the European Parliament, which is directly elected by EU citizens;
- the Council of the European Union, which represents the individual Member States; and
- the European Commission, which is composed of 28 commissioners, each appointed for five years and representing each Member State.

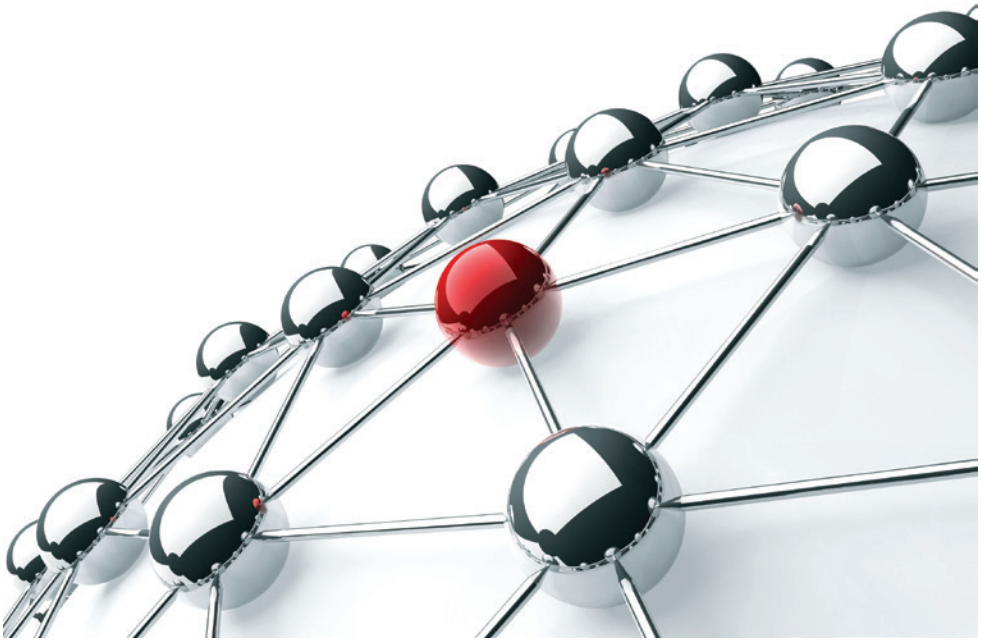
In principle, the Commission proposes new laws but the Parliament and Council adopt them. The Commission and the Member States then implement them. The Commission also has broad regulatory and administrative powers. The fourth institution, the Court of Justice, (which comprises the Court of Justice, the General Court and the Civil Service Tribunal) upholds the rule of European Law and the Court of Auditors checks the financing of EU activities. The Court;

- reviews the legality of the acts promulgated by the other EU institutions;
- ensures that each Member State complies with the obligations set out in the Treaties; and
- interprets EU law when requested by a national court of a Member State.

In addition to the Treaties, EU legislation consists of Regulations, Directives, Decisions and Recommendations/Opinions.

- A Regulation is a legislative act which is directly applicable in all Member States simultaneously (subject only to certain derogations sometimes granted to new Member States for a transitional period). No further action or legislation is required by the individual Member State, save in certain cases, for sanctions and penalties for non compliance.
- A Directive is a legislative act which requires Member States to achieve a particular result without dictating how they are to achieve that result. Each Member State implements the Directive through national legislation within a specified timetable. Whilst a Directive indicates the terms that should apply, the implementing national legislation may contain differences among Member States.
- A Decision applies only to the particular addressee of the decision (be it one or more Member States, companies or individuals), e.g. in competition law.
- A Recommendation or Opinion is a non-binding declaration.

Business Organisations



Business Organisations

German law offers a broad variety of legal forms for conducting a business. Individuals may start a business as a sole trader (*Einzelkaufmann*) or as a foreign entity via a German branch (*Zweigniederlassung*). If the investor would like to set up an independent German business vehicle, it can be differentiated between partnerships (*Personengesellschaften*) and corporations (*Kapitalgesellschaften*). A foreign investor should consider the extent to which he wishes to be liable to creditors. A corporation, as legal entity itself, is only liable to the extent of its capital contribution (e.g. €25,000 minimum registered share capital for a limited liability company (*GmbH*)). In a partnership, however, at least one partner is liable to an unlimited extent.

a) Sole Tradership (Einzelkaufmann)

This form of business organization is commonly used for small enterprises. The sole trader only has to register his business with the commercial register and the trade office (*Gewerbeamt*). Certain industries require further approvals and permissions (e.g. pharmacists). A sole trader is personally liable for all liabilities and debts deriving from the business. Profits are subject to German income tax.

b) Branch (Zweigniederlassung)

A branch has no separate legal entity status and is regarded as an integral part of the foreign company. Therefore, it may be suitable, in circumstances where a foreign entity is for example, uncertain about its initial commitment in Germany.

A prerequisite for a branch is its registration with the commercial register and the local trade office. Whereas the trade office only requires basic information such as branch name, its owner, representatives and the type of business, the application for registration with the commercial register is more complex: The application must include details of the respective foreign entity, such as legal form, place of incorporation, principal place of business, share capital and names of its officers and directors. The registration procedure can be very time consuming and may take up to a couple of weeks.

c) Corporations

German corporate law provides for the following three major forms of corporations:

- GmbH (*Gesellschaft mit beschränkter Haftung* – limited liability company)
- AG (*Aktiengesellschaft* – stock corporation)
- KGaA (*Kommanditgesellschaft auf Aktien* – partnership limited by shares)

Furthermore, an investor can also use the Societas Europaea (SE), a European company, as a business vehicle.

GmbH (Gesellschaft mit beschränkter Haftung)

The GmbH is the most commonly used corporate entity in Germany. It is suitable especially for closely held businesses with a stable shareholder structure. Therefore, it is the preferred form of the so-called German "*Mittelstand*", as well as for subsidiaries of foreign companies in Germany. The advantages of a GmbH, in particular, are as follows:

- Simple formation – a shelf company may be purchased within one or two days
- The articles of association can be easily adapted to the needs of the shareholders
- Liability protection of its shareholders
- Fewer legislative regulations as compared to an AG (*Aktiengesellschaft*)
- Shareholders can instruct the managing directors and can directly influence the management of the GmbH

Incorporation of a GmbH

A GmbH is formed by the founding shareholder(s) executing a deed of incorporation and articles of association before a German notary. Foreign individuals, partnerships or corporations may become a shareholder. After the notarization of the deed of incorporation and the articles of association, the company exists as "Company in Formation" (*Vorgesellschaft*) and may conduct business. However,

only upon the registration in the commercial register will the company become a separate legal entity as GmbH, i.e. all rights and obligations incurred prior to registration are assigned by law to the GmbH (and the personal liability of managing directors expires).

In order to avoid any delay in starting the business operations due to the registration requirements, investors usually acquire a shelf company from a service provider. The costs for such acquisition are generally around €5,000 including a fee for the service provider and notary fees. In addition, a minimum share capital of €25,000 has to be paid to the company's bank account, respectively, to the service provider. Due to a judgement of the German Federal Court of Justice (*Bundesgerichtshof*), the commencement of a shelf company's business is treated as a new incorporation of a GmbH. Therefore, the managing director(s) must disclose to the commercial register the startup and confirm that the registered share capital is still at their disposal.

As a general principle, the liability of the shareholders is limited to their capital contribution. Courts will not pierce the "corporate veil", unless for instance a shareholder intentionally abuses his controlling position to the disadvantage of the GmbH or its creditors.

Articles of Association

The articles of association can be kept rather short, only including the mandatory provisions regarding purpose, name of the company, registered office, duration, registered share capital, initial contributions of each shareholder, representation and management of the company. However, the articles may also be extensive and include, inter alia, several provisions regarding shareholders' rights and obligations and share transfer restrictions. A GmbH may be formed for any lawful purpose which has to be stated in the articles of association. A GmbH may also use any name including fictional names provided, however, that no risk exists of confusing the name of the entity with any other corporation within the same local area and that the name is not misleading.

German corporation law is federal law. Therefore, no differences exist if the corporation is registered in a particular state. However, from a tax perspective this may be different as trade tax rates are determined by municipalities and consequently may vary. The registered office of the corporation (*Satzungssitz*) must be within Germany. The place of management (*Verwaltungssitz*) may be outside of

Germany. From a tax perspective, a divergence between a German registered office and a non-German place of management may trigger detrimental consequences and create a double taxation risk.

Share Capital

The minimum share capital of a GmbH is €25,000 and can be divided into different nominal amounts of at least €1.00 per share. However, following recent changes in the German Act on Limited Liability Companies (GmbHG), a GmbH may also exist as so-called entrepreneurial company, "Unternehmergesellschaft (haftungsbeschränkt)" or "UG (haftungsbeschränkt)" with less than €25,000 as share capital. The minimum share capital of such entrepreneurial company is €1.00 and it is required by statutory law to pay ¼ of its annual profits into its capital reserves until the company has reached a share capital of at least €25,000.

Additional shares may be acquired through an ordinary capital increase, through a capital increase from authorized capital or if shares are acquired from another shareholder.

The GmbH is not required to issue share certificates or to maintain a share register. Instead, the ownership of the shares is documented in a shareholder list submitted to the commercial register. Only a shareholder who is registered on such shareholder list is considered a shareholder in relation to the GmbH. Therefore, after each share transfer an updated shareholder list must be submitted to the commercial register without undue delay.

Contribution and Maintenance of Capital

Contributions to the share capital may be made in cash or in kind. At least 50% of the share capital or €12,500 must be paid up in cash at the time of filing for registration of the GmbH in the commercial register. Contributions in kind must be submitted in full. Additionally, the articles of association must set forth the specific form of the contribution as well as the amount of the corresponding share capital. Furthermore, the shareholders must provide a valuation report of the contribution in kind. If the contribution in kind is not worth at least as much as the corresponding share capital, the shareholders must pay the difference in cash to the company.

A GmbH must not make any payments to its shareholders which would reduce the net assets of the corporation below the stated amount of its registered share capital. If payments are made to the shareholders violating the capital maintenance rules and such payment is not secured by an adequate refund claim of the GmbH, the respective shareholders are obliged to repay the received contributions. The managing directors, being responsible for the unlawful contributions, may also be held liable for any damages sustained by the company.

Transfer of Shares

A share transfer requires a notarized transfer deed. The articles of association may provide for restrictions on share transfers (e.g. consent of the other shareholders, pre-emption rights).

Shareholders

The shareholders of a GmbH are subject to various rights and duties. The most important rights are as follows:

- Voting rights
- The right to participate in the profits of the company
- Rights to any surplus upon liquidation
- The right to obtain information from the management

The shareholders pass their resolutions in shareholders' meetings or by circular resolutions. Such resolutions require a simple or bare majority, i.e. more than 50% of the votes cast, unless mandatory law or the articles of association require a greater majority or the consent of certain shareholders. For instance, an amendment of the articles of association requires a majority of 75% of the votes cast.

As a general principle, all shareholders of a GmbH must be treated equally. According to this principle, no shareholder may arbitrarily be treated unequally by the company or by any other shareholder without his/her consent.

The shareholders have a claim to the profits stated in the annual financial statements of the company in proportion to their shareholding, unless the articles of association provide otherwise. Shareholders have the right to inspect the books and records of the GmbH and to be informed by the managing director of the GmbH's affairs. However, such information must not be used for improper purposes, e.g. shared with a competitor. Each shareholder owes a duty of loyalty to the company as well as to the other shareholders.

Management and Representation

A GmbH is managed and legally represented by its managing directors (*Geschäftsführer*). There must be at least one managing director. A managing director does not need to be a shareholder or a German resident.

The managing director may act for and bind the GmbH towards third parties. Any restrictions on the authority of the managing director to bind the GmbH which are stated in the articles of association, in a shareholders' resolution or in the service agreement of the managing director (e.g. prior approval of the shareholders for certain actions) do not affect the managing director's ability to bind the GmbH. If the managing director breaches any of the aforementioned restriction, he may be liable for damages towards the GmbH.

If one managing director is appointed, he/she is the sole representative of the GmbH. If more than one managing director is appointed, they generally represent the company jointly. However, the shareholders may grant to one or several managing directors authority either (i) solely to represent the GmbH, or (ii) represent the GmbH jointly with one or more other managing directors or authorized officers (*Prokurist*). The power of representation of each managing director is registered with the commercial register and is binding in relation to third parties.

Managing directors must manage the business with the due care of a prudent business person. Additional specific obligations may be imposed by the articles of association or the service contract or in shareholders' resolutions. Further, the shareholders can give binding instructions which the managing directors must obey unconditionally unless the instructions are unlawful.

Supervisory Board

A GmbH may voluntarily establish a supervisory board consisting of non-executive members. However, depending on its amount of employees (at least 500 employees), a supervisory board is mandatory and 1/3 or even 1/2 of its member must be employee representatives.

Its main function is to supervise the management of the company and it may also be assigned the right of appointment and removal of the managing directors, adoption of the annual financial statements and calling of shareholders' meetings.

Accounting Obligations

According to the legal requirements imposed on an GmbH's accounting system, primarily pursuant to the German Commercial Code (*Handelsgesetzbuch*, HGB), GmbHG and tax laws, a GmbH must keep accounting records and prepare annual financial statements. In addition, medium-sized and large corporations must have their annual financial statements audited by a certified public accountant. The annual financial statements must be filed with the commercial register within twelve months following the end of each financial year.

Stock Corporation (AG)

The stock corporation (*Aktiengesellschaft* – AG) is the corporate form adopted by many of Germany's largest corporations. Also, some major publicly held US corporations use this form for their German subsidiaries such as Opel AG (German subsidiary of General Motors) and Ford AG.

Advantages/Disadvantages of an AG

The principal advantage of an AG is that its shares (unlike GmbH shares) may be transferred easily and that the AG can be listed on a stock exchange. Another important aspect is that management is not bound by shareholders' instructions. The management board is appointed by the mandatory supervisory board (as opposed to the appointment by the shareholders in a GmbH) and neither the supervisory board nor the shareholders may instruct the management board.

The disadvantage of an AG may be that it is subject to extensive legislative regulations. Most of these provisions are mandatory law and, therefore, the articles of association are less flexible compared to the articles of a GmbH.

Incorporation

An AG may be established by one or several shareholders. The formation procedures are similar to those of a GmbH. The articles of association have to be notarized and the founding shareholders subscribe to the initial shares. The founding shareholders then appoint the first supervisory board and the first auditor of the company. Such appointments must be notarized. The supervisory board appoints the first management board. Furthermore, the founding shareholders must prepare a written formation report.

The formation of the AG must be registered with the commercial register. All founding shareholders as well as the initial members of the management board and the supervisory board are required to sign the application for registration in front of a notary. Upon registration the AG exists as a separate legal entity. Persons acting on behalf of the AG prior to its registration are personally liable for any incurred debts.

After registration in the commercial register, only the AG is liable for its debts with its own assets, including its share capital whereas the liability of its shareholders is limited to their respective capital contribution.

Articles of Association

The minimum contents of the articles of association are specified in the German Stock Corporation Act (*Aktiengesetz*) and are as follows:

- Company's name and registered seat
- Object of the company
- Amount and division of the company's share capital
- Type of shares (bearer shares or registered shares)
- Number of the members of the management board or the rules for determining such number

Share Capital

The minimum share capital of an AG is €50,000. Shares may be issued either with par value (*Nennbetragsaktien*) of at least €1.00 per share or multiples thereof or without a par value (*Stückaktien*). Furthermore, share capital may be distinguished between bearer shares (i.e., shares where the name of the owner is not registered in the share register of the AG – these shares are most common) and registered shares (i.e., where the name of the owner has been registered in the AG's share register – these shares are rather rare). Shares may be issued as ordinary shares or as preferred shares. Preferred shares may be issued with or without voting rights. The holders of preferred shares are entitled to preferred dividends.

Contribution and Maintenance of Capital

Contributions to share capital may be made in cash or, if permitted by the articles of association, also in kind. As described before with a GmbH, the value of a non-cash contribution must be at least equal to the share capital to which it relates and certain procedures (formation report, audit of the formation report by an auditor, examination by the courts) must be followed to safeguard this principle.

If shares are issued for cash, at least 25% of the par value of each share (plus the full amount of any premium) must be paid prior to filing for registration of the AG with the commercial register. As with a GmbH, the provisions governing an AG are designed to ensure that the share capital is paid up and maintained. Contributions may not be repaid to shareholders unless a profit transfer or domination agreement is in place or the AG has a valid and substantial claim for consideration against the respective shareholder.

Transfer of Shares

Compared to a transfer of shares in a GmbH, the shares in an AG are easily transferable. A transfer of shares in an AG does not require the execution of a notarized transfer deed. However, the articles of association may contain restrictions on the transfer of shares.

Notification Requirements

Any direct or indirect shareholding in an unlisted AG exceeding 25% of the registered share capital must be notified by the relevant shareholder to the AG in writing. The same notification requirement applies if the shareholding exceeds 50% of the registered share capital or the voting rights. Without proper notification, the shareholder rights pertaining to such shares are suspended. If the shareholding falls below these threshold values, the same notification requirements apply.

Furthermore, in the case of a listed AG, the shareholders must notify any direct or indirect shareholding exceeding (or falling below) 5, 10, 25, 50 or 75% of the voting rights to the AG and the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*).

Management Board

The management board ("*Vorstand*") bears the sole responsibility for managing the AG. In contrary to a GmbH, neither the shareholders nor the supervisory board may instruct the management board regarding the management of the AG.

Shareholders may not direct the supervisory board as to whom should be appointed as a member of the management board. Members of the management board are appointed for a maximum term of five years which can be renewed for additional periods of up to five years each time. Once the members of the management board are appointed, they can only be removed for good cause by a resolution of the supervisory board.

The power of representation of the management board (individually, jointly, etc.) must be set forth in the articles of association. These may include limitations of their power of representation, for instance, that certain acts require the consent of the supervisory board or the shareholders in a general meeting. However, such limitations do not affect the validity of the actions of the management board towards third parties.

The members of the management board must apply the due care of a prudent and conscientious manager in managing the company. If they breach their duties, the members of the management board are jointly and severally liable for any damages sustained by the company. The burden of proof lies with the management who must prove that they complied with their duties. However, the so-called business judgement rule applies, i.e. members of the management board are not liable, if they could reasonably assume, based on appropriate information, that they were acting in the best interest of the company.

Supervisory Board

In contrast to the law governing the GmbH (GmbHG), the law pertaining to the AG (AktG) requires that every AG establishes a supervisory board ("*Aufsichtsrat*"). The board's primary functions are the appointment and dismissal of the board of management, the supervision of the management board, approval of the financial statements prepared by the executive board and approval of any special transactions enumerated in the articles of incorporation. Members of the supervisory board are appointed for a maximum term of five years.

The size of the supervisory board may vary between three and twenty-one members, depending on the size of the corporation. The minimum number of members is always three. The maximum size of the board depends on the nominal value of share capital of the company. For instance, if the value of share capital is €1.5 million or less, the law requires a board consisting of three but no more than nine members.

German law provides employees of larger corporations with the right to vote for positions on the supervisory board. The membership of employees on the supervisory board is generally dependent on the overall number of people employed by the corporation. Certain industries have special regulations governing employee participation.

The members of the supervisory board must apply the same due care as the members of the management board. In case of a breach of their duties, supervisory board members may be liable for any damages sustained by the company. In particular, they must not disclose any confidential information regarding the company and its affairs.

Stockholder Meeting

The general meeting of the stockholders (*Hauptversammlung*) must be held annually and within eight months after the end of the business year. The meeting must take place in Germany and generally at the place where the AG has its registered office. Additionally, extraordinary stockholder meetings can be called by the supervisory board or by stockholders holding at least 5% of the common stock.

The stockholders are responsible for the appointment and removal of their supervisory board representatives, the election of auditors, the formal approval of actions taken by the supervisory board and the management board during the preceding business year and decisions concerning the distribution of profits. The most important of the statutory powers that are the exclusive right of the stockholders are the rights to (i) amend the articles of incorporation, (ii) reduce or increase the stock capital, and (iii) liquidate the AG.

Accounting Obligations

According to the legal requirements imposed on an AG's accounting system, primarily pursuant to the German Commercial Code (*Handelsgesetzbuch*, HGB), AktG and tax laws, an AG must keep accounting records and prepare annual financial statements. In addition, medium-sized and large corporations must have their annual financial statements audited by a certified public accountant. In small stock corporations, the financial statements must be approved only by the supervisory board. The annual financial statements must be filed with the commercial register within twelve months following the end of each financial year.

Certain key characteristics of AG and GmbH are described in the following table:

	Aktiengesellschaft (AG)	Gesellschaft mit beschränkter Haftung (GmbH)
Incorporation and Registration Costs	Approx. €1,000 to €1,500.	Approx. €600 to €1,000.
Duration of Incorporation and Registration	2 to 8 weeks.	2 to 6 weeks.
Minimum Number of Shareholders	1	1
Formal Requirements of Incorporation	Notarised deed of incorporation and registration with commercial register.	Notarised deed of incorporation and registration with commercial register.
Minimum Share Capital	€50,000	€25,000
Capital Contribution (Cash)	25% of the registered share capital (minimum €12,500) plus full amount of any premium.	25% of the registered share capital (minimum €12,500).
Maintenance of Capital	Strict rules. In particular, no distribution of company's assets to shareholders (except for dividend payments out of distributable profits). Prohibition on financial assistance for acquisition of its own shares. In case of insolvency, shareholder loans are always subordinated. Under certain conditions, repayment of shareholder loans may be contested by the insolvency administrator.	No payments to shareholders which would reduce the company's assets below its registered share capital. In case of insolvency, shareholder loans are always subordinated. Under certain conditions, repayment of shareholder loans may be contested by the insolvency administrator.
Management	Management board and compulsory supervisory board with participation of employees: if more than 500 employees 1/3; if more than 2,000 employees ½ of the members of the supervisory board must be employees' representatives.	Minimum of 1 managing director. Supervisory board only required if more than 500 employees. Participation of employees: if more than 500 employees 1/3; if more than 2,000 employees ½ of the members of the supervisory board must be employees' representatives.

	Aktiengesellschaft (AG)	Gesellschaft mit beschränkter Haftung (GmbH)
Directors' Liability	The directors are liable in relation to the company in case of a breach of their managing duties.	The directors are liable in relation to the company in case of a breach of their managing duties.
Shareholders' Liability	Limited to capital contribution.	Limited to capital contribution; with the exception of actions of the shareholders justifying the application of the "piercing the corporate veil" doctrine.
Transfer of Shares	Execution of a transfer agreement. No notarization required.	Notarized transfer deed required.
Cost of Share Transfer	No notary fees incur.	Fees of the notary public are generally based on the purchase price.
Expatriation	Relocation of the administrative and/or registered office may result in the dissolution or in the change of legal form of the company (as the case may be).	Relocation of the administrative and/or registered office may result in the dissolution or in the change of legal form of the company (as the case may be).
Accounting / Taxation	National and international accounting standards. Taxable in Germany (Corporate Income Tax and Trade Tax).	National and international accounting standards. Taxable in Germany (Corporate Income Tax and Trade Tax).

Societas Europaea (SE)

The SE can also be used when setting up a business in Germany. There are different legal models of the SE in each European jurisdiction. Therefore, for foreign investors planning to invest in Europe via a SE, it will make a difference in which member state the SE is incorporated.

In Germany, the characteristics of a SE are similar to those of an AG. Like any SE, the German SE must also have a link to at least two member states of the EU.

Formation and Registration

The German SE can be formed by one of the following four ways:

- Formation by Merger - Two or more existing stock corporations or existing SEs may merge to form an SE provided at least two of them are governed by the laws of different member states. The merger may be conducted by acquisition (with the acquiring company becoming an SE) or by the formation of a new company (with the merging companies ceasing to exist).
- Formation of a Holding SE - Two or more existing corporations, including existing SEs, formed under the law of a member state and with a registered office in a member state may form an SE by promoting the formation of a holding SE.
- Subsidiary SE formed by an existing SE - An existing SE may itself form another SE as a subsidiary company, in which it may be the sole shareholders.
- Formation by transformation of an existing stock corporation - An existing stock corporation based in a EU member state may be transformed into a SE, provided that the stock corporation has had for at least two years a subsidiary governed by the laws of another member state.

Minimum Share Capital

SEs must have a minimum share capital of €120,000. One advantage compared to other German corporations is the fact that the SE may relocate not only its principal place of management, but also its registered office to another EU member state.

Management

A major difference regarding management of a German SE compared to an AG is that the German SE may choose to have a one-tier board system (Administration Board) instead of the otherwise mandatory two-tier board system of an AG. The Administration Board of a German SE may consist of executive and non-executive members and is, therefore, very similar to the one-tier board system in Anglo-Saxon jurisdictions.

The SE becomes a more and more popular choice of legal form although it may only be suitable for corporations with certain characteristics. Examples of German SEs include Allianz Holding SE and Porsche Automobil Holding SE.

d) Partnerships

Civil-law Partnership (Gesellschaft bürgerlichen Rechts, GbR)

Unlike the GmbH and the AG, the civil-law partnership does not possess the status of a separate legal entity and is not registered in the commercial register. The GbR may not be used as the organizational form for a commercial trade enterprise owned and operated by individuals who are merchants by profession. It is most commonly used to govern relationships between several partners in a professional society engaged in the provision of professional services, such as a law office or any other group of independent professionals working in a joint office.

To form a GbR, at least two partners must enter into a partnership agreement. This agreement does not need to be in writing (as opposed to a corporation, notarization is not required) and the parties are generally free to agree to the terms as they see fit. The law only requires that the partners agree to the purpose to be promoted and combine their efforts in pursuance of a common (economic) objective.

The assets of a GbR are held by all partners jointly (*Gesamthandsvermögen*, joint ownership) and they cannot be disposed of without agreement of all partners. All of the partners usually have the same rights. They jointly share the profits and losses and equally participate in any liquidation proceedings. All partners have equal voting rights in the partnership meetings and are able to represent the partnership as a whole in their dealings with third parties only through joint participation of the other

partners unless the partnership agreement provides for another form of representation. However, a fully authorized manager must also be a partner in the business (principle of self-organization).

The partners are jointly and severally liable for liabilities resulting from transactions conducted in the name of the partnership. Generally, creditors with unsatisfied claims can sue the partnership and its members as private individuals, i.e., they can tap the assets of both the partnership and its partners.

General Partnership (offene Handelsgesellschaft- oHG) and Limited Partnership (Kommanditgesellschaft- KG)

The German Commercial Code provides for the establishment of a partnership among merchants who wish to pursue a common commercial purpose under a common name. The oHG and the KG can only be chosen by merchants or by people who intend to operate a commercial trade. The major difference between oHG and KG is the liability of its partners. Whereas all partners of an oHG face unlimited liability for the partnership's debts and liabilities, a KG consists of at least one general partner with unlimited personal liability and one or more limited partners which are only liable with their subscribed and registered partnership contribution. A partnership can enter into contractual relationships, own assets and incur liabilities in its own name and on its own behalf.

The major reasons for investors to use a partnership instead of a corporate structure are:

- Greater flexibility in tailoring the internal affairs to the individual needs of the partners
- Fewer publication requirements (the partnership agreement need not be filed with the commercial register)
- Easier way to dissolve a partnership and distribute its capital to the partners
- Direct management by the (general) partners
- An advantageous Gift and Inheritance Tax treatment, useful for a family owned business facing a generation shift within the same family

To set up a partnership, at least two partners are required. These can be individuals, German or foreign corporations or other partnerships. While it is possible to have an oral partnership agreement, it is more common and preferable for it to be in writing. The partnership must then be registered with the relevant commercial register. To achieve the liability protection for the limited partners, the amount of the subscribed partnership contribution must be properly registered with the commercial register to become legally effective. If the KG commences its business activities prior to its registration, all partners including the limited partners are, in principle, fully liable for any obligations arising from such pre-registration dealings. The liability of the limited partners will only become limited upon the registration of the KG and the subscribed partnership contribution with the commercial register.

The transfer of any partnership interest (as limited or general partner) requires an agreement (written or oral) between the transferor and the transferee together with the consent of all other partners unless the partnership agreement provides otherwise. The partnership agreement may also impose certain restrictions relating to the transfer of a partnership interest. The change of partners must be registered with the commercial register.

In principle, the partners may freely agree upon their rights and obligations in the partnership agreement. However, limited partners are excluded by law from managing the KG. It is only possible to grant limited power of attorney to limited partners (i.e. for certain types of transactions). The management responsibility is undertaken by all general partners of a partnership. It is possible to restrict some general partners from managing the partnership. If the general partner is a corporation, the management of such corporation manages and legally represents the partnership.

The limited partners have certain information rights. In particular, they are entitled to request a written copy of the financial statements of the KG, as well as to inspect the records and accounts of the KG, in order to verify that the financial statements are correct. The partners determine the affairs of the partnership through partnership resolutions. Partnership resolutions must generally be passed unanimously. Although the partnership agreement may modify this principle, certain decisions relating to the fundamentals of the partnership exist which by law require the unanimous resolution of all partners. Therefore, the position of partners who acquire only a minority interest in a partnership is slightly stronger than it would be in a GmbH or AG.

GmbH & Co. KG

The GmbH & Co. KG is a form that combines the limited liability company (GmbH) with a limited partnership (KG) and is frequently used in Germany. This form is popular because investors can achieve the advantages of a partnership structure but nonetheless shield the partners from an unlimited personal liability risk by appointing a corporation (generally a GmbH) as the sole general partner of the KG, thereby forming a so-called GmbH & Co. KG. The sole general partner may also be a foreign corporation such as a UK Limited, a Dutch B.V. or other limited liability companies. Often, the limited partner also holds all shares in the GmbH which acts as the general partner. The limited partner is not only holding all interest in the KG directly and indirectly via the GmbH but is also controlling the partnership via their shareholding of the GmbH.

Certain key characteristics of GmbH & Co. KG and SE are described in the following table:

	GmbH & Co. KG	Societas Europaea (SE)
Incorporation and Registration Costs	Approx. €1,000 to €1,500.	Depends on type of corporation.
Duration of Incorporation and Registration	2 to 8 weeks.	Depends on each individual case, in particular on employee participation.
Minimum Number of Shareholders	2	1
Formal Requirements of Incorporation	Execution of partnership agreement and registration with commercial register.	Notarised deed of incorporation and registration with commercial register.
Minimum Share Capital	No minimum partnership contribution required (GmbH share capital must be at least €25,000).	€120,000
Capital Contribution (Cash)	No minimum payment requirements for the KG.	25% of the registered share capital (minimum €12,500) plus full amount of any premium.

	GmbH & Co. KG	Societas Europaea (SE)
Maintenance of Capital	None. (However the limited becomes unlimited liability of the partnership in cases where their contribution is paid back).	Strict rules. In particular, no distribution of company's assets to shareholders (except for dividend payments out of distributable profits). Prohibition on financial assistance for acquisition of its own shares. In case of insolvency, shareholder loans are always subordinated. Under certain conditions, repayment of shareholder loans may be contested by the insolvency administrator.
Management	GmbH as general partner manages the partnership.	Depending on outcome of negotiation procedure.
Directors' Liability	The general partner is liable in relation to the company in case of the breach of his managing duties.	See AG.
Shareholders' Liability	Unlimited liability of the general partner; liability of the limited partners is limited to their contribution.	See AG.
Transfer of Shares	Transfer of the interest in the KG requires the consent of all partners. Notarization required if both the KG-interest and the shares in the GmbH are transferred.	See AG.
Costs of Share Transfer	Transfer of partnership interest does not incur notary fees.	See AG.
Expatriation	Does not result in the dissolution of the company.	Relocation of the administrative and/or registered office is possible within the EU.
Accounting	National accounting standards.	See AG.
Taxation	Partnership itself is only subject to Trade Tax. The partners are taxed on the attributed profits.	See AG.

Restrictions on Investment

Restrictions on Investment

Germany has a welcoming attitude towards foreign direct investment (FDI). The German market is open for investment in practically all industry sectors. German law makes no distinction between Germans and foreign nationals regarding investments or the establishment of companies. The legal framework for FDI in Germany favors the principle of freedom of foreign trade and payment. Germany is one of the largest recipients of inbound foreign investment in the world. Every year more and more companies discover Germany as a secure and rewarding investment location. More than 55,000 foreign companies are already operating in Germany, employing around three million people. . According to the United Nations Conference on Trade and Development (UNCTAD), Germany ranked seventh in the world as a recipient of FDI in 2013. The inward FDI stocks reached approximately €641 billion. Germany is the number one business location in Europe and the number five worldwide of the most promising investor home economies for FDI in 2013-2015. Official German statistics further underscore Germany's attractiveness as a business location.

However, according to the *Außenwirtschaftsverordnung* (AWD) the Federal Ministry of Economics has the right to block investments of non-EU or non-EFTA countries if the investment jeopardizes Germany's public policy or national security.

Where the European Commission has jurisdiction over a merger under the EU Merger Regulations, Member States can intervene in cases involving the defence industry. For further information on mergers, please refer to Section 12 (Competition Law).

Capital Market Fundraising

Capital Market Fundraising

The German Stock Exchange, Deutsche Börse, in Frankfurt offers access to both EU regulated markets (Regulated Market) and to regulated unofficial markets (Open Market) regulated by the stock exchange itself. The Regulated Market has two primary listing segments: Prime Standard and General Standard. The Open Market is divided into Quotation Board and Entry Standard.

Which Market?

Choosing the right market and listing segment for an initial public offering (**IPO**) requires careful analysis. The high transparency requirements of the EU regulated General Standard are exceeded by the Prime Standard, which particularly serves companies that wish to attract international investors.

Companies that wish to allow the trading of their shares with little transparency or formal requirements at low costs choose the Entry Standard. Next to young, small or medium sized companies, the Entry Standard is frequently used as an exit route by private equity or venture capital investors.

The inclusion of shares in the Quotation Board is only possible if such shares are admitted to trading on a similar domestic or foreign exchange market recognised by Frankfurt Stock Exchange.

Admission Requirements

All public offerings to private and/or institutional investors and any admission to the Regulated Market and to the Entry Standard require a prospectus approved by the German Federal Financial Supervisory Authority (BaFin) or certain other, foreign authorities. It is possible, however, to limit an offering to selected institutional investors, which, if such placement occurs within the Open Market, does not require a prospectus. The same is true regarding a placement of a tradable security within the Open Market without a public offer.

The following overview highlights some of the admission requirements for each Standard at Deutsche Börse:

Requirements	General and Prime Standard
Prospectus	Required.
Accounting standards	EU/EEA issuers: IFRS if the issuer is obliged to prepare consolidated financial statements, otherwise: national GAAP. Others: IAS/IFRS or equivalent.
Reporting history	3 years, exemptions possible (e.g. SPACs, see below).
Minimum issuing volume	10,000 shares.
Minimum market capitalization	At least €1.25 million.
Initial free float	25% minimum (exemptions possible).
Free transferability of securities	Required.
Applicant	Issuer together with German bank or financial services institution admitted to German stock exchange trading (and the depositary for certificates representing shares).

Requirements	Entry Standard
Prospectus	Required.
Accounting standards	EU/EEA issuers: National GAAP or IFRS. Others: IAS/IFRS or equivalent.
Company history	Issuer must have existed for at least 2 years.
Minimum share capital	€750,000
Free float	At least 10% free float of the shares, which are held by at least 30 shareholders.
Applicant	Issuer together with German bank or financial services institution admitted to German stock exchange trading.
Listing Partner	Required.

It is worth noting that trading at Deutsche Börse does not require a local listing. Rather, it is possible to trade shares in the Open Market that are listed at certain foreign stock exchanges even without consent of the issuing company.

Continuing Obligations

Insider trading and market abuse are prohibited on all markets. In Regulated Markets, listed companies are under a variety of further continuing obligations, such as the timely publication of financial reports, ad hoc disclosures and corporate governance statements. Additional obligations for the Prime Standard segment include mandatory financial reports also for depositary receipts and the holding of analyst conferences.

In the Open Market, issuers are required to have an applicant registered with the stock exchange. Only companies listed at the Entry Standard, however, have to publish financial statements and interim reports and are subject to quasi ad-hoc disclosure rules.

REITs Segment and SPACs

A special segment is available for Real Estate Investment Trusts (REITs), offering the possibility to identify and differentiate REITs on the capital market via a listing in the Prime or General Standard (Regulated Market) or, alternatively for non-German REITs, the Entry Standard (Open Market).

The German capital market is unique in offering a listing of Special Purpose Acquisition Companies (SPACs) in any segment. A SPAC that consists of freely tradable securities and meets all further admission requirements may obtain an exemption from the requirement of a three-year company history provided that trading lies in the interest of the issuer and of the general public.

Regional Stock Exchanges

Deutsche Börse in Frankfurt is the largest but not the only German stock exchange. Six further regional stock exchanges offer a variety of trading segments, often with a special emphasis. At the second largest exchange, Börse Stuttgart, certified derivatives and warrants play an import role, while the bonds market has considerable weight at the Börsen AG in Hamburg/Hannover.

Taxation

Taxation

Basic Rules and Rates of German Taxation

Companies

Companies resident in Germany will be liable to Corporate Income Tax (*Körperschaftsteuer*) at 15% plus a so-called "solidarity surcharge" (*Solidaritätszuschlag*) of 5.5% on the Corporate Income Tax (raising the rate to 15.825%) and Trade Tax (*Gewerbesteuer*) at a rate between 7% and approx. 17% on their taxable profits. The overall tax burden on a German corporation can therefore be expected to be at approx. 30%.

Dividends and capital gains from shareholdings in German or foreign incorporated companies earned by a German resident company are only subject to Corporate Income Tax on 5% of the received amount at the recipient company level (i.e. 95% of the income received is Corporate Income Tax exempt). With regard to dividends, a minimum shareholding of 10% is required in order to obtain this tax benefit. This minimum shareholding is not necessary for the tax exemption on capital gains.

In the case of a non-German resident company which maintains a taxable branch ("permanent establishment") in Germany, only the profits attributable to the permanent establishment will be subject to Corporate Income Tax and Trade Tax in Germany. Other income may be subject to Corporate Income Tax in Germany, provided the income is derived from certain sources in Germany.

Partnerships

German partnerships (and sole proprietorships) are generally treated as transparent for German purposes, concerning taxes on income and gains. Profits are determined on the level of the partnership, but are attributed to the partners in accordance with their profit share. Accordingly, where the member of a partnership is a company or an individual, he will be taxed on his profit share as if accrued to him directly. Special partner remunerations (*Sondervergütungen*) paid by the partnership to its partner for services, loans and the use of assets are in a first step deductible in determining the income of the partnership. In a second step the special partner remuneration is added back to the

profit of the partnership and allocated to the partner who received them as special business income (*Sonderbetriebseinnahmen*). Hence, special partner remuneration does not reduce the taxable profit of the partnership.

Although a partnership is transparent for income tax purposes, the partnership itself is subject to Trade Tax.

It should be noted that a US Limited Liability Company (LLC) which is conducting inbound investments in Germany can be treated either as transparent or as opaque for German tax purposes. It depends upon whether the articles of association contain more partnership or more corporate characteristics. The German Federal Ministry of Finance has outlined very exactly what criteria must be considered. The determination is made under consideration of German law. The qualification under US law is irrelevant for German characterization purposes. The qualification of the LLC may have an impact on whether the US-German Double Tax Treaty is applicable at all.

Trade Tax

Trade Tax is levied by the municipalities on domestic commercial business establishments at a charge determined by the local authorities. Typically the Trade Tax rate amounts to a range between 7% and 17.15% (e.g. in Munich). The Trade Tax base is calculated by utilizing the Corporate Income Tax base, but adding certain expenses and reducing certain profits. E.g., 25% of the paid interest on debt must be added to the tax base, but profits derived from the management of own real estate, which are subject to Corporate Income Tax, are disregarded for Trade Tax purposes.

Corporations are usually subject to Trade Tax. Certain professions, such as accountants, attorneys, engineers, physicians and comparable professions are not subject to Trade Tax unless the particular firm has organized itself as a corporation or is for other reasons re-qualified as a Trade Tax vehicle.

Individuals

German resident individuals who are resident in Germany are generally liable to German taxation on their worldwide income.

Income Tax (*Einkommensteuer*) is charged progressively on income, which starts at a rate of 14% on taxable income from €8,005, reaching 42% on taxable income of €52,882 and 45% on income above €250,730. For married couples filing jointly, the above rates begin at twice of the mentioned income levels. In addition to the Income Tax, a solidarity surcharge at a rate of 5.5% of the amount of the calculated Income Tax is also charged. For members of the German national Catholic or Evangelical Churches, a Church Tax as a percentage of the calculated Income Tax is also levied by the tax authorities and the proceeds paid over to the respective Church.

Investment income and capital gains are no longer subject to the progressive rates under the income tax laws, but are instead subject to a flat rate withholding tax (*Abgeltungssteuer*) of 25% plus solidarity surcharge on such income exceeding the individual tax allowance rate of €801 (€1,602 for married individuals filing jointly). This method results in a total tax burden of 26.375% on investment income (including gains), unless the tax would be lower when applying the progressive tax rates.

Something different applies if the individual is holding shares in corporations not as private property but as business property, or the individual holds more than 1% of the shares at any point of time during a 5-year-period prior to the sale of the shares. In such a case, 40% of the dividends and the capital gains are tax exempt. The remaining 60% are subject to Income Tax at the individual's personal tax rate (depending upon his overall taxable income).

The following rough calculation gives an overview of the taxation of dividends and capital gains, depending on the legal nature of the respective shareholder:

Taxable Profits of Corporation			
Profit	100	100	100
./. Trade Tax (assumed 16%)	./. 16	./. 16	./. 16
./. CIT (15% on 100)	./. 15	./. 15	./. 15
Profit after tax	69	69	69
Shareholder	**Corp. (shares at least 10%)**	**Individual (Business property, 42% tax rate assumed)**	**Individual (Private property)**
Dividend	69	69	69
Tax exempt (95/40/0%)	./. 65.55	./. 27.6	0
Subject to tax	3.45	41.4	69
./. CIT/IT (without TT)	./. 0.52	./. 17.39	./. 17.25
+ Tax-exempt dividend	+ 65.55	+ 27.6	+ 0
Dividend after tax	68.48	51.61	51.75

Non-resident individuals will generally only incur German taxation on income and gains relating to a permanent establishment in Germany, or, in the case of income from employment, to the extent such income is attributable to duties of the employment performed in Germany or to activities as a managing director of a corporation being tax resident in Germany.

Social security, unemployment, and health insurance programs are jointly financed by employees and employers. The contribution limits (the maximum amount of monthly income to which the contribution rates apply) and the percentage rates are subject to frequent changes, so the following information from 2014 are simply to be approximations, indicative of the monthly costs incurred by employees and employers.

Program	Contribution Limits	Employer Portion	Employee Portion
Social Security 18.9% shared equally	€5,950 (West) €5,000 (East)	Up to €562.28 Up to €472.50	Up to €562.28 Up to €472.50
Unemployment Insurance 3.0% shared equally	€5,950 (West) €5,000 (East)	Up to €89.25 Up to €75.00	Up to €89.25 Up to €75.00
Health Insurance 14,6% shared equally plus 0.9% for employee	€4,050 (West & East)	Up to €295.65	Up to €332.10
Long-term care 2.05% shared equally (except Saxony, where employees cover 1.525% and employers 0.525%)	€4,050 (West & East)	Up to €41.51	Up to €41.51 + 0.25% if older than 23 and no children

Under EU law, and also under the US-German Social Security Totalization Agreement, individuals who come to live and work in Germany for a period of time, but do not settle permanently, may be able under certain circumstances to avoid inclusion into Germany's social security regime. Under those circumstances, the employer and/or employee make substitute social security contributions to the employee's own national social security program.

Double Tax Treaties

It is important to consider the impact of any applicable Double Tax Treaty in planning cross border operations. The provisions of a treaty may impact the form of the investment as well as the proceeds to be received from the foreign business units. In particular, the provisions of the treaty should be reviewed concerning whether the planned business activities constitute a permanent establishment (i.e. a taxable branch office) and with regard to the rules relating to the taxation of employees who may be sent on temporary assignment to the foreign location. Also the withholding rates on dividends, interest and royalties can have influence on the form and the financing of the investment. Lastly, the treaty provisions concerning the elimination of double taxation should also be reviewed.

Under German law and tax treaty practice, dividends paid to a foreign parent company holding at least a 10-25% interest in a German corporation are likely to have a withholding tax imposed on those dividends of 0-5%. Generally individuals and companies holding a lesser percentage will be subject to a 15% withholding tax. No withholding taxes are imposed on interest under the German tax treaties. Withholding taxes on royalties vary from treaty to treaty, ranging from 0-15%. If no tax treaty applies, the withholding taxes on dividends and royalties will be 25% plus the solidarity surcharge of 5.5%. Depending upon the application of a treaty a refund of or an exemption from withholding tax is possible, however, the German legislator has provided for strict substance requirements in this regard.

Valued Added Tax

Germany, as a member of the EU, applies the Value Added Tax (*Umsatzsteuer*) system (VAT). In broad terms, a sale of goods or a provision of services by an entrepreneur against consideration, may be – and where vendor and purchaser are German entrepreneurs normally will be – subject to VAT. The current German "standard rate" of VAT is 19%. It is the responsibility of the seller or of the service provider (if Germany-based) to account to the tax authority for VAT which arises on a transaction. Accordingly, a seller or service provider must ensure that his invoices fulfil the detailed formalities required under German VAT law. On the other hand, an entrepreneur receiving invoices with VAT may credit this VAT as input tax (*Vorsteuer*) from his own VAT liability.

In certain industries, including financial services, insurance, and healthcare, such sales or supplies are normally exempt from VAT. The same applies to the transfer of real estate, however, in such a case the seller may opt to subject the sale to VAT (which he usually will if he has deducted input tax (*Vorsteuer*) in the past). Some other goods and services, including certain categories of foods, books and clothing, are taxed at a reduced rate of 7%.

A business is obligated to register for VAT, and then charge VAT on its sales, if the projected, annualized value of its taxable turnover in the first year will exceed the registration threshold of €17,500. The exemption from registration continues in the following year if the actual taxable turnover in the immediately preceding year did not exceed €17,500 and the expected turnover in that following year will not exceed €50,000. If the exemption applies, the business is not allowed to include VAT on any of its invoices, nor can it obtain a credit or refund for the VAT on the invoices it pays. Therefore, businesses usually register for VAT on a voluntary basis, even if their turnover is below the threshold, as it is often advantageous to do so.

The seller must transfer the VAT collected on its sales to the tax authorities; its business customers are then normally in a position to recover an amount equal to such VAT, either by way of repayment from the tax authority or by set-off against the VAT for which the business customer must account for on its sales to its own customers. However, in those industries (see above) where sales to customers are "exempt" from VAT, the right to recover VAT incurred on purchases is restricted or prohibited.

In a cross border context, German VAT:

- is charged on most imports of goods into Germany (and for imports of goods from outside the EU, in which case VAT, together with other Customs or Excise duties or tariffs, is generally paid at the point of import);
- is charged on the purchase of certain services by a German business from businesses either in other EU countries or outside the EU – it is the German business which has to account for such VAT under a special "reverse charge" rule;
- is normally "zero rated" on the export of goods to business (but not private) customers in the EU, or to any customer in a destination outside the EU;
- is not charged on the supply of most services by German businesses to business customers in other EU countries or to customers generally who are outside the EU as the supply of services is deemed to be performed at the location of the recipient of those services.

Real Estate Transfer Tax

The transfer of domestic real estate property is subject to Real Estate Transfer Tax (*Grunderwerbsteuer*). Real Estate Transfer Tax occurs within the scope of a sale of real estate property, but also when transferring shares in corporations owning domestic real estate, if the purchaser obtains a shareholding of at least 95%. With regard to partnerships Real Estate Transfer Tax is triggered if within a period of 5 years 95% of the partnership interest is transferred to a new partner. Intra-group restructurings (merger, spin-off) are exempt from Real Estate Transfer Tax, however, strict requirements must be met. The tax rate differs between the German federal states and amounts to 3.5% (Bavaria, Saxony), 4.5% (Hamburg), 5.5% (Saarland), 6% (Berlin), 6.5% (Schleswig-Holstein) and 5% (the rest).

Inheritance Tax

Inheritance tax, which also includes in the taxable base major gifts of assets during lifetime, unless the donor survives 10 years from the date of gift, is imposed on the estates of German residents at Inheritance Tax rates that depend upon the degree of kinship of the beneficiary to the descendant. A German resident is also subject to inheritances and gifts received from foreign descendants and donors, but subject to a credit for foreign estate, Inheritance or Gift Taxes which were paid. Spouses (and life partners) receive a personal allowance of €500,000; children, €400,000; grandchildren, €200,000; and all other beneficiaries, €20,000. Rates increase in stages from 7% to 30% for the spouse and children (and their issue); otherwise the rate is 30% and jumps to 50% for inheritances of more than €6 million. Heirs of family businesses are currently granted generous tax concessions (up to 100%) if they continue the business and maintain employment levels, however, these benefits are currently under investigation of the German Federal Supreme Fiscal Court and will most likely be declared void.

Under the German Inheritance and Gift Tax treaties, a foreign citizen, resident in Germany for income tax purposes, will not necessarily be deemed to be German resident for Inheritance Tax purposes during the initial period of that residency, depending upon the particular treaty. For example, under the US-Germany Inheritance and Gift Tax Treaty, that initial period is 10 years. In the treaty with France, the period is 5 of the prior 7 years. Germany, however, has concluded such treaties with only 7 countries.

Non-German domiciled individuals are only liable to German Inheritance or Gift Taxes on assets situated in Germany.

Employment


EMPLOYMENT AGREEMENT
Employment Agreement, between the "Company" and the "Employee"
1. For consideration, the Company employs the Employee
2. Term ment. Subject to the provisions for termination
date", unless sooner terminated.
3. Salary. shall pay Employee a salary
services of payable at regular payroll
4. Duties and Company hires the
Employee's duties reasonably modified
time.
5. Employee to Devote
and energies to the
in any other business
or other pecuniary
matters in any other
matter in the operation of

Employment

There are many labor and employment law matters to consider for a company entering the German market. The relevant cornerstones of German labor and employment law are set out below.

As a starting point, it is always good to be aware that German labor and employment law is a mixture of case law and national legislation; however, the influence of EU legislation on German labor and employment law has grown in recent years and will continue to do so in the future.

Written Contracts of Employment

A contract of employment may or may not be put in writing; however, with regard to the German Documentation of Employment Contract Act (*Nachweisgesetz*), an employer is obliged to provide each of its employees with a written statement of conditions of employment no later than one month from the agreed start date of the employment. The statement must at least include:

- The name and address of the employer and employee;
- The date on which the employment begins or began;
- In case of a fixed-term contract, the anticipated duration of employment;
- The place of work, or where the employee is required to work at various places, a mobility clause allowing for flexibility;
- A short description of the work that the employee is required to carry out;
- The composition and amount of the wage including surcharges, bonuses, premiums and supplementary grants as well as other components of wage and their due-date;
- Hours of work;
- Entitlement to paid leave;
- Length of notice periods for terminating the employment;
- A general reference to collective bargaining agreements and/or works agreements where applicable.

An employer must also provide the employee with a written statement of any change in the conditions of employment within one month of that change. If a statement or a statement of changes is not provided, the employee may apply to an Employment Tribunal for an order requiring the employer to produce one.

In practice, employers often use one or more templates for employment contracts, and employees frequently accept them without negotiation; although, such general terms and conditions undergo a special review based on the rights of general terms and conditions provided by the German Civil Code. The aim of this review is to protect the employee, who is deemed to be the weaker party. If, under the German Civil Code, provisions are deemed vague, potentially unlimited (e.g. "Any overtime hours are compensated with this salary") or contain an inappropriate disadvantage, they are void. Please note that there is no blue-pencilling. This legal regime leads to significant uncertainty when drafting standard contracts. Bonus provisions, contractual penalties, overtime provisions and transfer clauses bear an especially high risk of being invalid.

Discrimination

Based on the General Equal Treatment Act, discrimination in employment is prohibited by German law in the form of direct and indirect discrimination, harassment, and instructions to discriminate as well as victimisation on grounds of race, ethnic origin, religion, belief, age and sexual identity. The Act covers access to positions, promotion, independent and self-employed persons, terms and conditions of employment, access to professional and vocational training, membership in professional associations, social security, social benefits, education and access to goods and services that are provided to the general public.

As opposed to the US or the UK, in practice discrimination does not play a large role in German employment law. The General Equal Treatment Act, which came into force in 2006, did not change this significantly. The reason for this might be that German law provides a much stronger protection for employees than employment law in the US or UK. While discrimination claims in the US and the UK are often used to achieve a higher compensation payment, this is not necessary in Germany because of the high level of protection for employees. Furthermore, German law does not recognize punitive damages, and German courts traditionally do not award high compensation for immaterial damages.

The Act imposes a number of obligations on the employer, namely:

- A duty not to advertise jobs in a discriminatory manner;
- A general duty to take necessary - sometimes preventive - measures to protect employees from discrimination. When determining what measures are necessary, an employer's size and resources are taken into account;
- A duty to inform employees in an appropriate manner of the unlawfulness of discrimination. Appropriate employee training on equal opportunities will also be deemed a fulfilment of the duty to take necessary measures to protect employees;
- A duty to take the necessary and appropriate measures against any employees who discriminate (e.g. disciplinary action);
- A duty to take the necessary and appropriate measures to protect employees who have been discriminated against in the course of their employment by third parties;
- A duty to inform employees of the Act and of the time limits within which claims can be brought, for example by putting the text of the Act on an intranet or notice board;

The consequences of any unlawful discrimination include:

- Discriminatory agreements are void;
- Affected employees have a right to complain - employers should provide an appropriate contact within the company to receive internal complaints;
- Employees who have suffered harassment can refuse to work without losing their entitlement to pay if it is necessary for their protection;
- Affected employees can claim damages for financial loss, provided the employer acted intentionally or negligently either by itself or through vicarious liability. Employees can also claim compensation for pain and suffering, which is a no fault liability. There are few indications as to the amounts the courts are likely to award in their absolute discretion; the only limit prescribed by the Act applies in cases where the recruitment process was discriminatory and the candidate would not have been employed even if there had been no discrimination, in which case compensation is limited to three months' salary;
- Works councils and trade unions can apply for injunctions against discriminatory measures.

National Statutory Minimum Wage

Since 2015 for the first time in Germany a statutory minimum wage has come into force. The wage has been set at €8.50 per hour. Generally, this minimum wage will apply on all employees in all branches of activity and all regions in Germany. However, several exceptions have been specified. The so-called Minimum Wage Commission shall carry out an examination of the minimum wage level in the future, on the first occasion by June 30, 2016.

Germany has previously relied on trade unions and business groups to fix minimum pay instead. The statutory minimum has been implemented because Germany's low-pay sector is growing and union membership is falling. Hence, many workers do not benefit from the collective bargaining system and are paid low wages.

The implementation of the minimum wage under the German Minimum Wage Act is being accompanied with liability provisions as well as new formalities employers are required to adhere to. The Minimum Wage Act imposes reporting and documentation requirements, which are meant to facilitate the monitoring of compliance with the Minimum Wage Act.

At present there remains legal uncertainty as to how these new rules are to be implemented and the effect they will finally have in practice. However, employers should make themselves familiar with these new rules in order to avoid liabilities, possible fines or exclusion from tenders for public supply.

Material Protection Instead of Procedure

One significant difference between Employment Law in Germany and in the US or the UK is that formal procedures do not play an important role in Germany. On the other hand, German employment law often provides strong material protection for employees. German employment law is targeted on maintaining the employment relationship. It is not focused on granting financial compensation.

As a consequence, using the US or UK approach when it comes to procedural matters is not advisable in Germany.

For example, in Germany the procedure leading up to a dismissal is not key. German courts will decide unfair dismissal claims based on their own view of what is reasonable, rather than on whether the employer acted within a range of reasonable responses open to an employer. This means German courts are entitled to replace the employer's decision with their own.

Thus, having detailed written procedures (policies) is actually not necessary in Germany. However, as a consequence of globalisation policies are becoming more and more frequent.

Employers must be aware of the fact that they may suffer strong disadvantages under German law in the event they "adopt" US/UK procedures in Germany. For example, when an employee is dismissed for cause, the employer has to serve notice within two weeks of learning of the cause. Should the employer adopt policies one would typically find in the the US or UK (e.g. informing the employee to adhere to a consultation process, notice might be served too late and as a consequence the dismissal would be null and void). Furthermore, the employment relationship would continue unchanged no matter how significant the breach of contract by the employee has been.

The same applies for grievance policies or formal written disciplinary procedures. Installing grievance procedures in Germany does not have any positive effect for the employer. On the contrary, German employment courts would accuse the employer in the event he did not adhere to his policies. In this context it is important to be aware that constructive dismissals are not known in Germany.

However, one important procedural aspect is that a dismissal for conduct reasons generally requires a prior written warning dealing with a breach of contract falling into the same category of misconduct. Nevertheless, an obligation to have formal disciplinary hearings does not exist in Germany.

Dismissing an Employee

In the event the employer wishes to terminate an employment contract, it is important to keep the following guidelines in mind.

Notice Letter

To begin with, there are form requirements for serving notice. Notices must:

- Be served in writing;
- Be signed by a representative of the employer (managing director) in original;
- Be served in such way that the employer can prove receipt (handing over in person or deliver by courier; registered mail is not advisable).

Minimum Notice Periods

Employment legislation sets out the minimum notice requirements to which an employee is entitled (section 622 German Civil Code). The length of the notice period depends on the length of service. It ranges from four weeks notice effective as of the 15th day of a calendar month or the end of the calendar month up to seven months to the end of the calendar month. It is quite common in Germany that a tariff agreement or the individual employment contract stipulates longer notice periods.

Works Council Consultation

If a works council exists, it must be consulted before serving notice. The employer must inform the works council about the reasons for the dismissal in full detail. This is a very important formal obligation. The employer must be able to prove that the consultation of the works council was proper and complete, otherwise the termination is null and void. The requirements set up by German employment courts with regard to the works council consultation are very high. Therefore, seeking legal advice before informing the works council is highly advisable. Formal errors during the consultation process cannot be corrected at a later date (e.g. during an unfair dismissal court proceedings) and can therefore make a dismissal void.

Co-Determination Rights in Case of Major Workforce Reductions/Operational Changes

When major workforce reductions/operational changes are envisaged, the works council has wide-ranging co-determination rights. The procedure is complex and includes a balancing of interests in detail as well as a social plan. It is important to know that without the works council's prior consent, the employer is not entitled to implement the restructuring process e.g. by serving notice. There is a risk that the works council might prevent the employer from implementing the new structure by means of an interim injunction.

Collective Redundancies

Employers are required to inform the employment agency in case of a so called mass dismissal. This is a formal notification requirement to provide the authorities with information about employees who will lose their jobs within a short period. It is very important to adhere to the formalities because a dismissal in a case of collective redundancies without prior notification of the employment agency is not valid. A collective redundancy in general means that at least 10% of the staff will be served notice within a 30 day period.

Garden Leave, Payment in Lieu

The employee in general has a right to work. Therefore, even after serving notice, the employer can only send an employee on garden leave based on a prior agreement; however, in practice employers very often put employees on garden leave after serving notice, especially when it is a high ranking employee. Please note that payment in lieu is not permitted under German employment law unless the employee agrees.

Protection Against Unfair Dismissal

German employment law does not allow termination of an employee's contract of employment "at will" by the employer. The Protection Against Unfair Dismissal Act (KSchG) applies to employment that has existed for more than six months with an employer that has more than five or more than ten employees, depending on the date of appointment. Under this Act, an employee is protected from unfair dismissal. As a consequence, a dismissal will be unfair unless the employer can show sufficient personal, employee conduct or business reasons exist.

- A dismissal for personal reasons in practice often comes into play in case of illness, either in the form of long-term illness or the form of numerous short-term illnesses. The employer must prove a negative prognosis, meaning that substantial health-related absenteeism will most likely occur in the future;
- A dismissal for conduct reasons generally requires at least one prior warning for comparable misbehaviour. It normally occurs in cases of infringement of contractual duties such as theft, deliberate insult etc;
- Of course, in cases of gross misconduct, the employment can be terminated based on a summary dismissal with immediate effect. A summary dismissal is only justified in cases where it would be it is unacceptable for the employer to retain the employee until the end of the applicable notice period;
- A dismissal for operational reasons (e.g. in case of a redundancy) requires an entrepreneurial decision that will lead to the loss of the organizational positions in question. Moreover, employers must adhere to a social selection process. The employer is generally obliged to choose those employees who will be least severely affected by the termination based on the following factors: age, seniority, disability and potential maintenance obligation are the criteria that have to be taken into account during the social selection process.

In any case, termination of employment can only be a last resort. Therefore, the employer has a duty to search for alternative employment before serving notice. This even applies when the employer needs less qualified employees, the remuneration is lower or the place of work will change. An alternative job offer is preferred to a dismissal.

Special Unfair Dismissal Protection

Moreover, special groups of employees like pregnant women, employees on parental leave, disabled employees and employees who are members of the works council have special dismissal protection. In these cases, the employer needs prior approval by authorities or the works council (depending on the reason for the special unfair dismissal protection).

Remedies for Unfair Dismissal

The employee is entitled to challenge the validity of any termination in court; however, an unfair dismissal claim has to be raised by the employee no later than three weeks after receiving notice, otherwise the termination is deemed to be fair. As a consequence, most terminations end up in court. In circumstances where an employment tribunal rules a dismissal to be unfair, the employee is not entitled to compensation. Rather, in this case the legal consequence is reinstatement. Accordingly, the employment has to be treated as if notice was never served, and the employment continues to exist unchanged. This again shows German employment law's preference for preserving the employment relationship, rather than providing compensation.

Due to the fact that requirements for a justified dismissal under German law are rather high, most of the unfair dismissal claims are settled based on a compensation payment. In cases of dismissals for operational reasons, compensation amounting to half a monthly gross salary per year of service is a rule of thumb; however, the compensation is always a matter for negotiation.

Business Sales and Outsourcing

As a result of EU directives, corporate transactions involving outsourcing or asset sales are subject to significant employment protection for any employees involved. Section 613a of the German Civil Code (BGB) is the key legal provision. Where a business or part of a business is transferred from one party (transferor) to another owner (transferee), the new owner will assume all rights and obligations arising from employment relations existing at the transfer date.

If rights and obligations of the employment are regulated by provisions of a trade union agreement or a works council agreement, they will generally become part of the employment with the new owner and may not be amended to the employee's disadvantage within one year of the date of transfer. The transferor and transferee are jointly liable to inform the affected employees in writing about the transfer of the business. The information letter must contain:

- The date or the planned date of the transfer;
- The reason for the transfer;
- The legal, economic and social consequences of the transfer of the employees;
- The prospective measures in relation to the employees.

Each employee has the right to object to the transfer within one month after having been properly and completely informed. If the information is not given or not done properly, employees have an unlimited right to object to the transfer of their employment relationship. In cases of an objection, the employment will continue with the original employer (transferor). The employee then risks being made redundant by the transferor, who will – due to the transfer of business – most likely no longer have a position for the employee. However, the employer must prove that the preconditions for dismissal based on operational reasons are met.

Any dismissal that is solely based on a transfer of business is automatically deemed to be unfair.

Where there is a transfer of the whole business, codetermination rights of the works council are not triggered because a transfer of business is not an operational change within the meaning of section 111 German Works Constitution Act (BetrVG). But whenever the transfer of business includes a change of operation, participation rights of the works council have to be considered. (For example, if only part of a business is sold). This will normally lead to a split up of the business, which is regarded as an operational changes that triggers co-determinations rights of the works council.

The question whether or not a transfer of business has taken place has been the subject of numerous court decisions on a national as well as a European level. It is one of the most difficult and non-transparent questions in German labor and employment law. There is always a risk of a transfer of

business when somebody takes over a business or part of a business and makes use of the already existing structures by using the same machines, know-how, customer relations, lists of data, intellectual property, employees etc. A transfer of business requires a certain degree of continuity. German employment courts tend to find that a transfer of business has taken place, because in doing so they aim to protect the employment relationships of the affected employees.

Buyers of a business should protect themselves by carrying out the appropriate due diligence and by including indemnities in the asset sale contract. The seller of any business will also need to consider what indemnification it requires, as a transfer of business can create ongoing liabilities for the transferor of the business or outsourced activity.

It should be noted that a transfer of business has broad application - it can apply to outsourcings overseas, for example, as well as to business transfers within subsidiaries of the same holding company.

Restrictive Covenants

In Germany, there is no general post-employment obligation implied by law. Without an explicit agreement between the parties, an employee can immediately compete with his former employer once the employment has terminated. German employment contracts therefore sometimes contain provisions restricting the employee's activities after employment. A restrictive covenant is only valid if the statutory requirements are fulfilled. One important point is that the provision must grant the employee compensation for the duration of the restrictive covenant. This compensation must at least amount to 50% of the average remuneration (including other benefits like bonus payments) earned by the employee, otherwise the restrictive covenant is invalid. The covenant must also be reasonable with regard to the scope of the territorial and functional restriction. Furthermore, the duration is limited to a maximum of two years.

A restrictive covenant must not solely be aimed at preventing competition. The employer must be able to prove that the restrictive covenant is necessary to protect company secrets or similar legitimate interests of the company. Due to this rather complicated situation, restrictive covenants are often ruled to be void by German employment courts. When drafting a restrictive covenant, it is therefore not advisable to simply use a general template. Rather, non-compete clauses should be tailor made and backed up with contractual penalties in order to protect the employer.

Business Immigration

Business Immigration

Citizens of countries which are members of the EU and their spouses, children and dependent family members may live and work in Germany. Besides national legislation, union laws as well as bilateral and multilateral agreements always have to be taken into consideration.

In general all employees from third countries require some sort of authorisation form the Aliens Department or the Federal Employment Office. There are, however, some exceptions such as for highly qualified employees (e.g. IT specialists). Work permit legislation is strongly connected with residency law in Germany. Generally, all foreigners require visas for stays of more than three months or for stays leading to gainful employment. Exemptions apply to EU and EEA citizens and Swiss nationals. In addition, citizens of Australia, Canada, Israel, Japan, New Zealand, the Republic of Korea and the United States of America can obtain a residence permit that may be required after entering Germany. Citizens of all other countries planning a longer stay in Germany must apply for visas at the relevant embassy before arriving at the country. Visa applications must be approved by the relevant immigration authority in Germany. The approval procedure usually takes up to three months, in some cases longer, since the immigration authority will often consult other authorities (e.g. the Federal Employment Agency).

Working as, or employing, a foreign national who does not have authorisation to work is a criminal offence.

There are different kinds of work permits. They can be restricted to a certain job, region or plant and/or a certain time. German authorities will in general decide in accordance with requirements of the German economy, giving due consideration to the situation on the labor market and the need to combat unemployment effectively. In this regard, German authorities will in general refuse granting a work permit in cases where employees who are entitled to preferential access to the German labor market are available for the type of employment concerned (e.g. (i) German workers, (ii) foreigners who possess the same legal status as German workers with regard to the right to take up employment or (iii) other foreigners who are entitled to preferential access to the labor market under the law of the EU).

The laws and procedures regarding immigration are constantly changing in Germany. German authorities base their decisions on taking all aspects of the individual case at hand into consideration. Therefore, individual up-to-date advice should be sought from Bryan Cave before making any application or decision relating to business immigration.

Pensions and Employee Benefits

Pensions and Employee Benefits

The German social security system comprises five statutory types: health insurance, long-term care insurance, pension insurance, accident insurance and unemployment insurance. Statutory pension insurance provides benefits in the event of invalidity, old age, death and for medical rehabilitation and workforce participation.

There are three pillars to the German retirement system; 1) the government-run retirement insurance system, 2) private company plans and 3) private individual retirement investments.

Statutory Pension Insurance

For statutory pension insurance, the total amount in 2015 is 18.7% of earnings up to the contribution limit (in 2015, this is €6,050 in the western Länder (countries) and €5,200 in the eastern Länder (countries) of Germany). Half of the contribution is borne by the employer and half of contribution is deducted from employees' gross salary. Statutory pension insurance is in general compulsory for all those in paid employment earning more than a minimum income. As a consequence currently about 85% of the work force in Germany is enrolled in the public retirement insurance. For more details please see page 36.

Pension as Part of the Employment Contract/Salary

As opposed to the U.S. legal system for example, pension in Germany plays a minor role in employment relationships. Due to the fact that pension in Germany is generally provided by a public institution Deutsche Rentenversicherung Bund (DRV), the employer is less involved. However, company plans (*betriebliche Altersvorsorge*) designed to supplement statutory pension insurance are becoming more and more popular in Germany. Such plans could be financed both by the employer only and/or by the employee. Under German law, employees are entitled for a deduction of a certain amount of their gross salary for deferred compensation (*Entgeltumwandlung*) and thus to finance a company pension on their own.

Occupational pensions can be promised individually as part of an employment contract or collectively as part of agreements with works councils and/or trade unions. Once occupational pensions have been set up, they are very difficult to change. Moreover, pension schemes are also subject of co-determination rights of the works council. Consequently, many employers in Germany tend to treat occupational pensions with reservations.

Under German pension law, pure money purchase schemes are not admissible. The German Pensions Act (*Betriebsrentengesetz*) only recognizes hybrid or final salary schemes. It offers five different financing vehicles:

- **Direct commitment:** under a direct commitment an employer directly promises to pay the employee a specific benefit amount. The benefits are paid directly by the employer from the employer's cash flow;
- **Direct insurance:** direct insurance is a life insurance contract taken out by the employer on behalf of the employee. The insurance company is the pension provider under such a scheme giving the employee and his survivors an irrevocable right to the insurance benefits. Where the insurance company is not able to meet its obligations, the employer becomes liable under the pension promise;
- **Pension fund:** a pension fund is an independent legal entity in the legal form of a mutual insurance association or a public company. Under a pension fund beneficiaries can claim pension benefits from the pension fund. However, the employer is still secondarily liable. Pension funds can be set up by a single employer, an employer association or by insurance companies. A pension fund is subject to supervision by the German financial market regulator (BaFin);
- **Pensionskasse:** a "Pensionskasse" is an independent legal entities. They are usually set up for a certain industry or employer. They are structured as a mutual insurance association or as a public company. Their freedom of investment is limited. They must not invest more than 30% of the book value of their assets in equity. A Pensionskasse is subject to supervision by the BaFin;

- **Support funds:** Support funds are independent legal entities. This financing vehicle is structured to be used by the employer as a paying agent only. The employer remains the primary debtor. To fully fund the employer's obligations the funds often enter into reinsurance contracts. Support funds can be group or industry support funds, but typically they are set up as subsidiaries of the sponsoring employer in the form of a registered association. A support fund is not subject to supervision by BaFin.

Individual Retirement Investments

The third pillar, individual retirement investments, have not been very significant in the past. However, their importance is growing more and more due to low birth rates and increasing life expectancy.

Private plans include (but are not limited to) the so called Riester and Rürup plans. Workers and other participants can receive certain tax advantages and benefits from government subsidies for these plans. The benefits and other details vary from plan to plan. There are differing payment methods, payout schemes, tax liabilities, portability opportunities and other factors that distinguish these plans from each other.

Intellectual Property

Intellectual Property

In the EU, protection for registered and unregistered intellectual property rights, including patents, trademarks and copyright, is generally available in a manner similar to the US. There exist a number of key differences, however, both as to nature of the intellectual property rights and as to the manner in which they may properly be protected in the EU.

The German Patent and Trademark Office (**DPMA**) deals with the patent, utility patent, trademark and registered design registries. Useful information can be obtained from its website at www.dpma.de.EU patents are prosecuted through the European Patent Office in Munich, Germany, which can be reached at www.epo.org. Community trademarks and registered Community designs are administered by the Office for Harmonization of the Internal Market (**OHIM**) in Alicante, Spain, which operates the website www.oami.europa.eu.

Patents

German patents may be obtained via the DPMA, and European patents may be available via the European Patent Office (**EPO**) under the European Patent Convention (**EPC**). However, other than the name suggests, the European patent, although administered and issued by the EPO, is currently not a single, unitary right with validity on the territory of the EU but a bundle of national patents subject to the relevant national laws of the respective jurisdiction. Although these, including German patent law, follow certain standards set by the EPC, obtaining EU wide patent protection is still a complex and expensive process.

That is about to change when, following several decades of discussion, EU level agreements on the establishment of a single, unitary European patent come into force. They will be accompanied by the establishment of an unitary enforcement system. As a result, both validity and enforceability of the new European patent will be dealt with on EU level with effects throughout the EU. Patent holders with thus have the option to choose between EU wide and mere national patents, which continue to exist in parallel.

Patent protection can be claimed for any invention in any field of technology which is new, involves an inventive step and is capable of industrial application. Priority is obtained on a 'first to file' basis. Unless any prior invention has been published or publicly used anywhere in the world, 'first to invent' will not be relevant.

Notably, discoveries, scientific theories and mathematical methods, schemes, rules and methods for performing mental acts, playing games or business methods, computer programs, and presentations of information are not patentable where the patent application relates to such subject matter per se. Excluded from patent protection are also plants and animal varieties or biological processes for producing plants or animals (microbiological processes and products thereof are not excluded) and methods for treatment of the human or animal body (pharmaceutical products or surgical instruments for use in such methods are not excluded).

German patents are granted for a period of twenty years from the date of the filing of the application. An extended term of protection is available for pharmaceutical and agro-chemical products.

Utility Models

German utility model law provides for the protection of new technical inventions, including chemical substances and pharmaceutical products but not methods or processes for the manufacturing of such substances or products. The substantive requirements for protection are not examined by the DPMA. Therefore this type of protection can be obtained quickly and for a relatively low cost.

The initial term of protection of a utility model is three years. It can be renewed for up to ten years.

Trademarks

The national trademark laws of the EU Member States are harmonized to standards set by an EU Directive on trademarks. Thus, the national law relating to trademarks (regarding the scope of protection, acts of infringement, etc.) is essentially similar across the EU. Still, national trademarks are obtained in each national jurisdiction and governed by national law.

Under the EU Directive, a trademark is any sign that can be represented graphically, which is capable of distinguishing goods and services of one undertaking from those of another. It may include words, designs, letters, numerals, color or the shape of goods or their packaging, and may include a smell or sound, if capable of being represented graphically.

In addition, the EU established a Community trademark providing for trademark protection through a single registration valid for the entire EU at the OHIM. Community trademarks are unitary, indivisible supranational rights that exist parallel to the national trademarks and to the International Registrations under the Madrid Agreement and Protocol. Neither of these three trademark registration types will take precedence over earlier registered marks regardless of their territorial scope.

Trademarks are registered for an initial term of ten years and may be renewed for subsequent ten year terms, with no limit on the number of renewals. Other than in the US, the applicant of a German national trademark or of a Community Trademark does not have to evidence its use for registration. Rather, a trademark becomes merely vulnerable after five years to a potential invalidation action and may be unenforceable against younger applications where the proprietor of the trademark cannot evidence its use within the previous five years.

The German Trademark Act also provides protection of rights in an unregistered trademark or tradename. Requirements for protection of such unregistered rights are, however, often difficult to establish, and the scope of protection of a trade name is more limited than the scope of protection of a registered trademark.

Designs

A design registration provides for protection for the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation.

Further to German national design registrations at DPMA, a Community Design may be registered at the OHIM, which provides for protection of a registered design across all EU Member States in a manner similar to the Community Trade Mark.

Registration in Germany and at the OHIM is available for a term of five years and may be renewed for successive five year periods up to a total of twenty five years.

Rights in a registered design should be distinguished from the limited protection available for new and not disclosed unregistered Community designs that can be available for up to three years.

In addition, an international registration system that allows to obtain protection for designs in a number of states and intergovernmental organizations by means of a single international application is available for applicants from countries which are signatories to the Hague Agreement Concerning the International Registration of Industrial Designs. Additional information can be obtained from World Intellectual Property Organization's website at www.wipo.int.

Copyright

The EU has, through a number of Directives, harmonized the national laws of Member States on copyrights. Thus, on various aspects (such as the scope of protection, duration of copyright, protection of computer programs, rental and lending rights,satellite broadcasting and cable transmission) national laws in EU Member State is essentially identical.

Copyright protection is granted in works of original literary, scientific, musical or artistic works, computer programs, sound recordings, films, broadcasts and the typographical arrangement of published editions. Generally, copyright protection ends 70 years post mortem auctoris.

Following the implementation of an EU Directive, German law furthermore recognises a separate intellectual property right in the compilation of data bases ("Database Right"). Protection requires a substantial investment in obtaining, verifying or presenting the contents of a database and is granted for a period of 15 years from the date of publication or creation (in the event that it has not been published).

Ownership and Evidence of IP Rights

German IP laws differ particularly from most common law jurisdictions with respect to ownership and enforcement of IP rights.

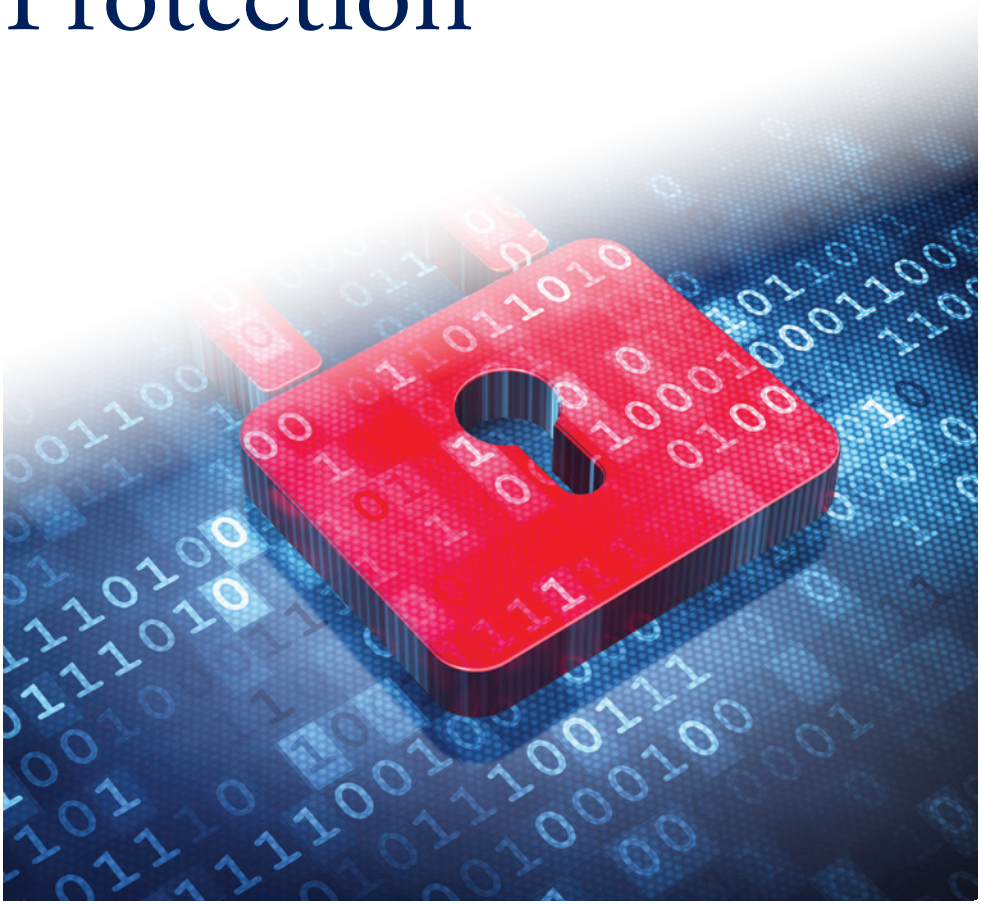
Rights in an invention lie with the inventor(s). German statutory law requires an employee who makes an invention based on his work to notify his employer thereof, who can claim all rights in the invention. The employee may then be entitled to a compensation in addition to his regular remuneration.

Copyright in a work lies with the author. Statutory exemptions apply to exploitation rights for producers of complex works such as film, phonograms or data bases. For works created by an employee during work, statutory law expressly grants the employer with rights to use the work only for computer programs. Although implied agreement on the transfer of rights to the employer will generally be assumed, exploitation rights do not originate in the employer, and express provisions on the scope of a transfer of rights should be included in an employment agreement. As Germany follows a doctrine on the transfer of rights being limited to the purpose of an agreement, that is also true for any other agreement under which an author creates a work for another party.

There is no central copyright register in Germany, and neither registration nor use of the copyright symbol © is required to obtain or evidence protection. However, it is good practice to insert a copyright notice on any publication of the work.

Similarly it is not necessary to use symbols such as ® or ™ in connection with registered patents or trademarks to enjoy protection. An infringement does not require that the infringer is aware of the registration.

Data Protection



Data Protection

The EU Data Protection Directive (95/46/EC) required Member States of the EU to put in place national legislation providing protection as to the manner in which information about individuals is obtained, held or used. The German Data Protection Act 1990 (DPA) imposes privacy obligations on public and civil entities as well as monetary sanctions and potential criminal liabilities on companies and individuals that do not comply with its provisions.

The Act applies to data about a living individual – *a data subject* – from which an individual can be identified. Information which is *processed* by automatic means or that forms a part of a non-automated system organised by reference to individuals or to some criteria that relates to individuals, falls within the definition of data to which the Act applies.

A *data controller* is a person who determines the purpose for which and the manner in which any *personal data* is, or is to be processed. Generally compliance is the responsibility of a *data controller*. A data processor is a person who simply processes data on behalf of a data controller and generally has no obligations under the Act, but owes obligations to the data controller.

As opposed to other EU states, German legislation has established two control instances for data privacy compliance. Companies processing data, except for small businesses, have to assign a *data protection officer* (DPO). In addition, each state of the federation has installed a local data protection authority.

The assignment of a DPO is required for most companies and in particular if:

- The processing company commercially transfers personal data (address trade, marketing database);
- 10 or more employees of the processing company constantly handle automatic data processing;
- 20 or more employees of the processing company regularly handle non-automatic data processing.

Even if only one part of the employee's work consists of data processing, this work is considered to constitute handling of data processing as stated above.

The DPO needs to be assigned in writing within one month after the beginning of operations. The assigned DPO has to be an adequately qualified and reliable person. DPO obligations may be outsourced allowing an external assignee to supervise internal data processing (e.g. certified attorneys or certified DPO service providers). No conflicts to his or her duties may arise, should the DPO also serve in another position. The DPO is not subject to any instructions by the management of the entity, when conducting his or her duties as DPO. With respect to the organization of the company, the DPO needs to report directly to the management. Furthermore, statutory law provides for a certain level of termination protection with regard to the DPO's position as data protector and with the DPO's position as employee. In return and under strict provisions, the DPO can be personally liable for breaches of compliance.

For companies which are not required to assign a DPO, the local data protection authority is the responsible control authority. In addition, a company's DPO is entitled to address local data protection authorities in cases of doubt to seek reassurance of his or her evaluation.

To enable the control authorities to perform supervision, the data controllers are generally obliged to notify their DPO/local data protection authority about their data processing tools. The information duties include a duty to notify about breach of data protection regulation.

The DPA sets out principles that govern the processing of personal data:

- Personal data must be processed fairly and lawfully;
- Personal data must be obtained only for specified and lawful purposes and may not be processed in a manner incompatible with those purposes;
- Personal data must be adequate, relevant and not excessive in relation to the purposes for which it is processed;
- Personal data must be accurate and, where necessary, kept up to date;
- The concerned individual (data subject) must be able to rectify, erase or block incorrect data;
- Personal data must be kept for no longer than is necessary for the purposes for which it is processed;
- Personal data must be subject to appropriate technical and organisation measures to protect against unauthorised or unlawful processing and accidental loss, destruction or damage;
- Personal data must not be transferred to a country or territory outside the EEA unless that country or territory ensures an adequate level of data protection.

It should be noted that currently the US is not recognised by the European Commission as having an adequate level of data protection.

There are additional restrictions on the processing of employee data and *sensitive personal data*, which would include data on ethnic or racial origin, political opinions, religious beliefs, trade union membership, physical or mental health, sex life or the commission of any criminal offence.

Data subjects have a right of access to their personal information, the right to require that processing cease where it is likely to cause substantial unwarranted damage or distress to them and the right to call for information to be removed if it is inaccurate.

Any entity established in or processing personal data with equipment/measures located in Germany (e.g. by operating a German website) may be required to comply with German national laws implementing the Data Protection Directive. In particular a data controller needs to consider matters carefully and if appropriate put in place contractual arrangements, to the extent to which it intends to transferring any personal data (whether for data processing or otherwise) outside the EEA to any country that has not been recognised by the European Commission as having in place adequate arrangements for the protection of personal data.

Please note that the European legal framework for Data Privacy is subject to a reform proposed by the EU Commission on January 25, 2012. This reform could lead to significant changes to the principles set out above.

Imports, Export Controls and Sanctions

Imports, Export Controls and Sanctions

Imports

There is a unified Customs law in the EU, which is a single trading area where all goods (subject to very narrow exceptions such as certain limited health and safety exceptions and military items) circulate freely, whether made in an EU member state or imported from outside. Internal customs duties, fees and barriers are removed within the EU, although member state customs authorities retain the right to check goods at the border. There is a common external customs tariff for products imported from outside the EU. That tariff is levied on an *ad valorem* basis and is intended to be applied and interpreted uniformly by all the Member States, although there are differences in interpretation and administration.

The EU has adopted a Community Customs Code, which sets out the general rules and all the customs procedures applicable to goods traded between the EU and non-EU countries, including in respect of import relief in the form of dumping and countervailing duties and quotas. In addition, the EU has adopted a more detailed implementing regulation. As EU regulations, the Customs Code and the Customs Regulation are directly applicable in the Member States and are administered and enforced by Member State customs authorities. In Germany the highest Federal customs authority is the Federal treasury department (*Bundesministerium der Finanzen*). Germany also has its own legislation that deals with certain aspects which are not covered by the EU regulations.

In some cases, imports may require a license. These can include e.g. Common Agricultural Policy licenses for certain foodstuffs and licenses for the importation of certain other foodstuffs.

Export Controls and Sanctions

Exports of dual-use goods, technology and software from the EU, and certain intra-EU transfers of such items, are controlled under an EU Regulation, which is directly applicable in the EU member states. Individual member states have implemented legislation to exercise options under the EU Regulation, and to establish administrative procedures and penalties with respect to violations, details of which legislation may vary from state to state. In general, the competent authority of the member state in which the exporter is established is the relevant licensing and enforcement authority with respect to the EU Regulation, even though the items to be exported may be located in another member state. In addition, member states are also permitted under the EU Regulation to establish national licensing requirements for reasons of public security or human rights considerations for dual-use items not controlled under the EU Regulation.

The EU Regulation imposes licensing requirements for exports to destinations outside the EU of items listed on the EU Dual-Use List. The EU Dual-Use List and the German´s national control list (Attachment to the *Außenwirtschaftsverordnung*) list is available at the following website:

http://www.bafa.de/ausfuhrkontrolle/de/gueterlisten/index.html

In addition, the EU Regulation imposes licensing or notification requirements if the exporter is informed, is aware or has grounds for suspecting that items may be intended for use in connection with certain nuclear, chemical or biological weapons or missile activities ("weapons of mass destruction" or "WMD" activities) or for certain military end-uses.

Exports of Military Items are Controlled by Each Individual Member State

In Germany, export licensing of dual-use and military items is administered by the Federal Office of Economics and Export Control (BAFA). Where licenses are required, in addition to individual licenses, Germany has also established general licenses for exports to certain destinations. In addition, the EU Regulation establishes a Community General Export Authorisation (CGEA) for exports of many EU Control List items to certain "friendly" nations.

Note that exports may be subject to controls under legislation other than that relating to dual-use items that may be administered by different agencies. Certain chemicals may require consent before exportation, and certain medicines may be subject to separate controls.

Enforcement of Export Controls is Handled by the BAFA.

The EU and its Member States also participate in various economic sanctions and arms embargo regimes pursuant to UN, EU and OSCE (Organisation for Security and Cooperation in Europe) initiatives. These include financial sanctions relating to terrorists, the Taliban, Al Qaeda, Burma, Liberia, Iran and other persons and destinations. They may affect the ability to export as well.

In Germany, the German Federal Bank (*Deutsche Bundesbank*) administers and enforces financial sanctions and maintains a consolidated list of persons subject to financial sanctions designated by the UN, the EU and the UK.

Competition Law

Competition Law[1]

Both German and EU competition law are potentially applicable to persons and entities doing business in Germany. In general, where anti-competitive behaviour would have an effect on trade between EU Member States, Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) would apply exclusively. Where anti-competitive behaviour would have an effect within Germany the German Act against Restraints of Competition (ARC) would apply, also if such behaviour was caused outside of Germany.

As a result of the Modernisation Regulation on the implementation of the rules of competition laid down in Articles 81 and 82 (now renumbered as Articles 101 and 102), the European Commission shares the competence to apply Articles 101 and 102 with German competition authorities and German courts, which also have responsibility for domestic German competition law. In cases where both German and EU law are applicable, the application of EU law takes priority.

The German and EU competition authorities have very broad powers of investigation, including the power to enter and search professional and private premises and effect "dawn raids". The competition authorities can stop violations of the ban on cartels by obliging the companies concerned to discontinue the infringement. Furthermore, fines can also be imposed on persons and companies who participate in such illegal cartels within the scope of administrative offence proceedings.

With regards to Germany, the competition authority "Bundeskartellamt" generally imposes substantial fines on persons and companies who participate in illegal cartels. Fines imposed on individual persons can amount to a maximum of €1 million; in addition to this, companies can be fined up to a maximum of 10% of the total turnover they achieved in the last business year.

[1] - *i.e. companies, partnerships, sole-traders and self-employed professionals that carry out economic or commercial activities.*

Anti-Competitive Agreements and Concerted Practices

Article 101 of the TFEU and Chapter I of the ARC prohibit agreements between undertakings, decisions by associations of undertakings and concerted practices that may appreciably affect trade within a relevant market and have the object or effect of preventing, restricting or distorting competition in this market.

These prohibitions can affect agreements and concerted practices between competitors (horizontal transactions) as well as between undertakings or groups of undertakings acting at different levels of a market (vertical transactions). An agreement or concerted practice that falls within Article 101 or Chapter I is not necessarily illegal. Both EU and German legislation provide for certain exemptions from the prohibition with respect to certain restrictive agreements and concerted practices.

The parties must (except in rare circumstances) self-assess whether an agreement meets the requirements for an exemption (which are subject, of course, to the ultimate determination of the courts).

The EU has established certain "block exemptions" for certain categories of agreements, which also apply if the restricting agreement only has an effect within Germany.

Where an agreement that has an effect on trade between EU Member States does not come under a block exemption, it may still be individually exempted provided the requirements for exemption are met. However, hard-core restraints in agreements such as those involving price fixing (both horizontal and vertical) and export bans partitioning national markets, which are contrary to the goal of single market integration in the EU, will generally not be exemptible and may attract heavy penalties.

Where an agreement has an effect only on the German market, the ARC has established exemption regulation in Section 3 (1) in favour of small and medium-sized enterprises (SME). In accordance with Section 3 (1) , agreements are exempt from competition restriction prohibition (Section 1) if they:

- Are concluded between undertakings that are in competition with one another (i.e. this exemption may only be applied to restraints on competition that have a horizontal effect);
- Have as their purpose the rationalisation of economic activities through inter-company cooperation;
- Do not significantly impair competition in the market as a result;
- Serve to improve the competitiveness of small or medium-sized enterprises.

Abuse of a Dominant Position

Article 102 of the TFEU and Chapter II of the ARC are aimed at unilateral conduct of dominant enterprises which abuse their dominant position within a relevant market in the EU or Germany. To have a dominant position is not prohibited, but its abuse is. A dominant position is generally one in which an undertaking (or a group of undertakings) has the economic strength to prevent effective competition being maintained on a relevant market such that the dominant firm has the power to behave independently of its competitors, customer and consumers. While there is no level of market share that is conclusive to determining dominance, generally a market share of 50% or more will give rise to a presumption of dominance, although, depending on the circumstances, undertakings with a lower market share may have sufficient market power to be viewed as dominant.

Issues under Article 102 and Chapter II have arisen in the context of single branding arrangements (such as exclusive purchasing, requirement contracts, non-compete obligations), tying arrangements, and refusals to supply involving dominant firms. In addition, certain pricing practices by dominant firms can raise issues, such as loyalty rebates, bundling, predatory and excessive pricing, and price discrimination.

Merger Control

European Merger Regulation

Concentrations involving German businesses where certain turnover thresholds are met, such that the concentration has a "Community dimension," are subject to the exclusive jurisdiction of the European Commission under the EU Merger Regulation (subject to certain "referral back" provisions). The EU Merger Regulation imposes mandatory pre-merger filing requirements in respect of such transactions and generally requires suspension of the transaction until approval is received. The exclusive jurisdiction of the European Commission operates as a "one stop shop" and approvals obtained in this manner are valid with regard to all EU Member States.

Generally, a concentration is defined in the EU Merger Regulation as a merger of two or more previously independent undertakings (or parts of undertakings) or the acquisition of direct or indirect control of the whole or parts of another undertaking, which brings about a durable change in the structure of the undertakings concerned. A merger has a "Community dimension" if the concerned undertakings exceed certain turnover thresholds in particular referring to aggregate Community-wide and worldwide turnover.

If each of the undertakings concerned achieves more than two-thirds of its Community-wide turnover within one Member State, the national competition authority of this respective Member State remains competent even if the turnover thresholds for "Community dimension" are exceeded.

German Merger Regulation

Where the EU Merger Regulation does not apply, acquisitions or mergers (whether in the form of an acquisition of shares or assets, a joint venture or similar transaction) will qualify for investigation under the ARC by the "Bundeskartellamt" as German merger authority if certain criteria are met.

Companies whose turnover exceeds certain thresholds have to notify any merger project to the "Bundeskartellamt". Such notification duty applies to a merger:

- If all the undertakings participating in a merger jointly achieve a worldwide turnover of more than €500 million; and
- At least two of the participating undertakings both achieve substantial turnover in Germany, one of them achieving a turnover of more than €25 million and another company achieving a turnover of more than €5 million.

If one company belongs to a group of companies, the "Bundeskartellamt" has to take the turnover of the entire group into consideration. In this way account is taken of the total available economic efficiency of the participating companies in an examination of the possible effects on competition.

Under the provisions of the ARC, a concentration arises under the following circumstances:

- Acquisition of shares: acquisition of at least 25% of the capital or of the voting rights;
- Acquisition of assets: acquisition of the assets or of a substantial part of the assets of another company;
- Acquisition of control: acquisition of the control of another company.
- Relations between companies which enable a company to exercise a competitively significant influence on the behavior of another company.

Until a notified concentration/merger is cleared by the "Bundeskartellamt" the participating companies may not merge with one another. Violations of the prohibition of putting a concentration into effect constitute an administrative offence, which can be punished by a fine.

Contact Us

The information contained in this guide is correct as of 1 February 2015. The information is general in nature and is intended to provide an overview of the relevant law and legal issues. It does not constitute legal advice with respect to any specific matter or set of facts. Professional advice should always be obtained before applying any information contained herein to particular facts and circumstances.

We welcome the opportunity to discuss any of the issues raised in this guide or any other questions you might have. If you would like to know more, please get in touch with your usual Bryan Cave contact or any of the Bryan Cave lawyers in Germany listed below. A complete list of lawyers in Germany can be found at www.bryancave.com.

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