Check-in Germany
A legal guide to setting up and doing business in Germany

TaylorWessing
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Introduction

Germany is one of the strongest global economies and the largest market in Europe for businesses. Being in the heart of Europe, Germany also often serves as the entry market for pan-European expansion and as a springboard to the economies in Eastern Europe. Furthermore, its strong economic ties to the US, Asian, and Middle Eastern markets makes Germany an immensely attractive and valuable hub for foreign companies and investors.

However, operating in Germany has often been viewed as being complex due to its legal framework and regulatory requirements which make market entry appear daunting. Check-in Germany is meant to reframe this traditional picture of doing business in Germany and to support companies that are considering expanding their business into this promising and exciting market. Hence, this guide focuses on providing a 360 degree overview of the key legal requirements for setting up a business and doing business in Germany. And with a rapidly growing degree of foreign investment and acquisition interest in the country, the guide also provides an overview on investments as well as mergers and acquisition.
Introduction

With offices in Berlin, Düsseldorf, Frankfurt, Hamburg, and Munich, Taylor Wessing is one of the leading law firms in Germany and can provide full service legal expertise wherever your business needs it. Moreover, with our very strong international presence, we have been helping international companies of all sizes do business in Germany for many years, from early stage entities to some of the biggest companies and brands in the world.

Our cross-jurisdictional teams of lawyers are perfectly suited to support international clients and understand the topics and requirements of businesses looking to set up or expand in Germany organically and by acquisition.
If you do nothing else

Check-in Germany provides a brief summary of the key legal issues that most foreign businesses will need to consider when setting up in Germany. However, if you do nothing else, as a minimum:

1. Remember that the law in Germany is usually different to your jurisdiction.

2. Take into consideration cultural differences that may impact your business.

3. Plan reasonably ahead and take necessary advice at an early stage.

4. Secure sufficient protection of your intellectual property by registering or expanding your patents, trade marks, domain names, and possible other IP.

5. Think about a local law review of your contractual terms and conditions, your website, your marketing approach, etc.

6. Consider using local language.
If you do nothing else

7. Do not underestimate the importance of data protection and compliance.

8. Seek immigration advice if you intend to send employees to work in Germany.

9. Explore the differences of German employment law – eventually use local law contracts and consult before terminating employees, changing terms, etc.

10. Get in touch with Taylor Wessing to discuss your plans and any questions.
Immigration

In recent years, immigration to Germany has become increasingly popular among foreign nationals and the number of qualified immigrants has also notably increased. Nevertheless, Germany still lacks highly qualified employees in certain occupations and has, therefore, opened up its borders for certain professions. For well-educated and highly skilled non-German nationals, immigration has become much easier, in particular due to the introduction of an EU Blue Card in 2012.

When setting up a business in Germany, immigration strategy should be prepared early and carefully to ensure that required permits will be granted in time for the business to become active and to avoid compromising options, thereby causing unwanted administrative effort.

Citizens of the European Economic Area (EEA) and Switzerland have the right to work in Germany without restriction and do not require a visa or a residence permit / work permit to enter or to work in Germany. All that is needed is a valid passport or identity card.
Citizens of all other countries, as a general rule, must apply for a visa to enter Germany. Applications must be completed in their country of origin through a German embassy or German consulate. Nonetheless, certain privileges apply for citizens of certain countries such as the USA and Canada.

Citizens of the USA and Canada (as well as of Australia, Israel, Japan, the Republic of Korea, and New Zealand) may enter Germany without a visa and may then apply for a residence permit (giving entitlement to work or to be self-employed) in Germany. The application has to be submitted to the municipal Residence Authority that is competent for their place of residence in Germany within three months upon the visa-free entry into Germany.

All other non-EEA citizens (so-called “visa nationals”) must apply for a visa in their home country. The application must be submitted to the German mission responsible for their place of residence. It is particularly important to ensure that the visa accurately represents the purpose of stay. This is a mandatory requirement to obtain a visa extension at a later stage or to change the visa to a residence permit that entitles a longer term of residence.

Having entered Germany with a visa, “visa nationals” must apply for a residence permit giving entitlement to work or be self-employed at the competent German municipal Residence Authority.
Trends and hot topics

► **Timing:** please bear in mind that it might take up to three months to obtain a residence permit giving entitlement to work in Germany.

► **Travelling without a visa / residence permit:** there are no restrictions on non-EEA employees of international businesses working remotely for the German office or for German clients from outside Germany. Employees may visit Germany, prior to any residence permit being granted, but citizens of certain countries are required to apply for a business visa prior to travel (so-called “visa nationals”; US and Canadian citizens, however, are exempted from this obligation, see above). In all cases, the visitor must only perform permissible business activities (e.g. business meetings) while in Germany and only come to Germany for short-term trips, even though a legally compliant business visitor can technically stay in Germany for up to three months cumulatively in any 12 month period. It is important that the business visitor does not “work” or appear to be working to the German authorities.
Key legal considerations

The type of residence permit required depends on the purpose and duration of the stay in Germany and, in some cases, on the personal skills of the applicant. The most frequent types of permits may be summarized as follows:

Self-employment

A residence permit for the purpose of self-employment grants both the right of residence and a permit to be self-employed (e.g. as a business owner, or possibly as a managing director of a newly established legal entity – depending on the service agreement). For such a permit, the local Residence Authority takes into account the:

- viability of the business idea;
- entrepreneurial experience of the investor;
- level of capital investment and availability of capital;
- effects on regional employment and (employee) training level; and
- contribution to innovation, research, and development in Germany.

Permits are, in general, limited in time (max. 3 years) and need to be renewed on a regular basis. The application process is usually rather complicated as the Residence Authority will involve the regional Chamber of Industry and Commerce and / or the municipal Department of Business Development in order to determine whether and to what...
extent the applicant’s business plan is beneficial to the economic structure and development in the respective area.

**Taking up employment**

A residence permit for the purpose of taking up employment is usually granted for certain professional groups, e.g. managerial employees, academics, IT professionals, and specialists upon a specific job offer. The permit usually requires the approval of the Federal Employment Agency. In exceptional cases (employment of the managing director of a limited liability company who is not a shareholder, employment of key employees with a specific power of attorney, etc.), the approval of the Federal Employment Agency is not required.

Permits are, in general, limited in time (max. 3 years) and need to be renewed on a regular basis. The approval of the Federal Employment Agency requires that:

- the foreigner’s employment does not have any negative effects on the labour market;
- no German citizens, nationals of EU / EEA countries or Switzerland, or legally equivalent foreigners are available for the employment (priority check – in exceptional cases not required); and
- the foreigner is not employed on poorer working conditions than comparable German employees.
Citizens of certain countries, among these the USA and Canada, enjoy privileges with respect to the above requirements if they are seconded to Germany and become active in Germany for their US or Canadian employer. In such a case, the decision on whether a permit is granted is in the discretion of the authorities so that it may be recommendable to contact the competent authorities well in advance to discuss the requirements for the individual employee.

**Highly qualified persons**

Highly qualified persons (foreigners with a German university degree or with a comparable foreign degree and with a certain minimum annual salary – in 2015 a minimum salary of EUR 48,400 gross p.a.) may be granted a residence permit in the form of an EU Blue Card. This permit does not require the approval of the Federal Employment Agency and can, therefore, be processed more quickly.

A residence permit in form of an EU Blue Card can also be issued to employees working in fields which suffer from a shortage of skilled personnel (e.g. medical doctors, science / engineering / information technology / communications technology professionals) with a (reduced) minimum salary of EUR 37,752 gross p.a. (in 2015). In these cases, (only) a simplified approval of the Federal Employment Agency is required.
Family members of EU Blue Card holders are immediately entitled to take up dependent and independent employment without any restrictions.

The EU Blue Card residence title is initially of limited duration and is valid for a maximum period of four years if the employment contract provides for a corresponding or longer term. If the term of the employment contract is less than four years, the EU Blue Card will be issued for the term of the employment contract plus three months. The validity of the EU Blue Card may be extended once it has expired and a settlement permit may be issued under certain conditions.

More favourable conditions for mobility apply to holders of the EU Blue Card in Germany. They (and their family members) are permitted to stay in non-EU countries for up to 12 consecutive months without their residence title expiring. Moreover, they can apply for a permanent national residence title (permanent residence permit) after 33 months of highly qualified employment and payment into a retirement scheme. Holders of the EU Blue Card who can prove adequate German language skills can even apply for a permanent residence permit after a stay of only 21 months. The same applies to family members.

The permanent residence permit is the most comfortable residence title a foreign national may obtain in Germany. It grants a right for permanent residence as well as unlimited mobility and unlimited employment (both as an employee or self-employed) in Germany.
Immigration

Changes

Immigration rules are subject to change, often at short notice. It is always advisable to obtain specific advice at an early stage prior to planning any permanent residence in Germany.
Employment

Employment laws in Europe can differ significantly from employment laws outside of Europe, in particular from US states with “at will” employment. There is no concept similar to employment “at will” in Germany. However, even though employees have a raft of protections by law, German employment law is rather flexible, if certain thresholds with respect to the number of employees within Germany are not exceeded.

Trends and hot topics

▶ Do we need a German legal entity in order to hire someone in Germany? It is possible to conclude an employment contract between a foreign company and an employee in Germany. If the main place of work of this employee is within Germany, German employment law applies. In such case, tax advice should be sought out in order to be aware of possible tax implications for the company depending mostly upon the specific tasks of the employee.
Can we just use independent contractors in Germany? Hiring independent contractors (sometimes referred to as consultants) can seem like an attractive option, especially if it means saving or delaying the costs of registering for payroll and other related costs. However, care must be taken to ensure that the relationship is in fact that of a genuine consultancy, especially that the individual is free with respect of the time, place, and way work is carried out. If as a matter of fact the relationship is one of employer / employee, the individual will acquire employment law rights and the employer will be responsible for deduction of income tax and social security contributions which can quickly add up to a significant amount. Furthermore, the employer can be held liable for such social security contributions and income tax not paid for this employment relationship in the past. Not paying social security contributions even though the employer knew or should have known that the relationship was in fact an employment relationship can even be regarded as a criminal offence.
Minimum wage: since January of 2015, a minimum wage of EUR 8.50 per hour (as of 2017 the minimum wage will increase to EUR 8.84) has to be paid to employees. This applies to all employees but not to apprentices and interns within certain internships. Companies may be held liable, if a contracting party does not pay the minimum wage to its employees.

Key legal considerations

Minimum legal rights: employees have minimum legal rights including rights in connection with pay, hours of work, vacation, sick pay, family leave, notice of termination, and dismissal.

Employment contract: each employee has a right to and will expect a written summary of the main terms and conditions of employment rather than a simple letter offering employment which might be more typically expected, for example, in the US. Furthermore, certain provisions are only enforceable if agreed in writing. Therefore, almost all employees in Germany have an employment contract. For employers a written contract has the advantage of making it possible to include certain provisions into the agreement, especially with respect to IP rights, confidentiality, and non-competition covenants. Irrespective of what the parties may agree upon in the
employment contract, however, German law imposes a number of obligations and rights which may override contractual agreements.

**Employment relationship for a definite or indefinite period:** it is possible to agree on an employment relationship for a definite period for up to a maximum duration of two years without the need for any cause for such limitation. Within this two-year-period, up to three extensions of shorter periods are possible. Further or longer limited durations are only possible if a special cause is given for such limitation, for example, if the employee is hired as a replacement for another employee being on parental leave. Any limitation of duration needs to be agreed upon in writing (wet signature).

**Non-compete and non-solicitation provisions:** during an ongoing employment relationship, employees are bound by statutory non-compete restrictions. Furthermore, employment contracts usually include additional detailed non-compete restrictions. However, post-termination non-competition obligations can only be enforced in Germany if they are reasonable and if the employer pays the employee compensation for the duration of the prohibition in the amount of at least 50 per cent of the last remuneration (including all benefits) under the employment contract. Finally, such prohibition on competition may only be agreed for a maximum period of two years after termination of the employment contract. Therefore, in each individual case it should be considered carefully whether it makes sense to agree upon a post-contractual non-competition covenant.
**Creation and ownership of intellectual property:** employment contracts usually include provisions regarding the ownership of intellectual property rights resulting from an employment relationship. The level of detail of such provisions usually depends on the tasks of the employee.

**Social security contributions:** employer’s contributions to social security are paid on top of the salary. They amount to approximately 20 per cent of the gross salary (status as of 2017) but are capped at a certain threshold. Employees’ contributions are withheld from the gross salary and paid directly to authorities by the employer. Social security contributions finance the statutory health, pension, nursing, and unemployment insurance system. Payroll service providers organize payment of social security contributions.

**Health care:** for employers the German health care system is easy to deal with compared to the situation in other countries. Employers do not have to provide health care plans to their employees. Instead, employees have health care insurance contracts themselves. These contracts are financed by the social security contributions of the employers and employees during the ongoing employment relationship. As the level of health care under this system is comparably high, it is unusual to offer further occupational health care in Germany.

**Unfair dismissal:** if an employer employs more than ten employees in Germany, the Protection against Unfair Dismissal Act applies. This means that the employer needs to have a legally “fair” reason to dismiss an employee who
Employment

has been employed for more than six months. Such reasons can be operational (e.g. restructuring), personal (e.g. long lasting sickness), or misconduct of the employee. If the threshold of more than ten employees is not exceeded, no reason for dismissal is needed, only the applicable notice period needs to be observed.

**Termination notice:** for any ordinary dismissal, the applicable termination notice period needs to be observed. German law does not recognize payment in lieu of notice. The length of notice periods can either be agreed in the employment contract or the statutory notice periods apply. If the statutory notice period is longer than the period agreed in the employment contract, the statutory notice period prevails. The length of statutory notice periods depends on time of service. During the initial six months of employment, a probationary period can be agreed. During such a probationary period, dismissal is possible with two weeks’ notice. Until completion of five years of service, the statutory notice period is one month to the end of a calendar month. The maximum statutory notice period is seven months to the end of a calendar month after 20 years of service. Extraordinary dismissals without notice are only possible in cases of severe misconduct of the employee.

**Employment Tribunals:** if an employee is dismissed, the employee has three weeks to file a claim with the employment court as otherwise the dismissal is deemed to be valid. The court only decides upon the validity of the
dismissal. If the court finds that the dismissal was valid, the employment relationship ends as terminated without the obligation to pay severance. If the court finds that the dismissal was not valid, the employee will be reinstated and the employer is obliged to continue to pay wages and to pay outstanding wages for the time after expiry of the notice period. The court does not decide on severance payments.

**Termination agreements:** a further option to end employment is the conclusion of a mutual termination agreement. Such an agreement has to be signed with wet signature and each party needs to receive a version which is signed in the original by the respective other party.

**Severance payments:** severance payments are often agreed upon in termination agreements or settlement agreements ending a law suit for unfair dismissal. There is no statutory calculation of severance payments.

**Works council:** in operations with at least five employees, employees can initiate the establishment of a works council. Works councils are typically established in larger operations, especially in the blue collar sector. Whereas in new economy companies, it is rather unusual to set up works councils. Works councils have broad determination rights. For example, a works council needs to be consulted before any dismissal as otherwise the dismissal is void.
The Reichstag, Berlin, Germany
In Germany, a state-run pension system provides for a basic old-age income. Both employer and employee are obligated to contribute the same amount to the state-run pension system. The amount is adjusted every year. In 2017, employer and employee both have to contribute 9.35 per cent of the monthly gross salary, but no more than EUR 593.73 per month.

In addition, employees have a statutory right to defer up to EUR 254 (in 2017) of their monthly salary through the employer to an external pension vehicle (most often the employer uses an insurance company). There is no statutory obligation for German employers to provide funding for a company pension. However, many (but by no means all) German employers provide some form of company funded pension to their employees. There are basically two different ways to set up a company pension:

- Direct commitment of the employer.
- Using an external vehicle to grant a company pension (direct insurance, pension fund, investment fund, support fund).
Trends and hot topics

- As recruiting has become increasingly challenging in recent years, more and more German employers have set up a company pension scheme as a tool to recruit and bind employees. However, the popularity of company pension schemes varies from industry to industry.

- In the past, most German company pension schemes had been set up by way of a direct commitment because such direct commitments did not need any immediate funding and, therefore, did not bind liquidity. However, in recent times external pension vehicles have become more popular since such vehicles allow a separate funding which makes the calculation of the overall pension costs more reliable.
Key legal considerations

Should a company pension be granted to the work-force?

If an employer becomes a member of an employer’s association, industry-wide collective bargaining agreements can become applicable which sometimes provide for an obligation to set-up a certain company pension plan. If no such collective bargaining agreement is applicable, the company should survey the market to find out how popular company pension schemes are in its industry and whether it will be able to recruit adequate employees without offering a company pension.

Choosing between direct commitment and external pension vehicles:

Before setting up a company pension scheme, the employer should give careful consideration to the question of whether to grant a direct commitment or to use an external pension vehicle. Direct commitments do not diminish the current liquid funds but the liabilities – usually calculated under international accounting standards – need to be reflected in the balance sheets.
Cologne Cathedral and Hohenzollern Bridge, Cologne, Germany
Employee incentives

Many foreign businesses use stock options to incentivise their employees. In Germany, stock options are not as common, but there are several (other) options available to incentivise employees. Usually the key aspects to consider when structuring employee incentives are tax issues – for the business as well as for the employees. Hence, it is very important to obtain specialist advice prior to granting employee incentives in Germany to avoid incurring substantial tax liabilities. The most common employee incentives in Germany are set out below:
Employee incentives

Bonus
A bonus, i.e. an additional remuneration which depends on the performance of the company as a whole, certain parts / divisions of its business, or the individual performance of the employee, constitutes a part of an employee’s salary on the basis of a contractual obligation between the company and the individual employee. This allows large flexibility with respect to the conditions subject to which a bonus shall be payable. However, a bonus of course cannot transport a “feeling of ownership” like the other forms of employee incentives set out below.

Phantom shares
The grant of phantom (or virtual) shares is a performance based remuneration based on a phantom share plan and / or an individual agreement. Employees are granted payment claims, represented by virtual shares, as part of their salary and generally participate in both, profit and loss of the company, as well as in the company’s value (or the value of certain of its business divisions). At the date of exercise, i.e. the virtual sale of the shares – usually an exit event of the company initiated by its shareholders – the beneficiaries receive the price per share in the company determined as of the date of exercise, usually reduced by the previously agreed strike price.
Shares (direct or indirect)

Employee incentives in the form of equity participations can be structured directly or indirectly:

- In case of direct equity participations, employees receive shares in the company as part of their salary against payment of a (generally pre-determined) price for these shares. The employees become shareholders in the company, with all rights and duties attached, and directly participate in the profit and loss of the company, their risk, however, being limited to their capital contribution.

- In case of indirect equity participations, employees become indirect owners of a participation in the company via an employee participation vehicle which directly owns the shares in the company. Indirect equity participation structures are often preferred, in particular, for German limited liability companies (GmbH), as formalities for the granting of benefits can be handled more easily with just one direct shareholder. Furthermore, they have less impact on the corporate governance of the company as employees’ rights regarding, in particular, information on the company’s business and the exercise of shareholder rights will be dealt with on the level of the participation vehicle, avoiding the “nuisance potential” of a group of minority shareholders in the company’s shareholders’ meeting.
Employee incentives

Stock options
Stock options (or share options) are issued to employees as part of their salary. Each employee can exercise the options individually and will, upon exercise, directly or indirectly hold shares in the company with the respective consequences set out above.

(Typical) indirect silent partnership
The silent partner participates in a business by a contribution (which can be made in cash or in kind through, e.g. services) and, in turn, participates in its profit and loss (while loss sharing can, however, be excluded). A silent partnership is not disclosed to the public. In many cases, employees indirectly participate in a business through a silent participation in a special purpose vehicle, such special purpose vehicle in turn being a shareholder in the company.

Participation certificates (Genusscheine)
Participation certificates establish contractual rights to participate in the company’s performance (mainly profit participation) without conveying a shareholder position; the participation is not disclosed to the public. The participation may be structured directly or indirectly (involving a special purpose vehicle). Employees receive participation certificates as part of their salary. It is a very flexible instrument as the content of participation certificates can be structured largely at the parties’ discretion.
Trends and hot topics

- Labour law aspects: employee incentives need to consider the regulations under German mandatory labour law and, to the extent applicable, collective labour agreements and shop agreements. In regards to mandatory labour law, often the specific wording of the arrangements is decisive. Furthermore, the structure and implementation of employee participation models for non-executive staff may be subject to works council’s right of co-determination, in particular insofar as equal allocation and distribution of employee participation are concerned.

- Tax aspects: it is important to obtain tax advice prior to granting employee incentives in Germany as potentially significant tax liabilities for both, the company and the employee, may be incurred. Subject to the specific structure of the incentive scheme, the tax rate and taxation events may differ considerably. In general, it is crucial to avoid that an employee is required to pay taxes prior to receiving funds from the programme.
Potsdamer Platz, Berlin, Germany
A key part of successfully setting up and doing business in Germany is to establish the appropriate business structure. This will usually include:

- the incorporation of an entity in Germany or the registration of a branch; and

- taking steps early in the process to consider the most appropriate structure from a commercial, corporate, finance, and tax perspective.

Key legal considerations

Trading in Germany

Inward investors use a number of different structures to enter the German market. The right structure will depend on factors such as the specific sector, business product, service, and the extent to which a local presence in Germany is required. Examples include:
Structuring your business

- Trading through a German legal entity (or a group of companies);
- Setting up a German branch;
- Running the business from outside Germany via the internet or otherwise selling directly into Germany;
- Using a franchise or licensing model;
- Using a distributor or agent;
- Using a joint venture with a third party;
- Acquiring an existing business in Germany; and / or
- Entering into a partnership with another business.

Choice of legal entity

Any private individual, partnership or corporation can set up an entity in Germany or acquire shares in an existing company, irrespective of nationality or place of residence. Germany does not have any specific investment legislation. Furthermore, no minimum percentage of German shareholders is required for foreign investments within Germany. A corporation can be founded by a single shareholder; a partnership requires at least two partners. In each case, the company can be represented by a foreign person as managing director.

Corporations are subject to corporate income tax and trade tax. The income is determined in accordance with the regulations of the Corporation Tax Act (Körperschaftssteuergesetz; KStG). Dividends paid from a German corporation to its foreign parent company are, in
Structuring your business
general, subject to a withholding tax (Kapitalertragsteuer) amounting to 25 per cent plus solidarity surcharge of the dividend (as of 2015). Modifications (in particular: tax refunds) are often provided in the provisions of Double Taxation Agreements, such as the Double Taxation Treaty USA-Germany.

Partnerships are “transparent” from a tax perspective and are, therefore, not subject to corporate tax. Instead, the taxation depends on the individual circumstances of the partners. The partners may be subject to personal income tax at the (individual) tax rate applicable to them (subject to the law of their country of residence).

Often times, corporations are the best option for larger companies. In many cases a limited liability company (Gesellschaft mit beschränkter Haftung, GmbH) is chosen, which is usually set up as a wholly owned subsidiary (i.e. 100 per cent of the shares are owned by the foreign parent). One of the main advantages of a GmbH is the limited liability of its shareholders. Setting up a GmbH usually requires a minimum share capital of EUR 25,000 which is protected by statutory law.
Structuring your business

Trends and hot topics

Since 1 November 2008, limited liability companies can be set up as “Mini-GmbH” (Unternehmergesellschaft (haftungsbeschränkt); UG). The idea behind the “Mini-GmbH” was to give a “German answer to the UK Ltd.”. The “Mini-GmbH” is not a new legal company form but a subtype of the “standard” limited liability company. The low minimum capital requirements (the registered share capital must be an amount from EUR 1 to EUR 24,999) are primarily designed to help startups to take up business in the legal form of a limited liability company.

German companies have accounting, tax, audit, and regulatory requirements that need to be complied with. When a new GmbH is set up, it usually takes up to three weeks from the incorporation date until the company is registered with the commercial register (pursuant to statutory law, a GmbH starts to legally exist upon registration with the commercial register). Instead of setting up a new company, investors may choose to acquire an already existing (but commercially inactive) shelf company from one of the various shelf company providers. The main advantage of a shelf company is that the company already legally exists and the operative business can be started immediately.
Structuring your business

German branches (Zweigniederlassungen) registered with the German commercial register can be a useful alternative to a corporation in some cases. This is often because a German establishment is seen as a lighter form of entry into the German market, with lower regulatory requirements and maintenance costs than a company. This can be an attractive option for inward investors who want to make a tentative first step into the German market or in cases where the levels of activity in Germany are likely to remain limited.

Branch offices do not have an independent or separate legal personality distinct from the head office of the main company. From a legal and organisational perspective a branch office is part of the head office, subject to the law governing the head office and part of the organization of the foreign main company’s organisation. Accordingly, the liability for debts and liabilities of the branch depends on the liability of the head office. Offices that only observe the market
Structuring your business

without doing business beyond this are often described as “representative offices”. However, this term does not exist in German commercial law – such offices must usually be registered as a branch office in Germany. Eventually, an office managed by an independent commercial agent may be considered an office without any business activity on behalf of the foreign company in which case registration with the local trade office may not be required.

Irrespective of whether a branch is registered with the competent German commercial register, business activities in Germany can be considered a permanent establishment (Betriebsstätte) from a tax perspective and can become subject to limited corporation tax and trade tax. These tax implications have to be carefully checked before starting business in Germany.

Name availability

For a company or German branch to be registered with the competent German commercial register, the name of the proposed entity must not be identical or too similar to an existing company or German branch registered with the same commercial register. In addition to checking the respective commercial register when forming the entity, it is advisable to carry out a trade mark search to assess the risk that the use of the proposed name may infringe an existing registered trade mark.
It can also be helpful to use a search engine to investigate whether the proposed name is similar to any other existing business name in the same or similar trade, where there could be a risk of a “passing off” action being brought by the existing business under German law, if that pre-existing business has established goodwill in the name and there is a risk of confusion.

Companies and German branches registered in Germany can be found in the common register of the federal states of the German judiciary authorities at www.handelsregister.de.

**Methods of trading**

Legal implications relating to the commercial activity in Germany depend on the envisaged methods of trade. Will customers trade with the German entity directly or with the parent entity? Which entity in the group will own the intellectual property?

Specific tax advice should be obtained and the relevant tax and commercial issues will need to be considered carefully in each case.

There is a high level of consumer protection in Germany. General terms and conditions are subject to a strict control of their legal effectiveness and validity, in particular when it comes to B2C business. Please see the section on contracts and commercial arrangements of this guide for more details.
Structuring your business

Bank accounts

Depending on the structure of the German entity, it could be necessary to establish a bank account before registering an entity in Germany. Due to the “know your customer” rules which are prevalent across Europe and the German Anti Money Laundering Act, setting up a bank account once a German entity has been established, might take some time. Banks may ask to be provided with (extensive) documentation relating to the shareholder(s) and to the new company. Any further beneficial owners of the company have to be declared, particularly the individuals who directly or indirectly hold a share of more than 25 per cent in the company. Proof of an uninterrupted chain of title is required. Accordingly, opening a bank account with a German subsidiary of a foreign bank the shareholders are already familiar with (e.g. Bank of America or Bank of China, which have German subsidiaries seated in Frankfurt) may be considered.

Duties after setting-up a German company

As a general rule, the following authorities need to be contacted after having set up a new company:

- Tax office (Finanzamt) and municipal tax authority
- (Stadt-/Gemeinde-Steueramt) *
- Local trade office (Gewerbeamt) *
- Labour office (Arbeitsamt) **
Structuring your business

- General Health Insurance (Allgemeine Ortskrankenkasse; AOK) **
- Chamber of Industry and Commerce (Industrie-und Handelskammer; IHK)
- Liability Insurance Association (Berufsgenossenschaft) **
  
  * usually informed automatically by the notary involved in the foundation / acquisition of the new company.
  ** only required if the company has employees.

Immigration

If the business is looking to send an employee to Germany to work, it is important to seek immigration advice in advance. In principle, citizens from outside the European Economic Area (EEA) may stay in Germany for up to 90 days without a visa. However, a visa / residence title may be required when running a business on-site in Germany or being employed in Germany. The type of residence title required depends on the purpose and duration of the stay in Germany and, in some cases, on the personal skills of the applicant. Please see the immigration section of this guide for more details.
Mergers and acquisitions

Many of the foreign businesses we advise enter the German market through mergers and acquisitions (M&A). German M&A activity has been, and continues to be, buoyant particularly in the services, IT, finance, mechanical engineering, and pharmaceuticals sectors. And the good news for foreign buyers of German businesses is that M&A will, generally speaking, have many of the hallmarks of North American M&A and thus might be familiar in terms of the process, timetable, and documentation required.
German M&A market booming: the German M&A market experienced a “boom year” in 2014 where transaction numbers and volumes reached the highest level within the last ten years. Germany is increasingly in the spotlight of foreign investors: in 2014, almost one third of all M&A transactions with German targets involved foreign investors as buyers. Key drivers for this increased activity were an abundance of liquidity, easy access to capital with low interest rates for both strategic and financial investors, and great synergistic potential, especially within the German “Mittelstand” (SMEs). We believe that the current M&A wave is deep and wide, at least on sight, especially since the European Central Bank continues to signal maintenance of its low-yield policy. In 2014, the German M&A market has again seen some mega deals relating to takeovers of publicly listed companies such as the takeover of Celesio by McKesson, while takeover activity in general was more or less on previous years’ level.

Berlin – the German “Valley”: Berlin is the home for many venture capital funds and business incubators who are offering funding and organizational support for startups. In addition, public institutions such as universities, technology
Mergers and acquisitions and innovation centers offer a variety of hands-on mentoring programs. This welcoming atmosphere and infrastructure combined with comparatively low rent prices, the city’s vibrant cultural life, and its hip, young image has made Berlin a magnet for founders and venture capital investors from around the world making it a hotspot for media and technology businesses. In fact, each year 40 per cent of German startups are founded in Berlin.

**High valuations:** as many corporates and financial investors are actively looking for investment opportunities in Germany, we expect rising competition among buyers. In this sellers’ market, valuations tend to be high. Even though valuations are generally considered high, stock exchange valuations in Germany still tend to lag behind e.g. those in the U.S., thereby possibly still offering interesting investment opportunities. In particular, German SMEs, especially technology-oriented companies, are viewed as attractive investment targets. As good bargains will be harder to find, for foreign corporate investors the roll-out of an existing business to Germany might be preferred over acquiring an existing German business. For financial investors, these are times to consider an exit. The positive effect of high valuations is that differences in purchase price negotiations can be increasingly bridged by paying consideration in shares.
Key legal considerations

German style M&A documentation

In purely domestic deals, German style M&A documentation is partly “leaner” compared to, for example, US style documentation. This is because statutory German law already provides for many of the definitions of contractual terms and concepts, e.g. definition of damages etc., so that fewer contractual details are needed. For cross-border deals, German style M&A documentation is often aligned to the extent possible with international standards.

Importance of German notaries in transactional practice

A peculiarity under German law is that an M&A agreement involving the sale of shares of a German limited liability company (GmbH) or, in particular cases, the transfer of assets must be notarised. German notaries are independent state-appointed officials and fully qualified lawyers who must not be involved in the negotiation of the transaction. Where notarisation is required, fees for the notary are calculated based on the value of the consideration involved in the transaction and are non-negotiable as they are mandatory by law. While notarial fees may, in certain deals, increase transactional costs, additional costs such as the stamp duty applied in various common law jurisdictions do not exist in Germany (other taxes such as real estate transfer tax may nevertheless apply).
Mergers and acquisitions

Shares or assets

Buyers should carefully weigh advantages and disadvantages of structuring the transaction as a share or an asset deal, especially regarding the assumption of potential liabilities and tax matters. Generally, sellers prefer a share deal because the taxation of capital gains is significantly lower compared to an asset deal. From a buyer’s perspective, an asset deal is usually preferred tax wise since most of the acquisition costs are tax deductible, immediately or by way of depreciation.

Signing and closing

German M&A agreements tend to ease the closing of any deal by reducing potential closing hurdles. This means they will contain less closing deliveries and less closing conditions compared to for example US style agreements, e.g. no material adverse change (MAC) clauses or confirmatory due diligence requirements. Also, the availability of financing is usually not a closing condition but put in place separately.

Purchase price adjustments

Net financial debt and working capital are the balance sheet items used for purchase price adjustments in mid to large cap transactions. However, the use of non-adjusted (“locked box”) purchase prices has become more and more prevalent in recent years, especially where respective balance sheet items are not overly volatile and periods between signing and closing are short, or in very small transactions.
Mergers and acquisitions

Escrow accounts

Warranties are frequently safeguarded by the use of an escrow account. Very often such accounts are operated by said German notary public. Warranty retentions in escrow tend to be in the range of 25 to 50 per cent of the consideration. In line with a trend towards locked box purchase prices, escrows are less needed to safeguard buyers’ rights to purchase price adjustments.

Earn-outs

While not frequently used in typical M&A deals, earn-outs are often used in talent and technology acquisitions where individual sellers are key value drivers and will continue to manage the company and add value to the business. When earn-outs are agreed upon, both parties will want to see appropriate “ring fencing” provisions in the sale and purchase agreement to avoid potential conflicts. While sellers may seek to be able to freely run the business in a way that it reaches earn-out parameters, buyers will seek protection against potential manipulation of earn out relevant financial statements by managing sellers.

Warranties and indemnities

US style M&A agreements customarily afford a buyer protections relating to the acquired target business on an indemnity basis. In Germany, protections other than relating to taxes are generally granted by sellers on a warranty basis resulting in a buyer being required to prove its loss to a greater extent than he would be in case of an
Mergers and acquisitions

Indemnity. Also, warranties in German M&A agreements, unlike indemnities, are often subject to stricter limitations, e.g. caps or basket amounts. It is also worth noting that warranty and indemnity insurance (W&I Insurance) has become a tool increasingly used in Germany to bridge differences in negotiations of risk allocation.

Limitation of sellers’ liability

Liability caps are standard in German deals and tend to be around 20 to 50 per cent of the purchase price, depending on respective bargaining power. Moreover, basket and de-minimis provisions are increasingly used in German deals.

Public takeovers

The acquisition of shareholdings in companies that are listed on a stock exchange in Germany are subject to comprehensive legislation based on the EU takeover directive (the German Securities Acquisition and Takeover Act – WpÜG). Takeovers of publicly listed companies are monitored by the German Federal Financial Supervisory Authority (BaFin). There are three types of public offers:

- **(i) ordinary offers** which are not aimed at acquiring control of the target,
- **(ii) takeover bids** aiming at controlling the target whereby control is defined as holding at least 30 per cent of the voting rights in the target, and
- **(iii) mandatory offers** that have to be made to all other shareholders when a bidder acquires control, i.e. exceeds the threshold of 30 per cent.
Mergers and acquisitions

While takeover bids can be made conditional e.g. upon achieving a certain threshold or the non-occurrence of a MAC, mandatory offers cannot. Takeover and mandatory offers must adhere to minimum price rules based on the volume-weighted average market price over the previous three months and prices paid for target shares in the six-months period before the offer.
Contracts and commercial arrangements

When entering the German and EU market, foreign businesses will need to consider what approach they wish to adopt in relation to their contractual arrangements. Whether they act indirectly (via agency, distributorship, franchise, commission, multilevel marketing) or directly by contracting under online terms with consumers or businesses, small print terms attached to purchase orders or invoices, or traditional “wet” signatures on formal agreements, the bottom line is that changes will be needed to protect the business as it expands into Germany.
Contracts and commercial arrangements

Trends and hot topics

► **Choice of law and jurisdiction:** EU companies typically resist non-EU law and jurisdiction, so unless you are happy to contract under local law, it is wise to have a compromise position at hand. English law might be a good compromise choice, if you prefer common law. Nevertheless, the majority of German / EU member state companies prefer civil law such as German law. Being an international law, the convention on the International Sale of Goods is an attractive option for an EU approach; moreover, the famous “neutral law” of Switzerland is frequently chosen (the Rome I Regulation provides for the freedom of choice of law all over Europe, whether or not it is the law of an EU member state). Furthermore, opting for an ordinary European court appears to be the obvious choice for German / EU member state companies as national rules governing jurisdiction as well as the recognition and enforcement of judgements is harmonised all over the EU (Brussels I Regulation).

► **B2C relationships need special care:** EU Directives closely regulate B2C relationships throughout the EU. Many terms which are standard in international contracts will be void, so a review and localisation exercise is often required. Businesses cannot, for
example, widely disclaim liability against consumers. Online orders for goods, services, or content by consumers are also typically cancellable by consumers without cause under the Consumer Rights Directive.

▶ **The General Terms & Conditions-dilemma:** in Germany / all over the EU, general terms & conditions (even standardized agreements, templates, or the like) are likely to be void if they deviate from statutory law; whereas the intensity of this problem varies in the different EU jurisdictions, this has to be considered and requires a smart approach in the contracting of foreign companies.

▶ **Competition rules:** under EC and German competition rules, certain agreements restricting competition are void. This can lead to fines and the relevant clauses – and perhaps the whole agreement – can be found to be unenforceable. It is, for example, important to take advice if you are seeking to fix resale prices, restrict territories, impose non-compete obligations, or grant exclusivities.
Contracts and commercial arrangements

Key legal considerations

Anglicisation

If looking to replicate an international business model in Germany / the EU, the existing contract templates should be reviewed and updated to ensure they comply with German / EU law. The focus of this process is usually on legal issues rather than on changing any commercials. Stylistic changes might also be advisable so that the template “looks right” for the German / EU market to avoid unnecessary queries or resistance from contracting parties.

Agency agreements

As in other parts of Europe, certain types of agency appointments and arrangements are protected under German / EU law and can provide the agent, regardless of contractual arrangements, with the right to claim compensation on expiry or termination. Foreign businesses should seek specific legal advice on the terms of these agreements so that they understand the implications of entering into them and can take steps to try to mitigate risk. Such considerations are also important for distributorship, franchises, multilevel marketing, or commission systems.
Offshore enforcement

There is no mutual recognition treaty for decisions of non-European courts, so they are not straightforward to enforce in Germany and the EU. If a foreign business is suing for payment under its contract, it will be easier to enforce a local German or EU judgement against the local assets of the other party.

Mandatory rules

Regardless of the law and venue agreed, when dealing with German or EU parties or performance of a contract in Germany or the EU, certain local “mandatory rules” will apply and often override what the parties have agreed. The mandatory rules in each country will be different, so foreign businesses should consider getting local counsel to review any high value or strategically important contracts which are not governed by the law of the market in which the customer is based.

Data protection, consumer law and IP

There is a raft of legislation in these areas, referred to in other chapters of this guide, which will also need to be considered when drafting contractual terms.
Online developments have revolutionised the way companies can do business and interact with their customers. An effective online presence may allow foreign businesses to enter the German and EU market rapidly and often at a relatively low cost, driving brand recognition and sales to the business in a new market.

While Germany has been relatively slow to pick up on online sales, the market is now one of the largest in Europe and is predicted to grow at a rate of more than ten per cent annually.
Trends and hot topics

- **Consumer Rights Directive**: the Consumer Rights Directive was implemented across Europe in June 2014. In Germany, the Directive has been implemented into the German Civil Code. Anyone contracting with consumers will need to review their sales “lifecycle”; pre-contractual information; contract confirmation process; cancellation, returns, and refund policies; and terms and conditions. Online retailers will also need to make sure they comply with special pre- and post-contractual information provisions and ensure they clearly inform consumers at the point of them entering into a payment obligation (“purchase button”). Particular points to note are the cooling off (withdrawal) period of 14 days, the requirement to refund within 14 days, and the obligation to provide standard cancellation forms for distance contracts.

- **Contractual terms**: terms and conditions for the supply of goods and services must be easily accessible and brought specifically to the consumer’s attention or they may not be enforceable. A pre-populated “accept” tick box is not sufficient. German law on terms and conditions imposes specifically strict limits on terms which are considered “unfair”, ambiguous, or unexpected for
both B2C and B2B agreements. Some contractual terms such as those which seek to restrict certain conditions and warranties implied by statute are absolutely prohibited from being included in consumer terms of supply. Similar consideration also needs to be given to the sellers’ online terms of use as well as its terms of supply.

- **Enforcement:** consumer protection organisations have been very active in suing businesses using “unfair” terms and conditions.

- **Virtual items, in-app-sales:** the rules for ecommerce transactions also apply to the sale of “virtual items” and sales transacted through mobile apps. This poses additional challenges, not least because of limited space available on mobile devices.

- **Payment services:** regulations imposed by the Payment Services Directive require scrutiny as to how payment streams are organised in online transactions. In particular, providers must not receive funds from a payer and transfer corresponding amounts to a payee, as this may be seen as a regulated payment service requiring a specific license. Please see the section Other issues – Financial services of this guide for more details.
Key legal considerations

Website information

All website operators are required to make certain information available to their users, including, amongst other things, names, geographical addresses, VAT registration, and details of any regulating body. In addition, a privacy policy must be easily accessible and provide information on the scope of the collection and use of personal data (e.g. through cookies). Please see the privacy section of this guide for more details.

Online and distance selling

Customers purchasing goods and services online must be provided with certain information before they can place an order and this information must be confirmed to the customer on a durable medium (e.g. via an email which can be printed) after the transaction has been concluded. Online businesses must offer at least one payment method which does not cause additional costs, and there may be no extra charges for telephone hotlines beyond actual costs. Specific rules apply for “digital content”, such as downloads of film, music, or video games.
Governing law

The attractiveness of an online business is the ability to reach users all over the world. This creates a legal challenge which has not been resolved satisfactorily over the years. Whether the law governing the country in which the consumer lives applies to the purchase varies from country to country and may depend on the functionality or even the domain of the website. It is important to take advice on the most appropriate approach for the business in each case.

Newsletters

Email newsletters will be considered unlawful “spam” unless the recipient has given prior and explicit consent. Limited exceptions apply if a consumer has made an (online) purchase and is thereafter, offered similar products or services by the seller, provided that the consumer has been informed of his right to object to any mailings.

Social media; user generated content

It is important to decide whether (and if so, how) to moderate user generated content and when to take material down to avoid liability for such content. Effective deployment of “intermediary defences” and prompt action can help manage the multiple legal risks which may be associated with social media and more generally, the hosting of user generated content.
Frankfurt Old Opera House,
Frankfurt, Germany
Privacy

Businesses increasingly collect, store, and use information about individuals on an unprecedented scale. This information ranges from a person’s contact details, to tracking their online habits. In the past, the European Union (EU) has adopted privacy directives to ensure that this information is lawfully obtained, used responsibly, kept securely, and that relevant consents are obtained. With other EU member states adopting data protection laws of varying degrees, Germany may actually be viewed as having the highest standards for data protection. However, the new General Data Protection Directive will provide for a high level harmonization of the data protection laws of the EU member states, forcing many of them to upgrade near the actual German standard.

Data protection (privacy) has always been an important topic for doing business in Germany, but more recently has become an increasingly crucial area of compliance as well. Furthermore, Germany’s exceptionally high-level of privacy standards compared to most other European legislations can be used as an advantage for pan-European and even global business activities, in particular in the light of the new
Privacy

General Data Protection Directive set to become effective in all EU member states. As a result, ensuring compliance with German privacy laws as a starting point is increasingly used for establishing a data protection standard that complies with most other European data protection laws; especially since most of the concepts already applied in Germany will become standard in the EU once the EU General Data Protection Regulation comes into force in 2018.

Also, whereas non-compliance can trigger negative PR, brand damage and regulator enforcement, demonstrating compliance with privacy standards can be a significant advantage when doing business with European customers.

Trends and hot topics

- **New Data Protection Legislation**: the data protection landscape is set to change significantly as the new General Data Protection Regulation (GDPR) has replaced the existing EU law. As mentioned earlier, the GDPR is set to come into force in May 2018. As being directly applicable in all member states, the GDPR is meant to provide a full harmonization of data protection laws across all EU member states. However, there will be room for variations according to interpretation; also certain areas are exempt from the harmonization of the GDPR, such as employee data. The GDPR will strengthen data subjects’ rights, impose for tougher
sanctions, increase the compliance requirements on businesses, and – most importantly – introduce a ‘one-stop shop’ regulator.

**Cookies:** the Privacy and Electronic Communications (EC Directive) Amendment Regulations 2011 requires organisations using cookies or similar tracking tools to only place these on machines of users, or access information from their devices, where users have first given their consent. An overseas business with a website actively targeting German users and which places cookies on their devices will need to provide clear information about how cookies are used and ensure user consent to the use of the cookie is obtained.

**Cybersecurity Directive:** the EU issued the Network Information Security Directive that is now to be transposed into local law by the Member States by May 2018. The Directive places cybersecurity, risk and incident management obligations, together with breach notification requirements, on operators of essential services and on digital service providers, defined as providers of online marketplaces, online search engines, or cloud computing services.

**“Safe Harbor” and “Privacy Shield”:** The EU restricts export of data outside the European Economic Area (EEA) unless certain pre-conditions
Privacy

are met to safeguard that data (see below). The “Safe Harbor” scheme, one of the most popular methods formally used by US organizations to enable the export of EU personal data, was invalidated by the European Central Court in 2015. It has since been replaced in 2016 by self-certification under the Privacy Shield, providing direct rights to European data subjects in the U.S., installing control mechanisms, and restricting government access to EU data. While the Privacy Shield addresses many of the major issues used for the Safe Harbor invalidation, the Privacy Shield is already subject to court reviews for being insufficient on that behalf, as are Standard Clauses and Binding Corporate rules.

Key legal considerations

Personal Data

Unlike the term “Personally Identifiable Information“ in the US and many other jurisdictions, personal data in Germany means any data which relates to a living individual who can be identified or may be identifiable from that information or in conjunction with other information. Thus, for example, IP addresses or other identifiers may be considered personal data.
Transparency and data use

Any activity where a business interacts with its users online through a German website is likely to trigger some personal data collection. Such websites should as a minimum publish a privacy policy that sets out in plain German what data is collected, for what purpose and to whom and where in the world it might be sent. It should also make key messages and choices about the use of personal data available to users at the point of collection. Furthermore, German language websites should have a notice giving contact details of the website provider.

Data Protection Officer

For any company that has more than nine employees dealing with personal data, the appointment of a data protection officer is mandatory. Once appointed, there is no requirement to notify the regulator (the Data Protection Authority in the Federal State in which the business is based). However, failure to appoint a data protection officer is an administrative offence and may be subject to fines. Under the GDPR the obligation to appoint a data protection officer will be extended to all EU countries to a certain extent.

Transferring data outside the EU/EEA

The European Directive generally prohibits personal data transfers to countries outside of the EU/EEA unless the EU Commission has found that the destination country provides a level of data protection similar to the EU’s requirements. This is the case for only a very limited number
Privacy

of non-European states, e.g. Canada, but not for the United States and most other non-European countries. “Transfer“ includes (viewing) access to data, i.e. the data need not be transferred physically. There are certain exceptions to this ban on transfers, e.g. if the transfer is required for performance of a contract, or the individual consented. In all other cases, for a transfer of personal data to non-European countries to be permissible it is required that the data recipient has either:

► (i) self-certified under the Department of Commerce’s “Privacy Shield“ framework (US only);
► (ii) signed “Standard Contractual Clauses“ (also called “Model Contracts“) provided for by the EU Commission, or
► (iii) has valid Binding Corporate Rules (BCRs) in place.

Transferring Data to “third parties”

In addition, under German data protection laws any data transfer to “third parties“ requires legal permission or consent, regardless of in which country this third party is located. “Third party“ is an entity or person other than the data controller. Therefore, even group companies are considered to be “third parties“. The only exception applies if the third party:

► (i) acts as a mere data processor, i.e. only collects, processes and uses personal data on behalf of the data controller; and
► (ii) this data processor is located within the EU/EEA.
Hence, for data transfers to data processors located outside the EU/EEA, it is important to ensure that such a transfer is permitted by law.

Different from other EU member states, in Germany, EU Standard Contractual Clauses are not in themselves considered a “legal permission”. Rather, they are only the first step in legitimizing the transfer of data to countries outside the EU/EEA (because they provide for an “adequate level of data protection”). As a second step, the data controller must verify whether the intended use of the transferred data by the data processor is legally justified, e.g. by applying the data processor exemption.

**Data Processor Agreements**

German data protection laws require any data controller using data processors for its business to have a written agreement in place. An agreement such as this has to address certain issues stipulated by the law and, in particular, it has to regulate the use of subcontractors and stipulate the technical and organizational measures that the data processor has to implement and maintain when providing the services. This requirement also applies to intragroup agreements and is layered on top of what the EU Standard Contractual Clauses 2010/87/EEC require. Failure to have such agreements in place and / or monitor their implementation can trigger an administrative fine.
Competent Local Data Protection Authority

Germany is a Federal State, where each individual German federal state has its own regulator; hence, it is important to consider in which state an entity is domiciled in order to evaluate which data protection authority is competent. Also, a different regulator may be competent in case the company is a state owned company, because in some states there is a regulator for privately held companies and a regulator for state owned companies. Furthermore, despite the fact that most data protection rules derive from Federal law, it is still true that the administrative practice can vary from State to State. Accordingly, it is important to be supported by data protection specialists who are very familiar with the local peculiarities and can provide strategic advice on how to handle respective issues with the different regulators.

For more insight and guidance on global data protection laws, including those in Germany, please visit our Global Data Hub microsite: www.taylorwessing.com/globaldatahub.
Intellectual property

Intellectual property rights (IPRs) are a major economic driver in Germany. IPR intensive industries contribute to 45.9 per cent of the GDP and 27.4 per cent of employment (figures as of 2014). In the statistics of the European Patent Organisation (EPO) and the Office for Harmonization in the Internal Market (OHIM), Germany ranks first among the EU member states for patents, trade marks, and designs granted.

Today, only four EU-wide intellectual property (IP) systems are in force – geographical indications, Community Trade marks, plant varieties, and Community Designs. The EU is continuing to harmonize and unify regulations for other IPRs. Considering the international treaties facilitating international filing, most of the IPRs are still regulated under national systems. A wide variety of rights are protected, some of which require registration. The most important include:
<table>
<thead>
<tr>
<th>Type</th>
<th>Examples</th>
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<tbody>
<tr>
<td>Trade secrets and business</td>
<td>Manufacturing, research and secrets development, sales figures, customer lists, business strategies</td>
</tr>
<tr>
<td>Copyrights and database rights</td>
<td>Films, music, software, images, drawings, texts</td>
</tr>
<tr>
<td>Design rights</td>
<td>Overall appearance of a design, product or its ornamentation</td>
</tr>
<tr>
<td>Patents and utility models</td>
<td>Inventive products, processes or devices</td>
</tr>
<tr>
<td>Trade marks</td>
<td>Designations, brands, logos, potentially shapes, colors and sounds</td>
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Trends and hot topics

▶ **Germany is implementing its High Tech Strategy** which aims at enhancing innovation in specific key sectors (e.g. energy, mobility, industry 4.0, personalized medicine, healthcare) by providing access to funding and adapting the regulatory framework. In parallel, the individual German states have set up “clusters” of technical expertise to support innovation-driven startups. These initiatives are supplemented by EU funding of key technologies, such as, nanotechnology and industrial biotechnology within the Horizon 2020 framework program. This foundation, combined with renowned universities and research institutions such as Max Planck and Fraunhofer, makes Germany an ideal place for innovative companies. This is further exemplified by Germany’s top ranking for patent filings among EU member states.

▶ **Germany is a patent litigation hot spot:** foreign companies increasingly use Germany as a strategic venue in (global) patent disputes. Direct patent infringement automatically results in an injunction – policy considerations do not apply. Germany has a bifurcated system, where infringement and validity are trialed before different courts. Accordingly, there is no defense of invalidity in infringement litigation. This, and the fact that proceedings are relatively
fast and moderately priced, makes Germany an attractive venue for patentees.

- **Unified Patent Court**: Patent Litigation in Europe is due to change significantly under the envisaged Unified Patent Court (ratification is ongoing; a start is expected as early as 2016). Under the new system, classical European Patents (bundle patents), as well as the new Unitary Patent can be litigated in a one-stop-shop with a judgment covering a territory of up to 25 countries. The Court will have a Central Division, as well as Regional and Local Divisions. Germany will host a part of the Central Division in Munich and have Local Divisions in Düsseldorf, Mannheim, Hamburg and Munich. To make full use of the new system and mitigate risks, it is important for companies to take strategic decisions regarding their European patent portfolios now, before the new system goes live.
Key legal considerations

The Single Market

With the exception of geographical indications, Community Trade marks, plant varieties, and Community Designs, all (other) IPRs are granted on a per state basis. However, the underlying rules are often harmonized to a certain extent. In order to ensure the free movement of goods within the EU, the right of distribution is “exhausted” with regard to each physical product having been put on the market within the European Union (EU) or the European Economic Area (EEA) by the rights owner or with his consent. For software, similar exceptions do apply. There is no such exhaustion with respect to the provision of services.

Licenses restricting the rights of exploitation to a limited territory are admissible in general but should always be carefully reflected.

Intellectual Property Ownership

Germany does not follow a strict work for hire doctrine, but protects the impact of the individual having created or invented the basis of the IPR. However, rules and provisions in force ensure that the commercial aspects of an IPR accruing from an employed individual will belong to the employer (at least by default) so that only personality and other moral rights stay with the individual. This is different for executives and independent contractors requiring an investor to provide for respective contractual coverage to ensure a proper transfer of title or sufficient licensing.
Copyrights

Copyrights provide protection for personal intellectual creations bearing the imprint of the author’s personality. There are no formal requirements such as registration. The right accrues upon creation and is protected until 70 years after the death of its author. The copyright per se is generally not transferable but rights of use and exploitation may be granted leading to a commercially similar result. Licensing agreements should be carefully drafted as the German Copyright Act provides for a rule of interpretation protecting the author’s interest: Unless otherwise agreed, rights are only granted to the extent necessary for the purpose of the underlying contract. The German Copyright Act includes provisions on limitations and exceptions to authors’ rights, but there is no “fair use defense” as, for example, in the US. Some limitations trigger the payment of compensations that are collected by collecting societies and have to be paid by manufacturers, importers and traders of devices, and data carriers.

Trade marks

Trade mark protection can be granted upon registration as well as upon use in commerce: Community Trade marks are administered by the OHIM and provide for a Community-wide protection. They coexist with trade marks based on national laws, which have been substantially harmonised within the EU. German trade marks are administered by the German PTO. Germany is a member of the Madrid Protocol of 1989 facilitating international registrations of trade mark
applications or registrations of the same. Upon registration, the initial term of both trade mark registrations will last for ten years from the date of filing the application; they can be indefinitely renewed for further periods of ten years. Aside from registered rights, Germany grants protection on the basis of use in commerce if a mark has become established in the trade. This requires knowledge of the mark by a significant proportion of the relevant public (at least 25 per cent).

Securing registered trade mark protection is not dependent on use which is only required to start within a five year grace period, unlike for example in the US. Another German / EU particularity is that the list of goods and services for which protection is sought does not need to be narrowly drafted, the German PTO as well as the OHIM accept descriptions in very broad terms.

Design rights

The regulatory situation for Design rights in Europe is similar to the setting for trade marks as there is a unified system for registered and unregistered Community Designs that is governed by an EU Regulation and administered by the OHIM in addition to the harmonized national design laws of member states like Germany. The German design right system only knows registered rights granted by the German PTO upon a review of the formal aspects of the application. Design protection requires “novelty” and “individual character”.

Intellectual property
Intellectual property

Even if German law does not allow for unregistered design rights, the owner of an unregistered design is not left unprotected. The aforementioned EU Regulation provides for an EU-wide protection of Unregistered Community Designs. Unregistered Community Designs only protect against copies and only offer protection for three years.

Patents & Utility models

At present, there is no Unitary Patent covering all of Europe. However, European patent applications can be prosecuted centrally before the European Patent Office (EPO) in Munich. If granted, these result in a bundle of national patents for the selected validation countries. Litigating these patents is done on a country-by-country basis.

Patents are granted after substantive examination by the EPO (for European Patents) or the German Patent and Trade mark Office (PTO) in Munich for purely national patents. They are granted on a first-to-file basis for a term of 20 years and with supplementary protections certificates available for pharmaceuticals and plant protection products for up to five years after the expiry of the patent.

The – more restrictive – requirement of absolute novelty under Article 54 of the European Patent Convention (EPC) is perhaps the major difference between the European Patent System and the patent system of many non-EU countries such as the US. Novelty is lost if the invention has been made available to the public either by written or oral description or in any other way before the priority date of
the European patent application. There is no such thing as the one-year grace period e.g. under the US laws allowing to file for patent protections within one year after the first barring event.

Utility models – the petty patent – are granted for technical products upon a formal examination only for a term of ten years. Subject to specific timing, utility models are strategic tools, as they can be “branched off” from a patent application and tailored in scope, so that they provide specific protection before the patent is actually granted. They do not require absolute novelty; and their validity is not affected by publication of the invention up to six months before filing. In contrast to patents, their validity may be challenged in infringement proceedings.

**Trade secrets**

There is no such thing as a comprehensive trade secrets act in Germany. However, German law provides for the protection of trade secrets and business secrets via specific provisions in the Act against Unfair Competition, the Criminal Code, the Act on Employee’s Inventions, and the Commercial Code. With regard to remaining gaps, it is common practice in Germany to use contracts to ensure that trade secrets are protected. Even though, German law does not provide a definition for trade secrets, the German Federal Constitutional Court has ruled that facts, circumstances, and / or processes qualify as trade or business secrets if they are:
Intellectual property

▸ (i) related to a particular business enterprise known only to a limited group of people (and are therefore not public),
▸ (ii) kept secret for the purposes of economic interest, and
▸ (iii) information the business enterprise has an apparent and legitimate interest in keeping secret.

In order to further harmonize the European law, the EU is actually in the process of introducing a Trade Secrets Directive.

IPR Litigation

Germany is well known for its fast, cost-efficient court system being the reason why two-thirds of all patent litigation proceedings in Europe are trialed before German courts. IP cases are heard by specialized chambers and judges, who are held in high esteem amongst their peers in the EU. Injunctions may be granted in preliminary proceedings even within a few hours or as permanent injunctions in regular main proceedings. The costs of IPR litigation are significantly lower compared to similar cases in countries such as the US or UK.

There is no real pre-trial discovery in Germany. However, in connection with the implementation of the EU Enforcement Directive, all IP laws now include provisions on inspection orders and plaintiffs often file for such inspection orders in preliminary injunction proceedings and combine such motion with the independent procedure for the taking of evidence by a court-appointed expert.
Right holders have statutory claims for:

- (i) cease and desist,
- (ii) disclosure of all information and rendering of accounts for past infringing activities,
- (iii) damages, and
- (iv) destruction, recall and final removal of infringing products, goods, and/or copies.

The right owner may calculate his damages on the basis of profits lost by the rights owner, profits generated by the infringer, or on the basis of reasonable royalties on the infringer’s sales (license analogy). There is no system of punitive damages under civil law.

**Useful links**

For more insight and guidance on intellectual property matters, please visit our micro sites Synapse (for legal and commercial issues in the life sciences sector), GIPI (for a detailed comparison and analysis of IP rights across many other jurisdictions, including North America and China), Download (for developments in media and tech law), and UPC (for developments in the area of the Unitary Patent/Unified Patent Court).

- www.taylorwessing.com/synapse
- www.taylorwessing.com/global-ip-index
- www.taylorwessing.com/download
- www.taylorwessing.com/unitarypatent
The websites below may also be of interest for further reading.

- www.dpma.de – German Patent Office
- www.oami.europa.eu – the Trade Marks and Designs Registration Office of the EU
Real estate

Foreign businesses setting up in Germany may start with a few employees working from a co-working space but sooner or later, most will need their own office or production space in Germany.

A business property is often the most significant overhead for a business but it can also provide a significant return on investment. Competing for space, businesses should always pause and consider the long term cost before rushing into deals. Questions should be asked, including:

- do we want to own our real estate or lease it?
- do we have a flexible exit strategy?
- what if our needs change?
- can we renew the lease on expiration?
- and many more ...
Trends and hot topics

► **Flexibility**: in the current economic environment, flexibility has become increasingly important to tenants but also to landlords. Leases have become shorter and may include break options for the tenant as tenants look increasingly for flexibility on exit.

► **Location, location, location**: no matter how flexible the exit provisions are in the lease, the business should always ask: “How marketable are these premises if we want to relocate and sublet or sell?”

► **Covenant strength**: a landlord and its financing bank will always look at the overall covenant strength of the tenant. Furthermore, the landlord will most likely ask for a cash deposit or bank guarantee (2 to 3 months’ rents) to be provided by the tenant before the handover of the property.
Key legal considerations

**Freehold vs. leasehold**

Most businesses will decide not to tie up capital and will look to occupy premises on a leasehold basis (especially when first setting up in Germany) but purchasing can (in the right market conditions) lead to a return on investment. For investors the form of lease and covenant strength of the tenant will underpin the investment value. It is worth remembering this when negotiating as a tenant.

**Term of lease**

A business should consider how long of a lease term it is prepared to take. Terms between five and ten years are common in Germany, while shorter or longer terms are less common. Therefore, if a business takes on a longer term, it may be able to negotiate incentives like rent-free times or a fit-out / refurbishment contribution to be granted by the landlord after several years into the lease term.

**Principal rent**

For businesses in the retail sector, consider whether a turnover rent or a turnover part of the rent may be appropriate for the business’ needs. Such a rent will, however, include the obligation to provide evidence of the generated turnover (e.g. auditors statement) which gives the landlord an insight into the business of the tenant.
Real estate

Rent review
Typically, commercial leases in Germany include an indexation clause which increases or decreases the rent according to the development of the German consumer price index (CPI). However, indexation is only in line with the legal regulations if there is either a minimum lease term of at least ten years or a shorter lease term with tenants only extension options which together are ten years or more. The indexation can amount to the full CPI-change or to part of it, it can be dependent upon reaching a threshold change amount and there can also be an indexation free period.

Incentives
The landlord may incentivise a business to take a lease for example by offering a rent-free period or contribution to fit-out.

Service charge
If a business takes a lease, it will need to pay a service charge to the landlord on top of the principal rent to cover items such as heating costs, maintenance and part of the repair works or the provision of facilities. The tenant will have to pay a monthly service charge prepayment which will be reconsolidated after the end of the year. Service charges can be costly and it is important to get an idea from the landlord as to the likely level.
Roof and structure – double net

In Germany, it is quite common in commercial leases for the landlord to be responsible for the maintenance and repair obligations of the roof and structure (Dach und Fach) while most of the rest is the tenant’s responsibility. This split of obligations is called a “double net lease”. It may be stipulated in the lease that the landlord carries out maintenance and repair beyond roof and structure but charges this part back to the tenant.

Security of occupation

In Germany, tenants are often granted options to extend the lease upon expiration. Whether or not such options exist or how many will be subject to the lease negotiations. However, there is always a mandatory termination right after a 30 year lease term.

Additional expenses

A factor to consider when purchasing a property in Germany is the requirement for a notarial contract to be read by a notary to both parties that will lead to notary and, furthermore, register and stamp duty costs, which a standard commercial lease in Germany does not include.
Other issues

Although comprehensive, this guide cannot provide a complete overview on all topics to be addressed when doing business or setting up a business in Germany. Depending on the sector and other factors, a foreign business may also need to consider other legal issues not covered in this guide; for example:

Regulatory issues

Commercial activities in Europe, and especially in Germany, are often subject to regulatory requirements. Inward investors should carefully examine their business model and trading methods to consider any regulatory permissions or consents. Such review should not only take place when entering the German market but also on an ongoing basis to ensure sustainable compliance. As regulatory issues can become business critical, advice should be taken at an early stage. This particularly applies to the following sectors or activities:

- The provision or facilitation of “financial services”, which may also include less obvious activities such as mobile or electronic payment systems, crowd funding, peer-to-peer lending, and hosting social forums with investment related content (see below);
Providing telecommunication services or systems, often defined in a more comprehensive understanding than in other countries;

Offering interactive activities such as gaming or competitions;

Advertisement undertakings, including correct product labeling, that need to be aligned with strict German unfair competition laws;

Doing business with consumers requiring compliance with diverse consumer protection regulations;

Sector specific product regulations, in particular referring to the offer of medical devices, pharmaceuticals, or other products related to the Life Sciences sector.

**Financial services**

Compliance with regulatory requirements is an issue that particularly affects financial services businesses in Germany and the EU. All sorts of business models attract attention (including mobile or electronic payment technology and online peer-lending or investment websites and other forms of collective or alternative investment schemes).

The German regulators tend to follow a broad approach on extending regulatory requirements. A company must not necessarily be physically present or established in Germany to be within their scope. If a business or even a website is seen as actively targeting the German market, then it may well be within the remit of German regulation.
As it can be a criminal offence to be active in the German financial services market without appropriate prior registration or even approval, an unintended rule breach could affect the way a business is able to develop its proposition both in Germany and its home markets. Taking appropriate advice at the outset can help a business decide whether it needs a registration or authorisation in Germany or how it could align its business model to benefit from any exclusion, to ensure the framework adopted is efficient now and flexible for future business growth.

Germany is well centered in Europe and provides investment opportunities, an established and proven infrastructure, and a reliable legal framework. If registration or authorisation is required in Germany, this usually allows a company to “passport” its activities across the EU and the EEA, making market entry in Germany a comfortable starting point for business expansion to other European countries.

**Bribery**

Bribery, in particular facilitation payments of any kind, is a criminal offense in Germany that can generate substantial damage to the reputation of a company and its business. Therefore, it is of particular importance for all businesses either operating or being registered in Germany to comply with the different German bribery laws. The measures required to address compliance are, in any event, good commercial practice and should be commonplace in a developed corporate governance program. Please note that
Other issues

the German bribery laws extend to matters which might not be covered by the bribery laws in other countries.

It is a strict liability offence where a business fails to prevent bribery by one of its employees, agents or persons associated with it, and a business may be subject to a fine or – depending on the type of business – even be endangered to lose its operating license for failure to comply with German requirements on business reliability.

To defend against this offence, the company must be able to demonstrate that it had installed adequate procedures designed to prevent bribery. This would typically include bribery compliant anti-corruption policies, training for all employees, including board level and senior management, and a number of other steps.

Non-legal specialist issues

In addition to legal matters, a foreign business setting up in Germany will need to consider a range of other specialist areas and obtain appropriate advice. This may include, for example, advice on tax matters and VAT, recruitment / relocation, real estate location services, banking and payroll services, insurance issues, accounting, audit and back-office assistance, or pensions and benefits provision.

Germany has a well-developed professional services sector to assist foreign businesses looking to set up and do business in the German market. Various governmental organizations, national and local agencies, as well as numerous specialized private companies can provide
valuable services to businesses. In close cooperation with these organizations and agencies as well as with other professional service providers, Taylor Wessing can help you to a seamless and successful entry into the German market and beyond.
Half timbered houses, Nuremberg, Germany
About Taylor Wessing

Taylor Wessing is a full-service international law firm, working with clients in the world’s most dynamic industries. We take a single-minded approach to advising our clients, helping them succeed by thinking innovatively about their business issues.

With over 1,200 lawyers working across 33 offices across Europe, the Middle East and Asia (including our associated offices in Indonesia and South Korea and representative offices in the US), we offer an integrated service across the full range of practice areas and support our clients wherever they want to do business.

In Germany, we are represented with 360 experts in the five major German business regions. Our lawyers blend the best of local business, industry and cultural knowledge with international experience to provide astutely commercial solutions for our clients.

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