TaylorWessing

Doing Business and Investing in Germany

A Practical Guide for Foreign Investors

June 2022

Introduction

If you're thinking of doing business in Germany, then our guide is for you. Designed to help foreign investors, it provides an overview of the legal issues involved when setting up a new or running an already existing business.

Focusing on commercial, corporate and employment law, it also covers other areas like:

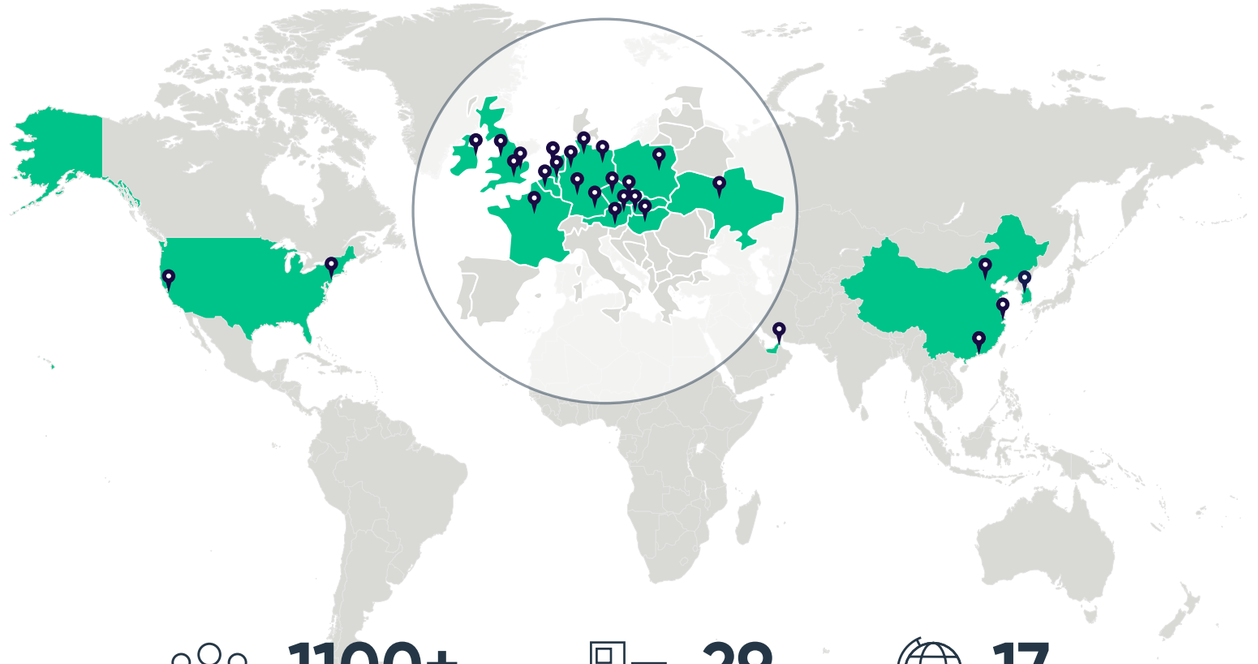
- the German tax system
- the financing of companies
- the protection of patents and trademarks.

Litigation, arbitration and foreign exchange law are briefly summarised where deemed appropriate.

Our guide is designed to give you an understanding of business-related legal concepts and potential issues that can arise from these, with more in depth information for lawyers in the annexes.

Please note this guide cannot replace legal and tax advice when starting or running business activites on-site. It reflects the status of law as at June 2021 and may be subject to further change in future.

The legal issues mentioned are simplified, focusing on key elements, and in individual cases legal exceptions and specific issues may not be covered. This guide is for initial information only and isn't intended to substitute specific legal advice.



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About Taylor Wessing

Taylor Wessing is a leading international law firm with a single-minded approach: to help its clients succeed by thinking innovatively about their business issues. It brings together **more than 1100 lawyers working across 29 offices in Europe, Asia and the Middle East,** offering an integrated service across the full range of practice areas, with core strengths in **Technology, Media and Communications, Private Wealth, Energy and Infrastructure** as well as **Life Sciences and Healthcare.**

We also have particular **expertise in advising clients in North America, Brazil and China** and are an active member of the **World Law Group,** a non-exclusive global network of highly recommended law firms in more than **89 countries** which allows its **59 member firms** and their clients access to more than **18,000 lawyers worldwide.**

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Taylor made
We blend the best of local business, sector and cultural knowledge with international experience.

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A.
Germany – Facts & Figures

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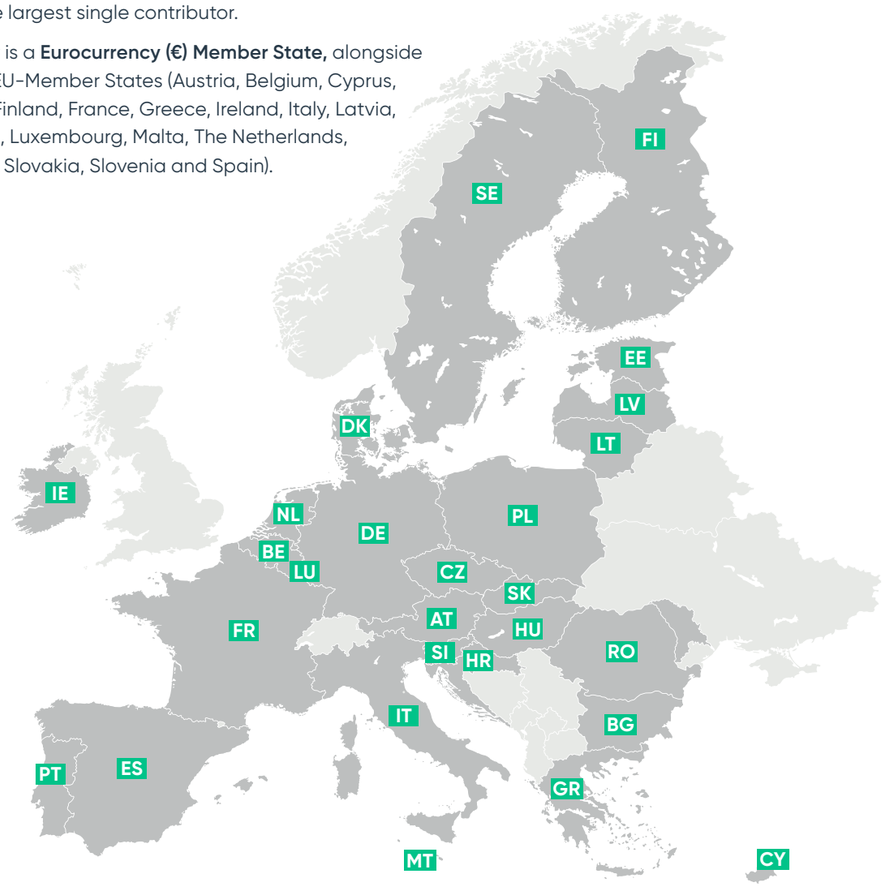
1. Germany

- is a federal parliamentary democracy
- has approximately **83 million inhabitants** (approximately 12 million internationals)
- has been a **full member of the United Nations (UN) since 1973**
- is **represented in the world by 227 foreign representative offices of the Federal Foreign Office** and currently maintains diplomatic relations with 195 countries
- is **situated in the centre of Europe,** an ideal platform for investments throughout Europe.

You can find out more about Germany (in English!) here:
http://globaledge.msu.edu/countries/germany
http://www.gtai.de
http://www.tatsachen-ueber-deutschland.de
http://www.auswaertiges-amt.de/EN/Startseite_node.html

2. As a Member State of The European Union

1. Germany contributes around **21% to the EU budget,** being the largest single contributor.
2. Germany is a **Eurocurrency (€) Member State,** alongside 18 other EU-Member States (Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Portugal, Slovakia, Slovenia and Spain).



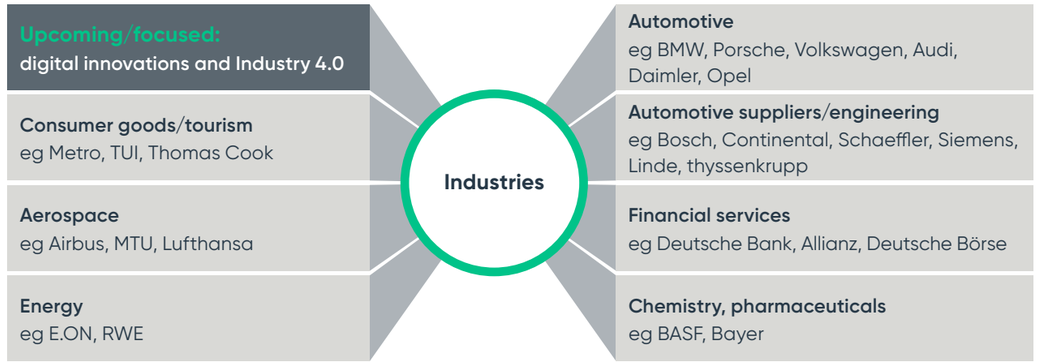
The European Union currently (in 2022) has 27 Member States:

Belgium (België/Belgique; BE), **Bulgaria** (България; BG), **Croatia** (Hrvatska; HR), **Denmark** (Danmark; DK), **Germany** (Deutschland; DE), **Estonia** (Eesti; EE), **Finland** (Suomi/Finland; FI), **France** (France; FR), **Greece** (Ελλάδα, Ελλάς; GR), **Ireland** (Ireland; IE), **Italy** (Italia; IT), **Latvia** (Latvija; LV), **Lithuania** (Lietuva; LT), **Luxembourg** (Lëtzebuerg/Luxemburg/Luxembourg; LU), **Malta** (Malta; MT), **The Netherlands** (Nederland; NL), **Austria** (Österreich; AT), **Poland** (Polska; PL), **Portugal** (Portugal; PT), **Romania** (România; RO), **Sweden** (Sverige; SE), **Slovakia** (Slovensko; SK), **Slovenia** (Slovenija; SI), **Spain** (España; ES), **Czech Republic** (Česko; CZ), **Hungary** (Magyarország; HU), **Cyprus** (Κύπρος/Kıbrıs; CY).

You can find out more about the European Union ("EU") here:
http://europa.eu/index_en.htm

B.
A Short Overview of the German Market (2021)

General overview



"Made in Germany" is a brand still representing high-quality, precise and innovative products and services. Germany is particularly renowned for its **automotive, machinery and engineering** as well as **chemicals industry** represented by international companies like Porsche, BMW, Audi, Volkswagen, Bosch, Siemens, thyssenkrupp, BASF and Bayer.

Further essential industries for the German economy are the:

- **aerospace, financial services**
- **consumer goods/tourism industry**
- **information technology, digital economy**
- **electronics and microtechnology**
- **energy and environmental technologies**

In the future, global growth scenarios will heavily be built on the ability of knowledge-driven economies to cope with global megatrends, like providing mobility and security and efficiently generating, saving and storing energy for urbanized societies. The German knowledge economy is in excellent shape, embracing all the relevant disciplines that address these challenges. Therefore, the upcoming industries the German economy is focussing on are for example the digital innovations and Industry 4.0, energy efficiency sector, energy storage and fuel cell industry, nanotechnology and the safety and security industry.

You can find out more about the market segments in Germany below:
https://www.gtai.de/gtai-en/invest/industries

C. Entering Germany

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EU Citizens as well as citizens of Iceland, Norway, and Liechtenstein **don't require any form of visa, residence or settlement permit** to be able to settle or work in Germany. **Swiss nationals** have to notify the local immigration office about their long-term stay in order to get a residence permit certifying their right to free movement. Apart from certain citizens of **Great Britain** falling under the scope of the EU-UK Withdrawal Agreement who can maintain their right to free movement, citizens of Great Britain are treated as privileged **non-EU nationals.** All other nationals ("non-EU nationals") require, as a general rule, a visa before they are allowed to enter, stay and work in Germany. Some non-EU nationals (citizens from Argentina, Australia, Brazil, Canada, Hong Kong, Israel, Japan, Mexico, New Zealand, United States, and South Korea for example) may stay in Germany **for up to 90 days within a 180-day period without a visa.** However, a visa/residence permit is still required when **running a business** on-site or **being employed** in Germany.

A non-EU national who may enter visa-free would only be allowed to perform certain, **restricted tasks** without the need for a visa/residence permit for the purpose to work *(Nichtbeschäftigungsfiktion).* No visa is needed if:

- The employee only conducts meetings or negotiations, prepares contract offers, concludes contracts or supervises the performance of a contract in Germany for an employer with its registered office abroad **(business trip).**
- The employee only establishes, supervises or controls a domestic part of a company with its registered seat abroad **(business trip).**
- The employee is an executive employee holding a general power of attorney.
- The employee is – depending on the service agreement – a managing director and only carries out management tasks.
- The employee may for these exceptions not stay more than 90 days within a 180-days period and must keep his/her place of residence abroad.

Germany distinguishes between three different kinds of residence titles:

- visas (Schengen visa (less than 90 days) and national visa (more than 90 days))
- residence permit
- settlement permit

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. The most frequent types of permits can be summarized as follows whereas details may differ:

Envisaged activity: Setting up and running a business on site

Type of residence title	Remarks
Residence permit for the purpose of self-employment *(Aufenthaltserlaubnis für selbständige Tätigkeit)*	■ Required for all foreign nationals from outside the EU, the European Economic Area (EEA) and Switzerland who intend to stay in Germany for longer than 90 days. ■ The permit is issued by the German Embassy or German Consulate in the home country of the applicant (before arrival) or the local immigration office *(Ausländerbehörde)* in Germany (after arrival). It grants both the right of residence and a permit to work as self-employed (eg as managing director – depending on the service agreement). ■ For granting the permit, the local immigration office takes into account the: ▪ Viability of the underlying business idea ▪ Entrepreneurial experience of the foreign national ▪ Level of capital investment and availability of capital ▪ Effects on (regional) employment and training situation ▪ Contribution to innovation, research, and development in Germany. ■ The immigration office *(Ausländerbehörde)* consults the local Chamber of Industry and Commerce *(Industrie- und Handelskammer – IHK)* or the Chamber of Crafts *(Handwerkskammer)* as well as the local trade office *(Gewerbeamt)*. ■ Permits are, in general, limited in time (max. three years) and can be renewed if the requirements are still met.
(Permanent) settlement permit *(Niederlassungserlaubnis)*	■ May be issued to foreigners who have been in possession of a residence permit for the purpose of self-employment for at least three years if the foreigner successfully carries out the planned business activity. ■ The permit is unlimited in time and also includes the right to take up employment. ■ Foreigner may otherwise under certain conditions also apply for a (permanent) settlement permit after having worked in Germany for at least five years.
Residence permit for the purpose of taking up employment *(Aufenthaltserlaubnis für abhängige Beschäftigung)*	■ Required for all non-EU nationals who intend to take up employment in Germany. ■ The permit is issued by the German Embassy or German Consulate in the home country of the applicant (before arrival) or the local immigration office *(Ausländerbehörde)* in Germany (after arrival) and grants both the right of residence as well as a permit to work in Germany as an employee. ■ A local employment contract will be needed. A visa/residence permit for an employee with a secondment contract will only be granted for certain employees. ■ The biggest category of employees that can be granted a visa/residence permit is that of skilled workers *(Fachkraft)*. Skilled workers are employees that have completed a university degree/vocational training that is recognized in Germany or that was completed in Germany. The qualification gained must qualify the employee to perform the tasks of the position. ■ Approval by the Federal Employment Agency *(FEA, Bundesagentur für Arbeit)* may be required subject to the foreign national's level of qualification and the characteristics of the job to be performed in Germany. ■ Certain professional groups can be granted a permit for employment without FEA approval. These include, amongst others: ▪ Scientific research personnel ▪ EU Blue Card applicants (see below) upon provision of a specific job offer. ■ Permits are, in general, limited in time (max. 4 years) and can be renewed if the requirements are still met.

Envisaged activity: Setting up and running a business on site

Type of residence title	Remarks
Exceptions for highly qualified professionals (EU Blue Card)	■ Highly qualified persons (foreigners with a German/comparable, recognized foreign university degree and an annual salary of at least gross EUR 56,800 (2021)) may be granted a permit in form of an EU Blue Card without prior approval by the FEA. ■ Professionals in fields which suffer from a shortage of skilled personal (eg medical doctors, science/engineering/information technology/communications technology professionals, with an annual gross salary of at least EUR 44,304 (2021)) may be granted a permit in form of an EU Blue Card with simplified approval of the FEA.
Exceptions for Intra-Corporate Transfers (ICT Card)	■ The ICT card enables intra-corporate transfers from a non-EU sending entity to a host entity in Germany. Both entities must be part of the same company or company group. ■ Eligible are: ▪ Non-EU managers ▪ Non-EU specialists having been employed in the sending entity for at least six uninterrupted months immediately preceding the transfer, their work contract and/or assignment letter stating details of the transfer and proof of the employee's professional qualification. ■ Transfer duration: more than 90 days up to a maximum of 3 years. ■ Simplified approval of the FEA is required.
Special rules for "privileged non-EU nationals"	■ Citizens of Andorra, Australia, Canada, Israel, Japan, Republic of Korea, Monaco, New Zealand, San Marino, United Kingdom of Great Britain, Northern Ireland and the USA are "privileged non-EU nationals". ■ For those nationals, a residence permit can be issued for any type of employment (eg local employment or secondment). ■ Approval from the FEA is required. The approval is subject to a priority check (Are there any EU nationals that could perform the job?) and subject to a check of the working conditions (Is the employee employed under less favourable working conditions than comparable domestic employees, especially with regard to the salary?). ■ These nationals may apply for a residence permit in Germany directly. However, until the residence permit is issued, the employee will not be allowed to start to work on his/her future position.
(Permanent) settlement permit (Niederlassungserlaubnis)	■ May be issued to foreigners who have been in possession of a residence permit for the purpose of taking up employment for at least five years. ■ For skilled workers, a permanent settlement permit can already be granted after four years, in some situations even after two years (university degree/vocational training completed in Germany). ■ EU Blue Card holders can be granted a permanent settlement permit within 33 months (21 months, where a specified German language aptitude level has been attained). ■ The permit is unlimited in time and location and also includes the right to take up self-employment.

Find out more below:
www.make-it-in-germany.com

D. Starting Business Activities in Germany

I. Analysis before entering the market

Before entering the market, you should carry out an analysis to establish a strategy to how and in which form you'll enter the market. Depending *inter alia* on the envisaged **scope of activities** and the **intensity of own structures** that need to be set up, businesses may be started in various forms such as:

Direct Distribution

↓ by

Setting up e-commerce

↓ or

Setting up a branch

↓ or

Setting up a subsidiary

↓ and

Hiring employees

Indirect Distribution

↓ by working with

Local Distributers

↓ or

Sales Agents

↓ or mixed forms thereof such as

Franchises

↓ or

Commissioners

II. Balancing openness to, and restrictions upon, foreign investment

It's widely recognised that foreign investment has been a considerable contributor to Germany's growth and prosperity. Accordingly, the German government and industry actively encourage foreign investment. But instead, the increase in investment from other countries has fuelled media debate and political discussion on whether the tools to review cross-border transactions are sufficient to prevent cutting-edge technologies and important know-how being lost abroad.

1. Foreign investment review regime

Germany has had formal mechanisms in place to review foreign direct investment since 2004. One such national security screening mechanism is the requirement that foreign investors notify the Federal Ministry for Economic Affairs and Energy *(Bundesministerium für Wirtschaft und Energie – BMWi)* of its acquisition of any business engaged in manufacturing or developing war weapons or armaments, or producing cryptographic equipment (a so-called **sector-specific investment review**). Since 2009, the BMWi may, in addition, control and prohibit acquisitions by investors based outside the territory of the European Union and the European Free Trade Association, if the transaction endangers public order or security (a so-called **cross-sector investment review**). The more generic character of this amendment of the German Foreign Trade and Payments Ordinance *(Außenwirtschaftsverordnung – AWV)* has raised uncertainty about which transactions are subject to review.

1.1 Cross-sector investment review

In principle, any acquisition of a company by investors located outside the territory of the EU or the EFTA region by which investors acquires ownership of at least 25 % of the voting rights of a Germany-based company could be subject to cross-sector investment review. In case the domestic company falls under one of the categories of numbers 8 to 27 of Sec. 55a AWV, the threshold for the review due to increased safety and inspection relevance is 20 %. If the domestic company operated critical infrastructure within the meaning of the Act on the Federal Office for Information Security, or if it provided other services of particular relevance to security, the threshold for the review would be a mere 10 %. If the direct buyer is seated in EU territory, such review could be carried out if there are any indications of an abusive approach or a circumvention transaction. Acquisitions in which the investor obtains at least 10 % of the voting rights in a company which operates a specifically defined critical infrastructure or provide certain services of particular relevance to security, notably in conjunction with the operation of such infrastructure, are required be reported to the BMWi. There is otherwise no requirement for investors to report or obtain approval. However, the BMWi may conduct a review ex officio within three months from the time it became aware of the conclusion of the acquisition agreement.

Alternatively, an investor may apply for a binding **certificate of non-objection** *(Unbedenklichkeits-bescheinigung)* from the BMWi prior to the planned acquisition in order to obtain legal certainty at an early stage. This certificate of non-objection would confirm that the acquisition does not raise any concerns related to public order or security. The written application would include basic information on the planned acquisition, the domestic company to be acquired, and the respective fields of business. If the BMWi does not open a review within two months from the receipt of the buyer's written application for a certificate of non-objection, the certificate shall be deemed to have been issued. In the event that a review procedure is opened, the buyer would be obligated to provide the BMWi with all relevant documents for the review. Furthermore, the BMWi may request additional documents. The acquisition may then be restricted or prohibited only within a period four months after submission of the full set of documents. During this review period, any legal transaction of this investment shall only be effective upon the condition that the acquisition is not subsequently prohibited.

1.2 Sector-specific investment review

Special rules for investment reviews apply to the acquisition of companies that operate in sensitive security areas (sector-specific investment review). This includes manufacturers and developers of war weapons and other key military technologies, specially designed engines and gearboxes for military tracked armoured vehicles, and products with IT security features that are used for processing classified government information. Any acquisition of a company by foreign investors in which it acquires ownership of at least 10 % of the voting rights of a Germany-based company can be subject to such review. The review considers whether the respective acquisition poses a threat to essential security interests of the Federal Republic of Germany.

Acquisitions subject to the sector-specific investment review must be notified. The written notification shall include basic information on the planned acquisition, the buyer, the domestic company that is being acquired, and the respective fields of business. If the BMWi does not initiate a **formal review procedure within three months** from the receipt of the buyer's written notification, the acquisition shall be deemed to have been approved. Furthermore, the BMWi may request additional documents (in German) for the review. The acquisition may be restricted or prohibited only **within three months** after the full set of documents has been submitted. The legal transaction on which the acquisition is based shall be provisionally ineffective until the BMWi grants its express or implied approval.

2. Tightening of the investment review regime in 2020 and 2021

In 2020, the German government had adjusted the regulations of the Foreign Trade and Payments Act **(AWG)** and the AWV investment screening regime. Among other things, the notification requirement in the area of non-military security was expanded (cross-sector review) and **a ban on execution of the transaction were introduced.** In addition, the provisions of the AWV will be adapted with a view to Germany's participation in the new **EU-wide cooperation mechanism.** This cooperation mechanism is the first step towards implementing Regulation (EU) 2019/452 (**"EU Screening Regulation"**) on uniform foreign investment screening in the European Union. Thus, the standard of screening will be extended in particular to public order or security in other EU Member States. Previously, only the security interests of the Federal Republic of Germany and the public order or security of the Federal Republic of Germany and the Union had been the yardsticks in German investment screening. In this context, the Member States are obliged to inform the European Commission and the other Member States of all ongoing foreign direct investment screenings. Any Member State may forward comments to the Member State carrying out the screening, if it deems that the investment in question is likely to affect its public order or security. The Member State reviewing the foreign investment must duly take the comments of this other Member State into consideration. The BMWi has established a national liaison office to coordinate the exchange with the other EU Member States.

The full implementation of the EU Foreign Investment Screening Regulation with further case groups of reportable acquisitions into German law took place with the so-called 17th AWV amendment on May 1, 2021. As a result of this reform the number of filings will increase further compared to 2020. The 17th AWV amendment extends the notification requirements. Overall, the list of mandatory

reporting practices and sectors is significantly expanded with the amendment. A large number of so-called emerging technologies, such as artificial intelligence, robotics, nanotechnology and quantum technology, are subject to the reporting obligation. The areas of cyber security, semiconductors, 3D printing and autonomous driving/flying are also included. However, other security-relevant companies such as those in food safety, aviation or the raw materials sector are also included. The concrete and definable formulation of the reporting offences is of considerable importance because the reporting obligation triggers a (punishable) prohibition of the execution of a transaction. The reform implements a typical acquisition of control as a new element of seizure and control. According to the wording of Sec. 56 (1) AWV (old version), investment control applies if an investor acquires 10 % or 25 % of the voting rights of a German target company. The 17th AWV amendment now clarifies that, in accordance with the previous practice of the BMWi, **"additional acquisitions"** above these thresholds also fall within the scope of investment control. For reasons of proportionality, the relevance of the review of additional acquisitions is limited to reaching or exceeding certain thresholds of particular relevance under company law, whereby the law differentiates between critical infrastructure, the other case groups of Sec. 55a (1) AWV and other companies. What is new is that control rights outside the formal voting rights can trigger an audit by the BMWi The German government refers to the appointment of supervisory bodies or management as well as to veto rights in strategic business decisions or extensive information rights. Several investors can also be regarded jointly if there is no express voting agreement, and other circumstances could lead to the conclusion that the voting rights would be exercised jointly, such as, in particular, if all the investors were from the same country and each of the investors was controlled by the state.

III. Indirect Distribution

1. Summary of main features

	Typical contractual rights and duties	Applicable law	Specific issues
Distributors ("D")	D buy and sell products; they bear the **risk of sale** and usually expect margins. To a large extent, D are **independent** from the sales force of the principal.	D law is not regulated in most EU Member States. However, in some Member States (including Germany) **extensive case law** is applicable to D. In some cases, the rules applicable to **sales agents** (in particular with regard to the **compensation claim upon termination)** have been applied to D by German courts.	The freedom of D to act as independent entrepreneurs can only be restricted within the limits of **antitrust law** (see **Sec. 2.2. below** for details).
Sales Agents ("SAG")	SAG act as **brokers** (with or without power to enter into legal transactions) for the principal. The **remuneration** of SAG is **success-related;** the **risk of sale** is borne by the **principal.** Due to their **duty of loyalty** SAG are not permitted to distribute competing products. The principal is free to give the SAG **instructions** relating to the territory of distribution, sales conditions and prices. SAG are **integrated** in the sales force of the principal and do not act as independently as D.	SAG law is subject to harmonised EU-law containing **mandatory provisions protecting SAG** which cannot be **circumvented** by choice of (another) law. Exceptions may, however, be permitted if the SAG is active outside the EU. Pursuant to mandatory EU-law SAG have a claim for: ■ **compensation** upon **termination** of the agreement ■ agent's commission if the arranged transaction is not performed for reasons attributable to the principa ■ payment of an advance once the principal has performed the arranged business transaction ■ information, copies and inspection of books ■ observance of minimal notice periods (of up to six months)	The attribution of atypical risks to the SAG should be avoided in order to ensure that the SAG-agreement does not become subject to **antitrust law** (which is not the case if the SAG only bears "typical" risks). A major issue in practice is the mandatory **compensation** claim of the SAG upon **termination** of the SAG-Agreement (see **Sec. 2.1. below** for further details).
Franchisees ("F")	F buy and sell in their **own name** and are therefore obliged to pay **licence fees** to the franchisor in exchange for the right to use specific knowhow provided by the franchisor.	In some cases, the rules applicable to **SAG** (in particular with regard to the **compensation claim upon termination)** have been applied to F by German courts in the past	A frequent issue is whether F are correctly and fully informed about the risks assumed by them at the beginning of their activity.
Comissio-ners ("C")	C are situated between D and SAG: they sell to their **own clients,** thereby acting in their **own name** but for the **account of the supplier.**	Neither the mandatory provisions of SAG law nor antitrust law applies to C (as long as the C does not bear the risk of sale. In some cases, the rules applicable to **SAG** (in particular with regard to the **compensation claim upon termination)** have been applied to C by German courts in the past.	C frequently hold stocks of goods owned by the supplier to which C have access and of which they may dispose. This constellation may be treated as a **branch for tax purposes.**

2. Specific issues

2.1 Mandatory claim for compensation of sales agents

Upon termination of the sales agency agreement, a mandatory compensation claim of the sales agent becomes due if the notice of termination was declared

- by the principal without cause
- by the sales agent for reasons attributable to the principal.

The sales agent's claim is based on mandatory EU-law, however, its calculation may vary in different EU Member States. In Germany, the compensation claim is calculated based on the **agent's annual average commission** earned **within the last five years.**

The compensation claim is, in principle,

- a forecast of the principal's future benefits resulting from business relationships with regular customers who were solicited by the agent, to be calculated with respect to an estimate of the earnings the sales agent would have been able to achieve within a reasonable period of time (basic rule: within the next five years)
- based on the agent's commission of the last year (as a maximum)
- reduced by an annual churn rate
- adjusted by special items (so-called equitable reduction).

A waiver of the compensation claim is only legally valid if granted no earlier than simultaneously with the termination of the sales agency agreement (or thereafter).

German courts have, in some cases, extended the case law relating to the compensation claim of sales agents to agreements with **distributors, franchisees and commissioners** if the following conditions were met cumulatively: (i) integration in the sales organisation of the principal and (ii) obligation to forward **customer data** during/at the end of the relationship.

2.2 Antitrust law

When setting up a distribution agreement, antitrust matters should always be considered. § 1 of the German Act Against Restraints of Competition (ARC), which in substance corresponds with Art. 101 (1) TFEU (Treaty on the Functioning of the European Union), prohibits all agreements and concerted practices the objective or effect of which is the prevention, restriction of distortion of competition. An infringement of this prohibition can be significantly fined by the German Federal Cartel Office. The prohibition covers not only horizontal agreements between competitors, but also all kinds of so-called vertical agreements, ie distribution agreements including selective and exclusive distribution agreements, franchising, supply and agency agreements. In contrast sales agent agreements do not fall within the scope of German and European antitrust regulations, provided that the sales agent does not bear any or only insignificant financial and commercial risks in relation to the concluded contracts.

Most vertical agreements do not give rise to competition concerns as they permit substantive efficiency gains which outweigh their anti-competitive effects. Therefore Regulation 330/2010 and the EU Vertical Block Exemption Regulation (VBER), which is also directly applicable under German antitrust law pursuant to § 2 (2) ARC, provides for a general exemption of vertical agreements from the prohibition laid down in § 1 ARC and Art. 101 TFEU.

However the VBER only applies if the market share held by the supplier does not exceed 30 % of the relevant market in which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.

Irrespective of market shares, the VBER excludes agreements that contain so-called "hard-core restrictions" from the block exemption. These agreements are considered to be null and void as a whole. Art. 4 VBER lists five hardcore restrictions:

- minimum resale price maintenance
- restrictions regarding the location of customers to whom the buyer may sell
- restriction on sales to end-users by members of selective distribution systems
- restrictions on cross-selling between members of selective distribution systems
- restrictions on the sale of spare parts by the manufacturer to end-users, repairers or other service providers.

Furthermore Art. 10 VBER excludes certain non-compete clauses and post-contractual obligations from the application of the block exemption. However, if a vertical agreement contains such clauses, only the clauses itself and not the vertical agreement as a whole will be invalid as is the case with hardcore restrictions. The rest of the agreement may still benefit from the exemption provided that the restriction in question can reasonably be separated from the rest of the agreement.

If an agreement does not fulfil the conditions for block exemption under the VBER because the market thresholds are exceeded or if it contains a hardcore restriction, the agreement may nevertheless be valid based on an individual exemption under § 2 (1) ARC (similar to Art. 101(3) TFEU). This is the case if the agreement yields pro-competitive effects that outweigh the negative effects on competition resulting from the market power held by the parties or the restrictions contained in the agreement. It should be noted that the parties are obliged to analyse individually whether or not an agreement is exempted, and bear the risk of their analysis not being correct. The German Federal Cartel Office does not issue formal exemptions or comfort letters.

The European Commission additionally published Guidelines on Vertical Restraints to address special problems in the context of the assessment of vertical agreements, eg of online sales agreements and franchises. These Guidelines are not binding on the German Federal Cartel Office, but summarize the principles for the analysis of the VBER.

Moreover, the Commission passed a special block exemption for technology transfer agreements (No 772/2004) and for vertical agreements and concerted practices in the motor vehicle sector (No 461/2010). These regulations are given priority in regards to the Vertical Agreements Block Exemption Regulation.

If you require advice on the application of the Block Exemption Regulations, please do not hesitate to contact one of our experts.

Pls. see also Annex 1 (Article 101 Treaty on the Functioning of the European Union (TFEU)).

IV. Direct distribution

1. Setting up e-commerce

E-commerce is subject to the European Distance Selling Directive dated 1997 and E-Commerce Directive dated 2000, both containing provisions relating to consumer protection.

In accordance with both Directives, provisions were added to national law dealing, *inter alia,* with

- Information duties;
- Requirements relating to the concept of online shops and
- Right of withdrawal of consumers.

In particular the right of withdrawal (and the form and content of the mandatory instruction of the consumer relating thereto) has given rise to legal uncertainty in the past.

Consumers may, furthermore, refer to national law (and the provisions protecting consumers provided) of the country in which they have concluded a contract; therefore the option of choosing the law of a country with less extensive consumer protection provisions is restricted.

You can find out more here:
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML

2. Setting up a branch

See **Sec. E/I/1** below.

3. Setting up a subsidiary

See **Sec. E/I/2** and **F/II** to **IV** below.

4. Hiring employees

See **Sec. J** below.

E. Setting up a Branch or a Company

I. Overview

1. Setting up a branch

Setting up a branch is an option to start business without immediately setting up a company. Foreign companies which have their seat and business outside of Germany can choose to establish either:

- an autonomous branch office *(selbständige Zweigniederlassung)*
- a dependent branch office *(unselbständige Zweigniederlassung).*

Branch offices do **not have an independent or separate legal personality** distinct from the head office of the foreign main company. From a legal and organisational perspective a branch office is **part of the foreign head office,** subject to the law governing the head office and part of the organisation of the main company's organisation. Accordingly, the branch does not provide any protection against any liability for debts or other liabilities for the benefit of the main company. It can also not assume any own debt or other liabilities of its own.

The two forms of branches can be summarised as follows:

Autonomous branch	■ Must display a certain degree of **autonomy** by having its own management with own executive powers, own bank accounts, an own balance sheet and independent business assets. ■ Only **foreign business persons registered with a commercial register** can establish an autonomous branch office. ■ The decision to set up a branch office must be made by the managing directors of the head office; the branch office must be **registered with the German commercial register** and the **local trade office.** ■ An **application** for registration must be filed with the local German commercial register including detailed information on the foreign company. Generally, a **notarised copy of the commercial register of the foreign company** and the power of representation of the managing director(s) must be filed (if the country of origin of the company does not have a commercial register, similar documentation such as a secretary certificate and letter of good standing may be filed alternatively). Furthermore, the application should be supplemented by certified copies of a **memorandum of association and Articles of Association.** The documents provided should be **translated into German** and the notary's certificate must be authenticated (usually by way of an apostil).
Dependent branch	■ does not have to be autonomous ■ is not registered with the German commercial register. ■ The only formal requirement is registration with the German local trade office.

Offices that only observe the market without doing business beyond of 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 German local trade office may not be required.

2. Setting up a company

Any private individual, partnership or corporation can set up a company in Germany or, in principle, acquire shares in an existing company, irrespective of nationality or place of residence. There is no minimum percentage of German shareholders required for foreign investments within Germany.

There are rules controlling foreign investments in certain sectors where national security interests are affected. **For details on these please see Sec. D/II.**

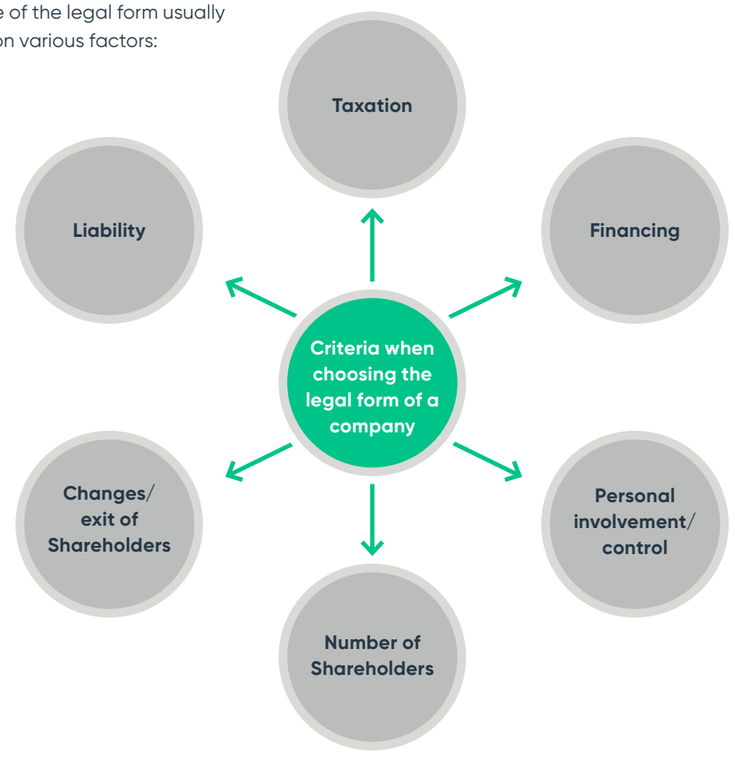
Please note, however, that due to a recent revision of statutory law, the Federal Ministry for Economy and Technology may control and – in extraordinary cases – prohibit acquisitions of private individuals or legal entities seated outside of the territory of the European Union, Iceland, Liechtenstein, Norway or Switzerland who (directly or indirectly) acquire 25 % or more of the voting rights in a German company if the transaction would endanger public order or safety (pls. see Sec. R below for more details) or is taking place in an industry deemed to be sensitive for the public order or safety.

Furthermore, some restrictions and/or specific requirements may apply (to foreign and domestic investors) with regard to businesses acting in certain sectors, including the following sectors:

- **Defence**
- **Pharmaceutical**
- **Offering of financial services and banking.**

2.1 Criteria for choosing a specific legal form

The choice of the legal form usually depends on various factors:



	Corporations		Partnerships
No. of shareholders	**At least one shareholder**		**At least two partners**
Involvement of shareholders in the management of the company/control of the management	**Stock corporation:** Very limited involvement of shareholders in the management; control of management is exercised by the supervisory board.	**Limited liability company:** The shareholders may give instructions and control the management.	**Limited partnership:** The general partner is normally responsible for the management; the rights of the limited partner with regard to management are (usually) rather restricted (depending on the partnership agreement).
Liability	**Stock corporation:** The liability of the shareholders is under normal circumstances limited to the duty to pay in their contributions (minimum share capital: EUR 50,000).	**Limited liability company:** The liability of the shareholders is under normal circumstances limited to the duty to pay in their contributions (at least ¼ of each share and ½ of the total share capital) (minimum share capital: EUR 25,000).	**Limited partnership:** The general partner is exposed to an unlimited liability; the liability of the limited partner under normal circumstances corresponds with his/her/its partnership interest (no minimum amount required).
Taxation	Corporations are subject to corporate income tax. The shareholders may be subject to tax on capital gain (on dividends).		Partners (not the partnership which is "transparent" for tax purposes) are subject to personal or corporate income tax.
Financing	No duty of the shareholders/partners to make additional payments to the company (in addition to their capital contributions) provided by statutory law (under normal circumstances). If the company is financed by funds provided by third parties (eg banks or investors) the form in which the funds are provided may have an impact on the choice of legal form (eg with regard to the possibility of increasing the share capital of the company etc.).		
Changes and/or exit of shareholders	Corporations can continue to exist with only one shareholder.		Partnerships are dissolved and assets and liabilities are assumed by the remaining partner if all partners except for one leave the company.
	Stock corporation: The sale and transfer of shares do not need to be notarised.	**Limited liability company:** The sale and transfer of shares need to be notarised.	**Limited partnership:** The sale and transfer of partnership interests do generally not need to be notarised.
	Shares are generally freely transferable (exceptions may apply to registered shares).	Changes of shareholders/partners are usually subject to the approval of the shareholders'/partners' meeting (or the company). In case of an exit, the leaving shareholder/partner is usually entitled to receive compensation.	

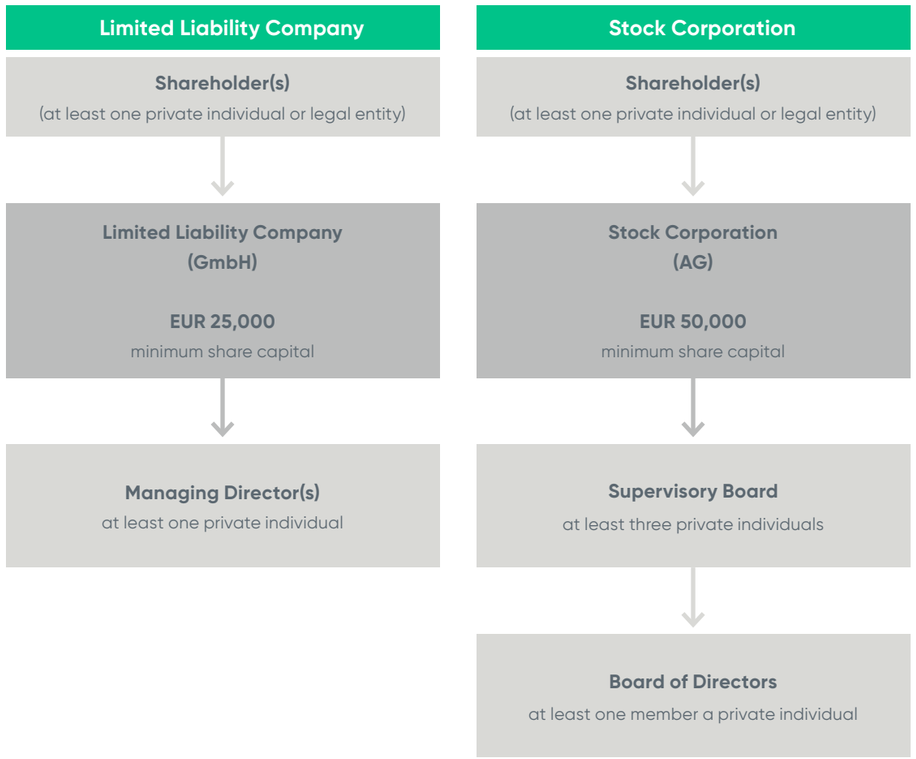
2.2 Corporations

Generally, corporations are the common option for **larger companies.** German law offers, amongst others, the following forms of corporations:

- Limited Liability Company *(Gesellschaft mit beschränkter Haftung; GmbH)*
- Stock Corporation *(Aktiengesellschaft; AG).*

One of the main advantages of corporations is the limited liability of its shareholders. Setting up a corporation usually requires a minimum share capital which is protected by statutory law.

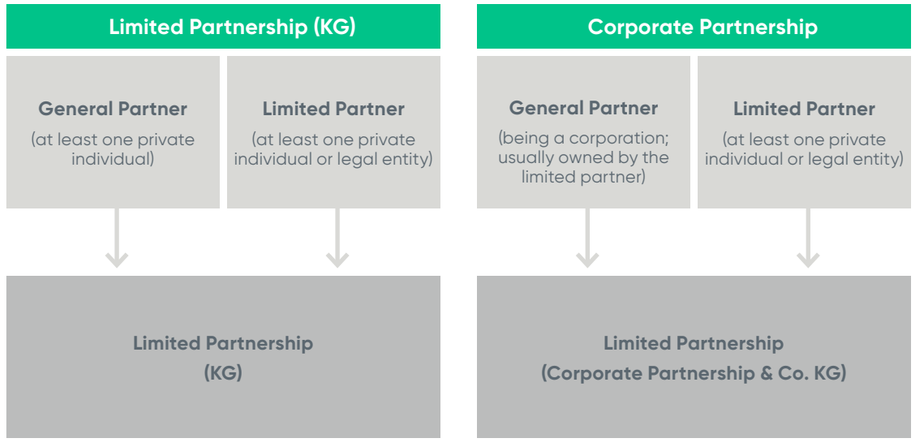
Whereas Limited Liability Companies usually have a one tier structure (consisting of at least one managing director *(Geschäftsführer))* and a minimum share capital of EUR 25,000, stock corporations have a two tier structure, (consisting of at least one director *(Vorstand)* and at least three members forming the supervisory board *(Aufsichtsrat))*, a minimum share capital of EUR 50,000 and are subject to a number of formal requirements.



2.3 Partnerships

The legal form of a partnership is frequently used for **tax purposes** (pls. see **Sec. I. 1. 3.** below). From a corporate law perspective, its main feature is the personal commitment of the partners. Each partnership requires **at least two partners.** At least one of the partners must assume **unlimited liability** for the debts and liabilities of the partnership. On the other hand, no **minimum share capital** is required for setting up a partnership and running its business. Furthermore, accounting obligation and publication requirements tend to be less extensive than for corporations. German law knows, *inter alia,* the following forms of commercial partnerships:

- Limited Partnership *(Kommanditgesellschaft, KG)*
- Corporate Partnership (limited partnership with a corporation as general partner, *GmbH & Co. KG).*



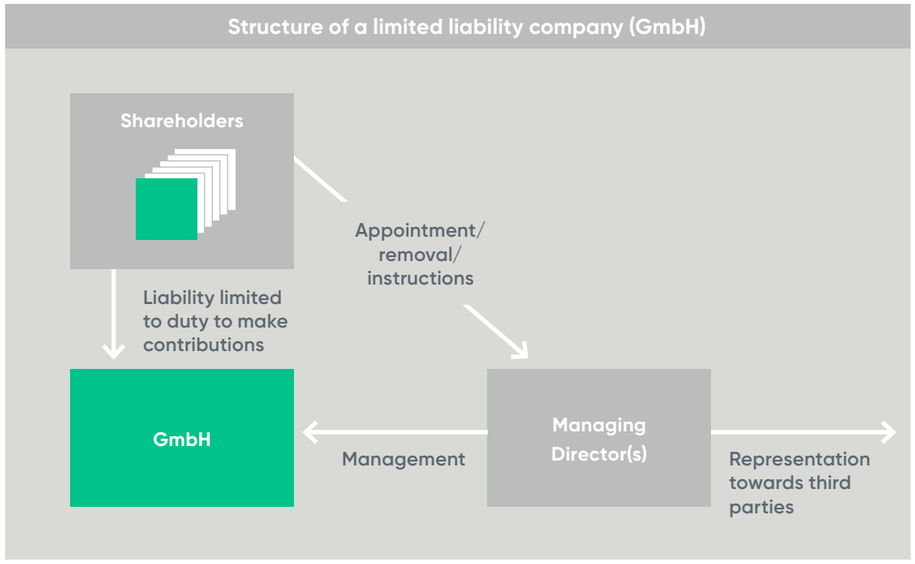
II. Limited Liability Company (GmbH)

1. Organisation

1.1 Structure of the company

The limited liability company (being the most frequently used company form in Germany) is a **corporation** and as such a separate legal entity which is liable towards its creditors with its assets. It can have **one or more shareholder(s)** (private individuals or legal entities) whose liability is under normal circumstances limited to the **duty to pay in the share capital** either in cash or in kind.

In general, the limited liability company consists of **two corporate bodies:** the shareholders' meeting *(Gesellschafterversammlung)* and the board of directors *(Geschäftsführung),* ie the managing director(s) *(Geschäftsführer)* **("MD").** A supervisory board is, in general (except for a company employing more than 500 employees), not mandatory. Its establishment may, however, is provided in the Articles of Association.



1.2 Shareholders' meeting (Gesellschafterversammlung)

The shareholders' meeting is the **supreme body** of the limited liability company. Unless otherwise provided by statutory law or the Articles of Association, its powers cover all business matters. These include, in particular, the approval of the annual financial statements, the use of profits, the appointment and removal of managing directors as well as the control and approval of their management performance.

A shareholders' meeting must be held at **least once a year** within 8 months (11 months for small companies) from the end of the previous business year in order to approve the annual accounts set up by the managing directors **(pls. see Sec. G below for more details relating to the annual accounts).**

1.3 Management/representation of the company

One or more managing director(s) who do not need to (but may, if individuals) be shareholders are in charge of the management and represent the company towards third parties. The scope of the powers of the managing director(s) to represent the company cannot be limited with legal effect towards third parties. Internally, however, the shareholders' meeting may give instructions to the managing directors; the competencies of the managing directors may further be restricted by internal regulations (set forth eg in rules of procedure). The managing directors may grant so-called *"Prokura"* to employees of the company, entitling them to represent the company with regard to the daily business and beyond. *Prokura* is registered with the commercial register.

Pls. see Annex 2 (Commercial power of representation *(Prokura))* for more information.

Managing directors have a relatively broad range of duties and liabilities under German law.

Pls. see Annex 3 (Duties and liability of managing directors) for more information.

2. Sub-form: Entrepreneur company

Limited liability companies can be set up as so-called entrepreneur companies *(Unternehmergesellschaft (haftungsbeschränkt); UG).* It 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 start-ups with limited funds to take up business in the legal form of a limited liability company. It is the intention of the underlying legal concept that the shareholders of a *"UG"* accrue enough earnings to convert the *"UG"* into a "standard" limited liability company over time. Statutory law, therefore, provides that ¼ of the annual net profit is (mandatorily) attributed to a statutory reserve of the company until the share capital of the company is increased to an amount of EUR 25,000.

3. Setting up or purchasing a (shelf) GmbH

When a new GmbH is set up, it usually takes several weeks from the incorporation date (ie notarisation of the foundation deed) until the company is registered with the commercial register due to the time required for setting up a bank account and payment of the share capital. Pursuant to statutory law, a GmbH starts to legally exist upon registration with the commercial register.

Instead of setting up a new company from scratch, 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 and shareholders being protected against liability through the shelf company's corporate veil immediately.**

Shelf companies are frequently used in connection with M&A transactions (eg as acquisition vehicles) or as general partners of limited partnerships.

The costs of acquiring a (shelf) GmbH amount to approximately **EUR 27,800** and comprise the following amounts:

- EUR 25,000 share capital of the company (which is actually not a cost but a compensation for an asset that the service provider has already added to the company's balance sheet by making the full initial shareholder contribution in cash when creating the shelf company)
- EUR 2,800 fees to be paid to the shelf company provider as a service fee.

In addition, **notary fees** and **fees for registration** (which, in a standard case, do not exceed a total amount of EUR –1,000) with the commercial register become due.

Furthermore, **cost for** (legal and/or tax) **consultants** may accrue.

Pls. see Annex 4 (Setting up/acquiring a (shelf) limited liability company *(GmbH)* in Germany) for detailed information.

III. Stock corporation (AG)

1. Organisation

1.1 Structure of the company

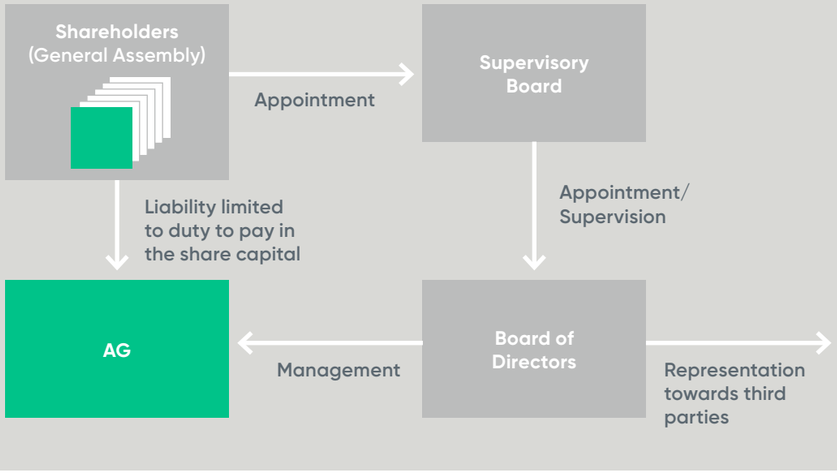
The stock corporation *(Aktiengesellschaft; AG)* which is used for **large or listed companies** is a **corporation** and as such a separate legal entity which is liable towards its creditors with its own assets. It can have **one or more shareholder(s)** (private individuals or legal entities) whose liability is (under normal circumstances) limited to the **duty to pay in the share capital** either in cash or in kind. The share capital of a stock corporation is divided into par value or non-par value shares (in the form of either registered or bearer shares).

In general, there are **no restrictions of the transfer of shares** (with potential exceptions for registered shares). Stock corporations can thus approach a large investing public, including the stock market. Share transfers are further **not subject to notarisation.**

Unlike the law governing the limited liability company, the stock corporation law *(Aktiengesetz; AktG)* is relatively **rigid** and to a large extent mandatory. It can be modified only to a limited extent by the Articles of Association and is rather complex concerning administration **and maintenance of the AG.**

The stock corporation mandatorily consists of three corporate bodies: the general assembly of shareholders *(Hauptversammlung),* the board of directors *(Vorstand)* and the supervisory board *(Aufsichtsrat).*

Structure of a stock corporation (AG)



1.2 General Assembly *(Hauptversammlung)*

The general assembly has **limited powers** such as, in particular, amending the Articles of Association and modifying the corporation's capital basis, discharging members of the board of directors and of the supervisory board, appointing the members of the supervisory board etc. **Resolutions** of the general assembly must be **notarised** (except for non-listed stock corporations if no resolutions are taken which require a statutory ¾ or higher majority, such as changes to the Articles of Association).

1.3 Board of Directors

The board of directors is in charge of the **management and representation** of the stock corporation towards third parties. It is not subject to any instructions from the supervisory board and/or the general assembly. Accordingly, the powers of representation of the board of directors vis-à-vis third parties are unlimited and its management authority is generally not subject to any resolutions of the other corporate bodies. The approval of the general assembly may, however, be required for decisions of fundamental importance; in addition, some decisions must be subject to prior approval of the supervisory board pursuant to mandatory statutory law and as stated in the Articles of Association. The members of the board of directors can be appointed for a maximum term of five years.

Pls. see Annex 5 (Duties and liability of members of the board of directors) for more information.

1.4 Supervisory Board

The supervisory board **appoints the members of the board of directors** and is responsible for their **supervision.** Certain types of management decisions usually require an internal prior approval of the supervisory board. The supervisory board must consist of at least three members. The members of the Supervisory Board can be appointed for a maximum term of five years.

Pls. see Annex 6 (Duties and liability of members of the supervisory board) for more information.

2. Law concerning the remuneration of directors in stock corporations

German law limits the remuneration of directors of (listed and non-listed) stock corporations in various ways. Under the law:

- The supervisory board shall make sure that the total remuneration of directors properly reflects their tasks and performance and bears an appropriate relation to the performance of the company.
- The remuneration of directors shall not exceed the average remuneration level of comparable directors in the same area and industry without cause.
- Remuneration of directors of listed companies shall be consistent with a sustainable development of the company and performance-related elements of the remuneration shall be assessed with reference to several business years, up to the entire term of office.
- Stock options shall be exercised no earlier than four years after they were issued.
- If short-term performance awards (like bonuses) are granted, the supervisory board shall be obliged to cap individual director's remuneration to avoid exorbitant bonuses due to eg extraordinary movements in share prices.

The law does, however, not provide for any explicit or detailed restrictions in remuneration agreements.

Pls. see Annex 7 (Limitation of director remuneration in stock corporations) for more information.

3. Setting up or purchasing a (shelf) stock corporation

If a new stock corporation is set up, it usually takes several weeks from the incorporation date (ie notarisation of the foundation deed) until the company is registered with the commercial register (pursuant to statutory law, an AG starts to legally exist upon registration with the commercial register).

As in the case of a GmbH, investors may 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 and shareholders being protected against liability through the shelf company's corporate veil immediately.**

The costs of acquiring a (shelf) stock corporation amount to approximately EUR 55,000 and comprise the following amounts:

- EUR 50,000 share capital of the company (which is actually not a cost but a compensation for an asset that the service provider has already added to the company's balance sheet by making the full initial shareholder contribution in cash when creating the shelf company).
- EUR 5,000 fees to be paid to the shelf company provider as a service fee.

The transfer of shares in a stock corporation does **not need to be notarised.**

However, **costs for** (legal and/or tax) **consultants** may accrue.

Pls. see Annex 8 (Setting up/acquiring a (shelf) stock corporation) for detailed information.

IV. Partnership with a limited liability company as general partner

1. Organisation

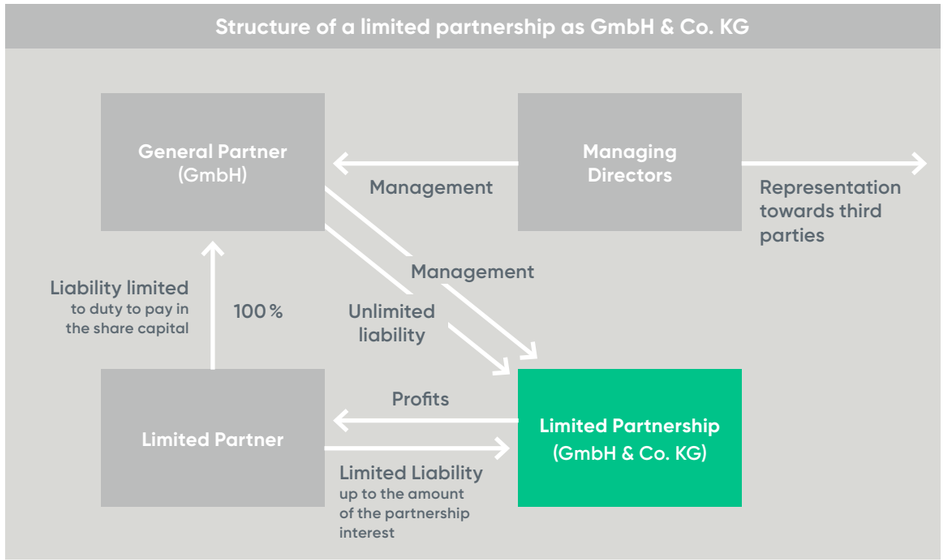
1.1 Structure of the company

The GmbH & Co. KG combines elements of a limited partnership with those of a limited liability company. The form of the limited partnership can primarily be recommended for smaller enterprises where some partners are actively involved in the business and others participate in the profits without being involved in the management. In some cases, limited partnerships are also set up because of **different taxation of partnerships** and corporations pursuant to local tax law.

Limited partnerships are commercial partnerships in which one or more partner(s) are liable for the debts and liabilities of the partnership only up to an amount registered with the commercial register (limited partners – LP) and one or more partner(s) are liable to an unlimited amount (general partners – GP).

If the limited partnership is set up in a form that **the only GP is a limited liability company** (in which case the limited partnership is called "GmbH & Co. KG"), the unrestricted liability of the GP is limited due to its legal form as a limited liability company. Usually the limited partners are also shareholders in the limited liability company in which case the company is a GmbH & Co. KG with identical participation *(Einheits-GmbH & Co. KG)*.

The advantage of a GmbH & Co. KG is that none of the private individuals participating in the partnership has unlimited liability. As the GP is responsible for the management of the partnership, the managing directors of the limited liability company are also the managing directors or managing body of the limited partnership. The disadvantage of this form of enterprise is its comparatively complicated structure due to the interlocking of two legal entities. Definitions, rules and provisions pertaining generally to the limited partnership and the limited liability company are equally and simultaneously applicable to the GmbH & Co. KG.



1.2 Limited Partners

From the date of registration with the commercial register the liability of the **LP** is determined by the amount of their **partnership interest** *(Hafteinlage)* registered with the commercial register. Generally, the LP have **fewer rights** (in particular with regard to management and participation in voting rights) than the GP.

1.3 General Partners

The GP has **unlimited liability** for the debts and liabilities of the limited partnership and is responsible for the **management** of the limited partnership.

2. Setting up or purchasing a (shelf) GmbH & Co. KG

A GmbH & Co. KG can be **set up** in two different ways:

- Either a newly established or already existing limited liability company joins (as general partner) with limited partners to form a limited partnership (before setting up the GmbH & Co. KG the founders may eg acquire a shelf company).
- Or a limited partnership is created in a first step with a private individual as GP. At a later stage, a limited liability company, established for the purpose of assuming the management responsibility as well as the personal liability, joins the limited partnership as GP and the previous GP withdraws from the partnership.

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 operative business can be started as soon as the limited partner(s) is/are registered with the commercial register.**

F.
Duties After Setting up a German Company

I. Notification duties

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)*
- Employment office *(Arbeitsamt)***
- 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.**

II. Opening up a bank account

In the course of the foundation process of a company, a Euro bank account must be opened in order to pay in the contributions of the founding shareholder(s). If a shelf company is acquired, the funds on its (already existing) bank account are to be transferred to a new account opened by the new shareholders.

When setting up a new bank account in Germany it should be noted that the bank may ask to be provided with (extensive) **documentation relating to the shareholder(s)** (eg an extract from the commercial register, a letter of good standing or similar documentation) **and the new company** (eg the incorporation deed, the share purchase agreement, an extract from the German commercial register etc.). Accordingly, opening a bank account with a **German branch of a foreign bank,** which the shareholders are already familiar with (eg Bank of America, which has a German subsidiary seated in Frankfurt) can be of advantage.

III. Mandatory indications on business letters, e-mails and internet sites

Information regarding the company which must be reflected in business letters (including e-mails) and be published on the internet site of German companies is set out in **Annex 9.**

IV. Applications to the commercial register at a later stage

The main corporate data of the company is published in the commercial register and must be kept up to date. Applications to the competent commercial register may become necessary due to changes at a later stage such as the appointment or resignation of managing directors, a change of the business address or amendments of the Articles of Association (eg change of company name, seat, registered share capital in case of a GmbH or change of the general partner or of the partnership interest of the limited partner in case of a limited partnership) etc. In each case, applications must be signed by the **managing director(s) in certified forms** either before a German notary or before a notary outside Germany (in which case an **apostille or legalization** is usually required additionally).

Pursuant to statutory law, the managing directors (or, if a notary is involved the notary) must amend the shareholders list of a limited liability company in case of any change of shareholders and/or the (number and/or nominal amounts of the) share(s) held by them. The amended shareholders list must be filed with the commercial register as soon as the changes with regard to the shareholder(s) and/or the share(s) have become legally effective.

V. Keeping the shareholders list up to date

It is important to know that, in principle, only shareholders who are reflected in the shareholders list published electronically by the competent local court can exercise shareholders' rights (in particular: their voting rights). This means that, in general, **no shareholders' resolutions can be passed** before the shareholder(s) is/are (i) included in the shareholders list and (ii) the shareholders list is published.

Furthermore, under certain circumstances, a person can acquire shares from a person who is not the (real) owner of the shares but (incorrectly) reflected in the shareholder list (so-called "acquisition in good faith"). In order to avoid the risks potentially arising from an acquisition in good faith, the managing directors need to ensure that the shareholders list is **regularly checked and immediately amended and the amended list is filed with the commercial register** in case of any changes.

TaylorWessing Doing Business and Investing in Germany

G.

Accounting and Publication Duties

Corporations and commercial partnerships are obliged to maintain accounts and to disclose their commercial transactions and financial status in these accounts in accordance with the German Commercial Code *(Handelsgesetzbuch; HGB).*

Apart from the obligation to prepare an opening balance sheet *(Eröffnungsbilanz)* as at the date of the commencement of their activities, German companies (including foreign subsidiaries) – irrespective of their size – must prepare annual accounts *(Jahresabschluss)* at the end of each business year consisting of at least a **balance sheet** *(Bilanz)* and an **income statement** *(Gewinn- und Verlustrechnung).*

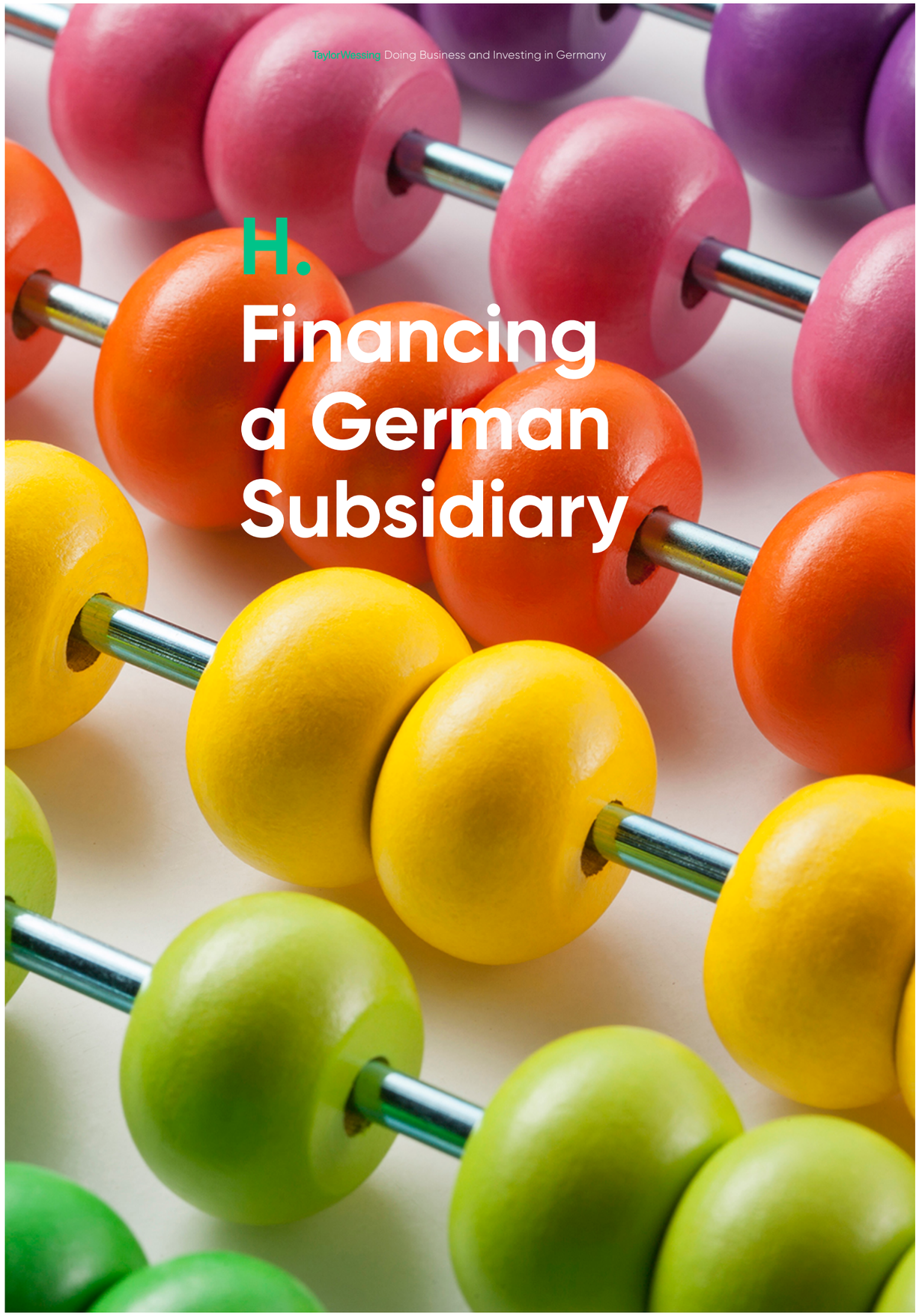
Pursuant to German statutory law (laid down in the German Commercial Code – *Handelsgesetzbuch; HGB)*, the scope and extent of accounting and publication duties of **corporations** (eg limited liability companies and stock corporations) increases **in relation to their size.** Large companies must provide all elements of the annual accounts, whereas medium-sized, small and micro companies benefit from various **simplifications:**

	Balance sheet total (in EUR million)	**Turnover** (in EUR million)	**Number of employees** (average p.a.)	**Annual accounts must include***	**Audit** of the annual financial statements*
Large companies	Above 20	Above 40	Above 250	■ Balance sheet ■ Report by supervisory board (if in existence) ■ Income statement ■ Notes to financial statements ■ Management report	Mandatory
Medium-sized companies	Above six to 20	Above 12 to 40	Up to 250	■ Balance sheet ■ Report by supervisory board (if in existence) ■ Income statement ■ Notes to financial statements ■ Management report	Mandatory
Small companies	Up to six	Up to 12	Up to 50	■ Balance sheet ■ Notes to financial statements	Not mandatory
Micro companies	Up to 0.35	Up to 0.7	Up to 10	■ Balance sheet without notes, if certain relevant information is contained in the balance sheet	Not mandatory

*In each case if **two of the three criteria highlighted in green** in the spread sheet are satisfied.

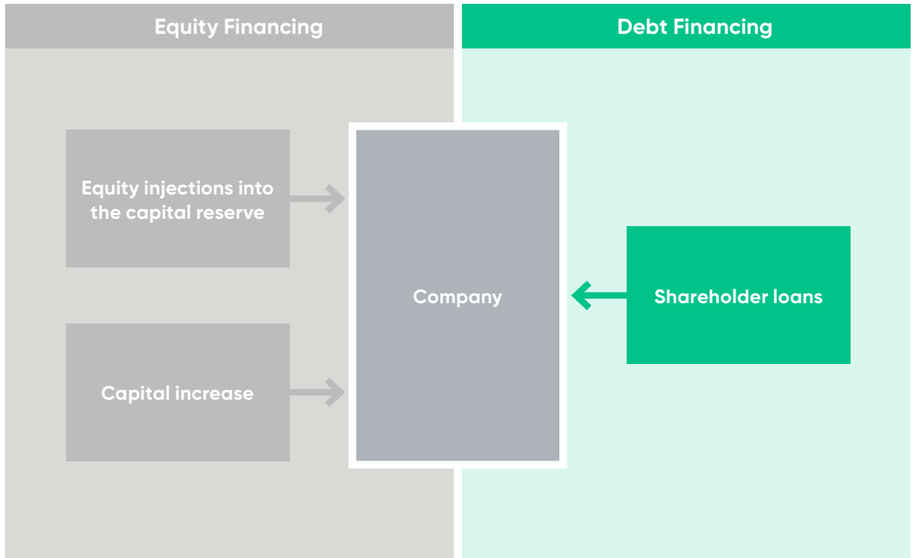
The annual accounts of the previous business year must, in principle, be **prepared by the management** within the first three months of the new business year (there are, however, some exceptions for smaller companies, providing for an extension of this period for up to six months). The annual accounts then have to be **approved by the shareholders** within eight months from the end of the business year (11 months for small and micro companies, which are limited liability companies).

The annual financial statements and the auditor's opinion (if applicable) must be filed electronically by the management of the company with the **German Federal Gazette** *(Bundesanzeiger)* immediately after the approval of the shareholders is granted (at the latest within 12 months from the end of the previous business year).



H. Financing a German Subsidiary

I. Financing by shareholders



1. Equity Financing

German statutory law does not provide for a duty of the shareholders of a corporation (GmbH and AG) or the partners of a limited partnership to inject additional equity unless otherwise provided in the Articles of Association, the partnership agreement or the shareholders' agreement (if any).

Additional equity can, however, be generated or injected by the shareholders by way of:

- Attributing (a part of) the annual profits to the capital reserve of the company
- Injecting equity into the capital reserve of the company
- Increasing the share capital.

Pursuant to statutory law, equity injections are not interest-bearing; shareholders granting equity to the company further fully participate in the commercial risks the company is exposed to.

If additional equity is injected by the shareholders, in most cases the manner of it being granted depends on the specific needs of the company and the shareholders and/or requirements imposed by third party investors requesting eg a certain equity ratio.

Generally, **equity injections** tend to be easier than a capital increase as they may be made by each shareholder individually (without other shareholders bearing the risk of their shares being diluted), the capital reserve may be released and the injected funds may be paid back relatively easily – provided, of course, that the funds are still available.

Capital increases are more time consuming and cost intensive (a notarised shareholders' resolution is required and the capital increase becomes legally valid only upon registration with the commercial register). All shareholders must either participate in the capital increase or waive their

subscription rights. Furthermore, the contributions cannot be paid back very easily as they become part of the registered share capital which is protected by specific provisions of statutory law, providing that the registered share capital must not be paid back to the shareholders in any form. Capital decreases also require notarisation and are subject to a number of legal requirements.

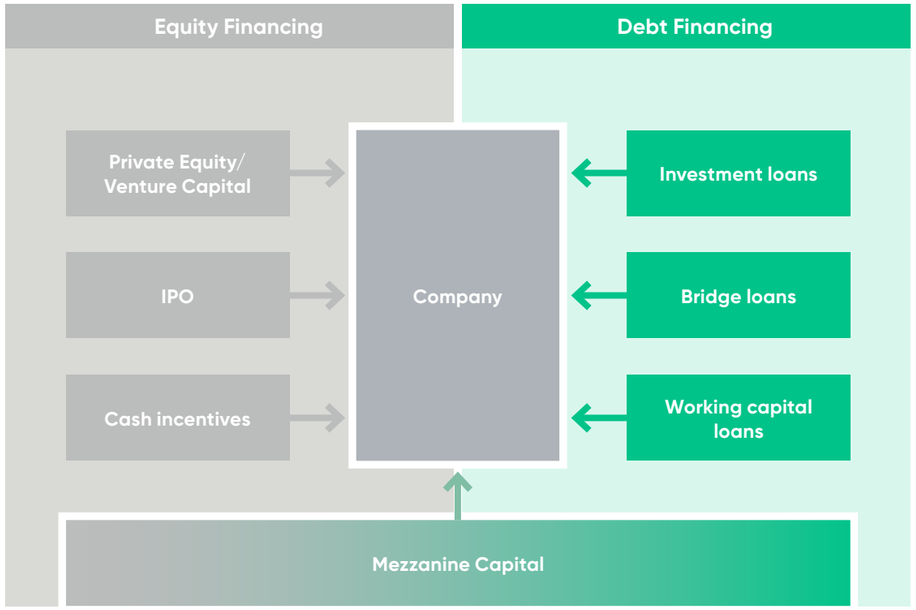
2. Debt Financing

From a legal point of view, shareholders may, at any time, grant interest-bearing loans to the company based on a loan agreement at arm's length. The conditions of the draft loan agreement should, however, be reviewed by the company's **tax consultant.**

It has to be noted that in the event of **insolvency** of the company (i) claims of shareholders for the repayment of loans granted by them to the company generally rank behind the claims of all other creditors of the company (ie such claims are generally only settled after the claims of all other creditors, unless the shareholder holds less than 10 % of the share capital and is not a managing director) and (ii) all payments made by the company to shareholders within a term of 12 months before the opening of the insolvency proceedings can be challenged by the insolvency receiver (resulting in a duty of the shareholders to repay the loan amount to the company).

In order to avoid over-indebtedness of the company, loan agreements with shareholders should, in any event, contain a **subordination clause** which is in line with the rulings of the German Federal Court of Justice *(Bundesgerichtshof)* and has the effect that the claim of the lender shareholder for repayment does not appear in the interim balance sheet based on which the existence or absence of over-indebtedness is assessed.

II. Financing by third parties



1. Equity Financing

Equity injections from third parties are frequently made in the form of **Private Equity** engagements or **Venture Capital** (in the context of high-tech or increased risk projects). Financial partners may be found eg through the **German Private Equity and Venture Capital Association** *(Bundesverband deutscher Kapitalbeteiligungsgesellschaften; BVK).*

You can read more here:
www.bvkap.de

Another instrument to find third party investors is an Initial **Public Offering (IPO)** or **Private Placement (PP)** at the German stock market.

Pls. see Annex 10 (Overview *Deutsche Börse* stock market) for more information.

As supplementary access to the German capital market, the acquisition by a publicly listed **Special Purpose Acquisiton Company (SPAC)** is increasingly becoming popular as an additional exit channel. A SPAC is, generally speaking, a publicly listed company funded by investors through an IPO with no own operating business or underlying assets which aims to acquire suitable existing companies in attractive market segments. The operating company can merge with (or be acquired by) the publicly traded SPAC vehicle and become a listed company – in lieu of executing its own IPO.

You can read more about SPACs here:
https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin

2. Debt Financing

Loans of third parties (in particular: banks) are often granted in one of the following forms:

Investment loans	Bridge loans	Working capital loans (including overdraft credit facilities)
■ **Long term** loans (up to 10 years) ■ **Interest** charged (semi-) annually ■ **Security** consisting of eg ▪ Collateral (fixed assets, inventory, receivables, real estate) ▪ Assignment of claims ▪ Shareholder guarantees ▪ Pledges	■ Granted for **bridging deferred financial inflow** ■ Usually **secured** by assignment of claims of the company against debtors to the lender	■ Granted for **providing liquidity for daily business** ■ **Conditions** usually **amended** on a **yearly** basis ■ **Interest** rates depend on level of loan utilisation, period of usage, and compliance with financial covenants ■ **Security** depending on the precise purpose and amount of the credit and the commercial situation of the borrower (range of potential means of security comparable with security for investment loans)

3. Mezzanine Capital

Mezzanine Capital is, from an accounting point of view, an **intermediary between equity and debt.** The term "Mezzanine Capital" covers a broad range of unsecured subordinated debt or preferred stocks. Due to relatively high risk exposure Mezzanine Capital tends to be relatively expensive.

Pls. see Annex 11 (Overview various forms of Mezzanine Capital) for more information.

4. Cash incentive programs

Investors in Germany are offered a multitude of German and EU **cash incentive programmes** set up to support companies at all stages of their business activities. Subsidies can be provided as grants and treated as **equity** for accounting purposes; other forms such as interest reduced loans are rather considered as **debt.**

Pls. see Annex 12 (Overview Incentives) for more information.

I. German Tax System (2020/2021)

I. Taxation of Companies

1. Overview

German tax law knows **two levels of taxation:**

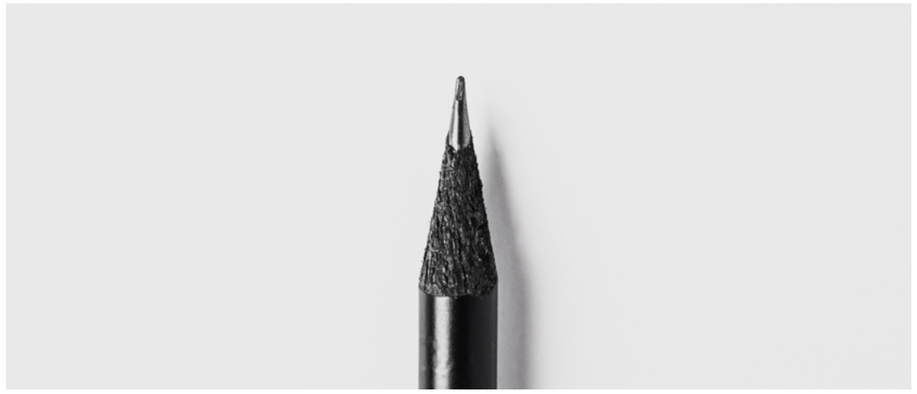
	Corporations	Partnerships	Individual enterprises
Income tax	Corporate income tax	Personal or corporate income tax (to be paid by the partners)	Personal income tax (to be paid by the entrepreneurs)
	In each case plus a **solidarity surcharge of 5.5 % of the assessed tax**		
Trade tax	**Municipal tax applicable to all company forms**		

2. Corporate Income Tax for corporations

2.1 Taxation on the level of the corporation ("Level I")

German corporate income tax amounts to a flat rate of **15 %** on all **taxable earnings** of corporations. The income is determined in accordance with the regulations of the Income Tax Act *(Einkommenssteuergesetz; EStG)* and the Corporation Tax Act *(Körperschaftssteuergesetz; KStG).*

In addition, **solidarity surcharge** amounting to **5.5 %** of the assessed tax is imposed.



2.2 Taxation of dividends at the shareholders' level ("Level II")

Profits distributed to shareholders (dividends) are also subject to taxes:

Taxation under the partial-income rule	Taxation under the flat tax (final withholding tax)
If individuals hold shares in corporations as **business** assets:	If individuals hold shares in corporations as **private** assets:
■ 40 % of the dividends received from domestic or foreign corporations are tax-exempt. 60 % are subject to income tax (plus solidarity surcharge) and trade tax under certain conditions.	■ Dividends received from domestic or foreign corporations are taxed at a flat rate of 25 % (plus solidarity surcharge). The progressive tax rate is applied on request.
■ 60 % of the expenses commercially related to dividends may be deducted as business-related expenses.	■ Expenses related to dividends cannot be deducted as income-related expenses.
■ 25 % withholding tax plus solidarity surcharge is deducted from the dividends. The withholding tax is credited against the income tax liability of the recipient of the dividends. For non-resident individuals, the withholding tax is generally final.	■ From the dividends, 25 % withholding tax plus solidarity surcharge are withheld. In general, the withholding tax is final.

Dividends paid from a German subsidiary **to its foreign parent corporation** are, in general, subject to a withholding tax *(Kapitalertragsteuer)* amounting to **25 %** of the gross dividend plus solidarity surcharge thereon. A (partial) tax relief (in particular: tax refunds) may be available under **double taxation treaties** between Germany and the state of origin of the foreign parent corporation (if the parent company has its seat outside of the European Union). A **refund of** 2/5 or even the full amount of the deducted withholding tax may be granted to foreign parent corporations, which have its seats in a state outside of the EU. Please note that a (partial) refund or exemption from withholding tax is governed by specific rules. The relevant requirements for a (partial) refund or exemption from withholding tax should be coordinated on an individual basis.

2.3 Double Taxation Treaty USA – Germany

According to the provisions of the Double Taxation Treaty USA-Germany (**"DTT"**) withholding tax may be reduced to the applicable treaty rate ranging between 0 %/5 %/15 % (the applicable rate depends on the individual case) if dividends are distributed by the German GmbH to its US parent company. The US parent company has to apply for a certificate of withholding tax exemption issued by the German Federal Central Tax Office *(Bundeszentralamt für Steuern)*. Alternatively, the US parent company may claim withholding tax withheld in excess of the relevant DTT provision from the Federal Central Tax Office by way of a refund procedure.

In addition to the limitation on benefits clause provided for by the DTT, Germany has enacted anti-treaty-shopping rules overriding the DTT provisions to some extent. Pursuant to the domestic anti-treaty-shopping rules, **substance** has to evidenced at the level of the holding corporation

(ie the corporation receiving dividend payments from Germany):

- There must be commercial or other important reasons (mere tax purposes are not sufficient) for setting up the foreign company.
- The foreign company is required to realise the respective revenues from own business activities thereby excluding revenues realised from asset management and from activities not carried out by the company itself (but instead by third party provider acting on behalf of the company).
- The foreign company has to participate in public commercial activities with a sufficiently implemented own organisational structure.

The aforementioned substance test will not be applied (ie the treaty relief will be granted irrespective of the aforementioned criteria) if the shares of the foreign company are listed at a stock exchange (to be more precise, there has to be a regular and significant trade of the company's main class of shares at a recognised stock exchange) or if the foreign company qualifies as an investment fund under the German Investment Tax Act.

If the substance test is applied and if there is a lack of substance in terms of the aforementioned German treaty-override-provisions, the US parent entity will not be entitled to treaty benefits and the German domestic withholding tax rates (as set out above) will apply.

Pls. see Annex 13 (Overview of tax agreements entered into between Germany and the United States) for more information.

3. Personal income tax for individuals and partnerships

Individuals are subject to **income tax, solidarity surcharge** (since 2021 only if certain income levels are exceeded) and may be **trade tax** levied on business income.

Partnerships are "transparent" from a tax perspective and are, therefore, not subject to corporate or personal income 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. If a partner is a **corporation,** this corporation is subject to **corporate income tax.**

Level income tax	From (EUR)		To (EUR)		Tax rates (%)	
	2020	2021	2020	2021	2020	2021
Personal exemption	0		9,408	9,744	–	
Entry-level bracket rate	9,409	9,745	14,532	14,753	14 – 23.97	
Progression zone	14,533	1,754	57,051	57,918	23.97 – 42	
Proportional zone	57,02	57,919	270,500	274,612	42.00	
Maximum tax rate	270,501	274,613			45.00	

Solidarity surcharge amounting to **5.5 %** of the assessed tax is imposed in addition to the personal income tax. As from 2021, no solidarity surcharge will be levied if the annual income tax charge falls short of EUR 16,956 in the case of an individual assessment or EUR 33,912 in the case of a joint assessment.

Personal income tax generally applies to **distributed and retained earnings** of the partnership. Due to some recent amendments, statutory tax law now provides for **two options** designed to lead to a certain tax relief:

- Trade tax payments for distributed and retained earnings may be set off (within certain limits and subject to further prerequisites) against the personal income tax charge with a compensation.
- Partnerships may apply for a flat tax rate of 28.25 % for retained earnings (leading to a flat taxation rate of 29.8 %) in order to avoid a progressively rising personal income tax. Later withdrawals trigger a recapture tax of 25 % plus solidarity surcharge.

4. Trade Tax (for corporations, partnerships and individual enterprises)

Trade tax is levied on every trade or business (also permanent establishment) located within the territory of Germany. The applicable trade tax rate depends on two **criteria:**

Tax assessment rate (= standard trade tax base rate pursuant to the German Trade Tax Act)	**Municipal collection rate** (= rade tax collection rate provided by each municipality individually)
Amounting to 3.5 % of the annual taxable earnings for corporations, partnerships, and other business operations.	At least 200 % up to an unlimited percentage of the tax assessment rate. The average municipal collection rate is approximately 400 %.

Currently, the highest trade tax multiplier applied by a municipality in Germany is 580 %. Accordingly, the trade tax burden varies between 7 % and 20.3 %.

No solidarity surcharge is imposed on trade tax. Furthermore, trade tax is not deductible as business expenses. For the reduction of personal income tax see above.

Sample calculation (simplified):

	Profit from a business enterprise
+/-	**Trade tax additions/deductions**
=	**Trading profit**
–	**Tax exempt amount of EUR 24,500** (only for individuals and partnerships)
=	**Trading profit** (after deduction losses, rounding, and tax-exempt amount)
x	**Basic trade tax rate 3.5 %**
=	**Base amount**
x	**Multiplier** (eg Munich as of 2019: 490 %)
=	**Trade tax** (effective tax burden eg for Munich: 17.15 %

Pls. see Annex 14 (Determination of trade tax and overall tax burden – example) for more information.

5. Overall tax burden

The average **overall tax burden** for corporate companies in Germany is **around 32 %** (tax rates may slightly vary depending on tax rates of the local municipalities).

Pls. see Annex 14 for more information.

6. Definitive withholding tax *(Abgeltungsteuer)*

A definitive withholding tax – as a flat tax amounting to **25 %** – is imposed on capital gains and other investment income received by **private individuals.** In general, the withholding of tax is final but the progressive income tax rate is applied on request. Expenses related to dividends cannot be deducted as income-related expenses.

Solidarity surcharge amounting to **5.5 %** of the assessed tax is imposed in addition to the definitive withholding tax, regardless of whether certain income limits are exceeded.

II. Taxation of Property

1. Overview

German law knows **two forms** of taxes relating to real property:

Real Property Tax *(Grundsteuer)*		Real Estate Transfer Tax *(Grunderwerbsteuer)*
Depending on the type of real property:		Applies if **real estate** within the territory of Germany **is sold or changes its owner**
Real Property "A"	**Real Property Tax "B"**	
Applies to real property used for **agriculture and forestry**	Applies to **constructible** real property or real property **with buildings**	

2. Real Property Tax

Real property tax is levied on any German real estate (land, buildings) held for business or private purposes. In principle the personal circumstances of the owner are disregarded.

The real property tax burden is currently calculated by multiplying the following:

The assessed value of the real property	x	The real property tax rate	x	The municipal collection rate
Is determined by the tax authorities in accordance with the German Valuation Tax Act *(Bewertungsgesetz).*		Depends on the type of real property (eg the rate for property used for (semi-) detached houses with a value of up to EUR 60,000 is 0.26 %; for all remaining property including commercially used property the rate is 0.35 %).		As in the case of trade tax (individual) municipal collection rates apply to real property "A" and "B".

From 1 January 2025 onwards, new rules regarding the calculation of the real property tax must be applied due to **a real property tax reform** which was passed in November 2019. Main changes effect the determination of the assessed value. Furthermore, the real property tax rate of 0.35 % will be decreased to 0.034 %. From 2025 onwards, the municipalities will have the option of setting a uniform assessment rate for properties ready for construction that is higher than the assessment rate for other properties for reasons of urban development (real property tax "C"). Urban development reasons include, for example, meeting an increased demand for housing and workplaces as well as community and follow-up facilities, the densification of existing settlement structures or the strengthening of urban development.

Due to an opening clause for the federal states anchored in the constitution, the federal states are free to decide which assessment basis they will actually apply from 2025. It is therefore possible that different property tax assessment bases could be applied in Germany in the future.

The new property tax values will be determined for the first time on 1 January 2022 (main determination date) and will be used as the basis for property tax from 1 January 2025. In future, the main assessment period will be seven years, so that the next main assessment will take place on 1 January 2029.

Pls. see Annex 15 (Determination of Real Property Tax Burden – example) for more information.

3. Real Estate Transfer Tax

Real estate transfer tax ("RETT") varies between 3.5 % and 6.5 % (in most federal states: 5.0 %) of the purchase price and is imposed if real property is sold for a price/exceeding EUR 2,500 which is usually borne by the buyer.

RETT is also triggered if at least 95 % of the ownership interest in a company which owns real estate is acquired. The same applies if at least 95 % of the interest in a partnership is transferred to new partners within five years.

Pursuant to a draft bill currently expected to be enacted with effect as of 1 July 2021, the participation threshold will be reduced from 95 % to 90 % with the observation period to be expanded from five to ten years. Under the revised rules, RETT will either be triggered (a) if at least 90 % of the shares in a company holding German situs real estate will be directly or indirectly held by a shareholder or affiliated companies, or (b) if at least 90 % of the shares in such company will be directly or indirectly transferred with the ten years observation period. The latter rule (b) will also apply to real estate held by partnerships.

III. Value Added Tax (VAT)

1. Overview

VAT is imposed on goods and services supplied by legal entities or individuals exercising a commercial activity within the scope of their commercial business against valuable consideration within the territory of Germany.

Whereas a reduced tax rate of **7 %** applies to convenience goods and services needed on a daily basis (eg newspapers, food and public transport) the standard VAT rate in Germany amounts to **19 %**. Some services (eg a part of banking services, healthcare and non-profit work) are exempt from VAT.

Pls. see Annex 16 (Comparison of European VAT rates (2021) in percentage) for more information.

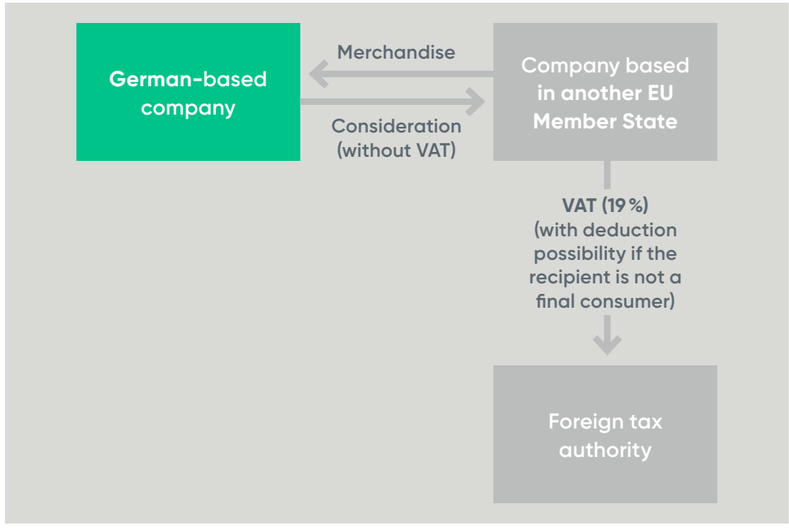
2. Input VAT deduction *(Vorsteuerabzug)*

VAT is a consumption tax **borne ultimately by the final consumer.** In order to ensure that VAT is neutral for taxable persons (ie VAT-registered businesses) they may deduct from the VAT they have collected the amount of tax they have paid to other taxable persons on purchases for their business activities (input VAT deduction).

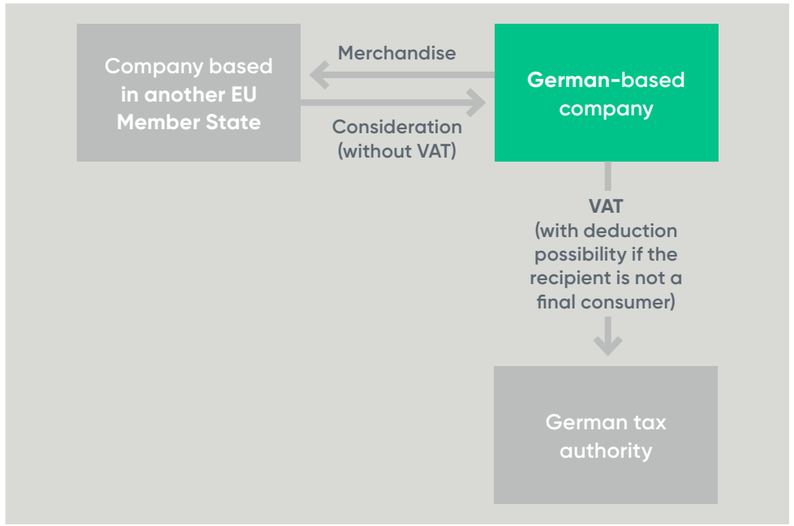
Pls. see Annex 17 (Concept of VAT – example) for more information.

3. Trade within the EU Common Market

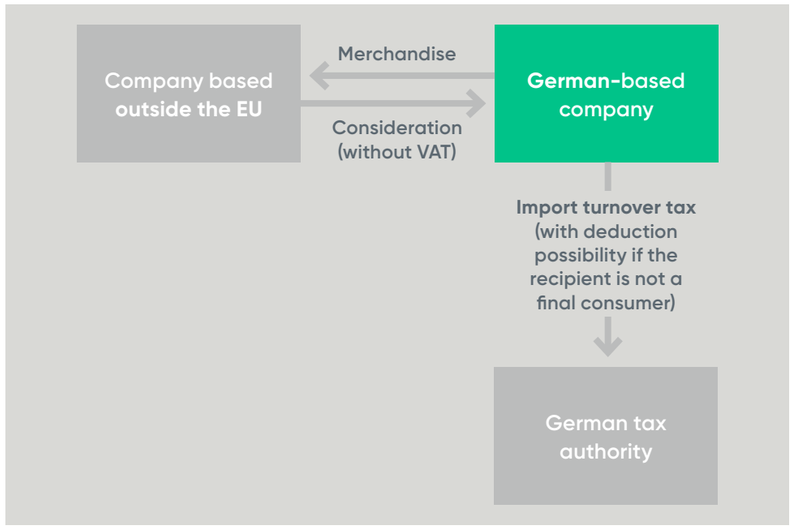
Within the EU Common Market trade is free of customs and other restrictions. However, goods traded between different EU Member States are subject to VAT payable by the **recipient** of the goods. Accordingly, if a German-based company delivers goods to a purchaser company based in another EU Member State, the supplier company does not need to pay customs or charge VAT. The **rate** of the VAT **corresponds to the VAT rate** of the country where the **recipient** of the goods is resident. The recipient may be entitled to a refund of input VAT levied on such cross-border supply in accordance with the VAT rules applying in the state of residence.



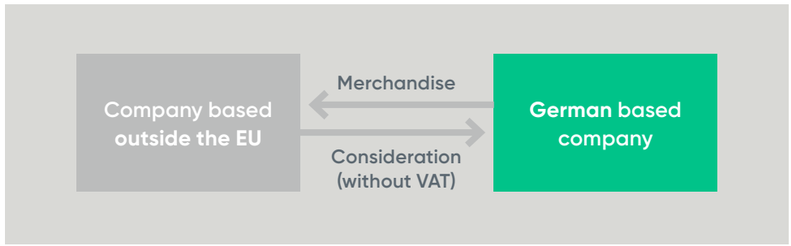
In accordance with the above, German-based companies need to pay VAT if they receive goods from a supplier based in another EU Member State:



4. Trade with Non-EU Member States



Goods **imported** from non-EU states are subject to import-VAT **(import turnover tax)** which amounts to the same rate as German VAT (19 % or 7 %).



Export of goods is **exempted** from VAT.

IV. Customs

1. Overview

The customs regime within the European Union is **governed by European law,** however customs within Germany are **administered by the German Customs Administration** *(Bundeszollamt)* with offices throughout Germany.

You can read more here:
http://www.zoll.de/EN/Home/home_node.html

2. European Customs Union

The European Customs Union, a **single trading area,** is based on the EU-wide community customs code *(Zollkodex der Europäischen Union)* which includes the customs tariff and is applied by all EU Member States and Andorra, San Marino and Turkey.

The European Customs Union has

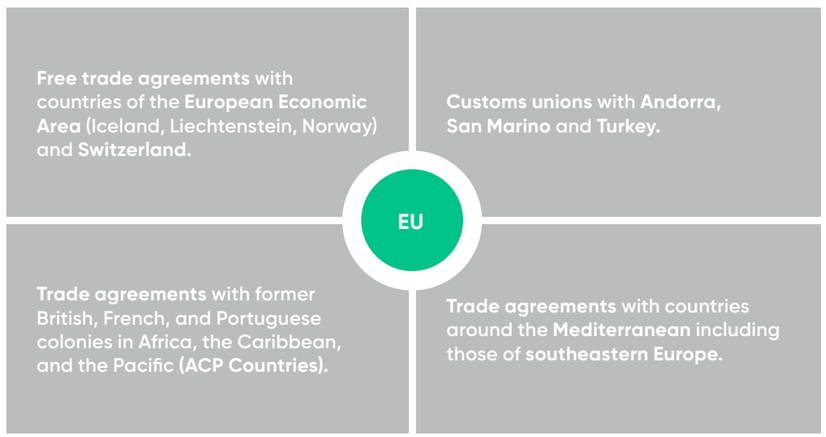
- **... eliminated customs** duties between EU Member States.
- **... eliminated import VAT** between EU Member States.
- **... created a uniform customs regime** including (external common customs tariff (CCT) rates for goods imported from non-Member States into the Customs Union area.

CCT rates vary depending on type and origin of the imported goods.

Tariffs can be found on the TARIC online database of the European Commission: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/what-is-common-customs-tariff/taric_en

3. EU Trade Agreements

Import tariffs and other customs rules are established on the basis of international agreements entered into by the European Union with non-EU Member States such as:



As of 1 January 2021 (subject to certain transition rules), a free trade and cooperation agreement is in place between the EU and the United Kingdom (excluding Northern Ireland, which for purposes of tariffs and customs continues to be treated as part of the EU) setting out preferential arrangements in areas such as trade in goods and services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination and law enforcement.

4. WTO Trade Agreements

As a member of the WTO the EU is also a party to several global trade agreements such as the **WTO Anti-Dumping Agreement** regulating the imposition of antidumping duties between WTO Member States.

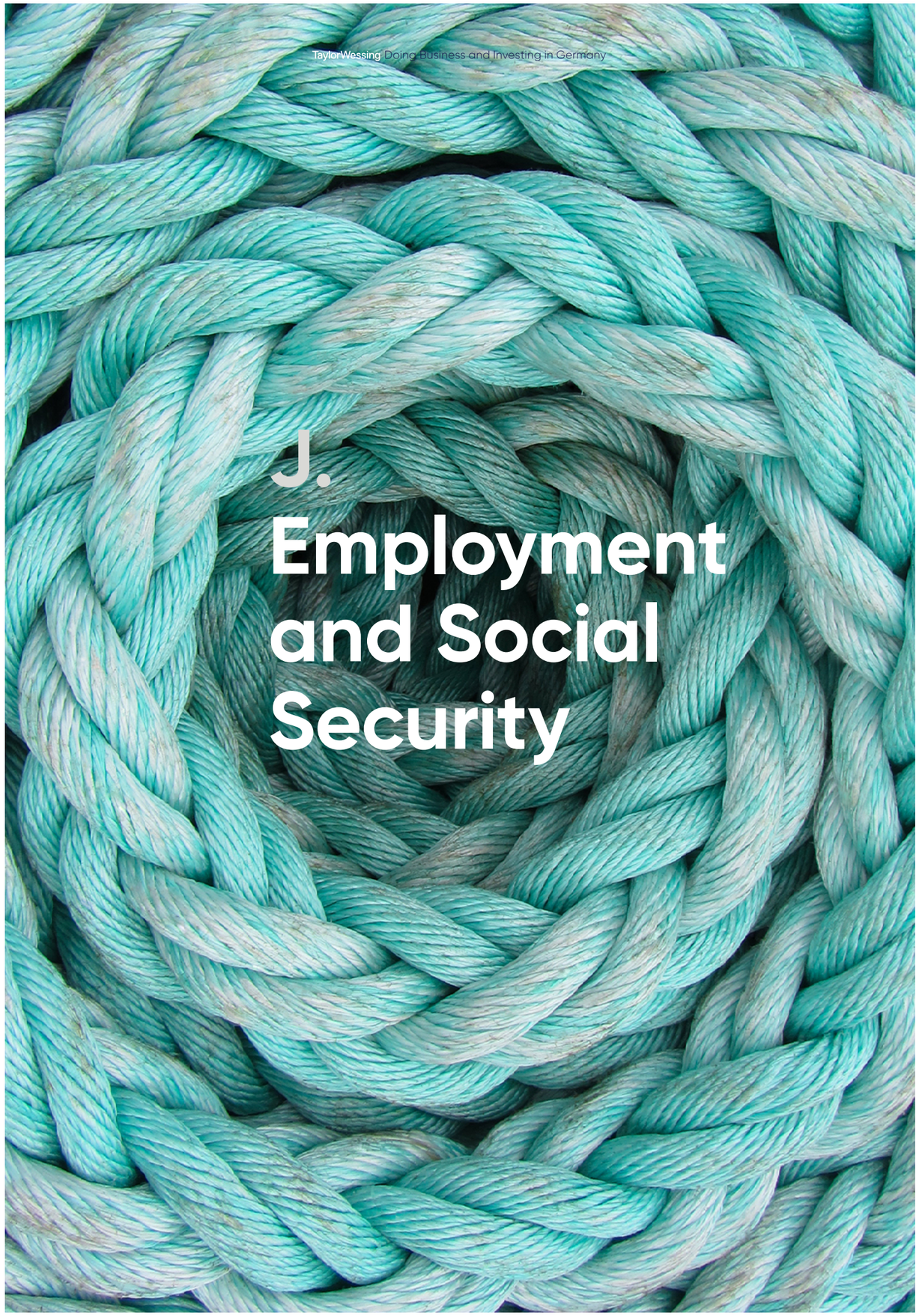
The WTO Anti-Dumping Agreement is implemented at an EU level by the **EU Anti-Dumping Basic Regulation** which sets the legal framework for antidumping duties on imports to the EU.

The EU Anti-Dumping Basic Regulation provides for **strict preconditions** regarding the imposition of antidumping duties that importing companies have to pay, such as the exact determination of dumping, the factual injury to the respective EU industry and a causal link between dumping and injury. Moreover, the imposition of antidumping duties must not be contrary to the European Union's interest.

It also contains substantive rules for the determination of dumping which is calculated by a comparison between the so-called normal value of the product (the price of the imported product in the ordinary course of trade in the country of origin or export) and its export price (the price of the product in the country of import). If the export price of the product concerned is lower than its normal value the product is supposed to be dumped. The difference between export price and normal value constitutes the **dumping margin.**

In terms of **procedural requirements,** the Anti-Dumping Basic Regulation provides that the investigating authorities, ie the European Commission, shall give notice of and explain their determinations at the various stages of the antidumping investigation process in substantial detail. The European Commission imposes a provisional antidumping duty if the investigation results in a provisional determination of dumping and injury. After a maximum period of nine months a definitive antidumping duty is established if the final facts show that there is dumping and injury caused thereby.

When the European Commission announces the initiation of an antidumping investigation it is important that affected companies importing the product concerned to the EU react promptly and cooperate with the Commission without delay. The deadlines to comply with the Commission's requests are very short and comprise approximately 15 days after the publication of the initiation. If affected producers/exporters do not submit the requested information within this deadline they will not be considered as an interested party to the proceeding and will lose crucial procedural rights.



J. Employment and Social Security

I. Employing staff

1. Management

1.1 Managing directors (GmbH)

Managing directors are **appointed by resolution of the shareholders' meeting** (formal act by which the term of their office as managing director starts). Independently thereof a **service agreement** may be concluded between the managing directors and the company (in this case represented by its shareholders). Whereas the appointment is governed by corporate law, the service agreement is subject to employment law. As a consequence, different provisions apply to the managing directors' function as a body of the company and their service agreement. One of the main differences is that managing directors can, in general (apart from a few exceptions) be recalled from office by shareholders' resolution with immediate effect whereas their service agreement (which can only be terminated within the applicable notice period or for cause) continues to be valid.

Pls. see Annex 18 (Provisions typically contained in service agreements with managing directors) for more information.

1.2 Board members (AG)

Board members of (listed or non-listed) stock corporations are **appointed by the Supervisory Board** (formal act by which the term of their office as board members starts). Independently thereof a **service agreement** may be concluded between the board members and the company (in this case represented by the Supervisory Board). Whereas the appointment is governed by corporate law, the service agreement is subject to employment law. As a consequence, different provisions apply to the board members' function as a body of the company and their service agreement. One of the main differences is that board members can generally (apart from a few exceptions) be recalled from office by resolution of the Supervisory Board with immediate effect whereas their service agreement (which can only be terminated within the applicable notice period or for cause) continues to be valid.

As set out above in **Sec. E/III/2** the German government has passed a statute limiting director pay in (listed and non-listed) stock corporations. Most of the provisions under the statute have become relevant for the financial year starting on January 1, 2010.

2. Employees

2.1 Employment Agreements

Irrespective of what the parties may agree upon in an employment contract, German law imposes a number of obligations and rights which may override contractual agreements. These provisions may apply even if the parties have agreed, for example, on Spanish law governing the contract.

Form and content of employment agreements*	Probationary period	Equal pay
Although employment agreements can be agreed to orally, German employees are entitled to receive **a confirmation in writing** of the essential terms and conditions of their employment relationship.	Probationary periods are common. The permitted probationary period is limited to a **maximum of six months;** furthermore, a **notice period of a minimum of two weeks** must be observed.	Throughout the EU, it is **not permitted to pay different rates for the same or equivalent work** due to gender. Furthermore Germany introduced a Transparency of Pay Act in July 2017 (see below).

(Major) issues subject to mandatory provisions under German employment law

Minimum wages**	Sick pay	Maternity and parental leave
Since January 2015, a **minimum wage per hour has to be paid. As of 1 July 2021 the minimum wage per hour is EUR 9.60.** There may also be **collective minimum wages for specific industry sectors.**	Employees are entitled **to six weeks* full pay from the employer for each individual illness during a calendar year.** After six weeks, State Insurance pays a reduced sum (70 %) to the employee.	There is a **ban on working** later than **six weeks before the expected birth date and up to eight weeks after the actual birth date** (extended to 12 weeks for premature or multiple births). Either parent or any other person who is looking after and raising the child, has a statutory claim for **unpaid parental leave for up to three years** of which up to 24 months can also be taken between the 3rd and 8th birthday of the child. During this time, the **employment contract is suspended and the previous position must still be available** when the employee returns.

*** Pls. see Annex 19 (Provisions typically contained in employment agreements) for more details.**

**** Minimum wage agreements were established eg in the following industries:** General construction trade; roofing/tiling; painting and varnishing; building cleaners; electricians; waste industry and street cleaning; textile services; private security services; temporary employment industry; special training and education services; scaffold workers and stone cutting.

The **Anti-Discrimination Act** (official name: General Equal Treatment Act – *Allgemeines Gleichbehandlungsgesetz – AGG)* of 2006 by which EU-regulations were implemented into German law establishes a prohibition of discrimination against any person for reasons of:

1. **Race**
2. **Ethnicity**
3. **Gender**
4. **Religion or ideology**
5. **Disability**
6. **Age**
7. **Sexual orientation.**

The Anti-Discrimination Act is furthermore of great relevance when posting job ads. Those have to be compliant with the Act. A violation might result in a civil lawsuit against the company.

2.2 Dismissal of employees

The notice period for employment contracts can be determined by individual contracts, collective bargaining agreements or statute.

The most important protection for employees is the **Act Against Unfair Dismissal** *(Kündigungs-schutzgesetz – KSchG).* The Act applies if the plant, shop or company **regularly employs more than 10** (or in case of employees who joined the company in 2003 or earlier, five) **individuals,** including part-time workers, under the condition that the employee has been **employed for more than six months.** The provisions of the Unfair Dismissal Act do not apply to employees with less than six months service or those who work for small companies.

To the extent to which the Act Against Unfair Dismissal is applicable, all employees, including part-time workers, are protected. Pursuant to the Act, any termination requires a **social justification** which can only be based on one of three arguments provided in the Act:

Termination of employment may be based on

Arguments relating to the **person** of the employee	Arguments relating to **performance and conduct** of the employee	Arguments relating to **business or operational reasons** of the employer
eg illness	eg theft, fraud	eg closure of the operation, downturn in sales and/or orders

In addition, **further special requirements** must be observed and reviewed by the employer prior to terminating any employee in Germany.

Extraordinary termination with immediate effect may be considered in cases of **serious misconduct** rendering it unacceptable for either party to continue the employment. Immediate termination cannot be based merely on the argument that it is necessary – the termination must be **immediately imperative.** Extraordinary termination is mainly governed by **case law** which, in many cases, may lead to some uncertainty as to whether the termination will be confirmed by the courts.

2.3 Employees with special protection

Special protection applies to

Employees covered by **maternity protection** laws	Employees in **parental leave**	**Severely handicapped persons**
The dismissal of a woman **during pregnancy and up to four months after birth** (or miscarriage after pregnancy week 12) is not permitted if the employer was aware of the pregnancy or childbirth at the time the employee received the termination notice, or up to two weeks thereafter. Dismissal due to non-childbirth factors (eg criminal offence by employee or complete closure of the business) is permitted but special requirements still have to be met and the permission of the State Authority has to be obtained prior to issuing a notice of termination.	The dismissal of a parent is not permitted **from the moment that parental leave is requested** (which must be done at the latest seven weeks prior to the start of the leave) and during the parental leave itself, which can last **for up to three years.** The State Authority can approve termination in exceptional cases, such as closure of business.	**Permission of the State Authority is required** before terminating the employment with a severely handicapped employee who has been **employed for more than six months.** The permission is required even in case of criminal acts and where the employer intends to terminate the employment relationship for cause with immediate effect. As of 1 January 2017 not receiving the required permission will automatically lead to an invalid termination.

On 1 January 2018 the redrafted Maternity Protection Act *(Mutterschutzgesetz – MuSchG)* came into force. The Act intends to reflect the outlook of mothers who are eager to start working as soon as practicable after giving birth and to establish an uniform level of protection for all mothers-to-be – regardless of being employed or still at university. Therefore the Act broadens the scope of application. Not only employees and persons similar to employees are protected by the Act but also women who are still at school or university. The only requirement is that participation of certain courses at the school/university is mandatory and not upon women's discretion. The same principle applies to internships. If the internship is required by the school's/ university's syllabus, the mothers-to-be are protected by the German Maternity Protection Act. Quite unique, is the fact that the protection can be waived by the students.

2.4 Restructure/Redundancy Dismissals

A termination based on redundancy is lawful providing that: it is not an arbitrary entrepreneurial decision that has led to job losses; the dismissals cannot be circumvented; and the dismissals can be justified via an objective selection process and social criteria.

In companies with less than **10,25 FTE** dismissals are effective without further requirements if they are not arbitrary, and the respective notice period and the Special Termination Protection is observed. Where managing directors are being dismissed, no Termination Protection applies, only a notice period must be observed.

In companies with **10,25 FTE or more,** the Protection Against Unfair Dismissal Act *(Kündigungsschutzgesetz – KSchG)* applies:If the employee has worked in the same company or business

establishment for six continuous months dismissals due to redundancy (referred to locally as operational reason dismissals) must meet the following requirements in order for the dismissal to be justified:

- An entrepreneurial decision by the management that a position will be eliminated due to internal and/or external operational reasons (eg closure of the business or a department, outsourcing, rationalization measures) is required.
- If, as a result of the management decision, only a proportion of employees are to be dismissed or an individual position is affected, the employer must carry out a social selection in order to determine the "strongest" employee by reference to "social criteria". The social selection must be made only in relation to employees who are in comparable positions in the company. The decisive criteria for social selection are: length of service, age, maintenance obligations and any severe disability on the part of the employee.
- The employees that are to be dismissed must be offered any vacant position within the company at the same or a lower level, if the individual employee is able to carry out the role after a reasonable period of training.
- The ordinary notice period must be adhered to. The length of the legal notice period depends on the employee's length of service. Longer periods may be agreed in the employment contract.
- If a certain number of employees are being dismissed within 30 days (including via termination agreements) mass dismissal forms have to be filed with the employment agency, see below.

Notification of mass terminations to the employment agency under sec. 17 KSchG

Furthermore, in the case of mass dismissals, the employer has to notify the local office of the employment agency (Arbeitsagentur) prior to dismissing employees (this provision refers to the date when the notice of dismissal is served, ie the declaration of the termination), if the employer dismisses (ie termination including termination agreements initiated/offered by the employer) within the next 30 calendar days in operations:

- with more than 20 and less than 60 employees at least six employees
- with at least 60 and less than 500 employees at least 10% of the employees or at least 26 employees.

A notice of termination without correct and prior notification of the employment agency is **null and void.**

Employees reaction and severance payments

If employees want to challenge the effectiveness of a dismissal, they can file a complaint with the employment court within three weeks of service of the termination notice, otherwise the dismissal will be considered effective. Where the employee has a good chance of success, the employer is often willing to pay the employee a severance payment to rule out the financial risk of losing the dismissal protection claim. The rule of thumb when calculating severance payments is: 0.5 month's gross salary per year of service. Severance payments **are not mandatory** but if agreed the payment is usually due on the date of termination or shortly afterwards.

2.5 Flexible employment concepts

Apart from **fixed-term contracts** (which can be entered into for a **maximum term of two years)** German law allows for some further concepts of flexible employment, in particular:

Temporary Employment	Mini and Midi Jobs	
	Mini Jobs	Midi Jobs
Companies can hire staff from a **temporary employment agency based on a service agreement** between the company and the agency **without concluding an employment agreement.** In such case, **the employees are employed by the agency.** The general working conditions (eg weekly working hours and salary) are usually determined in collective bargaining agreements between unions and the competent employers' association of the temporary employment industry.	**... are jobs with monthly salaries up to EUR 450 or if the employee works only three months or 70 days p.a.** or less for the employer. Commercial employers pay about **30 % of the gross salary as social security contributions** and flat tax (13 % health insurance, 15 % pension insurance, 2 % flat tax). The employee is in principle to be insured with statutory pension scheme and exempt from social security contributions.	**... are jobs with monthly salaries between EUR 450.01 and EUR 1,300** subject to **reduced employee social security contributions.** Employers are subject to **standard security contributions of approximately 21 % of the gross salary.**

The Temporary Employment Act *(Arbeitnehmerüberlassungsgesetz – AÜG)* was reformed in 2017. The most relevant changes are that the maximum period for temporary agency work is 18 months (exceptions due to collective bargains possible) and that nine months after starting the work temporary workers have to be treated equally with respect to other workers (again deviations due to collective bargains possible). Periods of interruption of work of less than three months must be added to the calculation for maximum period and equal treatment.

2.6 Handling of payroll issues and social security contributions

German employees receive a **net salary** from which tax and social security contributions are already deducted. The employer is obliged to register its employees with the tax authority, to **withhold** the taxes to be paid by them and to transfer the money directly to the tax authority.

Social security contributions must be **withheld** by the employer as well after calculation of the gross salary and must be transferred to the employee's health insurance company which then distributes all of the contributions except accident insurance to all relevant institutions.

The contributions for the **accident insurance** need to be paid separately to the Employers' Liability Insurance Association by the employer.

2.7 Transparency of Pay Act *(Entgelttransparenzgesetz - EntgTranspG)*

The Transparency of Pay Act came into force on 6 July 2017. Employees are granted an individual right to information on the remuneration paid to employees of the other gender and criteria to determine remuneration in the company. This applies to companies with regularly more than 200 employees. Employees will have a right to disclosure of the remuneration that employees (at least six) of the other gender receive for comparable work on a monthly average. This information can be broken down for up to two specified wage components (eg base salary, bonus payments). The information is there to help employees to verify the gender equality of their remuneration.

However if comparable group exists of less than six employees no right to information on monthly average of other employees is granted because of data privacy concerns.

Group of General Managers consist of five male employees

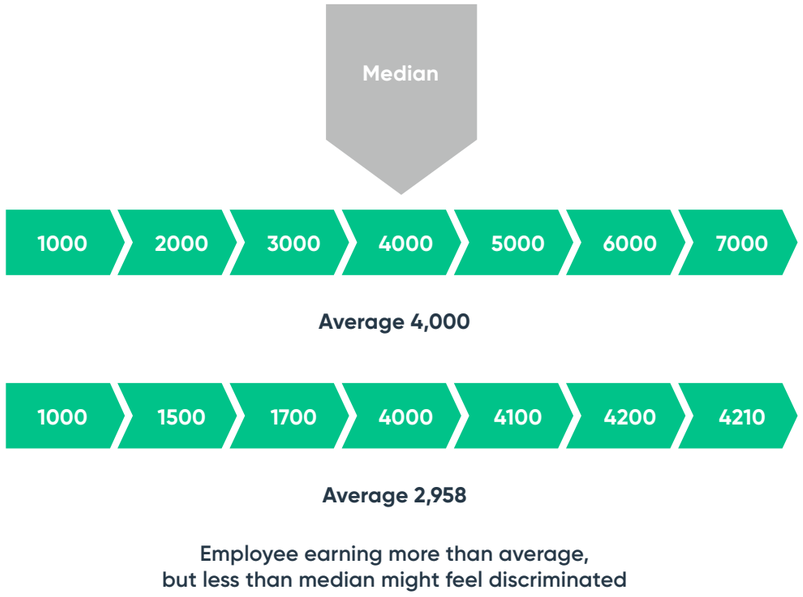
no disclosure of comparable remuneration because number of employees of other gender is less than six

Employer hires two more male and one female General Manager

female General Manager has right to information

The comparative remuneration, however, is not the average salary of all employees in the comparison group but the statistical median of the individual salary amounts. The statistical median is the "middle value" of a data set. To identify this value, companies will have to rank the individual salaries by their respective amounts and identify the "middle" amount.

Median vs. Average



The employer shall principally respond to the request within three months in text form. Should this deadline be missed but the information is provided at a later point in time, no negative consequences would arise. However, failure to provide information at all leads to a shift of the burden of proof.

The Act itself does not provide any legal consequences for companies applying discriminating pay schemes. The official justification of the law refers to existing legal bases for entitlements to salary adjustment in case of pay discrimination under the Anti-Discrimination Act, Sec. 15 AGG. The employee has therefore the claim for remuneration in case he/she feels disadvantaged based on the exchange of information.

They have to demonstrate and prove that the difference in pay is based on gender and thus discriminating. However, this does not apply in cases where a shift of the burden of proof is applicable. If the burden of proof has shifted, it will be up to the companies to prove that there is either no difference in pay or that the difference is not based on gender.

Employers with more than 500 employees are advised to audit gender pay every five years, but there is no obligation on them to do so.

Furthermore, in such operations there is the obligation to generate a status report *(Lagebericht)* according to Secs. 264 ff, 289 German Commercial Code *(Handelsgesetzbuch – HGB),* the Act obliges them to publish a report regarding gender equality and equal pay in the German Federal Gazette. This report extends to measures on promoting gender equality and their results as well as measures taken to achieve equal pay. The reports have to be prepared every three years and cover the preceding three years respectively.

2.8 EU General Data Protection

Since May 2018, the storage of personal data has to be General Data Protection Regulation (GDPR) compliant. According to Article 13 GDPR, applicants must be informed on receipt of their application as to how long their data will be stored. The applicants' personal data may be processed to the extent necessary for the decision on the establishment or implementation of an employment relationship, Article 26 German Federal Data Protection Act *(Bundesdatenschutzgesetz – BDSG).* After the application procedure is completed, the data must be deleted, Article 17 GDPR.

However, the data should and may be stored as long as lawsuits are to be expected because of Article 15 of the General Equal Treatment Act *(Allgemeines Gleichbehandlungsgesetz – AGG),* therefore five to six months. If the data should be stored in an applicant pool, the applicant's (revocable) consent is required. If the employer uses online application tools, he has to use appropriate encryption methods, Article 32 GDPR. If an employer violates central data protection regulations, this may lead to a fine of up to 20 million Euros or 4 % of global annual turnover pursuant to Article 83 GDPR, Article 41 – 43 BDSG.

Material and immaterial damage caused to the data subject by data protection violations must be compensated in accordance with Article 82 GDPR. **Further information on Data Protection can be found under Sec. O. (Privacy).**

II. Works Councils

1. General

Works Councils are committees of employees' representatives. They must be formed in all companies **with five or more employees** on **request of the employees.** The Works Councils have **co-determination rights** eg with regard to working hours, holiday schedules, matters of safety and welfare and distribution of remuneration. Members are elected for four years and must be employees of the relevant company but need no connection to a union. The next regular election is due in 2022.

The Works Councils must be **informed prior to any termination of any employee** (except so-called managerial employees in leading positions) to avoid the termination being legally invalid.

Termination of the employment of a member of the Works Council is **only allowed for cause** and with the **permission of the Works Council.** This protection is extended to another **12-month period** as from the end of a member's term in office, although permission of the Works Council is not required during this time. Any supplementary representative employee who attends even one meeting on behalf of another member, for example during a vacation, will also benefit from the 12 months' protection. There is also protection for employees involved in the election of the Works Councils.

2. Codetermination with respect to Industry 4.0

Representing one's company on social media is a key element of gaining attention for one's product, recruiting high-profile employees and building a brand. Eg setting up a Facebook page that allows registered users to post comments on the company's social media page and commented on behaviour of individual employees of the company leads to a right of co-determination. The judges of the German Federal Employment Court *(Bundesarbeitsgericht)* ruled that the employer's decision to directly publish posts on its Facebook page is subject to co-determination (not the setup of a Facebook page itself). Posts that refer to the behaviour or performance of employees constitute a monitoring of the conduct or performance of the employees within the meaning of sec. 87 para. 1 no. 6 Works Constitution Act *(Betriebsverfassungsgesetz – BetrVG).*

III. Social security system

Germany has a **national compulsory social security system** in which all employees participate by virtue of law. The law provides for a general obligation to join the state social insurance scheme. The **employer is obliged to pay about 50 % of the employees' social contributions.** Moreover, there is a statutory duty to deduct employees' contributions from their monthly remuneration and to transfer them to the medical insurance fund. This means that the employer must pay the full social contributions to the social security authorities. For this purpose employers must keep records of earnings for every employee organised by calendar year and preserve them until the end of the year following the next tax audit. Contribution forms for the medical insurance schemes must be kept on file. The statutory social security system is regulated in the German Social Security Code *(Sozialgesetzbuch – SGB)* and covers the following **five principal areas:**

Unemployment benefits	Old-age benefits (pension insurance)
Unemployment insurance contributions are **shared by the employer and the employee at a rate of 2.4 % of gross remuneration.** The payments have to be made by the employer who has to withhold the employee's share of the contributions as well. In the event of non-culpable loss of employment, insured persons receive 60 % of their final net earnings (67 % if the employee supports at least one child).	**Employer and employee also share old-age benefit contributions.** Again, the employer has to withhold the employee's share for transfer with his contributions to the pension insurance office. The old-age contributions are currently **18.6 % of gross remuneration.**

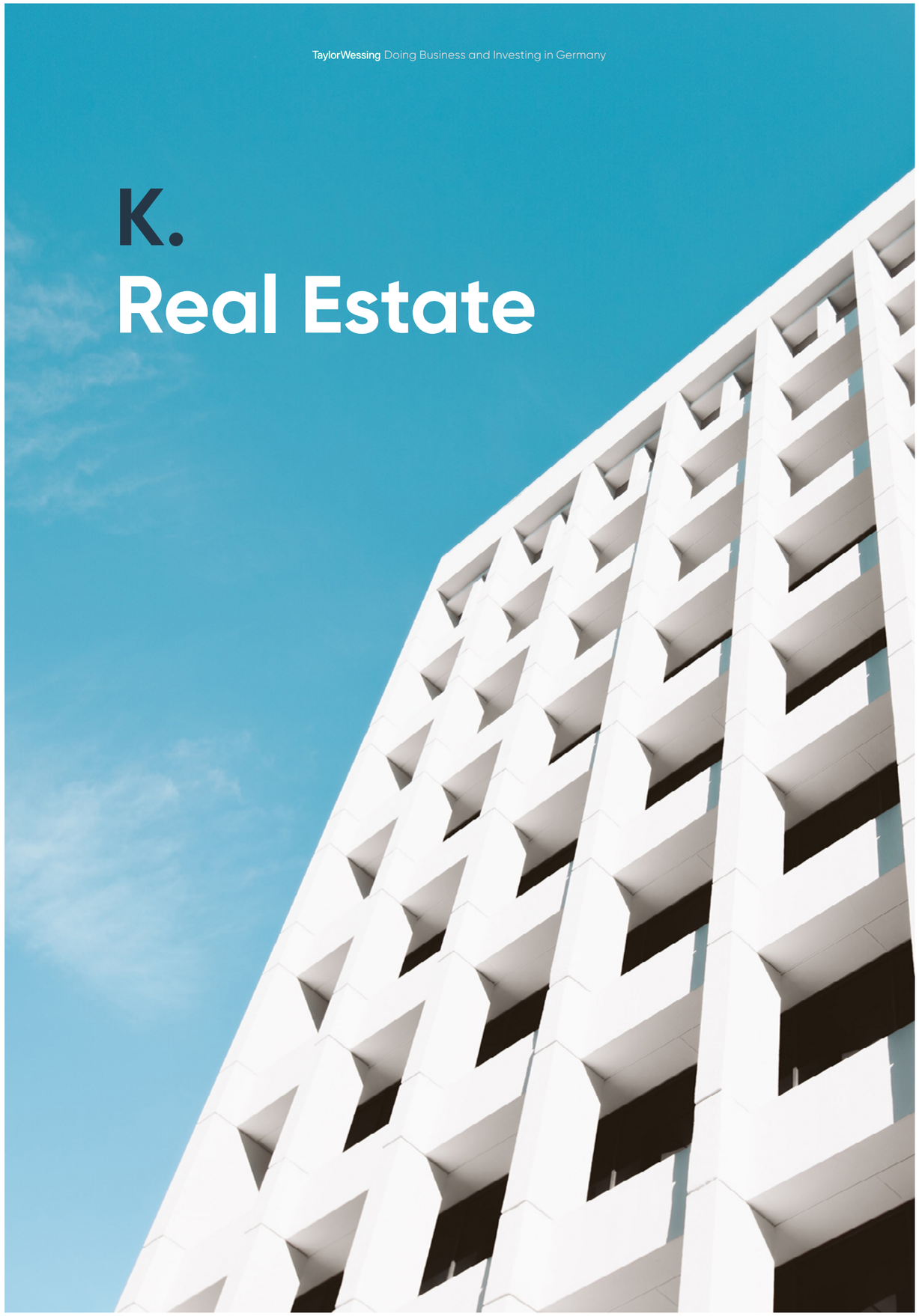
Social security system

Medical and health insurance	Nursing care insurance	Accident Insurance
Benefits from medical and health insurance include payment of medical and hospital expenses and compensations for loss of pay. Currently, contributions to the medical and health insurance scheme are 14.6 % of gross remuneration shared between employer (7.3 %) and employee (7.3 %). The employer has to withhold the employee's share for transfer with his contributions to the insurance office.	In principle, contributions to the nursing care insurance scheme are **shared on a fifty-fifty basis between employer and employee** (exceptions apply in the state of Saxony) at a rate of 3.05 % **(+ 0.25 % for childless employees) of gross remuneration.** The payments have to be made by the employer to the insurance office.	The accident insurance scheme is administered by associations and is set up for all branches of trade and industry *(Berufsgenossenshaften).* Solely the employer makes contributions to the accident insurance scheme. The amount of this contribution is fixed by the various *Berufsgenossenschaften,* taking into account individual risks of a work accident in the particular branch, the record of work accidents during the previous business year and the total annual pay of all employees concerned.

See also **Annex 20** (Social Security contributions (2021)) for further information.

TaylorWessing Doing Business and Investing in Germany

K. Real Estate



I. Introduction to Property Rights in Germany

Unlike most countries in Europe Germany has a special legal doctrine concerning land law. The German law distinguishes between absolute and relative rights. An absolute right is one that the title holder may assert against anyone (right of control); a relative right is one that arises from a special relationship between at least two persons (eg through the conclusion of an agreement) and which entitles and obligates these persons only and therefore does not affect any third parties.

Property rights are rights in rem and are the main manifestation of absolute rights. A right in rem relates to the res (the object) in question, ie to the real property as far as property rights are concerned. German statutory law provides for only a conclusive list of rights in rem. As a general rule, property rights in rem must be recorded officially and publicly. They enjoy special safeguards and must all be entered in the land register *(Grundbuch)*. The same procedure also applies to any adjustments, transfers or other changes concerning registered rights.

1. The Land Register

The land register is a **public directory** of all plots of land in the German territory and records information about the ownership of land, ground lease *(Erbbaurecht)* and/or condominiums, meaning buildings divided up into individual apartments, as well as certain encumbrances. As an important exception in most German states public easements are not registered with the land register but with the register of public easements **(see below Sec. 3.5)**.

Each property is registered under a **land register folio *(Grundbuchblatt).*** A folio may comprise more than one property. Each folio includes the heading *(Aufschrift),* the inventory *(Bestandsverzeichnis)* and three sections *(Abteilungen).* The information in the heading includes the competent local court, the district, the volume number and the folio number. The inventory documents, *inter alia,* the size and location of the property. The sections contain details on the legal circumstances of the property and are divided up as follows:

- **Section I:** Owner and legal basis of ownership
- **Section II:** Further entries other than charges on property, eg easements, pre-emption rights, priority notices of conveyance, encumbrances under public law and other encumbrances (except land charges and mortgages)
- **Section III:** Land charges and mortgages.

The **contents** of the land register are **generally deemed to be accurate** and its scope is restricted to specific procedures. This so-called protection of good faith regarding the entries in the land register leads to the effect that any potential **purchaser** or other third party **may rely on such entries.** Eg the purchaser can rebut any other party's claim which the purchaser did not know about and which had not been registered. It should be noted, however, that the good faith in the land register does not offer protection against rights, which are not registrable or do not require registration or are registered elsewhere. Such rights include, for example, public easements or municipal pre-emption rights. As only third parties can rely on good faith, the owner itself cannot rely on it. In consequence, a purchaser of shares of a company that owns property registered with the land register cannot rely on the good faith created by the land register regarding its entries.

Moreover, the land register may contain purely declaratory entries, which do not form the basis for asserting any legal position, eg the statement that the relevant plot is, as the case may be, situated

in an urban renewal area. Finally, **ownership** of real property **may change outside the land register** by way of universal succession (eg as a result of an inheritance or a merger or in accordance with the German Civil Code). Any due diligence under real estate law must take account of such aspects and should provide sufficient information on the legal situation *in rem* of a real property. Results have to be reflected in the purchase agreement.

2.Ownership of Real Estate and Similar Rights

Besides ownership of property, similar rights such as a ground lease are provided by law. Such rights, similar to ownership, can be independently subject to an encumbrance in rem, in particular for financing reasons (ie by way of a land charge that serves as security).

2.1 Freehold/Full Title

Freehold is the strongest form of absolute rights and gives the owner outright control over the property (within the limits of law and third parties' rights). Real property in the legal sense comprises a piece of land, registered under its own number in the land register; it includes the physical surface of the property and, to some extent, the earth beneath and the airspace above it. All material parts of the property are usually automatically part of the freehold, whereby a permanent connection with the property is legally required, ie buildings are usually material parts of real property and therefore full title to the land includes the building.

Freehold is not subject to any time limits. All individuals and most of the legal entities are entitled to acquire freehold to property. Freehold to property can also be held jointly by several persons. It must be observed that the acquisition of freehold requires not only the agreement between seller and purchaser but also the registration of title in the land register.

2.2 Ground lease *(Erbbaurecht)*

Owners of real property can encumber their full title by granting a ground lease (Erbbaurecht) to any third party, ie the saleable and transferable right to erect and maintain a building on or beneath the surface of the property. The ground lease must be recorded in the land register. As an exception to the general rule that ownership in a building will follow ownership in the land, in case of a ground lease the full title to the land remains with the owner of the land whereas the title to the building and the right to use the land belongs to the beneficiary of a ground lease. Accordingly, a separate land register for the ground lease becomes established *(Erbbaurechtsgrundbuch)* and as a reference an encumbrance becomes registered in sec. II of the land register pertaining to the land.

The beneficiary of a ground lease is entitled to encumber and use the ground lease in the same way as an owner of a freehold subject to the stipulations of the ground lease agreement *(Erbbaurechtsvertrag).* Ground leases are typically granted for a fixed period of time, and customary terms are between 30 and 99 years. As consideration for the ground lease, the holder of a ground lease pays an agreed amount once (as a one-off payment at the time it is granted) or a ground rent *(Erbbauzins)* on a regular basis. The ground rent in general becomes secured by registration of a respective land charge in the ground rent land register pertaining to the ground lease. The ground lease agreement may provide whether and to what extent the owner of the ground lease is entitled to claim compensation for the building upon expiry of the ground lease term *(Heimfall).*

The main difference between ground lease and freehold is that the ground lease is limited in time. Furthermore, the ground lease agreement usually stipulates that the encumbrance of the ground lease requires the approval of the freehold owner.

2.3 Condominium Property

German law does not provide for separate ownership of parts of buildings. However, as mentioned above, the buildings erected on a plot of land constitute material parts of the real property and are therefore part of the full title to the land. Nevertheless, residential and commercial properties can be divided into part-ownership pursuant to the Condominium Property Act *(Wohnungseigentumsgesetz,* hereafter "WEG") by way of deed of condominium *(Teilungserklärung).* An owner of an apartment (or otherwise defined part of the property) for which the statutory provisions of the WEG apply can only dispose of or encumber the respective apartment, but not common premises, which belong to the community of coowners. In general common premises like stairs, roof, walls, windows etc. are owned by the community of co-owners, who jointly decide about reconstruction and modernisation measures for these common areas. Moreover, typically the community of co-owners of a condominium property appoint a property manager *(Verwalter der Gemeinschaft der Wohnungseigentümer).*

3. Encumbrances on Real Property

When planning and realising real estate transactions and projects, a special focus must be placed on property encumbrances. Existing easements which are sometimes used to regulate the interfaces of neighbouring use or reflect other agreements such as pre-emption rights can affect the value of the property and its attractiveness on the market. Of particular importance in this context is the ranking of the respective encumbrances and their relationship with other charges on property, since the rank is crucial when it comes to the enforceability and value of real rights, in particular by way of compulsory auction.

The explanations below briefly outline the most important encumbrances on property.

3.1 Land Charges on Property

Land Charges on property become registered in sec. III of the land register and are crucial when it comes to financing real estate transactions, as they usually serve as a security for a loan. By creating a land charge on property, the owner agrees to tolerate the compulsory execution in respect of the relevant property if the owner should fail to fulfil its obligation to pay a certain sum (typically to serve the loan). This ultimately means that creating a land charge on property secures a claim for payment, but does not itself give rise to an immediate entitlement to the satisfaction of the claim. Land charges on property include mortgages and annuity charges *(Rentenschulden),* the land charge being the most common in practice.

3.2 Easements

Real property may further be encumbered by creating easements under private law. Easements either entitle a specific person as a beneficiary (limited personal easement – *beschränkte persönliche Dienstbarkeit)* or the respective owner of another property benefitting from the easement. Although the owner of the benefitting property may change over time, the right follows the property, which qualifies this kind of easement as a real easement *(Grunddienstbarkeit).* Easements (including their rank) must also be recorded in the land register.

The content of easements may vary and may:

- Entitle the beneficiary of the easement to certain uses of the property – eg rights of way for walking or driving across the property, or the right to lay pipelines, cables or other conducts across the encumbered property.

- Forbid the owner of the encumbered property specific activities on the encumbered property, eg erecting a certain type of building or operating a specific business.
- Order the owner of the encumbered property to tolerate specific activities or circumstances, such as the impingement of pollution and other rights pertaining to detriments to the property.

A particular case of a limited personal easement is usufruct *(Nießbrauch).* Usufruct entitles enjoyment, within the framework of proper management, of the use of the property ("fruits") subject to usufruct. Where the usufruct of real property has been established, the usufructuary is entitled, for example, to collect all rental payments due and to enter into arrangements regarding rent. However, in enjoying the fruits, the usufructuary is also obligated to manage, maintain and use the property and the business on it in an orderly and proper manner. Usufruct is tied to a specific person and is neither transferable nor heritable. Private law easement should be distinguished from public law easements *(Baulast).* The latter are in general not registered in the land register but by the local administrative building authority **(see below Sec. 3.5)**.

3.3 Priority Notice of Conveyance

The purchaser of real estate may have and usually has a claim to the transfer of ownership or of other registrable rights *in rem* – always resulting from an agreement or other legal grounds – secured by way of a priority notice. Such a priority notice is registered within a rather short period of time by the land registry while the registration of transfer itself is usually more time-consuming. A priority notice of **conveyance** secures a claim created under the law of obligations to execute the transfer of title. It has a rank-preserving effect, ie the anticipated registration of transfer of title ranks at the level of its notice of conveyance. That means that a priority notice of conveyance supersedes later, therefore below ranking dispositions, including encumbrances, of the property and therefore gives rise to a relative limitation on disposition in favour of the beneficiary. In practice, this is done by rendering ineffective any dispositions in regard to the relevant title that may be detrimental to the beneficiary of the priority notice and by safeguarding the priority of the right owed. In particular, a priority notice of conveyance is protecting the agreed transfer of title even in case of a vendor's insolvency. The security provided by a priority notice is of significant practical relevance because a considerable period of time may pass between the conclusion of a contract under the law of obligations which typically involves a claim to the transfer of a legal position, and registration in the land register. Without this registration the transfer of title remains ineffective.

3.4 Pre-emption Rights

Real property may also be encumbered with a pre-emption right. A pre-emption right enables its holder to purchase the property, within a certain period, on the same terms and conditions on which the obligor sold it to a third party. As soon as the obligor has concluded a valid sale and purchase agreement for the property with a third party, the pre-emption obligee may declare to the obligor that he intends to make use of his pre-emption right. A pre-emption right to a property may be based on either private or public law. Private pre-emption rights can have the nature of a right in rem and if so, they are evident from the land register, in contrast to public law pre-emption rights, which derive directly from statutory regulations and are not registered. There is also a contractual pre-emption right purely in personam which is also not registered with the land register. As it creates only rights and duties between its parties, it does not hinder the sale to a third party; but its infringement will most probably result in damage claims by the obligee against the obligor. In addition, if such right becomes duly registered, it has the effect of a priority notice in favour of its beneficiary **(see above Sec. 3.3)**.

3.5 Encumbrances Based on Public Law and Public Easements

The usability of real property may be or become restricted not only as a result of a public pre-emption right, but also through public planning law. In particular in the context of urban restructuring, maintenance and development measures. The entitlement to the measures concerned is based on public law. Where an urban development measure is adopted by way of a by-law, this involves powers of public intervention that may be far-reaching. Upon a relevant notification by the municipality, a (declaratory) entry will be made in section II of the land register. This entry merely serves to document the point in time after which any increases in the value of the property are no longer to be taken into account when calculating possible compensation and indemnification claims.

Public easements *(Baulasten)* safeguard the public needs in individual cases by encumbering property to a greater extent than is possible by applying the civil law standards in Germany and are stipulated in all German states except Bavaria. Generally, public easements aim to clear the public law hindrances to a building project (ie distance spaces, rights of way safeguarding development, obligation to create a parking space). Public easements are entered in the register of public easements *(Baulastenverzeichnis)* and are subject to the discretion of the supervisory authority for buildings *(Bauaufsichtsbehörde),* ie are beyond the influence of the property owner and a potential beneficiary under the public easement. Only in Bavaria *(Bayern)* private law easements with respective content become registered in the land register.

Any existing and concretely planned public restrictions on the usability of a property may be determined by way of a due diligence process. Urban development measures may cause financial disadvantages, but can also offer significant development potential for real estate, eg by adding attractiveness to the surroundings.

The encumbrances that are not obvious in the land register are not fully covered in this brochure.

For further public law issues concerning real estate, see the information in Sec. 5 and Sec. 6 on the topics "Public Building Law and Building Permit" and "Environmental Issues".

4. Acquisition and Sale of Real Property in Germany

German law does not stipulate any particular restrictions on domestic or foreign investors when acquiring and operating German real property. Therefore, in principle any natural persons and legal entities who have legal capacity and are capable of being registered in the land register may invest in German real estate and acquire ownership of property. This includes companies under German private law, such as partnerships, limited liability companies *(GmbHs)* and joint-stock companies *(AGs),* and companies under public law, as well as all companies established within the European Union.

Real estate in Germany may be acquired and sold by sale and transfer of either the title to a freehold or leasehold, ie ground lease, (**"Asset Deal"**) or the shares in the entity owning the real property (**"Share Deal"**).

	Share Deal	Asset Deal
Object of sale and transfer	Shares in a company holding the real property. Note: A purchaser of shares cannot rely on the good faith created by the land register regarding its entries.	Real property as a single asset. Note: A purchaser of property can rely on the good faith created by the land register regarding its entries.
Legal arrangement, closing, legal consequences	Sale and purchase of rights and transfer in rem by way of assignment. The closing is typically effected on signing the agreement and must be postponed by agreement if specific actions (eg payment of purchase price) shall be executed before transfer of shares. Universal legal succession regarding all rights and duties inherent in the participation, ie commercially entry into all legal relations and assumption of all assets and liabilities. The buyer becomes a shareholder of the company holding the real property.	Sale and purchase agreement and transfer *in rem* of property by way of registration as owner in the land register. Registration, and thus the closing of the sale and purchase agreement, is typically fulfilled a considerable period of time after the conclusion of the agreement and even the payment of the purchase price. Only by registration as owner in the land register the purchaser becomes the owner of the real property, but in the meantime he is protected by priority notice. The agreement typically stipulates that commercial transfer of possession of the property (in particular including the obligation to pay any costs arising in connection with the real property as well as the authority to collect the rental cash flow) occurs concurrently upon payment of the purchase price.
Requirements of form	No formal requirement normally exists for the transfer of company shares, except in the case of a GmbH where notarial recording is a mandatory requirement. A notarial recording may also become necessary in case of a sale of a limited partnership where the general partner (GP) is a limited liability company (eg GmbH & Co. KG) if in parallel to the sale of the limited partner interests also shares in the GP are sold. Notarisation is dispensable if the shares in the GP are not sold, but the GP is being exchanged on completion of the sale of the limited partner interests against a new GP joining the limited partnership.	Notarial recording of the entire sale and purchase agreement is prescribed by law. Also, notarial recording of the declaration of conveyance is a mandatory requirement for registration.

The decision on whether a transaction is to be carried out through a share or asset deal is usually tax driven and should be carefully considered in each case, relying on expert advice. This includes a due diligence process ascertaining the exact legal and factual status of the real property and as the case may be the target company.

As pointed out, tax aspects play a crucial role when it comes to choosing between a share and asset deal. For example, in the case of a well-structured share deal real estate transfer tax (RETT) may not become due subject to certain shareholding thresholds not being exceeded and/or holding periods being obeyed; however, investors must be aware that RETT taxation of share deals is subject to an ongoing political discussion (including legislation amendments) and

investors should carefully take into consideration potential changes of the current RETT regime when acquiring a property by way of a share deal. Moreover, it should be taken into account, that a share deal potentially involves higher risks compared to an asset deal because not all aspects will necessarily be fully reflected in the balance sheet or materialise only after completion of the transaction. Furthermore, structuring the financing of acquiring real estate via a share deal requires special care: As the shares are the object of sale and not the property the latter cannot be encumbered as security for the purchase price financing as easily as in an asset deal; such so-called upstream-security may cause difficulties in particular in the event the company owning the real estate (PropCo) has the legal form of a GmbH or AG due to applicability of so-called capital maintenance provisions. There are, however, possibilities including *inter alia* a pledge of shares, that lead to equivalent results. Although, as a general rule asset deals may appear less complex, in some situations there are other implications which may make it reasonable to choose a share deal structure. In particular, typically in development projects, parties often opt for a share deal in order to allow the purchaser as new owner of the PropCo to have full control over any agreements entered into with constructors also after acceptance of the building rather than providing for a warranty regime on building defects only between the parties to the purchase agreement.

5. Public Building Law and Building Permit

The regulations of public building law (öffentliches Baurecht) as well as public permits are of central importance to the usability of real property.

5.1 Public Building Law

Public building law comprises the entirety of statutory provisions relating to the permissibility, limitation, regulation and promotion of land use, ie the complete legislation concerning the admissibility of the construction, management, use and demolition of real estate, provided that no more specific rules apply (like for example permits under the Federal Immisson Control Act – *Bundesimmissionschutzgesetz BImSchG).* Public building law is part federal, part state and part municipal law. It is divided into interregional planning law (*Raumordnungsrecht),* urban development law *(Bauplanungsrecht),* state building regulations *(Bauordnungsrecht)* as well as ancillary building law *(Baunebenrecht).*

a) Interregional planning law serves to develop balanced areas of built and unbuilt land, preserving the functionality of the natural resources to avoid urban sprawl and sustain an effective infrastructure.

b) Urban development law is regulated by the German Federal Building Code *(Baugesetzbuch – BauGB)* and governs the proper use of land within a municipality, aiming at safeguarding orderly urban development, and is the responsibility of the municipalities, which define the legal status of land and its usability and establish the planning framework for the development of the various plots of land. This is primarily accomplished by the preparation of land use plans which include an overall concept for a specific area or a larger municipal district **(see Sec. 5.2 "Urban Land Use Planning").**

c) State building regulations essentially consist of the building codes enacted by the individual federal states *(Länder).* These are technical construction statutes applying to all building projects and primarily dealing with the prevention of risks arising from the erection, existence and use as well as change of use of structural works (ie protection of the neighbourhood, fire protection). In addition, the state building codes include provisions on architectural design. Public easements **(see above Sec. 3.5)** are also governed by the state building regulations.

d) It is compulsory that ancillary building law is to be observed in all construction projects. This includes statutes possibly impacting on the development potential of real property, such as the Monument Protection Act *(Denkmalschutzgesetz)* or the Nature Conservation Act *(Naturschutzgesetz).* However, the undeveloped areas *(Aussenbereich)* of a municipality are subject to specific statutory provisions that restrict the possibilities of future development substantially.

5.2 Urban Land Use Planning

In the context of urban land use planning *(Bauleitplanung)* the municipality first draws up a land use plan *(Flächennutzungsplan)* which includes a broad land use framework, as well as internal requirements obligating the local authority, and defines the usability of municipal land in view of the proposed urban development. The land use plan is binding when it comes to the formulation of downstream plans.

In a second step, on the basis of the land use plan, the municipality may adopt a detailed zoning plan *(Bebauungsplan)* as a local by-law. A zoning plan is more differentiated than a land use plan and provides detailed regulation, thus controlling of urban development. It sets up a legally binding framework for the individual development of parcelled property and for the use of the associated land to be exempted from development. A zoning plan does have external effects, and does not only bind subsequent plans. Immediate rights can be derived from it, such as a claim for the grant of a building permit.

Land outside a planning zone is referred to as a "non-developed area" *(unbeplanter Bereich).* Such areas are subject to different statutory provisions in the German Federal Building Code *(BauGB)* depending on whether they are located within a built environment (inner zone – *Innenbereich)* or outside an urban structure (outer zone – *Außenbereich).* If the developed area of a municipality is not subject to zoning plan *(unbeplanter Innenbereich)* the admissibility of a project is subject to Sec. 34 BauGB. A permit will be granted, if the project's size and use fits in the adjacent surrounding *(Umgebungsbebauung).* Outside the developed area of a municipality *(Aussenbereich)* the development is substanitially restricted (Sec. 35 BauGB) except for privileged uses (eg agriculture).

5.3 Procedure To Obtain a Building Permit

A building permit *(Baugenehmigung)* generally needs to be granted before a building project or a change of use of the real property can be realised. Nevertheless, an increasing scope of substantial projects is exempt from the requirement of a permit or might become subject to a simplified permitting procedure. As the permitting procedure is not federal but state law, the details vary in each of the sixteen different states of Germany. A building permit proceeding is initiated by filing a written application with the relevant public administrative agency either in the municipality in question or – for smaller municipalities – on the district level *(Landkreis).* Such an application must comply with certain requirements of form and must include all the supporting documentation required for an assessment and evaluation of the proposed real estate. In a building permit procedure, the competent authority examines whether the structural works comply with urban development law, state building regulations and other provisions under public law.

The developer has a right to become the building permit granted if the project does not contradict the provisions of public law. The authority is entitled to impose certain conditions on the developer. It should be noted that the requisite permit also extends to the concrete use, any change of use and the conversion and demolition of a building. The building permit does not affect the private law status of a property and is not affected by private law titles or obligations.

The building permit is both public law title for permitted works (construction, demolition etc.) but does also include the title for the permitted later use of the property.

In principle, building permits – after realisation of the project – do not relate to persons, but to plots of land and real estate. This means that in the event of a change of ownership the entire building permit will, by operation of law, be transferred to the purchaser at the time of transfer of property. This includes not only rights, but also duties.

Once a building permit has been granted, it should be kept in mind that it will lapse unless construction works start within one to five years (depending on the law of the specific state) after the permit has been issued. This term can become extended.

The building permit does not only consist of the permit document itself but also include as integrative part the relevant application to the extent that it was accepted by the administrative building authority as binding (eg description of the use – *Nutzungsbeschreibung)*. These may be stamped in green and might include binding changes by the public agency also marked in green. Thus the full documentation of a building permit always includes these so called green stamped/ green signed *(grüngestempelte/grüngezeichnete)* documents.

6. Environmental Issues

Environmental protection is of great importance in Germany and is even anchored in the German Constitution, according to which the state "shall protect the natural foundations of life". This principle is set out in a vast number of statutory and sub-statutory regulations, for example in regard to emissions, the handling of waste, soil pollution, nature and water protection. The following subsections outline the essentials of those German environment-related regulations that may be of particular interest in connection with a real estate transaction.

6.1 Energy Performance of Buildings

One of the focal areas of German energy and climate policies is the energy efficiency of buildings. The Energy Saving Act *(Energieeinsparungsgesetz)* and the Energy Saving Ordinance *(Energieeinsparungsverordnung)* form the legal basis for a reduction in the energy requirements of buildings and at the same time provide incentives for innovative developments in the building sector. For new buildings, for example, a low-energy standard is prescribed. Moreover, an energy performance certificate documenting the building's energy balance is required for all buildings. This is intended to provide potential users with information on the expected energy requirements of the building before making a decision on purchasing or renting.

6.2 Soil and Ground Water Contamination

Particular attention in the context of a real estate transaction must be paid to potential inherited environmental liabilities associated with the property, since a purchase of real property may give rise to legal succession regarding liability for contaminated sites and responsibility for soil restoration. The types of person liable to pay the costs of any officially ordered measures are defined by law. They include:

- The polluter having caused the adverse soil alteration or environmental legacy.
- The property owner and holder of actual authority over the plot of land.
- The shareholder of the registered proprietor (subject to strict constraints).
- The polluter's universal successor in title.

- The previous passive infringer having transferred to a third party or abandoned his ownership; and the person liable for the present passive infringement for reasons of commercial or company law.
- The previous owner if he transferred his property after 1 March 1999 and if he knew or should have known at the time of transfer of ownership of the adverse soil alteration or environmental legacy.

Multiple obligors have mutual compensation claims regardless of their respective payment obligations. Unless agreed otherwise, the obligation and scope of compensation depend on the extent to which the risk or damage was predominantly caused by one or the other party. The liability for a responsibility under the Federal Soil Protection Act will not become time-barred. Due diligence under real estate law must investigate any contamination risks. It is not uncommon for a real property to be contaminated. If this should be the case, suitable contractual arrangements, such as indemnity claims, have to be agreed. They need to take into account that such contractually agreed claims apply between the contracting parties only, and not vis-à-vis third parties, eg public authorities. A deal should not be jeopardised by environmental issues.

7. Leases

The letting situation of real property, in particular regarding the agreed terms of lease and the rent amounts, is of prime importance for real estate transactions as it determines the cash flow to be generated through the property and thus its market value to financial investors.

Rules of German law distinguish between commercial and residential leases. While residential leases are subject to rather strict, socially motivated legislative constraints, ie numerous regulations protecting the tenants that cannot be waived to the tenants' disadvantage, commercial leases can be freely negotiated to a large extent with only few regulatory restrictions. In practice, therefore, only the negotiation of commercial leases offers legal scope for tailor-made agreements.

7.1 Term

Tenancy agreements may be concluded on a fixed-term or open-end basis. The maximum period of legal commitment is in practice thirty years after delivery of the leased property to the tenant of the leased property, since after that time the contracting parties have a mandatory statutory **special right of termination** (Sec. 544 German Civil Code) except if the agreement was concluded for the duration of the lessor's or lessee's life.

In the case of **residential leases,** fixed-term agreements are subject to strict legal constraints to the effect that a qualified reason for limiting the term, such as foreseeable owner occupation, must exist. This means that the contractual relationship will normally be open-ended without much room for adjustment.

The term of **commercial leases,** on the other hand, may be freely negotiated. The contract will often include option clauses beyond the agreed term which entitle the lessee to unilaterally extend the contractual term by a specific period of time. When signing fixed-term leases with a term of more than one year it is essential to comply with the requirement of written form under Sec. 550 German Civil Code. If this requirement of written form is not met, the lease will be deemed to have been concluded for an indefinite period of time. As a consequence such lease agreement becomes subject to statutory termination with a notice period of app. six to nine months, even if an extended fixed term was informally agreed upon in the lease agreement originally. There is extensive case law specifying the exact written form requirements on lease agreements that have to be met.

7.2 Rents and rent adjustment

For residential leases exempt from rent control (ie all housing that is not publicly funded) and for commercial leases, the rent can in general be freely negotiated, with the proviso that rack rents are prohibited. The peculiarities pertaining to state-funded housing are not covered in this overview. If no rent adjustment is agreed by the parties in commercial leases, the rent will not automatically change, and any inflation-induced currency fluctuations will not be offset. There are various options available for rent adjustment, the most common being stepped rent and indexed rent. In the case of **stepped rent,** the times of rent increases are precisely defined in advance, this being subject to certain statutory restrictions where residential leases are concerned. An **indexed rent** includes an adjustment clause whereby the rent depends on any changes to an officially determined index, such as the consumer price index. Sec. 557 b German Civil Code includes the legal prerequisites to be observed for residential leases in this context, while commercial leases are subject to the provisions of the German Price Clause Act *(Preisklauselgesetz)*.

During the **COVID-19 pandemic,** the question arises whether a rent reduction or termination of the lease due to the coronavirus pandemic is legally justified. Generally, COVID-19 and business closures do not entitle tenants to rent reductions, since they do not constitute a "defect" *(Mangel)* of the premises, even for retail premises. However, German statutory contract law grants either party a right to claim for a modification of terms and, eventually, a termination right in cases of an "interference with the basis of the transaction". This doctrine is applicable once either party cannot reasonably be expected to uphold the contract without alteration. In commercial lease law, most litigation focuses on whether COVID-19 and/or the governmental response reaches the aforementioned threshold.

The Law to Mitigate the Consequences of the COVID-19 pandemic in Civil, Insolvency and Criminal Law dated 25 March 2020 **excluded landlords' notices of termination,** if these are solely based on non-payment of rent concerning the time period from 1 April – 30 June 2020, and if the non-payment is caused by the COVID 19 pandemic. It is disputed whether or not Landlords may access security packages (rent deposit or guarantee) or issue a debt claim, to which there are formally entitled.

As of 1 January 2021, **lawsuits** regarding rent modifications for commercial leases based on claims related to the pandemic are to be processed with priority in the court system.

In the case of **residential leases** (but not for commercial leases) the rent may be linked, within legally permissible bounds, to "reference rents customary in the locality" if neither indexed nor stepped rent has been agreed. Reference rents customary in the locality correspond to a national rent amount derived from regional and local residential quality criteria in average over the last six years. Here, a 20 % capping limit applies, ie within three years following the most recent adjustment the rent level must not be increased by more than 20 % or beyond the rent typical of the given area. In urban areas, this capping limit may be reduced to 15 % by state regulation. Moreover, in preferential areas where only a very reduced number of lettable residential units meet a strong demand the local authorites are entitled to activate a mechanism to limit the level of rent *(Mietpreisbremse)*. In such areas the rent must not exceed more than 10 % of the aforementioned reference rent customary in the locality. This rent control does not affect the letting of new built units as well as units which are let for the first time or after extensive modernisation. In addition the level of the current/previous rent remains untouched as a measure of preservation of the status quo.

7.3 Value Added Tax

Residential leases are exempt from VAT wherever the tenant is a natural person and is not renting the premises for commercial or professional purposes.

In the case of commercial leases generally no VAT is levied on the agreed rent to be paid by the entrepreneurs and traders. However, lessors renting out to businesses may opt for VAT regarding the rent under certain circumstances. The requisite preconditions are to be examined in each individual case. In principle, any obligation to pay VAT on the rent must be expressly stipulated in the lease agreement.

7.4 Operating Costs

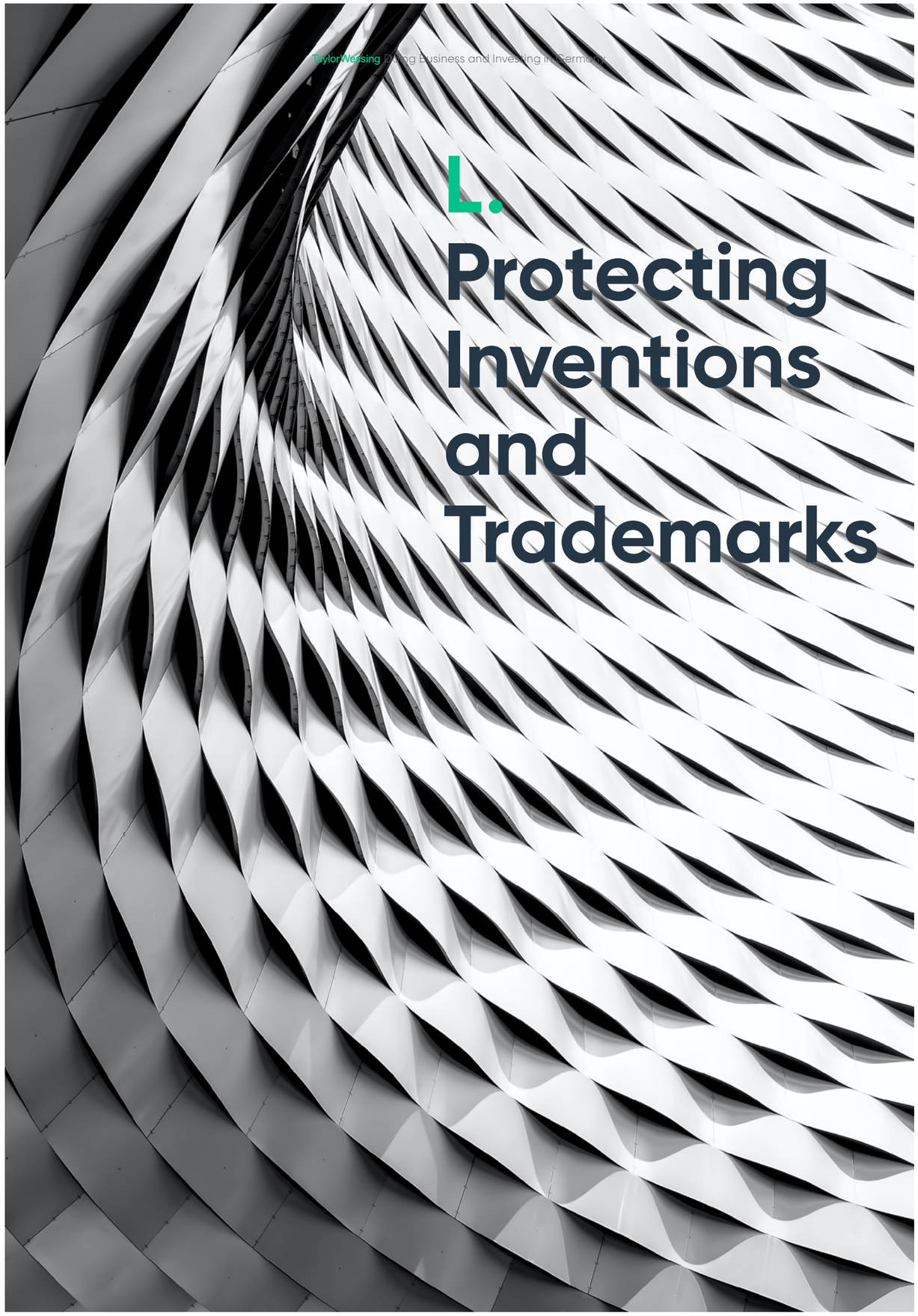
In practice, both residential and commercial leases obligate the lessees to bear their share of operating costs in addition to the rent. However, this must be explicitly agreed upon as under the general rule such costs are to be borne by the lessor. Pro-rated operating costs are calculated at regular intervals, depending on floor space or consumption, and typically include, but are not limited to, cost items such as property tax, water supply, drainage, heating and hot water facilities, lifts, street cleaning and waste disposal. As regards to residential leases, all operating costs are borne by the tenant on a pro-rata basis and are listed in the German Ordinance on Operating Costs. In the case of commercial leases, even further costs may be shifted to the lessee on a contractual basis.

7.5 Repair and maintenance

Under applicable law, the lessor is responsible for the repair and maintenance of the leased premises and thus has to carry out any and all repairs, maintenance and renovation work throughout the term of the lease at his own expense.

It is common, however, to at least oblige the lessee to perform cosmetic repairs eliminating the defects brought about by use in conformity with the contract (eg painting walls, cleaning carpets, etc.). Case law has specified the detailed prerequisites for a valid clause obligating the tenant to perform decorative repairs.

In the case of **residential leases,** any renovation duties on the part of the tenant exceeding the obligation to carry out cosmetic repairs are subject to strict statutory limits, unlike **commercial leases,** where it is quite common to transfer the lessor's repair and maintenance duties to the lessee, however, limited in particular by statutory laws on general terms and conditions.



L. Protecting Inventions and Trademarks

I. Protection of inventions

1. What can (not) be patented in Germany?

Patents are granted for **technical inventions of any technical field** (products or processes) which

are new	involve an **inventive step**	are susceptible to **industrial application**
An invention is new, if it is not state of the art. The state of the art comprises all knowledge disclosed or made available to the worldwide public by way of oral description (eg in public speeches, by demonstration in writing (eg in books, magazines, or other statements in writing).	An invention involves an inventive step, if it is not obvious to a person skilled in the art.	An invention is industrially applicable, if it can be produced or used in an industrial area (including agriculture). Eg processes for treatment of the human or animal body by surgery or therapy and diagnostic methods practice on the human or animal body are not susceptible to industrial application.

Pursuant to German patent law, patents cannot be granted for

Mere discoveries, scientific theories, and mathematical methods, aesthetics creations, schemes, rules and methods for performing mental acts, playing games or doing business, computer programs as such, presentations of information, the human body at the various stages of its formation and development.	Inventions opposing morality of public order (eg processes for cloning or modifying the genetic indentity of the genetic line of human beings, uses of human embryos for industrial or commercial purposes etc.), plants or animal varieties or essentially biological processes for breeding plants or animals.

Under certain conditions, patents can be granted for

Software	Inventions in the sector of biotechnology
While computer programmes as such are not patentable, because they have an exclusively verbal function (protected by copyright), so called computer-implemented inventions can be patented provided that they are based on technical considerations and solve a technical problem.	Inventions in the sector of microbiology and biotechnology are not generally excluded from patent protection. Eg isolated gene sequences are regarded as chemical substances, which are patentable. The same applies to mircroorganisms. Details are to a large extent subject to the EC Biotechnology Directive.

2. How long does patent protection last?

Patents are granted for a maximum period of **20 years** as from the date of filing of the **application.** Protection of medicinal products and plant protection products that require a marketing authorisation can be further extended for a maximum period of **five years** by means of a **"supplementary protection certificate"**. An additional extension period of **up to six months** is available for medicinal products for paediatric use.

3. Application of patents

3.1 National patents

To obtain patent protection in Germany, an application must be filed with the German Patent and Trade Mark Office *(Deutsches Patent- und Markenamt – **DPMA),*** seated in Munich.

Necessary elements of an application are: (i) the name of the inventor, (ii) the request for the grant of a patent, (iii) the patent claim(s), (iv) an abstract and (v) a comprehensive description of the invention so that a person skilled in the art can understand it and carry it out as well as any drawings necessary for explaining the invention.

In the course of the patent examination and grant procedure, the DPMA reviews whether the invention to be patented fulfils the necessary patentability criteria set out above, ie whether it is a **technical invention** which is **new,** includes an **inventive step** and is **industrially applicable.**

The grant procedure generally takes **several years,** however, in urgent cases (eg in case of ongoing licence or sales negotiations) an accelerated processing of the application can be requested (in writing, explaining the necessity of an accelerated procedure).

Pls. see Annex 21 (National patent examination and grant procedure in Germany) for details.

3.2 European patents

European patent applications may be filed centrally with the European Patent Office (**"EPO"**) seated in Munich, or, if the law of a contracting state so permits, with the central industrial property office or other competent authority of that state (in Germany: the **DPMA**).

Necessary elements of an application are: (i) a request for the grant of a European patent, (ii) a comprehensive description of the invention so that a person skilled in the art can understand it and carry it out, (iii) one or more claims, (iv) any drawings referred to in the description or the claims, and (v) an abstract.

The question whether a European patent can be granted for an invention is subject to the **European Patent Convention (EPC)**, which provides for similar criteria as German statutory patent law (pls. see above). The European grant procedure takes about **three to five years from the date the application is filed.** However, just as in German patent proceedings (see above), in urgent cases, an accelerated processing of the application can be requested.

European patents can be granted for the **38 contracting states** (as at November 2019) to the EPC and, at the applicant's request, can be extended to Bosnia and Herzegovina, and Montenegro. In addition, European patents can, at the applicant's request, be validated in Morocco, the Republic of Moldova, Tunisia and Cambodia.

The grant of a European patent creates a **bundle of individual national patents,** ie in each designated state for which it has been granted a European patent has the same effect as a national patent in that state and is subject to the same provisions. Accordingly, national courts and authorities are competent to decide on the infringement and validity of European patents (with the exception of those patents opposed at the EPO within the first nine months after having been granted).

Pls. see Annex 22 (European patent examination and grant procedure) for more details.

3.3 International applications

By filing a single international application under the Patent **Cooperation Treaty ("PCT"),** the applicant can obtain the effects of a national application in all PCT contracting states. International applications can be filed with the national patent office of the applicant's state of nationality or of the state in which the applicant has its registered seat as well as the EPO or the WIPO (World Intellectual Property Organisation).

You can find out more here:
http://www.epo.org/applying/international.html
http://www.wipo.int/pct/en/index.html

3.4 Unitary Patent

Supplementing the existing regime of European patents, in the future, the European patent with unitary effect (**"unitary patent"**) will be another option to obtain patent protection throughout the EU. This new unitary patent system is intended to provide a single patent jurisdiction. Ie unitary patents will protect the whole of the EU (except Spain who does not wish to participate) and be enforceable across the EU by a single set of proceedings.

The Unified Patent Court **(UPC)** will have exclusive jurisdiction for disputes relating to unitary patents. Ie, unlike the European patent, the unitary patent can be found infringed and can be revoked across Europe by one ruling rather than requiring separate proceedings in each European country. The UPC will have central divisions in *inter alia* Munich, as well as local and regional divisions to be determined by the Member States. In Germany, local divisions are being set up in Düsseldorf, Munich, Mannheim and Hamburg.

The new system of a unitary patent is governed by two EU regulations which entered into force on 20 January 2013, but will only apply once the UPC Agreement, which was signed on 19 February 2013, enters into force. According to the provisions of the UPC Agreement, the entry into force will occur four months after its thirteenth ratification (including the three Member States with the highest numbers of European Patents (i.a. Germany) as their ratifications are essential). At the moment (as at January 2021) 15 Member States have already ratified the UPC Agreement (ie Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, and Sweden). Following Brexit, the UK will not participate in the Unitary Patent System. Thus, only the ratification by Germany is still required. Germany's ratification, however, had been suspended due to a complaint which was brought in its Constitutional Court in 2017. By decision dated 20 March 2020, the German Constitutional Court has upheld the complaint and ruled that the ratification law required a two-thirds majority by the parliament. In November 2020, the German parliament approved the ratification law with the necessary majority. Following this approval, new complaints have been filed against the ratification law and are pending with the German Constitutional Court, now. It remains to be seen to what extent these complaints will cause

further delay of Germany's ratification and, as a consequence, the start of the UPC. According to an optimistic forecast and subject to the further development of the proceedings before the German Constitutional Court, the start of the UPC could still take place as early as 2022.

You can read more here:
https://www.taylorwessing.com/en/insights-and-events/insights/upc

II. Protection of trademarks

1. What can be protected?

Generally, any signs, in particular words including personal names, designs, letters, numerals, sounds, three-dimensional configurations including the shape or packaging of a product, as well as colours, holograms and multimedia signs can be protected as a trademark, inasfar as they are **suitable to distinguish** goods or services of one undertaking from those of other undertakings.

Accordingly, while the most frequent trademarks are word marks, figurative marks and combined word/figurative marks, under certain conditions also colour marks, sound marks, tactile marks, slogans and three dimensional marks can be registered.

Trademark protection is in general granted **upon registration** with the trademark register. In exceptional cases, trademark protection may also accrue without registration, either by long term intensive use in trade, provided that the sign has acquired prominence as a trademark among the trade circles concerned or if the trademark has obtained extraordinary reputation (so-called well-known mark).

The owner of a protected trademark has the exclusive right to use the trademark owned by him for the goods and services the trademark is protected for and may grant licences to third parties.

2. How long does trademark protection last?

German as well as European trademarks are initially registered for a term of **10 years.** Thereafter, trademark protection can be **renewed indefinitely by timely payment of the prolongation fees every 10 years.** Otherwise, the respective trademarks are deleted from the trademark register.

3. Registration of trademarks

3.1 National trademarks

German trademark applications are filed at the German Patent and Trade Mark Office *(Deutsches Patent- und Markenamt – **DPMA**).* The application should include: (i) a representation (illustration) of the trademark, (ii) information identifying the applicant, and (iii) a list of the goods or services in respect of which the registration is requested; furthermore, application fees (EUR 300 for up to three classes, each additional class costs EUR 100) shall be paid within a maximum period of three months after filing of the documents.

Upon receipt of the application, the DPMA reviews whether the application meets the formal requirements and whether there are absolute grounds for refusal. In particular, signs or indications

only **describing** the goods or services cannot be registered, because they must be kept available for general use. Other absolute grounds for refusal are eg: (i) lack of distinctiveness, (ii) obvious likelihood of confusion, (iii) offence against morality or public policy.

However, the DMPA does **not** review whether any **identical** or **confusingly similar** trademarks exist, which are already registered and, thus, enjoy an earlier priority (relative grounds of refusal).

If the DPMA comes to the conclusion that there are no absolute grounds for refusal, the trademark will be registered and the **registration will be published** in the German trademark journal.

Owners of earlier trademarks can **oppose** the registration of younger trademarks within a maximum period of **three months** after publication of the registration. Successful opposition leads to a **cancellation** of the younger trademark from the trademark register.

The decisions of the DPMA – eg the rejection of an application or the decisions in opposition proceedings – can be appealed to the Federal Patent Court.

After expiry of the three-month opposition period, third parties may challenge the validity of the registered trademark by initiating **cancellation proceedings** before the Civil Courts, in particular on the grounds that the later trademark is identical or confusingly similar to their earlier trademark or arguing non-use within a period of five years after registration. Please note, however, that the owner of an earlier trademark cannot for his part assert any claims against the owner of a younger trademark, if his earlier trademark has not been used within the last five years **(plea of insufficient use)**.

Trademarks may, furthermore, be **cancelled by the DPMA:**

- Upon request of the trademark owner
- Upon request by a third party based on absolute grounds for refusal (see above) or on grounds for revocation (ie if the trademark has not been used during a term of at least five years)
- Ex officio, if the required renewal fees have not been paid in time or if there are certain grounds for refusal (eg violation of emblems of state, deception etc.).

Once a trademark is successfully registered it confers on the proprietor exclusive rights therein. The proprietor is entitled to prevent all third parties not having his consent from using identical or confusingly similar trademarks in the course of trade.

You can read more here: http://www.dpma.de/

3.2 European Union Trademarks

Applications for European Union trademarks (**"EU Trademarks"**) are filed at the European Union Intellectual Property Office (EUIPO), seated in Alicante, Spain. They are governed by the provisions of the European Union Trademark Regulation. Accordingly, an application for a EU Trademark shall include: (i) a request for registration, (ii) information identifying the applicant, (iii) a list of the goods and services in respect of which the registration is requested, and (iv) a representation of the trademark. Application fees shall be paid within a period of one month after filing the documents.

Upon receipt of the application, the EUIPO reviews whether the application meets the formal requirements and whether there are absolute grounds for refusal. Even if there are absolute grounds for refusal in only one Member State, the application will be rejected.

In contrast to German trademark law, where a potential opposition follows the registration of the trademark, in the EU Trademark system, the opposition procedure is the last step before registration. **Notice of opposition** can be filed by owners of earlier national or EU trademarks within a maximum period of **three months** after the publication of a EU Trademark application. Successful opposition leads to the later trademark not being registered in the EU Trademark register. If no notice of opposition is filed or if the opposition has been rejected, the trademark will be registered as a EU Trademark.

The decisions of the EUIPO – eg the rejection of an application or the decisions in opposition proceedings – can be appealed to the Boards of Appeal of the EUIPO.

After expiry of the three-months opposition period, third parties may also challenge the validity of registered trademarks by initiating **cancellation proceedings** before the EUIPO arguing nullity due to absolute grounds of refusal, likelihood of confusion with their earlier rights or an insufficient use (like German trademarks, EU Trademarks must be "seriously used" during a term of **five years upon registration)**.

EU Trademarks are valid within the **whole territory of the EU,** ie after Brexit 27 nations. If further countries later join the EU, the trademark protection will automatically extend to the newly acceded countries. Non-Member States of the EU (eg Switzerland or Norway) are, however, not covered by a EU Trademark. EU trademarks that were registered before Brexit will stay valid in the UK by transfer to a "comparable right".

The registration procedure of EU Trademarks has, in particular, the following **advantages:**

- Registration requires only one application
- The applicant can opt for one single language for the registration procedure
- EU Trademarks are administered by only one central authority
- Only one trademark file needs to be maintained.

A **disadvantage** of the registration of a EU Trademark is that the application for registration will be **rejected,** if the EU Trademark is successfully opposed based on the national trademark of only one EU Member State. In such case, the application for registration of a EU Trademark can be **converted into a national application** with regard to those EU Member States in which registration of the trademark is possible.

You can read more here: https://euipo.europa.eu/ohimportal/en/home

3.3 International Registration

The owner of a national trademark can extend the protection of its trademark internationally by registering the trademark with the **International Trademark Register** pursuant to the Madrid Agreement Concerning the International Registration of Marks (**"Madrid Agreement"**) and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (**"Madrid Protocol"**) (together **"Madrid System"**).

The **application** for international registration needs to be filed **via the national trademark office** with the World Intellectual Property Organisation (**"WIPO"**) seated in Geneva, Switzerland (ie for

German nationals or legal entities domiciled or having a real and effective industrial or commercial establishment in Germany: via the DPMA). The Madrid System offers a trademark owner the possibility of having his trademark protected in a great number of countries by simply filing one application.

After being forwarded to the WIPO the application is examined by the WIPO and registered with the international register, if the requirements for an international registration are met. The registration is then published in the **"Gazette des marques internationals"**. Upon publication the trademark is deposited in all countries designated in the application. The trademark authorities concerned then have the possibility of **denying** trademark protection in accordance with their national laws during a term of **one year** (under the Madrid Agreement, **18 months** under the Madrid Protocol). If protection is granted, the applicant is granted the same rights as the owner of a national trademark. Denial of protection in one Member State does not affect trademark protection in the other designated countries.

Trademark protection is initially granted for a term of **10 years** and can be renewed indefinitely by timely payment of the prolongation fees.

You can read more here: http://www.wipo.int/trademarks/en/

M. Public Procurement Law

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The public procurement sector in Germany is of considerable economic importance. Every year, public authorities award contracts with a monetary volume of approximately EUR 300-400 billion to private enterprises. Enterprises intending to deliver goods or services to public authorities can gain access to interesting business opportunities.

Public authorities are required to issue procurement notices in order to initiate a non-discriminatory competition among tenderers. You can find Europe-wide procurement notices on **https://ted.europa.eu/TED/browse/browseByMap.do**. With regard to national procurement procedures you can find procurement notices in national journals of tender or on internet platforms (eg **www.bund.de**). You can browse, search and sort procurement notices by country, region and business sector.

Enterprises tendering for a contract with a public authority in Germany should be familiar with public procurement law. The Law against Restraint of Competition *(Gesetz gegen Wettbewerbsbeschränkungen – GWB)*, the Procurement Regulation *(Vergabeverordnung)* and the German contracting rules for award of public works *(Verdingungsordnungen)* must be observed. However, the pertinent laws have been revised in 2016.

Only enterprises which satisfy the qualification criteria and conditions as specified by the respective public authority have a chance to successfully participate in the tender procedure and to conclude the contract. Attention should be paid to the extensive formal requirements that must be met by the tenderer in the tender procedure. It is recommended that enterprises – especially if they lack the relevant knowledge of public procurement law – seek legal advice.

N. State Aid

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In recent years an upward trend in state aid expenditure can be observed in Germany. With regard to the enormous financial volume of state aid granted each year by local authorities, the federal and state governments, companies intending to build a business in Germany should be aware of the possibility of obtaining state aids and the basic features of EU state aid law.

In the Treaty on the Functioning of the European Union (TFEU) the EU Member States set up a consistent state aid system directly applicable in all Member States. The objective of European state aid control is to ensure that government interventions do not distort competition and trade inside the European Union. Therefore, the TFEU provides for a general prohibition of state aid, unless it is justified by reasons of general economic development. In that regard, the TFEU leaves room for a number of policy objectives for which state aid can be considered compatible. To ensure that this prohibition is respected and exemptions are applied equally across the European Union, the European Commission is in charge of ensuring that state aid complies with EU rules.

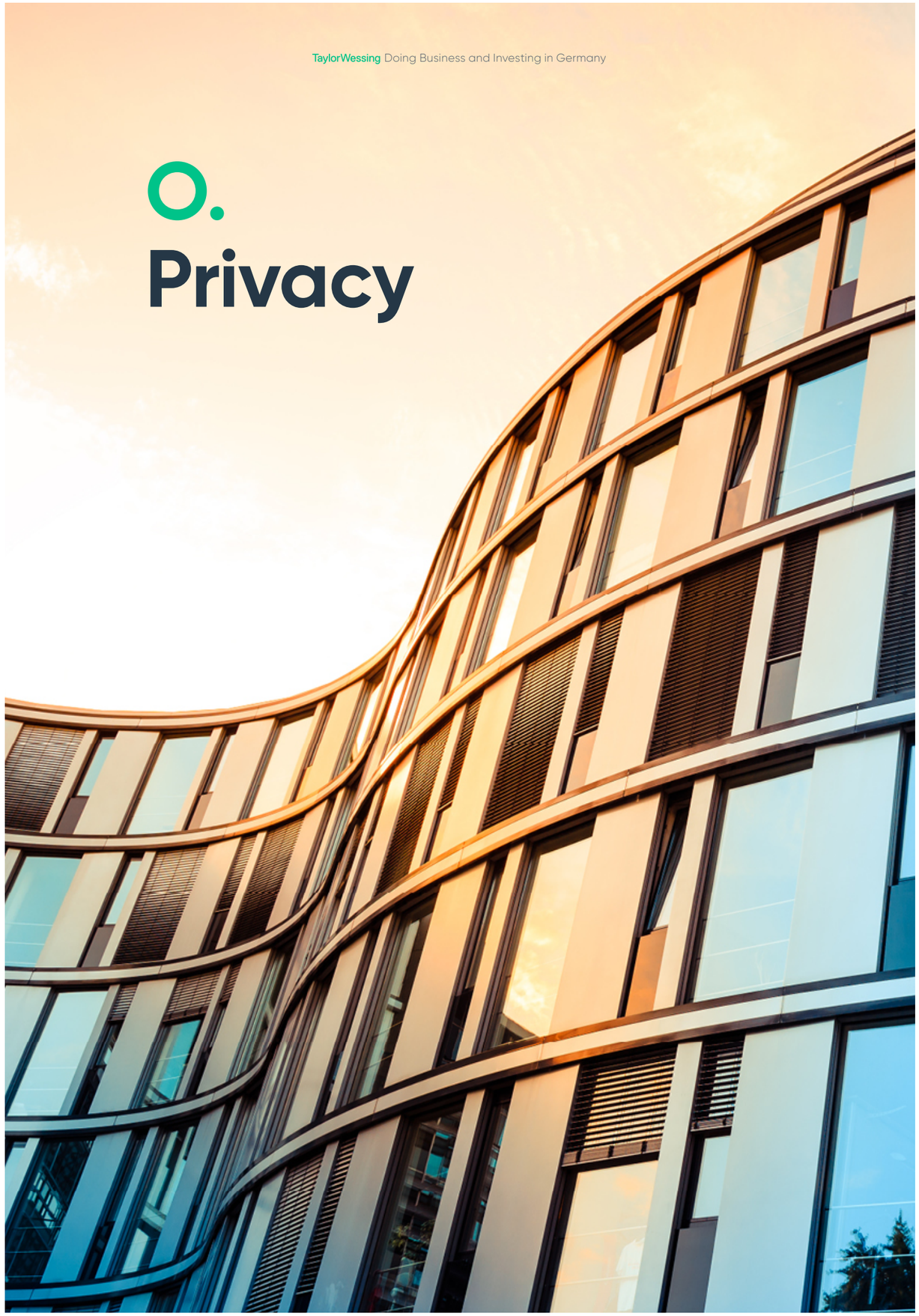
The TFEU gives a very broad definition of state aid. It comprises not only direct financial but any form of governmental benefits offered to private entities on a selective basis. Looking at expenditure by aid instruments, it is obvious that grants (including interest subsidies) remain the most popular aid instrument. However, in principle, state aids which do not exceed a total amount of EUR 200,000 over a period of three fiscal years are not considered to be state aids and thus not subject to authorisation by the Commission ("De minimis aid").

The European Commission has the exclusive competence to control and to authorise systems of state aid in the Member States. Therefore it has strong investigative and decision-making powers. At the heart of these powers lies the notification procedure which – except in certain instances – the Member States have to follow. Aid measures can only be implemented after approval by the European Commission. The Member States have to withhold state aids until the authorisation procedure is concluded ("stand-still-obligation"). State aid granted without authorisation or incompatible with EU state aid regulations can be reclaimed at any time. In that case the beneficiary enjoys very limited protection of legitimate expectations because according to the case-law of the European Court of Justice the beneficiary is obliged to ascertain that state aid control is implemented. For this reason it is necessary for companies to be familiar with the legal requirements and limitations of state aid clearance. Companies affected by recovery decisions have the opportunity to appeal against the decision before national or European courts.

Companies disadvantaged by state aid decisions in favour of competitors can invoke the violation of European state aid regulations before national courts and claim for damages and for injunctive relief.

The website **www.foerderdatenbank.de** provides a first overview of support programs of the German federal and state governments as well as the European Union. Please do not hesitate to contact our state aid team in case of any further queries related to subsidies und public aids.

O. Privacy



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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 May 2018, the EU adopted the General Data Protection Regulation ("GDPR") to ensure that this information is lawfully obtained, used responsibly, kept securely, and that relevant consents are obtained. The GDPR provides for a high-level harmonisation of the data protection laws of the EU Member States. It has strengthened the rights of data subjects, imposed tougher sanctions, increased compliance requirements for companies and introduced a one-stop shop regime. However, full harmonisation is not achieved. In addition to GDPR, further privacy requirements are introduced by the German Federal Data Protection Act, and German authorities tend to interpret and apply the new requirements in a stricter way than some of their colleagues in other Member States.

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.

Whereas non-compliance can trigger negative PR, brand damage and regulatory enforcement, demonstrating compliance with privacy standards can be a significant advantage not only when doing business with European customers, but also with regard to third countries, as many states are following suit in raising the data protection standards (eg the California Consumer Privacy Act and the Brazilian LGPD).

Trends and hot topics

Enforcement of the GDPR

- Three years after the GDPR became effective, it is now being enforced more vigorously. After initial restraint, first (high) eight figure GDPR-fines have been imposed in Germany, often followed by litigation of the allegedly non-compliant companies against the data protection supervisory authorities in order to have the fines waived or reduced.

Cookies

- One of the main topics since the implementation of the GDPR has been the legal justification of the use of cookies. Requirements for the use of cookies result from the ePrivacy Directive as well as the GDPR, whereby the relationship between these two EU legal acts has not been conclusively resolved. An envisaged ePrivacy Regulation shall provide more clarity. In the meantime, various European data protection authorities have issued guidelines on cookies, but these do not provide uniform standards. For example, the German authorities' guideline sets strict requirements and generally demands GDPR compliant consent for the use of cookies. On the other hand, other authorities, eg in Spain and Austria, seem to take a less restrictive approach.

Cyber security requirements

- The EU passed the so-called Network Information Security Directive (NIS-Directive), which has been transposed into national German law. The NIS-Directive and the corresponding national law (which has been updated mid-2021, now imposing GDPR-like fines for non-compliance) place cyber security, risk and incident management obligations, together with breach notification requirements, on "operators of essential services" in various sectors providing services critical for the well-being of the society. They also place them on "digital service providers", defined as providers of online marketplaces, online search engines, or cloud computing services. In October 2019, the German cyber security regulator BSI started to request operators of critical infrastructure to provide evidence of compliance with the IT security requirements for their respective systems. In this context, it is to be expected that the BSI's focus will expand to providers of digital services, such as cloud providers, in the near future. Furthermore, updated cyber security laws are expected both on a European and a national level.

Cross-border data transfers

- The EU restricts export of data to countries outside the European Economic Area (EEA) unless certain pre-conditions are met to safeguard that data (see below). A popular method for US organisations to enable the export of EU personal data used to be self-certification under the Privacy Shield, providing direct rights to European individuals. However, with the decision "Schrems II" of 16 July 2020 the European Court of Justice has ruled that the EU-US Privacy Shield is invalid due to data protection levels in the US being inadequate. While the EU Standard Contractual Clauses, which have been significantly updated in June 2021 (and only the updated version can be used going forward) continue a valid measure to justify cross-border data transfers, additional safeguards will often need to be taken. German regulators have started reaching out to companies to evaluate how they comply with the "Schrems II" obligations, and various regulatory proceedings have been commenced in that regard.

Key legal considerations

Personal Data

Only so-called 'personal data' is protected by European privacy laws, meaning any information relating to an identified or identifiable natural person ('data subject'). An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Records of processing activities, Art. 30 GDPR

Records of processing activities under the company's responsibility must in most cases be maintained. These records shall contain in particular the following information:

- Name and contact details of the company and its data protection officer

- The purposes of the processing
- A description of the categories of data subjects and of the categories of personal data
- The categories of recipients to whom the personal data have been or will be disclosed including recipients in third countries or international organisations
- Transfers of personal data to a third country and the documentation of suitable safeguards
- Envisaged time limits for erasure of the different categories of data
- A general description of the technical and organisational security measures.

Data Protection Impact Assessment, Art. 35, 36 GDPR

Where a data processing activity is likely to result in a high risk to the rights and freedoms of natural persons, the company shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations. In case the assessment indicates that the processing would result in a high risk in the absence of measures taken by the company to mitigate the risk, the supervisory authority shall be consulted.

Data Protection Officer, Art. 37-39 GDPR

An independent, reliable and knowledgeable data protection officer must generally be implemented in case:

- The company's core activities consist of processing operations which require regular and systematic monitoring of data subjects on a large scale.
- The company's core activities consist of processing on a large scale of special categories of data (eg health, religion, race, sexual orientation etc.) and personal data relating to criminal convictions and offences.
- As a German peculiarity, if a company constantly employs at least 20 persons dealing with the automated processing of personal data.

A group of undertakings may appoint a single data protection officer provided that such data protection officer is easily accessible from each establishment.

Implementation of Technical and Organisational Security Measures, Art. 32 GDPR

Appropriate and reasonable state of the art technical and organisational measures must be implemented in order to protect the personal data processed.

Data Breach Notifications, Art. 33, 34 GDPR

In case of personal data breaches with risks to rights and freedoms of the involved data subjects, the supervisory authority shall generally be informed within 72 hours after having become aware of the breach; in case of high risks for the data subjects, these will generally also have to be informed about the breach.

Representative in the EU

Companies without establishment in the EU but doing business in the EU must often appoint an EU representative for dealings with authorities etc. Upside of having a representative: this will establish a "one-stop-shop" for third country companies when it comes to notifying data breaches to the regulator.

Material requirements of data processing

Each processing of personal data will require either valid data subject consent or a legal justification. Cross-border data transfers to countries outside the European Economic Area still require additional justification, eg use of EU Standard Contractual Clauses or Binding Corporate Rules (or, in limited cases, consent).

Important particularities in Germany

With regard to processing in the context of employment, Art. 88 GDPR provides that Member States may adopt more specific rules, which has been done in Germany. Eg, more thorough requirements for compliance investigations exist, as well as additional requirements for collecting employee consent. Also, if private use of company devices and email accounts is permitted, this may lead to restrictions for employers when accessing data on the devices or the email accounts (even when the data that shall be accessed is not considered private).

Many companies have employee representatives that have far-reaching co-determination rights. If these "works councils" exist, new IT systems can generally not be implemented without their involvement.

P.
Some Key Issues Relating to International Commercial Agreements

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I. Applicable law

In international business relationships two or even more legal systems usually come into play. The first question to be answered in such cases is which law shall be applicable to the agreements governing the business relationship (**"International Agreements"**).

The applicable law is determined in accordance with the rules governing conflicts of law. The rules applicable **within the EU** are **harmonised** to a large extent.

Choice of law clauses may be crucial, in particular for International Agreements governing business relationships between **non-EU residents.**

Pls. see also Annex 23 (Typical issues in connection with International Agreements) for more detailed information.

II. Venue

The next important question is which court shall be competent to settle litigation arising out of and in connection with an International Agreement and where claims based on the International Agreement shall be made. **Within the EU,** the competent jurisdiction in international cases is **harmonised** to a large extent, but harmonised law may not apply where there are no **sufficient connections with the EU.**

It is, therefore, recommended to agree on a **venue** (official courts or arbitration).
Pls. see also Sec. Q/II below for more information.

III. General Terms and Conditions

If General Terms and Conditions are intended to be made part of an agreement, it is important to make sure that they are connected to the agreement in a legally valid form. Furthermore, it should be reviewed whether the content of the General Terms and Conditions complies with the applicable statutory law.

Pls. see also Annex 23 for more detailed information.

IV. Securing payment

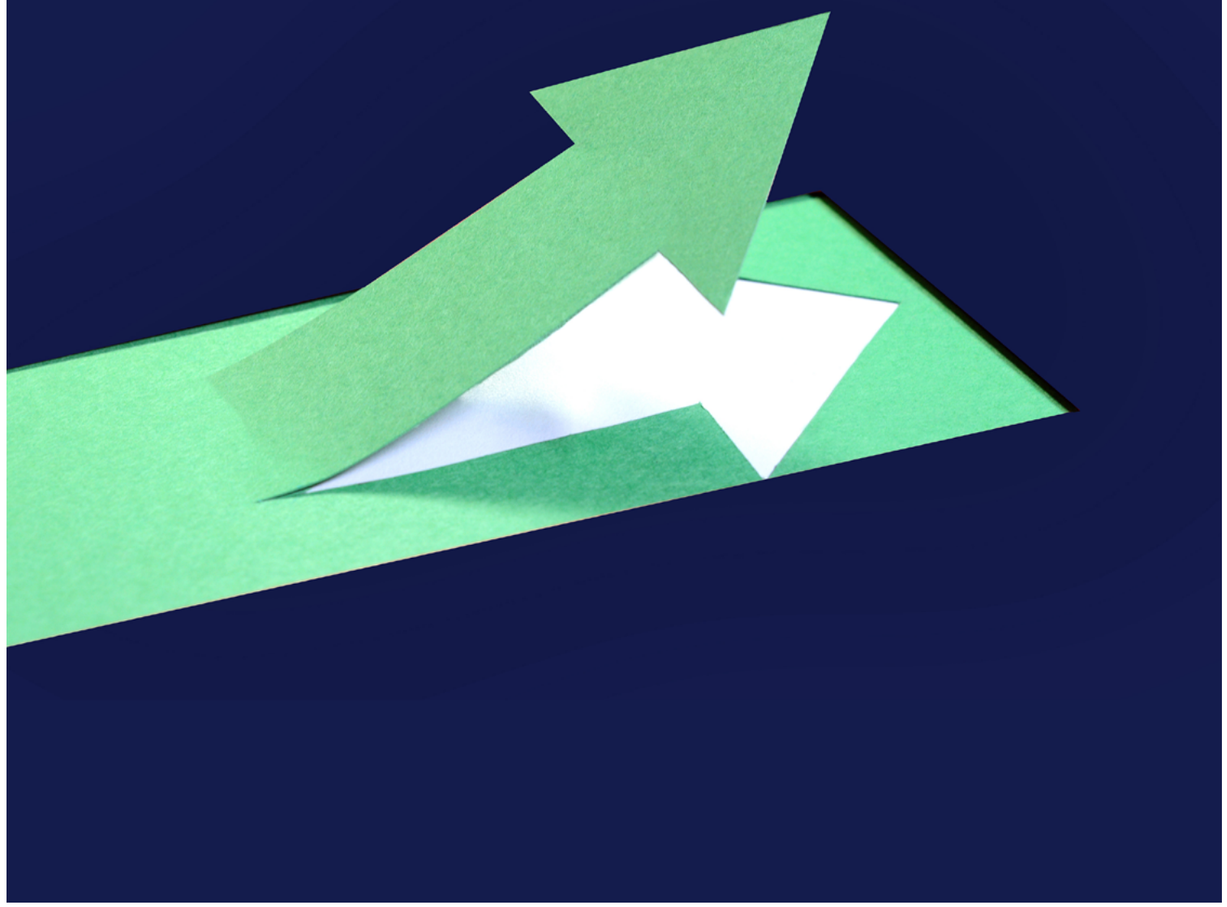
Another important issue is the question of how payment can be secured. Common securities in International Agreements include **personal guarantees, letters of credit** and **credit insurances.**

V. Supply conditions and risk allocation

The issue of supply conditions and risk allocation comes up in connection with cross-border supply agreements. International Agreements frequently refer to the **INCOTERMS®.**

Q.

Litigation, Venue, Arbitration and Enforcement



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I. Ordinary Courts

1. Courts hearing civil disputes

Against decisions of Courts of appeal relating to Regional Court decisions, under certain circumstances **revision** to the Federal Court of Justice is possible.

German Supreme Court
(Bundesgerichtshof)

Against decisions of Regional Courts relating to Local Court decisions, under certain circumstances revision to the Federal Court of Justice is possible.

Higher Regional Courts
(Oberlandesgerichte)

Against Local Court decisions, usually appeal to Regional Courts is possible.

Regional Courts
(Landesgerichte)

District Courts
(Amtsgerichte)

Besides jurisdiction in specific areas such as disputes relating to dwelling leases Local Courts have, in principle, first instance jurisdiction in civil disputes if:

- The monetary value of the dispute does **not exceed EUR 5,000** and
- The **Regional Court** does not have exclusive jurisdiction.

2. Special courts

Besides the ordinary courts, there are special courts for **administrative, social, employment and fiscal matters**, such as:

Employment Courts *(Arbeitsgerichte)*	**Fiscal Courts** *(Finanzgerichte)*
Responsible for disputes arising from employment relations, in particular with regard to collective agreements as well as individual employment agreements.	Responsible for disputes related to taxes and charges.

3. Costs

3.1. Composition of costs

Costs are generally composed fo the following elements:

Costs of the **Court**	Costs of the **Parties**
Court fees	**Lawyers' fees and expenses**
Expenses of the Court (eg for experts and witnesses examined by the Court, paperwork etc.)	**Expenses** such as travel and other expenses **of individuals representing the parties** in the hearings
	"Indirect" costs of internal nature such as use of in-house lawyers, disruption of business, diversion of external time etc.
	Commercial costs such as the loss of interest or currency fluctuations

3.2 How are costs/fees calculated?

Costs/fees are generally calculated by the following methods:

Lawyer's fees	**Court** fees	**Security deposit**
Lawyers' fees can either be based on applicable **national law** governing lawyers' fees or be **agreed on individually:** ■ Fees based on the **German Act on Lawyers' Fees** *(Rechtsanwaltsvergütungsgesetz; RVG)* depend, as a general rule on the **amount in dispute.** Pursuant to the Act on Lawyers' Fees, lawyers' fees are **capped** at an **amount in dispute of EUR 30 million** (ie if the amount in dispute exceeds EUR 30 million lawyers' fees do not exceed a certain maximum level defined by law). ■ Individual agreed fees are usually calculated on the basis of time spent, with hourly rates sometimes adjusted in accordance with the monetary importance and complexity of the case.	Court fees are calculated in **proportion to amount in dispute.** Pursuant to statutory law (Court Fees Act; *Gerichtskostengesetz; GKG)* court fees are **capped** at an **amount in dispute of EUR 30 million** (ie if the amount in dispute exceeds EUR 30 million court fees do not exceed a certain maximum level defined by law). The claimant has to advance court fees; otherwise the writ is not delivered to the defendant. If the defendant is resident outside of Germany in a state with an official language other than German the writ is translated by the court. In such case, the claimant needs to pay an **additional advance** for the envisaged translation costs.	**If the claimant is resident in certain countries outside the EU and EEA,** the defendant may request that the claimant makes a security deposit (as a security for costs to be reimbursed to the defendant if the claimant loses the case).

3.3. How are costs allocated?

Pursuant to German statutory law (Code of Civil Procedure; *Zivilprozessordnung; ZPO)* costs are **allocated** in accordance with the following principles:

If the defendant loses the case: defendant bears 100 % of the court fees, his own costs and the lawyers' fees* of the claimant.

If the claimant loses the case: claimant bears 100 % of the court fees, his own costs and the lawyers' fees* of the defendant.

In all other cases, the costs (court and lawyers' fees and expenses) are allocated in relation to the percentage with which each party has lost/won the case.

The aforementioned **principles also apply to court settlements.** However, court **fees can,** eventually, **be reduced** in case of a settlement or withdrawal of the claim.

*For the purpose of calculating the amount to be reimbursed by the counterparty, lawyers' fees are assessed in accordance with the **German Act on Lawyers' Fees.**

3.4. Model calculation of cost risk in proceedings before German official courts

Example:

If the **amount in dispute** amounts to (or exceeds) **EUR 30 million,** the claimant is exposed to the following cost risk (assuming that the lawyers are paid in accordance with the Act on Lawyers' Fees):

First Instance		
Fees		**Amount in EUR**
Lawyers' fees for **claimant's lawyer**		229,282.50
	plus lump sum for expenses	20.00
	plus 19 % VAT	43,567.48
	Total:	**272,869.98**
Court fees		**329,208.00**
Lawyers' fees for **defendant's lawyer**		229,282.50
	plus lump sum for expenses	20.00
	plus 19 % VAT	43,567.48
	Total:	**272,869.98**
Total amount		**874,947.96**

Second Instance		
Fees		**Amount in EUR**
Lawyers' fees for **claimant's lawyer**		256,796.40
	plus lump sum for expenses	20.00
	plus 19 % VAT	48,795.12
	Total:	**305,611.52**
Court fees		**438,944.00**
Lawyers' fees for **defendant's lawyer**		256,796.40
	plus lump sum for expenses	20.00
	plus 19 % VAT	48,795.12
	Total:	**305,611.52**
Total amount		**1,050,157.04**

Pls. see also **Annex 24** (Costs for official court proceedings – overview (2020)) for further examples.

II. Venue

In principle, the venue can be determined either by a jurisdiction clause agreed on by the parties or – if there is no such clause – by the **relevant provisions of statutory law.**

If no jurisdiction clause is agreed on, the venue is determined in accordance with the **German Code of Civil Procedure** *(Zivilprozessordnung; ZPO)* if the circumstances of the case are only related to Germany **(internal case)**. If the case has international aspects – eg if one of the parties is seated outside of Germany or in case of another cross-border issue such as supply of goods into a state other than Germany **(international case)** – the venue is primarily determined in accordance with **harmonised EU law** (in particular with the so-called **"Brussels Ia Regulation"** No. 1215/2012) if the case is **sufficiently connected to the territory of the EU.** If there is no sufficient link with the territory of the EU, the venue must be assessed on a case-by-case basis; however, the determination basically takes place in accordance with the rules of the German Code of Civil Procedure if this is the case.

The venue ist determined

If a venue is agreed upon
By contracting parties

Jurisdiction clauses usually are subject to certain **formal requirements:**

- Pursuant to European law the agreement must be in **writing** or in a form which accords with practices the parties have established between themselves or, in international trade or commerce, in a form which accords with a usage of which the parties are aware (if parties residing outside the EU are involved, the provisions of their country of residence should be consulted as well).
- If provided in General Terms and Conditions (**"GTC"**) the GTC must be **validly connected to the agreement.**

Particularities/limitations may, again, arise from **mandatory law protecting consumers or employees.**

If no venue is agreed upon
By the rules governing jurisdiction

German Code of Civil Procedure in **"internal" cases.**

Harmonised EU-law **in international** cases sufficiently connected to the territory of the EU.

Council Regulation (EC) No. 1215/2012 on jurisdiction and the recognition are enforcement of judgements in civil and commercial matters **("Brussels Ia Regulation").**

If the Brussels Ia Regulation is **not applicable** (in particular due to an insufficient link with the territory of the EU) assessment on a **case-by-case basis** is required.

Pls. see also **Annex 25** (Brussels Ia Regulation – key points) for more information relating to the Brussels Ia Regulation.

III. Execution of court decisions under the Brussels Ia Regulation within the EU

A judgement issued in a Member State must be **recognised** in the other Member States **according to a special procedure** set forth in the Brussels Ia Regulation. "Judgement" means any judgement given by a court or tribunal of a Member State within the scope of the Brussels Ia Regulation, whatever the judgement may be called, including a decree, order, decision or writ of execution. **Under no circumstances may a foreign judgement be reviewed as to its substance.**

However, a judgement will **not** be recognised:

- If such recognition is manifestly contrary to public policy in the Member State in which recognition is sought
- If the defendant was not served the document which initiated the proceedings in sufficient time and in such a way as to enable the defendant to arrange for its defence
- If it is irreconcilable with a judgement issued in a dispute between the same parties in the Member State in which recognition is sought
- If it is irreconcilable with an earlier judgement issued in another Member State or in a third state involving the same cause of action and between the same parties.

A court from which recognition of a judgement given in another Member State is sought may freeze the proceedings if an ordinary appeal against the judgement has been lodged.

A judgement must be enforced in another Member State on request of any interested party. The parties may appeal against decisions on the declaration of enforceability.

IV. Regulation relating to the execution of claims within the EU

Since December 2009 claims may be executed based on a **European Order for payment** or pursuant to the **European proceeding for small claims** (claims up to EUR 2,000). In both cases a payment order enforceable within the whole territory of the European Union can, in principle, be issued within relatively short time.

You can read more here:
https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do

V. Arbitration

1. Arbitration vs. proceedings before the ordinary courts

The following factors may, *inter alia,* have an impact on the decision whether arbitration or proceedings before the ordinary courts are agreed on:

Factor	Arbitration	Ordinary Courts
Publicity of proceedings	The arbitral hearings are **not public;** however, **enforcement** of the arbitral award may require public hearings before the ordinary courts competent for the **recognition** of the arbitral award.	Proceedings before ordinary courts generally are **public.**
Final, binding resolutions without possibility of recourse to ordinary courts	In most jurisdictions, arbitral awards may not be reviewed on the mertis by an ordinary court. Only a limited review of certain procedural requirements and of the award´s compliance with (international) public policy is possible.	Decisions of ordinary courts can, in general, be **revised by higher courts.**
International recognition and enforcement	The recognition and enforcement of arbitral awards is relatively easy due to a complex system of several international conventions and national laws. Especially the **New York Convention** of 1958 (pls. see below) has been instrumental in setting an international standard. Next to the New York Convention, most jurisdictions also have rules on the recognition and enforcement of foreign arbitral awards, which are sometimes more favourable than those of the New York Convention.	Recognition within the EU is also relatively easy due to **harmonised EU-law** (pls. see below).
Flexibility of the court	Freedom of the parties to choose **place, language(s) and applicable proceedings** as well as the **arbitrator(s).**	Proceedings before ordinary courts are governed by **local law on civil proceedings** and in the **official language of the forum state.** However, the courts have to apply such – local or foreign – material law to the respective case ex officio as is applicable under the relevant rules of choice of law. In many countries there are "international commercial courts". In Germany, for example, there is the Chamber for International Commercial Disputes at the Regional Court (Landgericht) Frankfurt where negotiations can be conducted in English.
Specialisation	The parties may choose arbitrators with special competencies.	Many European countries have **specialized courts** or **specialised chambers** of the official courts (in particular: commercial courts or chambers, Federal Patent Court in Germany etc.).
Duration and costs of proceedings	Should be assessed and compared on a **case-by-case basis.**	

2. Arbitration clauses

In civil matters the parties can agree on arbitration instead of ordinary courts. Arbitration clauses should be agreed on **in writing and be explicitly confirmed by all contracting parties.**

The following wording is recommended by the German Institution for Arbitration *(Deutsche Institution für Schiedsgerichtsbarkeit – DIS):*

"All disputes arising in connection with the contract (... description of the contract ...) or its validity shall be finally settled in accordance with the Arbitration Rules of (...) without recourse to the ordinary courts of law."

Arbitration clauses should be **thoroughly drafted** in order to cover the individual needs of the parties and the potential disputes which may arise between them. They should, *inter alia*, contain regulations with regard to:

- The scope of arbitration (which issues shall be settled by arbitration?)
- The place of arbitration
- The arbitrators (number and qualification requirements) and their remuneration
- The language of the arbitration proceedings
- Applicable arbitration proceedings (rights and duties of the parties, means of evidence etc.)
- Costs.

It is important to make sure that the arbitration clause is valid for several reasons, *inter alia* in order to:

- Ensure that the arbitral award can be recognised and enforced and
- Avoid prescription of claims which may arise if arbitration is pursued but the arbitration clause is invalid (if, due to the invalidity of the arbitration clause, ordinary courts are in fact competent and if this is not noticed by the parties in time, their claims may be forfeited before proceedings are initiated before the competent ordinary court).

3. Arbitration proceedings

Generally speaking, arbitration proceedings comprise the following **steps** (which may vary in detail, depending on the applicable arbitration rules):

Initiation	Pre-Hearing	Main Hearing	Post-Hearing
■ Request for arbitration ■ Answer ■ Appointment of tribunal deposit ■ Preparation of preliminary hearing ■ Payment of security deposit	■ Preliminary hearing ▪ Scheduling/ procedural orders ▪ Preliminary relief ■ Written phase ▪ Memoranda ▪ Discovery/witness statements ▪ Expert reports	■ Opening statements ■ Examination of witnesses ■ Expert testimony ■ Closing statements	■ Post-Hearing briefs ■ Deliberations ■ Drafting of award ■ Signing of award

The parties may either set up their **own arbitration rules** or opt for **official arbitration rules** such as the rules provided by the German Institute for Arbitration (**https://www.disarb.org/en/**) or the International Chamber of Commerce (**https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/**). It is also possible to agree on a **national law governing civil proceedings** instead of or in addition to official arbitration rules.

In any event, the applicable rules of procedure should be **reviewed** when drafting the arbitration clause. Special attention should be paid to whether the applicable rules of proceedings contain suitable provisions relating to **counterclaims, third party notice, extension of the claimants' claim** etc.

4. Costs

4.1. Composition of costs

Costs are generally composed fo the following **elements**	
Costs of the **Court**	Costs of the **Parties**
Arbitrators' fees.	**Lawyers' fees** and expenses (eventually including costs for hiring of local counsels at the place of arbitration/ lawyers specialized in arbitration).
Administrative costs (comprising fees and expenses of the institution administering the procedings and expenses incurred by its personnel).	**Anciliary litigation costs** relating eg to the jurisdiction of the tribunal, taking of evidence and security measures.
Experts' fees (of any experts hired by the Tribunal).	**Experts' fees** (of any experts hired by the parties).
Logistical costs connected with the hearings (conference facilities, translation costs, preparation of transcripts etc.)	**Expenses** such as travel and other expenses of **witnesses and individuals representing the parties** in the hearings.
	"Indirect" costs of internal nature such as use of inhouse lawyers, disruption of business, diversion of external time etc.
	Commercial costs such as the loss of interest or currency fluctuations.

4.2. How are fees calculated?

Fees are generally **calculated** by the **following methods:**

(calculation methods and elements may vary depending on the applicable arbitration rules and relevant national laws and lawyers' fees, if any)

Lawyers' fees	**Arbitrators'** fees	Fees of **arbitration institutions**	**Security deposit**
Lawyers' fees can either be based on applicable **national law** governing lawyers' fees or be **agreed on individually:** ■ Fees based on the **German Act on Lawyers' Fees** depend, as a general rule, on the amount in dispute. ■ Individually agreed fees are usually calculated on the basis of **time spent** with hourly rates sometimes **adjusted** in accordance with the monetary importance and complexity of the case.	The calculation methods of arbitrators' fees vary in accordance with the applicable rules. Most frequently, calculation is based on: ■ **The amount in dispute** ■ Or on **hourly or daily** fees regardless of the amount in dispute ■ Or a **combination thereof.**	The fees of Arbitration Institutions (eg filing fees or administrative fees) are frequently calculated in proportion to **the amount in dispute;** in some cases they are limited to a maximum fee (cap).	Most Arbitration Institutions require a deposit as a security for the cost of the tribunal and the institution. The security deposit is usually fixed in accordance with a **fee schedule.** **In principle, all parties are required to contribute** an equal portion of the deposit. However, in the event that one party (frequently the respondent) refuses to pay, the other party (typically the claimant) may (have to) pay the entire amount.

The German Institution for Arbitration offers a cost calculation tool for calculation of administrative fees and security deposits which can be found here:
http://www.disarb.org/

The ICC International Court of Arbitration also offers a cost calculation tool for calculation of administrative expenses and arbitrators' fees which can be found here:
https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/

4.3. How are costs allocated?

Depending on the applicable rules and/or the specific agreement of the parties, **allocation of costs:**

...can be governed by the so-called **"English Rule"**	...can be governed by the so-called **"American Rule"**	...can be governed by **agreement between the parties**
The so-called "English Rule" provides that the costs follow the event (ie that the costs for the procedure are **borne by the losing party).**	The so-called "American Rule" provides that each party bears its own costs and the costs of the Tribunal are **split evenly between the parties.**	...in which case the parties should **agree on a mechanism** governing the allocation of costs when drafting the arbitration agreement.

In cases where the applicable rules do not (or only partially) provide for a mechanism of allocation, costs may also be allocated based on a **compromise** of both systems set out above. Furthermore, the **costs of the Tribunal** may be allocated in a different way than the **costs of the parties.**

Risks/**Problems** in connection with the allocation of costs may, *inter alia*, arise with regard to:

Inflation of claims	**Definition of "reasonable" or "normal" costs** in connection with cost allocation
Claims are often exaggerated (ie a higher amount is claimed than is finally awarded or agreed on). If costs are calculated on the basis of the amount in dispute, it should be assessed how this issue is dealt with and whether it leads to additional costs to be borne by (either of) the parties.	Allocating systems following the "English Rule" (ie providing that all costs – including those of the winning party – are borne by the losing party), usually only "reasonable" or "normal" costs are allocated to the party by which they shall be borne. In order to avoid (negative) surprises it is recommendable to determine which kind and volume of costs is deemed "reasonable" or "normal" pursuant to the applicable rules.

4.4. Major elements influencing the costs of arbitration proceedings

5. Enforcement of arbitration awards

One advantage of arbitration – in particular outside legally harmonised territories – is that enforcement of arbitration awards is relatively easy – compared to official court decisions outside of the EU – due to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention" dated 1958 which is applied by more than 162 Member States.

You can read more here:
www.uncitral.org
https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/travaux

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R. Insolvency Proceedings in Germany

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I. Overview

Insolvency proceedings in Germany are governed by the German Insolvency Code *(Insolvenzordnung – InsO)*. They can be opened over the assets of individuals (businessmen or consumers) and over the assets of all sorts of legal entities including stock corporations, companies and partnerships as well as several forms of unincorporated entities.

Generally speaking, German insolvency proceedings ensure the observance of the principle of equal treatment of all unsecured creditors. Some creditors are entitled to preferential rights, in particular the right to segregation *(Aussonderungsrecht)* or a right to separate satisfaction *(Absonderungsrecht)* **(cf. Sec. VII below)**.

The main objective of insolvency proceedings is the collective (equal) satisfaction of all groups of creditors of the debtor through the liquidation of the assets or by reaching an agreement on an insolvency plan with the aim of reorganising the debt and maintaining the enterprise as a going concern, if possible.

Until 2021, German law did not recognise alternative reorganisation proceedings such as voluntary schemes of arrangement outside the InsO. Such reorganisation plans could only be agreed upon between all the parties involved in order to avoid insolvency. However, this has now changed.

In order to strengthen pre-insolvency restructuring opportunities, the EU Parliament created the "Preventive Restructuring Frameworks Directive" on 29 March 2019. The uniform legal framework makes it possible to implement restructuring measures outside insolvency proceedings without the need for a consensus or the possibility of individual parties blocking the plan. The German legislator has implemented the Restructuring Directive into national law with effect as of 1 January 2021 by way of the so called Further Development Act on Restructuring and Insolvency Law *(Sanierungsrechtsfortentwicklungsgesetz, "SanInsFoG")* including preventive restructuring opportunities outside insolvency proceedings. However, this new opportunity is only available outside insolvency proceedings in case of imminent illiquidity *(drohende Zahlungsunfähigkeit)*. If there is illiquidity or over-indebtedness, a request to open insolvency proceedings must still be filed. Against this background, please also note the following regarding such proceedings:

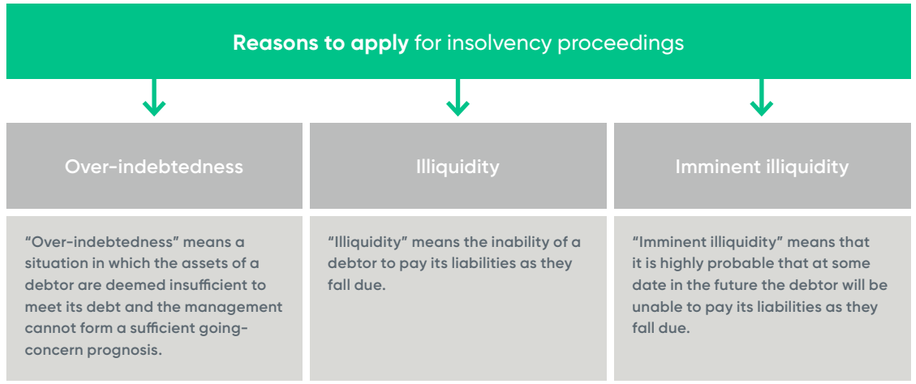
Insolvency proceedings can be divided into **three procedural phases:**

Request to open insolvency proceedings → **Preliminary insolvency proceedings** → **Opened insolvency proceedings**

As German insolvency law is focused on a **consistent distribution** of the assets of the insolvent debtor to its creditors based on the principle of **equal treatment** of all creditors, the *InsO* provides for a number of **preventive measures** to protect and preserve the assets of the insolvent debtor and to ensure equal treatment of all unsecured creditors, *inter alia* by providing the right of the insolvency administrator to **rescind** certain legal acts which would otherwise lead to an advantageous treatment of certain creditors at the expense of others (so called claw-back claims) and to terminate contracts that are not completely performed by the parties.

II. Reasons to open insolvency proceedings

The law sets out three different reasons for the opening of insolvency proceedings, ie illiquidity, over-indebtedness and imminent illiquidity. For legal entities, the opening of insolvency proceedings must be applied for in case of illiquidity or over-indebtedness. It may further be applied for (on a voluntary basis) in case of imminent illiquidity (whereas merely imminent illiquidity also qualifies for preventive restructuring opportunities outside insolvency proceedings – **see above under Sec. I)**.



In a **crisis,** the **management** of the company is subject to various **duties** such as, *inter alia:*

- Monitoring liabilities in order to assess whether the company is (imminently) illiquid or over-indebted (eg by setting up and analysing interim balance sheets and liquidity forecasts)
- Duty to prepare and file a correct and complete request to open insolvency proceedings to the competent court within statutory deadlines
- Duty to prevent payments of the debtor to the advantage of shareholders and other individual (third-party) creditors (and disadvantaging others)
- Information duties towards the shareholders (in case of a GmbH, the managing directors are obliged to call a shareholders' meeting if 50 % of the share capital is lost).

In the event of over-indebtedness the management is obliged to apply for the opening of insolvency proceedings unless it is predominatly likely that the business will survive as a going concern.

If illiquidity or over-indebtedness has occurred the debtor's management is obliged to file for the opening of insolvency proceedings without undue delay and under no circumstances later than **three weeks** in case of illiquidity and no later than **six weeks** in case of over-indebtedness after such trigger event has occurred. Violations may constitute a criminal offence and lead to the management's personal liability. Therefore, the proper handling of a financial crisis, in particular in situations of (imminent) illiquidity, can be very challenging for the **management** (and also to a certain extent for the **members** of a **supervisory board**) in order to avoid personal liability and criminal charges, eg for delaying insolvency proceedings and other insolvency law offences.

In a crisis German courts require the management to strictly observe monitoring rules as regards the financial and economic conditions of the business and established guidelines on how to conduct frequent tests as to whether the company is (imminently) illiquid and/or over-indebted. Usually **expert advice** will be necessary at an early stage in order to ensure that the management acts in conformity with such rules and guidelines.

III. Application for the opening of insolvency proceedings

Insolvency proceedings can only be opened if an application is filed at the local court (Amtsgericht) as insolvency court which is competent for the debtor's place of residence or – in the case of merchants or business enterprises – at the local court which is competent for the debtor's centre of main interests (COMI).

The application can either be filed by the debtor or a creditor on the grounds of illiquidity or over-indebtedness. If it is based on imminent illiquidity, only the debtor has the option to file the request.

Forthwith upon the application and during the period until formal insolvency proceedings are opened, the competent insolvency court is obliged to take all necessary steps to protect the debtor's assets. In particular, the court can impose a general prohibition on disposal of assets against the debtor and appoint a preliminary insolvency administrator. The rights and duties of such preliminary administrator depend on whether or not the court has imposed a general prohibition on transfers. In the first case (so called "strong" preliminary administrator), he is entitled to take possession of the debtor's assets, continue its business and – within certain limits – sell assets and collect the receivables. In the latter case (ie if a "weak" insolvency administrator is appointed) the preliminary insolvency administrator does not take possession of the debtor's assets and does not conclude agreements or execute transactions on his own, but must only consent to certain measures and transactions executed by the debtor's management which concern the debtor's assets.

IV. Preliminary insolvency proceedings and protective shield

With the filing for the opening of insolvency proceedings, the management may apply for self-administration proceedings, which enable the management to retain control over the company. Since March 2012 the *InsO* provides for a pre-insolvency moratorium under a so-called chapter 11 like protective shield *(Schutzschirm)* which facilitates the preparation of pre-packed insolvency plans in combination with self-administration (debtor-in-possession) by the management. In case the competent court grants self-administration it would appoint a custodian *(Sachwalter)* which shall supervise the management's actions. In case there is no application for self-administration proceedings, or the prerequisites for a debtor-in-possession administration are not met, and provided that the debtor's assets cover the costs of the court, the administrator and a creditors' committee, the court would open general preliminary insolvency proceedings with the appointment of a preliminary insolvency administrator and certain protective orders, such as the restriction on individual enforcements by creditors and imposing a general prohibition of the disposal of assets by the debtor.

V. Main insolvency proceedings

If the prerequisites for the opening of insolvency proceedings are met, it is common practice that the competent court decides on the formal opening of the proceedings (including a potential self-administration if applied for) and appoints an insolvency administrator (in case of regular proceedings) or a custodian (in case of self-administration) only after a period of about three months. This allows the administrator to apply for public funding in the form of the so-called insolvency payments by the Federal Agency (statutory workers compensation scheme which allows funding of the debtor's pay-roll for a period of up to three months during the stage of preliminary proceedings). The period may be shorter in the event of prevailing interests of the administrator to sell the business as a whole or major parts thereof as soon as possible in order to maintain its goodwill, as his authority to dispose of major assets is limited during the preliminary stages.

The different procedural phases of preliminary and opened insolvency proceedings are outlined in more detail in **Annex 26 (Procedural steps of insolvency proceedings).**

VI. Insolvency Plan

The insolvency plan in combination with self-administration (and preceding protective shield proceedings in a three-month period prior to the opening of insolvency proceedings, if applied for) is one of the main elements of the modernised German insolvency law granting the debtor's management the option to keep control over the business. The law grants the debtor utmost flexibility in structuring the plan as long as the plan is approved by the creditors and the insolvency court. The insolvency plan can even provide for a liquidation of the business although it mainly serves the purpose of reorganising and rescuing the enterprise. The plan which can be set up by the debtor or the administrator must consist of a declaratory and a constructive part. In the first part, the plan shall describe the measures taken or still to be taken to create the basis for fulfillment of the creditors' rights in accordance with the plan. The constructive part shall determine how the insolvency plan shall transform the legal position of the parties involved. While determining the rights of the parties in the insolvency plan, groups shall be formed where parties concerned have deferring legal status (eg unsecured creditors, secured creditors, employees etc.). The creditors will vote on the adoption of the plan by groups. The plan is adopted if in each group the majority of the voting creditors accept the plan, and if the sum of registered claims of the creditors' voting in favour of the plan exceeds 50 % of the total claims of the creditors' voting. However, the principle of prohibition of obstruction applies in that a group where the majority is not achieved is deemed to have consented if that group is not treated any worse by the plan than it would be without the plan. Finally, the majority of groups must have approved the plan whilst the formal consent of the court is dependent on the observance of statutory rules and procedures only.

VII. Prevention: security for claims in agreements

With regard to the fact proven by statistics that creditors with unsecured claims generally receive no more than a quota of about 5 % of the nominal value of their claims in insolvency proceedings, securing claims with collateral is of major importance as they provide individual creditors with rights to segregation *(Aussonderungsrecht)* or separate satisfaction *(Absonderungsrecht).*

Generally speaking, claims can be secured by:

Security granted by the debtor	Security granted by third parties
German law provides a number of different types of security, such as in particular: ■ **Retention of title** *(Eigentumsvorbehalt)* ■ **Liens** ■ **Global transfer of title** (eg to inventory in stock) ■ **Global assignment of receivables** ■ **Mortgages.** Depending on their type, security either grants a **right of seperation** or a **right for seperate satisfaction** to the creditor. **Note:** Security granted by the debtor shortly before the request to open InsP does, however, tend to be contested by the insolvency administrator or receiver.	From a legal perspective security granted by a third party (other than the debtor, eg a shareholder) such as: ■ **Guarantees** ■ **Sureties** ■ **Liens on third-party property** ■ **Letters of credit** tends to be **safer** as they are not influenced by the insolvency of the debtor. Security provided by third parties does, however, tend to be **more expensive** and **hardly negotiable.**

In Germany, **retention of title** is widely used by suppliers as a main source of security against customers. It is usually agreed on in such a manner that the transfer of title in a sold asset is subject to payment of the full purchase price. In such case, ownership is transferred upon payment of the last purchase price instalment.

There are **several subforms** of retention of title, such as:

- **Extended** retention of title (agreement that the transfer of title is subject to the settlement of all claims arising from the business relationship of seller and purchaser)
- **Prolonged** retention of title (agreement that the purchaser is allowed to sell the – unpaid – acquired assets in the ordinary course of business but is obliged to assign his claim for payment against his contracting partner to the seller).

The contracting parties may also provide that the claim of the seller is secured by **transfer by way of security** *(Sicherungsübereignung)* in which case the purchaser transfers the title in an asset owned by him to the seller as security for the seller's claims. In such case ownership is (re-) transferred to the purchaser upon payment of the full purchase price.

Another possibility is to secure claims by liens or mortgages. If chattels (movable assets) are subject to a **lien,** German law provides that possession (not the ownership title) of the chattel must be transferred to the pledgee which may turn out to be unsuitable in practice and it is, therefore, rarely used and instead replaced by transfer of "security title" agreements. **Mortgages** on real estate, vessels and vessels under construction must be registered with the land register or the ship- (building-) register whilst German law does not recognise the registration of liens in public registers with the exception of liens on aircraft.

TaylorWessing Doing Business and Investing in Germany

The business crisis

On newly introduced options and deadly sins

From the perspective of a German insolvency practitioner many aspects changed on 1 January 2021. The German legislator introduced the "Act on the Further Development of Restructuring and Insolvency Law" with which not only significant changes in the German insolvency law were installed but also the "out-of-court stabilisation and restructuring framework" ("Restructuring Framework") was introduced. With this comprehensive modification of the German insolvency law the German legislator implemented the (Directive (EU) 2019/1023 of 20 June 2019. The goal was to enable debtors much sooner than before to use the "tool-set" of insolvencies in order to prevent an insolvency proceeding and the threatened liquidation of the debtor in the first place. Introduced in the midst of the COVID-19 pandemic these modifications and especially the newly introduced Restructuring Framework are poised to become even more important to the debtor, its creditors and investors than it was the case before already. For this reason the following will provide a brief overview of these changes to the German Insolvency Code ("InsO") and the introduction of the Restructuring Framework. Afterwards we will also briefly provide hints as to "deadly sins" should be avoided if an investment in a distressed German business was to be considered. The awareness of the Restructuring Framework as well as the "deadly sins" will together significantly increase the investor's chances of success in Germany.

Part I: Newly introduced options

1. Reform of the InsO

1.1.
Firstly the German legislator implemented with section 10a InsO a chance for the debtor to have a preliminary meeting before the competent insolvency court. A necessary condition is that the debtor fulfills two of the three requirements of section 22 InsO, according to which a provisional creditors' committee would have to be formed and installed. These requirements are that the debtor would have at least a EUR 6 million balance sheet in total, EUR 12 million sales in the twelve months prior to the balance sheet date and/or an annual average of at least fifty employees. This preliminary meeting is meant as a better preparation of the process in order to increase the chances of restructuring the debtor successfully.

1.2.
Another important change was made with regard to one of the reasons for which the debtor has to apply for an insolvency, in this case the over-indebtedness (*"Überschuldung"*). The forecast period is now legally defined as 12 months. Previously, ie until the end of 2020, the duration of the forecast period was not applied uniformly. Case law had not specified a binding time period. The German legislator reacted with this amendment to the difficulties debtors usually have in predicting the development of the business for more than 12 months. This change is important since it ensures that business predictions remain realistic which provides security not only to the debtor and its creditors but also to potential investors. Furthermore, an application for insolvency must now be filed within six weeks (instead of the previous three), granting the debtor therefore more time in order to evaluate, monitor and maybe even solve the crisis.

1.3.
Another significant change is that section 15b InsO softens the liability standards for managing directors. Previously this aspect was regulated by the section 64 of the German Company Act

("*GmbHG*"), setting the standards how the managing director was to treat the debtor's assets in times of a crisis. In most cases it was safest for the management to restrain from any action that involved payments which made maintenance of the business operations difficult if not impossible. Now the German legislator recognises payments which are made in the ordinary course of business, in particular such payments that serve to maintain business operations as being conducted with the due care and diligence of a prudent and conscientious business manager.

1.4.
The InsO further provides for a specific form of insolvency proceeding, the so-called self-administration, in which the debtor's management is entitled to conduct the insolvency proceeding under the mere supervision of a custodian instead of an insolvency administrator. However, in order to shift the focus of the restructuring process to an earlier stage with the tools of the Restructuring Framework the German legislator tightens the access to the self-administration procedure by requiring now, among other things, an introduction of an accompanying self-administration plan with, a financial plan and implementation concept. But it must be pointed out that in practice these requirements, although not included in sections 270 InsO, existed before since the competent courts specifically asked for them before granting the self-administration. In any case this aspect highlights the necessity that every debtor in Germany should be well prepared before attempting the application for an insolvency or the self-administration and should include a legal counsel in advance.

1.5.
Although these modifications singularly do not seem to have much impact on the overall insolvency practice they together indeed prepare the introduction of the Restructuring Framework in order to shift the concentration of insolvency law practitioners to a stage of the business crisis, in which it is much more likely to avoid the liquidation of the assets.

2. Introduction of the Restructuring Framework

2.1.
As indicated before the European Union legislator further intended to introduce a comprehensive framework by which the debtor would have access to legal instruments that were before exclusively preserved to insolvency proceedings. The foundation of the Restructuring Framework, which does not apply to financial institutions, is the so-called restructuring plan (the **"Plan"**), whose concept was borrowed from the preexisting and frequently used insolvency plan in the InsO. With the Plan the debtor has the opportunity to negotiate with its creditors how the business can and must be restructured under the supervision of the restructuring court in order to avoid the liquidation of the business. Such an outcome would cause a potentially higher financial loss than the decrease of the creditor's claims could represent, which is often part of the debtor's restructuring process. However, the restructuring procedure is designed to be significantly more flexible than the insolvency plan.

2.2.
This instrument along with accompanying measures is now accessible to those debtors who do not have to apply for insolvency due to illiquidity or over-indebtedness but are indeed entitled to do so due to the threatened insolvency in accordance with section 18 InsO. Such a scenario for the debtor represents also the main condition for the right to apply and requires scrupulous financial foresight on the debtor's side. For this reason the Restructuring Framework now expressly obliges the debtor's management to set up an early warning system for crises and to react accordingly to any economic threats that become apparent (section 1 StaRUG).

2.3.
The management may then initiate the plan proceeding with the restructuring court. This application must be accompanied by a number of documents, in particular the draft or at least a concept of a restructuring plan, a description of the crisis and its causes, and the status of negotiations (section 5–16 StaRUG). This should include a business planning calculation as well and should be structured as an integrated income statement, balance sheet and liquidity planning for the development of the liquidity over a period of 24 months.

2.4.
The court's main task is the judicial confirmation (section 60, 67 StaRUG) of the Plan and the corresponding preliminary examination of disputed issues after the debtor's application. Further, the court's support lies in granting the aforementioned instruments, eg ordering stabilisation measures such as enforcement realisation freezes on the debtor's assets, which interfere to a particular extent with creditors' rights (section 29, 49 StaRUG). In addition interventions with existing contracts such as ancillary provisions are possible and can be expressly changed (eg the financial payment ratio, which in the event of non-compliance would lead to the financing becoming due and thus to insolvency) (section 2 para. 2 StaRUG). Another new and special feature is that the Plan can also be used to intervene in so-called third-party collateral of affiliated companies within the meaning of Section 15 of the German Stock Corporation Act (section 2 para. 4 StaRUG). This should make financial restructuring of corporations much easier, as it is common for lenders to also grant security to affiliated companies (guarantees; lien on shares, etc.).

2.5.
Also the Plan provides for an easier procedure when trying to find an agreement with the creditors than previously already existed in the insolvency plan. Whereas under insolvency law pursuant to section 244 I InsO a cumulative majority of the heads and a cumulative majority in the individual groups is required, section 25 StaRUG only requires a cumulative majority of 75 % without an additional majority of the heads when voting on the restructuring plan in the groups, streamlining therefore the so-called cram-down. Furthermore, only individual creditor groups can be regulated by the Plan, which was not possible before either.

2.6.
When confirmed by the court the regulations of the Plan become effective, even in relation to those who voted against it (section 67 StaRUG).

2.7.
Under the conditions of section 73, the motion of the debtor or at least 25% of the creditors, the restructuring court will ensure the preservation of the creditors' rights via a so-called restructuring officer, similar to the responsibilities a custodian has in the self-administration proceedings.

2.8.
Although the Restructuring Framework includes many more different and important aspects it can be emphasised at this point already that it has the potential to change the handling of the respective business crisis significantly and provides to the management and shareholders great opportunities while also financials risks to creditors since they can now be forced to depreciate their claims at a much earlier time than they were used to. This forces not only the debtor but also the creditors to monitor the debtor's financial situation much more closely making the involvement of experienced insolvency lawyers at the earliest stage possible an important necessity.

Part II: The five deadly sins when investing in insolvent targets

When dealing with a distressed target, meaning for the purpose of this text a business that already filed for insolvency or is about to do so and a preliminary insolvency administrator is already in charge of the procedure, interested parties (also referred to as "bidders" or "investors") often conduct mistakes that cannot be remedied but lead to the immediate exclusion of the party. Such mistakes shall be depicted additionally since in many cases they are committed before an experienced lawyer had the chance of consulting with the client and prevent them from such harmful conduct.

1. 1 Euro-Deal

Many investors, especially financial investors from the private equity side, are used to "cutting 1 Euro" deals. This is often seen when a company is "buried in debt" and the investor is prepared to take on the debt as well, but in exchange subtracting the debt value from the purchase price. This often results in the infamous "1 Euro"-deals or even negative purchase prices. Expecting to conduct business as usual, investors often treat insolvent targets the same way not knowing that such an offer discredits them immediately in the eyes of the insolvency administrator. The reason for this outcome is that the insolvency administrator does not have to care about any debt the company carries but only evaluates for how much the individual remaining assets of the debtor can be recovered. The amount of such recovery will always be larger than 1 Euro. When presented with an offer of this kind, the insolvency administrator then immediately understands that this bidder is not sufficiently experienced in acquiring such targets and therefore will not consider it seriously anymore. Therefore, the bidder always must try to get a clear picture of the debtor's assets and their value via due diligence in order to make a proposal that is to be treated seriously.

2. Earn-Outs

Similarly to the point made before investors are used to including earn-out-clauses in the purchase contracts. Although this is considered to be standard practice when the investor cannot estimate the business' future development sufficiently, it is nothing that the insolvency administrator can accept. This is due to the reason that he/she is prohibited to do so. From the principle of the immediate recovery of the debtor's assets the insolvency administrator is also restricted to speculate with regard to the purchase price as it represents a part of the insolvency estate and there the creditor's collective ownership. The insolvency administrator is obligated to protect the interests of the debtor's creditors and therefore cannot take part in possible projections of the business development but must fulfill the creditor's claims as good as possible immediately. Therefore, the investors will have to restrain from such clauses and instead will have to spend more time on the due diligence in order to make more accurate predictions regarding the potential of the business.

3. Extensive Guarantees

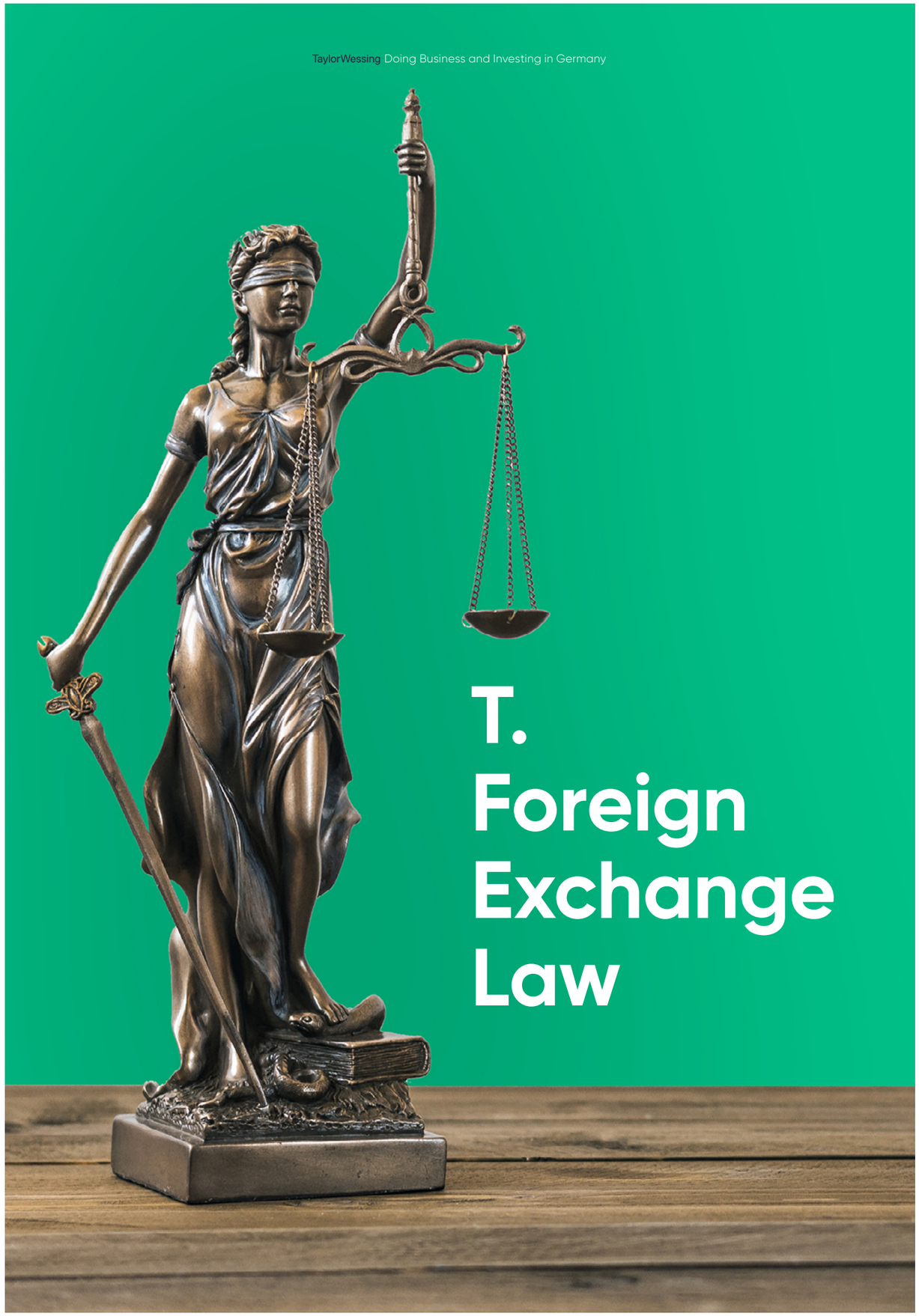
The same is true for when it comes to the commonly used practice to include extensive guarantees in the purchase contracts. While it is an excellent strategy to protect the investor from potential liabilities which the due diligence could not uncover but nonetheless might exist, it would again discredit the investor in the eyes of the insolvency administrator. Inexperienced bidders might not be aware that insolvency administrators only manage the debtor's assets for a brief period of time and often do not know more or even less about the debtor's business than the interested investor itself. Therefore, the insolvency administrator will under no circumstance accept extensive guarantees that go beyond the scope of his/her own knowledge regarding the business.

4. Extensive liability for the insolvency administrator

Closely connected with the previous aspect is the common practice to include in the purchase contracts an extensive personal liability of the insolvency administrator. Such provisions always betray the bidder to be inexperienced and negligent of the insolvency law since the insolvency administrator cannot be held accountable for deficiencies of the business in total or its individual assets. But nonetheless, bidders still include such clauses since many swiftly conducted due diligences (due to the pressure of costs) do not produce sufficiently reliable information and might overlook important aspects. This practice should strictly be excluded when dealing with an insolvency administrator in purchase negotiations.

5. Wrong allocation of purchase price

Another mistake often seen in drafts of purchase contracts submitted to the insolvency administrator is the wrong allocation of the purchase price. Many interested investors are not aware that the insolvency administrator's fee is calculated according to section 63 based on the value of the insolvency estate. However, assets that are encumbered with third party rights are not part of the insolvency estate but nonetheless must be directly returned to the creditor or liquidated and the amount paid to the respective creditor. If the interested investor then chooses an allocation of the purchase price mostly on encumbered assets, the insolvency administrator does not have the chance to increase the insolvency estate and his/her fee respectively. The purchase price in large part will have to be forwarded to the specific creditor instead of the insolvency estate in general in which all creditors including the insolvency administrator participate. Since insolvency administrators will act in their own self-interest, they will favour those offers, which allocate the purchase price as much as possible on assets that are part of the insolvency estate. This is why in some cases the paradoxical situation could be seen that a target or assets were sold to a betting party that did not offer the highest purchase price. The reason was then a skilful purchase price allocation that favoured the insolvency administrator.



T. Foreign Exchange Law

I. Acquisition of shares in German companies by foreign investors

Pursuant to German foreign exchange law, the acquisition of shares in local companies by foreign investors can be restricted with regard to **businesses dealing with weapons, certain types of munitions, cryptographic systems** or high-end satellite systems in order to safeguard **major safety interests** of the Federal Republic of Germany.

Since 24 April 2009 the **Federal Ministry for Economy and Technology** may, in addition, **control** and – in extraordinary cases – **forbid** acquisitions by private individuals or legal entities seated outside the territory of the European Union, Island, Liechtenstein, Norway or Switzerland who (directly or indirectly) acquire **25 % or more** of the voting rights in a German company if the transaction would **endanger public order or safety.**

Pls. see Sec. D/II/2 for more details.

II. Notification duties vis-à-vis the German Federal Bank

German law does **not** provide for any **restrictions** with regard to payments made by German residents to foreigners or foreigners to German residents. However, **the German Federal Bank** needs to be **notified** of payments exceeding certain amounts as well as of claims and liabilities of a certain volume for **statistical** purposes.

The most important notification duties can be summarized as follows:

Notification duty on a **case-by-case basis**	**Monthly** reporting duties
Payments exceeding EUR 12,500 (or adequate consideration)	**Claims and liabilities of residents against foreigners if the sum of claims/ liabilities exceeds EUR 5 million**
↓ if made	↓ if made
by foreigners (or on their account) to residents (incoming payments)	by residents (or on their account) to foreigners (outgoing payments)

The German Federal Bank is subject to a **strict duty of confidentiality** with regard to the notified information.

You can read more here:
www.bundesbank.de

III. Export control by the Federal Office of Economics and Export Control

Generally, goods can be exported from Germany to any destination outside of Germany **without any restrictions.**

However, the export of **certain goods** from Germany to a territory **outside the EU** is **supervised** and may require **prior approval** by the Federal Office of Economics and Export Control *(Bundesamt für Außenwirtschaft; BAFA),* being the central authority for questions relating to export restrictions.

Export restrictions may **arise** from:

Statutory law	EU-law	International agreements	Embargos
In particular ■ Foreign Trade And Payments Act, *(Außenwirtschaftsgesetz, AWG*)* ■ Foreign Trade And Payments Regulation *(Außenwirtschaftsverordnung, AWV**)* ■ War Weapons List*** ■ War Weapons Control Act****	■ In particular the **Council Regulation (EC) No. 1334/2000,** dated 22 June 2000, setting up a Community regime for the control of exports of dual-use items and technology*****		Embargos are generally based on resolutions of the United Nations, OSCE or the Council of the EU and exist in form of ■ **Full** scale embargos; ■ **Partial** embargos or ■ **Weapon** embargos, Embargos may further relate to ■ Specific countries or ■ Specific (groups of) persons

For English translations pls. see:
https://www.bafa.de/EN/Foreign_Trade/Export_Control/Export_Control_and_Academia/export_control_academia_node.html

*** https://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/afk_foreign_trade_and_payments_act.html**

**** https://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/afk_foreign_trade_and_payments_ordinance.pdf?__blob=publicationFile&v=3**

***** https://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/afk_war_weapons_list.html**

****** https://www.gesetze-im-internet.de/englisch_waffg/englisch_waffg.html**

******* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000R1334**

Export restrictions may, *inter alia,* apply to the following **types of goods** or parts thereof and, possibly to **brokering** and **technical support** relating thereto:

Weapons, ammunition, and armament	So called **dual use products***	**Nuclear** materials, plants, and equipment	**Chemicals, microorganisms,** or **toxic materials**
Electronic products and/or **equipment**	Computers	Products and/or equipment relating to **telecommunication** and **information security**	**Sensors and lasers**

*** Dual use products** are products which can be used for civil as well as for military purposes.

You can read more here:
www.bafa.de

IV. Import control by the Federal Office of Economics and Export Control

As a rule, goods can be imported from destinations outside of Germany to Germany **without any restrictions.**

However, the import of **certain goods** from **outside of the EU** to Germany/the EU is **supervised** and may require **prior approval** by the Federal Office of Economics and Export Control *(Bundesamt für Außenwirtschaft; BAFA),* being the central authority for questions relating to import restrictions.

Import restrictions may **arise** from:

Statutory law	EU-law	International agreements

In particular

- Foreign Trade And Payments Act (please see above);
- Foreign Trade And Payments Regulation (please see above);
- As well as laws relating to *(inter alia)*
  - Food
  - Pharmaceutical products
  - Nuclear products and equipment
  - Intellectual property
  - Weapons
  - Drugs
  - Endangered plant and animal species

Import restrictions may, *inter alia*, apply to the following **types of goods** or parts thereof:

Textiles from certain countries*	Iron and steel from certain countries**	Potassium Chloride

* Refers to textiles and cloths with origin in Belarus, North Korea and Uzbekistan.
** Refers to iron and steel with origin in Kazakhstan and the Russian Federation.

You can read more here:
www.bafa.de

Annexes Overview

Annex 1

Article 101 Treaty on the Functioning of the European Union (TFEU)

1. **The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:**

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

   (b) limit or control production, markets, technical development, or investment;

   (c) affect share markets or sources of supply;

   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. **Any agreements or decisions prohibited pursuant to this article shall be automatically void.**

3. **The provisions of paragraph 1 may, however, be declared inapplicable in the case of:**

   - Any agreement or category of agreements between undertakings;
   - Any decision or category of decisions by associations of undertakings;
   - Any concerted practice or category of concerted practices,

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Annex 2

Commercial Power of Representation *(Prokura)*

In order to achieve greater flexibility in the daily business of the company, the managing directors of a GmbH or the board of directors of an AG may grant so-called "commercial power of representation" to authorized signatories *(Prokuristen).* Usually, commercial power of representation is granted to employees in leading positions; being granted commercial power of representation is generally deemed a career move. Holders of commercial power of representation sign by adding **"p. p."** *(per procura)* to their names.

Commercial power of representation covers a **smaller scope** of legal transactions than the power of representation of a managing director (**"MD"**):

Type of legal transaction	MD	Holder of commercial power of representation
Transactions within the ordinary course of business (conclusion/amendment/termination of lease and loan agreements and other contracts relating to the daily business)	✔	✔
Acquisition, sale and encumbrance of real estate on behalf of the company	✔	Only based on an additional power of attorney
Initiation and settlement of litigation on behalf of the company	✔	Only based on an additional power of attorney
Signing of applications with the commercial register	✔	–
Maintenance of the shareholder list	✔	–

The following **forms** of commercial power of representation can be registered with the commercial register:

Commercial Power of Representation *(Prokura)*	Joint Commercial Power of Representation *(Prokura)*	
	Together with another Prokurist	**Together with a managing director**
	Or a **mixed form** thereof (Together with another Prokurist or a managing director)	

As in the case of managing directors, **restrictions of commercial power of representation** (eg restriction of the commercial power of representation to legal transactions up to a certain value) **cannot be registered with the commercial register** and are, therefore, not binding vis-à-vis third parties. It is however possible to subject the holder of commercial power of representation to **internal restrictions** with legal effect between the holder of commercial power of representation and the company; in case of a breach thereof the legal transaction performed by the holder of commercial power of representation is legally valid towards third parties (unless they know about the internal restrictions) but the holder of commercial power of representation can be held liable for damages.

Annex 3

Duties and liabilities of managing directors

Apart from being responsible for the overall management of the company, managing directors, *inter alia*, have the following duties:

General duties

Prepare/convene **shareholders' meetings**	Provide **information** relating to the company to shareholders on demand.	Maintain/update the **shareholders' list**

Duties relating to finances of the company

Set up proper **accounts** in accordance with German GAAP	Prepare the **annual financial statements**	Ensure that the company files **tax returns** promptly and correctly

Duties relating to the protection of the share capital of the company

Confirm that the **initial contributions** of the shareholders were made correctly and are at the disposition of the company	Undertake all measures necessary to **protect the share capital** and prevent its payback to the shareholders	Call a shareholders' meeting in case the equity falls below an amount corresponding to **50 % of the share capital**

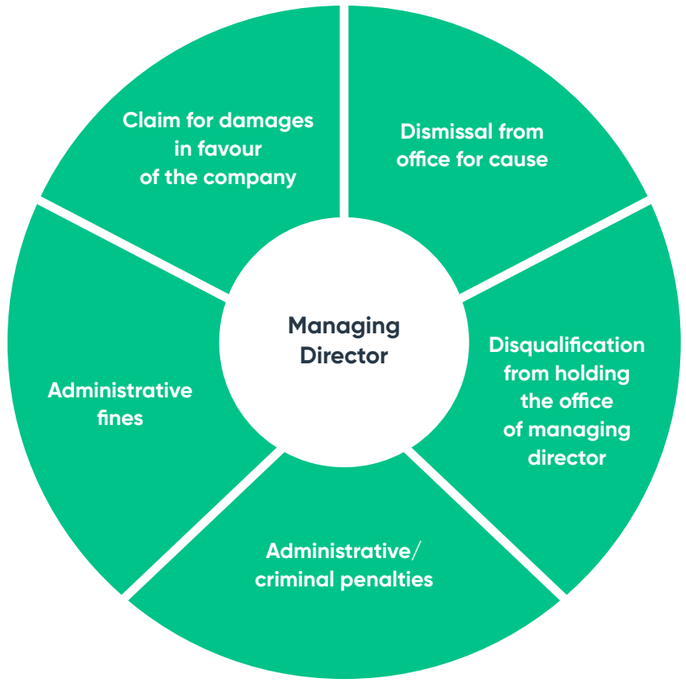
Joint Commercial Power of Representation *(Prokura)*

Make sure that a petition **for the opening of insolvency proceedings** in case of over-indebtedness or insolvency is filed promptly and correctly in accordance with statutory law	**Prevent certain payments** in case of over-indebtedness or insolvency of the company

Annex 3

Liability and sanctions

A breach of the aforementioned duties of managing directors may give rise to a **claim for damages** of the company against the managing director(s) and may justify a **dismissal** of the managing director(s) for cause. In addition, non-compliance with certain duties may lead to further sanctions, eg authorize the courts or governmental authorities to impose fines in order to enforce compliance with statutory law. They may also provide for **administrative and/or criminal penalties** or entitle shareholders and/or third parties (in particular: creditors of the company) to claims for damages against the managing director(s). Furthermore, a conviction for certain crimes relating to breaches of the duties of the managing directors (eg the duties relating to the insolvency of the company, fraud or embezzlement) leads to a **disqualification** from holding the office of a managing director in the future.



Setting up/acquiring a (shelf) limited liability company (GmbH) in Germany

I. Overview

The **formation** of a limited liability company requires **notarization by a German notary.** The legal existence of the GmbH starts with its r**egistration with the commercial register.** The steps necessary for the **setting up** of a GmbH can be summarized as follows:

Preparation (1 day – 2 weeks)*	Notarization (1 – 1.5 hours)	Application (15 min. – 2 weeks)*	Registration (Up to 3 weeks)
■ Execution of the PoA ■ Preparation of documents relating to the founding shareholders ■ Drafting of acquisition documents.	■ Incorporation deed ■ AoA.	■ For filing the application: ▪ At least ¼ of the contribution for each share, but at least 50 % of the share capital in the aggregate, must be paid up. ▪ Contributions in kind must be **fully** paid up.	■ Start of the legal existence of the GmbH

*Depending on the time needed to provide original certified/apostilled documents (eg secretary of certificate, letter of good standing, application form etc.).

PoA: Power of attorney; **AoA:** Articles of Association.

The **acquisition** of shares in a shelf company also requires **notarization by a German notary.** As the shelf company already legally exists it is **operative immediately,** provided that the share purchase and transfer agreement does not contain a clause pursuant to which the share transfer is subject to the payment of the purchase price to the shelf company provider. Please note, however, that the (new) shareholders' rights (in particular: the voting rights) can be exercised only after the new **shareholder list** is filed with the commercial register (but usually the shelf company provider grants a power of attorney for such interim period). The steps necessary for **acquiring a shelf company** can be summarized as follows:

Preparation (1 day – 2 weeks)*	Notarization (1 – 1.5 hours)	Application (15 min. – 2 weeks)*	Registration (Up to 3 weeks)
■ Execution of the PoA ■ Preparation of documents relating to the new shareholders ■ Drafting of acquisition documents.	■ Shareholders' resolution ■ New AoA ■ SPA.	■ New AoA ■ New MD(s) ■ New shareholders list.	

*Depending on the time needed to provide original certified/apostilled documents (eg secretary of certificate, letter of good standing, application form etc.).

PoA: Power of attorney; **AoA:** Articles of Association; **MD:** Managing director; **SPA:** Share purchase and transfer agreement.

II. Required information

Name	The name must (i) **not be misleading,** (ii) be **distinctive** from other companies and (iii) contain the designation **"Gesellschaft mit beschränkter Haftung"** or **"GmbH".** If it is intended to use the company name as a **trademark or domain name** at the same time, a (trademark and domain) research may be recommended and respective application filings. The use of the word "Germany" as an element in the chosen name requires the intention to conduct business in the whole of Germany and should also be reflected in the business object's clause (see below).
Seat	The seat of the company can be **freely determined** within Germany. When choosing the seat of the company, **tax issues** (in particular: the municipal trade tax rates) may be considered.
Business object	The Articles of Association must contain a **description of the company's business and area of activity** (eg "the business object of the company is the purchase and sale of (...) and the performance of services related thereto"). The statutory business object limits the internal power of the managing director(s) who can be held liable internally (vis-à-vis the company) in case of a performance of business transactions which are beyond the statutory business object. The statutory business object does, however, in general not limit the (external) power of representation of the managing director(s) towards third parties.
Business address	Each company is obliged to have a German business address (not necessarily identical with the statutory seat) which is registered with the commercial register.
Receiving agent	It is possible (not mandatory) to register a so-called receiving agent, ie a person (private individual or legal entity) who is entitled to receive documents and legal statements on behalf of the company.
Managing director(s)	A GmbH can have **one or more private individuals** (no legal entities) as managing directors. The following information must be provided to the commercial register with regard to managing directors: Name, (private) address, date of birth (however, the address will not be fully published in the commercial register, only the city of residence).
Power of representation	If the company has only one managing director, the managing director automatically represents the company alone. If the company has two or more managing directors, they can be granted either **sole or joint power of representation.** In addition, managing directors can be **released from the so-called "restriction of self-contracting and multi-representation"** (preventing a managing director from entering into legal transactions in the name of the company with himself in his own name or as representative of a third party). A release from the restrictions of contracting both in the name of the company and in the name of a third party in one and the same transaction may enable managing directors to act on behalf of several companies of the same group.
Registered share capital	The registered share capital must amount to a **minimum of EUR 25,000.** When determining the registered share capital it should be noted that the share capital is subject to **specific protection** under German law. The share capital can be paid up either by contributions **in cash** or contributions **in kind.** If contributions in kind (eg patents, real property or a business) are made, the contributed items and the value they represent must be assessed by an auditor and stated in the Articles of Association.
Transparency Register	The notification of the ultimate beneficial owners must be filed online via **www.transparenzregister.de** and include information of the beneficial owner, namely the given and family name, date of birth, place of residence, nationality as well as nature and extent of his/her economic interest; there are, however, exceptions to the obligation to notify, which must be examined on a case-by-case basis.

Annex 4

Shares	The shares must have a nominal amount of **at least EUR 1** and be **divisible by 1.** Each shareholder can take over one or several shares.
Power of representation	A GmbH can be set up by **one or several (individual or corporate) shareholders.** The following information is required relating to the shareholders: Name, (private/business) address, date of birth (if private individuals). If the shareholders are foreign companies, a (certified and apostilled) **extract from the commercial register** (or similar documentation such as a secretary certificate and a letter of good standing) confirming the legal existence of the company and the power of representation of its directors may be required.
Fiscal year	The fiscal year must refer to a fixed period (eg the calendar year or December 1 to November 30 of the following calendar year etc.) as German law does not allow for a flexible calendar year (such as the last weekend in December to the last weekend in December of the following calendar year).

The data **highlighted** above is **registered with the commercial register** or the **transparency register** and **publicly available**. The shareholders of the company must be reflected in the **shareholder list** which needs to be filed with the commercial register as well.

III. To Dos/Required Documents

If a new GmbH is set up the following standard documentation needs to be executed:

Document	Remarks	Form	Involved Persons
Power of attorney ("PoA")	Required only if the founders (or in case of corporations, their statutory representatives) cannot appear personally before a German notary.	■ Certified ■ Apostilled*.	■ Founding shareholder(s) ■ Foreign notary/ German Embassy/German Consulate ■ [Authority issuing the apostil]*.
Certificates	In addition to the power of attorney the following documents may be required (if the founding shareholder(s) is/are (a) corporation/s): ■ **Secretary certificate(s)** of the founding shareholder(s) confirming that the person(s) signing the power of attorney on behalf of the founding shareholder(s) has/have sufficient power of representation. ■ **Letter of good standing** confirming that the founding shareholder(s) has/have been duly incorporated and do validly exist(s).	■ Certified ■ Apostilled*.	■ Founding shareholder(s) ■ Company secretary ■ Foreign notary/ German Embassy/German Consulate ■ [Authority issuing the apostil] ■ Authority issuing the letter of good standing.
Incorporation deed	The incorporation deed includes the resolution of the founding shareholder(s) to adopt the Articles of Association and to appoint the managing director(s) of the company. It further creates the obligation of the shareholders vis-à-vis the company to pay in their contributions. If shareholders' contributions are made in kind further documentation (eg valuation report) is necessary.	Notarised.	■ German notary ■ Founding shareholder(s.)

Annex 4

Document	Remarks	Form	Involved Persons
Articles of Association	Include *inter alia* the company name and business object.	Notarised.	■ German notary ■ Founding shareholder(s.)
Shareholder list	Includes the names and addresses of the shareholders and the (number of) shares taken over by them.	Signed and stamped by the German notary.	■ German notary
Application to the commercial register	To be signed by the new managing director(s) and filed with the commercial register by the German notary.	■ Certified ■ Apostilled*.	■ New managing director(s) ■ German notary ■ Foreign notary/ German Embassy/ German Consulate ■ [Authority issuing the apostil]*.
Instruction letter	The new managing director(s) need/s to sign a so-called "instruction letter" (issued by a German notary or lawyer) informing them about their duty to disclose certain information to the commercial register if they cannot appear personally before a German notary.	■ In writing.	■ German notary or lawyer ■ New managing director(s).

The documents set out above must be filed with the commercial register and are **publicly available.** Eventually, **further documents** (such as eg a shareholders' agreement, an assessment of the value of contributions in kind made by the founding shareholder(s) etc.) may be required.

If a **shelf company** is acquired the following standard documentation needs to be executed:

Document	Remarks	Form	Involved Persons
Power of attorney ("PoA")	Required if the new shareholder(s) (or in case of corporations, their statutory representatives) cannot appear personally before a German notary.	■ In writing.	■ Founding shareholder(s); ■ Foreign notary/ German Embassy/German Consulate; ■ [Authority issuing the apostil]*.
Certificates	In addition to the power of attorney the following documents may be required (if the founding shareholder(s) is/are (a) corporation/s): ■ **Secretary certificate(s)** of the new shareholder(s) confirming that the person(s) signing the power of attorney on behalf of the founding shareholder(s) has/have sufficient power of representation. ■ **Letter of good standing** confirming that the new shareholder(s) has/have been duly incorporated and validly exist(s).	■ Certified ■ Apostilled*.	■ New shareholder(s) ■ Company secretary ■ Foreign notary/ German Embassy/German Consulate ■ [Foreign authority issuing the apostil] ■ Foreign authority issuing the letter of good standing.

Annex 4

If a **shelf company** is acquired the following standard documentation needs to be executed:

Document	Remarks	Form	Involved Persons
Shareholders' resolution	The existing managing director(s) is/are exchanged by the new managing director(s) and the Articles of Association are amended by the shareholders' resolution.	Notarised.	■ German notary ■ Shelf company provider.
New Articles of Association	*Inter alia* provide a new name and business object.	Notarised.	■ German notary ■ New shareholder(s).
Share Purchase and Transfer Agreement	Contains standard reps and warranties of the shelf company provider (ownership of title, free transferability of the shares, absence of pledges and encumbrances, guarantee that the company has not taken up any commercial business and that the share capital was paid in and is still at the dispo-sition of the company).	Notarised.	■ German notary ■ Shelf company provider ■ New shareholder(s).
Shareholder list	Lists the new shareholder(s)	Signed and stamped by the German notary.	■ German notary
Application to the commercial register	To be signed by the new managing director(s) and filed with the commercial register by the German notary.	■ Certified ■ Apostilled*.	■ New managing director(s) ■ German notary ■ Foreign notary/ German Embassy/ German Consulate ■ [Authority issuing the apostil]*.
Instruction letter	The new managing director(s) need/s to sign a so-called "instruction letter" (issued by a German notary or lawyer) informing them about their duty to disclose certain information to the commercial register if they cannot appear personally before a German notary.	In writing.	■ German notary or lawyer ■ New managing director(s).

The documents **highlighted** above must be filed with the commercial register and are **publicly available.**

Annex 5

Duties and liabilities of the Board of Directors

Apart from being responsible for conducting the company's business in the best interest of the company, the board of directors and each of its board members have, *inter alia*, the following duties:

General duties

- Prepare/execute resolutions of the **General Assembly**
- Provide **information,** report to the supervisory board and establish **a monitoring system**
- Maintain/update the **shareholders' list**

Duties relating to finances of the company

- Set up proper **accounts** in accordance with German GAAP/IFRS
- Prepare the **annual financial statements**
- Ensure that the company files **tax returns** promptly and correctly

Duties relating to the protection of the share capital of the company

- Confirm that the **initial contributions** of the shareholders were made correctly and are at the disposition of the company
- Undertake all measures necessary to **protect the share capital** and prevent its payback to the shareholders
- Call a shareholders' meeting in case **50 % of the share capital is lost**

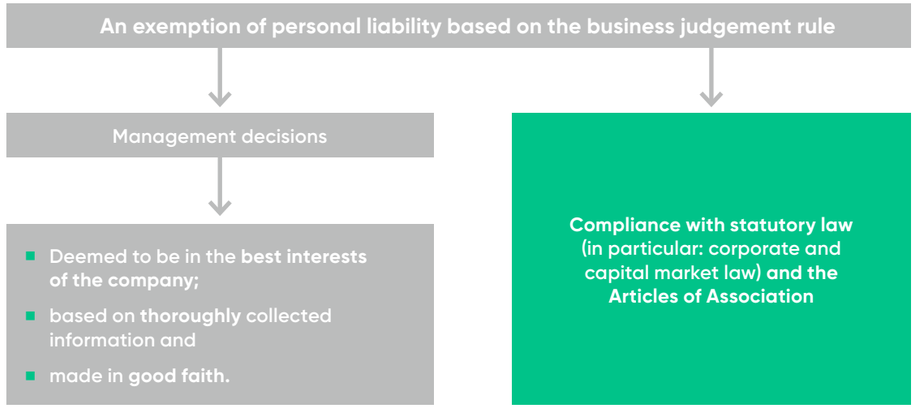
Duties in case of insolvency of the company

- Make sure that an **application for the opening of insolvency proceedings** in case of over-indebtedness or insolvency is filed promptly and correctly in accordance with statutory law
- **Prevent certain payments** in case of over-indebtedness or insolvency of the company

Annex 5

Business judgement rule

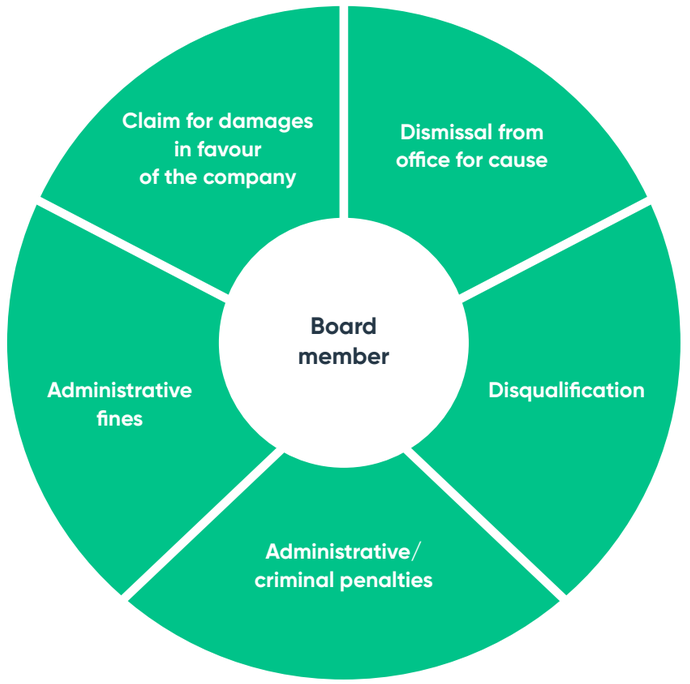
German corporate law provides for a principle comparable to the Anglo-American concept of the business judgement rule based on which the personal liability of board members is excluded with regard to management decisions if certain conditions are met:



Annex 5

Liability and sanctions

A breach of the aforementioned duties of board members may give rise to a **claim for damages** of the company against the board member and may justify a **dismissal** of the board member for cause. In addition, non-compliance with certain duties may lead to further sanctions, eg authorize the courts or governmental authorities to impose **fines** in order to enforce compliance with statutory law. They may also provide for **administrative and/or criminal penalties.** Furthermore, a conviction for certain crimes relating to breaches of the duties of the board members (eg the duties relating to the insolvency of the company, fraud or embezzlement) leads to a **disqualification** from holding the office of a director in the future.



Annex 6

Duties and liabilities of members of the Supervisory Board

The main duty of the supervisory board and each of its members is the supervision and control of the management activities of the board of directors:

Supervision and control

If the conduct of business as such as well as individual management decisions comply with legal requirements

If the business of the company is managed in an appropriate and commercially reasonable way

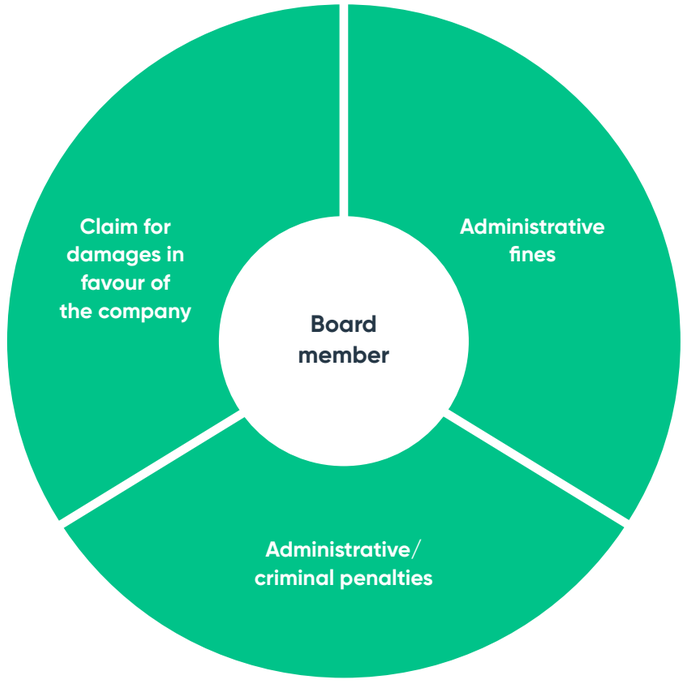
Includes supervision and control of decisions and activities of the Board of Directors in the **past and present** and a **preventive** control of future activities

Duties may be **intensified** in situations where the company is confronted with **financial, commercial and/or legal problems**

Annex 6

Liability and sanctions

A breach of the aforementioned duties of members of the supervisory board may give rise to a **claim for damages** of the company against the supervisory board member. In addition, non-compliance with certain duties may lead to further sanctions, eg authorize the courts or governmental authorities to impose **fines** in order to enforce compliance with statutory law. They may also provide for **administrative and/or criminal penalties.**



Annex 7

Limitation of director remuneration in stock corporations

Apart from limiting directors' remuneration as set out in **Sec. E/III/2** of the main text, the law has further implications as follows:

Increased rights and responsibilities of the Supervisory Board

Supervisory Board/its members:

- Are no longer allowed to delegate the decision on the directors' remuneration to lower-ranking committees (eg compensation committees).
- Have more flexibility regarding the reduction of (variable or fixed) remuneration (and pension entitlements) if the company faces a commercially difficult period.
- Are (personally) liable for damages towards the shareholders if directors' compensation is inflated.

In addition, a more comprehensive disclosure of the directos' compensation in the annual financial statements (including any arrangements and payments made in connection with a director's exit) is required.

D&O insurance

Statutory law dictates that D&O insurances acquired by listed companies for their directors shall provide for a deductible payable by the directors (amounting to at least 10 % of the damages but to no more than 1.5 times of the directors' annual fixed remuneration).

New right of shareholders to (dis)approve directors' remuneration

Shareholders in listed stock corporations are granted the right to approve or disapprove the remuneration package proposed by the Supervisory Board. Such approval/disapproval is, however, not binding and does not limit the powers of the Supervisory Board.

Cooling-off period

The practice of directors becoming members of the Supervisory Board immediately after termination of their office as directors is prevented by introducing a cooling-off period of **two years.** The cooling-off period helps to avoid conflicts of interest. It also allows the discovery and the review of potential breaches of duties and omissions of former directors during the term of their office.

Annex 8

Setting up/acquiring a (shelf) stock corporation (AG) in Germany

I. Overview

The **formation** of a stock corporation requires **notarization at a German notary.** The legal existence of the AG starts with its r**egistration with the commercial register.** The steps necessary for the **setting up** of a AG can be summarized as follows:

Preparation (1 day – 2 weeks)*	Notarization (1 – 1.5 hours)	Application (15 min. – 2 weeks)*	Registration (Up to 3 weeks)
■ Execution of the PoA ■ Preparation of documents relating to the founding shareholders ■ Drafting of incorporation documents.	■ Incorporation deed ■ AoA.	■ For filing the application the contributions of the shareholders must have been made in full.	■ Start of the legal existence of the AG

*Depending on the time needed to provide original certified/apostilled documents (eg secretary of certificate, letter of good standing, application form etc.).

PoA: Power of attorney; **AoA:** Articles of Association.

The acquisition of shares in a shelf company does not require notarization. However, the **shareholders' resolution** relating to the amendment of the Articles of Association is subject to **notarization.** As the shelf company already legally exists it is **operative immediately** provided that the share purchase and transfer agreement does not contain a clause pursuant to which the share transfer is subject to the payment of the purchase price. The steps necessary for **acquiring a shelf company** can be summarized as follows:

Preparation (1 day – 2 weeks)*	Notarization (1 – 1.5 hours)	Application (15 min. – 2 weeks)*	Registration (Up to 3 weeks)
■ Execution of the PoA ■ Preparation of documents relating to the new shareholders ■ Drafting of acquisition documents.	■ Shareholders' resolution ■ New AoA ■ SPA (in writing).	■ New AoA ■ New members of the Board of Directors ■ New members of the Supervisory Board.	

*Depending on the time needed to provide original certified/apostilled documents (eg secretary of certificate, letter of good standing, application form etc.).

PoA: Power of attorney; **AoA:** Articles of Association; **SPA:** Share purchase and transfer agreement

II. Required information

Name	The name must (i) **not be misleading,** (ii) be **distinctive** from other companies and (iii) contain the designation **"Aktiengesellschaft"** or **"AG"**. If it is intended to use the company name as a **trademark or domain name** at the same time, (trademark and domain) research may be recommended and respective application filings. The use of the word "Germany" as an element in the chosen name requires the intention to conduct business in the whole of Germany and should also be reflected in the business object's clause (see below).
Seat	The seat of the company can be **freely determined** within Germany. When choosing the seat of the company, **tax issues** (in particular: the municipal trade tax rates) may be considered.
Business object	The Articles of Association must contain a **description of the company's business and area of activity** (eg "the business object of the company is the purchase and sale of (...) and the performance of services related thereto").
Business address	Each company is obliged to have a German business address (not necessarily identical with the statutory seat) which is registered with the commercial register.
Receiving agent	It is possible (not mandatory) to register a so-called receiving agent, ie a person (private individual or legal entity) who is entitled to receive documents and legal statements on behalf of the company.
Members of the Supervisory Board	An AG must have **at least three private individuals** (no legal entities) as members of the Supervisory Board. The first members of the Supervisory Board can be appointed for a term until the end of the first (short) business year. The following information must be provided to the commercial register with regard to members of the Supervisory Board: name; (private) address; date of birth; profession.
Auditors	The founding shareholders must appoint an auditor (private individual or legal entity) who must be qualified as a certified public accountant *(Wirtschaftsprüfer).*
Members of the Board of Directors	An AG can have **one or more private individuals** (no legal entities) as members of the board of directors. The same information to be provided for members of the supervisory board must also be provided with regard to each member of the board of directors.
Power of representation	If the company only has one director, the director automatically represents the company alone. If the company has two or more directors, they can be granted either **sole or joint power of representation.** In addition, directors can, to some extent, be **released from the so-called "restriction of self-contracting and multi-representation"** (preventing a director from entering into legal transactions in the name of the company with him/her/itself in his/her/its own name or as representative of a third party). A release from the restrictions of contracting both in the name of the company and in the name of a third party in one and the same transaction may enable directors to act on behalf of several companies of the same group. The release from the restriction to act in his/her/its own name for himself/herself/itself and for the company cannot be granted.
Registered share capital	The registered share capital must amount to a **minimum of EUR 50,000.** When determining the registered share capital it should be noted that the share capital is subject to **specific protection** under German law. The share capital can be paid up either by contributions **in cash** or contributions **in kind.** If contributions in kind (eg patents, real property or a business) are made, the contributed items and the value they represent must be assessed by an auditor and stated in the Articles of Association.
Shares	Shares can be issued either as **par value shares** (with a nominal amount) or as **non par value shares** (without a nominal amount) – the two forms of shares cannot be mixed. The nominal value of shares (in case of par value shares)/the value attributed to each share (in case of non par value shares) must be **at least EUR 1.** Shares may further be issued as **registered shares or bearer shares** (both forms can be combined). The company can (but does not mandatorily have to) issue **share certificates.**

Founding shareholder(s)	An AG can be set up by **one or several shareholders** who must be identified by their names and addresses. If the founding shareholders are foreign companies, a (certified and apostilled) **extract from the commercial register** (or similar documentation such as eg a secretary certificate and a letter of good standing) confirming the legal existence of the company and the power of representation of its directors may be required.
Fiscal year	The fiscal year must refer to a **fixed period** (eg the calendar year or December 1 to November 30 of the following calendar year etc.) as German law does not allow for a flexible calendar year (such as eg the last weekend in December to the last weekend in December of the following calendar year).
Transparency Register	The notification of the ultimate beneficial owners must be filed online via **www.transparenzregister.de** and includes information of the beneficial owner, namely the given and family name, date of birth, place of residence, nationality as well as nature and extent of his/her/its economic interest; there are, however, exceptions to the obligation to notify, which must be examined on a case-by-case basis.

The data **highlighted** above is **registered with the commercial register** or the **transparency register** and is **publicly available.**

III. To Dos/Required Documents

If a new AG is **set up,** the following standard documentation needs to be executed:

Document	Remarks	Form	Involved Persons
Power of attorney ("PoA")	Required only if the founders (or in case of corporations, their statutory representatives) cannot appear personally before a German notary. **In addition** to the power of attorney the following documents may be required (if the founding shareholder(s) is/are (a) corporation(s): ■ **Secretary certificate(s)** of the founding shareholder(s) confirming that the person(s) signing the power of attorney on behalf of the founding share-holder(s) has/have sufficient power of representation. ■ **Letter of good standing** confirming that the founding shareholder(s) has/have been duly incorporated and do validly exist(s).	■ Certified ■ Apostilled.	■ Founding shareholder(s) ■ Foreign notary/ German Embassy/German Consulate ■ [Authority issuing the apostil].
Incorporation deed	The incorporation deed usually includes the resolution of the founding shareholder(s) to adopt the Articles of Association and to appoint the members of the Supervisory Board. It further creates the obligation of the shareholders vis-à-vis the company to pay up their contributions. If shareholders' contributions are made in kind, further documentation (eg valuation report) is necessary.	Notarised.	■ German notary ■ Founding shareholder(s).
[Appointment of first members of Supervisory Board]	Usually part of the incorporation deed.	Notarised.	■ Founding shareholders/ their representative(s) based on PoA.
[Appointment of the first auditor]	Usually part of the incorporation deed.	Notarised.	■ Founding shareholders/ their representative(s) based on PoA.
Articles of Association (AoA)	The AoA must contain a **catalogue of business transactions subject to the approval of the supervisory board.**	Notarised.	■ German notary.
Appointment of first members of Board of Directors		In writing.	■ Supervisory board.

Document	Remarks	Form	Involved Persons
Notification	Shareholders must notify the company if they have taken over **more than 25 %** of the shares in the company.	In writing.	■ Founding shareholders.
Application to the commercial register	To be signed by the director(s) and filed with the commercial register by the German notary.	■ Certified ■ Apostilled.	■ Founding shareholders members of supervisory board and board of directors ■ German notary ■ Foreign notary/German Embassy/German Consulate ■ [Authority issuing the apostil].

The documents set out above must be filed with the commercial register and are **publicly available.** Eventually, **further documents** (such as eg a shareholders' agreement, an assessment of the value of contributions made by the founding shareholder(s) in case of contributions in kind etc.) are required.

Annex 8

If a **shelf company** is acquired, the following standard documentation needs to be executed:

Document	Remarks	Form	Involved Persons
Power of attorney ("PoA") to amend the Articles of Association	Required if: ■ the shareholders' resolution relating to the amendment of the Articles of Association is passed by the new shareholder(s) (and not by the shelf company provider) and ■ the new shareholder(s) (or in case of corporations, their statutory representatives) cannot appear personally before a German notary.	In writing.	■ New shareholder(s)
Shareholders' resolution	By the shareholders' resolution the members of the supervisory board are exchanged, a new auditor is appointed and the Articles of Association are amended.	Notarised.	■ German notary ■ Shelf company provider or new shareolder(s).
New Articles of Association	Providing, *inter alia*, a new name and business object.	Notarised.	■ German notary
Share Purchase and Transfer Agreement	Contains standard reps and warranties of the shelf company provider (ownership of title, free transferability of the shares, absence of pledges and encumbrances, guarantee that the company has not taken up any commercial business and that the share capital was paid in and is still at the dispo-sition of the company).	In writing.	■ Shelf company provider ■ New shareholder(s).
Change of members of Board of Direcotors		In writing.	■ Supervisory board.
Notification	Shareholders must notify the company if they acquire **more than 25 %** of the shares in the company.	In writing.	■ New shareholders.
Application to the commercial register	To be signed by the new director(s) and filed with the commercial register by the German notary.	■ Certified ■ [Apostilled]*.	■ New member(s) of the board of directors ■ German notary ■ Foreign notary/German Embassy/German Consulate ■ [Authority issuing the apostil].

The documents **highlighted** above must be filed with the commercial register and are **publicly available.**

Annex 9

Mandatory indications on business letters (including e-mails) and internet sites

Pursuant to statutory law, the following data must be reflected in business letters (including any non-oral messages relating to business activities such as, in particular e-mails and faxes) which are addressed to one specific third party or a number of specific third parties:

GmbH and AG	1. Full company name (as registered with the commercial register) 2. Legal form of the company 3. Seat of the company 4. Competent local court (commercial register) and company number 5. Name(s) of the managing director(s) (GmbH)/members of the Board of Directors and identification of the chairman of the Board of Directors (AG) 6. Name of the chairman of the advisory board (GmbH – if applicable)/of the Supervisory Board (AG).
GmbH & Co. KG	7. Full company name of the limited partnership 8. Legal form of the limited partnership 9. Seat of the limited partnership 10. Competent local court (commercial register) and company number of the limited partnership 11. Legal form of the general partner 12. Seat of the general partner 13. Competent local court (commercial register) and company number of the general partner.
Autonomous branch (if the main company is a limited liability company)	14. Competent local court (commercial register) and company number of the German branch 15. Full company name of the main company 16. Legal form of the main company 17. Seat of the main company 18. Competent local court (commercial register) and company number of the main company (if available) 19. Name(s) of the managing director(s) of the main company 20. Name of the chairman of the advisory board of the main company (if applicable) 21. Indication that the branch is in liquidation and names of the liquidators (if applicable).

In case of non-compliance a **fine up to EUR 5,000** may be imposed by the competent local court. Non-compliance may further lead to **claims for damages of third parties.**

The following data needs to be published on the **internet site** (at least in the imprint) of **corporations** (eg a GmbH):

22. **Full company name (as registered with the commercial register)**
23. **Legal form of the company**
24. **Seat of the company**
25. **Business address of the company**
26. **Competent local court (commercial register) and company number**
27. **Name(s) of the managing director(s)**
28. **Indication that the company is in liquidation (if applicable).**

In case of non-compliance a **fine up to EUR 50,000** may be imposed. Non-compliance may further lead to **claims for damages of third parties.**

Annex 10

Overview *Deutsche Börse* stock market

I. Markets, listing segments and listing rules

In Europe, there are two legally defined ways to access the capital market:

EU-regulated markets	**Markets regulated by the stock exchanges themselves**
EU-regulated markets are, **to a large extent, governed by:** ■ **EU-Directives** (implemented into German national law) and ■ **EU-Regulations** (directly applicable).	Markets in the responsibility of the stock exchanges are **governed by EU-law only to some extent**

Via *Deutsche Börse,* issuers and investors can have access to **both markets:**

"Regulated Market"	**"Regulate Unofficial Market"** (Open Market)
Comprising the **listing segments:** ■ **Prime Standard** ■ **General Standard.**	Comprising the listing **segments:** ■ **Basic Board** ■ **Quotation Board** ■ **Scale.**
Listing rules are mainly governed by: ■ **EU**-law (pls. see above) ■ German Stock **Exchange Act** *(Börsengesetz)* ■ **Stock Exchange Admission Regulation** *(Börsenzulassungsverordnung)* ■ German **Securities Trading Act** *(Wertpapierhandelsgesetz)* ■ German **Securities Trading Reporting and Insider List Ordinance** *(Wertpapierhandels- und Insiderverzeichnisordnung)* ■ **Exchange Rule For The Frankfurt Stock Exchange** *(Börsenordnung der Frankfurter Wertpapierbörse)* ■ German **Securities Prospectus Act** *(Wertpapierprospektgesetz).*	Listing rules are mainly governed by: ■ **EU**-law (to some extent; pls. see above) ■ German **Stock Exchange Act** *(Börsengesetz)* ■ German **Securities Trading Act** *(Wertpapierhandelsgesetz;* only with regard to insider trading and market abuse) ■ **General Terms and Conditions For The Regulated Unofficial Market** at Frankfurt Stock Exchange *(Allgemeine Geschäftsbedingungan fur den Freiverkehr an der Frankfurter Wertpapierbörse)* ■ German **Securities Prospectus Act** *(Wertpapierprospektgesetz;* only in case of public offering).

Annex 10

II. Transaction types

When accessing the capital market, companies can choose between different types of transactions (irrespective of the market segment they intend to select). For some transaction types a **prospectus** is required.

Initial Public Offering (IPO)	Private Placement (PP)	Admission/inclusion without public offering
In an IPO, shares are offered to private and/or institutional investors. When a company offers shares for the first time, the offer is called an IPO. Once a company is listed and intends to make a further public offering, the transaction is called a seasoned equity offering (SEO). In case of an IPO, an approved prospectus is required by the Federal Financial SUpervisory Authority *(Bundesanstalt für Finanzaufsicht, BaFin).*	A PP involves offering shares to a selected base of institutional investors. In case of a PP, the need for an approved prospectus is dependant on the intended market segment (Regulated Market or Regulated Unofficial Market).	In case of no public offering, the need for an approved prospectus also depends on the intended market segment (Regulated Market or Regulated Unofficial Market).

The law applicable to the **prospectus** (mainly: the EU-Prospectus Regulation and further EU-Regulations as well as the German Securities Prospectus Act) provides for a **minimum content** of the prospectus, **language** requirements, requirements relating to the **accounting standard** of issuers applying to the Regulated Market and the Regulated Unofficial Market.

The **issuer data form** is not an offering circular but simply an **information paper** on the issuer to be provided to Deutsche Börse; unlike the prospectus it is **not published.**

Your can read more here:
https://www.deutsche-boerse.com/dbg-en/our-company/deutsche-boerse-group/business-areas

Annex 11

Overview of various forms of Mezzanine Capital

I. General information

The various forms of Mezzanine Capital differ with regard to:

- Duration of the capital commitment
- Loss-sharing and
- Conditions of compensation.

The following overview can be given with regard to potential forms of Mezzanine Capital. With regard to their classification as debt or equity in the balance sheet, variations may occur due to different accounting rules.

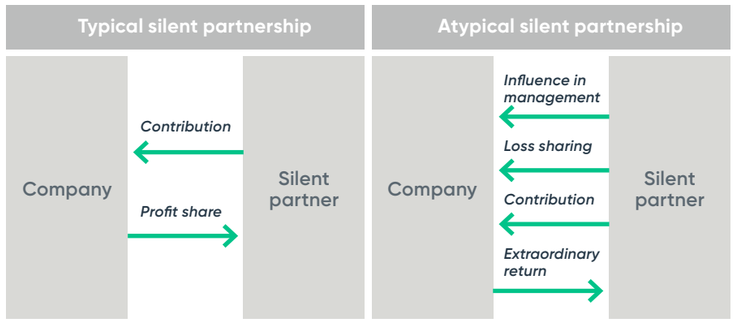
Form	Duration in years	Loss sharing	Compen-sation	Balance sheet		Taxable debt
Subordinate Loan	3 – 10	No but subordination	Fixed	In writing.		Yes
Silent Partnership (typical)	5 – 10	No but subordination	Fixed and variable (depending on profit)	Debt	or equity, (depending on the agreement)	Yes
Participation right *(Genuss-schein)*	5 – 10	No but subordination	Fixed or variable	Generally debt	Equity in case of subordina-tion and loss sharing	Yes, if no sharing of liquidation profits
Convertible bonds	5 – 10	Before conversion: no subordination but after conversion: yes	Fixed and conversion rights	Equity after conversion		Before conversion
Silent Partnership (atypical)	5 – 10	Yes	Fixed and/ or variable (depending on profit)	Equity		No

Annex 11

II. Example: silent partnership

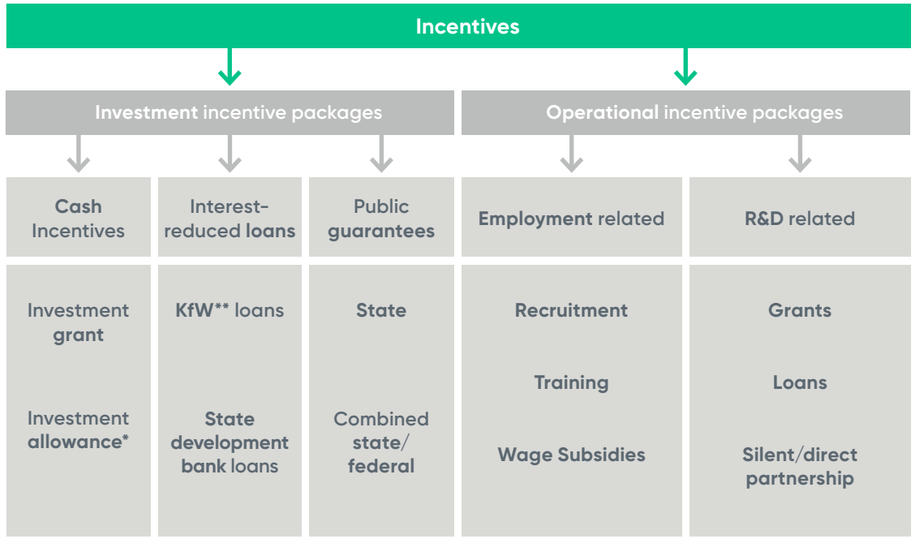
One of the standard forms of Mezzanine Capital used in Germany is the **silent partnership** which is frequently used in the context of public funding.

In a silent partnership the silent partner is granted a **profit share** in exchange for a **capital contribution.** Depending on the conditions of the silent partnership agreement with regard to the silent partner's influence in the management and risk exposure, the silent partnership can be designed as a **typical** or as an **atypical** silent partnership:



Annex 12

Overview Incentives



*Only available for investments in **Eastern Germany.**

The **KfW banking group *(Kreditanstalt für Wiederaufbau)* is the nationally operating bank of the Federal Republic of Germany offering a number of different financing tools (eg promotional loan programs, mezzanine financing and private equity). The KfW is usually contacted via the applicant's private bank.

You can read more here:
https://www.kfw.de/kfw.de-2.html

Annex 13

Overview of tax agreements entered into between Germany and the United States

Date	Title of Agreement
2 December 2019	Joint declaration by the responsible authority of the Federal Republic of Germany and the responsible authority of the United States of America on the implementation of the spontaneous exchange of country-specific reports for financial years beginning in 2018
16 August 2018	Joint declaration by the responsible authority of the Federal Republic of Germany and the responsible authority of the United States of America on the implementation of the spontaneous exchange of country-specific reports for financial years beginning in 2016
31 May 2013	Declaration of Understanding regarding the agreement between the United States of America and the Federal Republic of Germany to international tax compliance and with respect to the United States information and reporting provisions commonly known as the Foreign Account Tax Compliance Act
19 March 2012	Agreement between the Competent Authorities of the United States and the Federal Republic of Germany, regarding the eligibility of certain pension arrangements for benefits under Article 10(3)(b) of the Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes, together with a related Protocol signed on 29 August 1989, and amended by the Protocol signed on 1 June 2006
12 December 2009	Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation as amended by the Protocol of June 1, 2006; Art. XIX Para. 1 Friendship, Commercial and Consular Agreement between the Federal Republic of Germany and the United States of America dated 8 December 1923; Memorandum of Understanding relating to the taxation of salary of the local staff in consular representations
8 December 2008	Memorandum of Understanding between the Competent Authorities of the Federal Republic of Germany and the United States of America relating to the application of arbitration
4 June 2008	Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to certain other Taxes

Annex 13

Date	Title of Agreement
1 June 2006	Joint Declaration by the Federal Republic of Germany and the United States of America on the Occasion of the Signing on 1 June 2006 of the Protocol Amending the Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes signed on 29 August 1989
1 June 2006	Protocol amending the Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to certain other Taxes signed on 29 August 1989
2 December 2000	Revision of the Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation with respect to Taxes on inheritance and gifts
29 August 1989	Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes

Annex 14

Determination of trade tax and overall tax burden – example

I. Determination of trade tax

The applicable trade tax rate depends on **two criteria:**

Tax assessment rate:	**Municipal collection rate:**
(= standard trade tax base rate pursuant to the German Trade Tax Act) Amounting to 3.5 % of the annual taxable earning for corporations, partnerships and other business operations.	(= trade tax collection rate provided by each municipality individually) At least 200 % up to an unlimited percentage of the tax assessment rate. The average municipal collection rate is approximately 400 %.

No solidarity surcharge is imposed on trade tax.

II. Calculation of trade tax burden - example:

Company A with annual taxable earnings of **EUR 1,000,000** is seated in the municipality of X. X has a municipal collection rate of **400 percent**.

Step 1	Step 2
The trade tax base amount of A is: EUR 1,000,000 multiplied with the basis rate of 3.5 % (=EUR 35,000)	The trade tax base amount EUR 35,000 is multiplied with **the municipal collection rate** of 400 % leading to a **trade tax burden** of EUR 140,000.

III. Determination of overall tax burden

Example:

Company A with annual taxable profit of **EUR 1,000,000** is resident in the municipality of X. X has a municipal trade tax multiplier of **400 percent.**

Annex 14

	Corporation			Partnership	
	Company Level ("Level I")				
Taxable Income – *Level I*	1,000,000 EUR			1,000,000 EUR	
Trade Tax	– 140,000 EUR			– 140,000 EUR	
Corporate income tax	– 150,000 EUR			–	
Solidarity surcharge	– 8,250 EUR			–	
Net income	= 701,750 EUR			= 860,000 EUR	
	in case of **distribution** of dividends		in case of **full retention** of dividends	**Withdrawal** of profits	**Full retention** of profits
	Individuals hold shares in corporation as **business** assets (partial income rule)	Individuals hold shares in corporation as **private** assets (final withholding tax)			
	Shareholder/Partner Level ("Level II")				
Taxable Income – *Level II*	701,750 €	701,750 €	–	1,000,000 EUR	1,000,000 EUR
Income tax	– 176,841 EUR (assumed incremental tax bracket of 42.00 %)	– 175,437 EUR	–	– 420,000 EUR (assumed incremental tax bracket of 42.00 %)	– 282,500 EUR
Trade tax payments to be set off against personal incom tax	–	–	–	+ 133,000 EUR	+ 133,000 EUR
Solidarity surcharge	– 9,726 EUR	– 9,649 EUR	–	– 15,785 EUR	– 8,233 EUR
Net income after tax	= 515,183 EUR	= 516,664 EUR	–	= 557,215 EUR	= 702,277 EUR
Overall tax burden	48.48 %	48.33 %	29.83 %	44.28 %	29.77 %

Annex 15

Determination of Real Property Tax Burden – example

I. Summary real property tax system

Up to the assessment period 2024 (inclusive), the real property tax burden is calculated by multiplying the following:

The assessed value of the real property	The real property tax rate	The municipal collection rate
determined by the tax authorities in accordance with the German Valuation Tax Act *(Bewertungsgesetz)*.	depends on the type of real property (eg the rate for property used for (semi) detached houses with a value of up to EUR 60,000 is 0.26 %) for all remaining property including commercially used property the rate is 0.35 %.	as in the case of trade tax (individual) municipal collection rates apply to real property "A" and "B".

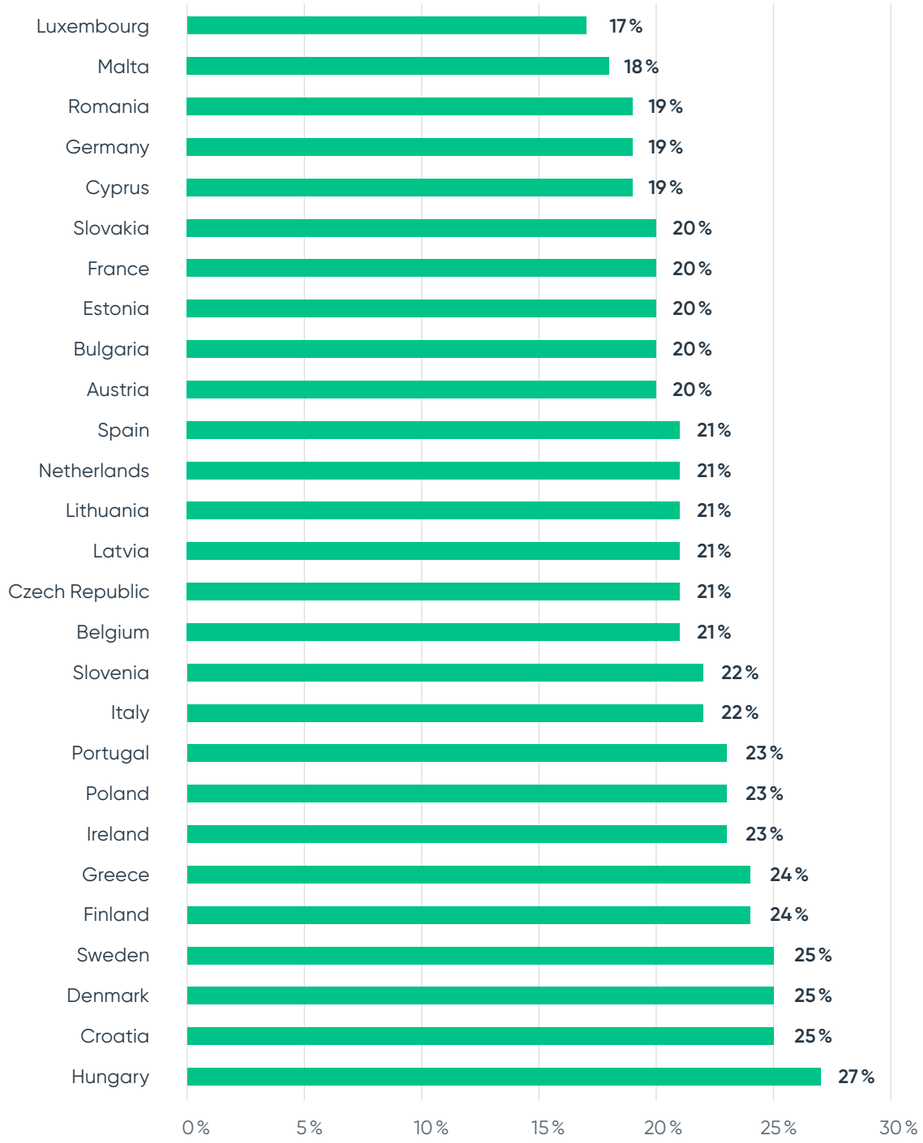
II. Calculation of real property tax burden – example:

Real property tax burden for a commercial building with an assessed value of EUR 1,000,000 in a municipality with a real property tax "B" collection rate of 350 %:

Assessed value	EUR 1,000,000
x basic real property tax rate	x 0.35 %
x municipal collective rate "B"	x 350 %
= Real property tax burden	= EUR 12,250

Annex 16

Comparison of European VAT standard rates (2021) in percentage



Annex 17

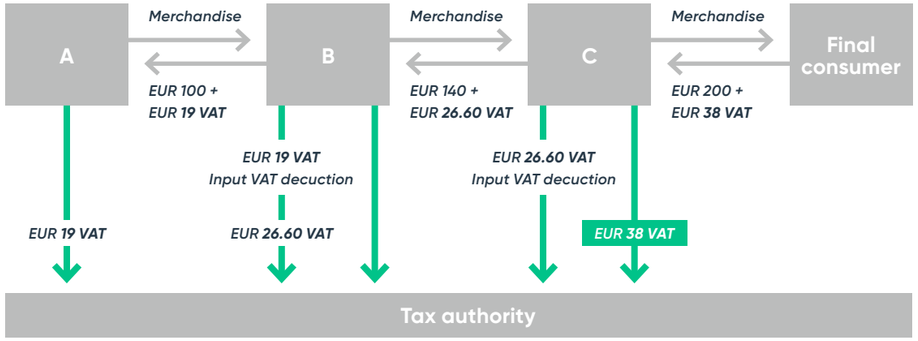
Concept of VAT – example

Example:

Company A supplies merchandise with a value of EUR 100.00 plus EUR 19.00 VAT (19 % of EUR 100.00) to company B. A pays EUR 19.00 VAT to the tax authority whereas B applies to the tax authority for input VAT deduction in the same amount.

If B sells the merchandise for EUR 140.00 plus EUR 26.60 VAT (19 % of EUR 140.00) to company C, B is obliged to pay EUR 26.60 VAT to the tax authority whereas C may apply for input VAT deduction in the same amount.

If C sells the merchandise to a final consumer for EUR 200.00 plus EUR 38.00 VAT (19 % of EUR 200.00), C must pay VAT in the amount of EUR 38.00 to the tax authority. **This amount finally remains with the tax authority.**



Annex 18

Provisions typically contained in service agreements with managing directors

Start date	
Term (in case of a fixed term contract) **Termination**	Fixed term contracts are quite usual in practice. It should, however, be considered that fixed term contracts can only be prematurely terminated **for cause** and are, in particular, **not automatically terminated in case of removal of the managing director from office** (unless this is explicitly provided for in the service agreement).
Managing authority and power of representation	If the company has only one managing director, the managing director automatically represents the company alone. If the company has two or more managing directors, they can be granted either **sole or joint power of representation.**
Business transactions requiring prior consent of the shareholders' meeting	Service agreements frequently contain a **catalogue** of business transactions subject to prior approval of the shareholders. Such internal restrictions, however, **only affect the relationship between the managing director and the company.** In the event of a breach the managing director can be **held liable** by the company. Business transactions subject to the catalogue but performed without prior approval are, nevertheless, binding for the company vis-à-vis the contracting partner unless the contracting partner was aware of the catalogue and the breach.
Office time/side activities	Managing directors are, in principle, obliged to invest their full time and to dedicate their whole working capacity, professional skills and experience exclusively to the company and to be available to the company at any time. They may, however, be allowed to have side activities which are usually specified in the service agreement or made subject to prior approval by the shareholders.
Non-compete	Whereas managing directors are obliged not to perform any activities competing with the company **during the term of their office,** a specific agreement is necessary for a **post-contractual** non-compete obligation (often combined with a non-solicit obligation). Post-contractual non-compete obligations are possible but subject to **some limitations** with regard to **1.** The prohibited **competitive activity;** **2.** The **territory** within which the competitive activity is prohibited and **3.** The **term** of the post-contractual non-compete agreement. Managing directors subject to a post-contractual non-compete are further entitled to a **compensation** of at least 50 % of their last annual contractual benefits for the term of the non-compete obligation.
Remuneration	Remuneration of managing directors frequently contains **fixed and variable elements** (in particular performance related bonuses). Furthermore, provisions relating to **company cars** and **travel expenses** are frequently part of remuneration provisions.
Vacation	Statutory law does not provide managing directors with the right to a minimum annual vacation; an annual vacation of 20 to 30 working days is, however, usually agreed on in the service agreement.
Confidentiality and return of documents	Managing directors are subject to a confidentiality duty with regard to business and trade secrets of the company by law. However, service agreements often contain more precise (and/or extensive) provisions with regard to confidentiality and the return of documents.
Incapacity for work	Statutory law provides that managing directors are entitled to continue to receive the agreed remuneration if they are prevented from exercising their office for a period of no more than a few days.
Intellectual Property (IP) rights	Managing directors are usually obliged to transfer the exclusive and unlimited right of use and exploitation of all IP rights created by them during the term of their office to the company.

Annex 19

Provisions typically contained in employment agreements

Name and address of the parties	
Start date	
Term (in case of a fixed term contract)	If the employee has not been employed by the same employer previously (which should be checked first), a term of **up to two years** can be agreed on without any justification of the limitation of term. If an employee has been employed before (eg seasonal work) during the last three years, or it is intended that the duration shall exceed two years (eg for the substitution of employees in parental or maternity leave) the reason for the use of a fixed term contract needs to be **specified.** In case of non-compliance with these provisions the employee will be considered as a **permanent employee** from the very beginning of his contract in case he takes legal action against the limitation within three weeks after the intended end date.
Place of work	
Job description	
Remuneration	**Composition** and **amounts** of remuneration, including any **supplements** and **bonuses** and the **date** on which they will be paid.
Working time	Under German law the normal working day is **eight hours,** up to a maximum of **10 hours** provided that an average of eight hours is not exceeded during a period of six months or 24 weeks. However, **collective agreements** or the employment contract typically provide for reduced working hours, between 35 and 40 hours per week. **Extra hours** worked must be compensated by allocation of additional time off. **Overtime bonuses** are only mandatory if provided for in individual or collective labour agreements.
Annual vacation	The legal minimum vacation is **20 working days p.a.** after completing six months of service, based on a five day working week. Collective agreements or the employment contract may increase these entitlements, typically up to 30 days per year. The number of bank holidays varies from region to region, from between nine to 13 days.
Notice period in case of termination	The statutory minimum is **two weeks within the probationary period** (usually six months) following four weeks, calculated to the 15th day of the month or the end of the month. For subsequent years with the same employer, **increased notice periods** apply in stages, up to a **maximum of seven months' notice after 20 years** of service.
Reference to collective bargaining agreements, shop agreements or any other general rules applicable to the employment relationship (if any).	

Annex 20

Social Security contributions (2021)

Components in % of gross salary	Employer's/employee's share of contribution	
Pension Insurance (18.6 %)	Employer: 9.3 %	Employee: 9.3 %
Health Insurance (14.6 %)	Employer: 7.3 %	Employee: 7.3 %
Unemployment Insurance (2.4 %)	Employer: 1.2 %	Employee: 1.2 %
Nursing Care Insurance (3.05 %)	Employer: 1.525 %	Employee: 1.525 %*
Accident Insurance (depends)	Employer: (depending on hazard class)	Employee: –

* Childless employees pay an extra 0.25 % on top of their contribution.

Annex 21

National patent examination and grant procedure in Germany

The **patent examination and grant procedure** can be broadly divided into the following steps:

Step 1: Application

Filing the application and transfer of application fee (EUR 60):

- **Priority** (can be claimed within a period of 12 month for EU, international or foreign applications relating to the same invention).

Step 2: Preliminary examination

The documentation filed is reviewed as to any obvious (formal) deficiencies of the application and as to whether any preconditions for patentability are obviously not satisfied.

Step 3: Publication of the application

The patent application is published in the patent gazette/DPMA database after a maximum period of **18 month** after the date of filing or another earlier priority date.

The request for examination must be filed within a maximum period of **seven years after application** for the patent. However, **annual fees** must be paid as from the third year after application in order to maintain the application (and the priority thereto).

A separate research request subject to fees may be filed by the applicant in order to receive information on the documents that may be relevant for the assessment of the patentability of the invention.

Step 4: Request for examination

In order to initiate the examination procedure (ie the heart of the patent granting procedure) a request for examination must be filed and the examination fee (EUR 350) must be paid.

Step 5: Examination procedure

Upon receipt of the request for examination, the DPMA examines whether the invention meets the patentability criteria. If this is the case, a patent is granted.

If the requirements are not met, an examination report is issued giving the applicant the opportunity to **amend defaults.**

Step 6: Grant of the patent/ rejection of the application

The examination either results in the rejection of the application or the grant of the patent.

The grant of the patent is **published** together with the patent specification in the patent gazette/DMPA database.

The grant of patents can be **opposed** within a maximum term of **nine month after publication of the grant.**

Decisions of the DPMA (eg the rejection of the application or decisions in opposition proceedings) can be appealed to the Federal Patent Court.

After the expiry of the 9-month period, third parties with doubts about the validity of a patent can challenge the patent by bringing a **nullity action before the Federal Patent Court.**

Annex 22

European patent examination and grant procedure

Step 1: Application	Step 2: Formal examination and search report	Step 3: Publication of the application
Filing the application along with the payment of the necessary fees, in particular application and search fees: ■ **Priority**	The EPO reviews whether the application meets all the formal requirements and draws up a **search report** listing all the documents available to the EPO that may be relevant for assessing novelty and inventive step. This **search report** is sent to applicant together with an initial opinion on whether the claimed invention and the related application meet the requirement of the EPS.	The patent application is published in the European patent bulletin after a maximum period of **18 months** after the date of filing or another earlier priority date.
Step 4: Request for examination	**Step 5: Substantive examination**	**Step 6: Grant of the patent/ rejection of the application**
In order to initiate the examination procedure (ie the heart of the patent granting procedure) a request for examination must be filed (and the relevant fees must be paid) within a maximum period of **six month** after the publication of the application.	Upon receipt of the request for examination, the EPO examines whether the application and invention meet all requirements of the EPC, in particular the patentability criteria. If the requirements are not met, the EPO shall invite the applicant to file his observations and amend the application.	The examination either results in the rejection of the application or the grant of the patent. The grant of a patent is **published** in the European patent bulletin.

The grant of European patents can be **opposed** within a maximum term of **nine months after publication of the grant.**

Decisions of the EPO (eg refusing an application or decision in opposition proceedings) can be appealed ot the Boards of Appeal of the EPO.

After the expiry of the nine-month period, the validity of European patents can only be challenged on national level, ie only the national authorities and courts are competent to decide on the validity. However, European patents can only be revoked if the requirements of one of the revocation grounds of the EPC (Art. 138) are satisfied.

You can read more here: http://www.epo.org/

Annex 23

Typical issues in connection with International Agreements

I. Choice of law

The applicable law is determined

*If a choice of law is **agreed** on* → by the contracting parties

*If **no choice of law is agreed on*** → by the rules of governing conflicts of law

Choice of law agreements usually are subject to certain **requirements:**

- The agreement must be **explicit** or at least **clearly** result from the circumstances (the safest solution is an agreement in writing)
- If provided for in General Terms and Conditions (**"GTC"**) the GTC must be **validly linked to the agreement.**

Harmonised EU-law:

- **Rome Convention** dated 1980 (until 17 December 2009)
- **Rome-I Regulation No. 593/2008** (as from 17 December 2009)*.

* not applicable to Denmark.

The scope of choice of law agreements is limited: Choice of law agreements:

apply to → **Contractual** rights and duties

*do **not apply** to* → Choice of law agreements usually are subject to certain requierements:

- Transfer of title
- Intellectual property rights
- Overriding mandatory rules of the forum state (eg unfair competition law) and of foreign states (the latter is higly controversial).

Particularities/limitations may also arise from **mandatory law protecting consumers or employees** or from provisions relating to **specific areas** (such as public transport, insurance etc.)

You find the text of the Rome-I Regulation here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF

You find the text of the Rome Convention here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126(02):EN:HTML

II. Referring to model laws and model regulations

1. Convention on the International Sale of Goods

When agreeing on the law applicable to agreements on the sale of goods in situations where the contracting parties are residents of different states, opting for the Convention on the International Sale of Goods ("CISG") should be considered.

CISG applies automatically (if not explicitly excluded)

- If each of the contracting parties are residents of a **CISG-Member State** (such as the United States and Germany).
- If the **rules governing conflicts of law lead to the application of the law of a CISG-Member State.**

You can read more about the CISG contracting states here:
https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states

When agreeing (or not excluding) CISG, it should be considered that **the scope of the CSIG-provisions is limited.**

CISG only **covers core provisions** of sales agreements such as

- **Conclusion** of the agreement
- **Duties and obligations** of the contracting parties
  - **Seller:** duty to support the sold goods.
  - **Buyer:** duty to pay the purchase price.
- **Rights** of the contracting parties in case of breach

CISG does **not** cover *(inter alia)*

- **Validity** of agreements or any of its provisions
- Effect the agreement may have on the **property** of the sold goods
- Liability of the seller for **death or personal injury caused by the sold goods** to any person

Issues not covered by CISG are subject to the **applicable national law** which may be **agreed on** by the parties within the limitations set forth in sec. I above.

Furthermore, CISG is applicable only to **sales of goods.**

CISG is, in particular, **not** applicable to sales

- Of goods bought for **personal, family or household use,** unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use
- **By auction**
- **On execution** or otherwise by authority of law
- Of stocks, shares, investment securities, negotiable instruments or money
- Of ships, vessels, hovercrafts or aircrafts
- Or electricity

Depending on the position of the contracting party, CISG can – in spite of its limited scope – be more attractive, eg with regard to the liability of the seller.

You can read more about the CISG here:
https://uncitral.un.org/en/texts/salegoods
https://iicl.law.pace.edu/cisg/cisg

2. INCOTERMS®

INCOTERMS® (developed by the International Chamber of Commerce) are frequently agreed upon in International Agreements. In their 2000 edition they provide a system of 13 clauses containing rules as to which party shall be obliged to provide the documents relating to the sold goods and their transport, bear custom fees, organize the necessary insurance agreements, examine the goods and take care of packaging. The new INCOTERMS® 2010 (effective as of 1 January 2011) provide 11 clauses (four old clauses [DAF, DES, DEQ, DDU] were deleted, two new clauses were inserted [DAP, DAT]). Three clauses were changed: FOB, CFR, CIF > goods now must be put on deck of the vessel to effect transfer of risk (under the old INCOTERMS® the transfer took place when the goods passed the rail of the vessel). Moreover, the guidelines differentiate between clauses for ship transport (blue clauses: FAS, FOB, CIF, CFR) and multimodal transport (others). It is also now recommended that for container transport not CFR and CIF but FCA, CIP and CPT is best practice. As the old clauses can continue to be used and the new clauses could be used before 2011 – it is recommended to clarify which edition of the terms are referred to, eg by citing "INCOTERMS ® 2000" or "2010".

Annex 23

The content of INCOTERMS can be divided into three main areas

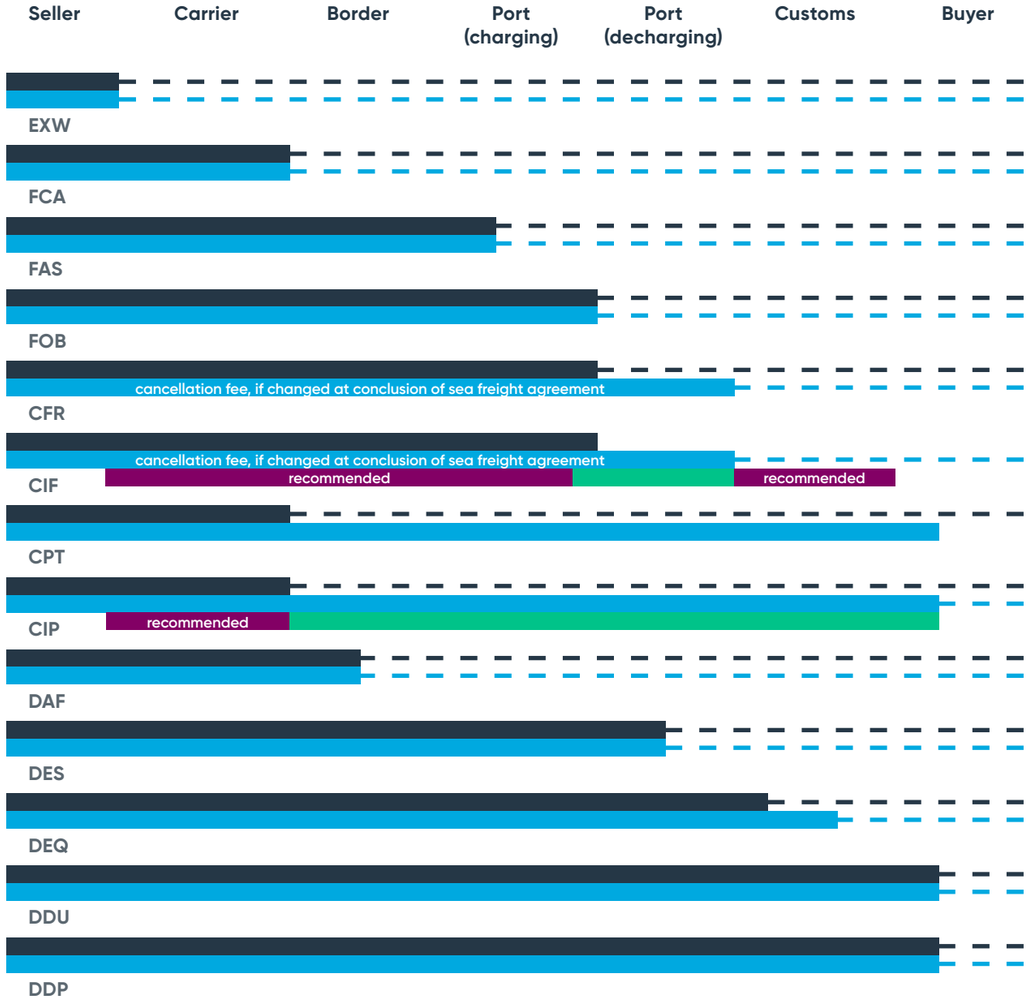
Payment of freight charges	Allocation of risks relating to the transport of goods	Duties relating to the accomplishment of business transactions

The current INCOTERMS®2010 contain the following clauses; the INCOTERMS 2000 were slightly revised:

INCOTERMS®2000		INCOTERMS®2010 (changes and annotations)
EXW	Ex Works	
FCA	Free Carrier (to named place of destination)	
FAS	Free along ship	Blue clause; FCA better for containers
FOB	Free on board	Blue clause; FCA better for containers; goods now to be put on deck of vessel
CFR	Cost and freight	Blue clause; CPT better for containers; goods now to be put on deck of vessel
CIF	Cost, insurance and freight	Blue clause; CIP better for containers; goods now to be put on deck of vessel
CPT	Carriage paid to (named place of destination)	
CIP	Carriage and insurance paid to (named place of destination)	
DAF	Delivered at frontier	DAP (Delivered at Place): duty unpaid, not unloaded DAT (Delivered at Terminal): duty unpaid, unloaded
DES	Delivered ex ship	
DEQ	Delivered ex quay	
DDU	Delivered duty unpaid	
DDP	Delivered duty paid	

Annex 23

Depending on which INCOTERMS are agreed upon, the **duties of seller and buyer** are determined as follows:



Risk borne by **Seller**
Cost borne by **Seller**
Duty of Seller to **insure** goods
Risk borne by **Buyer**
Cost borne by **Buyer**

You can read more here:
http://www.iccwbo.org/incoterms/id3040/index.html

Annex 23

III. Handling of General Terms and Conditions (GTC)

Choice of law and venue clauses – as well as other terms eg relating to supply conditions, conditions of payment, liability and guarantees – can be made part of GTC.

If contractual conditions are laid down in GTC, it is important to make sure that the GTC are **(physically) sent to and – ideally – countersigned by the contracting partner.** Having the GTC countersigned also helps to avoid the contracting partner adding his own GTC to the main agreement which may lead to a **conflict of GTC** (resulting eventually in a (partial) invalidity of both GTC with the effect that – probably unexpected – statutory law is applicable).

The GTC should further be in a **language** the contracting partner understands. This also applies to the (mandatory) **indication in the main agreement referring to the GTC.**

IV. Venue and enforcement

Pls. see Sec. P/II of the main text.

Annex 24

Costs for official court proceedings – overview (2020)

First instance		Second instance	
Amount in litigation (in EUR)	Cost risk* (in EUR)	Amount in litigation (in EUR)	Cost risk* (in EUR)
50,000	8,605.46	50,000	9,981.84
100,000	12,068.46	100,000	14,167.60
500,000	29,772.96	500,000	35,603.04
1,000,000	44,097.96	1,000,000	52,799.04
5,000,000	158,697.96	5,000,000	190,367.04
10,000,000	301,947.96	10,000,000	362,327.04
20,000,000	588,447.96	20,000,000	706,247.04

* including own lawyers' fees, court fees and lawyers' fees of the counterparty; assuming that lawyers' fees are calculated based on the German Act on Lawyers' Fees.

Annex 25

Brussels Ia Regulation – key points

I. Matters covered by the Brussels Ia Regulation

The Brussels Ia Regulation applies to
Civil and commercial matters

The Brussels Ia Regulation does not apply to				
Customs or administrative matters	Status or legal capacity of natural persons, matrimonial matters, wills and succession	Bankruptcy	Social Security	Arbitration

II. Main principles of the Brussels Ia Regulation

The Brussels Ia Regulation applies to

Basic principle: Jurisdiction is to be exercised by the **Member State in which the defendant is domiciled** (regardless of his or her nationality).

Exemptions from the basic principle

- Special jurisdiction
- Insurance matters
- Consumer contracts
- Employment contracts
- Exclusive jurisdiction

- **Domicile** is determined in accordance with the domestic law of the Member State where the matter is brought before a court;
- **For legal entities** domicile is determined by the country where the entity has its statutory seat central administration or principal place of business.

Annex 25

Special jurisdiction

in matters relating to (purchase and service) contracts...	in matters relating to harmful events...	in matters relating to insurance...
... are dealt with by the courts of the place **where the obligation in question should be performed.**	... are dealt with by the courts of the place **where the harmful event ocurred or may occur.**	... **the insurer** may be sued before the courts of the Member State **where the insurer is domiciled** or in another Member State; in cases in which actions are brought by the policyholder, the insured or a beneficiary, before the courts of the place where **the claimant is domiciled.** In respect of liability insurance or insurance of immvoable property, the insurer may, in addition, be sued before the courts of the place where the **harmful event occurred.**

Special provisions apply with regard to contracts concluded by **consumers** and individual contracts of **employment:**

Contracts concluded by **consumers**	Individual contracts of **employment**

"Consumers" are persons who conclude a contract **with a professional** for a purpose **other than trade or profession.**

Consumers may		Employees may
Bring proceedings either in the courts of the Member State in which the **defendant is domiciled** or in the courts of the place where **the consumer** (the claimant) is domiciled.	**Be sued** by the other party to the contract only in the courts of the Member State in which the **consumer is domiciled.**	**Sue their employer** either before the courts of the Member State where the employer is domiciled or in another Member State before the courts at the place **where the employee habitually works.** An employee who does not habitually work in any one country may sue the employer before the courts of the place where the business the employee is engaged in is situated. An employer who is not domiciled in any Member State but has a **branch, agency or other establishment** in one of the Member States is deemed to be domiciled in that Member State. An **employer** may bring proceedings against an employee only in the courts of the place where the employee is domiciled.

Annex 25

Courts have exclusive jurisdiction, regardless of the domicile of the parties and regardless of whether the parties have agreed on a venue, in the following cases:

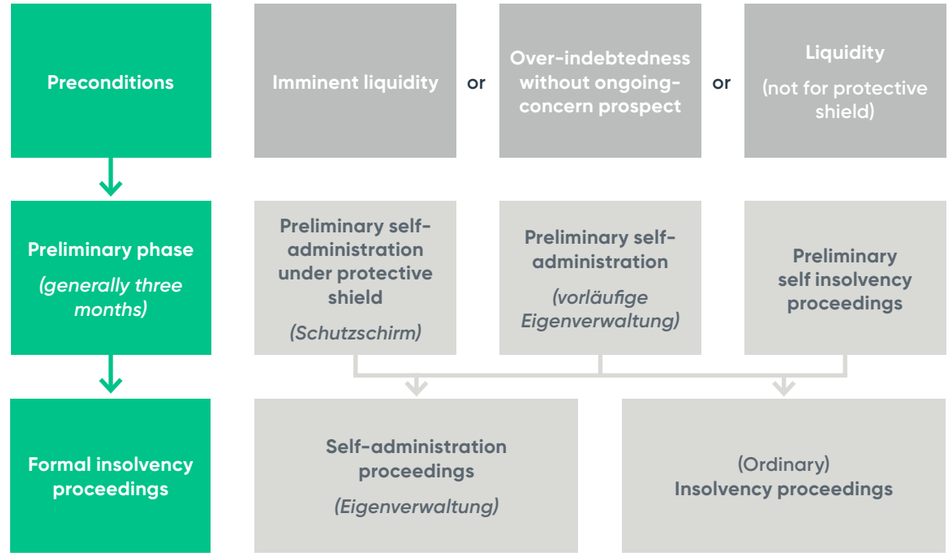
Rights in rem (property rights) in **immovable property or tenancies relating to immovable** property	Validity of the constitution, the nullity or the dissolution **of companies or other legal entities,** or of the validity of the decisions of their bodies.
Exclusive competence of the courts of the Member State in **which the property is situated.**	Exclusive competence of the courts of the Member State in **which the legal entity is seated.**

Exclusive jurisdiction

Registration or **validity of patents, trademarks, designs or other similar rights**	Validity of **entries in public registers**	**Enforcement of judgements**
Exclusive competence of the courts of the Member State in which the deposit or registration has been applied for, has taken place or is deemed to have taken place under the terms of a Community instrument or an international convention.	Exclusive competence of the courts of the Member State in which **the register is kept.**	Exclusive competence of the courts of the Member State in which the judgement **has been or is to be enforced.**

Annex 26

Procedural steps of insolvency proceedings



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