

Doing business in Germany

This is a brief, practical, legal guide for a foreign enterprise doing business in Germany. It is not comprehensive. In particular, it does not deal with tax issues, grants and incentives. The sections in italics give information about some of the specialist legal areas covered by Taylor Wessing in Germany.

Setting up in Germany

Choice of Entity

The various forms of entities in Germany differ substantially in their economic purpose and legal organization.

German law offers several options for establishing a business in Germany depending on whether the foreign enterprise intends to:

- (i) register a branch, or
- (ii) incorporate a partnership or a corporation to act either as a subsidiary of a foreign enterprise or as a vehicle to attract European financing or for a joint venture.

A branch is not a separate legal entity. It will therefore create direct claims and obligations for the foreign enterprise.

However, the branch must have some independence, e.g. its own management, organisation and bookkeeping.

The following forms of partnerships and corporations are most commonly used:

Partnerships:

- (i) general partnership with unlimited liability of all members ("OHG")
- (ii) limited partnership with at least one general partner and a limited partner, the latter being liable only up to the amount of its registered capital contribution ("KG")
- (iii) limited partnership with a general partner being a limited liability company ("GmbH & Co. KG"); the foreign enterprise may elect to be both the sole shareholder of the limited liability company and the limited partner.

The formation of a partnership requires only a minimum of formal procedures including registration in the commercial register. Partnerships are mostly preferred by small businesses where the partners wish to be actively involved in the business.

Corporations:

- (i) limited liability company ("GmbH") which is a legal entity with a minimum share capital of EUR 25,000
- (ii) stock corporation ("AG") which is a legal entity with a minimum share capital of EUR 50,000 divided into stocks.

The formation of a corporation requires articles of incorporation to be notarized by a (German) notary public and registration in the commercial register. The minimum share capital must be paid in prior to registration. Further, corporations are governed by relatively strict laws, e.g. as to capitalization and accounting/taxation.

Shares in a GmbH are not embodied in certificates and cannot be quoted on stock exchanges. They can be transferred only by way of transfer deeds notarized by a notary public.

Because there are fewer applicable regulatory requirements, the GmbH is more flexible than an AG and is therefore the most common type of company in Germany. The GmbH & Co. KG is the next most common type of company.

Taylor Wessing Germany has both a proven track record in corporate law transactions and a longstanding tradition of advising foreign enterprises on their inward investment in Germany. It provides all necessary forms and documentation for a quick launch of any new legal entity in Germany.

Choice of Company Name

Generally, the company name can be chosen freely but must not be misleading or confusing, and must be distinctive from other companies in the same local area. Further, it must contain the relevant designation, e.g. "ABC GmbH" or "ABC KG".

However, the choice of a company name needs to be checked in advance to ensure that it does not conflict with any existing German or EC trademark.

Taylor Wessing Germany provides a comprehensive trademark and firm-name search in order to assure the availability and the subsequent registration of a specific company name.

Methods of Trading

The German entity may trade by way of:

- (i) independent commercial agents bringing about direct legal relations between the German entity and the third party
- (ii) distributors selling/buying in their own name
- (iii) commission agents
- (iv) direct sell/buy arrangements.

The German entity may also act as a provider of pre- and post-sales services, fulfilment services or logistic services for the foreign enterprise without having its own contractual relationship with the customer.

In any event, the relationship between the foreign enterprise and the German entity must comply with the German transfer pricing regime in order to avoid material tax disadvantages.

Taylor Wessing Germany provides tax advice with respect to all aspects of international transfer pricing issues, and assists in setting up appropriate contractual documentation in order to minimise risks during field audits conducted by German tax authorities.

Stock Options

Stock options are commonly used in Germany along with several other forms of bonus payments. They can be granted by the parent company, the German entity or a combination of both. However, substantial tax consequences for both the German entity and the employee require careful planning in advance.

Taylor Wessing Germany has wide experience of advising foreign enterprises on the implementation of stock and other incentive plans in Germany.

Labour Law

German labour law is highly protective of the rights of employees.

Generally, any employment relation requires a contractual basis since there is no concept of employment "at will". Under German law:

- (i) each employee has the right to a written contract stating the terms and conditions of employment, e.g. the hours of work, payment details, sickness pay, holidays and notice periods
- (ii) there are mandatory minimum periods of notice, and there is no right for an employer to make a payment in lieu of notice

- (iii) an employee has the right not to be unfairly dismissed after six months of continuous employment provided that the relevant employer has a minimum of ten employees; however, he/she may be laid off due to operational reasons, misconduct or certain other reasons relating to the individual (especially long-term illness)
- (iv) an employee is entitled to remain in employment if unfairly dismissed
- (v) managing directors are generally exempted from mandatory labour law
- (vi) employees automatically transfer with the business or an independent part of the business being sold (i.e. an asset deal). It is therefore advisable for a purchaser to obtain indemnities from the vendor in respect of redundancy/unfair dismissal payments and any other liabilities which the purchaser will otherwise inherit.

Proprietary Information and Confidentiality Agreements

Agreements or clauses as they are often used by foreign enterprises need to be redrafted under German law as they sometimes tend to be either inappropriate or ineffective. In addition, the foreign enterprise needs a mechanism to protect all intellectual property rights produced by employees of the German entity, especially if such rights are intended to be used abroad.

Non-Competition Clauses

It is possible to agree on valid non-competition clauses for key personnel where confidential information or special knowledge needs to be protected. Under such a non-competition clause an employee can be prevented from moving to a competitor for a maximum period of two years, if the employee is compensated in cash for agreeing to such clause.

Taylor Wessing is able to provide standard forms of clauses, employment contracts, directors' contracts, proprietary information and confidentiality agreements for use by its foreign clients in Germany. Taylor Wessing also has a team of lawyers which is wholly dedicated to dealing with HR issues for its foreign clients.

Work Permits / Immigration

Subject to a number of exceptions in respect of designated types of employees/business persons, all non-EU citizens need to apply for both a stay permit and a work permit. Exceptions include:

- (i) citizens of certain designated countries (including the US, Canada and Japan) who are entitled to stay in Germany

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without a working or residence permit, and without the requirement to obtain a visa, for a period of up to three months in total during a continuous period of six months from first entry into Germany

- (ii) freelancers (self-employed persons), who do not require a work permit, but may be subject to other restrictions.

Managing directors of a German GmbH may have their residence abroad; however, depending on certain circumstances to be checked in advance (e.g. influence on management, right of immigration and practice of the local commercial register) they need to have a stay permit and/or a work permit as well.

Taylor Wessing offers the assistance and documentation to obtain quickly any necessary permit.

Real Estate

Partnerships and corporations are fully entitled to ownership and other interests in real estate; there are no restrictions for German companies owned by foreign enterprises regarding ownership of real estate. The acquisition and transfer of real estate requires notarization by a public notary and registration in the land register.

Commercial leases are usually agreed upon for a period of between 5 to 10 years. There is no special form required for the lease contract but it should be in writing for reasons of evidence and time limitation. It is advisable to involve German lawyers in order to ensure that the terms of the proposed lease are fair and not unusual in terms of market practice.

In order to find the right property it is useful to seek assistance from real estate agents/brokers.

Other Links

Taylor Wessing Germany offers to link each "in-bound" foreign enterprise with other German service providers. These can be government and regional agencies, accountants, bankers, bookkeepers, tax advisers, real estate agents/brokers and other suppliers and consultants who are used to dealing with foreign enterprises setting up in Germany.

Trading with Germany

The following contains some guidelines for foreign enterprises in their contractual matters whether or not they have set up in Germany.

General Contractual Terms

Sales might be undertaken in Germany by means of independent commercial agents, distributors, licensees or direct sell/buy arrangements, often using standard form agreements.

The following issues need to be considered in relation to the appointment of agents, distributors and others:

- (i) non-EU court judgements are often not enforceable in Germany. Therefore, consideration should be given to the agreement of German law as the governing law of a contract to prevent the delays involved in having to prove foreign state law before a German court
- (ii) German law (which is based on an EU directive) relating to standard terms and conditions is very strict and imposes severe restrictions for the user of standard forms
- (iii) many standard form software license agreements have invalid clauses prohibiting copying because they breach the EU Copyright Directive. The result is that the license agreement may not have a valid restriction on copying
- (iv) agreements with commercial agents or distributors are not terminable "at will". The mandatory notice periods range from one to six months depending on the duration of the agreement. When such agreements are terminated, the agent or distributor might be entitled to claim compensation. This risk can be reduced by careful drafting of the relevant agreement.

In particular, Taylor Wessing Germany advises that German law, like other European codes, imposes severe restrictions on exclusions and limitations of implied warranty and liability. As a result, foreign standard form documents should be reviewed.

EU and German Competition Rules

EU and German law provide a complex and strict system of competition rules. Accordingly, certain agreements restricting competition may need to be "notified" to the competent authorities for exemption, unless they fall within certain automatic exclusions or exemptions. Clauses containing restrictions which are not exempted are void and, as a result, under German law those clauses and perhaps the agreement may fail. Enforcement (for the most part) is increasingly being passed on to the national courts within Europe. Damage

claims can be made by third parties affected by the agreement as well as by the disadvantaged party against the other party.

Distribution and Licensing

Under the EU block exemption for vertical agreements (i.e. agreements between businesses at different levels of the supply chain), these agreements may be automatically exempt under EU competition rules (and, in most cases, German competition rules) if specific legal requirements are met, e.g. the market share is under 30%. However, the exemption does not apply to agreements which fix resale prices. The EU exemption does not permit a supplier to prohibit its distributor from making sales outside its territory if the distributor receives an enquiry from outside the territory but within the EEA, as long as the distributor has not solicited the sales enquiry (active sale). There must therefore be no export ban within the EEA. Outside the EEA, by careful drafting, a ban can usually be imposed. There is no general exemption for emerging growth companies from these provisions.

Technology Transfer

The technology transfer and joint research and development block exemptions are very complex and deal with manufacture followed by distribution. They emphasize allowing only necessary restrictions in an agreement to enable commercial exploitation of intellectual property rights protected by patents and/or know-how. They are particularly relevant to partnering transactions in the life science sector.

Website Review

German law advice is required on contracts for advertising, procurement, sale and auction of all types of goods and services over the internet. This involves considering issues such as consumer protection, data protection, unfair contract terms, distance selling, auctions and e-commerce. For financial and e-money services, special attention is required under German securities laws.

Taylor Wessing has experienced lawyers who work with foreign enterprises on all of these issues. We endeavour to make as few changes as possible, thus maintaining the integrity of the documents. As German law overrides, attempts to limit liability in standard form agreements will often fail. This makes German legal review essential.

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A legal force for Europe

By merging Wessing and Taylor Joynson Garrett, two of Europe's major law firms, there is now a powerful source of legal support for commercial organizations doing business in Germany. Based principally in Germany, the UK and France with an office in Brussels and representative offices in Alicante and Shanghai, Taylor Wessing provides a full range of legal services to major corporations and growing enterprises.

Through its affiliates, Taylor Wessing provides a pan-European and worldwide service.

The firm provides a full corporate law service and specializes in corporate, securities, property and finance as well as dispute resolution. In addition, the firm has broad experience in intellectual property law (patents, copyrights and trade marks) and has been consistently ranked as one of the top IP law firms in Germany and the UK for the past ten years.

Overlaying these specializations is Taylor Wessing's German In-bound Group, set up to provide specialist advice to foreign enterprises doing business in or with Germany. The group is made up of partners taken from various specialist practice areas within the firm. Each partner has an associate assigned to him/her to work with foreign clients.

Taylor Wessing has links and good working relationships with many leading foreign law firms, including in particular many of the top foreign technology law firms.

Taylor Wessing's continuing goal is to stay a top quality technology law firm in Europe as well as one of the first addresses for inward investment in Germany.