ADVANT Beiten

INVESTING IN GERMANY

Legal and tax aspects

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Foreword

Dear Reader,

Welcome to the new edition of **Investing in Germany**. This handbook reflects the most recent legal developments in Germany until December 2024.

As the third largest economy worldwide after the US and China, and as the largest economy within the European Union, Germany is a major destination for foreign direct investment. Germany is consistently ranked as one of the most attractive destinations based on its stable legal environment, its skilled workforce and the innovation skills of its numerous industrial mid-cap companies.

The German government and the European Union have made it a priority to secure and develop the industrial basis for critical technologies in Europe and we can already see a trend for increased foreign direct investment into Germany in greenfield projects aimed at making supply chains more resilient to trade barriers and geopolitical risk. We expect this trend to continue, as international players strengthen their footprint in the 450 mio + European Union consumer market.

ADVANT Beiten will offer you an excellent gateway to Germany and to the European Union internal market. With **ADVANT Altana** in France and **ADVANT Nctm** in Italy, we are present in 15 locations and cover all relevant areas of business law with more than 650 professionals across Europe and beyond.

We hope this brochure will provide you and your company the information you need to take your first steps towards market entry or the development of your business in Germany!

Best regards,

Dr Christian von Wistinghausen
Partner | Lawyer | LL.M.
ADVANT Beiten

Content

A. The European Union and Germany

As a community of 27[1] states, the European Union (EU) is the world's biggest economy. Together, the EU Member States produce 14.8% of the worldwide gross domestic product (GDP)[2].

With a purchasing power of nearly half a billion people[3] EU is the world's most lucrative consumer market. Consequently, it is one of the most important trade partners in the world, accounting for around 13% of the world's trade in goods[4]. The EU scontribution to trade in services was even greater. The EU's contribution to trade in services is even greater. EU trade with third countries accounted for 20.2% of world exports of services and 20.7% of imports.[5]

According to the latest Foreign Direct Investment Confidence Index released by global management consulting firm A.T. Kearney,[6] three EU Member States are among the ten best-rated investment destinations worldwide: Germany (5), France (6), and Spain (9).

An investor seeking to enter the EU market will consider several criteria when selecting the location, such as the general investment landscape, the condition and reliability of transport, communications and energy infrastructure, availability of well-qualified employees, the competitiveness of the tax system, options available for setting up businesses, and the applicable employment regulations, to name but a few. You can find an overview of the main investment criteria for doing business in Germany in Chapter I of this handbook.

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1 The United Kingdom's exit from the EU, often referred to as Brexit, occurred on 31 January 2020, and is governed by the Withdrawal Agreement signed on 24 January 2020.

2 European Commission, "Key figures on the EU in the world – 2023 edition": https://ec.europa.eu/eurostat/en/web/products-key-figures/w/ks-ex-23-001.

3 *Ibid*. The combined EU population is 447 million.

4 *Ibid*.

5 *Ibid*.

6 A.T. Kearney GmbH, "The 2024 Kearney FDI Confidence Index®: Continued optimism in the face of instability": https://www.kearney.com/service/global-business-policy-council/foreign-direct-investment-confidence-index.

Germany is a key driver of the EU economy and the most attractive investment destination in Europe. Renowned as a strong and stable business location, Germany offers investors excellent infrastructure, a highly skilled and educated workforce, and an outstanding research environment. These characteristics, combined with a taste for innovation, a clear international dimension, and the global reach of its economy make Germany a highly attractive investment destination.

B. Corporate law & acquisitions

Foreign investors have numerous options when structuring their German market entry.

As a rule, corporate foreign direct investments will set up either a branch office (*Zweigniederlassung*) or a corporate entity, usually in the form of a GmbH (*limited liability company*) or an AG (*public limited company*), or enter into a partnership, typically in the form of a KG (private limited partnership).

This chapter provides an overview of the main options.

I. Establishment of a company branch

If a company wishes to operate in Germany, it can establish a legally independent subsidiary or set up a branch office.

Setting up a branch office does not require the establishment of a legal entity separate from the company based at the head office. The branch remains, legally and in terms of organisation, part of the company based at head office. In this respect, it is subject to the laws applicable at the head office location.

Germany distinguishes between independent **branch offices** (*Zweigniederlassung*) and dependent branch offices (*unselbständige Niederlassung or Filiale*) (also referred to as **business premises**).

1. Independent branch (branch establishment or branch office)

According to the Commercial Code (*Handelsgesetzbuch*, HGB)[7], an independent branch is a branch office that is geographically separated from the head office and has been established as an additional long-term base of the company.

[7] Commercial Code (*Handelsgesetzbuch, HGB*) of 10 May 1897 (BGBl. III, No. 4100-1), last amended by § 14 of the Law of 23 October 2024 (BGBl. 2024 I No. 323).

The typical characteristics of a branch office are:

- **Separate management**
  There is a branch manager who represents the company branch independently in business transactions.

- **Separate capital resources**
  The branch office has its own operating capital. However, no minimum sum is prescribed.

- **Separate accounting and balance sheet preparation**
  The branch office usually keeps its own business accounts and prepares an independent annual balance sheet.

- **Certain duration**
  The branch office handles short-term transactions, and, like the head office, also pursues long-term business.

Since the branch office is not an independent company but part of the company as a whole, its name will, as a rule, be identical to that of the main company. Additions such as “German office” are possible

The managers of the branch office represent it independently in external dealings. They must be vested with a power of attorney (general commercial power of attorney (*Generalhandlungsvollmacht*) or power of procuration (*Prokura*)) which authorises them to act for the branch office. In the case of liabilities, the debtor will always be the natural or legal person that is the main company, not the branch office.

The branch must be registered in the German commercial register. This registration provides the branch office with its own registered office, its own commercial register number, and its own jurisdiction. The application for registration must be notarised and submitted to the commercial register in writing. Those persons at the head office vested with power of representation will be responsible for completing the above steps.

2. Dependent branch (business premises)

A company may also have several business premises which are not independent but fully dependent on the head office. They have no capital resources of their own, do not act independently in business dealings, and do not keep separate accounts. They are separated geographically, but in no way structurally, from the main enterprise. For example, business premises may not issue invoices in their own name, their company name must be the same as the name of the head office and they do not need to be registered in the commercial register. The head office must apply for registration of a trade (business registration) to the local trade licensing office (see V.1. f)).

II. Representative offices

Although the concept is common in many countries, the "representative office" is not a form of entrepreneurial activity under German law. A foreign companies can establish a representative office in Germany, but this will not represent independent commercial activity on the part of the foreign company. A representative office does not need to be registered with the trade licensing office, nor does it need to be registered in the commercial register. However, in accordance with the Banking Act (*Kreditwesengesetz, KWG*)[8], banks with a registered office abroad require the approval of the German supervisory authority for the banking industry (BaFin) to establish a representative office in Germany.

Often, a representative office is simply an office from which one person establishes business contacts or cultivates existing contacts. However, the representative is not vested with power of attorney by the foreign company and thus cannot conclude transactions, either in his/her own name or in the name of the company. As soon as the office is used by the foreign company as a base for commercial operations, it begins to function as part of the foreign company's own organisation and legally constitutes a branch office. Depending on the degree of dependence on the head office, it is either a dependent branch (= business premises) or a true branch establishment under the Commercial Code, which must also then be registered in the commercial register.

While a representative office can be set up and used in advance of any commercial activities, the company cannot use it to conduct those activities, since this would make the representative office a branch with additional obligations.

III. Establishment of a sole proprietorship

The establishment of a business in the form of sole proprietorship (*Einzelkaufmann/-frau*) can be a suitable for market entry for small business. The formalities are straightforward: the company simply needs to be registered with the trade licensing office (see V. 1. f)).

The business is run by the sole proprietor, who is personally liable with his or her entire private and business assets. The company does not need to be registered in the commercial register. However, it may be registered voluntarily, giving the entrepreneur the status of a "registered business person" (*eingetragener Kaufmann, e.K.*).

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[8] Banking Act (*Kreditwesengesetz, KWG*) of 9 September 1998 (BGBl. I p. 2776), last amended by § 4 of the Law of 28 November 2024 (BGBl. 2024 I No. 377).

If the company is not registered in the commercial register, it does not need to keep detailed accounts; simple cash-based accounts are sufficient.

The options for operating a company as a sole proprietorship are limited. As soon as the company's activities expand and exceed certain limits, the entrepreneur is obliged to run the company according to commercial principles and register it in the commercial register. He or she must then also prepare annual financial statements, i.e., balance sheets and income statements.

IV. Establishment of partnerships

When setting up a new company, the first decision is whether to form a partnership or a corporate entity. While the individual identity of the partners is very important for a partnership, with a corporate entity, the identity of the shareholders is less important than the fact that the company acts externally as an independent unit and the shareholders participate through a more impersonal and limited employment of capital.

The personal nature of the partnership results in the following fundamental characteristics

- The partnership has **no legal personality** of its own; **each partner is jointly and severally liable for the company**. However, partnerships, such as the general partnership (*offene Handelsgesellschaft, OHG*) or the private limited partnership (*Kommanditgesellschaft, KG*), are recognised in Germany as having 'partial legal capacity'. This means they can act independently in legal transactions and can, for example, sue or be sued (§ 124 HGB).

- Each partnership consists of at least 2 persons and has at least one partner who is personally liable for the company's liabilities with their private assets.

- The principle of inherent powers of corporate offices applies, *i.e.*, the company has, in its members, "born" corporate bodies; third parties may not be appointed as corporate bodies.

- The purpose of the company is primarily pursued through the partners' personal commitment of their efforts, creditworthiness, and private assets.

- Voting in the meeting of fully liable partners takes place by headcount; decision making fundamentally follows the principle of unanimity, unless the shareholders have otherwise agreed.

- An agreement is sufficient for the company to be established. No written form is required.

- The partners cannot be replaced at will; the death, resignation or insolvency of a partner can therefore affect the existence of the company, unless otherwise agreed by the shareholders.

The three most important forms of partnership are the partnership under German civil law (*Gesellschaft bürgerlichen Rechts, GbR*), the general partnership (*Gesellschaft bürgerlichen Rechts, GbR*) the general partnership (*OHG*) and the private limited partnership (*KG*).

1. The *Gesellschaft bürgerlichen Rechts* or "GbR" (partnership under German civil law)

In order to form a GbR, you need at least two partners who wish to pursue a common aim. Like all partnerships, the GbR does not represent a corporate entity and, accordingly, it will generally not exist long term, but be created to achieve a common purpose, such as the construction of a dam by several construction companies. GbRs are also frequently used to jointly hold real estate. The partners of a GbR enjoy equal rights and are fully liable with their private assets for all liabilities arising from the undertaking. It is not necessary to draft articles of association for a GbR, although it is advisable.

The GbR is not limited to the relationship between the partners, but it may enter into legal transactions with third parties. It can acquire rights, enter into commitments, bring actions before a court, or have actions brought against it.

Where the purpose of the GbR is to conduct trade, it will be automatically classified as an OHG and must comply with the applicable regulations for this form of company.

Since the beginning of 2024, the GbR can be registered in a newly created corporation register (*Gesellschaftsregister*). Following registration, the GbR must use the suffix "eGbR". Registration can provide business partners with certainty about the essential elements of the partnership, such as its name, registered office, and partners. The GbR must be registered if the partners intend to use the GbR to acquire or amend rights to real property, registered shares or registered intellectual property rights.

2. The *offene Handelsgesellschaft* or "OHG" (general partnership)

In the case of an OHG, at least two partners join together to conduct a commercial business under a joint company name. In contrast to the GbR, the company must apply for registration in the commercial register (*Handelsregister*).

While the OHG is not a legal entity, the law grants it a degree of autonomy. Under its company name, the OHG can, for example, acquire rights and enter into liabilities, acquire property, and bring actions before a court or have actions brought against it.

As a fundamental rule, all partners will be authorised to manage and represent the partnership externally. Each partner will be jointly and severally liable with their entire private assets for the company's liabilities. This means creditors can seek out any partner and demand the entire amount which the partnership owes to the creditor from them.

3. The *Kommanditgesellschaft* or "KG" (private limited partnership)

The *Kommanditgesellschaft (KG)* is a special form of the OHG. It possesses no legal personality of its own, although its legal position corresponds in some respects to that of a legal entity. It can thus acquire rights, enter into liabilities, and bring actions before a court or have actions brought against it.

a) The partners in the KG

To form a KG, at least two partners must join together for the **purpose of conducting** a commercial business. However, in contrast to the OHG, the liability of at least one partner is limited to the amount of a particular contribution of assets. In the case of the KG, there are thus 2 types of partners, and there must be at least one of each type, namely:

- a partner with unlimited personal liability, referred to as the **general partner**; and
- a partner whose liability is limited to the amount of assets contributed, referred to as the **limited partner**.

Since general partners do not necessarily need to be natural persons, it is also possible – and widespread practice – to use a GmbH as the personally liable partner. For the resulting **GmbH & Co. KG**, the liability of the general partner is effectively limited, since the law limits the liability of a GmbH to its own assets (see VI. 3.).

b) Management and representation

As a fundamental rule, only the general partners in a KG will be authorised to manage the partnership. Limited partners are granted a right of control, but the articles of association may define this management authority so that it departs from the legal rule. The law also does not allow the limited partners to represent the company

externally. However, individual limited partners may be granted a power of attorney (e.g., power of procuration, general power of attorney), thereby allowing them to act for the KG in external dealings.

c) Articles of association

As with other forms of partnership, written articles of association are not a legal requirement. However, **the drafting of written articles of association is recommended** when establishing any company. The costs of legal advice should not be a deterrent in this respect. As a rule, these costs will be much lower than the expected costs and losses in the case of disputes, which may jeopardise the existence of the partnership because no articles exist, or the articles of association are deficient. Any articles of association of a KG should therefore contain at least the following provisions:

- name of the company;
- registered office of the company;
- object of the company;
- partners and their share in the company capital;
- management and representation;
- participation in profits and losses;
- drawing right(s);
- duration of the company;
- termination or continuation of the company in the event of the withdrawal or death of a partner;
- succession;
- expulsion of partners;
- transfer of shares in the partnership; and
- liquidation.

d) Registration of the KG in the commercial register

The KG – like the OHG – must be registered in the commercial register of the local court where the company's registered office is located. Registration must contain:

- the surname, first name, date of birth and place of residence of each partner;
- the name of the partnership, the location of its registered office and its business address within Germany;
- the powers of representation of the partners; and
- the limited partners and the respective amount of their capital contribution.

The application for registration must be made by all partners in the KG in notarised form. The general partners, as well as any appointed authorised signatories, must provide a specimen of their signatures, stating the company name, to be kept on file at the court.

V. Establishment of a corporate entity

A corporate entity is principally distinguished by the following characteristics:

- It has its **own legal personality**, *i.e.*, it is a legal entity which can sue and be sued, has to pay taxes on its profits ("corporation tax") and can acquire property (*e.g.*, land).
- The shareholders of a corporate entity will **not be held personally liable** with their private assets.
- The directors (*Geschäftsführer*) and management board members (Vorstand) do not need to hold shares in the capital.
- Voting at the shareholders' meeting is based on equity interests, unless otherwise agreed by the shareholders.

The most common forms of corporate entity are the GmbH (*Gesellschaft mit beschrängter Haftung*, or limited liability company) and the AG (*Aktiengesellschaft*, or stock corporation).

1. Establishment of a *Gesellschaft mit beschränkter Haftung* or "GmbH" (limited liability company)

A *Gesellschaft mit beschränkter Haftung (GmbH)* is an independent legal entity under private law and as such, it is the bearer of rights and obligations. It is a trading

company and can be formed for any permissible purpose, including non-commercial purposes. Unlike a partnership, a GmbH can be founded by a single shareholder. The establishment of a GmbH begins with the drafting of the articles of association and ends with the registration of the GmbH in the commercial register kept by the local court with jurisdiction over the company's registered office.

Establishment of a GmbH involves the following steps:

a) Drafting the articles of association

The articles of association require **notarisation**. Representation by proxy is permissible, but this requires at least a notarised power of attorney. An individual can also establish a GmbH and draft the articles of association. The articles of association must specify the following:

(1) Name of the company

The company name is the name under which the GmbH is registered in the commercial register and uses when operating on the market. Fundamentally, the shareholders are free in their choice of company name. However, the company name must always contain the legal form, "***Gesellschaft mit beschränkter Haftung***" or a generally understood abbreviation of this designation ("***GmbH***"). The name must not be misleading. For example, it must not pretend that the company is active in an industry where it is not, has decades of tradition where this is not the case, or is an official state institution if this is not true. Whether the company name can be used depends on the circumstances of the individual case; it is **recommended** to consult the competent Chamber of Industry and Commerce (*Industrie- und Handelskammer, IHK*) in advance to confirm the preferred company name may be used.

(2) Registered office of the company

The articles of association should specify the location of the registered office of the company in Germany, where the company can be reached for service, particularly by creditors, administrative authorities and courts. The administrative office of a company, *i.e.*, the effective place of business/centre of effective administration/centre of effective management, does not need to be identical to the registered office. Fundamentally, relocating the administrative office to any place within Germany or abroad will not require an amendment to the articles of association.

If major business management decisions are not actually taken in Germany, the company could be found to have dual domicile for tax purposes: in Germany and in the country in which the senior business management duties are effectively performed. Depending on the applicable double taxation agreement, this could be disadvantageous (**double taxation**).

Moreover, relocating the management office abroad after establishing the company could give rise to potential liquidation taxation in accordance with Corporate Tax Act (*Körperschaftsteuergesetz, KStG*)[9] Such conflicts can only be avoided if the actual management duties are also permanently conducted from the company's registered office.

(3) Object of the company

A GmbH can pursue **any legally admissible purposes**. The articles of association should, as precisely and accurately as possible, establish the scope of activity of the GmbH.

(4) Nominal capital and shares in the business

The nominal capital of the GmbH must be at least **EUR 25,000** and consists of one or more shares in the business. Except in the case of the simplified procedure (see V.1.b)), one shareholder may already acquire several shares in the business upon the establishment of the company. The number and nominal amounts of the shares in the business that each shareholder acquires must be included in the articles of association and must be consecutively numbered in the list of shareholders. The usual practice now is for shares to have a nominal value of EUR 1 each, *i.e.* at least 25,000 shares.

The nominal capital may be provided in cash or as tangible assets. However, tangible assets may only be used where the articles of association expressly provide.

(5) Special services on the part of the shareholders

If, in addition to the provision of capital contributions, the shareholders are required to assume additional obligations towards the company, these must also be specified in the articles of association. Such special services may, for example, involve additional contributions on top of the initial contribution (capital surplus) or the obligation to grant loans.

(6) Other provisions

Generally, further provisions will be included in the articles of association, such as stipulations concerning the representative and management authority of the directors (possibly including a list of transactions requiring approval) and the convening and conduct of shareholders' meetings.

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[9] Corporate Tax Act (Körperschaftsteuergesetz, KStG) in the version of the publication of 15 October 2002 (BGBl. I p. 4144), last amended by § 8 of the Law of 2 December 2024 (BGBl. 2024 I No. 387).

b) Establishment through the simplified procedure – the model statutes

With the adoption of the Law on the Modernisation of the Private Limited Liability Companies Act and Combating of Misuse (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen, MoMiG*),[10] the legislator has provided "model statutes" for simple cases of incorporation. One procedural simplification means the model statutes now include the articles of association as well as the appointment of the directors and the list of shareholders. This consolidation reduces the number of documents required.

The model statutes can be used where it is agreed that the GmbH will have a maximum of three shareholders and only one director, only cash contributions will be provided, and each shareholder will have only one share in the business.

The content of the model statutes is limited to: the date, register and numbers of deeds; notary, location of the notary's office; shareholders; company name; registered office; object of the company; nominal capital; distribution of shares in the business between the shareholders; name, date of birth and place of residence of the director; and special comments by the notary, supplemented with provisions on representation and costs of establishment.

Departures from the model statutes are only permissible to a limited extent; complicated formulations are not permitted.

The model statutes yield a slight advantage in terms of costs. However, this is countered by several disadvantages. For example, the simplified procedure does not allow the appointment of more than one director.

While the model statutes may be useful for simple cases, as soon as the structure becomes more sophisticated, the disadvantages outweigh the advantages. This simplification will therefore probably only be of theoretical benefit to foreign investors.

c) Appointment of the company's directors

The GmbH has one or more directors. The directors are appointed at the first general meeting, which is held immediately following the notarisation of the articles of association.

Only natural persons with unlimited legal capacity can be appointed as directors. They do not need to be German nationals.

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[10] Law on the Modernisation of the Private Limited Liability Companies Act and the Combating of Misuse (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen, MoMiG*) of 23 October 2008 (BGBl. I 2008, p. 2026).

Details on the rights and duties of the directors are described in 3. b) and in their service contracts (see Chapter G. IV. 3, below).

d) Provision of the nominal capital and opening of a bank account

In view of the fact that the shareholders of a GmbH are not personally liable and only the company's assets are available to creditors, the shareholders must make their share contributions available to the company.

If the company is formed by way of a capital contribution in cash from a shareholder, the shareholder must immediately pay one-quarter of each share into the business, but no less than half of the minimum nominal capital of **EUR 12,500** in total.

Immediately following notarisation of the articles of association, the director should therefore open a company bank account into which the shareholders can deposit their contributions.

A company which is not yet registered in the commercial register can also have a bank account opened as a company "in the course of establishment" (*in Gründung*), or "i.G." for short.

The directors and all founding members are entitled to open an account. The following documents must be submitted to open an account:

- a certified copy of the notary deed for the incorporation: this will mainly consist of the notarised articles of association;
- a copy of the shareholders' resolution on the appointment of the directors;
- a copy of proof of existence and proof of power of representation where the parent company is a legal entity, *i.e.*, certificates of good standing, certificate of incorporation and certificate of shareholders, certificate of directors and secretary in most cases, where necessary with translation of the documents by a sworn translator and authorisation by apostille or legalisation;
- an organisation chart for the parent company, indicating its shareholder(s) and revealing the ultimate beneficial owner(s);
- a valid passport or ID of the applicant; and
- proof of the residential address of the applicant (if the shareholder or the director(s) of the company, for whom the account will be opened, is from another country).

Additional KYC ("know your customer") requirements resulting from anti-money laundering requirements and the internal regulations of banks or financial institutions may also be required.

e) Application and registration of the company in the commercial register

All directors must apply for the registration of the establishment of the GmbH in the relevant **commercial register**. The commercial register is a register of all traders and trading companies. Anybody can inspect the register, free of charge, at the local court; you can also access it online at: www.handelsregister.de.

The register contains information on the name of the company, its legal form and its shareholders. The local court in the district where the GmbH has its registered office is responsible for maintaining the relevant register.

The application for registration in the commercial register must be made in **notarised form** by the managing directors. Representation by proxy is not permitted.

The following documents, in certified form, must be submitted to the commercial register together with the application for registration:

- certified copy of the notarised articles of association, and appointment of the directors;

- list of the shareholders, indicating the surname, first name, date of birth and place of residence of each shareholder, as well as the nominal amounts of the shares held by each shareholder, together with the percentage of shares compared to the total nominal capital;

- if non-cash contributions are agreed: documents confirming that the value of the non-cash contributions corresponds to the value of the shares in the business or assets taken over in return;

- written confirmation by the directors that they have not been convicted of financial or insolvency-related offences, nor have they been prohibited from practising a profession;

- written confirmation by the directors that the contributions relating to the shares in the business held by the shareholders have been provided, and that the subject of the contributions is, with final effect, at the free disposal of the directors; and

- the nature and scope of the representative authority of the directors.

The commercial register checks the formalities associated with the establishment of the GmbH. It usually takes two to four weeks for the company to be registered, depending on the competent commercial register court.

The costs for the notary, including registration in the commercial register, depend on the amount of the nominal capital. The establishment of a GmbH with a nominal capital of EUR 25,000 would result in notary’s fees of approximately EUR 1,000.

f) Business registration

Once a GmbH has been founded, the business **must be registered** before business operations can commence, in accordance with the Industrial Code (*Gewerbeordnung, GewO*)[11]. This also applies in the case of a takeover of an existing business.

Business registration is, in principle, merely the notification of the commencement of the intended business to the competent administrative authority. The authority must only approve certain types of business, as defined by statute. Approval is required, for example, for business activities in the financial sector or in other sectors which might be hazardous to the general public, such as gambling or private security.

The authorities responsible for business registration vary depending on the federal state. As a rule, the local administration where the company has its registered office is the competent authority. The relevant competent authority regularly makes a standard form available online to be used when registering a business. The costs for the administrative procedure differ between authorities, varying between approximately EUR 15 and EUR 60 at the time of writing. Any failure to comply with the registration requirement is considered an administrative offense; continued and intentional non-compliance is considered a criminal offence.

g) Mandatory information on company's letterhead

Under German law, any company letterhead, *i.e.*, notice of the company to third parties about business matters in written or email form (email signature), must contain specific information about the company (*i.e.*, the complete company name, legal form, seat of the company), as well as the relevant company register, the company's registration number in that commercial register, the name(s) of the director(s) and, in the case of a supervisory board, the name of the chairperson of the supervisory board.

In addition, specific tax information (like the VAT and tax identification numbers) must be included on any invoices issued by the company.

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[11] Industrial Code (*Gewerbeordnung, GewO*) in the version of the publication of 22 February 1999 (BGBl. I p. 202), last amended by § 36 of the Law of 23 October 2024 (BGBl. 2024 I No. 323).

2. The *Unternehmergesellschaft haftungsbeschränkt* or "UG" (entrepreneurial company with limited liability)

An "*Unternehmergesellschaft haftungsbeschränkt*" (entrepreneurial company with limited liability), or "*UG haftungsbeschränkt*" may be established with a share capital of less than EUR 25,000. This is a sub-form of the GmbH. Accordingly, the same regulations apply to the UG as apply to the GmbH, with several key differences.

a) Special features relating to the establishment of the company

The most important difference between the UG and the "classic" GmbH is that a UG can be founded with a nominal capital between EUR 1 and EUR 24,999. This makes it particularly interesting for persons starting up a new business as it only requires a small start-up capital. However, the amount of nominal capital chosen should be adjusted to the specific requirements of the proposed business activity, as the lower the nominal capital, the higher the risk of insolvency. Founding a company with EUR 1 nominal capital is therefore impractical.

Unlike the "classic" GmbH, the nominal capital of the UG must be fully paid up as cash contributions prior to registration of the company in the commercial register. Non-cash contributions are not permitted.

Practical advice: If a foreign investor plans to enter into a contract with a UG, the amount of the UG's capital should be verified. In the absence of recoverable assets, we recommend obtaining supplementary forms of security (reservation of title, transfer of title by way of security or similar, sureties, or the like).

b) Formation of reserves

In order to ensure the availability of adequate capital resources, the UG may not distribute any profits in full. Instead, it must form a statutory reserve and transfer into it one quarter of the net income for the year, minus the loss carry forward from the previous year. Apart from a nominal capital increase, this reserve may also be used to balance an annual deficit or loss carry forward. This obligation ceases once the company's nominal capital is increased to at least EUR 25,000, following the adoption of a resolution to amend the articles of association of the UG.

Failure to satisfy the reserve requirement will annul the approval of the annual financial statements, which will in turn lead to the annulment of any resolution on the appropriation of profits. This can result in repayment claims against the shareholders and personal liability on the part of the directors.

c) Obligation to convene the shareholders' meeting

A shareholders' meeting must be convened in any of the circumstances stipulated by law (see 3.a, below), or when it is required in the interest of the GmbH. A shareholders' meeting must be called immediately if insolvency is impending. Unlike the GmbH, the loss of half of the nominal capital is not required to trigger a shareholders' meeting.

d) Conversion of the UG into a GmbH

The UG can be converted into a normal GmbH by means of a capital increase, although there is no obligation to do so. This procedure is governed by § 5a of the Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*)[12], and falls outside of the scope of the Reorganisation of Companies Act (*Umwandlungsgesetz, UmwG*)[13]. The company must reach the minimum nominal capital of a GmbH (EUR 25,000), through either cash capital increases or the conversion of reserves into nominal capital under the rules on capital increases from company resources. An audited balance sheet is also required. Once the capital increase takes effect, the special regulations no longer apply, and the company becomes a full GmbH.

Practical advice: The UG can be a good instrument for quickly and economically establishing an initial presence on the German market. If the business is successful, a GmbH can then be created by converting the reserves into capital. However, the legal form of the UG suffers from lower reputation than a GmbH.

e) UG (*haftungsbeschränkt*) & Co. KG

As the UG is only a new form of GmbH, a UG (*haftungsbeschränkt*) & Co. KG can be set up for the same purposes as a GmbH & Co. KG.

If a UG is involved, the obligation to form reserves can de facto be rendered ineffective because the KG agreement may stipulate that profits will only be made by the limited partner, but not the general partner. The law does not affect the admissibility of a contractual waiver of the general partner's right to generate profits.

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[12] Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*) of 20 April 1892 (BGBl. Part III, No. 4123-1), last amended by § 21 of the Law of 23 October 2024 (BGBl. 2024 I No. 323).

[13] Reorganisation of Companies Act (*Umwandlungsgesetz, UmwG*) of 28 October 1994 (BGBl. I p. 3210; 1995 I p. 428), last amended by § 17 of the Law of 23 October 2024 (BGBl. 2024 I No. 323).

3. The corporate bodies of the GmbH

As a legal entity, the GmbH acts through its corporate bodies. The corporate bodies of the GmbH are the shareholders' meeting, the directors and, optionally, the supervisory board.

a) The shareholders' meeting

The shareholders' meeting (*Gesellschafterversammlung*) is the highest decision-making body of the GmbH. It is responsible for the fundamental matters of the GmbH, in particular:

- the amendment of the articles of association;
- the appointment and removal of directors;
- the dissolution of the company;
- the approval of the annual financial statements and the appropriation of profits.

The shareholders' meeting can decide on all matters within its competence as long as it is not prohibited by law or by the articles of association. In particular, it can intervene directly in the management of the company by issuing instructions.

Participants in the shareholders' meeting generally take decisions through the adoption of resolutions. The law stipulates special requirements in terms of the majority required to adopt resolutions concerning specific issues, such as the amendment of the articles of association or the dissolution of the company. Resolutions are otherwise passed with a simple majority. However, different rules may be stipulated in the articles of association. In particular, voting rights may be distributed in a different way to the shares in the company.

b) The directors

The directors (*Geschäftsführer*) form the representative body of the GmbH. Only natural persons may become directors. They do not have to be shareholders of the GmbH (third-party representation). The law distinguishes between the **management** of the company and the **representation** of the company by the directors.

Representation requires the authority of the directors to represent the company externally in all legal and business transactions, *i.e.*, with customers and suppliers, authorities, etc. In contrast, management concerns the scope of authority granted to directors within the company to manage the company's business operations, *i.e.*, the limits, in terms of content or amount, within which the shareholders have authorised the directors to carry out transactions.

Fundamentally, the authority to manage covers the entire scope of the company, in both business and technical terms – unless otherwise stipulated – for ordinary and extraordinary legal transactions. The authority to manage does not include the power to amend the articles of association or various other rights in the articles. The articles of association usually contain a limitation, requiring shareholder approval for directors to undertake transactions outside of the "normal course of business". Frequently, the articles of association will also specify a list of legal transactions requiring approval, restricting the directors' internal authority to manage.

In this context, the statutory power of directors to represent the company remains **unrestricted** and **cannot be limited**. Even if the directors are required to observe internal restrictions imposed on their power of representation by the articles of association or resolutions of the shareholders, such restrictions in the relationship between the company and the directors do not, in principle, have an impact on the power of the director to represent the company externally, such as vis-à-vis contractual business partners.

Directors are only subject to the **legal restrictions of § 181 Civil Code** (*Bürgerliches Gesetzbuch, BGB*)[14], which prevents directors from acting simultaneously in their own name and in the name of the company (prohibition against contracting with oneself or self-agency) or simultaneously representing the GmbH and a third party in a transaction between said third party and the company (prohibition against multiple agency). Directors may only engage in self or multiple agency if these are explicitly permitted, *e.g.*, in the articles of association, or by a resolution of the shareholders' meeting.

The potential for abuse of a managing director's representative authority can be limited if the company appoints several (at least 2) directors and grants them joint representative authority. In this case, the company can only be represented externally with legally binding effect by 2 directors jointly (genuine joint representation) or by one director together with an authorised signatory (non-genuine joint representation). If only one director acts, it will only be binding on the company if the other directors either empower the acting director to do so prior to the transaction, or approve his or her declarations retrospectively.

Directors are also subject to other specific obligations. For example, they are responsible for convening and preparing shareholders' meetings. In addition, directors are responsible for ensuring entries in the commercial register are complete and correct, for fulfilling tax obligations on behalf of the company, and for the fulfilment of the accounting obligations of the GmbH, such as maintaining trading books and preparing an opening balance sheet. The directors are also responsible for preparing the annual financial statements, submitting these to the shareholders' meeting and the operator of the Federal Gazette (*Bundesanzeiger*), and for publishing the company's reporting documents.

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[14] Civil Code (*Bürgerliches Gesetzbuch, BGB*) of 2 January 2002 (BGBl. I p. 42, 2909; 2003 I p. 738), last amended by § 14 of the Law of 23 October 2024 (BGBl. 2024 I No. 323).

Finally, in the event that there are grounds for insolvency of the company, the directors must apply for the opening of insolvency proceedings without any culpable delay.

Digression: rights and obligations of the authorised signatories

The **power of procuration** (***Prokura***) is a special authorisation which, in accordance with the provisions of the HGB, can only be issued by the proprietor of the commercial business or their legal representative. In the case of a GmbH, the power of procuration is issued by the directors, notwithstanding any approval by the shareholders' meeting that might be necessary internally.

Only natural persons can be granted a power of procuration. The power of procuration becomes effective at the time of its issuance, which does not need to adhere to formal requirements. It lapses immediately, irrespective of registration in the commercial register, upon revocation, which can occur at any time. Both the issue and the lapse of the power of procuration must be registered in the commercial register. Procuration empowers the holder to carry out all kinds of transactions and legal acts, in or out of court, which are associated with the management of a commercial business, with the sole exception that the authorised signatory is only empowered to sell and encumber plots of land if he or she has been specifically granted the relevant authority. The power of procuration may not be limited vis-à-vis third parties. Personal limitation of the power of procuration is only possible in the form of a "branch power of procuration" (*i.e.*, limitation to one branch office or an independent branch establishment) or as joint power of procuration (several persons may only represent the company jointly).

The power of procuration is also limited as "principal transactions" may only be conducted by the proprietor of the commercial business. These include fundamental and structural decisions. The authorised signatory cannot, for example, sell or discontinue the commercial business, apply for registration in or sign the commercial register on behalf of the company, issue powers of procuration, or sign annual financial statements.

c) The supervisory board

Generally, the supervisory board (*Aufsichtsrat*, also sometimes called the advisory board) is not a mandatory corporate body of a GmbH. However, shareholders may establish a board in the articles of association (optional supervisory board – *freiwilliger Aufsichtsrat*). The supervisory board does not have a management function, but simply monitors and supervises the management and provides advice as appropriate.

In certain cases, the GmbH is required by law to have a supervisory board. These include:

- The One-third Participation Act (*Drittelbeteiligungsgesetz, DrittelbG*)[15] requires a supervisory board to be established where the GmbH employs more than 500 employees. One-third of the members of the supervisory board must then be representatives of the employees. When calculating the number of employees of the GmbH under the DrittelbG, employees of operations of dependent companies are deemed to be employees of the controlling company if a control agreement exists between the 2 companies, or if the dependent company is integrated into the controlling company.

- Pursuant to the Co-determination Act (*Mitbestimmungsgesetz, MitbestG*)[16], a supervisory board is mandatory in companies which typically employ more than 2,000 employees and must be made up of representatives of the employers and employees in equal parts. Companies active in the mining and steel industries which fulfil the prerequisites of the Mining and Steel Industry Co-determination Act (*Montanmitbestimmungsgesetz, MontanMitbestG*)[17] are exempt from this obligation.

- Where a GmbH is active in the mining and/or steel producing industries, the Mining and Steel Industry Co-determination Act (*Montanmitbestimmungsergänzungsgesetz, MontanMitbestGErgG*)[18] will apply and require a GmbH to establish a supervisory board with rights of co-determination where it employs more than 1,000 employees. The Supplementary Mining and Steel Industry Co-determination Act extends the provisions of the MontanMitbestG to parent companies of groups which, while not themselves fulfilling the prerequisites set forth in the MontanMitbestG, head a group characterised by companies involved in the mining and/or steel industries.

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[15] One-third Participation Act (*Drittelbeteiligungsgesetz, DrittelbG*) of 18 May 2004 (BGBl. I p. 974), last amended by § 21 of the Law of 7 August 2021 (BGBl. I p. 3311).

[16] Co-determination Act (*Mitbestimmungsgesetz, MitbestG*) in the version of the publication of 4 May 1976 (BGBl. I p. 1153), last amended by § 17 of the Law of 7 August 2021 (BGBl. I p. 3311).

[17] Mining and Steel Industry Co-determination Act (*Montanmitbestimmungsgesetz, MontanMitbestG*) of 7 August 1956 (BGBl. Part III, No. 801-2), last amended by § 14 of the Law of 7 August 2021 (BGBl. I p. 3311).

[18] Supplementary Mining and Steel Industry Co-determination Act (*Montanmitbestimmungsergänzungsgesetz, MontanMitbestGErG*) of 7 August 1956 (BGBl. Part III, No. 801-3), last amended by § 15 of the Law of 7 August 2021 (BGBl. I p. 3311).

4. Miscellaneous

a) Amendments to the articles of association

Resolutions pertaining to amendments of the articles of association **must be notarised**. Amendments to the articles of association **must be registered in the commercial register** by the directors **in notarised form**; the full text of the (revised) articles of association **must be submitted to the commercial register**.

Amendments to the articles of association only enter into force at the time of registration in the commercial register.

b) Liability of the shareholders

Shareholders are **not personally liable** for the liabilities of the company. Fundamentally, the company is only liable with its corporate assets.

Exceptionally, shareholders can only be considered directly liable under very limited preconditions, such as in the case of undercapitalisation, a combination of personal and company assets or spheres of activity, a threat to the continued existence of a company in a qualified *de facto* group, or the misuse of corporate structures. The latter is assumed where the absence of personal liability on the part of the shareholder has been deliberately used to the detriment of creditors and none of the other cases apply.

c) Preservation of capital

Assets of the company required to maintain nominal capital may not be paid out to the shareholders. Any payments made in contravention to this prohibition must be refunded to the company by the relevant shareholder. If the refund cannot be obtained from the relevant shareholder, the other shareholders will be liable for the amount which is to be refunded, to the extent required to satisfy the company's creditors, in proportion to their stake in the business. In addition, the directors will also be required to provide compensation.

d) Reporting and auditing obligation

Each GmbH must prepare annual financial statements (balance sheet, income statement and notes). The specific scope of this obligation, as well as the obligation to audit and disclose the annual financial statements, will depend on the size of the company.

- In the case of a **small corporate entity**, the annual financial statements must be prepared within the first six months of the following business year. No management report needs to be prepared.

The annual financial statements of a small corporate entity are not subject to any auditing obligations. They must be submitted to the competent commercial register immediately after presentation to the shareholders, at the latest by the end of the 12th month of the following business year and must immediately be submitted to the Federal Gazette (*Bundesanzeiger*).

Small enterprises are those which do not fulfil at least two of the following three characteristics:

- a balance sheet total of at least EUR 7,500,000;
- sales revenues of at least EUR 15,000,000 in the twelve months prior to the balance sheet date;
- a yearly average of at least 50 employees.

- Annual financial statements of **medium-sized and large GmbHs** must include a management report, be prepared within the first three months of the business year, and be audited by an independent auditor.

  Medium-sized enterprises are those which exceed at least two of the three characteristics above.

  Large enterprises are those which exceed at least two of the following three characteristics:

  - a balance sheet total of at least EUR 25,000,000;
  - sales revenues of at least EUR 50,000,000 in the twelve months prior to the balance sheet date;
  - at least 250 employees on a yearly average.

5. Purchasing a GmbH

Instead of establishing a new GmbH, market access can be gained through the acquisition of an existing GmbH. This can involve the purchase of a “shell GmbH”, which has discontinued its business operations and no longer possesses significant assets, but is still registered in the commercial register. Conversely, a “shelf company”, which has not yet started business operations, can be purchased from specialist providers. The extra costs incurred (in addition to the share capital, establishment costs and costs of any legal and tax advisors) usually amount to around EUR 3,500.

According to the GmbHG, the sale and assignment of the shares in an existing GmbH require notarisation. The assignment must be registered with the commercial register. The managing director must submit an updated list of shareholders to the commercial register whenever there is a change in shareholder structure.

In most cases, it is also necessary to amend the articles of association, since the company name and object are usually changed. These amendments also require notarisation and registration in the commercial register.

In summary, the acquisition of an existing GmbH requires the following:

- a notarised contract of purchase and assignment of the shares in the business;
- a notarised shareholders' resolution concerning amendments of the articles of association and change of directors, including the new company name and new object of the company;
- a notarised application for the registration in the commercial register of:
    - the assignment of the shares in the business and submission of a new list of shareholders;
    - the release of the previous directors from office and appointment of new directors;
    - the amended articles of association.

Practical advice: Before acquiring an existing company, check the existing liabilities of the company.

6. Establishment of an *Aktiengesellschaft* or "AG" (public limited company)

An *Aktiengesellschaft (AG)* is also a legal entity under private law and, as such, bears rights and obligations. Liability of the company towards its creditors is limited to the company's assets. Where the shares in the company are traded on the stock exchange, it will be referred to as a listed public limited company (*börsennotierte Aktiengesellschaft*).

Establishing an AG involves the following steps:

a) Drafting the articles of association

In order to form an AG, a notarised deed of incorporation (articles of association) is required. An AG can be founded by a single person. The articles of association must contain the following minimum components:

- company name and registered office of the company;
- object of the company;
- amount of the share capital;
- division of the share capital into either par-value shares or no-par shares; in the case of par-value shares: their nominal amounts and number of shares of each nominal amount; in the case of no-par shares: their number;
- if there are several classes of shares, the number of shares in each class;
- information on whether the shares are bearer shares or registered shares;
- number of management board members or the rules according to which this number is determined;
- special benefits granted to individual shareholders or third parties;
- formation costs incurred by the company;
- in addition, in the case of non-cash contributions:
  - the subject of the non-cash contribution;
  - the person from whom the company acquires the non-cash contribution;
  - the nominal amount or the number of no-par shares to be granted in return for the non-cash contribution.

(1) Digression: forms of shares and classes of shares

Formation of an AG requires a minimum share capital of EUR 50,000, divided into shares. Each share thus represents a fraction of the share capital.

(2) Forms of shares: par-value shares and no-par shares

Shares can be issued in two different forms, either as par-value shares or as no-par shares. The two forms of shares may not be combined.

Par-value shares, where the nominal value of the share is marked on the share. They must be denominated with a value of at least EUR 1.

No-par shares represent a percentage shareholding rather than a fixed amount of the share capital of a company. The quota is not marked on the share since it changes with each capital increase or reduction. The shareholding quota of a no-par share is calculated based on the share capital set forth in the articles of association and the number of shares.

(3) Distinction between bearer and registered shares

Shares can be issued as bearer shares or registered shares. Both forms of shares can also exist together.

In the case of anonymous **bearer shares**, the holder of a certificate is a shareholder of the company. The share certificate serves as documentary proof of the shareholder's interest in the AG. The transfer of bearer shares can take place anonymously; consequently, the company cannot exercise any influence on the shareholder structure. Notifications to the shareholders must, accordingly, be published in publicly accessible media.

In the case of **registered shares**, the names and addresses of the shareholders are known to the company and are recorded in, the "share register". The transfer of registered shares can only be validly executed through reregistration of the shareholding in the share register. For this to occur, the company must be provided with proof of the proper transfer of the shareholding. The articles of association can make the transfer of registered shares subject to company approval ("registered shares with restricted transferability"). This makes it possible – to a certain extent – for the company to exercise influence over the shareholder structure and, for example, defend itself against hostile takeovers.

(4) Different categories of shares

Fundamentally, each **ordinary share**, also confers a voting right. Since the end of 2023, it has also been possible to have multiple-voting shares. However, these are limited to registered shares and they may not exceed ten times the usual voting rights. Shares without voting rights are only permitted where the shares are provided, in return, with a dividend preference to be paid out later. In the case of such "**preference shares**", the shareholder will have all shareholder's rights except voting rights.

b) Appointment of the supervisory and management boards of the AG

The founders appoint the first supervisory board for the first business year, which in turn appoints the first management board. Only natural persons with full legal capacity can be appointed as members of the supervisory or management boards. They do not need to be German nationals. The question of whether the individuals

must be able to enter Germany at any time to become members of the management board is controversial and the German Federal Court of Justice has not yet clarified this issue. In any case, persons who can enter Germany at any time as EU citizens or for whom there is no visa requirement for a limited period of time are preferred management board appointees. There is no such requirement for members of the supervisory board.

For more details see 7. b) and 7. c), below.

c) Formation report and formation audit

The founders prepare the formation report for the establishment of the AG. The report must include, *inter alia*, whether and to what extent shares have been acquired for a management or supervisory board member during the establishment of the company. In the case of establishment through non-cash capital contributions, the report must explain the key circumstances on which the appropriate nature of the performances as non-cash contributions depend.

The members of the management and supervisory boards must examine the formation process. The examination must cover the following points:

- Have the founders provided complete information concerning the acquisition of the shares or the capital contributions to the share capital?

- Does the value of the non-cash contributions reach the minimum issue value of the shares or the benefit to be granted in return?

- A description of the nature of each non-cash contribution, specifying and describing the valuation methods applied in determining its value.

In the case of establishment through non-cash capital contribution or where the founders are members of the management or supervisory board, the formation audit must be performed by external auditors appointed by the court.

d) Deposit of the share capital

Before the company can be registered in the commercial register, at least a quarter of the minimum issue value of any cash contributions must be paid into an account held by the AG. If the shares were issued at a value higher than the minimum issue value, this additional amount must also be placed at the free disposal of the management board. Where the AG is set up by only one person, said person must also provide a security for the amount exceeding the amount paid in, for example in the form of a bank guarantee.

e) Registration and entry of the AG in the commercial register

All founders, management board and supervisory board members must apply for registration of the company in the commercial register. The application must be notarised. The court examines the registration documents filed by the notary and, in case of doubt, obtains an opinion from the Chamber of Industry and Commerce (*Industrie- und Handelskammer, IHK*). If there are no obstacles to registration, the AG is normally registered in the commercial register approximately two to four weeks later, after which time it enjoys its own legal personality. The registration must be published in the Federal Gazette and, if applicable, in a further publication medium.

The costs of establishing an AG depend on the share capital. The following costs will nonetheless be involved:

- notarisation of the articles of association;
- notarisation of the application for registration in the commercial register;
- registration in the commercial register;
- publication of the registration in the Federal Gazette;
- additional legal advice.

f) Business registration and mandatory information on company's letterhead

The company letterhead must show the business registration and other information. The requirements are similar to those described in 1. f) and g).

7. The corporate bodies of the AG

The AG acts, as a legal entity, through its corporate bodies. The corporate bodies of the AG are the management board, the supervisory board, and the general meeting of shareholders.

a) The general meeting

All the shareholders exercise their rights in the general meeting (*Hauptversammlung*), which represents the decision-making body within the AG. The general meeting may only take decisions in those cases prescribed by law; it does not enjoy universal competence. Its powers extend predominantly to regularly recurring and structural measures such as

- the appointment of supervisory board members;
- the appointment of the auditor of the financial statements;
- the appropriation of the balance sheet profit;
- formal approval of the actions of members of the management board and the supervisory board;
- any amendments to the articles of association;
- measures for raising and reducing capital;
- the dissolution of the company.

The general meeting is thus not responsible for management matters, unless the management board requests.

At least once a year, the shareholders must convene to pass resolutions. Certain formalities must be observed prior to a general meeting as well as when exercising the voting rights during the general meeting.

(1) Calling the general meeting

The general meeting is normally convened by the management board. The board must announce in the company's designated publications the meeting at least 30 days prior to the meeting date, *i.e.*, at least in the Federal Gazette, which is a generally accessible source for a normally unspecified group of addressees. The Federal Gazette is published by the Federal Ministry of Justic (*Bundesministerium der Justiz, BMJ*) and is operated by Bundesanzeiger Verlags GmbH in Cologne; www.bundesanzeiger.de. If the shareholders of the company are known by name, the general meeting may be convened by registered letter, unless the articles of association stipulate otherwise. The date of dispatch is considered the date of announcement.

The announcement must at least include the following content:

- the company name with its correct legal form and registered office;
- the date and time of the general meeting;
- the venue for the general meeting, with the exact address;
- conditions for participation and the exercise of voting rights;

- the procedure for voting by proxy, postal vote, or by way of electronic communication pursuant to § 118 (1) sentence 2 of the Stock Corporation Act (*Aktiengesetz, AktG*)[19], provided the articles of association allow the form of exercising voting rights; and

- the agenda of the general meeting.

The general meeting is held at the registered office of the company, unless otherwise provided for in the articles of association. If the shares are listed for trading on a German stock exchange, the general meeting can also take place at the stock exchange premises. The Covid-19 pandemic frequently saw companies organise and hold their general meetings as virtual meetings or in hybrid form. However, virtual general meetings are only possible if the articles of association so provide. In contrast to the GmbH, resolutions by written circulation procedure are not permitted for an AG.

The law does not stipulate the timing of the general meeting. A date should therefore be set, taking into consideration feasibility and customary practice. The general meeting of a publicly held corporation may not take place on a Sunday or public holiday, nor should it commence before 8 a.m.

In addition to providing the subject of any planned resolutions, the agenda must also include the order in which these resolutions will be considered. The information must be specific enough for the shareholders to recognise the subjects proposed for discussion and resolution without the need to make further queries.

If all shareholders or their representatives are present and if they all agree, the general meeting can also pass resolutions without observing the statutory forms and periods of notice. Admittedly, this will mainly be relevant and of interest to small corporate entities rather than publicly held corporations.

(2) Conduct of the general meeting

The general meeting must maintain a register of those shareholders in attendance, stating their place of residence, the percentage of their shareholding, and the category of the shares. It is not strictly necessary for shareholders to appear in person as they can also be represented by proxy. In this case, the name and address of the proxy must also be recorded in the register. The same applies to the exercise of voting rights by a banking institution.

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[19] Stock Corporation Act (*Aktiengesetz, AktG*) in the version of the publication of 6 September 1965 (BGBl. I p. 1089), last amended by § 18 of the Law of 23 October 2024 (BGBl. 2024 I No. 323).

The register must be made available to all participants before the first vote. Essentially, it is used to establish a quorum, to enable the outcome of voting to be determined, and to allow any exclusions of voting rights to be assessed more rapidly.

The general meeting must have a chairperson: the chairperson is chosen by vote unless already specified in the articles of association. Management board members may not be chosen. Articles of association usually specify that the chairperson of the supervisory board will chair the general meeting.

The chairperson opens and closes the general meeting and deals with the subjects proposed for resolution in the order published in the agenda. The chair shall invite the speakers to take the floor, limit – if necessary – speaking time, and take measures to impose order on individual participants in the general meeting.

Each shareholder, in his or her capacity as a participant in the general meeting, has an inalienable right to information. This is primarily intended to enable the shareholder to obtain all information necessary to cast their vote.

The chair of the meeting initiates and leads voting on motions raised, and rules on the outcome of the resolution.

In order to ensure proper documentation of the general meeting of a listed AG, each resolution must be certified through registration by a notary. In the case of an unlisted AG, the private record kept by the chair of the meeting is sufficient if the meeting does not pass any resolutions on fundamental issues.

b) The management board

The management board (*Vorstand*) manages the AG on its own responsibility. It is also the legal representative body of the AG in judicial and extrajudicial matters. It is subject to the control of the supervisory board, to which it must report. However, the management board is not bound by instructions issued by the supervisory board or the general meeting.

The duties and obligations of the management board include, among others:

- preparing resolutions to be placed before the general meeting and implementing them as resolved;
- keeping and maintaining trading books;
- preparing the annual financial statements;
- applying for insolvency in the event of the insolvency or overindebtedness of the company;

- calling an extraordinary general meeting in the event of the loss of half of the share capital;

- collecting the employees' social insurance contributions;

- fulfilling the company's tax obligations.

The management board is appointed by the supervisory board for a maximum term of five years. It can be made up of one person or several persons. Where the share capital exceeds EUR 3 million, the management board must consist of at least two persons, unless otherwise stipulated in the articles of association.

Management board members are authorised to jointly manage and represent the company, unless otherwise stipulated in the articles of association. The representative authority cannot be restricted in terms of external dealings. However, internally it can be agreed that certain transactions require the approval of the supervisory board.

c) The supervisory board

The supervisory board (*Aufsichtsrat*) supervises the management board in the performance of its management duties. Management tasks cannot be assigned to the supervisory board. However, the supervisory board must define a catalogue of measures that may only be implemented with the approval of the supervisory board. The supervisory board is authorised to inspect and examine all books and documents of the AG, as well as the portfolios of securities and inventories of goods. Other duties of the supervisory board include:

- Mandating the auditor to audit the annual and consolidated financial statements; and

- representing the AG with respect to all matters concerning the members of the management board.

The supervisory board must consist of at least three members, but the articles of association may stipulate a higher number of members, divisible by three. However, the law limits the number of supervisory board members for companies with a share capital of

- up to EUR 1.5 million: a maximum of 9 members;

- more than EUR 1.5 million: a maximum of 15 members; and

- more than EUR 10 million, to a maximum of 21 members.

A supervisory board member cannot simultaneously be a management board member or permanent proxy for a management board member. The position as authorised sig-

natory of the AG is also incompatible with the exercise of the supervisory board mandate. As a control body, the supervisory board is required to hold at least one meeting every six months, or two in the case of listed companies. A record must be kept of the meetings of the supervisory board, which must be signed by the chairperson. In addition, larger companies (with more than 500 or 2,000 employees) are subject to co-determination laws (One-Third Participation Act and Co-Determination Act – *Drittelbeteiligungsgesetz/Mitbestimmungsgesetz*) apply, which require employee representation on the supervisory board.

8. Comparison between GmbH and AG

The most **significant differences between a GmbH and an AG** can be summarised as follows:

- The director of a GmbH is bound by the instructions of shareholders, whereas the management board of an AG is free in its commercial decisions but is subject to control by the supervisory board.

- The transfer of GmbH shares requires notarisation, whereas AG shares are freely transferable like other goods.

- In the case of a GmbH, shareholders can demand to inspect the business documents at any time, whereas in the case of an AG, only the supervisory board, and not the individual shareholder, has the right to inspection.

- One advantage of the AG in comparison to the GmbH is the possibility, through the issue of shares, to acquire a widely spread share capital. The AG is therefore also the more suitable legal form if employee participation is planned.

- The minimum share capital of a GmbH is EUR 25,000 (§ 5 (1) GmbHG), whereas the minimum share capital of an AG is EUR 50,000 (§ 7 AktG).

- The formation of an AG tends to be more complicated and more expensive than the formation of a GmbH. The AG is subject to more extensive regulatory requirements, such as an audit of the formation by external auditors for contributions in kind (§ 33 AktG), whereas these are handled more simply for the GmbH.

VI. Combined form of company – the GmbH & Co. KG

The GmbH & Co. KG is a special manifestation of the *Kommanditgesellschaft (KG)*, in which the personally-liable partner (**general partner**) is not a natural person but a ***Gesellschaft mit beschränkter Haftung*** (*GmbH*). The GmbH & Co. KG is frequently

used where many limited partners contribute cash amounts and, in view of the high volume of financing, no natural person should assume the position of the personally liable partner.

1. Establishment

A KG requires at least two persons, one general partner and one limited partner. The company is created through establishment, *i.e.*, usually through articles of association. These are typically agreed in writing, although this form is not prescribed by law.

The parties may agree to defer when the company comes into being, for internal purposes, to a date after the adoption of the articles of association. In order to avoid personal liability on the part of the limited partners, you should ensure the company only comes into being and starts operations upon registration in the commercial register.

2. Share capital

There is no legal minimum share capital for the KG itself. The nominal capital of the general partner GmbH must be at least **EUR 25,000**.

Capital contributions for both the general partner GmbH and the KG can be provided as cash or non-cash contributions. The law does not require non-cash contributions to be audited by an auditor or other expert.

A distinction is made between the liable capital contribution, which must be registered in the commercial register, and any limited partner's contribution provided in excess of this.

3. Shareholders' liability

The general partner's liability is **unlimited**. The limited partner's liability is **restricted** to the amount registered in the commercial register. Limited partners will not be held liable once they have made their investment provided the money or property contributed has not been returned to them.

The general partner's risks of commercial liability are borne by the general partner GmbH, the shareholders of which are strictly not liable for the company's liabilities. Consequently, there is a ***de facto* limitation of the liability of the general partner**. Since the GmbH is only liable in the amount of its nominal capital (at least EUR 25,000), and the limited partners assume no personal liability, the GmbH & Co. KG circumvents the characteristic features of a partnership (personal unlimited liability).

4. Representation

The management and representation of the GmbH & Co. KG follow the same principles as the KG. As the general partner, the GmbH, therefore, has the (sole) authority to conduct the business of the KG and to represent it externally. The limited partner has no authority to represent the company.

An interesting aspect of this arrangement is that the GmbH requires a managing director, because it is not capable of acting as a legal entity. This conflicts with the principle of self-representation which applies to partnerships, because a person, who is not a partner in the company and who does not bear the risk of personal liability, can conduct the company's business and represent the company ("third-party representation").

If the limited partners are shareholders in the general partner GmbH and perform a management function, they will have comprehensive management authority.

5. Amendments to the articles of association

Amendments to the articles of association can be made in accordance with the provisions of the articles of association, which generally require a written shareholders' resolution. If no specific majorities are stipulated for the adoption of amendments, the resolution will require the unanimous approval of the shareholders.

6. Nature of the shares in the company / voting rights

Each limited partner holds a limited partner's share. According to the legal ideal, to be passed by the shareholders, a resolution requires the approval of all the shareholders called on to participate in the passing of resolutions. However, to comply with the principle of equal treatment, the articles of association can stipulate otherwise – as is often the case in practice. For example, in the case of majority votes, voting rights can be linked to the amount of liable capital contributed, the statutory limited partner's contribution, or the total of both amounts.

7. Transfer of limited partner's shares

Due to the personal nature of the position of partner in a KG, the transfer of the limited partner's shares is restricted by law. Consequently, for a valid transfer, the articles of association must allow it to happen or all other partners must agree to the transfer. The transfer of the limited partner's shares is not strictly subject to any for-

mal requirements, unless the articles of association stipulate. Since any new limited partner will be liable for existing debts of the company, the transfer of shares in the KG should always be subject to its registration in the commercial register.

8. Auditing of financial statements

Both the KG and the GmbH must prepare their own annual financial statements. For a typical GmbH & Co. KG, the general partner GmbH will usually be a small corporate entity and enjoys concessions associated with this.

9. Dissolution

The dissolution of a GmbH & Co. KG occurs by law upon the expiry of the period for which the company was formed, as a result of a resolution passed by the shareholders or the opening of insolvency proceedings concerning the company's assets, or upon the order of a court.

VII. Regulatory framework for the acquisition of companies

Germany's **open investment landscape** is one of the cornerstones of its economic development. Despite a tendency within Europe to restore technological sovereignty, the German policy on foreign direct investment remains comparatively liberal. With its central location, Germany has become an attractive hub for many foreign investors seeking a **gateway into Europe**.

1. Advantages of acquiring a company in Germany

There are many advantages to acquiring an existing European or German company which is already active on the market. A foreign investor can also acquire an existing distribution network, sparing the costs of having to develop their own network from scratch. The newly acquired customer base can be targeted when marketing the investor's own products. On the other hand, the foreign investor can gain access to new technologies and the know-how of the target company. In particular, the considerable wealth of expertise of small and medium-sized enterprises, means they are recognised as "**hidden champions**" in Germany.

The European labour market offers foreign investors a rich pool of qualified employees. Furthermore, the acquisition of a German company enables an investor to streamline employee structures and reduce HR costs.

Non-EU investors can also benefit significantly from the possibility of raising additional capital on the German and European capital markets.

2. Restrictions on foreign investors

There are no fundamental legal barriers to acquiring the shares or assets of a European company, other than the **foreign investment control** and **merger control** requirements and, as of recently, the **EU Foreign Subsidies Regulations**. Any foreign investor seeking to invest in Germany must therefore take the applicable German and EU regulatory frameworks into consideration.

a) Foreign investment control[20]

The legal basis for German foreign investment control can be found in the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz, AWG*)[21] and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung, AWV*)[22]. However, the German regulatory framework, as well as the regulatory frameworks of other EU Member States, are influenced by the evolving EU regulations on FDI control[23] and have been subject to multiple revisions in recent years. The most notable developments so far are (i) the expansion of the scope of German foreign investment review, (ii) the reduction of requirements for possible intervention of the Ministry, and (iii) the establishment of an EU-wide screening mechanism. German control of foreign investments also covers domestic-to-domestic transactions, where the acquirer is directly or indirectly controlled by a foreigner.

The competent German authority is the Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz, BMWK*). The BMWK is not only in charge of the foreign investment review but also serves as the link to the other European FDI control bodies. The review procedure conducted by the BMWK is free of charge.

The German foreign investment control regime can be divided into: (1) sector specific investment control, which mainly applies to military goods and (2) general investment control for critical infrastructure, critical industries, and all other sectors, which

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[20] The following overview of the German foreign investment control is based on our firm's latest publication in the *International Comparative Legal Guides (ICLG), Foreign Direct Investment Regimes 2024, Fifth Edition, Q&A Chapter on Germany, 3 November 2021*, which can be accessed under the following link: https://www.advant-beiten.com/fileadmin/beiten/Dateien_zum_Verlinken_2024/Foreign_Direct_Investment_Regimes_2024_-_Germany_chapter.pdf.

[21] Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*) of 6 June 2013 (BGBl. I p. 1482), last amended by § 2 of the Law of 27 February 2024 (BGBl. 2024 I no. 71).

[22] Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) of 2 August 2013 (BGBl. I p. 2865), last amended by § 2 of the Regulation of 11 December 2024 (BGBl. 2024 I no. 411).

[23] For example, the latest Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79/1 of 21 March 2019.

applies to all direct or indirect participations in domestic companies, irrespective of whether the investment reaches any share-based or monetary threshold, such as a turnover or transaction value.

Foreign investments caught under German foreign investment control include both share and asset deals. Share deals are only subject to review if the respective threshold is met. Asset deals are only subject to review if a foreign investor acquires (i) a separable part of a German company, or (ii) all essential operating resources of a German company, or a separable part of it, which is necessary to maintain the operation of said company or part of it. In practice, we have also seen the *BMWK* review a share redemption in the context of a shareholder dispute. The AWG and AWV do not explicitly mention the redemption of shares.

(1) Sector-specific investment control

The sector-specific investment control is designed to protect the essential security interests of the Federal Republic of Germany, in particular German security policy and military interests, and applies to all activities listed in § 60 (1) of the AWV.

This list is comparatively short and applies to any (direct or indirect) acquisition of voting rights of at least **10%** in a German company or certain assets of a German company (such as a separate business unit or all essential operating resources) by a **non-German investor**, if said target company

- develops, manufactures, modifies, or has actual control over certain goods related to **weapons, ammunition and armaments** or has actual knowledge of or access to the technology underlying such goods; or

- develops, manufactures, modifies, or has actual control over certain **defence-related goods** or has actual knowledge of or access to the technology underlying such goods; or

- manufactures or has manufactured certain **products with IT security functions** for processing classified government information or components of such products that are essential for IT security and the target still is in possession of the underlying technology; or

- qualifies as a **defence-related entity**.

(2) General (cross-sector) investment

General (cross-sector) investment control forms the second category of transactions subject to governmental control by the *BMWK*. This aims to protect German and European public order and security, as well as the public order and security with regard to certain projects and programmes of European Union interest.

General investment control has three sub-categories: (i) the control of investments in **critical infrastructure**; (ii) the control of investments in **critical industries**, and (iii) the control of investments in **all other sectors**.

Unlike sector-specific investment review, which applies to any non-German investor, general investment control only applies to foreign investors based outside of the European Union (EU) and the European Free Trade Association (EFTA). However, intra-group transfers outside of the EU and EFTA may be excluded from German foreign investment review under certain circumstances.

i. Control of investments into critical infrastructure

General investment control for foreign investments in critical infrastructure applies to the activities listed in § 55a (1) No. 1–7 of the AWV. Specifically, this list applies to any (direct or indirect) acquisition of at least **10%** of the voting rights in a German company or certain assets of such company (e. g. a separate business unit or all essential operating resources) by a **non-EU/EFTA investor**, if said target company qualifies as

- an **operator of critical infrastructure** (such as in the energy, information technology, telecommunications, transportation, healthcare, water, food, finance or insurance sectors);
- a developer of **software for critical infrastructure**;
- an operator in the **telecommunications** sphere;
- a large **cloud computing** service provider;
- an authorised provider of **telematics infrastructure**;
- a **media** company; or
- a provider of **state communication infrastructure services**.

ii. Control of investments into critical industries

The general investment control for critical industries applies to all activities listed in § 55a (1) No. 8–27 of the AWV. This list is much more comprehensive and applies to any (direct or indirect) acquisition of at least **20%** of the voting rights in or certain assets of a German company by a **non-EU/EFTA investor**, if said target company qualifies as

- a manufacturer, developer or distributor of certain products in the **healthcare sector**, such as personal protective equipment or related production facilities, essential medicines, medical devices, or in vitro diagnostics;

- an operator of high-quality **geospatial systems**;
- a manufacturer or developer of certain goods that utilise **artificial intelligence** and can be used for cyber-attacks, the spread of disinformation, surveillance or the analysis of location data;
- a manufacturer or developer of certain automated motor vehicles or unmanned aerial vehicles or components essential for **driving controls or navigation** or the related software;
- a manufacturer or developer of **robots** with specific characteristics;
- a manufacturer, developer or processor in the area of **semiconductor or optoelectronics fields**;
- a manufacturer or developer of **cybersecurity and IT security products**;
- an operator of certain **aviation** companies, or a manufacturer or developer of certain goods or technologies related to avionics, navigation, spacecraft, or propulsion systems;
- a manufacturer, developer, modifier, or user of certain goods in relation to **nuclear materials, facilities and equipment**;
- a manufacturer or developer of goods and essential components of **quantum computing**, quantum communication or quantum-based metrology;
- a manufacturer or developer of certain goods used to manufacture components made of metal or ceramic materials for industrial applications, as well as the use of additive manufacturing processes ("**3D printers**"), or essential components of such goods or the powder materials used during the additive manufacturing processes;
- a manufacturer or developer of certain goods specifically designed to operate wireless or wireline **data networks**;
- a manufacturer of **smart meter gateways** or security modules;
- a company which employs individuals who work in **vital facilities in safety sensitive locations**;
- a company that extracts, processes or refines certain **raw materials** or their ores;

- a manufacturer or developer of certain goods which fall under the protection of patents or utility models constituting **state secrets**; and

- a company that directly or indirectly cultivates an **agricultural area** of more than 10,000 hectares.

iii. Control of investments into other industries

General investment control also applies to all other activities not listed as critical infrastructure or critical industries. However, the legal framework for such other activities deviates from the legal framework for the above-listed activities on two key elements. First, FDI control will apply where **25%** or more of the voting rights are acquired in the domestic company. Second, such an acquisition does not need to be notified to or approved by the *BMWK* prior to the completion of the transaction.

However, if the *BMWK* considers an acquisition is likely to affect the public order and security of Germany or another EU Member State or certain projects and programmes of EU interest, it may open an investment review procedure *ex officio* within five years of the signing of the transaction. To obtain legal certainty for a planned transaction, foreign investors therefore often choose to make a voluntary filing (called an application for a certificate of non-objection). If the *BMWK* does not launch a formal review within two months of receipt of the investor's application, you can assume, the certificate has been issued.

Apart from the above thresholds, subsequent participations in a German company will also fall under the scope of German investment control if they reach or exceed certain thresholds (i.e. 20%, 25%, 40%, 50% or 70%). However, when calculating the exact share of voting rights, all other forms of participation through which the foreign investor solely or jointly exercises effective control over the target company must be considered.

(3) Investment review procedure

A transaction **must be reported** to the *BMWK* (immediately after signing) if it falls within the scope of either the sector-specific investment review or the general investment review for critical infrastructure or critical industries and it may not be consummated (closed) prior to clearance. As the factual completion of such a transaction can result in fines and/or criminal liability, **the respective transaction should not be closed without prior legal consultation and the involvement of the *BMWK***. In all other cases, the transaction may be closed prior to obtaining clearance or a certificate of non-objection.

Once the *BMWK* has knowledge of the transaction (either by the investor's notification or application for a certificate of non-objection, or through public sources), it then has two months to decide whether to initiate formal proceedings. If the *BMWK* does not initiate formal proceedings within this period, approval is deemed to have been granted. If formal proceedings are initiated, the formal review period lasts up to an additional four months, starting with the submission of a complete filing. However, this formal review period can be suspended or extended by the *BMWK* under certain circumstances, resulting in a significant lengthening of the total investment review procedure. In complex cases, informal consultations between legal advisers and the *BMWK* prior to a formal notification can accelerate the review procedure significantly.

The type and degree of information to be provided by an investor depends on the specific review procedure as well as the stage of the respective investment review and includes:

i. Information on the target company, *e.g.*:

- the company details and information on the management;
- a description of the business activities and industry sector;
- a chart showing the company's shareholding structure, indicating the direct and indirect shareholders' percentage of voting rights;
- a workforce breakdown;
- the turnover of the last three fiscal years;
- a list of business contacts with public authorities or companies in the defence sector over the last five years;
- information on the target company's obligation to protect classified information;
- an indication of which of the specific categories subject to sector specific and/or general (cross sector) investment review for critical infrastructure or critical industries might best fit the target company's business; and
- a list of the main suppliers and main customers for the last five years for the goods listed under the sector specific investment review.

ii. Information on the transaction such as:

- a description of the acquisition, including details on the purchase price and the specific type of acquisition (share and/or asset deal); and

- information on the direct and indirect purchasers' share of voting rights in the target company prior to the acquisition as well as the percentage of voting rights to be acquired and other possibilities for the purchaser to exert control over the target company.

iii. Information on the direct and indirect purchaser(s) such as:

- a list of all direct and indirect shareholders of the direct purchaser, including the company details as well as a chart showing the respective percentage of the shareholders' voting rights; and

- confirmation of the existence or absence of any (i) governmental control and/or financing, (ii) involvement in activities which had a negative effect on the public order or security of Germany or any other EU Member State, or (iii) risk of present or past involvement in activities which would constitute a criminal offence or a misdemeanour in Germany under certain statutory law.

iv. Information on the seller:

- the company details and, where the seller qualifies as a foreigner, the designation of a person authorised to accept service of process in Germany.

(4) Conclusion of proceedings

After the parties have provided the *BMWK* with all requested information and the *BMWK* has conducted its review, the transaction may either be completely **cleared**, **subjected to conditions**, or **prohibited** in total or in part.

In the case of prohibition, the transaction will become legally invalid and, if already closed, will have to be unwound by the parties. The *BMWK* can also enforce its prohibition decision by fining subsequent contraventions (such as placing restrictions on voting rights or appointing a trustee). However, it is still rare for the *BMWK* to intervene against foreign investments. As the *BMWK* is bound by the legal principle of proportionality, it considers any remedies proposed by the parties and must accept them if they are suitable to remove its concerns.

As the decision of the *BMWK* and its assessment are largely based on the information the investor provided during filing, it is crucial for the success of the transaction that the parties **seek legal support at an early stage**.

b) Restrictions under competition law

Acquiring shares in or assets of a German company, or entering into a joint venture in Germany may be subject to **merger control** clearance. The German authority in charge of enforcement is the Federal Cartel Office (*Bundeskartellamt*). For large transactions, however, the European Commission has exclusive jurisdiction and decides with effect for the entire EU.

Whether the acquisition of a company is in fact subject to merger control depends, in particular, on the transaction structure and the turnover of the companies involved. Whether the acquisition is permitted or not, depends on the competitive effects of the transaction.

(1) German merger control

The legal basis of **German merger control** is the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*)[24]. The following types of acquisitions are subject to German merger control:

- an acquisition of (direct or indirect) control over another company or parts thereof;
- an acquisition of all or a substantial part of the assets of another company;
- an acquisition of shares in another company resulting in a situation where the purchaser holds 25% (or more) or 50% (or more) of the shares or voting rights;
- an acquisition that enables the purchaser(s) to exercise, directly or indirectly, a competitively significant influence over another company.
- an acquisition that otherwise enables the purchaser(s) to exercise, directly or indirectly, a competitively significant influence over another company (*e.g.*, acquisition of less than 25% of the shares but the target is a competitor/supplier/customer and the purchaser is granted the right to nominate a board member and a pre-emptive right).

However, the acquisition will only require a merger control filing in Germany if it also meets the following turnover thresholds:

- the combined worldwide group turnover of all participating companies exceeds EUR 500 million; and

[24] Act against Restrictions on Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) of 26 June 2013 (BGBl. I p. 1750, 3245), last amended by § 25 of the Law of 15 July 2024 (BGBl. I p. 236).

- at least one participating company has a group turnover in Germany exceeding EUR 50 million; and

- at least one further participating company has a group turnover in Germany exceeding EUR 17.5 million; or, alternatively, the transaction value amounts to more than EUR 400 million and the target company has significant activities in Germany but achieves a German turnover below EUR 17.5 million.

The turnover is to be calculated by reference to the net consolidated group sales of the participating companies in the financial year prior to the completion of the transaction. This implies that not only are the purchaser's sales relevant, but the sales of its ultimate parent company and all other companies controlled by its ultimate parent company (for SOEs, including other SOEs of the same industry) are relevant, too. "Participating companies" include the purchaser and the target company. However, the turnover of other current/future shareholders in the target company are also taken into account if they retain/acquire (joint) control or 25% (or more) of the shares or voting rights in the target company.

Example: A foreign investor wants to acquire 51% of the shares in a German manufacturing company with a worldwide turnover of EUR 10 million, while the seller will continue to hold the rest of the shares in the target company. The foreign investor is not active in Germany yet, but its parent company is listed on the Hong Kong stock exchange and has another subsidiary with significant sales of automotive parts to Germany. The seller is part of a big German industrial group. The acquisition may be subject to German merger control if the foreign investor's automotive parts subsidiary and the seller meet the turnover thresholds.

Several exceptions (*e.g.*, exemption for intracompany transactions) and special rules (*e.g.*, lower turnover thresholds for media mergers) apply.

The Federal Cartel Office has the power to order large companies to file for merger control clearance of certain acquisitions which meet neither the turnover thresholds nor the transaction value threshold. However, this instrument is irrelevant for most international transactions as it only applies following a sector investigation and its use is subject to further preconditions. To date, the Federal Cartel Office has only explored its use for one German waste management company.

The (partial or full) implementation of an acquisition subject to German merger control without prior clearance constitutes an administrative offence. Any legal

transactions concluded contrary to this implementation prohibition are invalid and must be undone.

Most transactions are cleared by the *Bundeskartellamt* within **one month** of receipt of the complete notification. This review process may take up to **five**

months (or longer) if the *Bundeskartellamt* decides to initiate an in-depth review. These proceedings conclude with the adoption of a formal decision – either clearance, clearance subject to remedies, or prohibition. In rare cases, the parties may request a ministerial authorisation, which, if granted, would permit a merger that the *Bundeskartellam*t prohibited.

The decision of the *Bundeskartellamt* is based on whether the acquisition will result in a significant impediment to effective competition, such as where the acquisition creates or reinforces a dominant position in one or several markets. The market share threshold for the statutory presumption of single dominance is 40%.

(2) EU merger control

Under **EU merger control** law, acquisitions constitute a merger if they result in a change in the control of a company on a lasting basis. This includes the purchase of a majority interest in a company, as well as the purchase of a minority interest that confers the possibility of exercising decisive influence over the company. The creation of a joint venture that will be jointly controlled by two or more companies and will perform on a lasting basis all the functions of an autonomous economic entity is also deemed to constitute a merger.

A merger requires a filing to the European Commission, where the following cumulative conditions are met:

- the combined worldwide group turnover of the participating companies (*e.g.*, purchaser group and target company, or joint venture parents) is greater than EUR 5 billion; and

- at least two participating companies have each an EU-wide group turnover of EUR 250 million;

- unless each of the participating companies achieves more than two-thirds of its EU-wide turnover within one and the same EU Member State;

Alternatively, a merger also requires a filing to the European Commission if it meets the following cumulative conditions:

- the combined worldwide group turnover of all participating companies amounts to more than EUR 2.5 billion; and

- at least two participating companies have each an EU-wide group turnover of EUR 100 million; and

- in each of at least three EU Member States, the combined turnover of all participating companies exceeds EUR 100 million, and in each of at least three of these EU Member States, the turnover of each of at least two of the undertakings concerned exceeds EUR 25 million;

- unless each of the participating companies achieves more than two-thirds of its EU-wide turnover within one and the same EU Member State.

Before the parties formally file a merger control notification, they will enter pre-notification discussions with the European Commission. Beginning with the formal notification, the Commission has an initial period of 25 working days to take an unconditional/conditional clearance decision or to open an in-depth "Phase II" investigation. The period is extended by 10 working days if the parties offer commitments (within 20 working days).

The review period for a potential Phase II investigation is 90 working days. This period is extended by 15 working days if the parties offer commitments 55 working days or more after the beginning of the Phase II procedure. The period may also be extended by up to 20 working days with the parties' consent. The clock is stopped under certain circumstances attributable to the parties.

The European Commission will assess whether the acquisition will result in a significant impediment to effective competition. Like German merger control law, there is a prohibition on implementing the acquisition prior to clearance.

A national competition authority may refer a case to the European Commission or vice versa under certain conditions.

(3) Foreign merger control

The acquisition of a German company may also require merger control filings outside of Germany. Germany is a leading export nation and German companies have largely free access to the EU market. Many German companies therefore have significant sales outside Germany. This may trigger merger control filing requirements outside of Germany – even in countries where the target company has no subsidiaries or assets.

Example: The foreign investor is an Asian company with several billion in turnover. The target is a German manufacturer of parts for busses. Last year, it achieved a turnover of EUR 30 million, evenly split between a German and a Polish bus manufacturer. While the acquisition of the target does not need to be notified with the Bundeskartellamt in Germany, it will need to be notified to the President of the Office of Competition and Consumer Protection in Poland.

c) EU Foreign Subsidies Regulation

On 12 January 2023, the EU Foreign Subsidies Regulation ("FSR") entered into force, providing the EU with a brand-new tool to ensure fairer competition within the internal market. For companies, however, this means in turn some new notification requirements and the risk of fines.

The FSR enables the European Commission ("Commission") to tackle subsidies from non-EU Member States to companies active in the EU that could potentially distort competition in the internal market. This Regulation fills a regulatory gap: while subsidies granted by Member States are subject to close scrutiny under European state aid law, subsidies granted by non-EU governments so far went unchecked.

The FSR establishes two new (or rather additional) tools which allow the Commission to review the influence of foreign investments on the European market:

- Notification requirements: companies that have received substantial financial contributions from non-EU governments are obliged to notify certain large mergers or public tenders.

- *Ex officio* investigations: the Commission may start investigating foreign subsidies even outside of the companies' notification obligations.

The target of the Regulation – as per its title – is foreign subsidies having distortive effects. What does this mean?

(1) Foreign subsidy

A subsidy is defined as:

- a financial contribution;

- which is provided by a non-EU state;

- which confers a benefit on the recipient; and

- is limited to one or more businesses or industries (*i.e.*, it is selective).

The concept of "financial contribution" is broad and covers any transfer of funds, forgoing of revenues, or the provision of goods or services. A financial contribution confers a benefit on a company if it could not have been obtained under normal market conditions. The Commission assesses the existence of a benefit based on comparative benchmarks, such as the investment practice of private investors, the financing rates obtainable on the market, the tax treatment applied to similar companies, or adequate remuneration for goods or services.

(2) Distortive effects

A subsidy is distortive if it is liable to improve the competitive position of the recipient company in the internal market. Article 5 of the FSR provide a list of certain categories of subsidies likely to have distortive effects, and namely:

- subsidies granted to an ailing undertaking, unless there is a restructuring plan in place;
- unlimited guarantees for debts and liabilities;
- an export financing measure that is not in line with the OECD Arrangement;
- support for a specific merger or public tender.

(3) Notification requirements

When a company receives a foreign subsidy, it must now notify certain mergers and public procurement procedures:

(4) Mergers

Companies must notify concentrations involving a financial contribution by a non-EU government to the Commission where:

- the acquired company, one of the merging parties or (once established) the joint venture is established in the EU and has an aggregate EU turnover of at least €500 million; and
- the parties to the transaction (*e.g.*, the buyer and the target or the undertakings creating the joint venture and the joint venture) received a financial contribution from countries from outside the EU of at least €50 million in the last three years.

The notified concentration cannot be implemented while it is being reviewed by the Commission (stand still obligation, risk of fines up to 10% of the annual turnover if the parties fail to comply).

The procedure for foreign subsidy review is the same as EU merger control: pre-notification is followed by a Phase I review (25 working days), and possible Phase II review (90 working days), with the option for the companies to offer commitments.

The Commission enjoys a wide range of investigative powers. It may send information requests to companies and conduct fact-finding missions within and outside of the EU.

The Commission has the power to remedy distortive effects caused by foreign subsidies, by

- prohibiting the merger transaction;
- implementing structural remedies (such as divestments or capacity reductions);
- implementing behavioural remedies (such as access commitments for infrastructure, publication of R&D results);
- implementing obligations to inform the Commission of future mergers or public procurement procedures.

The Commission has adopted rules and procedures for mergers and public procurement notifications under the FSR (Implementing Regulation 2023/1441). This contain rules regarding the procedures for filing, in particular the required content of notifications, rules for calculating time limits, and procedural rules on preliminary reviews and in-depth investigations.

(5) Public procurement

Notification obligations now also apply to public procurement procedures involving financial contributions by non-EU governments where:

- the estimated contract value is at least EUR 250 million; and
- in cases where the tender is divided into lots, the aggregate value of the lots applied for is at least EUR 125 million; and
- the foreign financial contribution involved within the last three years is at least EUR 4 million per non-EU country.

These include not only financial contributions granted to the bidder itself, but also contributions received by the bidder's main subcontractors and suppliers involved in the same tender.

Where the conditions for the notification are met, the bidder notifies to the contracting authority. The contracting authority transfers the notification to the Commission.

The Commission may initiate a preliminary review period (20 days), followed by a possible in-depth review (110 days). A bidder cannot be awarded the public

procurement contract while under investigation by the Commission. However, a contract can still be awarded to a non-subsidised best bidder in certain cases.

Moreover, in the context of notifications within public procurement procedures, the Commission can make use of its investigative powers and implement remedies, including the prohibition of the award of the public contract.

(6) *Ex-officio* investigations

The Commission may also start investigations on its own initiative (*ex officio*) even in cases where the thresholds are not met where it suspects that distortive foreign subsidies are in place. The Commission can thereby examine information from any source regarding alleged distortive foreign subsidies. The Commission also enjoys a wide range of investigative powers, including the possibility to send information requests to companies and launch market investigations into specific sectors or types of subsidies.

In the case of non-compliance (also with respect to notification requirements), the Commission may impose fines (up to 10% of the annual turnover).

d) Restrictions on disposal, requirement of approval by third parties

(1) Restrictions under public law

Economic activity in Germany often requires official approval. For example, approval must be obtained for the manufacture, transport, and storage of radioactive materials, for aviation companies, and for the extraction of raw materials.

A distinction should be made between two cases: if the conduct of the business is tied to a personal approval of the operator, *e.g.*, the approval to operate a private hospital or a gambling facility, the foreign purchaser will only be able to operate the business if they are also granted approval. However, if the conduct of the business depends on the approval of a specific facility, such as a building approval or an approval under emissions control law, and the acquired enterprise already holds said approvals, the continuation of the activity post-acquisition does not require any further official approval. It is therefore vital to ascertain beforehand – preferably during the due diligence process – which approvals are required for the planned activity and whether these have already been obtained.

(2) Further restrictions

It may be necessary to obtain additional approvals when purchasing a company. These approvals may arise from the company purchase agreements, for example, which may stipulate that the approval of the supervisory board, the advisory board or the shareholders of a purchaser or seller is required. In the event that only a

part of the shares in the company are sold, it may be necessary to observe pre-emptive rights of other shareholders, or obtain the approval of the company or the other shareholders.

However, there may also be a statutory obligation to obtain approval. If an AG pledges to sell its entire company assets or a significant part thereof, the contract will only be valid with the approval of 75% of the general meeting of shareholders (§ 179a of the *AktG*). The prevailing opinion is that § 179a of the AktG also applies to other forms of company, including the GmbH. In addition, there are other uncodified requirements for approval by the general meeting or shareholders' meetings (see the judgment of the Federal Court of Justice (*Bundesgerichtshof, BGH*) in the *Holzmüller* and *Gelatine* cases).

The approval of the general meeting of an AG is also required if an important part of the business operations or an important subsidiary is sold. A part is considered "important" if it accounts for around 70-80% of the overall value of the company. If a company is sold from an estate, possible restrictions under succession law must be considered, *e.g.*, provisional succession, execution of the will, or administration of the estate.

3. Issues to be clarified prior to acquisition

Before entering the acquisition phase, several preliminary issues must be clarified:

a) Selection of the target

The target of an acquisition may be a company in any form.

b) Share deal or asset deal

A company can be acquired through either the takeover shares in the target company ("**share deal**") or the acquisition of individual assets of the target company ("**asset deal**").

Liability, tax and contractual considerations are key when determining the best form of acquisition.

(1) Liability of the purchaser

Purchasers naturally wish to avoid liability risks. Buying shares means buying the target company with all its good and bad qualities, including the risk of "skeletons in the closet". Purchasers can protect themselves through guarantees, but the usefulness of any such guarantees depends on the creditworthiness of the seller. Purchasers also prefer to avoid the trouble and expense of enforcing guarantees.

An alternative way to get around these risks is to take over the target company by way of an asset deal. Asset deals allow purchasers to acquire only certain assets and/or contractual relationships, but no debts.

(2) Tax aspects

From a fiscal perspective, the following scenarios should be considered:

- If a natural person sells holdings in a GmbH or shares in a company in which they held an interest of at least 1% within the last five years, the profit derived from the sale will be taxed subject to the **part-income method**. Accordingly, 40% of the profit from the sale will be tax-free. The remaining 60% of the profits will be taxable at the individual tax rate of the seller. Furthermore, the profit from the sale remains tax-free if the natural person selling the shares acquired a shareholding in a GmbH/AG before 1 January 2009 and, within the last five years, had a shareholding of less than 1% in the GmbH/AG and the speculation period of one year has elapsed. This privilege does not apply to shareholdings in a GmbH/AG which were acquired after 1 January 2009; instead, the profit from a sale of such a share will be subject to tax at a flat rate of 26.375% (flat rate *withholding tax*, including the **solidarity surcharge** (*Solidaritätszuschlag*)).

- If a natural person sells their entire shareholding in a KG or an OHG, the profit on sale will be fully taxable at the individual tax rate of the seller. The tax rate may be reduced on socio-political grounds if the seller has reached the age of 56 or is permanently incapable of working. If these pre-conditions are fulfilled, a maximum of EUR 5 million of the profit from the sale will be taxed, upon application, at a reduced tax rate. The **reduced tax rate** is approximately 56% of the individual tax rate, but no less than 14%. The taxpayer can only claim this reduction once. In addition, the taxpayer is granted an exemption of EUR 45,000, which will be reduced by the amount by which the profit on the sale exceeds EUR 136,000. The sale of a natural person's full shareholding will be exempt from **trade tax**.

The above concessions (reduced tax rate, exempted amount, exemption from trade tax) do not apply if only part of a stake in a partnership is being sold.

- If a corporate entity sells holdings in a GmbH or shares, then 95% of the profit on the sale is tax-free.

- If a corporate entity sells shares in a KG or an OHG, then the whole profit on the sale is subject to **corporation tax**. Trade tax is also due, although in this case it is the KG/OHG which must pay the trade tax, which is generally reflected in a reduction in the corresponding purchase price.

- For the purchaser, acquisition by way of an asset deal is generally more favourable, since individual assets can be written off over the subsequent period, reducing the taxable profit. The same applies to the acquisition of shares in a partnership which – like an asset deal – is regarded in tax terms as an acquisition of part of the economic assets of the partnership. In the case of shares in partnerships, this means the value added on the assets as embodied in the purchased dormant reserves can be reported in the "**supplementary balance sheets**" and written off. In the case of a share deal, the shareholding being acquired would have to be reported as fixed assets and cannot be written off but can be written down in the event of permanent value impairment.

- Furthermore, in the case of an asset deal or share deal in the form of the acquisition of shares in a partnership, the purchaser can, in principle, deduct the entire financing costs (such as interest on loans taken out for the purchase price) as operating expenses. If the purchaser of shares in a GmbH is a natural person, they may only deduct 60% under the **part-income method**, whereas a corporate entity can, in principle, also deduct its entire financing costs for tax purposes.

However, any deduction of financing costs is subject to the "**earnings stripping rule**" (*Zinsschranke*).

- In the case of a share deal relating to a GmbH/AG, any existing **loss carried forward** is generally lost in the event of a direct or indirect acquisition of more than 50% (harmful acquisition of a shareholding). However, under certain conditions regulated in the Corporation Tax Act, the loss carry forward can still be saved if the business will continue unchanged.

- In the case of an asset deal, no **value added tax** is due on the purchase price or the assumed liabilities if, on the basis of the total of all acquired assets, it can be assumed that a business has been acquired as a whole, see § 1 (1a) of the Turnover Tax Act (*Umsatzsteuergesetz, UStG*)[25]. In case of a share deal or the acquisition of a partnership interest, the transaction is generally VAT exempt. However, the parties may opt for a VAT-able transaction.

- In the case of an asset deal, if the purchase price relates to a plot of land, **real estate transfer tax** ("**RETT**") must also be paid (between 3.5% and 6.5% of the agreed purchase price, depending on the federal state where the real estate is located). In the case of a share deal, if the company to be purchased has real estate holdings, **RETT** is due, where (in the case of a partnership) at least 90% of the shares in the company are transferred to new partners within

[25] Turnover Tax Act (*Umsatzsteuergesetz, UStG*) of 21 February 2005 (BGBl. I p. 386), last amended by § 27 of the Law of 2 December 2024 (BGBl. 2024 I No. 387).

a period of 5 years. In the case of a share deal where a corporate entity is the purchaser **RETT** will be due where at least 90% of the shares in the company come to be owned by the purchaser. An indirect share acquisition can also fulil both variants. Since 2013, the "economic" transfer (i.e., without a change of the shareholder's legal status) is considered circumvention. The basis for calculating the **RETT** in the case of a share deal is a specific "real property value" of the property holdings, determined in accordance with the Valuation Act (*Bewertungsgesetz, BewG*)[26].

From a fiscal perspective, sellers generally prefer the share deal while purchasers favour asset deals (subject to the normally higher **RETT**). A careful analysis of the specific case is therefore required to determine how the different interests can be balanced to optimise the acquisition from a fiscal perspective.

(3) Contractual aspects and formal requirements

If the target company is a GmbH, any share deal contract must be notarised. Conversely, an asset deal contract does not require a specific form unless the contract includes real property and/or all the assets are acquired. In such cases, the asset deal contract must also be notarised. The asset deal contract must strictly list each individual asset of the company in extensive annexes and these assets must be sold and transferred in accordance with the specific legal rules applicable to the group of assets. The asset deal also requires all current contracts to be listed and dealt with separately. In this case, the respective parties to the contract must agree to the transfer of the contract. The seller remains liable pending final agreement.

In the case of a share deal, the sale and transfer (assignment) of the shares in the business is sufficient. However, in this case too, because of the different individual guarantees, the individual assets, liabilities, and contracts must be included in detailed form in the contract. Alternatively, it is possible to refer to the documents disclosed by the seller in the (electronic) data room. This is recommended: for the seller, because the examination of all assets, liabilities and current contracts prevents later disputes, and for the purchaser, because it reduces risks.

4. Process of acquiring a company

For the most part, the acquisition of a company in Germany follows customary international procedure.

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[26] Valuation Act (*Bewertungsgesetz, BewG*) of 1 February 1991 (BGBl. I p. 230), last amended by § 36 of the Law of 2 December 2024 (BGBl. 2024 I Nr. 387).

a) Confidentiality agreement

Before information on the target company is disclosed to potential purchasers, a **confidentiality agreement** should be concluded between the seller and potential purchaser. It is advisable to precisely define terms such as "confidential information" and "confidential treatment," as well as any exceptions, together with stipulations concerning the copying, return or destruction of any documents or information shared. The agreement should also stipulate the contractual penalties and/or liquidated damages that apply in the event of a breach of confidentiality.

b) Letter of Intent

Adopted from Anglo-American legal practice, the **Letter of Intent** (LoI, sometimes also called a "**Memorandum of Understanding**", **MoU**), a preparatory declaration for the company purchase agreement, has become an established step in the sale and purchase of a company in Germany. As a rule, it will declare the intentions of the parties to commence contractual negotiations and establish a framework for these negotiations. This declaration of intent will not generally have any binding effect.

In many cases, it is advisable to sign a legally binding agreement, at least regarding the exclusivity and confidentiality of negotiations, to allow the parties to proceed without time pressure and the risk associated with the disclosure of sensitive data. Appropriate contractual penalties can help protect these obligations.

c) Due diligence

The seller naturally has an advantage over the purchaser in terms of information and knowledge: they know the key data of the target company (balance sheets, annual financial statements, etc.). When purchasing a company, the purchasers must therefore take special measures to obtain all the information which is important to them. This is done through the **due diligence** process, during which the legal, tax, financial, business, commercial, technical, and other aspects of the target company are shared and examined. The data is made available for inspection for a limited period, either physically in a data room or virtually through password-protected internet access. The legal due diligence examines the target company for legal weaknesses. Particular attention is paid to aspects such as contractual obligations, liability issues, industrial property rights, subsidy issues, corporate matters, and ownership of shares.

Due diligence fulfils different functions for each party:

- The due diligence report provides the purchaser with a snapshot of the target company, which offers more information than a conventional interim financial statement. However, claims by the purchaser are excluded if the relevant problems were already recognisable in the due diligence review.

- The catalogue of guarantees can be adjusted to take into account any identified risks in the company. Indemnification claims by the purchaser are recommended for risks identified in the due diligence review.

- The purchaser and the seller can negotiate the purchase price based on the findings.

- The due diligence process makes it easier for both sides to determine, following the transfer of the company, whether and to what extent the seller provided accurate information concerning various aspects of the target prior to conclusion of the sale and purchase agreement.

- In addition, due diligence provides the purchaser's decision-makers with internal documentation, which serves as proof that they have received adequate information about the risks of the acquisition.

- If the purchase price is financed, banks will often perform their own additional due diligence assessment or request copies of the due diligence reports of other (legal, tax, financial) advisors.

d) Negotiation and conclusion of the purchase agreement

The negotiation and drafting of the agreement for the sale and purchase of the company requires both legal expertise and experience of M&A practices. It is advisable to form a specific negotiating team and discuss expectations regarding timing, *i.e.*, "milestones", "signing date", "closing date" etc. It is also advisable to record in writing any aspects already negotiated, *i.e.,* in the form of minutes of the negotiations.

After an intensive due diligence examination, the seller is often unprepared to make many additional guarantees. The purchaser, on the other hand, usually wishes to have both the intensive preliminary examination and comprehensive guarantees.

The contract should include **separate provisions on guarantees** since the statutory provisions governing the purchase of a company in Germany are often inadequate. In the past, it has proven worthwhile to agree on strict liability guarantees.

The contract should also stipulate the legal consequences in the event of failure to comply with the guarantees: either the purchaser should be treated as if the guarantees were correct, or a contractual penalty should apply. The unwinding of the purchase agreement may only be considered as a last resort.

In light of Brexit and the Covid-19 pandemic, future global economic uncertainties (*e.g.*, the introduction of international duties) and their effect on financial markets, as

well as political uncertainties, we expect **material adverse change** (**MAC**) clauses to be discussed and negotiated even more intensively in the future – also in Germany.

Whereas, like other goods, AG shares are freely transferable, the transfer of GmbH shares **requires notarisation**.

e) Closing

The term "**closing**" regularly describes the point in time in which shares in fact pass to the acquirer. Apart from the payment of the purchase price, the parties to a contract must often meet additional requirements at closing, such as the conclusion of certain side agreements, the provision of securities, or the approval of antitrust or FDI authorities.

f) Post-merger

Following the conclusion of the agreement, the company transaction must be executed in practical form. For example, entries must be made in the commercial register (e.g., change in company name), the purchase price may need to be adjusted, the support of those employees in key positions within the target company must be secured, a new management structure and organisation must be created, communication within the company must be standardised, and legal disputes need to be avoided ("post-merger litigation"). It may be useful for the legal advisers consulted in connection with the transaction to continue to **provide advice and assistance** during this post-merger period.

5. Tax issues

Tax issues have a decisive influence on the acquisition of a company. The structure of many acquisition procedures can often only be explained from a tax perspective.

a) Regular taxation of corporations

Corporations (such as an AG or GmbH) with either management or registered office in Germany are required to pay **corporation tax**, meaning their entire worldwide income is subject to German taxation (unless otherwise provided in applicable **double taxation agreements**). Corporation tax is calculated according to the taxable income of the corporation and therefore includes the difference between all the corporation's revenues and all associated operating expenses. However, exceptions need to be taken into consideration where the income of the corporation is (largely) **tax-free** and operating expenses are (largely) not taken into account. This applies in particular to

income from dividends and income the corporation earns from the sale of shareholdings in other corporations.

Corporations with unlimited tax liability are currently subject to a **standard corporate tax rate of 15%**. In addition, there is a "**solidarity surcharge**" (*Solidaritätszuschlag*) of 5.5% on corporation tax, meaning the total tax rate amounts to **15.825%**. Corporations with unlimited tax liability are also subject to **trade tax**. Foreign corporations must pay trade tax if they operate commercially within Germany, while German corporate entities must pay it because of their legal form, irrespective of their activities. Due to the nature of trade tax and the fact that it is **levied by local authorities**, the rate will depend on the "**municipal collection rate**" of the municipality in which the company has its registered office or the permanent establishment(s) of the company are located. The effective trade tax rate varies between approximately 17% and 19.8%; this brings the overall income tax of a corporation with unlimited tax liability to around **30%** to **33%**.

b) Regular taxation of trading partnerships

German tax law does not treat trading partnerships as separate taxable entities for income and corporation tax purposes but does do so for trade tax and VAT purposes. Although the income of a trading partnership is assessed separately, the result is apportioned between the shareholders according to their respective shareholdings. **Income tax** (where an entity is a shareholder) are charged at shareholder level. If the shareholders are natural persons, they are generally taxed at the applicable income tax rate, unless the shareholder applies for the reduced "**reinvestment tax rate**" of 28.25% on retained profits. Where corporate entities are shareholders in the partnership, the shares in profits allocated to the corporate entity from the partnership will be subject to corporation tax (incl. solidarity surcharge) of 15.825%. In contrast, for the purposes of trade tax (approximately 17% to 19.8%) and **value added tax** (**VAT**)**,** the trading partnership is regarded as an independent taxable entity. Accordingly, where the trade partners are natural persons, they can theoretically offset the **trade tax** incurred on the level of the partnership against their income tax.

For tax purposes, the operating assets of a partnership also include the economic assets made available to the company by the partners, known as "**special operating assets**", such as plots of land leased to the partnership. An important consequence of this is that, upon the sale of a shareholding by a natural person, the relevant economic assets of the "special operating assets" must also be transferred in proportion to the shareholding; they will otherwise count as having been withdrawn and are subject to the **full taxation of dormant reserves**.

c) Minimum taxation

With respect to income tax and corporation tax, up to **EUR 1 million** (married couples filing jointly: **EUR 2 million**) in **losses can be carried back**, but only into the immediately preceding assessment period[27]. There is no time limit for a loss carry forward into subsequent assessment periods. Note: a trade tax loss can only be carried forward.

Profits can only be offset with existing **loss carryforwards** up to an amount of EUR 1 million plus 70% of the excess amount under the "minimum taxation" rule.

6. Subsidies

Many German municipalities have developed commercial zones with all the necessary connections (electricity, water, gas, roads, and sometimes even railway connections).

Depending on the chosen region, investors can sometimes count on **extensive state aid**. It is therefore worthwhile to consider, at the planning stage of an investment, which possible subsidies may be available. In some cases, the available subsidies may even determine the choice of location.

Aid can be granted in the form of subsidies for the implementation of investment plans or as tax concessions. Investors can receive subsidies from both EU and national support programmes. In Germany, support is usually provided at a regional level; the individual federal states have special investment banks for this purpose.

Example for the State of Brandenburg: New investment support is provided to small, mid-sized and large companies as part of the community initiative "Improving the Regional Economic Structure" (GRW-G):

a) Growth programme for small companies

Depending on the location, branch of industry, and the project, small companies can receive the highest possible grant (30%–40%) for investments eligible for support, with a total investment of between EUR 60,000 and EUR 1.2 million under the community initiative "Improving the Regional Economic Structure" (GRW-G).

[27] In 2021, a EUR 10 million loss (married couples filing jointly: EUR 20 million) could be carried back.

b) Growth programme for mid-sized and large companies

Medium-sized and large companies can receive the highest possible grants for eligible investments in certain core sectors (e.g., energy technology, optics, healthcare). When setting up a production site and investing EUR 500,000, for instance, investors can receive the highest possible level of subsidies (5%–20%) for each permanent job created at the site as part of the community initiative "Improving the Regional Economic Structure" (GRW-G).

C. Distribution of Products and Services

I. Make or buy? Self-distribution or distribution through commercial agents and distributors

All companies must sell their products or services. This also applies to foreign companies that want to sell to customers in Germany. The question is: make or buy?

Foreign companies can choose to handle sales themselves, either from their foreign sites or through group companies in Europe. Alternatively, they transfer sales to external, independent third parties, such as commercial agents, distributors or franchisees (intermediaries).

In the second case, it is important for the foreign company not to relinquish all control over distribution, but to maintain influence to a reasonable degree. This is achieved by contractually binding the sales intermediaries.

From a producer's point of view, the following **aspects** may **speak in favour of distribution via third parties, *i.e.*, external sales intermediaries**:

- The **avoidance of labour law and social security law**, as well as the resulting obligations and expenses.

- **Low-cost and low-risk market development**, especially for products that are not yet established, thanks to performance-based remuneration.

- Sales agents who represent several companies can achieve **synergy effects** that make sales profitable.

- In some areas, sales staff are in short supply, especially those with special technical expertise (*e.g.*, sales engineers); **several producers can thus share external sales intermediaries**.

- **Synchronisation of remuneration with the turnover achieved** in difficult, but also in good times.

- **Economic self-interest** can give the **intermediary greater motivation** to sell and consult.

Distribution law establishes the applicable legal rules for when the producer uses an external company for distribution.

II. Two basic forms of distribution via third parties

There are two basic forms of distribution via external third parties:

1. Distribution via commercial agents

The first form is distribution via a commercial agent who arranges or concludes contracts with customers on behalf of the foreign manufacturer. The **commercial agent does not become the buyer or seller of** a product. The **manufacturer concludes a contract directly with the customer**; they are therefore the customer's direct contractual partner. The commercial agent acts as an intermediary and is commissioned by the foreign manufacturer.

2. Distribution via distributors and other dealers

The second form is that of the dealer. The **dealer buys the goods from the foreign manufacturer in its own name and for its own account**. It then also sells the goods to its own European customers in its own name and for its own account. The foreign **manufacturer is not the contractual partner of the European customer**. If the dealer is contractually obliged to make every effort to sell the products, it is referred to as a distributor. Distributors are often – with slight differences – also integrated into the manufacturer's sales organisation.

3. Other forms of distribution

Other forms of distribution, *e.g.*, via **franchise systems**, **brokers**, **commission merchants or commission agents**, play a lesser role in practice but can still be interesting alternatives.

III. Selection of the appropriate form of distribution

Various aspects are relevant from a legal perspective when choosing the appropriate form of distribution. In addition to commercial, organisational and tax aspects (which are not dealt with here), the following questions are **particularly important from a legal perspective**:

- **Should the sales intermediary be obliged to actively seek sales** or should it decide whether and when to sell products?

- **Who should bear the business risks** (*e.g.* the risk that the customer does not pay)?

- Should the foreign manufacturer have **rights of instruction and control** over the sales intermediary?
- **Should the manufacturer be able to set the prices** customers must pay?
- **Should the manufacturer be able to determine which customers are supplied**?
- Is the foreign manufacturer prepared to accept the **disadvantages resulting from specific legal norms** (*e.g.*, payment of indemnity to commercial agents at the end of the contract)?

IV. Overview of distribution forms

Form of Distribution	Characteristic Elements	Advantages from the Manufacturer's Point of view	Disadvantages from the Manufacturer's Point of View
(Simple) Dealer ("*Händler*")	• Buys and sells in its own name and for its own account • No obligation to sell • No or little integration into sales organisation of the producer • Bears the risks from transactions with customers itself	• Commercial agency law does not apply • Can usually be terminated at short notice • No claim for indemnity	• No distribution obligation • Hardly any control, especially with regard to price and customers
Distributor ("*Vertragshändler*")	• Buys and sells in its own name and for its own account • Has a distribution obligation • Is integrated into the sales organisation of the producer • Largely bears the risks in connection with customer transactions itself	• Certain but limited control opportunities, *e.g.*, with regard to customers • A possible indemnity claim on termination of the contract can be avoided by contractual arrangement	• No control with regard to price • Commercial agency law may apply analogously • Cannot be terminated at short notice • An indemnity claim is possible but can be avoided by contractual arrangement

Form of Distribution	Characteristic Elements	Advantages from the Manufacturer's Point of view	Disadvantages from the Manufacturer's Point of View
Commercial Agent ("*Handelsvertreter*")	• Negotiates or concludes contracts in the name and for the account of the manufacturer. It is not itself a party to the purchase contracts • Has a distribution obligation • Is integrated into the sales organisation of the producer • Manufacturer bears the risks from transactions with customers	• Prices can be fixed by the producer • Extensive (but not unlimited) • Control opportunities • The producer can determine which customers are sold to	• Strict commercial agency law • Indemnity claim under § 89b of the German Commercial Code (HGB)
Broker ("*Makler*")	• Negotiates or concludes contracts in the name and for the account of third parties • No distribution obligation • Is not integrated into the sales organisation of either party • The producer generally bears the risks from transactions with customers	• Producer can fix prices • Commercial agency law does not apply analogously • The producer can determine which customers to supply	• No obligation to sell • No control opportunities beyond the specific transaction
Commission Agent ("*Kommissionsagent*")	• Buys and sells in its own name, but on behalf of the manufacturer • Has a distribution obligation • Is usually integrated into the manufacturer's sales organisation • Manufacturer generally bears the risks from transactions with customers	• Producers can fix prices • Producer can determine which customers are supplied	• Commercial agency law may apply accordingly • Contract cannot be terminated at short notice • An indemnity claim is possible, but can probably be avoided by contractual arrangement

Form of Distribution	Characteristic Elements	Advantages from the Manufacturer's Point of view	Disadvantages from the Manufacturer's Point of View
Commission Merchant ("*Kommissionär*")	• Buys and sells in its own name, but on behalf of the manufacturer • Only acts for individual transactions • Producer generally bears risks from transactions with customers	• Producer can fix prices • Producer can determine which customers are served • Commercial agency law does not apply, even analogously	• No distribution obligation • No control options beyond the specific business
Franchising	• The franchisee concludes transactions in its own name and for its own account • Cooperation between self- employed producers (franchisor's obligation to provide support – franchisee's obligation to implement the franchise concept) • Integration into the franchise system • The franchisee bears the economic risk from transactions	• Specifications and guidelines are allowed, but not for core areas of self-employed activity (*e.g.*, staff sovereignty, opening hours, pricing) • Control rights of the franchisor • Quasi-branch system without the need to use equity capital	• Commercial agency law may apply analogously • Possible indemnity claim but it can probably be avoided by contractual arrangement • Extensive pre-contractual duties of disclosure

The following focuses on the legal situation for commercial agents and distributors.

V. The legal framework

Distribution law is only partially codified by law. There are specific and detailed regulations **for commercial agents in particular**, in **§§ 84 *et seq.* of the German Commercial Code (HGB)**. These **regulations apply in part, analogously to other types of sales intermediaries (especially distributors)**. However, the exact application will depend on the respective provision and whether the distributor is integrated into the manufacturer's sales organisation in the same way as a commercial agent.

Particularly when a distribution agreement is not a commercial agency agreement, it is important to contractually regulate, in detail, the rights and duties of the parties. In Germany, the **principle of freedom of contract** applies. Accordingly, the contracting parties are generally free to structure contracts as they see fit. This also applies to distribution agreements. The parties can therefore deviate from statutory provisions.

Freedom of contract does not apply without restriction. The legal framework sets limits. The **most important limits** are

- **commercial agency law** ((§§ 84 *et seq.* of the German Commercial Code). Some of these standards apply not only to commercial agents, but also to other types of distribution,

- the **law on general terms and conditions**, which applies to pre-formulated contracts that are not negotiated in detail (§§ 305 *et seq.* of the German Civil Code (BGB)),

- **antitrust law** (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), German Competition Act (GWB), Vertical Block Exemption Regulation (Commission Regulation (EU) 2022/720)).

Some of these regulations are mandatory. The important elements are summarised below.

1. Commercial agency law of § 84 *et seq.* HGB (selection)

Section	Essential Content
Section 84 HGB	**Independence** of the commercial agent: As the commercial agent is an independent entrepreneur, it is entitled to **entrepreneurial freedom**, which cannot be restricted too strictly by contract. Example: The contract may not stipulate in detail when the agent has to visit certain customers nor require daily reports. This also applies to other sales intermediaries, *e.g.*, distributors.

Section	Essential Content
Section 87c (2) HGB	**Book extract**: Commercial agents are entitled to book extract. This is a control instrument which allows the commercial agent to check whether they have received all the commission to which they are entitled. The book extract is an orderly compilation of all business transactions for which the commercial agent may be entitled to commission. The work involved in preparing a book extract can be significant. This does not apply to distributors.
Section 89 HGB	**Notice periods**: 1 to 6 months, depending on the length of the contractual cooperation. Depending on the circumstances, the standard applies not only to commercial agents, but also to other sales intermediaries, such as distributors.
Section 89a HGB	If there are serious grounds that make the continuation of the cooperation an unreasonable burden, it may be **terminated without notice**.
Section 89b HGB	**Indemnity claim**: If a commercial agency agreement ends, the commercial agent is often entitled to an appropriate monetary indemnity for the customer base they have built up. This can amount to as much as an average annual commission. This can also apply to distributors if they are integrated into the manufacturer's sales organisation, but can be avoided by contract design.
Section 90a HGB	**Post-contractual non-compete clauses** for commercial agents are only possible to a limited extent. The consequence of a non-compete clause in the contract is that the foreign manufacturer must pay an additional indemnity to the commercial agent. For distributors, post-contractual non-compete clauses are almost impossible to regulate effectively under antitrust law.

2. The law on general terms and conditions

General terms and conditions are all (1) contractual conditions pre-formulated for a multitude of contracts, (2) which one party imposes on the other and which are not negotiated in detail (§ 305 of the German Civil Code (BGB)).

In practice, this applies to most distribution agreements. This is because the courts take a narrow view when assessing whether there is a "negotiation" within the specific sense of the law.

If only part of the manufacturer's pre-formulated contract is negotiated, the remainder of the contract will generally be regarded as not negotiated and, therefore, as general terms and conditions (T&Cs).

If a contract or parts of a contract are regarded as T&Cs, the particularities explained below shall apply. They do not apply to contracts that do not qualify as T&Cs.

Surprising clauses do not become an effective part of the contract, § 305c (1) of the BGB.

Contractual clauses that unreasonably disadvantage the contractual partner contrary to good faith are invalid (§ 307 of the BGB). What is inappropriate must be decided on the basis of previous court judgments. Some **important examples** include:

- Reporting obligations in commercial agency agreements: permissible if not too onerous, otherwise ineffective

- If a commercial agent is required to pay a price at the beginning of the cooperation in return for receiving the representation rights (initial payment), it will only be effective if the price is reasonable. Careful drafting is necessary for such provisions.

- Liability clauses excluding or limiting the manufacturer's liability in commercial agency or authorised dealer agreements are often ineffective.

- Clauses prohibiting the commercial agent from using customer data after the end of the contract are invalid (although the commercial agent may not copy customer lists).

- The commercial agency or distribution agreement can only stipulate, to a limited extent, the grounds that entitle the manufacturer to immediate and extraordinary termination.

- If a distribution agreement ends, the manufacturer may have to buy back goods still in the distributor's warehouse if the distributor was obliged to maintain a warehouse. Restrictions to this obligation in T&Cs are often ineffective.

3. Antitrust law

Antitrust law plays a particularly important role in agreements with distributors, but not usually in contracts with commercial agents.

European antitrust law generally prohibits agreements that restrict competition (Article 101 of the Treaty on the Functioning of the European Union (TFEU)). Agree-

ments which do not comply with this are partially or completely invalid. There is also the threat of high fines for non-compliance.

However, if neither the manufacturer nor the distributor has a market share of more than 30%, the Vertical Block Exemption Regulation (Commission Regulation (EU) 2022/720) provides certain exemptions for restrictive agreements ("safe harbour"). However, these do not apply without restriction. In the case of larger market shares, a particularly careful examination is required so that the following explanations only apply to a limited extent.

Typical clauses in agreements with distributors requiring carefully examination under antitrust law (not exhaustive!):

Price fixing	The distributor is dictated the price or a minimum price it must charge customers.	Ineffective. Risk of high fines. However, non-binding price recommendations are possible. But be aware: you may not exert pressure on the distributor to comply with these non-binding price recommendations!
Prohibition against delivery to customers outside the contractual territory	The manufacturer often assigns contract territories exclusively to distributors. Contracts with distributors sometimes stipulate that the distributors may not sell to customers outside their own territory.	Ineffective in this form. Risk of fines. Distributors can only be prohibited from actively operating in contractual territories exclusively reserved to either the producer or other sales intermediaries. Distributors must always be permitted to make passive sales (example: a French customer contacts the German distributor on his own initiative – in such case the German distributor must be permitted to supply such a customer). The text of the contract must reflect this.
Restriction of online trading	Manufacturers often regulate the use of the internet for the sale of goods by the distributor.	The effective use of the internet must not be prohibited: the distributor may therefore sell via its own online store. However, it will generally be permissible to prohibit the distributor from selling goods via online platforms. Special rules apply to selective distribution systems.

Non-compete clauses	Manufacturers often want to prohibit distributors from selling competing products.	This is permissible in principle, but only for a limited period of 5 years.
Post-contractual non-compete clauses	Sometimes manufacturers also want to prohibit their distributors from selling competing products for a period after the end of the contract.	This is only possible to a very limited extent. Therefore, post-contractual non-compete clauses are almost impossible to regulate effectively. Such provisions can be agreed in commercial agency agreements, but not without restrictions. Where one applies, the commercial agent must be paid an additional indemnity.

VI. Conclusion and form of distribution agreements, no obligation to register

Distribution agreements can be concluded verbally or even tacitly. However, it is advisable to put them in a contractual document so both parties know their rights and obligations.

Contract amendments can also be made in writing, verbally or tacitly.

Distribution contracts do not have to be registered in Germany.

VII. The termination of distribution relationships

1. Commercial agency agreements

Commercial agency agreements can be concluded for a limited period. They terminate at the end of the agreed term.

In most cases, however, commercial agency agreements are concluded for an indefinite period. They end either when the parties terminate the contract by means of a mutual termination agreement, or when one of the parties gives notice.

Notice periods can be regulated in the contract. However, § 89 of the HGB stipulates minimum notice periods which cannot be undercut. This period is one month in the first year of the contract, two months in the second year, three months in the third to fifth year and six months thereafter, in each case to the end of the calendar month.

However, if there is good cause that makes it unreasonable for one of the parties to continue working with the other party until the end of the notice period, the party can also terminate the contract with immediate effect (§ 89a of the HGB). As a rule, it is necessary to issue a warning before extraordinary termination. However, this may be different in individual cases of particularly serious breaches of contract.

If the manufacturer terminates the contract for cause, while in realty there is no good cause for such termination, the manufacturer may be liable for damages. Before giving notice of termination for cause, it is therefore advisable to check carefully whether there is good cause for termination.

2. Contracts with distributors

Contracts with distributors can also be concluded for a fixed term and will end automatically after expiry of the term without the need for termination. If a contract is concluded for an indefinite period, the parties can either terminate it by mutual agreement or one of the parties can terminate the contract by giving notice.

Notice periods are not regulated by law. In most cases, however, the courts apply the notice periods which apply to commercial agents (see above). However, if the distributors had to make specific investments (*e.g.*, in the field of distribution of motor vehicles), the courts often enforce longer notice periods.

If there is good cause that makes the cooperation unreasonable, in particular in the event of serious breaches of contract by the other party, a distribution agreement can also be terminated with immediate effect. As with commercial agency agreements, however, a warning is usually required before termination for cause is possible.

VIII. Claim for indemnity

1. Commercial agency agreements

The commercial agent can demand appropriate monetary indemnity from the manufacturer after termination of the contractual relationship if and to the extent the requirements of § 89b of the HGB are met. Comparable regulations exist throughout the European Union.

Indemnity can amount to up to an average annual remuneration and may therefore have considerable economic value. The commercial agent receives residual remuneration for having built up or expanded the customer base, which the manufacturer can continue to use after the end of the contract.

This agent's right to claim indemnity is mandatory. The parties can neither exclude nor limit this right. According to the case law of the European Court of Justice, it also cannot be circumvented by contractually stipulating that a different legal system applies, such as Chinese law.

Section 89b (1) of the HGB sets out the requirements which must be met for the commercial agent to be able to demand indemnity.

First, the commercial agency agreement must be terminated. In addition

- the producer continues to derive substantial benefits, even after termination of the agency contract, from business relations with new customers found and fostered by the commercial agent, and

- the payment of indemnity is equitable, having regard to all the circumstances and, in particular, to the commission lost by the commercial agent on the business transacted with such customers.

These conditions determine whether indemnity is due. They also indicate how it should be calculated. However, § 89b (2) of the HGB introduces a maximum limit by stipulating that this indemnity shall not exceed the annual remuneration, calculated on the basis of the average of the last five years of the commercial agent's activity.

Furthermore, § 89b (3) of the HGB provides three circumstances which exclude indemnity:

- the commercial agent has terminated the agency contract,

- the producer has terminated the agency contract for good cause owing to culpable conduct on part of the commercial agent, or

- a third party enters into the agency contract in place of the commercial agent on the basis of an agreement between the producer and the commercial agent.

However, § 89b (3) of the HGB allows two exceptions to the principle of the exclusion of indemnity in the event of termination by the commercial agent. Despite termination by the agent, the claim for indemnity will still exist if

- the conduct of the producer yielded justified grounds for the termination, or

- the commercial agent cannot reasonably be expected to continue their activities on account of their age or an illness.

Section 89b (4) of the HGB provides for a period of one year within which the commercial agent must have filed a claim for indemnity after termination of the contract if they do not wish the claim to be time barred.

The examination and calculation of such a claim is complex and only possible if one is familiar with the relevant case law. If an indemnity claim is asserted against your company or you wish to reach an agreement on an indemnity claim, we strongly recommend you seek legal advice.

2. Contracts with distributors

According to the case law of the German Federal Court of Justice (*Bundesgerichtshof, BGH*), distributors may also be able to assert a claim for indemnity under § 89b of the HGB.

Two conditions must be met for the analogous application of § 89b of the HGB to a distributor. First, as with any analogy of commercial agency law, there must be a legal relationship between the distributor and the manufacturer which integrates the distributor into the producer's distribution network in a manner similar to a commercial agent. In addition to this general analogy requirement, the case law also requires the distributor to be contractually obliged to transfer its customer base to the producer so that the producer is able to immediately and easily use the customer base at the end of the contract. Whether the producer actually uses the customer base is irrelevant for the indemnity claim.

If these two analogy requirements are met, the further requirements discussed above for the commercial agent's indemnity claim must also be met.

The calculation of a distributor's indemnity claim is more complicated than that for a commercial agent. The distributor does not earn commission, but a margin. This is therefore the starting point for the calculation. However, deductions must be made from this, as the distributor's margin is typically higher than the commercial agent's commission. However, the distributor should not be placed in a better position than a commercial agent, so that a comparable level of entitlement should be established through adjustments.

D. Investing in real estate

There are numerous possibilities for investing in real estate in Germany. For example, you can purchase undeveloped plots of land or plots of land containing existing buildings which may be used for commercial or residential purposes. Currently, residential properties are particularly popular with investors.

Real estate investments can be important in asset planning, either as provisions for old age or a value-oriented capital investment. They often have a stable value and are regarded as a safe investment in tangible assets. The long-term nature of these investments often ensures stable asset growth.

It is important to obtain as much information as possible about the proposed form of investment prior to investing. Expectations and risks should be transparent and quantifiable for the investor.

I. No special conditions for foreign investors

The key characteristic of the real estate market is the transferability of ownership of land. The dynamic nature of the market means investors can acquire a plot of land, realise a new development or conversion project on the site, and then absorb the capital from the plot of land through lease or sale.

Subject to EU sanction rules, foreign natural and legal persons can acquire land in Germany, like German investors.

II. Types of property

There are various types of property and therefore various possibilities for acquiring property. In a legal sense, there are **plots of land**, **apartments**, and **hereditary building rights**. In terms of the use of property, a distinction should be made between residential and commercial properties. In Germany, the legal regulations governing the purchase of property do not distinguish between properties for residential or commercial purposes.

The purchaser can acquire a plot of land or a hereditary building right

- containing an existing building (a distinction must be made here as to whether the building on the site is a new or existing building);

- with an obligation on the part of the seller, as the developer or general contractor, to construct a particular building, or have it constructed;

- free of any building.

1. Definition of a plot of land

The entire surface area of Germany has been surveyed and is recorded into cadastral sections and land plots in official land survey registers kept by the respective city or district where the land plots are situated. Each plot of land is registered under a specific title number (*Flurstück*) according to regional law. This title number notes the ownership and limiting rights *in rem* recorded in the **land register** (*Grundbuch*), which is maintained by the local courts. Purchase agreements and agreements transferring rights in real estate refer to these registers to define the subject matter.

According to the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), the land and buildings, and all objects firmly attached to them, **form a unit**. They cannot be the subject of separate rights. Ownership of the plot of land therefore also extends to the building. There is no such thing as ownership of parts of a building, only co-ownership of the – developed or undeveloped – plot of land.

Generally, assets serving the economic purpose of the plot of land, *i.e.*, spatially and economically related to the plot of land, will also belong to this unit. Purchase agreements usually embrace these assets. Mortgages on the plot of land embrace these assets by law.

2. Land register law, registration

The **land register** is a record of all plots of land and sets forth the *in rem* legal circumstances relating to the plot of land. In particular, it provides information on the owner of the relevant plot of land. The land register is kept by the local court. A local court district is divided into several land register districts (parishes). Within these land register districts, the land registers are ordered by volume and folio.

To register a **right *in rem*** to a particular plot of land, a notarised application must be filed with the land register. As a rule, the purchaser's application for registration in the land register will be included in the notarised deed. The submission of this deed to the land register will therefore suffice as an application for registration. Acquisition, change, and revocation of ownership, as well as other rights to plots of land are registered in the land register and all existing and prior registrations remain visible. If an entry is to be deleted, this is noted accordingly in the land register. The old entry is underlined to show it has been deleted. The land register simply shows the in rem legal circumstances. The land register does not show whether the plot of land is let or leased, or whether there is a contractual pre-emptive right.

The owner is registered in section I of the land register. In the case of several joint owners, the register will note the respective shares of each party or the legal relationship between the co-owners.

Encumbrances on the plot of land, priority notices, restrictions, and land register annotations are entered in section II of the land register. The purchaser either takes over these encumbrances or has them deleted.

Mortgages, annuity land charges and other land charges are entered in section III of the land register.

A right shown in the land register or the revocation of a right entered in the land register is considered proof of the right of its holder or former beneficiary, unless refuted through evidence to the contrary.

3. Apartments

In addition to the regulations set forth in the BGB, the provisions of the Act on the Ownership of Apartments and the Permanent Residential Right (*Wohnungseigentumsgesetz, WEG*)[28] play an important role when purchasing residential properties. The Apartments Act makes it possible to purchase individual apartments in a building. An apartment involves a co-ownership share in a plot of land in combination with the separate ownership of a residential apartment or a self-contained part of the building not used for residential purposes. It thus represents a mixture of sole and co-ownership.

4. Hereditary building right

From the point of view of the leaseholder, a **hereditary building right** (*Erbbaurecht*) means the right – which can be sold or inherited - to own a building structure on or below the surface of a plot of land owned by a third-party owner. From the point of view of the owner, the hereditary building right is a limited right in rem encumbering their plot of land. The hereditary building right has historical origins and tends to play a minor role in Germany. It is regulated by the Hereditary Building Right Act (*Erbbaurechtsgesetz, ErbbauRG*)[29]. The term of the hereditary building right can be agreed.

The hereditary building right is itself treated like a plot of land and is registered both in section II of the land register as an encumbrance on a plot of land and in a

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[28] Act on the Ownership of Apartments and the Permanent Residential Right (*Wohnungseigentumsgesetz, WEG*) of 12 January 2021, (BGBl. I p. 34), last amended by § 1 of the Law of 10 October 2024 (BGBl. 2024 I Nr. 306).

[29] Hereditary Building Right Act (*Erbbaurechtsgesetz, ErbbauRG*) of 15 January 1919, (BGBl. III, 403-6), last amended by § 4 (7) of the Law of 1 October 2013 (BGBl. I p. 3719).

separate building lease land register folio. It can be encumbered, for example, with property liens. The leaseholder and owner usually agree that the leaseholder must pay the owner of the plot of land a one-off consideration or yearly payments, known as ground rent.

The hereditary building right is established through an agreement between the owner and rightsholder and its registration in the land register. The hereditary building right lapses with the expiry of the agreed period. Following expiry of the agreed period, whether the building has to be removed from the plot of land or the leaseholder receives a payment for the value of the building will depend on the agreements between the owner and the leaseholder.

III. Direct investment as an asset or share deal

A plot of land may be acquired either through a straightforward land purchase agreement (**asset deal**) or through the takeover of shares in a holding company (**share deal**).

The way in which the property is acquired should always be chosen and structured in consideration of tax aspects. A transaction structure optimised for tax considerations is essential.

1. Asset deal

The investor and the seller conclude a purchase agreement which contains an undertaking to transfer ownership of the plot of land to the investor. The purchase agreement must be notarised. The requirement of notarisation extends to all arrangements the parties make in connection with the transfer of ownership, such as preliminary agreements.

However, ownership of the plot of land is only transferred to the purchaser with the agreement of the parties and registration of the transfer in the land register.

For more information about the requirements of the agreement, the conveyance of ownership, priority notice of conveyance, and registration in the land register, see section V, below.

2. Share deal

In contrast, share deals involving real estate also have tax benefits with respect to the seller's profit on the sale, namely the use of the part-income method in the case of natural persons (= 60% of the profit on the sale is taxed at the corresponding personal tax rate plus solidarity surcharge and, where applicable, trade tax), and a

95% tax exemption in the case of corporations, *i.e.*, corporate entities (= only 5% of the profit on the sale is subject to corporate/trade tax plus solidarity surcharge) as the seller. Under certain circumstances, natural persons who own real estate, which has been used for non-commercial purposes for at least 10 years, can even sell their property tax-free. With a share deal, the purchaser can, when acquiring a share of up to a given portion (see 3.), even avoid real estate transfer tax (RETT) altogether. In many cases, value added tax risks can also be avoided with a share deal.

The procedure followed in a share deal essentially depends on the legal form of the holding company, which is usually either a GmbH or GmbH & Co. KG.

a) The GmbH

In the case of a GmbH, both the contractual (sale and purchase) agreement and the enforceable transfer deed on the transfer of a share in the business require notarisation. Acquisition of the shares is generally completed with assignment unless the parties have previously agreed to a special condition. Acquiring a share in a GmbH is therefore usually a significantly quicker way to achieve the desired economic objective than the direct acquisition of the plot of land.

The assignment of a share in a business is normally not tied to other prerequisites. However, the articles of association may also require the approval of the company or the shareholders, or other shareholders may hold pre-emptive rights. In this case, the share purchase agreement should already contain all the necessary approvals or waivers.

When formulating a share purchase agreement, particular attention should be paid to the inclusion of agreements or guarantees concerning the properties of the share or the land. One example of a share-related guarantee is an assurance that the shareholding is legally valid, and the seller can freely dispose of it; that the share is not encumbered by any rights of third parties, especially not attached or pledged. A property-related guarantee includes the assurance that the GmbH is the owner of the plot of land and the land is free of encumbrances.

b) The GmbH & Co. KG

In the case of acquisition of shares in a GmbH & Co. KG, both the shares in the GmbH and the limited partner's shares in the KG are acquired.

There are several issues impact the acquisition of the limited partner's shares. In contrast to the acquisition of shares in a GmbH, a limited partner's share can be acquired without any formal requirements, providing the shares of the corresponding

general partner GmbH, which are subject to formal requirements, are not acquired at the same time. The assignment of the shares to the purchaser and the withdrawal of the previous limited partner shall only become legally valid once they have been recorded in the commercial register.

However, effective assignment should be subject to the condition precedent of registration in the commercial register. This is the only way to effectively limit the liability of the purchaser towards company creditors to the limited partner's interest. Irrespective of registration in the commercial register, the purchaser becomes a shareholder in the KG with the assignment of the limited partner's share.

3. Trade tax on rental income

Rental income earned by a real estate investment company (GmbH or a GmbH & Co. KG with a GmbH as 100% limited partner) is subject to both corporation tax (15.825%) and trade tax. The latter is raised by the municipal authorities and therefore varies within Germany (usually between 14% and 17%). However, the pure administration of property assets by a company, be it a GmbH or GmbH & Co. KG, can be exempt from trade tax on the collected rent payments, to the extent that the company exclusively administers its own property holdings, especially if it only lets or leases them. Nevertheless, such an administrative function does not apply if the company also provides tenants with extra commercial services, or if, in addition to the property holdings, it lets items of operating equipment, which can be a fixed component of the property.

If the company is exclusively involved in the administration of assets, the nominal overall tax burden can therefore effectively be reduced to 15.825% with correct organisation.

IV. Due diligence

Due diligence involves on examination of the real estate to be acquired. The aim of the due diligence process is to create a basis, in the form of a due diligence report, for the detailed valuation of the real estate and to reveal the risks associated with its acquisition with a sufficient period of advance notice (see also Chapter B. VII. 4. c)).

Legal due diligence on real estate is usually divided into the following sections: the status of the real estate, restrictions on use and disposal, financing encumbrances, tenancy agreements, public law aspects, environmental law, insurance and (pending) legal disputes.

1. Status of the real estate

In any real estate transaction, the land register must be inspected to ascertain the ownership situation, to determine any restrictions on use and disposal, and to see whether there is mention of any financing charges. Restrictions on use and disposal are reflected in the value of the plot of land, because they affect its usability.

a) Priority notice

Under German property law, the **priority notice** (*Vormerkung*) represents an announcement in the land register of a future acquisition of title to a plot of land, to which the party in whose favour the priority notice was entered has a claim based upon contract or tort. In practice, the most frequent form is the priority notice of conveyance, which announces a conveyance, or the legal transfer of ownership.

The acquisition of a plot of land or title to a plot of land has two stages. First, it requires a contract in which the parties agree on the acquisition of title by one party and second, registration of said acquisition of title in the land register. The purchaser of a plot of land can only be sure of their rights to the purchased property once they are recorded in the land register as the new owner.

As the registration in the land register takes time and the parties have no influence over registration (which is carried out by the relevant officials), there is a risk for the purchaser of the plot of land or the title to the plot of land that, before registration of the acquisition of title in the land register, the still-entitled seller could sell or use the plot of land to the detriment of the imminent purchaser. The only possible recourse would be a compensation claim against the seller for breach of contract. A claim against the third party for the grant of title to the plot of land is ruled out due to the inter partes effect of the obligations involved. A priority notice of conveyance should therefore be registered to protect the purchaser.

b) Restrictions on use and disposal

Restrictions on the use of the plot of land arise from the encumbrances entered in section II of the land register. The scope and extent of the encumbrances are often not apparent from the land register alone, so the agreements underlying the relevant easement should also be consulted to determine the precise content.

(1) Usufruct

Usufruct (*Nießbrauch*) grants the usufructuary the right to comprehensively use the encumbered property. This includes the deriving of benefits, such as products and other yields of the property.

The beneficiary is not only entitled to beneficial use with respect to the other party to the agreement but enjoys the right of beneficial use with respect to any other person(s).

The usufruct for immovable objects is granted through informal agreement and registration in the land register.

(2) Easement

Easements (*Grunddienstbarkeit*) are frequently found in the land register and are encumbrances on a plot of land in favour of the respective owner of another plot of land, frequently a neighbouring plot. The two owners may, for example, agree that a third party can use the encumbered plot of land in certain ways, certain actions may not be carried out on this plot of land, or to exclude the exercise of a right. For example, an agreed "right of way" is a path across a plot of land owned by a third party, which may be used for pedestrian or vehicular access.

An easement is created through an agreement between the owners and registration in the land register of the encumbered plot of land. The easement may also be registered in the land register of the neighbouring property which controls the easement right, but this is not obligatory.

The creation of an easement acts as a right *in rem*; the right encumbers the plot of land. Subsequent purchasers of the neighbouring property may also make use of the right. Subsequent owners of the encumbered property must also tolerate the exercise of the right.

(3) Limited easement in gross

A **limited easement in gross** (*beschränkte persönliche Dienstbarkeit*) is the authority of a certain person to use the encumbered plot of land in certain ways. A limited easement in gross can also prevent the owner of the encumbered plot of land from carrying out individual actions or limit their rights to use individual rights of defence. An easement in gross is created through agreement between the owner and beneficiary and registration in the land register.

(4) Public charges

Public charges are created by operation of law, without registration in the land register, unless their registration is specially permitted or required by law (§ 54 of the Land Register Act (*Grundbuchordnung, GBO*)[30]. Public charges include, for

[30] Land Register Act (*Grundbuchordnung, GBO*) of 26 May 1994 (BGBl. I p. 1114), last amended by § 16 of the Law of 19 December 2022 (BGBl. I S. 2606).

example, public infrastructure development contributions in accordance with §§ 127 *et seq.* of the Federal Building Code (*Baugesetzbuch, BauGB*)[31], road-building contributions in accordance with regional bylaws, rates due pursuant to § 9 of the Real Estate Tax Law (*Grundsteuergesetz, GrStG*),[32] or canal charges under regional laws on municipal charges..

c) Financing encumbrances

Mortgages and **land charges** serve to secure monetary claims. If the landowner fails to meet their payment obligations, the holder of the mortgage or land charge can, after obtaining a title to payment, levy execution on the property. The register does not show the amount of the underlying claim or whether it still exists, or to what extent the creditors' demands have already been met.

(1) Mortgage

A **mortgage** (*Hypothek*) is an encumbrance in rem of a plot of land, not associated with possession, to secure a monetary claim. Its creation and existence are fundamentally dependent on a claim. The secured claim for which the mortgage is created is always a monetary claim. The debtor may be the owner or a third party. The mortgage is created by an agreement and registration as an uncertificated or certificated mortgage by handing over the mortgage certificate.

(2) Land charge

In contrast to a mortgage, a **land charge** (*Grundschuld*) does not depend on the existence of a secured claim. Like the mortgage, the land charge can be uncertificated or certificated. The land charge exists independently from the debt claim. Land charges are therefore more flexible than mortgages and can be used to swap the respective secured debt claims.

2. Tenancy agreements

Valid medium or **long-term tenancy agreements** are an important factor when considering the yield from a real estate investment. The effectiveness and long-term validity of a tenancy agreement is assessed under the provisions on tenancy law in the Civil Code (BGB).

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[31] Federal Building Code (*Baugesetzbuch, BauGB*) of 3 November 2017 (BGBl. I p. 3634), last amended by § 3 of the Law of 20 December 2023 (BGBl. I Nr. 394).

[32] Real Estate Tax Act (*Grundsteuergesetz, GrStG*) of 7 August 1973 (BGBl. I p. 965), last amended by § 32 of the Law of 2 December 2024 (BGBl. 2024 I Nr. 382. 2931).

In this context, the **distinction between residential and other tenancies** is crucial; these include the applicability of the provisions regarding rent increases in the BGB, and the calculation of the period of notice of termination or the issue in compliance with the rules on protection against termination of a tenancy.

Residential tenancy means the parties agree to the provision of property for residential purposes in return for payment. Business premises tenancy means the property is leased by the tenant for the purposes of commercial gain.

a) Entry into the existing tenancy

A purchaser only enters into an existing tenancy agreement by law if the landlord and owner were previously identical. In this respect, the purchaser assumes all rights and obligations associated with the tenancy from the seller.

b) Compliance with written form

You should pay particular attention to the stipulation of the term when examining tenancy agreements.

Section 550 of the BGB stipulates that a tenancy agreement for a period exceeding one year requires **written form**; if it is not in written form, it will be regarded as agreement for an indefinite term and can, as such, only be terminated on the expiry of one year following handover of the residential premises. This provision mainly applies to commercial leases.

Supplements to the tenancy agreement should correctly refer to the main agreement.

c) Index-linking of rent

Longer-term commercial tenancy agreements commonly include an agreement to adjust the rent according to an **official index**. The absence of such a provision can have a depreciative effect, since there will be no compensation for any loss of purchasing power occurring over the term of the lease.

d) Deposit

Many tenancy agreements include arrangements for the payment of a **deposit**. This minimises the risk of non-payment of rent. Irrespective of whether the deposit has been passed on to the purchaser, the purchaser will be responsible for returning it to the tenant upon termination of the tenancy. This will only not apply if the cash deposit was invested separately from the assets of the landlord.

e) Operating costs

Operating costs must be explicitly listed in the tenancy agreement together with the costs charged to tenant. Where this is not done, it will be assumed the payment of rent covers all additional costs.

f) Maintenance

Considerable costs can arise as a result of obligatory repairs. If the tenancy agreement does not contain any stipulations concerning repairs, the landlord is responsible for the **maintenance** of the property and must ensure that the property is suitable for the contractually agreed use, without any defects.

g) Rights of withdrawal

Of note are also the **contractual rights of withdrawal**, such as in the case of the failure to obtain planning permission or the delayed completion of a building.

3. Public-law aspects

When acquiring a property, you should also establish whether the property constructed in accordance with official building law regulations and planning permission has been obtained.

a) Planning law

German planning law distinguishes between three zoning categories for construction projects. The most important distinction is between the outer and inner zone, with the key aim of protecting the outer zone against uncontrolled development.

(1) Outer zone

The **outer zone** (*Außenbereich*) refers to the areas that lie outside of built-up areas and have no qualified development plan. A fundamental ban on construction is presumed for the outer zone; only projects connected with the land (such as agriculture, power stations, research facilities, military installations, etc.) are permissible. Such projects are referred to as “privileged projects”. More detailed regulations can be found in § 35 of the BauGB.

(2) Inner zone

The **inner zone** (**Innenbereich**) refers to the unplanned areas within the built-up parts of the municipality. The evaluation of construction projects for a location within the inner zone is based on § 34 of the BauGB. According to this provision, the nature and extent of use of a new construction project will be assessed in

relation to the (existing, built-up) surrounding area. The character of the area also plays an important role.

(3) Planned inner zone

The third category is represented by those areas which lie within areas covered by **development plans**, *i.e.*, those scheduled for development. Since these generally involve existing or new development areas, they are also referred to as the planned inner zone.

(4) Content of a development plan

Section 9 of the BauGB defines what can be included in a development plan (*Bebauungsplan*). However, each element included must have planning justification. The details and dimensions related to specific uses are taken from the Land Use Ordinance (*Baunutzungsverordnung, BauNVO*)[33], which supplements § 9 of the BauGB.

Well-known assessments include area type (purely residential zones, general residential zones, village zones, mixed zones, core zones, commercial zones), with the corresponding catalogue of uses and the upper limits for useful dimensions (*e.g.*, floor space index, building heights, number of floors). The Land Use Ordinance also defines construction methods and areas of land which can be built on and regulates the legitimacy of ancillary buildings, parking spaces and garages.

b) Buildinging permission

Building permission (Baugenehmigung)is the official permission for the construction, alteration or change of use of buildings. Many federal states do not require planning permission for the demolition and removal of buildings, just a simple notification.

Building permission officially attests to the acceptability of the developer's building project in terms of the official regulations examined in planning procedures. State building regulations may also require the approval of the building following its completion – possibly also inspections during at intermediate stages of construction, especially in the case of large construction projects – the scope of which is left to the building authorities. Any building defects are recorded during inspections; the approval for use or occupation is only granted once these have been rectified.

[33] Land Use Ordinance (*Baunutzungsverordnung, BauNVO*) of 21 November 2017 (BGBl. I p. 3786), last amended by § 2 of the Law of 3 July 2023 (BGBl. 2023 I Nr. 176).

c) Registers of construction and maintenance obligations

The obligation to construct and maintain (*Baulast*) is the public-law counterpart to the easement, otherwise known as a "**public easement**." It is an obligatory undertaking intended to secure compliance with certain planning and building regulations. For example, there may be an obligation to provide a specified number of parking spaces.

A public easement is created through the provision of a building obligation by the landowner to the responsible building authority. Public easements are not usually registered in the land register; it is therefore vital to inspect the register of construction and maintenance obligations where the relevant regional law provides for such a register.

d) Infrastructure development

When acquiring undeveloped plots of land, pay particular attention to infrastructure development and the associated costs. The purchase agreement should stipulate which party is responsible for the costs incurred.

Full **infrastructure development** includes public infrastructure development (roads, green spaces etc.) and the laying of distribution networks for water, wastewater, gas, electricity, telephone, and broadband up to the boundary of the property.

Infrastructure development can constitute a considerable financial burden in addition to the purchase price. The party who owns the property when the contribution notice is issued must pay the infrastructure development contribution. Some time can elapse between the completion of infrastructure and the issue of the contribution notice.

Utility connections from the property boundary to the building are laid by the utilities company. The costs ensued are normally charged to the developer. In the case of an infill or rear development, you should obtain details in writing of the remaining infrastructure measures to be carried out and the anticipated costs from the local authority and the utilities company before signing the real estate contract.

e) Restrictions on disposal and pre-emptive rights

Public law restrictions on disposal protect the interests of the general public; the interests of the owner are subordinate to greater public interest. Public law restrictions on land ownership help ensure the plot of land, and parts or properties thereof remain, as far as possible, available to implement public interests. The following official restrictions on disposal could significantly affect the value of a property and must therefore be examined in detail:

- restrictions on traffic under the BauGB or special town planning laws, such as due to the reparcelling of land;

- the boundary determination procedure pursuant to the BauGB;

- restrictions on disposal to protect tourist areas pursuant to § 22 BauGB, in areas covered by an environmental conservation statute, to protect building use pursuant to § 35 (5) of the BauGB, or under agricultural law, economic and social legislation, or for public legal entities;

- public sector **rights of pre-emption**.

f) Conservation of historical buildings

You should check whether any conservation orders have been issued. If the property is listed, in whole or in part, as a **historical building**, it will have a significant impact, particularly on possible structural changes. It may also affect necessary maintenance costs, which could mean considerable financial expense. In Germany, the federal states govern the conservation and upkeep of historical buildings. Listing as a historical building often represents a burden for the owners because of the legal maintenance obligations.

4. Environmental law (existing contamination)

The property may be affected by existing biological or chemical contamination. An examination of the building ground is advisable to minimise risks. If soil contamination has been found on a property, the purchaser can be held liable for cleaning up the contamination by the responsible administrative authorities.

According to the Federal Soil Protection Act (*Bundesbodenschutzgesetz, BBodSchG*)[34], in addition to the party responsible for the **contamination**, the landowner is obliged, *inter alia*, to clean up the soil and water in such a way that no permanent hazards or significant losses or damages are caused to individuals or the general public.

The *BBodSchG* does not contain an obligatory deadline for the clean-up process.

[34] Federal Soil Protection Act (*Bundesbodenschutzgesetz, BBodSchG*) of 17 March 1998 (BGBl. I p. 502), last amended on 25 February 2021 (BGBl. I S. 306).

An extract from the contaminated land survey register (*Altlastenkataster*) provides an initial indicator to help quantify the risk of existing contamination. If there are grounds for suspecting contamination, more detailed studies will subsequently be carried out. For example, if contamination is suspected, the necessary soil and groundwater samples will be collected and analysed.

5. Insurance

Insurance policies taken out by the seller with respect to the building offered for sale can also be relevant. Pursuant to the Insurance Contract Act (*Versicherungsvertragsgesetz, VVG*)[35], property damage insurance policies, such as insurance for operating premises or fire and natural disaster insurance, transfer by law to the purchaser. The purchaser may cancel these policies; however, they must observe the statutory notice period of one month from the acquisition of the property. In practice, new insurance policies are usually taken out on the date of the handover.

6. Legal disputes

Legal disputes in connection with the property can also be relevant for the purchaser. These include legal disputes with tenants, and public-law disputes with neighbours.

V. Purchase agreement

The acquisition of ownership of the plot of land requires:

- a notarised contractual agreement for sale;
- the agreement of the participants concerning the transfer of ownership – referred to as the conveyancy agreement;
- registration of the change of ownership in the land register, which takes place upon approval and application.

[35] Insurance Contract Act (*Versicherungsvertragsgesetz, VVG*) of 23 November 2007 (BGBl. I p. 2631), last amended by § 4 of the Law of 11 April 2024 (BGBl. I Nr. 119).

1. Form, parties and content of the purchase agreement

a) Form

Without **notarisation**, an agreement on the sale or purchase of a property will be null and void.

b) Parties

The parties to the sale of a property are known as the seller and purchaser or buyer. There may be several persons on each side. Other persons may also be involved, such as a guarantor for the payment of the purchase price.

Special considerations arise if a married couple purchases or sells a property, in the case of inheritance, or where there are restrictions on disposal on the part of the seller, for example, as a result of insolvency, compulsory auction, or forced administration. In these cases, additional requirements apply.

In addition to private persons, parties can include institutional investors such as closed or open real estate funds or real estate investment companies.

c) Content

Any agreement whereby someone undertakes to convey ownership of a property to another natural or legal person requires notarisation. The same applies to an agreement whereby someone undertakes to purchase a property. Undertakings to create or revoke, sell or purchase a building lease pursuant to the ErbbauRG and the obligation to grant or revoke separate ownership pursuant to the WEG must also be notarised.

Certain minimum requirements apply to the real estate purchase agreement. For example, it must specify the object of the purchase, identity of the purchaser and the seller, and the purchase price.

The purchase agreement usually also stipulates the **time of the transfer of possession**, **benefits**, **and chargess**, when the purchase price is due for payment, and contains provisions on liability for legal and material defects, responsibility for infrastructure development costs, and liability for costs and taxes.

The purchase agreement must also specify when the handover will take place and the point at which the risk of accidental destruction or accidental deterioration, the benefits and charges, as well as liability for public safety will transfer to the purchaser.

As a rule, the risk of accidental destruction or accidental deterioration of the property is transferred to the purchaser on handover. In exceptional cases, the risk can be transferred to the purchaser before the handover of the property, namely when the purchaser is in default of acceptance.

Real estate purchase agreements often provide for an **exclusion of guarantees**. This means the seller wishes to avoid providing any warranty that, *e.g.*, a building is free of structural defects, the property is free of harmful substances and existing contamination, the soil has certain load-bearing properties, or the groundwater has a certain depth. The purchaser should be very cautious if there is an exclusion of guarantees. If the purchaser agrees to an exclusion of guarantees, sight unseen, and later establishes that, *e.g.*, the building requires repairs or the purchased land requires alterations or additional measures to allow the planned building to be constructed, the purchaser will not be able to hold the seller liable and will instead be responsible for any issues which arise.

There is also a risk that the purchaser may incur additional costs and the project will become significantly more expensive. In the worst-case scenario, the purchaser may find the purchased property is unfit for the intended purpose.

In order to minimise the risks associated with purchasing real estate, the purchase agreement should be drawn up by an experienced real estate lawyer. Through skilled negotiations with the seller, the lawyer can help the parties agree on provisions which are advantageous to the purchaser.

2. Conveyance

The *in rem* agreement between the parties (the **conveyance** – *Auflassung*) is normally included in a special, separate clause of the contract and its validity does not depend on the validity of the purchase under the law of obligations.

The agreement for the conveyance of ownership of a plot of land must be declared "**in the simultaneous presence of both parties before the notary**". This formal requirement is intended to emphasise the importance of the transfer of ownership of the plot of land to the participants. At the same time, the responsible notary should ensure compliance with all regulations. Moreover, the land register will only register the transfer of ownership if the conveyance is proven in officially certified form.

3. Registration

Registration in the land register completes the transfer of ownership. It also determines the priority of the right and establishes the assumption of correctness of the land register.

As the registration in the land register takes some time and the parties themselves have no influence over it (which is carried out by the relevant officials), there is a risk for the purchaser of the plot of land or the title to the plot of land that the still-entitled seller could sell or use the plot of land to the detriment of the imminent purchaser before the declaration of the acquisition of title in the land register. The creditor would have a compensation claim for breach of contract by the debtor, but it would be the only possible recourse. A claim against the third party for the grant of title to the plot of land is ruled out due to the *inter partes* effect of the obligations involved.

In order to safeguard the purchaser, the parties should agree in the purchase agreement to the registration of a **priority notice of conveyance** (*Vormerkung*) and an application should be submitted to the relevant register. As soon as the *Vormerkung* is entered in the land register, the purchaser is largely protected and ensured the seller will not sell the real estate to a third party in the meantime. On no account should the purchase price be paid before the *Vormerkung* has been registered. The contract should stipulate that the purchase price only becomes due once this entry has been made (along with other possible conditions precedent). The notary should verify fulfilment of the preconditions for payment. Payment should only be made once the notary has informed the purchaser in writing that the preconditions have been fulfilled.

Conversely, the seller should not agree to the purchase price only becoming due on or after the purchaser has been registered as the new owner. However, the purchaser is protected by the *Vormerkung* in as far as the purchase price is to be paid after it has been registered. After the purchase price has been settled, an application is made for the deletion of the *Vormerkung* and the registration of the purchaser as the new owner. This, too, can be agreed in the purchase agreement.

Often, the property will be encumbered. In this case, the purchaser must ensure they only pay the purchase price and are registered as the new owner once they have been informed in writing by the notary that these encumbrances have been deleted.

4. Public approvals and attestations

The validity of the sale of real property is in part dependent on official approvals of various kinds. The contractual agreement can be concluded before obtaining these approvals, conveyance can even be declared beforehand and a priority notice of conveyance can be registered. However, the change of ownership can only be registered in the land register once the land register is provided with proof of the official approvals. These approvals do not include pre-emptive rights or the clearance certificate concerning real estate transfer tax pursuant to the Real Estate Transfer Tax

Act (*Grunderwerbsteuergesetz, GrEStG*)[36]. However, both are prerequisites for the execution of the purchase agreement. Statutory pre-emptive rights to the property may, for example, involve pre-emptive rights on the part of nature or heritage conservation authorities, or pre-emptive rights under the BauGB. The statutory pre-emptive right provided for in the BauGB blocks registration in the land register. Registration in the land register requires confirmation that the pre-emptive right does not exist or is not being exercised.

5. Costs

a) Notary costs and court costs

The notary is responsible for the notarial recording of a real estate purchase agreement. The notary is an independent holder of public office. In exercising their office, notaries are obliged to act independently and impartially and not as the representative of one party. The notary is also under an obligation to maintain confidentiality.

As a rule, the parties will specify in the contract which party has to bear the costs associated with the purchase of the real estate. However, both parties pay the notary costs.

The purchaser of real estate must, by law, bear the costs of notarisation of the purchase agreement, conveyance, notice period of conveyance, and registration, including the costs of the declarations required for registration. These costs also include those which arise because other rights created in the agreement need to be entered in the land register, too, *e.g.*, a mortgage for the purchase price, a right of usufruct, a land charge, or other encumbrance to be entered in section II of the land register.

b) Real estate transfer tax (RETT)

The contracting parties are liable for the RETT as joint and several debtors. The purchaser and seller would each have to bear 50% of the tax. However, as a rule, payment of the RETT will be contractually assumed by the purchaser alone.

The notary is obliged to notify the revenue authorities of purchase agreements. **The RETT amounts to between 3.5% and 6.5%** of the purchase price, *e.g.*, 3.5% in Bavaria, 6% in Berlin, 6.5% in North Rhine-Westphalia.

Real estate transfer tax can also be charged in the case of a share deal. This will generally occur if the purchaser acquires more than 90% of the shares in a limited

[36] Real Estate Transfer Tax Act (*Grunderwerbsteuergesetz, GrEStG*) of 26 February 1997 (BGBl. I p. 418, 1804), last amended by § 33 of the Law of 2 December 2024 (BGBl. 2024 I Nr. 387).

liability real estate company or if, in the case of a property partnership, a change of partnership holdings of at least 90% takes place within a period of 10 years. However, the basis for the calculation of the RETT in a share deal is determined according to a special "standardised value".

Partnerships are primarily chosen as the form of property company. Shares will be transferred by way of a share deal, if, in particular, the desire is to directly allocate, in tax terms, the losses from the property company to its shareholders, although allocation will depend on the amount of the capital contribution or on the amount of the partner's liable capital as entered in the commercial register. For the seller, the sale of shares in a corporate entity can be interesting in tax terms, because 95% of any resulting profits on sale are effectively taxed only if the shares are held and sold by a corporate entity.

c) Agent's costs

It can be difficult to find a suitable plot of land for development and it is often necessary to seek the assistance of an agent. **Agents charge commission** for their services, which is usually calculated as a percentage of the purchase price of the property. Agents' fees vary depending on the region.

Some purchase agreements stipulate when the agent can demand their fee directly from the purchaser, even if the sale was commissioned by the seller. This means the purchaser will have to pay the agent's fee in addition to the actual purchase price. However, in the case of the acquisition of a residential house or apartment, the seller must – under mandatory law – pay at least 50% of the agent's fee.

There is often uncertainty as to whether the agent is entitled to demand a fee when the purchaser considers the agent's activities inconsequential to the conclusion of the purchase agreement. An agent must arrange a transaction concerning immovable property or prove the opportunity to conclude such a transaction existed. This usually involves naming the vendor and arranging a viewing of the property. The agent can only demand a fee once the purchase agreement has been concluded.

VI. Financing

Investments in real estate can be either direct or indirect.

If the acquisition of real estate is conducted by means of an asset deal or a share deal, it will be a direct investment.

In an indirect investment, the investor does not acquire ownership of the real estate but instead participates in institutional real estate funds which provide the capital invested in the property.

The type of investment form chosen will depend on various factors. The investor may profit from having a professional asset manager for indirect investments. If the investor has sufficient property management resources of its own, a direct investment may be preferred.

1. Direct Investment – Financing through bank loans

The most popular financing instrument in Germany for direct investments is the bank loan. Prior to granting the loan, the bank will undertake a detailed analysis of the creditworthiness of the investor and the real estate in question. The bank will seek to mitigate its risks by means of representations and covenants in the loan agreement.

As an alternative to taking out a new loan, the investor may, under certain circumstances and with the approval of the existing lender, instead take over loans taken out by the seller. In most cases, however, investors prefer to select their own financiers and negotiate their own financing terms with them. The security package required by the banks customarily includes the following: (i) a land charge on the real estate; (ii) assignment of rent receivables and insurance claims; (iii) pledge of bank accounts; (iv) and pledge of shares held by the purchaser of the property and receivables under the shareholder loan agreements.

a) Land charge

Banks require financed real estate to be encumbered by a land charge (*Grundschuld*). A distinction is made between uncertificated land charges (*Buchgrundschulden*), which are simply registered in the land register in favour of the bank, and certificated land charges (*Briefgrundschulden*), for which a land charge certificate (*Grundschuldbrief*) is issued in addition to the registration.

In addition to the basic amount of the land charge which generally reflects the amount of the loan, a land charge including interest (*Zinsen*), and ancillary payments (*Nebenleistung*). The amount of interest is not linked to the interest to be paid under the loan agreement and often varies from 12 to 20% p.a. Both, the interest and the ancillary payments increase the security for the bank in case of default.

The land charge and loan are linked through a separate agreement between the property owner and the bank, *i.e.*, the statement of collateral purpose (declaration of purpose for land charges). This agreement specifies elements such as when the bank may enforce its rights to the property, what notification periods are required prior to enforcement, and when and how the land charge will be released.

b) Compulsory execution

More often than not, banks will require that the land charge is created conditional to immediate enforcement pursuant to § 800 of the Code of Civil Procedure (*Zivilprozessordnung, ZPO*)[37]. Subject to compliance with the contractually agreed stipulations and statutory law, this allows the bank to foreclose on the property without requiring a prior judgment. This also applies in the event of a transfer of the property, where the acquired property is encumbered with a land charge.

In addition, the purchaser or borrower is required to provide "abstract acknowledgement" (*abstraktes Schuldanerkenntnis*) generally in the amount of the land charge, equivalent interest, and the ancillary costs of the land charge. To facilitate enforcement proceedings in the case of default, the borrower must subject all its assets to immediate enforcement. Compulsory execution can be levied under this deed without the need for summary judgment, though in this case it is exclusively executed against the persons who have supplied the abstract acknowledgment. It does not therefore extend to the new owner of the real estate.

c) Collateral value

The value of the collateral (*i.e.*, the value of the security package at hand) is of particular importance as it determines the amount the bank is willing to lend against the collateral. It is assessed according to the lending guidelines (*Bewertungsrichtlinien*) of the credit institution in question. Two reference points are key to determining the value of the real estate: the market value (*Verkehrswert*) and the lending value (*Beleihungswert*). The lending value generally reflects the value of the real estate on a long-term basis, regardless of changes in values on the market.

d) Determination of the lending value (*Beleihungswert*)

(1) Asset value method (*Sachwertverfahren*)

The value of the property is determined based on the construction costs and the value of the land. Current developments are not considered. This method is commonly used for owner-occupied properties.

(2) Income method (*Ertragswertverfahren*)

This method is used for yield-oriented properties, such as rental properties or commercial properties. The value is calculated from the land value (*Bodenwert*) and the expected income the property will generate in the future.

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[37] Code of Civil Procedure (*Zivilprozessordnung, ZPO*) of 5 December 2005 (BGBl. I p. 3202, corrected 2006, p. 432 and 2007, p. 1781), last amended by § 1 of the Law of 2 October 2024 (BGBl. 2024 I Nr. 328).

(3) Comparative value method (*Vergleichswertverfahren*)

This method is based on a comparison of the property with similar, recently sold properties. It is often used for apartments and single-family homes. This method broadly reflects the actual value of the property but is subject to market fluctuations more than other methods.

e) Power of attorney

Banks will require a land charge to disburse funds under the loan agreement. The seller's cooperation as the existing property owner is normally required for the registration of this land charge because the disbursement of funds is required prior to the purchaser becoming the registered owner of the real estate. In most cases, the notarised sale and purchase agreement for the property will contain provisions whereby the seller grants the purchaser a power of attorney to create encumbrances (*Belastungsvollmacht*) on the real estate prior to becoming the registered owner, the details of which are negotiated.

2. Indirect Investment – Investment Funds

Investments may be made through open-ended or closed-ended real estate funds, considered under the applicable Investment Code (*Kapitalanlagegesetzbuch, KAGB*)[38] as Alternative Investment Funds (Funds). Funds must always invest under the principle of risk sharing, and thus must invest in at least three to five parcels of real estate.

Additional costs due to regulation, asset management, and the involvement of a depositary bank will apply. Fund investments are mostly made by investors such as insurance and pension schemes, which must invest in a risk diversified manner.

VII. Special problems arising under building and architectural law

Building and architectural law are specialist areas in the field of civil law. They are particularly relevant if a building is to be built on the acquired piece of land.

[38] Investment Code (*Kapitalanlagegesetzbuch, KAGB*) of 4. July 2013 (BGBl. I p. 1981), last amended by § 5G of the Law of 28 November 2024 (BGBl. 2024 I Nr. 377).

1. Architect's copyright

The **architect's copyright** can become a cost pitfall for the purchaser, even in the case of purely functional office buildings.

The Act on Copyright and Related Rights – the Copyright Act (*Urheberrechtsgesetz, UrhG*)[39] – protects works in the visual arts, including architectural works, and the plans as well as designs for such works.

A building can be deemed to be a work of architecture if it is a unique creative work resulting from design activity and it displays individual creative qualities.

If alterations are to be made to a copyright-protected work in the course of renovation or conversion, these alterations will be strictly prohibited pursuant to the *UrhG*. This means alterations are not permitted without the consent of the architect. The architect may also be entitled to distribution and reproduction rights, as well as rights to mention by name.

The infringement of copyright through unauthorised alteration can result in claims for damages and injunctive relief.

If possible, where copyright is involved, the parties will need to establish whether consent to later alterations was agreed in the original architect's contract. Where this is not the case, the purchaser should insist on indemnification from the seller.

2. Developer model

In the **developer model**, for the construction work, contractual relations only exist between the purchaser and the developer on the one hand and between the developer and the construction companies and architects on the other hand.

The construction companies do not have any claim for payment against the purchaser; nor, conversely, does the latter have any warranty rights.

From a legal perspective, the developer contract is a mixture of a purchase agreement and a contract for goods and services and may be subject to the strict regulations of the Ordinance on the Obligations of Agents, Loan and Investment Brokers, Investment Advisers, Developers and Building Managers (*Makler- und Bauträgerverordnung, MaBV*)[40].

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[39] Act on Copyright and Related Rights – Copyright Act (*Urheberrechtsgesetz, UrhG*) of 9 September 1965 (BGBl. I p. 1273), last amended by § 28 of the Law of 23 October 2024 (BGBl. 2024 I Nr. 323).

[40] Ordinance on the Obligations of Agents, Loan and Investment Brokers, Investment Advisers, Developers and Building Managers (*Makler- und Bauträgerverordnung, MaBV*) of 7 November 1990 (BGBl. I p. 2479), last amended by § 14 of the Ordinance of 11 December 2024 (BGBl. 2024 I Nr. 411).

In particular, if the agreement is concluded before the building work is completed, the agreement will contain elements of the contract for goods and services. The MaBV governs payments in accordance with the current progress of work. The developer undertakes to construct the property in accordance with the agreed building specifications and subsequently hand it over to the purchaser and transfer ownership of the property to them.

Since it involves the sale of real property, the developer contract must be notarised.

The developer will usually retain ownership until payment is completed. The purchaser should therefore safeguard itself and register a priority notice of conveyance as a safeguard.

3. General contractor agreement

The **general contractor** performs all construction services involved in the construction of the building. This form of building contract, as a type of contract for goods and services, is referred to as a general contractor agreement. In contrast to the sole contractor, the general contractor and the developer agree that the general contractor may subcontract (partial) services. However, this does not alter the fact that the general contractor is the sole contracting partner of the developer and bears full responsibility for the entirety of the works.

In this case, the property is conveyed and transferred to the purchaser prior to the commencement of construction work. All construction works therefore become the purchaser’s property.

E. Capital markets law

Access to **capital markets** in Germany opens up the capital markets in Europe. The most interesting way to access these capital markets is an initial public offering (IPO) of shares in a foreign company based on a special purpose vehicle (SPV) in Europe or the direct issuance of bonds of a foreign company in Germany and/or Europe. This overview focuses on the requirements for listing and post-listing of initial public offerings (**IPO's**) and the issuance of bonds.

I. IPO

Germany has several stock exchanges, including those located in Dusseldorf, Stuttgart, Munich and Frankfurt. The most important stock exchange in Germany is the **Frankfurt Stock Exchange** (FSE), which is one of the world's leading international stock exchanges by revenue, profitability and market capitalisation, offering excellent services and systems for listed companies and investors. It is owned and operated by **Deutsche Börse AG**. However, for special investments like bonds, other stock exchanges, *e.g.*, in Stuttgart or Dusseldorf, could be of interest.

The following outlines the **listing** and **post-listing** requirements of the FSE.

For international companies, the main advantages of the FSE are direct and cost-efficient access to European capital markets, additional liquidity to finance further growth, unique market segments based on international transparency and corporate governance standards, simple and cost-efficient listing, and reduced exposure to inherent deficiencies in the legal systems of emerging markets.

The main listing and post-listing requirements of other stock exchanges in Germany are similar.

1. How is the market organised?

The FSE comprises two basic market segments, the **Regulated Market** (*Regulierter Markt*) and the **Open Market** (*Freiverkehr*).

The **Regulated Market** (Prime and General Standard) is subject to the regulatory provisions of the European Union (EU), while the **Open Market** is mainly regulated by **Deutsche Börse AG**.

The choice of the specific market segment and transparency standard of the FSE depends on the goals of the issuer. The **Regulated Market** (particularly **Prime Standard**) is more suitable to well-established, large-scale and mid-sized enterprises. In contrast, the **Open Market** can be more suitable for smaller companies or companies planning to "test the water" first and enter the **Regulated Market** as a second step. Each listed company is automatically included in the FSE indices. Some of these indices (such as DAX®, MDAX®, SDAX® and TecDAX®) include only those issuers, which are listed in Prime Standard.

The Open Market is divided into the segment **Scale** (Basic Board) for companies which are not yet listed on any other stock exchange recognised by the FSE, and the segment **Quotation Board** for companies already listed at an FSE approved stock exchange.

2. What are the main listing and post-listing requirements?

The **listing** and **post-listing** requirements depend upon the market segment chosen by the issuer, as well as the applicable transparency standard. **Scale** provides for a lower set of requirements, whereas the **Prime Standard** sets forth the strictest transparency and ongoing compliance rules for issuers. Most of the **post-listing** requirements are stipulated in the European Market Abuse Regulation[41] which applies to issuers that applied for listing/trading in all market segments. While shareholder transparency rules do not apply to shareholders of companies traded on the **Open Market**, all other rules apply.

One of the key documents to be prepared for the listing is the prospectus. A prospectus contains information material to potential investors, in particular about the business of the issuer and its financial standing. A prospectus must be approved by the **Federal Financial Supervisory Authority** (*Bundesanstalt für Finanzdienstleistungsaufsicht,* **BaFin**) or by another competent authority in the EU.

If foreign companies are required to draft a prospectus for listing on a **Regulated Market** on the FSE or a public offering of their securities, the mandatory historical financial information to be incorporated into the prospectus, must be prepared in accordance with IFRS or an equivalent accounting standard.[42]

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[41] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC; OJ L173/1 of 12 June 2014.

[42] Commission Regulation (EC) No. 1289/2008 recognises the GAAP of the Peoples' Republic of China.

a) Open Market Scale (Basic Board)

A **prospectus** is required for successful placement in the **Scale** segment. In the case of a private placement (no **public offer** and no prospectus needed), the minimum requirement is an inclusion document (*i.e.*, an informational document, containing the basic data about the issuer). Unlike the prospectus, an inclusion document does not need the approval of **BaFin**. Below are some of the key conditions of **Scale**:

- minimum two years existence (under certain circumstances this requirement may be waived by the Management of the FSE);
- an application by the issuer together with a Deutsche Börse Capital Markets Partner (bank or financial institution);
- an estimated minimum market capitalisation of EUR 30 million at the time of inclusion in trading;
- free-float requirement of at least 20% (at least 1 million free float shares);
- fulfilment of at least three of the following criteria/ performance indicators:
    - turnover of at least EUR 10 million;
    - earnings for the year at least EUR 0 (not negative);
    - equity capital of more than EUR 0 (not negative);
    - at least 20 employees;
    - cumulated equity capital before IPO of at least EUR 5 million.

The **post-listing** obligations of the issuers in **Scale** are lower than those for the General and **Prime Standard** and are as follows:

- submission to **Deutsche Börse AG** AG of the audited annual financial statements, including the management report, within six months of the end of the reporting period;
- submission to **Deutsche Börse AG** of the half-year financial statements, including the interim management report, within four months of the end of the reporting period;
- continued updates and the submission to **Deutsche Börse AG** of the corporate calendar;

- analysis conferences at least once a year;

- submission of information required for the generation of research report updates by the research provider mandated by **Deutsche Börse AG** within the given time limit;

- *ad hoc* disclosures, directors' dealings, insider lists, insider trading prohibitions, market abuse rules, as well as notification to **Deutsche Börse AG** of any significant changes to the issuer or included securities (Deutsche Börse's General Terms and Conditions);

- a contractual relationship with a supporting Deutsche Börse Capital Market Partner for the overall duration of the inclusion;

- all information must be submitted in German or English.

b) Open Market (Quotation Board)

The main listing requirements for the **Quotation Board** are listing on an FSE-approved stock exchange in Germany or another country (however not on any open market of these exchanges), and an application for inclusion from a trading participant.

The post listing obligations for the Quotation Board depend on the regulations of the FSE approved stock exchange in Germany or another country where the company has its first listing. However, *ad hoc* disclosures, directors' dealings, insider lists, insider trading prohibitions, and market abuse rules are applicable to all Open Market segments.

c) Regulated Market (General and Prime Standard)

The General and Prime Standard provide a greater level of transparency and set forth higher listing requirements for the issuer:

- minimum three years of corporate existence (under certain circumstances this requirement may be waived by the Management of the FSE);

- minimal prospective market value of the securities to be admitted of not less than EUR 1,250,000 (at least 10,000 (underlying) shares);

- a minimum "free float" requirement for outstanding securities (under certain circumstances this requirement may be waived by the Management of the FSE);

- minimum three years of reporting history (i.e., publication of the financial statements).

- The post-listing requirements of the General Standard are much broader than those of the Open Market and relate to the issuer's compliance with several continuing obligations and reporting requirements, including:
    - publication of its annual accounts (not later than four months after the end of the financial year);
    - publication of half-yearly financial reports (not later than two months after the half-year end) and interim management statements;
    - disclosure of directors' dealings;
    - *ad hoc* disclosure;
    - insider lists;
    - insider trading prohibitions;
    - market abuse rules;
    - notification of shareholdings.

L**isting** in the **Prime Standard** brings additional **post-listing** requirements: the publication of quarterly reports, the annual publication of a calendar regarding major corporate events, and the holding at least one analyst presentation per year.

3. Main Steps for the listing and timing

The procedure for listing on the FSE generally comprises the following main steps:

- selection of an issuing bank, certified accountants, and lawyers;
- completion of a due diligence investigation (legal, financial, business);
- drafting of the **prospectus**/issuer data form;
- receipt of the BaFin approval regarding the prospectus (if applicable);
- underwriting and offering (if applicable);
- admission to listing/inclusion in trading on the FSE;
- commencement of trading.

II. Bond issuance

Similar to shares, foreign companies may have access to capital markets in Germany through the issuance of **corporate bonds** in Germany and/or Europe. As outlined above, bonds can be listed on the **Regulated Market** (**Prime Standard** and **General Standard**) or on the **Open Market** (**Segment Scale** or **Quotation Board**) of the FSE.

1. Listing Corporate Bonds in Prime Standard

The FSE offers large members of international corporations an avenue for raising debt capital through the exchange of **corporate bonds** in the form of **Prime Standard**. Prime Standard for corporate bonds is geared towards recognised market leaders seeking to sharpen their competitive edge internationally and enhance their reputation by floating bonds.

The **Prime Standard** for corporate bonds can be accessed via admission to the **Regulated Market**. An application to participate in the segment must be filed by both the issuer and a bank or financial institute.

The main steps for admission to the **Regulated Market** are outlined under I. 2. C, above.

The listing requirements for Prime Standard for corporate bonds are as follows:

- admittance to the **Regulated Market** on FSE with a prospectus;
- the applicant is the issuer in cooperation with a co-applicant (trading participant on the *Frankfurter Wertpapierbörse* (FWB));
- national accounting standards of the foreign investor or International Financial Reporting Standards (IFRS) apply;
- bond volume placed in the amount of at least EUR 100 million;
- bearer bonds with a denomination of EUR 1,000 each;
- the securities must be deliverable through Clearstream;
- company or bond rating, credit rating, summary of rating report.

The main post-listing obligations for participants are:

- publication and submission of the annual financial report or of the annual financial statements together with the management report within four months of the end of the reporting period;
- publication and submission of the half-yearly financial report or half-yearly financial statements together with the interim management report within three months of the end of the reporting period;
- continuous updates and submissions of the corporate calendar;
- continuous updates and submissions of the company and bond profiles;
- submission of key company figures within four months of the end of each financial year;
- submission of a current and valid company or bond rating;
- at least one information event for bond investors and bond analysts each year;
- *ad hoc* disclosures, directors' dealings, insider lists.

Indices

Admission to the Prime Standard for Corporate Bonds means automatic inclusion in the XETRA Prime Standard Corporate Bond and SXETRA Overall Corporate Bond indices.

2. Open Market Scale

Scale for corporate bonds, the FSE's segment for small and medium-sized enterprises (SMEs), offers an efficient opportunity to raise debt capital through the exchange. The listing of corporate bonds creates strategic room for growth and innovation and significantly increases the company's public profile.

The main requirements for inclusion are:

- an application by issuer together with a Deutsche Börse Capital Market Partner (bank or financial institution);
- the public offer, together with a valid prospectus approved by BaFin;
- national accounting standards of the foreign investor or International Financial Reporting Standards (IFRS) apply;

- company history of at least two years;
- bond volume placed of at least EUR 20 million;
- denomination of corporate bonds separated into partial bonds amounting to a maximum of EUR 1,000;
- bearer bonds that are not subordinated capital market liabilities of the issuer;
- the securities must be deliverable through Clearstream;
- ● fulfilment of at least three of the following criteria/performance indicators:
    - EBIT interest coverage of at least 1.5;
    - EBITDA interest coverage of at least 2.5;
    - total debt/EBITDA of a maximum of 7.5;
    - total Net Debt/EBITDA of a maximum of 5;
    - risk bearing capital of at least 0.20;
    - total debt/capital of maximum of 0.85.

The main follow-up obligations arising from inclusion:

- Submission of the audited annual financial statements including the management report within six months of the end of the reporting period;
- Submission of the half-yearly financial statements including the interim management report within four months of the end of the reporting period;
- Analysts' presentation at least once a year;
- Submission of current and valid company or bond ratings;
- *Ad hoc* disclosures, directors' dealings, insider lists (by law) as well as notification to the FSE of any significant changes to the issuer or included securities (by rules & regulations).

3. Open Market (Quotation Board)

Most corporate bonds were listed on the Open Market of FSE, without any prospectus and bonds with a denomination of at least EUR 100,000 each. The requirements for listing on the Quotation Board and the post-listing requirements are similar to those for the listing of shares on the Open Market (Quotation Board) outlined in I. 2. B, above, with the exception of the requirement that the bonds should not be listed on an FSE-approved stock exchange in Germany or elsewhere.

4. Main steps for the offering and/or listing

The procedure for listing on the FSE generally comprises the following main steps:

- completion of a due diligence investigation (legal, financial, and business);
- drafting of the prospectus or offering memorandum;
- receipt of BaFin approval of the prospectus (if applicable);
- underwriting and offering;
- admission to listing/inclusion in trading from FSE;
- commencement of trading.

5. Green Bonds – Sustainable Bond Investments

Proceeds from the issue of so-called **green bonds** are used to finance environment-related projects. They are issued by banks, corporations, and governments. There is no legal regulation regarding their classification, but private initiatives have set standards for market transparency to ensure the sustainable quality of the bonds, such as the **Green Bond Principles** of the International Capital Markets Association (ICMA). These guidelines relate to the use of the bond proceeds, the project selection process, management, and ongoing reporting.

Green bonds have the same structure, yield and risk as "normal" **bonds** but the issuer of a green bond uses the proceeds to finance climate protection or environmental projects.

Green bonds can be divided into two categories: those on the market without the "green bond" label and those specifically marketed as **green bonds** and are at best are certified. However, there is no universal standard or mandatory certification for bonds marketed as "green bonds".

Green bonds should meet the ICMA guidelines to be listed in the **Green Bond Segment** of the FSE. The Green Bond Principles contain four components:

- **Use of issue proceeds:** The bond prospectus describes how the issue proceeds are to be used. Nine project categories are Green Bond eligible: renewable energy and energy efficiency, pollution prevention and control, management of living natural resources and land, terrestrial and aquatic biodiversity, clean transportation, sustainable water and wastewater management, climate change adaptation, circular economy adapted products, production technologies and processes and green buildings.

- **Project selection process:** The issuer discloses the criteria used to select and evaluate green projects. The issuer also sets out the sustainability objectives of the project.

- **Revenue management**: The collected revenues must be managed separately. A formal internal process ensures the proceeds are used exclusively for lending and investment activities related to green projects.

- **Reporting:** At least once a year, the issuer shall provide information on the investments until the funds have been fully allocated.

F. Award of public contracts

The award of public contracts is of great economic significance in Germany and other EU Member States. Each year, public authorities (federal government, federal states and municipalities) procure goods, services and construction contracts with a **total volume of approximately EUR 350 billion**[43]. The spectrum of public contracts is broad, ranging from simple office supplies to extremely complex high-tech instruments or sophisticated consulting services.

I. Legal framework

The legal framework for the award of public contracts is rather **complex and fragmented**.

1. Regulations for contracts exceeding the thresholds

For services with a contract value reaching or exceeding certain thresholds, a **legal regime** applies, **derived from relevant EU Procurement Directives**. In addition to Part 4 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) these are

- the Ordinance on the Award of Public Contracts (*Vergabeverordnung, VgV*)[44] for supplies and services, including independent professional services;
- Section 2 of the Award Procedures for Construction Services (*Vergabe- und Vertragsordnung für Bauleistungen – Teil A, VOB/A-EU*)[45] for public work contracts;
- the Ordinance on the Award of Public Contracts in Specific Sectors (*Sektorenverordnung, SektVO*)[46] for public contracts in the fields of transport, drinking water supply and energy supply;

[43] https://simap.ted.europa.eu/european-public-procurement (accessed on 30 November 2021).

[44] Ordinance on the Award of Public Contracts (Vergabeverordnung, VgV) of 12 April 2016 (BGBl. I p. 624), last amended by § 1 of the Ordinance of 7 February 2024 (BGBl. I No. 39).

[45] Award Procedures for Construction Services (*Vergabe- und Vertragsordnung für Bauleistungen – Teil A, VOB/A*) of 31 January 2019 (BAnz AT 19.02.2019 B2).

[46] Ordinance on the Award of Public Contracts in Specific Sectors (*Sektorenverodnung, SektVO*) of 12 April 2016 (BGBl. I p. 624, 657), last amended by § 3 of the Ordinance of 7 February 2024 (BGBl. I No. 39).

- the Ordinance on the Award of Public Contracts in the Fields of Defence and Security (*Vergabeverordnung Verteidigung und Sicherheit, VSVgV*)[47] for defence and security-specific supply and service contracts.

In addition, a simplified regulatory framework known as the Ordinance on the Award of Concession Contracts (*Konzessionsvergabeverordnung, KonzVgV*)[48] applies to the award of building and service concessions.

2. Regulations for contracts below the thresholds

Should the value of the contract to be awarded fall below the relevant EU threshold, a national regulatory framework applies based on the **budget law** of the German federal government and the federal states:

- the Ordinance on Award Procedures Below Certain Thresholds (*Unterschwellenvergabeordnung, UvgO*)[49] for public supply and service contracts; or

- Section 1 of the Award Procedures for Construction Services (*Vergabe- und Vertragsordnung für Bauleistungen – Teil A, VOB/A*) for public work contracts.

Furthermore, almost all German federal states have their own laws governing award procedures, the so-called "*Landesvergabegesetze*". These laws only apply in the respective federal state, usually regardless of whether the respective contract exceeds the relevant EU threshold or not.

3. Thresholds

The thresholds are decisive when it comes to the applicable legal framework. These are adapted and redefined by the EU Commission every two years. Apart from some particularities, the following threshold values apply for 2024 and 2025:

- for procurements of the federal government in the field of public supplies and services: EUR 143,000;

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[47] Ordinance on the Award of Public Contracts in the Fields of Defence and Security (*Vergabeverordnung Verteidigung und Sicherheit, VSVgV*) of 12 April 2016 (BGBl. I p. 624, 657), last amended by § 2 of the Ordinance of 7 February 2024 (BGBl. I No. 39).

[48] Ordinance on the Award of Concession Contracts (*Konzessionsvergabeverordnung, KonzVgV*) of 12 April 2016 (BGBl. I p. 624, 683), last amended by § 4 of the Ordinance of 17 August 2023 (BGBl. I No. 222).

[49] Award Procedures Below Thresholds (*Unterschwellenvergabeordnung, UVgO*) of 2 February 2017 (BAnz AT 07.02.2017 B1).

- for procurements of the federal states and municipalities in the field of public supplies and services: EUR 221,000;

- for the procurement of public supplies and services in the utilities sector and in the field of defence and security: EUR 443,000;

- for construction works consistently EUR 5,538,000.

The contracting authority determines the value of the contract to be awarded, and, accordingly, whether the relevant threshold is exceeded on the basis of a forecast decision. Such a decision can be reviewed and verified by a review body.

II. Foundations and basic principles

The different legal frameworks, applicable to contracts exceeding or below the thresholds respectively, have practical implications in two main aspects: contracts exceeding the thresholds must be tendered and published EU-wide, whereas contracts below the thresholds only have to be published nationally (see III.1.). Contracts with a value above the threshold may also be **reviewed for any procedural errors** upon the request of a tenderer. Specific procedures apply to a review either before the Federal Public Procurement Tribunal (*Vergabekammern des Bundes*) of the Bundeskartellamt and the Public Procurement Tribunals of the federal states (*Vergabekammern der Bundesländer*) or by immediate appeal to the Higher Regional Courts (*Oberlandesgerichte*). This review procedure is generally not available for contracts falling below the thresholds (with certain exceptions in some federal states pursuant to special procedures derived from the *Landesvergabegesetze*). In such cases, tenderers may lodge claims for procedural breaches only before civil courts (see IV.).

The award of contracts, regardless of the value, is subject to the basic principles of procurement law that contracting authorities must respect: **transparency, equal treatment, non-discrimination, and competition**.

III. Cornerstones of the award procedure

1. Contract notice

With the exception of certain circumstances which allow the contracting authority to approach only one or a few tenderers directly, the contracting authorities must publicly announce their intended procurement in a manner that allows as many companies as possible to participate to ensure transparency. Contract notices of EU-wide invitations to tender must be published in the Official Journal of the European Union.

This is carried out centrally via the **Internet portal Tenders Electronic Daily** (TED)[50]. The key parameters of any invitations to tender published on TED are available in all official languages of the European Union.

There is no standard publishing portal in Germany to announce national invitations to tender for contracts falling below the EU thresholds. Contracts to be awarded by the German federal government are consistently published on the procurement portal of the federal government[51]; federal states maintain their own platforms for award procedures[52].

2. Participation of foreign enterprises

Even though EU-wide invitations to tender are addressed to companies from other EU Member States and national invitations to tender are, in general, addressed to enterprises within Germany, **undertakings from non-European countries can submit tenders for public procurement contracts in Germany**. Procurement law does not, in principle, restrict the group of participants to those from the European Union or Germany[53]. If non-European companies are prevented from participating in EU-wide award procedures, judicial recourse before reviewing authorities is available tothem[54].

However, the contracting authority can determine the language in which the award procedure will be conducted and tenders are to be submitted. Limiting the award to only one language, *e.g.*, German, is not considered discrimination. Accordingly, foreign companies intending to participate in award procedures of German contracting authorities should be represented by a domestic company or a domestic consultant for both legal and language reasons.

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[50] https://ted.europa.eu/TED/main/HomePage.do (accessed on 7 January 2024).

[51] https://www.service.bund.de/Content/DE/Ausschreibungen/Suche/Formular.html?view=processForm&nn=4642046 (accessed on 7 January 2024).

[52] *E.g.*, for Berlin this is www.vergabe.berlin.de, (accessed on 30 November 2021).

[53] An exception is made for the utilities sector where, pursuant to § 55 of the SektVO, contracting authorities may exclude those offers in which more than 50% of the total value of goods originates outside the EU or associated markets. Moreover, the EU-Regulation on the International Procurement Instrument (IPI; Regulation (EU) 2022/1031 of 23 June 2022) enables the EU to limit or exclude, on a case-by-case basis, access to its public procurement markets from economic operators originating in the countries that apply discriminatory restrictions vis-à-vis EU businesses.

[54] Higher Regional Court Dusseldorf, Decision of 31 May 2017 – VII Verg 36/16, however the ECJ recently ruled that third country bidders without a reciprocity agreement cannot invoke EU rules to ensure their participation on equal terms with European companies (Case C-652/22 of 22 October 2024).

3. Electronic awarding

Since 18 October 2018, the contracting authorities in **EU-wide award procedures** have been required to conduct procedures **fully electronically**. Accordingly, tenders may only be accepted in electronic form. Tenders submitted in written form must be excluded. The settlement of such award procedures is usually performed via procurement platforms which are easily accessible and simple to use. The tenderer can obtain the complete tender dossier through the platform, without a complicated registration procedure. Nowadays this duty also applies generally for procedures for contracts below the relevant thresholds, with certain exemptions for public work contracts and very small contracts.

4. Award criteria, strategic objectives

A company will decide whether to take part in a tender procedure based on the tender specifications and the award criteria. The transparency requirement demands contracting authorities publish the award criteria and their weighting. **Qualitative criteria** for the award decision are usually also laid down, as well as the price. Moreover, public contractors increasingly pursue political objectives with their invitations to tender. Accordingly, **social and environmental aspects** as well as sustainability aspects are increasingly used as award criteria. This provides an opportunity for companies that can render appropriately qualified services to be awarded the contract.

German procurement law further provides the general duty to divide public contracts into lots, so small and medium-sized enterprises **(SMEs) can also take part in such invitations to tender**. The possibility to form a bidding consortium or employ subcontractors also facilitates the participation of SMEs in larger public contracts.

5. Sustainability strategy and Green Public Procurement (GPP)

According to the 1987 report of the World Commission on Environment and Development entitled "Our Common Future," sustainable development "meets the needs of the present without compromising the ability of future generations to meet their own needs."[55] In 2001, the European Council passed a sustainability strategy to identify and develop actions that would enable the EU to achieve a continuous long-term improvement in the quality of life through the creation of sustainable communities,

[55] Report of the World Commission on Environment and Development: Our Common Future, p. 41, available under (https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf).

which can manage and use resources efficiently. The secondary aims were to tap ecological and promote social innovation.[56]

The consequences for environment, economy and society are increasingly becoming a focus of public procurement. In 2014, the directives of the European Parliament and of the Council first codified sustainability aspects for public procurement, which were transposed in national law in 2016. According § 97 (3) of the GWB, aspects of quality, innovation as well as social and environmental aspects can now be considered. This applies to all phases of the award process, from the definition of the suitability criteria[57] to the execution of the contract.[58] In particular, it is also possible to exclude companies which do not comply with environmental or social standards from the award procedure.[59]

Green Public Procurement (GPP) is still a voluntary instrument, but it has a key role to play in the EU's efforts to become a more resource-efficient economy. It can help stimulate demand for more sustainable goods and services which otherwise would be difficult to get onto the market. GPP is therefore an important stimulus for eco-innovation. The use of purchasing power to choose environmentally friendly goods, services and works, enables companies to make an important contribution to sustainable consumption and production. However, with sustainability and the protection of environment and climate gaining in importance, the current revision of the German procurement law system is likely to make it mandatory for at least one environmental or social criteria to be considered in each procurement procedure.[60]

IV. Legal protection

Where contracts are subject to mandatory Europe-wide tendering, tenderers may assert the violation of their rights in review procedures before specific public procurement tribunals. For this, the defect detected in a procedure must be first notified to the contracting authority,[61] usually within a deadline of 10 calendar days. If the contracting authority rejects this notification, the tenderer has 15 calendar days in which to appeal to the locally competent public procurement tribunal. Failure to comply with this deadline will render the review procedure inadmissible. The public procurement tribunal must take a decision on the application for review within a period of five weeks.

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[56] European Commission, Next steps for a sustainable European future, COM (2016) 739 final, p. 2.

[57] Environmental aspects § 49 of the VgV.

[58] § 128 of the GWB.

[59] §§ 123 and 124 of the GWB.

[60] https://ec.europa.eu/environment/gpp/index_en.htm.

[61] § 160 (3) of the GWB.

This guarantees **fast and effective legal protection in award procedures**. An appeal against the decision of the public procurement tribunal can be lodged with the Higher Regional Court as the competent court, which will then fully review and decide on the substance of the case.

This particular legal protection does not apply to contracts below the relevant thresholds. Prior to the award of the contract in such cases, tenderers can seek an injunction before civil courts against the contracting authority's intention to award the contract. After the award of the contract, tenderers can claim damages.

G. Visa requirements and options

While EU citizens do not require a visa to enter, live long term, or work anywhere in the EU, a **general visa requirement** applies to most foreign nationals.

As a matter of principle, third country nationals who would like to work in Germany and are currently still abroad need a work visa to enter the country. As a rule, this also applies to cases in which it would be possible to enter the country for a short stay without a visa (*e.g.*, Australia, Israel, Japan, Canada, the Republic of Korea, New Zealand, and the United States of America). For nationals of these countries, the EU has withdrawn the visa requirement for visits of up to 90 days within a 180-day period. However, according to current plans, from Q4 of 2026 onwards, visitors from these countries will need to apply for digital travel authorisations under the European Travel Information and Authorisation System (ETIAS) before entry

Applicants must apply for this visa at a German Embassy or Consulate within the respective country prior to entry into the EU. There are two types of visa: **the short-term Schengen visa and the long-term national visa**.

A Schengen visa entitles the holder to enter Germany and the other Schengen countries and remain for a **maximum period of 90 days** within a 180-day period. Schengen Visas can be issued for different purposes (*e.g.*, family visits, tourism, or business). Travellers may also apply for **multiple-entry visas** for several years (maximum of five years), for business reasons where the applicant's credibility has been proven through a previous visa. Schengen Visa holders will not need to apply for digital travel authorisations under ETIAS.

Any non-EU citizen who wishes to remain in Germany for **more than 90 days** must apply for a National Visa before entering Germany and for a **residence permit** (***Aufenthaltserlaubnis***) from the local authorities after entering Germany. Depending on the purpose of the stay, there are different types of residence permit, governed by the **Residence Act** (**Aufenthaltsgesetz, AufenthG**)[62] and supplementary complementary ordinances:

- residence for the purpose of gainful employment;
- residence for study purposes;

[62] Law on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Residence Act – *Aufenthaltsgesetz, AufenthG*) of 25 February 2008 (BGBl. I p. 162), last amended by § 3 of the Law of 25 October 2024 (BGBl. l. Nr. 332).

- family reunification;
- residence on the grounds of international law or on humanitarian and political grounds.

I. Application procedure

1. Application for a national visa to enter Germany

An application for a National Visa must be submitted to the responsible German Embassy or Consulate and requires the approval of the relevant **immigration authority** (*Ausländerbehörde*) at the future place of residence. The application procedure normally takes several months. The authority will assess the documents provided by the German Embassy, and decide on this basis whether the requirements for the grant of a residence permit are fulfilled. The Embassy or Consulate will subsequently decide on the issuance of the visa.

The immigration authority examines the general prerequisites for the issuance of the residence permit under the AufenthG. As a rule, the issuance of a residence permit requires:

- possession of a recognised passport;
- assurance for the means of subsistence;
- confirmation of the applicant's identity and nationality;
- no existing grounds for deportation;
- no expectation of interference with or endangerment to public interests; and
- the applicant entered the country legally (with a visa).

The German Embassy generally issues residence titles for specific purposes in the form of a visa with a maximum validity of 90 days. Shortly after entering Germany, the visa holder must contact the responsible immigration authority in Germany, which then issues the residence permit.

The decision of the immigration authority to issue the residence permit is linked to the decision of the Federal Employment Agency (*Bundesagentur für Arbeit*) concerning the issue of a work permit.

2. Application for the issuance of a residence permit

The residence permit will be granted by the immigration authority at the place of residence. The application for the residence permit must be submitted before the visa elapses (it is usually granted for a period of 90 days). The residence permit is granted at relatively short notice, based on the issuance of the entry visa. Residence permits are issued for a limited period and may be extended where the necessary requirements are still met.

3. Registration of residence

Within one or two weeks of moving to a new residence in Germany (depending on the local state law), the foreign national must notify their new address to the **local residents' registration office** (***Einwohnermeldeamt*** or ***Bürgeramt***). As a rule, you will be required to appear in person, bring your passport, and prove you reside at the new address, such as through certification from the landlord.

II. Forms of residence title and other residence permits

There are four different residence titles for third country nationals intending to live in Germany long term:

- residence permit (temporary residence title);
- EU Blue Card/ICT Card (temporary residence title);
- settlement permit (permanent residence title); and
- EU permit for permanent residence (permanent residence title).

Residence permits are the most common residence titles. Depending on the reason for residence, there are different forms of permits, each with their own requirements. In addition, EU law grants special residence titles: **the EU Blue Card for highly qualified employees** which is combined with some privileges over holders of other residence permits, and the **ICT card, for employees who will work in Germany for the same company they work for abroad**.

At the earliest after five years (27 months for holders of an EU Blue Card, which is reduced to 21 months in case of sufficient German language skills, and three years for skilled workers), residence permit holders may apply for a **settlement permit** (***Niederlassungserlaubnis***) or for an **EU permit for permanent residence** (***Erlaubnis zum Daueraufenthalt-EU***). Both permits are unlimited.

1. Residence permits for self-employed foreign investors

Foreign investors can obtain a residence permit for the purpose of self-employment in accordance with § 21 of the *AufenthG*. Applicants making investments, *e.g.*, through the formation of a GmbH, holding sufficient shares in its nominal capital (at least 50%) and exercising a management position (such as director), are acknowledged as self-employed for residence law. It is important, however, that the applicant does indeed perform management duties.

A **residence permit for self-employed non-EU citizens** is issued if the following three prerequisites are met:

- there is an economic interest in or a regional need for the planned activity in Germany;
- the activity is expected to have positive effects on the economy;
- personal capital or a loan undertaking on the part of the applicant is available to implement the business idea.

In the past, the first two conditions were deemed met if EUR 250,000 was invested and at least five jobs were created. Currently, the law does not stipulate a minimum level of investment or number of jobs that must be created. This gives the regions flexibility in granting residence permits to investors.

The Immigration Authority decides based on its analysis of the sustainability of the project, the business experience of investors, the sums invested, the effects on the German employment market where the company's registered office is located, and the type of activity, *e.g.*, investment into research and innovation. The authority also takes into account the opinion given by the competent chamber of industry and commerce and/or business promotion agency on the basis of the documents submitted by the investor when applying for the national visa (business plan, business concept, financial planning, etc.).

The residence permit for the purpose of self-employment is issued for an initial period of no more than three years. Upon request by the investor, the permit can be extended for an unlimited period. Additionally, the residence permit holder can apply for a settlement permit or an EU permit for permanent residence for an unlimited period.

2. Residence permit for the purpose of employment

Any non-EU citizen seeking long-term employment in Germany can apply for a residence permit for the purposes of employment in accordance with § 18 of the AufenthG. In this context, employment means a person is gainfully employed and not

self-employed. **Gainful employment** means a contract exists under which a person is paid to perform services in a relationship of subordination, *i.e.*, the employee is required to follow directions and is integrated into a third-party operating procedure. Under German immigration law, even the director of a GmbH who owns no (or close to no) shares in a company is considered an employee.

The residence permit for the purpose of employment can be granted if the following conditions are met:

- The applicant has a firm offer of employment.
- The applicant fulfils all legal requirements for the access to the German job market in the respective branch (*i.e.*, has all legal access requirements).
- There are no prioritised jobseekers (*i.e.*, German, EU and EEA citizens) for the specific job (so-called "**priority check**" (*Vorrangprüfung*)).
- The employment conditions must be comparable to those which apply to German employees.
    - Means of subsistence are ensured during residence;
    - No objections on grounds of public safety or social order.

The residence law follows the principle that the German labour market should be primarily reserved for German and EU citizens. However, non-EU citizens may get access to the German labour market where the law or intergovernmental agreements stipulate this or if their employment will have no negative effect on the German labour market. Only nationals of the European Economic Area (EEA, EU Member States plus Iceland, Liechtenstein, and Norway) and of Switzerland have unrestricted access to the German labour market.

In general, **consent is required from the Federal Employment Agency** (***Bundesagentur für Arbeit***). The law also provides exceptions regarding this consent requirement. Certain types of employment do not require consent, including managers and those engaged in scientific, research and development activities.

Skilled workers from non-EU countries will find it easier to access the German labour market than non-skilled workers because the *Bundesagentur für Arbeit* does not undertake a priority check for positions skilled workers would fulfil. They are also able to come to Germany to look for a job and will be granted a residence permit for up to six months for this purpose. Skilled workers are persons with qualified vocational training or a university education. The qualification as a skilled worker must be recognised by the competent body. The residence permit for a skilled worker is valid for a maximum of four years after the first application.

3. EU Blue Card for highly qualified foreign employees

Highly qualified foreign nationals, who possess a university degree or comparable qualification, can obtain a "**EU Blue Card**" through a simplified application procedure. Since November 2023, the EU Blue Card can also be obtained by master craftsmen, technicians, business administrators and educators without university degree and by experienced professionals in the ICT field (with at least three years of relevant professional experience within the last seven years). Further, the list of occupations for which there is a shortage of skilled workers ("understaffed professions") has been extended and allows further professionals to apply for an EU Blue Card. The EU Blue Card is a long-term residence permit allowing the holder to work in the EU. **It is valid for a maximum of four years after first application or for the duration of the contract and an additional three months after the termination**. The EU Blue Card will be issued if the following conditions are met:

- The applicant must possess a German or recognised foreign university degree or a foreign university degree comparable to German standards, or specified tertiary education qualification with a duration of at least three years. In Germany, this must correspond to at least Level 6 of the International Standard Classification of Education (ISCED 2011). IT professionals without formal qualification but with at least three years professional experience at university level may also apply.

- The applicant has signed an employment contract or received a binding offer of employment (duration of at least six months).

- The applicant must receive an annual salary of at least EUR 48,300 gross per year (2025).

- The applicant must possess a permit to exercise a profession in Germany if such a permit is required for the specific profession. In Germany, a special permit is required to practice certain professions, such as human medicine professions, tax consultants, lawyers, etc.

For occupations for which there is a shortage of skilled workers, as defined by law (the relevant list has recently been extended), the minimum annual gross salary is lower: EUR 43,759.80 gross per year (2025).

Where the minimum salary limit is not reached, the approval of the *Bundesagentur für Arbeit* is necessary.

4. ICT card for expats

The **ICT card** is designed to enable the **intra-company transfer of personnel**. It applies to expats who intend to work at a German branch or subsidiary of a foreign company which previously employed the same employee at another site prior to the

transfer. This could be a branch office, subsidiary, or – conversely – the headquarters or a holding company.

The transfer does not change anything with respect to the contract between the expat and the company. The employee must have been employed by the foreign company for at least six continuous months prior to the transfer.

The ICT card is granted solely to executives, who occupy management positions within the office or an autonomous corporate department; to specialists, who have a special qualification and work experience in the relevant field; and to trainees, to improve their qualifications and professional development. **The ICT card is limited to three years** (one year for trainees). It can be extended, but not beyond a total period of three years (one year for trainees, respectively).

The holder of the ICT card may also enter other EU countries for a short period of time with this residence permit.

A worker can be issued with an intra-company transferee permit if:

- the branch of the international company is in Germany, whereas the employment contract is with a branch in a non-EU country, has existed for more than six continuous months and contains a transfer provision (this may be set out in a separate agreement);

- a minimum transfer duration of 90 days is fulfilled;

- the employee will be working as an executive, specialist or trainee in the German branch;

- proof of the qualification to perform the work as an executive, specialist or trainee has been provided; and

- the *Bundesagentur für Arbeit* has given its approval (some cases are exempt from this requirement).

The ICT card can only be applied for from the non-EU country where the ICT-transferee resides. Although the initial application cannot be made from Germany, the transferee may apply for an extension of the ICT-Card while in Germany. If the transferee wishes to apply for another separate ICT-Card after finishing the first transfer, he or she must observe a cool-down period of six months before re- applying.

5. Job search opportunity card ("*Chancenkarte*")

The **opportunity card** was introduced in 2024 for stays for the purpose of **seeking employment**. It offers the holder the opportunity to take up a trial position or a part-time job for up to 20 hours per week during their stay in Germany.

This card can be obtained in two ways:

- Non-EU citizens, who can prove full equivalence of their foreign qualification and are therefore considered "skilled workers," can obtain the opportunity card without any further special requirements.

- All others must provide proof of a foreign university degree, vocational qualification of at least two years, or vocational qualification issued by a German chamber of foreign trade. In addition, either basic German (level A1) or English language skills (level B2) are required.

If these requirements are met, points can be accumulated based on criteria such as the recognition of qualifications in Germany, language skills, professional experience, age, and relationship to Germany, as well as the potential of accompanying spouses or life partners. At least six points must be attained to receive the opportunity card.

The opportunity card is issued for a maximum of one year if the person can prove that they have sufficient funds to support themselves during this time.

If, after one year – and assuming the holder has not obtained another residence title or permit – there is still an offer of qualified employment, the opportunity card can be extended for a further two years.

6. Settlement permit (= Permanent residence permit)

The **unlimited settlement permit**, the most comprehensive form of residence permit, is usually subject to strict preconditions. The freedom to take up permanent residence is granted if the following preconditions are fulfilled:

- possession of a residence permit for five years;

- assurance of livelihood without public assistance;

- at least 60 months of mandatory contributions to the statutory pension insurance have been paid;

- there are no objections on grounds of public safety or social order;

- work permit (permission for employment or other gainful occupation);

- possession of adequate knowledge of the German language as well as familiarity with the social and legal order in Germany;

- access to adequate housing for the applicant and their family.

Settlement permits authorise employment as a permanent residence title.

The following less stringent requirements for a settlement permit apply to qualified persons:

- **Foreigners who have graduated from a German university** may be granted a settlement permit under less strict conditions. They must have held a residence permit for two years and be working in a job that corresponds to their degree. Furthermore, they must have paid into the statutory pension insurance for at least 24 months.

- **Highly qualified persons** (under the *AufentG*, *e.g.*, scientists with special knowledge, instructors or senior research assistants) can immediately receive a settlement permit for employment if they have a firm job offer and can show their livelihood in Germany is ensured without public assistance. There is no minimum income requirement.

- **Skilled workers** can now receive a settlement permit after three years if they have a position of employment commensurate to their qualifications and have sufficient knowledge of the German language (level B1). They must have paid into the statutory pension insurance for at least 36 months.

- **Self-employed individuals** may obtain a settlement permit after three years if their business project is sustainable, the means of subsistence are assured, and they have held a residence permit for self-employed people.

- Foreigners who possess the **EU Blue Card** can apply for an unlimited settlement permit after 27 months, if they have paid compulsory or voluntary contributions to the statutory pension insurance scheme for that period. If they have sufficient knowledge of the German language (level B1), the period is reduced to 21 months.

7. EU permit for permanent residence

The EU permit for permanent residence is an expression of the freedom of establishment. It resembles the permanent residence permit in legal effects. The main difference is that the **EU permit for permanent residence allows the holder to reside in other EU countries, not just Germany**.

The requirements are as follows:

- residence in Germany under a residence title for at least five years or longer;

- assurance of livelihood of the applicant and their next of kin through stable and regular income;

- no adverse impact on public security;

- sufficient knowledge of the German language and familiarity with German society and the legal and social order in Germany; and

- adequate housing for the applicant and their family.

Unlike the settlement permit, a work permit and a minimum 60-month payment into the state pension insurance are not mandatory. However, the requirements regarding a previous residence permit are stricter, and the assurance of livelihood extends to next of kin.

8. Family reunification

The family members of foreign investors and employees, namely their spouse and children, may obtain a **residence permit for family reunification purposes**. Despite the title, family members can apply for the visa and for the residence permit simultaneously with the investor or the employee. In general, the following requirements must be met:

- the foreign national holds a long-term residence permit for Germany;

- the foreign national and the applicant (family member) have access to adequate housing in Germany;

- the applicant's livelihood must be secured. The livelihood is deemed ensured if the applicant can pay for it (including adequate health insurance) without any state support. For this, the financial contributions to the household income of all family members are considered.

If the above conditions are met, the spouse of a foreign national has the right to be granted a residence permit, provided the spouse is 18 years of age and has a basic command of the German language. Knowledge of the German language is not required in several cases, *e.g.*, if it is presumed, that the lack of command of the German language will not be an obstacle for integration in Germany. Spouses of self- employed foreigners, owners of an EU Blue Card, or highly qualified persons or researchers also do not need to prove any basic German language skills.

If spouses or minor children move to Germany to join certain skilled workers, proof of sufficient living space will now be waived. In addition, skilled workers who have received their residence permit for the first time on or after March 1, 2024, they will also be able to bring their parents and – if their spouse is also a permanent resident of Germany – their parents-in-law to join them.

Underage children (unmarried, not divorced or widowed) of foreign nationals have the right to a residence permit for family reunification purposes if a parent holds a long-term residence permit for Germany.

H. Employment law

I. German employment law

1. Overview

German employment law is not completely codified. There is no special code of employment and no standard law governing employment contracts. Instead, German employment law is – to the extent it is governed by legal norms – covered by several different laws. Judicial development of the law is also very important.

German employment law can be divided into three areas:

- Individual employment law:

  This stipulates the relationship between the individual employees and the employer and includes the rules on the drafting, content and termination of employment contracts.

- Collective employment law:

  This governs the legal relationships between the employment law coalitions (trade unions, employers and employers' associations) and the bodies representing the workforce (works councils and staff councils as well as executives' representative committees).

- Occupational health and safety legislation:

  These are the obligations the individual employer must fulfil with respect to public authorities, and which have a direct effect on individual employees.

2. Sources of law

Both supranational and national sources of law impact German employment law. Supranational sources of law include:

- primary EU law such as the Treaty on the Functioning of the European Union (TFEU), and the Treaty on European Union (TEU)[63];

[63] Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union of 7 June 2016.

- secondary EU law (regulations and directives);
- decisions by the European Court of Justice;
- the European Social Charter (ESC)[64];
- the European Convention on Human Rights (ECHR)[65].

Since there is no code of employment in Germany, the national legal norms governing employment are embodied in numerous different laws. Regulations governing individual employment law include:

- the Constitution (*Grundgesetz, GG*)[66];
- the Civil Code (*Bürgerliches Gesetzbuch, BGB*);
- the Industrial Code (*Gewerbeordnung, GewO*);
- the Act on the Protection Against Dismissal (*Kündigungsschutzgesetz, KSchG*)[67];
- the Part-time and Limited-term Employment Act (*Teilzeit- und Befristungsgesetz, TzBfG*)[68];
- the Federal Holidays Act (*Bundesurlaubsgesetz, BUrlG*)[69];
- the Working Hours Act (*Arbeitszeitgesetz, ArbZG*)[70];

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[64] The European Social Charter entered into force on 26 February 1965 and was revised in 1996.

[65] The Éuropean Convention on Human Rights came into force on 3 September 1953.

[66] The Constitution or Basic Law (*Grundgesetz, GG*) of 23 May 1949 (BGBl. Part III, No. 100-1), last amended by § 1 of the Law of 19 December 2022 (BGBl. I p. 247).

[67] Act on Protection Against Dismissal (*Kündigungsschutzgesetz, KSchG*) of 25 August 1969 (BGBl. I p. 1317), last amended by § 2 of the Law of 14 June 2021 (BGBl. I p. 1762).

[68] Part-time and Limited-term Employment Act (*Teilzeit- und Befristungsgesetz, TzBfG*) of 21 December 2000 (BGBl. I p. 1966), last amended by § 7 of the Law of 20 July 2022 (BGBl. I p. 1174).

[69] Federal Holidays Act (*Bundesurlaubsgesetz, BUrlG*) of 8 January 1963 (BGBl. Part III, No. 800-4), last amended by § 3 (3) of the Law of 20 April 2013 (BGBl. I p. 868).

[70] Working Hours Act (*Arbeitszeitgesetz, ArbZG*) of 6 June 1994 (BGBl. I p. 1170, 1171), last amended by § 52 of the Law of 23 October 2024 (BGBl. I p. 323).

- the Minimum Wage Act (*Mindestlohngesetz, MiLoG*)[71];
- the Occupational Health and Safety Act (*Arbeitsschutzgesetz, ArbSchG*)[72];
- the Continued Payment of Wages Act (*Entgeltfortzahlungsgesetz, EntgFG*)[73];
- the Maternity Protection Act (*Mutterschutzgesetz, MuSchG*)[74];
- the Proof of Substantial Conditions Applicable to the Employment Relationship Act (*Nachweisgesetz, NachwG*)[75]; and
- Social Security Codes (*Sozialgesetzbuch, SGB*) III-XI (including: health insurance, pension insurance, accident insurance, protection of the severely disabled, long-term care insurance).

Collective employment law is governed by, *inter alia*:

- the Constitution (Article 9 GG on freedom of association);
- collective bargaining agreements:

  In Germany, a **collective bargaining agreement** (***Tarifvertra***g) is a written contract between the parties to the collective bargaining agreement. These are the employers or employers' associations on the one hand and trade unions (representing the employees) on the other. The legal framework for a collective bargaining agreement is the Collective Bargaining Act (*Tarifvertragsgesetz, TVG*)[76]. The collective bargaining agreement contains legal norms which regulate the content, conclusion, and termination of the employment relationship as well operational and industrial relations questions.

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[71] Minimum Wage Act (*Mindestlohngesetz, MiLoG*) of 11 August 2014 (BGBl. I p. 1348), last amended by § 1 and 2 of the Law of 28 June 2023 (BGBl. I p. 969 and 172).

[72] Occupational Health and Safety Act (*Arbeitsschutzgesetz, ArbSchG*) of 7 August 1996 (BGBl. I p. 1246), last amended by § 32 of the Law of 15 July 2024 (BGBl. I p. 236).

[73] Continued Remuneration Act (*Entgeltfortzahlungsgesetz, EntgFG*) of 26 May 1994 (BGBl. I p. 1014, 1065), last amended by § 9 of the Law of 22 November 2019 (BGBl. I p. 1746).

[74] Maternity Protection Act (*Mutterschutzgesetz, MuSchG*) of 23 May 2017 (BGBl. I p. 1228), last amended by § 54 of the Law of 23 October 2024 (BGBl. I p. 323).

[75] Proof of Substantial Conditions Applicable to the Employment Relationship Act (*Nachweisgesetz, NachwG*) of 20 July 1995 (BGBl. I p. 946), last amended by § 52 of the Law of 23 October 2024 (BGBl. I p. 323).

[76] Collective Bargaining Act (*Tarifvertragsgesetz, TVG*) of 25 August 1969 (BGBl. I p. 1323), last amended by § 8 of the Law of 20 May 2020 (BGBl. I p. 1055).

- Works agreements:

  A **works agreement** (***Betriebsvereinbarung***) is a contract between the employer and the works council (*Betriebsrat*) which establishes binding norms for all employees of the work. A works agreement can cover all aspects for which the works council enjoys a legal right of co-determination. The core area of this co-determination is social aspects (for example the length and distribution of working hours). To the extent that a matter is already covered by a collective bargaining agreement, this matter, as a rule, can no longer be the subject of a works agreement (priority of collective agreements). The works council is established in line with the statutes and represents the employees' interests, exercising the employees' right of co-determination with respect to the employer.

- Works Council Constitution Act:

  Essentially, the Works Council Constitution Act (*Betriebsverfassungsgesetz, BetrVG*)[77] regulates the rights of the works council. It establishes the rights of participation and co-determination of the works council in personnel, social and economic matters within the work.

II. Recruitment of employees

In Germany, the search for personnel is assisted, generally free of charge, by the *Bundesagentur für Arbeit*, which has agencies in all German cities. Private employment agencies may also be used, though these charge agency fees. It may also be possible to contact universities when looking for specialist personnel; Germany also has numerous internet employment exchanges.

III. The definition of an employee

The differentiation between employees and other personnel (such as commercial agents and freelancers) is particularly important as the protective provisions of employment law often only apply to employees. Employers are obliged to make contributions towards the social insurance of their employees, incurring extra costs (see XI.). According to the case law and the definition in § 611a (1) of the BGB, employees are individuals who, on the basis of a private-law contract, are obliged to perform services in a relationship of subordination; the non-independent nature of the services performed is particularly relevant here. if they are required to follow directions and are integrated into a third-party organisation.

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[77] Works Council Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) of 25 September 2001 (BGBl. I p. 2518), last amended by § 14 of the Law of 19 July 2024 (BGBl. I p. 248).

A few areas of German employment law also still distinguish between workers and salaried employees, although this now plays little role. Originally, salaried employees were a smaller and more highly qualified group of employees than the majority of workers.

1. Executive employees

Executive employees (*leitende Angestellte*) are accorded a special role in Germany. They are at the top of the operational hierarchy, below the senior management, but are at the same time employees. Their status is unique because they are subject to directions as employees, but also exercise the functions of employers with respect to other members of the workforce (management functions). The German legislator takes this special role into account in various ways:

- The law on public working hours is not applicable to executive employees.
- The regulations on the protection againstdismissal apply less strictly to executive employees.
- Under the works constitution, executive employees are not represented by the works council but can elect their own representative bodies (executives' representative committees).

2. Trainees

Persons engaged for the purpose of occupational training (*Auszubildende*) are also classified as employees. Where the Occupational Training Act (*Berufsbildungsgesetz, BBiG*)[78] or the Protection of Young Persons in the Workplace Act (*Jugendarbeitsschutzgesetz, JArbSchG*)[79] do not contain specific provisions, the relevant regulations on employment contracts apply. In the case of trainees, the employment relationship is characterised by a training purpose. The *BBiG* provides special rules intended to ensure appropriate occupational training. However, a distinction should be made between trainees, on the one hand, and any volunteers, work experience employees, or interns, on the other, to whom the BBiG does not generally apply.

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[78] Occupational Training Act (*Berufsbildungsgesetz, BBiG*) of 23 March 2005 (BGBl. I p. 931), last amended by § 2 of the Law of 19 July 2024 (BGBl. I p. 246).

[79] Protection of Young Persons in the Workplace Act (*Jugendarbeitsschutzgesetz, JArbSchG*) of 12 April 1976 (BGBl. I p. 965), last amended by § 53 of the Law of 23 October 2024 (BGBl. I p. 323).

3. Underage employees

The age of majority in Germany is 18. A minor can only sign an employment contract with the consent of their legal guardian (usually the parents). As a rule, an employment contract cannot be concluded with persons below the age of 15, even with the consent of a legal guardian.

IV. Conclusion and content of employment contracts

1. Form

An employment contract can be concluded verbally or in writing. According to the Proof of Substantial Conditions Applicable to the Employment Relationship Act (*Nachweisgesetz, NachwG*), in the case of a **verbal employment contract**, the employer is obliged to provide the employee with a written copy of the essential conditions of the contract within one month of the beginning of the employment relationship. In view of this requirement, and to avoid evidentiary problems in any court proceedings, we recommend you use written employment contracts that include the essential conditions mentioned in § 2 of the *NachwG*.

The Fourth Bureaucracy Relief Act (*Viertes Bürokratieentlastungsgesetz, BEG IV*) makes it easier to meet the formal requirements of the Employment Relationship Act. In concrete terms: in the future, essential working conditions within the meaning of § 2 of the Employment Relationship Act can be drawn up in written form without a wet ink signature, and sent to the employee electronically.

However, this only applies if the document is accessible to the employee, can be saved and printed out, and the employer requests that the employee provide proof of receipt when sending.

2. Content

a) Limited-term and unlimited-term contracts

L**imited-term employment contracts** are permitted under certain conditions. The Part-time and Limited-term Employment Act regulates the permissibility and content of such employment contracts. Effective limitation of the term requires written form. The duration of a limited-term employment contract can be determined in terms of calendar months or the type, purpose or nature of the work performed. When an employer takes on a new employee for the first time, the employment contract can be limited to a period of up to two years without stating any grounds for the limitation of

the term. Where the limited term of the contract is longer than two years, however, the reason for the limitation must be set out in writing. Permissible grounds for a limitation of term include:

- temporary requirement;
- entry into a profession following training or study;
- the special nature of the employment (seasonal work);
- probation;
- special reasons associated with the person of the employee.

Moreover, limited-term employment contracts can be concluded without material grounds during the first four years of existence of a newly-established company. An employee with a limited-term employment contract may not be placed in a worse position than employees employed for an unlimited period.

b) Part-time employment contract

Under the Part-time and Limited-term Employment Act (*Teilzeit- und Befristungsgesetz, TzBfG*), **part-time employees** may also not be placed in a position worse than that of full-time employees, unless there is an objective reason for this. Unlike full-time employees, part-time employees must be paid *pro rata*, in accordance with their reduced working hours. The employer and employee should agree on part-time work if the employee wishes to reduce their working hours. However, the employee will only be entitled to part-time work if the employer has more than 15 employees. The employer can deny the employee's request for part-time work on operational grounds. The *TzBfG* also stipulates that part-time employees who wish to change their working hours are to be informed about any available part-time or full-time positions and given preference when filling future open positions, unless this is not feasible for operational reasons or the working hour requests of other employees. Finally, employers must also indicate in advertisements when a position can be performed on a part-time basis.

c) Probationary period

A probationary period may be agreed in a limited-term employment contract (see VI. 2. a)) or set out in a probationary period provision of an unlimited-term employment contract. The probationary period in Germany lasts for a maximum of six months. During the probationary period, the employment relationship can be terminated by either party on two weeks' notice, unless a longer period of notice is stipulated in a collective bargaining agreement, for example.

d) Duties and working location

The employment contract should specify the scope of the employee's duties, as well as their working location. Any **redeployment** of the employee in the form of an assignment abroad must be contractually agreed between employer and employee and cannot be ordered within the scope of the employer's managerial authority (see V.). The redeployment of an employee to another city (to perform an equivalent job) is – in general – only possible if this has been agreed in the employment contract or a collective wage agreement, or if the employee agrees to it. Redeployment within the same city is feasible as long as this does not involve undue hardship.

e) Working hours and overtime

The **working hours** are based on the provisions of the employment or collective bargaining agreement. When setting working hours, the stipulations of the **Working Hours Act** (*Arbeitszeitgesetz, ArbZG*), as well as the occupational health and safety regulations must be observed. The occupational health and safety regulations include the Protection of Young Persons in the Workplace Act (*Jugendarbeitsschutzgesetz, JarbSchG*), the Maternity Protection Act (*Mutterschutzgesetz, MuSchG*) and the Shop Closing Times Act (*Ladenschlussgesetz, LadSchlG*)[80].

The Working Hours Act is based on the principle of an eight hour workday. The **daily working hours** can be extended to up to ten hours if, within an equalisation period of four months, the average daily number of working hours (taking Saturdays into account as a workday) does not exceed eight hours. According to the statutory regulations on **breaks**, for six hours of work, a break period of at least 30 minutes must be provided and a break of at least 45 minutes must be provided for more than nine hours of work. The minimum break time can be divided into smaller breaks, but each break must be at least 15 minutes. No employee can be required to work for longer than six hours without a break.

Special protective regulations apply to employees who work at night. Working on Sundays and public holidays is not permitted, except in exceptional circumstances. Moreover, in workplaces with a works council, the works council will have a say in defining the beginning and end of the working day, the arrangements for breaks, and the distribution of weekly working hours.

In order for employees to be legally obliged to work **overtime**, there must be an enabling provision in place. Thus, employees are only obliged to work overtime if this is stipulated in the collective wage agreement, a works agreement, the employment contract, a practice within the workplace known to employees, or, if necessary, as an ancillary obligation on the employee arising under the employment contract (duty of good faith).

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[80] Shop Closing Times Act (*Ladenschlussgesetz, LadSchlG*) of 2 June 2003 (BGBl. I p. 744), last amended by § 430 of the Regulation of 31 August 2015 (BGBl. I p. 1474).

f) Wages

Employees' wages are usually fixed through collective bargaining agreements or agreed upon in the employment contract. The employer must withhold income tax, the solidarity surcharge (*Solidaritätszuschlag*), church tax (*Kirchensteuer*), as well as the employees' social insurance contributions (health, pension, long-term care, and unemployment benefit insurance). The employer must pass on these retained amounts to the relevant authorities. Collective bargaining agreements or agreements in the employment contract also often entitle employees to non-cash benefits from their employer.

If the amount of remuneration has not been fixed by the parties to the employment contract, the law in Germany provides for the "usual remuneration", *i.e.*, the remuneration which an equally qualified employee is paid in the industry and the region. In the case of doubt, this is the wage under the relevant collective bargaining agreement.

Throughout Germany, a **statutory minimum wage** of EUR 12.82 (gross) per hour must be paid from 1 January 2025. The Minimum Wage Act has no effect on higher remuneration entitlements under employment contracts or collective wage agreements.

g) Continued payment of wages in the event of illness

All employees and trainees, even those employed for short periods or on a part-time basis, are entitled to continued payment of their wages for a period of up to six weeks in the event they are unfit for work through no fault of their own, provided they have been employed for a continuous period of four weeks by the respective employer.

The employee is obliged to notify the employer immediately of their unfitness for work and its anticipated duration. In the case of illness exceeding three days, the employee must submit an official doctor's note no later than the following working day.

h) Holidays

The legal national minimum **holiday entitlement** (paid holiday leave) is 24 working days in a calendar year, based on a six-day working week. In the case of a five-day working week, the legal entitlement is reduced to 20 working days. Collective bargaining agreements often fix minimum holiday entitlements, extending these entitlements to approximately six weeks. Many employment contracts will therefore provide for such entitlements. Moreover, the legal minimum holiday entitlement is increased in the case of the seriously disabled.

However, the minimum holiday entitlement only comes into effect after a waiting period of six months from the beginning of the employment relationship. In the case of an employment relationship which ends before six months have elapsed, the holiday entitlement is calculated *pro rata* based on the actual number of full months of employment. The employee's preferences should be taken into consideration in setting the date on which holidays are to be taken. However, this does not apply where urgent operational requirements do not allow. Holiday entitlements may only be transferred to the next calendar year if it is justified by urgent operational reasons or reasons relating to the employee. In this case, the transferred leave must be taken within the first three months of the following year.

3. Service contracts with directors (GmbH) and management board members (AG)

Directors and **management board members** are corporate bodies of the company who perform the functions of employers and are therefore not strictly employees. The appointment of directors of a GmbH and management board members as corporate bodies of the company is an act under company law and must be distinguished from the conclusion of a service contract. Service contracts govern the personal rights and obligations between the director or management board member and the company. A distinction must also be made between the termination of office and termination of the service contract. Relief from office, like voluntary retirement from office, can happen at any time without a statement of grounds, unless otherwise stipulated in the shareholders' agreement or the articles of association. The service contract must be terminated separately. The legal literature and case law differ as to which employment law norms apply to the service contract of a director of a GmbH. Irrespective of whether the director of a GmbH is sometimes exceptionally classified as an employee, labour courts do not have jurisdiction over legal disputes between a director and the company.

V. Management authority of the employer

An employment contract naturally cannot cover all details of an employment relationship. For this reason, the employer enjoys management authority (right of direction) with respect to employees. This management authority authorises the employer to determine which duties the employees are required to perform, when and where, and in what manner. Moreover, the employer can stipulate the internal workplace rules within the scope of their management authority, for example smoking bans, the obligation to wear protective clothing, etc. In addition to any stipulations in the employment contract, this management authority is limited by collective bargaining agreements or works agreements, as well as by the rights of co- determination of the works council and legislation.

VI. Protection against discrimination

In Germany, employees are protected against discrimination on grounds of gender, sexual orientation, disability, race or ethnic origin, age, religion or belief, in particular through the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*)[81].

VII. Termination of employment relationships

1. Through limitation of term

An employment relationship automatically ends if the parties to the employment contract have agreed on a limited term or a condition for termination from the outset. Limited-term employment contracts end without termination on expiry of the agreed time or with the achievement of the agreed purpose. The employer must give the employee two weeks' notice and notify them in writing of the end of a limited-term employment contract concluded for a fixed purpose.

2. On reaching retirement age

At present, an employee has a basic entitlement to the statutory old-age pension on reaching retirement age. Since 2012, the retirement age must be calculated individually, because it has been increased in stages, depending on the year of birth, from 65 to 67 years. Several special regulations also apply for certain occupational groups, seriously disabled persons, and others. However, this does not mean an employment relationship automatically ends upon the employee reaching retirement age. To prevent an over-ageing workforce, the collective bargaining agreements, works agreements, or individual employment contracts of many companies stipulate age limits, with the employment relationship ending when the employee reaches this age.

3. Through a severance agreement

The **severance agreement** – the termination of the employment relationship by mutual agreement – is very popular in practice. In comparison to termination of employment (see below under 4.), the advantage of a severance agreement is that it avoids protracted and costly court disputes about the validity of the termination. Neither the law on the protection against dismissal nor the right of participation of the works council apply where a severance agreement is concluded.

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[81] General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) of 14 August 2006 (BGBl. I p. 1897), last amended by § 15 of the law of 22 December 2023 (BGBl. I p. 414).

The severance agreement is popular with employees because it does not carry the stigma of dismissal and employees typically receive a payment as compensation for the termination of the employment relationship. However, the law stipulates certain conditions that must be fulfilled to avoid a waiting period during which no unemployment benefit will be paid (*e.g.*, due to leaving a job for no good reason). This needs to be considered when negotiating severance agreements.

Severance agreements govern the conditions of an amicable termination of the contract and are often signed after notice of termination has been issued. If an employee files an action under the Protection of Against Dismissal Act (*Kündigungsschutzgesetz, KSchG*), judicial conciliation may still facilitate an agreement on the terms of an amicable termination of the contract.

4. Through unilateral termination

In the case of termination, one party to the employment contract unilaterally declares the termination of the employment relationship. Both parties have a right to termination, although stricter preconditions apply to the employer. Employment contracts can be terminated by giving notice of termination within the notice periods stipulated by the law or as agreed in the employment contract or collective bargaining agreement. Alternatively, a party can also declare extraordinary termination (without notice and with immediate effect) if the contract is terminated for cause

The content of the notice of termination – in particular, when the employment relationship will end – must be clear and unequivocal since the terminating party will be held responsible for any uncertainties. Moreover, the notice of termination must be in writing (signed by hand) and the original must be delivered to the recipient. It is not necessary to state the reasons for termination in the case of contractual termination (unless stipulated by law *e.g.*, for pregnant employees or trainees).

In the case of termination without notice, the employer must only state the reason for termination upon the demand of the employee. or if this requirement was stipulated in the employment contract, works agreement, or collective bargaining agreement.

a) Contractual termination

Notice of contractual termination will only be legally valid if it is issued for an objective reason. However, to the extent that the Protection of Against Dismissal Act applies, there must be a **socially-justifiable reason** for contractual termination. The required notice periods must also be observed. The minimum statutory notice period that employers and employees must observe is four weeks, with the termination taking effect on the 15th of the month or at the end of a calendar month. Depending on the duration of the existing employment relationship, the statutory period of notice extends as follows:

Time with the company	Notice required
2 years	1 month with effect from the end of a calendar month
5 years	2 months with effect from the end of a calendar month
8 years	3 months with effect from the end of a calendar month
10 years	4 months with effect from the end of a calendar month
12 years	5 months with effect from the end of a calendar month
15 years	6 months with effect from the end of a calendar month
20 years	7 months with effect from the end of a calendar month

These notice periods can be extended or reduced in collective bargaining agreements. The basic notice period (four weeks with effect on the 15th of the month or at the end of a calendar month) may be extended where the contract is terminated by the employee, but it must not exceed the notice period applicable to the employer. For the automatic extension of the basic notice period to apply, as shown above, it must be explicitly stated in the contract.

As an exception, the basic period of notice does not apply in the case of temporary employment (three months), or in enterprises with generally no more than 20 employees. The period of notice during an agreed probationary period, lasting no longer than six months, is two weeks, which can be reduced only through a collective bargaining agreement. Limited-term employment relationships can only be terminated if this possibility was agreed in the employment contract or collective bargaining agreement.

b) Extraordinary termination

There must be **substantial grounds**, *i.e.*, "cause", for extraordinary termination (without notice). Substantial grounds will exist if it is unreasonable for the terminating party to continue the employment relationship until the end of the notice period. Extraordinary termination must be a very last resort for the terminating party and all less severe measures (warning, reassignment, contractual termination) must first be exhausted. Both parties to the employment contract can declare extraordinary termination. Typical grounds for dismissal without notice by the employer include:

- persistent refusal of work by the employee;
- feigned illness;
- betrayal of company or trade secrets; or

- suspicion of having committed a criminal offence.

Possible grounds for termination without notice by the employee include:

- non-payment of employee's wages over a longer period;
- wilful or grossly negligent endangerment of the life and health of the employee;
- continuously and significantly exceeding maximum legal working hours.

c) Hearing of the works council

If a workplace has a works council, it must be granted a hearing before the employer terminates the employment contract. The works council can contest an extraordinary termination in writing within three days and a contractual termination within one week. The works council examines issues, such as whether the employer has taken into consideration the employee's personal circumstances and whether employees might be able to remain employed in a different position within the company. Even if the works council contests a termination, the employer may still terminate the contract. The **works council's objection** does not render the termination invalid, but it will have consequences in any subsequent claim for unfair dismissal.

d) Protection of employment

In Germany, the *KSchG* imposes a strict general protection of employment, designed to protect employees against a dismissal that is not socially justified. A dismissal will be socially justified if it is based on grounds which lie within the person or behaviour of the employee or result from urgent operational needs that do not allow continuing employment with the company.

An invalid dismissal does not effectively end the employment relationship. The employee concerned still has the right to be actively employed. German employment protection law is only concerned with **reinstatement** and an employer usually cannot claim a **severance payment** or compensation unless the parties mutually agree. Nevertheless, severance packages can be agreed in settlement negotiations, and this frequently occurs. Severance payments generally amount –although no binding stipulation exists – to 0.5 gross monthly salaries for each year of employment. Depending on the circumstances of the individual case (chances of success of a court action for unfair dismissal, particularities of the specific case, economic strength of the company, etc.), the amounts agreed between the parties may deviate considerably from the above rule.

The *KSchG* differentiates between employment relationships that commenced before and after 1 January 2004. If the employment relationship began on or after 1 January 2004, the *KSchG* generally applies if more than ten employees (excluding trainees;

part-time employees are taken into account as a percentage of a full-time employee) are employed in the workplace. For employment relationships which existed on or prior to 31 December 2003, the *KSchG* applies if, as a rule, more than five employees (employees working part-time are taken into account as a percentage of a full-time employee) were employed in the workplace at the end of 2023 and were still employed in the workplace at the time of termination. The *KSchG* also only applies if the employment relationship to be terminated has existed for longer than six months without interruption at the time of termination.

Contractual and extraordinary termination by the employer can be divided into three sub-categories based on the grounds for termination: termination on personal grounds, termination on grounds of behaviour, and termination on operational grounds.

e) Termination on personal grounds

In the case of termination on **personal grounds**, there must be objective reasons based on the person of the employee, such as physical or intellectual unsuitability for the position or a decline in performance. The most frequent case of termination on personal grounds is termination due to illness on the part of the employee. However, the case law imposes strict requirements in terms of the justification of termination on grounds of illness. Alcohol dependency or other addictive conditions can also justify a termination on personal grounds.

f) Termination on grounds of behaviour

The employment relationship can be terminated on **grounds of behaviour** if it is detrimentally affected by the behaviour of the employee, especially in cases of culpable breach of contract. This can include refusing to perform tasks, falsifying expenses, or insulting colleagues or superiors. Before the employment relationship can be terminated on grounds of behaviour, the employee must be given an **official warning**. This warning must outline the offensive behaviour and inform the employee that they can expect to be dismissed if the behaviour is repeated. There are few cases where termination without notice on grounds of behaviour can be valid.

g) Termination on operational grounds

Employers frequently base the termination of an employment contract on **operational grounds**. The prerequisites include an operational need which justifies the loss of the job and thus the termination of employment. Termination on operational grounds is typically a response to a **decline in business** (decrease in orders or sales) or an **organisational action** on the part of the employer (reduction in size or closure of the workplace or a change of production method). The **corporate decision** to restrict or reduce the productivity of operations is not subject to review by the courts. However, in the case of dispute, the employer must prove the employee's position was lost as a result of the corporate measure.

If urgent operational requirements necessitate staff cutbacks, and several comparable employees could be terminated on operational grounds, the employer must decide which employment contracts to terminate based on **social criteria**. This involves examining which employee would suffer the least hardship through the loss of their job, taking into consideration the amount of time they have spent with the company, their age and family commitments, as well as any serious disability. This employee will then be given a notice of termination. A works agreement can also stipulate how to assess the social criteria in such cases. In certain situations, it is possible to agree on a "**list of names**" with the works council. This lists the names of the employees to be given notice of termination and mitigates the risks, should any (terminated) employee take legal action for unfair dismissal.

h) Special protection of employment

In addition to the general protection of employment, special protection against dismissal arises under various different laws and applies to groups of persons who enjoy special protection of employment, for example:

- **pregnant women** and mothers up to four months of delivery;
- employees on **parental leave**;
- severely **disabled persons**;
- **works council members**.

These employees benefit from a prohibition against termination of employment; their employment may only be terminated in exceptional cases, subject to the approval of the relevant state authorities.

VIII. Co-determination by employees

1. Co-determination within the workplace

The term co-determination (*Mitbestimmung*) covers the legal provisions concerning the rights of **co-determination of employees** within a workplace, based on the Works Council Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) and the Executives' Representative Committee Act (*Sprecherausschussgesetz, SprAuG*) (for executive employees)[82].

[82] Executives' Representative Committee Act (*Sprecherausschussgesetz, SprAuG*) of 20 December 1988 (BGBl. I p. 2312, 2316), last amended by § 6e of the Law of 16 September 2022 (BGBl. I p. 1454).

a) Works Council Constitution Act

The Works Council Constitution Act from 1972 governs the works constitution, *i.e.*, the fundamental code of industrial cooperation between employers and employees. It provides employees with a right of co-determination through the works council in social, personnel, and economic matters related to the workplace.

b) Works council

Works councils are elected in workplaces with more than five permanent employees who are entitled to vote, at least three of whom are electable. If these prerequisites are met, the employees not only have the right to elect a works council, but the law assumes a works council is, in fact, established. However, there is no obligation to have a works council. This decision is at the sole discretion of the employees of a given workplace. The works council represents the employees in the workplace and their interests with respect to the employer. The individual responsibilities and powers of the works council are set out in the *BetrVG*.

2. Board-level representation

Board-level representation does not involve the formation of a co-determination body but representation through employee representatives within existing corporate bodies (in particular within the supervisory board) and thus the possibility to influence corporate decisions (see B. III. 3. and V. 7.).

IX. Collective employment law

1. Trade unions and employers' associations

Trade unions and employers' associations are of great importance in Germany and enjoy constitutional protection. Less than 20% of all German employees are members of a trade union, with collective agreements applying in approximately 60% of West German companies and approximately 40% of (former) East German companies. These figures, however, should not be misconstrued as suggesting that more than half of all German employees are paid wages below the levels set in the relevant collective agreement. Larger companies in particular are subject to collective bargaining agreements. Companies not bound by collective bargaining agreements often pay the same wages and offer the same benefits set out in collective agreements.

Trade unions and employers' associations play an important role in shaping employment and economic conditions in Germany. The conclusion of collective bargaining agreements is a key element of this, but change can also be brought about through

industrial dispute measures (such as strikes). In addition, trade unions and employers' associations advise and support their members and participate in the legislative process and process of government administration.

Trade unions are primarily organised according to branches of industry. A few of the most important trade unions, which are members of the umbrella organisation Confederation of German Trade Unions (*Deutscher Gewerkschaftsbund, DGB*, with six million members) include:

- the industrial unions (*IG Bergbau, Chemie, Energie; IG Metall; etc.*) — approx. 3.1 million members
- the United Services Union (*Vereinte Dienstleistungsgewerkschaft, ver.di*)[83] — approx. 2 million members

Employers' associations are also organised according to the industry federation principle. The common umbrella organisation is the Confederation of German Employers' Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände, BDA*).

2. Collective bargaining agreements

Collective bargaining agreements contain legal norms which regulate the content, conclusion, and termination of an employment relationship, as well as questions relating to the workplace and industrial relations.

Statutory law allows partners in a collective bargaining agreement to agree to different arrangements – both to the advantage and the disadvantage of the employees. The provisions set forth in a collective bargaining agreement apply directly and in mandatory form to an employee who is a member of a trade union that has concluded a collective bargaining agreement with the employer or with an employers' association of which the employer is a member. In addition, the application of a collective bargaining agreement or individual provisions of a collective bargaining agreement can be agreed between the employer and the employee in the employment contract. In practice, where collective bargaining agreements are implemented, employees who are not organised into trade unions are usually treated in exactly the same way as unionised employees. However, there is no legal entitlement to such treatment.

[83] ver.di is the world's largest individual union.

A distinction can be made between the following types of collective bargaining agreement: fundamental questions, *e.g.*, general working conditions such as holidays and working hours, are regulated in an industry-wide collective agreement. A framework collective agreement groups employees into wage and salary groups. The regional collective agreement applies to a regionally limited area and the "in-house" or "company collective agreement" applies to an individual company.

3. Works agreements

Works agreements are widely used in German companies. They are concluded in writing between the employer and the works council and are an important instrument in joint decision-making. Works agreements are subordinate to collective bargaining agreements and therefore may not cover areas which have already been covered by collective bargaining agreements. Works agreements contain norms relating to workplace and industrial relations issues. Typically, "workplace rules" are also formulated through works agreements. For example, works agreements can cover:

- rules on the distribution of working hours;
- basic rules on holidays;
- arrangements concerning the use of technical monitoring equipment.

Works agreements apply directly and in mandatory form to all employees in the workplace.

X. Employment disputes

The labour courts are fundamentally responsible for employment disputes. The procedure followed before German labour courts is set forth in the Labour Courts Act (*Arbeitsgerichtsgesetz, ArbGG*)[84], which distinguishes between judgment and decision proceedings. Judgment proceedings are all individual legal proceedings, i.e., legal disputes between employees and employers arising from the employment relationship. Judgment proceedings are preceded by a a **conciliation hearing**, the aim of which is to arrive at an 'amicable' settlement of the legal dispute. Decision proceedings decide matters arising in connection with the Works Council Constitution Act and Co-determination Acts. These are also referred to as collective proceedings. Geographically, the district where the respondent has their registered office or the place of work is located will determine which labour court has jurisdiction.

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[84] Labour Courts Act (*Arbeitsgerichtsgesetz, ArbGG*) of 2 July 1979 (BGBl. I p. 853, 1036), last amended by § 10 of the Law of 15 July 2024 (BGBl. I p. 236).

The labour court is generally made up of a presiding full-time judge and two lay judges representing employees and employers. Each of the three judges has the same voting right. Labour court judgments can be appealed to the regional labour court. There is one regional labour court in each federal region, with the exception of North Rhine-Westphalia and Bavaria (which have three and two respectively), as well as Berlin and Brandenburg, which have a joint regional labour court. Appeals of decisions of the regional labour courts can be brought before the Federal Labour Court (*Bundesarbeitsgericht*), based in Erfurt.

A peculiarity of proceedings before labour courts is that both parties bear their own costs at first instance, irrespective of the outcome of proceedings.

XI. Basic principles of German social security law

The **Social security** in the Federal Republic of Germany is organised as a **contributions system** in which the risks to be insured are borne collectively by all insured persons. Irrespective of their individual income and contributions, all insured persons are largely and comprehensively protected against various life and health risks. The vast majority of Germans are insured on a compulsory basis under the social insurance system.

Most insured persons are gainfully employed. Under the system, employers and employees pay approximately half of the social insurance contributions. The employer not only withholds and pays the wage tax, but also withholds the employee's share of the social insurance contributions, adds the employer's share, and then pays the full amount of contributions to the competent social insurance carriers. The employee and employer each pay a sum equalling approximately 20% of the employee's gross salary.

The system is essentially based on five pillars:

1. Health insurance

The benefits under the statutory **health insurance** system (*Krankenversicherung*) are intended to maintain, restore, or improve the health of the insured persons. The diverse functions range from preventive measures, treatment of the sick, and rehabilitation, to the payment of sickness and pregnancy benefits and maternity protection, as well as covering necessary medical care during travel abroad.

All German employees are required to take out statutory health insurance if their monthly gross salary does not exceed a maximum limit, which is adjusted each year

(EUR 6,150.000 in 2025). If their monthly income exceeds this threshold, employees can choose whether they wish to insure themselves through the statutory scheme or through a private health insurance scheme. Even where an employee is insured under a private scheme, the employer will pay a portion of the contributions.

In 2025, the standard contribution rate under the statutory health insurance system is 14.6% of the employee's monthly gross wages. The employer and the employee each pay half of the contributions.

2. Long-term care insurance

This insurance offers beneficiaries protection against the financial consequences of a need for long-term care and, if this should occur, provides assistance and nursing services. However, **long-term care insurance** (*Pflegeversicherung*) is not full coverage insurance. Instead, insured persons and other agencies may wish to take out additional insurance. According to the legal definition, insured persons are classed as needing care if, due to a physical, mental or emotional disorder, they require significant assistance when performing everyday tasks on a long-term basis, *i.e.*, for at least six months. The degree of care needed is determined by the medical service of the health insurance organisation. The legislator has provided for three levels of long-term care:

- care level I = significantly in need of care;
- care level II = severely in need of care;
- care level III = most severely in need of care.

However, claimants are only entitled to benefits under long-term care insurance if they were insured under such an insurance scheme for at least five years before making

the application (waiting period). Long-term care insurance is compulsory and is linked to health insurance. Anyone who has statutory health insurance also belongs to the associated long-term care insurance scheme. Voluntarily insured persons must take out private long-term care insurance.

As in the case of health insurance, long-term care insurance is generally borne equally by the employee and the employer. The contribution rate is fixed by law and in 2025, amounts to 3.6% of the monthly gross wage. The ceiling is the same as for statutory health insurance contributions. From of the age of 23, employees who have no children pay a supplementary contribution of 0.6%.

3. Pension insurance

The payment of **old-age pensions**, reduced capacity pensions, and survivors' pensions as a substitute for wages are one of the central functions of pension insurance (*Rentenversicherung*). The scope of benefits depends on the amount of the contributions paid in. A precondition for receiving an old-age pension following retirement is reaching the statutory retirement age, which was 65 years until 2011. In view of increasing life expectancy, the retirement age has been gradually adjusted since 2012 and is now 67 years of age. The regular retirement age of employees born after 1963 will be 67. Currently, it is possible to retire at age 63 if pension insurance contributions have been paid for 45 years. However, this age limit has also been gradually increased. An applicant can also apply for a pension earlier if they are seriously disabled or have certain occupations.

Pension insurance covers rehabilitation measures and promotes social involvement. It provides and finances treatment and retraining designed to counteract, prevent, or overcome reduced capacity to work. Pension insurance also compensates for reduced earnings capacity where an employee is no longer able to work regularly.

The statutory pension insurance is primarily financed through the contributions of employees and employers. Both pay half of the contribution rate applicable to employees (in 2025 18.6% of gross wages). The income ceiling for compulsory pension insurance contributions currently (2025) stands at EUR 8,050.

4. Unemployment insurance

In Germany, all persons who do more than a minimal amount of paid work must contribute to the statutory **unemployment insurance** scheme (*Arbeitslosenversicherung*). As a rule, employees and employers pay half of the contributions towards job creation measures; the remaining financing comes through levies, government funding, voluntary additional insurance contributions and other
sources of income. The current contribution rate (2025) is 2.64% of the employee's gross wages; the ceiling is the same as for statutory pension insurance contributions.

The benefits and services funded through unemployment insurance include:

- payments in the case of unemployment;
- job-seeking advice and support (*e.g.*, with applications and interviews);
- identifying possible suitable jobs for claimants;
- providing assistance for persons starting a business.

5. Accident insurance

Statutory **accident insurance** (*Unfallversicherung*) is a form of third-party liability insurance for employers. If an employee suffers an occupational illness or accident during the performance of their work, including on the way to or from work, it will be covered by statutory accident insurance. Accident insurance is designed to prevent accidents at work, occupational illnesses, and work-related health risks by providing advice to companies on all areas of health and safety. Other benefits include restoring the health and capabilities of employees following accidents at work or occupational illnesses and providing compensation in the form of monetary benefits to insured persons or their surviving dependents. Unlike the other types of insurance, employers are required by law to participate in and pay the contributions on their own. The amount of contributions is determined through an annual assessment procedure based on previous average requirements. The actual contributions vary greatly depending on the industry of the employer.

I. Overview of the German tax system

I. Overview

The German tax system has two basic tax categories: direct and indirect taxes. As far as direct taxes are concerned, the taxable entity bears the tax burden, *e.g.*, **income tax** (*Einkommensteuer*), **corporation tax** (*Körperschaftsteuer*) and **trade tax** (*Gewerbesteuer*).

For indirect taxes, the tax debtor transfers the tax burden to a third party. The most important indirect tax is **value added tax** (VAT). In the case of VAT on the supply of goods and services by entrepreneurs, the latter will usually pass on the VAT incurred to the end user through the correspondingly higher selling price. Other indirect taxes include excise taxes, such as taxes on mineral oil and tobacco.

II. Types of tax

1. Income tax

The Income Tax Act (*Einkommensteuergesetz, EStG*)[85] covers 7 different types of income:

- income from agriculture and forestry;
- income from commercial business;
- income from self-employment;
- income from employment (wages and salaries);
- income from capital investments;
- income from rental and leasing; and
- other income.

[85] Income Tax Act (*Einkommensteuergesetz, EStG*) of 8 October 2009 (BGBl. I p. 3366, 3862), last amended by § 2 of the Law of 23 December 2024 (BGBl. 2024 I Nr. 449).

Any accrual of amounts not falling under one of these seven categories is not subject to German income tax.

a) Unlimited tax obligation

Natural persons who have their domicile or usual place of residence in Germany have an unlimited obligation to pay income tax. This means all their net worldwide income will be taxed in Germany, irrespective of where the income was generated. **Double taxation agreements** often contain exceptions to this general principle.

For the purposes of German national tax law, a natural person is considered to have their **domicile** in Germany if they own a home they obviously wish to keep and use. In this context, even people who have a secondary residence or a holiday home may be deemed to have their domicile in Germany, which can lead to unlimited taxation in Germany.

Under taxation legislation, a natural person is considered to have their **usual place of residence** in Germany if circumstances indicate the residence is not simply of a temporary nature. However, the law presumes a natural person will have their **usual place of residence** in Germany if they remain there permanently for a period of more than 180 days.

The above definitions of domicile and usual place of residence may be superseded by definitions in double taxation agreements. This must be examined on a case-by-case basis.

(1) Tax assessment basis and assessment of the taxable income

The tax assessment basis is the natural person's net worldwide income. For this calculation, the natural person's income from all sources is first assessed and then subdivided into specific types of income. In a next step, the costs linked to the various incomes, specifically operating expenses, and other allowable costs, are deducted from the individual forms of income. Finally, the net amounts of the individual types of income are combined into a total which, following further deductions such as special expenses and extraordinary burdens, ultimately **forms the assessment basis for the applicable tax rate** in the form of "taxable income". Investment income is exempt from this net balance; it is determined separately and subject to a **special tax rate of flat rate withholding tax**.

(2) Tax rates

The taxable income of unlimited taxpayers – with the exception of investment income – is subject to a progressive tax rate. The following tax rates apply for the tax year 2025:

- Income below EUR 12,096 p.a. is exempt from income tax.

- The tax rate for income between EUR 12,096 and EUR 68,480 rises progressively from 14% to 42%.

- The tax rate of 42% also applies to income between EUR 68,480 and EUR 277,826.

- Where the total income exceeds EUR 277,826, the income exceeding EUR 277,826 is taxed at the maximum tax rate of 45%.

The **withholding tax** on the investment income of natural persons is charged at a flat rate of 25% and is, in most cases, **already deducted at the source** by the respective debtor. The flat rate taxation is linked to the prohibition against deducting investment income-related expenses. Investment income taxed at source does not have to be included in the tax return. However, it may be advisable to declare this investment income (e.g., for the assessment of losses, crediting foreign taxes, or in the event of an applicable overall tax rate of less than 25% in individual cases). Investment income that is not taxed at source must be included in the tax return.

Couples (and civil partners) who are both subject to unlimited taxation in Germany may reduce their tax burden by splitting income taxation (joint assessment). In such cases, the income earned by the spouses is taxed as follows: first, the tax rate applicable to half of the joint income is determined. The **full joint income** is then taxed at this **reduced rate**.

In addition, a **solidarity surcharge** (*Solidaritätszuschlag*) is levied at 5.5% of the income tax. This surcharge was abolished in 2021 for "low-income earners" (natural persons). Accordingly, in the future, a solidarity surcharge will only be levied if the income tax payable exceeds EUR 17,543 or EUR 35,085 (single or collective assessment respectively).

b) Limited tax obligation

Natural persons who have neither their **domicile** nor **usual place of residence** in Germany are subject to a limited tax liability, *i.e.*, they are only taxed in Germany on certain types of income originating from German sources.

(1) Tax assessment basis and assessment of the taxable income

Income is usually classed as domestic income subject to a limited tax liability if the income has a particularly close connection to Germany, e.g., income from a commercial operation which can be assigned to business premises in Germany, or income derived from letting property **located in Germany**. When assessing the taxable income, any operating or other expenses connected economically with the domestic income can, in principle, be deducted. In the case of taxpayers with limited tax liability, the deduction of special expenses is severely restricted, while extraordinary charges may not be deducted.

(2) Tax rates

For taxpayers with **limited tax liability**, the same tax rates generally apply as those for taxpayers with unlimited tax liability (described above), but there is no basic exempted amount.

German taxation at source at a rate of 15% to 30% applies to various forms of the domestic income of a taxpayer with limited tax liability, such as wages, dividends, remunerations for licensing rights or other rights of use, and payments e.g., to supervisory board members. In general, the German revenue authorities retain these withholding taxes at certain fixed tax rates – irrespective of the individual tax rate of the limited tax liability taxpayer – because in most cases, the retention of withholding tax is definitive with respect to limited tax liability taxpayers. However, where a **double taxation agreement** restricts Germany's right to tax at source, a taxpayer with limited tax liability may be entitled to a refund or offset of the excess withholding tax paid in Germany.

According to the European Union Savings Directive (Council Directive 2014/48/EU[86], the same applies to certain investment income. In certain cases, the withholding tax may be reduced at source. A reduction of the **withholding tax** requires taxpayer to apply for certain concessions.

2. Corporation tax

Corporations are independent taxable entities. Accordingly, the taxable income is determined at the level of the corporation, and it is the corporation which is liable for tax.

a) Unlimited tax obligation

Corporations which have either their management or registered office in Germany are subject to an unlimited tax obligation.

(1) Tax assessment basis and assessment of the taxable income

The tax assessment basis for corporations **with unlimited tax liability** is their net worldwide income. The income of a domestic corporation (especially a GmbH or AG) is classified by law as business income, irrespective of the business activity conducted by the corporation. This means corporations are automatically subject to trade tax solely on the basis of their legal form.

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[86] Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings income in the form of interest payments (OJ L 111/50 of 15 April 2014).

Pure asset management companies may avoid all or part of the **trade tax** through reduction rules (*e.g.*, real estate leasing companies).

All income from business operations of a domestic corporation must be included in the assessment of the taxable income. However, there are various exceptions:

- **Dividends** received from other corporations are excluded from the taxable income if the corporation held an interest of at least 10% in the corporation distributing the dividends at the beginning of the respective calendar year (otherwise, dividends received from other corporations will not be excluded from the taxable income). The acquisition of more than 10% in the dividend distributing company during a calendar year will be considered as already meeting this criteria at the start of that calendar year. However, 5% of the exempt dividends count as non-deductible operating expenses, which in economic terms means 5% of the dividends paid out to the corporation, are taxed. Accordingly, in practice, 95% of the dividends are exempt from German **corporation tax**. This also applies to trade tax with a few modifications that **need to be examined on a case-by-case basis**. This tax exemption does not apply to dividends from shares held as part of current assets or belong to the trading books of banking institutions. The details must therefore also be examined on a case-by-case basis.

- Profits from the sale of a shareholding in another corporation are also usually tax-free. However, 5% of the profit on the sale is also classified as non- deductible operating expenses, meaning 5% of the profit on the sale is taxed. **In the case of the sale** of a shareholding, there is no difference between free float shares (<10%) and shareholdings of more than 10%.

All operating expenses associated with the generation of income can be deducted from the income of the corporation. Deductible operating expenses include:

- wages and salaries of employees of the corporation, including management board salaries;

- depreciation: in general, economic assets can be written off using a linear scale (*i.e.*, in equal parts) over the usual service life. If the economic assets involve property, the amount of depreciation is 3% of the acquisition costs annually (2% or 2.5% for residential buildings);

- financing costs such as interest which was paid on a loan taken out for business purposes. However, under the '**earnings stripping rule**' the deduction of interest can be restricted in exceptional cases where the negative interest balance (interest expenses minus income from interest) exceeds EUR 3 million. In this case, no more than 30% of the corporation's tax EBITDA is deductible,

though the remaining non-deductible interest can be carried forward. In terms of **trade tax**, 25% of all financing costs are non-deductible, leading to an effective trade tax on financing expenses of approximately 3.25% to 4.25%. Other expenses, such as rent or payments for licencing rights, can – despite their "expense" nature – effectively lead to trade tax burdens of up to 2%.

(2) Tax rates

German corporations are currently subject to a standard **corporation tax** rate of 15% plus a **solidarity surcharge** of 5.5% on the corporation tax, resulting in a total tax burden of 15.825%. In addition, there is a locally variable trade tax of around 7% to 19.8%. The nominal overall tax therefore amounts to approximately 23% to 36%.

b) Limited tax obligation

Corporations which have neither their registered office nor management in Germany are subject to a **limited corporation tax** obligation.

(1) Tax assessment basis and assessment of the taxable income

Like natural persons subject to a limited tax liability, foreign corporations are only taxed in Germany on any income originating from German sources.

However, in contrast to German corporations, the income of foreign corporations is not, by law, automatically classified as income subject to **trade tax**. This requires that the foreign corporation maintains a business establishment in Germany.

(2) Tax rates

Corporations with a **limited tax liability** are also subject to corporation tax at a standard rate of 15%, plus a solidarity surcharge of 5.5% on the corporation tax, resulting in a total tax burden of 15.825%. If permanent business establishments are maintained in Germany, local trade tax of approximately 7% to 19.8% also applies, making the nominal overall tax burden around 23% to 36%, like that of a corporation with unlimited tax liability.

c) New electoral law through the Corporate Modernisation Act

Since 1 January 2022, commercial partnerships **may opt to be treated as corporations** for tax purposes.

(1) Tax assessment basis and assessment of the taxable income

By exercising the option, a commercial partnership will be subject to trade and corporation tax like a corporation. In order to exercise this option, the partner-

ship **must submit an irrevocable application** to the tax office **no later than one month before the beginning of the financial year**.

(2) Tax rates

Opting commercial partnerships are also subject to corporation tax at a standard rate of 15% (plus a solidarity surcharge of 5.5% on the corporation tax), as well as the applicable local trade tax.

3. Withholding tax

a) Income subject to taxation at source

Various forms of income from German sources, such as wages and salaries, dividends or certain interest payments, are subject to German **withholding tax** (*Quellensteuer*). This applies to both taxpayers who are domiciled in Germany and taxpayers who are not domiciled in Germany. In general, the German fiscal authorities may initially retain these withholding taxes at certain fixed tax rates; in the case of taxpayers with unlimited tax liability, these withholding taxes **are regularly deducted in the assessment procedure**. Only the flat rate withholding tax of 26.375% on investment income is compensatory.

Where a taxpayer is not domiciled in Germany but generates income in Germany, German regulations on **taxation at source remain unaffected**, even where a **double taxation agreement** or the EU Parent-Subsidiary Directive[87] applies. As a rule, taxation at source is definitive; there will be no assessment. To this extent, full or partial exemption from German taxation at source **always follows a formal exemption procedure**. Domestic taxpayers under an obligation to pay withholding tax may make use of exemptions only once they have been issued a final exemption certificate by the German authorities. If withholding tax was paid although the German revenue authorities should not have taxed at source under double taxation agreements or Community law, a refund procedure must be initiated.

Germany is strict when it comes to concessions for withholding tax. In individual cases, the grant of concessions under a double taxation agreement or Community law may be refused based on the “anti-treaty shopping” or “anti-directive shopping” rule.

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[87] Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345/8 of 29 December 2011.

The above scenario and steps that can be taken to avoid an overpayment of tax in Germany are outlined in the following example of a dividend payment by a German corporate entity to an investor domiciled abroad.

b) Example

A German corporate entity pays a dividend to a **shareholder domiciled abroad**.

(1) German tax law

To the extent the dividends are paid to a foreign corporation or a foreign natural person, the German corporate entity paying the dividends is obliged to withhold 26.375% capital gains tax and pay the tax to the relevant authority.

However, German law provides for a refund of two-fifths of the tax if the foreign corporation is a shareholder of the German entity. The remaining taxation at source would therefore be 15%.

(2) EU law

If the prerequisites of the EU Parent-Subsidiary Directive are fulfilled, the dividends paid may be exempt from capital gains tax. This requires a minimum shareholding of 10% in a non-tax-exempt company domiciled in the EU (or the EEA). The responsible authority will check whether the strict requirements (see 3. a)) are met in a formal exemption procedure.

(3) Double taxation agreements

As a rule, under German double taxation agreements, dividends paid by a German corporate entity to a person domiciled in the country that is a party to the agreement may be taxed in both countries. However, the German tax rate must not exceed 5% or 10% of the gross dividend if the dividend is received by a company holding an interest of 10% or more in the German corporate entity. In all other cases, including where natural persons are the recipients of the dividends, the German tax must not, as a rule, exceed 15%.

The reduction of the capital gains tax rate to the relevant 'treaty rate' also requires a formal exemption procedure. If the full tax amount was withheld, **a refund can be claimed through another formal procedure**. In both cases, the competent authority will examine whether the strict requirements (see 3. a)) have been met. Essentially, **the foreign company must prove it pursues a sustainable business** and is not simply used as an 'empty shell' to reduce taxation at source.

In any case, it is important to check which double taxation agreement applies and how it is structured in detail.

4. Taxation of permanent establishments

a) German tax law

The Tax Code (*Abgabenordnung, AO*)[88] defines a "**permanent establishment**" (*Betriebsstätte*) as any fixed place of business or facility serving the business of an enterprise. According to the Income Tax Act, income attributed to the German permanent establishments of a foreign company are qualified as domestic income from business operations and are therefore subject to German income or corporation tax.

Accordingly, the permanent establishments of a foreign corporation are subject to corporation tax in the amount of 15% plus solidarity surcharge of 5.5%, *i.e.*, a total tax rate of 15.825%. If the German permanent establishment belongs to a foreign natural person, the income tax in Germany will be subject to a progressive tax rate of 14% to 45%, if applicable, plus the solidarity surcharge of 5.5%, without any tax-exempt amount. In addition, the income of German permanent establishments is subject to trade tax of between 7% and 19.8%, depending on their location.

Germany has implemented the so-called "authorised OECD approach". As a result, a permanent establishment is treated as a separate and independent enterprise **for the purposes of transfer pricing tax rules**, ignoring the fact that, in legal terms, a permanent establishment is a dependent business unit of a company.

b) Avoiding double taxation

To avoid double taxation, many tax treaties or **double taxation agreements** address this issue. In double taxation agreements, the term "permanent establishment" generally refers to a permanent business establishment in Germany through which all or part of the business of a company is conducted. This is often the case if a management office, a branch, an office, or a production facility is located in Germany.

According to many double taxation agreements, company income can generally be taxed in the **country in which the company is located**. However, to the extent the company conducts its business activities in a country through permanent establishments located there, the income is taxed in the country in which these establishments are located.

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[88] Tax Code (*Abgabenordnung, AO*) of 1 October 2002 (BGBl. I p. 3866; 2003 I p. 61), last amended on 2 December 2024 (BGBl. I Nr. 387).

5. Taxation of partnerships

a) German tax law

According to German tax law, partnerships **are not treated as separate tax entities**, but are deemed to be transparent in tax terms, with the exception of **trade tax** and **VAT**. This means that only the partners in the partnership **are subject to income or corporation tax**. Accordingly, the partners are liable to pay income or corporation tax on the income attributable to them. However, the income is determined at partnership level, and the income so determined will form the basis on which (*pro rata*) taxes are to be paid by the individual partners are assessed.

Natural persons may apply to have those profits which are not withdrawn taxed at the **at the reduced tax rate of 28.25%** (plus solidarity surcharge). In the event that these amounts are withdrawn later, a supplementary taxation of 25% (plus solidarity surcharge) applies. Due to this later supplementary taxation, such a procedure is really **only worthwhile in the case of very high income from the company and relatively long reinvestment periods** (interest effect).

b) Avoiding double taxation

The treatment of partnerships in terms of taxes may lead to difficulties where **double taxation agreements exist**. In Germany, partnerships are fundamentally treated as "transparent" for tax purposes (with the exception of trade tax and value added tax), meaning each partner is taxed individually on their share. Certain income and expenses incurred by the partners in connection with the partnership are directly attributed to the partnership for German taxation purposes. Therefore, it is important to identify differences in the tax treatment of partners in advance. In such cases, **double taxation** (or other undesired taxation) **can be avoided with an appropriate partnership design**.

As a result, "Under the authorised OECD approach" (see above), partnerships are treated as separate, independent entities for the purposes of transfer pricing tax rules.

6. Value added Tax (VAT)

a) Subject of the tax

Value added tax (*Umsatzsteuer, USt*) is charged on the following transactions:

- delivery or other performance by an entrepreneur within the country in return for payment;

- the import of objects from third countries into the country (= any country which is not an EU member);

- intra-EU acquisitions in return for payment.

Essentially, the taxability of a turnover in Germany depends on whether the delivery or other service takes place in Germany according to the applicable regulations on the determination of location.

As a rule, VAT is owed to the tax authorities by the party performing the service or delivery. In certain constellations, however, it is the responsibility of the recipient of a service or delivery to calculate and pay the VAT to the tax authorities (*e.g.*, when buying property or receiving deliveries or services from entrepreneurs who are not domiciled in Germany). This is called the "**reverse charge**," and the recipient will be held liable for payment of the tax.

German VAT law is increasingly influenced by European legal standards. With the single European market (free movement of goods and services), these important standards are often the subject of proceedings before the European Court of Justice

b) Tax assessment basis

Value added tax is charged on the basis of the payment, *i.e.*, the consideration for the delivery or other service; the VAT is not taken into account when assessing the value of the consideration.

c) Tax rate

The general VAT rate in Germany is 19%. A reduced rate of 7% applies to certain transactions, such as the delivery of basic foodstuffs.

d) Tax exemptions

Certain transactions are exempt from VAT, such as the sale of property holdings, the letting and leasing of property, the grant of loans, and medical services.

e) Input tax

If goods or services are provided by one entrepreneur to another for their company, the entrepreneur receiving the goods or services can reclaim the VAT in the form of input tax from the revenue authorities, providing the entrepreneur has received an invoice for the goods or services in question duly made out by the entrepreneur providing the goods or services. Value added tax **between business entities is therefore effectively neutral**. However, a refund of input tax is excluded if the entrepreneur receiving the goods or services in turn uses them to generate tax-exempt turnover.

7. Trade tax

German business enterprises are generally subject to a trade tax at an effective rate of 7% to 19.8%, depending on the municipality in which the business enterprise is based or maintains a **permanent establishment**.

The assessment basis for trade tax is initially determined in accordance with the provisions of the Income Tax Act or the Corporation Tax Act (*Körperschaftssteuergesetz, KStG*[89]) (profit = trade earnings), and is subject to certain trade tax modifications in a second step. In particular, financing costs are effectively taxed with a trade tax burden of 1.75% to 4.29% as a result of add-backs. However, other expense items, such as rent payments for immovable or movable assets or licence payments, may effectively be charged with a trade tax of up to approximately 2%. Conversely, the simple administration of properties by companies can, under certain preconditions, be exempt from trade tax.

Foreign companies are not subject to any trade tax in Germany as long as they do not maintain a permanent establishment in Germany.

8. Real estate transfer tax (RETT)

Real estate transfer tax (*Grunderwerbsteuer*) is charged on various transactions in connection with real estate located in Germany. These include:

- the acquisition of real estate (**asset deal**);
- a change in partnership interests **of 90% or more** in relation to the shares in a partnership within a 5-year period if the partnership's assets include real estate assets in Germany (share deal);
- at least 90% of the shares in a corporate entity becoming held by a single shareholder or controlling and controlled undertakings, if the corporation's assets include real estate assets in Germany (share deal).

With respect to **share deals**, both signing and closing generally trigger RETT. However, upon application and under certain strict conditions, it is possible to waive the RETT triggered by the signing. Importantly, owned real estate is considered for allocation purposes, together with a specific allocation of real estate to companies according to previous transactions applies (which deviates from legal ownership).

[89] Corporation Tax Act (Körperschaftssteuergesetz, KStG) of 15 October 2002 (BGBl. I p. 4144), last amended by § 8 of the Law of 2 December 2024 (BGBl. 2024 I p. 387).

The rate of RETT is between 3.5% and 6.5%, depending on the respective federal state and, as a rule, is charged on the basis of the purchase price paid to the seller. If there is no purchase price, the assessment basis is determined according to a special 'real property value,' which often is considerably lower than the fair market value. In principle, both the seller and the purchaser **are joint and several debtors** in terms of RETT; in practice, the RETT burden is transferred contractually to the purchaser. If at least 90% of the shares in a partnership are transferred (see above, point 2), the partnership itself must pay the RETT. If all the shares come to be owned by one person, **the purchaser owes the tax**.

9. Inheritance and capital transfer tax

Inheritance or capital transfer tax (*Erbschaft- und Schenkungsteuer*) is charged on the basis of the Inheritance and Gift Tax Act (*Erbschaftsteuer- und Schenkungsteuergesetz, ErbStG*)[90]. The provisions of the law have repeatedly been subject to review by the Constitutional Court (Bundesverfassungsgericht). The 2009 reform of inheritance law was also a result of an earlier objection raised by the Court. In 2014, the Constitutional Court held that parts of the Inheritance Tax Act were inconsistent with the Basic Law (constitution), notably the special rules governing operating assets explained in point e) below. Legislators responded by amending the relevant provisions with the adoption of the Tax Act of 4 November 2016.

a) Subject of the tax

Inheritance or capital transfer tax is normally **due on transfers of assets** which do not involve payment if the deceased, at the time of their death, the donor, at the time of the donation, or the sponsor, at the time of the endowment, is domiciled within the country. These are usually individuals whose domicile or usual place of residence is in Germany or (where it is not in Germany) who are German citizens who have not remained abroad for more than five years.

If none of the participants in the transfer are **domiciled in Germany**, the obligation to pay inheritance or capital transfer tax (restricted exclusively to domestic assets) applies. Examples of such domestic assets are:

- **property assets** in Germany;
- **operating assets** located in Germany, *e.g.*, economic assets which are part of a German business enterprise, if a permanent establishment is maintained in Germany for the purposes of this business enterprise;

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[90] Inheritance Tax Act (*Erbschaftsteuergesetz, ErbStG*) of 27 February 1997 (BGBl. I p. 378), last amended by § 34G of the Law of 2 December 2024 (BGBl. 2024 I p. 387).

- **a stake of more than 10% in a German corporation held** by a shareholder (together with other related persons in terms of § 1 (2) of the International Tax Relations Act (*Außensteuergesetz, AStG*))[91];

- **mortgages, land charges or other claims or rights**, if these are secured through domestic property holdings.

b) Tax assessment basis

As a basic rule, for the purpose of determining the tax assessment basisunder the ErbStG, all transferred assets are valued **at their actual value**.

c) Exempted amounts

The tax-exempt amount for persons with unlimited liability for inheritance or capital transfer tax **depends on the degree of relationship** between the donor and the beneficiary. The amount ranges from EUR 20,000 for unrelated persons to up to EUR 500,000 for married couples and EUR 400,000 for children. In addition, the transfer of the family home to the married partner or children **can**, under certain preconditions, **be exempt** from inheritance/capital transfer tax.

d) Tax rate

The tax rate depends both on the amount of the tax assessment basis and the degree of the relationship. In the case of married couples, children and other close relations, the tax rate rises progressively **from 7% to 30%**. In the case of unrelated taxpayers, the inheritance or bequest is taxed **at 30% to 50%**. The lowest tax rate applies to inheritances or bequests with an assessment basis of between EUR 1 and EUR 75,000 over the applicable exempted amount. The highest tax rate applies to inheritances or bequests with an assessment basis of EUR 26,000,000 or more over the applicable exempted amount.

e) Special rules

In the case of operating assets to be transferred (individual businesses, shares in commercial partnerships, more than 25% of the shares in corporate entities, or an agreement on the bundling of voting rights and limiting disposal), there are two options; each must fulfil certain preconditions:

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[91] International Tax Relations Act (*Außensteuergesetz, AStG*) of 8 September 1972 (BGBl. I p. 1713), last amended by § 14G of the Law of 2 December 2024 (BGBl. I p. 387).

First, in the case of the transfer of business assets (e.g., sole proprietorships, shares in commercial partnerships, more than 25% of the shares in corporations), a **further tax exemption can apply under certain conditions**, which allows an 85% reduction in the tax base as well as a reduction the tax base by a further EUR 150,000 on the basis of a tax write-off model. A prerequisite for the grant of the tax exemption is the existence of beneficiary assets and a maximum quota of assets under management.

Second, the Inheritance and Gift Tax Act provides for an exemption of 10% for real estate leased for residential purposes.

As the special rules are quite detailed and complex, each case **must be assessed individually**.

J. Overview of investment criteria and legal forms of doing business in Germany

General conditions	Taxes (taxation of holding companies)
• No special restrictions on capital transactions, currency transfers, or the repatriation of profits; • Recognised worldwide as politically stable; • Very good logistics and transport infrastructure; • Very good and reliable telecommunications infrastructure; • Very high level of education and training; • Very high level of technological and scientific expertise; • Largest population within the EU; • Strongest economy within the EU.	• Corporation tax (incl. solidarity surcharge) on all income except dividends: 15.825%; • Trade tax on all income except dividends of approx. 7% to 19.8% (depending on the location of the registered office of the holding company); • 95% of the dividends received from other corporations are exempt from corporation tax and (generally with shareholdings of over 15%) also from trade tax; • For individuals who hold shares as part of their private assets: flat rate withholding tax (incl. solidarity surcharge) of 26.375% on all dividends; • Financing costs are only deductible within the scope of the "earnings stripping rule" (= 30% of the EBITDA, as long as the net interest balance is more than EUR 3 million); deductible financing costs under the "earnings stripping rule" are subject to approx. 3.25% to 4.25% effective trade tax; • According to the "minimum taxation" rule, only profits of EUR 1 million plus 60% of the amount exceeding said threshold can be offset against existing loss carry-forwards; • Loss carryforwards are lost with a share-holding acquisition of over 50% within 5 years unless the business is continued unchanged; • Double taxation agreements with numerous countries worldwide, including all important business information.

Corporate entities and establishment costs	Employment law and laws relating to foreign nationals

• Establishment costs:
  • *GmbH*: EUR 25,000 nominal capital plus state fees and consultancy costs;
  • *Unternehmergesellschaft (haftungs-beschränkt)*: nominal capital of EUR 1 to EUR 24,999;
  • *AG*: EUR 50,000 share capital plus state fees and consultancy costs;
• Operating costs:
  • Tax advice: variable costs, depending on scope and extent of mandate;
  • Accounting: approx. EUR 2,000 to EUR 3,000 per year for small enterprises;
  • Balance sheet accounting/auditing: approx. EUR 2,000 to EUR 5,000 per year for small enterprises;
• Social insurance costs:
  • Employer's contribution towards social security (health, unemployment and pension insurance) of approx. 20% of the gross income.
	• Residence permit/work permit:
	  • Easy to obtain a temporary residence permit for directors, executive employees, and highly-qualified specialists;
	  • Permit for commercial activities and employees on short-term assignment;
	• Employment law:
	  • Tightly regulated and employee-friendly, in large parts based on EU-Law;
	  • Well-trained and qualified employees;
	  • National minimum wage.

Legal form	***Einzelkaufmann*** **Sole trader**	***Gesellschaft bürgerlichen Rechts*** **(GbR, partnership under German law)**	***offene Handels-gesellschaft*** **(OHG, general partnership)**
Proprietor	Entrepreneur (business person)	Partners	Partners
Minimum number of shareholders (partners)	1	2	2
Minimum capital in EUR	n. a.	None	None
Management	Proprietor	All partners	All partners
Liability	Personal and unlimited liability	Personal and unlimited liability on the part of all partners	Personal and unlimited liability on the part of all partners
Profit sharing	Entire profits are at the disposal of the proprietor	According to shares	According to shares
Entry in commercial register	Possible as registered a business person (*eingetragener Kaufmann* (*e.K.*))	Possible, but only necessary for some operations, such as the acquisition or amendment of real property	Required

Kommandit-gesellschaft **(KG, private limited partnership)**	***Gesellschaft mit beschränkter Haftung*** **(GmbH, limited liability company, corporate entity)**	***Unternehmer-gesellschaft*** **(UG, entrepre-neurial company with limited liability, corporate entity)**	***Aktiengesellschaft*** **(AG, public limited company, corporate entity)**
Partner with unlimited liability (general partner) Partner with limited liability (limited partner)	Shareholders	Shareholders	Shareholders
General partner: 1 Limited partner: 1	1	1	1
General partner's contribution: none Limited partner's contribution: any amount	25,000	1 – 24,999	50,000
General partner	Director(s) (*Geschäftsführer*)	Director(s) (*Geschäftsführer*)	Management board (*Vorstand*)
General partner: personal and unlimited Limited partner: up to the amount of the limited partner's contribution	Limited by the amount of the nominal capital	Limited by the amount of the nominal capital	Limited by the amount of the share capital
According to shares	Proportionally	Proportionally	Proportionally (dividends)
Required	Required	Required	Required

K. Useful addresses for investors in Germany

Contact	Address
Baden-Württemberg International Gesellschaft für internationale wirtschaftliche und wissenschaftliche Zusammenarbeit mbH	Lautenschlagerstrasse 21/23 70173 Stuttgart Phone: +49 711 22787-0 Fax: +49 711 22787-22 www.bw-i.de
Berlin Partner für Wirtschaft und Technologie GmbH	Ludwig Erhard Haus Fasanenstrasse 85 10623 Berlin Phone: +49 30 46302-500 www.berlin-partner.de www.berlin-sciences.com www.businesslocationcenter.de
Invest in Bavaria im Bayerischen Staatsministerium für Wirtschaft, Infrastruktur, Verkehr und Technologie	Prinzregentenstrasse 28 80538 Munich Phone: +49 89 2162-2630 Fax: +49 89 2162-2803 www.invest-in-bavaria.com
Invest in Bavaria	Rosenheimer Str. 143C 81671 Munich Phone: +49 89 24210-7500 Fax: +49 89 24210-7557 www.invest-in-bavaria.com
Wirtschaftsförderung Land Brandenburg GmbH (WFBB)	Babelsberger Strasse 21 14473 Potsdam Phone: +49 331 730-6100 Fax: +49 331 730 61-109 www.wfbb.de

Contact	Address
WFB Wirtschaftsförderung Bremen GmbH	Ansgaritorstrasse 11 28195 Bremen Phone: +49 421 9600-10 Fax: +49 421 9600-810 www.wfb-bremen.de
Germany Trade and Invest – Gesellschaft für Außenwirtschaft und Standortmarketing mbH	Friedrichstrasse 60 10117 Berlin Phone: +49 30 200 099-0 Fax: +49 30 200 099-812 www.gtai.com
HIW Hamburg Invest Wirtschafts-förderungsgesellschaft mbH	Wexstrasse 7 20355 Hamburg Phone: +49 40 227019-0 Fax: +49 40 227019-29 www.hamburg-invest.com
HA Hessen Agentur GmbH	Mainzer Str. 118 65189 Wiesbaden Phone: +49 611 950 17-80 www.hessen-agentur.de
Hessen Trade & Invest GmbH (*a subsidiary of Hessen Agentur*)	Mainzer Str. 118 65189 Wiesbaden Phone: +49 611 95017-85 www.htai.de
Invest in Mecklenburg-Vorpommern GmbH	Schlossgartenallee 15 19061 Schwerin Phone: +49 385 592250 Fax: +49 385 5922522 www.invest-in-mv.de
Invest in Niedersachsen – Niedersächsisches Ministerium für Wirtschaft, Arbeit, Verkehr und Digitalisierung	Referat 25 Außenwirtschaft Ansiedlung und Marketing Friedrichswall 1 30159 Hannover Phone: +49 (0)511 120 5578 www.nds.de

Contact	Address
NRW.Global Business GmbH Trade & Investment Agency of the German State of North Rhine-Westphalia (NRW)	Völklinger Strasse 4 40219 Duesseldorf Phone: +49 211 13000-0 Fax: +49 211 13000-154 www.nrwglobalbusiness.com
Investitions- und Strukturbank Rheinland-Pfalz (ISB)	Holzhofstrasse 4 55116 Mainz Phone: +49 6131 6172-0 Fax: +49 6131 6172-1299 www.isb.rlp.de
gwSaar Gesellschaft für Wirtschaftsförderung Saar mbH	Balthasar-Goldstein-Strasse 31 66131 Saarbruecken Phone: +49 6893 9899 600 https://germanys.saarland/
Wirtschaftsförderung Sachsen GmbH (WFS)	Bertolt-Brecht-Allee 22 01309 Dresden Phone: +49 351 2138-0 Fax: +49 351 2138-399 www.wfs.sachsen.de
IMG Investitions- und Marketinggesellschaft Sachsen-Anhalt mbH	Am Alten Theater 6 39104 Magdeburg Phone: +49 391 568 99-0 Fax: +49 391 568 99-50 www.investieren-in-sachsen-anhalt.de
WTSH Wirtschaftsförderung und Technologietransfer Schleswig-Holstein GmbH	Lorentzendamm 24 24103 Kiel Phone: +49 431 66666-0 Fax: +49 431 66666-700 www.wtsh.de
Landesentwicklungsgesellschaft Thüringen mbH (LEG Thüringen)	Mainzerhofstrasse 12 99084 Erfurt Phone: +49 361 5603-0 Fax: +49 361 5603-333 www.leg-thueringen.de

Contact	Address
Invest Region Leipzig GmbH	Markt 9 04109 Leipzig Phone: +49 341 2682 77-70 Fax: +49 341 2682 77-99 www.invest-region-leipzig.de
Bundesverband für Wirtschafts-förderung und Außenwirtschaft Global Economic Network e.V. (BWA)	Kranzler Eck Berlin Kurfürstendamm 22 10719 Berlin Phone: +49 30 700 11 43-0 Fax: +49 30 700 11 43-20 www.bwa-deutschland.com

L. Glossary

I. German laws

An English version of many German laws can be found on: https://www.gesetze-im-internet.de/Teilliste_translations.html

German (incl. abbreviation)	English
Abgabenordnung (AO)	Tax Code
Aktiengesetz (AktG)	Stock Corporation Act
Allgemeines Gleichbehandlungsgesetz (AGG)	General Equal Treatment Act
Arbeitsgerichtsgesetz (ArbGG)	Labour Courts Act
Arbeitsschutzgesetz (ArbSchG)	Occupational Health and Safety Act
Arbeitszeitgesetz (ArbZG)	Working Hours Act
Aufenthaltsgenehmigungsgesetz (AufenthaltsG)	Residence Act
Aufenthaltsgesetz (AufenthG)	Law on the Residence, Economic Activity and Integration of Foreigners in die Federal Territory (Residence Act)
Außensteuergesetz (AStG)	International Tax Relations Act
Außenwirtschaftsgesetz (AWG)	Foreign Trade and Payments Act
Außenwirtschaftsverordnung (AWV)	Foreign Trade and Payments Ordinance
Baugesetzbuch (BauGB)	Federal Building Code

German (incl. abbreviation)	English
Baunutzungsverordnung (BauNVO)	Land Use Ordinance
Berufsbildungsgesetz (BBiG)	Occupational Training Act
Beschäftigungsverordnung (BeschV)	Regulation on the Employment of Foreigners (Employment Regulation)
Betriebsverfassungsgesetz (BetrVG)	Works Council Constitution Act
Bewertungsgesetz (BewG)	Valuation Act
Bundesgesetzblatt (BGBl.)	Federal Law Gazette
Bundesbodenschutzgesetz (BBodSchG)	Federal Soil Protection Act
Bundesurlaubsgesetz (BUrlG)	Federal Holidays Act
Bürgerliches Gesetzbuch (BGB)	Civil Code
Drittelbeteiligungsgesetz (DrittelbG)	One-third Participation Act
Einkommensteuergesetz (EStG)	Income Tax Act
Entgeltfortzahlungsgesetz (EntgFG)	Continued Payment of Wages Act
Erbbaurechtsgesetz (ErbbauRG)	Hereditary Building Right Act
Erbschaftsteuergesetz (ErbStG)	Inheritance Tax Act
Europäische Marktmissbrauchs-verordnung	European Market Abuse Regulation
Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)	Limited Liability Companies Act
Gesetz gegen Wettbewerbs-beschränkungen (GWB)	Act against Restraints of Competition

German (incl. abbreviation)	English
Gesetz über die Kontrolle von Kriegswaffen (KrWaffKontrG)	Control of Military Weapons Act
Gesetz zum Schutz vor Gefährdung der Sicherheit der Bundesrepublik Deutschland durch das Verbreiten von hochwertigen Erdfernerkundungsdaten (SatDSiG)	Satellite Data Security Act
Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)	Law on the Modernisation of the Private Limited Companies Act and the Combating of Misuse
Gewerbeordnung (GewO)	Industrial Code
Grundbuchordnung (GBO)	Land Register Act
Grunderwerbsteuergesetz (GrEStG)	Real Estate Transfer Tax Law
Grundgesetz (GG)	Constitution
Grundsteuergesetz (GrStG)	Real Estate Tax Law
Handelsgesetzbuch (HGB)	Commercial Code
Insolvenzordnung (InsO)	Insolvency Code
Jugendarbeitsschutzgesetz (JarbSchG)	Protection of Young Persons in the Workplace Act
Kapitalanlagegesetzbuch (KAGB)	Investment Code
Konzessionsvergabeverordnung (KonzVgV)	Ordinance on the Award of Concession Contracts
Körperschaftsteuergesetz (KStG)	Corporation Tax Law
Kreditwesengesetz (KWG)	Banking Act

German (incl. abbreviation)	English
Kündigungsschutzgesetz (KSchG)	Protection of Employment Act
Ladenschlussgesetz (LadSchlG)	Shop Closing Times Act
Landesvergabegesetze	Federal state laws of German federal states governing award procedure
Makler- und Bauträgerverordnung (MaBV)	Ordinance on the obligations of agents, loan and investment brokers, investment advisers, developers and building managers
Mindestlohngesetz (MiLoG)	Minimum Wage Act
Mitgestimmungsgesetz (MitbestG)	Co-determination Act
Montanmitbestimmungsergänzungs-gesetz (MontanMitbestGErgG)	Mining and Steel Industry Co-determination Act
Montanmitbestimmungsgesetz (MontanMitbestG)	Mining and Steel Industry Co-determination Act
Mutterschutzgesetz (MuSchG)	Maternity Protection Act
Nachweisgesetz (NachwG)	Proof of Substantial Conditions Applicable to the Employment Relationship Act
Schornsteinfeger-Handwerksgesetz (SchfHwG)	Chimney Sweeping Craft Act
Sektorenverordnung (SektVO)	Ordinance on the Award of Public Contracts in Specific Sectors
Sozialgesetzbuch (SGB)	Social Security Code
Sprecherausschussgesetz (SprAuG)	Executives´ Representative Committee Act

German (incl. abbreviation)	English
Tarifvertragsgesetz (TVG)	Collective Bargaining Act
Teilzeit- und Befristungsgesetz (TzBfG)	Part-time and Limited-term Employment Act
Umsatzsteuergesetz (UStG)	Turnover Tax Act
Umwandlungsgesetz (UmwG)	Reorganisation of Companies Act
Unterschwellenvergabeordnung (UvgO)	Award Procedures below Thresholds
Urheberrechtsgesetz (UrhG)	Law on copyright and related property rights (Copyright Act)
Vergabe- und Vertragsordnung für Bauleistungen – Teil A (VOB/A)	Award Procedures for construction services
Vergabe- und Vertragsordnung für Leistungen – Teil A (VOL/A)	Award Procedures for public supplies and services
Vergabeverordnung (VgV)	Ordinance on the Award of Public Contracts
Vergabeverordnung Verteidigung und Sicherheit (VSVgV)	Ordinance on the Award of Public Contracts in the fields of defence and security
Versicherungsvertragsgesetz (VVG)	Insurance Contract Act
Wohnungseigentumsgesetz (WEG)	Law on Apartments and the Permanent Residential Right
Zivilprozessordnung (ZPO)	Code of Civil Procedure

II. German authorities, courts and institutions

German (incl. abbreviation)	English
Ausländerbehörde	Immigration authority
Bundesagentur für Arbeit	Federal Employment Agency
Bundesanstalt für Finanzdienst-leistungsaufsicht (BaFin)	Federal Financial Supervisory Authority
Bundesarbeitsgericht (BAG)	Federal Labour Court
Bundesanzeiger	Federal Gazette
Bundesgerichtshof (BGH)	Federal Court of Justice
Bundeskartellamt	Federal Cartel Office
Bundesministerium der Justiz und für Verbraucherschutz (BMJV)	Federal Ministry of Justice and Consumer Protection
Bundesministerium für Wirtschaft und Energie (BMWi)	Federal Ministry for Economic Affairs and Energy
Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA)	Confederation of German Employers` Associations
Bundesverfassungsgericht	Constitutional Court
Bürgeramt	Local Residents` Registration Office
Deutscher Gewerkschaftsbund (DGB)	German Trade Union
Einwohnermeldeamt	Local Residents` Registration Office
Frankfurter Börse	Frankfurt Stock Exchange (FSE)
Industrie- und Handelskammer (IHK)	Chamber of Industry and Commerce
Oberlandesgericht	Higher Regional Court
Vergabekammern des Bundes	Federal Public Procurement Tribunal
Vergabekammern der Bundesländer	Public Procurement Tribunal of the federal states
Vereinte Dienstleistungsgewerkschaft (ver.di)	United Service Union

III. German legal terms

German (incl. abbreviation)	English
Abstraktes Schuldanerkenntnis	Abstract acknowledgment
Aktiengesellschaft (AG)	Public limited company
Altlastenkataster	Contaminated Land Survey Register
Arbeitslosenversicherung	Unemployment insurance
Auflassung	Agreement for the conveyance of ownership
Aufsichtsrat	Supervisory board
Auszubildende	Person taken on for occupational training
Außenbereich	Outer zone
Baugenehmigung	Planning permission
Baulast	Obligation to construct and maintain or public easement
Beleihungswert	Lending value
Beschränkte persönliche Dienstbarkeit	Easement in gross
Betriebsrat	Works council
Betriebsstätte	Permanent establishment
Betriebsvereinbarung	Works agreement
Bewertungsrichtlinien	Lending guidelines

German (incl. abbreviation)	English
Börsennotierte Aktiengesellschaft	Listed public limited company
Briefgrundschuld	Certificated land charge
Buchgrundschuld	Uncertificated land charge
Bundesanzeiger (BAnz)	Federal Gazette
Eingetragener Kaufmann (e.K.)	Registered businessman
Einkommensteuer	Income tax
Einzelkaufmann	Sole trader
Erbbaurecht	Hereditary building right
Erbschaftsteuer	Inheritance tax
Erlaubnis zum Daueraufenthalt-EU	EU permit for permanent residence
Ertragswertverfahren	Rental value method
Filiale	Dependent company branch
Flurnummer	Specific title number
Freiverkehr	Open Market
Freiwilliger Aufsichtsrat	Optional supervisory board
Geschäftsführer	Director
Gesellschaft bürgerlichen Rechts (GbR)	Partnership under German civil law
Gesellschafterversammlung	Shareholders’ meeting
Gesellschaft in Gründung (i.G.)	Company being established

German (incl. abbreviation)	English
Gesellschaft mit beschränkter Haftung (GmbH)	Limited liability company
Gewerbesteuer	Trade tax
Grundbuch	Land register
Grunderwerbsteuer	Real estate transfer tax
Grunddienstbarkeit	Easement
Grundschuld	Land charge
Grundschuldbrief	Land charge certificate
Hauptversammlung	General meeting
Hypothek	Mortgage
Innenbereich	Inner zone
Kirchensteuer	Church tax
Kommanditgesellschaft (KG)	Private limited partnership
Körperschaftsteuer	Corporation tax
Krankenversicherung	Health insurance system
Leitende Angestellte	Executive employees
Mitbestimmung	Co-determination
Nebenleistung	Ancillary payment
Niederlassungserlaubnis	Settlement permit
Nießbrauch	Usufruct

German (incl. abbreviation)	English
Offene Handelsgesellschaft (OHG)	General partnership
Pflegeversicherung	Long-term care insurance
Prokura	Power of procuration
Quellensteuer	Withholding tax
Regulierter Markt	Regulated Market
Rentenversicherung	Pension insurance
Sachwertverfahren	Asset value method
Solidaritätszuschlag	Solidarity surcharge
Tarifvertrag	Collective bargaining agreement
Umsatzsteuer (USt)	Value added Tax (VAT)
Unfallversicherung	Accident insurance
Unselbständige Niederlassung	Dependent company branch
Unternehmergesellschaft (oder UG) haftungsbeschränkt	Entrepreneurial company with limited liability
Verkehrswert	Market value
Vormerkung	Priority notice of conveyance
Vorrangprüfung	Priority check
Vorstand	Management board
Zinsen	Interests
Zinsschranke	Earnings stripping rule
Zweigniederlassung	Company branch

IV. Keyword Index

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