



Doing Business in Germany: A Guide for Foreign Investors



FOERSTER+RUTOW®
RECHTSANWÄLTE

IRRERSTRASSE 17 - 19
D-90403 NÜRNBERG
FON +49 (911) 2 35 69 - 00
FAX +49 (911) 2 35 69 - 11
e-mail: fr@fr-lawfirm.de
<http://www.fr-lawfirm.de>



Table of Contents

0.	Abbreviations.....	3
1.	Introduction.....	4
2.	Options Available for Doing Business Alone	4
2.1	Direct Selling a Product into the German Market	4
2.2	Agency and Distribution Agreements.....	5
2.3	Licensing Agreements.....	6
2.4	Branch Office	6
2.5	Wholly Owned Company	7
2.6	Trade Notification.....	7
2.7	Acquisition and Disposal of Real Estate	7
3.	Common Legal Forms Available for Entrepreneurial Activities in Germany.....	7
3.1	Limited Liability Company (<i>Gesellschaft mit beschränkter Haftung, GmbH</i>)	7
3.2	Stock Corporation (<i>Aktiengesellschaft, AG</i>).....	9
3.3	Limited Partnership (<i>Kommanditgesellschaft, KG</i>)	10
3.4	GmbH & Co. KG.....	11
3.5	Limited & Co. KG	12
3.6	European Corporate Law	12
3.7	Cross-Border Mergers.....	13
4.	Currency.....	13
5.	Taxes	13
5.1	General Principles	13
5.2	Tax Considerations for Doing Business in Germany.....	14
6.	Merger & Acquisition	15
6.1	Types of Deals.....	15
6.2	Peculiarities of German Law	16
7.	Merger Control.....	17
8.	Joint Ventures	18
8.1	Legal Concept.....	18
8.2	Contractual Joint Ventures	18
8.3	Equity Joint Ventures	18
9.	German Co-Determination and Employee Representation.....	19
10.	Specific Law Issues of Cross-Border Transactions.....	19
10.1	Applicable Law	19
10.2	Jurisdiction	19
10.3	Arbitration.....	20
11.	Hyperlinks for Investments in Germany.....	21
12.	Coordinates of F+R.....	24
13.	Authors	24



0. Abbreviations

Abbreviation	Definition
AoA	Articles of Association (<i>Satzung</i>)
AG	<i>Aktiengesellschaft</i> (Stock Corporation)
AktG	<i>Aktiengesetz</i> (Stock Corporation Act)
B2B	Business to Business
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)
CISG	United Nations Convention on Contracts for the International Sale of Goods
DIS	German Institution of Arbitration
EC	European Community
EEC	European Economic Community
EJC	European Court of Justice
EU	European Union
GmbH	<i>Gesellschaft mit beschränkter Haftung</i> (Limited Liability Company)
GmbHG	<i>Gesetz betreffend die Gesellschaften mit beschränkter Haftung</i> (Limited Liability Company Act)
GWB	<i>Gesetz gegen Wettbewerbsbeschränkungen</i> (Act Against Restraints of Competition)
HGB	<i>Handelsgesetzbuch</i> (German Commercial Code)
KG	<i>Kommanditgesellschaft</i> (Limited Partnership)
SE	Societas Europaea
Treaty	Treaty Establishing the European Community
UK	United Kingdom
US	United States
ZPO	<i>Zivilprozessordnung</i> (German Civil Procedure Law)



1. Introduction

This guide provides an overview of the main options available to non-Germany businesses (foreign parties) for doing business in Germany and explains the peculiarities of the relevant German and European legislation. Needless to say, due to the variety of options available and the complexity of German and European legislation involved, this guide can by no means substitute legal advice.

As in other free countries, a foreign party can do business in Germany either in stand-alone mode or in co-operation with others.

2. Options Available for Doing Business Alone

A foreign party can do business alone in Germany by:

- selling products (supplies or services) directly into the German market from outside Germany (2.1),
- using agents or distributors to sell products into the German market (2.2),
- entering into licensing arrangements with German based licensees (2.3),
- establishing a branch office in Germany (2.4), or
- establishing a wholly owned company in Germany (2.5).

2.1 Direct Selling a Product into the German Market

2.1.1 Exporting into Germany

If a foreign party has fully developed a complete, marketable product, and is not interested in co-operative production or any other form of commercial relationship with a German partner, the foreign party can simply export its products into the German market.

2.1.2 Safety Laws and Standards

Products brought to the German market must comply with European and German product safety standards. Regarding consumer products, for example, the manufacturer's obligations comprise the provision of sufficient information and warnings to the consumer regarding the safe use of the products. Furthermore, the manufacturer and/or the agent/importer must display its name and address on the product or packaging and underlies comprehensive reporting requirements in a manner similar to the US Consumer Product Safety Commission.



2.1.3 Electronic Commerce

Natural or legal persons offering information or communication services in Germany or to the German market (Service Providers) are subject to the German Telemedia Law (Telemediengesetz, [TMG](#)). The TMG contains several regulations for information and communication services, such as information duties, definitions of provider responsibility, and data protection. Excluded from this regulation are only Service Providers residing in a [Member State of the European Union \(EU\)](#) other than Germany who underlie their [Member State's transmission norms](#) of [Directive 2000/31/EC](#).

2.2 Agency and Distribution Agreements

2.2.1 Agency Agreements

Foreign parties should be aware of the following when entering into an agency agreement with a German party:

According to [Council Directive 86/653/EEC](#)¹ and the German Commercial Code ([HGB](#))², in certain circumstances, a commercial agent is entitled to a post-contractual indemnity on termination of his/her contract.³ The indemnity can be as high as payment for one year's agency fees calculated from the commercial agent's average annual remuneration over the preceding five years. The parties may not contract out of this mandatory indemnity to the detriment of the commercial agent. This specific risk must be taken into account when entering into an agency agreement with a German or European agent for commercial territory in any part of the European Union.

2.2.2 Distribution Agreements

Foreign parties should take note of the following when entering into a distribution agreement with a German party.

Distribution agreements are subject to Article 81 (3) of the [Treaty Establishing the European Community](#). The benefit of the [Block Exemption Regulation \(EC\) No. 2790/1999](#)⁴ may not apply in cases of core restrictions such as – for example – the

¹ [Council Directive 86/653/EEC](#) of December 18, 1986, on the coordination of the laws of the EU Member States relating to self-employed commercial agents

² [§ 89b HGB](#)

³ This is known as a *nachvertraglicher Ausgleichsanspruch*.

⁴ [Block Exemption Regulation \(EC\) No. 2790/1999](#) of December 22, 1999, on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted actions



restriction of a distributor's ability to determine its sales price or certain territorial or other restrictions. Contracts containing provisions that contravene this rule may be made void in whole, which could result in public fines.

2.3 Licensing Agreements

Foreign parties should take note of the following when entering into a licensing agreement with a German party:

Licensing agreements are subject to Article 81 (3) of the [Treaty Establishing the European Community](#). The benefit of the [Block Exemption Regulation \(EC\) No. 772/2004](#)⁵ may not apply in cases of hardcore restrictions such as – for example – a licensee's ability to determine its prices when selling products to third parties or certain output limitations or allocations of markets or customers. Licensing arrangements containing provisions that contravene this rule may be made void in whole, which could result in public fines.

2.4 Branch Office

Any foreign party or company with a seat outside of Germany who exists as a legal person according to the law of its principle place of business is entitled to establish a branch office in Germany. In general, a branch office may use its principal's firm name. However, German law may require that the word "*Zweigniederlassung*" (meaning branch office) be added to the name, at least where there is a risk of confusion.

According to German law, a branch office does not have its own legal personality, but rather remains part of the business and assets of the foreign company's principal establishment. Consequently, a branch office does not enjoy any legal rights and obligations of its own. In general, branch offices do not enjoy an optimum reputation in the business community simply because of this lack of legal personality.

⁵ [Block Exemption Regulation \(EC\) No. 772/2004](#) of April 27, 2004, on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements



2.5 Wholly Owned Company

A foreign party is permitted to establish its own company in Germany. The various corporate legal forms available are defined in the German legislation. The question of which legal form is appropriate in the individual case is dependent on many different factors. (For details, see section 3 below.)

2.6 Trade Notification

The commencement, any change, and termination of established trade activity must be notified to the trade office⁶ responsible for the relevant place of business. This applies to every individual and or company conducting trade regardless of its legal status.

2.7 Acquisition and Disposal of Real Estate

Acquisition and disposal of real estate in Germany always require notarization. No special restrictions for the acquisition or disposal of real estate exist for foreign investors.

3. Common Legal Forms Available for Entrepreneurial Activities in Germany

Various legal forms for business entities are permitted by German law. For the most part, these forms are defined in German statutory regulations, the provisions of which may be departed from to a greater or lesser extent in a contract. The legal form a foreign party chooses for its German-based operations will depend on many factors, such as, but not limited to, functioning, capitalization, liability, accounting issues, and tax considerations.

3.1 Limited Liability Company (*Gesellschaft mit beschränkter Haftung, GmbH*)

German law provides ample potential, flexibility and freedom for tailoring a GmbH to the individual needs of its shareholders. This is why the GmbH is the most common and preferred legal form, especially for small- and medium-sized businesses.

Legal Nature	<ul style="list-style-type: none"> - Company with legal personality. - A GmbH can hold and dispose of rights, can sue and be sued. - Shareholders participate in the company through ownership of shares (known as <i>Geschäftsanteile</i>).
Diagram	<pre> graph LR A["Limited Liability Company (Gesellschaft mit beschränkter Haftung, GmbH)"] --- B["Shareholder (Gesellschafter): no personal liability"] A --- C["Shareholder (Gesellschafter): no personal liability"] </pre>

⁶ municipal or local authority bodies



Legislation	- Limited Liability Companies Act (<i>Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG</i>).
Comparison to legal forms in other jurisdictions	- UK: private limited company. - USA: closely held corporations. - Note: the legal differences go far beyond apparent similarities.
Shareholders	- One or more natural or legal persons.
Formation	- Two steps necessary: (1) formation of the company by conclusion of a notarized agreement embodying the Articles of Association (AoA / <i>Satzung</i>); and, (2) registration of the company in the commercial register (known as <i>Handelsregister</i>). - Time needed for formation: 3-12 weeks; faster registration can be effected by using a "shelf company" (a registered company that has not yet traded).
Pre-GmbH	- The GmbH becomes a legal person only on registration. Transactions entered into by the "Pre-GmbH" (<i>Vor-GmbH</i>) expose the founding shareholders to the risk of being held liable in person for losses of the GmbH prior to registration.
Name	- No restrictions, except to avoid confusion with existing companies. - Must contain a reference to its limited liability by use of the abbreviation "GmbH" at the end of the name.
Object	- Any purpose legally admissible.
Registered Share Capital (<i>Stammkapital</i>)	- Not less than EUR 25,000.00. - Cash contributions and contributions in kind are admissible. - Unless agreed in the AoA or any Shareholders' Agreement, no additional contributions by the shareholders are required.
Mandatory Bodies	- Managing Director(s) - Shareholders' Meeting
Managing Director(s)	- Any person with full legal capacity may be appointed managing director. - The managing director needs not to be a shareholder. - German nationality or residency not necessary. - German law distinguishes between the appointment respectively, the removal of the managing director on the one hand and his service contract (<i>Dienstvertrag</i>) on the other hand. Both issues are dealt with separately by the law. - The managing director may become liable to the company if he fails to apply the standard of "a prudent business person" in his dealings.
Shareholders' Meeting	- Can appoint and remove managing directors. - Adopts annual financial statements. - Appropriates and distributes profits. - Has control over management.
Supervisory Board	- Unless otherwise agreed in the AoA or Shareholders' Agreement, a supervisory board is generally not necessary. - Exceptions apply in German legislation: (1) on co-determination for big companies that regularly employ more than 500 employees; and (2) for investment companies.
Liabilities	- The GmbH's liability is limited to the value of its registered share capital. - GmbH shareholders are not subject to any personal liability or obligations of the company. - Piercing the corporate veil only occurs in rare and exceptional cases (e.g., fraudulent actions).
Accounting	- Obligations defined in the German Commercial Code (<i>Handelsgesetzbuch, HGB</i>).



3.2 Stock Corporation (*Aktiengesellschaft, AG*)

The Stock Corporation Act (*Aktiengesetz*) provides less flexibility. Most of its provisions are mandatory and may only be modified by Articles of Association if this is expressly permitted in the *Aktiengesetz*. Thus, the legal form of the *Aktiengesellschaft* (AG) is normally only used by larger companies.

Legal Nature	<ul style="list-style-type: none"> - Company with legal personality. - AG can hold and dispose of property and rights and can sue and be sued. - Stockholders are not liable to third parties for the acts or omissions of an AG.
Diagram	<pre> graph LR A[Stock Corporation (Aktiengesellschaft, AG)] --- B[Stockholder (Aktionär): no personal liability] A --- C[Stockholder (Aktionär): no personal liability] </pre>
Legislation	<ul style="list-style-type: none"> - Stock Corporation Act (<i>Aktiengesetz, AktG</i>)
Comparison to legal forms in other jurisdictions	<ul style="list-style-type: none"> - UK: public limited company. - USA: stock corporations. - Note: the legal differences go far beyond apparent similarities.
Stockholders	<ul style="list-style-type: none"> - One or more natural or legal persons.
Formation	<ul style="list-style-type: none"> - Notarization of Articles of Association (<i>AoA/Satzung</i>). - Appointment of first supervisory board. - Appointment of statutory auditor. - Appointment of first management board by supervisory board. - Appointment of statutory auditor. - Formation report on contributions. - Audit of the formation procedure by the members of the management board and the supervisory board. - Application to commercial register (<i>Handelsregister</i>) for registration. - Audit of the formation procedure by the members of the management board and the supervisory board. - Registration of the company in the commercial register (<i>Handelsregister</i>).
Pre-Company	<ul style="list-style-type: none"> - The AG only becomes a legal person on registration.
Name	<ul style="list-style-type: none"> - No restrictions, except to avoid confusion with existing companies. - Must contain a reference to its legal form by use of the abbreviation "AG" at the end of the name.
Object	<ul style="list-style-type: none"> - Any purpose legally admissible.
Registered Share Capital	<ul style="list-style-type: none"> - Not less than EUR 50,000.00. - Share capital is divided into shares (<i>Aktien</i>), which either can be par value or non-par value shares. - Cash contributions and contributions in kind are admissible. - Founding stockholders must pay up their contributions prior to application for registration. - In case of cash contributions, at least one-quarter of the lowest issue price of the subscribed stock. - Contributions in kind must be paid up in full.
Corporate Structure	<ul style="list-style-type: none"> - Management Board - Supervisory Board - General Meeting of Stockholders - The three-tiered structure is one of the striking characteristics of the AG.
Management Board	<ul style="list-style-type: none"> - Manages the AG on a day-to-day business and represents the AG in and out of court. - In general, may comprise one or more persons. Exceptions: for companies



	<p>with a registered share capital of more than EUR 3 million, which requires at least two persons unless the AoA expressly states otherwise. In companies with more than 2,000 employees, the requirement is likewise at least two persons, one of whom being the "works director" (<i>Arbeitsdirektor</i>).</p> <ul style="list-style-type: none"> - Members of the Management Board need not be stockholders. - German nationality or residency not necessary – members of the Management Board may become liable to the AG if they fail to apply the standard of "a prudent business person" in their dealings.
Supervisory Board	<ul style="list-style-type: none"> - Is the controlling body of the AG. - Members cannot be members of the Management Board at the same time. - Duties: appointing and removing members of the Management Board, supervising and controlling the Management Board.
General Meeting	<ul style="list-style-type: none"> - Is the meeting in which stockholders exercise their rights. - Appointment and removal of the members of the Supervisory Board. - Appropriation of balance sheet profit. - Formal acceptance (<i>Entlastung</i>) of dealings by members of Management Board and Supervisory Board. - Appointment of auditors. - Amendments to AoA. - Decisions on matters of fundamental importance.
Liabilities	<ul style="list-style-type: none"> - Stockholders are not personally liable for the AG. - Stockholders' duties are limited to paying the contributions owed.
Accounting	<ul style="list-style-type: none"> - Obligations defined in Stock Corporation Law (<i>Aktiengesetz, AktG</i>) and the Commercial Code (<i>Handelsgesetzbuch, HGB</i>).

3.3 Limited Partnership (*Kommanditgesellschaft, KG*)

Legal Nature	<ul style="list-style-type: none"> - KG can, in its own name, acquire property and rights and can enter into obligations, can sue and be sued.
Diagram	
Legislation	<ul style="list-style-type: none"> - Commercial Code (<i>Handelsgesetzbuch, HGB</i>)
Partners	<ul style="list-style-type: none"> - Minimum of two natural or legal persons required: one general partner (<i>Komplementär</i>) with unlimited personal liability and one limited partner (<i>Kommanditist</i>) with its liability limited to its initial contribution (<i>Einlage</i>). - Responsible for the maximum liability amount (<i>Haftsumme</i>) as agreed in the partnership agreement and entered in the commercial registry (<i>Kommanditanteil</i>).
Formation	<ul style="list-style-type: none"> - Two steps necessary: <ol style="list-style-type: none"> (1) forming the KG by conclusion of a partnership agreement (<i>Gesellschaftsvertrag</i>), and (2) registering the KG in the commercial register (<i>Handelsregister</i>).
Name	<ul style="list-style-type: none"> - No restrictions, except to avoid confusion with existing companies. - Must contain a reference to its legal form by use of the abbreviation "KG" at the end of the name.
Object	<ul style="list-style-type: none"> - Any commercial purpose legally admissible.
Registered Share Capital	<ul style="list-style-type: none"> - None. - Limited partner makes an initial contribution (<i>Einlage</i>) as agreed in the partnership agreement.
Management	<ul style="list-style-type: none"> - Vests with general partner. - Limited partner is excluded from managing and representing the KG,



	unless the partnership agreement expressly provides otherwise.
Liabilities	<ul style="list-style-type: none"> - General partner is subject to unlimited liability for the KG. - Limited partner is subject to liability only with respect to its initial contribution (<i>Einlage</i>) in the KG. If the initial contribution has been made and equals the maximum liability amount agreed in the partnership agreement, and entered into the commercial registry (<i>Haftsumme</i>), any personal liability of the limited partner exceeding the maximum amount of liability is excluded.
Accounting	<ul style="list-style-type: none"> - Obligations defined in the German Commercial Code (<i>Handelsgesetzbuch, HGB</i>).

3.4 GmbH & Co. KG

Legal Nature	<ul style="list-style-type: none"> - A GmbH & Co. KG is a special form of a limited partnership (KG), in which a corporation (GmbH) participates as general partner (<i>Komplementär</i>). Thus, a GmbH & Co. KG is a partnership in which no natural person is liable for the KG's obligations. - The main difference between a GmbH & Co. KG and a standard KG is that by introducing a GmbH, which by its status as a legal person only has limited liability <i>per se</i>, as general partner to the KG, the general partner in the GmbH & Co. KG also receives limited liability status as a consequence of the partnership.
Diagram	<pre> graph LR A[GmbH & Co. KG] --- B[GmbH = General Partner (Komplementär): liability limited to GmbH share capital] A --- C[Limited Partner (Kommanditist): liability limited to initial contribution] </pre>
Legislation	<ul style="list-style-type: none"> - Commercial Code (<i>Handelsgesetzbuch, HGB</i>)
Partners	<ul style="list-style-type: none"> - Minimum two or more natural or legal persons.
Formation	<ul style="list-style-type: none"> - Steps necessary: <ol style="list-style-type: none"> (1) formation of the GmbH and (2) formation of the KG by conclusion of a partnership agreement (<i>Gesellschaftsvertrag</i>) and (3) registration of the GmbH and the KG in the commercial register (<i>Handelsregister</i>).
Name	<ul style="list-style-type: none"> - No restrictions, except to avoid confusion with existing companies. - Must contain a reference to its legal form, i.e., the corporate name must contain the abbreviation "GmbH & Co. KG" as a reference to its limitation of liability, because no natural person is personally liable.
Object	<ul style="list-style-type: none"> - Any commercial purpose legally admissible.
Registered Share Capital	<ul style="list-style-type: none"> - None.
Mandatory Bodies	<ul style="list-style-type: none"> - None.
Liabilities	<ul style="list-style-type: none"> - The general partner is subject to unlimited liability for obligations of the KG. However, as the general partner is a GmbH, its liability is generally limited to its registered share capital (see above section 3.1). - The limited partner is subject to liability only with respect to its initial contribution (<i>Einlage</i>) in the KG. If the initial contribution has been made, and equals the maximum liability amount agreed upon in the partnership agreement and entered into the commercial registry (<i>Haftsumme</i>), any personal liability of the limited partner exceeding the maximum amount of liability is excluded.
Accounting	<ul style="list-style-type: none"> - Separate annual financial statements must be prepared for the general partner (GmbH) and the limited partner to the GmbH & Co. KG.



3.5 Limited & Co. KG

A Limited & Co. KG is – comparable to the [GmbH & Co. KG](#) – a special form of a limited partnership (KG) in which a UK-based Limited participates as general partner (*Komplementär*). Within the Limited & Co. KG, no natural person is liable for the KG's obligations. The concept of the Limited & Co. KG is a consequence of developments in European Corporate Law.

3.6 European Corporate Law

3.6.1 Developments Initiated by the European Court of Justice

In the *Überseering* case, the [European Court of Justice \(EJC\)](#) held that foreign-based companies incorporated in other EU member states could migrate to Germany. Further, such foreign-based companies can conduct business activities in Germany; and, while they are fully recognized in Germany, they continue to be subject to the liability regime of their place of incorporation at home. In a further decision (known as "the Inspire-Act"), the EJC stated that forming a company in one particular EU member state for the sole purpose of enjoying favorable incorporation rules is not considered an abuse. On these bases, it is well established that companies incorporated in any EU member state can move freely within the EU, migrate into any other EU member states, and do business there without being restricted by the law of the place of incorporation in any way.

3.6.2 European Public Limited Company (*Societas Europaea, SE*)

Legal Nature	<ul style="list-style-type: none"> - Company with legal personality. - SE can hold and dispose of property and rights and can sue and be sued. - Stockholders are not liable to third parties for acts or omissions of the SE.
Diagram	<pre> graph LR SE[European Public Limited Company (Societas Europaea, SE)] --- SH1[Stockholder (Aktionär): no personal liability] SE --- SH2[Stockholder (Aktionär): no personal liability] </pre>
Legislation	<ul style="list-style-type: none"> - EU Regulation 2157/2001 on the Statute for a European company (SE)
Comparison to legal forms in other jurisdictions	<ul style="list-style-type: none"> - UK: public limited company. - USA: stock corporations. - Note: the legal differences go far beyond apparent similarities.
Stockholders	<ul style="list-style-type: none"> - One or more natural or legal persons.
Modes of Formation	<ul style="list-style-type: none"> - By merger. - Or by formation of a holding SE. - Or by formation of a joint subsidiary SE. - Or by conversion of an existing public limited company (having a subsidiary in another member state),



	- A SE may establish other subsidiary SEs.
Name	- Must contain a reference to its legal form by use of the abbreviation "SE" at the end of the name.
Object	- Any purpose legally admissible.
Registered Share Capital	- Not less than EUR 120,000.00.
Different Options for Corporate Structure	- "German System": Management Board (<i>Vorstand</i>) and Supervisory Board (<i>Aufsichtsrat</i>) and General Meeting of Stockholders. - "UK/US System": Board and General Meeting of Stockholders.
Liabilities	- Stockholders are not subject to any personal liability for the SE. - Stockholders' duties are limited to paying the contributions owed.
Accounting	- According to regulation at seat/place of incorporation.

3.7 Cross-Border Mergers

Cross-Border Mergers are possible based on [EU Directive 2005/56/EG](#) regarding the merger of corporations from different EU member states.

4. Currency

Germany has adopted– together with twelve other countries of the [European Union \(EU\)](#) –the single currency Euro ([Euro Area](#)). In cross-border transactions between German companies and companies residing outside the Euro Area, economical risks due to fluctuating exchange rates should be avoided by currency instruments or specific currency clauses. The [Euro foreign exchange reference rates](#) are published by the [European Central Bank \(ECB\)](#).

5. Taxes

5.1 General Principles

5.1.1 Subjects of Taxation

For tax considerations, it must be distinguished whether the foreign party is an individual or a corporation. A partnership, which is in principle a group of several individuals and/or corporations, is not itself liable for income tax. Only its partners are liable for either personal or corporation income tax.

Individuals and corporations who reside in Germany are subject to German income tax on their worldwide profits (for the prerequisites, see scheme below). Nonresident individuals and corporations are taxed only on the income that has its source in Germany.



5.1.2 Income Tax Rates

The current tax rates are measured in percent of the taxable income (which is in principle the gross income less expenses and other deductibles). In addition, a solidarity surcharge (*Solidaritätszuschlag*) of 5.5% on the amount of the personal or corporation income tax is levied.

person	formal tax rate	real tax rate (including 5.5% surcharge)	prerequisites for taxation in Germany on worldwide profits
individual	subject to individual's income with a rate of 45% maximum	47.475% maximum	<ul style="list-style-type: none"> - maintains a home in Germany, or - is present in Germany during the calendar year for a minimum of 183 days; - citizenship is irrelevant
corporation	25% fixed	26.375% fixed	<ul style="list-style-type: none"> - incorporated in Germany, or - central management and control is in Germany; - place of establishment is irrelevant

5.1.3 Trade Tax

In addition to personal or corporation income tax, the income of a company (regardless of whether the company is formed by an individual, a corporation, or a partnership) is subject to a community trade tax on income levied by the municipal authorities according to the municipality's specific tax rate (*Gewerbesteuer*). As a general rule, the trade tax rate varies between 15 percent (15%) and 20 percent (20%) of the company's income.

5.1.4 Double Tax Treaties

The taxation might be restricted by way of treaties for the avoidance of double taxation (so called double tax treaties – "DTT"). Germany has entered into DTT with approximately ninety other states worldwide ([current status](#)).

5.2 Tax Considerations for Doing Business in Germany

5.2.1 Doing Business Alone by Any of One of the Options in 2.1 – 2.4

As long as the foreign party does not perform its business through establishment of a wholly owned company in Germany (2.5), but by any of the other options (2.1-2.4), the foreign party remains nonresident, being taxed only on the income that has its source in Germany. If, by way of example, a nonresident party sets up a permanent establishment (*Betriebsstätte*) in Germany or participates in a German partnership, the income derived



from this permanent establishment or this participation will be subject to German income tax. The term of a permanent establishment, however, is much wider than the term of a branch office (2.4). A permanent establishment might also be a business office, a warehouse, or a construction site that lasts for more than six (6) months.

5.2.2 Doing Business Alone by Way of Establishing an Own Company in Germany

For tax considerations, it must be distinguished whether the legal form of the company is a corporation or a partnership. There is no general rule whether a corporation or a partnership should be preferred. Detailed information must be left to individual advice on the individual and particular set of circumstances.

Corporations	<ul style="list-style-type: none"> - Limited Liability Company (GmbH, 3.1) - Stock Corporation (AG, 3.2) - European Public Limited Company (SE, 3.6.2) 	<ul style="list-style-type: none"> - Corporation is resident in Germany, thus subject to German taxation on its worldwide profits - Dividends received from the German corporation are tax exempt in Germany, but 5% of the dividend is deemed being nondeductible expenses. This tax exemption also affects trade tax (<i>Gewerbesteuer</i>), but, for trade tax purposes, a minimum participation quota of 10% in the subsidiary has to be fulfilled, and the shares have to be held from the beginning of the fiscal year of the recipient of the dividends.
Partnerships	<ul style="list-style-type: none"> - Limited Partnership (KG, 3.3) - GmbH & Co. KG (3.4) - Limited & Co. KG (3.5) 	<ul style="list-style-type: none"> - Only the partners of the partnership are subject to German income tax. - A foreign party being partner will be subject to German income tax related to its income derived from the partnership.

6. Merger & Acquisition

6.1 Types of Deals

As in many other jurisdictions, German law provides two basic options by which to acquire a company. Foreign parties may purchase either the shares of a company (share deal) or its assets (asset deal).

6.1.1 Share Deal

One issue about share deals, which is specific to Germany, is that – if the target company is set up as a limited liability company (GmbH) – both the purchase and the assignment of the shares will be valid only if executed in a notary deed (see section 6.2.3). Besides this, a share deal will provide a good basis for smooth continuation of the targeted company's' business, because the shift in ownership of shares will not normally



affect the assets, rights, and liabilities of the targeted company except for a change of the control provisions in the targeted company's contracts with third parties.

6.1.2 Asset Deal

An asset purchase agreement must describe the target's assets and liabilities in detail. It is not sufficient merely to describe the targeted company's business in general. Rather, every single item – be it a right, an obligation, or a liability – must be clearly identified and provided for in the asset purchase agreement as well as the transfer agreement (see section 6.2.2). In contrast to a share deal, an asset deal does not require notarization. One exception to this rule is where the asset deal includes real estate or shares in a limited liability company (GmbH). If an entire business is acquired by way of an asset deal, the business' rights and responsibilities according to employment contracts with its employees also pass to the purchaser automatically by operation of the law.

6.2 Peculiarities of German Law

6.2.1 No Statutory Closing Concept

German sellers were traditionally reluctant to disclose information to purchasers, but this has changed. Nowadays, performing due diligence audits is increasingly becoming the standard for M&A transactions in Germany. The same is true for the application of the closing concept in transaction documents, as is customary in US and UK style contracts.

6.2.2 The "Principle of Abstraction"

According to the German Principle of Abstraction (known as *Abstraktionsprinzip*), a purchase agreement only creates the obligation (*kausales Rechtsgeschäft*) to transfer ownership in shares or assets but does not actually transfer such ownership. A second agreement is required for the transfer of ownership itself (*abstraktes Rechtsgeschäft*). This concept necessitates that ownership of any share or asset needs to be transferred by an agreement separate from the purchase agreement. In practice, this second agreement is often contained in the first agreement. However, when applying the closing concept, the parties must be aware that the second agreement (transfer of ownership of shares or assets) will only be effected upon closing and that the requirement of notarization, if any, must be fulfilled.



6.2.3 Requirement of Notarization

A mandatory obligation of notarization applies to purchase agreements for shares in a limited liability company (GmbH). Asset purchase agreements only require notarization if real estate or shares in a limited liability company (GmbH) form part of the assets.

7. Merger Control

Whether a concentration of enterprises is subject to merger control can be a question for either German law, European Community law, or the law of a third country (e.g. US anti-trust law).

German Merger Control⁷ according to [GWB](#) (Act Against Restraints of Competition) will apply to transactions meeting certain turnover thresholds (combined aggregate worldwide group turnover of all participating companies exceeds EUR 500 million; and where the group domestic turnover in Germany of at least of one participating company exceeds EUR 25 million). Further *de minimis* exemptions may apply. German merger control law does not apply if the concentration of enterprises comes under the provision of European law, making it subject to European Community merger control. The principle is known as a "one-stop-shop", meaning that EC merger control law will prevail, as far as it applies, over all EC national merger controls. According to German merger control law, mergers must be pre-notified to the Federal Cartel Office if the parties' turnovers exceed the previously mentioned threshold amounts.

A concentration is exempt from German merger control provisions if the concentration has no effect on the German domestic market; or if the concentration does not reach the aforesaid turnover thresholds; or if an undertaking that is not a controlled undertaking and, in the last business year, had a worldwide turnover of less than EUR 10 million and affiliates itself with another undertaking (*de minimis* clause); or where a market is concerned in which goods or commercial services have been offered for at least five (5) years and that had a sales volume of less than EUR 15 million in the last calendar year (minor market clause).

⁷ according to [GWB](#) (Act Against Restraints of Competition)



To clarify whether a merger control is subject to the German law or the European Merger Regulation, the following five-part test may be useful:

1. Is there a "merger" according to the German Act Against Restraints of Competition?
2. Is there also a "merger" according to the EC Merger Regulation?
3. Is the concentration subject to merger and reporting responsibilities according to the German Act Against Restraints of Competition?
4. Is the concentration also of community-wide relevance according to the EC Merger Regulation?
5. Is creation or strengthening of market domination expected according to the German Act Against Restraints of Competition? Is strengthening of a dominant position expected according to the EC Merger Regulation?

8. Joint Ventures

8.1 Legal Concept

The term "joint venture" does not denote a precise legal concept under German law. The term is used for many different forms and structures encompassing all sorts of:

- co-operative endeavors, such as, but not limited to, joint research and development or joint marketing activities,
- teaming agreements or other associations of two or more parties for the completion of one or more projects (*Arbeitsgemeinschaften, Konsortien*), or
- corporate vehicles of greater permanence.

Customarily, contractual and equity joint ventures are distinguished despite the fact that the line between the two is not absolutely strict. This is because the nature of joint venture projects varies considerably in practice.

8.2 Contractual Joint Ventures

Contractual joint ventures are those that are not primarily aimed at the formation of a corporate vehicle of greater permanence but remain unincorporated. Such joint ventures are regularly based on pure contractual relationships, lacking a separate legal identity.

8.3 Equity Joint Ventures

In contrast, equity joint ventures are aimed at forming a corporate vehicle with a distinct legal identity. In such cases, the joint venture agreement will not only normally consist of a joint venture agreement, but also the incorporation of a legal identity that is separate from the parties to the joint venture.



9. German Co-Determination and Employee Representation

German corporate and labor law⁸ provides for employee representation and co-determination in companies with more than 500 or 2,000 employees respectively. Co-determination effectively means that a share (either one-third or one-half) of the supervisory board's members is elected by the company's employees themselves.

10. Specific Law Issues of Cross-Border Transactions

10.1 Applicable Law

In Germany, parties are free to choose the substantive law in their contracts⁹. If no choice is made, the substantive law will be determined according to the principles of conflict of laws¹⁰. Regularly, this is the law of the place that has the closest relationship to the contract. This legal situation leads to different results for various types of contracts, e.g., for international sales contracts, agency, distribution, or licensing agreements.

To avoid uncertainties and difficulties about the substantive law, it is therefore highly recommended to make a choice in the contract. If the parties stipulate German law, the United Nations Convention on Contracts for the International Sale of Goods (CISG) will apply to cross-border sales contracts between parties whose places of business are in different states. As of April 1, 2007, seventy states have ratified the CISG ([current status](#)). If parties do not want the CISG to apply, they must expressly opt out in the contract.

Just as important as the choice of the applicable law is the choice of jurisdiction, especially in cross-border transactions.

10.2 Jurisdiction

In principle, German Civil Procedure Law¹¹ provides that the defendant's place or seat will determine the jurisdiction of the ordinary court. In B2B¹² transactions, parties are free to choose the place of jurisdiction. To avoid expensive and time-consuming expert

⁸ Works Council Constitution Act (*Betriebsverfassungsgesetz*)
Workers' Co-Determination Act (*Mitbestimmungsgesetz*)
Coal and Steel Industry Co-Determination Act (*Montanmitbestimmungsgesetz*)

⁹ There are some exceptions in civil and commercial law, e.g., concerning contracts with consumers.

¹⁰ In Germany, this is the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (EGBGB).

¹¹ *Zivilprozessordnung* (ZPO)



opinions on foreign law, the country of the place of jurisdiction of the ordinary court should always harmonize with the country of the applicable law. The best solution in cross-border transactions is the exclusion of the ordinary jurisdiction of the courts by choosing arbitration instead.

10.3 Arbitration

Choosing arbitration as a mean of settling disputes has many advantages, such as the possibility of the parties to select arbitrators, the neutrality, independence, and competence of arbitrators, the flexibility of arbitral proceedings, choice of language, confidentiality, the high acceptance of arbitral awards by the parties, and the international enforceability of arbitral awards. Contrary to decisions by ordinary courts, the international enforceability is guaranteed by the widely recognized¹³ New York Convention¹⁴,

In an arbitration agreement, parties should at least agree upon the seat of arbitration, the numbers of arbitrators, the language of the arbitral proceedings, and the arbitration rules to be applied. Parties are free to choose any seat of arbitration. If parties agree on Germany as the seat of arbitration, the German procedural law¹⁵ will apply. Like many other countries, Germany has adopted the UNCITRAL Model Law on International Commercial Arbitration. Therefore, when choosing Germany as the seat of arbitration, proceedings are guaranteed according to internationally acknowledged procedural rules.

If the parties decide to have the arbitration proceedings administered by an arbitration institution, the parties may use the German Institution of Arbitration (DIS)¹⁶, regardless of the chosen seat of arbitration. For national and international arbitration proceedings, the DIS offers an administrated arbitral procedure according to the DIS Arbitration Rules.

¹² Business to Business

¹³ 142 members as per April 1, 2007

¹⁴ "Convention on the Recognition and Enforcement of Foreign Arbitral Awards"

¹⁵ §§ 1025 ff. ZPO

¹⁶ [Deutsche Institution für Schiedsgerichtsbarkeit \(DIS\)](#)



11. Hyperlinks for Investments in Germany

Organization	Function	Link
Umbrella organizations of the Trade		
BDI Bundesverband der Deutschen Industrie	Umbrella Organization of Trade and Industry Associations	http://www.bdi-online.de
DIHT Deutscher Industrie und Handelskammertag	Central Organization of German Chambers of Industry and Commerce	http://www.diht.de
Bundesverband des Deutschen Groß- und Außenhandels (BGA)	Federation of German Wholesale and Foreign Trade	http://www.bga.de
Federations of industries		
VDA Verband der Automobilindustrie	The German Association of the Automotive Industry	http://www.vda.de
Bund Deutscher Architekten (BDA)	Association of German Architects	http://www.bda-architekten.de
Hauptverband der Deutschen Bauindustrie	Federation of German Construction Industry	http://www.bauindustrie.de
Zentralverband Deutsches Baugewerbe (ZDB)	Central Federation of the German Building Trade	http://www.zdb.de/
Vereinigung Bergbau und Rohstoffe (VRB)	German Association for Raw Materials and Mining	http://www.v-r-b.de
Verband der Chemischen Industrie (VCI)	German Chemical Industries Association	http://www.vcide
Bundesverband der Pharmazeutischen Industrie (BPI)	German Pharmaceutical Manufacturers Association	http://www.bpi.de
ZVEI-Fachverband Kommunikationstechnik	German Association of the Communications Technology Manufacturers	http://www.zvei.de
Bundesverband Informationswirtschaft Telekommunikation und neue Medien (BITKOM)	German Association for Information Technology, Telecommunications, and New Media	http://www.bitkom.org/
Verband Deutscher Maschinen- und Anlagenbau (VDMA)	German Machinery and Plant Construction Association	http://www.vdma.de
Verband für Schiffbau und Meerestechnik (VSM)	German Shipbuilding and Ocean Industries Association	http://www.vsm.de/
Deutscher Boots- und Schiffbauer-Verband (DBSV)	Association of German Boat and Shipbuilders	http://www.dbsv.de/
Bundesverband der Deutschen Luft- und Raumfahrtindustrie (BDLI)	German Aerospace Industries Association	http://www.bdli.de
Deutscher Industrieverband für optische, medizinische und mechatronische Technologien (SPECTARIS)	German Industry Association for Optical, Medical, and Mechatronical Technologies	http://www.feinoptik.de
Mineralölwirtschaftsverband (MWV)	Association of the German Petroleum Industry	http://www.mwv.de/
Wirtschaftsvereinigung Stahl (WV Stahl) / Stahlinstitut VDEh	German Association of Steel Industries	http://www.stahl-online.de
Deutscher Giessereiverband (DGV)	German Foundry Industry Association	http://www.dgv.de



Organization	Function	Link
Bundesverband Solarwirtschaft (BSW)	Solar Energy Industry Association	http://www.solarwirtschaft.de
Wirtschaftsverband Stahlbau und Energietechnik (SET)	German Association of Structural Steel and Power Engineering	http://www.set-online.de/
Gesamtverband Kunststoff-verarbeitende Industrie (GKV)	German Association of Plastics Processing Industries	http://www.gkv.de
Hauptverband der Deutschen Holz und Kunststoffe verarbeitenden Industrie und verwandter Industriezweige (HDH)	Association of the German Woodworking, Plastic, and Similar Industries	http://www.hdh-ev.de
Hauptverband Papier.- und Kunststoffverarbeitung (HPV)	German Association of Paper and Plastics Processing	http://www.hpv-ev.org
Bundesverband Druck und Medien (BVDM)	German Printers and Media Federation	http://www.bvdm.org
Verband der Keramischen Industrie	Association of the German Ceramic Industry	http://www.keramverband.de
Bundesverband Glasindustrie (BV Glas)	German Glass Association	http://www.bvglas.de/
GermanFashion Modeverband Deutschland	German Fashion and Clothing Industry Association	http://www.germanfashion.net
Gesamtverband der deutschen Textil- und Modeindustrie (textil+mode)	German Textile and Fashion Industry Association	http://www.gesamttextil.de
Verband der Deutschen Lederindustrie (VDL)	German Leather Federation	http://www.vdl-web.de
Hauptverband der Deutschen Schuhindustrie (HDS)	German Shoe Industry Association	http://www.hds-schuh.de/
Bundesverband der Deutschen Sportartikelindustrie (BSI)	National Federation of the German Sports Goods Industry	http://www.bsi-ev.de
Deutscher Verband der Spielwaren-Industrie	German Toy Industry Association	http://www.toy.de
Bundesverband der Deutschen Musikinstrumenten-Hersteller (BdMH)	National Association of German Musical Instrument Manufacturers	http://www.musikinstrumente.org/
Bundesvereinigung der Deutschen Ernährungsindustrie (BVE)	German Food and Drink Industry Association	http://www.bve-online.de
Bundesverband der Deutschen Süßwarenindustrie (BDSI)	German Confectionery Industry Association	http://www.bdsi.de
Deutscher Brauer-Bund	Association of German Brewers	http://www.brauer-bund.de
Bundesverband der Deutschen Spirituosen-Industrie und -Importeure (BSI)	German Spirits Industry and Spirit Importers Association	http://www.spirituosen-verband.de
Verband der Cigarettenindustrie (VdC)	German Cigarette Industry Association	http://www.vdc-berlin.de/
Immobilienverband Deutschland (IVD)	Association of the German Real Estate Agents and Managers	http://www.ivd.net/
Bundesverband deutscher Banken (Bankenverband)	Association of German Banks	http://www.bdb.de
Deutscher Sparkassen- und Giroverband (DSGV)	German Savings Banks Association	http://www.dsgv.de



Organization	Function	Link
Deutscher Bauernverband (DBV)	Association of German Farmers	http://www.bauernverband.de
Trade Fair Associations		
Ausstellungs- und Messe-Ausschuss der Deutschen Wirtschaft (AUMA)	Association of the German Trade Fair Industry	http://www.auma.de
Associations for the Promotion of Economic Development		
Invest in Germany GmbH	Information and Services for International Investors	http://www.iic.de
Gesellschaft für internationale wirtschaftliche Zusammenarbeit Baden-Württemberg mbH – GWZ	Baden-Württemberg International	www.bw-i.de
Bayerisches Staatsministerium für Wirtschaft, Verkehr und Technologie	Bavarian Ministry for Economic Affairs, Transport, and Technology	http://www.stmwvt.bayern.de
Bayern International – Bayerische Gesellschaft für Internationale Wirtschaftsbeziehungen mbH	Bavarian Bureau for International Business Relations	http://www.bayern-international.de
Berlin Partner GmbH	Berlin Economic Development Corporation	http://www.berlin-partner.de/
Zukunftsagentur Brandenburg	Brandenburg Economic Development Corporation	http://www.zab-brandenburg.de/
BIG Bremen	Foreign Economic Development Corporation of the State of Bremen	http://www.big-bremen.de
HWF Hamburgische Gesellschaft für Wirtschaftsförderung mbH	Hamburg Business Development Corporation	http://www.hamburg-economy.de
Hessen Agentur	Economic Development Agency Hessen	http://www.hessen-agentur.de
Gesellschaft für Wirtschaftsförderung Mecklenburg-Vorpommern mbH	Economic Development Corporation Mecklenburg-Vorpommern	http://www.gfw-mv.de
Investment Promotion Agency Niedersachsen (IPA)-	Investment Promotion Agency Lower Saxony	http://www.ipa-niedersachsen.de
NRW.Invest GmbH	Agency for Investment Projects in Nordrhein-Westfalen (NRW)	http://www.nrwinvest.com
Investitions- und Strukturbank Rheinland-Pfalz (ISB) GmbH	Investment and Economic Structure Bank of Rheinland-Pfalz	http://www.isb.rlp.de
Gesellschaft für Wirtschaftsförderung Saar mbg (gwSaar)	Saarland Economic Promotion Corporation	http://www.gwsaar.de
Wirtschaftsförderung Sachsen GmbH	Saxony Economic Development Corporation	http://www.wfs.sachsen.de/
IMG Investitions- und Marketing-gesellschaft Sachsen-Anhalt mbH	Association for the Promotion of Economic Development for the Land of Saxony-Anhalt	http://www.img-sachsen-anhalt.de/
Wirtschaftsförderung und Technologietransfer Schleswig-Holstein GmbH (WTSH)	Business Development and Technology Transfer Corporation of Schleswig-Holstein	http://www.wtsh.de
Landesentwicklungsgesellschaft Thüringen mbH (LEG Thüringen)	State Development Corporation Thüringen	http://leg.thueringen.de



Organization	Function	Link
Foreign Chambers of Commerce		
Deutsche Auslandshandelskammern (AHK)	German Chambers of Commerce Abroad	http://www.ahk.de
Embassies		
German Embassies	German Embassies	http://www.auswaertiges-amt.de

12. Coordinates of F+R

The information contained in this guide is not intended to constitute legal advice on a particular set of circumstances.

If you would like to receive further information on the above topic as it relates to your business, please contact the authors at:

FOERSTER+RUTOW Rechtsanwälte
Irrerstr. 17-19, 90403 Nuremberg, Germany
phone: +49 / 911 / 2356900
fax: +49 / 911 / 2356911
e-mail: fr@fr-lawfirm.de
website: www.fr-lawfirm.de

13. Authors

- [Klaus Rutow](#)
- [Dr. Dirk Lange](#)
- [Annette Lionnet](#)
- [Michael Wagner](#)