



# DOING BUSINESS IN *Germany*

## TIEFENBACHER

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## Business Structures:

What types of business structures are permitted?

German law offers a broad variety of different legal forms for running a business. Main types of business structures are:

- Stock corporation (AG)
- Limited liability company (GmbH)
- General partnership (OHG)
- Limited partnership (KG)
- Limited partnership with a limited liability company as general partner (GmbH & Co. KG)
- Branch

The GmbH is by far the most chosen legal form by foreign investors doing business in Germany. One reason for this is the fact that the German law provides great potential, flexibility and freedom for adapting a GmbH to the individual needs of its shareholders. Also the legal requirements to form a GmbH are easier to meet compared to the AG. Therefore, the GmbH is especially suitable for small- and medium-sized businesses. On the downside GmbH shares cannot be traded on a stock exchange like AG shares, because the agreement to transfer a GmbH share must be notarized. On this account the AG is the legal form to choose to gather financial capital from the public.

Partnerships are even more flexible than the GmbH and the legal requirements and duties are also easier to meet, but they have only partial legal capacity and all or at least one shareholder must be liable without limit.

Carrying on business in Germany by registering as a branch is especially suitable for companies which are not sure yet about the sustainability of their commitment in Germany. The branch has to be registered with the commercial register and the trade office.

Joint Ventures are very common in Germany, but they can only be formed by choosing one of the usual legal forms the German law offers. There is no special regulation. Trusts also do not exist as an own legal form in Germany. They have to be created by using the general German civil law and usually are not recommendable for running a business. **Further less commonly used or for foreign investors less recommendable business structures are e.g:**

- Partnership under civil law (GbR)
- Partnership limited by shares (KGaA)
- European stock corporation (SE)
- Mini-limited liability company (UG)
- Sole trader

The structure of the SE is quite similar to an AG. But every SE in Germany must have a link to at least two member states of the European Union. As a result, sheer German business operations cannot be carried out through an SE.

The UG is not an own legal form of a company, but a sub-type of the GmbH, which can be formed without meeting the minimum capital requirement of 25,000 Euro. It is possible to form an UG and then gradually expand it to a normal GmbH.

Due to the freedom of establishment, foreign companies from the EU can be seated and do business in Germany. The same applies to

companies from the EEA (European Economic Area: EU + Iceland, Liechtenstein and Norway) and to US companies due to a Treaty between Germany and the USA.

**Taxation:** Briefly explain the country's tax regime including rates and how rates differ based on business structures.

Germany does not provide one consistent nationwide tax rate for all companies. Instead, the law distinguishes between corporations (such as the GmbH and AG), which are subject to **corporate** income tax (Körperschaftsteuer) and partnerships, which's shareholders are subject to **personal** income tax (Einkommenssteuer). Both of these taxes are levied by the German government. In addition, almost every German business operation is subject to trade tax (Gewerbesteuer). This tax is levied by local municipals such as the city where the company is based.

**Corporate income tax (including additional Solidarity Surcharge):** The corporate income tax is a flat tax rate at 15.825% and applicable to the taxable income of the corporation, if the company is based in Germany or has an executive board in Germany.

**Personal income tax:** Currently, the Personal Income Tax adds up to 14% (2017) for an annual income exceeding the tax-free allowance of 8,820 Euro. The tax rate is rising progressively to 42% for a taxable income of 54,058 Euro. Furthermore a tax rate of 45% is applicable in excess of earnings of 256,304 Euro per year (these are so-called limit tax rates). In addition, the Solidarity Surcharge which amounts to 5.5% of the individual income tax rate of every partner is added to Personal Income Tax (This means if an individual income rate is 30% the total amount of tax will be 31.65% of the individual income). Income from capital assets is taxed at a standard tax rate of 25 % (plus solidarity surcharge). The Trade Tax has to be paid by all business operations in Germany regardless of their legal form. Due to the fact that the Trade Tax Rate is set by local authorities it can vary from one German location to another. However, the Trade Tax Rate generally varies between 7 and 17.15%. Nevertheless, partnerships have an annual tax free allowance for trade tax of 24,500 Euro. The Solidarity Surcharge is not added to the Trade Tax Rate. In addition, trade tax paid by natural persons (such as shareholders of partnerships) can partly be credited towards the personal income tax (limited to a trade tax rate of 13.3%).

**The VAT tax rates are:**

- General rate of 19%
- Reduced rate of 7% applicable, among others, to hotel and entertainment services and a range of goods listed in the VAT Act such as basic food.

**Immigration:** Summarize immigration laws, including visas available for foreign employees.

**EU/EEA Citizens and Switzerland:** Due to the EU rules on the free movement of workers, citizens of EU Member States as well as those of the EEA (European Economic Area: EU + Iceland, Liechtenstein and Norway) have the unlimited right to live and work in Germany without any kind of visa or other permit. Nevertheless, just like German nationals every new citizen must register with the residents' registration office within 3 months. Swiss nationals also enjoy freedom of movement within the EU, but must apply for a special, purely declaratory, residence permit Switzerland.

**Non-EU/EEA Citizens (including US Citizens):** As a rule, all citizens of “third countries” require visas to enter Germany. For stays no longer than 3 months that do not lead to gainful employment citizens of certain countries (e.g. US Citizens) do not need a visa. The list is available at: <https://www.auswaertiges-amt.de/en/einreiseundaufenthalt/-/231148> For stays of more than 3 months or stays leading to gainful employment, all citizens of “third countries” require a German residence permit. This permit to stay in Germany for longer than 3 months as a citizen of a “third country” is called “residence title”. For the right to work in Germany a special residence title for the purpose of employment is required. In order to obtain a residence title, employees need first and foremost to satisfy some general preconditions, as having a valid passport. The purpose of the intended stay and the grade of professional training then determine exactly which residence title an employee qualifies for. In this respect, residence titles for the purpose of employment are divided into the following categories:

- Qualified professionals
- Highly-qualified workers
- Researchers
- Self-employed persons
- Job-seekers
- Intra-corporate transfer
- The EU Blue Card

**UK Citizens after Brexit:** With regard to the Brexit, there is still no final agreement between the EU and the UK. According to a memo from the EU Commission of 12 December 2017, it is planned that UK Citizens who reside legally (temporarily or permanently) in the EU at the time of UK leaving the EU shall retain the right to live and work there after Brexit. The same shall apply vice versa. In addition, there shall be the right in both directions to apply for a permanent residence permit after 5 years of permanent legal residence. All in all, however, there is still great legal uncertainty regarding Brexit and many questions remain unanswered.

**Foreign Investment Review and Issues:** Does the government review and approve foreign investments? What factors are considered?

Foreign investment in Germany is basically free. However, aside from the usual restrictions (e.g. competition law) the Federal Ministry for Economic Affairs and Energy (BMWi) may review the acquisition of domestic companies by foreign buyers in individual cases with respect to threats to national security. Legal basis for this is the Foreign Trade and Payments Act (AWG). This foreign investment review procedure applies to all sectors regardless of the size of the companies involved in the acquisition. Special rules apply to the acquisitions of certain defence and IT security companies. Any acquisition of a company by investors located outside the territory of the EU or the EFTA region whereby investors acquire ownership of at least 25% of the voting rights of a company resident in Germany can be subjected to such review. Under certain circumstances, purchasers from the EU can be reviewed as well. Acquirers of companies which operate certain critical infrastructures in Germany have to notify the acquisition to the BMWi.

**Dealing with the Government:** Identify major issues when dealing with local and federal governments.

No issues should be expected when dealing with the federal or local governments. The German authorities work reliably and usually show an interest in finding a working compromise in difficult approval cases. Please note that in Germany there is a detailed procurement law stated in various regulations. Its purpose is to ensure a fair awarding process and prevent corruption when awarding public contracts.

**Dispute Resolution and Court Systems:** Summarize the court system, including the use of juries and arbitration.

Germany has a civil law system. Past legal precedents or judicial rulings are used only to fill in gaps in the codified law. Judicial decisions are never made by juries but always by judges. The jurisdiction of an arbitral tribunal is often agreed among the parties in large or cross-border transactions. A so-called ordinary judicial branch, consisting of four levels up to the Bundesgerichtshof, focuses on civil and criminal cases. Additionally, there are separate judicial branches for administrative, labour, finance and social security issues each with their own hierarchies. In addition to that, Germany has a Federal Constitutional Court (Bundesverfassungsgericht), responsible for constitutional matters, with power of judicial review. For all matters pertaining to EU law, the European Court of Justice decides as the highest authority.

**Foreign Corrupt Practices:** What are the anti-corruption, anti-bribery and economic sanction laws which impact doing business in the country?

The German Criminal Code (StGB) defines Money Laundering, bribery and corruption on the public sector as well as on the private sector as criminal offenses. In June 2017, a new transparency register was introduced to combat money laundering and terrorist financing. The register is under certain preconditions available to everyone. Nearly all companies registered in Germany must now provide information about their "beneficial owners". As such, only the deciding natural persons can be recognized and never a company. An important exception is that companies that are listed on a stock exchange are exempted. According to the German Civil Code (BGB), civil law contracts may be ineffective due to a violation of a prohibition law or due to violation of moral principles. In this context, also claims for damages can arise according to Sec. 823 et seqq. BGB.

**Types of transaction:** How may businesses combine?

The most common types of business combinations are:

- Purchase of shares or assets
- Mergers, split-ups, spin-offs, contributions of shares or assets
- Sale of business units within insolvency proceedings
- Cooperation agreements such as joint ventures
- Takeover bids in listed companies to acquire control
- Cross-border transactions

**Competition Law:** How do laws impact competition?

Both German and EU law prohibit anticompetitive agreements (anticompetitive coordinated business acting of two or more companies) and abuse of market power. In the event of violations, the competition authorities can intervene and competitors can claim injunctive relief or financial compensation. Furthermore regarding business combinations there is a German and a European merger control. Above certain thresholds, transactions must be reported to the relevant competition authority to check for risks to competition. Additionally there is a law against unfair commercial practices (UWG), which may give rise to claims for damages.

**Employment Relations:** Briefly summarize major laws impacting employment and employee relations.

German labour law still lacks a unitary code covering all regulations of individual and collective employment law. Instead, there exists a complex system of various legal rules regulating dependent employment. The German Civil Code (BGB) contains general rules for labour and employment relationships, which are complemented and specified by further codes, e.g.:

- Employment Protection Act
- Minimum Wage Act
- General Equal Treatment Act
- Maternity Protection Act
- Part-Time and Limited Term Employment Act
- Federal Paid Leave Act

As Germany is a member of the EU, labour law is strongly influenced by EU

legislation and case law as well. Labour disputes are settled in front of a labour court. This legal framework is completed by numerous collective agreements and works agreements.

**Statutes and regulations:**  
What are the main laws and regulations governing business combinations?

In Germany, the purchase of shares, assets or complete companies is not codified in a special law. The general rules for sale and purchase in Sec. 433 et seqq. of the German Civil Code (BGB) apply. But this regulation is non-mandatory, so as a rule, the parties are free to create and stipulate their own sale and purchase agreement. However, in some cases the SPA has to be notarized, e.g. if a share of a limited liability company (GmbH) or real estate shall be transferred. Notwithstanding this contractual level, for the performance of company transformations there is an own mandatory Transformation Act (UmwG), which applies to mergers, split-ups, spin-offs and changes of legal form of companies seated in Germany. The Securities Acquisition and Takeover Act (WpÜG) states rules for a fair procedure in the acquisition of shares and public takeovers. It contains regulations for three different kinds of tender offers:

- General rules for the acquisition of shares (mainly publication duties and formal requirements)
- Additional special rules for takeover offers
- After gaining control over a target company: Possible obligation to publish and submit a tender offer

**Governing Law:** What law typically governs the transaction agreements?

Share purchase agreements can be governed by the law chosen discretionary by the parties. However, even if the transaction agreements are governed under a foreign law, the transfer of shares of a German company must comply with the formalities under German law, as notarization in case of transferring a share of a limited liability company (GmbH). Other mandatory form or process regulations apply, among others, to corporate reorganisations, contributions of assets, mergers, spin-offs, transactions involving securities of listed companies or to the acquisition of business units or assets during insolvency proceedings.

**Filings & Fees:**  
Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees payable in connection with a business combination?

Except for some special business sectors, business combinations do not require filings with any authority in Germany. Indeed, the most common requirement to file documents with authorities and to pay fees arises in Germany in context of business combinations due to the often necessary notarization. Such is required e.g. if a share of a limited liability company (GmbH) or real estate shall be transferred within a SPA or if a transformation shall be carried out in accordance with the German Transformation Act. In addition, documents must often be filed with the commercial register to take effect.

**Information to be Disclosed:**  
What information must be made public in a business combination? Does this depend on the structure used?

Share and asset deals of privately held companies do not generally require public disclosure. Although, pursuant to Art. 17 of the EU Market Abuse Regulation (MAR) listed companies must disclose immediately any information that is likely to have an impact on the stock price of the shares or on the decision of an investor to buy or sell shares. Furthermore, the Securities Acquisition and Takeover Act (WpÜG) states that tender offers on the acquisition of shares of listed companies must be published as soon as a formal decision has been made by the board of the bidding company provided that the financing of the offer has been committed.

**Disclosure of substantial shareholdings:** What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The acquisition of voting rights in a German listed company results in notification and disclosure obligations in the event of exceeding or falling below certain thresholds. The notifications must be made immediately to the issuer of the securities and the Federal Financial Supervisory Authority (BaFin) and must also be published. The thresholds are 3, 5, 10, 15, 20, 25, 30, 50 and 75% of the voting rights. The thresholds can be exceeded by holding own shares or by acting in concert with others. If the 10% threshold is exceeded, the buyer must also communicate his strategic goals with regard to the purchase to the issuer of the shares. Similar but much less strict duties apply to the acquisition of shares of a non-listed stock corporation (AG) seated in Germany. Sec. 35 of the Securities Acquisition and Takeover Act (WpÜG) states that shareholders under certain conditions have to publish and submit a takeover bid for 100% of the company. This especially applies, if a shareholder individually or acting in concert with others acquires 30% of a listed company's voting rights, because Sec. 29 WpÜG defines exceeding the 30% threshold as the acquisition of control.

**Duties of directors and controlling shareholders:** What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors' duties include diligent administration, faithful defence of corporate interests, loyalty and confidentiality. The general duty includes specific provisions regarding the misuse of an influential position and insider trading information, to prevent conflicts of interests and maintain the secrecy of all confidential information. Additionally, the management has to inform the supervisory board about the conduct of business. Directors can only be released from liability under certain conditions, e.g. by proving that he or she did not participate in the adoption of the relevant harmful resolution and was unaware of it. Controlling shareholders have no duties under German law in connection with a business combination other than not abusing their majority position to the detriment of the minority shareholders.

**Approval and appraisal rights:** What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Regarding the German stock corporation (AG), extensive judicial case law exists with respect to the circumstances under which resolutions of the executive board with far-reaching consequences must be confirmed by a resolution of the general meeting. Therefore in case of major transactions, it is always necessary to check whether the general meeting must approve the board decision. In the limited liability company (GmbH), the shareholder meeting finally makes all major decisions. It is authorized to give instructions to the management about all business activities. However, this internal distribution of power may be changed almost arbitrarily in the articles of association. The same applies to the partnerships OHG and KG. Appraisal rights of the shareholders may be agreed in the articles of association, but are not prescribed by law.

**Hostile transactions:** What are the special considerations for unsolicited transactions?

Germany has implemented the European Takeover Directive 2004/25/EC taking on the passivity or neutrality rule and the breakthrough rule, squeeze-out and sell-out rights. Prior mandatory approval from the shareholder meeting is required for directors and managers to take actions designed to prevent the success of an unsolicited offer, except for searching competing bids ("white knights"). In addition, the target company's board of directors must issue a report on the takeover bid, stating whether or not they support it, which will certainly influence the target's shareholders.

**Break-up fees – frustration of additional bidders:** Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

As a rule, in German law break-up fees can be agreed without any formal requirements in a Letter of Intent. This even applies if the business transaction agreement later has to be notarized. However, a notarization of the Letter of Intent itself may be necessary if, due to the agreed break-up fee clause, an indirect economic compulsion arises to conclude the transaction agreement that demands notarization. On the contrary a simple cost reimbursement clause is usually legally effective without notarization. In case of the acquisition of shares of a listed company, the options to protect the deal from third-party bidders are limited. Shareholders of the target company who have accepted a purchase offer can withdraw from the contract until the expiration of the acceptance period if there is another offer.

**Government influence:** Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In Germany, there is no reason to worry that the government or other authorities interfere in business combinations outside the usual respective regulations. So, apart from competition law and some rules for special sectors the authorities have only one legal instrument to affect business combinations, the foreign investment review according to the Foreign Trade and Payments Act (AWG) and its accompanying ordinance (AWV) (see section Foreign Investment Review and Issues). The Securities Acquisition and Takeover Act (WpÜG) states rules for a fair procedure in the acquisition of shares and public takeovers but does not give any government the possibility to review an investment directly.

**Conditional offers:** What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In private company acquisitions and business combinations the parties are free to insert any conditions they deem suitable including financing or approval by the competition authorities. Mandatory tender offers involving listed companies cannot be subject to conditions except from regulatory approvals. As a rule, financing cannot be conditional on a tender offer in a listed company, since it needs to contain guarantees of the fulfilment of the obligations derived from the offer.

**Financing:** If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In a private business combination, the parties involved are free to stipulate financing clauses at their own discretion. There is neither a typical obligation of the seller to assist in the purchaser's financing nor that the purchaser has to disclose his source of financing to the seller. Usually the purchaser negotiates and concludes the financing contract simultaneously to the transaction contract, but in independent documents. For tender offers on shares of listed companies Sec. 13 WpÜG states that before publishing the offer document, the bidder must take the necessary measures to ensure the financing. Additionally, an independent financial services company must confirm in writing that the bidder has ensured the financing.

**Minority squeeze-out:** May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

German law offers three ways to perform a squeeze-out: The general meeting of a stock corporation (AG) may, at the request of a shareholder owning at least 95% of the share capital, decide to transfer the shares of the minority shareholders to the majority shareholder in exchange for a cash settlement. The general meeting requires special preparation for this and its resolution must be registered with the commercial register to take effect. In case of a group merger according to the Transformation Act, the same rules apply from a threshold of 90%. Following a takeover offer, the bidder holding at least 95% of the shares of the target company is entitled to claim

	<p>the remaining shares in return for granting the minority shareholders an appropriate payment. The request must be filed with the regional court of Frankfurt am Main, which carries out the transfer by resolution.</p>
<p><b>Cross-border transactions:</b> How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?</p>	<p>Cross-border transactions are not specifically regulated in German law. Only the EU Directive 2005/56/EC has been implemented into national law, which allows the merger of corporations from different EU and EEA Member States. Apart from that, it remains to the parties to design and elaborate an agreement that governs all contingencies in all affected jurisdictions. E.g. closing conditions can be included to hedge a part of the risk.</p>
<p><b>Waiting or notification periods:</b> Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?</p>	<p>In share or asset deals of private companies there are no waiting or notification periods unless by-laws or shareholder agreements provide for pre-emption rights. The same applies to business cooperations, such as joint ventures. Only a possibly necessary notarization or registration to the commercial register can take some time. E.g. the agreement to transfer limited liability company (GmbH) shares must be notarized. Transformations according to the Transformation Act usually require a resolution of the general meeting and a filing to the commercial register. During takeover proceedings in listed companies, the bidder must transmit the takeover prospectus within four weeks of the publication of the decision to submit an offer to the Federal Financial Supervisory Authority (BaFin). After approval by the BaFin, the takeover prospectus has to be published immediately and transmitted to the target company.</p>
<p><b>Sector-specific rules:</b> Are companies in specific industries subject to additional regulations and statutes?</p>	<p>In Germany there are several sectors that require an official permit for any form of business entry or transfer, e.g.:</p> <ul style="list-style-type: none"> <li>-Banking, financial services and Insurance</li> <li>-Pharmacies, elderly care and medical sector</li> <li>-Catering industry</li> <li>-Gambling and betting</li> <li>-Passenger transport (taxi, railways, flights etc.)</li> <li>-Postal services and Telecommunication</li> <li>-Legal advice, tax advice, auditors</li> <li>-Weapons and war weapons</li> </ul>
<p><b>Tax issues:</b> What basic tax issues are involved in business combinations?</p>	<p>Regarding the German Conversion Tax Act (Umwandlungssteuergesetz) a tax neutral combination/ transformation is possible. But for a tax neutral combination/ transformation there are a few prerequisites to note as well as holding periods after the transformation (these are quite different and have to be examined on a case-by-case basis). In case of combination/transformation of real estate holding companies the transformation process could be subject to property transfer tax (any exemptions regulations for property transfer tax should be examined on a case-by-case basis).</p>
<p><b>Labor and employee benefits:</b> What is the basic regulatory framework governing labour and employee benefits in a business combination?</p>	<p>The main regulatory framework governing labour relationships in a business combination is the employment contract and the relevant collective bargaining agreement applicable to each company. Furthermore, as a mandatory rule, Sec. 613a of the German Civil Code (BGB) states that if a business or part of business is transferred to another owner by legal transaction, the purchaser/ transferee enters into the rights and obligations arising from the employment relationship existing at the time of the transfer.</p>

**Restructuring, bankruptcy or receivership:** What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Upon the opening of the insolvency proceedings the right to manage and dispose of the assets belonging to the insolvency estate passes over to the insolvency administrator. Therefore, all negotiations and agreements must be made with the insolvency administrator. The former management loses every power of decision. The insolvency administrator must conduct all negotiations in the interest of the creditors and is therefore obliged to negotiate the highest possible selling price.

**Anti-corruption and sanctions:** What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

There are no special anti-corruption or anti-bribery provisions in respect of business combinations. For the respective general rules consider the section Foreign Corrupt Practices.