IR GLOBAL - MEET THE MEMBERS

# Germany

# IR Global - The Future of Professional Services

IR Global was founded in 2010 and has grown to become the largest practice area exclusive network of advisors in just a few years, this incredible success story has seen the network awarded Band 1 status by Chamber & Partners, recommended by Legal 500 and has been featured in publications such as The Financial Times, Lawyer 360 and Practical Law amongst many others.

The group's founding philosophy was based on bringing the best of the advisory community into a sharing economy; a system, which is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward thinking clients now have a credible alternative, which is open, cost effective and flexible.

## Our Founding Philosophies

**MULTI-DISCIPLINARY**

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

**NICHE EXPERTISE**

In today's marketplace, both local knowledge and specific practice area / sector expertise is needed. We select just one firm, per jurisdiction, per practice area ensuring the very best experts are on hand to assist.

**VETTING PROCESS**

Criteria is based on both quality of the firm and the character of the individuals within. It's key that all of our members share a common vision towards mutual success.

**PERSONAL CONTACT**

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

**CO-OPERATIVE LEADERSHIP**

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups who focus on network development, quality controls and increasing client value.

**ETHICAL APPROACH**

It is our responsibility to utilise our business network and influence to instigate positive social change. IR founded Sinchi a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities / tribes around the world.

**STRATEGIC PARTNERS**

Strength comes via our extended network, if we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR or someone else.

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FOREWORD BY EDITOR, NICK YATES

# Germany – Traditional High-Tech Hub

## Germany is the largest economy in Europe and the fourth largest in the world. It is a highly industrialised country, with an efficient workforce and a mixture of large mature industries such as chemicals and automotive manufacturing and emerging sectors including artificial intelligence and e-commerce.

It's population of 82 million people produced a gross domestic product (GDP) of USD3.7 trillion in 2017 according to figures from the United Nations Conference on Trade and Development (UNCTAD).

Germany is an export-oriented economy, with a trade surplus of USD285 billion in 2017, according to UNCTAD. It's main trading partner is the USA, worth USD126 billion in exports, followed by France, China, the United Kingdom and The Netherlands.

All these indicators emphasise the attractiveness of Germany as a gateway to Europe, as well as a significant market in its own right. It has well-developed transport and communications infrastructure and a decentralised economy, with several large centres of commerce including Hamburg, Berlin, Munich and Stuttgart.

Figures from a recent foreign direct investment (FDI) report carried out by Germany Trade & Invest (GTAI), show that 2,062 foreign companies opened a business in Germany to 2018. The USA was the top investor, with 345 projects, while Switzerland had 229, China 188 and the United Kingdom 168. The survey notes that British investment in Germany has increased by 34 per cent since the Brexit Referendum, as UK companies seek a stable base inside the European Union.

While many of these investments will be in traditional industries, there is a growing digital economy in Germany, which is thriving in the larger cities, driven by a young, well-educated and tech-savvy population. Analysis from the Boston Consulting Group suggests that Germany has some 27,000 experts in digital fields, such as artificial intelligence (AI), data mining and app development. This places them second globally to the USA.

Career motivations have evolved across recent generations, and Germany was rated highly in the study for working relationships, work-life balance, and career development opportunities. Berlin was deemed the third-best city to work in, after London and New York, while Munich was also highly-rated.

The data suggests that the economic environment is very attractive for inward investment, and the country also has a well-developed network of funding options to help foreign businesses to grow and develop. The German government has recently announced an increased package of investment for artificial intelligence, up from EUR140 million to EUR500 million in 2019.

There is also a well-known seed fund called the High-Tech Gründerfond (HTGF). It focuses solely on technology driven start-ups, offering initial investments of EUR1 million, up to EUR3 million per enterprise. HTGF is funded by the Federal Ministry for Economic Affairs and Energy, plus the state-owned development bank KfW and other large German corporations.

The individual Federal states of Germany also have their own funding structures for small and medium-sized enterprises (SMEs). Mittelständische Beteiligungsgesellschaften (MBGs) operate silently via the provision of subordinated capital with an average investment of EUR3 million.

All this adds up to a healthy proposition for FDI and showcases the powerful draw that Germany exerts on foreign capital. Once new businesses are established and funded, they can also look forward to a competitive tax framework, designed to be pro-business rather than punitive.

The average tax burden on German companies is less than 30 per cent and, in some regions, can be as low as 23 per cent due to variations in regional taxes. The German tax authorities have tightened up regulations dealing with globally-generated income, but taxes paid elsewhere can be offset against German tax provided the correct double taxation treaties are in place.

The following report features ten German legal experts, who provide a unique take on innovative developments in their country's economic and legal landscape. We hear about the legalisation of cannabis, the growth of the German life sciences sector and changes to German corporate tax law among other topics.

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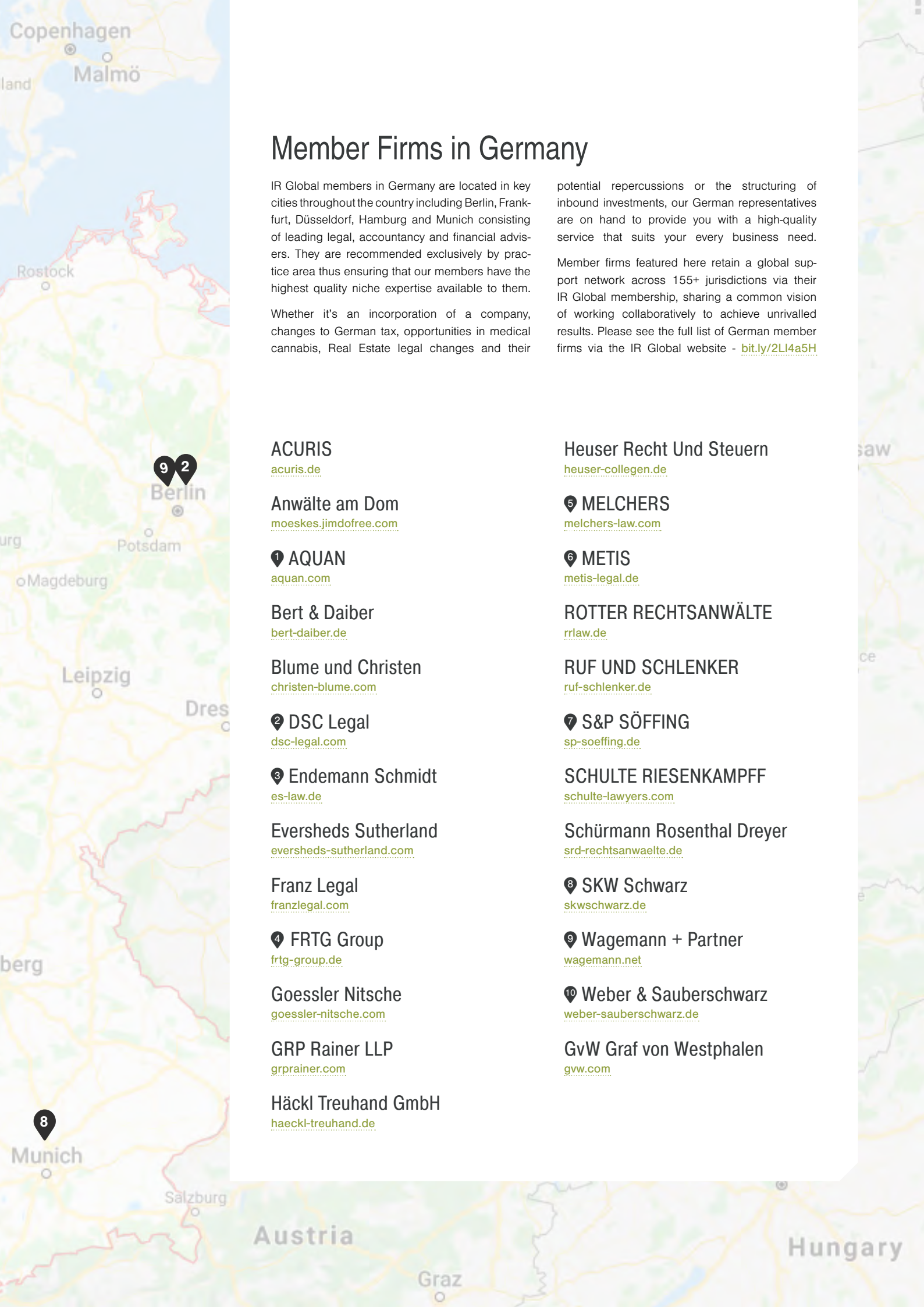


# Member Firms in Germany

IR Global members in Germany are located in key cities throughout the country including Berlin, Frankfurt, Düsseldorf, Hamburg and Munich consisting of leading legal, accountancy and financial advisers. They are recommended exclusively by practice area thus ensuring that our members have the highest quality niche expertise available to them.

Whether it's an incorporation of a company, changes to German tax, opportunities in medical cannabis, Real Estate legal changes and their potential repercussions or the structuring of inbound investments, our German representatives are on hand to provide you with a high-quality service that suits your every business need.

Member firms featured here retain a global support network across 155+ jurisdictions via their IR Global membership, sharing a common vision of working collaboratively to achieve unrivalled results. Please see the full list of German member firms via the IR Global website - bit.ly/2LI4a5H

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Urs is managing partner at AQUAN Rechtsanwälte, forming the business after 15 years of legal practice in Düsseldorf.

He has more than a decade of experience working on complex M&A transactions, and is specialised in cross-border deals. He also has considerable expertise of company and group restructurings, and their tax consequences, as well as in insolvency matters.

Among his domestic and international clients are family-owned businesses, private equity firms, and family offices. He also advises foreign companies on inbound investments into Germany. He became a Certified M&A advisor in Chicago in 2016.

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Jana is one of the founding partners at AQUAN Rechtsanwälte. Prior to joining the firm, she spent two years as an attorney at law in a team run by Urs Breitsprecher.

Jana obtained her first state exam at the University of Münster, Germany in 2011 and her second state exam at the higher regional court of Düsseldorf in 2016.

She has significant international experience, working on a range of cross-border M&A transactions. Her legal expertise is focused on company law, M&A, trade law, litigation and contract and she represents clients in Germany and beyond. These clients range from family-owned businesses, through to private equity firms and start-ups.

*AQUAN Rechtsanwälte is a young start-up law firm which aims to forge a new type of legal practice based on the principles of honesty, integrity and professional ethics.*

*The team, led by managing partner Urs Breitsprecher, is specialised in all areas of corporate/ M&A, Inbound Investment and Commercial Law. In addition, the firm has expertise in restructuring and insolvency law as well as employment law.*

*Aquan can facilitate the corporate finance on your acquisition of a new business or help you to wind up or dispose of your old one. Aquan will represent you as a creditor in a bankruptcy case or can help to restructure your business should the need arise.If you are a foreign investor looking at opportunities in Germany, Aquan will advise you on contract negotiations, as well as on tax consequences and finance options. One of Aquan's core specialisations, next to Corporate/ M&A, is helping foreign companies enter the German market.*

# Checks on Foreign Investment: Exploring the relevant German law

The direct or indirect acquisition of an interest in a German company by a non-EU company is sometimes considered to be a threat by the German government.

In such a case, the Federal Ministry of Economics and Energy (BMWi) may examine the acquisition under Section 55 of the Foreign Trade and Payments Ordinance (AWV).

Under the previous legal situation, the relevant thresholds that initiated an examination by the BMWi were reached if more than 25 per cent of the voting rights of a domestic company were acquired.

Since the 12th regulation amending the Foreign Trade and Payments Ordinance came into force on 28 December 2018, the critical threshold for certain companies is now only 10 per cent of the voting rights. After the relevant thresholds of 10 per cent or 25 per cent have been exceeded for the first time, a further increase in the share of voting rights may, under certain circumstances, also result in a renewed auditability if public security is endangered as a result.

The importance of the foreign trade investment audit for M&A transactions has thus increased significantly, particularly in the case of investments by non-European investors in German investment companies.

The threshold of 10 per cent is decisive if the domestic company is active with regard to a critical infrastructure pursuant to Section 55 I 2 No. 1 AWV, i.e. in particular in the areas of energy, water, nutrition, IT, health, finance and insurance or transport and traffic.

Other particularly security-relevant services within the meaning of Section 55 I 2 nos. 2 to 6 AWV include the development of software which serves the operation of critical infrastructures in a sector-specific manner, implementation of measures provided for by law for monitoring telecommunications, provision of cloud computing services and activities in the media industry.

In the case of the acquisition of an indirect interest in a domestic company, the addressee of the investigation procedure is the acquirer who acquires the shares which mediate the indirect interest in the domestic target company (so-called direct acquirer).

If the BMWi has indications that an investor from outside the EU has abused or circumvented the agreement in order to avoid the audit procedure, e.g. if the acquiring European special purpose entity does not conduct a significant independent business, the acquisition by EU residents may also be reviewed.

The benchmark is always whether the concrete acquisition endangers the public order or security of the Federal Republic of Germany. Purely economic interests are not sufficient for this.

The BMWi may only perform the examination pursuant to Section 55 AMV if it notifies the purchaser and the affected company of the audit procedure within three months of gaining knowledge of the conclusion of the acquisition (Section 55 III 1 AWV).

If the BMWi does not meet this deadline the transaction is deemed to have been cleared. The BMWi is then prevented from formally reviewing the acquisition, issuing orders or prohibiting the acquisition (Section 81 AWV).

Section 58 AWV opens up the possibility of applying to the BMWi for a clearance certificate in advance of signing.

The decision on the application for a clearance certificate takes a maximum of two months if the BMWi is actually of the opinion that it is harmless. During the verification period, the legal transaction on which the investment is based remains effective in the case of cross-sector investment verification. However, the acquisition is subject to the resolutory condition of prohibition (Section 15 II AWG).

The lowering of the participation thresholds to 10 per cent is of considerable importance, especially for venture capital (VC) transactions, since smaller minority shareholdings are often acquired here. In all cases, the following must now be observed when drafting the contract.

In transactions with investors outside the EU, it is generally recommended to include the clearance of the investment by the BMWi, as a condition precedent in the framework of M&A transactions.

As the purchaser is the addressee of the clearance certificate, it is generally agreed that the purchaser prepares and submits the application in cooperation with the vendor, similar to merger control requests.

Particularly in cases in which the BMWi's concerns regarding the transaction cannot be excluded from the outset, adjustment clauses, cancellation rights, contractual penalties and comparable agreements should be laid out in the contract. The parties may also regulate which conditions, if any, the purchaser and the seller are required to fulfil under the BMWi.

The parties may prepare and submit their request prior to the signing of the contract. In most cases - in particular if merger control or other closing conditions have to be met - filing an application after signing will be sufficient and will not delay the transaction.

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Dr. Istvan Szabados is a founding partner of DSC Legal, specialising in advising on a broad range of real estate transactions, project development and finance, across all asset classes (office, residential, hotel, nursing, logistics, and retail). Furthermore, he advises on investments and transactions in the area of renewable energy projects (solar, thermal, and wind). His expertise also encompasses the structuring of joint ventures and legal advice in relation to asset and property management issues.

Istvan studied law in Berlin, Kingston-upon-Thames (UK) and Sydney (Australia), and passed the bar exam in 2002. Prior to the foundation of DSC Legal in 2010, he worked in firms such as Freshfields Bruckhaus Deringer, Olswang and FPS. Istvan received his doctor's degree from the Faculty of Law of Europa-Universität Viadrina Frankfurt (Oder) in 2013, and was appointed as notary in Berlin in 2017.


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Dr. Peter Diedrich is a founding partner and the managing partner of DSC Legal and specializes in advising national and international clients in investing in real estate, renewable energy and startups in Germany.

For more than 20 years, he has been advising clients in real property acquisitions, investments and financing. Peter also has expertise in mergers and acquisitions, corporate law, and international arbitration. He is a double qualified lawyer with admission in Germany and Poland and appointed as notary in Berlin.

Following his apprenticeship at Siemens, Peter studied law at Freie Universität Berlin and passed the bar exam in 1989. Until 2010, Peter worked as an attorney and partner at law firms including Gaedertz, Haarmann Hemmelrath, Ernst & Young and Olswang. In 1994, Peter received his doctor's degree from the Faculty of Law of Freie Universität Berlin. From 1999 to 2019 he has served as Chairman of the executive board of the Association of German-Polish Jurists. In 2017, Peter was appointed spokesman for the Legal Committee and Deputy Chairman of the Arbitration Panel of the German Association of Small and Medium-sized Businesses.

*DSC Legal Rechtsanwaltsgesellschaft mbH (DSC Legal) focuses on rendering legal advice and providing notary services with respect to real estate law, asset management and projects in the area of renewable energies. The firm is highly experienced in the aforementioned areas of consulting, with special expertise in advising national and international clients.*

*DSC Legal's objective is to create an alternative to the major law firms on the German market. The firm combines first-class legal consultancy with personalised service for its clients. The partners believe that it is only possible to provide professionally and personally individual, yet comprehensive legal services, by focusing on the expectations of clients.*

# Residential Real Estate: Recent legal changes and their potential repercussions for investments

Residential properties have soared to new heights, during a prolonged decade-long boom in the German real estate market.

While the German economy is currently standing on the verge of a recession, the real estate market does not yet seem to be affected by the economic slowdown. For example, Berlin has been identified by Savills as the European city with the fastest-growing prime residential property prices in 2019.

Rents have also risen sharply, particularly in metropolitan areas, at a rate twice that of salaries and wages. Tenants in metropolitan areas now have to allocate up to 48 per cent of their monthly household income to rent payments, which creates pressure on poorer households to move away from city centres to more affordable suburban areas or out of the town altogether. The rapidly developing urban hinterland of Berlin, especially along the regional railway lines, is a good example of such socio-economic developments.

Political pressure has led the government to introduce regulatory changes seeking to prevent further steep rises in rents, and to expand the building of new apartments.

- The ruling government coalition has recently expressed its intention to prolong the existing 'rent brake' law for another five years until 2025. According to this law, rents under new leases must not exceed more than 10 per cent of the local average rent, otherwise tenants will be entitled to claim back overpaid rent for a period of up to 30 months. Newly built or comprehensively refurbished apartments are exempt.
- Furthermore, in order to better protect tenants, the government is planning to enact new laws by the end of the year, making the transformation of rental apartments into condominiums more cumbersome.
- In order to lower the financial hurdles for the acquisition of residential real estate, new regulation shall be introduced according to which the buyer is obliged to only pay up to half of the broker's commission fee. In some regions, it is common to ask the buyer to carry the full fee, even if it was the seller who instructed the broker in the first place.
- Special allowances for depreciation have been introduced that apply to newly built residential properties for a limited period of four years. According to the new rules, up to 20 per cent of the building costs can be depreciated additionally, provided that the property is rented out for a period of 10 years at least and the construction costs do not exceed EUR3,000 per sqm.

the stricter tenancy law regulations should slowdown the upward trajectory of rental prices. However, due to the persistant attraction of metropolitan areas, especially to young people and immigrants, the population of metropolitan areas is likely to grow faster than the number of newly built apartments. In consequence, rents will continue to rise, even if it is not at the same speed as before. In any case, it is highly recommended that landlords check their potential for rent increases in light of the changing legal framework.

The high demand for rental apartments, together with the historically low interest rates for loans, may lead to a further increase of prices and to an even higher yield compression. Even if the overall number of real property transactions was lower than in the previous year, the overall transaction volume was higher again. Hence, investors may be inclined to sell their properties in order to realise profits. In the case of residential buildings that can be partitioned into condominium ownership, the sale of condominium apartments to individuals may be a preferred exit route for investors.

The regulatory changes are also aimed at providing a stimulus for the construction of new buildings. Investors may re-think their business strategies and start investing into development projects or enter into building activities. Due to the scarcity of building land in the top cities, major beneficiaries of further construction activities could be municipalities in the surrounding areas, provided they are sufficiently linked to the city.


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Gunther Schmidt is a partner of ENDEMANN.SCHMIDT Partnerschaft von Rechtsanwälten mbB (ES) and has more than 15 years of experience as a bar admitted lawyer. Before founding ES, together with Dr. Harald Endemann and Dr. Katja Endemann in 2014, Gunther worked as executive in-house counsel for an international group and as a lawyer and partner with a well-renowned German law firm.

Gunther is specialised in corporate and commercial law, including M&A, and consults to private companies and businesses of all sizes – from start-ups to international groups – as well as public entities with a special industry focus on life sciences.

Gunther speaks German and English.

*ENDEMANN.SCHMIDT Partnerschaft von Rechtsanwälten mbB (ES) is an independent law firm based in Munich and Hamburg with an industry focus on Life Sciences. The firm consults a wide range of Health Care providers such as numerous leading private hospital groups, university hospitals and medical schools, public and church hospitals, medical centres and nursing homes in all business-related legal fields. ES further focuses on servicing technology providers and other businesses, from start-ups to international groups, in the field of Life Science and Health Care. The firm's lawyers combine deep and proven legal expertise and experience with professional curiosity and a sincere interest in, and understanding of, science. Several of the firm's lawyers have gathered in-house experience during their careers, which adds a special sense for the clients' operational requirements.*

# German Life Sciences and Healthcare: Well-funded, versatile and dynamic

Germany's life sciences market is ranked fourth worldwide and it is obvious that no other industry in Germany is gaining more opportunities from demographic change. An aging society and increasing life expectancy have changed the game dramatically and have fuelled pioneering new business models. All stakeholders such as providers, governments, payers, consumers, and other organisations, have to adapt to the new and ever-changing demands and requirements; while advances in technology, most notably digital technology, promise (costly) solutions. The focus in the German healthcare market is shifting away from treating patients after they fall ill to supporting well-being, prevention, and early intervention.

In addition to the core market, countless more life-style focused business models offering, for example, diets, fitness or 'quantified self' solutions – particularly based on smart-phone apps – form a sustainable trend and develop their own markets.

The overall expenditure for healthcare in Germany amounted to EUR 376 billion in 2017, equalling 11.5 per cent of the country's GDP, or 4.544 euros per citizen. This is expected to increase in the coming decade. The Federal Administration – alone – spent 14.9 billion euros on publicly founded or co-founded R&D projects, while this is just a small fraction of the amounts invested by private companies and other public entities.

It is clear that the German healthcare and life sciences market is well funded, versatile and extremely dynamic; there is a high demand for innovation and investments increasingly driven by digital technologies.

On the other hand, no market in Germany is more comprehensively regulated. Conducting business in this industry requires compliance with dozens of confusing and fragmented laws and regulations. For example, a simple guideline on handling third-party funds for a German medical school makes reference to no less than 35 different laws and regulations, let alone all other applicable secondary legislation, governmental frameworks and guidelines. Thus, reliable legal advice is key to successfully entering and sustainably conducting business in the life sciences and healthcare market.

All stakeholders need legal guidance on regulatory and compliance issues. The legal framework is complex, fragmented, while European and national laws are under constant review to keep pace with the scientific progress.

The use of digital technology and data processing – in particular big data approaches – come along with strict data protection requirements, as patient data is considered to be most critical and sensitive. Thus, data protection schemes and their respective legal strategies constantly gain importance.

In Germany many stakeholders are publicly governed and, for example, many hospitals and research facilities are publicly funded. However, such public entities are increasingly encouraged to team up with international private stakeholders, particularly on conducting research and sharing results. Therefore, public procurement legislation plays an important role.

As the industry is increasingly technology-driven, IP has to be handled with care and requires thoroughly tailored legal protection. All of these complex legal tasks have to be taken into account and combined with all other legal considerations regarding, for example, labour law, corporate law, taxes and commercial law, in designing business models, drafting contracts and M&A projects.

Summed up, the German life sciences and healthcare market provides for countless opportunities, particularly for providers of innovative technology, R&D and life-style-oriented products and services. However, reliable and constant legal advice is one key to success in this highly-regulated legal environment.


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Wolfgang Hohl started his career at Franz Reißner Treuhandgesellschaft mbH in 1977. A few years later, he completed his exams to become a Tax Consultant and Auditor. In 1980 he became the CEO of the company, and since then he has continuously developed the Franz Reißner Treuhandgesellschaft mbH and the FRTG Group.

Wolfgang Hohl's second business interest, besides the FRTG Group, is the FRTG Holding. The holding has companies in different fields at home and abroad. These include, for example, SOLVANTIS AG, EWG Edelstahlschraubenfabrik Winterberg and FRTG Expotel Hannover AG & Co. KG.

*The FRTG Group is an association of five tax consulting companies. This means the group can draw on a pool of experts who are able to provide their clients with qualified, comprehensive and personalised advice in different specialist areas.*

*FRTG Group provides clients with individual solutions tailored precisely to their needs, from a single source for national and international companies of any legal form and size, entrepreneurs, associations, foundations and private individuals in the following areas;*

- *Auditing*
- *Tax consulting*
- *Services*
- *Business management consulting*
- *Restructuring*

*Independent institutes and magazines have awarded the FRTG Group several times already.*

# The Relevance of Restructuring

Global markets have been challenging during the past few years, creating significant obstacles for many businesses. This environment has led to a rise in restructuring of companies before or during insolvency.

Restructuring has become a specialist discipline for the FRTG Group and the advice we provide is not limited to individual industries. The key is to work closely with clients and insolvency administrators.

The overall relationship between the client and the management is important to optimise results and procedures, while digitisation in all areas will speed up this trend even more.

The modern form of restructuring businesses in Germany is to take advantage of the opportunities emerging through the protective shield of ESUG. In the case of imminent insolvency under self-administration, the company is able to implement a financial recovery plan accompanied by a so called 'Sachwalter' (meaning a trustee) who has limited authority over the company.

The company is able to act on its own authority in line with the Sachwalter. Once the company is unable to pay its liabilities, or is over-indebted, there is a time frame of 21 days to initiate insolvency proceedings. If that deadline is not met, all participants can be held accountable for the delay in filing for insolvency.

The closer the deadline comes, the more complicated the structured preparation of the filing process. The Sachwalter or the restructuring management represent the interests of advisory and supervisory boards as well as those of the creditors. The client is usually hesitant to enter the ESUG-procedures because of the fear of insolvency, so the goal of the consultant is therefore to convince the client that restructuring a business to become competitive again is not the end of a company but can be the beginning of a major overhaul leading to more profit and long-lasting changes.

Over the past two years we have worked with many clients in the field of medical care. Several hospitals and clinics have been restructured in cooperation with insolvency administrators and other business consultants. Hospitals are facing financial troubles and illiquidity and we are working on market consolidation in this field, since it is obvious that the market is leaning towards greater units instead of smaller clinics.

Hospitals showing high deficits will be forced from the market and the need for restructuring services is and will be higher than ever. The costs for the hospitals will increase as much as the requirements, and we expect the market to adjust to the politically motivated changes within ten years. We therefore will see more insolvencies and merging transactions in the field of medical care over the next years.

Another industry undergoing alot of restructure is the automotive sector. In terms of turnover this market is Germany's largest industrial sector, but now faces extensive changes due to the diesel scandal, electric mobility, international tensions and economic fluctuations. The automotive market has also shown in the past that even the smallest market changes or market insecurities can have a tremendous impact on the profit situation of suppliers along the entire value chain. Suppliers are the automotive industries 'workbench' and do not achieve enough margins to fully react to market changes and therefore declining revenues. We have accompanied a lot of those companies, either automotive groups or suppliers, through restructuring measures as well as insolvency proceedings.


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Dr. Voigt has extensive experience in advising on all legal aspects regarding the establishment, management and internationalisation of distribution structures. His expertise comprises the (transnational) implementation of advertising measures, including the design and exploitation of transnational customers or employee databases. Dr. Voigt has a particular industry focus on software/IT, advertising and industry and consumer goods. He publishes on a regular basis mainly on questions related to data protection, distribution and advertising.

Dr. Voigt is a Recommended Lawyer 2019 in Legal500 Germany and the exclusive German member for franchise and distribution law in the international lawyer network IR Global. He is based in Frankfurt/Main.

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Dr. Ebert is a Rechtsanwalt (German attorney) and certified specialist for labour, commercial and corporate law. He has many years of experience in service contract law, in the dismissal and appointment of managing directors/executives and in all associated issues relating to the establishment and termination of the underlying employment contracts. Furthermore, Dr. Ebert advises clients in cases of typical shareholder disputes.

In commercial law, Dr. Ebert's practice focuses in particular on distribution and franchise law. He is regarded here as a proven specialist who represents franchise companies nationally and internationally both out of court and in court. This includes advice on the establishment and further development of franchise systems, but also on all related corporate law issues, such as the holding of shareholders' or general meetings and the development of participation models for distribution partners.

*Since its foundation in 1973 MELCHERS' philosophy has been the individual and comprehensive counseling of its clients by experienced specialists. More than 45 attorneys advise clients in this spirit in all fields of national and international business law.*

*Our clients include leading multinationals, growing companies and entrepreneurs. MELCHERS covers all regularly required business law areas including corporate law, labor and employment law as well as regulatory law and litigation. MELCHERS has special expertise in distribution law, gambling law, construction law, and law relating to economic and fiscal offenses among many other specialist areas.*

*Depending on the clients' needs, the firm can work in individually configured teams in order to provide the best possible legal support to clients. However, the client has always one personal contact person who is the hub for all tasks and keeps everything under control.*

# Understanding GDPR and Data Privacy

Franchise systems regularly require an extensive exchange of information between franchisor and franchisee. If the information relates to an at least identifiable natural person, the transfer will most likely have to comply with applicable data protection laws.

The European Union's General Data Protection Regulation (GDPR) applies to any franchisor or franchisee, who is either established in the EU/EEA, or processes the personal data of EU citizens.

The data transfer between franchisor and franchisee, requires a legal justification for the transfer under GDPR and that the data controller transferring the data to the recipient has informed the natural persons in compliance with Art. 13/14 GDPR. In case of a data transfer from the EU/EEA to a third country, the transferring entity must also ensure that the recipient has an adequate level of data protection.

In an ideal world, the franchisee would control the customer database operated by the franchisor. The franchisor would in this case process the personal data only as instructed by the franchisee. If such processing is based on a Commissioned Data Processing Agreement under Art. 28 GDPR, there is no further need for any additional legal justification. This concept works for general advice, billing and collection services or marketing services rendered by the franchisor to the franchisee.

Franchisors, however, are often interested in using the personal provided by the franchisee for their own purposes, e.g for the improvement for the improvement of goods or services offered under the franchise system, or to gain intelligence on customer behaviour or customer preferences.

In any of these cases, the data transfer must be based on a statutory legal basis. Consent is not useful to justify a standard process, because it can be withdrawn by the data subject at any given time without limitation. Provided that the personal data transferred from the franchisee to the franchisor does not qualify as a special category of personal data (as defined in Art. 9 GDPR), the transfer of personal data can be based on the legitimate interests of the franchisor (as defined in Art. 6 para 1 GDPR).

These interests will not be overridden by the interests or fundamental rights and freedoms of the data subject (in the meaning of Art. 6 para 1 GDPR), unless the personal data is used for direct marketing purposes by other members of the franchise system. Further, the personal data transferred must be 'necessary' in order to pursue the interests.

Qualification as 'necessary' requires that the processing of personal data is more than just 'useful', but not the only option. Franchisors and franchisees have to tailor their IT-systems to the fact that the data subject may object to the data transfer under Art. 21 para 1 GDPR. Unless the personal data is going to be used for direct marketing purposes, the objection to the processing of the personal data must be based on grounds relating to the particular situation of the data subject.

It is therefore safe to conclude that the GDPR does not stand in the way of a data transfer between franchisee and franchisor, provided that the data transfer occurs either under a Commissioned Data Processing Agreement in the meaning of Art. 28 GDPR, or is necessary to pursue the legitimate interests of the franchisor. Direct marketing via the franchisor, other than by regular letter mail, will regularly require the consent of the addressees.


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According to Legal 500 Germany 2018, Florian is described as an 'excellent and assertive lawyer and litigation strategist'.

*Founded as a spin-off of the international law firm Freshfields Bruckhaus Deringer LLP in 2010, METIS has grown to be one of the leading business boutique law firms in Germany.*

*The firm provides high end legal advice to its domestic and international clients with a strong focus on corporate law and M&A, employment law and dispute resolution. All partners of METIS have lived and worked abroad, the practical understanding of foreign legal systems and cultural backgrounds including various languages spoken (among others, Arabic, Chinese Mandarin and Russian) make METIS a competent partner in international mandates.*

# D&O Insurance: Cutting away the complexity

Companies frequently take out directors and officers (D&O) insurance for their managers. This type of liability insurance protects managers in the event that claims are brought against them on the basis of omissions and mistakes made in the course of their duties.

In the German-speaking world, such claims are rarely brought by third parties against managers, but rather primarily by the manager's employer. A prominent current example is the Volkswagen (VW) diesel scandal. Since 2017, VW has been investigating who can be held liable internally for the billions of losses resulting from the manipulation of car emissions. By all accounts, D&O insurance of EUR500 million is in place.

D&O insurance is concluded with the insurer by the company as the policy holder, but the entitlement to the rights arising out of it rest solely with the managers, as the insured persons. Only they are able to claim insurance coverage from the D&O insurer for those losses for the compensation of which they are being sued.

Up to 2016, the company that suffered the loss, despite being the policy holder, had first to bring a claim against its managers. This was the case even if it intended to continue working with the managers, or it was clear that they could not themselves cover the sometimes enormous losses. Even in the event that there is success on liability, it is not certain that the D&O insurer will ultimately pay. An insurer will regularly challenge its obligation to provide cover on the basis of typical insurance exclusions, such as possible wilful intent of the managers. There is then a risk of a further coverage proceeding against the insurer.

The German Federal Supreme Court rendered two judgments on 13 April 2016 (IV ZR 304/13 and IV ZR 51/14), in which it had the opportunity to decide on the simplified enforcement of liability and coverage claims by companies that have suffered losses. In both cases, a co-insured subsidiary company of the insurance policy holder brought a claim against the D&O insurer for coverage of losses caused by its managers. The claimants had requested the managers to merely pay damages out of court, in order to be able to then immediately assign to themselves the managers' coverage claims against the D&O insurer. Contrary to the views of the lower courts, the German Federal Supreme Court viewed this as permissible.

The court found that the D&O insurance policy holder or – as here – a subsidiary included in the insurance policy, is also subject to the legal and insurance contract requirements that permit the assignment of the cover claim to 'third parties' suffering loss. The court was not persuaded by the objection that the assignment of a manager's D&O cover claims to his company implies a particular risk of abuse for the insurer. This was because the risk of consensual cooperation between the person allegedly causing the loss and the person sustaining the loss also exists in other fields of liability insurance.

The D&O insurer's obligation to indemnify may also, according to the German Federal Supreme Court, not be denied on the basis that the claimants never intended to claim against the managers personally, but rather only claim the insurance. This is, in the view of the court, legitimate. In favour of this, is the general protective purpose of liability insurance to secure compensation for those suffering loss. Also, it could not be inferred from the underlying insurance conditions that the company that suffered the loss must have seriously intended to secure compensation out of the manager's own property.

With these decisions, the German Federal Supreme Court has created more legal certainty for companies and their managers when settling D&O liability cases. Once a claim has been made against a manager, the company suffering the loss can assign its claim for cover and thus clarify its liability and cover claims directly in proceedings with the insurer. In this way, access to D&O insurance payouts is basically simplified for companies suffering loss. It remains to be seen whether insurers will seek to limit this effect through amendments to their terms and conditions – and whether the German courts will uphold those.


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Dr. Steffen Kranz is a German lawyer and certified specialised lawyer for tax law. His advisory services are focused on tax structuring, in particular on the occasion of asset and company successions. Once Steffen had completed his law studies at the University of Cologne he completed a Master of Law degree (LL.M. Taxation) in Tax Law Science. During his tax law science studies, Steffen wrote his doctoral thesis concerning aspects of real estate ac-counting under national GAAP and IFRS. Before joining S&P Söffing in 2016, Steffen worked for an international law firm in the Practice Area Tax and a Big Four accounting firm in the Transaction Tax Department.

In addition to his daily work for clients, Steffen publishes articles and other contributions regarding German tax law matters on a regular basis. He is a member of the German Bar Association and the taxOS Association.

*S&P SÖFFING is one of Germany's leading law firms, specialised in the field of tax and corpo-rate law as well as tax proceedings.*

*The firm has offices in Düsseldorf, Munich, Zürich (Switzerland) and Paris, and its clients are wealthy individuals and entrepreneurs, investment companies, asset managers, family offices as well as upper medium sized companies. In many cases, the firm operates as an advisor of the advisor. The advisory approach is interdisciplinary and always tailored to the individual needs of clients.*

*S&P SÖFFING's clients obtain individual and pragmatic solutions that are designed for sustainability and legal certainty. Specialisation, experience, know-how and thoroughness guarantee competent and efficient legal advice. On the basis of excellent practical and scientific expertise, the firm's lawyers advise with seriousness, discretion and continuity.*

# Tightening the Noose: Changes to German tax liability

Germany has a rather complex tax environment by international standards. There are extensive structuring opportunities to optimise cross-border activities and investments for tax purposes, however, the complexity often discourages a large number of companies from setting up a subsidiary in Germany.

Even opening an office in Germany can be undesirable, because setting up a permanent establishment with associated tax liability in Germany can be expensive. Many companies keep in mind that, under German law, a permanent establishment basically requires facilities that serve the activities of a company.

## Beware of personnel working in Germany

Against this background, many foreign companies rely on the mobility of their employees, who can get on the plane at any time and handle business locally. In this context, special attention must be paid to the activities of the managing directors. These days, managing directors are no longer tied to the headquarters of their company and in many cases, are rarely there. Instead, they are with business partners abroad or supervising projects elsewhere.

The risks of these arrangements are not always adequately understood. If, for example, the managing director rented an apartment in Germany, due to his frequent or long-term stays in the country, the foreign company may be threatened with unlimited tax liability in Germany.

Even without a fixed place of residence for the managing director, the company may become subject to German tax liability. Recently, the Federal Fiscal Court decided that a corporation can become taxable in Germany if one of its managing directors sustainably manages the company's business in Germany and is subject to the company's instructions. This means that the mere cross-border management activity of a board member can result in the company having to file tax returns and, as the case may be, also have to pay taxes on the profits gene-rated by its activities in Germany.

## Beware of real estate investments from abroad

Until recently, foreign investors who wanted to invest in German real estate were able to avoid tax liability in Germany by means of a simple structure: The investor did not acquire the property directly, but indirectly via a corporation domiciled abroad. If the property was sold, the investor did so only indirectly - by selling the shares in the foreign real estate company. The capital gain from this sale was not subject to German tax.

The legal situation changed on January 1, 2019. Now a (limited) income tax liability will arise on the sale of shares in a so called real estate corporation. This means that, at any time during the 365 days before the sale, more than 50 per cent of the corporation's share value was based directly or indirectly on German immovable assets and the shares were attributable to the seller at that time.

For share disposals that take place after 1 January 2020, a further, very significant tightening of the legal situation with regard to German real estate transfer tax (RETT) must also be taken into account.

The transfer and acquisition of real estate located in Germany is subject to RETT. The tax rates for RETT vary between 3.5 and 6.5 per cent, depending on the law of the relevant federal state. However, if the investor acquires the real estate indirectly, via a (domestic or for-eign) corporation, the applicable German law stipulates that the purchaser (investor) is only liable for RETT if he acquires at least 95 per cent of the shares in this corporation. Therefore, using intermediate corporations can avoid RETT as long as the aforementioned limits are not exceeded.

In the future, there will be a major tightening for indirect real estate investments via corporations, specifically if at least 95 per cent of the shares in the German real estate holding corporation are transferred to new shareholders within five years. This means the end of club deals for the time being.


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Margret Knitter has advised her clients in all matters of intellectual property and competition law for twenty years. This includes not only strategic advice but also legal disputes. Her practice focuses on the development and defence of trademark and design portfolios, border seizure proceedings and advice on developing marketing campaigns. She advises on labelling obligations, packaging design and marketing strategies.

In the field of media and entertainment, she mainly advises on questions of advertising law, in particular, product placement, branded entertainment and influencer marketing. She is a member of the board of the Branded Content Marketing Association (BCMA) DACH.

Margret Knitter is a frequent speaker and publisher on trademarks, designs, branded content and advertising in social media. In particular, she publishes in the INTA Bulletin, the newsletter of PTMG (Pharmaceutical Trademarks Group), and is the co-author of the blog BEO Branded Entertainment Online and the book, Fifteen Years, A Branded Content Story of BCMA. She regularly holds workshops at the Confectionery and Textile Association and is a sought-after speaker at industry get-togethers such as dmexco.

*SKW Schwarz is an independent German law firm. The firm advises businesses ranging from closely held companies to listed stock corporations, as well as entrepreneurs in all relevant fields of national and international business law. With our offices in Berlin, Düsseldorf, Frankfurt am Main, Hamburg and Munich we have a presence in all relevant business centres.*

*The firm has 130 attorneys and is a large mid-market firm that operates internationally on a daily basis, comparable only to large international law firms. Margret Knitter is head of the firm's IP practice group.*

INTELLECTUAL PROPERTY

# Injunctive Relief: The obligation to recall products

Legally impeccable advertising campaigns make a measurable contribution to the economic success of a company. Still, there are numerous pitfalls for potential violations of the German Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) which may trigger cease and desist claims by competitors. Legally watertight advice is even more necessary, as recent case law from the German Federal Court of Justice (BGH) has extended the cease and desist obligation, by making the obligation to recall infringing goods from the distribution chain.

The infringer is now obliged to take all possible and reasonable measures to prevent any further distribution of the infringing products, especially by asking his customers to return the remaining products. In the case of a cease and desist order issued in preliminary injunction proceedings, the supposed infringer is not obliged to a full recall of the infringing goods, but only to request his customers not to redistribute the goods concerned.

This generous interpretation of the cease and desist obligation entails serious consequences for the infringer, in particular consisting of high expenses and reputational damage. The risk for the infringer is even multiplied by the fact that disputes under IP and unfair competition law are frequently held in preliminary injunction proceedings which can be issued ex-parte without a prior hearing of the supposed infringer and within a few days after filing.

The generous interpretation of the cease and desist obligation is not only associated with advantages for the applicant of the injunction claim. If it subsequently turns out that the cease and desist order was unjustified, the defendant may claim damages from the applicant. Damage caused by the recall would then have to be compensated by the applicant.

CANNABIS BUSINESS LAW

## Opportunities in Medical Cannabis

The legalisation of medical cannabis in 2017, has turned Germany into an attractive destination for related businesses.

New business perspectives have opened up, however, anyone wishing to do business with cannabis should be familiar with its complex legal framework. Further, when doing business in Germany, future stakeholders should be aware of the obligation to recall products in the case of injunctive relief claims.

Medical marijuana has been legal in Germany since March 2017. Since this date, doctors have been able to prescribe cannabis flowers and extracts from cannabis to seriously ill patients. The number of patients receiving cannabis on prescription has increased rapidly, triggering a genuine demand for domestic growing and importation and thus offering a great opportunity for innovative business models. However, it should be noted that, under German law, medicinal cannabis products are subject to both pharma and narcotics legislation with accordingly high requirements on product quality, import and distribution.

The domestic growing of cannabis is managed and controlled by the Federal Cannabis Agency (Cannabisagentur) set up by the Federal Institute for Drugs and Medical Devices (Bundesinstitut für Arzneimittel und Medizinprodukte, BfArM), as the competent regulatory authority whose main task is ensuring a high quality of cannabis produced in Germany. Home growing, even for medical purposes, remains prohibited and production can only be carried out by companies selected by the Cannabis Agency in a government bidding process.

The first tender procedure, covering a total of 10,400 kilograms of cannabis produced over four years, was completed in May 2019. The first harvest is expected in the fourth quarter of 2020. The total production will be bought up by the Cannabis Agency and subsequently resold without profit to pharmaceutical manufacturers, wholesalers and pharmacies holding the distribution licenses required under narcotics legislation.

Additionally, supply of cannabis products to patients will be covered by imports. Importation of cannabis requires several narcotics and pharma legislation-related licenses and authorisations. In particular, any company wishing to import cannabis products into Germany has to apply to the Federal Opium Authority, a sub-unit of the BfArM, for a narcotic trade license; the applicant must have a registered office in Germany and has to provide specific documentation, inter alia relating to the persons in charge, who must have the required expertise, as well as relating to the local production plants, which must be secured against unauthorised removal.

Finally, it should be mentioned that violations of the applicable narcotics legislation may result in severe criminal sanctions. Still, if the licensing proceedings mentioned above are observed, the legalisation of cannabis offers great opportunities for innovative business models. In this context, cannabis manufacturers should consider protecting their brand as a trademark in Germany. However, as recreational cannabis remains unlawful, the German Patent and Trademark Office for the time being only accepts trademark protection for medical cannabis in Nice Class 5 or the retail of medical and / or marketable cannabis in Class 35.


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Dirk has been in the tax consulting business for 25 years. He is partner of Wagemann + Partner PartG mbB in Berlin and responsible for international taxation, which is a focal point of his firm. Clients and cooperation partners worldwide trust Dirk´s advice and appreciate his practical approach. For more than 10 years, Dirk has been leading a group of international tax law specialists to promote the exchange of current issues in international taxation.

A further focus for Dirk, is taxation of capital investments and clients in the healthcare sector. He advises clients of all legal forms, including high-net worth-individuals.

Dirk has a Master´s degree in Business Management and a Master of International Taxation. He has been licensed as a tax advisor in Germany since 2001, and is a Certified Tax Advisor for International Tax Law and Healthcare.

*Wagemann + Partner PartG mbB (limited liable partnership) is a full-service tax advisory, audit and CPA firm experienced in providing advice on all issues of tax law and accounting. Beside the main location in Berlin, the firm is present in Düsseldorf and Hamburg. The firm was founded 40 years ago and today more than 50 professionals and partners advise clients in the fields of taxation and auditing. Wagemann + Partner PartG mbB has implemented a quality management system and is certified in accordance with DIN EN ISO 9001: 2008.*

*Through a close cooperation with foreign tax consultants and auditors, Wagemann + Partner PartG mbB is global represented with Integra International and IR Global. Wagemann + Partner PartG mbB is proud that the firm was repeatedly described as one of the best tax advisory firms in Germany by the well-known business newspaper Handelsblatt.*

# Coming to Germany: Structuring inbound investments for income tax purposes

One of the key areas of focus when investing in foreign jurisdictions is the issue of tax.

Professional advice is almost always needed for entry taxation, current taxation and exit taxation. Besides the knowledge about the main facts in German tax law, a successful investment depends also on the regulations in the home country of the investor and of bilateral regulations between both countries.

To avoid double taxation risks, investments should be structured via countries that have concluded double taxation treaties with Germany. In general, these treaties follow OECD standards, but there are different anti-avoidance rules implemented in German tax law to address certain scenarios, including treaty shopping, untaxed income or double dips. As a result, national German tax law includes various treaty override provisions.

## Taxable person

Distinction should be made between corporations, partnerships and individuals. Corporations and individuals are tax subjects for income tax purposes, while partnerships are qualified as transparent entities and are not subject to income taxes, except trade tax. The taxable persons of a partnership are the partners themselves, like corporations and/or individuals.

Partnerships with a limited liability like a GmbH & Co. KG (limited liable partnership) are common. The liability is reduced to the assets of the partnership, similar to that of a corporation. For cross-border activities through such legal forms, the investor has to take care because in several jurisdictions such entities will be qualified as non-transparent entities (like in Spain) while qualifying as transparent in Germany.

In other jurisdictions, possibly options exist (like in the Netherlands) to qualify the entity as transparent or non-transparent for tax purposes. A GmbH (limited liability corporation) is qualified as a non-transparent entity in Germany, but could be qualified as transparent in other jurisdictions like the US. The knowledge about these kind of facts are essential to avoid double taxation risks.

## Tax liability

Individuals are subject to unlimited tax liability in case of a fiscal residence in Germany. An individual is a resident of Germany if his domicile or habitual place of abode is in Germany. Usually a domicile is a home or dwelling unit at the disposal of the individual and maintained on a long-term basis, independent of the actual stay in Germany.

The tax liability includes the worldwide income. Without fiscal residence the tax liability is limited to German income sources.

Corporations are subject to unlimited tax liability in case of a registered office or in case of the place of the actual management in Germany.

## Tax burden

The income tax rate for individuals in Germany is progressive and goes up to 45 per cent plus solidarity surcharge of 5.5 per cent and possibly plus church tax. The tax burden could potentially increase to a little bit less than 50 per cent of the taxable income (including a trade tax credit). The tax burden for corporations amounts to 15 per cent corporate tax, plus a solidarity surcharge of 5.5 per cent and trade tax. The trade tax rate depends on the municipality (between 7 per cent and 20 per cent) in which the business is located, and averages 15 per cent. The total tax burden for corporations is therefore around 30 per cent, meaning a corporation is the preferred entity for investment in Germany.

To compare the tax burden between individuals and corporations, the taxation of dividends has to be included. Dividends paid or distributed, trigger withholding tax (WHT) in the amount of usually 25 per cent plus solidarity surcharge. Dividends paid to corporations within Germany are tax exempt in the amount of 95 per cent. Independently of this exemption, WHT has to be withheld, including in cases that the shareholder has its fiscal residence abroad. The shareholder has to apply for a refund of the withheld and paid WHT, or can apply for an exemption-certificate before the dividend is distributed. In both cases the WHT can only be reduced to the agreed upon rate in a double taxation treaty, or by multilateral agreements, like the parent-subsidiary-directive within the European Community.

To avoid or reduce the tax burden through WHT, a clear structure is needed. Three different methods can be used to optimise the tax burden.

Holding structure with corporations in Germany and an active parent corporation within European Community, a limited liable partnership in Germany with shareholders as corporations abroad, or a German permanent establishment operated by a foreign corporation.

We strongly recommend cooperation with advisory firms who are highly experienced, not only with the local tax law and international regulations, but also familiar with the main regulations in other jurisdictions. Close cooperation between tax advisory firms in Germany and the home country of the investor is essential.


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Hans Michael Prange is a partner at Weber Sauberschwarz. He has 30 years' of experience dealing with a large variety of cases in unfair competition law. More than 20 of these cases became leading cases in the German Federal Court, impacting the development of unfair competition law in Germany.

Some of Hans Michael's major clients incude big department stores and the digital commerce sector. He is certified as a specialist lawyer in intellectual property law and information technology law. He is also a data protection auditor lecturing at the Hochschule Düsseldorf University of Applied Sciences (HSD) and a member of the legal affairs committee of the Düsseldorf Chamber of Industry and Commerce.

Hans Michael is a recommended lawyer in the JUVE Handbook of German commercial law firms.

*Weber Sauberschwarz is located in the heart of Düsseldorf, one of the leading venues for commerce, media and advertising in Germany. Since the firm's inception in 1963, the firm has specialised in legal consultation for product and service development as well as in a broad range of litigation matters.*

*The core areas of our expertise include competition law, trademark law, media law internet law, data protection law and intellectual property law. The firm represents its clients worldwide by working closely with law firms abroad.*

*The foundation of the firm's consultation, is the ability to identify with clients. The firm takes the philosophy that you can only advise clients intelligently when you know and understand their particular industry and its specific legal issues. Weber Sauberschwarz is proud of its well-grounded legal advice, geared toward dynamic solutions and based on decades of experience.*

# Unfair Competition Law: A grand history of German enforcement

German unfair competition law was split between national legislation and European Union (EU) rules, until the Unfair Commercial Practices Directive (UCPD) was adopted in 2005.

This EU directive puts a general ban on unfair practices, as well as creating specific rules addressing various types of unfair business practices, and a 'black list' of unfair practices.

The directive provides for full (maximum) harmonisation with respect to substantive law. EU member states are not allowed to introduce or maintain a higher level of consumer protection in the area of the law covered by the UCPD.

Despite this, enforcement is not harmonised at all. According to Art 11 UCPD, it is left to the member states; "to ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers. Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:

- take legal action against such unfair commercial practices; and/or
- bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings."

In consequence, a wide variety of enforcement systems have been established by the different member states. Germany has opted to stick to the tradition of a private enforcement scheme, since more than 100 years combating on unfair competition in Germany is based on civil law.

The first German Act Against Unfair Competiton (Gesetz gegen den unlauteren Wettbewerb, UWG) was codified in 1909. According to this law, it was up to the competitors themselves to prosecute unfair business practices. For this purpose they were given the right to take action for injunctive relief and to claim for damages at civil courts. .

As the prosecution of unfair business practices is not only of interest to competitors affected by such practices, but also to the general public, the UWG contained a right for certain associations to also take legal action.

These principles are still the basis of the German system for combating unfair competiton. Whoever violates the rules against unfair competition, pursuant to the current Act Against Unfair Competion, can be sued for elimination, and in the event of the risk of repetition, to cease and desist. (Section 8 (1) UWG).

The parties entitled to take these actions are competitors and certain business associations offering the same goods or services on the same market that is affected by the unlawful practice.

Certain registered consumer associations, as well as chambers of commerce and craft chambers, are also entitled to take action in cases of unfair competition. Competitors are also entitled to claim for damages.

According to Section 12 (1), before starting court proceedings a party entitled to claim for cease and desist should send a warning letter to the violator, giving them the opportunity to resolve the dispute by signing a declaration of cease and desist subject to a reasonable contractual penalty (Abmahnung). If the warning is justified, the violator has to reimburse the necessary expenses. In order to avoid improper use of this instrument, claims are inadmissible where the predominant purpose is not the fight against unfair competition but the generating of a claim for reimbursement of expenses or of the costs of taking legal action.

The claimant is not obliged to send a warning letter prior to going to court, but if they don't, they will bear the costs of the court proceedings if the defendant acknowledges the claim immediately after having been sued.

The exclusive jurisdiction in cases concerning unfair competition is to the regional Courts. Specialised courts have been designated to hear competition disputes for the districts of several regional courts. Thus, lawsuits concerning the right of unfair competition in Germany are dealt with by highly specialised lawyers at specialised courts.

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