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Doing business in Germany

Consumer Sector 2019/2020



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Introduction

Germany should not be a blank spot on your company map. Located at the center of Continental Europe, it is the world's fourth biggest economy and the home of some of the biggest companies in the world. It plays a key role in the EU and is a motor of the European economy. At the same time, the consumer industry is one of Germany's largest industries: with a population of almost 83 million, there is plenty of business to do. No surprise that every industry giant and numerous multinationals from all around the globe are present here. Whilst Germany has a well-organized legal system, it is dominated by a sometimes complex mix of national and EU legislation, and there are some significant legal pitfalls.

Whether a global player, a start-up, or a new market entrant, this overview will help you to smoothly conduct your consumer business in Germany, identify the legal snags, and determine how best to maneuver.

We hope you enjoy reading.

Your German Consumer Team

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B2C: Consumer Protection



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There are a high number of consumer protection regulations both on the national and the EU level in Germany. To name just a few things national and international players have to cope with: online sales are deeply regulated by remote sales requirements; because German law sets aside unfair and intransparent T&Cs and implies various warranty rights into consumer contracts, there is a special way to draft German law consumer terms, and there is limited room for choice of law provisions; and unfair competition laws require full transparency about products, services, and prices and prohibit abusive and misleading trade practices. Regulators, consumer agencies, and even competitors closely monitor what companies are doing, and have traditionally been willing to take and capable of taking legal action (including cease and desist actions and damage claims).

Established consumer companies, as well as new market entrants operating in Germany, should educate themselves about the legal environment for disruptive technologies, digitalization, and industry 4.0, and identify current and future applicable laws and regulations. The legal regime substantially impacts the way smart technologies, IoT, and smart devices can be legally designed and implemented, and also governs how smart contracts can legally operate. Recent history has shown that consumer watchdogs are ready to challenge anything they think is not in line with the best interests of consumers. To name just one example, a smart device for ordering products recently has been successfully challenged before German courts because it did not comply with the German consumer protection information requirements.

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B2B: Supply Chain Issues



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As B2C has its legal peculiarities, so does B2B, from sourcing to distribution. This starts with a strict control of boilerplate agreements and T&Cs by courts even in the B2B area. For example, the legal framework significantly restricts the option to include limitations of liability in boilerplate agreements. This is in addition to specific antitrust regulations prohibiting and heavily fining certain contract practices such as resale price fixing. Legislation in the EU and Germany also protects suppliers from late payment and protects sales representatives and distributors in termination scenarios.

On the sourcing side, it is ever more important to implement and closely monitor ethical behavior and sustainability with downstream suppliers, and new sourcing models such as directed supplies are implemented in procurement arrangements. Consumer companies in Germany face increased scrutiny of their supply chains, from certification and country of origin requirements to anti-bribery and corruption issues. Based on complex contracting arrangements, retailers combine their market power to form purchasing associations; in this respect they also have to navigate around antitrust pitfalls. Certain actors in the agricultural and food industries will have to educate themselves about the impact of the new Directive (EU) 2019/633 (prohibiting unfair trading practices in the supply chain in B2B relationships), which recently entered into force and has to be implemented by EU Member State legislators no later than 1 November 2021.

On the sales and distribution side, new delivery services transform old-fashioned logistics systems, and digitization continues to revolutionize traditional business models, reshaping customer interactions. Navigating the digital economy is no longer an option: it is a necessary part of doing business. Manufacturing and delivery was yesterday; today is 3D printing. But the law has not kept up, and in the same instances new developments must be brought in line with the traditional legal concepts of the German Civil Code (BGB) and Commercial Code (HGB).

Throughout the supply chain, artificial intelligence solutions are being implemented and companies are on a direct path toward running virtual factories. This requires the creation and implementation of smart contracting arrangements and raises complex legal questions around smart contracts and liability regimes.

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Competition and Antitrust



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Superior market power, mergers, distribution systems, and pricing strategies are increasingly scrutinized – by EU and national regulators, competitors, and others. When developing business and pricing strategies companies must navigate through legal pitfalls including: potential antitrust/competition issues, endorsements, comparative advertising, promotions, product pricing, and discounts (including in relation to online sales). You need to consider legal restrictions, as well as industry and other voluntary codes of practice.

In Germany, as well as in the rest of the EU, enforcement activities of competition watchdogs very much have focused on e-commerce. This holds particular true for the German Competition Authority, which is very active in this area and does not shy away from pilot investigations into novel issues (including investigations against foreign multinationals, concerning alleged abuses of dominance due to regulatory violations). Any kind of restrictions of online sales, or discrimination by e-tailers, are of particular concern, as is the growing market power of online platforms and marketplaces. The use of new technologies in distribution (e.g. pricing algorithms, personalized pricing, dynamic pricing, or profiling/scoring) increasingly captures the attention of competition authorities and is the subject of investigations. With respect to retail trade, the buying power of retail chains and buying syndicates is also in the focus of investigations in Germany.

Companies need to be mindful in these areas in order to avoid pitfalls. But there is often more than one way to reach an important business objective, and creative solutions help to achieve commercial goals while balancing the risks of regulator or private party complaints or litigation.



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Corporate M&A



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Given the rapid and enormous changes for players in the consumer sector, it does not come as a surprise that M&A does and will play a considerable role here. By way of example, the technological challenges resulting from digitalization often can be addressed by partnering with other companies through entering into joint ventures or by acquiring other businesses which have the required know-how, brands, and/or people. A key factor for structuring and running an M&A transaction successfully, be it as seller or purchaser, is a clean and proper due diligence process. As seller, it is imperative to be aware of the jurisprudence of German courts regarding pre-contractual information duties when setting up a data room and dealing with Q&A of the prospective purchaser. Conversely, because the managers representing a purchaser in negotiations can face personal liability under German law, it is critical to gather a solid amount of information about the target business in order to be able to craft an appropriate share or asset purchase agreement. For the reasons described above, commercial agreements, brand protection, and competition law will regularly be a focus of the due diligence in German M&A transactions. Depending on the nature of the due diligence findings, the relevant risks will be addressed in the purchase agreement through guarantees, indemnities, or closing conditions.

Consumer enterprises active in M&A in Germany should also be aware of Warranty & Indemnity Insurance, which is becoming increasingly popular and allows the risk of guarantee breaches to be, to a large extent, transferred from the seller to the insurer.

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Data Privacy and Ownership



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International companies that are doing business in Germany will quickly notice the specific requirements and strict approach of the German regulators when it comes to data privacy, telemedia, and telecommunication laws. This is true even in the age of the General Data Protection Regulation, although the European legislature has been putting considerable efforts into establishing a level playing field across the European market.

For instance, while many European countries are rather relaxed when it comes to the use of cookies, web beacons, or pixels in advance of the upcoming European Regulation on electronic communication (e-Privacy Regulation) that will regulate these aspects of digital marketing, expected to be adopted by the end of 2020, the German Conference of Federal Data Protection Authority is requesting explicit consent to the use of these technologies. In spring 2019, the DPA emphasised its expectations by investigating 40 websites, platforms, and online shops for compliance with these requirements.

Likewise, the use of social plug-ins, web analytics, profiling, and tracking tools and other means of targeted advertising are often challenged by consumers, consumer protection associations, and even competitors by raising out-of-court claims or by initiating litigation. Therefore, companies that are doing business in Germany should review and adjust their privacy policy language and consent mechanisms before entering the German market.

When sending e-newsletter advertising, push notifications, or other means of active electronic communications to consumers (and even in B2B context), companies must consider that under German unfair competition law, obtaining prior consent is mandatory in most instances. German courts are even requesting a so-called double opt-in, according to which subscribers to email distributions or push notification marketing lists even have to confirm their requests to receive advertising content by actively clicking on a confirmation link or button (second opt-in) in a first message upon subscription.

And finally, international players in the consumer markets should be aware that many messages that would be considered being “transactional” in other markets, like consumer satisfaction surveys, promotion of additional services, or product updates, are treated as advertising messages by the German courts.



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Intellectual Property

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Your IP assets make your business unique. Tapping into new technology, securing brand ambassadors, leveraging social media or stopping copycats, or counterfeiters – it's all about IP. A noticeable number of the world's most valuable consumer brands (Forbes, 2019) originate from Germany, including T-Mobile, adidas, Mercedes, and BMW. And with digitalization and the rise of artificial intelligence, patents are becoming increasingly important for the consumer industry, whether it is 3D printing, smart clothing, or connected household devices.

Across the life cycle of IP assets, from development to commercialization, and licensing through to maturity, in Germany, you will find a well-developed legal framework to build, manage, and enforce IP. Germany has always been a preferred forum for IP enforcement because it offers a number of effective legal remedies, such as preliminary injunctions, at predictable costs. These can be obtained on short notice, normally within a couple of days. On the other hand, this is something that makes trademark clearance and freedom to operate analysis prior to product rollouts in Germany even more important. Last but not least, German unfair competition law offers effective remedies against misleading advertising, false product labeling, and unfair imitation of product designs.

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Litigation and Arbitration



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It is almost inevitable that in today's global supply chains, consumer companies will find themselves in international disputes. Such complex disputes may range from classic supply chain breakdowns to violations of IP and competition law, quality issues, know-how, and license agreements, as well as the liquidation of joint ventures and disputes on recovery of costs within the supply chain due to regulatory non-compliance.

Once confronted with a supply chain dispute, legal protection (such as interim relief) might be a way to maintain production and prevent damages.

The careful choice of the applicable jurisdiction and other concrete contractual regulations such as on the (continued) use of IP rights, rights in the event of non-compliance with compliance regulations, or the consequence of price volatilities can be an effective tool for avoiding or, if this not possible, handling supply chain disputes.

As an alternative to state-court, arbitration pursuant to well-drafted arbitration clauses help to achieve the efficient resolution of commercial disputes in supply chain contracts and other contracts. Germany's arbitration-friendly legislation and the pro-enforcement approach adopted by its courts have given Germany its reputation as an arbitration-friendly jurisdiction.

While strict requirements apply to arbitration clauses in contracts with consumers, disputes between consumers and traders may be resolved by other methods of alternative dispute resolution (ADR). Under the German Consumer Dispute Resolution Law (VSBG), special ADR bodies in Germany and Europe have the power to resolve such disputes by way of out-of-court solutions.



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Consumer Class Actions and Consumer Mass Litigation



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In November 2018, Germany introduced a new procedural tool for consumer litigation. This new action differs in several aspects from traditional class or group actions. The new action (Musterfeststellungsklage) aims at facilitating consumer litigation by enabling consumers to rely on a declaratory judgment on legal and factual questions relevant to their claims. Participation in the action is not compulsory for consumers, and as a result the new form of action does not replace traditional consumer mass litigation. In addition, the new form of action does not provide for awards for the benefit of consumers, and individual claims can only be determined in follow-on actions.

Only qualified entities, such as registered consumer associations meeting strict criteria defined in the Code of Civil Procedure, have standing to sue commercial entities for a declaratory judgment. Consumers can register their claims in a litigation register. Registration suspends the statute of limitation for a consumer's individual claim. The declaratory judgment is binding for all registered consumers even if they are not parties to the lawsuit (Musterfeststellungsverfahren) and for the defendant entity. Alternatively, a court-approved settlement is possible where a sufficient number of consumers opt for joining the settlement.

Navigating consumer mass litigation in Germany requires coordination of various issues and strategy. One of the considerations is the new German consumer action and cross-border issues. With an EU-wide representative action in the collective interest of consumers on the horizon, cross-border issues are more important than ever for litigation strategy.

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Product Liability



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Consumer companies face highly developed laws and regulations concerning product regulation and liability in Germany. Many of these are local implementation of EU law. The Product Liability Act and the Product Safety Act provides the basic rules in this regard and is complemented by the Civil Code and the Criminal Code. Particular laws and ordinances also include specific safety and liability rules for certain products (e.g. pharmaceuticals).

Liability for defective products under the Civil Code has generated a wealth of case law. National and EU case law continues to shape the product liability and safety landscape in Germany, with several recent European Court of Justice decisions originating from German proceedings. Various authorities are charged with ensuring product safety on federal and state level. Their jurisdiction is often defined by the product and location. Whether insurance coverage for product liability or similar adequate measures are required must be determined by the type of product.





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Product Regulation



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It's important to understand the huge range of regulatory requirements at play in Germany and to be prepared for changes.

Distinct regulatory requirements fundamentally affect how consumer companies can design their products and how they can market and sell them in Germany. German regulations are well-developed, and from food hygiene to chemicals regulations and age-restricted products to electrical products regulations, the interaction of EU and German local regulations creates a high complexity within the regulatory requirements. Regulatory requirements and risk profile differ from product to product. With the meteoric development in technologies and the ever-changing consumer behavior, it is challenging to keep up with regulatory requirements and anticipate coming regulatory changes.

In addition, in Germany you have to be prepared to discuss your product portfolio's regulatory compliance with the regulators and consumer advocacy organizations that are entitled to make regulatory compliance subject to civil law proceedings and preliminary injunctions.

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Payment and Financial Services Regulations



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Consumer companies doing business in Germany face various potential conflicts with the financial market regulations. On the one hand, they will want to avoid falling within the scope of the second payment service directive (PSD2) and providing payment services without the required license. On the other hand, they will want to ensure that by financing of sales they are not providing credit business (subject to authorisation). Violations of these regulations can lead to supervisory measures and, in the worst case, even result in criminal prosecution.

A company can be deemed to be provided payment services if it (e.g. as commercial agent and/or through an online platform) brings two other persons (e.g. buyer and seller) together and manages the cash flow between them through its own accounts. A commercial agent falls out of the scope of PSD2 if it has a genuine range for negotiating or concluding a sale or purchase of goods and services. Pure messenger activities, i.e. the mere forwarding of given declarations of intent, are not covered by the exception. Online platforms with general terms and conditions that provide, for example, that the operator acts as the agent of the customer or the trader or which stipulate certain conditions for contracts concluded via the platform, are generally not covered by the exception provision. According to the German supervisory authority, such online platforms have no decision-making authority for the customer or trader, but only contribute to the conclusion of the contract in an automated manner. Therefore, such online platforms require a payment service provider license.

Customer cards, vouchers, or loyalty cards may trigger a license requirement if they are not limited in scope or if they are not accepted by a limited network. PSD2 states that these exceptions do not apply if a payment instrument with a particular use becomes an instrument for general use. The payment instrument may be designed in various ways, e.g. as a card with a magnetic strip or chip or other digital data carrier or app. In any case, merchants who make use of these exemptions must notify German authorities if the total value of the payment transactions in the amount of EUR 1 million in the preceding 12 months is exceeded.

In Germany, the granting of loans qualifies as credit business which, as a rule, requires a credit institution license. A merchant who credits his own sales by deferring the purchase price is not deemed by engaging in the lending business, even if he has interest paid on the deferral loan. In this case, although the seller gives the buyer an economic loan, this loan is not based on a loan agreement, but solely on an atypically designed purchase agreement. However, this exemption does not apply if an already existing debt, e.g. from a sales contract, is not only deferred, but is repacked into a loan.



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Tariffs and Customs



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“Trade War” or “Brexit” became synonyms for the increase or imposition of customs duties. Duties can dramatically affect trade volume, competition and, thus, the profits of a consumer business performing cross-border supplies of goods.

Customs and tariffs are not only determined by national provisions but also and mainly by EU legislation (i.e. the Union Customs Code). Because export duties are only levied in exceptional cases, the focus lies on the rules of import. In this context, attention has also to be paid to special anti-dumping and excise duties rules as well as the intersection with national import VAT. Not only here smart choices of Incoterms and declarants can make a difference.

Finally, to prevent the emergence of customs duties, the procedural rules must be strictly observed if goods are not intended for release into free circulation. Concerning the export rules, however, the national rules of the foreign trade law and a variety of European regulations (e.g. embargo or dual use regulations). Because of the rather formalistic nature of the requirements, documentation and data recording, as well as the archiving of information, is of critical importance.





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