

Martin Schulz
Oliver Wasmeier

The Law of Business Organizations

A Concise Overview
of German Corporate Law

 Springer

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Preface

This book provides a concise overview of the relevant legal framework governing German business organizations. Thus, our book is neither meant to be fully comprehensive in scope, nor can it substitute the advice and guidance of qualified attorneys and tax advisors in individual cases. Rather, this book is intended to provide the reader with a basic introduction into some key aspects of German business law in general, and of German corporate law in particular. Our goal is to help business practitioners and international students to familiarize themselves with the general framework and the characteristic features of German corporate law.

The first chapter provides an introduction into the economic background and general aspects of conducting business in Germany. To this purpose we present some characteristic features of the German legal system, outline the legal framework, and give an overview of typical forms of business organizations. The next two chapters focus, in particular, on the German stock corporation (*Aktiengesellschaft, AG*) and the German limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*) as the most popular and widespread German corporate forms. Using these corporate forms as an example, we then look at some persistent corporate law issues such as capitalization requirements, managerial duties, shareholders' liability and employees' participation rights. Furthermore, we illustrate the process of designing a GmbH's articles of associations to the benefit of the shareholders and we provide a brief introduction into the regulations governing capital market transactions in Germany. After addressing some key aspects of corporate acquisitions in the fourth chapter, we discuss some typical problems faced by companies engaged in cross-border activities, including the relevant EU framework, in the fifth chapter. The supplementary materials include some recommendations for further reading, selected bilingual excerpts of important statutes, as well as examples of some important corporate documents.

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Abstract

In the following first chapter, we will provide an introduction to the legal and economic environment to be aware of when considering doing business in Germany. Beginning with a short summary of the economic framework conditions of the German market, we will explain some basic features of the German legal system, including the structure of the legislative and judicial system, and will describe some of the most important legal frameworks. Thereupon, we will outline some of the key aspects of German business law to be considered when deciding upon establishing a business enterprise in Germany. We will continue our presentation by introducing the main options for foreign entrepreneurs to this purpose, by outlining the requirements for establishing a branch office for an existing foreign company as well as by a brief presentation of the most important non-corporate and hybrid forms of German business organizations available. Finally, we will provide a brief introduction into the German legal framework governing insolvency and restructuring of companies as a matter of utmost practical importance for any business operation.

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1.1 Conducting Business in Germany

1.1.1 Case Study

Case Study

A-Corporation (**A**) is incorporated in the state of Delaware, USA, with its headquarters in Wilmington. **A** manufactures components for automobile brakes. **A** conducts business throughout the US and is considering a future expansion of its business into Europe. John B. (**B**), the CEO of **A**, is interested in Germany in particular. He has visited the International Automobile Fair in Frankfurt/M. and has gained the impression that Germany would be well suited for the sale and distribution of **A**'s products. **B** was especially impressed by the number of visitors to the Frankfurt Fair interested in automobiles. Seeing them as potential buyers (of cars and their components, such as **A**'s products), **B** calls Peter C. (**C**), head of **A**'s legal department, to ask him to prepare a memorandum on the framework for doing business in Germany.

B asks **C** to address the following issues and questions:

- Elaborate on the general economic background and business climate in Germany.
- What advantages does Germany have to offer to a foreign investor?
- What are the key features of German business law?

1.1.2 Economic Background

Germany is one of the world's leading industrial nations and, e.g. in terms of total economic output, Germany is also one of the leading economies within Europe. In 2009, Germany exported goods amounting to EUR 803.2 billion and imported goods amounting to EUR 667.1 billion. Germany has a highly developed free market system; its economy is closely linked to the other Member States in the European Union. Trademarks of Germany's economic system are its highly developed infrastructure, its qualified workforce and its international, export-oriented focus.

Many German companies generate a great deal of their profits through exports and many jobs are dependent on foreign trade. From 2003 until 2008, Germany was the world export champion ('*Exportweltmeister*') since no other country exported more goods to other countries during this time period.¹ In 2009, China surpassed

¹ Source: German Federal Statistical Office (Statistisches Bundesamt), Export, Import, Globalisierung, 2010, p. 37.

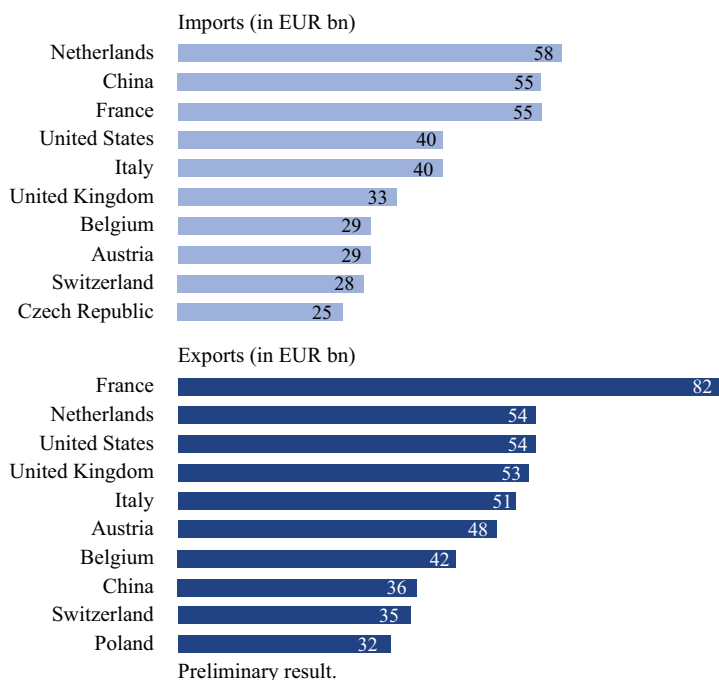


Fig. 1.1 Germany's major trading partners in 2009. (Source: Statistisches Bundesamt, Wiesbaden 2010)

Germany, however, Germany was second, still ahead of the US. Also, with regard to the import of goods, Germany remains one of the leading countries worldwide; in 2009 only the US and China imported goods with a higher aggregate value.² For this reason, Germany has traditionally been attractive to foreign investors looking for business opportunities in Germany. Germany's most important trading partners are EU Member States like France and the Netherlands.³ Almost three out of four goods 'Made in Germany' are delivered to European countries. In 2009, 63% of goods were delivered to EU Member States. However, in 2009 the second important market for German products was Asia with a share of about 14%, ahead of the US market with a share of about 10% (Figs. 1.1 and 1.2).

In an advanced economy such as that of Germany, business organizations are important economic and social institutions. The success of these business organizations obviously depends on the legal framework surrounding them. Since Germany is a member of the European Union, cross-border commercial activities in the European market and the resulting legal issues become more and more important for investors in the German market.

² Source: World Trade Organization (http://www.wto.org/english/res_e/statistics_e/its_e.htm).

³ Source: German Federal Statistical Office (Statistisches Bundesamt), Wiesbaden 2010.

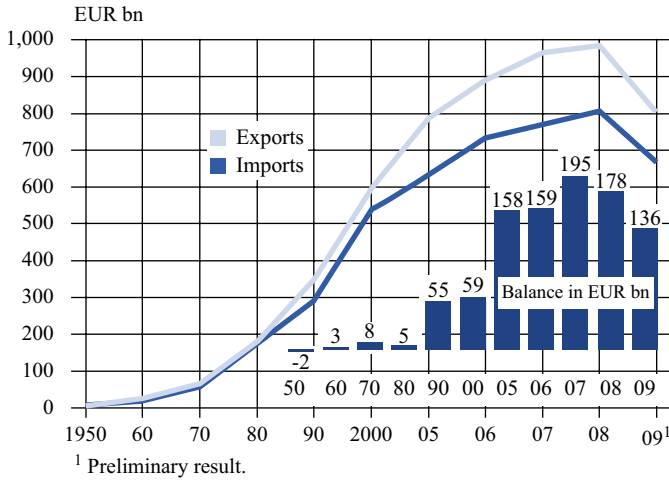


Fig. 1.2 Development of German foreign trade from 1950 to 2009. (Source: Statistisches Bundesamt, Wiesbaden 2010)

1.1.3 Core Features of the German Legal System

As its name suggests, the Federal Republic of Germany is organized as a federal system consisting of 16 federal states (*Bundesländer*), each of which is responsible for the government of its own state, including law-making powers in many areas, provided that they are not preempted by Federal law.

Furthermore, Germany is a Member State of the European Union (EU). This is the association of a large number of European states and, as such, the impact of European law on many areas of national law has become more and more important. This is particularly true for those areas of EU law which are either directly or indirectly applicable, such as EU Regulations or the Directives. It is also true for the case law of the European Court of Justice (ECJ) which often plays a decisive role in legal disputes when the national courts of EU Member States have to interpret the scope of applicability of the Union Treaties.

1.1.3.1 Hierarchy of Norms and Constitutional Framework

In Germany, the highest written national norm is the Federal Constitution. The Constitution or so-called 'Basic Law' (*Grundgesetz, GG*), which was promulgated by the Parliamentary Council on 23 May 1949, defines and regulates the political and legal system of the Federal Republic of Germany (Fig. 1.3).

Germany is a republic and a democracy; it is a federal state based on the rule of law and social justice. The *Grundgesetz* contains a catalogue of fundamental rights and values to be protected against any form of infringement, such as the dignity of man, freedom of religious belief, freedom of speech, freedom of arts and sciences, freedom of assembly, freedom of association, the right to freely choose one's profession, the principle of equality before the law and a constitutional guarantee