THOMSON REUTERS
PRACTICAL LAW™

Lending to a Company in Germany: Regulatory Issues

by Dr Matthias Grund and Marlena Bitner, K&L Gates LLP

Status: **Law stated as of 01-Mar-2024** | Jurisdiction: **Germany**

This document is published by Practical Law and can be found at: **uk.practicallaw.tr.com/w-033-0676**
Request a free trial and demonstration at: **uk.practicallaw.tr.com/about/freetrial**

A Practice Note looking at regulatory issues for a proposed loan finance transaction where the borrower is a company incorporated in Germany and the lender is incorporated in another jurisdiction.

This Note considers economic and trade sanctions, anti-money laundering laws, anti-corruption laws, anti-bribery laws, and currency exchange controls in Germany applicable to foreign lenders.

It also considers licensing, filing, and registration requirements for foreign lenders making loans to and taking security in Germany and other doing business requirements for foreign lenders under the laws of Germany.

Lawyers advising a lender who is proposing to make a loan to a borrower in another jurisdiction need to be aware of the various issues that may arise as a result of the different jurisdictions involved in the transaction. Regulatory issues in a jurisdiction may cause problems in a transaction, and it is essential to identify these problems early on so that they can be dealt with to ensure that the transaction runs smoothly.

This Note highlights the following regulatory issues that apply to foreign lenders:

- Laws and regulations in Germany relating to economic and trade sanctions.
- Anti-money laundering laws and regulations in Germany.
- Anti-corruption and anti-bribery laws and regulations in Germany.
- Currency exchange controls in Germany.
- Restrictions on a foreign lender making loans or taking security or guarantees in Germany.
- Other doing business requirements in Germany that may apply to the making of loans by a foreign lender to a borrower in Germany.

This Note does not consider or address consumer finance laws or regulations.

For information about matters which a lender may wish to consider in relation to tax, costs, security, and insolvency in connection with a proposed loan transaction where the borrower is incorporated or located in Germany and the lender is incorporated elsewhere, see Practice Note, Lending to a Company in Germany: Structuring the Transaction.

Economic and Trade Sanctions

Legal Framework: Economic and Trade Sanctions

Monetary and capital transactions with foreign countries are generally free and unrestricted in Germany and the entire European Union (Article 63, Treaty on the Functioning of the European Union) (TFEU). Section 1 of the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*) (AWG) stipulates the fundamental freedom of foreign trade and links possible restrictions to specific conditions (in contrast to the US, by the way, where under the US Constitution's Commerce Clause, the US government has exclusive power to regulate foreign trade). In order to prevent any abuse of the freedom of foreign trade, there are reporting obligations stipulated in the AWG and the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) (AWV).

Additionally, there may be restrictions based on sanction measures of:

- The United Nations (UN).
- The European Union (EU), some of which require implementation in national law of EU Member States.
- National authorities.

Sanction measures imposed by UN Security Council resolutions are directed exclusively at states. In order to implement them in the EU, a decision of the Council of the EU is first required, in which the EU's approach to a particular matter is defined (Art. 29, the Treaty on European Union) (TEU). These decisions are not directly applicable in EU Member States, but require implementation by the EU through Council or Commission regulations that, in turn, are directly applicable in all Member States. Responsibility for the administration and enforcement of these regulations rests with the competent authorities in each Member State, where relevant domestic legislation may be enacted.

Sanction measures by the EU are also possible without underlying measures by the UN. In the area of foreign trade law, sanctions may essentially only be issued by the EU in light of the common trade policy allowing the Member States only to impose sanctions in very few areas, e.g. arms embargoes and travel restrictions. EU sanctions require a Council decision establishing the EU's approach to a particular matter (Art. 29, TEU) and its implementation by an EU regulation.

Generally, the following persons are required to comply with the EU sanctions:

Any person within the EU.

Any person who is a national of a Member State.

Any legal person, entity or body which is constituted in a Member State.

Any legal person, entity or body which conducts any business within the EU or any person on board an aircraft or vessel under the jurisdiction of a Member State.

Entities incorporated outside the EU are not required to comply with EU sanctions as long as they do not conduct business in whole or in part within the EU.

In exceptional cases, the Federal Ministry for Economic Affairs and Energy, as the competent authority in Germany, issues restrictive emergency measures, so-called individual measures, in consultation with the Federal Foreign Office, the Federal Ministry of Finance, and the German Central Bank (*Bundesbank*) based on sections 4 and 6 of the AWG. These individual measures usually serve to implement sanctions of the UN Security Council in a timely manner and are taken in anticipation of corresponding measures of the EU. They apply only for a temporary period.

Beyond that, the EU has enacted the so-called EU Blocking Statute, or Blocking Regulation (Regulation (EC) No. 2271/1996), which prohibits compliance with certain specified extraterritorial measures under US sanctions by (amongst others) any legal person incorporated within the EU, any natural person who is resident in the EU, or a national of any Member State. The German legislature went even further in enacting section 7 of the AWV, when it stipulated that the making of a declaration in foreign trade by which a resident participates in a boycott against another state (boycott declaration) is generally prohibited.

All of these sanction measures may consist of prohibitions on making funds or economic resources available directly or indirectly to certain persons, organizations, or institutions. Information on the current prohibitions (without binding effect) can be found on the website of the German Central Bank (*Bundesbank*) under https://www.bundesbank.de/de/service/finanzsanktionen/sanktionsregimes, and on the website of the European Commission under

https://data.europa.eu/data/datasets/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions?locale=en.

Penalties for Breach of Economic and Trade Sanctions

Breach of financial sanctions that have been published in the Official Journal of the EU or the Federal Gazette (*Bundesanzeiger*) are punishable with a fine or imprisonment, including possible prison sentences up to five years or more (sections 17 and 18, AWG).

Economic and Trade Sanctions Provisions in a Loan Agreement

It is common practice to include in loan agreements under German law representations and undertakings relating to economic and trade sanctions that have been issued by, or are enforced by, the US, the UN, the EU (including its member states), the UK, Germany, and Hong Kong.

Such representations will typically state that:

- Neither the obligor nor any representative is:
  - a person subject to, or at least half-owned by (or otherwise directly or indirectly controlled by or acting on behalf of) persons or entities that are subject to sanctions (Sanctioned Person); nor
  - registered or located in a country or area which itself, or whose government or other territory, is subject to a general export, import, financial or investment embargo under any sanctions (Sanctioned Country).
- No obligor has or intends to have any business operations or other dealings:
  - in any Sanctioned Country;
  - with any Sanctioned Person; or

  - involving commodities or services originating in a Sanctioned Country or shipped to, through, or from a Sanctioned Country, or on vessels or aircraft that are owned by, or registered in, a Sanctioned Country;
- or to finance or subsidise any of the foregoing activities unless the transaction value of such activities does not exceed, in aggregate, an amount equivalent to five per cent of the total assets or revenues of all obligors.

In an undertaking relating to sanctions, an obligor will typically undertake not to use the proceeds of the facility (directly or indirectly):

- To fund or facilitate any activities of or business with any individual or entity that is subject to Sanctions.
- To fund or facilitate any activities or business in a Sanctioned Country.

Such representations and undertakings will not be given by an obligor or affiliate which has its seat in the EU or is managed inside the EU to the extent giving the representation would result in a breach of the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*), the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*), the provisions of EU-Regulation (EC) 2271/1996 (EU Blocking Regulation), or any similar applicable anti-boycott laws or regulations.

Breach of such a representation or undertaking will constitute an event of default.

Anti-Money Laundering Laws and Regulations

Legal Framework: Anti-Money Laundering

The following pieces of legislation relate to anti-money laundering in Germany:

- Money Laundering Act (*Geldwäschegesetz*).
- Tracing of the Proceeds of Serious Crime Act (*Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten*).
- Banking Act (*Kreditwesengesetz*).
- Investment Code (*Kapitalanlagegesetzbuch*).
- Insurance Supervision Act (*Versicherungsaufsichtsgesetz*).
- Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz*).
- Payment Account Identity Verification Ordinance (*Zahlungskonto-Identitätsprüfungsverordnung*).
- Audit Report Ordinance (*Prüfungsberichtsverordnung*).
- Payment Institutions Audit Report Ordinance (*Zahlungsinstituts-Prüfungsberichtsverordnung*).
- Capital Investment Audit Reports Ordinance (*Kapitalanlage-Prüfungsberichte-Verordnung*).
- Audit Reports Ordinance (*Prüfungsberichteverordnung*).

The Money Laundering Act (*Geldwäschegesetz*) (GWG) imposes "identification," documentation, and reporting obligations on certain persons involved in economic transactions and business activities, including credit and financial services institutions, payment institutions, electronic money institutions, certain insurance undertakings and intermediaries, capital management companies, and lawyers and other advisors (Obligated Persons). The GWG also imposes the obligation to take preventive security measures.

A foreign lender can be an Obligated Person in many situations, including when it hires and creates a business relationship (of some duration) with a lawyer, chamber counsel, notary, or certified public accountant in Germany.

All Obligated Persons are required to fulfill the general diligence obligations (see section 10, paragraphs 1 and 3, GWG), whenever all of the following apply:

- A business relationship is or will be established.
- A transaction carried out outside a business relationship exceeds the total value of EUR15,000 or more.
- Some facts indicate that assets in connection with a transaction or business relationship are being used for money laundering or the assets are related to terrorist financing.
- There is any doubt as to the accuracy of the information concerning the identity of the contracting party, the person acting on its behalf, or the beneficial owner.

When applicable, the money laundering general diligence obligations require Obligated Persons to do the following:

- Identify the contracting party and the persons (if any) acting on its behalf (contracting partner's identity shall be recorded and supported by copies of the identity documents presented).
- Clarify whether the contracting party is acting for a beneficial owner and, if so, to identify the beneficial owner itself (in case of a legal entity, the ownership and control structure of the contracting party is to be clarified).
- Obtain information on the purpose and intended nature of the business relationship.

- Determine by appropriate, risk-oriented procedures whether the contracting party or the beneficial owner is a politically exposed person.
- Monitor continuously the business relationship, including the transactions carried out in the course of the business relationship.

Beyond the above requirements, Obligated Persons need to satisfy increased diligence obligations, if the risk analysis reveals a higher risk of money laundering or terrorist financing (see section 15, GWG). Whenever an Obligated Person (such as a covered foreign lender) has a branch in Germany and the facts to be reported relate to an activity of the German branch, the Obligated Person must clarify whether a member of its management needs to file a Suspicious Activity Report (*Verdachtsmeldung*) with the Central Financial Transaction Investigation Authority (*Zentralstelle für Finanztransaktionsuntersuchungen*) under section 43 of the GWG. This can be the case regardless of the value of the asset involved or the amount of the transaction, if any of the following applies:

- An asset related to a business relationship, brokerage, or transaction is derived from a criminal offence that could constitute a predicate offence (*Vortat*) to money laundering.
- A business transaction, a brokerage transaction, or an asset is related to terrorist financing.
- The contracting party fails to comply with its obligation to disclose the beneficial owner.

Penalties for Breach of Anti-Money Laundering Laws and Regulations

Any Obligated Person commits an administrative offense (*Ordnungswidrigkeit*) under the GWG (section 56, paragraph 1, nos. 15-25, and no. 69), if it does any of the following:

- Violates intentionally or grossly negligently the general or the increased diligence obligations under the GWG.
- Intentionally or grossly negligently fails to file a Suspicious Activity Report.
- Does not file the Suspicious Activity Report correctly, completely or on time.

An administrative offence can be punished with a fine of up to EUR1,000,000 or with a fine of up to twice the economic advantage derived from the violation if the violation is serious, repeated or systematic (section 56, paragraph 2, GWG). The economic advantage includes the profit made and the losses avoided and can be estimated.

Furthermore, a deterrent effect is intended by a risk of damage to reputation, as the competent supervisory authorities are obliged to publish unappealable (*unanfechtbar*) decisions imposing fines on their website (see section 57, paragraph 1, GWG). Such notice shall specify the type and nature of the breach and the natural and legal persons or associations of persons responsible for the breach.

Anti-Money Laundering Provisions in a Loan Agreement

It is common practice to include in a loan agreement under German law repeating representations and general undertakings relating to AML laws.

Such a representation typically states all of the following:

- There is (and has been) no litigation, arbitration, investigation, or administrative, regulatory, or criminal proceeding against the obligor or any affiliate or representative in relation to applicable anti-money laundering laws.
- The obligor and its affiliates and representatives have conducted and are conducting their businesses in compliance with applicable anti-money laundering laws.
- The obligor, and its affiliates and representatives have instituted and maintain systems, controls, policies, and procedures designed to detect incidences of money laundering and to promote and achieve compliance with applicable anti-money laundering laws.

It is also typical for a loan agreement under German law to impose a general undertaking on the borrower to comply with all existing anti-money laundering laws.

A breach of the repeating representation or the undertaking will constitute an event of default under the loan agreement.

Anti-Corruption and Anti-Bribery Laws and Regulations

Legal Framework: Anti-Corruption and Anti-Bribery

There is no legal definition of corruption in the German Criminal Code (*Strafgesetzbuch*) (StGB) or the ancillary criminal laws. Corruption can be understood as the abuse of public or private-sector entrusted positions of power. A person acts corruptly if, in making a decision, it acts for its own benefit (benefactor and beneficiary are the same person) or for the benefit of a third party and, in doing so, it violates certain rules.

Under German law, there are several criminal offences in the area of corruption and bribery, including:

- Acceptance (section 331, StGB) and granting of advantages (section 333, StGB).
- Corruptibility (section 332, BGB) and bribery (section 334, StGB).
- Bribery and corruptibility of foreign and international officials (section 335a, StGB).
- Corruptibility and bribery in business transactions (section 299, StGB).
- Anti-competitive offers in tendering procedures (*Wettbewerbsbeschränkende Abs prachen bei Ausschreibungen*) (section 298, StGB).
- Bribery of members of parliament (section 108e, StGB).
- Bribery of voters (section 108b, StGB in conjunction with section 108d, StGB).
- The acceptance of advantages (section 331, StGB) and corruptibility (section 332, StGB) as well as, in reverse, the granting or providing of advantages (section 333, StGB) and bribery (section 334, StGB), are the core provisions of German criminal law aiming at protection against corruption in the public sector. Separately, acts of bribery in the commercial sector are covered by section 299 of the StGB. The acceptance and the granting of advantages essentially differ from bribery and corruptibility as the latter require the public official involved to breach a sufficiently specific duty.
- Certain officials of foreign states and international organisations are treated in the same way as German public officials, provided that the act in question relates to a future official act in breach of duty (see section 335a, StGB). It is irrelevant whether the act was committed in Germany or abroad. The only decisive factor is whether a German is involved as donor or recipient.
- As examples, any of the following can be considered as bribes:
- Overt and covert monetary payments (also disguised as commission, bonus, credit note, special remuneration or consulting fee).
- Construction and other non-cash benefits.
- Low-interest loans.
- Discounts.
- Donations, sponsorship and (research) funding.
- Invitations to events and trips.
- Dinner invitations.
- Invitations to congresses with a "side programme".
- Non-enforcement or deferral of claims.
- Intangible benefits such as the retention of a professional position, special career opportunities, or the awarding of orders, titles, and honorary offices.

In addition to the special provisions on corruption and bribery, there are related criminal offences including:

- Disloyalty (*Untreue*) (section 266, StGB).
- Fraud (*Betrug*) (section 263, StGB).
- Betrayal of secrets (*Geheimnisverrat*) (sections 203 and 353b, StGB).
- Breach of the duty of supervision (*Verletzung der Aufsichtspflicht*) (section 130 of the Administrative Offences Act (*Ordnungswidrigkeitengesetz*) (OWiG)).

According to section 7, paragraph 1 of the StGB, an offence committed abroad (outside of Germany) can be punished under German criminal law if the offence in question was committed against a German citizen and is punishable at the place of the offence. Beyond that, German criminal law applies to the acceptance and the granting of advantages, the bribery and corruptibility committed abroad, irrespective of the law of the place of the offence, if any of the following applies:

- The offender is German at the time of the offence.
- The offender is a European public official at the time of the offence and their office is based in Germany.
- The offence is committed against a public official, a person under special public service obligation, or a soldier of the Federal Armed Forces.
- The offence is committed against a European public official or arbitrator who is German at the time of the offence, or a person with equivalent status (under section 335a of the StGB), who is German at the time of the offence.

(See section 5, no. 15, StGB).

Therefore, the various crimes relating to corruption and bribery may involve and be charged against foreign lenders making loans to German borrowers or otherwise doing business in Germany, depending on the specific facts involved in each case.

Penalties for Breach of Anti-Corruption and Anti-Bribery Laws and Regulations

Individuals who commit any of the offences noted above (see Legal Framework: Anti-Corruption and Anti-Bribery) face a fine of up to EUR5 million to EUR10.8 million or imprisonment ranging from three to ten years, depending on the specific violation involved.

In addition, a company that has offered a bribe or is otherwise involved in corruption faces the following types of penalties:

- Fines under the StGB and OWiG.
- Liability for damages under German civil law.
- Profit skimming (*Gewinnabschöpfung*) under the StGB (sections 73 to 73e).
- Entries in the central business register (*Eintragungen in das Gewerbezentralregister*) under sections 149 to 153 c of the German Trade Regulation (*Gewerbeordnung*) (GewO).
- Disqualification from trading (*Gewerbeuntersagung*) under section 35 of the GewO.
- Prohibition from entering into contracts.

Anti-Corruption and Anti-Bribery Provisions in a Loan Agreement

Typically, a loan agreement under German law will include repeating representations and general undertakings relating to corruption and bribery. They typically cover the topic of regulatory investigations, as well as compliance with applicable corruption and bribery laws, and adoption of policies and procedures.

A breach of such a representation or undertaking will constitute an event of default.

Currency Exchange Controls

Restrictions on Payments to a Foreign Lender (in Any Currency)

Under German law, there are no currency exchange controls or laws or regulations restricting payments to foreign lenders under a loan agreement, security document, or guarantee.

A German borrower (company or partnership registered in Germany, and possibly others) is required to notify the German Central Bank (*Bundesbank*) of any loan advanced by a foreign lender if the loan exceeds EUR12,500 (or the equivalent in another currency) or is granted under a loan agreement which has an original term of more than twelve months (section 11, paragraph 2, AWG and section 67, paragraph 2, AWV). For this purpose, the term "foreign lender" is interpreted broadly and includes:

- A branch of a German lender located and managed outside Germany.
- A foreign lender's "permanent establishment" located and managed in Germany.

Any repayment by a German borrower to a foreign lender also must be notified to the German Central Bank, subject to the same conditions and under the same provisions.

A German corporate borrower is also required to report to the German Central Bank its liabilities arising from loans received from foreign lenders if the aggregate sum of all outstanding liabilities (irrespective of their legal basis) owed to foreign lenders at the end of any month exceeds EUR5,000,000. Financial institutions and investment companies are excluded in relation to amounts owed to and owing from their investment funds.

Failure to submit the required report is punishable by a fine of up to EUR30,000.

If a loan is denominated in a currency other than euros and is to be repaid in Germany, the borrower is entitled to make the repayment in euros (section 244, German Civil Code (*Bürgerliches Gesetzbuch*)), unless payment in the other currency is agreed in the effective clause (*Effektivklausel*). If the lender does not hedge the risk of currency movement with a value protection clause (*Wertsicherungsklausel*), which is intended to make a monetary debt stable in value, the lender bears the risk of a negative change in the exchange rate between euros and the other currency.

Restrictions on Making Loans or Taking Security or Guarantees

Restrictions on Making Loans

German law requires a banking licence granted by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (BaFin) for any person or entity that lends money if the lending is conducted on a commercial basis or the scale of it requires a commercially established business operation (section 32, German Banking Act (*Kreditwesengesetz*) (KWG)). Lending is deemed to be commercial if loans are granted for certain periods of time and the lender intends to make a profit or lends in return for payment.

The BaFin takes the view that a commercially established business operation is generally required if more than 20 individual loans are made with a total value of at least EUR500,000 or if more than 100 individual loans are granted regardless of the total value.

A banking licence is not required in the following cases:

- Lending transactions conducted exclusively with or among parent, subsidiary, or affiliated companies.
- Loans granted by an employer to an employee to finance home ownership.

- Loan agreements that include a beer supply contract (subject to certain conditions).
- Deposits made with licensed credit institutions.
- Loans to a company with a loss participation clause (*Verlustteilnahmeklausel*) or a qualified subordination clause (*qualifizierte Nachrangklausel*) allowing the loans to be classified as equity and not as debt, provided that these loans cannot be classified as deposit business on the borrower side (section 1, paragraph 1, sentence 2, no. 1, KWG).

The requirement for a banking licence applies to any lender, regardless of whether or not it is located in Germany. However, a credit institution authorised in one member state of the European Economic Area may carry out its activities in Germany, provided that it complies with the notification procedure set out in section 53b of the KWG and section 39 of the German Payment Services Supervision Act.

Carrying on banking business without a banking licence is punishable by imprisonment for up to five years or a fine (section 54, paragraph 1, no. 2, KWG).

Restrictions on Taking Security or a Guarantee

There are no restrictions on the taking of security over assets by foreign lenders.

The provision of third-party security (in the form of a surety (*Bürgschaft*), guarantee (*Garantie*), assumption of debts (*Schuldübernahme*), letter of comfort (*Patronatserklärung*), or endorsement obligations (*Indossamentverpflichtungen*)) requires a banking licence if it is done on a commercial basis or the scale of it requires a commercially established business operation (section 1, paragraph 1, sentence 2, no. 8, KWG).

Guarantees by one company of obligations of another company within the same group do not require a banking licence.

Restrictions on Enforcing Rights Under a Loan Agreement

There are no restrictions on a foreign lender enforcing its rights under a loan agreement, such as any licensing or registration requirements, against a borrower incorporated or located in Germany. This remains true even when a foreign lender fails to obtain a banking license required by law (see Restrictions on Making Loans).

Restrictions on Enforcing Security

There are no restrictions on a foreign lender enforcing the securities granted in its favour.

Doing Business Requirements

There are no further restrictions or qualifications on foreign lenders doing business in Germany.