



WINHELLER
RECHTSANWÄLTE

Legal Webinar

**How To Do
Online Business
in the German
Market**

make a difference.



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WINHELLER Attorneys at Law

- ▶ Germany-based Full-Service Law Firm for Business and Nonprofit Law
- ▶ Practices:
 - ▶ IP Law, Copyright & Media Law
 - ▶ M&A, Transactions, Distribution
 - ▶ Employment Law
 - ▶ Tax Law & Tax Advisory, Inheritance Law
 - ▶ Banking & Finance, Insurance Law
 - ▶ Nonprofit Organizations, Private Foundations
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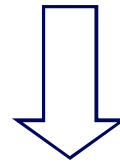
Overview

- I. Introduction: When Does German Law Apply?**
- II. Consequences in Case of Legal Mistakes**
- III. Imprint**
- IV. Withdrawal Instructions / Information on the Right of Withdrawal**
- V. General Terms and Conditions**
- VI. Price Description Laws**
- VII. Privacy Policy / Data Protection Declaration**
- VIII. Disclaimer**
- IX. Value-Added Tax (VAT) – Basic Rules**
- X. Checklist – 7 Basic Requirements acc. to German Law**
- XI. Questions & Answers**



I. Introduction: When Does German Law Apply?

Online company targets the German market



Applicability of German Law

- ▶ **German Civil Code**
- ▶ **Introductory Act to the German Civil Code**
- ▶ **German Telemedia Act**
- ▶ **German Price Description Law**



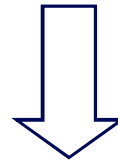
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II. Consequences in Case of Legal Mistakes

Is your company's website legally deficient?



Possible Consequences:

- ▶ **Cease and desist letters from competitors' attorneys:**
You will have to compensate the attorney fees of your competitor.
- ▶ **Cease and desist letters from consumer protection agencies:**
You will have to compensate the consumer protection agency.
- ▶ **Court injunctions** (at your cost)
- ▶ In certain cases: Fine imposed by the authorities, up to 50.000 Euro or more



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III. Imprint

What must be written in the Imprint?

(a) Name:

Examples: Robert E. Schneider; FUN PRODUCTS LLC; GOOD BANK AG

(b) Legal form of a company:

Examples: LLC; Inc.; Ltd.; GmbH; S.A.; AG

(c) Name of the authorized representative of a company:

Example: Chief Executive Officer Michael S. Miller



III. Imprint

What must be written in the Imprint?

(d) Capital of the company does not need to be mentioned on the website.

Exceptions:

- ▶ **The company voluntarily provides information about the company's capital on its website:**

In such a case the company must specifically name its share capital / basic capital / common capital stock in the imprint.

- ▶ **Not all deposits have been paid yet into the share capital:**

The unpaid deposits must be specified in the imprint.



III. Imprint

What must be written in the Imprint?

(e) Address:

Street address. No P.O. Box address possible.

(f) Telephone number, fax number, e-mail address:

Fax number only if available.



III. Imprint

What must be written in the Imprint?

- (g) **If the responsible person or company needs permission from the authorities for the services they offer to their customers, contact details of the controlling authority must be specified:**

Examples:

Banks: must name contact details of the responsible Financial Services Authority (FSA – UK) or the responsible Office of the Comptroller of the Currency (OCC – USA) or the BaFin (Germany).

Attorneys: must name the contact details of the responsible Bar Association.



III. Imprint

What must be written in the Imprint?

- (h) Name of the responsible companies' register and the registration number of the company.**

Examples:

- ▶ Companies House in Cardiff, UK. Company-No.: 04072877
- ▶ Registry court: Amtsgericht Offenbach, Germany. Registry-No.: HRB 34392.

- (i) Value added tax identification number (VAT No.)**

Example: VAT-ID-No.: DE812763796

- (j) If the company is in the process of liquidation or being closed down, the imprint must mention this fact.**



III. Imprint

What must be written in the Imprint?

(k) Further information obligations according to special laws, if applicable in the individual case:

Example: Attorneys must name in addition:

- ▶ Titles of the attorney.
- ▶ Liability insurance of the attorney.
- ▶ Listing of all rules and regulations which cover the obligations of attorneys.
- ▶ Contact information where clients can seek mediation in case of conflict with the attorney.
- ▶ Specification of other business activities of the attorney.
- ▶ Specification of membership in attorney-related organizations.
- ▶ Specification of collaboration with other attorneys.



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IV. Withdrawal Instructions / Information on the Right of Withdrawal

Legal situation in Germany (and the EU):

**Consumers have the right
to withdraw from a contract,
which has been concluded online,
within a certain period of time.**

In Germany this withdrawal period is regularly 14 days.



IV. Withdrawal Instructions / Information on the Right of Withdrawal

Obligation to inform the consumer about his/her right to withdraw from the contract within a certain period of time.



How to instruct on the website:

1. Alternative: Clear and visible link “WITHDRAWAL INSTRUCTIONS” on the website. **OR**

2. Alternative: Include withdrawal instructions in the General Terms and Conditions, highlighted in bold print.



IV. Withdrawal Instructions / Information on the Right of Withdrawal

Obligation to inform the consumer about his/her right to withdraw from the contract within a certain period of time.

Additional Obligation:

In addition to the instructions on the website, the withdrawal instructions must be sent to the consumer in text form (letter or fax or e-mail).

Recommendation: Include the withdrawal instructions in the order confirmation, which is sent to the consumer in an e-mail.



IV. Withdrawal Instructions / Information on the Right of Withdrawal

How do the withdrawal instructions look like?

The German legislature enacted binding rules on how withdrawal instruction must look like. These rules need to be adapted to the individual case.

Example of withdrawal instructions:

“I. Right of withdrawal

1. If you are a consumer, you can withdraw from the contract in text form (e.g. letter, fax, e-mail) within 14 days without giving any reasons or - if the goods are handed out to you before the 14 days deadline expires - by returning the goods. The 14 days time limit begins after receipt of this notice in text form, but not before receipt of the goods by the recipient [in case of recurring deliveries of similar goods not before receipt of the first installment], where services are concerned not prior to concluding the contract, in all cases not prior to fulfilling our information obligations which correspond to the information obligations stated in Article 246 § 2 in connection with § 1 (1) and (2) of the German Introductory Act to the German Civil Code, as well as our duties according to § 312g (1) sentence 1 of the German Civil Code in connection with Article 246 § 3 of the German Introductory Act to the German Civil Code. Timely dispatch of the withdrawal notice in text form or the goods is sufficient to meet the 14 days deadline. The withdrawal in text form can be sent to:

[name + address]



IV. Withdrawal Instructions / Information on the Right of Withdrawal

2. *The right of withdrawal shall be barred for the following contractual situations:*

a) *delivery of goods manufactured according to customer's specifications or to personal needs, or which are, due to their quality, not suitable for return, or which are spoiled fast, or which are beyond the expiry date,*

b) *delivery of audio or video recordings if delivered data carriers have been unsealed by customer,*

c) *delivery of newspapers and magazines,*

d) *In the case of a service, the right of withdrawal is also extinguished if the contract was performed in full by both parties at the express wish of the consumer before the consumer exercised his right of withdrawal.*

II. Consequences of withdrawal

In case of an effective withdrawal each party shall return what they have received in the course of the contract to the other party including any gains or benefits such as interests. As our services are concerned, this can lead to the fact that the contractual payment obligations for the period up to the withdrawal must nevertheless be fulfilled. Insofar as goods have been damaged or got lost and therefore cannot be returned in the same condition as received such party being responsible may be liable for damages unless such damage might have also occurred when testing the goods onsite as, for example, in a shop. Liability for damages can be avoided if you do not start using the goods like an owner and refrain from any activity which could deteriorate the value of the goods to be returned. The consumer shall bear the costs incurred when returning goods up to a gross order value of 40 Euros, if the delivered goods are identical with the ordered goods; we are obliged to bear these if the order value exceeds this amount, unless you have not paid your contractually agreed upon consideration at the time of your withdrawal, or if the ordered goods are not identical with the delivered goods. Goods which cannot be sent by post will be collected from you by us. Obligations to reimburse payments must be made within 30 days. This time limit begins for you when you send out your withdrawal or the received goods to us, for us upon receipt of the withdrawal notice or the goods.



END OF WITHDRAWAL INSTRUCTIONS"

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V. General Terms and Conditions – Overview

1. **Information to be given to the customer**
2. **Special information to the customer as to batteries**
3. **Special information to the customer as to packaging**
4. **General Terms and Conditions must be reasonable, clear and comprehensible (acc. to § 307 German Civil Code)**
5. **Other key issues usually addressed in the General Terms and Conditions (acc. to §§ 305 et seq. German Civil Code)**
 - a) **Limitation of Liability**
 - b) **Limitation of Warranty concerning defective products**
 - c) **Requirement for written form for amendments or modifications of the General Terms and Conditions is invalid**
6. **Jurisdiction and applicable law**



V. General Terms and Conditions

1. Information to be given to the customer

- ▶ Information on when and how the contract will be concluded.
- ▶ Information on the technical steps on the website which will lead to the conclusion of the contract.
- ▶ Information on whether the text of the contract will be saved with the seller (owner of the website) and whether and how this text is accessible to the customer.
- ▶ Available contractual language(s) must be explicitly named.
- ▶ In case of recurring or continuing obligations: the minimum term of the agreement.
- ▶ Details on payment terms and options.
- ▶ Details on when and how the product or service will be delivered to the customer.
- ▶ Warranty terms.
- ▶ Information on how input or typing errors of the customer can be easily detected and corrected.
- ▶ Information on an existing customer service.



To be continued on next page...

V. General Terms and Conditions

1. Information to be given to the customer

Recommendation:

The information should be included in the General Terms and Conditions. Otherwise it must be accessible via a special information link on the website.



Additional Obligation to send this information, including the GTCT, to the customer:

In addition, this information, including the General Terms and Conditions, must be sent to the customer in text form (e-mail or fax or letter) before or in connection with the performance of the contract.



V. General Terms and Conditions

2. Special information to the customer as to batteries or accumulators

In connection with the distribution of batteries or accumulators you must inform consumers on your website about the following:

“You as a customer have the legal obligation to return batteries and accumulators after their use. You can return them free of charge to our selling facility, to a municipal collection point, or also to any trading facility.

Batteries containing hazardous substances are connected with a sign which consists of a crossed out garbage bin and the chemical symbol Cd, Hg or Pb. The chemical symbol marks the heavy metal which is considered as hazardous.”



V. General Terms and Conditions

3. Special information to the customer as to packaging

Participation in a packaging return system

Currently, there are nine companies which offer a valid packaging return system in Germany:

- ▶ Der Grüne Punkt (www.gruener-punkt.de)
- ▶ Landbell (www.landbell.de)
- ▶ Interseroh (www.interseroh-isd.de)
- ▶ Vfw (www.vfw-revlog.com)
- ▶ Eko-Punkt (www.eko-punkt.de)
- ▶ BellandDual (www.bellandvision.de)
- ▶ Zentek (www.zentek.de)
- ▶ Redual (<http://reclay-group.com/de/>)
- ▶ Veolia (www.veolia-umweltservice.de)



V. General Terms and Conditions

3. Special information to the customer as to packaging

Participation in a packaging return system

On your website, e.g. in your General Terms and Conditions, you need to explicitly say in what packaging return system of what of the nine companies you participate. You need to specify the name and address of this company on your website.



V. General Terms and Conditions

4. General Terms and Conditions must be reasonable, clear and comprehensible (acc. to § 307 German Civil Code)

a) Every provision in the General Terms and Conditions must be *reasonable to the consumer*

Provisions in General Terms and Conditions are invalid if they bring unreasonable disadvantage to the consumer.

An unreasonable disadvantage shall, in case of doubt, be assumed to exist if a provision

- is not compatible with essential principles of the statutory provision from which it deviates,*
- or*
- limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized.*



V. General Terms and Conditions

4. **General Terms and Conditions must be reasonable, clear and comprehensible (acc. to § 307 German Civil Code)**
 - b) **Every provision in the General Terms and Conditions must be *clear and comprehensible***

An unreasonable disadvantage may also arise from the provision not being clear and comprehensible. If the consumer cannot clearly understand the meaning of the provision, the provision shall be regarded as invalid.



V. General Terms and Conditions

5. Other key issues usually addressed in the General Terms and Conditions (acc. to §§ 305 et seq. German Civil Code)

a) Limitation of Liability

Limiting the liability of your online company is only possible to a minimal extent. For example the following “Limitation of Liability” provisions would be valid:

“The liability of our company is excluded or limited concerning injuries and damage to life, body or health, unless we or our legal or other representatives were acting with intent or negligence concerning the acts or omissions that led to the injuries.

For all other injuries the liability of our company is excluded or limited, unless we or our legal or other representatives were acting with intent or gross negligence concerning the acts or omissions that led to the injuries.

If a statute holds a provision we cannot deviate from, then this statutory provision shall apply (e.g. § 14 German Product Liability Code).”



V. General Terms and Conditions

5. Other key issues usually addressed in the General Terms and Conditions (acc. to §§ 305 et seq. German Civil Code)

b) Limitation of Warranty concerning defective products

Consumer rights are very strong in case of a defective product. A limitation of legal warranty claims of the consumer is virtually not possible. In case of doubt courts will regard provisions which limit the legal warranty claims of consumers as invalid.



If the product has a significant defect and the seller is not able to cure the defect within a reasonable time at his own cost, a provision in the General Terms and Conditions is ineffective which excludes or restricts the *right of the consumer to revoke the contract* in such a situation *or to reduce the purchase price* at the consumer's free discretion.



V. General Terms and Conditions

5. Other key issues usually addressed in the General Terms and Conditions (acc. to §§ 305 et seq. German Civil Code)

c) Requirement for written form for amendments or modifications of the General Terms and Conditions is invalid

The following clause would be **invalid**:

“No amendment to or modification of these General Terms and Conditions shall be binding unless in writing and signed by both parties.”



Individually agreed upon terms shall always take priority over General Terms and Conditions. Such individual agreements can also be done orally. See § 305b German Civil Code.



V. General Terms and Conditions

6. Jurisdiction and applicable law

a) Jurisdiction

A provision about jurisdiction is void. The consumer must be sued where the consumer resides.

b) Applicable law

Any clause which tries to deviate from German consumer protection laws would not be valid.



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VI. Price Description Laws

End purchase price:

Clearly and visibly next to the product must be mentioned the

End purchase price, including value-added tax (VAT) and all price components.

It must be explicitly said that the purchase price for the product includes 19% VAT.

Example: 29.95 Euro incl. 19% VAT

Delivery charges:

If the customer has to pay delivery costs in addition, this needs to be explicitly mentioned. The precise amount of the delivery charges must be clearly stated.

Example: 29.95 Euro incl. 19% VAT
plus 4.00 Euro delivery charges



If the precise amount of the delivery charges depends on the individual circumstances, e.g. the weight of the product, then the calculation method of the delivery charges must be clearly and easily explained on the website.

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VII. Privacy Policy / Data Protection Declaration

Every website which collects, uses, processes etc. personal data of others must have a

Data Protection Declaration

Content: Clear and comprehensible information to the website user about type, extent and purpose of the collection and use of his personal data.

Explicit information obligation: The user may revoke a given consent to the use of his personal data with immediate effect.

Location: It must be readily retrievable via a separate link on the website.



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VIII. Disclaimer

No requirement: to have a Disclaimer on your website.

Limitation of liability is hardly possible. Limitation of liability clauses should be included in the General Terms and Conditions.

Possible Content of Disclaimer:

- ▶ No liability for external websites, even if links to external websites are on your website.
- ▶ No liability for third party content.
- ▶ No guarantee that the website will be uninterrupted and error-free.
- ▶ Website may close down business at any time.



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IX. Value-Added Tax (VAT) – Basic Rules

1. Import / Delivery of Goods

Goods imported into Germany from a non-European-Union country like the US are subject to 7 or 19% import turnover tax (which is a special VAT on imports). However, business companies can deduct the import turnover tax from their VAT bill, provided the items have been procured for business purposes.

2. Delivery of Services

a) Delivery to Companies (B2B)

A non-European-Union company rendering services to business companies in Germany / Europe usually does not owe VAT. Rather the buyer company is subject to VAT. However, the seller has to include some special language into its invoices which it sends to the buyer.

b) Delivery to Consumers (B2C)

A non-European-Union company rendering services to consumers in Germany / Europe usually does not owe VAT.



IX. Value-Added Tax (VAT) – Basic Rules

3. *Example: Delivery of software*

A non-European-country company delivering software into Germany / Europe (B2B or B2C) **electronically** over the internet (download) has to register in Europe for VAT purposes and owes VAT at a tax rate applicable to the respective country of destination (Germany: usually 19%). If software is delivered non-electronically (DVD, CD-Rom, etc.), the general rules mentioned earlier apply (cf. slide no. 51).

The German / European VAT rules are complex and still developing. Their application strongly depends on the facts and circumstances of each case. The aforementioned basic rules should therefore never be applied without having retained individual legal and tax counsel!



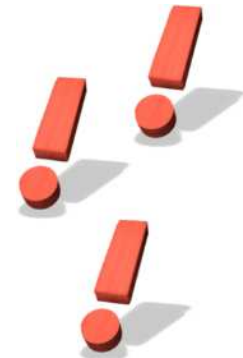
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X. Checklist – 7 Basic Requirements acc. to German Law

- 1) **Imprint**
- 2) **General Terms and Conditions**
 - include all required information acc. to German Law
 - must be reasonable, clear and comprehensible
- 3) **Withdrawal instructions to the consumer**
- 4) **Data Protection Declaration (Privacy Policy)**
- 5) **Information in text form to consumer**
- 6) **Price Description Law**
- 7) **VAT provisions**



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IX. Questions & Answers

Questions & Answers



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Thank You For Your Attention.



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