



# German-Australian-Pacific Lawyers Association

## Overview of legal forms of distribution in Germany

Dr. Dennis Groh, LL.M., Attorney-at-Law, Cologne, Germany

Every Australian company that wants to offer goods or services ("products") in Germany needs a distributor. After all, what good is the best product if you can't sell it? Sooner or later, every Australian company that wants to export to Germany has to think about its sales strategy. There are a lot of questions to be answered, for example, whether the products should be sold directly or indirectly through sales agents. Or whether sales should take place online or offline. When choosing the right form of distribution, however, not only economic but also legal pitfalls must be taken into account. Reason enough to deal with the various legal problems of distribution in Germany.

The following article will give you a first overview of the different forms of distribution in Germany to provide you with a basis for your decision for your sales organization.

### **I. Direct Sales**

Almost every company starts selling its products through direct sales, i.e. directly to the end customer without any intermediate trade levels. Nowadays, direct sales take place mainly online (e-commerce). However, there are still a large number of products that are sold offline, for example because they require special support.

The advantage of direct sales is obvious: The company can control sales centrally and has it in his own hands what is sold, when and at what price. On the other hand, however, direct sales can also entail legal risks, some of which will be explained below.

#### **1. Direct sales through E-Commerce**

Almost no company today can do entirely without direct sales through e-commerce, so that selling through a web store or online marketplaces is now part of every company's standard repertoire.



# German-Australian-Pacific Lawyers Association

The advantage of this form of distribution is without question that it is accompanied by manageable investments for the foreign company. There are neither costs for the installation of a store nor personnel costs for sales personnel or sales agents in Germany. In addition, the products can be offered to a broad public - sometimes even worldwide - and the company receives direct customer contact, which facilitates the conclusion of follow-up business.

However, e-commerce also has its pitfalls. The abundance of legal regulations to be observed - especially in the area of B2C - can hardly be surveyed without competent legal advice. In Europe and Germany in particular, special information and labelling requirements must be observed in addition to particularities in price labelling, data protection and information on rights of withdrawal. Mistakes in this sensitive area often lead to expensive formal warnings or penalties.

E-commerce is therefore only quick and easy to handle at first glance. On closer consideration, a whole series of legal problems arise which the company must take into account. The Australian company is therefore strongly advised to consult a German distribution law expert before going live with its web store.

## **2. The employed traveler**

An "employed traveler" is a person who, on the basis of an employment relationship, arranges business in Germany on a permanent basis for an employer or concludes business transactions in his name. Ultimately, this is the company's own sales force.

This form of distribution is also still very popular, not least because the traveler is bound by instructions due to the employment relationship and can therefore be easily controlled. In addition, it can be good for the image of the product, especially with high-priced branded goods, if the company uses its "own" sales force.

On the other hand, distribution via employees involves economic and legal risks for the foreign company. In most cases, the sales force employee receives a high fixed salary in addition to a performance-related commission. This fixed salary is also due if the employee is unsuccessful



in sales, so that the entrepreneur bears the economic risk for the success of the sales. The incidental wage costs incurred in Germany increase this economic risk and lead to a large amount of capital being tied up in the company. In addition, travelers as employees in Germany have a multitude of claims and rights (vacation entitlement, continued payment of wages in case of illness), which do not exist with other forms of distribution and in non-European countries. Smaller Australian companies in particular therefore avoid sales via employed travelers.

## II. Indirect Sales

The indirect sales differs from the direct sales by the fact that the company does not sell directly to the end customer, but rather uses intermediaries. Depending on how many sales intermediaries are interposed, one speaks of a one-step or multi-level distribution (e.g. via wholesalers and retailers).

The big advantage is that the sales risk is thereby shifted to the sales agents. There are no high fixed costs - as with employed travelers - with indirect sales. However, these advantages also have their price, because sales agents and Co. are equipped by the German legislator with extensive rights, which can quickly become annoying and expensive for the foreign company.

### 3. The Commercial Agent

A commercial agent is someone who, as an independent entrepreneur, is constantly entrusted with the task of arranging business for another company or concluding business on its behalf. The commercial agent differs from the employed traveler thus by his independence. A commercial agent distinguishes himself from a broker by his duty to act as an intermediary, whereas a broker only acts as an intermediary "on occasion".

The special thing about the commercial agent is that he mediates a business. The actual contract of sale is therefore concluded between the foreign company and the customer. The commercial agent, on the other hand, does not enter into a contractual relationship with the customer.



## German-Australian-Pacific Lawyers Association

The independence of the commercial agent has advantages and disadvantages. Since he is not employed by the foreign company, he is not bound by instructions to the same extent and is therefore more difficult to control than the traveler. On the other hand, the commercial agent himself bears his full entrepreneurial risk and is not legally entitled to vacations or continued payment of wages in case of illness. He receives his remuneration - the commission - only if he successfully arranges a deal for the entrepreneur. The commission claim of the commercial agent opposite the entrepreneur corresponds thus always a requirement of the entrepreneur opposite the customer, so that the selling over commercial agents is economically attractive for the entrepreneur.

But the rude awakening is quick to follow, i.e. if the entrepreneur would like to part with the commercial agent. It is true that the commercial agent relationship can be terminated in principle under German law. In Germany, however, in the case of ordinary termination, periods of notice must be observed, which can be up to 6 months, depending on the duration of the contract. In addition - and this is something that very few foreign entrepreneurs are aware of - the commercial agent is usually entitled to a termination indemnity under German law, the so-called compensation claim. The calculation of the compensation claim is extremely complex, because it depends on the question of how many new customers the commercial agent has acquired and to what extent the entrepreneur still profits from these customer relationships even after termination of the contract. As a rule of thumb one can note however that the commercial agent receives an annual average commission as compensation. The compensation claim can therefore quickly reach a six-figure sum, which at least puts the commercial agent's economic attractiveness into perspective. In addition, the commercial agent is entitled to extensive information claims against the entrepreneur, in particular the dreaded claim to a book extract. The granting of a book extract can be connected with such a high expenditure of time and effort that this claim has established itself in practice as an effective means of pressure on the commercial agent.



## 2. The Dealer

Distribution via dealers varies from that via commercial agents in that the dealer purchases the products from the entrepreneur in his own name and for his own account and then resells them in his own name and for his own account. The dealer does not earn a commission, but a margin, which is calculated from the difference between the sales and purchase price.

For the foreign businessman, distribution via dealers is interesting, since he can also outsource the sales risk to the German dealer in this constellation. In addition, this constellation often involves B2B transactions, so that the company is subject to less strict legal conditions under German law. The other side of the coin is that the dealer is the freest of all sales intermediaries. Unless the dealer contract provides otherwise, the dealer is not bound by instructions and is completely free in reselling. The company has no great influence on the further sale of the products - also for reasons of antitrust law. His control ends with the selection of the dealer. A further disadvantage of dealer sales is that the company has no direct contact with its customers.

It is therefore not uncommon for companies to try to integrate their dealers more closely into their own sales structure by means of elaborate dealer contracts, for example by obliging them to submit regular reports or to pass on customer data to the company. However, caution is advised here. After all, if the dealer is too closely integrated, German law can result in the strict protective regulations of the law on commercial agents being applied to the dealer by analogy. This can even lead to the dealer being entitled to a compensation claim.

## III. Conclusion

For the Australian entrepreneur, there is no such thing as "the" right sales channel. All of the sales opportunities presented here have advantages and disadvantages. The entrepreneur is well advised to first think about which points are important to him in sales. Only then should he



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choose the right legal construct in a second step. Here it applies to select the contractual arrangement in such a way that possible legal pitfalls are circumvented in the best possible way, so that nothing stands in the way of a successful selling in Germany.

**Dr. Dennis Groh, LL.M.**  
**Attorney-at-Law**  
**Certified Specialist for Intellectual Property Law**

**LLR Rechtsanwälte PartG mbH**  
**Mevissenstraße 15**  
**50668 Cologne**  
**Germany**

**T: +49 (0)221 55 400 170**  
**F: +49 (0)221 55 400 192**  
**E: [dennis.groh@llr.de](mailto:dennis.groh@llr.de)**

**LLR.**