



Background screening is becoming increasingly commonplace throughout Europe, including Germany. However, there are diverse legal and cultural considerations that companies should be aware of before implementing a background screening program in this particular country as the topic of background screening remains contested in some areas.

Legal Landscape

Germany is a member state of the European Union (EU) and as such is responsible for compliance with regulations and directives. A regulation is a binding act that must be uniformly applied across all member states within the EU, whereas a directive establishes a legislative goal that each member state must implement with their own laws. Laws implementing a directive must be at least as strict but can impose additional requirements. The European Commission is responsible for ensuring each member state properly applies EU law.

Capital	Berlin
Currency	Euro (€) (EUR)
Population	82,175,700
Area	357,168 km ²
Language	German
Time Zone	UTC +1(2 summer)
Calling Code	+49

Data Privacy

There are 16 states that comprise Germany, and each state has its own data protection law and authority. State agencies are governed by the specific privacy laws in each state whereas the federal law will control federal agencies and private entities.

Under the current data privacy scheme – the Federal Data Protection Act (Bundesdatenschutzgesetz or BDSG) which implements the European Data Protection Directive 95/46/EC – collection and processing of personal data may only occur with an individual’s consent (unless an exemption applies which is unlikely in the background screening context). In Germany, consent must be informed and freely given (i.e., must be free of coercion). However, the Federal Commissioner for Data Protection and Freedom of Information has opined that consent will never be considered freely given in the employment relationship context as the individual is seeking employment. Arguably then an applicant’s failure to provide consent to background screening should not be held against him or her.

It is also important to note that the data privacy landscape throughout the European Union is shifting due to the passage of the General Data Protection Regulation (GDPR) which goes into effect May 25, 2018. As noted in the introductory notes of the legislation, the fragmented nature of data privacy across member states created significant challenges to businesses in terms of compliance and presented different rights for individuals depending on where they resided. Instead, the GDPR will represent a uniform law that all impacted companies must adhere to. The GDPR presents strengthened protections for data subjects as well including a “right to be forgotten”, easier access to their data and stronger enforcement of the rules.

Companies should ensure all aspects of the BDSG are followed, including data transfer requirements. After the invalidation of the Safe Harbor Framework in October 2015, the data



protection authority (DPA) in Hamburg has been particularly outspoken regarding “illegal” data transfers. In June 2016, the Hamburg DPA announced fines against three U.S. based companies finding they continued to transfer data relying on the now-defunct Safe Harbor program instead of using another method such as standard contractual clauses or binding corporate rules. Elsewhere in Germany, the data protection authority (ULD) in Schleswig-Holstein (Germany) issued a press release and position paper after the Safe Harbor’s invalidation calling into question whether alternatives to data transfer – standard contractual clauses or data subject consent – were even valid.

DPA’s in some German states also represent a potential threat to the newly passed and effective EU-US Privacy Shield program which is designed to replace the Safe Harbor framework and allow companies to transfer personal data once they are certified. More information about this program may be found here: <https://www.privacyshield.gov/welcome> and a list of active and inactive organizations, including Info Cubic’s certification, may be found here: <https://www.privacyshield.gov/list>.

Equal Treatment

There are several items of legislation that address equality and freedom from discrimination in Germany, including the Basic Law of the Federal Republic of Germany (ratified in 1949)¹ and the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz or AGG)² which was adopted in 2006.

The AGG’s objective is to ensure equal treatment and protection for all, eliminating discrimination in the workplace and beyond. Under the AGG, discrimination on the basis of ethnic background, gender, disability, religion, belief, age or sexual orientation is prohibited. There are five forms of discrimination outlined by the AGG:

1. Direct Discrimination: An individual is treated less favorably than another individual.
2. Indirect Discrimination: Treatment that appears to be neutral, but places individuals at a disadvantage.
3. Harassment: Unwanted conduct or an offensive environment based on the grounds of any of the protected classes.
4. Sexual Harassment: Unwanted conduct of a sexual nature.
5. Instructing others to discriminate: For example, an employer instructing employees not to hire any individuals with disabilities.

¹ The Basic Law incorporates the essential precepts of equality established in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations.

² The General Equal Treatment Act incorporates implements four European Directives into law: Directive 2000/43/EC of 29 June 2000 (European Racial Equality Directive), Directive 2000/78/EC of 27 November 2000 (Framework Directive on Employment – combats discrimination on grounds of religion or belief, disability, age or sexual orientation in employment), Directive 2004/113/EC of 13 December 2004 (Gender Directive Civil Law) and Directive 2002/73/EC (Gender Guideline Employment Law).



The AGG's requirements extend to many facets of the employment relationship including job advertisements, interviews and hiring. Individuals who feel there are impacted by discrimination may consult with the Federal Anti-Discrimination Agency.

Background Screening – Available Checks

Bankruptcy Records

Civil Records

Criminal

Directorship

Education

Employment

Global Monitor Check

Motor Vehicle Records

Passport Check

Professional License Verification

References

In general, the most commonly conducted checks in Germany include reviewing an individual's past education and employment history, and checking professional. Criminal record searches tend to be a more controversial topic, but generally speaking, criminal searches should only be conducted if the information is highly relevant to the position being filled. That logic also extends to additional checks such as financial or bankruptcy searches which are typically not conducted unless there is a high degree of job-relatedness such as a position within financial services. All checks will require consent from the individual applicant.

Education

In Germany it is common to verify only the highest degree obtained by a candidate. Educational institutions will be contacted to verify dates of attendance, graduation date and degree information.

Employment

It is common to verify the last seven years of employment for candidates. Employers will be contacted to verify the individual's title, dates of employment and if the candidate is eligible for rehire. Current employers will only be contacted with express consent from the applicant. Further, in Germany it is arguably not permissible to inquire into an applicant's past salary history information if it is not relevant.

When requesting and reviewing education and employment verifications, employers should remain cognizant of the AGG to ensure the information remains related to the position being filled and is not used in a discriminatory manner.



Criminal

Criminal records checks in Germany are one of the more controversial checks given the diverse viewpoints individuals have as it pertains to the permissibility of this type of search. In general, criminal searches should not be conducted unless the information is highly relevant to the position being filled.

Certificate of Good Conduct

The Federal Central Criminal Register Act (Bundeszentralregistergesetz) regulates the Federal Central Criminal Register (FCCR) including what convictions or other information may be included, removed or disclosed. A Certificate of Good Conduct contains any conviction information entered into the FCCR. Generally, this information will only include convictions that resulted in a fine of at least 90 days' income or imprisonment of at least 3 months; thus, minor offenses are not included. Additionally, convictions are no longer disclosable after 5 to 20 years (depending on the nature of the crime) with the exception of severe crimes which resulted in life imprisonment for example.

The applicant must apply for the Certificate of Good Conduct him-or-herself – third parties cannot request this information (apart from law enforcement agencies). The Certificate is issued in German and is returned to the individual which the individual can then decide to pass along to a third party. Individuals residing in Germany must submit an application for the Certificate in person or in writing via mail. E-mailed requests are not honored. Individuals not currently residing in Germany may make the request in writing which requires completion of a specific written application, a fee and proof of identity. The signature and form must be notarized.

Miscellaneous

Other searches in the Germany include: Civil Records, Bankruptcy Records, Directorship Search, Motor Vehicle Records (validation of the individual's driver's license), Passport Check, Global Monitor Check (sanctions and watch lists), Professional License Verification and Professional References.

The preceding is offered as general educational information and is not intended to constitute legal advice. Given the intricacies of the pertinent laws and regulations, consultation with qualified legal counsel is recommended.