

# Germany

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## 1. What is the understanding or definition of AI in your jurisdiction?

The term artificial intelligence (AI) (*Künstliche Intelligenz* or KI) is used to refer to software that is able to detect and solve complex problems. In contrast to 'non-intelligent systems', an AI can open up solutions for itself and develop solutions that do not have to be taught in advance. It is able to learn by itself through a large amount of data (reasoning and machine learning).

Sometimes a distinction is made between 'weak' and 'strong' AI. Strong AI assumes that AI systems have the same or even greater intellectual abilities than humans. Weak AI concentrates on the solution of concrete application problems based on scientific methods. This is referred to as 'intelligent' systems that are capable of self-optimisation.

## 2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

There are many possible applications of AI to provide legal services. In addition to tools for the administration of law firms, AI supports, in particular, activities such as the processing and evaluation of legal documents, judgments and contracts, and the platform-based verification of claims.

Some companies in Germany are currently working on software that will automatically analyse judgments. The software is intended to make statements for the future based on judgments already made. How could a court decide? What could the reasoning be based on? Does judge 'A' possibly have special features in his/her decisions or does judge 'B' always decide in a particularly strict or lenient manner? It could also be used to examine when a decision is particularly often or particularly rarely overturned by a higher court. One of these tools, 'law stats', independently evaluates revisions using quantitative risk analysis. It is therefore less a legal service than machine learning from statistical data. However, it improves lawyers' work by setting them free from repetitive work.

Another example of an AI tool was developed by the Berlin startup 'Leverton'. The tool from Leverton is used for fully automated contract analysis. Its automated abstraction process eliminates error-prone, manual data entry while also helping to identify and eliminate data discrepancies. The software extracts key data from

the document and links each extracted data point to the source information. This simplifies the work of lawyers considerably. For example, a 100-page rental agreement can be checked in seconds, and data can be extracted, such as termination modalities of the rental parties. The startup offers solutions for compliance, invoice reconciliation, lease abstraction, legal AI for due diligence, regulatory compliance and tax compliance. According to its own statements, Leverton's software is used by companies such as Deutsche Bank and EnBW, among others.

### **3. If yes, are these AI tools different regarding**

- **independent law firms;**
  - **international law firms; and**
  - **in-house counsel;**
- and what are these differences?**

Most law firms currently use software to manage their cases or to search online databases. Most common are the online database 'Juris', which mainly contains judgments, and 'BeckOnline', which offers access to legal literature on a large scale and also includes publicised judgments. However, these databases or software cannot be considered AI. In any case, these databases are commonly used by in-house counsel as well as law firms – regardless of size. The same is to be expected for AI applications.

In the future, the use of AI will be useful for independent law firms, international law firms and in-house counsel. With AI, legal work can be done faster and easier; time-consuming research or analysis of judgments is no longer necessary. For this reason, the use of AI makes sense for both smaller and larger law firms. International law firms can save costs because they need fewer employees or can use their staff differently. Smaller law firms can take on larger projects with the help of AI.

There are therefore few differences in the use of AI tools between international law firms, independent law firms and in-house counsels.

### **4. What is the current or planned regulatory approach on AI in general?**

#### **Lawyers**

Legal services are strictly regulated in Germany. Software that not only collects statistical data but also provides legal services itself must therefore comply with specific legal conditions. In principle, the German law for legal services (Rechtsdienstleistungsgesetz or RDG) does not allow the fully automated provision of legal services; however, to provide legal services, using AI is possible.

According to current case law, debt collection companies can also use software solutions to check legal issues, as long as they are related to the claim (for more information, see question 7).

Using AI just to assist lawyers is in accordance with German law, as long as the legal service is provided by the lawyer him/herself. However, lawyers can save themselves research work, which can slow down their professional activity.

For a legally secure use, it is always important that the legal service is still provided by the lawyer him/herself and that the AI only acts as an 'assistant' to the lawyer and not as the lawyer him/herself.

## **Courts**

It is clear that, according to the German constitution, a judge may not be replaced by AI. However, it is already less clear whether the judge should be allowed to use AI in his/her decision-making. The use of AI seems conceivable, especially in lower courts with less complex facts and legal issues. However, this is only a theoretical problem and only discussed in the literature as there is still a lack of functional software

## **General**

In November 2018, the Federal Government of Germany launched its AI strategy. The strategy presents the progress made in terms of AI in Germany, the goals to achieve in the future and a concrete plan of policy actions to realise them. The range of policy initiatives outlined in the strategy aims to achieve the following goals:

- increasing and consolidating Germany's future competitiveness by making Germany and Europe a leading centre in AI;
- guaranteeing the responsible development and deployment of AI that serves the good of society; and
- integrating AI in society in ethical, legal, cultural and institutional terms in the context of a broad societal dialogue and active political measures.

For the implementation of the strategy, the Federal Government of Germany intends to provide around €3bn for the period 2019–2025.

Starting with the AI strategy, the Federal Government of Germany launched initiatives to tackle specific issues with AI, for example, information management, data ownership, free flow of data and standardisation.

Reforms of the legislation target many domains, including codifying the rights of the labour force, consolidating competitiveness of the industry and developing rules with respect to data usage and protection. Among the initiatives are:

- the launch of a Commission on Competition Law 4.0, serving as a political platform for a debate on how to further develop competition and copyright law;
- the launch of the Opportunities for Qualifications Act, a legislation providing reskilling opportunities and support to employees whose jobs are at risk due to AI technologies;
- the adoption of the Skilled Labour Immigration Act, legislation to facilitate the migration of skilled workers to Germany;
- the formation of a Workforce Data Protection Act to codify data protection regulation and privacy (ie, safeguard the control on personal data), compliant with EU law, especially the General Data Protection Regulation (GDPR);
- review and, if necessary, adaptation of the legislation concerning the use of non-personal data as well as copyright; and
- implementation of the Cybersecurity Directive: this Directive, properly known as the Directive on security of network and information systems (NIS), requires Member States to adopt a national cybersecurity strategy.

The Federal Government of Germany advocates using an ‘ethics by, in and for design’ approach throughout all the development stages and use of AI-based applications. It highly recommends engaging in dialogue with other leading regions to reach an agreement on joint guidelines and ethical standards on AI. Hence, the strategy foresees work on a legal and ethical framework aligned with European guidelines and taking into account the recommendations of the national Data Ethics Commission:

- guidelines for developing and using AI systems in compliance with data protection rules;
- ethical requirements to ensure transparency, verifiability and predictability of AI systems (eg, ethical guidelines for self-driving cars); and
- initiative to enforce a better coordination of ethical values at European level.

Besides ethical guidelines and legislative reforms, standards form an essential aspect of an adequate and effective regulatory framework. Standards shall act as

a seal of excellence in ensuring high-quality products and services. With respect to standardisation, the Federal Government of Germany proposes following support initiatives:

- funding for the development of data standards and formats to encourage European Union-wide collaborations;
- funding for experts, particularly from small and medium-sized enterprises (SMEs) and startups in order to support their participation in international standardisation processes; and
- develop a roadmap on AI standardisation to review existing standards regarding whether they are AI-compatible.

None of this has yet led to legislation.

## **5. Which are the current or planned regulations on the general use of AI or machine learning systems?**

Currently, AI is not yet explicitly regulated in many areas of law. There are special regulations on the liability of AI in road traffic law. In 2017, the legislator amended the Road Traffic Act to explicitly allow autonomous driving. The owner of the vehicle, as well as the driver of the vehicle, are both liable if the AI causes damage.

In other fields of law, in the absence of special statutory regulations, only the general statutory regulations developed for human liability apply. That means that general statutory regulations on contracts and torts apply to liabilities arising from losses, with all their features and differences, in terms of liability allocation, burden of proof and statutes of limitations, arising therefrom.

The question of whether the producer of software can also be held liable for the misconduct of an AI remains unresolved. In Germany, a distinction is made between contractual and tortious liability. In the contractual area, the manufacturer can largely avoid liability risks. As a result, a company using AI often has to bear the cost of damages itself and has no recourse to liability. In tort law, liability is hardly more favourable for companies that want to use AI. The manufacturer is only liable if it has violated its duty of safety on the road or knew that it was selling defective software.

Since the use of AI usually requires a large amount of data, data protection is also often an important area to be regulated. In Europe, the GDPR exists for this purpose, which does not contain any specific regulations on the use of AI, but compliance with it is nevertheless an important prerequisite.

The Data Protection Supervisory Authorities of the German Federal and State Governments (the 'DPA') specified the data protection requirements for AI. In particular, their restrictive interpretation of the principals of purpose restriction and data minimisation will

pose significant challenges for companies. The adopted Hambach Declaration on Artificial Intelligence (Hambacher Erklärung zur Künstlichen Intelligenz) stipulates seven data protection requirements, which must already be complied with today based on current data protection laws:

1. AI must not turn human beings into objects;
2. AI may only be used for constitutionally legitimate purposes and may not abrogate the requirement of purpose limitation;
3. AI must be transparent, comprehensible and explainable;
4. AI must avoid discrimination;
5. the principle of data minimisation applies to AI; and
6. AI needs responsibility.

The DPA concludes with arguing that AI development requires regulation.

## **6. Is free data access an issue in relation with AI?**

The strict requirements of the European GDPR must be taken into account when processing personal data. This is especially true when the trend is towards 'legal outsourcing' and data processing does not remain with the processor.

Furthermore, free data access is essential for AI. An AI is superior to humans in that it can read and understand thousands of documents full of judgments or legal literature in a second. It can thus recognise and analyse key points of important judgments better and faster than any human. But this only works if the AI can train with a lot of data beforehand (machine learning).

With respect to legal information, in Germany, court decisions are not always made publicly available on the internet. Although there are always rulings of the highest courts (Federal Constitutional Court and Federal Supreme Court) that are accessible on the internet, there is rarely free access to rulings of lower courts. All in all, Germany lacks a freely accessible database containing all judgments. Although there are fee-based databases, such as 'Juris', these are limited. For an AI to work most efficiently, it would need access to a central database containing all judgments and all legal literature.

## **7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?**

The German courts have, in some cases, dealt with the use of legal tech and AI. Predominantly, the question was raised regarding whether legal services may be provided by automated software at all.

In Germany, the provision of legal services is regulated by the RDG. This law stipulates that legal services may only be provided by lawyers. Collection agencies are also regulated by the RDG. However, they are generally only allowed to collect receivables for their customers but not provide legal advice.

The German Federal Supreme Court recently dealt with the case of *wenigermiete.de* ('lessrent.de' in English). *Wenigermiete.de* is a website that enables tenants of apartments to calculate whether the rent they pay is reasonable or higher than the German law allows (statutory rent cap/rental price brake).

The advantage for the tenant is that it can calculate directly on the website whether it pays too much, and if so, by how much. In addition, the tenant only has to pay *wenigermiete.de* a success commission, so no risks arise for the tenant.

The company that operates the website *wenigermiete.de*, however, is not a law firm but only a collection agency.

The German Federal Supreme Court ruled on the question of whether the provision of such services by legal tech companies constitutes an illegal legal service, that is, whether the activity is so advisory that it should have been performed by a lawyer rather than by a software plus collection agency. The court decided that, even in the provision of mere collection services, a comprehensive and full consideration of the legal situation is possible as long as it is necessary for the collection agency to enforce the claim. According to the Federal Supreme Court, the purpose of the RDG is to promote and permit the use of new forms and technologies. An automated provision of legal services is also covered by this, as long as it remains within the scope of the RDG.

The judgment opens up many new possibilities for the use of AI for legal services. In particular, it allows enforcement in cases where consumers want to assert a right but are not prepared to bear the costs and risks. A contingency fee cannot be agreed upon in Germany with a lawyer; however, it is possible with a collection agency (legal tech companies like *Wenigermiete.de*).

## **8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?**

As already explained in question 7, the Federal Court of Justice decided that the RDG should also aim to use new technologies for the provision of legal services. This would enable, for example, debt collection companies to provide legal services with the help of an AI that had previously only been provided by lawyers.

However, the core area of legal services is still left to lawyers. It is therefore always necessary that legal services, which include legal representation in court and so on, are provided by lawyers.

The ruling of the Federal Court of Justice, however, opens up the possibility of providing simpler legal services not by lawyers but by other companies, such as debt collection agencies.

## **9. What is the role of the national bar organisations or other official professional institutions?**

The bar association will have the primary task of critically monitoring progress. The main purpose is to protect the high quality and reliability of legal services. In addition, the bar association will also try to protect the legal profession in the best possible way and not allow competition from unqualified or defective AI.

For example, the bar association has already taken legal action against providers who wanted to offer 'legal documents in lawyers' quality' through 'SmartLaw software'. This service using 'SmartLaw software' was prohibited by the court. The provider advertised that the software could generate adapted contracts for little money, which were of the same quality as a contract prepared by a lawyer. However, this generator did not achieve the high quality of legal advice.

This demonstrates the main task of the bar association with regard to AI will be to review new developments and ensure the high quality of human legal advice.