

Doing Business in Germany: Formation Process of a GmbH and the Establishment of a Branch Office

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This paper covers the main options for doing business in Germany and the peculiarities of the relevant German legislation. A foreign company or merchant can do business in Germany by selling products directly into the German market, by using agents or distributors, by establishing a branch office, by establishing a company, by entering into a licensing agreement with a German company or by acquiring German businesses. This Article explains the business establishment process in Germany by focusing on the questions most often posed by foreign investors regarding the GmbH and a branch office and provides useful tips, albeit it cannot substitute individual legal and tax advice. Germany offers an attractive investment climate, in which foreign merchants or companies are generally treated as equal to national merchants and companies when investing. This paper reflects information current at the beginning at June 2012.

Business Entities

The German Law offers a variety of different legal structures suitable for every type of business. It should be noted that, anyone regardless of the nationality or place of residence can establish a business in Germany. In Germany, there is no specific investment law or legislation, which limits the business activity of foreigners. Investors can establish the business as sole trader (Einzelkaufmann), by establishing a branch office (Zweigniederlassung), by establishing a partnership (Personengesellschaft) or corporation (Kapitalgesellschaft). A key criterion in the process of establishing an independent business entity is to take account of the intended function of shareholders, liability and terms of taxation. It should be noted that global entrepreneurs and expanding companies often choose to establish a subsidiary company or to register a local branch office.

Partnerships

Partnerships are not independent legal entities but associations of people. The characteristic feature of a partnership is that the personal commitment is minimum two partners and personal liability with their private assets is unlimited and therefore a minimum share capital is not required. There are four forms of partnerships according to German Law; the Civil Law

Partnership (Gesellschaft bürgerlichen Rechts; abbr. GbR), the General Partnership (offene Handelsgesellschaft; abbr. oHG), the Limited Partnership (Kommanditgesellschaft; abbr. KG) and the Corporate Partnership (Gesellschaft mit beschränkter Haftung & Co. Kommanditgesellschaft; abbr. GmbH&Co. KG). Fiscally, a partnership is seen as a transparent vehicle. While the partnership is subject to trade tax, the partners are taxed on the distributed profits.

Corporations

In German Law, there are mainly four types of corporations. The main feature of a corporation according to German Law is the capital contribution of the shareholders and the limitation of the shareholders' liability. A corporation does not depend on a certain number of shareholders and may be formed by one or more shareholders (natural person, partnerships or corporation) regardless of the nationality or their place of residence. A corporation itself is an independent legal entity and therefore the corporation itself concludes under the firm name agreements, holds assets and is itself subject to taxation.

The Private Limited Liability Corporation - GmbH

The concept of the GmbH is the most used corporation form in Germany - for domestic as well as for

foreign investors. The minimum share capital of the GmbH is € 25,000.00. This legal construct has the aim to fully protect its shareholders by limiting the liability and by entitling them to give the management instructions concerning the management of the GmbH. The GmbH is formed by minimum one shareholder without restriction regarding the maximum number of shareholders by a notarially certified company agreement. Prior the notarization, which is between the founding and entry, the company exists as a preliminary corporation (Vorgesellschaft). The preliminary company may perform business-like-economic activities and shall expire when the company is registered. It shall be mentioned that, rights and obligations resulting from the pre-company's activities are transferred ipso iure to the GmbH. Till the registration, the managing director is jointly and severally responsible with the pre-company to the creditors. Once registered, the company itself is liable to its creditors with its assets, which includes the registered share capital. Under German Law, the principle of ultra vires does not exist and therefore, the GmbH may enter into business which is not related to its purpose stipulated in the Articles of Association. The GmbH shall have minimum one director.

Registration of a German Company and its Procedure

In the following an outline of two different business vehicles available in Germany is set forth. A foreign investor can choose between a German branch (A.) and a subsidiary (B)

German Branch

Registration with the commercial/company register
The set-up of a German branch as well as its shut down require the registration with the commercial/company register where the branch is to be located (sec. 13 d para. 1 of the Commercial Code (HGB)). The notification must include the following information and details:

Details about the foreign company

- The commercial register where the company is registered and the register-number, but only in the event that the laws of the place of incorporation (China) require such a registration (place of incorporation, sec. 13 e para. 2 no. 1 HGB).
- The legal form of corporation of the foreign company (sec. 13 e para. 2 no. 2 HGB).
- If the company is not subject to laws of a mem-

ber state of the European Union or another contracting state of the agreement of the European Economic Area, the laws of the state the company is subject to (sec. 13 e para. 2 no. 4).

- The firm and registered office of the foreign company (principle place of business, sec. 13 g para. 3 HGB, sec. 10 para. 1 GmbHG).
- The purpose of the business (sec. 13 g para. 3 HGB, sec. 10 para. 1 GmbHG).
- The date of conclusion of the articles of association (sec. 13 g para. 3 HGB, sec. 10 para. 1 GmbHG).
- Names of the managing directors and the scope of their power of representation (sec. 13 g para. 3 HGB, sec. 10 para. 1 GmbHG).
- The amount of the share capital (sec. 13 g para. 3 HGB, sec. 10 para. 1 GmbHG).

Specifications about the branch

- The address and purpose of the branch (sec. 13 e para 2 HGB).
- The date of the resolution of establishment.
- Names of the managing directors who are entitled to represent the foreign company in regard to the activities of the branch legally and generally and the scope of their power of representation (sec. 13 e para. 2 no. 3 HGB).

Appendices

The following documents have to be filed for notification:

- Supporting document about the existence of the foreign company (certificate of incorporation, sec. 13 e para. 2 HGB; a certified copy which is authenticated by the Foreign Ministry and legalized by the German embassy is required ("Over-Legalization").
- Over-legalized copies of the articles of association and, in case of the original of the articles of association is not subject to German text, a certified translation of the articles of association (sec. 13 g para. 2 HGB).
- If the purpose of the foreign company is sub-

ject to permission by state authorities according to the German laws, a supporting document of such permission has to be enclosed (sec. 13 e para. 2 HGB).

- If any, evidence of the power of representation to act for a third party; a managing director or “Prokurist” has to prove its power of representation via extract of the commercial register.

Requirements of Registration: Limited Liability Company

The incorporation of the GmbH requires the registration with the commercial register where the company is to be located (sec. 7 para. 1 GmbHG). According to sec. 8 para. 1 GmbHG the notification must include the following:

- The articles of association signed by every shareholder; if an authorized representative signs the articles of association, his power of attorney (PoA) has to be proved by a certified PoA. This PoA needs to be apostilled or over-legalized depending whether the country in which the notary is located is a member of the Hague Convention.
- The power of representation of the managing director(s), their full name, birthday and address.

A list of all shareholders which sets forth name,

birthday, residence as well as the amount of every share held by a shareholder.

- If the purpose of the GmbH is subject to permission of state authorities according to the German laws, a supporting document of such permission is required.
- Business address in Germany.

General Comments

After the formation of the GmbH the company has to apply for a tax number and file a registration of the business, if applicable.

Notary's Fees

The costs for the notarization of the formation of a GmbH amount to approximately € 600.

Conclusion

This Article is intended to serve an overview of the legal forms of doing business in Germany and the basics of German business entities. Furthermore the Article gives a summary of the formation process of a GmbH and the establishment of a branch office. Finally, it shall be mentioned, that the incorporation of a GmbH is simpler than the setting up of a branch in Germany and is a compatible alternative to a branch office.