

HOW TO SET UP A GMBH IN GERMANY (FAST)

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When wishing to expand a business into Germany, setting up a company there can seem cumbersome. This guide will briefly examine the material administrative steps required under German law when setting up a company in Germany. For the purpose of this guide, we focus on the incorporation of a (private) limited liability company (*Gesellschaft mit beschränkter Haftung*, "GmbH") governed by German law. The GmbH is the most common business vehicle in Germany due to the fairly simple but formal incorporation procedure and the credibility of the GmbH in light of its share capital (*Stammkapital*) of at least €25,000. We recommend consulting with your tax and legal advisors on which legal company form suits your envisaged business activities in Germany the best.

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FORMATION OF THE GMBH: ARTICLES OF ASSOCIATION (*SATZUNG*)

The articles of association (*Satzung*) of the GmbH is the main constituent document for the incorporation of a GmbH. The articles of association must include at least the following information on the GmbH:

- **Company Name:** The company name of the GmbH may be of factual or fantasy nature, comprise names of its shareholders or the group or contain information about the company's commercial activities. In each case, the name of the GmbH must have a distinctive character, must not be misleading and must be followed by

the designation "Gesellschaft mit beschränkter Haftung" (*limited liability company*) or a readily comprehensible abbreviation of this designation such as "GmbH". We recommend checking the German commercial register (*Handelsregister*) and consulting with the competent chamber of commerce and industry (*Industrie- und Handelskammer*) (free of charge) to assess whether the planned company name is identically or similarly being used by another entity and whether there is a risk of confusion with existing company names used in the same area where the GmbH shall have its seat. A declaration of the competent chamber of commerce and industry that there are no objections against the use of the planned company name may speed up the registration process of the GmbH as the relevant registry court is more likely to share the chamber's assessment. Besides, the availability of suitable free domains for the planned company website including the company name or trademarks to be registered comprising the planned company name should be considered when deciding on the GmbH's company name.

- **Registered Office:** A GmbH is required to have its registered office (*Satzungssitz*) in Germany. The registered office determines the jurisdiction of the commercial register and is of importance for the assessment of the distinctiveness of the company name of the GmbH. The registered office may differ from the administrative office (*Verwaltungssitz*), i.e. the place where the GmbH is mainly managed from (which could be from abroad), which is not part of the GmbH's articles of association.
- **Object(s) of the Company:** The object of the GmbH corresponds to the focus of its business activities. The object can generally be a description of the envisaged business activities of the GmbH but should be limited to avoid any authorisation requirements. The envisaged business activity of the GmbH should, thus, be clear and identifiable.
- **Share Capital (*Stammkapital*) and Contributions:** The GmbH must have a minimum share capital (*Stammkapital*) of at least €25,000. The nominal value of each share must be a full euro amount. The number and the nominal amounts of the shares which each shareholder takes over against contribution to the share capital must be part of the articles of association. The articles of association can determine the amount of the nominal values but the sum total of the nominal values of all the shares must equal the amount of the share capital. The company's share capital can be contributed in cash (*Bareinlage*) or in kind (*Sacheinlage*), e.g. contributions of material or intangible assets such as trademarks or licenses. If the contributions are made in kind, the value of the assets must be shown specifically in the articles of association.

In addition to the information required under statutory German law, the GmbH's articles of association may also provide for specific voting rights of shareholder(s), transfer restrictions, rights of pre-emption, rules of conduct of shareholders' meetings and provisions on distribution of profits and losses of the GmbH, amongst others. If not regulated by the GmbH's articles of association, the statutory legal provisions apply. In case the GmbH shall have one shareholder and one managing director only and wish no specific rules differing from the statutory legal provisions, the articles of association can be drafted based on standardised templates. Otherwise, the articles of association should be customised.

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The articles of association of the GmbH must be in German and may be supplemented with an English translation for information purposes.

REGISTRATION WITH THE COMMERCIAL REGISTER (*HANDELSREGISTER*)

A GmbH must be registered with the commercial register (*Handelsregister*) to become legally effective under German law. The documents to be filed with the commercial register must comprise of:

- the formation protocol (*Gründungsprotokoll*) including: the GmbH's articles of association signed by the forming shareholders or, in case the shareholders are legal entities, their representatives, as the case may be, and notarised (*beurkundet*) by a public notary; and the appointment of one or more managing directors (*Geschäftsführer*) as legal representatives of the GmbH and their scope of power of authorisation;
- the application for registration with the commercial register signed by the managing director(s) and certified (*beglaubigt*) by the notary;
- the list of shareholders (*Gesellschafterliste*) indicating the shareholder(s) of the GmbH and the allocation of the GmbH's share capital as well as the nominal values of their shares in the GmbH; and

- the certification of the managing directors that there are no circumstances opposing their appointment as managing directors according to German law (in particular, that there has been no prior conviction for fraudulent insolvency).

If the shareholders cannot attend the notary appointment, a proxy can be authorised by way of a notarised or certified power of attorney. The power of attorney should include a notarial confirmation of the signatory's authority of the power of attorney to represent the shareholder. If the shareholder is a legal entity not registered with the German commercial register, supplemental documentation may be required, such as sufficient evidence of existence of the shareholder.

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The application for registration will be electronically submitted by the acting notary to the competent commercial register. The notary makes the submission of the documents subject to the receipt of the proof of payment of the share capital into the GmbH's bank account (see below for further information).

Once the review of the documents by the competent registry court is completed, the registry court will notify the acting notary about the successful incorporation of the GmbH. Anyone acting on behalf of the GmbH before its entry into the commercial register can be held personally liable until the entry has taken place.

Any change of the GmbH's articles of association requires notarisation (*Beurkundung*) and must be applied for registration with the commercial register (*Handelsregister*) to become effective, which is why the articles of association of the GmbH should be prepared with utmost care and in close alignment with legal advisors and the notary.

OPENING A BANK ACCOUNT FOR THE GMBH

When applying for the registration of the GmbH, at least €12,500 of the GmbH's share capital must have been paid into a bank account of the company and evidenced to the notary. However, we recommend that the full share capital amount indicated in the GmbH's articles of association is fully paid in to exclude any personal liability of the shareholders until the full amount of the GmbH's share capital is fully paid in the GmbH's bank account.

Before opening a bank account for the GmbH, banks usually wish to see the notarised incorporation documents first. Setting up a bank account for a GmbH may be easier where a business relationship to a local bank exists. We recommend contacting a bank in good time to have the information and documents required by the banks for the opening available. If there is no existing business relationship with a local bank or whenever shareholder(s) or the ultimate beneficial owner(s) of the GmbH are not German residents, the requirements within the KYC-process may be particularly more difficult to meet.

ALTERNATIVE: ACQUISITION OF A GMBH-SHELF-COMPANY (*GMBH-VORRATSGESELLSCHAFT*)

"It may be advisable to acquire a GmbH-shelf-company (GmbH-Vorratsgesellschaft) instead of incorporating a GmbH as described above."

If you wish to start your business in Germany, in some cases, it may be advisable to acquire a GmbH-shelf-company (*GmbH-Vorratsgesellschaft*) instead of incorporating a GmbH as described above. The acquisition of shares in a GmbH-shelf-company from a notary or a service provider is generally more expensive. The GmbH-shelf-company has, however, fulfilled all formal requirements for the registration of the GmbH with the commercial register and, in particular, already has a bank account, which may be beneficial when the shareholders expect difficulties with opening a bank account.

The sale and transfer of the shares in a GmbH-shelf-company from a notary or a service provider are subject to a share purchase agreement to be notarised (*beurkundet*) by a notary, who also must, *inter alia*, notarise the change of the GmbH's articles of association (based on standard terms) and certify (*beglaubigen*) the change of the GmbH's management and the economic re-formation (*wirtschaftliche Neugründung*). To become the legal owner of the shares in the GmbH-shelf-company, the changes must be registered with the competent commercial register.

FURTHER REGISTRATIONS

Once registered with the commercial register (*Handelsregister*), the GmbH must undertake further applications required under German law and to start its business activities. For example, the GmbH and its ultimate financial owner must be registered with the German transparency register (*Transparenzregister*). Also, the GmbH's business activities must be registered with the competent trade office (*Gewerbeamt*). The GmbH further requires a tax registration with the competent tax office (*Finanzamt*) to obtain a tax number (*Steuernummer*). In addition, certain activities may be subject to governmental authorisations and permits.

Should you have any questions or require further information, please do not hesitate to contact us.

KEY CONTACT



MUTEBER YALCIN LL.M.

SENIOR ASSOCIATE
• HAMBURG

T: + 49 40 800 084 434

Myalcin@wfw.com

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