



Fact Sheet: Company Law in Germany



VON SEELSTRANG & PARTNER
Rechtsanwälte, Steuerberater, Wirtschaftsprüfer.

Provided by:

FORUM von Seelstrang & Partner mbB
Rechtsanwälte Steuerberater Wirtschaftsprüfer

Brienner Straße 55 . D-80333 München
<https://vonselstrang-partner.de/>

Company Law in Germany

Do you plan to become commercially active in Germany? Do you plan to establish a company or branch office in Germany?

This leaflet provides you with an overview of the most important points, if you plan to become commercially active in Germany, or you plan to establish a company or branch office in Germany. It serves as the first port of call for information, but it cannot replace professional legal advice.

If you want to expand your Australian business to Germany, you can establish a

- subsidiary
- branch office
- permanent establishment or
- agency

Generally, in order to start a business activity in Germany it is necessary to register as a business. In certain cases government approval is also required.

What is a subsidiary?

A subsidiary is a legally independent entity in which the Australian entity holds the shares. The subsidiary is a company under German law.

What is a branch office?

A branch office is a part of the Australian entity, which is territorially and organisationally independent, but not legally independent. As a branch office is not legally independent, it is subject in principle to Australian company/corporate law, being the law of the principal place of business. Of course, German law still applies, generally.

Last edited: March 2019

The key feature of a German branch office is that it is a domestic organisation which

- undertakes transactions that are essentially the same as those conducted at the Australian principal place of business, in particular it cannot only carry out subordinate ancillary transactions or implement transactions;
- is territorially independent (e.g. has its own bank account, separate book-keeping, but not necessarily its own assets); and
- is independent in terms of personnel (i.e. the head of the branch office must in principle have authority to act for it in business transactions).

A branch office is established in accordance with the above-mentioned criteria. Registration as a business and entry in the German Commercial Registry are required.

What is a permanent establishment?

A permanent establishment is a branch office or outlet of the Australian entity, which is established as a local business; however, it is dependent on the central office in Australia. It is therefore not permitted to conduct a business different to that of the Australian entity. The permanent establishment conducts ancillary transactions that assist with the preparation, placement or carrying out of the main business activities of the Australian entity, e.g. as manufacturing operations without sales, warehousing, receiving and dispatch office, a mere placement office or marketing office without its own purchasing functions.

A permanent establishment is not required to register with the German Commercial Registry. However, every permanent establishment must be registered as a business with the relevant trade office.

What is an agency?

An agency represents an Australian entity in Germany and is legally dependent on the entity. The agency is led by an external and appropriately contracted independent business, e.g. a sales representative. The activities of an agent simply serve to establish the first market presence or market research, or to maintain customer/supplier services. This means that there is no independent commercial activity by the foreign business in Germany.

An agency is established by its implementation. It is not compulsory to apply for entry to the German Commercial Registry or for registration as a business.

Is a business registration or special approval required?

In order to start a business activity in Germany, it is necessary to register as a business and in certain cases government approval is also required. Generally, under German law the business activities of a subsidiary, a branch office or a permanent establishment in Germany must at least be registered with the relevant trade office.

Which legal structures are generally used for a subsidiary?

German law governs the establishment of a German subsidiary. The legal structures with limited liability are the most commonly used: a company with limited liability (*Gesellschaft mit beschränkter Haftung* – “**GmbH**”), a company with limited liability & Co. limited partnership (*GmbH & Co. Kommanditgesellschaft* – “**GmbH & Co. KG**”) and a public limited company (*Aktien-gesellschaft* – “**AG**”). All subsidiaries with these legal structures are registered in the German Commercial Registry.

What is a GmbH?

The GmbH is a company limited by shares with its own legal personality. This means the company itself has rights and obligations, and it acts independently in legal transactions (represented by its directors). All acts affecting the business are attributed to the company. The company's own rights and obligations exist separately from those of the shareholders and the directors.

A GmbH can be established by one or more shareholders. Every natural and legal person (domestic or foreign) and (business) partnership is able to establish a GmbH. The GmbH is finally established on its entry in the German Commercial Registry. The minimum share capital of a "full" GmbH is EUR 25,000.00.

The essential advantages of a GmbH are its flexibility in management and the fact that the liability of shareholders is limited to the level of their issued shareholding. It is in principle not possible for creditors of the company to have access to the private assets of shareholders.

Since 2008 with the entrepreneurial company (limited liability) (*Unternehmergeellschaft (haftungsbeschränkt)* – "**UG (haftungsbeschränkt)**"), there is an additional option of establishing a company with limited liability with a share capital of one euro. However, the share capital actually required in any specific case depends on the planned business activities.

The disadvantage of such an UG (haftungsbeschränkt) (alongside the limited acceptance of this legal form in legal transactions) is the statutory obligation to establish a reserve in which a quarter of the current year's profit, reduced by carried forward losses from the previous year, must be deposited. Otherwise, so far as possible, the same rules apply to the UG (haftungsbeschränkt) as those that apply to the GmbH.

A GmbH can only act through its organs, as a legal person. Compulsory organs of a GmbH are the directors and the shareholders' meeting. The director or directors represent the GmbH externally, and the internal decision-making process lies with the shareholders' meeting. The shareholders' meeting can give directions to the directors. No set number of directors is required by law but every company must have at least one director. The director can also be a shareholder but does not have to be. Directors can, however, only be natural persons and must be unconditionally legally competent.

What is an AG?

The AG is a company limited by shares, just like the GmbH, however it must have a minimum share capital of EUR 50,000.00. The AG is similarly a legal person, i.e. a company that is legally independent. It is liable to creditors only to the extent of the assets of the company.

The capital of the AG is divided into shares. The law applicable to the AG is codified in the German Stock Corporation Act (*Aktiengesetz* – "**AktG**"). The AG can be established by one or more persons. The founder or founders (shareholder/s) can be natural persons, legal persons or (business) partnerships.

With the choice of a public company structure, a business can obtain capital on the capital markets. As the shareholders don't take on any further responsibilities when purchasing shares, the AG can seek capital from a wide sector of the general public on the global capital markets. Due to this, and because there is the option of trading the shares of an AG on a stock exchange, the AG is the preferred corporate structure for large businesses. Compulsory organs for an AG are the Board, Supervisory Board and shareholders' meeting.

The directors of an AG form the Board. This management authority is in principle unlimited. The Board acts on its own account. At the same time the Board represents the AG externally – in court as well as out of court. This power of representation is also in principle unlimited. The Board is appointed by the Supervisory Board for a maximum of five years and can be comprised of one or more persons. Only a natural person who is unconditionally legally competent can be a member of the Board.

The Supervisory Board, which is comprised of at least three members, appoints and supervises the Board. Essentially any natural person can be elected. The appointment of the Supervisory Board occurs at the general meeting of shareholders. The members of the Supervisory Board are published in the German Commercial Registry. The Supervisory Board is not permitted to undertake directors' responsibilities nor to issue directions to the Board.

The shareholders vote on fundamental matters in the general meeting. The members of the Board and the Supervisory Board also participate in the meeting.

The shareholders generally vote in the general meeting on the appointment of the members of the Supervisory Board, the application of profits, the release of members of the Board and Supervisory Board and regarding any changes to the Constitution.

Shares that are to be traded on a stock exchange must be approved. The application for approval is usually made by a credit institution that is approved on a domestic stock exchange.

For small businesses, particularly for public companies limited by shares where the identity of the shareholders is known, there are several simplifications in the AktG. However, with these so-called “small AGs”, no new type of AG has been created, but rather a similar set of rules to that which applies to the GmbH is offered to businesses of a certain size and with a limited number of shareholders. In this way medium-sized businesses are given relaxed access to the AG.

The advantage of an AG is, above all, the ability to gain equity finance from the capital markets. However, the AG is a relatively complicated form of company as there is a high density of rules with which compliance is compulsory.

What is a GmbH & Co. KG?

The GmbH & Co. KG is a special form of partnership (*Kommanditgesellschaft* – “**KG**”). A KG must comprise of at least two partners, namely at least one fully liable partner, referred to as the general partner, and at least one partner whose liability is limited to the level of its investment, referred to as the limited partner.

With the GmbH & Co. KG, the general partner (who is personally liable) isn't a natural person, but is instead a GmbH. The GmbH is in turn liable in accordance with the law only to the extent of its assets. This structure means that in fact only partners with limited liability are present. As soon as the KG and the level of liability of the limited partner are registered in the German Commercial Registry, the limited partner's limitation of liability takes effect externally. There is no prescribed level of liability for the limited partner at law.

The GmbH & Co. KG is a partnership although it incorporates numerous elements of a company limited by shares. Therefore, the name of the entity must also contain the supplement GmbH & Co.

The general partner manages and represents the entity externally. Thus the GmbH, as the general partner, represented by its director or directors, undertakes the transactions of the KG. The limited partners are essentially excluded from managing and representing the KG. However, they have the right to object to unusual transactions that go beyond the usual business operations of the entity. However, other contractual agreements are possible and also quite usual. Thus a partnership agreement can determine for which transactions the general partner requires the consent of the other partners or the partners' meeting. The shareholders of the GmbH and the limited partners of the KG can otherwise be one and the same person.

Ansprechpartner

Mario von Seelstrang

Managing Partner

Tel.: +49 89 17113217

E-mail: mario.vonseelstrang@vonseelstrang-partner.de



Ansprechpartner

Fr. Birgit Tegethoff

Director Consulting Services

Tel.: +61 2 8296 0455

E-mail: birgit.tegethoff@germany.org.au



Disclaimer:

Please note that the content of this leaflet is intended only to provide a general overview on matters of interest. It is not intended to be comprehensive, nor does it constitute legal advice. Please seek professional advice from a lawyer in respect of your particular individual circumstances before acting or relying on any of the content of this leaflet.

Last edited: March 2019