

Establishment of a Company or Branch Office

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1 Alternative Ways of Doing Business in Germany

Foreign companies planning to do business in Germany in order to expand their business or for investment purposes have various alternatives available to them. The legal organization of their business activity can take place in the traditional way by establishing a local subsidiary or branch office.

1.1 Subsidiaries

In legal terms, a subsidiary is an autonomous business enterprise that is established by an existing parent company. The formation of a subsidiary is subject to the particular set of corporate laws applicable to the legal form chosen for the business.

There are no special legal conditions or restrictions applicable to foreign companies interested in establishing a subsidiary. Foreign companies are subject to exactly the same, exclusively German laws and regulations that local companies are subject to with regard to the establishment of a business and the registration of it with both the Trade Supervision Office (*Gewerbeamt*) and the Commercial Register (*Handelsregister*).

Hence, all of the same options are available to a foreign company as to a local one when it comes to selecting the most appropriate organizational form for the planned business venture. Each of the various organizational forms has a different procedure for its establishment. A concise overview of the requirements that each type of business organization has to fulfill upon its establishment is presented in the article “Recognized Forms of Business Organization.” By way of supplement, the requirements for registration in the commercial register and, if necessary, with the Trade Supervision Office, which also apply to the establishment of subsidiaries, will be dealt with below.

1.2 Branch Office (*Niederlassung*)

Instead of or in addition to the formation of a new subsidiary company, it is often advisable for a foreign company to set up a branch office (*Niederlassung*) in Germany. Tax advantages often play an important role in such a decision. On the other hand, a parent company is fully liable to the extent of its own assets for any claims creditors might assert against the dependent German office.

A branch office can be established either as an independent branch office (*Zweigniederlassung*) or an operational location (*Betriebsstätte*), which is a fully dependent branch office. German law makes a sharp distinction between independent and dependent branch offices.

1.2.1 Independent Branch Office (*Zweigniederlassung*)

Legal Personality (*Rechtspersönlichkeit*)

An independent branch office is not an autonomous legal entity separate from that of the business headquarters. An independent branch office is a part of a company that is permanently separated from its headquarters, geographically and in terms of its internal processes, and operates independently to a very large extent, keeping and balancing its own books. Its business activities are based on the same subject matter as those of the headquarters and cannot be limited to mere support or implementation tasks.

It is legally and organizationally part of the headquarters business operation and is, therefore, subject to the laws governing the main company. If the branch office is established by a foreign company, it is dependent on the foreign law applicable to the main company.

In general, a branch may sue or be sued only through the main company. However, by virtue of its local presence the German branch office of a foreign company can have action taken against it by local creditors through the local judicial system. Also, since an independent branch office is not an autonomous legal entity but rather an integral part of the main company, any obligations or debts incurred by the branch office are the legal responsibility of the natural person or legal entity that comprises the main business.

Organization

The organization is led by a manager who has the power of external representation, even though he may receive orders from company headquarters. It is a bona fide independent branch office only when, from an overall perspective, it can be seen that, in terms of personnel and organizational structure, it constitutes an independent organizational unit that could theoretically function fairly easily on its own, even if the company headquarters did not exist.

As concerns material matters, a separate share of the company assets must be allocated to the branch office. It also has to be equipped in a way that enables it to independently participate in everyday business activities and, thereby, fulfill its purpose.

Corporate Name (*Firma*)

Since the branch office is not an autonomous company but rather an integral part of the corporation as a whole, the name of the branch office is generally identical to the name of main company. The name of the main company and hence the name of the branch office is subject to the laws of the country or state in which the corporate headquarters are located. However, an application to have the branch office registered in the German commercial register will be rejected if its corporate name does not conform with the German public order (Article 6 EGBGB).

As a general rule, the name of the company headquarters and an indication of its legal form must appear unaltered in the name of the branch office of a foreign or domestic company, even though it may mean the retention of foreign words. If the foreign laws governing the corporate name do not require an indication of the company's legal form or if the indication of the legal form is neither in common use in Germany nor understandable to most Germans, a clarification tag is required to avoid potential confusion. Tags such as "*Niederlassung München*" ("Munich Branch") are also possible.

Formalities

All of the commercial activities of an independent branch office have to be reported to the Trade Supervision Office. Usually, no special licenses are required unless the planned business activity of the branch office falls into a special category. Businesses requiring a special license, to cite some of the most common examples, include banks, restaurants, hotels, bars, insurance companies and passenger transportation lines. Failure to provide the required notification and obtain the necessary permit can result in a substantial fine.

Furthermore, it is necessary to file for registration of the company in the commercial register (*Handelsregister*). Upon doing so, the branch office will receive its own registered location, its own commercial register number (HR number) and will be assigned to its own court of jurisdiction. All of the relevant information and documents concerning the establishment of the branch office must be submitted to the commercial register in notarized form when filing for registration. In the case of an independent branch office of a corporation with foreign headquarters, the following items would be included:

- A copy of the registration of the main office insofar as the country or state laws of the place where it is located require registration
- Statement of the main company's legal form

- If the company is not subject to the laws of a member state of the European Community or those of another state that is a partner to a treaty regulating its participation in the European Market, explicit mention must be made of the body of national laws that the main company is subject to
- The corporate name and registered location of the company headquarters
- The corporate purpose
- The official date on which the company was incorporated
- The full names of the managing directors (Geschäftsführer) and/or the board members (Vorstand) of the corporation and their signature powers
- The nominal capital or capital stock
- Planned duration of the company (if temporary)
- The address and purpose of the branch office
- The amount of working capital available to the branch office
- The date on which the resolution to form the branch office was passed
- The full names of the managing directors and/or board members who will have the authority to represent the branch office in and out of court and the extent of their powers of representation
- Planned duration of the branch office (if temporary)
- Proof of the existence of the parent company
- If the particular business the company is in requires a license under German law, proof of the existence of such a license is to be attached
- A notarized copy of the articles of incorporation (Gesellschaftsvertrag) of the company accompanied by a certified translation of the same if the original is not in German
- The application for entry of the branch office in the commercial register must be signed by all the officers of the company in the presence of a notary. Normally their signatures must be submitted to the German consulate for verification but, according to the Hague Convention of October 5th, 1962, this requirement can be met by attaching an apostille to the application. An apostille is a certificate of authenticity that is attached to the notarized document by the local authorities in the country where the branch office is being set up. The Convention is also valid in the United States

The Registration in the commercial register was substantially accelerated by the Act on Electronic Commercial Registers, Registers of Cooperatives and Business Registers, which came into force at the beginning of 2007. The documents required may be submitted electronically to the court. The court is able to allow a direct entry of the data in the register it keeps electronically.

If a foreign corporation wants to set up several branch offices in Germany, it can select the commercial register of one district as its main register. Then it only has to send all of the items listed above to that one particular registrar's office.

The following documents must be submitted to the Trade Supervision Office:

- Proof of the identity of the applicant (passport or official I.D. card) as well as proof of his power to represent a third party (natural person or legal entity) if applicable
- Any state permits required
- Foreigners must submit a residence permit issued by the local authorities that include permission to engage in self-employment in Germany
- Companies registered in a foreign country must submit proof of registration together with a German translation. Certification of the translation is generally not required
- Foreign companies must submit the name of a local representative as well as a local address. The local representative must submit a power of attorney issued in his name

1.2.2 Dependent Branch Offices (*Betriebsstätte*)

The setting up of a dependent branch office is the simplest organizational alternative available to any domestic or foreign company that already has a registered office in Germany and would like to do business from another location as well. The same company can have several dependent branch offices. A dependent branch office is dependent on the main office in every respect. Its operations are unified and the only difference is that the branch office is on a different location than headquarters. Even its invoices are issued in the name of the head office.

A dependent branch office is not officially registered. However, every branch office must report its business activities to the local Trade Supervision Office. The formal application procedures are the same as those described above. Since dependent branches are involved in the same operational procedures as the head office, simply performing their part on a different location, they are not allowed to have company names that are different from that of the head office.

1.2.3 Representative Organizations (*Repräsentanzen*)

It is often the case that companies interested in setting up branch offices in Germany, especially foreign companies, mention the terms “local representation” when referring to the kind of organization they wish to create. However, German commercial law makes no provision for a purely “representative organization” (*Repräsentanz*). It holds that a representative office is either an integral part of a single company with a German head office and is actively involved in business operations itself (in which event it is a dependent branch office) or it is an office that was founded with the intention of having it operated by an external self-employed merchant, such as a sales representative (*Handelsvertreter*), with a special internal contract, in which event the foreign company itself is not actively involved in the German market.

2 Legal Requirements for Non-Citizens

If subsidiaries or branch offices are to be managed and operated by non-citizens of Germany, the parties in question have to be in possession of a residence permit that grants them general permission to engage in the kind of work anticipated. A residence permit is required whenever the person in question is planning to stay in Germany for an extended period of time. However, if the person in question intends to retain his or her usual place of residence abroad and merely travel to Germany from time to time, no special residence permit allowing commercial activity is required.

The above requirements do not apply to citizens of the member states of the European Union, citizens of foreign states that are not members of the EU but belong to the European Market [*Europäischer Wirtschaftsraum* (EWR)] and citizens of states with which Germany has special economic agreements (e.g. the United States).

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