

# Doing Business and Investing in Germany

> a practical guide for foreign investors <

**October 2009**

## **Taylor Wessing**

*by Nicole Battistini-Kohler, LL.M.Eur.*

Doing Business and Investing in Germany  
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## Introduction

The following guide is addressed to foreign investors who are interested in taking up business in Germany and designed to give the addressees an overview of potentially involved legal issues which may arise when setting up a new or running an already existing business.

While being focussed on commercial, corporate and labor law, the guide does also include further aspects relating e.g. to the German tax system, financing of companies as well as protection of patents and trademarks. Furthermore, litigation and arbitration as well as foreign exchange law are briefly summarized where deemed appropriate.

The main part of the guide is drafted to give any interested person an understanding of business-related legal concepts and potential issues arising therefrom while technical information (including more detailed information about specific aspects and checklists) for lawyers is contained in the Annexes.

Please note that **the guide cannot replace legal and tax advice** when starting or running business activities on-site. The information presented hereafter further reflects the **status of law as per October 2009** and may be subject to alteration in the future. Finally, the legal issues described in the following are presented in a **simplified manner** focussed on key elements; accordingly, a number of special cases, exceptions and specific issues may not be covered.

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Taylor Wessing

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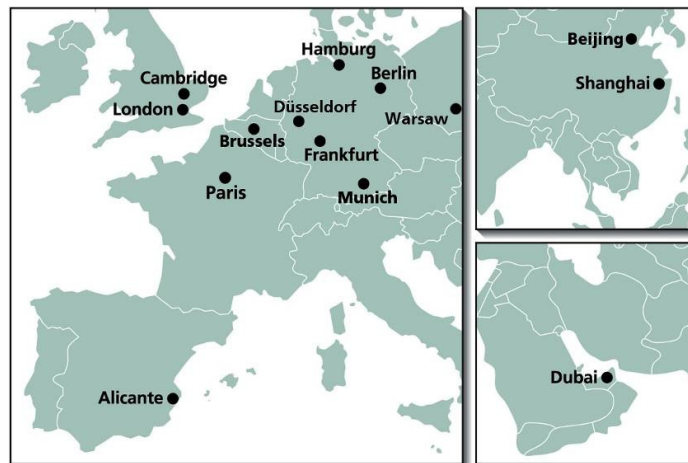
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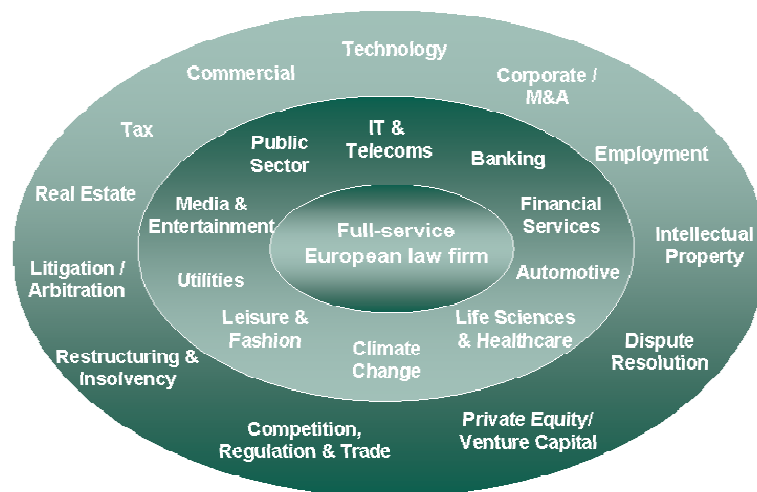
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**ANNEXES**



## A. Germany – some facts & figures

### I. Germany...



- is a parliamentary federal democracy
- has some 82.3 million inhabitants (including around 7.3 million international inhabitants)
- has been a full member of the United Nations (UN) since 1973
- is represented in the world with 226 foreign representative offices of the Federal Foreign Office and currently maintains diplomatic relations with 191 countries
- is situated in the center of Europe, being an ideal platform for investments throughout Europe

#### Did you know that ...

- Germany is the largest economy within the European Union and the third largest in the world?
- Germany is the world's leading exporter with a volume of goods exported amounting to EUR 969 billion in 2007?
- The United States is Germany's second-largest trading partner (other key trading partners are France, Great Britain and Italy)?
- Germany is Europe's number 1 in terms of patent registration?

**More information** about Germany (in the English language) can be found here:

- <http://globaledge.msu.edu/>,
- [www.gtai.com](http://www.gtai.com) and
- [www.tatsachen-ueber-deutschland.de](http://www.tatsachen-ueber-deutschland.de).

## II. As a Member State of the European Union...



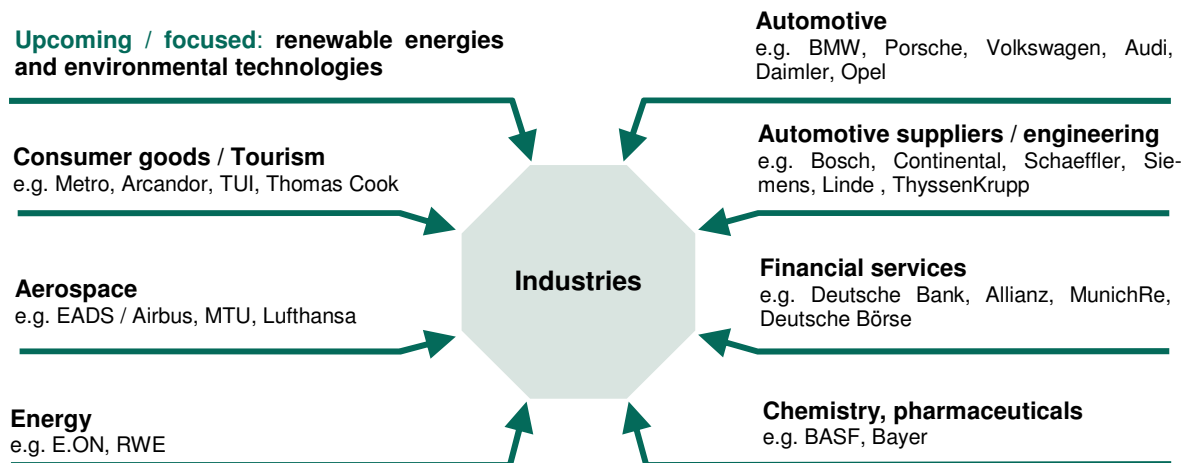
- Germany contributes some 20 % (around 22 billion Euro) of the EU budget, being the largest single contributor
- Germany shares the euro currency with 15 other EU-Member States (Austria, Belgium, Cyprus, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain)

The European Union currently (in 2009) has **27 member states**: **Belgium** (België / Belgique; BE), **Bulgary** (България; BG), **Denmark** (Danmark; DK), **Germany** (Deutschland; DE), **Estland** (Eesti; EE), **Finland** (Suomi / Finland; FI), **France** (France; FR), **Greece** (Ελλάδα, Ελλάς; GR), **Ireland** (Ireland; IE), **Italy** (Italia; IT), **Latvia** (Latvija; LV), **Lithuania** (Lietuva; LT), **Luxembourg** (Lëtzebuerg / Luxemburg / Luxembourg; LU), **Malta** (Malta; MT), **The Netherlands** (Nederland; NL), **Austria** (Österreich; AT), **Poland** (Polska; PL), **Portugal** (Portugal; PT), **Romania** (România; RO), **Sweden** (Sverige; SE), **Slovakia** (Slovensko; SK), **Spain** (España; ES), **Czech Republic** (Česko; CZ), **Hungary** (Magyarország; HU), **United Kingdom** (United Kingdom; GB), **Cyprus** (Κύπρος / Kibris; CY).

**More information** about the European Union (“EU”) can be found here: [http://europa.eu/index\\_en.htm](http://europa.eu/index_en.htm).

**B. A short overview of the German market (2009)**

**I. General overview**



Germany is particularly renowned for its **automotive industry**. This sector is without doubt one of Germany's core industries. According to the German Association of the Automotive Industry (VDA), 757,000 people are in jobs directly linked with this sector i.e. at OEMs such as Daimler, BMW, Porsche, Opel and Volkswagen as well as at automotive suppliers such as Bosch, Schaeffler, Continental and many more. However, in a broader context some 5 million peoples' employment depends on this industry sector. In the second half of 2008 the German automotive industry was hit hard by the economic slowdown following the global financial crisis. Revenues dropped considerably. Due to these financial difficulties, safeguarding liquidity was and still is of major importance. With Volkswagen's recent takeover of Porsche and Opel negotiating with Magna this hints at the unique consolidation and restructuring situation within the German automotive industry at present.

Apart from that, Germany's **engineering, machinery and equipment** sector is the largest and strongest in Europe and is also counted among Germany's key industries.

A further strong pillar for Germany's economy is the **chemical industry**. Global players with products labelled "made in Germany" are, among others, BASF and Bayer. With a 12,4 percentage share in the worldwide chemical exports, Germany excels all other countries in this industry.

Other essential industries provide also strong and well-known names, representing German industry i.e. EADS, Airbus or Lufthansa for the **aerospace industry**, E.ON and RWE in the **energy** sector, Deutsche Bank, Allianz, Deutsche Börse and others with regard to **financial services** and Metro, Arcandor and TUI in the sector of **consumer goods / tourism**.

An upcoming / focused industry on a Europe-wide level relates to **renewable energies and environmental technologies**.

**More information** about market segments in Germany can be found here: <http://www.gtai.com/homepage/industries/>.

## II. Impact of the financial crisis

With the **Baltic Dry Index** (the benchmark for freight costs for dry bulk commodities) having experienced a major decrease of 53 percent in late 2008 and being considered to serve as early indicator for the foreign trade situation, there was early evidence that Germany's economy would have to face a slowdown in the near future. On the one hand, Germany is currently suffering from fading export numbers. On the other hand it appears the majority of German consumers have not been too reluctant to purchases. Along with the car-scrap bonus scheme, a governmental incentive programme to create inducement to buy, the German gross domestic product gained 0.3 percent compared to the first quarter of 2009. Thus there are first signs for Germany's economy to have negotiated the downturn and to have rebounded confidence, however very cautious.

## C. Entering Germany

Citizens from the **United States** may stay in Germany **up to 90 days without any visa**. However, a visa / residence title may be required when **running a business** on-site in Germany or **being employed** in Germany.

The type of residence title required depends on the **purpose** and **duration** of the stay in Germany and, in some cases, on the **personal skills** of the applicant. The most frequent types of permits may be summarized as follows:

Envisaged activity: Setting up and running a business on site	
Type of residence title	Remarks
<b>Residence permit for the purpose of self-employment</b> <i>(Aufenthaltserlaubnis für selbständige Tätigkeit)</i>	<ul style="list-style-type: none"> <li>Required for all foreign nationals from outside the EU, the European Economic Area (EEA) and Switzerland who intend to stay in Germany <b>longer than 90 days</b>.</li> <li>The permit is issued by the German Embassy or German Consulate of the home country of the applicant and includes at the same time the <b>right of residence and the permit to work</b> in a self-employed capacity (e.g. as managing director – depending on the service agreement).</li> <li>The permit is usually granted if <b>at least EUR 250,000</b> are invested and at least <b>five new jobs</b> are created. If these requirements are not met, the responsible local residence authorities (<i>Ausländerbehörde</i>) and the local Chamber of Commerce and Industry (<i>IHK</i>) may assess the envisaged business idea.</li> <li>Permits are, in general, <b>limited in time</b> and need to be prolonged on a regular basis.</li> </ul>
(Permanent) <b>settlement permit</b> <i>(Niederlassungserlaubnis)</i>	<ul style="list-style-type: none"> <li>May be issued to foreigners who had been <b>in possession of a residence permit for at least five years</b> (in some cases only three years).</li> <li>The permit is <b>unlimited</b> in time and place and includes the right to take up gainful employment.</li> </ul>

Envisaged activity: Working as an employee	
Type of residence title	Remarks
Residence permit for the purpose of <b>taking up employment</b> ( <i>Aufenthaltserlaubnis für abhängige Beschäftigung</i> )	<ul style="list-style-type: none"> <li>Required for all foreign nationals from outside the EU, the European Economic Area (EEA) and Switzerland who intend to take up employment in Germany.</li> <li>The permit includes at the same time the <b>right of residence and the permit to work</b> in Germany as an employee</li> <li>The permit is usually granted upon provision of a <b>specific job offer</b> and normally requires the approval of the <b>Federal Employment Agency</b> (<i>Bundesagentur für Arbeit</i>).</li> </ul>
Exceptions for <b>highly qualified professionals</b>	<ul style="list-style-type: none"> <li>Highly qualified persons (i.e. scientists with special technical knowledge active in teaching, scientific personnel in prominent positions and specialists and executive personnel with extensive professional experience and an annual salary of at least EUR 64,800 (EUR 54,600 in the new federal states)) may be granted a <b>permanent settlement permit immediately</b> without prior approval of the Federal Employment Agency.</li> </ul>
Exceptions for <b>temporarily posted employees</b>	<ul style="list-style-type: none"> <li>There are different possibilities allowing non-EU-based companies to temporarily send employees to Germany without having to apply for the approval of the Federal Employment Agency (e.g. the approval is not needed for certain occupational groups for a period of <b>up to three months</b> within a twelve months period – which does not have to be consecutive).</li> </ul>
(Permanent) <b>settlement permit</b> ( <i>Niederlassungserlaubnis</i> )	<ul style="list-style-type: none"> <li>May be issued to foreigners who had been in possession of a residence permit for at least five years (in some cases only three years).</li> <li>The permit is unlimited in time and place and includes the right to take up gainful employment.</li> </ul>

**More information** can be found here:

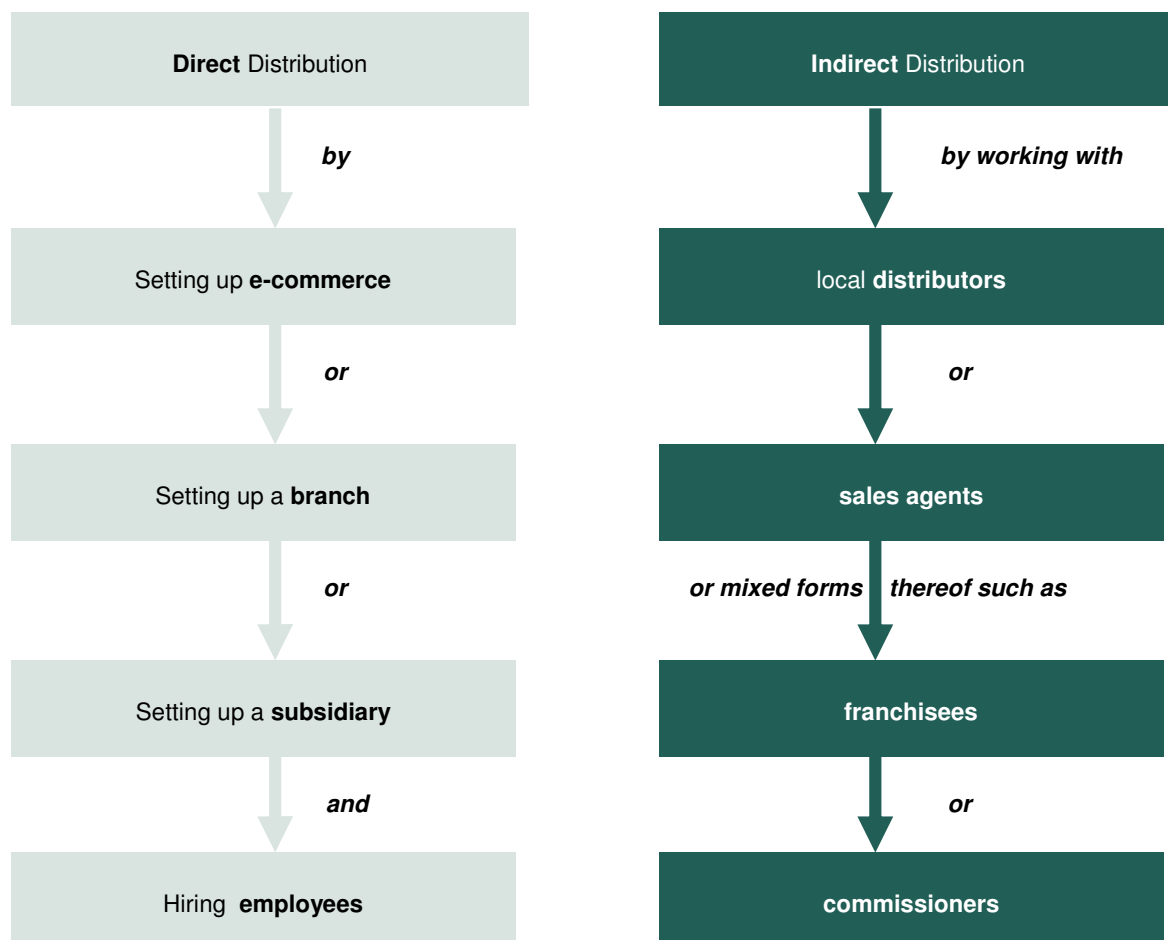
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## D. Starting business activities in Germany

### I. Analysis before entering the market

Before entering the market an analysis should be performed as to how and in which form the market shall be entered.

Depending *inter alia* on the envisaged **scope of activities** and the **intensity of own structures** to be set up, business may be started in various forms such as e.g.:



## II. Indirect Distribution

### 1. Summary of main features

	Typical contractual rights and duties	Applicable law	Specific issues
<b>Distributor (“D”)</b>	<p>D buy and sell products; they bear the <b>risk of sale</b> and do usually expect <b>margins</b>.</p> <p>D are to a large extent <b>independent</b> from the sales force of the principal.</p>	<p>D law is not regulated in most of the EU-member states. However, in some member states (including Germany) <b>extensive case law</b> is applicable to D. In some cases, the rules applicable to <b>sales agents</b> (in particular with regard to the <b>compensation claim upon termination</b>) were applied to D by German courts in the past.</p>	<p>The freedom of D to act as independent entrepreneurs can only be restricted within the limits of <b>antitrust law</b> (pls. see <b>Sec. 2.2. below</b> for details).</p>
<b>Sales Agent (“SAG”)</b>	<p>SAG act as <b>brokers</b> (with or without power to enter into legal transactions) for the principal. The <b>remuneration</b> of SAG is <b>success-related</b>; the <b>risk of sale</b> is borne by the <b>principal</b>.</p> <p>Due to their <b>duty of loyalty</b> SAG are not permitted to distribute competing products.</p> <p>The principal is free to give the SAG <b>instructions</b> relating to the territory of distribution, sales conditions and prices.</p> <p>SAG are <b>integrated</b> in the sales force of the principal and do not act as independently as D.</p>	<p>SAG law is subject to harmonized EU-law containing <b>mandatory provisions protecting SAG</b> which can <b>not</b> be <b>circumvented</b> by choice of (another) law. Exceptions may, however, be permitted if the SAG is active outside the EU. Pursuant to mandatory EU-law the SAG has a claim for</p> <ul style="list-style-type: none"> <li>• <b>compensation upon termination</b> of the agreement;</li> <li>• provision if the arranged transaction is not performed for reasons attributable to the principal;</li> <li>• payment of an advance once the principal has performed the arranged business transaction;</li> <li>• Information, copies and inspection of books;</li> <li>• Minimal notice periods (of up to six months).</li> </ul>	<p>It should be <b>avoided</b> that <b>atypical risks</b> are attributed to the SAG in order to make sure that the SAG-agreement does not become subject to <b>antitrust law</b> (which is not the case if the SAG only bears “typical” risks).</p> <p>A major issue in practice is the mandatory <b>compensation claim</b> of the SAG upon <b>termination</b> of the SAG-Agreement (pls. see <b>Sec. 2.1. below</b> for further details).</p>
<b>Franchisee (“F”)</b>	<p>F buy and sell in their <b>own name</b>, thereby being obliged to pay <b>licence fees</b> to the franchisor in exchange for the right to use specific knowhow provided by the franchisor.</p>	<p>In some cases, the rules applicable to <b>SAG</b> (in particular with regard to the <b>compensation claim upon termination</b>) were applied to F by German courts in the past.</p>	<p>A frequent issue is whether F are correctly and fully informed about the risks taken over by them at the beginning of their activity.</p>
<b>Commissioner (“C”)</b>	<p>C are situated between D and SAG: they sell to their <b>own clients</b>, thereby acting in their <b>own name</b> but for the <b>account of the supplier</b>.</p>	<p>Neither the mandatory provisions of SAG law nor antitrust law applies to C (as long as the C does not bear the risk of sale).</p> <p>In some cases, the rules applicable to <b>SAG</b> (in particular with regard to the <b>compensation claim upon termination</b>) were applied to C by German courts in the past.</p>	<p>C frequently entertain stocks for goods owned by the supplier to which C have access and of which they may dispose. This constellation may create a <b>branch for tax purposes</b>.</p>



## 2. Specific issues

### 2.1. Mandatory claim for compensation of sales agents

Upon termination of the sales agency agreement, a mandatory claim of the sales agents becomes due in case of

- termination by the principal without cause or
- termination by the sales agent for reasons attributable to the principal

The claim of the sales agent is based on mandatory EU-law. However, its calculation may vary in different EU- member states. In Germany, the compensation claim is calculated based on the **average annual provision** of the sales agent **within the last five years**. The compensation claim is, in principle,

- a forecast of what the sales agent would have been able to earn within a reasonable period of time (basic rule: within the next five years),
- based on the provision of the last year (as a maximum),
- reduced by an annual churn rate and
- adjusted by special items (so called equitable reduction).

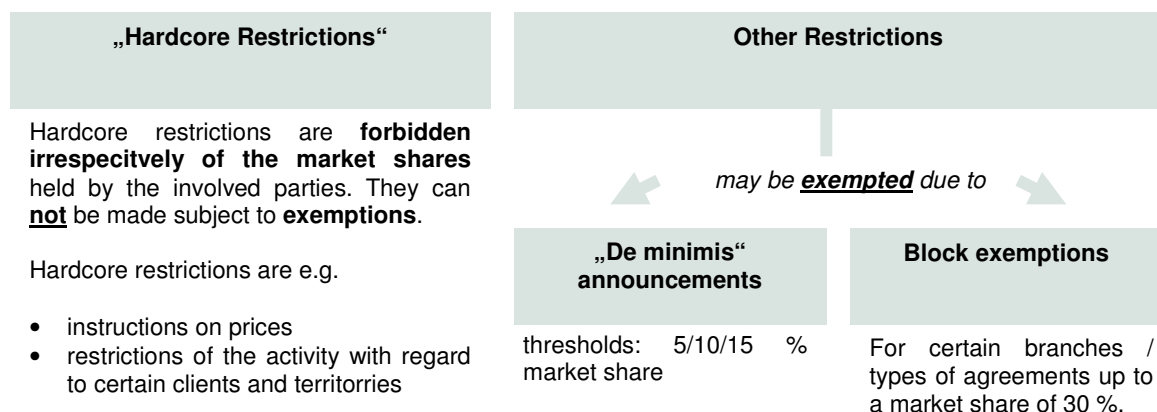
A waiver of the compensation claim is only legally valid if granted at the earliest simultaneously with the termination of the sales agency agreement (or thereafter).

German courts have, in some cases, extended the case law relating to the compensation claim of sales agents to agreements with **distributors, franchisees and commissioners** if the following conditions were met cumulatively: (i) **integration** in the sales organization of the principal and (ii) obligation to forward **customer data** during / at the end of the relationship).

### 2.2. Antitrust law

Pursuant to German antitrust law (which corresponds to a large extent with EU-antitrust law, in particular Article 81 of the EC Treaty) a prohibited restraint of competition is given if an **independent market participant is limited in his/her freedom to act**.

With regard to the type / intensity of restriction, German antitrust law differs between:



Pls. see also [Annex 1](#) (Article 81 of the EC-Treaty).

### III. Direct distribution

#### 1. Setting up e-commerce

E-commerce is subject to the European Distance Selling Directive dated 1997 and E-Commerce Directive dated 2000, both containing provisions relating to **consumer protection**.

In accordance with both Directives, provisions were inserted into national law dealing, *inter alia*, with

- information duties
- requirements relating to the concept of webshops
- right of withdrawal of consumers

In particular the **right of withdrawal** (and the form and content of the mandatory instruction of the consumer relating thereto) has given rise to legal uncertainty in the past.

Consumers may, furthermore, refer to the national law (and the provisions protecting consumers provided for by this law) of the country in which they have concluded a contract; accordingly, the possibility to choose another law (with less extensive consumer protection provisions) is limited.

**More information** can be found here:

- <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML>
- <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>

#### 2. Setting up a branch

Pls. see **Sec. E/I/1** below.

#### 3. Setting up a subsidiary

Pls. see **Sec. E/I/2** and **F/II to IV** below.

#### 4. Hiring employees

Pls. see **Sec. J** below.

## E. Setting up a branch or a company

### I. Overview

#### 1. Setting up a branch

Setting up a branch is a possibility to start business without immediately setting up a company. Foreign companies having their seat and business outside Germany can choose to establish either

- an **autonomous** branch office (*selbständige Zweigniederlassung*) or
- a **dependent** branch office (*unselbständige Zweigniederlassung*)

Branch offices do **not have an independent or separate legal personality** distinct from the head office of the main company. From a legal and organizational perspective a branch office is **part of the head office**, subject to the law governing the head office and part of the organization of the foreign main company's organization. Accordingly, the liability for debts and liabilities of the branch depends on the liability of the head office.

The two forms of branches can be summarized as follows:

#### Autonomous branch

- Must display a certain degree of **autonomy** by having its own management with own executive powers, own bank accounts, an own balance sheet and independent business assets.
- Only **foreign business persons registered with a commercial register** can establish an autonomous branch office.
- The decision to set up a branch office must be made by the managing directors of the head office; the branch office must be **registered with the German commercial register** and the **local trade office**.
- An **application** for registration must be filed with the local German commercial register including detailed information on the foreign company. Generally, a **notarized copy of the commercial register of the foreign company** and the representation power of the managing director(s) must be filed (if the country of origin of the company does not have a commercial register, similar documentation such as a secretary certificate and letter of good standing may be filed alternatively). Furthermore, the application should contain a **memorandum of association** and **articles of association** should be provided. The documents provided should be **translated to German** and the notary's certificate must be authenticated (usually by way of an apostil).

#### Dependent branch

- Does not have to be autonomous and is not registered with the commercial register.
- The only formal requirement is **registration with the local trade office**.

Offices that only observe the market without doing business beyond of that are often described as "representative offices". However, this term does not exist in German commercial law – such offices must usually be registered as a branch office in Germany. Eventually, an office managed by an independent commercial agent may be considered as office without any business activity on behalf of the foreign company in which case registration with the local trade office may not be required.

## 2. Setting up a company

**Any private individual, partnership or corporation** can set up a company in Germany or acquire shares in an existing company, irrespective of nationality or place of residence. Germany does not know any specific investment legislation; furthermore, no minimum percentage of German shareholders is required for foreign investments within Germany.

Please note, however, that due to a recent revision of statutory law, **the Federal Ministry for Economy and Technology** may **control** and - in extraordinary cases - **prohibit** acquisitions of private individuals or legal entities seated outside the territory of the European Union, Island, Liechtenstein, Norway or Switzerland who (directly or indirectly) acquire **25 % or more** of the voting rights in a German company **if the transaction would endanger public order or safety** (pls. see **Sec. O** below for more details).

Furthermore, some **restrictions and/or specific requirements** may apply (to foreign and domestic investors) with regard to certain businesses such as e.g. with regard to following sectors

- defense
- pharma
- offering of financial services and banking

### 2.1 Criteria for choosing a specific legal form

The choice of the legal form usually depends on various factors such as e.g.



	Corporations		Partnerships
<b>Number of shareholders</b>	At least <b>one</b> shareholder		At least <b>two</b> partners
<b>Involvement</b> of shareholders in the management of the company / <b>control</b> of the management	<b>Stock corporation:</b>  Very <b>limited involvement</b> of shareholders in the management; control of management is exercised by the Supervisory Board	<b>Limited liability company:</b>  The shareholders may give <b>instructions</b> to the management and <b>control</b> the management	<b>Limited Partnership:</b>  The <b>general partner</b> is responsible for the <b>management</b> ; the rights of the limited partner with regard to management are (usually) rather restricted (depending on the partnership agreement)
<b>Liability</b>	<b>Stock corporation:</b>  The liability of the shareholders is limited to the <b>duty to pay in their contributions</b> (minimum share capital: <b>EUR 50,000</b> )	<b>Limited liability company:</b>  The liability of the shareholders is limited to the <b>duty to pay in their contributions</b> (at least ¼ of each share and ½ of the total share capital in the aggregate). (Minimum share capital: <b>EUR 25,000</b> )	<b>Limited Partnership:</b>  The <b>general partner</b> is exposed to an <b>unlimited liability</b> ; the liability of the <b>limited partner</b> corresponds with his <b>partnership interest</b> (no minimum amount required).
<b>Taxation</b>	<b>Corporations</b> are subject to <b>corporate income tax</b> . The shareholders may be subject to tax on capital gain (on dividends).		<b>Partners</b> (not the partnership which is “transparent” for tax purposes) are subject to <b>personal or corporate income tax</b> .
<b>Financing</b>	<b>No duty</b> of the shareholders / partners <b>to make additional payments</b> to the company (in addition to their capital contributions) provided for by statutory law.  If the company is financed by funds provided by third parties (e.g. banks or investors) the form in which the funds are provided may have an impact on the choice of legal form (e.g. with regard to the possibilities to increase the share capital of the company e.t.c.).		
<b>Changes and/or exit of shareholders</b>	Corporations can <b>continue to exist</b> with only one partner.		Partnerships are <b>dis-solved</b> if one of two partners leaves the company.
	<b>Stock corporation:</b>  The sale and transfer of shares does <b>not</b> need to be <b>notarized</b> .	<b>Limited liability company:</b>  The transfer of shares needs to be <b>notarized</b> .	The transfer of partnership interests does <b>not</b> need to be <b>notarized</b> .
	Shares are, in general <b>freely transferable</b> (exceptions may apply to registered shares).		Changes of shareholders / partners usually are subject to the <b>approval of the shareholders’ / partners’ meeting</b> (or the company). In case of an exit, the leaving shareholder / partner is usually entitled to receive <b>compensation</b> .

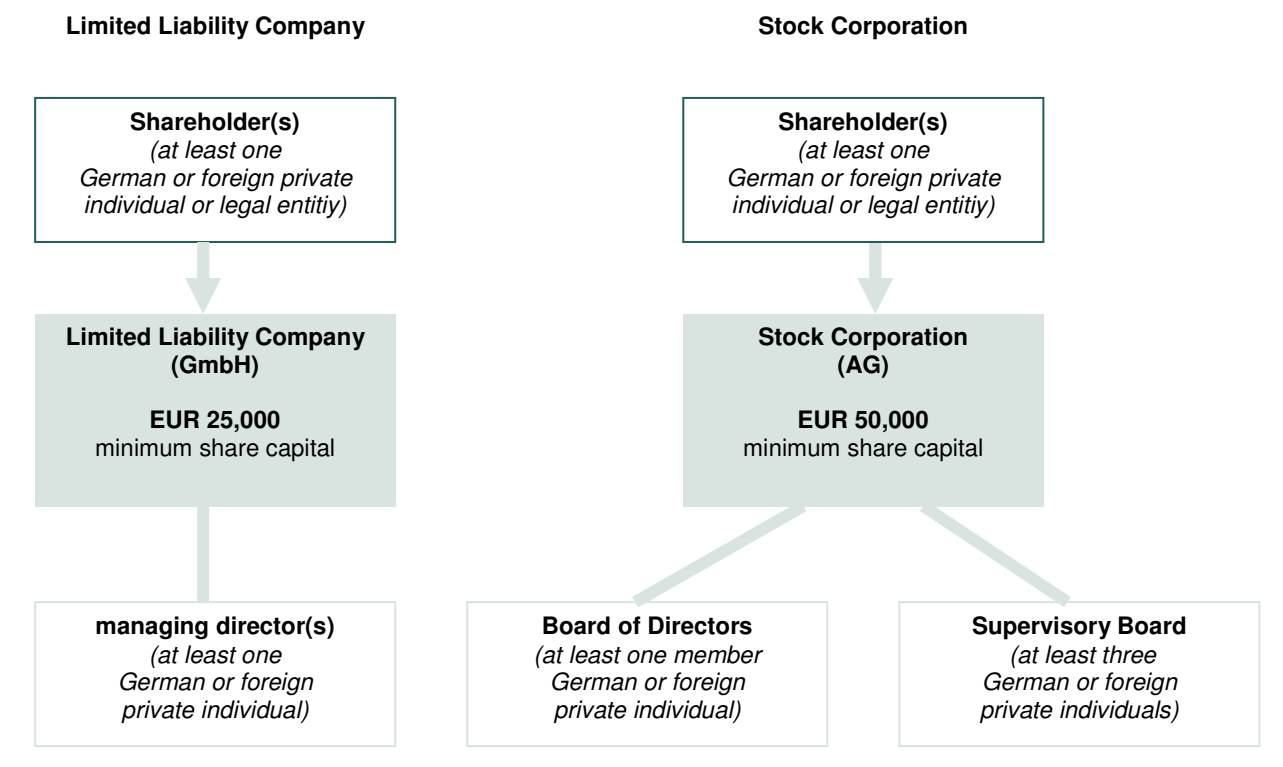
## 2.2 Corporations

Generally, corporations are the best option for **larger companies**. German law offers, amongst others, the following forms of corporations:

- Limited Liability Company (*Gesellschaft mit beschränkter Haftung; GmbH*) and
- Stock Corporation (*Aktiengesellschaft; AG*)

One of the main advantages of corporations is the limited liability of its shareholders. Setting up a corporation usually requires a minimum share capital which is protected by statutory law.

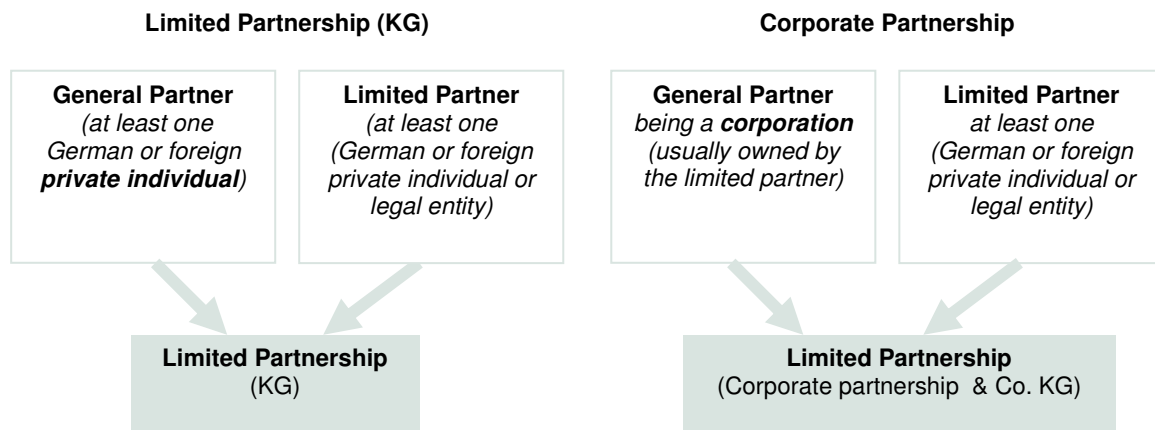
Whereas Limited Liability Companies usually have a one-tier structure (consisting of at least one managing director) and a minimum share capital of EUR 25,000, stock corporations have a two-tier structure (consisting of at least one director and of at least three members forming the Supervisory Board), a minimum share capital of EUR 50,000 and are subject to a number of formal requirements.



## 2.3 Partnerships

The legal form of a partnership is frequently used for **tax reasons** (pls. see **Sec. I/1/3** below). From a corporate law perspective, its main feature is the personal commitment of the partners. Each partnership requires **at least two partners**. At least one of the partners must assume **unlimited liability** for the debts and liabilities of the partnership. On the other hand, **no minimum share capital** is required for setting up a partnership and running its business. Furthermore, accounting obligation and publication requirements tend to be less extensive than for corporations. German law knows, *inter alia*, the following forms of commercial partnerships:

- Limited Partnership (*Kommanditgesellschaft, KG*) and
- Corporate Partnership (limited partnership with a corporation as general partner)



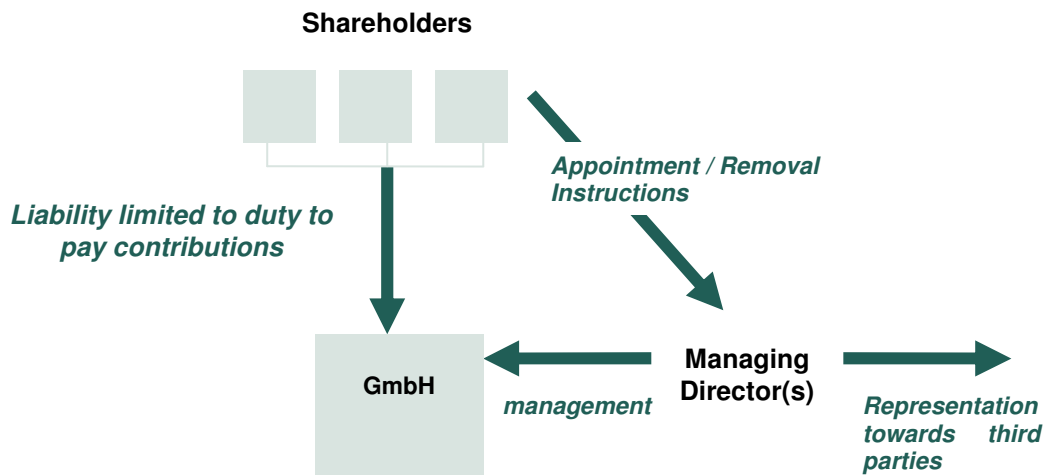
## II. Limited Liability Company (GmbH)

### 1. Organization

#### 1.1 Structure of the company

The limited liability company (being the most frequently used company form in Germany) is a **corporation** and as such a separate legal entity which is liable towards its creditors with its assets. It can have **one or more shareholder(s)** (private individuals or legal entities) the liability of which is limited to the **duty to pay in the share capital** either in cash or in kind.

In general, the limited liability company consists of **two corporate bodies**: the shareholders' meeting and the managing directors ("MD"). A supervisory board is, in general, not mandatory, its establishment may, however, be provided for in the articles of association.



#### 1.2 Shareholders' meeting (*Gesellschafterversammlung*)

The shareholders' meeting is the **supreme body** of the limited liability company. Unless otherwise provided for by statutory law or the articles of association, its powers cover all business matters. These include, in particular, the approval of the annual financial statements, the use of profits, the appointment and removal of managing directors as well as the control and approval of their management performance.

A shareholders' meeting must be held **at least once per year** in order to approve the annual accounts set up by the managing directors within 8 months (11 months for small companies) from the end of the previous business year (pls. see **Sec. G** below for more details relating to the annual accounts).

#### 1.3 Management / representation of the company

One or more managing directors who do not need to be shareholders are in charge of the management and represent the company towards third parties. The scope of the powers of the managing director(s) to represent the company can not be limited with legal effect towards third parties. Internally, however, the shareholders' meeting may give instructions to the man-



aging directors; the competencies of the managing directors may further be restricted by internal regulations (set forth e.g. in rules of procedure). The managing directors may grant so called “Prokura” to employees of the company, entitling them to represent the company with regard to the daily business. Prokura is registered with the commercial register.

Pls. see [Annex 2](#) (Prokura) for more information.

Managing directors have a relatively broad range of duties and liabilities under German law.

Pls. see [Annex 3](#) (Duties and liability of managing directors) for more information.

## 2. New sub-form: “Mini-GmbH”

Since 1 November 2008, limited liability companies can be set up as “Mini-GmbH” (*Unternehmensgesellschaft (haftungsbeschränkt); UG*). The idea behind the “Mini-GmbH” was to give a “German answer to the UK Ltd. “. The “Mini-GmbH” is not a new legal company form but a subtype of the “standard” limited liability company. The low minimum capital requirements (the registered share capital must be in an amount from EUR 1 to EUR 24,999) are primarily designed to help startups with limited funds to take up business in the legal form of a limited liability company. It is the intention of the underlying legal concept that the shareholders of a “Mini-GmbH” accrue enough earnings to convert the “Mini-GmbH” into a “standard” limited liability company over time. Statutory law, therefore, provides for that ¼ of the annual net profit is (mandatorily) attributed to a statutory reserve of the company until the share capital of the company is increased to an amount of EUR 25,000.

## 3. Setting up or purchasing a (shelf) GmbH

If a new GmbH is set up, it usually takes up to three weeks as from the incorporation date until the company is registered with the commercial register (pursuant to statutory law, a GmbH starts to legally exist upon registration with the commercial register).

Instead of setting up a new company, investors may choose to acquire an already existing (but commercially inactive) shelf company from one of the various shelf company providers. The main advantage of a shelf company is that the company does already legally exist and that **the operative business can be started immediately**.

Shelf companies are frequently used in connection with M&A transactions (e.g. as acquisition vehicles) or as general partners of limited liability companies.

The cost for acquiring a (shelf) GmbH amount to approximately **EUR 27,500** and comprise the following amounts:

- EUR 25,000 **share capital** of the company (which stays within the company and, therefore, commercially is transferred to the new shareholder(s)) and
- EUR 2,500 **fees** to be paid to the shelf company provider

In addition, **notary fees** and **fees for registration** (which do, in a standard case, not exceed a total amount of EUR 400 - 600) with the commercial register become due.

Furthermore, **cost for** (legal and/or tax) **consultants** may be generated.

Pls. see [Annex 4](#) (Setting up / acquiring a (shelf) limited liability company (GmbH)) for detailed information.

### III. Stock corporation (AG)

#### 1. Organization

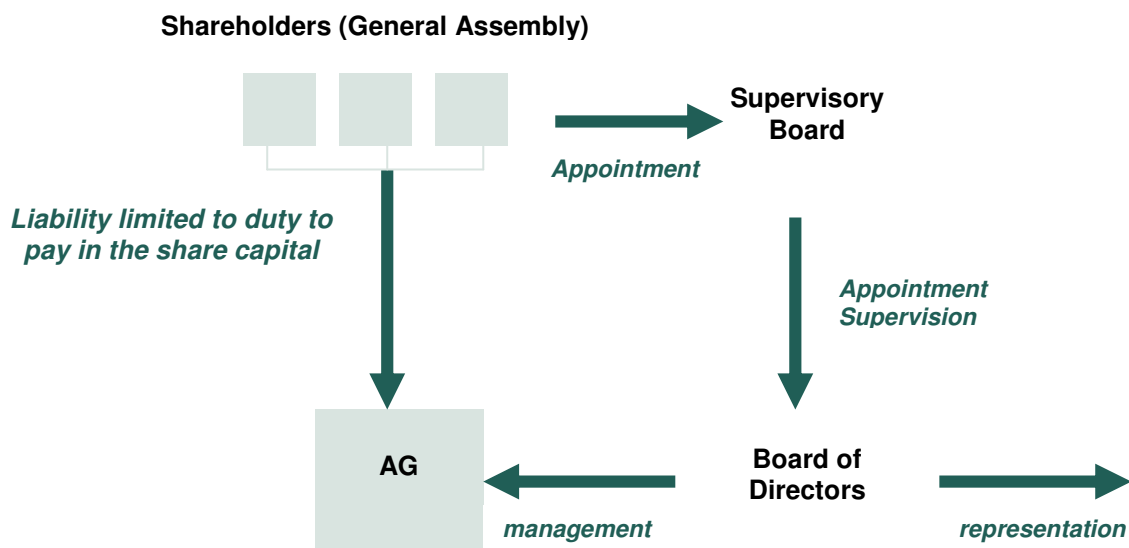
##### 1.1 Structure of the company

The stock corporation (*Aktiengesellschaft; AG*) which is used for rather **large or listed companies** is a **corporation** and as such a separate legal entity which is liable towards its creditors with its own assets. It can have **one or more shareholder(s)** (private individuals or legal entities) the liability of which is (apart from exceptional cases) limited to the **duty to pay in the share capital** either in cash or in kind. The share capital of a stock corporation is divided in par value or non par value shares (in the form of either registered or bearer shares).

In general, there are **no restrictions of the transfer of shares** (with potential exceptions for registered shares). Stock corporations can thus approach a large investing public, including the stock market. Share transfers further are **not subject to notarization**.

Unlike the law governing the limited liability company, the stock corporation law (*Aktiengesetz; AktG*) is relatively **inflexible** and to a large extent mandatory. It can be modified only to a limited extent by the articles of association and is **administratively rather demanding**.

The stock corporation mandatorily consists of **three corporate bodies**: the General Assembly of shareholders, the Board of Directors and the Supervisory Board.



##### 1.2 General Assembly (*Hauptversammlung*)

The General Assembly has **limited powers** such as, in particular, amending the articles of association and modifying the corporation's capital basis, discharging members of the Board of Directors and of the Supervisory Board, appointing the members of the supervisory board etc. **Resolutions** of the General Assembly must to a large extent be **notarized**.

##### 1.3 Board of Directors

The Board of Directors is in charge of the **management and representation** of the stock corporation towards third parties. It is not subject to any instructions from the Supervisory Board

and/or the General Assembly. Accordingly, on the one hand the powers of representation vis-à-vis third parties of the Board of Directors are unlimited and on the other hand its management authority is, in general, not subject to any resolutions of the other corporate bodies. The approval of the General Assembly may, however, be required for decisions of fundamental importance; furthermore, some decisions must be subject to prior approval of the Supervisory Board pursuant to mandatory statutory law. The members of the Board of Directors can be appointed for a maximum term of five years.

Pls. see [Annex 5](#) (Duties and liability of members of the Board of Directors) for more information.

#### 1.4 Supervisory Board

The Supervisory Board **appoints the members of the Board of Directors** and is responsible for their **supervision**. Certain types of management decisions usually internally require a prior approval of the supervisory board. The Supervisory Board must consist of at least 3 members. The members of the Supervisory Board can be appointed for a maximum term of five years.

Pls. see [Annex 6](#) (Duties and liability of members of the Supervisory Board) for more information.

### **2. New law on the remuneration of directors in stock corporations**

The German government has passed a new law limiting director pay in (listed and non listed) stock corporations. Most of the provisions under the new law will become relevant for the **financial year starting on January 1<sup>st</sup> 2010**. Under the new law

- the Supervisory Board shall make sure that the total remuneration of directors properly reflects their tasks and performance and is in an appropriate relation with the performance of the company;
- the remuneration of directors shall not exceed the average remuneration level of comparable directors in the same area and industry without cause;
- remuneration of directors of listed companies shall be consistent with a sustainable development of the company and performance-related elements of the remuneration shall be assessed with reference to several business years, up to the entire term of office;
- stock options shall be exercised no earlier than four years after they were issued;
- if short-term performance awards (like bonuses) are granted, the Supervisory Board shall be obliged to cap individual director's remuneration to avoid exorbitant bonuses due to e.g. extraordinary movements of share prices.

The new law does, however, not provide for any explicit or detailed restrictions in remuneration agreements.

Pls. see [Annex 7](#) (Limitation of director pay in stock corporations) for more information.

### **3. Setting up or purchasing a (shelf) stock incorporation**

If a new stock corporation is set up, it usually takes up to three weeks as from the incorporation date until the company is registered with the commercial register (pursuant to statutory law, an AG starts to legally exist upon registration with the commercial register).

As in case of a GmbH, investors may acquire an already existing (but commercially inactive) shelf company from one of the various shelf company providers. The main advantage of a shelf company is that the company does already legally exist and that **the operative business can be started immediately**.

The cost for acquiring a (shelf) stock corporation amount to approximately **EUR 55,000** and comprise the following amounts:

- EUR 50,000 **share capital** of the company (which stays within the company and, therefore, commercially is transferred to the new shareholder(s))
- EUR 5,000 **fees** to be paid to the shelf company provider

The transfer of shares in a stock corporation does **not need to be notarized**.

However, **cost for** (legal and/or tax) **consultants** may be generated.

Pls. see [Annex 8](#) (Setting up / acquiring a (shelf) stock corporation) for detailed information.

**IV. Partnership with a limited liability company as general partner**

**1. Organization**

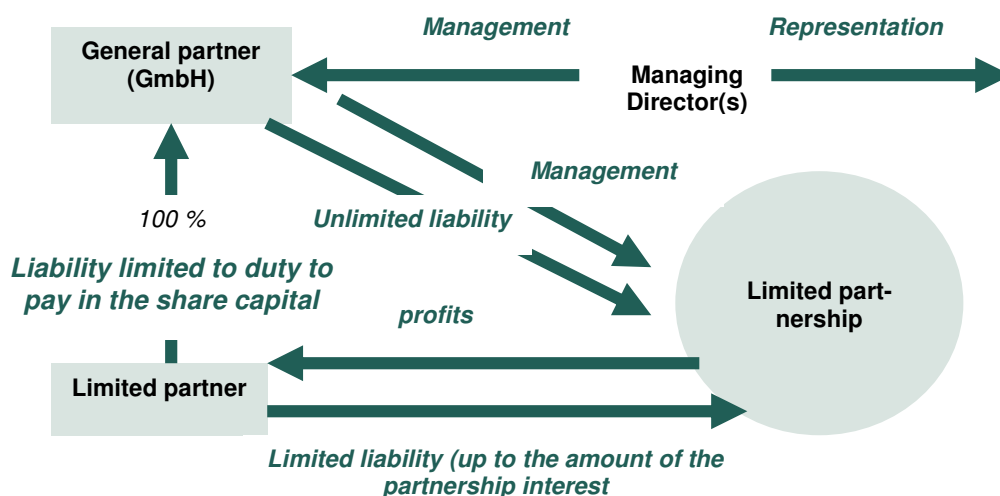
1.1 Structure of the company

The GmbH & Co. KG is a mixed form of a limited partnership and a limited liability company. The form of the limited partnership can primarily be recommended for **smaller enterprises** where some partners shall be actively involved in the business and others shall participate in the profits without being involved in the management. In some cases, limited partnerships are also set up because of **different taxation of partnerships** on the one and corporations on the other hand pursuant to local tax law.

Limited partnerships are commercial partnerships with one or more partner(s) who are liable for the debts and liabilities of the partnership only up to an amount registered with the commercial register (limited partners; “LP”) and one or more partner(s) with unlimited liability (general partners; “GP”).

If the limited partnership is set up in a form that **the only GP is a limited liability company** (in which case the limited partnership is called “GmbH & Co. KG”), the - unrestricted – liability of the GP is limited due to its legal form as a limited liability company. Usually the limited partners are also shareholders in the limited liability company in which case the company is a GmbH & Co. KG with identical participation.

The advantage of a GmbH & Co. KG is that none of the private individuals participating in the partnership has unlimited liability. As the GP is responsible for the management of a partnership, the managing directors of the limited liability company are also the managing directors or managing body of the limited partnership. The disadvantage of this form of enterprise is its comparatively complicated structure due to the interlocking of two legal entities. Definitions, rules and provisions pertaining generally to the limited partnership and the limited liability company are equally and simultaneously applicable to the GmbH & Co. KG.



1.2 Limited Partners

The liability of the LP is – from the date of registration with the commercial register forward – determined by the amount of their **partnership interest** (*Hafteinlage*) registered with the

commercial register. Generally, the LP have **less rights** (in particular with regard to management, participation in profits and voting rights) than the GP.

### 1.3 General Partners

The GP has **unlimited liability** for the debts and liabilities of the limited partnership and is responsible for the **management** of the limited partnership.

## 2. Setting up or purchasing a (shelf) GmbH & Co. KG

A GmbH & Co. KG can be **set up** in two different ways:

- either a newly established or already existing limited liability company joins (as general partner) with limited partners to form a limited partnership (before setting up the GmbH & Co. KG the founders may e.g. acquire a shelf company)
- or a limited partnership is created in a first step with a private individual as GP. At a later stage, a limited liability company, established for the purpose of assuming the management responsibility as well as the personal liability, joins the limited partnership as GP and the previous GP withdraws from the partnership.

Instead of setting up a new company, investors may choose to acquire an already existing (but commercially inactive) **shelf company** from one of the various shelf company providers. The main advantage of a shelf company is that **the operative business can be started as soon as the limited partner(s) is/are registered with the commercial register.**

The cost for acquiring a (shelf) GmbH & Co. KG amount to approximately **EUR 29,000 - 30,000** and comprise the following amounts:

- EUR 25,000 **share capital** of the GmbH (which stays within the company and is, therefore, commercially transferred to the new shareholder(s))
- EUR 500 partnership interest of the limited partner (which stays within the limited partnership and is, therefore, commercially transferred to the new limited partner(s))
- EUR 3,500 to 4,500 **fees** to be paid to the shelf company provider

In addition, **notary fees** and **fees for registration** with the commercial register become due (which do, in a standard case, not exceed a total amount of EUR 800).

Furthermore, **cost for** (legal and/or tax) **consultants** may be generated.

Pls. see [Annex 9](#) (Checklist for setting up / acquiring a (shelf) GmbH & Co. KG) for detailed information.

## F. Duties after setting up a German company

### I. Notification duties

As a general rule, the following authorities need to be contacted after having set up a new company:

- Tax office (*Finanzamt*) and municipal tax authority (*Stadt- / Gemeinde- Steueramt*)\*
- Local trade office (*Gewerbeamt*) \*
- Labor office (*Arbeitsamt*) \*\*
- General Health Insurance (*Allgemeine Ortskrankenkasse; AOK*) \*\*
- Chamber of Industry and Commerce (*Industrie- und Handelskammer; IHK*)
- Liability Insurance Association (*Berufsgenossenschaft*) \*\*

\* usually informed **automatically** by the notary involved in the foundation / acquisition of the new company.

\*\* only required if the company has **employees**.

### II. Opening up a bank account

Usually, a bank account for a newly set up company is opened after its foundation in order to pay in the contributions of the founding shareholder(s). If a shelf company is acquired the funds on its (already existing) bank account are usually transferred to a new account opened up by the new shareholders.

When opening up a new bank account in Germany it should be borne in mind that the bank may ask to be provided with (extensive) **documentation relating to the shareholder(s)** (e.g. an extract from the commercial register, a letter of good standing or similar documentation) **and to the new company** (e.g. the incorporation deed, the share purchase agreement, an extract from the German commercial register etc.). Accordingly, it might be considered to open up a bank account with a **German subsidiary of a foreign bank** (e.g. Bank of America which has a German subsidiary seated in Frankfurt) the shareholders are already familiar with.

### III. Mandatory indications on business letters, e-mails and internet sites

A number of data must be reflected in business letters (including e-mails) and be published on the internet site of German companies.

Pls. see [Annex 10](#) for more information.

### IV. Applications with the commercial register at a later stage

Applications with the commercial register might be necessary due to changes at a later stage such as e.g. the appointment of new managing directors, a change of the business address or amendments of the Articles of Association relating, in particular, to changes of data registered with the commercial register (e.g. company name, seat, registered share capital in case of a GmbH or change of the general partner or of the partnership interest of the limited partner in case of a limited partnership).

In each case, applications must be signed by the **managing director(s)** in **certified** form either before a German notary or before a notary outside Germany (in which case usually an **apostil** is required in addition).

After execution, applications must be **filed** with the competent commercial register **electronically**; this can either be done by a **German notary** (which is the standard case) or by the managing directors with specific software.

## V. Keeping the shareholder list up to date

Pursuant to statutory law, the managing directors or – if a notary is involved the notary - must amend the shareholders list of a limited liability company in case of any change of shareholders and/or the (number and/or nominal amounts of the) share(s) held by them. The amended shareholder list must be filed with the commercial register as soon as the change with regard to the shareholder(s) and/or the share(s) has become legally effective.

It is important to know that, in principle, only shareholders who are reflected in the shareholder list published electronically by the competent local court can exercise their shareholders' rights (in particular: their voting rights). This means that, in general, **no shareholders' resolutions can be passed** before the shareholder(s) is/are (i) inserted in the shareholder list and (ii) the shareholder list is published.

Furthermore, under certain circumstances, a person can acquire shares from a person who is not the (real) owner of the shares but (incorrectly) reflected in the shareholder list (so called **"acquisition in good faith"**). In order to avoid the risks potentially arising from an acquisition in good faith, it should be made sure that the shareholder list is **regularly checked and immediately amended and filed with the commercial register** in case of any changes.



## G. Accounting and publication duties

Corporations and commercial partnerships are obliged to keep accounts and to disclose in these accounts their commercial transactions and financial status in accordance with the German Commercial Code (*Handelsgesetzbuch; HGB*).

Apart from the obligation to establish an opening balance sheet (*Eröffnungsbilanz*) as of the date of the commencement of their activities, German companies - irrespective of their size - must prepare at the end of each business year annual accounts (*Jahresabschluss*) consisting at least of a **balance sheet** (*Bilanz*) and an **income statement** (*Gewinn- und Verlustrechnung*).

Pursuant to German statutory law (laid down in the German Commercial Code) the scope and extent of accounting and publication duties of **corporations** (e.g. limited liability companies and stock corporations) increases **in relation to their size**:

	Balance sheet total (in EUR million)	Turnover (in EUR million)	Number of employees (average p.a.)	Annual accounts must include*	Audit of the annual financial statements*
<b>Large</b> companies	above 19,250	above 38,500	above 250	<ul style="list-style-type: none"> <li>• Balance sheet</li> <li>• Income statement</li> <li>• Notes to financial statements</li> <li>• Management report</li> </ul>	Mandatory
<b>Medium-sized</b> companies	above 4,840 to 19,250	above 9,680 to 38,500	up to 250	<ul style="list-style-type: none"> <li>• Balance sheet</li> <li>• Income statement</li> <li>• Notes to financial statements</li> <li>Management report</li> </ul>	Mandatory
<b>Small</b> companies	up to 4,840	up to 9,680	up to 50	<ul style="list-style-type: none"> <li>• Balance sheet</li> <li>• Income statement</li> </ul>	Not mandatory

\* in each case if **two of the three criteria highlighted in green** in the spreadsheet are fulfilled.

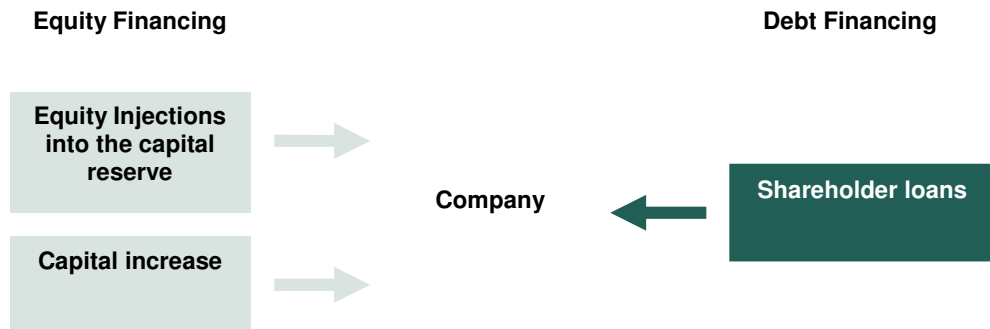
Whereas large companies must provide the elements of the annual accounts in the complete format as provided for by statutory law, some **simplifications** apply to medium-sized and small companies.

The annual accounts of the previous business year must, in principle, be **set up by the management** within the first three months of the new business year (there are, however, some exceptions for smaller companies, providing for an extension of this period to up to six months). The annual accounts have then to be **approved by the shareholders/partners** within 8 months from the end of the business year (11 months for small companies).

The annual financial statements and the auditor's opinion (if applicable) must be filed electronically by the management of the company to be published in the **German Federal Gazette** (*Bundesanzeiger*) immediately after the approval of the shareholders is granted (at the latest within 12 months from the end of the previous business year).

## H. Financing a German subsidiary

### I. Financing by shareholders



#### 1. Equity Financing

German statutory law does not provide for a duty of the shareholders of a corporation (GmbH and AG) or the partners of a limited partnership to inject additional equity unless provided for otherwise in the articles of association, the partnership agreement or the shareholders' agreement (if any).

Additional equity can, however, be generated or injected by the shareholders e.g. by way of

- attributing (a part of) the annual profits to the capital reserve of the company
- injecting equity into the capital reserve of the company or
- increasing the share capital

Pursuant to statutory law, equity injections are not interest-bearing; shareholder granting equity to the company do further fully participate in the commercial risks the company is exposed to.

If additional equity is injected by the shareholders the way how it is granted depends in most cases on the specific needs of the company and the shareholders and/or requirements imposed by third party investors requesting e.g. a certain equity ratio.

Generally, **equity injections** tend to be easier than a capital increase as they may be made by each shareholder individually (without the risk of the other shareholders to be diluted with the shares held by them), the capital reserve may be released and the injected funds may be paid back relatively easily – provided, of course, that the funds are still available.

**Capital increases** are more time consuming and cost intensive (a notarized shareholders' resolution is required and the capital increase becomes legally valid only upon registration with the commercial register), all shareholders must either participate in the capital increase or waive their subscription rights; furthermore, the contributions can not be paid back very easily as they become part of the registered share capital which is protected by specific provisions of statutory law, providing for that the registered share capital must not be paid back to the shareholders in any form. Capital decreases require, again, notarization and are subject to a number of legal requirements.

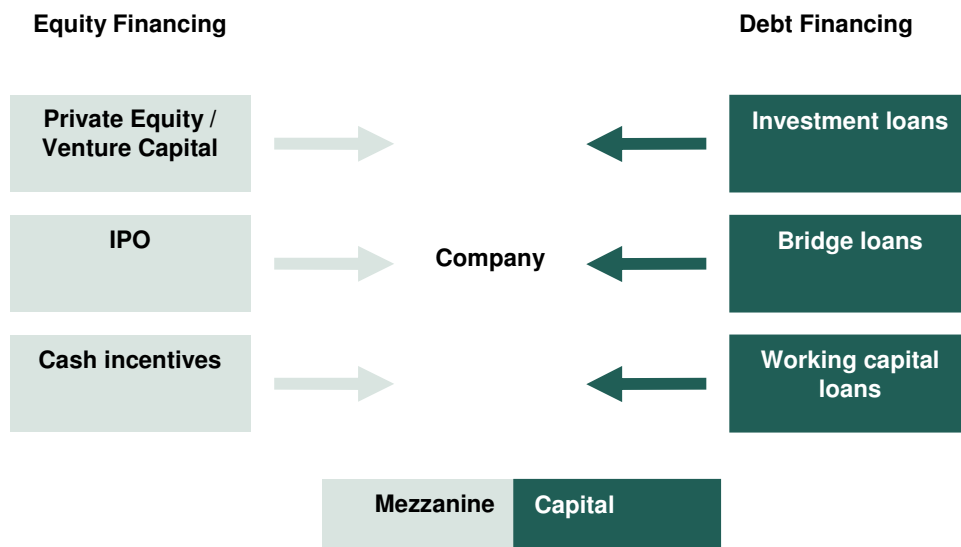
## 2. Debt Financing

From a legal point of view, shareholders may, at any time, grant interest-bearing loans to the company based on a loan agreement at arm's length. The conditions of the draft loan agreement should, however, also be reviewed by the company's **tax consultant**.

It has to be noted, however, that in case of **insolvency** of the company, (i) claims of shareholders on the repayment of loans granted by them to the company are ranking behind the claims of all other creditors of the company (i.e. such claims are only settled after the claims of all other creditors) and (ii) all payments made by the company to shareholders within a term of 12 months before the opening of the insolvency proceedings can be challenged by the insolvency receiver (resulting in a duty of the shareholders to pay the loan amount back to the company).

In order to avoid over-indebtedness of the company, loan agreements with shareholders should, in any event, contain a **subordination clause** which has the effect that the claim of the lender shareholder for repayment does not appear in the interim balance sheet based on which the existence or absence of over-indebtedness is assessed.

## II. Financing by third parties



### 1. Equity Financing

Equity injections from third parties are frequently made in the form of **Private Equity** engagements or **Venture Capital** (in the context of high-tech or increased risk projects). Financial partners may be found e.g. through the **German Private Equity and Venture Capital Association** (*Bundesverband deutscher Kapitalbeteiligungsgesellschaften; BVK*).

**More information** can be found here: [www.bvkap.de](http://www.bvkap.de).

Another instrument to find third party investors is an **Initial Public Offering (IPO)** or a **Private Placement (PP)** at the German stock market.

Pls. see [Annex 11](#) (Overview Deutsche Börse stock market) for more information.

## 2. Debt Financing

Loans of third parties (in particular: banks) are often granted in one of the following forms:

Investment Loans	Bridge Loans	Working Capital Loans (including overdraft credit facilities)
<ul style="list-style-type: none"> <li>• <b>Long term</b> loans (up to 10 years)</li> <li>• <b>Interest</b> charged (semi-) annually</li> <li>• <b>Securities</b> consisting in e.g.               <ul style="list-style-type: none"> <li>○ collateral (fixed assets, inventory, receivables)</li> <li>○ assignment of claims</li> <li>○ shareholder guarantees</li> <li>○ pledges</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Granted for <b>bridging deferred financial inflow</b></li> <li>• Usually <b>secured</b> by assignment of claims of the company against debtors to the lender</li> </ul>	<ul style="list-style-type: none"> <li>• Granted for providing <b>liquidity for the daily business</b></li> <li>• Conditions usually <b>amended on a yearly basis</b></li> <li>• <b>Interest</b> rates depend on level of loan utilization and period of usage</li> <li>• <b>Securities</b> depending on the precise purpose and amount of the credit and the commercial situation of the borrower (range of potential means of securities comparable with securities for investment loans)</li> </ul>

## 3. Mezzanine Capital

Mezzanine Capital is, from an accounting point of view, an **intermediary between equity and debt**. The term “Mezzanine Capital” covers a broad range of unsecured subordinated debt or preferred stocks. Due to relatively high risk exposure Mezzanine Capital tends to be relatively expensive.

Pls. see [Annex 12](#) (Overview of different forms of Mezzanine Capital) for more information.

## 4. Cash incentive programs

Investors in Germany are offered a multitude of German and EU **cash incentive programs** set up to support companies at all stages of their business activities. Subsidies can be provided as grants and treated as **equity** for accounting purposes; other forms such as interest reduces loans are rather considered as **debt**.

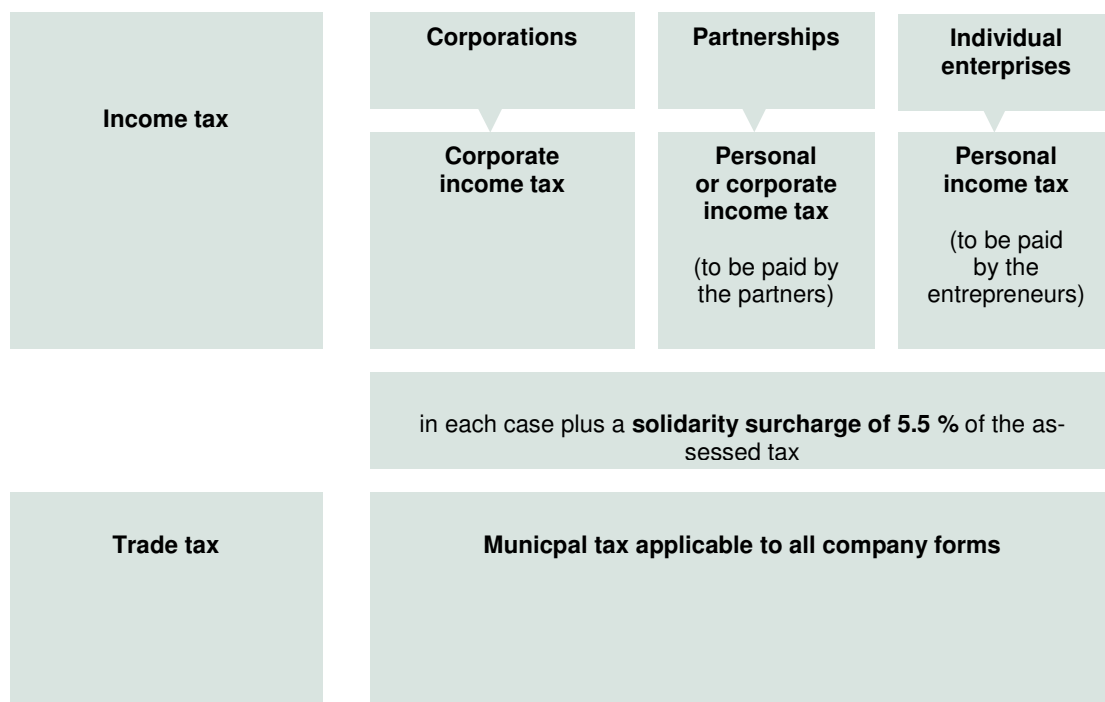
Pls. see [Annex 13](#) (Overview of Incentives) for more information.

## I. German tax system (2009)

### I. Taxation of Companies

#### 1. Overview

German tax law knows **two levels of taxation**:



#### 2. Corporate Income Tax for corporations

##### 2.1. Taxation on the level of the corporation ("**Level I**")

German corporate income tax amounts to a flat rate of **15 %** on all **taxable earnings** of corporations. The income is determined in accordance with the regulations of the Income Tax Act (*Einkommenssteuergesetz; EStG*) and the Corporation Tax Act (*Körperschaftsteuergesetz; KStG*).

In addition, **solidarity surcharge** amounting to **5.5 %** of the assessed tax is imposed.

## 2.2. Taxation of dividends at the shareholders' level ("**Level II**")

Profits distributed to shareholders (**dividends**) are subject to taxes as well:

Taxation under the partial-income rule	Taxation under the flat tax (final withholding tax)
If individuals hold shares in corporations as <b>business</b> assets:	If individuals hold shares in corporations as <b>private</b> assets:
40 % of the dividends received from domestic or foreign corporations are tax-exempt. 60 % are subject to income tax (plus solidarity surcharge) and trade tax under certain conditions.	Dividends received from domestic or foreign corporations are taxed at a flat rate of 25 % (plus solidarity surcharge). The progressive tax rate is applied on request.
60 % of the expenses commercially related to dividends may be deducted as business-related expenses.	Expenses related to dividends cannot be deducted as income-related expenses.
25 % withholding tax plus solidarity surcharge is deducted from the dividends. The withholding tax is credited against the income tax liability of the recipient of the dividends. For foreign individuals, the withholding tax is, generally, final.	From the dividends, 25 % withholding tax plus solidarity surcharge are withheld. In general, the withholding tax is final.

Dividends paid from a German subsidiary **to its foreign parent corporation** are, in general, subject to a withholding tax (*Kapitalertragssteuer*) amounting to **25 %** of the dividend. Modifications (in particular: tax refunds) may be provided for in **double taxation treaties** between Germany and the state of origin of the foreign parent corporation (if the parent company is seated outside the European Union). Since January 1<sup>st</sup> 2009 a **refunding of 2/5** of the deducted withholding tax may be granted to foreign parent corporations with seat outside the EU in a state with which no double taxation treaty exists.

## 2.3. Double taxation treaty USA-Germany

According to the provisions of the double taxation treaty USA-Germany ("**DTT**") withholding tax may be reduced at 0%/5%/15% in case of a dividend distribution from the German GmbH to its US parent company. The US parent company has to apply for a certificate of withholding tax exemption issued by the German Federal Central Tax Office (*Bundeszentralamt für Steuern*). Alternatively, the US parent company may claim withholding tax withheld in excess of the relevant DTT provision from the Federal Central Tax Office by way of a refund procedure.

However, Germany has enacted anti-treaty-shopping rules overriding the DTT provisions to some extent. Germany asks for **substance** at the level of the holding corporation (i.e. the corporation receiving dividend payments out of Germany):

- there must be commercial or other important reasons for setting up the foreign company; **and**
- the foreign company is required to realize more than 10% of its revenues from own business activities; **and**
- the foreign company has to participate in public commercial activities with a sufficiently implemented own organisation.

The aforementioned substance test will not be applied (i.e. the treaty relief will be granted irrespective of the aforementioned criteria) if the shares of the foreign company are listed at a stock exchange (to be more precise, there has to be a regular and significant trade of the company's main class of shares at a recognized stock exchange) or if the foreign company qualifies as an investment fund under the German Investment Tax Act.

If the substance test is applied and if there is a lack of substance in terms of the aforementioned German treaty override provisions, the US parent entity will not be entitled to treaty benefits and the German domestic WHT rates (as set out above) will apply.

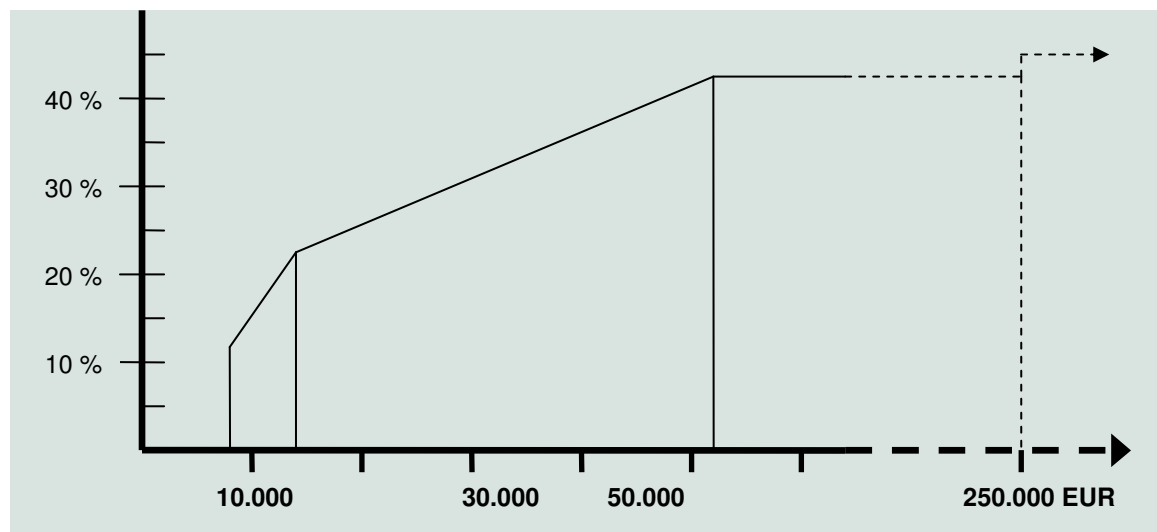
Pls. see also [Annex 14](#) (Overview of tax agreements entered into between Germany and the United States).

### 3. Personal income tax for individuals and partnerships

**Individuals** are subject to **income tax**, **solidarity surcharge** and may be **trade tax** levied on business income.

**Partnerships** are “transparent” from a tax perspective and are, therefore, not subject to corporate or personal income tax. Instead, the taxation depends on the **individual circumstances of the partners**. Therefore, the partners may be subject to **personal income tax** at the (individual) tax rate applicable to them. If a partner is a **corporation**, this corporation is subject to **corporate income tax**.

Level income tax	from	to	Tax rates in %
Personal exemption	0,00 EUR	7.834,00 EUR	---
Entry-level bracket rate	7.835,00 EUR	13.139,00 EUR	14,00 – 23,97 %
Progression zone	13.140,00 EUR	52.551,00 EUR	23,97 – 42,00 %
Proportional zone	52.552,00 EUR	250.400,00 EUR	42,00 %
<b>Maximum tax rate</b>	<b>250.401,00 EUR</b>	...	<b>45,00 %</b>



Again, **solidarity surcharge** amounting to **5.5 %** of the assessed tax is imposed in addition to the personal income tax.

Personal income tax generally applies to **distributed and retained earnings** of the partnership. Due to some recent amendments, statutory tax law now provides for **two options** designed to lead to a certain tax relief:

- on the one hand, trade tax payments for distributed and retained earnings may be **set off against personal income tax** to a larger extent than before; and
- on the other hand, partnerships may apply for a flat tax rate of 28.25 % (leading to a **flat taxation rate of 29.8 %**) in order to avoid a progressively rising personal income tax. Later withdrawals trigger a **recapture tax of 25 % plus solidarity surcharge**.

#### 4. Trade Tax (for corporations, partnerships and individual enterprises)

Trade tax is levied on every trade or business (also permanent establishment) located within the territory of Germany. The applicable trade tax rate depends on **two criteria**:

<p style="text-align: center;"><b>Tax assessment rate</b></p> <p style="text-align: center;">(= standard trade tax base rate pursuant to the German trade tax code)</p> <p>Amounting to <b>3.5 %</b> of the annual taxable earnings for corporations, partnerships and other business operations</p>	<p style="text-align: center;"><b>Municipal collection rate</b></p> <p style="text-align: center;">(= trade tax collection rate provided for by each municipality individually)</p> <p><b>At least 200 %</b> up to an unlimited percentage of the tax assessment rate. The average municipal collection rate is approximately 400 %.</p>
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**No solidarity surcharge** is imposed on trade tax. Furthermore, trade tax is not deductible as business expenses.

Sample calculation (simplified):

Profit from a business enterprise	
+/- Trade tax additions/ deductions	
= Trading profit	
– Tax exempt amount of EUR 24,500 (only for individuals and partnerships)	
= Trading profit (after deduction losses, rounding and tax-exempt amount)	
x Basic trade tax rate 3.5 %	
= Base amount	
x Multiplier (e.g. Munich as of 2009: 490 %)	
= Trade tax (effective tax burden e.g. for Munich: 17.15 %)	

Pls. see also [Annex 15](#) (Determination of trade tax and overall taxburden – example).

#### 5. Overall tax burden

The average **overall tax burden** for corporate companies in Germany is **just below 30 %** (tax rates may slightly vary depending on tax rates of the local municipalities).

Pls. see also [Annex 15](#) and [Annex 16](#) (Comparison of international taxation for companies (2008) in percent).

#### 6. Final withholding tax (*Abgeltungssteuer*)

Pursuant to a recent revision of German tax law, final withholding tax – a flat tax amounting to **25 %** - is imposed on **capital gains** earned by **private individuals**. In general, the withholding of tax is final but the progressive income tax rate is applied on request. Expenses related to dividends cannot be deducted as income-related expenses.

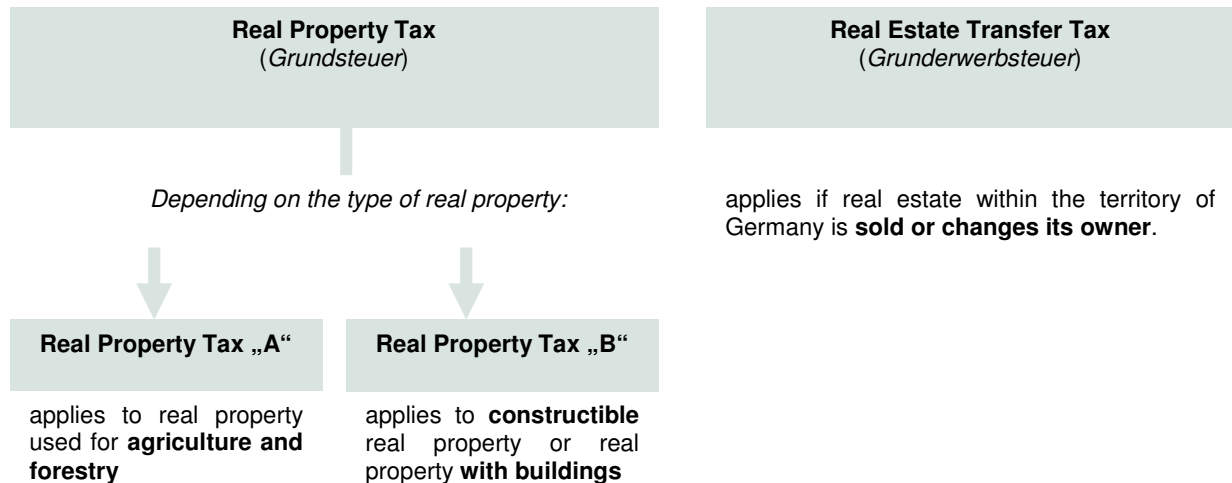
**Solidarity surcharge** amounting to **5.5 %** of the assessed tax is imposed in addition to the final withholding tax.



## II. Taxation of Property

### 1. Overview

German law knows **two forms of taxes** relating to real property:



### 2. Real Property Tax

Real property tax is levied on any German real estate (land, buildings) held for business or private purposes. In principle, personal circumstances of the owner are disregarded. The real property tax burden is calculated by multiplying

the <b>assessed value of the real property</b>	the <b>real property tax rate</b>	the <b>municipal collection rate</b>
Is determined by the tax authorities in accordance with the German Assessment Code ( <i>Bewertungsgesetz</i> ).	depends on the type of real property (e.g. the rate for property used for [semi-] detached houses with a value of up to EUR 60,000 is 0.26 %; for all remaining property including commercially used property the rate is 0.35 %).	As in case of trade tax (individual) municipal collection rates apply to real property "A" and "B".

Pls. see also [Annex 17](#) (Determination of Real Property Tax Burden – Example).

### 3. Real Estate Transfer Tax

Real estate transfer tax of **3.5 %** (in Berlin and Hamburg: **4.5 %**) of the purchase price / consideration is imposed if real property is **sold** for a price / consideration exceeding EUR 2.500 which is usually borne by the buyer.

Real estate transfer tax is also triggered if at least a 95 % ownership interest in a company which owns real estate is acquired. The same applies if at least 95 % of the interest in a partnership is transferred to new partners within five years.

### III. Value Added Tax (VAT)

#### 1. Overview

VAT is imposed on supply of goods and services by persons (legal entities or individuals) exercising a commercial activity within the scope of their commercial business against valuable consideration within the territory of Germany.

Whereas a reduced tax rate of 7 % applies to convenience goods and services needed on a daily basis (e.g. newspapers, food and public transport) the standard VAT rate in Germany amounts to **19 %**. Some services (e.g. a part of banking services, healthcare and non-profit work) are exempt from VAT.

Pls. see also [Annex 18](#) (Comparison of European VAT rates 2008).

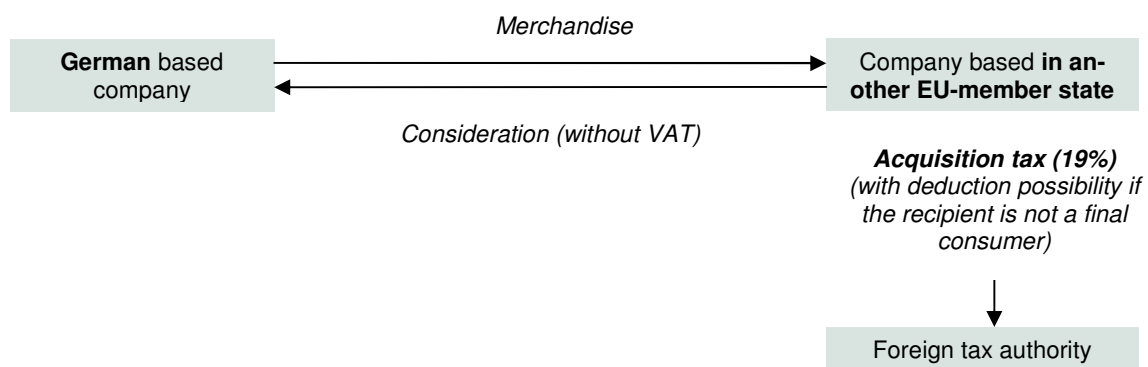
#### 2. Input VAT deduction (*Vorsteuerabzug*)

VAT is a consumption tax **borne ultimately by the final consumer**. In order to ensure that VAT is neutral for taxable persons (i.e. VAT-registered businesses) they may deduct from the VAT they have collected the amount of tax they have paid to other taxable persons on purchases for their business activities (input VAT deduction).

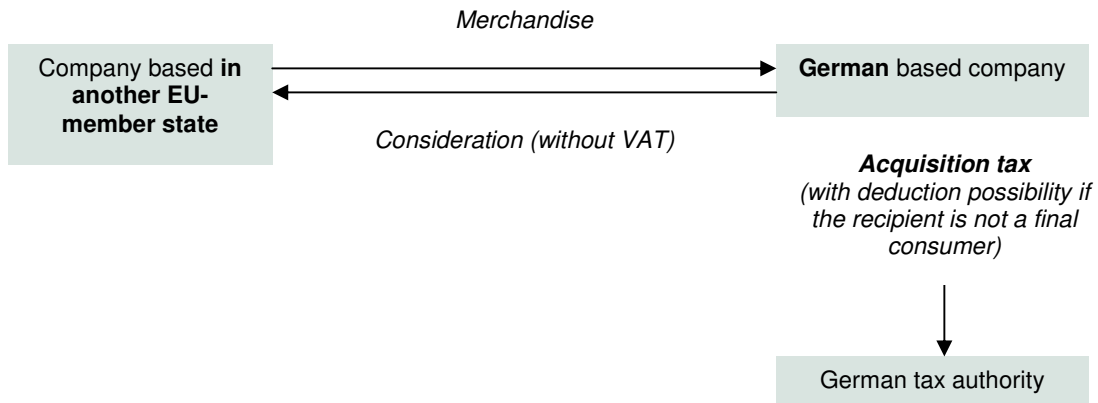
Pls. see also [Annex 19](#) (Concept of VAT – Example).

#### 3. Trade within the EU-Market

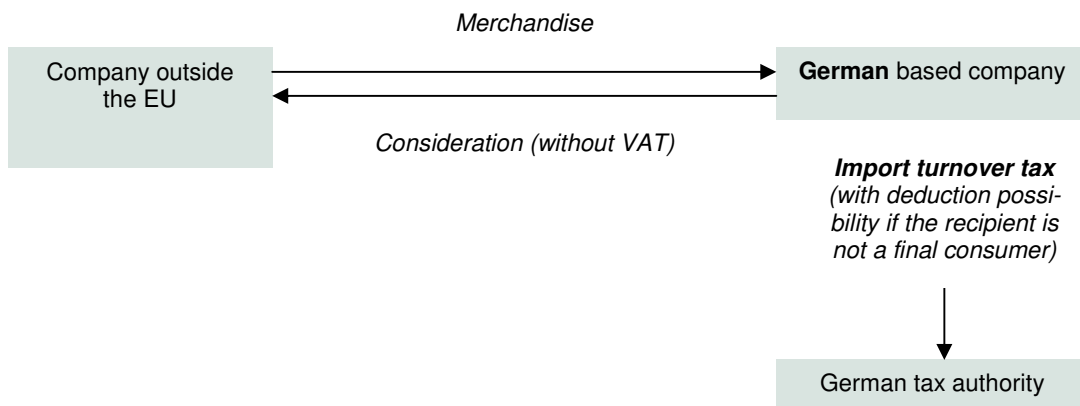
Within the EU-market trade is free of customs and other restrictions. However, goods traded between different EU-member states are subject to an **acquisition tax** payable by the **recipient** of the goods. Accordingly, if a German-based company delivers goods to a purchaser company based in another EU-member state, the supplier company does not need to pay customs or charge VAT. The **rate** of the acquisition tax **corresponds with the VAT rate** of the country where the **recipient** of the goods is seated. Companies paying the acquisition tax on goods received from other companies have the possibility to **reclaim acquisition tax** similar as in case of input VAT deduction.



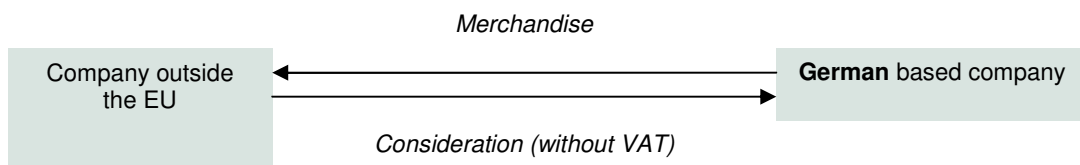
In accordance with the above, German based companies need to pay acquisition tax if they receive goods from a supplier based in another EU-member state:



#### 4. Trade with Non-EU Member States



Goods **imported** from non-EU states are subject to import-VAT (**import turnover tax**) which amounts to the same rate as German VAT (19 % or 7%).



**Export** of goods is **exempted** from VAT.

## IV. Customs

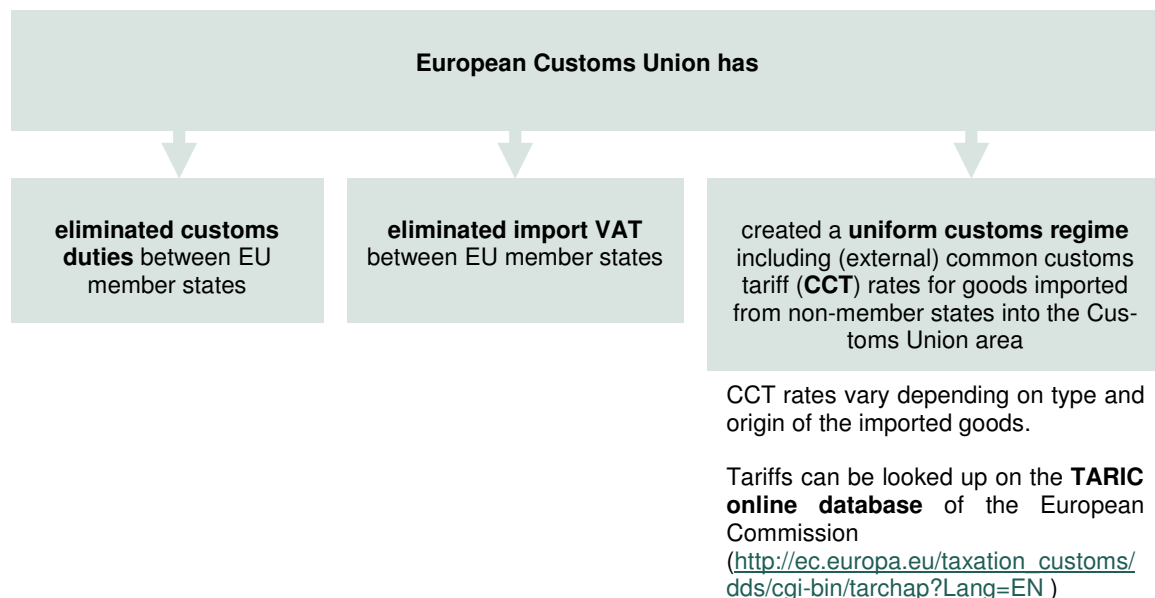
### 1. Overview

Whereas the customs regime within the European Union is **governed by European law** customs within Germany are **administered by the German Customs Administration** (*Bundeszollamt*) with offices throughout Germany.

**More information** can be found here: [http://www.zoll.de/english\\_version/index.html](http://www.zoll.de/english_version/index.html).

### 2. European Customs Union

The European Customs Union, a **single trading area**, is based on the EU-wide community customs code (*Zollkodex der Gemeinschaften*) which includes the customs tariff and is applied by all 27 EU member states as well as by Andorra, San Marino and Turkey.



### 3. EU Trade Agreements

Import tariffs and other customs rules are set up on the basis of international agreements entered into by the European Union with non-EU member states such as

Free trade agreements with countries of the **European Economic Area** (Island, Liechtenstein, Norway) and **Switzerland**

Customs unions with **Andorra, San Marino and Turkey**

Trade agreements with former British, French and Portuguese colonies in Africa, the Caribbean and the Pacific (**ACP Countries**)

Trade agreements with countries around the **Mediterranean** including those of **southeastern Europe**

## J. Employment and social security

### I. Employing staff

#### 1. Management

##### 1.1. Managing directors (GmbH)

Managing directors are, on the one hand, **appointed by resolution of the shareholders' meeting** (formal act by which the term of their office as managing director starts). On the other hand, a **service agreement** may be concluded between the managing directors and the company (in this case represented by its shareholders). Whereas the appointment is governed by corporate law, the service agreement is subject to employment law. As a consequence, different provisions apply to their function as a body of the company and their service agreement. One of the main differences is that managing directors can, in general (apart from a few exceptions) be recalled from office by shareholders' resolution with immediate effect whereas their service agreement (which can only be terminated within the applicable notice period or for cause) continues to be valid.

Pls. see also [Annex 20](#) (Provisions typically contained in service agreements with managing directors).

##### 1.2. Board members (AG)

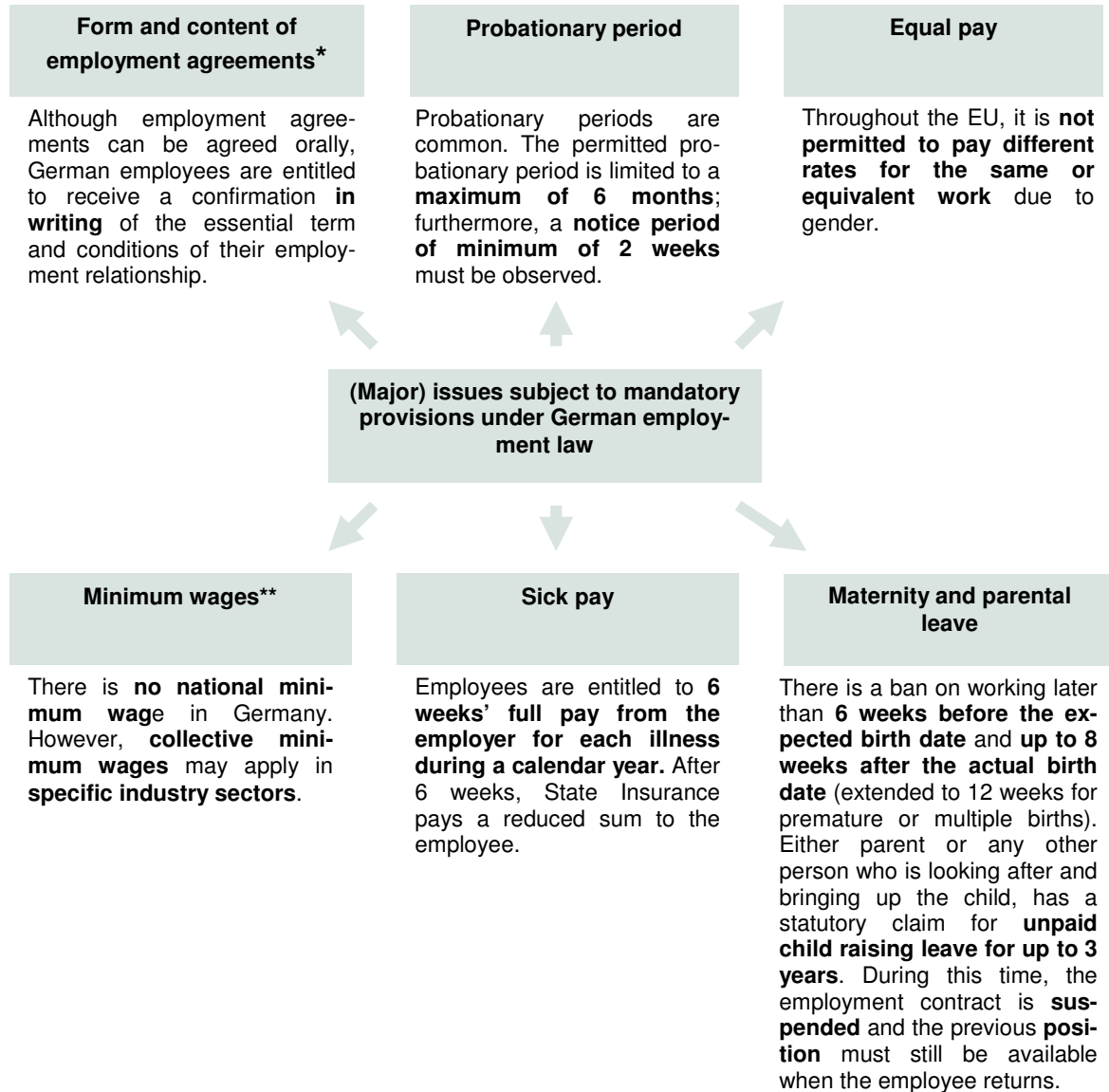
Board members of (listed or non-listed) stock corporations are, on the one hand, **appointed by the Supervisory Board** (formal act by which the term of their office as board members starts). On the other hand, a **service agreement** may be concluded between the board members and the company (in this case represented by the Supervisory Board). Whereas the appointment is governed by corporate law, the service agreement is subject to employment law. As a consequence, different provisions apply to their function as a body of the company and their service agreement. One of the main differences is that board members can, in general (apart from a few exceptions) be recalled from office by resolution of the Supervisory Board with immediate effect whereas their service agreement (which can only be terminated within the applicable notice period or for cause) continues to be valid.

As set out above in [Sec. E/III/2](#) the German government has passed a **new law limiting director pay in (listed and non listed) stock corporations**. Most of the provisions under the new law will become relevant for the **financial year starting on January 1<sup>st</sup> 2010**.

## 2. Employees

### 2.1. Employment Agreements

Irrespective of what the parties may agree in an employment contract, German law imposes a number of obligations and rights which may override contractual agreements. These provisions may apply even if the parties have agreed, for example, that Spanish law governs the contract.



\* Pls. see [Annex 21](#) (Provisions typically contained in employment agreements) for more details.

\*\* **Minimum wage agreements were established in the following industries:** General construction trade; roofing / tiling; painting and varnishing, demolition work; building cleaners; electricians; postal delivery services. Eventual extension of minimum wage agreements is currently discussed; a decision is, however, unlikely to be made before the end of 2009.

## 2.2. Anti-Discrimination

The **Anti-Discrimination Act** (official name: General Equal Treatment Act) of 2006 by which EU-regulations were implemented into German law provides for a prohibition of discrimination against any person for reasons of

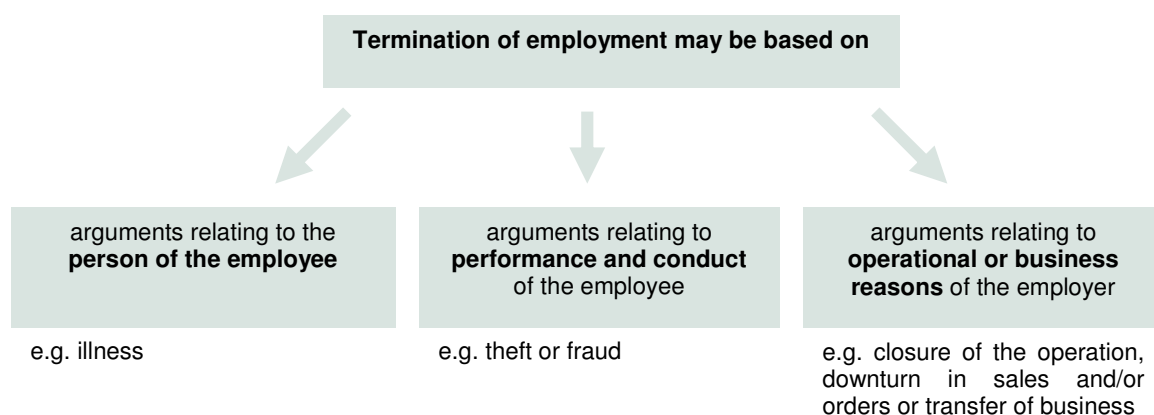
- race
- ethnicity
- gender
- religion or ideology
- disability
- age and
- sexual orientation.

## 2.3. Dismissal of employees

The notice period for employment contracts can be determined by individual contracts, collective bargaining agreements or statute.

The most important protection for employees is the **Act against Unfair Dismissal** (“*Kündigungsschutzgesetz*”). The Act applies if the plant, shop or company **regularly employs more than 10** (or in case of employees who joined the company in 2003 or earlier, **5 individuals**, including part-time workers under the condition that the employee has been **employed for more than six months**. The provisions of the Unfair Dismissal Act do not apply to employees with less than 6 months service or in small companies.

To the extent the Act Against Unfair Dismissal applies, all employees, including part-time workers, are protected. Pursuant to the Act, any termination requires a **social justification** which can only be based on one of three arguments provided for in the Act:

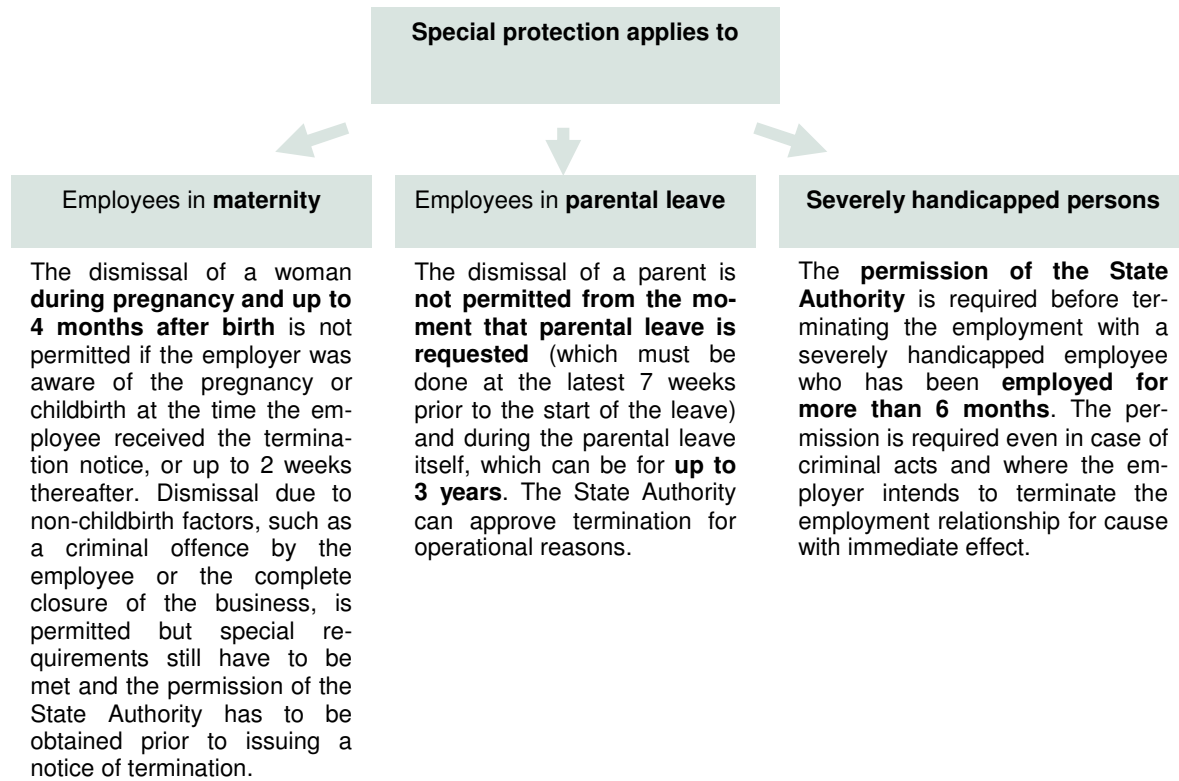


In addition, **further special requirements** must be observed and reviewed by the employer prior to terminating any employee in Germany.

**Extraordinary termination with immediate effect** may be considered in cases of **serious misconduct** rendering it unacceptable for either party to continue the employment. Immediate termination can not be based just on the argument that it is necessary – it must be **immedi-**

**ately imperative.** Extraordinary termination is mainly governed by **case law** which may, in many cases, leads to some uncertainty whether it will be confirmed by the courts.

2.4. Specially protected employees





## 2.5. Flexible employment concepts

Apart from **fixed term contracts** (which can be entered into for a **maximum term of two years**) German law allows for some further concepts of flexible employment, in particular:

Temporary Employment	Mini and Midi Jobs	
<p>Companies can hire staff from a temporary employment agency based on a service agreement between the company and the agency <b>without concluding an employment agreement</b>.</p> <p>In such case, the employees are <b>employed by the agency</b>. The general working conditions (e.g. weekly working hours and salary) are usually determined in collective bargaining agreements between unions and the competent employers' association of the temporary employment industry.</p>	<p><b>Mini Jobs...</b></p> <p>...are jobs with <b>monthly salaries below EUR 400</b> providing for that the employee works <b>50 days p.a.</b> or less for the employer.</p> <p>Employers pay <b>30.1 % of the gross salary as social security contributions and flat tax</b> (13 % health insurance, 15 % pension insurance, 2 % flat tax and 0.1 % sick pay contribution allocation) while employees are fully exempt from social security contributions.</p>	<p><b>Midi Jobs...</b></p> <p>...are jobs with <b>monthly salaries between EUR 401 and EUR 800</b> subject to <b>reduced employee social security contributions</b>.</p> <p><b>Employers</b> are subject to <b>standard security contributions</b> of approximately 21 % of the gross salary.</p>

## 2.6. Handling of payroll issues and social security contributions



German employees receive a **net salary** from which tax and social security contributions are already deducted. The employer is obliged to register its employees with the tax authority, to **withhold** the taxes to be paid by them and to transfer the money directly to the tax authority.

**Social security contributions** must be **withheld** by the employer as well after calculation of the gross salary and to be transferred to the employees health insurance company which then distributes all of the contributions except accident insurance to all relevant institutions.

The contributions for the **accident insurance** need to be paid separately to the Employers' Liability Insurance Association by the employer.

## II. Works Councils

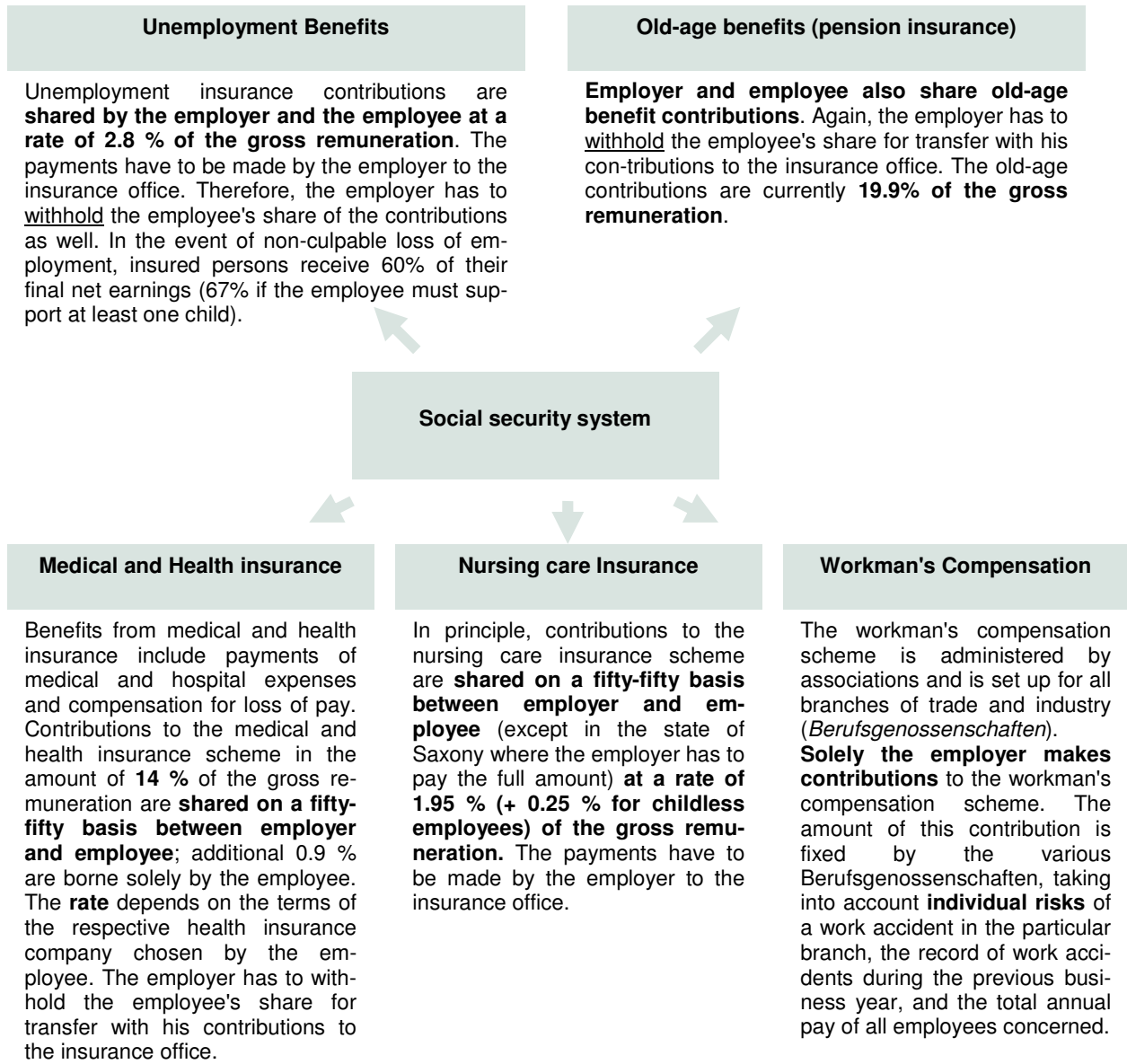
Works Councils are committees of employees' representatives. They must be formed in all companies **with 5 or more employees** on **request of the employees**. The Works Councils have **co-determination rights** e.g. with regard to working hours, holiday schedules, matters of safety and welfare distribution of remuneration. Members are elected for 4 years and cannot be union members.

The Works Councils must be **informed prior to any termination of any employee** (except so called managerial employees in leading positions) to avoid that the termination is legally invalid.

**Termination** of the employment of a member of the Works Council is **only allowed for cause** and with the **permission of the Works Council**. This protection is extended to another **12 months' period** as from the end of a member's term in office, although permission of the Works Council is not required during this time. However, any supplementary representative employee who attends even one meeting on behalf of another member, for example during a vacation, will also benefit from the 12 months' protection. There is also protection for employees involved in the election of the Works Councils.

## III. Social security system

Germany has a **national compulsory social security system** in which all employees participate by virtue of law. The law provides for a general obligation to join the state social insurance scheme. The **employer is obliged to pay 50 % of the employees' social contributions**. Moreover, there is a statutory duty to deduct employees' contributions from their monthly remuneration and to transfer it to the medical insurance fund. This means that the employer must pay the full social contributions to the social security authorities. For this purpose employers must keep records of earnings for every employee organized by calendar year and preserve them until the end of the year following the next tax audit. Contribution forms for the medical insurance schemes must be kept on file. The statutory social security system is regulated in the German Social Security Code (*Sozialgesetzbuch; SGB*) and covers the following **five principle areas**:

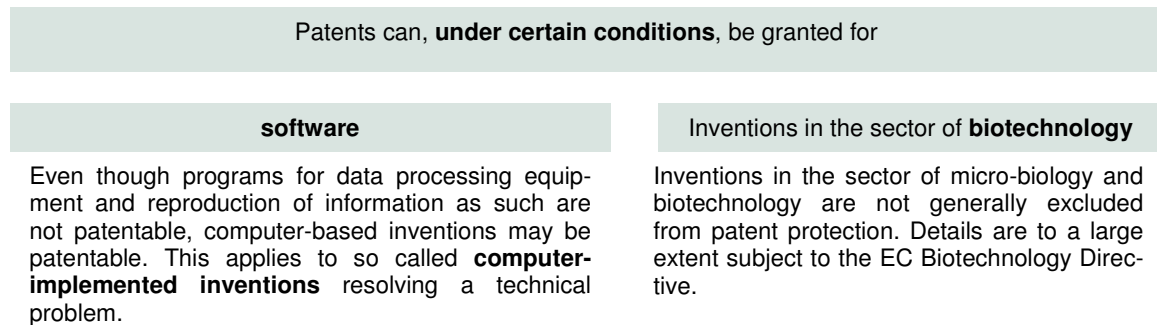
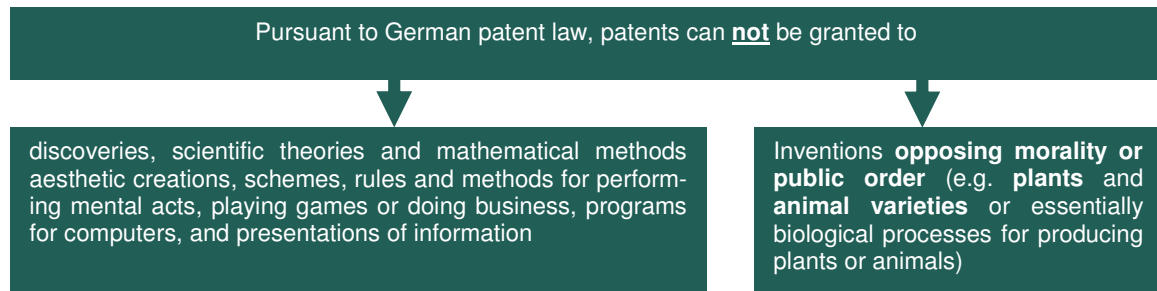
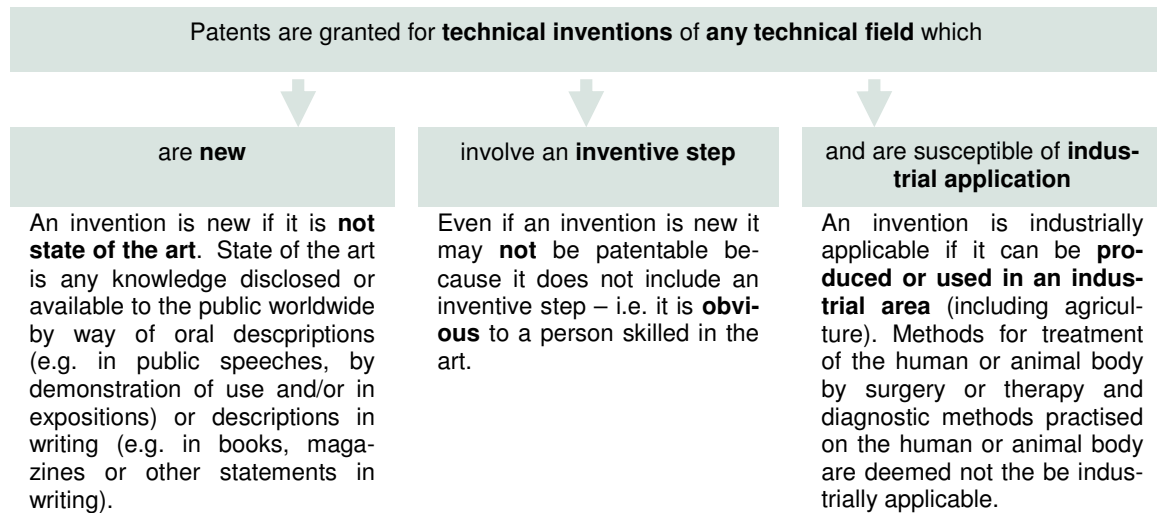


Pls. see also [Annex 22](#) (Social Security contributions (July 2009)).

## K. Protecting inventions and trademarks

### I. Protection of inventions

#### 1. What can (not) be patented in Germany?



#### 2. How long does patent protection last?

Patents are granted for a period of **20 years** as from the date of filing of the **application**. Thereafter, a **certificate for extended protection** may be granted for inventions relating to **pharmaceutical products and plant protecting agents** providing for an extended protection for a maximum term of **five years**.

### 3. Application of patents

#### 3.1 National patents

In the course of the patent examination and grant procedure, the German Patent and Trade Mark Office (*Deutsches Patent- und Markenamt; DPMA*), seated in Munich, reviews whether the invention to be patented fulfils the necessary patentability criteria, i.e. whether it is a **technical invention** which

- is **new**
- includes an **inventive step** and
- is **industrially applicable**.

Pls. see [Annex 23](#) (National patent application in Germany) for details.

#### 3.2 European patents

The question whether a European patent can be granted for an invention is subject to the **European Patent Convention (EPC)** which provide for similar criteria as German statutory patent law (pls. see above). European patents are granted by the European Patent Office ("**EPO**") seated in Munich for the **36 contracting states** (as at July 2009) to the European Patent Convention ("**EPC**") and, at the applicant's request, can be extended to Albania, Bosnia and Herzegovina, and Serbia. The European grant procedure takes about **three to five years from the date the application is filed**. However, applicants who want their applications processed rapidly have the possibility to file a request for accelerated prosecution of patent applications.

Pls. see [Annex 24](#) (European patent application) for more details.

#### 3.3 International applications

The **EPO** also handles patent applications filed under the **Patent Cooperation Treaty ("PCT")**. The PCT makes it possible for the applicant to receive multinational patent protection through one single international application.

**More information** can be found here:

- <http://www.epo.org/patents/Grant-procedure/Filing-an-application/international-applications.html> .
- <http://www.wipo.int/pct/en/index.html>

## II. Protection of trademarks

### 1. What can (not) be protected?

Principally, all signs, in particular words including personal names, designs, letters, numerals, acoustical signs, three-dimensional configurations including the shape or packaging of a product as well as other get-ups including colours and compositions of colors can be protected as trademarks, insofar as they are **suitable to distinct** goods or services of one undertaking from those of other undertakings.

Trademark protection is granted upon **registration** with the trademark register. In some (few) cases, trademark protection can also arise from **secondary meaning** or the fact that a trademark is **notorious**.

The owner of a protected trademark has the exclusive right to use the trademark owned by him for the goods and services the trademark is protected for and may grant licences to third parties.

### 2. How long does trade mark protection last?

Trademarks are initially registered for a term of **10 years**. Thereafter, trademark protection can be **prolonged eternally**. It is, however, deleted from the trade mark register if **prolongation fees** are not paid every 10 years.

### 3. Registration of trademarks

#### 3.1 National trademarks

The German Patent and Trade Mark Office (*Deutsches Patent- und Markenamt; DPMA*) reviews whether any absolute obstacles are given against registration of a trademark. In particular signs or indications only **describing** the goods or services the trademark is intended to be registered for can not be registered. Signs consisting exclusively of a shape which (i) results from the nature of the goods themselves, (ii) is necessary to obtain a technical result, or (iii) gives substantial value to the product are explicitly excluded from protection. The DPMA does, however, **not** review whether there exist any **similar** or **identical** trademarks which are already registered.

Owners of older trademarks have the opportunity to **oppose** against registration of newer trademarks within a term of **three months** upon publication of the registration. Successful opposition leads to a **cancellation** of the newer trademark from the trademark register.

Trademarks may further be **cancelled**

- upon **request** of the trademark owner
- in case of **nullity** of the trademark
- upon application by a third party because of **liability to revocation** (e.g. if the trademark is **not used** during a term of at least 5 years)

The proprietor of a trademark which has been registered for at least 5 years cannot assert any claims against third parties if the trademark has not been used within the last 5 years (**plea of insufficient use**). In the case of legal action, the plaintiff is liable to establish proof that the trademark has been used in response to objections raised by the defendant.

**More information** can be found here: [www.dpma.de](http://www.dpma.de).

### 3.2 European trademarks

European trademarks („**Community Trademarks**“) are valid within the **whole territory of the EU**, i.e. current 27 nations. In case further countries are later joining the EU, the trademark protection would automatically extend to the newly acceded countries which means that trademark protection would successively adapt. Non-Member States of the EU (such as e.g. Switzerland) are, however, not covered by a Community Trademark. They are registered at the Office for Harmonization in the Internal Market, Trade Marks and Designs (“**OHIM**”), seated in Alicante, Spain, in accordance with the provisions of the Community Trademark Regulation (“**CTMR**”).

Community Trademarks are initially registered for a term of **10 years** and can be **prolonged eternally** for another term of 10 years (provided that **prolongation fees** are timely paid).

The registration procedure of Community Trademarks has, in particular, the following **advantages**:

- registration requires only one application;
- the applicant can opt for one single language of the registration procedure;
- Community Trademarks are administered by only one central authority;
- only one trademark file needs to be maintained.

A **disadvantage** of the registration of a Community Trademark relates to the fact that the application for registration is **rejected** if the Community Trademark can not be registered due to an absolute obstacle in any of the EU-member states or if its registration is successfully opposed to in any EU-member state. In such case, the application for registration of a Community Trademark can be **converted into a national application** with regard to those EU-member states in which registration of the trademark is possible.

The owner of a Community Trademark has the exclusive right to use the trademark owned by him for the goods and services the trademark is protected for in the 27 EU-members states.

Community Trademarks must be „seriously used“ during a term of **five years upon registration**. „Serious use“ is given even if the trademark is used only in one EU-member state or a part thereof. Community Trademarks can further be maintained if serious reasons for non-use can be provided.

In contrast to German trademark law, where a potential opposition follows the registration of the trademark, in the Community Trademark system, the opposition procedure is the last step before registration and can be raised within a 3 month period after the publication of a Community Trademark application.

Community Trademarks may be cancelled due to surrender, revocation and invalidity.

**More information** can be found here: [www.oami.europa.eu](http://www.oami.europa.eu).

### 3.3 International registration

Trademarks can be also registered with the **International Trademark Register** pursuant to the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (**Madrid System**).

The **application** for international registration needs to be filed **via the local trademark office** (in Germany: the German Patent and Trade Mark Office) with the World Intellectual Property Organization (“**WIPO**”) seated in Geneva, Switzerland. The Madrid system offers a trademark owner the possibility to have his trademark protected in several countries by simply filing one application directly with his own national trademark office.

After being forwarded to the WIPO the application is examined by the WIPO and registered with the international register if the registration requirements are met. Registration is then published in the "**Gazette des marques internationales**". Upon publication the trademark is deposited in all countries designated in the application. The concerned trademark authorities now have the possibility to **deny** trademark protection in accordance with their national laws during a term of **one year (18 months** under the Protocol Relating to the Madrid Agreement). If protection is granted, the applicant is granted the same rights as the owner of a national trademark. Denial of the protection in a member state does not affect trademark protection in the other designated countries.

Trademark protection is initially granted for a term of **10 years** (pursuant to the Protocol Relating to the Madrid Agreement) or **20 years** (pursuant to the Madrid Agreement) and can be **prolongued eternally**.

**More information** can be found here: <http://www.wipo.int/trademarks/en/>.



## L. Some key issues relating to international commercial agreements

### I. Applicable law

In case of international business relationships two or even more legal systems use to be confronted to each other. The first question to be answered in such cases is which law shall be applicable to the agreements governing the business relationship ("**International Agreements**").

The applicable law is determined in accordance with the rules governing conflicts of law. The rules applicable **within the EU** are to a large extent **harmonized**.

**Choice of law clauses** might be crucial in particular for International Agreements governing business relationships between **non-EU residents**.

Pls. see [Annex 25](#) (Typical issues in connection with International Agreements) for more detailed information.

### II. Venue

The next important question is which court shall be competent to settle litigation arising out of and in connection with an International Agreement and where claims based on the International Agreement shall be **enforced**. Whereas the competent jurisdiction in international cases is, again, to a large extent **harmonized within the EU**, harmonized law may not apply where there are no **sufficient connections with the EU**.

It is, therefore, recommendable to agree on a **venue** (official courts or arbitration).

Pls. see also [Sec. M/II](#) below for more information.

### III. General Terms and Conditions

If General Terms and Conditions are intended to be made part of an agreement, it is important to make sure that they are **linked with the agreement** in a legally valid form. Furthermore, it should be reviewed whether the **content** of the General Terms and Conditions complies with the applicable statutory law.

Pls. see [Annex 25](#) for more detailed information.

### IV. Securing payment

Another important issue is related to the question how payment can be secured. Common securities in International Agreements are e.g. **personal guarantees**, **letters of credit** and **credit insurances**.

### V. Supply conditions and risk allocation

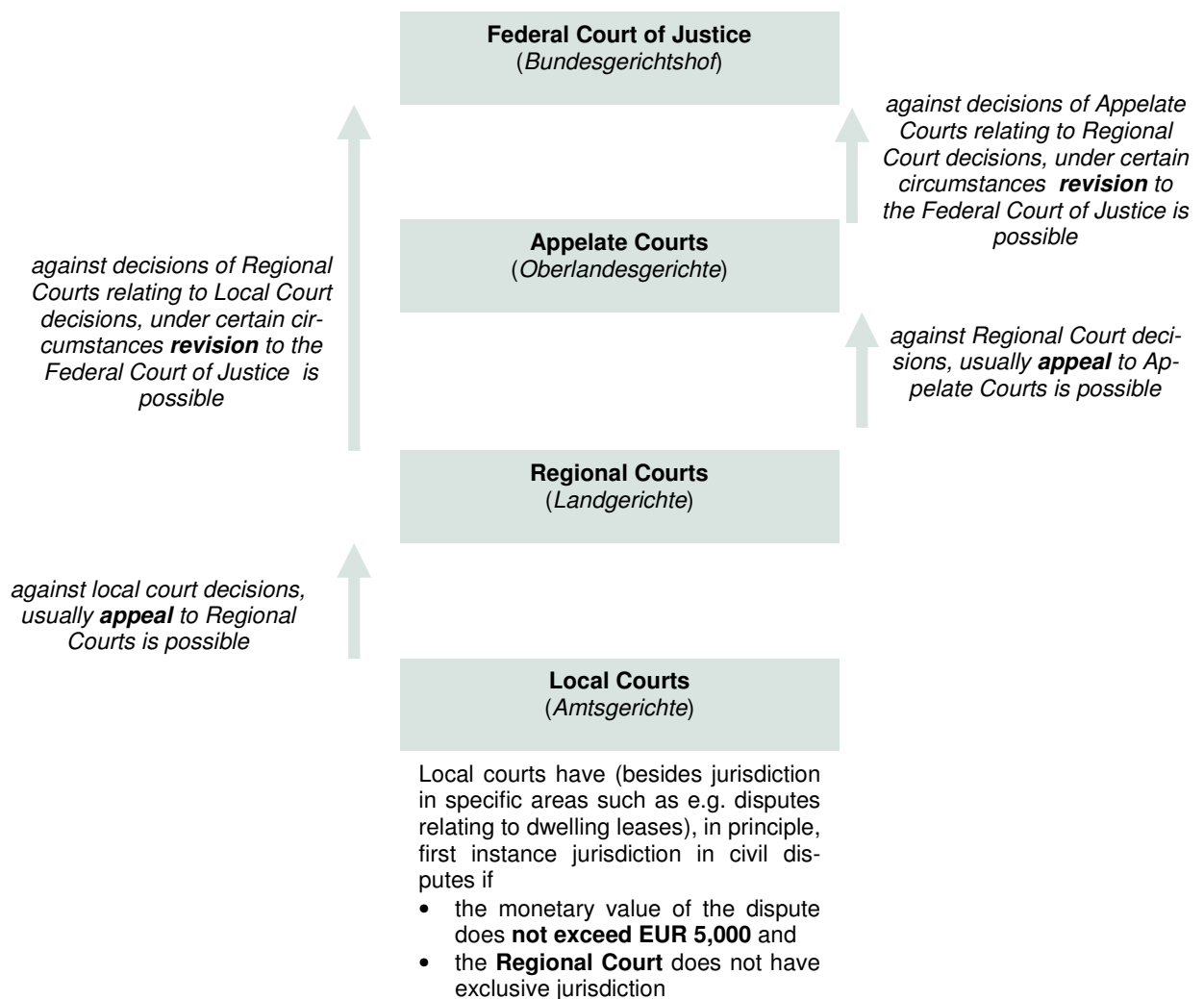
The issue of supply conditions and risk allocation comes up in connection with cross-border supply agreements. International Agreements frequently refer to the **INCOTERM** rules.

Pls. see [Annex 25](#) for more detailed information.

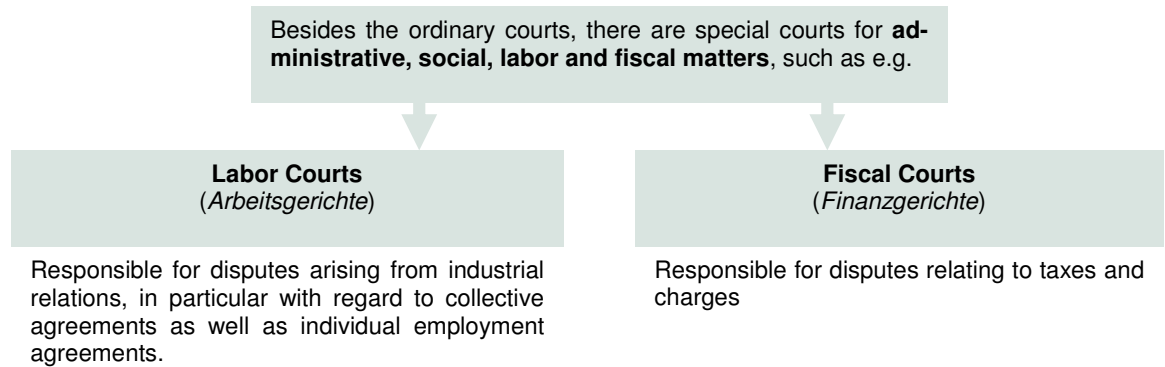
**M. Litigation, venue, arbitration and enforcement**

**I. Official Courts**

**1. Courts hearing civil disputes**

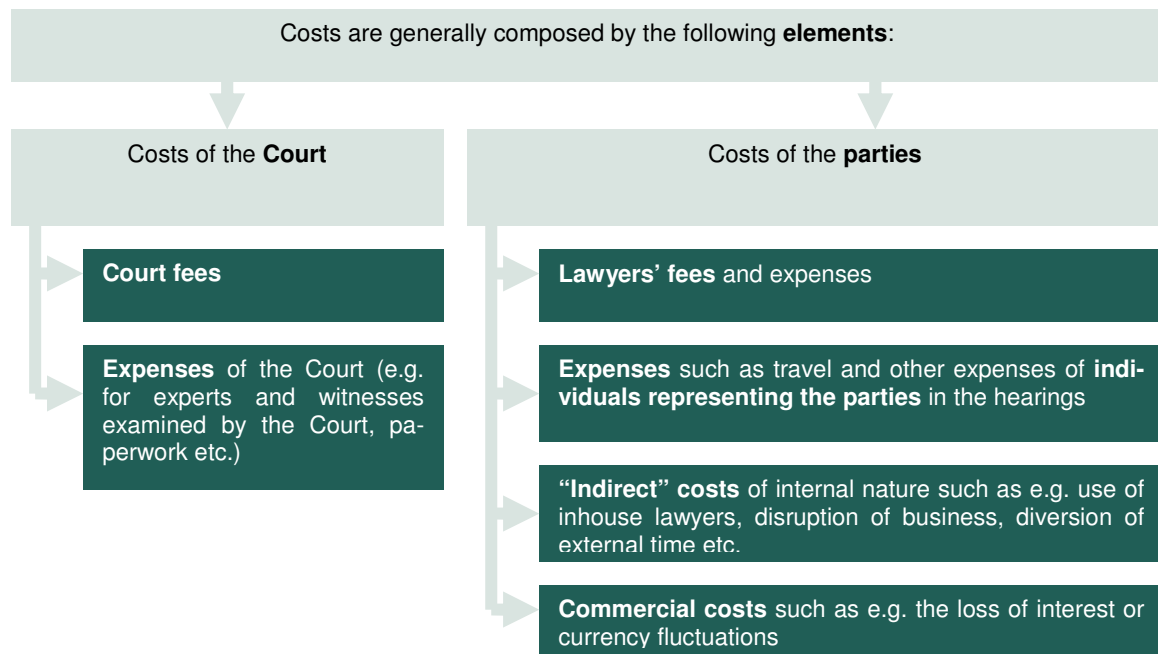


## 2. Special courts

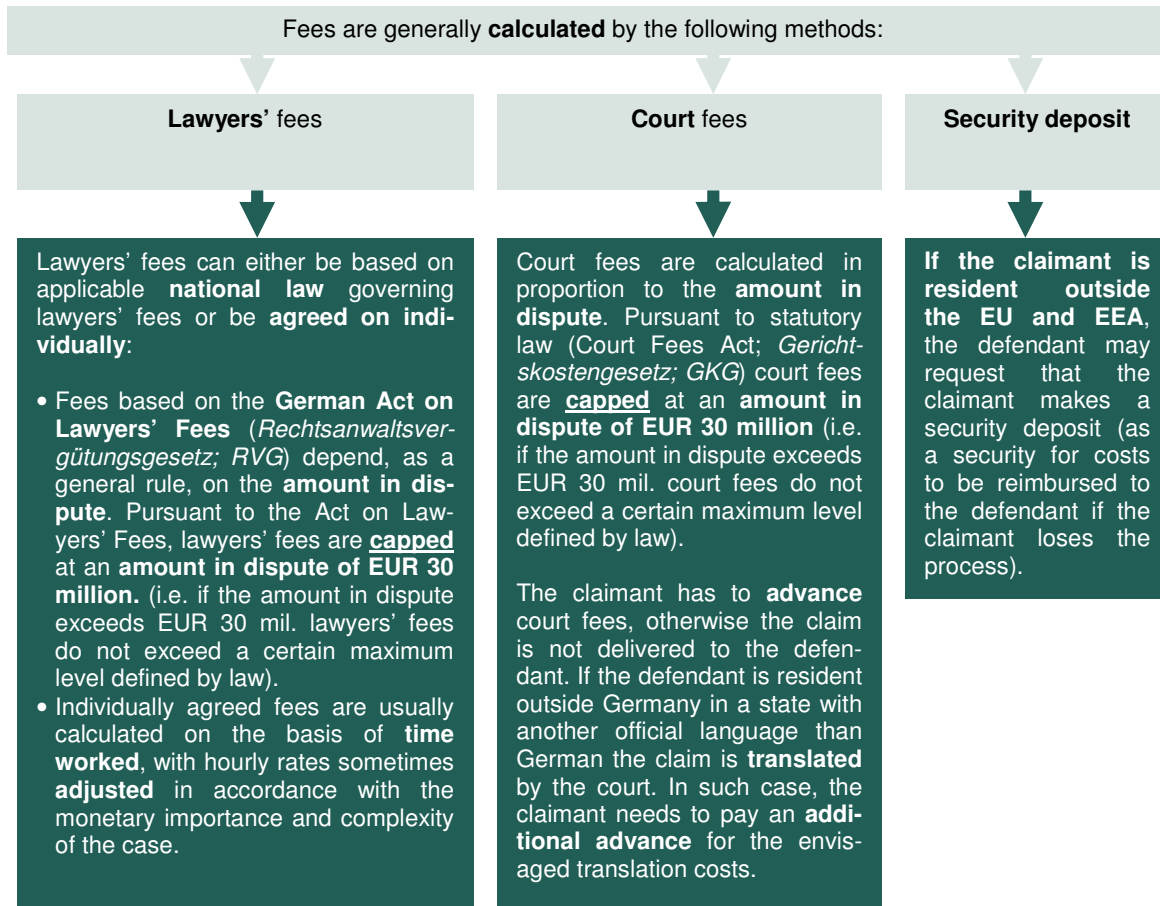


## 3. Costs

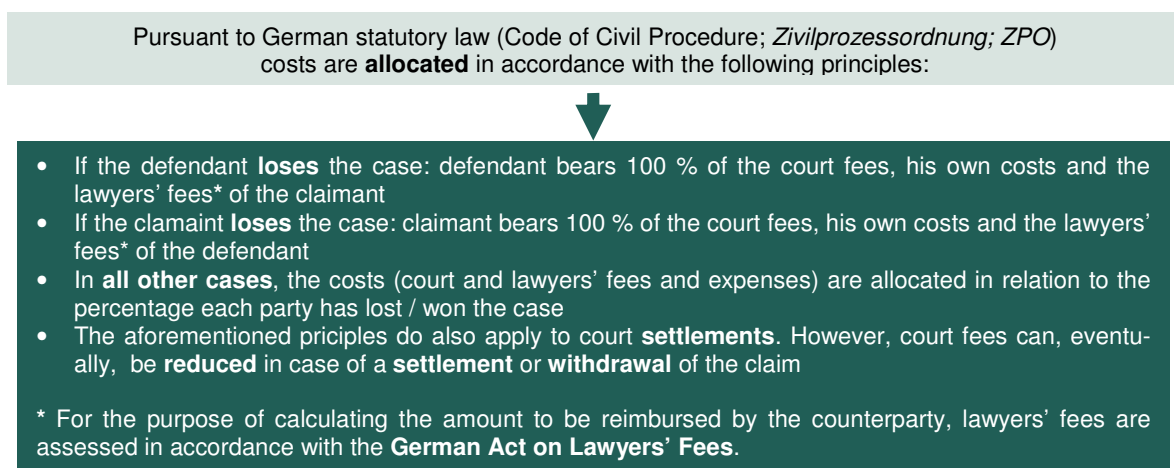
### 3.1. How are costs composed?



### 3.2. How are costs/fees calculated?



### 3.3. How are costs allocated?



### 3.4. Model calculation of cost risk in proceedings before German official courts

#### **Example:**

If the **amount in dispute** amounts to (or exceeds) **EUR 30 million**, the claimant is exposed to the following cost risk (assuming that the lawyers are paid in accordance with the Act on Lawyers' Fees):

<b>First instance</b>		
<b>Fees</b>		<b>amount in Euro</b>
Lawyers' fees for <b>claimant's lawyer</b>		228,740.00
	plus lump sum for expenses	20.00
	plus 19 % VAT	<u>43,464.40</u>
	<b>Total:</b>	<b>272,224.40</b>
<b>Court fees</b>		<b>274,368.00</b>
Lawyers' fees for <b>defendant's lawyer</b>		228,740.00
	plus lump sum for expenses	20.00
	plus 19 % VAT	<u>43,464.40</u>
	<b>Total:</b>	<b>272,224.40</b>
<b>Total amount</b>		<b>818,816.80</b>

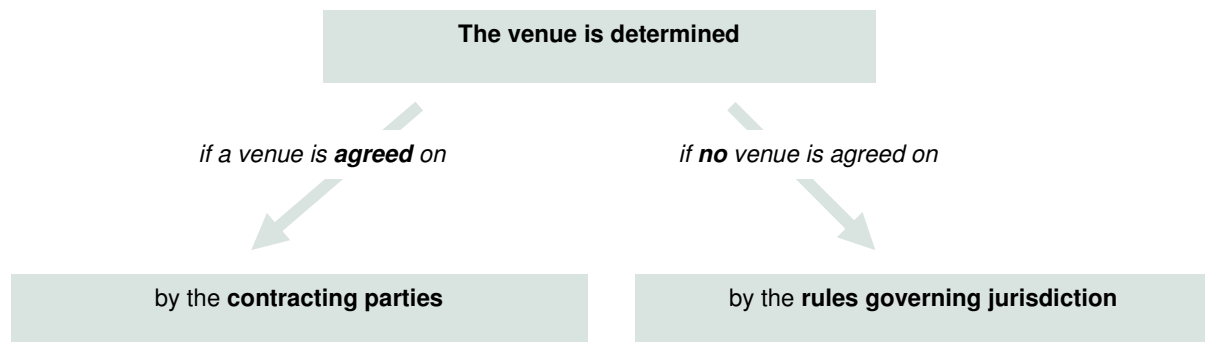
<b>Second instance</b>		
<b>Fees</b>		<b>amount in Euro</b>
Lawyers' fees for <b>claimant's lawyer</b>		256,188.80
	plus lump sum for expenses	20.00
	plus 19 % VAT	<u>48,679.67</u>
	<b>Total:</b>	<b>304,888.47</b>
<b>Court fees</b>		<b>365,824.00</b>
Lawyers' fees for <b>defendant's lawyer</b>		256,188.80
	plus lump sum for expenses	20.00
	plus 19 % VAT	<u>48,679.67</u>
	<b>Total:</b>	<b>304,888.47</b>
<b>Total amount</b>		<b>975,600.94</b>

Pls. see [Annex 26](#) (Costs for official court proceedings – overview (2009)) for further examples.

## II. Venue

In principle, the venue can be determined either by a **jurisdiction clause** agreed on by the parties or – if there is no such clause - by the **relevant provisions of statutory law**.

If no jurisdiction clause is agreed on, the venue is determined in accordance with the **German Code of Civil Procedure** (*Zivilprozessordnung; ZPO*) if the circumstances of the case are only related to Germany (**internal case**). If the case implies international aspects - e.g. if one of the parties is seated outside Germany or in case of another cross-border issue such as e.g. supply of goods into another state than Germany (**international case**) - the venue is determined in accordance with **harmonized EU law** (in particular with the so called “**Brussels I Regulation**”) if the case is **sufficiently linked to the territory of the EU**. If there is no sufficient link with the territory of the EU, the venue must be assessed on a case-by-case basis.



Jurisdiction clauses usually are subject to certain **formal requirements**:

- Pursuant to European law the agreement must be **in writing** or in a form which accords with practices the parties have established between themselves or, in international trade or commerce, in a form which accords with a usage of which the parties are aware (if parties residing outside the EU are involved, the provisions of their country of residence should be consulted as well);
- if provided for in General Terms and Conditions (“**GTC**”) the GTC must be **validly linked to the agreement**.

Particularities / limitations may, again, arise from **mandatory law protecting consumers or employees**.

Pls. see [Annex 27](#) (Brussels I Regulation – key points) for more information relating to the Brussels I Regulation.

German Code of Civil Procedure in “**internal**” cases.

Harmonized EU-law in **international** cases sufficiently linked with the territory of the EU:

Council Regulation (EC) No 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (“**Brussels I Regulation**”).

If the Brussels I Regulation is **not applicable** (in particular due to a insufficient link with the territory of the EU, assessment on a **case-by-case basis** is required.

### III. Execution of court decisions under the Brussels I Regulation within the EU

A judgement given in a Member State must be **recognised** in the other Member States **according to a special procedure** set forth in the Brussels I Regulation. "Judgement" means any judgement given by a court or tribunal of a Member State within the scope of the Brussels I Regulation, whatever the judgement may be called, including a decree, order, decision or writ of execution. **Under no circumstances may a foreign judgement be reviewed as to its substance.**

However, a judgement will **not** be recognised:

- if such recognition is manifestly **contrary to public policy** in the Member State in which recognition is sought;
- if the defendant was not served with the document which instituted the proceedings in **sufficient time** and in such a way as to **enable the defendant to arrange for its defence**;
- if it is **irreconcilable with a judgement given in a dispute between the same parties** in the Member State in which recognition is sought;
- if it is **irreconcilable with an earlier judgement** given in another Member State or in a third state involving the same cause of action and between the same parties.

A court in which recognition is sought of a judgement given in another Member State may freeze the proceedings if an ordinary appeal against the judgement has been lodged.

A judgement must be enforced in another Member State on request of any interested party. The parties may appeal against a decision on an application for a declaration of enforceability.

### IV. New regulation relating to the execution of claims within the EU

Since December 12, 2008 / January 1<sup>st</sup> 2009 claims may be executed based on a **European Order for payment** or pursuant to the **European proceeding for minimal claims** (claims up to EUR 2,000). In both cases a payment order enforceable within the whole territory of the European Union can, in principle, be issued within relatively short time.

**More information** can be found here: [http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm).

## V. Arbitration

### 1. Arbitration vs proceedings before the official courts

The following factors may, *inter alia*, have an impact on the decision whether arbitration or proceedings before the ordinary courts are agreed on:

Factor	Arbitration	Ordinary Courts
<b>Publicity of proceedings</b>	The arbitral hearings are <b>not public</b> ; however, <b>enforcement</b> of the arbitral award may require public hearings before the ordinary courts competent for the <b>recognition</b> of the arbitral award.	Proceedings before ordinary courts generally are <b>public</b> .
<b>Final, binding resolutions without possibility of recourse to ordinary courts</b>	Arbitration awards can, in general <b>not be revised by ordinary courts</b> (this may - but does not mandatorily need to - be an advantage).	Decisions of ordinary courts can in general be <b>revised by higher courts</b> .
<b>International recognition and execution of recision / award</b>	International recognition of arbitral awards is relatively easy due to the <b>New York Convention</b> (pls. see below)	Recognition within the EU is relatively easy as well due to <b>harmonized EU-law</b> (pls. see below)
<b>Flexibility of the court</b>	Freedom of the parties to choose <b>place, language and applicable proceedings</b> as well as the <b>arbitror(s)</b> .	Proceedings before ordinary courts are governed by <b>local law on civil proceedings</b> and in the <b>official language of the forum state</b> . However, the courts have to apply <i>ex officio</i> such – internal or foreign – material law to the respective case as is applicable under the relevant rules of choice of law.
<b>Specialization</b>	The parties may choose arbitrators with special competencies.	Many European countries have <b>specialized courts or specialized chambers</b> of the official courts (in particular: commercial courts or chambers, Federal Patent Court in Germany etc.).
<b>Duration and cost of proceedings</b>	Should be assessed and compared on a <b>case-by case-basis</b>	

### 2. Arbitration clauses

**In civil matters** the parties can agree on arbitration instead of ordinary courts. Arbitration clauses should be agreed on **in writing and be explicitly confirmed by all contracting parties**.

The following wording is recommended by the German Institute for Arbitration (*Deutsches Institut für Schiedsgerichtsbarkeit; DIS*):

*"All disputes arising in connection with the contract (... description of the contract ...) or its validity shall be finally settled in accordance with the Arbitration Rules of (...) without recourse to the ordinary courts of law."*



Arbitration clauses should be **thoroughly drafted** in order to cover the individual needs of the parties and the potential disputes which may arise between them. They should, *inter alia*, contain regulations with regard to

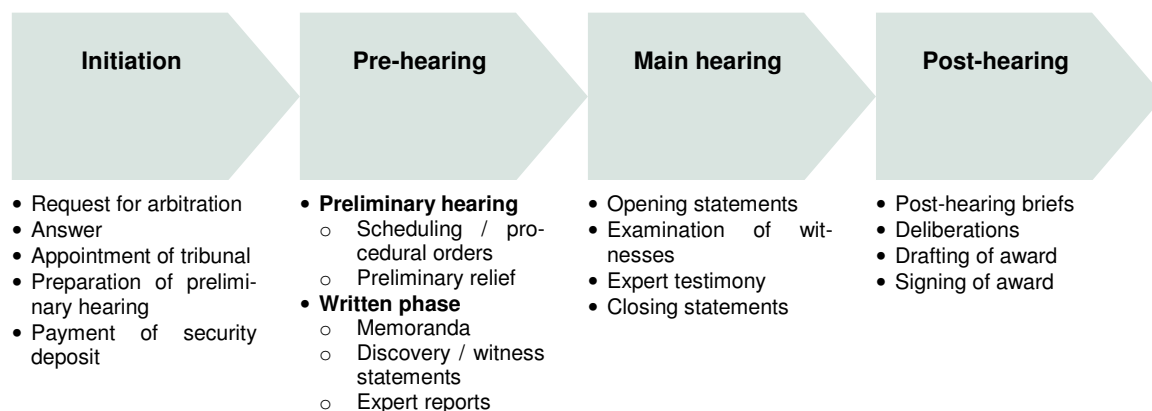
- the **scope** of arbitration (which issues shall be settled by arbitration?),
- the **place** of arbitration
- the **arbitrators** (number and qualification requirements) and their remuneration
- the **language** of the arbitration proceedings
- applicable arbitration **proceedings** (rights and duties of the parties, means of evidence etc.)
- **cost**

It is important to make sure that the arbitration clause is valid for several reasons, *inter alia* in order to

- make sure that the arbitral award can be **recognized** and **enforced** and
- **avoid prescription of claims** which might arise if arbitration is sought based on an invalid arbitration clause (if, due to the invalidity of the arbitration clause, actually ordinary courts are competent and if this is noticed by the parties too late, their claims may be forfeited before proceedings are initiated before the competent ordinary court)

### 3. Arbitration proceedings

Generally speaking, arbitration proceedings comprise the following **steps** (which may vary in details, depending on the applicable arbitration rules):

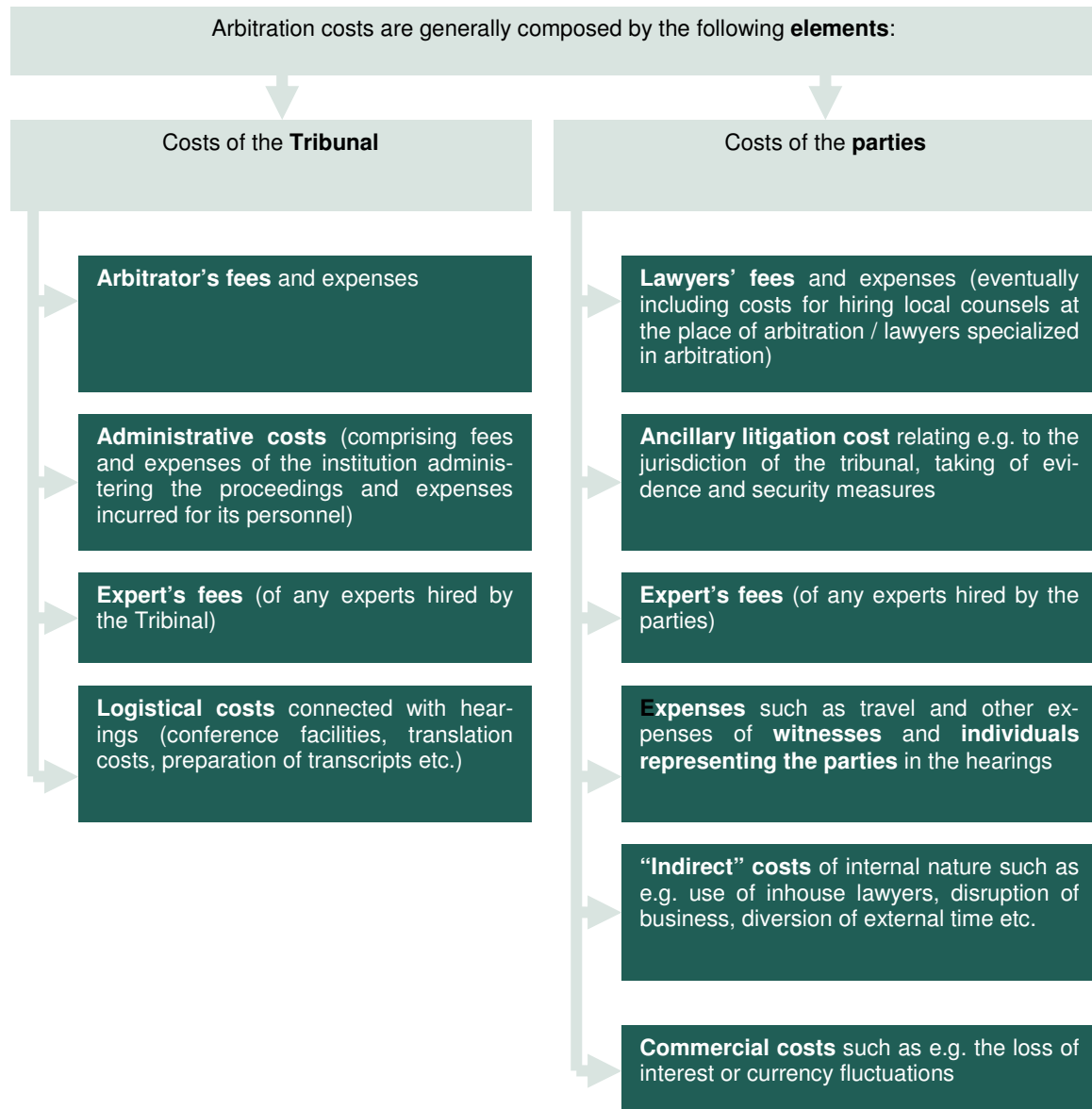


The parties may either set up their **own arbitration rules** or opt for **official arbitration rules** such as e.g. the rules provided by the German Institute for Arbitration (<http://www.dis-arb.de/>) or the International Chamber of Commerce (<http://www.iccwbo.org/court/arbitration/id4424/index.html>). It is also possible to agree on a **national law governing civil proceedings** instead of or in addition to official arbitration rules.

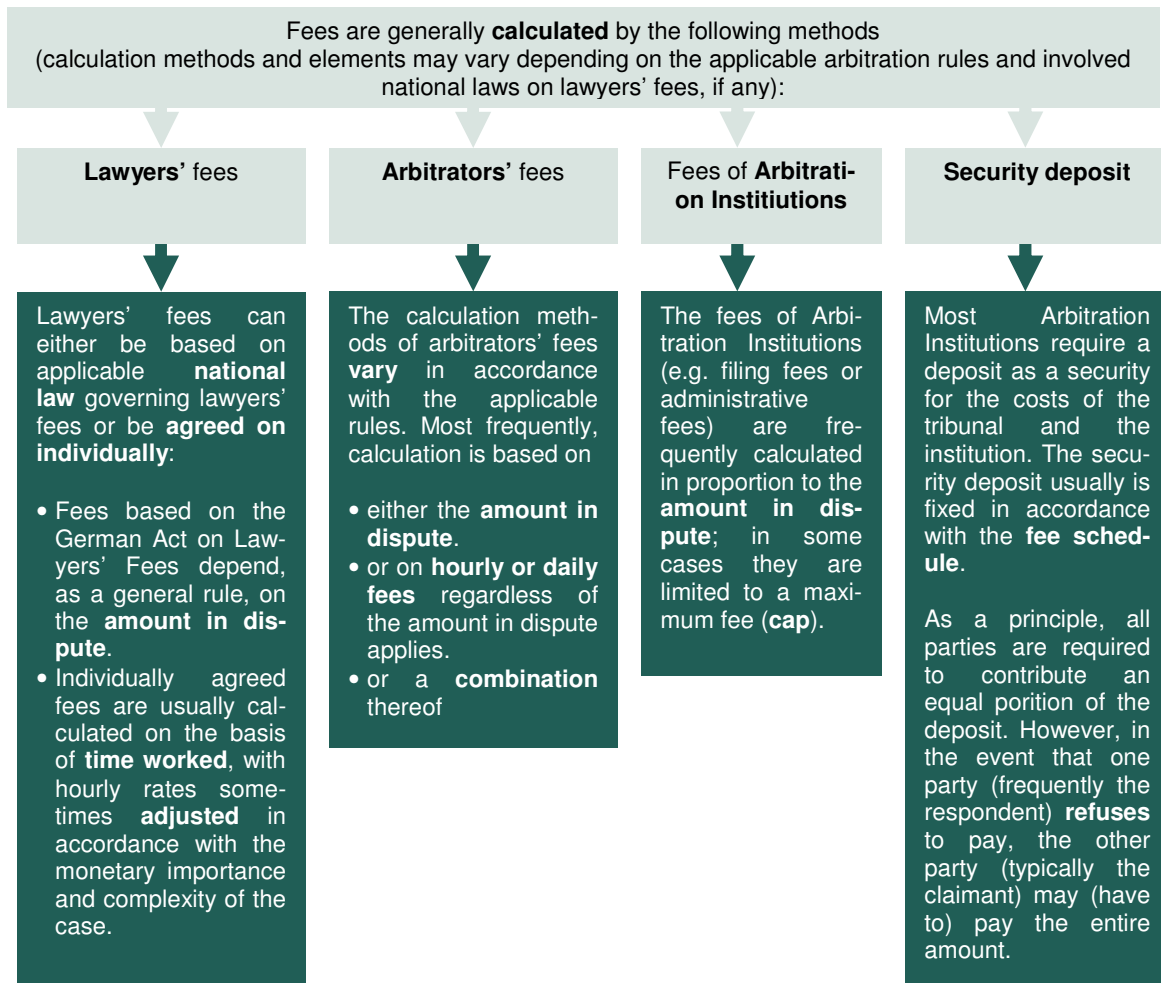
In any event, the applicable rules of procedure should be **reviewed** when drafting the arbitration clause. Specific attention should be paid to whether the applicable rules of proceedings contain suitable provision relating to **counterclaims**, **third party notice**, **extension of the claimant's claim** etc.

#### 4. Costs

##### 4.1. How are costs composed?



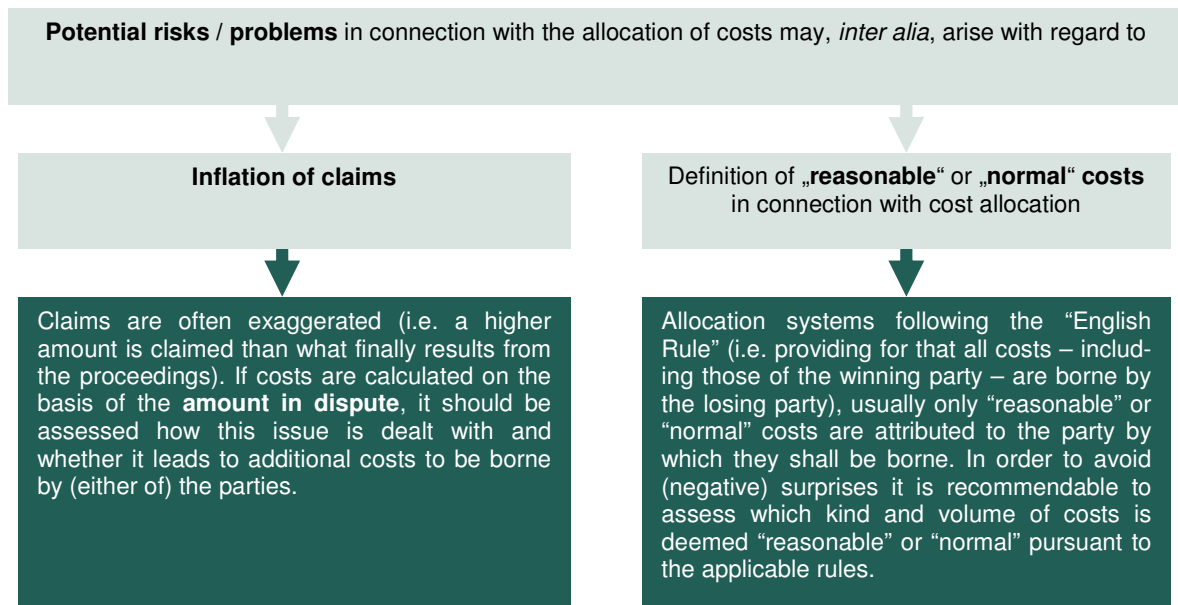
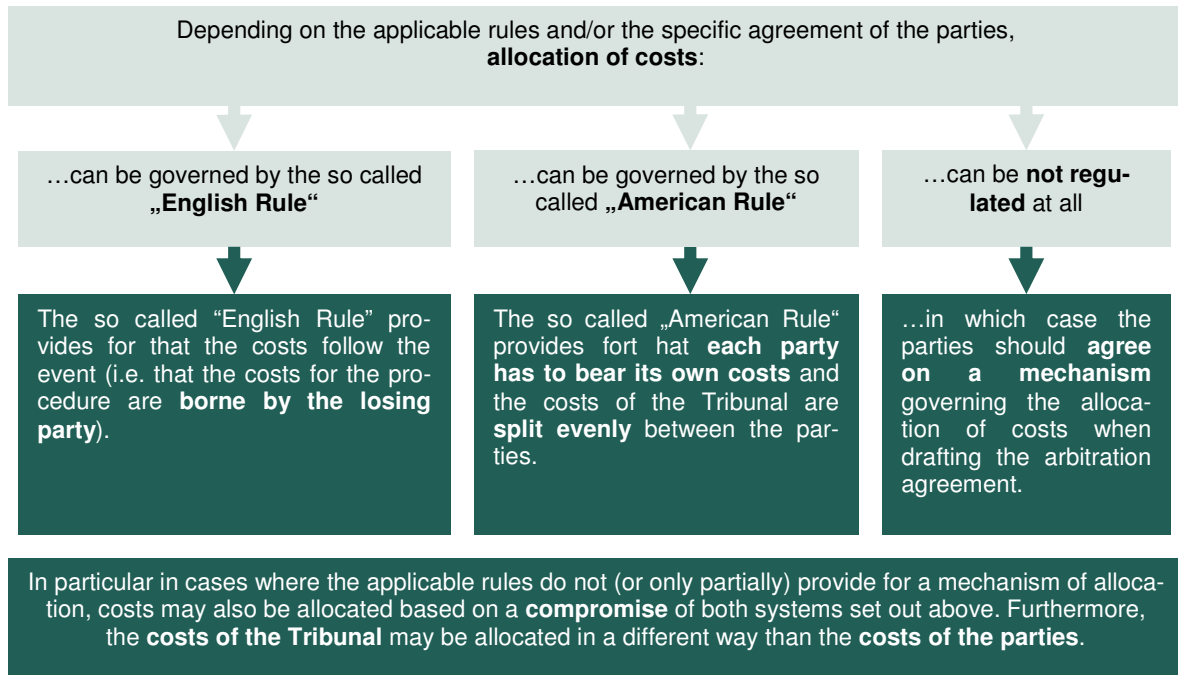
4.2. How are fees calculated?



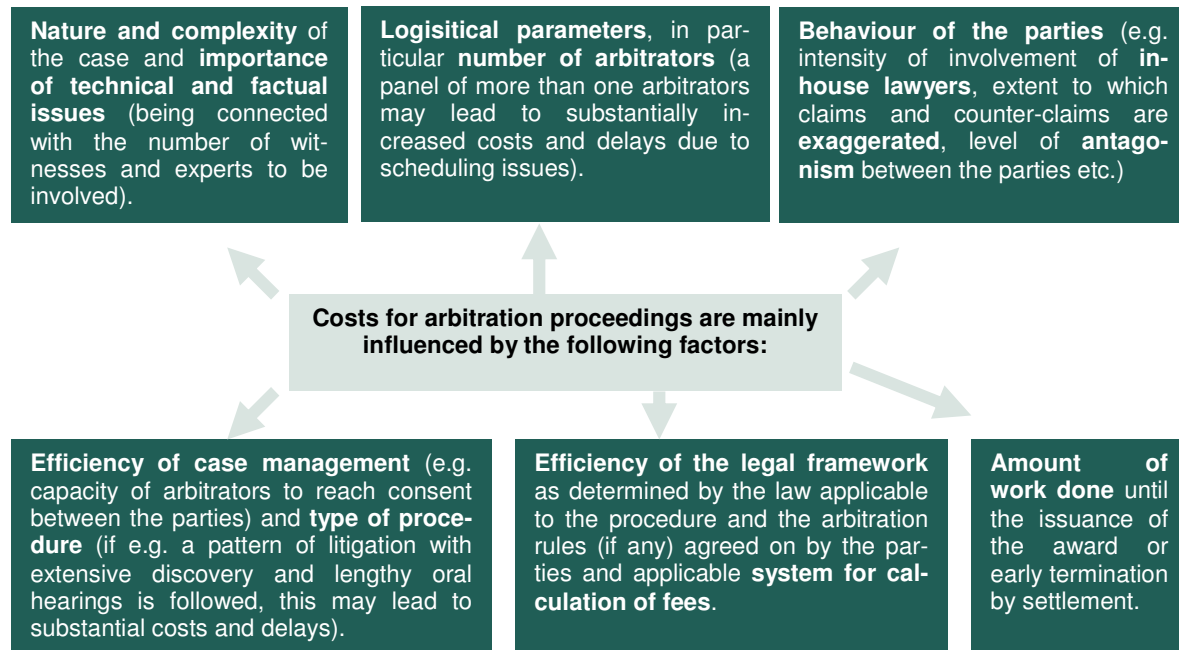
The **German Institute for Arbitration** offers a cost calculation tool for calculation of administrative fees and security deposits which can be found here: <http://www.dis-arb.de/>.

The **ICC Court of Arbitration** offers a cost calculation tool for calculation of administrative expenses and arbitrators' fees which can be found here: <http://www.iccwbo.org/court/arbitration/index.html?id=4097>.

4.3. How are costs allocated?



#### 4.4. Major elements influencing the costs of arbitration proceedings



#### 5. Enforcement of arbitration awards

One advantage of arbitration – in particular **outside legally harmonized territories** - is that enforcement of arbitration awards is – compared to official court decisions outside the EU – relatively easy due to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the **"New York Convention"** dated 1958 which was entered into by **more than 140 member states**.

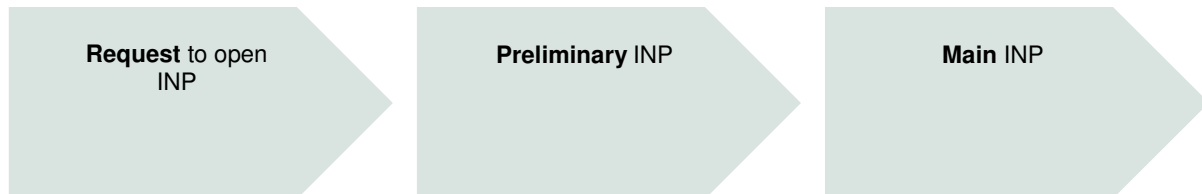
**More details** can be found here:

- [www.uncitral.org](http://www.uncitral.org).
- [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) (text of the NY Convention)

## N. Insolvency proceedings in Germany

### I. Overview

Insolvency proceedings (“**INP**”) in Germany can be roughly split in **three procedural steps**:



The INP as such is focused on a **consistent distribution** of the assets of the insolvent debtor to its creditors based on the principle of **equal treatment** of all creditors. The law governing the INP (Insolvency Act; *Insolvenzordnung*) provides for a number of **preventive measures** to protect and conserve the assets of the insolvent debtor and to assure equal treatment of the creditors, *inter alia* by providing the right of the insolvency administrator to **contest** transactions leading to an advantage of certain creditors at the expense of others.

### II. Prevention: securities for claims in agreements

With a view to the fact that creditors with unsecured claims do, in general, receive not more than a quota of about 5 % of their claims in an INP, securing claims with collateral is of major importance.

Generally speaking, claims can be secured by:

Securities granted by the debtor	Securities granted by third parties
<p>German law provides for a number of different securities, such as in particular</p> <ul style="list-style-type: none"> <li>• <b>retention of title</b> (<i>Eigentumsvorbehalt</i>)</li> <li>• <b>liens</b> and</li> <li>• <b>mortgages</b></li> </ul> <p>Depending on their type, securities either grant a <b>right of separation</b> or a <b>right for separate satisfaction</b> to the creditor.</p> <p>Securities granted by the debtor shortly before the request to open INP do, however, tend to be contested by the insolvency receiver. Accordingly, <b>enforcement</b> of the rights granted by them <b>risks to be time consuming and costly</b>.</p>	<p>From a legal perspective securities granted by a third party (other than the debtor) such as e.g.</p> <ul style="list-style-type: none"> <li>• <b>guarantees</b> and</li> <li>• <b>letters of credit</b></li> </ul> <p>tend to be <b>safer</b> as they are not influenced by the insolvency of the debtor.</p> <p>Securities provided by third parties do, however, tend to be <b>more expensive</b> and <b>hardly negotiable</b>.</p>

In Germany, **retention of title** is a widely used means of security. It is usually agreed on in a form that the transfer of title in a sold asset is subject to payment of the full purchase price. The ownership is in such case transferred upon payment of the last purchase price instalment.

There are **several subforms** of retention of title, such as

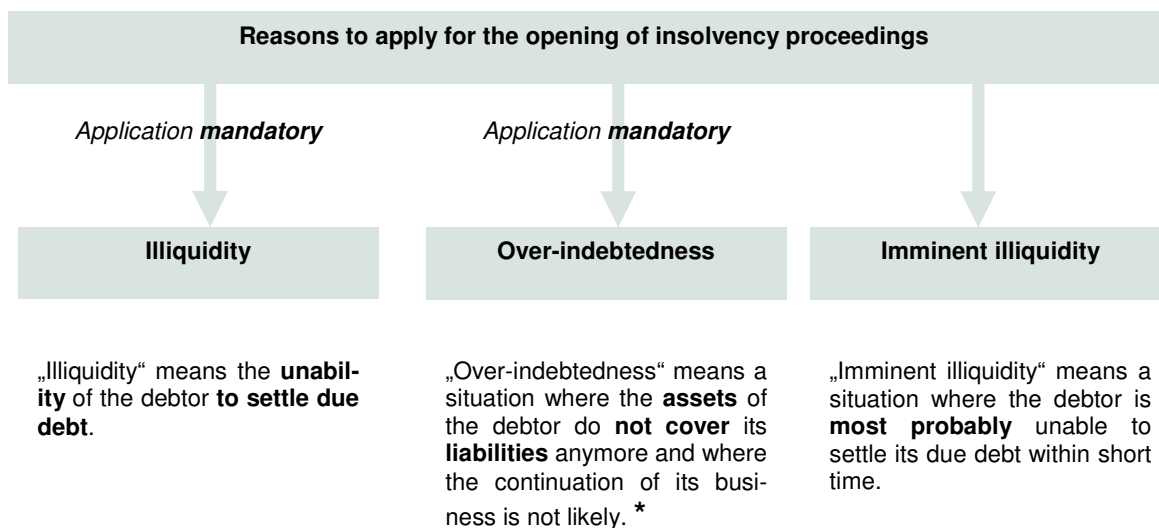
- **Extended** retention of title (agreement that the transfer of title is subject to the settlement of all claims arising from the business relationship of seller and purchaser) and
- **Prolonged** retention of title (agreement that the purchaser is allowed to sell the – unpaid – acquired assets but obliged to assign its claim for payment against his contracting partner to the seller)

The contracting parties may also provide for that the claim of the seller is secured by **transfer by way of security** (*Sicherungsübereignung*) in which case the purchaser transfer the title in an asset owned by him to the seller as security for the seller's claims. The ownership is in such case (re-)transferred to the purchaser upon payment of the full purchase price.

Another possibility is to secure claims by liens or mortgages. If chattel (movable assets) are subject to a **lien**, German law provides for that the possession (not the ownership) of the chattel must be transferred to the pledge which may turn out not to be suitable in practice and it therefore rarely found. **Mortgages** on real estate can be registered with the land register.

### III. Application for the opening of insolvency proceedings

The opening of insolvency proceedings must be applied for in case of **over-indebtedness** and/or **insolvency**. It may further be applied for (on a voluntary basis) in case of **threatening insolvency**.



\* The aforementioned definition of “over-indebtedness” which is based on the Law on Stabilization of the Financial Market shall apply only for a limited period until December 31, 2010.

In situations of (imminent) illiquidity or over-indebtedness, the **management** of the concerned company is subject to **various duties** such as, *inter alia*:

- Information duties towards the shareholders (in case of a GmbH, the managing directors are obliged to call a shareholders' meeting if 50 % of the share capital is lost)
- Monitoring duties in order to assess whether the company is illiquid or over-indebted (e.g. by setting up and analyzing interim balance sheets)
- Duty to prepare and file a correct and complete request to open INP to the competent court within statutory deadline
- Duty to prevent payments of the debtor company advantaging individual creditors (and disadvantaging others)

The handling of situations of (imminent) insolvency can be **very delicate and challenging** for the **management** and – due to a recent amendment of corporate law providing for that the duty to apply for the opening of INP passes to the shareholders in case the company (GmbH or AG) does not have any managing directors / board members – also for the **shareholders** (GmbH) or the **members of the Supervisory Board** (AG).

#### IV. Preliminary insolvency proceedings

Pls. see [Annex 28](#) (Preliminary insolvency proceedings – chart).

#### V. Main insolvency proceedings

Pls. see [Annex 29](#) (Main insolvency proceedings – chart).



## O. Foreign Exchange Law

### I. Acquisition of shares in German companies by foreign investors

Pursuant to German foreign exchange law, the acquisition of shares in local companies by foreign investors can be restricted with regard to **businesses dealing with weapons, certain types of munitions, cryptographic systems or high-end satellite systems** in order to safeguard **major safety interests** of the Federal Republic of Germany.

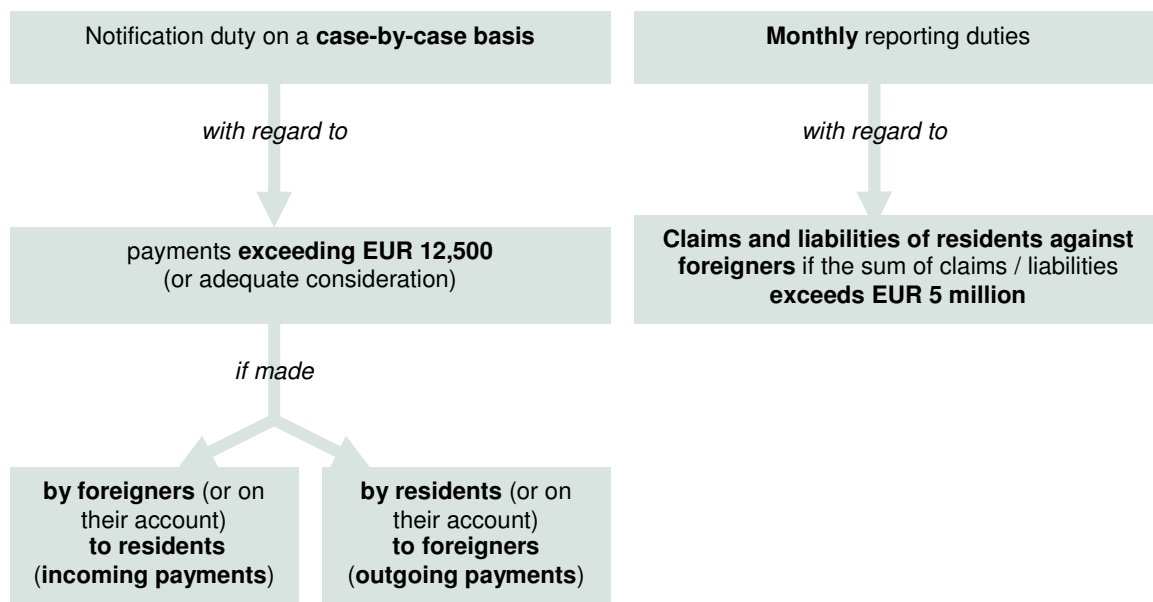
Since April 24, 2009 the **Federal Ministry for Economy and Technology** may, in addition, **control** and - in extraordinary cases - **forbid** acquisitions of private individuals or legal entities seated outside the territory of the European Union, Island, Liechtenstein, Norway or Switzerland who (directly or indirectly) acquire **25 % or more** of the voting rights in a German company if the transaction would **endanger public order or safety**.

Pls. see [Annex 30](#) (Control of investments of foreign investors) for more details.

### II. Notification duties vis-à-vis the German Federal Bank

German law does **not** provide for any **restrictions** with regard to payments made by German residents to foreigners or foreigners to German residents. However, payments exceeding certain amounts as well as claims and liabilities of a certain volume need to be **notified to the German Federal Bank** for **statistic** purposes.

The most important notification duties can be summarized as follows:



The German Federal Bank is subject to a **strict duty of confidentiality** with regard to the notified information.

**More information** can be found here: [www.bundesbank.de](http://www.bundesbank.de).

### III. Export control by the Federal Office of Economics and Export Control

Generally, goods can be exported from Germany to any destination outside Germany **without any restrictions**.

However, the export of **certain goods** from Germany to a territory **outside the EU** is **supervised** by and may require **prior approval** of the Federal Office of Economics and Export Control (*Bundesamt für Aussenwirtschaft; BAFA*), being the central authority for questions relating to export restrictions.

Export restrictions may **arise** from

Statutory law	EU-law	International Agreements	Embargos
<p>In particular:</p> <ul style="list-style-type: none"> <li>• Foreign Trade and Payments Act (<i>Aussenwirtschaftsgesetz; AWG</i>)*</li> <li>• Foreign Trade and Payments Regulation (<i>Aussenwirtschaftsverordnung, AWV</i>)**</li> <li>• War Weapons List***</li> <li>• War Weapons Control Act****</li> </ul>	<p>In particular the <b>Council Regulation</b> (EC) No. 1334/2000 dated 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology.*****</p>		<p>Embargos are generally based on resolutions of the United Nations, OSCE or the Council of the EU and exist in the form of</p> <ul style="list-style-type: none"> <li>• <b>full scale</b> embargos,</li> <li>• <b>partial</b> embargos or</li> <li>• <b>weapon</b> embargos</li> </ul> <p>Embargos may further relate to</p> <ul style="list-style-type: none"> <li>• specific <b>countries</b> or</li> <li>• specific (<b>groups of</b>) <b>persons</b></li> </ul>

For **English translations** pls. see

\* [http://www.bafa.de/bafa/en/export\\_control/legislation/export\\_control\\_awg\\_en.pdf](http://www.bafa.de/bafa/en/export_control/legislation/export_control_awg_en.pdf)

\*\* [http://www.bafa.de/bafa/en/export\\_control/legislation/export\\_control\\_awv\\_en.pdf](http://www.bafa.de/bafa/en/export_control/legislation/export_control_awv_en.pdf)

\*\*\* [http://www.bafa.de/bafa/en/export\\_control/legislation/export\\_control\\_cwc\\_p\\_war\\_weapons\\_list.pdf](http://www.bafa.de/bafa/en/export_control/legislation/export_control_cwc_p_war_weapons_list.pdf)

\*\*\*\* [http://www.bafa.de/bafa/en/export\\_control/legislation/export\\_control\\_cwc\\_p\\_war\\_weapons\\_control\\_act.pdf](http://www.bafa.de/bafa/en/export_control/legislation/export_control_cwc_p_war_weapons_control_act.pdf)

\*\*\*\*\* [http://www.bafa.de/bafa/en/export\\_control/legislation/en\\_2000R1334\\_do\\_001.pdf](http://www.bafa.de/bafa/en/export_control/legislation/en_2000R1334_do_001.pdf)

Export restrictions may, *inter alia*, apply to the following **types of goods** or parts thereof and, eventually, to **brokering** and **technical support** relating thereto:

<b>Weapons, munition and armament</b>	so called <b>dual use</b> products*	<b>Nuclear</b> materials, plants and equipment	<b>Chemicals, micro-organisms</b> or toxic materials
<b>Electronic</b> products and/or equipment	<b>Computers</b>	Products and/or equipment relating to <b>telecommunication</b> and <b>information security</b>	<b>sensors</b> and <b>lasers</b>

\* **Dual use products** are products which can be used for civil as well as for military purposes.

**More information** can be found here: [www.bafa.de](http://www.bafa.de).

#### IV. Import control by the Federal Office of Economics and Export Control

**Generally**, goods can be imported from destinations outside Germany to Germany **without any restrictions**.

However, the import of **certain goods** from a territory **outside the EU** to Germany / the EU is **supervised** by and may require **prior approval** of the Federal Office of Economics and Export Control (*Bundesamt für Aussenwirtschaft; BAFA*), being the central authority for questions relating to import restrictions.

Import restrictions may **arise** from

Statutory law	EU-law	International Agreements
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In particular:

- Foreign Trade and Payments Act (pls. see above)
- Foreign Trade and Payments Regulation (pls. see above)
- as well as laws relating to (*inter alia*)
  - food
  - pharmaceutical products
  - nuclear products and equipment
  - intellectual property
  - weapons
  - drugs
  - endangered plant and animal species

Import restrictions may, *inter alia*, apply to the following **types of goods** or parts thereof:

Textiles from <b>certain countries*</b>	Iron and steel from <b>certain countries**</b>	Potassium Chloride
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\* refers to textiles and cloths with origin in Belorussia, North Korea and Uzbekistan.

\*\* refers to iron and steel with origin in Kazakhstan and the Russian Federation.

**More information** can be found here: [www.bafa.de](http://www.bafa.de).

<b>Annexes</b>	
<b>Annex 1</b>	Article 81 of the EC-Treaty
<b>Annex 2</b>	Prokura
<b>Annex 3</b>	Duties and liability of managing directors
<b>Annex 4</b>	Setting up / acquiring a (shelf) limited liability company (GmbH) in Germany
<b>Annex 5</b>	Duties and liability of members of the Board of Directors
<b>Annex 6</b>	Duties and liability of members of the Supervisory Board
<b>Annex 7</b>	Limitation of director pay in stock corporations
<b>Annex 8</b>	Setting up / acquiring a (shelf) stock corporation (AG) in Germany
<b>Annex 9</b>	Setting up / acquiring a (shelf) GmbH & Co. KG in Germany
<b>Annex 10</b>	Mandatory indications on business letters (including e-mails) and internet sites
<b>Annex 11</b>	Overview Deutsche Börse stock market
<b>Annex 12</b>	Overview various forms of Mezzanine Capital
<b>Annex 13</b>	Overview Incentives
<b>Annex 14</b>	Overview of tax agreements entered into between Germany and the United States
<b>Annex 15</b>	Determination of trade tax and overall taxburden – example
<b>Annex 16</b>	Comparison of international taxation of companies (2008) in percent
<b>Annex 17</b>	Determination of Real Property Tax Burden – Example
<b>Annex 18</b>	Comparison of European VAT rates (2008) in percent
<b>Annex 19</b>	Concept of VAT – Example
<b>Annex 20</b>	Provisions typically contained in service agreements with managing directors
<b>Annex 21</b>	Provisions typically contained in employment agreements
<b>Annex 22</b>	Social Security contributions (July 2009)
<b>Annex 23</b>	National patent application in Germany
<b>Annex 24</b>	European patent application
<b>Annex 25</b>	Typical issues in connection with International Agreements
<b>Annex 26</b>	Costs for official court proceedings – overview (2009)
<b>Annex 27</b>	Brussels I Regulation – key points
<b>Annex 28</b>	Preliminary insolvency proceedings - chart
<b>Annex 29</b>	Main insolvency proceedings - chart
<b>Annex 30</b>	Control of investments of foreign investors

## Article 81 of the EC-Treaty

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
  - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) limit or control production, markets, technical development, or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
  - any agreement or category of agreements between undertakings;
  - any decision or category of decisions by associations of undertakings;
  - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
  - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

**Prokura**

In order to have more flexibility in the daily business of the company, the managing directors of a GmbH or the Board of Directors of an AG may grant so called “Prokura” to authorized signatories (*Prokuristen*). Usually, Prokura is granted to employees who are in leading positions; being granted Prokura is generally deemed a career move. Prokuristen sign by adding “ppa.” to their names.

Prokura covers a **smaller scope** of legal transactions than the representation power of a managing director (“MD”):

Type of legal transaction	MD	Prokurist
Transactions within the <b>ordinary course of business</b> (e.g. conclusion / amendment / termination of lease and loan agreements and other contracts relating to the daily business)	x	x
Acquisition, sale and encumbrance of real estate on behalf of the company	x	<i>Only based on an additional power of attorney</i>
Initiation and settlement of litigation on behalf of the company	x	<i>Only based on an additional power of attorney</i>
Signing of applications with the commercial register	x	-
Maintenance of the shareholder list	x	-

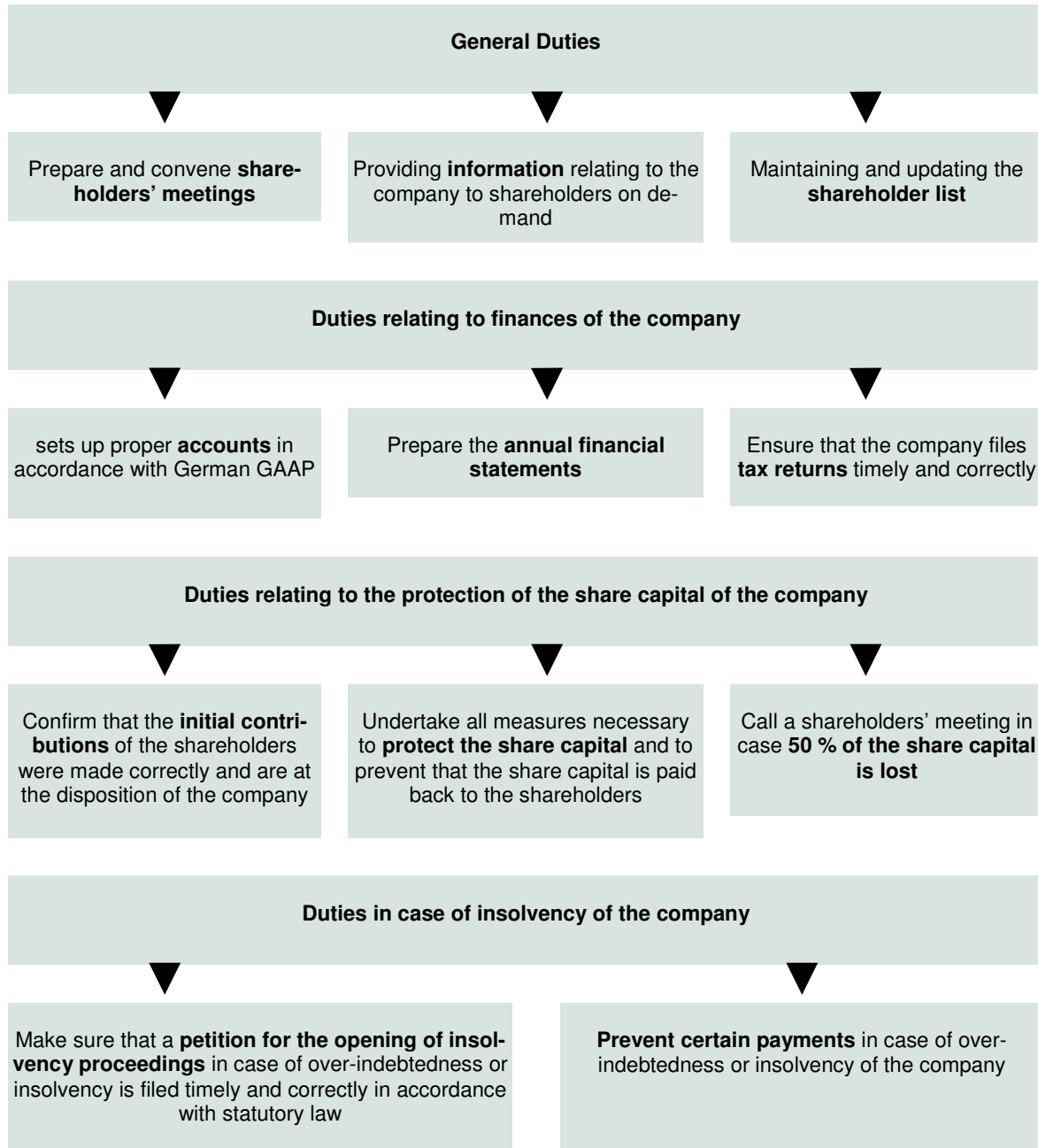
The following **forms** of Prokura can be registered with the commercial register:

Sole Prokura	Joint Prokura	
	together <b>with another Prokurist</b>	together <b>with a managing director</b>
	or a <b>mixed form</b> thereof (together with another Prokurist or a managing director)	

As in case of managing directors, **restrictions of the Prokura** (e.g. restriction of the Prokura to legal transactions up to a certain value) **can not be registered with the commercial register** and are, therefore, not binding vis-à-vis third parties. It is, however, possible, to subject Prokuristen to **internal restrictions** with legal effect between the Prokurist and the company; in case of breach the legal transaction performed by the Prokurist is legally valid towards third parties (unless they know about the internal restrictions) but the Prokurist can be held liable for damages.

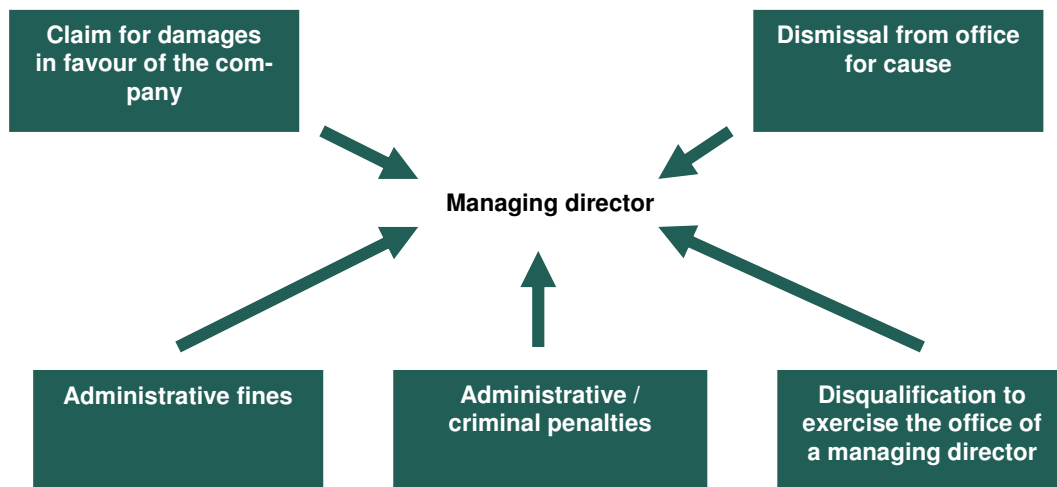
## Duties and liability of Managing Directors

Apart from being responsible for the **overall management of the company**, managing directors do, *inter alia*, have the following duties:



## Liability and sanctions

A breach of the aforementioned duties of managing directors may give rise to a **claim for damages** of the company against the managing director(s) and may justify a **dismissal** of the managing director(s) for cause. In addition, non-compliance with certain duties may lead to further sanctions, e.g. authorize the courts or governmental authorities to impose **finances** in order to enforce compliance with statutory law. They may also provide for **administrative and/or criminal penalties** or entitle shareholders and/or third parties (in particular: creditors of the company) to claims for damages towards the managing director(s). Furthermore, a conviction for certain crimes relating to breaches of the duties of the managing directors (e.g. the duties relating to the insolvency of the company, fraud or embezzlement) leads to a **disqualification** to exercise the office of a managing director.

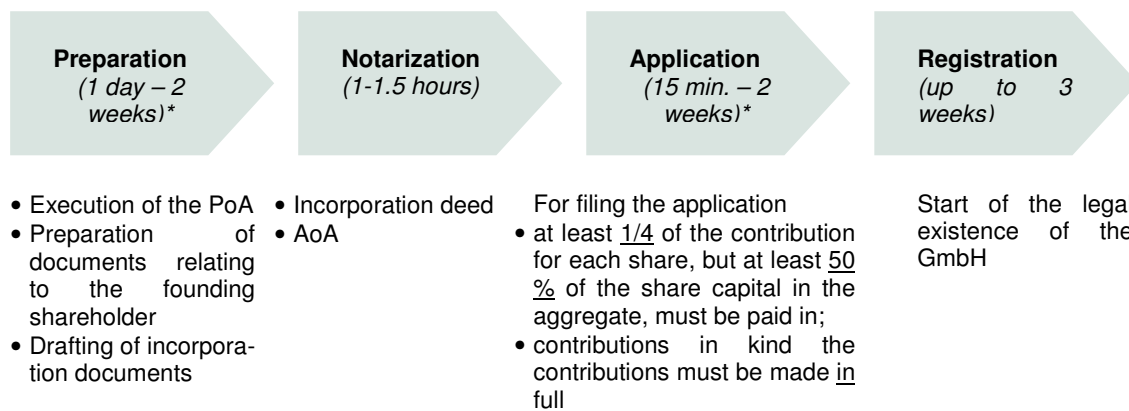




## Setting up / acquiring a (shelf) GmbH in Germany

### I. Overview

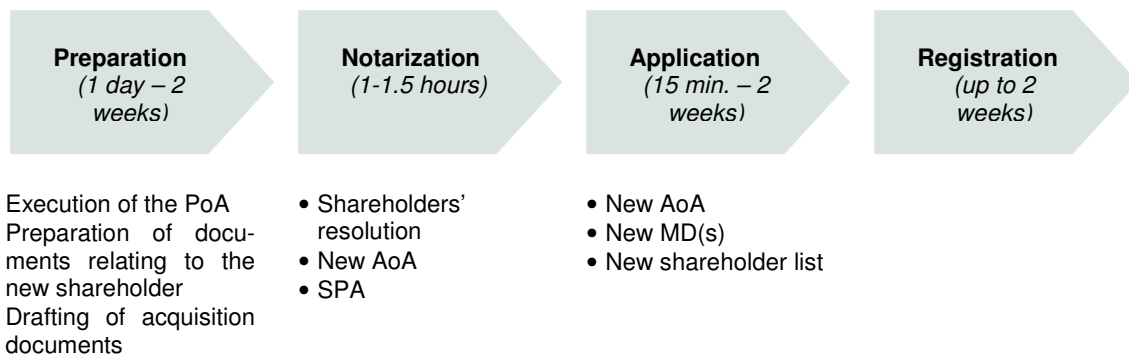
The **formation** of a limited liability company requires **notarization**. The legal existence of the GmbH starts with its **registration with the commercial register**. The steps necessary for the **setting up** of a GmbH can be summarized as follows:



\* depending on the time needed to provide original certified / apostilled documents (e.g. secretary of certificate, letter of good standing, application form etc.).

**PoA:** Power of attorney; **AoA:** Articles of association; **MD:** managing director.

The **acquisition** of shares in a shelf company requires **notarization** as well. As the shelf company does already legally exist it is **operative immediately** provided that the share purchase agreement does not contain a clause pursuant to which the share transfer is subject to the payment of the purchase price. Please note, however, that the (new) shareholders' rights (in particular: the voting rights) can be exercised only after the new **shareholder list** is deposited at the commercial register. The steps necessary for **acquiring a shelf company** can be summarized as follows:



## II. Required information

<b>Name</b>	The name must (i) <b>not be misleading</b> , (ii) be <b>distinctive</b> from other companies and (iii) contain the designation " <b>Gesellschaft mit beschränkter Haftung</b> " or " <b>GmbH</b> ". If it is intended to use the company name as a <b>trademark or domain name</b> at the same time, a (trademark and domain) research may be recommendable).
<b>Seat</b>	The seat of the company can be <b>freely determined</b> within Germany. When choosing the seat of the company, <b>tax issues</b> (in particular: the municipal trade tax rates) may be considered.
<b>Business object</b>	The articles of association must contain a <b>description of the company's business and area of activity</b> (e.g. "the business object of the company is the purchase and sale of (...) and the performance of services related thereto"). The statutory business object limits the internal power of the managing director(s) who can be held liable internally (vis-à-vis the company) in case of a performance of business transactions which are beyond the statutory business object. The statutory business object does, however, in general not limit the (external) representation power of the managing director(s) towards third parties.
<b>Business Address</b>	Each company is obliged to have a business address which is registered with the commercial register.
<b>Receiving agent</b>	It is possible (not mandatory) to register a so called receiving agent, i.e. a person (private individual or legal entity) which is entitled to receive documents and legal statements on behalf of the company.
<b>Managing director(s)</b>	A GmbH can have <b>one or more private individuals</b> (no legal entities) as managing directors. The following information must be provided to the commercial register with regard to managing directors: Name, (private) address, birthday date.
<b>Representation power</b>	If the company only has one managing director, the managing director automatically represents the company solely. If the company has two or more managing directors, they can be granted either <b>sole or joint representation power</b> . In addition, they can be <b>released from the so called "restriction of self-contracting"</b> (preventing managing directors to enter into legal transactions on behalf of the company on the one and on behalf of a third party or themselves on the other hand). A release from the restrictions of contracting on behalf of the company on the one and a third party on the other hand may enable managing directors to act on behalf of several companies of the same group.
<b>Registered share capital</b>	The registered share capital must amount to a <b>minimum of EUR 25,000</b> . When determining the registered share capital it should be noted that the share capital is subject to a <b>specific protection</b> under German law. The share capital can be paid up either by contributions <b>in cash</b> or contributions <b>in kind</b> . If contributions in kind (e.g. patents, real property or a business) are made, the contributed items and the value they represent must be assessed by an auditor and stated in the articles of association.
<b>Shares</b>	The shares must have a nominal amount of <b>at least EUR 1</b> and be divisible by 1. Each shareholder can take over one or several shares.
<b>Shareholder(s)</b>	A GmbH can be set up by <b>one or several shareholders</b> . The following information is required relating to the shareholders: Name, (private) address, birthday date (if private individuals)  If the shareholders are foreign companies, a (certified and apostilled) <b>extract from the commercial register</b> (or similar documentation such as e.g. a secretary certificate and a letter of good standing) confirming the legal existence of the company and the representation power of its directors may be required.
<b>Fiscal year</b>	The fiscal year must refer to a <b>fixed period</b> (e.g. the calendar year or December 1 <sup>st</sup> to November 30 of the following calendar year etc.) as German law does not allow for a flexible calendar year (such as e.g. the last weekend in December to the last weekend in December of the following calendar year).

The data **highlighted in green** above are **registered with the commercial register** and publicly available. The shareholders of the company must be reflected in the **shareholder list** which needs to be filed with the commercial register as well.

### III. To Dos / Required Documents

If a new GmbH is **set up** the following standard documentation needs to be executed:

Document	Remarks	Form	Involved persons
<b>Power of attorney ("PoA")</b>	Required only if the founders cannot appear personally before a German notary	<ul style="list-style-type: none"> <li>• Certified</li> <li>• [Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>• Founding shareholder(s)</li> <li>• [US notary]*</li> <li>• [Authority issuing the apostil]*</li> </ul>
	<p><b>In addition</b> to the power of attorney the following documents might be required:</p> <ul style="list-style-type: none"> <li>• <b>Secretary certificate(s)</b> of the founding shareholder(s) confirming that the person(s) signing the power of attorney on behalf of the founding shareholder(s) have sufficient representation power</li> <li>• <b>Letter of good standing</b> confirming that the founding shareholder(s) have been duly incorporated and do validly exist</li> </ul>	<ul style="list-style-type: none"> <li>• Certified</li> <li>• Apostilled</li> </ul>	<ul style="list-style-type: none"> <li>• Founding shareholder(s)</li> <li>• Company secretary</li> <li>• US notary</li> <li>• Authority issuing the apostil</li> <li>• Authority issuing the letter of good standing</li> </ul>
<b>Incorporation deed</b>	<p>The incorporation deed includes the resolution of the founding shareholder(s) to adopt the Articles of Association and to appoint the managing director(s) of the company. It further creates the obligation of the shareholders vis-à-vis the company to pay in their contributions.</p> <p>If shareholders' contributions are made <u>in kind</u> further documentation is necessary.</p>	Notarized	<ul style="list-style-type: none"> <li>• German notary</li> <li>• Founding shareholder(s)</li> </ul>
<b>Articles of Association</b>		Notarized	German notary
<b>Shareholder list</b>	Includes the names and addresses of the shareholders and the (number of) shares taken over by them.	Signed and stamped by the German notary	German notary
<b>Application with the commercial register</b>	To be signed by the managing director(s) and filed with the commercial register by the German notary.	<ul style="list-style-type: none"> <li>• Certified</li> <li>• [Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>• Managing director(s)</li> <li>• German notary</li> <li>• [US notary]*</li> <li>• [Authority issuing the apostil]*</li> </ul>
<b>Instruction letter</b>	The managing director(s) need to sign a so called "instruction letter" (issued by a German notary) informing them about their duty to disclose certain information to the commercial register if they cannot appear personally before a German notary	In writing	<ul style="list-style-type: none"> <li>• German notary</li> <li>• Managing director(s)</li> </ul>

\* If signed in the US.

The documents set out above must be filed with the commercial register and are **publicly available (if highlighted in green above)**. Eventually, **further documents** (such as e.g. a shareholders' agreement, an assessment of the value of contributions made by the founding shareholder(s) in case of contributions in kind etc.) may be required.

If a **shelf company** is bought the following standard documentation needs to be executed:

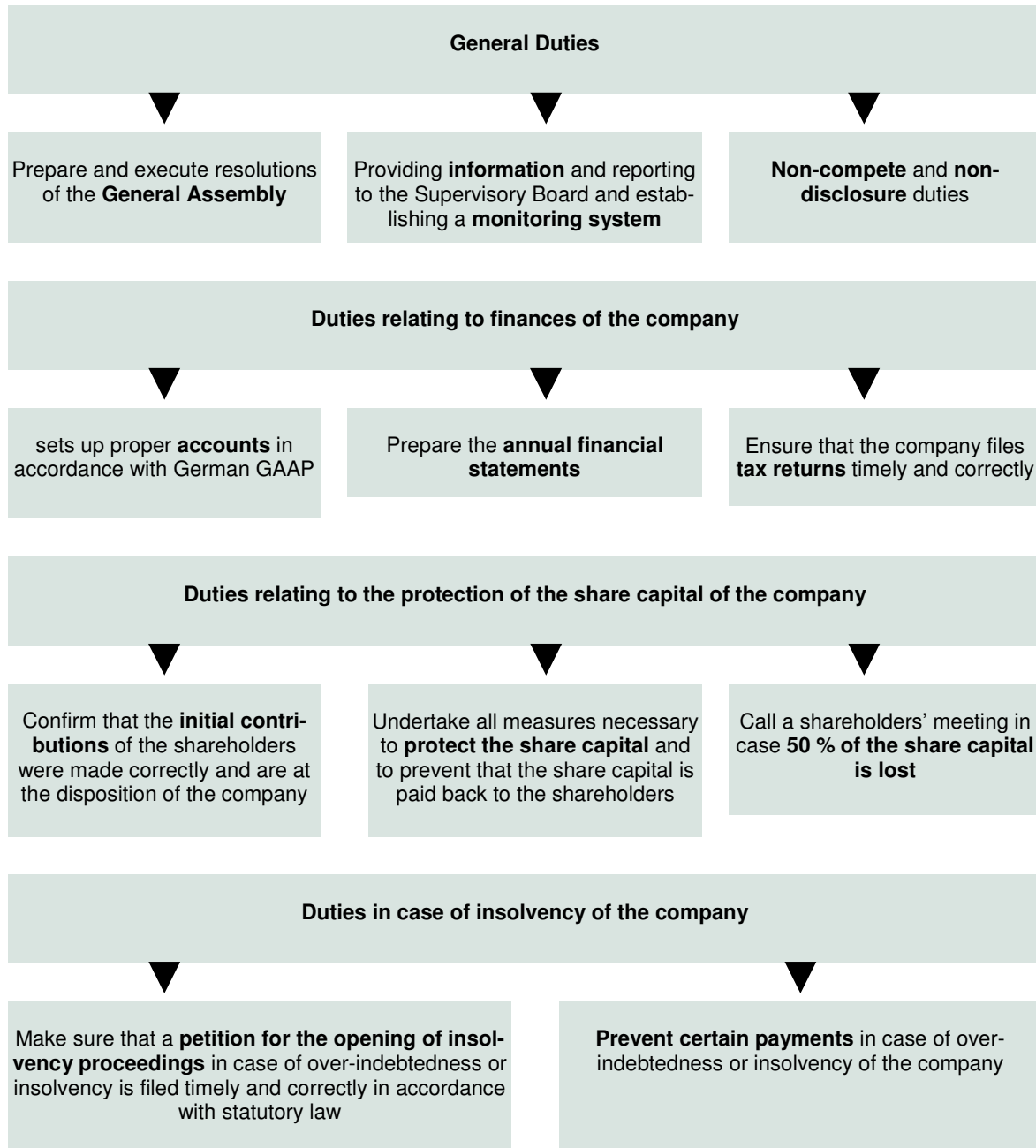
Document	Remarks	Form	Involved persons
<b>Power of attorney ("PoA")</b>	Required if the new shareholder(s) cannot appear personally before a German notary.	<ul style="list-style-type: none"> <li>In writing</li> </ul>	New shareholder(s)
	In addition to the power of attorney the following documents might be required: <ul style="list-style-type: none"> <li><b>Secretary certificate(s)</b> of the new shareholder(s) confirming that the person(s) signing the power of attorney on behalf of the founding shareholder(s) have sufficient representation power</li> <li><b>Letter of good standing</b> confirming that the new shareholder(s) have been duly incorporated and do validly exist</li> </ul>	<ul style="list-style-type: none"> <li>Certified</li> <li>Apostilled</li> </ul>	<ul style="list-style-type: none"> <li>new shareholder(s)</li> <li>Company secretary</li> <li>US notary</li> <li>Authority issuing the apostil</li> <li>Authority issuing the letter of good standing</li> </ul>
<b>Shareholders' resolution</b>	By the shareholders' resolution the managing directors are exchanged and the Articles of Association are amended.	Notarized	<ul style="list-style-type: none"> <li>German notary</li> <li>Shelf company provider</li> </ul>
<b>New Articles of Association</b>	Providing <i>inter alia</i> for a new name and business object.	Notarized	German notary
<b>Share Purchase Agreement</b>	Contains standard reps & warranties of the shelf company provider (ownership of title, free transferability of the shares, absence of pledges and encumbrances, guarantee that the company has not taken up any commercial business and that the share capital was paid in and is still at the disposition of the company).	Notarized	<ul style="list-style-type: none"> <li>German notary</li> <li>Shelf company provider</li> <li>New shareholder(s)</li> </ul>
<b>Shareholder list</b>		Signed and stamped by the German notary	German notary
<b>Application with the commercial register</b>	To be signed by the new managing director(s) and filed with the commercial register by the German notary.	<ul style="list-style-type: none"> <li>Certified</li> <li>[Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>Managing director(s)</li> <li>German notary</li> <li>[US notary]*</li> <li>[Authority issuing the apostil]*</li> </ul>
<b>Instruction letter</b>	The managing director(s) need to sign a so called "instruction letter" (issued by a German notary) informing them about their duty to disclose certain information to the commercial register if they cannot appear personally before a German notary	In writing	<ul style="list-style-type: none"> <li>German notary</li> <li>New managing director(s)</li> </ul>

\* If signed in the US.

The documents **highlighted in green above** must be filed with the commercial register and are **publicly available**.

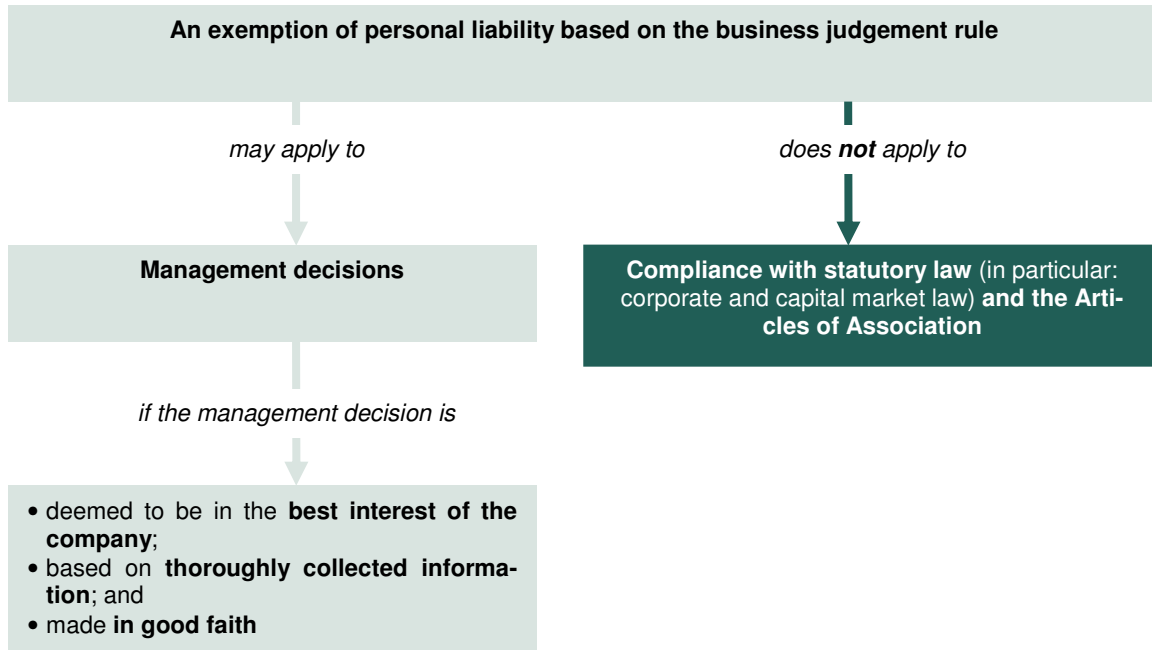
## Duties and liability of members of the Board of Directors

Apart from being responsible to conduct the company's business in the best interest of the company, Board of Directors and each of its members do, *inter alia*, have the following duties:



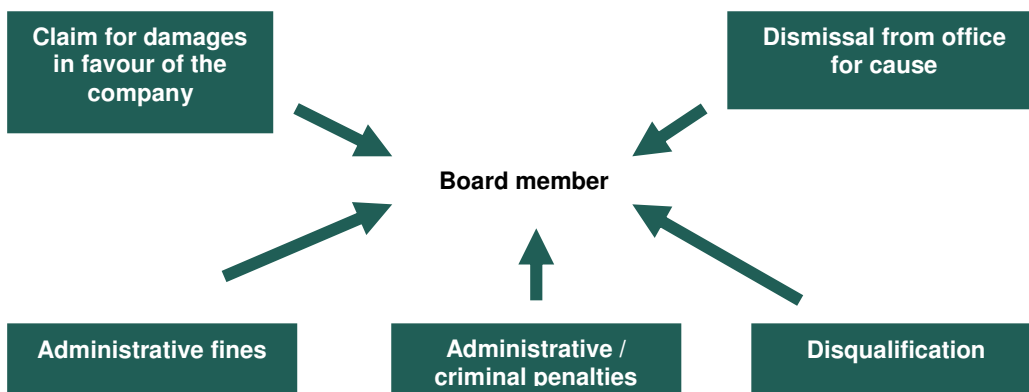
## Business judgement rule

German corporate law provides for a principle comparable to the anglo-american concept of the business judgement rule based on which the personal liability of board members is excluded with regard to management decisions if certain conditions are met:



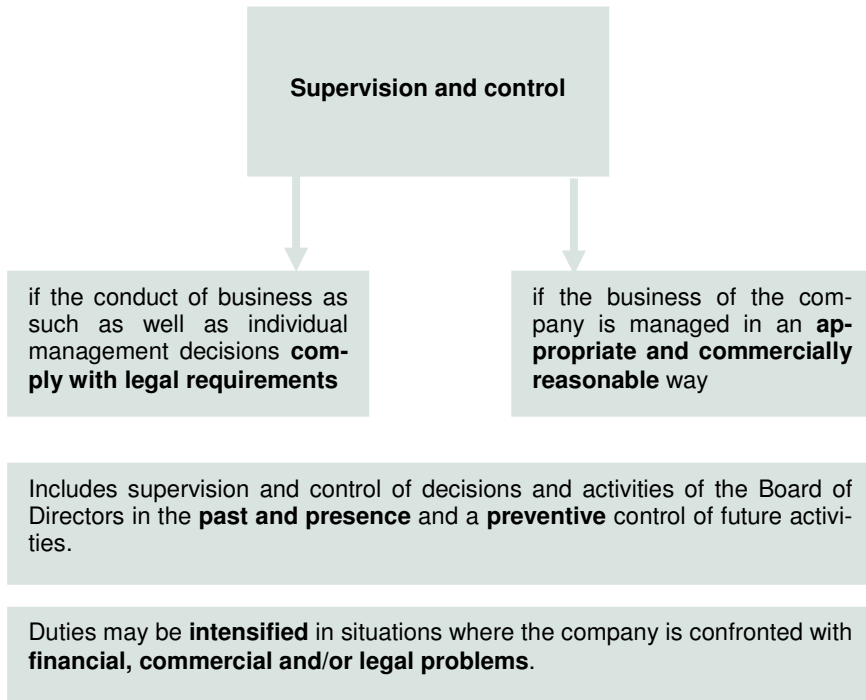
## Liability and sanctions

A breach of the aforementioned duties of board members may give rise to a **claim for damages** of the company against the board member and may justify a **dismissal** of the board member for cause. In addition, non-compliance with certain duties may lead to further sanctions, e.g. authorize the courts or governmental authorities to impose **finances** in order to enforce compliance with statutory law. They may also provide for **administrative and/or criminal penalties**. Furthermore, a conviction for certain crimes relating to breaches of the duties of the board members (e.g. the duties relating to the insolvency of the company, fraud or embezzlement) leads to a **disqualification** to exercise the office of a director.



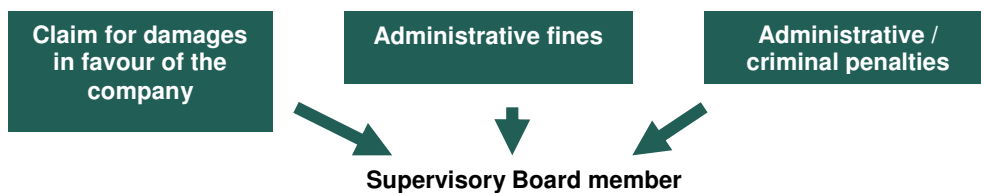
## Duties and liability of members of the Supervisory Board

The main duty of the Supervisory Board and each of its members is the supervision and control of the management activities of the Board of Directors:



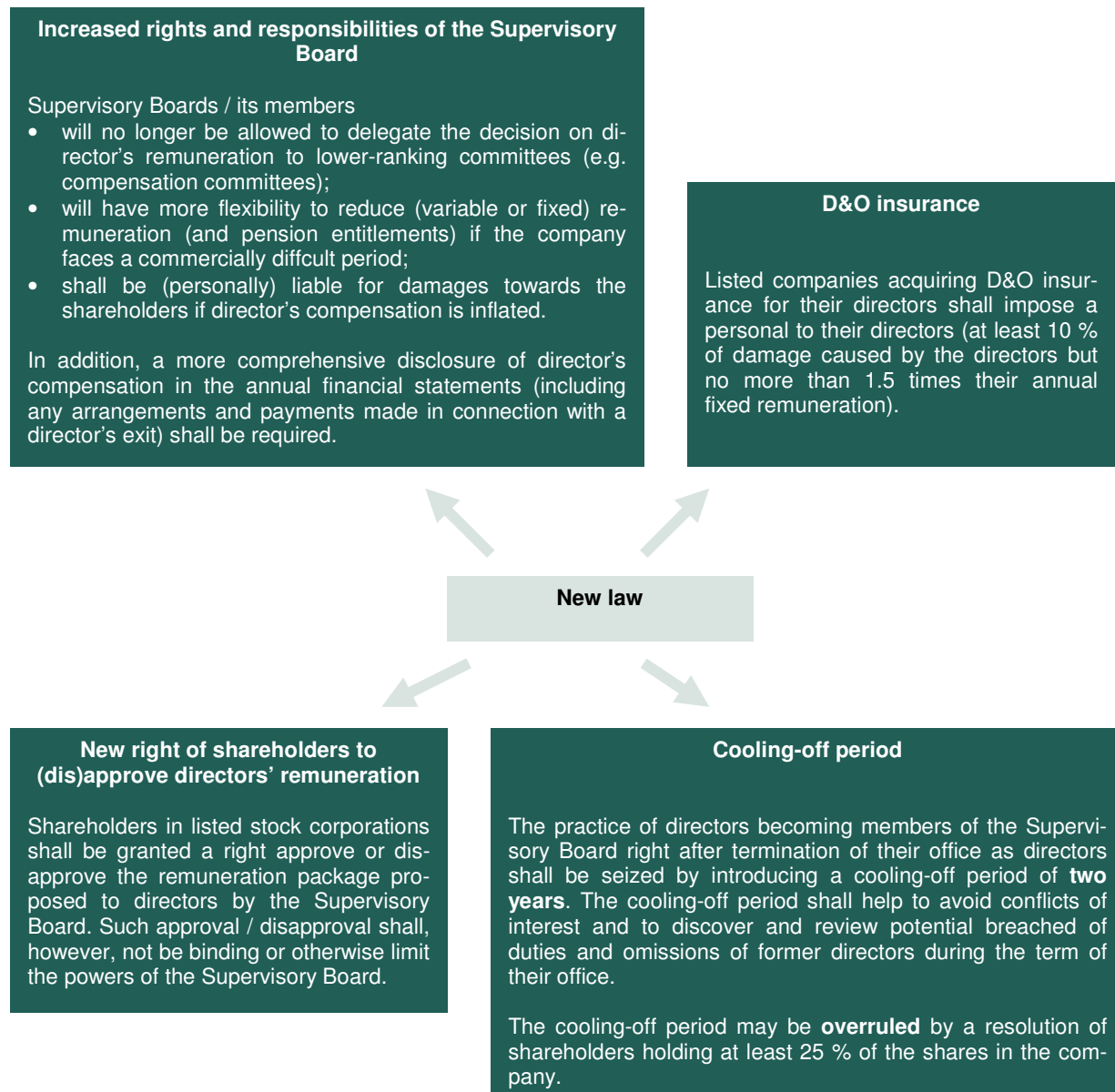
## Liability and sanctions

A breach of the aforementioned duties of members of the Supervisory Board may give rise to a **claim for damages** of the company against the board member. In addition, non-compliance with certain duties may lead to further sanctions, e.g. authorize the courts or governmental authorities to impose **fines** in order to enforce compliance with statutory law. They may also provide for **administrative and/or criminal penalties**.



## Limitation of director pay in stock corporations

Apart from limiting directors' pay as set out in **section E/III/2** of the main text, the new law will have further impacts as follows:

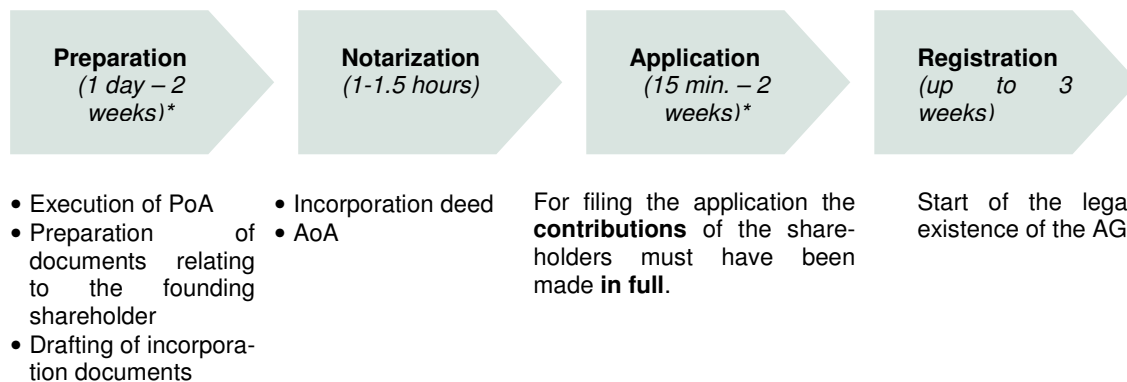




## Setting up / acquiring a (shelf) Stock Corporation (AG) in Germany

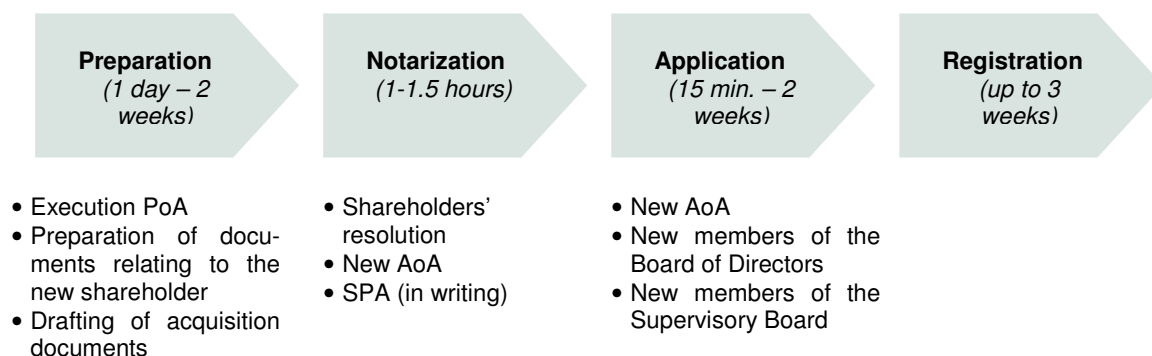
### I. Overview

The **formation** of a stock corporation requires **notarization**. The legal existence of the AG starts with its **registration with the commercial register**. The steps necessary for the **setting up** of an AG can be summarized as follows:



\* depending on the time needed to provide original certified / apostilled documents (e.g. secretary of certificate, letter of good standing, application form etc.). **PoA**: Power of attorney; **AoA**: Articles of association.

The acquisition of shares in a shelf company does not require notarization. However, the **shareholders' resolution** relating to the amendment of the Articles of Association is subject to **notarization**. As the shelf company does already legally exist it is **operative immediately** provided that the share purchase agreement does not contain a clause pursuant to which the share transfer is subject to the payment of the purchase price. The steps necessary for **acquiring a shelf company** can be summarized as follows:



## II. Required information

<b>Name</b>	The name must (i) <b>not be misleading</b> , (ii) be <b>distinctive</b> from other companies and (iii) contain the designation " <b>Aktiengesellschaft</b> " or " <b>AG</b> ". If it is intended to use the company name as a <b>trademark or domain name</b> at the same time, a (trademark and domain) research may be recommendable).
<b>Seat</b>	The seat of the company can be <b>freely determined</b> within Germany. When choosing the seat of the company, <b>tax issues</b> (in particular: the municipal trade tax rates) may be considered.
<b>Business object</b>	The articles of association must contain a <b>description of the company's business and area of activity</b> (e.g. "the business object of the company is the purchase and sale of (...) and the performance of services related thereto").
<b>Business Address</b>	Each company is obliged to have a business address which is registered with the commercial register.
<b>Receiving agent</b>	It is possible (not mandatory) to register a so called receiving agent, i.e. a person (private individual or legal entity) which is entitled to receive documents and legal statements on behalf of the company.
<b>Members of the Supervisory Board</b>	An AG must have <b>at least three private individuals</b> (no legal entities) as members of the Supervisory Board. The first members of the Supervisory Board can be appointed for a term until the end of the first (short) business year. The following information must be provided to the commercial register with regard to members of the Supervisory Board: name; (private) address; birthday date.
<b>Auditors</b>	The founding shareholders must appoint an auditor (private individual or legal entity) who must be qualified as a certified public accountant ( <i>Wirtschaftsprüfer</i> ).
<b>Members of the Board of Directors</b>	An AG can have <b>one or more private individuals</b> (no legal entities) as members of the Board of Directors. The same information as for members of the Supervisory Board must be provided with regard to each member of the Board of Directors.
<b>Representation power</b>	If the company only has one director, the director automatically represents the company solely. If the company has two or more directors, they can be granted either sole or joint representation power. Directors can only be released from the so called "restriction of self-contracting" to the extent that they can be entitled to enter into legal transactions on behalf of the company on the one and on behalf of a third party on the other hand.
<b>Registered share capital</b>	The registered share capital must amount to a <b>minimum of EUR 50,000</b> . When determining the registered share capital it should be noted that the share capital is subject to a <b>specific protection</b> under German law. The share capital can be paid up either by contributions <b>in cash</b> or contributions <b>in kind</b> . If contributions in kind (e.g. patents, real property or a business) are made, the contributed items and the value they represent must be assessed by an auditor and stated in the articles of association.
<b>Shares</b>	Shares can be issued <u>either</u> as <b>par value shares</b> (with a nominal amount) <u>or</u> as <b>non par value shares</b> (without a nominal amount) – the two forms of shares can not be mixed. The nominal value of shares (in case of par value shares) / the value attributed to each share (in case of non par value shares) must be <b>at least EUR 1</b> . Shares may further be issued as <b>registered shares or bearer shares</b> (both forms can be combined). The company can (but does not mandatorily have to) issue <b>share certificates</b> .
<b>Founding shareholder(s)</b>	An AG can be set up by <b>one or several shareholders</b> who must be identified by their names and addresses. If the founding shareholders are foreign companies, a (certified and apostilled) <b>extract from the commercial register</b> (or similar documentation such as e.g. a secretary certificate and a letter of good standing) confirming the legal existence of the company and the representation power of its directors may be required.
<b>Fiscal year</b>	The fiscal year must refer to a <b>fixed period</b> (e.g. the calendar year or December 1 <sup>st</sup> to November 30 of the following calendar year etc.) as German law does not allow for a flexible calendar year (such as e.g. the last weekend in December to the last weekend in December of the following calendar year).

The data **highlightd in green** above are **registered with the commercial register** and publicly available.

### III. To Dos / Required Documents

If a new AG is **set up** the following standard documentation needs to be executed:

Document	Remarks	Form	Involved persons
<b>Power of attorney ("PoA")</b>	<p>Required only if the founders cannot appear personally before a German notary.</p> <p><b>In addition</b> to the power of attorney the following documents might be required:</p> <ul style="list-style-type: none"> <li>• <b>Secretary certificate(s)</b> of the founding shareholder(s) confirming that the person(s) signing the power of attorney on behalf of the founding shareholder(s) have sufficient representation power</li> <li>• <b>Letter of good standing</b> confirming that the founding shareholder(s) have been duly incorporated and do validly exist</li> </ul>	<ul style="list-style-type: none"> <li>• Certified</li> <li>• [Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>• Founding shareholder(s)</li> <li>• [US notary]*</li> <li>• [Authority issuing the apostil]*</li> </ul>
<b>Incorporation deed</b>	<p>The incorporation deed usually includes the resolution of the founding shareholder(s) to adopt the Articles of Association and to appoint the members of the Supervisory Board. It further creates the obligation of the shareholders vis-à-vis the company to pay in their contributions.</p> <p>If shareholders' contributions are made <u>in kind</u> further documentation is necessary.</p>	Notarized	<ul style="list-style-type: none"> <li>• German notary</li> <li>• Founding shareholder(s)</li> </ul>
<b>[Appointment of first members of Supervisory Board]</b>	Usually part of the incorporation deed.	Notarized	Founding shareholders / their representative(s) based on PoA
<b>[Appointment of the first auditor]</b>	Usually part of the incorporation deed.	Notarized	Founding shareholders / their representative(s) based on PoA
<b>Articles of Association (AoA)</b>	The AoA must contain a <b>catalogue of business transactions subject to the approval of the Supervisory Board.</b>	Notarized	German notary
<b>Appointment of first members of Board of Directors</b>		In writing	Supervisory Board
<b>Notification</b>	Shareholders must provide a notification to the company if they have taken over <b>more than 25 %</b> of the shares in the company.	In writing	Founding shareholders
<b>Application with the commercial register</b>	To be signed by the director(s) and filed with the commercial register by the German notary.	<ul style="list-style-type: none"> <li>• Certified</li> <li>• [Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>• Founding shareholders; members of Supervisory Board and Board of Directors</li> <li>• German notary</li> <li>• [US notary]*</li> <li>• [Authority issuing the apostil]*</li> </ul>

\* If signed in the US.

The documents set out above must be filed with the commercial register and are **publicly available (if highlighted in green above)**. Eventually, **further documents** (such as e.g. a shareholders' agreement, an assessment of the value of contributions made by the founding shareholder(s) in case of contributions in kind etc.) are required.

If a **shelf company** is bought the following standard documentation needs to be executed:

Document	Remarks	Form	Involved persons
<b>Power of attorney (“PoA”) to amend the Articles of Association</b>	Required if <ul style="list-style-type: none"> <li>the shareholders’ resolution relating to the amendment of the Articles of Association is passed by the new shareholder(s) (and not by the shelf company provider) and</li> <li>the new shareholder(s) cannot appear personally before a German notary.</li> </ul>	<ul style="list-style-type: none"> <li>In writing</li> </ul>	New shareholder(s)
<b>Shareholders’ resolution</b>	By the shareholders’ resolution the members of the Supervisory Board are exchanged, a new auditor is appointed and the Articles of Association are amended.	Notarized	<ul style="list-style-type: none"> <li>German notary</li> <li>Shelf company provider or new shareholder(s)</li> </ul>
<b>New Articles of Association</b>	Providing <i>inter alia</i> for a new name and business object.	Notarized	German notary
<b>Share Purchase Agreement</b>	Contains standard reps & warranties of the shelf company provider (ownership of title, free transferability of the shares, absence of pledges and encumbrances, guarantee that the company has not taken up any commercial business and that the share capital was paid in and is still at the disposition of the company).	In writing	<ul style="list-style-type: none"> <li>Shelf company provider</li> <li>New shareholder(s)</li> </ul>
<b>Change of members of Board of Directors</b>		In writing	Supervisory Board
<b>Notification</b>	Shareholders must provide a notification to the company if they acquire <b>more than 25 %</b> of the shares in the company.	In writing	New shareholders
<b>Application with the commercial register</b>	To be signed by the new director(s) and filed with the commercial register by the German notary.	<ul style="list-style-type: none"> <li>Certified</li> <li>[Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>New member(s) of the Board of Directors</li> <li>German notary</li> <li>[US notary]*</li> <li>[Authority issuing the apostil]*</li> </ul>

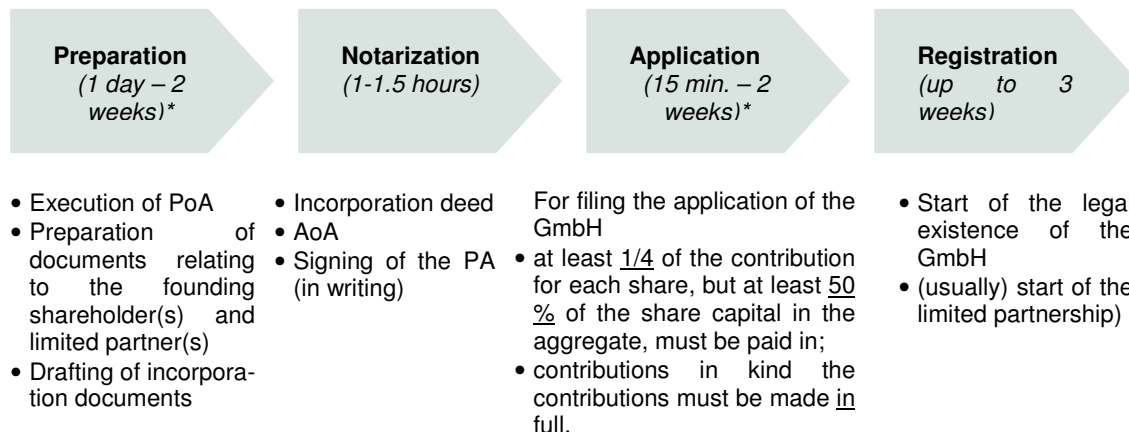
\* If signed in the US.

The documents **highlighted in green above** must be filed with the commercial register and are **publicly available**.

**Setting up / acquiring a (shelf) GmbH & Co. KG in Germany**

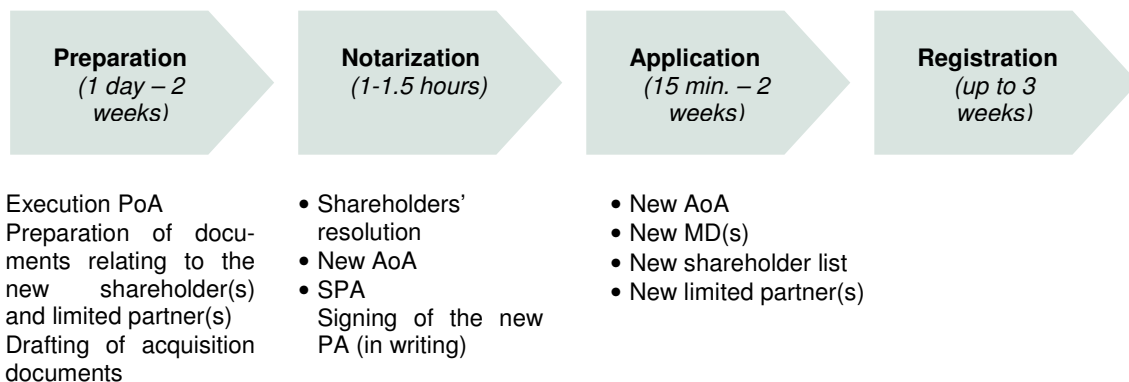
**I. Overview**

Assuming that both, the GmbH and the KG are newly set up, the setting-up procedure can be summarized as follow:



\* depending on the time needed to provide original certified / apostilled documents (e.g. secretary of certificate, letter of good standing, application form etc.). **PoA**: Power of attorney; **AoA**: Articles of association; **PA**: Partnership Agreement; **MD**: managing director.

A GmbH & Co. KG can also be **acquired** as an already legally existing shelf company in which case formally two companies are acquired (a GmbH and a limited partnership).



## II. Required information

Relating to the limited liability company (GmbH)	
<b>Name</b>	The name must (i) <b>not be misleading</b> , (ii) be <b>distinctive</b> from other companies and (iii) contain the designation " <b>GmbH</b> ". If it is intended to use the company name as a <b>trademark or domain name</b> at the same time, a (trademark and domain) research may be recommendable.
<b>Seat</b>	The seat of the company can be <b>freely determined</b> within Germany. When choosing the seat of the company, <b>tax issues</b> (in particular: the municipal trade tax rates) may be considered.
<b>Business object</b>	The business object of a GmbH being a general partner of a limited partnership usually comprises the holding of investments in other entities in particular as general partner of the limited partnership.
<b>Business Address</b>	Each company is obliged to have a business address which is registered with the commercial register.
<b>Receiving agent</b>	It is possible (not mandatory) to register a so called receiving agent, i.e. a person (private individual or legal entity) which is entitled to receive documents and legal statements on behalf of the company.
<b>Managing director(s)</b>	A GmbH can have <b>one or more private individuals</b> (no legal entities) as managing directors. The following information must be provided to the commercial register with regard to managing directors: <ul style="list-style-type: none"> <li>• name</li> <li>• (private) address</li> <li>• birthday date</li> </ul>
<b>Representation power</b>	If the company only has one managing director, the managing director automatically represents the company solely. If the company has two or more managing directors, they can be granted either sole or joint representation power. In addition, they can be released from the so called "restriction of self-contracting" (preventing managing directors to enter into legal transactions on behalf of the company on the one and on behalf of a third party or themselves on the other hand). A release from the restrictions of contracting on behalf of the company on the one and a third party on the other hand may enable managing directors to act on behalf of several companies of the same group.
<b>Registered share capital</b>	The registered share capital must amount to a <b>minimum of EUR 25,000</b> . When determining the registered share capital it should be noted that the share capital is subject to a <b>specific protection</b> under German law. The share capital can be paid up either by contributions <b>in cash</b> or contributions <b>in kind</b> . If contributions in kind (e.g. patents, real property or a business) are made, the contributed items and the value they represent must be assessed by an auditor and stated in the articles of association.
<b>Shares</b>	The shares must have a nominal amount of <b>at least EUR 1</b> and be divisible by 1. Each shareholder can take over one or several shares.
<b>Shareholder(s)</b>	A GmbH can be set up by <b>one or several shareholders</b> . If the shareholders are foreign companies, a (certified and apostilled) <b>extract from the commercial register</b> (or similar documentation such as e.g. a secretary certificate and a letter of good standing) confirming the legal existence of the company and the representation power of its directors may be required.
<b>Fiscal year</b>	The fiscal year must refer to a <b>fixed period</b> (e.g. the calendar year or December 1 <sup>st</sup> to November 30 of the following calendar year etc.) as German law does not allow for a flexible calendar year (such as e.g. the last weekend in December to the last weekend in December of the following calendar year).

<b>Relating to the Limited Partnership (KG)</b>	
<b>Name</b>	The name of a GmbH & Co. KG must include a reference indicating its legal form of a limited partnership with a limited liability company as general partner; accordingly, the name of the company must include "GmbH & Co. KG".
<b>Seat</b>	Unlike in case of limited liability companies, the registered seat of a partnership should cover with the place of management of the partnership. If the partnership is managed from outside Germany, German statutory law does, in principle, provide for that the partnership ceases to exist as a "German partnership" and is dissolved. Accordingly, it should be made sure that the management of the partnership is (at least mainly) acting at the German seat of the partnership.
<b>Business address</b>	As above.
<b>Partnership interest(s)</b>	The limited partner(s) may freely choose the amount of its/their partnership interest; there is no minimum amount provided for by law.
<b>Limited partner(s)</b>	The KG needs to have at least one limited partner which can be a private individual or a legal entity.
<b>General partner</b>	Usually, the GmbH is the sole general partner of the GmbH & Co. KG.
<b>Fiscal year</b>	As above.

The data **highlighted in green above** are **registered with the commercial register** and are publicly available.

### III. To Dos / Required Documents

If a GmbH & Co. KG is **set up**:

Document	Remarks	Form	Involved persons
<b>Power of attorney ("PoA")</b> for setting up the GmbH & Co. KG	Required only if the founders cannot appear personally before a German notary	<ul style="list-style-type: none"> <li>• Certified</li> <li>• [Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>• Founders</li> <li>• [US notary]*</li> <li>• [Authority issuing the apostil]*</li> </ul>
	<p><b>In addition</b> to the power of attorney the following documents might be required:</p> <ul style="list-style-type: none"> <li>• <b>Secretary certificate(s)</b> of the founding shareholder(s) confirming that the person(s) signing the power of attorney on behalf of the founding shareholder(s) have sufficient representation power</li> <li>• <b>Letter of good standing</b> confirming that the founding shareholder(s) have been duly incorporated and do validly exist</li> </ul>	<ul style="list-style-type: none"> <li>• Certified</li> <li>• Apostilled</li> </ul>	<ul style="list-style-type: none"> <li>• Founding shareholder(s)</li> <li>• Company secretary</li> <li>• US notary</li> <li>• Authority issuing the apostille</li> <li>• Authority issuing the letter of good standing</li> </ul>

#### Documents required to set up the GmbH

<b>Incorporation deed</b>	The incorporation deed includes the resolution of the founding shareholder(s) to adopt the Articles of Association and to appoint the managing director(s) of the company	Notarized	<ul style="list-style-type: none"> <li>• German notary</li> <li>• Founding shareholder(s)</li> </ul>
<b>Articles of Association</b>		Notarized	German notary
<b>Shareholder list</b>		Signed and stamped by the German notary	German notary
<b>Application with the commercial register</b>	To be signed by the managing director(s) and filed with the commercial register by the German notary	<ul style="list-style-type: none"> <li>• Certified</li> <li>• [Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>• Managing director(s)</li> <li>• German notary</li> <li>• [US notary]*</li> <li>• [Authority issuing the apostil]*</li> </ul>
<b>Instruction letter</b>	The managing director(s) need to sign a so called "instruction letter" (issued by a German notary) informing them about their duty to disclose certain information to the commercial register if they cannot appear personally before a German notary	In writing	<ul style="list-style-type: none"> <li>• German notary</li> <li>• Managing director(s)</li> </ul>

#### Documents required to set up the KG

<b>Partnership agreement</b>		In writing	<ul style="list-style-type: none"> <li>• Partners of the KG</li> </ul>
<b>Application with the commercial register</b>	To be signed by the general partner (represented by its managing director(s))	<ul style="list-style-type: none"> <li>• Legalized</li> <li>• [Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>• Managing director(s)</li> <li>• German notary</li> <li>• [US notary]*</li> <li>• [Authority issuing the apostil]*</li> </ul>

\* If signed in the US.



The documents highlighted above must be filed with the commercial register and are **publicly available (if highlighted in green above)**.

If a **shelf company** is bought the following standard documentation needs to be executed:

Document	Remarks	Form	Involved persons
<b>Power of attorney ("PoA")</b>	Required if the new shareholders cannot appear personally before a German notary.	In writing	New shareholder(s)
	In addition to the power of attorney the following documents might be required: <ul style="list-style-type: none"> <li>• <b>Secretary certificate(s)</b> of the founding shareholder(s) confirming that the person(s) signing the power of attorney on behalf of the founding shareholder(s) have sufficient representation power</li> <li>• <b>Letter of good standing</b> confirming that the founding shareholder(s) have been duly incorporated and do validly exist</li> </ul>	<ul style="list-style-type: none"> <li>• Certified</li> <li>• Apostilled</li> </ul>	<ul style="list-style-type: none"> <li>• Founding shareholder(s)</li> <li>• Company secretary</li> <li>• US notary</li> <li>• Authority issuing the apostil</li> <li>• Authority issuing the letter of good standing</li> </ul>
<b>Shareholders' resolution for the GmbH</b>	By the shareholders' resolution the managing directors are exchanged and the Articles of Association are amended.	Notarized	<ul style="list-style-type: none"> <li>• German notary</li> <li>• Shelf company provider or its representatives (authorized by PoA)</li> </ul>
<b>New Articles of Association</b>	Providing <i>inter alia</i> for a new name and business object.	Notarized	German notary
<b>Partners' resolution for the limited liability company</b>	By the partners' resolution the partnership agreement is amended.	In writing	• Partners
<b>New partnership agreement</b>	Providing <i>inter alia</i> for a new name and business object.	In writing	• Partners
<b>Share Purchase Agreement (referring to the GmbH and the limited partnership)</b>	Contains standard reps & warranties of the shelf company provider (ownership of title, free transferability of the shares / partnership interests, absence of pledges and encumbrances, guarantee that the company has not taken up any commercial business and that the share capital was paid in and is still at the disposition of the company).	Notarized	<ul style="list-style-type: none"> <li>• German notary</li> <li>• Shelf company provider</li> <li>• New shareholder(s) and limited partner(s)</li> </ul>
<b>Shareholder list</b>		Signed and stamped by the German notary	German notary
<b>Application with the commercial register</b>	To be signed by the new managing director(s) of the GmbH and filed with the commercial register by the German notary.	<ul style="list-style-type: none"> <li>• Certified</li> <li>• [Apostilled]*</li> </ul>	<ul style="list-style-type: none"> <li>• Managing director(s)</li> <li>• German notary</li> <li>• [US notary]*</li> <li>• [Authority issuing the apostil]*</li> </ul>
<b>Instruction letter</b>	The managing director(s) need to sign a so called "instruction letter" (issued by a German notary) informing them about their duty to disclose certain information to the commercial register if they cannot appear personally before a German notary	In writing	<ul style="list-style-type: none"> <li>• German notary</li> <li>• New managing director(s)</li> </ul>

\* If signed in the US.

The documents highlighted above must be filed with the commercial register and are **publicly available (if highlighted in green above)**.

## Mandatory indications on business letters (including e-mails) and internet sites

Pursuant to statutory law, the following data must be reflected in **business letters** (including any non oral messages relating to business activities such as, in particular **e-mails** and **faxes**) which are addressed to one specific third party or a number of specific third parties:

<b>GmbH and AG</b>	<ul style="list-style-type: none"> <li>• full company name (as registered with the commercial register);</li> <li>• legal form of the company;</li> <li>• seat of the company;</li> <li>• competent local court (commercial register) and company number;</li> <li>• name(s) of the managing director(s) (GmbH) / members of the Board of Directors and identification of the chairman of the Board of Directors (AG);</li> <li>• name of the chairman of the advisory board (GmbH - if applicable) / of the Supervisory Board (AG).</li> </ul>
<b>GmbH &amp; Co. KG</b>	<ul style="list-style-type: none"> <li>• full company name of the limited partnership;</li> <li>• legal form of the limited partnership;</li> <li>• seat of the limited partnership;</li> <li>• competent local court (commercial register) and company number of the limited partnership</li> <li>• legal form of the general partner;</li> <li>• seat of the general partner;</li> <li>• competent local court (commercial register) and company number of the general partner.</li> </ul>
<b>Autonomous branch (if the main company is a limited liability company)</b>	<ul style="list-style-type: none"> <li>• competent local court (commercial register) and company number of the German branch;</li> <li>• full company name of the main company;</li> <li>• legal form of the main company;</li> <li>• seat of the main company;</li> <li>• competent local court (commercial register) and company number of the main company (if available);</li> <li>• name(s) of the managing director(s) of the main company;</li> <li>• name of the chairman of the advisory board of the main company (if applicable);</li> <li>• indication that the branch is in liquidation and names of the liquidators (if applicable).</li> </ul>

In case of non-compliance a **fine up to EUR 5,000** may be imposed by the competent local court. Non-compliance may further lead to **claims for damages of third parties**.

The following data need to be published on the **internet site** (at least in the impressum) of **corporations** (e.g. a GmbH):

- full company name (as registered with the commercial register);
- legal form of the company;
- seat of the company;
- business address of the company;
- competent local court (commercial register) and company number;
- name(s) of the managing director(s);
- indication that the company is in liquidation (if applicable).

In case of non-compliance a **fine up to EUR 50,000** may be imposed. Non-compliance may further lead to **claims for damages of third parties**.

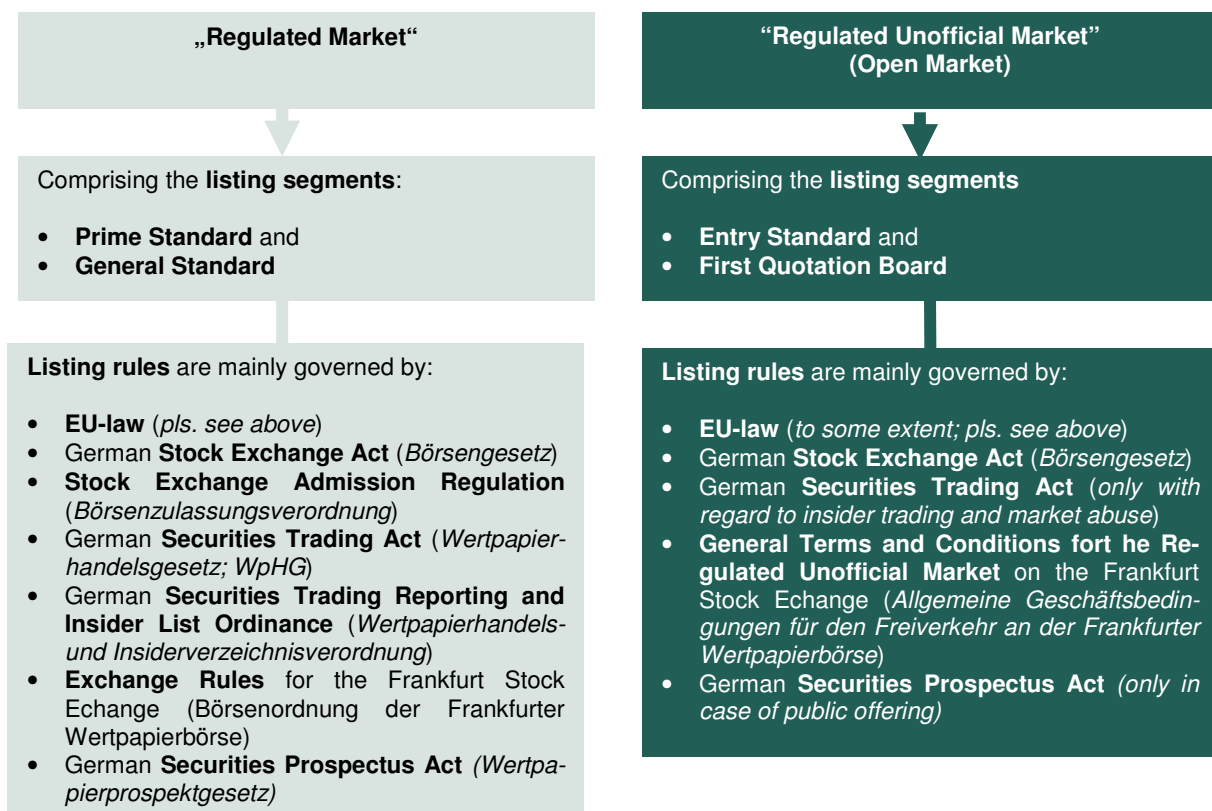
## Overview Deutsche Börse stock market (2009)

### I. Markets, listing segments and listing rules

In Europe, there are **two legally defined ways to accede capital market**:



Via Deutsche Börse, issuers and investors can have access to **both markets**:



In addition, Real Estate Investment Trusts („**REITs**“) whose shares have been listed in the General Standard or Prime Standard or included in the Open Market or Entry Standard may accede a **specific REITs segment** („Deutsche Börse REITs segment“).

## II. Transaction types

When accessing the capital market, companies can choose between different types of transactions (irrespective of the market segment they intend to select). For some transaction types a **prospectus** is required.

Initial Public Offering (IPO)	Private Placement (PP)	Admission / inclusion without public offer
<p>In an IPO shares are offered to private and/or institutional investors. When a company offers shares for the first time, the offer is called an <b>IPO</b>.</p> <p>Once a company is listed and intends to make a further public offering, the transaction is called a seasoned equity offering (<b>SEO</b>).</p>	<p>A PP involves offering shares to a <b>selected base of institutional investors</b>.</p> <p>In case of a PP no approved prospectus is required for a placement within the <b>Regulated Unofficial Market</b> (First Quotation Board and Entry Standard); it is sufficient to provide an <b>issuer data form</b>.</p>	<p>For inclusion without public offer within the <b>Regulated Unofficial Market</b> no approved prospectus is required; an <b>issuer data form</b> is sufficient.</p> <p>In the <b>Regulated Market</b> a <b>prospectus for admission purposes</b> is, in general, mandatory.</p>
<p>In case of an IPO an <b>approved prospectus</b> is required by the Federal Financial Supervisory Authority (Bundesanstalt für Finanzaufsicht; <b>BaFin</b>).</p>	<p>A <b>prospectus</b> is, however, required for the purpose of listing shares or certificates representing shares in the <b>Regulated Market</b> (Prime Standard or General Standard).</p>	

The law applicable to the **prospectus** (mainly: the EC-Prospectus Regulation and further EC-Regulations as well as the German Securities Prospectus Act) provides for a **minimum content** of the prospectus, **language** requirements, requirements relating to the **accounting standard** of issuers applying to the Regulated Market and the Regulated Unofficial Market.

The **issuer data form** is not an offering circular but only an **information paper** on the issuer to be provided to Deutsche Börse; unlike the prospectus it is **not published**.

### III. Admission requirements

#### 1. Regulated Market (General and Prime Standard)

Requirements	
Approved prospectus	Required
Accounting standards	<ul style="list-style-type: none"> <li>• <b>EU issuers</b> preparing <b>consolidated</b> financial statements (“FS”): <b>IAS/IFRS</b></li> <li>• <b>Non-EU issuers</b> preparing consolidated FS: <b>IAS/IFRS</b> or <b>equivalent</b> standards (<b>US-GAAP</b>, Canadian GAAP and Japanese GAAP)</li> </ul>
Reporting history	<p>The company must have existed as an enterprise for <b>at least 3 years</b>; the issuer must, however, not have existed in its current legal setup (e.g. as a stock corporation) for this period. <b>Exemptions are possible</b> (assessed by the Management Board of Deutsche Börse on a case-by case-basis).</p> <p>Furthermore, the issuer must have <b>published</b> its <b>financial statements</b> for the <b>last three financial years</b> in accordance with applicable law.</p>
Minimum issuing volume	10,000 shares
Minimum market capitalization	EUR 1.25 million
Initial free float	Minimum of 25 % Exemptions possible
Free transferability of securities	Required
Applicant	<p><b>Issuer</b> together with a <b>German bank</b> or a <b>financial services institution</b> admitted to participate in stock exchange trading on a German securities exchange (minimum equity capital of EUR 730,000.00).</p> <p>If <b>certificates</b> representing shares are to be issued, the <b>depository</b> needs to sign the listing application as well.</p>

## 2. Regulated Unofficial Market

Requirements	First Quotation Board	Entry Standard
Approved prospectus	Required in case of a <b>public offer</b>	
Prospectus accounting standards (if a prospectus is required)	<ul style="list-style-type: none"> <li>• <b>EU issuers</b> preparing <b>consolidated</b> financial statements (“FS”): <b>IAS/IFRS</b></li> <li>• <b>Non-EU issuers</b> preparing consolidated FS: <b>IAS/IFRS</b> or <b>equivalent</b> standards (<b>US-GAAP</b>, Canadian GAAP and Japanese GAAP)</li> </ul>	
Issuer data form	Required if securities are <b>not traded</b> on a domestic or foreign organized market or <b>no prospectus</b> is submitted	Required if <b>no prospectus</b> is submitted
Audited consolidated financial statements including a consolidated management report	-	Required
Reporting and accounting standards	-	<b>National GAAP or IAS/IFRS</b>
Orderly stock exchange trading	At least <b>30 initial shareholders</b>	
Minimum share capital	<b>EUR 250,000</b>	
Applicant	Required at all times	
Deutsche Börse Listing Partner	-	Required

#### IV. Follow-up duties

Regulated Market		Regulated Unofficial Market	
Prime Standard	General Standard	Entry Standard	First Quotation Board
<ul style="list-style-type: none"> <li>• <b>Quarterly reports</b></li> <li>• <b>Company news</b> in English language</li> <li>• <b>Company calendar</b> on internet</li> <li>• At least one <b>analysts conference/year</b></li> </ul>			
<ul style="list-style-type: none"> <li>• <b>Annual financial report</b> (within 4 months after the end of the reporting period)</li> <li>• <b>Half-yearly financial report</b> (within 2 months after the reporting period)</li> <li>• <b>Management interim statements</b> (required in the period between 10 weeks before and 6 weeks after the first and second half of the business year)</li> <li>• <b>Publication language:</b> German (for German issuers) / English (for international issuers)</li> <li>• <b>Accounting standards:</b> IAS/IFRS or equivalent (US-GAAP, Canadian Gaap and Japanese GAAP)</li> <li>• <b>Ad hoc disclosure</b> required</li> <li>• Disclosure of directors' dealings</li> <li>• <b>Publication of voting rights notifications</b> (within 3 trading days)</li> <li>• <b>Corporate governance</b> (German issuers: each year; explanation required if not complied with)</li> <li>• <b>Annual information update</b></li> </ul>		<ul style="list-style-type: none"> <li>• <b>Publication of annual financial statements</b> (within 6 months after the end of the reporting period)</li> <li>• <b>Publication of interim reports</b> (within 3 months after the end of the reporting period)</li> <li>• <b>Publication language:</b> German (for German issuers) / English (for international issuers)</li> <li>• <b>Accounting standards</b> <ul style="list-style-type: none"> <li>◦ In <b>reports:</b> National GAAP or IAS/IFRS</li> <li>◦ In <b>prospectus</b> (if required): IAS/IFRS or equivalent (US-GAAP, Canadian Gaap and Japanese GAAP)</li> </ul> </li> <li>• <b>Quasi ad hoc disclosure</b> required</li> <li>• <b>Corporate profile</b> required</li> <li>• <b>Corporate calendar</b> required</li> <li>• <b>Applicant monitoring follow-up obligations</b> required</li> </ul>	
<ul style="list-style-type: none"> <li>• <b>Insider trading rules</b></li> <li>• <b>Market abuse rules</b></li> </ul>			

More information can be found here:

[http://deutsche-boerse.com/dbag/dispatch/de/binary/qdb\\_content\\_pool/imported\\_files/public\\_files/10\\_downloads/33\\_going\\_being\\_public/10\\_products/055\\_listing\\_guide/Listing\\_Guide.pdf](http://deutsche-boerse.com/dbag/dispatch/de/binary/qdb_content_pool/imported_files/public_files/10_downloads/33_going_being_public/10_products/055_listing_guide/Listing_Guide.pdf)

## Overview various forms of Mezzanine Capital

### I. General information

The various forms of Mezzanine Capital differ with regard to

- duration of the capital commitment
- loss-sharing
- conditions of compensation

The following overview can be given with regard to potential forms of Mezzanine Capital. With regard to their classification as debt or equity in the balance sheet, variations may occur due to different accounting rules.

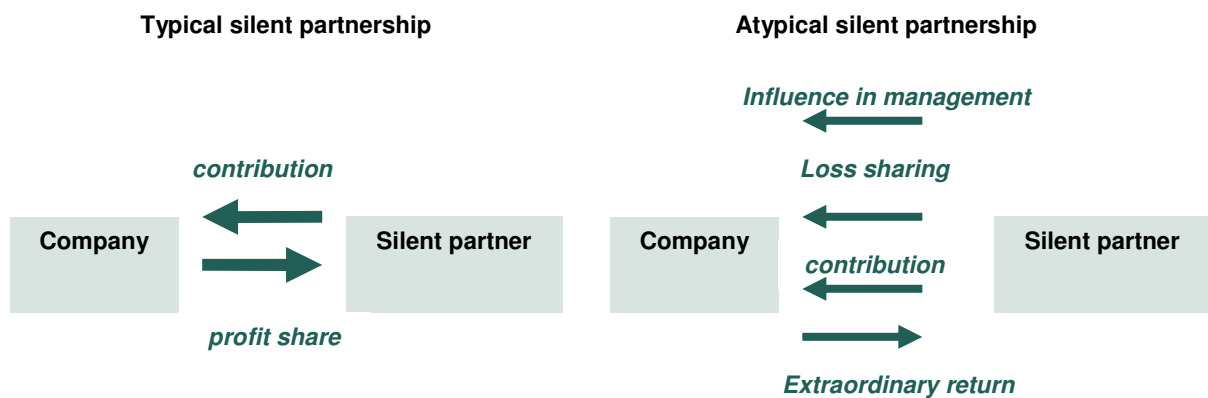
Form	Duration in years	Loss sharing	Compensation	Balance sheet		Taxable debt
<b>Subordinate Loan</b>	3 – 10	No but subordination	Fix	Debt		Yes
<b>Silent partnership (typical)</b>	5 – 10	No but subordination	Fix and variable (depending on profit)	Debt	or equity, (depending on the agreement)	Yes
<b>Participation right (Genussschein)</b>	5 – 10	No but subordination	Fix or variable	Generally debt		Equity in case of subordination and loss sharing
<b>Convertible bonds</b>	5 – 10	before conversion: subordination after conversion: yes	Fix and conversion rights	Equity after conversion		Before conversion
<b>Silent partnership (atypical)</b>	5 – 10	yes	Fix and/or variable (depending on profit)	Equity		No



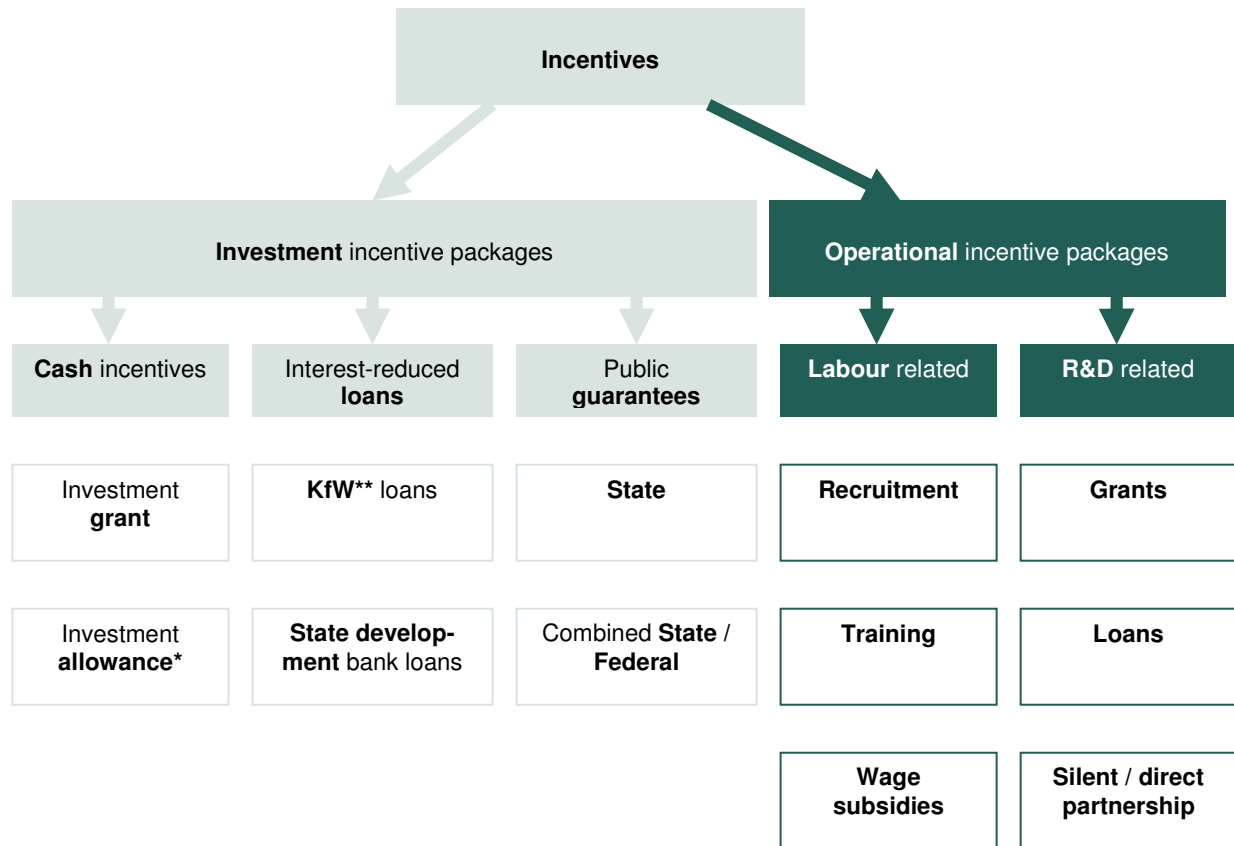
## II. Example: silent partnership

One of the standard forms of Mezzanine Capital used in Germany is the **silent partnership** which is frequently used in the context of public funding.

In a silent partnership the silent partner is granted a **profit share** in exchange for a **capital contribution**. Depending on the conditions of the silent partnership agreement with regard to the silent partner's influence in the management and risk exposure, the silent partnership can be designed as a **typical** or as an **atypical** silent partnership:



Overview Incentives



\* only available for investments in **Eastern Germany**.

\*\* the **KfW banking group** (*Kreditanstalt für Wiederaufbau*) is the nationally operating bank of the Federal Republic of Germany offering a number of different financing tools (e.g. promotional loan programs, mezzanine financing and private equity). The KfW is usually contacted via the applicant's private bank.

**More information** can be found here:

- <http://www.gtai.com/homepage/investment-guide-to-germany/incentives-programs/>
- [www.kfw.de](http://www.kfw.de)

**Overview of tax agreements entered into between Germany and the United States**

Date	Title of Agreement
December 8, 2008	Memorandum of Understanding Between The Competent Authorities of The Federal Republic of Germany and The United States of America
June 4, 2008	Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to certain other Taxes
June 1 <sup>st</sup> , 2006	Joint Declaration by the Federal Republic of Germany and the United States of America on the Occasion of the Signing on 1 June 2006 of the Protocol Amending the Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes signed on 29th August 1989
June 1 <sup>st</sup> , 2006	Protocol amending the Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to certain other Taxes signed on 29th August 1989
December 21, 2000	Revision of the Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation with respect to Taxes on inheritance and gift
August 29, 1989	Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes

## Determination of trade tax and overall taxburden – example

### I. Determination of trade tax

#### 1. Summary trade tax system (for corporations and partnerships)

The applicable trade tax rate depends on **two criteria**:

##### **Tax assessment rate**

(= standard trade tax base rate pursuant to the German trade tax code)

amounting to **3.5 %** of the annual taxable earnings for corporations, partnerships and other business operations.

##### **Municipal collection rate**

(= trade tax collection rate provided for by each municipality individually)

**at least 200 %** up to an unlimited percentage of the tax assessment rate. The average municipal collection rate is approximately 400 %.

**No solidarity surcharge** is imposed on trade tax.

#### 2. Calculation of trade tax burden - example:

Company A with annual taxable earnings of EUR 1,000,000 is seated in the municipality of X. X has a municipal collection rate of 400 percent.

##### **Step 1:**

The **trade tax base amount** of A is:

1,000,000 multiplied with the base rate of **3.5 %** (= EUR 35,000).

##### **Step 2:**

The trade tax base amount of EUR 35,000 is multiplied with the **municipal collection rate** of 400 % leading to a **trade tax burden** of EUR 140,000.

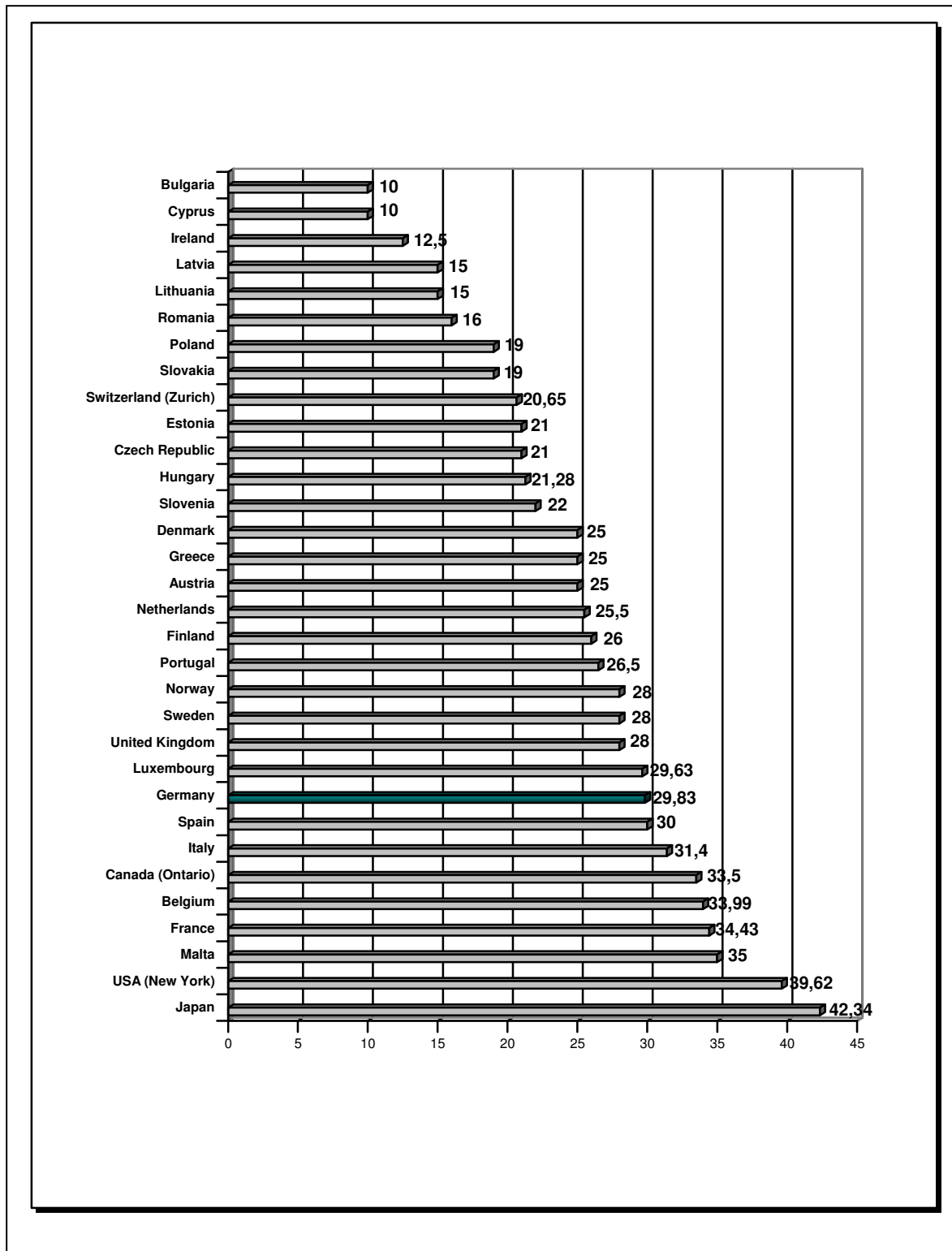
## II. Determination of overall tax burden

### Example:

Company A with annual taxable earnings of **EUR 1,000,000** is seated in the municipality of X. X has a municipal collection rate of **400 percent**.

	Corporation			Partnership	
<b>Company Level ("Level I")</b>					
Taxable Income – <i>Level I</i>	1,000,000 EUR			1,000,000 EUR	
Trade Tax	– 140,000 EUR			– 140,000 EUR	
Corporate income tax	– 150,000 EUR			---	
Solidarity surcharge	– 8,250 EUR			---	
Net income	= 701,750 EUR			= 860,000 EUR	
	in case of <b>distribution</b> of dividends:		if no distribution of dividends <b>(full retention)</b>	<b>withdrawal</b> of profits	<b>full retention</b>
	individuals hold shares in corporation as <b>business</b> assets (partial income rule)	individuals hold shares in corporations as <b>private</b> assets (final withholding tax)			
	↓	↓	↓	↓	↓
<b>Shareholder / Partner Level ("Level II")</b>					
Taxable Income – <i>Level II</i>	701,750 EUR	701,750 EUR	---	1,000,000 EUR	1,000,000 EUR
Tax-exempt	– 280,700 EUR	---	---	---	---
Income tax	– 176,841 EUR	– 175,437 EUR	---	– 420,000 EUR	– 282,500 EUR
Trade tax payments to be set off against personal income tax	---	---	---	+ 133,000 EUR	+ 133,000 EUR
Solidarity surcharge	– 9,726 EUR	– 9,649 EUR	---	– 15,785 EUR	– 8,223 EUR
Net pay	= 515,183 EUR	= 516,664 EUR	---	= 557,215 EUR	= 702,277 EUR
Overall tax burden (trade tax, income tax, solidarity surcharge)	<u>48.48 %</u>	<u>48.33 %</u>	<u>29.83 %</u>	<u>44.27 %</u>	<u>29.77 %</u>

Comparison of international taxation of companies (2008) in percentage



Source: German Federal Ministry of Finance.

**Determination of Real Property Tax Burden – Example**

**I. Summary real property tax system**

The real property tax burden is calculated by multiplying

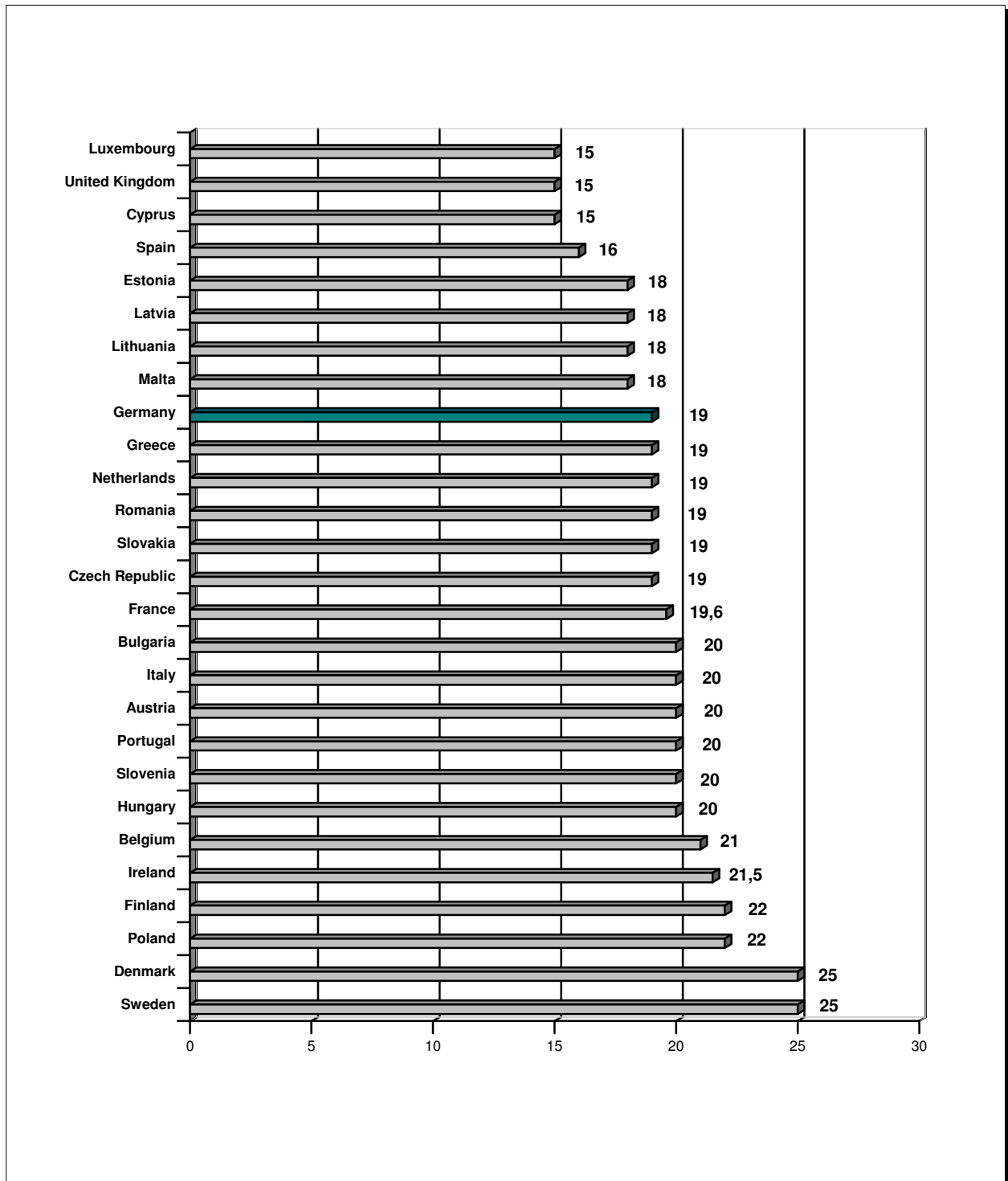
the assessed value of the real property	the real property tax rate	the municipal collection rate
is determined by the tax authorities in accordance with the German Assessment Code ( <i>Bewertungsgesetz</i> ).	depends on the type of real property (e.g. the rate for property used for [semi-] detached houses with a value of up to EUR 60,000 is 0.26 %; for all remaining property including commercially used property the rate is 0.35 %.	as in case of trade tax (individual) municipal collection rates apply to real property "A" and "B".

**II. Calculation of real property tax burden - example:**

Real property tax burden for a commercial building with an assessed value of EUR 1,000,000 in a municipality with a real property tax "B" collection rate of 350 %.

Assessed value	EUR 1,000,000
x basic real property tax rate	X 0.35 %
x municipal collection rate "B"	X 350 %
<hr/>	<hr/>
= Real property tax burden	= EUR 12,250

Comparison of European VAT rates (2008) in percentage



Source: German Federal Ministry of Finance.

The VAT-rates of the **UK** (usually being 17.5 %) were reduced by 2.5 % until December 31, 2009 as a part of the UK economic stimulus plan.



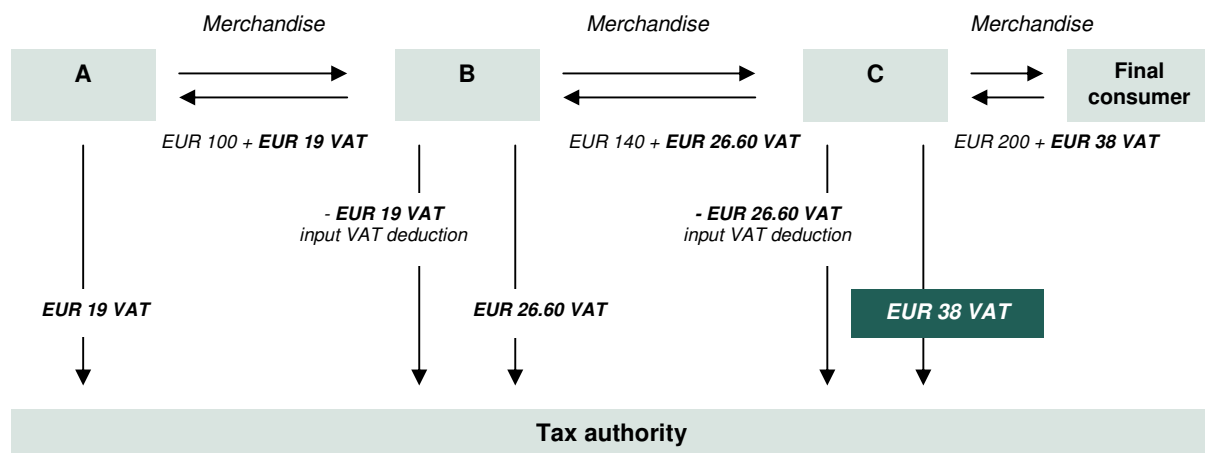
**Concept of VAT – Example**

**Example:**

Company A supplies to company B merchandise with a value of EUR 100 plus EUR 19 VAT (19 % of EUR 100). A pays EUR 19 VAT to the tax authority whereas B applies for input VAT deduction in the same amount towards the tax authority.

If B sells the merchandise for EUR 140 Euro plus EUR 26.60 VAT (19 % of EUR 140) to company C, B is obliged to pay EUR 26,60 VAT to the tax authority whereas C may apply for input VAT deduction in the same amount.

If C sells the merchandise for EUR 200 plus EUR 38 Euro VAT (19 % of EUR 200) to a final consumer, C must pay VAT in the amount of EUR 38 Euro to the tax authority. **This amount remains finally with the tax authority.**



**Provisions typically contained in service agreements with managing directors**

<b>Start date</b>	
<b>Term</b> (in case of a fixed term contract)	Fixed term contracts are quite usual in practice. It should, however, be considered that fixed term contracts can only be prematurely terminated <b>for cause</b> and are, in particular, <b>not automatically terminated in case of removal of the managing director from office</b> (unless this is explicitly provided for in the service agreement).
<b>Termination</b>	
<b>Managing authority and power of representation</b>	If the company only has one managing director, the managing director automatically represents the company solely. If the company has two or more managing directors, they can be granted either <b>sole or joint representation power</b> .
<b>Business transactions requiring prior consent of the shareholders' meeting</b>	Service agreements frequently contain a <b>catalogue</b> of business transactions subject to prior approval of the shareholders. Such internal restrictions do, however, <b>only affect the relationship between the managing director and the company</b> . In case of breach the managing director can be <b>held liable</b> by the company. Business transactions subject to the catalogue but performed without prior approval are, nevertheless, binding for the company towards the contracting partner unless the contracting partner was aware of the catalogue and the breach.
<b>Office Time / side activities</b>	Managing directors are, in principle, obliged to invest their full time and to dedicate their whole working capacity, professional skills and experience exclusively to the company and to be available for the company at any time. They may, however, be allowed to have side activities which usually are specified in the service agreement or made subject to prior approval of the shareholders.
<b>Non-compete</b>	Whereas managing directors are obliged not to perform any activities competing with the company <b>during the term of their office</b> , a specific agreement is necessary for a <b>post-contractual non-compete</b> (often combined with a non-solicit obligation). Post-contractual non competes are possible but subject to some <b>limitations</b> with regard to <ul style="list-style-type: none"> <li>• the prohibited <b>competitive activity</b></li> <li>• the <b>territory</b> within which the competitive activity is prohibited and</li> <li>• the <b>term</b> of the post-contractual non-compete</li> </ul> <p>Managing directors subject to a post-contractual non compete are further entitled to a <b>compensation</b> of at least 50 % of their last annual contractual benefits for the term of the non compete.</p>
<b>Remuneration</b>	Remuneration of managing directors frequently contains <b>fixed and variable elements</b> (in particular performance related bonuses). Furthermore, provisions relating to <b>company cars</b> and <b>travel expenses</b> are frequently part of remuneration provisions.
<b>Vacation</b>	Statutory law does not provide for a right of managing directors for a minimum of annual vacation; usually, annual vacation of 20 to 30 working days is, however, agreed on in the service agreement.
<b>Confidentiality and return of documents</b>	Managing directors are subject to a confidentiality duty with regard to business and trade secrets of the company by law. However, service agreements often contain more precise (and/or extensive) provisions with regard to confidentiality and return of documents.
<b>Incapacity for work</b>	Statutory law provides for that managing directors are entitled to continue to receive payment if they are prevented from exercising their office for a period of not more than a few days.
<b>Intellectual Property (IP) rights</b>	Managing directors are usually obliged to transfer to the company the exclusive and unlimited right of use and exploitation of all IP rights created by them during the term of their office.

**Provisions typically contained in employment agreements**

<b>Name and address of the parties</b>	
<b>Start date</b>	
<b>Term</b> (in case of a fixed term contract)	If the employee has not been employed by the same employer previously (which should be checked first), a term of <b>up to 2 years</b> can be agreed without any justification of the limitation of term. If an employee has been employed before (e.g. seasonal work), or it is intended that the duration shall exceed 2 years (e.g. for the substitution of employees in parental or maternity leave) the reason to use a fixed term contract needs to be <b>specified</b> . In case of non-compliance with these provisions the employee will be considered as a <b>permanent employee</b> from the very beginning of his contract.
<b>Place of work</b>	
<b>Job description</b>	
<b>Remuneration</b>	<b>Composition</b> and <b>amounts</b> of remuneration, including any <b>supplements</b> and <b>bonuses</b> and the <b>date</b> on which they will be paid.
<b>Working time</b>	Under German law the normal working day is <b>8 hours</b> , up to a maximum of <b>10 hours</b> provided that an average of 8 hours is not exceeded during a period of 6 months or of 24 weeks. However, <b>collective agreements</b> or the employment contract typically provide for reduced working hours, between 35 and 40 hours per week.  <b>Extra hours</b> worked must be compensated by allocation of additional time off. <b>Overtime bonuses</b> are only mandatory if provided for in individual or collective labor agreements.
<b>Annual vacation</b>	The legal minimum vacation is <b>20 working days p.a.</b> after completing six months of service, based on a 5 day working week. Collective agreements or the employment contract may increase these entitlements, typically up to 30 days per year. The number of statutory holidays varies from region to region, from between 9 to 13 days.
<b>Notice period in case of termination</b>	The statutory minimum is <b>2 weeks within the probationary period</b> (usually 6 months) following 4 weeks, calculated to the 15th day of the month or the end of the month. For subsequent years with the same employer and after the employee's 25th birthday, <b>increased notice periods</b> apply in stages, up to a <b>maximum of 7 months' notice after 20 years</b> of service. Service periods of the employee prior to his 25th birthday are not counted as years of service for this calculation.
Reference to <b>collective bargaining agreements, shop agreements or any other general rules</b> applicable to the employment relationship (if any).	

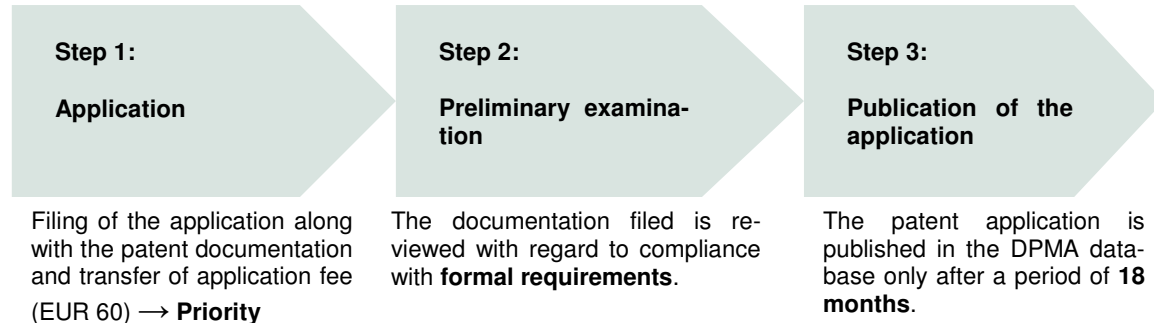
**Social Security contributions (July 2009)**

Components in % of gross salary	Employer's / employee's share of contribution	
<b>Pension Insurance</b> (19.9 %)	Employer: 9.95 %	Employee: 9.95 %
<b>Health Insurance</b> (14.9 %)	Employer: 7.3 %	Employee: 8.2 %
<b>Unemployment Insurance</b> (2.8 %)	Employer: 1.4 %	Employee: 1.4 %
<b>Nursing Care Insurance</b> (1.95 %)	Employer: 0.975 %	Employee: 0.975 %*
<b>Accident insurance</b> (1.8 %)	Employer: 1.28 %	Employee: 0.975 %

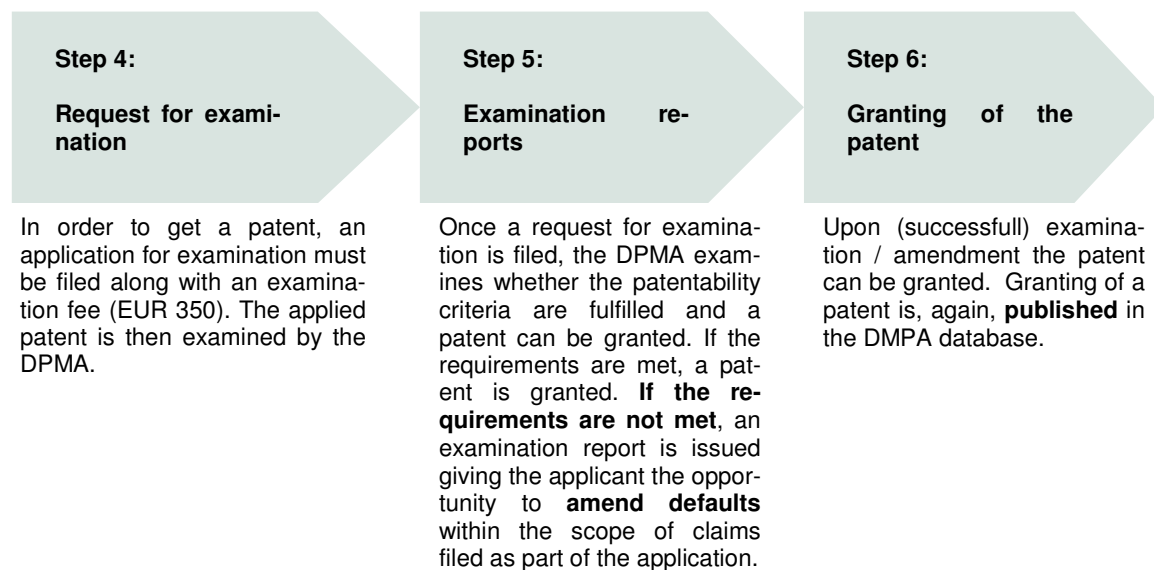
\* Childless employees pay an extra 0.25 % on top of their contribution.

## National patent examination and grant procedure in Germany

The **patent examination and grant procedure** can be roughly divided in the following steps:

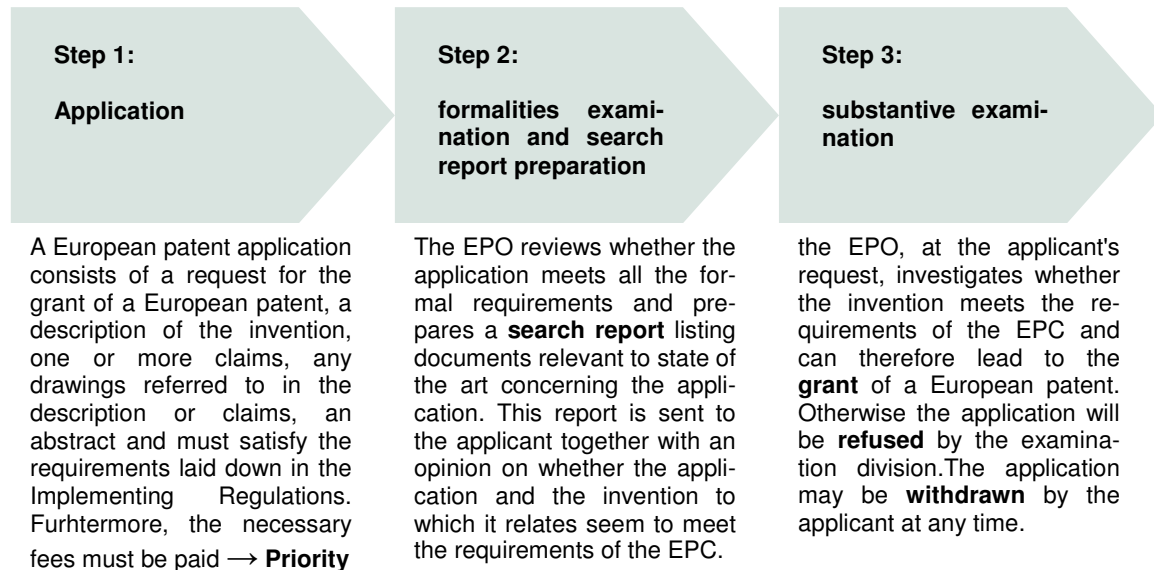


The request for examination must be filed within a maximum period **7 years upon application** of the patent. However, **annual fees** must be paid **as from the 3<sup>rd</sup> year** upon application in order to maintain the application (and the priority related thereto). A **separate research request** may be filed before the examination of the application in order to be informed about the documents which might be relevant to assess the patentability of the invention.



The granting of patents can be **opposed** to within a term of **three months upon publication of grant**. If no (successful) opposition is filed, the patent becomes provides full protection as from the **date of the application** for a period of **20 years**. If the opposition is successful, the applicant may **appeal to the Federal Patent Court**.

**European patent examination and grant procedure**



Apart from the examination and granting procedure, there may be **further proceedings** such as:

**Opposition proceedings...**

...can take place if an opposition is filed **within nine months of publication of the grant of the European patent**. Oppositions can be filed, for example, on the grounds that an invention is **not patentable** under the EPC, that it does **not disclose the invention clearly and completely** so that a person skilled in the art could carry it out, or that the subject-matter of the European patent extends **beyond the content of the application as filed**. At this stage, **revocation or limitation proceedings**, initiated by the patent proprietor himself, may take place.

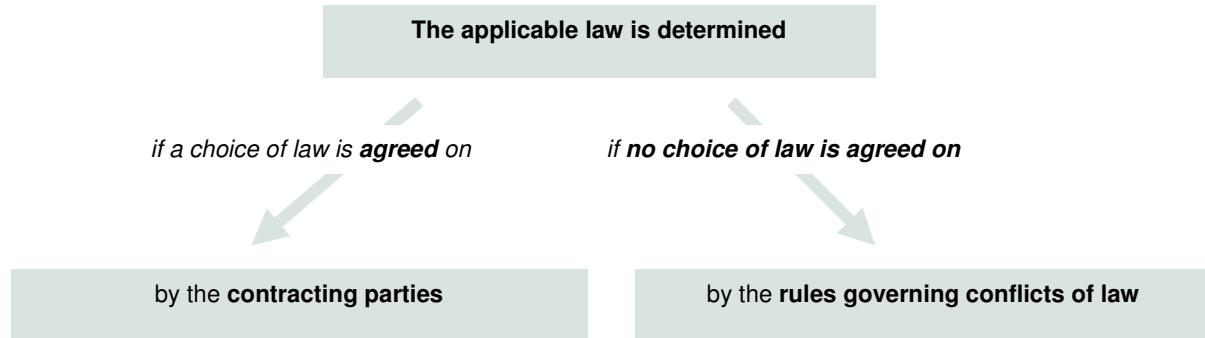
**Appeal proceedings...**

... constitute the judicial procedure in proceedings before the EPO which may take place even before the patent is granted. Appeals may be filed **against decisions taken in particular by the examining divisions and the opposition divisions** which **adversely affect the appellant**, e.g. refusal of a patent application, revocation of a patent in opposition proceedings or rejection of an opposition. Decisions on appeals are taken by the independent EPO boards of appeal. In certain limited cases it may be possible to file a petition for review by the Enlarged Board of Appeal.

**More information** can be found here: [www.epo.org](http://www.epo.org).

**Typical issues in connection with International Agreements**

**I. Choice of law**

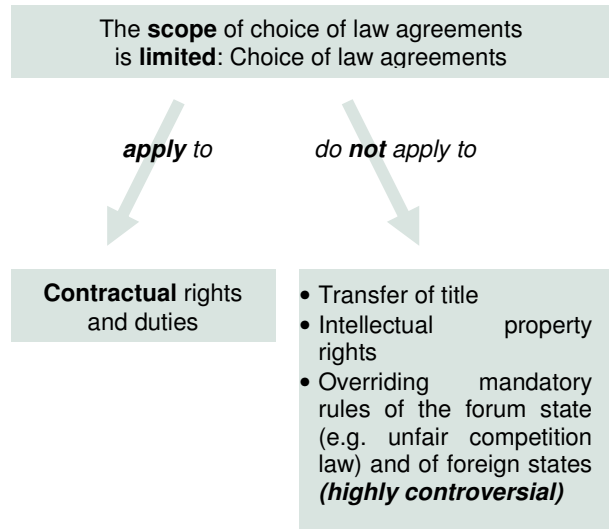


Choice of law agreements usually are subject to certain **requirements**:

- the agreement must be **explicit** or at least **clearly** result from the circumstances (the safest solution is an agreement **in writing**);
- if provided for in General Terms and Conditions ("**GTC**") the GTC must be **validly linked to the agreement**.

**Harmonized EU-law:**

- **Rome Convention** dated 1980 (until December 17, 2009)
- **Rome-I Regulation** (as from December 17, 2009)\*



Particularities / limitations may also arise from **mandatory law protecting consumers or employees** or from provisions relating to **specific areas** (such as e.g. public transport, insurances etc.)

\* not applicable for Denmark.

The text of the **Rome Convention** can be found here:

- [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126(02):EN:HTML)

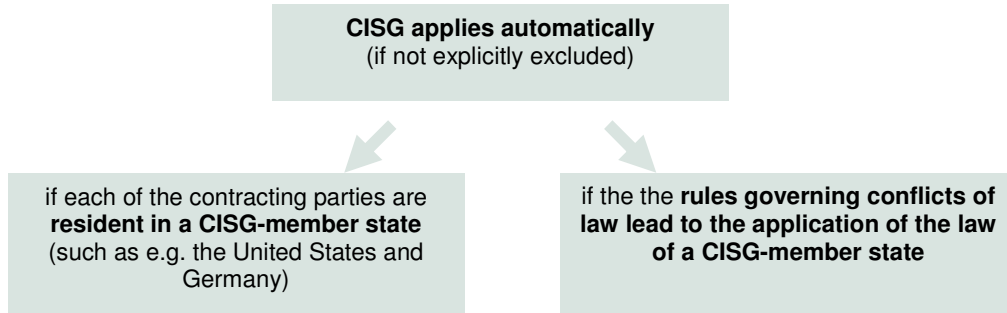
The text of the **Rome-I Regulation** can be found here:

- <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF>

## II. Referring to model laws and model regulations

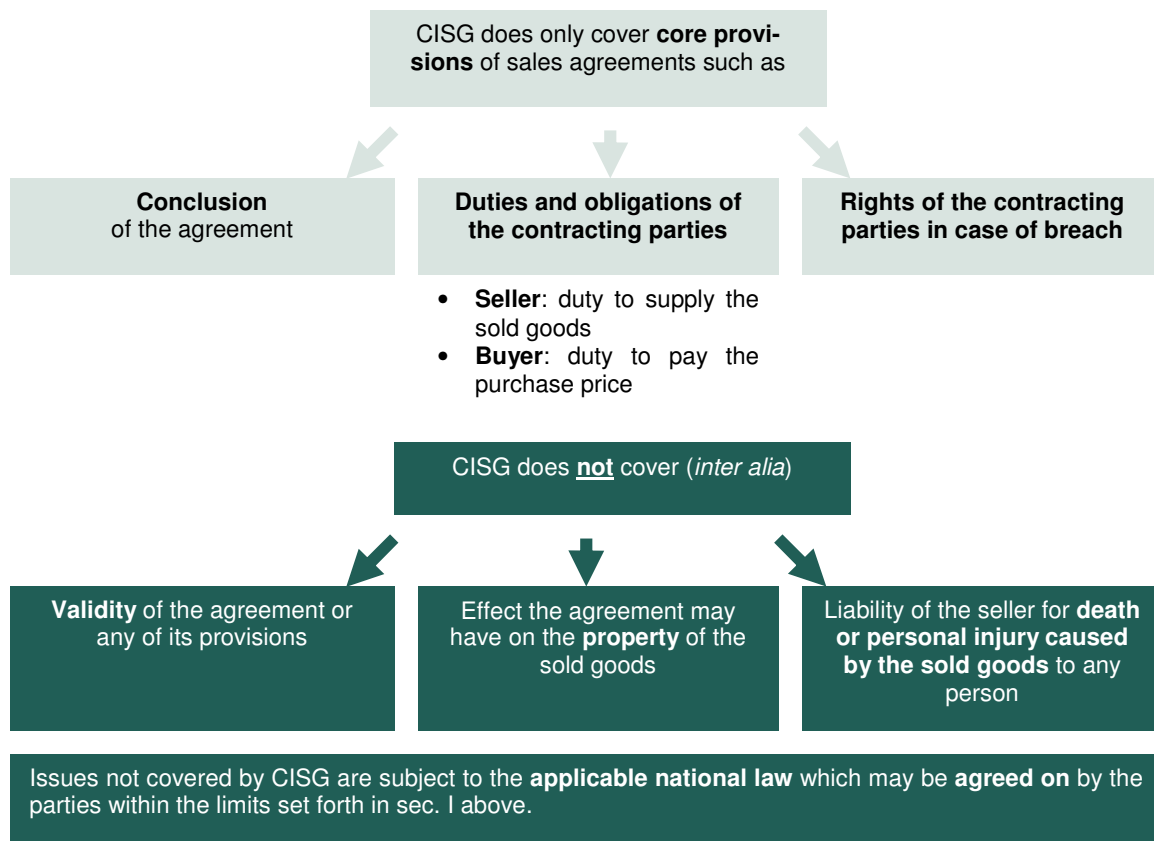
### 1. Convention on the International Sale of Goods

When agreeing on the law applicable to agreements on the **sale of goods** in situations where the contracting parties are **resident in different states**, it should be considered to opt for the Convention on the International Sale of Goods (“**CISG**”).



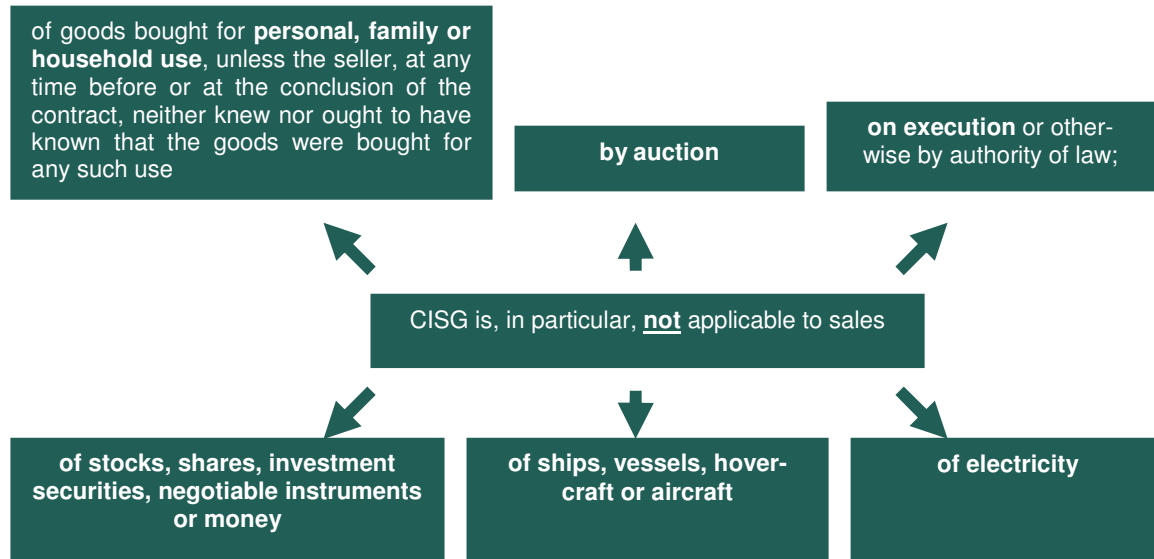
More information about the CISG-member states can be found here: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

When agreeing on (or not excluding) CISG, it should be considered that the **scope of the CISG-provisions is limited**.





Furthermore, CISG is only applicable to **sales of goods**.



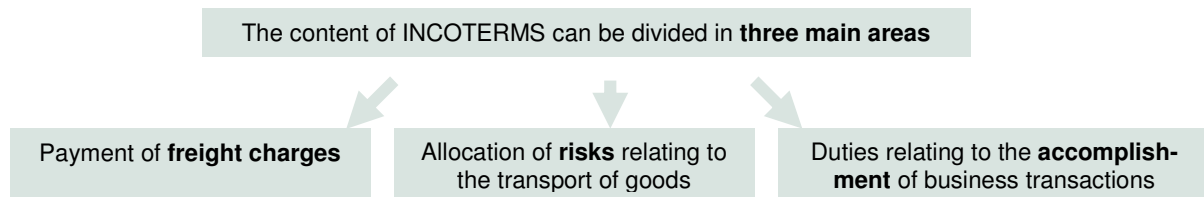
Depending on the position of the contracting party, CISG can – in spite of its limited scope - be more attractive e.g. with regard to liability of the seller.

More information about CISG can be found here:

- <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>
- <http://www.cisg.law.pace.edu/>

## 2. INCOTERMS

INCOTERMS (developed by the International Chamber of Commerce) are frequently agreed on in International Agreements. They provide a system of **13 clauses** containing rules which party shall be obliged to provide the documents relating to the sold goods and their transport, bear custom fees, organize the necessary insurance agreements, examine the goods and take care of packaging.



The current INCOTERMS (**INCOTERMS 2000**) contain the following clauses:

<b>EXW</b>	Ex Works
<b>FCA</b>	Free Carrier (to named place of destination)
<b>FAS</b>	Free along ship
<b>FOB</b>	Free on board
<b>CFR</b>	Cost and freight
<b>CIF</b>	Cost, insurance and freight
<b>CPT</b>	Carriage paid to (named place of destination)
<b>CIP</b>	Carriage and insurance paid to (named place of destination)
<b>DAF</b>	Delivered at frontier
<b>DES</b>	Delivered ex ship
<b>DEQ</b>	Delivered ex quay
<b>DDU</b>	Delivered duty unpaid
<b>DDP</b>	Delivered duty paid

Depending on which INCOTERMS are agreed on, the **duties of seller and buyer** are determined as follows:

	Seller	Carrier	Border	Port (charging)	Port (decharging)	Customs	Buyer
<b>EXW</b>	█	█	█	█	█	█	█
<b>FCA</b>	█	█	█	█	█	█	█
<b>FAS</b>	█	█	█	█	█	█	█
<b>FOB</b>	█	█	█	█	█	█	█
<b>CFR</b>	█	█	█	█	█	█	█
	cancellation fee, if charged at conclusion of sea freight agreement					█	█
<b>CIF</b>	█	█	█	█	█	█	█
	recommended			recommended			
<b>CPT</b>	█	█	█	█	█	█	█
<b>CIP</b>	█	█	█	█	█	█	█
	recommended						
<b>DAF</b>	█	█	█	█	█	█	█
<b>DES</b>	█	█	█	█	█	█	█
<b>DEQ</b>	█	█	█	█	█	█	█
<b>DDU</b>	█	█	█	█	█	█	█
<b>DDP</b>	█	█	█	█	█	█	█

- Risk borne by **Seller**
- Cost borne by **Seller**
- Duty of Seller to **insure** goods
- Risk borne by **Buyer**
- Cost borne by **Buyer**

**More information** can be found here: <http://www.iccwbo.org/incoterms/id3040/index.html>.

### III. Handling of General Terms and Conditions (GTC)

Choice of law and venue clauses – as well as other terms relating e.g. to supply conditions, conditions of payment, liability and guarantees – can be made part of GTC.

If contractual conditions are laid down in GTC it is important to make sure that the GTC are **(physically) sent to and – ideally – countersigned by the contracting partner**. Having the GTC countersigned also helps to avoid that the contracting partner adds its own GTC to the main agreement which might lead to a **conflict of GTC** (resulting eventually in a (partial) invalidity of both GTC with the effect that – a probably unexpected – statutory law applies).

The GTC should further be in a **language** the contracting partner understands. This also applies to the (mandatory) **indication in the main agreement referring to the GTC**.

### IV. Venue and enforcement

Pls. see **Sec. M/II** of the main text and **Annex 26**.

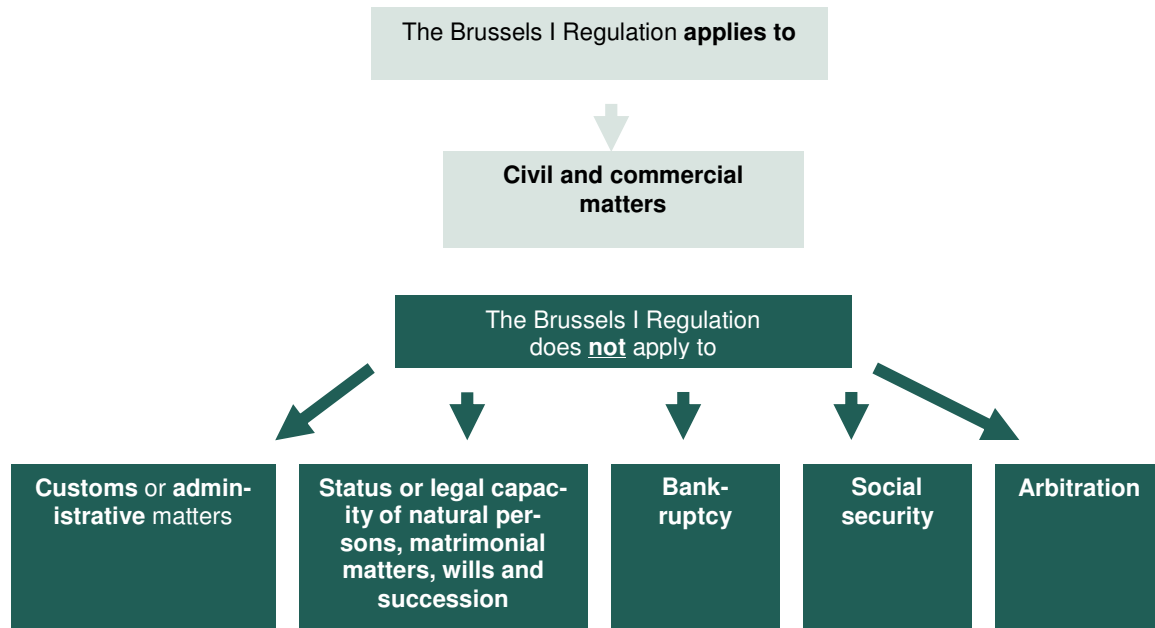
**Costs for official court proceedings – overview (2009)**

First instance		Second instance	
Amount in litigation (in Euro)	Cost risk* (in Euro)	Amount in litigation (in Euro)	Cost risk* (in Euro)
50,000	7,639	50,000	8,842
100,000	10,673	100,000	12,495
500,000	26,742	500,000	31,837
1,000,000	40,167	1,000,000	47,833
5,000,000	147,567	5,000,000	175,801
10,000,000	218,817	10,000,000	335,761
20,000,000	550,317	20,000,000	655,681

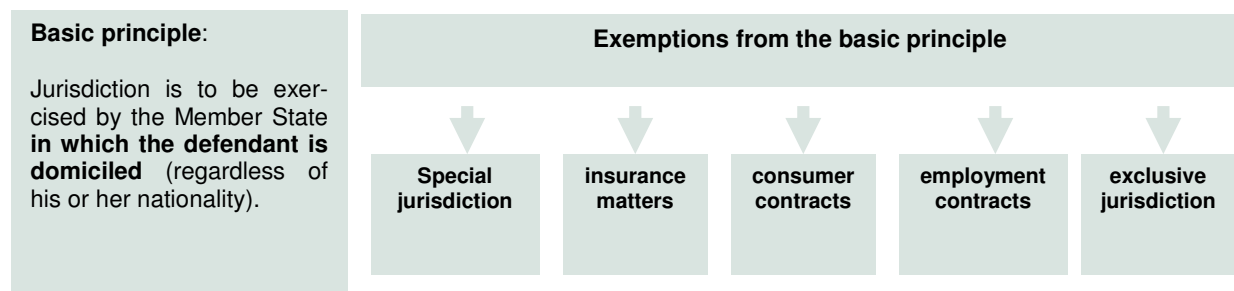
\* including own lawyers' fees, court fees and lawyers' fees of the counterparty; assuming that lawyers' fees are calculated based on the German Act on Lawyers' Fees.

## Brussels I Regulation – key points

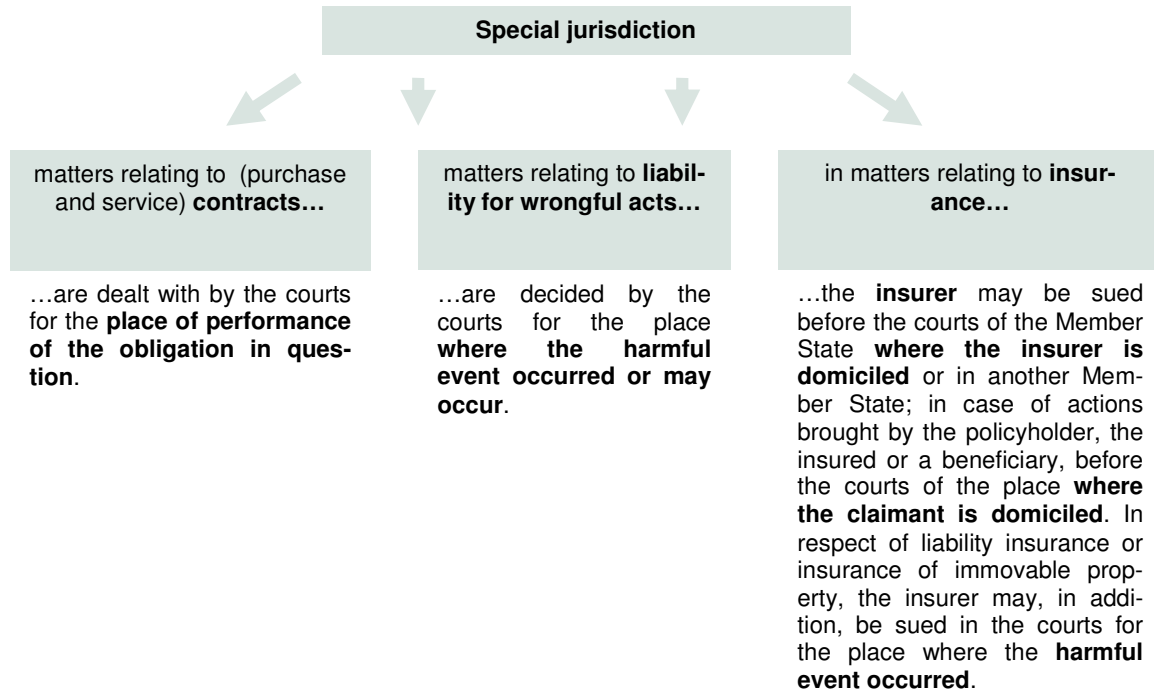
### I. Matters covered by the Brussels I Regulation



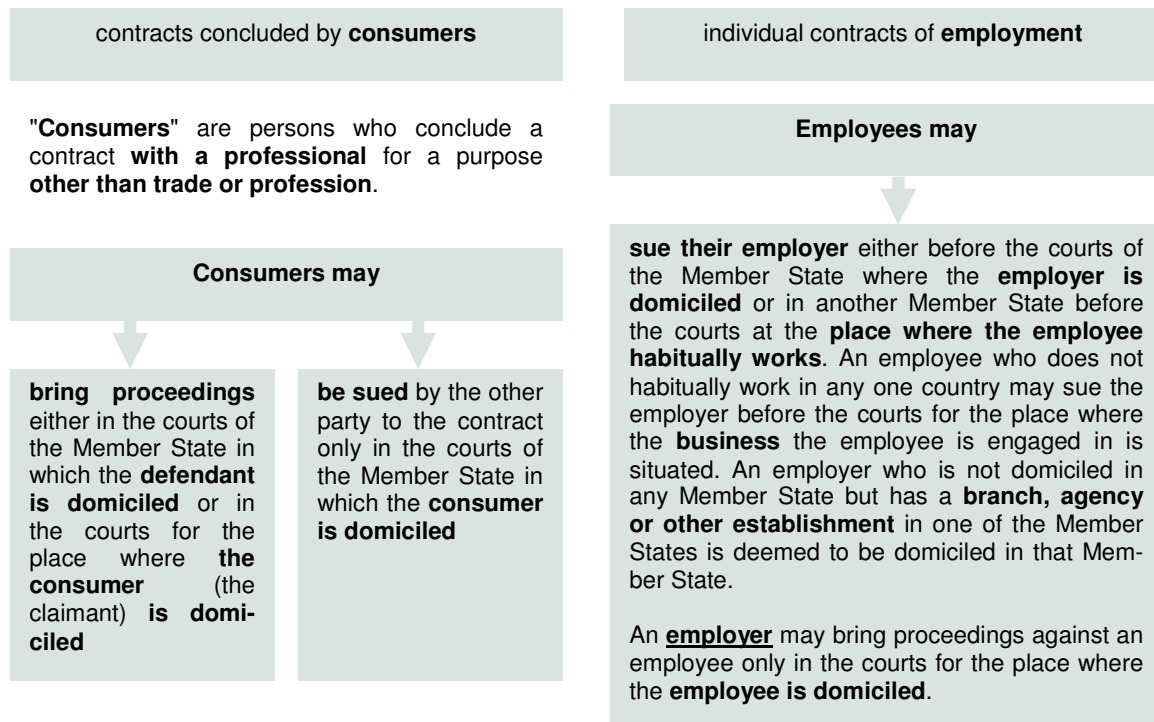
### II. Main principles of the Brussels I Regulation



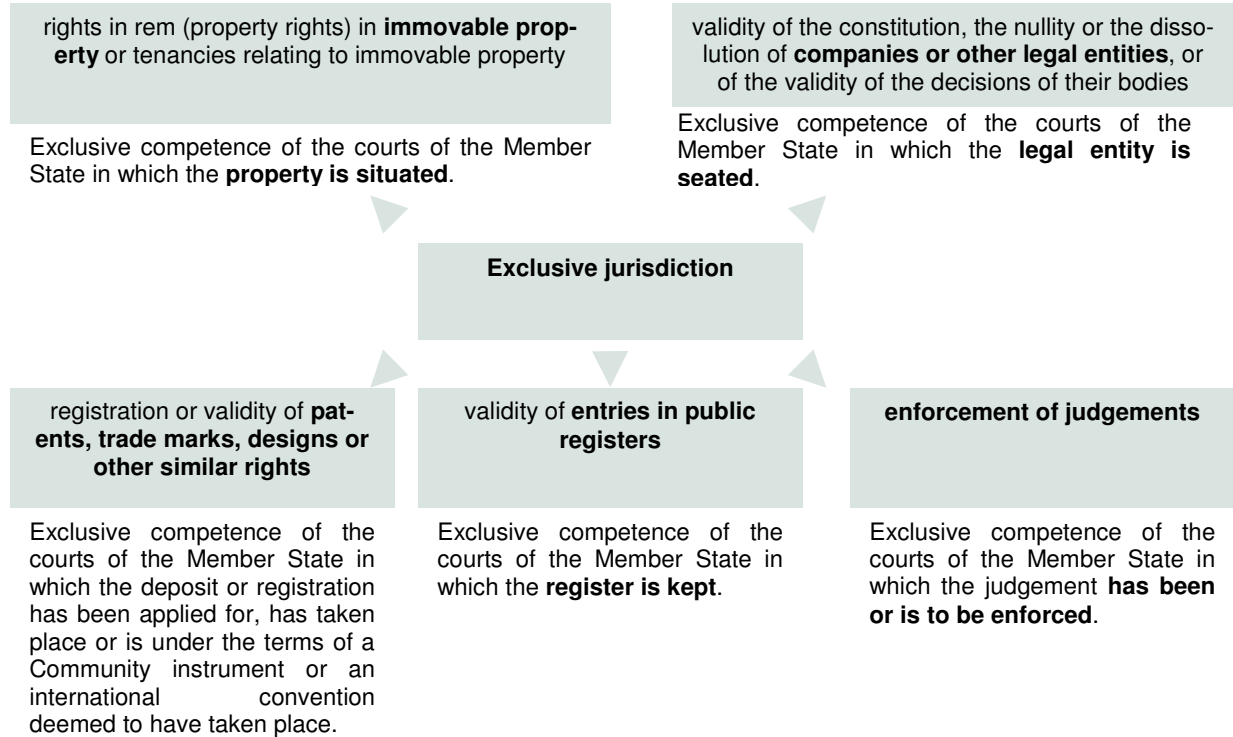
- **Domicile** is determined in accordance with the domestic law of the Member State where the matter is brought before a court.
- For **legal entities** domicile is determined by the country where they have their statutory seat, central administration or principal place of business.



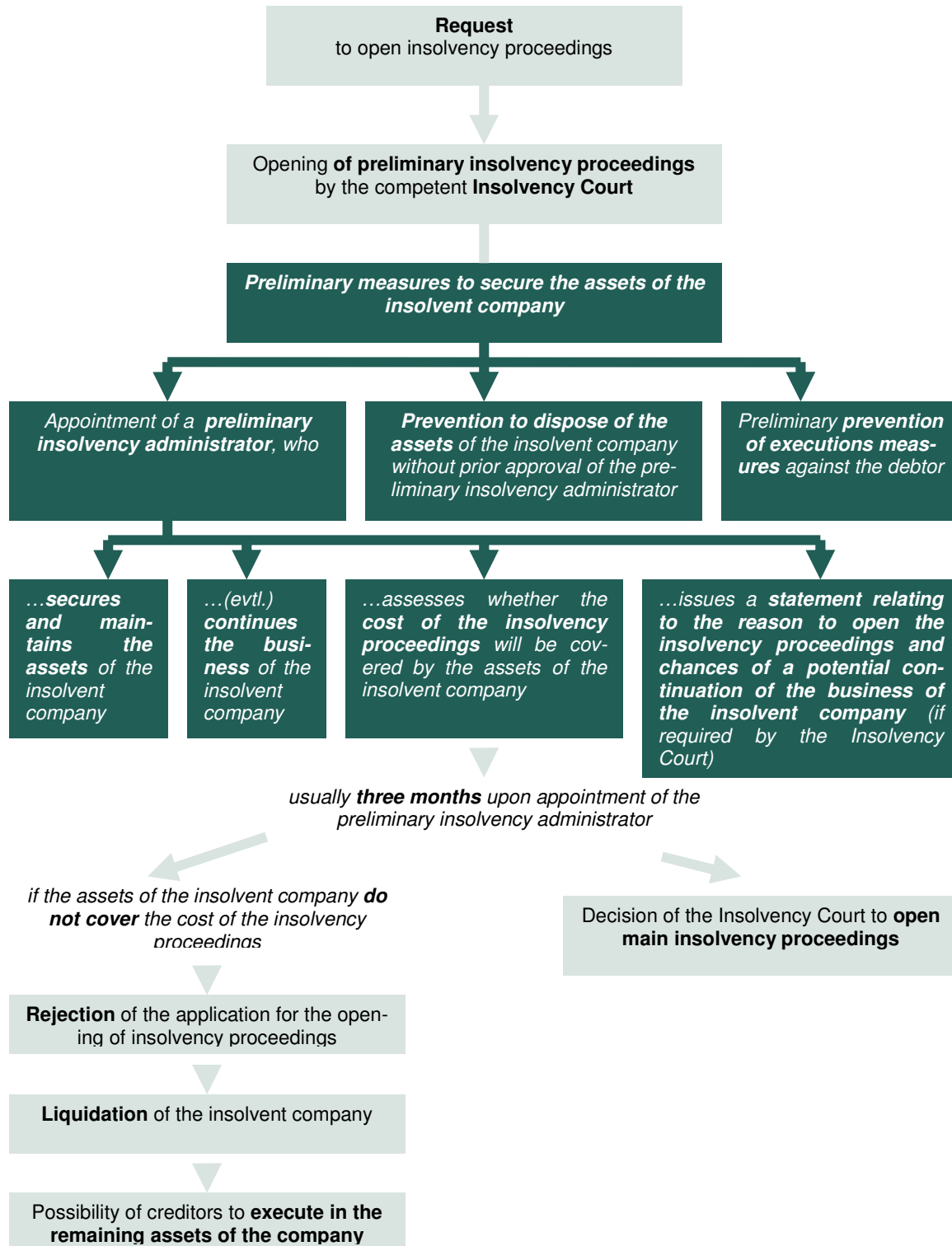
Special provisions apply with regard to contracts concluded by **consumers** and individual contracts of **employment**:



Courts have **exclusive jurisdiction**, regardless of domicile of the parties and regardless of whether the parties have agreed on a venue, in the following cases:

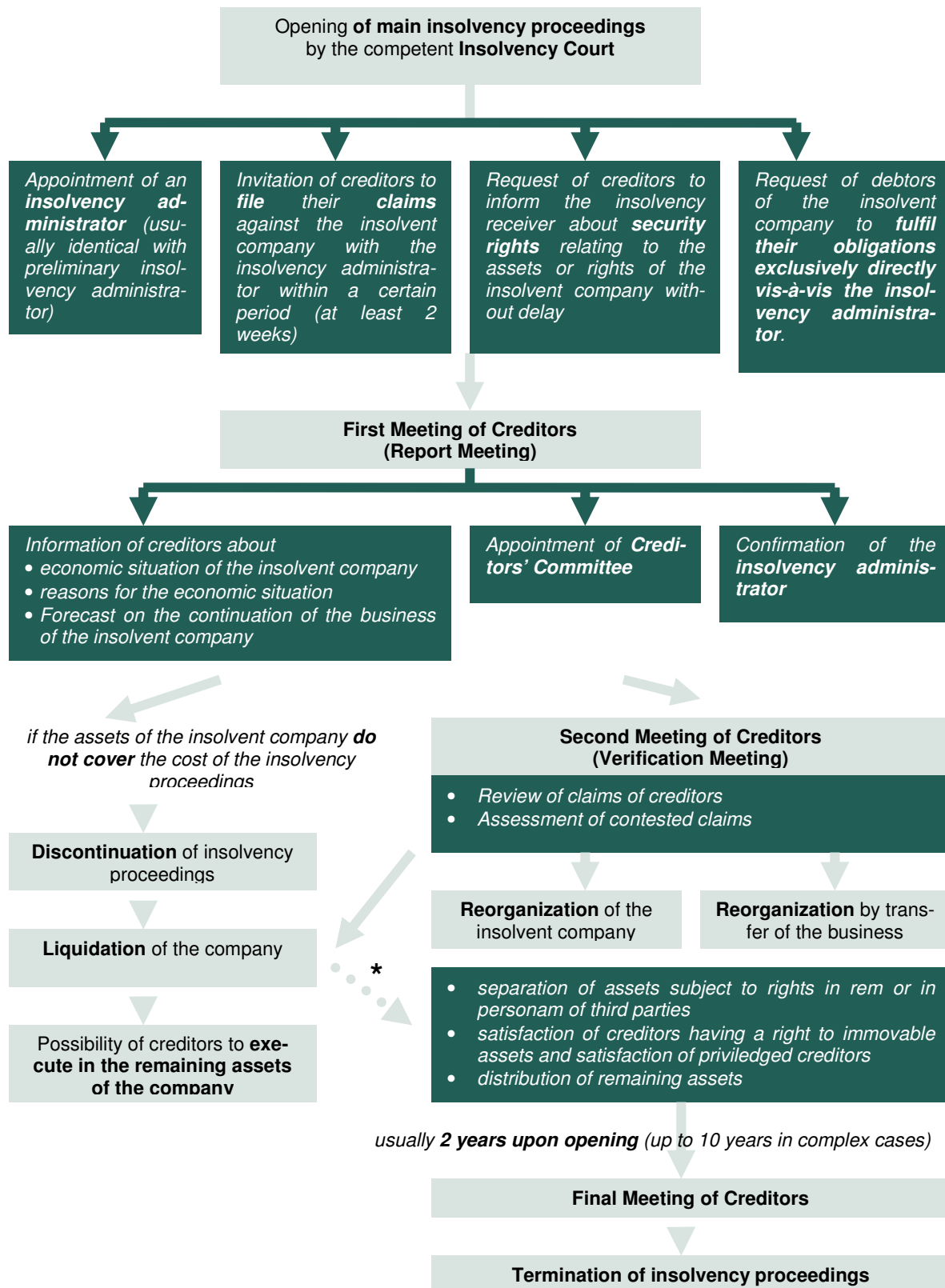


**Preliminary insolvency proceedings – chart**





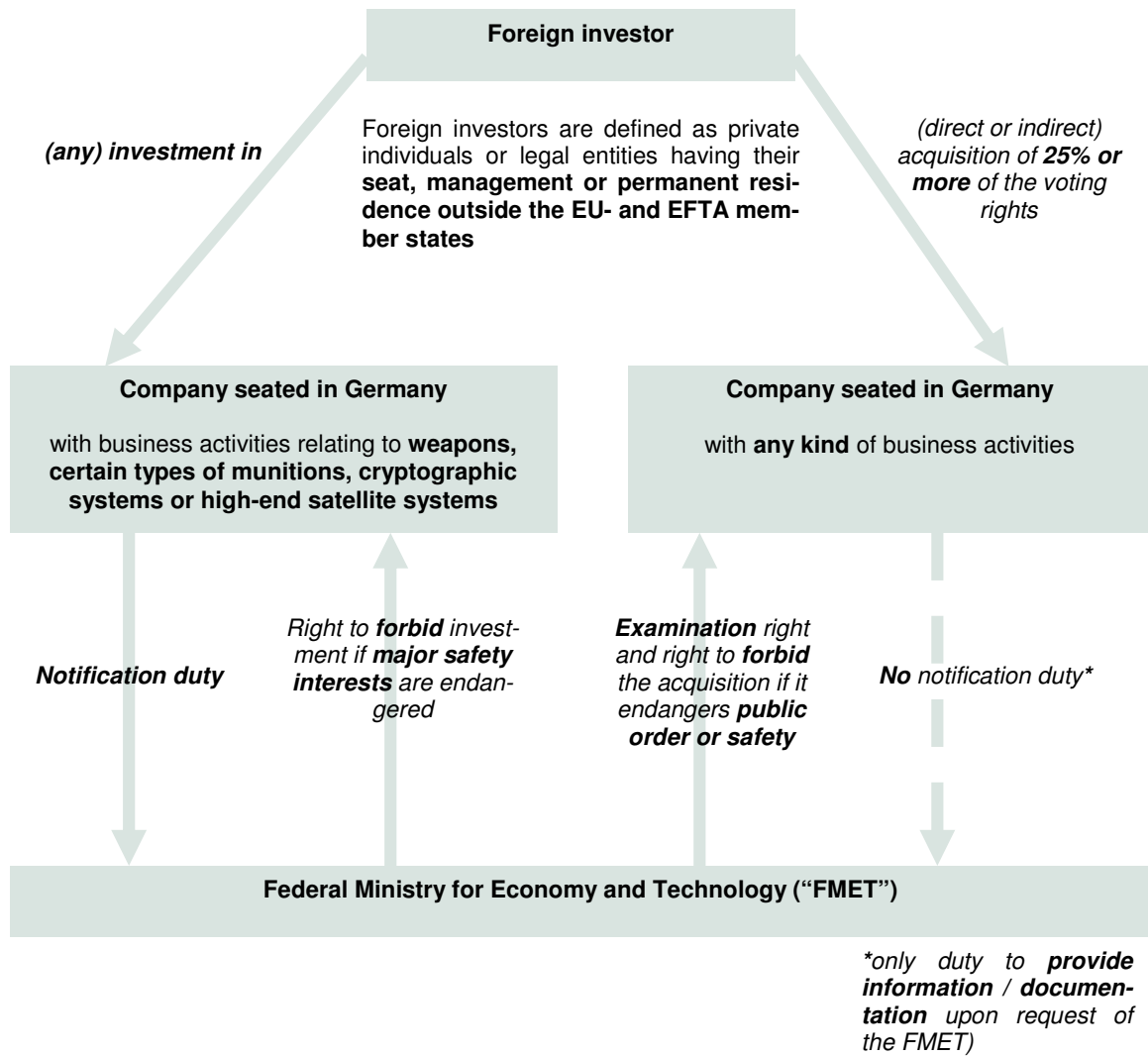
**Main insolvency proceedings – chart**



\* Privileged rights are taken into account also in case of liquidation.

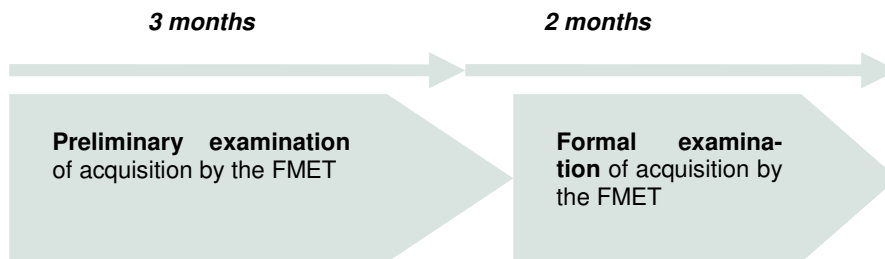
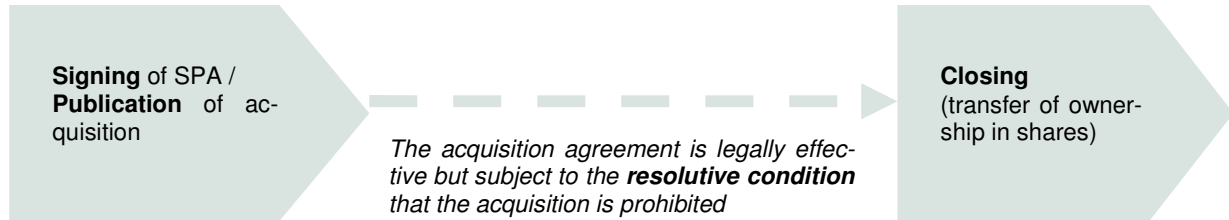
**Control of investments of foreign investors**

**I. General overview of acquisitions subject to control**



**II. Mechanism of the (new) general control of acquisitions of foreign investors**

Acquisition of 25 % or more of voting rights by a foreign investor in a German company:

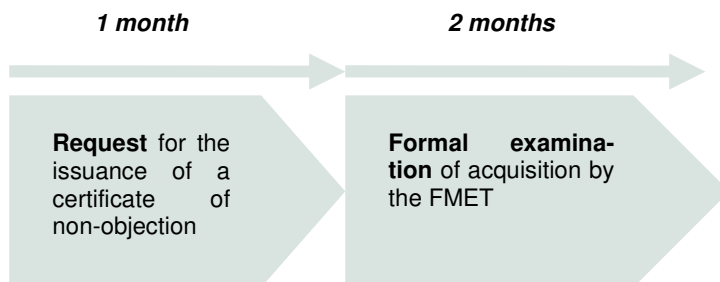


If the FMET intends to start formal examination, the acquiring party must be **informed** about the opening of the formal examination procedure within a period of three months as from signing / publication of the acquisition. Otherwise, the right of the FMET to prohibit the acquisition is **forfeited**. If a formal examination is started, the FMET may require to be provided with **information and/or documentation** relating to the acquisition.

If there are concerns that the acquisition **endangers public order or safety**, the FMET may either **prohibit** the acquisition or issue **directives**.

Prohibition may be challenged by the acquiring party by **action of opposition** (*Anfechtungsklage*) within 1 month upon notification.

**Alternative: request of the acquiring party for issuance of a certificate of non-objection**



The request can be filed by the acquiring party **at any time** (even before signing / application). If the FMET does not start formal examination within 1 month as from filing of the request, the certificate is **deemed granted**.

If there are concerns that the acquisition **endangers public order or safety**, the FMET may either **prohibit** the acquisition or issue **directives**.