I. Legal Forms of Doing Business

To do business in Germany, entrepreneurs and investors have several options in terms of the legal forms of business available under German and EC law. There are (i) the sole proprietorship, (ii) the professional partnership, (iii) the general partnership, (iv) the limited partnership, (v) the limited liability company, (vi) the stock corporation and (vii) the European company. The corporate law is as well influenced by the jurisdiction of the European Court of Justice for instance regarding the cross-border relocation of corporate entities. A principal distinction in German company law is the division of legal forms into those which are considered to be “legal persons” and others which are not. In some aspects, however, this distinction is not carried out in all legal consequences. The most important legal forms for international activities are the following:

1. Partnerships

a. Civil Law Partnership *(Gesellschaft bürgerlichen Rechts – GbR)*

Civil law partnerships are governed by §705 et seqq. of the German Civil Code *(BGB)* and serve only non-commercial purposes. The formation is quite simple. There are no material formalities to be observed. If only at least two partners agree on a partnership agreement, the civil law partnership is established. Contributions to the partnership are not required. Partners can be natural and legal persons in any conceivable form or combination. Only partners – no third parties – are in charge to manage and represent the partnership. Generally the partners are jointly entitled to manage the partnership, if not a single or more partners are appointed to do so. In the latter case all other partners are excluded of the authorization of management and the power of representation. Moreover they can control the actions of the managing partners. Civil law partnerships are quite popular for the practices of self-employed professionals, such as lawyers, tax advisors, auditors, doctors, architects, real estate agents, etc.

The civil law partnership as such is not a “legal person”. Over the years, however, its ability to exercise rights and obligations in its own name became legally recognized. A partnership has the legal ability to enter into contracts, to be owner of real estate and to sue third parties under its own name and also to be sued by third parties. The partnership and all partners are jointly and severally liable for partnerships obligations.

b. Professional Partnership *(Partnerschaftsgesellschaft – PartG)*

The professional partnership is similar to the civil law partnership but it serves the special needs of self-employed professionals. The partners have unlimited personal liability just for instances based on their own professional work.

On July 19, 2013 the reform of the *PartG* brought a possibility to limit the liability up to the assets of the partnership, if special professional indemnity insurance is stipulated. In this case the professional partnership is a so-called “professional partnership with limited professional indemnity insurance *(Partnerschaftsgesellschaft mit beschränkter Berufshaftpflicht – PartG mbB).*

c. General Partnership *(Offene Handelsgesellschaft – OHG)*

The *OHG* is similar to the civil law partnership but it serves business purposes and carries out trade. It is, therefore, a so-called commercial entity within the meaning of the Commercial Code *(Handelsgesetzbuch – HGB)*. In addition to the conclusion of the partnership agreement, the general partnership has to be registered with the commercial register as the only formal legal requirement. Registration must include the names of the partners, the name of the partnership and the business address. The *OHG* comes into legal existence when the partnership agreement is executed. All of its partners have unlimited personal liability for all obligations and debts of the *OHG*.

d. Limited Partnership *(Kommanditgesellschaft – KG)*

The legal form of a limited partnership is popular for small and medium-sized businesses which require operational capital from investors who do not wish to be liable beyond their capital investment. In general, the legal provisions governing the *OHG* also apply to the limited partnership. The Commercial Code contains additional provisions reflecting the nature of the limited partnership.

In addition to one or more general partners with unlimited liability, a limited partnership has at least one partner with limited liability – the “limited partner” *(Kommanditist)*. The liability of each limited partner is limited to his registered contribution in the partnership’s capital. Once the limited partner has paid up his contribution, neither the *KG* nor the creditors of the *KG* may claim any further payments from the limited partner. As it is the case with the *OHG*, the *KG* as such is not a “legal person” but can also enter into agreements under its own name, can sue and be sued in court. Only the general partner –not the limited partner- is responsible for the management of the KG and represents it towards third parties,

The formation and registration of a limited partnership is similar to that of a general partnership. There are no general legal requirements regarding the minimum amount of capital or the maximum number of partners. It comes into existence as soon as the partnership agreement is executed and it starts doing business. However, the limitation of liability of the limited partner requires registration with the commercial register.

e. Combination of Limited Partnership *(KG)* and Limited Liability Company

(GmbH) (GmbH & Co. KG)

The *GmbH & Co. KG* is a hybrid legal form in which a limited liability company *(GmbH)* serves as the general partner of the partnership. This hybrid form is legally considered to be a limited partnership. The specialty of this construction is that the liability of all persons involved is limited: The persons listed as limited partners are only obliged to pay their registered capital contribution. Although the general partner *GmbH* as such has unlimited liability, the legal form of the *GmbH* provides for the limitation of liability of its shareholders; the shareholders' obligations are limited to pay the individually subscribed share capital (see below). The *GmbH & Co. KG* provides a unique way to limit personal liability of the participating parties. However, all shareholders are jointly liable to pay up any registered or subscribed but unpaid capital.

2. Corporate Entities

A foreign company, entrepreneur or investor can also acquire or establish a German company in the legal form of a limited liability company *(GmbH)* or a (stock) corporation *(AG)*. There are no legal restrictions regarding the acquisition of corporate entities by foreign parties. Restrictions may apply only if contained in a target company's articles of association, or if the business conducted by the *GmbH* or *AG* is subject to regulatory restrictions. Additionally, there is the European vehicle of the *Soeciatas Europae*, which can be registered in Germany as well.

a. The (Private) Limited Liability Company

(Gesellschaft mit beschränkter Haftung – GmbH)

The limited liability company is an incorporated registered business entity within the meaning of the Commercial Code and a "legal person". It provides for limited liability of its shareholders. Its management may be composed of shareholders and non-shareholders. The activities of a limited liability company are not restricted to mercantile or commercial purposes. It can also conduct not-for-profit (charitable) and other non-commercial activities.

The *GmbH* is the most popular German investment vehicle chosen by foreign investors. Its formation and management are governed by the Act on Limited Liability Companies *(GmbH-Gesetz – GmbHG)*. The *GmbH* requires a minimum share capital of EUR 25,000 of which EUR 12,500 must be paid up before the company can be registered with the commercial register. A limited liability company can be established by one or more persons or companies by adopting the articles of association *(Satzung)* before a notary public.

The company exists legally as soon as it is registered within the commercial register. It may start doing business before registration, but until the registration is recorded with the register, each shareholder is personally liable for debts incurred by the company. The limited liability company, basically, has two corporate bodies: the shareholders' meeting *(Gesellschafterversammlung)* and the registered manager(s), namely one or more managing directors *(Geschäftsführer)*. A third corporate body, the supervisory board, is mandatory only if the *GmbH* has more than 500 employees.

Basically, capital contributions are paid in cash but all or part of the contributions may also be made in kind. In the latter case, the articles of association have to state exactly the asset to be contributed and the monetary value of such capital contribution. The founding shareholders are required to prepare a special report demonstrating the adequacy of the valuation of the contribution in kind.

The transfer of shareholding in a limited liability company requires notarization. Its shares cannot be traded at the stock exchange. On November 1, 2008 the most far reaching reform (called *"MoMiG"*) of the Act on Limited Liability Companies since its existence entered into force and brought important changes. The *MoMiG* introduced the possibility to acquire shares in a limited liability company in good faith from a person that is not a shareholder of the company (anymore) if such person is (still) registered with the commercial register as shareholder of the company. Furthermore, the limited liability company may now relocate its head office to a jurisdiction different from that of its registered office.

Moreover, the *MoMiG* established a modified form of a limited liability company, the so-called "enterprise company (with limited liability)" – in German *"Unternehmergesellschaft (haftungsbeschränkt)"*. This company requires a minimum capital of EUR 1. The registered share capital has to be paid up completely and capital contributions have to be made in cash only. The company has to observe certain restrictions with respect to distribution of profits. b. (Stock) Corporation *(Aktiengesellschaft – AG)*

Like the limited liability company, a (stock) corporation is also an incorporated business entity within the meaning of the Commercial Code and a "legal person". Corporations are regulated by the Corporation Act *(Aktien-Gesetz)*.

A corporation must maintain a minimum share capital of EUR 50,000. It must be fully subscribed; and at the time of formation at least 25% of this equity capital must be paid up.

Shares of a corporation must have a minimum par value of EUR 1.00. They can be issued without par value but the value allocable must be at least EUR 1.00.

A German corporation has a three-tier structure. Bodies of this structure are the shareholders' meeting *(Hauptversammlung)*, the supervisory board *(Aufsichtsrat)*, and the board of directors *(Vorstand)*. The latter two bodies are strictly separate. It is not permissible for any individual to serve on both boards. Members of both boards have to be appointed before the corporation can be registered with the commercial register. The supervisory board consists of at least three members. It appoints and dismisses the members of the board of directors, represents the corporation in disputes between the corporation and members of the board of directors, and has the duty to examine the balance sheet, income statement, and further documents composing the annual financial statements. Moreover, the supervisory board advises the board of directors on essential business decisions. The board of directors is responsible for the management of the corporation and represents it towards third parties.

The tasks of the shareholders' meeting include, in particular, the election and removal of

members of the supervisory board, the determination of the distribution of profits and the approval of increases or decreases of the share capital.

Shares of a corporation are freely transferable; a notary deed is not necessary. Especially – fulfilling further requirements – shares of a corporation can be traded at the stock exchange. Shares can be issued as bearer shares *(Inhaberaktien)* or registered shares *(Namensaktien)*. The corporation may also issue non-voting preference shares *(Vorzugsaktien)*. Bearer shares are not required to be documented by share certificates. The transfer of registered shares requires entry of the transfer in the shareholders register of the corporation.

c. The European Company (*Societas europaea*, SE)

The SE is a corporation, in its legal structure similar to the German AG as described above. An SE, however, can be registered in any Member State of the European Union and can be transferred to other Member States basically without liquidation and/or reestablishment.

The company is registered with a commercial register of a Member State. An EU-wide register does not exist, but each registration is published with the Official Journal of the European Union.

SEs can generally be created by merger of national companies (stock corporations) of Member States of the European Union, by creation of a joint venture between companies of Member States or of a subsidiary of a company of a Members State or by conversion of a company of a Member State.

The SE has a minimum subscribed share capital of EUR 120.000, whereas national laws can provide for higher requirements.

National laws are also decisive for further details of the SE, in addition to particularly Council Regulation (EC) No 2157/2001of 8 October 2001 on the Statute for a European company (SE).

3. Cross-border Relocation of Corporate Entities within the EU

Any European company on shares or stocks can be transferred to another European Member State according to a recent decision of the European Court of Justice (Case VALE, file number C-378/10).

Thus, the relocation shall follow specific rules, which are to a certain extent still subject of discussion.
However the following formalities shall be obeyed:

a. The shareholders shall decide to adopt the share capital in accordance with the requirements of the target jurisdiction.

b. The shareholders and the management of the company shall apply to the commercial register of the target seat of the company in accordance with legal requirements of the target

jurisdiction.

c. Only when all formalities are settled at the target seat, the former commercial register shall be informed to strike off the (old) registration.

Due to the current lack of legal provisions we recommend to apply SE-rules (Article 8 SE-Council Regulation) accordingly.

Useful Links:

- www.ihk.de