

## **Corporation with limited liability** (Gesellschaft mit beschränkter Haftung – GmbH)

A corporation with limited liability (GmbH) is the easiest form of company to establish, the most flexible, and the most common to operate form of corporation in Germany. There are about 500,000 registered GmbHs, ranging from the very smallest ones to major international conglomerates, as e.g. the famous Fried. Krupp GmbH, prior to its merger with Thyssen AG. Thus, the GmbH is the first choice for any foreign investor wishing to run German or European operations. However one disadvantage is that a GmbH cannot issue securities and its shares cannot be traded on a stock exchange: the transfer of shares requires a notarised deed. The shares can be freely transferred to any third party if the contrary is not expressly provided for in the Articles of Association.

A GmbH may be established by only one – individual or corporate – shareholder with a minimum subscribed share capital of 25,000 EUR. It can pursue any legal objects in trade, industry etc., remunerated or not.

It must have a name ("Firma" = name) taken either from its object, from the name of one of its shareholders – e.g. Coca-Cola Deutschland GmbH – or from pure fantasy; however, the name chosen must include "GmbH" and must not be similar to and be reasonably different from other names already registered. The Codes of Trade Mark and of Unfair Competition may impose further restrictions which can only be dealt with on a case by case basis.

The contribution of the shareholder may consist in cash or in kind, if the latter is specifically provided for in the Articles of Association. The contribution must be actually paid into the hands of the director, prior to the application for registration of the company, and this in turn requires the opening of a bank account. It should be noted that the paid in capital may not be repaid to the shareholders, by way of loans etc., for at least a reasonable amount of time.

In theory, contributions in cash must only be paid in to half of their nominal amount; however, depending on the object of the company, start up costs may run to ten or twenty times the minimum share capital thus requiring a constant provision of liquidity. This has two rather inconvenient consequences:

1. Interests due on such loans are tax deductible only to the extent that such loans are not higher than twice the shareholders' equity;
2. Under certain conditions, the law deems such loans as "surrogation of share capital" with the result that interest cannot be paid to the share-

holder, and that the loan cannot be repaid to the shareholder making it. As a consequence, the shareholder may be faced with the necessity of a depreciation of such a loan in his own financial statements which would not have occurred if the amount of such loan had been capitalised as shares in a subsidiary.

Thus, it is rather questionable if the minimum share capital is always the best choice.

The company must have at least one Director ("Geschäftsführer") who may or may not reside in Germany and may or may not be remunerated for his services; the director must be an individual, he cannot be a company as is permitted in some other jurisdictions. It is quite common that the proportionate costs of the foreign based director (salary etc. plus reasonable overheads) are invoiced to the subsidiary. The director is entitled to fully represent the company without any limitation of his powers vis-à-vis third parties; however, for ease of control, the shareholder may choose to nominate more than one director for joint representation of the company, usually by two of them. Special provisions must be drafted in the Articles of Association in case the director happens to be simultaneously on the board of directors of the shareholder: failing such provisions, the director may not conclude agreements between the shareholder and the subsidiary.

A supervisory board ("Aufsichtsrat") is required only in the case of a staff of more than 500. If so, the supervisory board must comprise a staff member.

A GmbH may at any time be transformed into a stock holding company, it may be merged into other German based companies, which may be achieved free of any tax disadvantages.