

Germany - Share Capital, Financial Assistance, Corporate Governance and Economic Data

Within the scope of this memorandum it is not possible to cover the various forms of business organisations existing under German Law. As business organisations with partnership organisations for individual persons are rather rarely involved in M & A transactions this memorandum shall not cover particular questions with regard to these forms of organisation.

The “Gesellschaft mit beschränkter Haftung” (private limited company, “GmbH”) and the “Aktiengesellschaft” (stock corporation, “AG”) are the forms of business organisation suited for almost any investor’s purpose.

The AG is governed by the Stock Corporation Act (“Aktiengesetz”) which provides for detailed, complex and mostly mandatory rules. Transactions on German capital markets relating to listed AGs are furthermore governed by the Security’s Trading Act (“Wertpapierhandelsgesetz”) and the Security’s Acquisition and Takeover Act (“Wertpapierübernahmegesetz”). They provide detailed rules for the acquisition of significant participations in listed AGs. Compliance is supervised by the Federal Financial Services Supervisory Authority (“Bundesanstalt für Finanzdienstleistungsaufsicht” – BaFin).

The GmbH is governed by the Private Limited Companies Act (“GmbH-Gesetz”) which is less complex and formal and provides for more freedom for an individual organization in every single case. It is thus not surprisingly that most of the companies in Germany are GmbHs. Therefore, this memorandum shall focus on GmbHs.

1. Issuance of share capital for cash consideration in a GmbH

Although the GmbH is a company limited by shares the GmbH is a business organisation which is broadly influenced by its shareholders. The GmbH may be founded by one or more persons. The articles of association (agreement of the founding shareholders) must be adopted by a resolution recorded in the presence of a notary public and then filed for registration with the commercial register. The GmbH comes into existence upon registration in the commercial register. Until this moment the GmbH exists as “GmbH in Gründung” (GmbH in the process of formation).

The minimum share capital of a GmbH is EUR 25.000. The capital contributions may be made in cash or as a contribution in kind. The shares into which this capital is divided may be of unequal nominal amounts provided that none of them is smaller than EUR 100 and that in each case the amount is dividable by EUR

50. In the incorporation process no shareholder may subscribe to more than one share. Later on he may acquire additional shares by way of transfer or issuance of new shares.

The issuance of new share capital requires a shareholder resolution that at the same time amends the articles of association. As all amendments to the articles of association require notarisation also this resolution has to be notarised by a notary public. The issuance of new shares may also be based upon cash injection, contribution in kind or even a conversion of capital reserves of the GmbH.

In the case of the issuance of new share capital the existing shareholders have a subscription right. Therefore, the shareholder resolution has to cover the question whether the shareholders or a third party shall be entitled to subscribe to the new shares. In any case the new shareholder has to explicitly declare the assumption of the new issued share and to contribute cash or contribute in kind as resolved by the shareholders.

As the capital increase only becomes valid by registration in the commercial register the management of the GmbH has then to apply for such registration. The executive directors are obliged to submit such application only when the contribution of the new shareholder has been made to the free and irrevocable disposal of the management.

Together with the application the management has to submit to the commercial register a new list of shareholders.

2. Transfer of share capital for cash consideration

Acquisition and disposal of GmbH shares must be recorded in a notarial deed but need not be registered with the company or the commercial register in order to become valid. Nevertheless, in order to enable the new shareholder to exercise his rights as a shareholder a notice of the transfer must be given to the company. Therefore, no public record of the shareholders exists. Since there are no GmbH share certificates representing ownership of a specific share the only reliable proof of ownership is a chain of notarial deeds leading back to a founding shareholder.

The transfer of a share is basically a share purchase agreement between the seller (shareholder) and the purchaser (future shareholder) providing for the transfer of the share by way of assignment and the agreed purchase price. As the share capital of the company is not disbursed to the seller/purchaser the purchase price for the share is subject to free agreement between the parties to

the share purchase agreement. The articles of association may (and often do) provide for pre-emption rights of the existing shareholders of the GmbH.

3. Cash consideration vs. consideration in kind

The procedure for issuance of shares in a GmbH for non-cash consideration is identical to the procedure mentioned under no. 1 above except for the fact that some further requirements have to be observed.

If a contribution in kind is agreed between the shareholders the subject of such contribution and the exact amount of the share capital, which shall be represented by such contribution in kind, have to be defined exactly in the shareholder resolution about the issuance of new shares/capital increase. No capital increase may be issued against own shares of the GmbH but claims against shareholders or third parties against the company may be contributed to the company as a contribution in kind (the value for the company is the release from a liability).

If contribution to the share capital is made otherwise than in cash a report on the formation/capital increase provided by external auditors must prove the value of these contributions and that the contribution in kind is reasonably equalled by the amount by which the share capital is increased. The commercial register may refuse registration if any of the information requirements has not been duly complied with or if it determines that the contributions were overvalued.

The complete contribution in kind has to be made to the free disposal to the company's management before the capital increase may be applied for registration at the commercial register.

Shareholders sometimes try to avoid these additional requirements by making a cash contribution which is then used to purchase an asset from or settle a liability to the shareholder or a related party. Such action should be in any case avoided because it renders the cash contribution invalid resulting in the shareholder remaining fully liable for its entire obligation to pay the capital.

4. Use of target's assets to fund or provide security for the funding of the acquisition

Generally, shareholders of a GmbH may pledge or encumber their shares as security for any debt as long as the shareholder agreement does not provide for a special provision with regard to the pledge or encumbrance of shares and as long as compulsory statutory provisions do not stipulate the opposite. However, the use of a GmbH's assets to fund or provide security for the funding of the acquisition of the GmbH is to a very large extent prohibited by Sec. 30 Subsec. 1

Act concerning Private Limited Companies (“Gesetz betreffend die Gesellschaften mit beschränkter Haftung” – “GmbHG”). According to Sec. 30 Subsec. 1 GmbHG it is not allowed to distribute the assets of the company needed to maintain the nominal capital. To what extent the assets of a GmbH still can be used for the aforementioned purpose needs, therefore, to be determined very thoroughly from case to case.

5. Corporate Governance

The German Minister of Justice has in 2001 appointed a high level commission to draft a German Corporate Governance Code. Such code was published in the beginning of 2002. The code itself is not part of German statutory law. However, sec. 161 of the German Stock Corporation Act (Aktiengesetz) has incorporated the obligation of the management boards and supervisory boards of all German listed AGs that every year a statement is published on whether the respective AG complies with the recommendations of the German Corporate Governance Code. Furthermore, the publication has to identify which recommendations have not been or are not complied with. The statement has to be permanently accessible and has to be published with the annual accounts and filed with the commercial register. The German Corporate Governance Code does only apply to publicly listed AGs.

The German Corporate Governance Code is available under www.corporate-governance-code.de in English, French, German, Italian and Spanish.

6. Economic data

The German Federal Statistical Office publishes economic data for Germany on a regular basis. The website of the German Federal Statistical Office can be found under www.destatis.de and is available in English and German.

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