Establishment of a company or branch office

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I. Alternative ways of doing business in Germany

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

A. Subsidiaries

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

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

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

B. Branch Office (Niederlassung)

Instead of or in addition to the formation of a new subsidiary company, it is often advisable for a foreign company to set up a branch office (Niederlassung) in Germany. Tax advantages often play an important role in such a decision. On the other hand, a parent company is fully liable to the extent of its own assets for any claims creditors might assert against the dependent German office.
A branch office can be established either as an independent branch office (Zweigniederlassung) or an operational location (Betriebsstätte), which is a fully dependent branch office. German law makes a sharp distinction between independent and dependent branch offices.

1. Independent Branch Office (Zweigniederlassung)

a) Legal personality (Rechtspersönlichkeit)

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

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

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

b) Organization

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

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

c) Corporate name (Firma)

Since the branch office is not an autonomous company but rather an integral part of the corporation as a whole, the name of the branch office is generally identical to the name of main company. The name of the main company and hence the