

Overview of the Key Characteristics of and Key Differences between a 'GmbH' and an 'AG' under German Corporate Law

	GmbH	AG
Legal form and denomination	<ul style="list-style-type: none"> • Legal entity with separate legal identity and distinct from its shareholders <p>➤ German denomination: <i>Gesellschaft mit beschränkter Haftung</i></p> <p>➤ Most common English denomination: Limited Liability Company</p>	<p>➤ German denomination: <i>Aktiengesellschaft</i></p> <p>➤ Most common English denomination: Stock Corporation</p>
Business purpose	<ul style="list-style-type: none"> • No limitations • Business purpose must be stated in the articles of association • Regulatory aspects / approvals to be observed to the extent applicable; whether or not public law imposes limitations, approval processes, permits or alike depends, as a general rule, on the business purpose, not on the legal form chosen 	
Formation	<ul style="list-style-type: none"> • Established by one or more shareholders adopting the articles of association by means of a notarial deed • The entity comes into legal existence upon registration with the Commercial Register (<i>Handelsregister</i>) • To avoid personal liability it is advisable to abstain from acting on behalf of the entity until registered • Formation via Powers of Attorney is possible (additional formalities apply) 	
Shareholders (<i>Gesellschafter/ Aktionäre</i>)	<ul style="list-style-type: none"> • One or more shareholders (natural or legal person(s)) <ul style="list-style-type: none"> • Nationality of shareholders irrelevant <p>(foreign investors may require clearance when buying shares in certain industries, e.g. infrastructure, weapons' manufacturing companies, certain technology)</p>	
Capital requirements (<i>Stamm-/Grundkapital</i>)	<p>➤ KEUR 25 minimum share capital (regulatory requirements may overrule this basic corporate rule)</p> <ul style="list-style-type: none"> • Contribution in cash or contribution in kind can be made; capital increases may be done formally (by an increase of the share capital) or in a less formal way by injecting funds into the company's capital reserves • Authorized capital (<i>genehmigtes Kapital</i>) for purposes of fast and more flexible capital increases allowed 	<p>➤ KEUR 50 minimum share capital (regulatory requirements may overrule this basic corporate rule)</p>

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<p>Capital maintenance (Kapital- erhaltung)</p>	<ul style="list-style-type: none"> • Capital maintenance rules are applicable and violations of the same are sanctioned by law <p>➤ Protection of capital is in principle restricted to the registered share capital; statutory and case law based exceptions apply (e.g. in special situations such as insolvency scenarios) – but it is nonetheless as a general principle possible to refund payments made by the shareholders into the capital (reserves) of a GmbH except where formal capital increases have been made; in such cases capital reductions have to be implemented observing corresponding formalities</p>	<p>➤ Strictest system of capital maintenance under German corporate law, in principle all equity funds are safeguarded and strictly only profits may be distributed to shareholders</p>
<p>Shareholders’ Meeting</p>	<p>➤ The shareholders’ meeting (<i>Gesellschafterversammlung</i>) is the main corporate body of the GmbH; it decides by way of majority resolutions on the structure of the company, any amendments thereto and on the more important corporate affairs; the default position is that the simple majority of the votes suffices; exceptions apply (provided for by law e.g. for reorganisation matter or the articles of association for any measure set forth in the articles)</p> <p>➤ Each shareholder has broad statutory information rights, these may be executed in a shareholders’ meeting, but also on an isolated basis by means of an informal request to the management</p>	<p>➤ Limited powers of the shareholders’ meeting (<i>Hauptversammlung</i>), in light of the dualistic German system for an AG (i.e. there is a managing and a supervisory board), an AG always has three bodies; this as a matter of applicable law creates complex interdependencies, examples:</p> <ul style="list-style-type: none"> ○ significant powers are with the supervisory board (e.g. the right to appoint the managing directors) ○ in turn, the members of the supervisory are elected by the shareholders meeting ○ moreover, unless jointly decided otherwise by the managing and the supervisory board, these two bodies revolve on profit distribution; it is only by means of an exception that they decide to defer this right to the shareholders’ meeting <p>➤ statutory information rights of shareholders are restricted and may only be evoked in the context of a shareholders’ meeting</p>

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<p>Managing directors / members of the managing board</p>	<ul style="list-style-type: none"> ● Only natural persons can be managing directors/members of the managing board; the nationality of managing directors is irrelevant, in particular within the European Union (the individuals have to be practicably reachable, though) ● One or more managing directors (<i>Geschäftsführer</i>) are competent to represent the GmbH towards third parties and to manage its daily business <ul style="list-style-type: none"> ➤ Remuneration of managing directors in principle not subject to any limits (except for misuse of corporate funds to the detriment of the shareholders); please also not recent maximum pay provisions that apply from an employment law perspective ➤ Managing directors may, at the discretion of the shareholders' meeting (see next paragraph), be appointed for an indefinite term and, in turn, be removed without cause at the discretion of the shareholders' meeting (contractual rights of a managing director, in particular for remuneration, may run longer in cases of premature termination) ➤ The managing directors run a GmbH (in principle at their own discretion), but they are strictly are obliged to follow instructions issued by the shareholders' meeting (few exceptions to this rule, e.g. in case of "unlawful instructions"); it is the shareholders' meeting that appoints the managing directors and negotiates the terms of their engagement ➤ Articles of association may define certain reserved matters/actions of the managing directors that require prior consent of the shareholders 	<ul style="list-style-type: none"> ● One or more members of the managing board (<i>Vorstandsmitglieder</i>) are competent to represent the AG towards third parties and to manage its daily business <ul style="list-style-type: none"> ➤ Remuneration of members of the managing board restricted by the general principles of adequacy and appropriateness (<i>Angemessenheitsgrundsatz</i>); please also not recent maximum pay provisions that apply from an employment law perspective ➤ Members of the managing board are appointed (by the supervisory board, see supra) for a maximum period of five (5) years, consecutive re-appointments are possible; the removal of members of the managing board (again: by the supervisory board) is only possible for good cause ➤ Members of the managing board run the company "at their own discretion" and they are not bound by instructions from the shareholders' meeting or the supervisory board ➤ Articles of association may define certain reserved matters/actions of the members of the managing board that require prior consent of the supervisory board
<p>Supervisory / advisory board</p>	<ul style="list-style-type: none"> ➤ The establishment of a supervisory/advisory board (<i>Aufsichtsrat</i> or <i>Beirat</i>) is at any time possible at a voluntary basis, but not mandatory, unless certain co-determination laws apply (see below) 	<ul style="list-style-type: none"> ➤ The establishment of a supervisory board (<i>Aufsichtsrat</i>) is mandatory, its main function is to appoint (see supra) and supervise the members of the managing board; the members of the supervisory board have far reaching information rights, the managing board has multiple reporting duties (this includes intermittent information duties as well as ad hoc information duties in case matters with "far reaching effect" occur or have to be decided)

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Employee co-determination (<i>Mitbestimmung</i>)	<ul style="list-style-type: none"> • If more than 500 employees: one third of the members of the supervisory board have to be representatives elected by the employee-side • If more than 2,000 employees: 50 percent of the members of the supervisory board have to be representatives elected by the employee-side; in the event of a stalemate the chairman vote (the chairman is in all likelihood a representative of the shareholders) is decisive 	
Assignment of Shares	<ul style="list-style-type: none"> ➤ Shares in a GmbH are, as a rule, freely assignable; articles of association may contain clauses restricting the assignment of shares ➤ Share transfers require notarial deeds (which can be a cost driver since notarial fees are calculated in proportion of the value of the shares transferred, not the complexity of the underlying legal documentation) 	<ul style="list-style-type: none"> ➤ In principle shares are negotiable instruments which may be listed and traded on a stock exchange market ➤ Articles of association can provide for consent requirements and alike restrictions for the transfer of shares (e.g. by establishing registered shares (<i>Namensaktien</i>))
Liability	<ul style="list-style-type: none"> • In principle, liability of the shareholders for the performance of the obligations of the GmbH/AG is limited to the share capital • As an exemption, the shareholders may be liable for piercing the corporate veil, e.g. in cases of – <i>inter alia</i> - undercapitalization, mingling of assets or destructive intervention (<i>existenzvernichtender Eingriff</i>) 	
Registration	<ul style="list-style-type: none"> • Commercial Register • Local Trade Office (<i>Gewerbeamt</i>) • Additional registrations may follow the corresponding regulatory context of the business pursued 	
Publicity	<ul style="list-style-type: none"> ➤ The shareholders' list of a GmbH is publicly available • The articles of association are publicly available; everyone can access the Commercial Register and inspect these documents; this is why often in practice certain provisions (drag- and tag-along rights, pre-emptive rights, etc.) are outsourced to a shareholders' agreement 	<ul style="list-style-type: none"> ➤ There is no shareholders' list deposited with the Commercial Register, in case the company has opted for registered shares the register is not publicly available
Administrative requirements	<ul style="list-style-type: none"> ➤ Average maintenance level, probably a bit stricter but still comparable to the handling of a limited liability company in other jurisdictions (e.g. UK, The Netherlands). ➤ Medium level of formalities 	<ul style="list-style-type: none"> ➤ High maintenance ➤ High level of attention required to match compelling administrative requirements (e.g. when calling shareholders' meetings, passing resolutions, etc.)