

NOTARIAT AM ALSTERTOR

DR. ROLF-HERMANN HENNIGES DR. WOLFGANG ENGELHARDT
JOHANN JONETZKI DR. ROBERT DIEKGRÄF
DR. ARNE HELMS, LL.M. DR. MICHAEL VON HINDEN
NOTARE

Client Information on the Standard Record for the Formation of a German GmbH (*limited liability company*)

1. What is a standard record?

The German Act to Modernize the Law Governing Limited Liability Companies and to Combat Abuses (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen [MoMiG]*) enables formation of a "GmbH" or an "Unternehmergesellschaft (haftungsbeschränkt)" (*entrepreneurial company [with limited liability]*) in the form of a standard record if the company is formed by cash subscription.

The content of the integral parts of the standard record is compulsorily stipulated. The standard record includes the formation formalities for the formation by cash subscription with one up to three shareholders and with one "Geschäftsführer" (*managing director*), who as a matter of principle is exempt from the restrictions of Section 181 of the Civil Code (*BGB*), the (few) provisions of the articles of association and the list of shareholders.

The integrated articles of association permit only provisions regarding

- the firm name
- the object of the company
- the amount of the share capital
- the founding shareholders and the shares subscribed to by them

A formation with more than three founders is not possible with the standard record.

Appointment of more than one "Geschäftsführer" and/or different agency relationships is not possible with the standard record (in the period following either).

2. What are the advantages of using the standard record?

- In particular cases the standard record may result in a somewhat faster registration of the company in the commercial register. However, so far there has been no practical experience showing this. Experience shows that even examination of the articles of association by the registry court does not cause a delay, but practical issues such as the paying in of the share capital are "more time critical".
- If the company to be formed is a German entrepreneurial company (with limited liability) (see "Client Information on the "Unternehmergeellschaft") the formation may offer cost advantages.

Examples (excluding VAT)

(for the GmbH the fees arise for

1. Formation with individual articles of association
2. Appointment of "Geschäftsführer"
3. List of shareholders)

Share capital in EUR	(Fee(s) in EUR			
	UG with one shareholder	GmbH with one shareholder	UG with two or three shareholders	GmbH with more than one shareholder
1,000.00	10.00	n/a	20.00	n/a
5,000.00	42.00	n/a	84.00	n/a
10,000.00	54.00	n/a	108.00	n/a
20,000.00	72.00	n/a	144.00	n/a
24,999.00	84.00	n/a	168.00	n/a
25,000.00	n/a	1. 84.00 2. 168.00 3. <u>21.00</u> 273.00	n/a	1. 168.00 2. 168.00 3. <u>21.00</u> 357.00

The aforesaid costs comprise the recording, (for the GmbH:) the drawing up of the individual articles of association (including counselling), the appointment of one or more "Geschäftsführer" (for the GmbH with individual adjustment of the agency relationships after appropriate counselling) and the list of shareholders.

- If, however, a "normal" GmbH is involved, the cost advantages do not arise.

3. What are the disadvantages of using the standard record?

If the standard record is used, it is not possible to diverge from the content at all, either with regard to the structure of the articles of association or the representative authority of the "Geschäftsführer".

However, we know from our day-to-day counselling practice that in almost all cases provisions are desired and required which are individually tailored to the needs of the shareholders, such as provisions concerning

- the creation of several shares (possible in future), their splitting and consolidation
- termination of the company
- abstract representative authority in case of more than one "Geschäftsführer" and "Prokurist" (holder of a general commercial power of attorney)
- holding of shareholders' meetings and proportions of votes cast in shareholders' meetings
- restriction on transferability of shares
- rights of preemption
- fate of the capital participation in the case of inheritance
- expulsion of shareholders (e.g. in the case of insolvency)
- determination of the compensation in the case of expulsion of shareholders
- representative authority of liquidators
- any prohibition of competition (mostly their exclusion)
- assumption of costs by the company in excess of EUR 300.00 and/or in the case of capital increases

and much more. As experience shows, this also applies to formations of one-man companies in which arrangements have already been made for future developments.

Provisions diverging from the tight corset of the standard record are also appropriate and desired with regard to the appointment of "Geschäftsführer" and their agency relationships in almost all cases (apart from perhaps in the case of formation of one-man companies):

- appointment of more than one "Geschäftsführer"
- no or only limited exemption from the restrictions of Section 181 of the Civil Code (self-dealing and/or multiple representation)
- sole power of representation, even if further "Geschäftsführer" are appointed later
- joint power of representation with "Prokurists"
- formation of specifically named representative couples

4. For whom is the standard record suitable?

Given the disadvantages of the standard record we advise against using this for a "normal" GmbH. This does not offer any cost advantages. From an overall perspective we do not expect any significantly faster registration in the commercial register.

The standard record can possibly be used at most in specific cases of formation of an "Unternehmensgesellschaft" if the founder or founders are able and wish to dispense with any kind of counselling and individualization given the (moderate) costs advantages. We cannot expressly advise this. The disadvantages (also financial ones) of "unsuitable" articles of association quickly offset the (moderate) cost advantages.

Notice: This client information contains merely non-binding general recommendations. It is no substitute for personal counselling in the individual case. All liability for the accuracy of this client information is excluded.