

# NOTARIAT AM ALSTERTOR

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## Client Information on the "Unternehmergesellschaft (haftungsbeschränkt)" (*entrepreneurial company (with limited liability)*)

### 1. What is an "Unternehmergesellschaft (haftungsbeschränkt)"?

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 an "Unternehmergesellschaft (haftungsbeschränkt)" (*entrepreneurial company [with limited liability]*) from 1 November 2008.

The "Unternehmergesellschaft" is not an independent corporate form, but a subtype of the German GmbH (limited liability company). It may be formed as an "entry-level variant" of the GmbH without complying with the provisions applicable to a "normal" GmbH in respect of minimum share capital, but is subject to specific statutory restrictions. By increasing the capital to at least EUR 25,000.00 an "Unternehmergesellschaft" can later become a "normal" GmbH. On the other hand, it is not permitted to change a "normal" GmbH into an "Unternehmergesellschaft" by changing the legal form or reducing the capital.

### 2. What improvements have been made with regard to the "normal" GmbH?

The advantages and disadvantages of an "Unternehmergesellschaft" must be assessed against the backdrop of a few important improvements applicable to the formation of a "normal" GmbH from 1 November 2008. Although a minimum share capital of EUR 25,000.00 is still required for a "normal" GmbH, the following facilitative changes have been introduced:

- Even if the GmbH is formed by one shareholder the cash contribution must be made only in the amount of half the minimum share capital (EUR 12,500.00). There is no longer any obligation to furnish security for this case.
- The amount of the contribution paid in may on certain conditions, which are specified by the law, flow back to the contributing shareholder direct as a loan provided that this use of the contribution is disclosed to the commercial register and the value of the restitutory claim is proven. This now makes it possible, for instance in the case of a GmbH & Co. KG (*limited partnership with a GmbH as general partner*), for the GmbH to grant a loan to the KG (*limited partnership*) in the amount of the contribution made provided that the legal requirements applicable to such an arrangement are complied with.

Of course, it is still possible to use the amount of the contribution required to cover the minimum capital for purposes of the GmbH by using the amount paid in for purchases from third parties (i.e. not from shareholders or related persons/enterprises).

It further remains possible to form a GmbH by contributions in kind without any cash contributions if the GmbH receives from the shareholders physical assets which can be proved to have a value of least EUR 25,000.00.

### 3. What advantages does the "Unternehmergesellschaft" have over a "normal" GmbH?

For the "Unternehmergesellschaft"

- no minimum share capital is prescribed by law; therefore, it may be formed with a share capital of (theoretically) EUR 1.00 to EUR 24,999.00.
- formation cost advantages arise provided the standard record as stipulated by law is used (see "Client Information on the Standard Record for the Formation of a German GmbH [*limited liability company*]") On the other hand, if any point deviates from these standard articles of association, which will nearly always be the case at least for companies formed by more than one shareholder, it will not be more cost-advantageous to form an "Unternehmergesellschaft" before a notary irrespective of the amount of the share capital than to form a "GmbH" with a share capital of EUR 25,000.00.

### 4. What disadvantages does the "Unternehmergesellschaft" have over a "normal" GmbH?

The disadvantages of the "Unternehmergesellschaft" over a "normal" GmbH include the following:

- Instead of the addition "GmbH" the name of the company must mandatorily contain the designation "Unternehmergesellschaft (haftungsbeschränkt)" or "UG (haftungsbeschränkt)" It is not permitted to abbreviate the addition "haftungsbeschränkt" (*with limited liability*) as the purpose of the addition is to make clear in legal relations that the company possibly has a very low share capital.
- The share capital must mandatorily be fully paid in.
- The lacking minimum share capital must not obscure the fact that the company typically will not manage with a very low share capital to avoid an immediate overindebtedness according to the books (vicinity of insolvency!) – if only for covering the usual formation expenses, but all the more for necessary investments. In this regard, shareholders and "Geschäftsführer" (*managing directors*) are exposed to increased liability risks owing to undercapitalization and delay in filing a petition in insolvency.
- The shareholders' meeting must already be convened when inability to pay debts impends, and must be convened without undue delay. Like for a "normal" GmbH, there is also an obligation enforced by penalty to disclose a loss amounting to half of the share capital to the shareholders' meeting. Both aspects are possibly of increased importance for the "Unternehmergesellschaft" owing to its low capital.
- The "Unternehmergesellschaft" must mandatorily create a legal reserve in its balance sheet amounting to one quarter of the annual surplus. Hence, it is not permitted to distribute the entire surplus.
- A formation by contributions in kind or a subsequent capital increase by way of contributions in kind in the form of assets is not permitted.
- The possibility of a reorganization under the German Reorganization Act (*Umwandlungsgesetz*) is very restricted for the "Unternehmergesellschaft". In particular, it is not permitted to

change the legal form of the "Unternehmergeinschaft" directly (e.g. into an AG [*stock corporation*] or into a limited partnership [KG]).

- An "Unternehmergeinschaft" cannot be a controlled company of an intercompany agreement.
- An "Unternehmergeinschaft" is unsuitable as a general partner of a limited partnership.

#### **5. Does the formation of an "Unternehmergeinschaft" have cost advantages?**

No. The "Unternehmergeinschaft" as such does not offer cost advantages compared with the "normal" GmbH. Such advantages might at most arise if the statutory "standard record" is used unchanged, which often will be unsuitable in practice (see "Client Information on the Standard Record for the Formation of a German GmbH (*limited liability company*)"). On the other hand, if any point deviates from the standard articles of association provided for in this, which will nearly always be the case, it will not be more cost-advantageous to form an "Unternehmergeinschaft" before a notary irrespective of the amount of the share capital than to form a "normal" GmbH.

#### **6. For whom is the "Unternehmergeinschaft" suited?**

Given the improvements which have been made for the "normal" GmbH there is no practical need to form an "Unternehmergeinschaft" in many formation situations.

An "Unternehmergeinschaft" may at most be a suitable legal form if all the following requirements are satisfied:

- Your business model does not require any significant capital investment.
- You cannot / do not want to raise the contributions payable for the formation of a "normal" GmbH by cash subscriptions (of initially EUR 12,500.00 in total).
- You do not wish / are not able to form a "normal" GmbH by non-cash contributions.
- You assume that use of the firm name "UG (haftungsbeschränkt)" will be accepted by our customers (unlike, as is often the case, for the English Ltd.).
- You accept the mandatory reserve amounting to one quarter of the annual surplus that is stipulated by law for the "Unternehmergeinschaft".
- If necessary, you will bear (depending on the amount of the share capital) the formation expenses personally and/or cover any losses to prevent liability and criminal liability risks by a shareholder's loan provided with a letter of subordination according to Sections 19 paragraph 2, 39 paragraph 2 of the German Insolvency Code (*Insolvenzordnung*).

Even in such a case one will not necessarily wish to form an "Unternehmergeinschaft" with a share capital of merely EUR 1.00. But it may be worth considering whether, for example, a share capital running into four figures will suffice. However, in such a case you should examine whether a firm organized in corporate form has to be formed at all or whether a one-man business (e.K.) or formation of a partnership (OHG, KG) would be more suitable. The tax differences between the legal forms should be discussed with a tax advisor.

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