

Insights

REQUIREMENT OF A DOMESTIC BUSINESS ADDRESS WHEN ESTABLISHING A GMBH OR AN UG

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In its decision dated 6 October 2021, the KG Berlin dealt with the obstacles to registration in the case of a new formation of a GmbH (*Gesellschaft mit beschränkter Haftung* – limited liability company) or an UG (*Unternehmergesellschaft* – entrepreneurial company). In addition to the issue of the lack of an advance on registration costs, the decision dealt with the requirement of a domestic business address. The court affirmed such requirement during the formation process and, as a result, rejected the previous appeal of the notary notarising the formation. The decision of the KG Berlin, in line with its previous rulings on these matters, also reflects the prevailing opinion in register law practice and should therefore – as will be briefly outlined below – also be taken into account in ongoing transaction advice, particularly when involving special purpose vehicle (SPVs) with only domestic founding shareholders.

First, the KG Berlin held that the lack of a domestic business address capable of being served constitutes an obstacle to registration on the grounds of which the registration court must refuse registration pursuant to Sec. 9c para. 1 s. 1 Limited Liability Companies Act (“**GmbHG**”).

The requirement to provide a domestic business address stems from Sec. 8 para. 4 GmbHG. The domestic business address is to be registered pursuant to Sec. 10 para. 1 s. 1 GmbHG and also must be made public under Sec. 10 German Commercial Code (“**HGB**”). This regulation was included in the GmbHG in the course of the Law for the Modernisation of the German Limited Liability Company Law and the Prevention of Misuse (“**MoMiG**”). Previously, only the location of the business premises had to be filed pursuant to Sec. 24 para 2. s. 1 of the Commercial Register Ordinance (“**HRV**”). In view of MoMiG’s aim to combat misuse, the mandatory requirement to provide a domestic business address was included to strengthen creditor protection. In particular, the reason for this was the difficulties with servings (*Zustellungen*) that existed prior to the MoMiG, which proved to be very disadvantageous for creditors of a GmbH. This is why, according to the government draft of the MoMiG, a serviceable address which is available via a public register should be included in the GmbHG for increased creditor protection (cf. government draft, BT-Drs. 16/6140, p. 35). The domestic business address can be chosen freely and therefore does not necessarily have to be consistent with the registered seat or administrative headquarters of the company. However, the business address must be located in Germany and reliably allow for

effective formal servings to the Company. Addresses in other European countries or third countries are not permissible. According to the court, this requires that service, in particular substitute service (*Ersatzzustellung*), to the company is actually possible at the designated location, for example because the company's business premises are located there. If none of the locations are in Germany, the purpose of Sec. 8 para. 4 GmbHG requires that another address be established at which the company can actually be contacted/served (notwithstanding Sec. 4a GmbHG). Such an address can even be the address of an authorized agent for service of process (*Zustellungsbevollmächtigter*) such as a lawyer, tax adviser or a notary. Providing a "c/o" address is permissible insofar as this is not intended to obfuscate the possibility of service or to only fake it.

For legal corporate law practice, the decision of the court and the respective register law is particularly relevant in scenarios where a GmbH or an UG is founded entirely by foreign entities or persons, for example to serve as an SPV in a multi-level transaction structure. In this case, legal advisers need to ensure that a domestic business address – which is actually serviceable – is in place when registering the formation, for example by means of granting the advisers respective power of attorney. If the domestic business address changes, there is an obligation to register such change pursuant to Sec. 31 para. 1 HGB and Sec. 13 para. GmbHG. To comply with these registration duties, the managing directors may even be subjected to a fine pursuant to Sec. 14 HGB in conjunction with Sec. 388 et seq. Act on Procedure in Family Matters and Non-Contentious Matters ("**FamFG**") (cf. Hamburg Higher Regional Court, decision dated 27 January 2011 – 11 W 4/11).

Secondly, the KG Berlin ruled that failure to pay the statutory advance on costs also constitutes an obstacle to registration and results in rejection of the application for registration. In practice, it should be ensured that a domestic business address is available, at which an advance payment request can be served and that such advance payment is duly paid. This is because registration of the GmbH or the UG is decisive for their formation and consequently, prior to registration, there is no statutory limitation in liability (Sec. 11 GmbHG). Both the shareholders and the managing director(s) of a GmbH in foundation are fully and personally liable under the general principles of partnership law. Therefore, a suitable domestic business address is required for the founding process in order to limit liability exposure and provide legal certainty.

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