

How to set up in Germany

MIFID Firm

This series is designed to help you understand the benefits and drawbacks of setting up your business in key European jurisdictions. Here, we provide a summary of the key issues and processes involved in setting up in Germany.

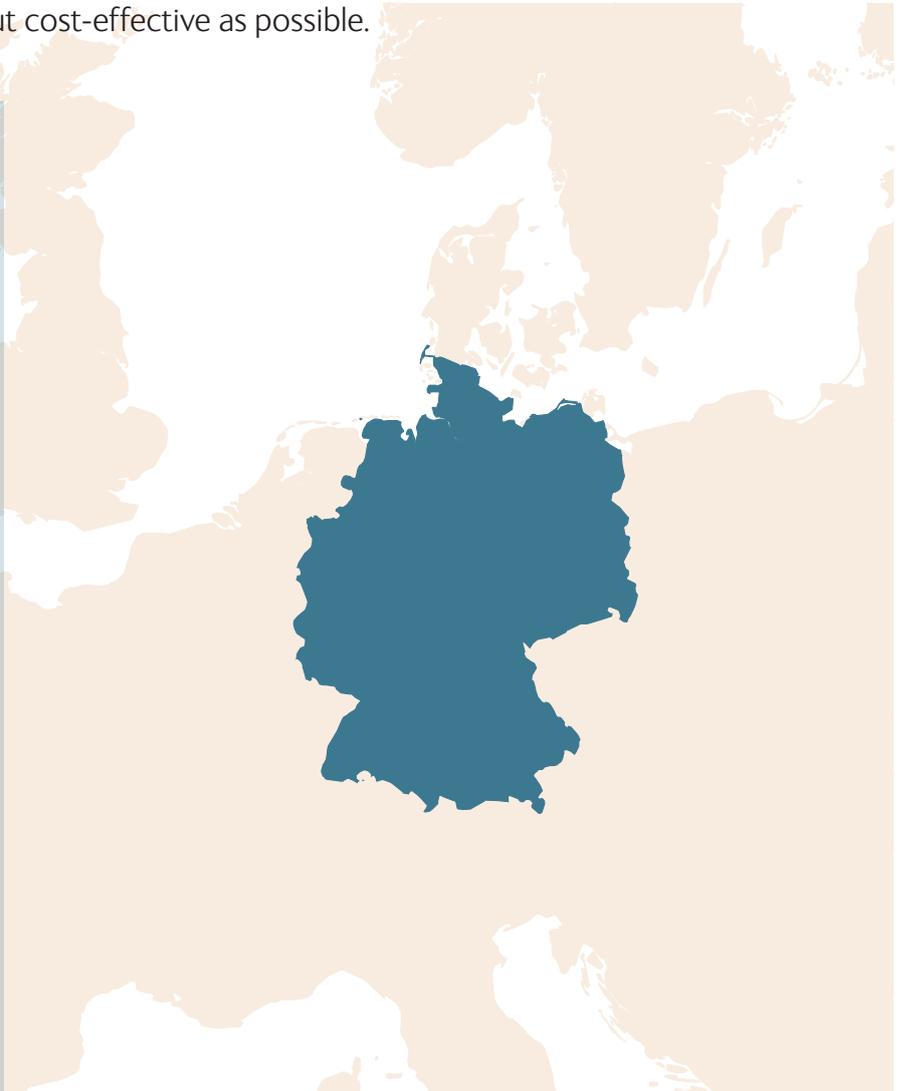
Simmons & Simmons has a team of experts, skilled in assisting clients with achieving the correct authorisation to establish their businesses across Europe. We use a series of tools to help streamline the process, making it as efficient, but cost-effective as possible.

What are the pros?

- Reliable, predictable principle based approach
- Timely service
- No material super-equivalent requirements
- Financial services providers benefit from various exemptions including remuneration restrictions
- Data protection legislation similar to UK

What are the cons?

- Extensive employees' protection rights
- Formalistic approach



Subsidiary (MiFID Investment Firm)

Licence/Passport Process

- Information on the application process is available here: [Application Guidance](#)
- The process is iterative and involves submission of an application plus numerous supporting documents to the German Federal Financial Supervisory Authority ([Bundesanstalt für Finanzdienstleistungsaufsicht](#) – “BaFin”)
- Financial services providers restricted to investment advice and intermediation of public funds benefit from a light-touch licensing regime
- Timetable is up to six months for BaFin to review once full application is submitted, and as a rule totals 9-12 months including preparation time
- The authorisation procedure is subject to a fee which depends on the required processing time and the extent of the performed business; the fee charged ranges between €2,000 and €20,000. For a standard MiFID firm BaFin fees are between €5,000 and €10,000.

Conduct of business Prudential rules

- German requirements will apply based on MiFID
- CRR/CRD IV requirements will apply; for smaller institutions the German Banking Act is relevant which relaxes some requirements as compared to CRR/CRD IV
- No material super-equivalent requirements albeit certain derogations have been exercised (as in all Member States).

Corporate governance

- Systems and controls requirements are based on MiFID/CRD IV or the German Banking Act requirements
- Certain resources are needed, in particular sufficient initial capital, which alters depending on the financial services provided (minimum €50,000). The level of required resources depends on the type/size/risk of the business
- An institution must have at least two managing directors (four eyes principle). The managing directors must be trustworthy, be sufficiently qualified and devote sufficient time to their role. Institutions that only provide the service of “reception and transmission of orders in relation to one or more financial instruments” usually only require a single manager
- At least one director must have sufficient experience with a German institution of similar size and organisation.

Regulatory environment

- BaFin is open to discussions in key issues – regulatory approach is generally “principle based” with a tendency towards a risk-based approach
- Strict compliance with notification requirements is required.

Subsidiary (MiFID Investment Firm)

Tax

- Corporate income tax rate of 15.825% on German taxable income
- A German resident subsidiary is also subject to the trade tax at a rate depending on the municipality in which the corporation is located and differs significantly within a range of about 7% to almost 17% (the trade tax rate for Frankfurt, for example, is 16.1%)
- UK-Germany double tax treaty provides for a 5% withholding tax on dividends. Impact of the Brexit on the application of the EU Parent-Subsidiary Directive (0% WHT) has to be considered
- Related party transactions must be conducted considering the OECD arm's length principles. The subsidiary has to document any transfer pricing to any companies holding directly or indirectly at least 25% of the shares in the subsidiary. No formal transfer pricing study is required if the aggregate amount of payments to related parties is lower than €0.5m p.a. In case the amount is lower than €0.5m pa, it is sufficient to document why the relevant payment should be at arm's length
- See also a [comparative table](#) of the main taxes and reliefs relevant to setting up a financial services business.

Employment law

- To the extent applicable the German Act against unfair dismissals sets high requirements for the social justification of a dismissal. Most of the requirements have to be proved by the employer
- Generally, an employee is not entitled to a severance payment if the dismissal is (socially) justified. However, since the requirements for a dismissal are very high there is a risk of having to pay severance in the case of a court hearing
- Employees have the right to establish a works council. This is an independent body to represent the employees in discussions with the employer and has certain co-determination rights
- Financial services providers restricted to investment advice and intermediation benefit from various exemptions including remuneration restrictions.

Data protection

- Legislation is based on EU directives; EU General Data Protection Regulation will apply from 25 May 2018

Outsourcing

- Most functions can be outsourced with the exception of managerial functions and internal audit. The institution may, however, not constitute an empty shell. The institution must appropriately manage the risks associated with material outsourced activities and processes and must properly monitor the provision of the outsourced activities and processes
- The institution remains responsible for any outsourced activity and will be expected to maintain in-house expertise to supervise/manage the outsourced activities.

Corporate

- Financial services institutions must be established as a corporation
- Common legal persons are the limited liability company (GmbH) or a stock corporation (AG)
- Capital minimum requirements depending on the type of service apply starting with €50.000.

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