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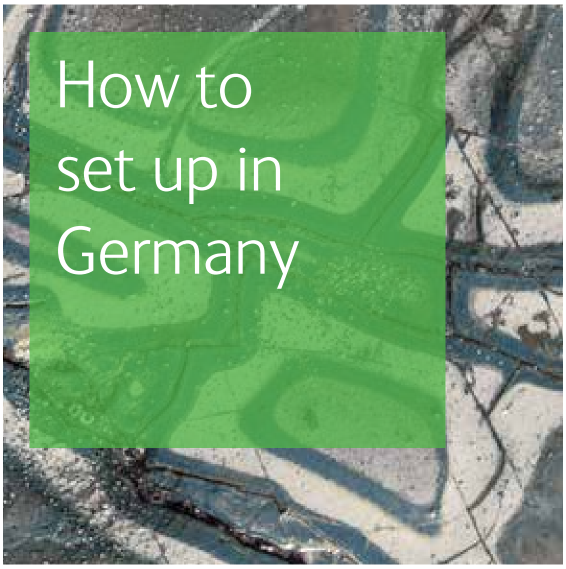


How to set up in Germany

CRD/CRR Bank

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 a bank in Germany.

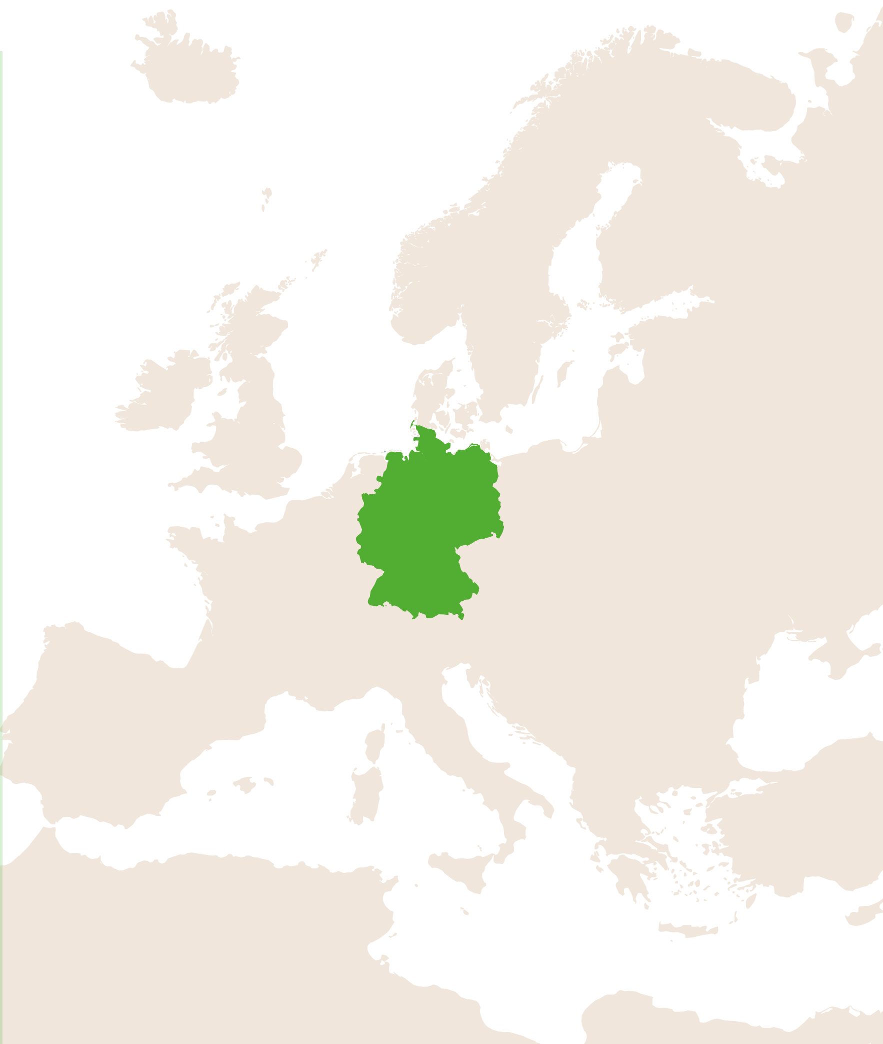
Simmons & Simmons has a team of experts, skilled in assisting clients with achieving the correct authorisation to establish their businesses across Europe. We use a series of tools to help streamline the process, making it as efficient, but cost-effective as possible.

What are the pros?

- ECB headquartered in Frankfurt
- German regulator ("BaFin") is experienced with establishing new banks and has dedicated teams
- BaFin has made clear that it intends to stick to the time frame of six months for responses to applications

What are the cons?

- Strict compliance with process essential to avoid delays



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Licence/Passport Process	■ Information on the application process is available here: [Application Guidance] ■ As a result of the creation of the EU Banking Union, the ECB (in conjunction with national competent authorities (NCAs)) grants and withdraws any bank authorisation. Therefore, the process should be more streamlined than in the past ■ The ECB also takes "fit and proper" decisions – it assesses the suitability of new members of the significant banks' management bodies ■ BaFin serves as the entry point for applications and notifications related to all authorisation procedures. For smaller banks BaFin will carry out all necessary evaluations concerning the application. Bigger banks are subject to direct supervision by ECB ■ Applicants should use BaFin's forms for application or notification where available ■ Feedback from the ECB is that it has a backlog of authorisation applications, so delays can be expected (we understand that the ECB is not outsourcing as much to the NCAs as it could) ■ In light of Brexit, the ECB is considering its approach and with what guidance it will provide firms ■ BaFin has to provide a response whether it grants or refuses to grant an authorisation within six months following the applicant providing a complete application. Usually the preparation of the application also takes a while and applicants should be prepared that a final decision is more likely to take between 12-18 months ■ The decisions are made following the ECB and BaFin applying the Common Procedures – which include information as to expectations as to substance and people, including: – programme of operations – governance (fit and proper members of management bodies, suitable shareholders) – capital, liquidity and solvency – internal organisation (risk management, compliance, audit) ■ "Mind and management" will have to be located in Germany, such that day-to-day decision making and key risk functions (CEO, CRO, CFO, Legal, Compliance) are located in Germany
Conduct of business Prudential rules	■ CRR/CRD IV requirements will apply; for smaller institutions the German Banking Act is relevant ■ No material super-equivalent requirements
Corporate governance	■ Systems and controls requirements are based on CRD IV or the German Banking Act requirements ■ German Banks must have a minimum of two managing directors ■ The managing directors must be trustworthy, be sufficiently qualified and devote sufficient time to their role ■ At least one director must have sufficient experience with a German bank ■ A German internal audit function is required for which BaFin might initially accept outsourcing to a German audit company. However, after a while BaFin would expect that this is insourced and it might ask for more – risk management and compliance are usually the next requirements ■ BaFin does not have an "approved persons" regime comparable to that of the UK. However, the regulator's review places particular focus on the CVs of proposed managing directors and whether they verify the directors' good repute and experience to conduct the business of the bank. This includes a certificate of good conduct (either in Germany or an equivalent abroad) ■ BaFin's review places particular focus on the verification of the ability to ensure sound and prudent management ■ Head office and registered office must be in Germany
Regulatory environment	■ Strict compliance with notification requirements is required ■ Licensing restrictions into other jurisdictions for marketing will need to be considered ■ Although delegation is generally possible, this is likely to require that any representative of the UK entity would need to be dual hatted (secondment arrangement probably suffice) to do the marketing into jurisdictions where a licence is required ■ Dual hatting will need to be considered from a corporate/regulatory perspective

Bank

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 does not exceed certain thresholds ■ The personal income tax rate is progressive, rising to a top rate of up to approx. 47.5 % ■ Germany does not levy stamp duty. The VAT rate is 19% ■ 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 in practice most of the cases are settled at court against payment of a severance ■ 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 ■ Notice: The statutory notice period for the employer is four weeks to the 15th or the calendar month throughout the first two years of employment, one month to the end of the month until the fifth year of employment and is slowly increased up to a maximum statutory notice period of seven months after tenure of 20 years. However, many employers chose to include a contractual notice period of three month to the end of the calendar month in the employment contracts which is superseded by the contractual notice period after ten years of employment ■ Remuneration principles as specified in CRDIV
Data protection	■ Legislation is based on EU directives; EU General Data Protection Regulation will apply from 25 May 2018
Outsourcing	■ Subject to any new Brexit rules outsourcing is possible to the extent the German entity does not remain an empty shell ■ Critical/significant outsourcing requires pre-approval by ECB/BaFin ■ The institution remains responsible for any outsourced activity and will be expected to maintain in-house expertise to supervise/manage the outsourced activities
Corporate	■ Banks must be established as a stock corporation (Aktiengesellschaft) (AG) or as a limited liability company (Gesellschaft mit beschränkter Haftung) (GmbH) ■ No "single entity representation" rule equivalent. German public banks are all separate legal entities within specific group structures ■ It is not possible to convert a branch into new legal entity – a new entity needs to be established

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