IGuFU Institut für Gründer und Familienunternehmer

Questionnaire

for the preparation of the articles of association of a German limited liability company (GmbH) with several shareholders

(Status 1st June 2021)

No.	Question	Reply
A.	**Company name, registered office, object of business, business year**	
1.	What should the company name be? Have you already contacted the competent Chamber of Industry and Commerce („Industrie- und Handelskammer (IHK)“) regarding the admissibility of the company name? The company name must have distinctive character, i.e. it must be clearly distinguishable from other companies already existing at the same location and must not be misleading. Furthermore, it must not infringe the rights of third parties with regard to names and competition. Example: „Electronics Smith GmbH“	
2.	Where should the company's registered office be located? If already known, please also provide the complete address. The registered office is in particular relevant for the jurisdiction and need not, but should in principle, correspond to the actual administrative seat, i.e. the seat of the management. The specification of a German local municipality is required. If a municipality extends over several German judicial districts (e.g. Berlin), a more detailed specification is required. Examples: Munich; Berlin-Mitte	
3.	Please describe the object of business, i.e. the company's activities. Should the company also hold shares in other companies, e.g. in subsidiaries?	

No.	Question	Reply
4.	Should the business year differ from the calendar year? If yes: How should the business year be defined?	
B.	**Registered share capital and shares**	
5.	How much should the company's registered share capital be? The registered share capital must amount to at least EUR 25,000 and be denominated in full euros. At least half of the share capital must be paid in at the time of formation (see also No. 8 below). In the event that a registered share capital of less than EUR 25,000 is desired, the formation of an entrepreneurial company ("UG", a special form of a limited liability company) can be considered. In the event that a higher amount than EUR 25,000 is to be paid in, the question arises as to whether a premium should be paid, i.e. whether the shares should be issued at a higher price than the nominal value. Is this the case? Should there be other secondary obligations binding the shareholders (e.g. taking over the management or providing certain consulting services, etc.)?	
6.	Particularly in the case of companies with several shareholders, a division into shares with a nominal value of EUR 1 each is common. The smaller the denomination, the more flexibly the shares can be disposed of. Is a denomination other than the nominal amount of EUR 1 desired, and if so, which one?	
7.	Who should be the company's shareholders? What shares are the shareholders to take over? Please provide the first name, surname, date of birth, place of residence and nationality of each shareholder as well as the number of shares to be taken over. If shareholders are married, please also indicate the matrimonial property regime and the jurisdiction of the marriage. If legal entities are to be shareholders, please state the company name, legal form, registration number and registration court (if applicable) as well as the shares to be taken over.	

No.	Question	Reply
	Examples: Max Mustermann, born on 1.1.1970, resident in Munich, married in separation of property: 12,500 business shares at EUR 1.00 each with the consecutive numbers 1 to 12,500. Muster Holding AG, registered at Munich Local Court HRB 123456: 12,500 shares at EUR 1 each with the serial numbers 12,501 to 25,000.	
8.	To what amount should the shares be paid in immediately? A total amount of at least EUR 12,500 must be paid in before registration and at least one quarter of the nominal amount must be paid in for each share. It is often recommendable that all shares are paid in fully.	
C.	**Non-cash contributions**	
9.	Should there be any non-cash contributions? Non-cash contributions are non-monetary contributions, i.e. a shareholder does not pay in money but transfers a different good to the company, e.g. an existing enterprise or real estate. By far the largest number of incorporations is by cash contribution, i.e. by paying in the amounts attributable to the capital contributions. If a non-cash contribution is intended, please describe the object of the non-cash contribution and specify the shares to which the non-cash contribution is to relate. Non-cash contributions result in a more complex formation process, since a specified procedure must be used to verify whether the value of the non-cash contribution is equal to the amount of the contribution.	
D.	**Management and representation**	
10.	How many managing directors should the company have? This can also be left open in the articles of association.	

No.	Question	Reply
11.	Who should be the managing director(s)? Please enter first name, last name and address of every director.	
12.	How should the managing directors be entitled to actively represent the company if there are several managing directors? Representing the company actively means to make a declaration which is legally binding for the company. In contrast, the company is always represented passively by every managing director individually, i.e. a third party's declaration to the company becomes effective once it reaches one managing director. In particular, the following two arrangements can be considered: - Individual representation authority of each managing director - Alternatively, it can be provided that each managing director is only authorized to actively represent the company together with another managing director or – optionally – together with an authorized signatory („Prokurist“). Different arrangements can be made for different managing directors.	
13.	Should the managing directors be exempted from the prohibition of self-dealing and multiple representation (Sec. 181 of the German Civil Code)?	

No.	Question	Reply
E.	**Restriction of Transferability**	
14.	According to the dispositive legal provisions (Sec. 15, para. 1 German Limited Liability Company Act), shares may be freely disposed of and transfered. However, it is possible to stipulate a requirement for consent for the disposal of shares ("Restriction of Transferability", in German "Vinkulierung"). A disposal made without the required consent is then invalid. In practice, a Restriction of Transferability is very common. This prevents a shareholder from leaving the company by transferring their shares to a third party and the remaining shareholders having to deal with an unpopular new shareholder. Should the shares be subject to a Restriction of Transferability?	
15.	If a Restriction of Transferability is desired: Who should be able to give consent? If it is provided that consent needs to be given by the managing directors, a resolution of the shareholders' meeting is only required in the internal relationship, i.e. the transfer is valid if the mangaging directors approved it regardless of the resolution of the shareholders' meeting. Alternatively, the consent of the shareholders' meeting can also be provided for as a prerequisite for effectiveness in the external relationship. With what majority should the shareholders' meeting (without the shareholder concerned) decide on the granting of consent (examples: simple majority of the votes cast, three-quarters majority, unanimity)?	
16.	If a Restriction of Transferability is desired: Should dispositions in favor of co-shareholders be exempt from the consent requirement? It is also conceivable that transfers of company shares to companies controlled by a shareholder or to companies affiliated with a shareholder can be transferred without consent. Is this relevant here or should this be regulated?	
17.	If a Restriction of Transferability is desired: Should dispositions in favor of spouses and descendants be exempt from the consent requirement?	

No.	Question	Reply
F.	**Shareholders leaving the company**	
18.	Shares in a company are inheritable. In the event of the death of a shareholder, should it be possible for the company to redeem the shareholder's shares in return for compensation for the heirs?	
19.	According to the dispositive legal provision, in the event of the withdrawal of a shareholder, the withdrawn party has an immediate claim for compensation against the company in the amount of the market value of the shares. In order to avoid a considerable burden on the company's liquidity, deviating calculation methods, which generally lead to lower severance payments, may be provided for. Within certain limits, for example, a settlement based on the book value, the net asset value or the capitalized earnings value is permissible. Which valuation method is desired? Do you have any specific preferences regarding the details of the valuation method (e.g. application of the principles for the performance of business valuations IDW S1 of the Institute of Public Auditors in Germany e.V. or similar)? Should the company be allowed to pay the compensation in installments? If so, how is interest to be paid on the amount? Should the company be obliged to provide collateral? Mixed forms of calculation methods are also possible, in particular so-called Vesting. If this is agreed, certain shareholders must first earn their shares from an economic point of view by participating in the business for a certain period of time. Only on expiry of certain - usually staggered - periods are the shares gradually deemed to have been earned („vested shares“) (e.g. 20% after one year, 40% after two years, 60% after three years, 100% after four years). It can then be provided that, in the event of withdrawal, the withdrawing party will receive compensation in the amount of the market value for vested shares and only compensation in the amount of the	

No.	Question	Reply
	nominal value for shares not yet earned. In addition, a differentiation can be made between a "good leaver" and a "bad leaver", according to which, for example, a "bad leaver" is always compensated for all their shares only at the nominal amount. Such regulations regularly protect not only the leaving shareholders in the event of a redemption, but also the company. This is because the procurement of new capital for the continuation of business is regularly made considerably more difficult, particularly in the early phase of a company, if the company has to pay large amounts to a withdrawing shareholder, as investors and banks want their capital to be used to finance new business and not to settle old debts. Do you think Vesting should be agreed upon in your case? If you already have more detailed ideas, please let us know.	
20.	Are call options desired? If so, for which events? A call option entitles its holder to demand the sale and assignment of another shareholder's shares in certain more closely defined cases. Usually, the other shareholders are entitled to do so on a pro rata basis according to the amount of their shares. The method of calculating the purchase price can also be regulated differently here for good leavers and bad leavers, also in connection with the above-mentioned Vesting.	
21.	Should the other shareholders (proportionate to the size of their shareholding) or the company be entitled to rights of first refusal in the event that a shareholder wishes to sell shares? In practice, these are essentially so-called tender obligations, i.e. a shareholder who intends to sell their shares must first offer them to the other shareholders on the same terms as those agreed with the third party willing to buy. In particular, if a Restriction of Transferability has been agreed, this is often combined with corresponding tender obligations.	
22.	Are drag-along and tag-along rights desired? In the event of a sale of a company by way of a share deal, drag-along clauses ensure the possibility for the majority shareholder that not only their shares but also the shares of the minority shareholders and thus 100% of the shares can be sold, since a third party has a strong interest in acquiring 100% of the shares. In	

No.	Question	Reply
	the event that a shareholder sells their shares to the third party, this shareholder can therefore be granted the right to drag along the other shareholders and force them to also sell to the third party (drag-along right). Conversely, tag-along clauses protect the minority shareholders against the majority shareholder selling their shares and the minority shareholders having to remain in the company. For this purpose, the other shareholders can be granted the right to demand that the selling shareholder also sell their shares to the third party (tag-along right).	
23.	Should the compulsory redemption of shares (Sec. 34 of the German Limited Liability Company Act) be permissible? If so, under what circumstances? Typically, redemption is permitted in articles of association in the following cases: • Insolvency proceedings are opened against the shareholder's assets with final effect or the opening of insolvency proceedings is rejected for lack of assets. • A creditor of the shareholder initiates compulsory enforcement proceedings against the sharehold-ing on the basis of a title that is not only provisionally enforceable, and the enforcement measure is not revoked within two months, at the latest by the time the shareholding is realized. • There is an important reason in the person of the shareholder which justifies their exclusion from the company. • Death of a shareholder (also see No. 18). • A shareholder gets divorced and company shares become the subject of claims for equalization of gains asserted in court.	

No.	Question	Reply
	If the shares of a shareholder are withdrawn, the shareholder is generally entitled to receive a settlement (see No. 19 above for possible provisions).	
24.	Is a shoot-out clause desired? Shoot-out clauses are mainly relevant for companies with only two shareholders each holding an equal amount of shares. There are different variants of shoot-out clauses. What they all have in common is that, in the event that further cooperation is no longer desired – for example, due to a dispute – they provide for a radical procedure in which one shareholder acquires all the shares of the other. The price is also determined by the procedure, e.g. in the basic form, by shareholder A naming an amount and shareholder B having to decide whether he would like to buy all of A's shares for exactly that amount or sell all of their shares to A for exactly that amount.	
G.	**Shareholders' meeting**	
25.	According to the dispositive legal regulation, each euro of a share grants one vote (Sec. 47 para. 2 German Limited Liability Company Act). Are deviating arrangements such as multiple voting rights, maximum voting rights, non-voting shares, each shareholder having exactly one vote, rules for stalemate situations desired, and if so, which ones and why?	
26.	According to the dispositive legal regulation, resolutions in the shareholders' meeting are generally adopted by a simple majority (> 50%) of the votes cast. A qualified majority of three quarters of the votes cast is required by law in particular for the following resolution items: • amendments to the Articles of Association (thus also capital increases and capital decreases), • dissolution, • change of the company's legal form, • demerger, • merger.	

No.	Question	Reply
	Should further resolution items require a qualified majority? If so, which resolution items? How high should the required quorum be (e.g. 75%)? The articles of association could provide for a qualified majority, for example for resolutions on: • the appointment, employment, discharge and dismissal of managing directors, • the exemption of managing directors from the prohibition of self-dealing and multiple representation (Sec. 181 of the German Civil Code), • the granting of procuration, • the distribution of competences between the advisory board and the shareholders' meeting.	
27.	Should the articles of association generally allow shareholders' meetings to be held online, even in the event that not all shareholders agree in an individual case?	
28.	According to the dispositive legal regulation, the shareholders' meeting needs to be convened by registered mail. Should the articles of association also permit convening by e-mail?	
29.	The law does not provide for a minimum quorum for the shareholders' meeting; such quorum should be agreed in the articles of association. It may be stipulated, for example, that 50% or 75% of the shares must be present or represented for a shareholders' meeting to have a quorum, i.e. to be competent to adopt regulations. What is the minimum quorum required for a shareholders' meeting? Usually, if a minimum quorum is agreed upon, the articles of association will also provide for the possibility of a repeat meeting in the event that the quorum is not reached, which will in any case be competent to adopt regulations regardless of the quorum.	

No.	Question	Reply
H.	**Advisory board/supervisory board**	
30.	Will the company be subject to co-determination? If yes: according to which law? Co-determined limited liability companies are required to have a supervisory board similar to that of a stock corporation. For the other companies, shareholders are free to establish an advisory board and/or a supervisory board and to agree upon its details. As a rule, the co-determination obligation is linked to the employment of a certain number of employees. The lowest applicable threshold is 300 employees.	
31.	In the case of a company that is not subject to co-determination: Should the company have an advisory board as an additional body? If yes: How many members should the advisory board have and what powers should it have? Should certain shareholders be granted delegation rights?	
32.	In the case of a company that is not subject to co-determination: Should the company have a predomi-nantly controlling supervisory board as an additional body? If yes: How many members should the supervisory board have and what powers should it have? Should certain shareholders be granted delegation rights? A company can also have both an advisory board and a supervisory board.	
I.	**Profit distribution**	
33.	According to the dispositive legal regulation (Sec. 29 para. 3 of the German Limited Liability Company Act), the distributable profit is distributed in proportion to the nominal amounts of the shares in the company. Is a different method of profit distribution desired and if so, which and why?	

No.	Question	Reply
J.	**Distribution of liquidation proceeds**	
34.	In the event of the dissolution of the company, the liquidation proceeds are distributed among the share-holders. According to the dispositive statutory rule (Sec. 72 of the German Limited Liability Company Act) the liquidation proceeds are distributed in proportion to the nominal amounts of the company shares. Is a different method of distribution of liquidation procees desired and if so, which and why?	
K.	**Non-competition and non-solicitation clauses**	
35.	Should shareholders be subject to a non-competition clause? If so, to which shareholders should this ap-ply? Are there any activities that should not be covered by the non-competition clause (e.g., holding certain shares, etc.)? Should there be a non-solicitation clause with regard to employees?	
L.	**Arbitration clause**	
36.	Should any disputes in connection with the articles of association be settled before an arbitration court (e.g. an arbitration court of the German Institution of Arbitration (DIS))?	
M.	**Other requests**	
37.	Do you have any other requests regarding the drafting of the articles of association?	

* * *