

Guide to Business & Investment in Germany



Content

More than 55,000 foreign companies are currently operating in Germany, employing about three million people. They show: Germany is a top location for investors.

As the strongest economy in Europe and one of the largest markets worldwide, Germany offers excellent opportunities for investments in all economic branches. Germany's climate for innovation, the comparatively flexible labor market with its highly qualified work force, and the advanced infrastructure are only some of the factors contributing to the outstanding success of German enterprises and those investing in Germany. Even in the current worldwide economic crisis, they have made Germany a robust international player.

While these perspectives are setting the momentum for investment success in Germany, a carefully planned investment strategy and well structured implementing procedures is still the recipe to follow.

The *BPG Guide to Business & Investment in Germany* will give you a useful first overview about matters such as company formation, business tax and employment regulations in Germany. Providing general background information, this booklet will serve as reference guide for your preliminary planning efforts.

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This online publication is a shortened version of the complete BPG guide. For the complete guide and additional advice, please contact us directly at bpg-frankfurt@bpg.de or find our contact information in the back of this booklet or on our web page: www.bpg.de

We are looking forward to helping you to do business in Germany.

Frankfurt am Main, August 2014

Lothar Boelsen

Types of business entities

Business activities of foreign investors in Germany may take on very different (legal) forms, depending very much on the individual circumstances of the investor or business and the intended goals of the investment.

For short-term or otherwise limited activities on the German market, foreign investors may prefer not to base own staff in Germany. Instead they handle all activities through cooperations and direct transactions with local business partners, *independent sales agents* or *distributors*.

If a foreign investor intends to conduct business that requires a direct, long-term presence in Germany, the business can be set up as a

- permanent establishment, in form of an independent branch or as a dependent permanent establishment; or as a
- subsidiary with a legal structure of its own (i.e. a partnership or a corporation).

If a foreign business operates a German site solely for the purpose of performing preparatory or auxiliary tasks for the enterprise, the German place of business will not be defined as permanent establishment (e.g. warehouses, representative offices).

Of course, any business, factory or other enterprise must be registered with the respective local administration and tax authorities prior to taking up any activities. Due to the arising consequences for taxation, liability and other legal matters, the choice of the appropriate legal form should be carefully considered.

I. Permanent Establishment (PE)/ Branch

From a legal point of view, a permanent establishment (PE) in Germany is defined as an incorporated part of the foreign investor's business and is not considered a legal entity of its own.

Business activities of a PE may not differ from those of the parent and invoices are also issued in the name of the head office. Dependent offices like these are not entered in the Commercial Register; business registration with the respective local municipality is sufficient.

A permanent establishment may also take on the form of an independent branch, if its German business activities are structured in such a way that the business could continue if the main branch no longer existed. Typically, branches are lead by their own management with a certain freedom of authority, possibly its own accounting and its own balance sheet.

Despite this degree of independence of the branch, all liabilities and obligations still attach to the parent company and the branch is subject to the laws of the main branch. Branch offices require both a business registration and a registration in the Commercial Register.

In principle, the profits earned either by a PE or branch in Germany are subject to non-resident tax liability in Germany. Double tax treaties usually agree that these profits earned in Germany will either be exempt from taxation in the country of the parent company or the amount of taxes paid in Germany is deducted from those charged in the country of origin.

II. Subsidiaries

Subsidiaries form legally independent structures from their (foreign) parent company, trading under their own name and preparing their own balance sheets. The German Commercial and Company Law distinguishes between unincorporated companies (i.e. partnerships) and corporations and offers various forms of organization for subsidiaries.

The following gives a brief overview of the most common forms of business entities that may be relevant for foreign investors opening a subsidiary in Germany.

III. Corporations

As a legal entity that is assessed separately from its shareholders, the corporation itself carries all rights and obligations and liability is limited to the corporation's business assets, including its share capital.

For tax purposes, the corporation and the shareholders are treated separately. With the corporation being an independent taxable entity, both trade tax and corporate income tax are levied on the income of the corporation.

The place of residence of a corporation determines whether a corporation is subject to tax in Germany on its worldwide income or only on its German-source income. Residence in Germany is assumed, if the registered office or principal place of management of the corporation is maintained in Germany.

Profits distributed to shareholders are taxable at the level of the shareholders. Depending on whether the shareholder is an individual or a corporation they will be either charged for income tax or corporate income tax. The rules of residence correspond to those applicable for the corporation.

The *Limited Liability Company (GmbH)* is a very common organizational form for mediumsized businesses that are lead by a relatively stable number of shareholders. They are often family owned businesses and owner-managed.

- Minimum Share Capital: EUR 25,000
- Legal Liability: Liability limited to registered share capital

Advantages: Most common legal entity of all limited liability companies, less administrative efforts than the stock corporation

The *Unternehmergesellschaft (UG)*, also known as Mini-GmbH, is the attractive alternative of limited liability company for business starters. It may be founded under similar conditions with the amount of share capital being appointed in the articles of association. The minimum amount of share capital is EUR 1.

The **Stock Corporation** (AG) is a popular structure for commercial enterprises that have large capital needs. Shares may be traded publicly on the stock exchange.

- Minimum Share Capital: EUR 50,000
- Legal Liability: Liability limited to shareholder capital
- Advantages: High market reputation, flexible capital acquisition, anonymity
 of shareholders, flexible transfer of shares
 Disadvantages: Strict founding formalities and high costs, extensive
 organizational obligations

IV. Partnerships with unlimited liability

Partnerships may be formed by two or more persons. In contrast to corporations, partnerships are directly linked to the person of the shareholder and liability attaches to the individual partners. The advantages of a partnership lie in its uncomplicated formation, as minimum share capital and sometimes registration is not required, and the reduced accounting or auditing obligations.

A partnership is not itself taxable for corporate income tax purposes. Although the income is determined at the level of the partnership by filing a return for informational purposes, it is taxed at the hands of the partners on their personal tax returns. Trade tax still applies to partnerships and is levied, if the partnership's business activity constitutes a commercial activity.

In case of a business owned by a foreign investor, the business income is only subject to income tax on the German-source income attributable to the German partnership.

A **General Commercial Partnership (OHG)** is a legal entity of its own. Liability, however, attaches to the individual partners, either jointly or separately. A partnership's agreement sets the conditions for the partnership and usually all partners are entitled to represent and manage the business. The OHG needs to be registered in the Commercial Register.

- Legal Liability: General partner(s) with personal unlimited liability and limited shareholder(s) with limited share liability
- Advantages: Achievement of contractual purposes, uncomplicated formation without obligation, no accounting or auditing requirements
- Disadvantages: Personal liability and commercial register entry

In contrast to the OHG, unlimited liability in a *Limited Partnership (KG)* may attach only to one general partner, while there are also limited partners with limited share liability. Limited partners usually do not participate in the management and cannot represent the KG.

- Legal Liability: General partner with personal unlimited liability and limited shareholder(s) with limited share liability
- Advantages: Achievement of contractual purposes, uncomplicated formation without obligation, only one partner with limited liability, no accounting or auditing requirements
- Disadvantages: Personal liability

V. Other Forms of Business Entities

The **Societas Europaea** (**SE**) is aimed at unifying company structures across Europe and is based on EU law. It can only be founded by a merger of stock corporations or conversion of a business with involvement in at least two EU-member states. With a required minimum share capital of EUR 120,000, the requirements are set higher than those for the establishment of a stock corporation (AG)

The *GmbH* & *Co. KG* is a special form of the limited partnership (KG), in which one or more corporations act as general partner(s). This form combines the advantageous flexibility of the KG and the limited liability of the GmbH.

The **Dormant Partnership (Stille Gesellschaft)** is not a legal entity, but can simply be seen as a contractual, financial investment into an existing company. Dormant partners do not participate in the business, but share in the enterprise's profits and losses.

There are various other forms of business entities that apply either only to very special cases or are of minor relevance to foreign investors and shall therefore be omitted in this section.

VI. Corporate Reorganization and Changes of the Legal Form

In answer to ever shifting markets, changing legal requirements or simply for purposes of tax optimization, corporate reorganizations are quite common and legally accepted. Business activities are then continued within a new legal form or structure. All forms of corporate reorganization are regulated in the Reorganization Tax Act (*Umwandlungssteuergesetz*). These can be:

- Change of the legal form
- Mergers: Two or more companies merge into one
- Splits: A legal entity may be split up into several new legal entities (Aufspaltung)
- Spin-offs: sections of the parent are split off as a separate business entity
- Transfer of assets and liabilities

Provided the proper formalities or procedures are observed, most of the transactions are possible without triggering detrimental tax effects. Changes from partnership to corporation and vice versa are possible without having to recognize a taxable capital gain. Accordingly, depreciation policies and valuation options can be carried over into the new entity. Excluded from this are branches, which cannot be converted into corporations without triggering a taxable gain.

Business taxes

Business taxes

Generally, all resident companies and entrepreneurs with commercial activities in Germany are liable to pay taxes. There is limited taxation for non-resident companies. Depending on their organizational form, they may only be liable to pay taxes on businesses conducted in Germany. Authoritative source for determining the taxable income from business is the respective tax balance and income statement which is usually deducted from the financial statements (according to German Accounting Principles, if applicable).

Overall Tax Liability for Corporate Enterprises in Germany

The overall tax liability may be as low as 25% in certain regions where trade tax is levied at a lower rate, but usually the rate for business taxes adds up to about 29 to 34% in strong economic regions.

Туре	Tax Rates	Total
Corporate income in EUR		100,000
Trade tax (3.5 % x Multiplier) in EUR	14,98%	14,980
(German average Municipal Multiplier 428%*)		
Corporate Income Tax (15 %) in EUR	15%	15,000
Solidarity Surcharge	5.5%	825
(5.5% on Corp. Income Tax)		
Net Income in EUR		69,195
Overall Tax Liability		30.8 %

^{*}In the example the Municipal Multiplier for the trade tax is set at the German average rate for 2013 (Source: DIHK)

I. Corporate Income Tax

> Corporate income tax or corporation tax (Körperschaftsteuer) is an income tax for legal entities, i. e. incorporated companies like AG, GmbH or European Company and other organized groupings of persons (such as associations), and conglomerations of assets (such as foundations). It is imposed at the level of the company that generated the profit and applies to all taxable earnings, i.e. retained and distributed profits earned during the tax year.

Corporate income tax is levied at the rate of 15% on the profit earned during the calendar year. The solidarity surcharge on the corporate income tax (5.5%) is added, resulting in a combined tax rate of 15.825%.

Resident corporations are subject to corporate income tax on their worldwide income. In practice, however, double tax treaties generally provide that income earned in a foreign country will be taxed in that country only and remain tax-free in Germany. Non-resident companies are subject to German corporate income tax only on German source income.

In an ownership chain of companies, there may be a tax exemption for income from holdings. The detailed rules for chains of companies, however, are very specific so that single cases have to be reviewed and assessed carefully and general advice cannot be given here. Furthermore, the German government and the OECD are currently working on plans to avoid base erosion and profit shifting. It is therefore important to build solid structures in order to distribute dividends to foreign countries.

Corporation tax has to be paid in advance every quarter of the calendar year and will be assessed in a final account with the annual tax return. Assessment basis for the quarterly prepayment is the profit of the previous year.

Business taxes

II. Trade Tax

> Trade tax (Gewerbesteuer) is directed at businesses' real earning capacity. As a non-personal tax, it is charged on the earnings generated by a business, irrespective of the personal circumstances of any of the owners. The tax that is levied by the local communities is thus imposed purely on the conduct of business.

Trade tax is levied by the local communities totaling 7% at minimum and usually ranging from 14% to 17% on average.

Individual entrepreneurs and partnerships qualify for a tax-free allowance of EUR 24,500 on their business profits. As part of their personal tax assessment, sole traders and partners can also claim a credit against their income tax liability reflecting the trade tax they have paid. Corporations do not qualify for the tax-free allowance.

All businesses that operate and have a permanent establishment in Germany are charged with trade tax, regardless of their actual activities. Liability attaches to the actual business entity on whose account the business is carried out. This may be a sole trader, a corporation or a partnership.

III. Personal Income Tax for Partnerships

As individual partners carry all the rights and obligations in a partnership, general and limited partnerships (OHG and KG) are not themselves taxable entities. Both the undistributed and distributed profits of a partnership are determined at the partnership level according to their shares.

This taxable income of the partners is subject to > Personal Income Tax (Einkommenssteuer). It is levied at a minimum of 14% for income that exceeds the annual exemption of EUR 8,354 and progressively increases to a top rate of 45% of taxable income (for income exceeding EUR 250,731). Solidarity surcharge of 5.5% is then added to the corresponding rate of personal income tax. Additionally, partners in a partnership can offset trade tax against personal income tax.

IV. Valued Added Tax (VAT)

As a tax on consumption, > Value Added Tax (VAT – Umsatzsteuer) is levied at each stage of the production and distribution chain. The standard VAT rate in Germany of 19% is below the European average. For basic goods (e.g. food, books or public transportation over short distances) a reduced tax rate of 7 % applies for the time being. Exempt from VAT are leasing of buildings for residential purposes, as well as insurance services, medical services and any transaction subject to German Real Estate Transfer Tax.

VAT paid by entrepreneurs (so-called Input VAT) may be deducted from the VAT payable from their own turnover, if the turnover is not generally exempt from VAT. Thus, VAT is often neutral within a chain of entrepreneurs entitled to deduct input VAT.

Businesses must register for VAT with the responsible regional tax office and will be given a VAT identification number. They are required to issue invoices for all taxable sales. The correct invoicing practice cannot be detailed here; most importantly all invoices have to indicate the charges for VAT by listing it separately.

V. What other taxes may apply to businesses and entrepreneurs?

> Real Property Tax is imposed annually on all immovable property regardless of whether the property is held as a business asset or for private use. > Real Estate Transfer Tax (RETT) taxes any transfer of real estate located within the territory of Germany to a new owner

Business taxes

- > Customs Duties: All importers are obliged to declare all goods intended for commercial use to customs, even if they are free of duty. > Excise duties are levied on various items, including tobacco, alcohol, petrol, oil and heating oil.
- > Dividends are currently taxed at 26.4 % are withheld at the source, normally a bank. The statutory withholding tax rate on > Royalty and Lease Payments on movable property is 15.825% (including solidarity surcharge) for non-resident corporations. Withholding tax on royalties may be reduced under a tax treaty or the EU interest and royalties directive.
- > Wages Tax is levied on all income accruing to an employee from employment. > Social Security Contributions that are equally divided between employer and employee (See charge-right-num

Other indirect taxes, such as *electricity tax (Stromsteuer)* or *mineral oil tax (Mineralölsteuer)* may also be of relevance to businesses in certain industry sectors.

VI. Deductibility and tax relief

In principal, the taxable income of any business is determined on the basis of the results shown in the annual accounts in the year of assessment. Nevertheless, many factors are taken into account that allow for deduction and tax relief:

In general, any expenses related to the company's business operations and not related to tax-exempt income are deductible. These deductible expenses include the *costs of foundation* of a corporation or the increase of its capital, *repair and maintenance expenses* or *remuneration for shareholders* and *interest payments*. Most of the expenses may only be deducted in the year they occurred.

Depreciation is generally allowed on all tangible and intangible fixed assets with a useful life of more than one year. These include investments in plant and office equipment, motor vehicles, patents, trade marks and goodwill amortization. Depending on their worth, these assets may be either depreciated completely in the year they are acquired or over a period of five years following the straight line method.

Losses are generally offset against gains for computing the taxable income. Losses that cannot be offset in the same year may be carried forward indefinitely and carried back one year within certain limitations. Under certain conditions, capital gains from the sale of real estate may be offset against the acquisition costs of a new, similar asset (so-called *roll-over relief*).

The creation of *provisions* for certain liabilities or anticipated losses will be discounted by 5.5% for tax purposes. Companies may create an accrual for surety obligations, warranties, damage claims, litigation expenses or future pensions to employees.

In cases where corporations are integrated financially, organizationally and economically, these enterprises may form a > Tax Group (Organschaft). Companies that are part of the group may then offset losses against the profits of the parent company for corporate income or trade tax purposes. Different rules apply for forming a tax group for VAT purposes.

Accounting and Filing Requirements

All companies operating in Germany are required to keep adequate records of their finances and commercial transactions. By giving a true and fair view of the company's affairs and state, a company's annual financial statements and management reports eventually serve as a business card vis-à-vis shareholders, banks, business partners and customers, but also as a basis for tax assessment.

Generally, all business records - from account books to vouchers and inventory lists - must be filed and kept in Germany. Upon application before moving the accounting, fiscal authorities may grant the relocation within the EU and the EEA; this, however, includes merely the electronic book-keeping. All paper files have to remain in Germany without exception, thereby securing the access to all data for unannounced reviews by the fiscal authorities. Furthermore, businesses have to make sure that the electronic book-keeping abroad is accurate according to German GAAP.

Accounting principles under German law also aim at protecting creditors, going beyond the mere informational function set in the International Financial Reporting Standards (IFRS).

I. German Accounting Principles (GAAP)

Only sole proprietors with sales revenues under EUR 500,000 and net income of less than EUR 50,000 for two consecutive fiscal years are exempt from the requirements of keeping records, and preparing financial statements. All other businesses are subject to the statutory accounting rules, regardless of their size or legal form.

These companies are required to record all of their commercial transactions, assets and correspondence according to German GAAP. Other documents for orderly accounting generally include commercial business records, inventories and procedural instructions and other organizational documents and respective vouchers, amongst others. All records must be filed and kept for tax purposes or audits by the fiscal authorities for at least ten years.

Besides keeping adequate records, these companies are also required to set up annual financial statements including a balance sheet and an income statement at the end of each financial year.

Corporations and partnerships whose liable general partner is not an individual must disclose their annual financial statements in the (Electronic) Federal Gazette. This information is published on the website: www.bundesanzeiger.de. The requirements for the content of the annual financial statements and the items of disclosure, however, depend on the size of the company.

II. Filing requirements and payment of tax

The accounting principles of the German Commercial Code also tie in with German tax law and make correct accounting the starting point for tax assessment, with annual financial statements as the basis of taxation for business income.

While taxes are assessed on an annual basis, businesses make quarterly *advance payments* for business taxes and withhold wage taxes with every wage payment. The amounts for these payments are usually derived from the tax assessment notice of the preceding year or based on the taxpayer's estimated results.

Final tax returns for businesses and individuals must be filed annually by May 31 following the period of assessment. A unique tax identification number serves as permanent identifier in all tax respects. The business year is the basis for tax assessment and can be shorter, but may not be

Accounting and Filing Requirements

longer than 12 months. This is generally the calendar year; a resident company may, however, elect a deviating fiscal year with the consent of the tax authorities.

Tax payers who prepare their return with the help of a certified tax consultant are granted an automatic extension until December 31. Aiming at reducing bureaucracy, the law requires companies to transmit their tax balance sheets and income statements electronically from 2014 on.

Of course, all tax returns need to include a detailed *documentation of all income and expenses* during the tax year. Next to the financial statements, corporations also need to include a copy of the auditor's report; a reconciliation between financial statement figures and those shown in the tax accounts; a copy of the resolution of the supervisory board or shareholders approving the financial statements, and finally a copy of the shareholder resolution on the distribution of the profit for the year. Tax groups may be obliged to prepare consolidated financial statements that present legally independent group enterprises as one entity.

Eventually, the annual income tax return (*Einkommensteuererklärung*) or corporate income tax return (*Körperschaft-Steuererklärung*) will close the accounts of the tax year and determine the final income with its respective taxes. Any payment obligations are then balanced by a final adjusting payment or refund when the assessment is issued.

Tax audits are usually conducted every three to five years. Larger companies (with foreign shareholders), however, are almost always subject to continuous and comprehensive German tax audits. In addition, special audits may be conducted in order to verify correct VAT payment.

Employment and Labor

The labor market in Germany is comparatively flexible, but the high standard of employee protection sets limitations. Also, while Germany's highly qualified labor force offers foreign employers good conditions for recruitment and employment, this high standard is also expensive. Generous remuneration and the additional social security contributions amount to relatively high employment costs.

I. Employment Contracts

Employment contracts are usually settled in written form, but this is not mandatory. They should contain a job description, details on the duration of the contract, remuneration, paid vacation days and working conditions. Common is a probationary period of up to six months within which each party may terminate the contract with a shorter period of notice.

In addition, extensive legal regulations are setting the framework for employer-employee relationships providing high standards of protection for employees. The majority of these regulations are laid down in the German Labor Law (Arbeitsgesetzbuch – ArbG) and the German Commercial Code (Handelsgesetzbuch – HGB).

II. Remuneration and Social Security Contributions

Although there are minimum wages for specific industry sectors based on collective agreements in these sectors, no general mandatory minimum wage exists that is applicable to all industries in Germany.

In 2013, the average monthly gross earnings for employees in Germany were at EUR 3,400. This figure, however, is merely a rough indication, as wage levels largely depend on various factors like company size and location, business branch and sector or experience, skills and age of the employee.

Fringe benefits in Germany usually include work amenities like canteen meals, fuel vouchers, et cetera. Company cars are common among senior employees and business travelers. Furthermore, larger German companies often offer their employees relief funds or voluntary pension plans that supplement the state retirement-pension scheme.

Wages and salaries only constitute a part of the total labor costs, however. Mandatory contributions for social security and health care increase labor costs considerably. Unlike in other countries, these contributions are not treated as taxes in Germany.

Social security coverage is generally mandatory for all employees working in Germany, regardless of their citizenship or the residence of the employer. They include payments to the statutory pension insurance and unemployment insurance, as well as health and long-term homecare insurance.

Employer and employee are equally bearing the costs that combine to an average of approximately 40% of gross income. The employer is liable for remitting all contributions and generally deducts the employee's portion from wages.

Social Security Contributions (2013/2014)

Pension Fund	18.9 %
Health Insurance*	15.5 %
Unemployment Insurance	3 %
Nursing Insurance**	2,05 %
Accident Insurance	~ 1,6 %***

^{*} Differing rates for employer (7.3%) and employee (8.2%)

^{**} Employees without children pay an additional 0.25%

Employment and Labor

III. Employment of Foreigners

EU citizens can migrate freely within the EU and do not require work visa or work permits. Individuals from other nations who want to settle and work in Germany are required to obtain a residence title issued by the immigration office (i.e. a visa, a residence permit or a permission of settlement) and a work permit. Citizens of certain countries are privileged in that they may apply for a residence/ work permit from within Germany.

The work permit can be obtained at the local employment agency (Agentur für Arbeit). The issuance, however, is subject to considerations relating to the employment market. Usually, highly qualified employees such as scientists, high-level teachers, professors, specialists and management level employees who receive an annual salary of more than EUR 66,000 will be granted work and residence permits of indefinite duration.

Secondment of Staff (Entsendungen)

If staff employed at a company abroad is only temporarily transferred to a German branch or a related company in Germany, they may be exempt from social insurance contributions and German wage tax.

In case of a lasting secondment, however, the host company resident in Germany will be assessed as the (new) employer of the seconded staff. In consequence, wages and salaries paid to the seconded staff will most probably be subject to German wage tax as well as social security contributions. As a general rule, income tax and social security contributions are paid in the country where the employment is carried out, unless the individual is protected by a double tax treaty. Other exemptions are possible.

This is also the case, if the sending company does not have a *statutory place of business* in Germany and seconds *executive staff* to Germany. German tax authorities will then assume that an *effective place of management* is being established in Germany. This may also trigger other tax liabilities for the sending company.

About BPG Frankfurt

BPG assists you in organizing your strategy for doing business in Germany and preparing the legal and economic requirements of your investment. By mapping out the details of your plans and assessing the resources required, we can help you to grow your business in Germany smoothly and with lasting success.

Reliability for your Decisions over 30 years

Cooperating with our professional colleagues of the Leading Edge Alliance (LEA), we cater to requirements resulting from the internationalization of the economic and legal systems. Within these networks, we keep track of any legal changes and its repercussion and are sharing international economic know-how and contacts with companies and chambers throughout the world.

Our experienced CPAs and tax consultants, lawyers and M&A specialists are looking forward to accompanying your enterprise in Germany, whether they are regarding a business start-up, expansion or relocation plans.

Our Experts



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Areas of Specialization:

- Auditing and consulting for non-profit organizations and family-owned companies
- International tax law and restructuring advice
- Due Diligence consulting
- Legal consulting in specific areas



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Areas of Specialization:

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- Restructuring advice and due diligence consulting



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Areas of Specialization:

- Management and Corporate Finance Consulting
- Transaction advice on the purchaser and seller side
- Performance of financial Due Diligences and business valuations

If you are planning to invest in Germany, please get in touch with us directly or visit our website www.bpg.de for any further questions.

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