La Kanzlei

How to set up a business in Germany

Gesellschaftsrecht

Content:

- **Why set up a business in Germany?**
- **From a simple telephone number to a subsidiary**
- **Which form of company is the most appropriate for my business?**
- **What are the steps for setting up a GmbH (limited liability company) under German law?**
- **What are the costs involved in setting up a GmbH?**
- **Taxation of company income**
- **Comparative table of the most important company forms under German law**

Contact us

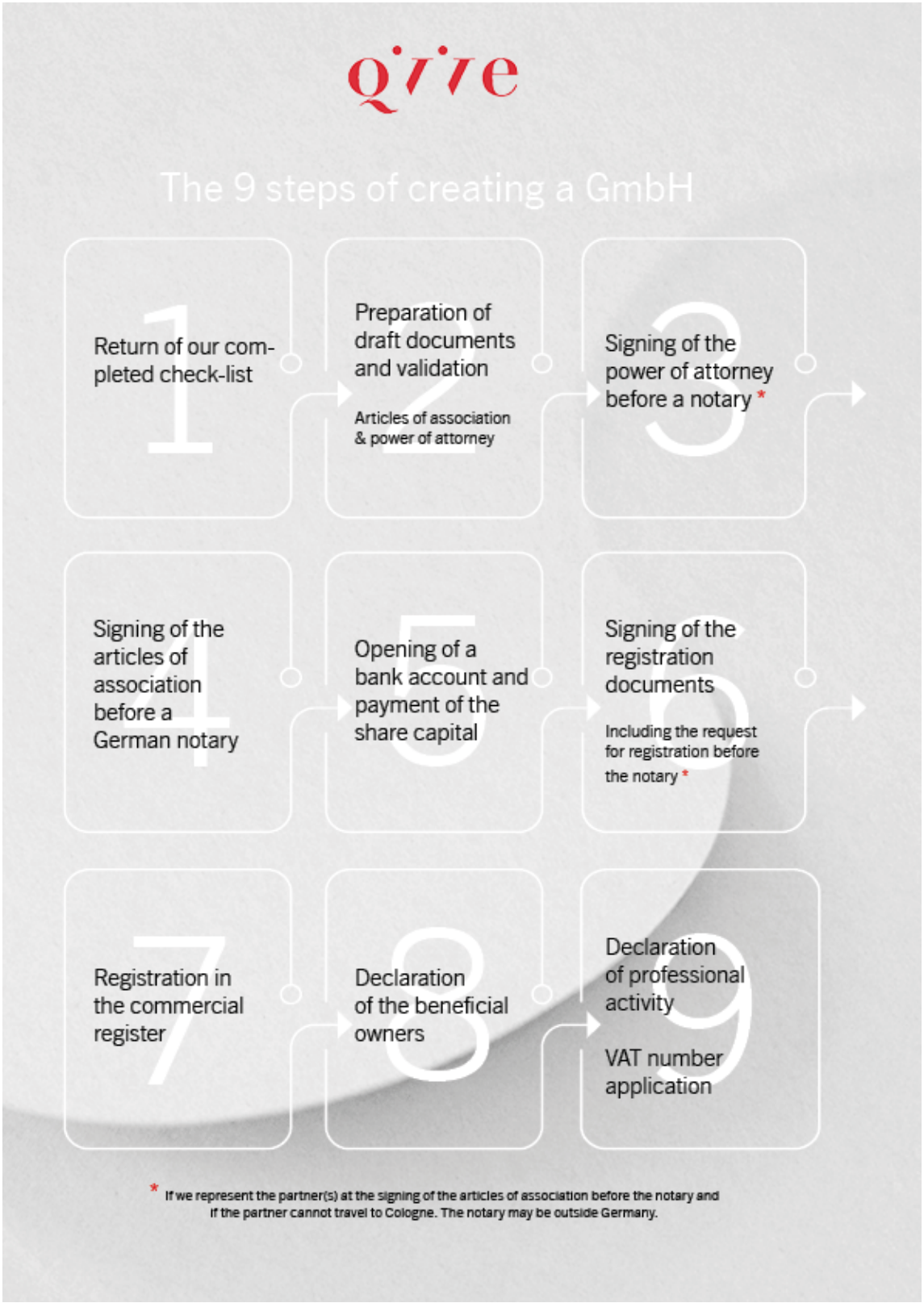
[1] Why set up a business in Germany?

The German market is one of the largest in Europe and is of particular interest to foreign companies, who are increasingly keen to set up a business there.

Insofar as the distribution of products in Germany does not require the creation of a German structure, it is possible to approach and serve the German market from abroad without establishing a presence in Germany.

However, it appears that a presence in Germany has a considerable impact on a company's commercial success in this market. This impact is linked in particular to the fact that German customers are more reluctant to place orders with a company located abroad and to call a foreign number. This can be explained by a certain reluctance to be greeted in another language without knowing the language. Conversely, German customers will be more reassured to be able to communicate with someone in Germany, or even to place their order with a German legal entity.

La Kanzlei



Cliquez ici pour le PDF (The 9 steps of creating a GmbH).

[2] From a simple telephone number to a subsidiary

The choice of structure depends on the degree of desired presence.

1. **The most flexible form: virtual presence**

For the reasons given above, it is strongly recommended that you at least have an address and telephone number in Germany, to make it easier for a potential German customer to contact you. In this case, it is entirely possible to arrange for a call to be transferred to your country. This solution, which is by far the least expensive, can have the first beneficial effects on your business in Germany.

Features:

- Very limited costs
- Highly flexible structure
- The foreign company has no physical presence in Germany and takes no active steps there.
- All contracts are concluded with the foreign structure.

Advantages:

- It is easier for German customers to contact you.
- German customers feel reassured by the company, which offers them a German contact person (whether in the form of a physical or virtual presence).
- Ongoing costs are very limited compared with setting up a branch or subsidiary.

Disadvantages:

- This solution can only be seen as a starting point: the company has no real activity in Germany and does not actively solicit German customers.
- Telephone reception must be in German, so it must be handled by a German-speaking person, regardless of whether that person works in Germany or abroad.

2. **Physical presence: sales agent, distributor, commercial employee / V.I.E.**

Another solution, which establishes closer links with customers and is therefore much better suited to a real presence in Germany, is to set up a physical presence in the country.

This commercial representation may be effected by

- A sales agent
- A distributor (it should be noted that particular attention should be paid to the law applicable to the contract)
- By hiring a commercial employee or by entering into an international volunteer in company (hereinafter "V.I.E."), if it is desired to have greater control over the representative's commercial

activities.

It should be noted that the creation of a company in Germany is not a prerequisite for the hiring of an employee in Germany, as the employment contract can be concluded between the foreign company and the employee based in Germany.

If you would like more information on this point, please see our note on hiring of employees in Germany.

Features:

- The foreign company concludes a contract with a sales representative (whether self-employed or not) working for the company from his/her home in Germany.
- All contracts are concluded with the parent company.
- The company does not have a person in Germany with power of representation for the company (in order to avoid setting up a permanent establishment for tax purposes).
- All accounting is done at parent company level and profits are taxed abroad (provided, once again, that no permanent establishment is set up).

Advantages:

- The company has a local contact.
- It may be possible to use the business network of this contact in Germany.
- Running costs are lower than when setting up a branch or subsidiary.

Disadvantages:

- A commercial agent or distribution contract deprives the parent company of any means of management and does not allow it to interfere in the distribution of products in Germany. In the case of a commercial agency contract, the costs of terminating the contract can be substantial. In the absence of a structure separate from the parent company, the latter bears all the risks incurred by the business in Germany.
- Furthermore, depending on the structure adopted, the company runs the risk of being considered to have set up a permanent establishment for tax purposes, which would result in taxation of income generated in Germany and the obligation for the company to keep separate accounts from the parent company for this income. If such an establishment is set up without the company's knowledge, the latter also runs the risk of being subject to double taxation and having difficulty recovering its costs.
- From a commercial point of view, there is a risk that German customers will not place the necessary trust in a foreign organization (even if the latter provides a German or German-speaking contact person).

3. **Setting up a subsidiary**

The most significant form of establishment, and the one that has the most promising effects from a commercial point of view, is the creation of a subsidiary. This type of set-up results in two legally distinct structures, the parent company abroad and the subsidiary in Germany.

Main features:

- The subsidiary is a separate and independent legal entity from the parent company and as such has full legal capacity.
- All contracts are concluded with the subsidiary. It is therefore fully liable to third parties.
- All invoices are issued by the subsidiary.
- It has its own accounting department.
- The subsidiary hires its own employees in Germany.

Advantages:

- One of the major advantages of setting up a subsidiary is the presence of a German legal structure, known to German customers, which is a considerable commercial advantage.
- Furthermore, depending on the form of company chosen, the subsidiary acts as a limitation of liability between the shareholders and the creditors, so that the latter cannot, except in special cases, take legal action against the parent company abroad.
- Another advantage of the subsidiary is that it avoids any double taxation in respect of the permanent establishment, which is synonymous with a clear structure regarding legal and tax aspects.
- Finally, in the event of the structure's closure, creditors and employees will only be able to take action against the subsidiary, and not - with a few exceptions - against the parent company.

Disadvantages:

- Depending on the form of company chosen, the creation of a subsidiary may involve the payment of a minimum share capital. This amount may be higher or lower (see point 3.). However, this disadvantage is only relative, as this sum will not be blocked in an account but can be used to run the company.
- Subsidiaries are required to keep separate accounts (although this obligation also exists in the case of a permanent establishment or branch in Germany).
- Furthermore, the creation of a subsidiary incurs set up costs (see point 5. below for the amount of these costs in the case of the creation of a GmbH), it being specified that the creation of a branch also incurs certain costs in any event (see point 2.4. below).

4. **The intermediate form: the branch**

This last option is available to foreign companies that do not wish to set up a legal structure in Germany.

Main features:

- A branch is de facto created when business is set up in Germany.
- It may be entered in the commercial register of the local court.
- Its accounts are kept separately from those of the parent company outside Germany.
- However, all contracts are concluded with the parent company, as it has no legal personality.
- The branch is represented by its own manager (who may be the manager of the parent company), registered as such in the commercial register.

- It may have its own name; in which case a supplement must be added to include the name of the parent company.
- The parent company must include the costs incurred by the branch and the administration of the branch in its accounts.

Advantages:

- A branch enables you to explore the German market without incurring the cost of setting up a company (in particular, the cost of paying in share capital).
- It is registered in the German Commercial Register and therefore enjoys a certain level of trust among German customers.

Disadvantages:

- As a branch requires its own accounts, it incurs obligations and administrative costs comparable to those incurred by a subsidiary.
- The branch is a permanent establishment for tax purposes, which means that the profits generated by the branch are taxable in Germany. This can entail the risk of a tax reassessment and double taxation.
- Managing a branch generates additional administrative work for the parent company, which is obliged to document the branch's costs in a separate register so that they can be claimed from the German tax authorities.

Our advice:

It is perfectly conceivable to test the German market initially, to ensure that it is sufficiently promising, without actually setting up an independent structure, in particular by means of a virtual presence or an employee in Germany. However, this mechanism does not appear to be suitable in the long term, as there is a risk of setting up a permanent establishment.

If you want to establish a long-term presence in the German market, we strongly advise you to set up a subsidiary.

Contact us

[3] Which form of company is the most appropriate for my business?

German law recognizes various forms of company, which can be divided into two main categories: partnerships (e. g. the general partnership (Offene Handelsgesellschaft), the limited partnership (Kommanditgesellschaft)) and capital companies (e. g. the limited liability company (Gesellschaft mit beschränkter Haftung) and the public limited company (Aktiengesellschaft)).

1. **Partnerships and capital companies**

a. **Partnerships**

Features:

- The shareholders of these companies are (depending on the case) jointly and severally liable for the company's debts.
- These companies are represented by their partners (or some of them).

Advantages:

- Setting up a partnership does not require the payment of a minimum share capital.
- At the same time, the company is not subject to any rules on the maintenance of share capital or the keeping of balance sheets.
- To establish such a company, there is no need to go before a notary.
- Possible advantage: partnerships are transparent for tax purposes, and their profits are taxable by the partners.

Disadvantages:

- The major risk of partnerships is that the partners (or certain categories of partners) are jointly and severally liable with their private assets for the debts of the company.

b. **Capital companies**

Features:

- The company limits the liability of the shareholders to the company's creditors.
- These companies are represented by a body separate from the shareholders.
- They are represented by natural persons.

Advantages:

- The parent company is protected from the company's creditors, who can only be paid out of the company's assets (except in the case of fraudulent or abusive maneuvers on the part of the shareholders or failure to comply with the rules on paying up and maintaining the share capital).
- Capital companies have a certain reputation on the German market, which stems in particular from the obligation to maintain the company's share capital.

Disadvantages:

- Depending on the form of company chosen, its creation requires a minimum amount of share capital to be paid up (which may, however, be spent or invested by the subsidiary).

The creation of a limited liability company and any changes to its articles of association require notarisation.

2. **The GmbH**

The most common form of company in Germany is a "Gesellschaft mit beschränkter Haftung" or "GmbH" under German law.

- **Members**: A GmbH can be founded by one or more natural persons or legal entities. A foreign company may become a shareholder in a GmbH, provided it has legal capacity.
- **Minimum share capital**: **€25,000**
- **Payment**: If the company is paid up in cash, one quarter of each share must be paid up when the company is formed, and the share capital must be at least €12**,500**. This is the minimum amount required to set up a GmbH.
- **Company name**: The company name may include the object of the company or the name of one or more shareholders, or a combination of the two.
- **Registered office**: The registered office is the place where the company's decisions are made. The Articles of Association only state the city where the registered office is located, but not the full address. A change of address within the same city therefore does not require an amendment to the Articles of Association, but merely a declaration to the Commercial Register. It is not necessary to rent office spaces to set up a registered office. There are a number of solutions for domicilation.
- **Form of the Articles of Association**: The company's Articles of Association are drawn up in the form of a notarial deed and signed by the legal representatives of the founding partners of the company or by proxies who have received a power of attorney certified by a notary for this purpose. As with their initial signature, any changes to the articles of association require a notarized deed.
- **Representation**: The GmbH is represented by one or more managing directors, who may have the power to act individually or collectively. The manager may reside abroad, but in the long term it is advisable to appoint a local manager, who will be available to sign important documents.
- **Control**: The Articles of Association may provide for the appointment of a **supervisory board,** but this is not mandatory.

3. **Other forms of company**

a. **The "small" GmbH, known as** Unternehmergesellschaft **or** UG (haftungsbeschränkt)

In order to overcome the disadvantage of the GmbH in terms of share capital, the German legislator introduced a "new" form of company in 2008. This company is commonly known as a "Mini-GmbH". It enables people who do not have sufficient liquidity to set up a UG and acquire GmbH status once the liquidity is available.

It therefore has virtually the same characteristics as a GmbH.

Main differences to the GmbH:

- **Minimum share capital**: €1
- **Accounting obligation**: Obligation to transfer ¼ of annual profits to reserves until an amount equivalent to €25,000 is obtained of the initial share capital
- **Company name**: the company name must include the addition "Unternehmergesellschaft (haftungsbeschränkt)" or "UG (haftungsbeschränkt)".

Main disadvantage:

- This form of company does not enjoy a particularly good reputation on the German market. It is often used by dubious entrepreneurs who do not offer their business partners the security they require. As a result, suppliers and banks may be reluctant to grant advances, loans or other benefits to this type of company.

b. **Public limited company (Aktiengesellschaft - AG)**

This form of company is rarely used by SMEs in Germany. Instead, it is reserved for large companies.

- **Members**: Like the GmbH, the AG may be formed by one or more natural or legal persons.
- **Minimum share capital**: **€50,000**
- **Payment**: If the shares are paid up in cash, at least one quarter of each share must be paid up when the company is formed. The minimum amount required to set up an AG is therefore also **€12,500**.
- **Representation**: The AG is represented by a Management Board (Vorstand) consisting of one or more natural persons.
- **Control**: The Management Board is appointed and controlled by a Supervisory Board (Aufsichtsrat).

c. **GmbH & Co. KG**

One form of company frequently used in Germany is the limited partnership ("Kommanditgesellschaft - KG"). As a partnership, it is transparent for tax purposes and has the other characteristics of partnerships mentioned above (see point 3.1.1.).

The form of GmbH & Co KG is very common in Germany, as it combines the tax advantages of the KG with the protection of the GmbH. The mechanism here involves a GmbH participating as a shareholder in the KG. The GmbH assumes the role of general shareholder, which is responsible for managing and representing the company, and is therefore the shareholder with unlimited liability to third parties.

- **Shareholders**: A GmbH & Co KG is formed by at least two shareholders: a limited shareholder, who may be an individual or a legal entity, whose liability is limited to the amount of his contributions, and a general shareholder, the GmbH, who has unlimited liability to third parties. In practice, the general shareholder is 100 % owned by the limited shareholder (the parent company), so that the latter alone can set up a GmbH & Co KG by initially creating a subsidiary in the form of a GmbH.
- **Minimum share capital**: There is no minimum amount for the creation of the KG, but the capital required for the creation of the GmbH, which will have the function of general shareholder, must be taken into account.
- **Form of Articles of Association**: As a partnership, signing the Articles of Association of a KG does not require notarization. In principle, the Articles of Association do not even need to be drawn up in writing. In practice, however, it is advisable to draw it up in writing. The formalities required to set up a GmbH must also be considered.

- **Representation**: The company is represented by the general shareholder, in the case of a GmbH & Co KG, this would be the GmbH.
- **Disadvantage**: Despite its tax advantages, this form of company entails the creation of two German companies with more complicated management, particularly for a foreign parent company.

Our advice:

The GmbH seems to us to be the most suitable structure for setting up a company in Germany. It is well known on the German market, offers creditor protection and has a relatively flexible structure, particularly in terms of its operation. The disadvantage of having to pay up the share capital is put into perspective by the fact that the company will, in any event, need funds to develop its business. The minimum sum of €12,500 will therefore constitute capital available to the manager for the management of the company.

4 What are the steps for setting up a GmbH (limited liability company) under German law?

The procedure for setting up a GmbH is as follows:

1. **Drafting the Articles of Association**
2. **Power of attorney**

If the notary appointment for signing the Articles of Association must be attended by an authorized representative (in particular because the managing directors do not wish to travel to the appointment), each shareholder must first issue a power of attorney for their respective representative (e.g. their lawyer).

Form of power of attorney: Under German law, **the signature of this power of attorney must be certified** by a notary. If the certificate is not drawn up in German, it must be translated into German by means of a sworn translation.

3. **Extract from the Commercial Register**

If the partner is a legal entity, a certified extract from the Commercial Register must be submitted to the notary. This extract must be translated into German by a sworn translator.

4. **Appointment with the notary to sign the Articles of Association**
5. **Payment of share capital**

Once the Articles of Association have been signed, the bank account can be opened and the share capital paid up.

6. **Concluding contracts with the company in formation**

Once the Articles of Association have been signed, the company is said to be "in formation" ("in Gründung"). It is then possible to conclude contracts in the name and for the account of the company, but the shareholders will be liable for the obligations entered into until the company is registered. As a precautionary measure, we advise you, if possible, to wait until the company has been registered.

7. **Declaration of registration and list of shareholders**

Once the capital has been paid up, the manager of the new company signs (i) the declaration of registration and (ii) the list of shareholders.

The signature on the declaration of registration must be certified by a notary (German or foreign, in the latter case with a notarized translation of the signature certificate).

8. **Payment of trade register fees**

Once the declaration has been signed, the notary submits all the documents to the German Commercial Register, which issues a payment notice for the registration fees. Registration is carried out once these fees have been paid.

BEWARE OF FRAUD

When German-registered GmbHs are set up, they often receive documents shortly after registration that look suspiciously like invoices from the German commercial register. In reality, this is an offer to publish the company's details on a private website. Some customers pay these invoices by mistake and struggle to recover their costs. Be careful about payments made after your company has been registered! Otherwise you could lose several thousand euros.

5 What are the costs involved in setting up a GmbH?

- Notary fees: these depend on the share capital
- Commercial register fees
- Translation costs
- The (minimal) cost of declaring your activity to the office for industrial, commercial and/or craft activities
- Lawyer's fees for drafting deeds

The costs involved in setting up a GmbH depend on the share capital of the new structure and range from €2,500 to €4,000 excluding VAT in total (including bilingual documents, notary fees, lawyers' fees and translations) for a single-member company with share capital of €25,000.

6 Taxation of company income

It should be noted that German tax law provides for a system of withholding tax, which applies in particular to corporation tax and tax on financial income (such as interest or dividends).

German limited companies are subject to corporate income tax (Körperschaftssteuer), solidarity contribution (Solidaritätsbeitrag) and business tax (Gewerbesteuer) (for industrial or commercial activities) on their entire taxable profit. This also applies to the profits of a foreign company that can be attributed to a permanent establishment for tax purposes in Germany.

The current effective rate of corporate income tax in Germany is 15.825 %, i. e. 15 % corporate income tax with a surcharge of 5.5 % on this rate for solidarity contribution.

The rate of business tax (Gewerbesteuer) is calculated in two stages: a fixed rate of 3.5 % is applied to taxable profits, and this rate is then multiplied by the municipal rate (which varies depending on the municipality). For example, since the municipal rate for Cologne is 475 %, the effective business tax rate for Cologne is 16.62 %.

This means that profits will be taxed at around 28-30 %.

Any losses are first allocated to the tax period immediately preceding the current period and, if they cannot be offset against the results of the previous year, they can in principle be carried forward for an unlimited period to subsequent years. However, there are legal restrictions on the use of loss carry-forwards. In particular, there is a so-called "taxation floor": for subsequent financial years, losses that have not been offset are deducted without restriction up to an amount of €1.0 million, and above this threshold, only up to 60 % of the amount exceeding €1.0 million (loss carry-forwards). The use of losses carried forward is also restricted in the event of the sale of company shares.

7 Comparative table of the most important company forms under German law

	KG	AG	GmbH	UG
Minimum number of shareholders	2	1	1	1
Form of articles of association	No form required, usually by private deed	Notarial deed	Notarial deed	Notarial deed
Minimum social capital	€ 1	€ 50.000	€ 25.000	€ 1
Minimum amount of capital payment (if contribution in cash)	No minimum payment required, but shareholders are only partially liable once their contribution has been paid in full	Payment of one quarter	Payment of one half	Full payment
Liability of the shareholders	Liability of the **limited shareholder** limited to his/her contribution. Unlimited liability of the **general shareholder** (limited indirectly when the general partner is a GmbH)	Limited to their contribution	Limited to their contribution	Limited to their contribution
Management / Representation	By the general shareholder (generally the GmbH)	By the management board	By the managing directors	By the managing directors
Monitoring / Control body	Optional: Supervisory board	Compulsory: Supervisory board	The managing directors of the GmbH are bound by the instructions of the shareholders. Optional: Supervisory board	The managing directors of the UG are bound by the instructions of the shareholders. Optional: Supervisory board

2020-01-01

Qivive Rechtsanwalts GmbH

qivive.com

Köln[D]
Konrad-Adenauer-Ufer 71
D – 50668 Köln
T + 49 (0) 221 139 96 96 - 0
F + 49 (0) 221 139 96 96 - 69
koeln@qivive.com

Paris[F]
50 avenue Marceau
F – 75008 Paris
T + 33 (0) 1 81 51 65 58
F + 33 (0) 1 81 51 65 59
paris@qivive.com

Lyon[F]
4 Pl. Amédée Bonnet
F – 69002 Lyon
T + 33 (0) 4 27 46 51 50
F + 33 (0) 4 27 46 51 51
lyon@qivive.com

Strasbourg[F]
10 Pl. Gutenberg
F – 67000 Straßburg
T + 33 (0) 3 92 12 02 20
F + 33 (0) 3 92 12 02 21
strasbourg@qivive.com