

Cross-Border Joint Venture and Strategic Alliance Guide (Germany)

A Practical Guidance® Practice Note by
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This Cross-Border Joint Venture and Strategic Alliance Guide (Germany) discusses relevant law and practice related to the formation and operation of cross-border joint ventures, including corporate and contractual joint ventures, in Germany. For other jurisdictions see the [Cross-Border Joint Venture and Strategic Alliance Resource Kit](#).

Structures

What are the standard forms of joint ventures/ strategic alliances and common features of each?

In Germany, no standard form of strategic alliance or joint venture exists. Prospective partners can freely structure their collaboration based on size, assets, purpose, number of parties, duration, distribution of profits and losses, and a variety of other provisions.

However, joint venture and strategic alliance structures most often used are either:

1. Contractual relationships
2. Entity-based structures

Contractual Relationships

A collaboration can be formed based on a contract setting forth the rights, obligations, and financial terms that exist

between the parties. Typical contractual relationships are license agreements, joint research and development agreements, construction project agreements, or distribution agreements. Accordingly, special focus should be put into drafting the provisions contained in the agreement(s) governing the relationship. These provisions will differ, depending on the specific circumstances and goals of the collaboration, including (1) the ownership of tangible goods and IP rights, and (2) the manner of termination of the contractual relationship and future ownership of assets. Parties should keep in mind that certain anticompetitive forms of collaboration (horizontal and vertical agreements containing price-fixing, market-sharing, supply-limiting, etc.) may be illegal under competition/antitrust law. In a collaboration based on a contractual relationship, each party remains legally separate in its structure and business, and relationships with third parties remain unaffected. There is no equity participation in this structure.

Entity-Based Structures

Entity-based structures are, as the name indicates, built around the formation of a new legal entity or participation in an existing entity. In Germany, the most popular legal form is the GmbH (*Gesellschaft mit beschränkter Haftung*). A GmbH is a company with limited liability and in which the parties have an equity interest. The new legal entity (joint venture vehicle) is controlled by the shareholders according to the articles of association that are set up during the process of formation. The laws governing the GmbH are quite flexible in terms of corporate governance and (relative) participation of members, but a set of basic provisions are required by law (GmbHG, German LLC Act), including a minimum registered share capital of €25,000.

What are some of the key corporate governance, tax, regulatory, and timing considerations that could impact the choice of structure?

As indicated above, corporate governance has a limited role regarding the choice of structure, as German law is relatively flexible here. However, tax, regulatory, and timing considerations always have a say in deciding a potential collaboration.

As far as tax issues are concerned, most joint ventures are entered into for commercial purposes (as opposed to mere asset or property management). Therefore, the choice of the legal form (for equity-based joint ventures) significantly impacts taxation. For example, a partnership is – for income tax purposes – fiscally transparent (i.e., only the partners are tax subjects, and in turn, their respective taxation depends on their legal form). In contrast, the GmbH is subject to trade tax and corporate income tax. In any case, it is advisable to consult a tax advisor when analyzing tax ramifications when forming a joint venture.

There are no specific statutory provisions targeting joint ventures. Nonetheless, there are general limitations for regulated industries (e.g., the banking, pharmaceutical, health care, energy, and arms sectors).

Can a joint venture or strategic alliance be formed for any purpose?

As long as the purpose is not illegal, a joint venture or strategic alliance can be formed for any purpose. An example for an illegal purpose would be anticompetitive (formation of cartels, etc.) or criminal activities.

Are there any forms of joint ventures or strategic alliances that are more typically used in certain industries (such as real estate, pharmaceutical, or technology)? Why are such forms favored?

The form of collaboration depends on the relative investment of time and resources as well as taxation issues and possible forms of participation, not on certain industries. The more intensive and long lasting a partnership is meant to be, the more likely it is to be an entity-based structure.

Are there any industries that would not permit or would not be conducive to a joint venture or strategic alliance?

As long as the purpose of the joint venture or strategic alliance is not illegal, there are no categorical limits.

How is a joint venture or strategic alliance structured to minimize potential liability? Are there instances where parties to a venture or alliance may knowingly choose a vehicle without limited liability and, if so, why would such party make that choice?

The underlying contractual agreement(s) in a contractual-based joint venture and strategic alliance govern(s) the parties' respective obligations, allocation of risk, liabilities, and indemnification rights. As a result, the liability of the parties will also be subject to the organizational form of each party.

A GmbH limits the potential liability to the registered share capital as agreed in the articles of association. In the unlikely event that partners decide on a different legal form, the most likely reason is taxation. For example, sometimes private limited partnerships (KG, *Kommanditgesellschaft*) or partnerships under civil law (GbR, *Gesellschaft bürgerlichen Rechts*) are chosen because they are – for income tax purposes – fiscally transparent. However, this must be assessed in depth and on a case by case basis.

Statutory Framework

What is the applicable statutory framework for each structure discussed above?

Contractual Relationships

For contractual relationships, the applicable statutory framework incorporates all German law, especially civil law. In an international context, the parties will also agree on a choice-of-law clause that in turn can lead to foreign law being applicable.

Entity-Based Structures

For entity-based structures, the specific statutory framework for the chosen entity depends on its legal form – if, for example, the parties choose a GmbH, the German LLC Act (GmbHG) applies.

Are there statutory or other limits on the duration of a joint venture or strategic alliance?

There are no general statutory or other limits on the duration of a joint venture or strategic alliance. However, if the parties choose to have a contractual relationship, very long durations exceeding 10 years can be problematic, because in case law, under certain conditions, they have been deemed inadequate. For instance, in general contract law unilateral beer supply agreements between breweries and pub owners with a term of 20 years have

been deemed inadequate. In the event of a unilateral joint venture agreement, this case law may be on point as well.

Do joint ventures or strategic alliances have to be registered with any federal or local body in order to effect the entity's formation?

Where there are concerns regarding compliance with competition law, a filing with the Federal Cartel Office (Bundeskartellamt) has to be considered (especially in the case of mergers where certain turnover thresholds are exceeded).

If the business purpose falls under special regulations, a trade registration may be necessary.

However, solely based on being a joint venture or strategic alliance, there are no special filings to be considered.

Regulatory Environment

Are joint ventures or strategic relationships specifically regulated?

No.

Are there any antitrust matters to be considered in forming a joint venture or strategic alliance?

Yes, as joint ventures and strategic alliances cannot be used to circumvent antitrust regulations / competition law (on a European and a German level), these regulations always have to be taken into consideration. The specifics depend on the case at hand.

Forming the Joint Venture or Strategic Alliance

What are the procedures in forming a joint venture or strategic alliance?

Contractual Relationships

As long as the parties choose to collaborate in the form of a contractual relationship, it is sufficient to agree on its terms between the parties, as documented in a contract, which generally can be concluded observing only private written form.

Entity-Based Structures

Should the parties prefer an entity-based structure, there are general requirements that must be met in order to establish the entity. Typically, this would be the formation

of a GmbH. This requires that the parties to the joint venture or strategic alliance take all of the following actions:

- (1) Agree on the content of the articles of association.
- (2) A first shareholders meeting would take resolutions (adopting the articles of association and appointing (at least) one managing director) which have to be signed by the parties and mandatorily notarized by a German civil law notary.
- (3) Contribution of the minimum equity share capital amounting to at least € 25,000.00.
- (4) Filing of a list of shareholders to the commercial register.

What documentation or other steps are required to form a joint venture or strategic alliance?

There are no additional documentary or other requirements to form a joint venture or strategic alliance.

If there is no documentation forming the joint venture or strategic alliance, is there a standard form that exists by default? Are there any attendant risks of falling within that category?

As there are no special requirements, only the general requirements apply (e.g., two companies acting in concert for a specific common purpose may be considered a partnership under civil law (GbR) even without having signed any written agreement). Other general requirements deal with defective contracts or entities, but none of them apply specifically to joint ventures or strategic alliances.

What filings with governmental authorities (if any) are required to form the joint venture or strategic alliance?

None specifically targeted at joint ventures or strategic alliances.

Becoming a Member/Partner

What are the different levels of equity and voting participation in the various forms of joint ventures and strategic alliances? How flexible is each of the structures?

Contractual Relationships

In a contractual relationship, the participation can be designed in any way that satisfies the mutual preferences or needs of the parties.

Entity-Based Structures

In the entity-based structure of the GmbH, the degree of equity and voting participation will typically be defined by the partners' respective capital contributions to the GmbH. However, the structure may implement special rules allowing a party to have special voting rights or equity interests that do not necessarily correlate to the amount of capital contribution. Notwithstanding, these rules are limited to the extent that all shareholders are guaranteed basic participation rights.

What forms of contributions (e.g., cash versus in-kind) may be made by members/partners?

Investors in any contractual-based or entity-based joint venture or strategic alliance may contribute in the form of cash, contributions in kind, or services.

When choosing a form of in-kind contribution that may be difficult to value (e.g., real property), the investor should conduct a due diligence regarding the contribution and its value.

Should contributions to the joint venture or strategic alliance be documented? If so, what is the typical form of documentation?

Typically, contributions to joint ventures or strategic alliances will be documented either in the contract (as a contractual obligation), in the form of contribution receipts, or as a part of the participation agreement for the entities.

Additionally, for tax and accounting purposes, it is advisable to have all contributions documented, particularly if contributions in kind are made. It is important to keep in mind that in certain cases certified valuation reports may be required.

Are there any statutory or other requirements regarding the number (i.e., minimum or maximum) or type of members (as in age requirements or legal status; individual or juridical person) in the joint venture or strategic alliance?

There are no requirements regarding the number of members.

Juridical persons and individuals are equally able to participate in joint ventures or strategic alliances; however, minors need the approval of their parents (or if there is a conflict of interest for the parents, the approval of a court)

to enter into legally binding contracts (i.e., founding legal entities as well).

Can a public sector body be a member/partner in the joint venture or strategic alliance?

Yes, however, restrictions can be placed on the public sector entity in the event that the partnership is financed by the public/municipal/governmental budget and competes with private competition.

What restrictions, other than contractual ones, are there on a member/partner transferring its interest in the joint venture or strategic alliance?

The general laws (competition law, etc.) have to be complied with, but there is no statutory provision specifically targeting joint ventures or strategic alliances. In practice, in both contractual and equity-based joint ventures, parties agree in advance on certain restrictions regarding the transfer of rights or shares (by inserting preemptive rights).

Restrictive Covenants

What restrictive covenants can apply to members/partners relating to corporate opportunity, non-competition, and non-solicitation?

A non-compete/non-solicitation clause is standard practice for joint ventures or strategic alliances in order to prohibit any venture partner (including affiliated entities, controlled entities, or entities under common control) from competing with the partnership.

In a contractual partnership, non-compete/non-solicit clauses would form part of the contract. In an entity-based partnership, they would be included either in the articles of association or in the shareholders agreement. In case there is no agreement to such effect, the directors, officers, or principal shareholders owe a duty not to compete with the entity as far as those actions would undermine the basis of the partnership.

Typically, a non-compete/non-solicit clause would apply during the term of the joint venture or strategic alliance, but in specific circumstances it can continue for a certain amount of time after the exit of a member or the termination of the joint venture or strategic alliance. The actual parameters and enforceability depend on the

individual case. Generally speaking, these provisions have to be carefully drafted to ensure that they do not result in any antitrust violations.

Management

How is the joint venture or strategic alliance managed in the different structures? Are there statutorily mandated supermajority provisions?

Contractual Relationships

Within the contractual partnership, the joint venture or strategic alliance is managed solely based on the provisions of the contract. Supermajority rules can be included but are not required.

Entity-Based Structures

In an entity-based partnership, the basic structure of cooperation is determined by the law governing the entity, as substantiated in the articles of association of the entity. Within the concrete laws governing the entity – most likely the German LLC Act (GmbHG) – certain actions require supermajority provisions, such as changing the articles of association or liquidating the entity.

What mechanisms are there for resolving deadlocks on major decisions?

Deadlocks should be addressed in the articles of association or the shareholders agreement (for entity-based structures) or in the contractual agreement (for contractual partnerships) where a clear mechanism for resolving conflicts is to be implemented. Without such a mechanism, dissolution is very often the only choice.

Typical mechanisms to address a deadlock are escalating the resolution of the issue to:

1. Certain key executives of each partner or
2. A chairman, or a designated independent director, who has been granted a tie-breaking vote.

Alternatively, an independent mediator or arbitrator can assist in finding a resolution to implement buy/sell provisions giving one of the members the right to buy out the other. In order to deal with unresolved deadlock situations, entity-based joint ventures provide for an exit mechanism, typically referred to as a “Texas shootout” or a “Russian roulette.” In such instances, one party is forced to acquire the other party’s shares.

What procedures apply for electing and removing managers in joint ventures and strategic alliances?

Procedures to elect or remove managers are drawn up in the contractual agreement or the articles of association. In case there are no rules agreed to between the parties, the statutory provisions governing an entity-based relationship establish such rules. For example, in the GmbH, a shareholders’ resolution is required to appoint or remove a managing director.

Allocating Profits, Losses, and Distributions

How are profits, losses, and distributions allocated among partners/members? Are there legal or regulatory restrictions that may limit the ability of the partners/members to make such allocations on their own?

Contractual Relationships

In a contractual partnership, the allocation of profits, losses, and distributions depends solely on the agreement between the partners/members.

Entity-Based Structures

In an entity-based joint venture or strategic partnership, the articles of association and/or the shareholders agreement among the partners/members govern the allocation of profits, losses, and distributions.

Indemnification

What indemnification provisions would apply in a joint venture or strategic alliance?

Contractual Relationships

Indemnification provisions can be implemented in any contractual relationship between parties. The scope of these provisions can vary. However, according to statutory law, the liability of partners or managers for claims or damages arising out of intentional acts or gross negligence cannot be excluded.

Entity-Based Structures

In an entity-based partnership, the articles of association or shareholders agreement should provide the parties with a definite way to handle indemnification claims, subject to the same limitations as in contractual partnerships.

Exit or Termination

How does a partner/member exit a joint venture or strategic alliance?

Contractual Relationships

In a joint venture or strategic alliance, typically the agreement governing the relationship between the parties addresses the exit of a partner/member and/or limits the term of the partnership as a whole.

Entity-Based Structures

Ideally, the same applies to an entity-based joint venture or strategic alliance. However, depending on the entity chosen by the parties, the law governing that entity provides a standard set of rules for the exit of a partner/member.

How is a joint venture or strategic alliance terminated?

Contractual Relationships

In a contractual partnership, the agreement typically addresses the termination of the partnership.

Entity-Based Structures

Ideally the same applies to an entity-based partnership; however, depending on the form of entity chosen by the parties, the law governing that entity provides a standard set of rules for the termination of the company.

In the case of a GmbH, the common exit of both parties would typically be realized by either selling all shares to a third party (trade sale) or liquidating (winding up) the GmbH.

Is the termination of a joint venture or strategic alliance subject to the approval of any governmental body?

No.

Foreign Members/Partners

What statutes or rules govern joint ventures or strategic alliances with foreign parties?

Aside from the standard set of rules indicated above, joint ventures or strategic alliances can be subject to the German Act on Foreign Trade (*Außenwirtschaftsgesetz*, AWG). The AWG requires special approval by the German Federal Government in particular cases (e.g., if foreign companies acquire participations in companies active in

certain sensitive areas, such as military defense or other areas of importance for the protection of the Federal Republic of Germany and the German population). In case of equity joint ventures, the partners should be aware that relevant thresholds for approval of their transaction can be triggered when they establish their joint venture as a new commonly held entity as well as in cases where existing companies or businesses are contributed into the joint venture, also by way of asset deal. See also the answer to the question below.

What are the material provisions of such statutes or rules?

According to the AWG, the Federal Republic of Germany, in principle, retains the right to disapprove joint ventures or strategic alliances that:

- Endanger the essential security interests of the Federal Republic of Germany
- Endanger the peaceful relationships between peoples
- Contain the possibility of significantly disrupting foreign policy of the Federal Republic of Germany
- Endanger the public order or security of the Federal Republic of Germany or of an EU member state
- Influence capital or payment transactions –or–
- Influence transactions with foreign shares or gold

What constitutes a foreign member or partner of a joint venture or strategic alliance? If there is an attribution rule that traces the ultimate ownership of a local member/partner to a foreign entity, what are the equity-holding and voting-rights thresholds for deeming “control” at each level of an ownership chain?

Any seat or domicile outside of Germany constitutes a foreign member or partner. There are no rules on minimum participation of domestic partners.

Do such statutes or rules have any limitations regarding foreign members/partners in a joint venture or strategic alliance (For instance, levels of participation, investments, management, etc.)?

As indicated above, the goal of the limitations imposed by the AWG is to prohibit joint ventures or strategic alliances that endanger, disrupt, or otherwise adversely affect the interests mentioned above, as determined by the German administration.

What permits, consents, or registrations are required by foreign members/partners of a joint venture or strategic alliance?

If the AWG is applicable, an approval will be required.

Are there any economic incentives for foreign direct investments in a joint venture or strategic alliance?

No.

Are there mandatory minimums or maximum equity investments or contributions for a foreign joint venture or strategic alliance member/partner?

No.

Are there any restrictions regarding distributions to, or repatriation of profits by, foreign partners/members?

No.

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