

# COMPARISON OF THE STOCK CORPORATION (AG) WITH THE LIMITED LIABILITY COMPANY (GmbH)

**taking into consideration the preliminary draft (PD)  
of April 1999 regarding the revision of  
limited liability company law**

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	Advantage AG	Disadvantage AG	Advantage GmbH	Disadvantage GmbH
				<i>provide for transferability without approval of the other partners or may further restrict transferability. Publication is only necessary in the case of a duty to provide additional contributions.</i>
Bankruptcy of a shareholder / partner	No influence on the course of business of the company.			May lead to dissolution and liquidation. <i>PD: In the case of the acquisition of a company share within the framework of a debt enforcement, the Partners' meeting may deny the buyer provided that the meeting offers the buyer the opportunity to acquire the company share against payment of its real value.</i>

#### GmbH recommended for:

- Small number of partners;
- Partnership relations which are planned for a longer duration, i.e. when it is expected that company members will not change very often or a far-reaching restriction of transferability of the company shares is desired;
- Form of organization for company relationship in which the partners shall somehow participate directly in management and where, therefore, more than just a financial participation is desired;
- Determination of additional obligations of the partners;
- Also suited for simple companies, the structure of which can be regulated in less detail and less strictly than demanded by the provisions regarding the stock corporation.

#### Transformation of AG into GmbH:

- The company capital of the GmbH must correspond to the share capital of the dissolved AG;
- The shareholders must be informed that they have the opportunity to participate equally in the GmbH;
- Shareholders who represent at least  $\frac{2}{3}$  of the share capital must participate in the GmbH;
- The Transformation legally presents a combination of a new formation of a GmbH by shareholders with subsequent absorption of the AG by the GmbH (universal succession). Therefore, two publicly recorded resolutions are necessary: First, the resolution of the general meeting on the dissolution of the AG (qualified majority:  $\frac{2}{3}$  of the represented votes, absolute majority of the represented nominal value of the shares), and, second, the resolution of the partners on the formation of the GmbH (with the condition that all founders agree unanimously);
- After the Federal Law on the Merger, Spin-off and Transformation of Legal Entities (Merger Law) has entered into force, the Transformation is to take place in accordance with the provisions of said law.

	Advantage AG	Disadvantage AG	Advantage GmbH	Disadvantage GmbH
Resolution of the general meeting or of the partners, respectively		May not be made by circular resolution (proxies admissible, however).	If provided by the Articles of Association, written vote by circular resolution possible (especially advantageous when partners live far apart). <i>PD: Admissible by law.</i>	
Auditors		Mandatory.	Not mandatory when all partners are either executives or at least have a right to inspect the business records. If, however, due to the lack of the above, the use of auditors is required, the same regulations are applicable as for the auditors of a corporation. <i>PD: Mandatory.</i>	
Liability for company debts	To the extent that the share capital is not fully paid in, each shareholder is liable for the full payment of his/her/its share(s).			Insofar as the company capital is not fully paid in, each partner is liable jointly and severally up to the amount of the entire registered capital. (This is also applicable if the company capital has been subsequently diminished by a partner). <i>PD: The joint and several liability of the partners is abolished.</i>
Acquisition by the company of its own shares		10% or, in connection with a restriction of transferability, 20% (Art. 659 CO).	Almost unlimited (Art. 807 CO). <i>PD: Only 10% or temporarily 20%.</i>	
Administrative costs		Relatively high costs, auditors mandatory.	Lower than AG. Auditors in principle not mandatory. <i>PD: Mandatory. Therewith higher administrative costs compared to AG.</i>	
Sales of company shares	As a rule, shares may be freely sold by formless transfer or endorsement.	Limited possibilities to restrict transferability (i.e. transferability may only be restricted within certain limits, denial of the transfer without presenting justification is only possible when shares are acquired against payment of the real value).	Unlimited possibilities to restrict transferability.	Notarization, publication and approval of $\frac{3}{4}$ of the partners representing $\frac{3}{4}$ of the company capital are necessary for the sale. <i>PD: By law, approval by <math>\frac{2}{3}</math> of the represented votes and an absolute majority of the company capital entitled to vote is necessary. Articles of Association may, however,</i>

	Advantage AG	Disadvantage AG	Advantage GmbH	Disadvantage GmbH
Additional obligations (i.e. other than obligations to pay in)		None. Determination of additional obligations is only possible through shareholders' agreement.	Additional obligations may be determined in the Articles of Association as desired. A non-compete clause for managing partners applies by law. Extension to all partners by adapting the Articles of Association accordingly is possible. <i>PD: The duty to be loyal is stated in the law for all partners.</i>	
Composition of the Board of Directors / Executive Board		The Members of the Board of Directors must be shareholders (exception: Board Members of a subsidiary representing the parent company as a shareholder).	Executives do not have to be partners. According to the law, however, all founding partners are jointly empowered to form the Management. The composition of the Management may be determined as desired in the Articles of Association.	
Nationality and domicile requirements regarding the Board of Directors / Management		The majority must be composed of Swiss citizens having domicile in Switzerland <i>PD: No nationality requirements. At least one Member of the Board who is authorized to sign for the company alone (or two if they are only authorized to sign jointly) must have domicile in Switzerland.</i>	No nationality requirements, however, at least one executive who is authorized to sign for the company alone or two when they are only authorized to sign jointly must have domicile in Switzerland.	
Duties of the Board of Directors / Management		Law provides for a catalogue of non-transferable and inalienable duties of the Board of Directors. If regulated by the Article of Association, the Board of Directors may delegate certain powers to third parties by means of the Organisation by-laws.	The form of Management and company representation may be fixed as desired. <i>PD: Catalogue of non-transferable and inalienable duties of the executives.</i>	Managing partners are subject to bankruptcy proceedings (Art. 39, para. 1, section 5, Swiss Federal Act on Debt Enforcement and Bankruptcy Proceedings). <i>PD: Abolishing of the provisions that the managing partners are subject to bankruptcy proceedings.</i>

	Advantage AG	Disadvantage AG	Advantage GmbH	Disadvantage GmbH
Number of Founders		At least three. Preliminary draft. <i>(PD): one person.</i>	At least two. <i>PD: one person.</i>	
Purpose	Economic or other purposes.			Economic purposes only. <i>PD: Also other purposes.</i>
Share capital / Company capital	Unlimited maximum.	CHF 100,000 at least whereof 20%, but CHF 50,000 at the minimum, must be paid in.	CHF 20,000 at least. Minimum of 50% must be paid in. <i>PD: Minimum of CHF 40,000. At least 100% must be paid in.</i>	At least CHF 2 million. <i>PD: Abolishing of the upper limit of CHF 2 million.</i>
Par value of shares	Minimum of one Swiss cent.			Minimum of CHF 1,000 or a multiple thereof. Only one company contribution per partner possible. <i>PD: Minimum of CHF 100. One partner may also own several contributions in the company capital.</i>
Public disclosure	The identity of individual shareholders need not be publicly disclosed. <i>PD: In case of a one-person company, the name must be publicly disclosed.</i>			The names of all participating partners are to be publicly disclosed. Duty to communicate changes to the commercial register annually. <i>PD: The names are only to be disclosed publicly in the case of a duty to make additional contributions or a one-person company.</i>
Articles of Association		More mandatory provisions than in the case of the GmbH.	The Articles of Association need not contain any provisions concerning the bodies of the company. Mandatory content according to 766 Swiss Code of Obligations (CO) is only the company name, domicile, purpose, company capital, company contributions and the form of publication. <i>PD: In addition, provisions concerning the Management must be contained in the Articles of Association.</i>	