TUTORIAL DESCRIPTION AND INSTRUCTIONS

A. DESCRIPTION

The main goals of the tutorial are to further clarify some key aspects covered during the classes and to enrich the knowledge gained by the students by analyzing hot topics, the discrepancies existing in EU and also the perspectives for the future of company law in EU.

In the light of these goals, the following is the schedule of the tutorials for the company law course:

TUTORIAL 1

Wednesday (11 Dec. 2013)

Reading material:
SCHMIDT, Jessica, The New Unternehmergesellschaft (Entrepreneurial Company) and the Limited – A Comparison, 9 no. 9 German Law Journal 1093 (2008).
LEWIS, Rhidian et al., The European Private Company: An Opportunity from an Economic Crisis?, 3 no.8 International Journal of Humanities and Social Science 106 (2013).

Goal: to practically illustrate what is meant by the issue of regulatory competition in the context of EU. The emphasis will be put on the linked issues of the registered capital. Furthermore, the tutorial will touch upon the European Private Company.

Instructions: Read the recommended material and think about the answers to the questions.
A. Regulatory competition in EU and its practical significance:

Reading material:
SCHMIDT, Jessica, The New Unternehmergesellschaft (Entrepreneurial Company) and the Limited – A Comparison, 9 no. 9 German Law Journal 1093 (2008).

Questions:

1) How do you understand the term of “regulatory competition”? How do you perceive it? What positive / negative consequences can it bring?

2) Consider both the new Unternehmergesellschaft (Entrepreneurial Company) and the Limited from different standpoints – shareholders’, creditors’... Which solution seems to be more attractive (accordingly)?

3) In your opinion, what are the biggest weaknesses of the “modified” German GmbH (UG)? On the other hand, which modifications do you find as the most business-friendly?

4) Imagine that you are a German investor willing to incorporate a company for the purpose of doing business in Germany - what sort of company would you prefer to establish – UK Limited or UG?

   Next, what if you are a UK investor willing to incorporate a company for the purpose of doing business in Germany? Would there be any practically significant difference?

5) Additional question: As for the management model, starting from the 1st January 2013 Dutch lawmaker decided to enable the investors to choose between one-tier and two-tier models? What do you think about such a solution? What would you opt for? Why?

B. Registered capital:

Reading material:
Traditionally, among the functions of the registered capital there are two main ones distinguished: serving as security for the company creditors and economic function (using the capital to realize the aims of the company).

Recently, in Europe, the situation varies from country to country. While, e.g., in Hungary there is a discussion to increase the registered capital from actually EUR 1.600.- to EUR 10.000, in other countries there is a tendency the abolish such a requirement. In EU countries the situation is the following:

- Germany:
   = AG Grundkapital: EUR 50.000.-
   = GmbH Stammkapital EUR 25.000.-
   = Unternehmergesellschaft EUR 1.-
- UK: authorized capital requirement abolished in 2006
- Poland: EUR 1.200.-
Questions:

1) Which of these solutions is the best from several points of view: from the point of view of creditors, employees, entrepreneurs, new entrepreneurs...?

2) Theory vs. practice: Do you believe that the registered capital assumes its theoretical functions?

For instance, in Poland the registered capital requirement for LLC is approx. EUR 1200 – is it enough to efficiently protect the creditors?

   - What about the company’s assets? What role can they/do they play?

   - What about psychological effects the registered capital can play? What are the sensitive sectors where the existence of the capital can play significant role? Can you think of any?

3) In order to efficiently protect the creditors - if not the capital – what protection could be provided alternatively? Can you think of any possibilities reaching the same results by means of other techniques?

4) Do you see the minimum capital requirement as an impediment or necessary condition to start up a company?

What is the most recent situation in China? Would you abolish the minimum capital requirement or rather impose a stricter requirement than the one in force? How both solutions can possibly affect the business environment?

C. European Private Company:

Reading material:
LEWIS, Rhidian et al., The European Private Company: An Opportunity from an Economic Crisis?, 3 no.8 International Journal of Humanities and Social Science 106 (2013).

Questions:

1) What are the practical differences between Societas Europaea and Societae Privata Europaea (European Private Company)?

2) What are the possible benefits resulting from the introduction of the European Private Company?

3) There has been a long unsuccessful discussion between member states around this
potential new European company form. One of the issues debated has been the minimum capital requirement. What are the solutions discussed in this area?

4) Referring to the title of the article – how do you understand the question “The European Private Company: An Opportunity from an Economic Crisis?”

TUTORIAL 2

Thursday (12 Dec. 2013)

Goal: to discuss about the role of members of the boards¹ and shareholders in the companies, and also about the interaction between them. One of the main focuses will be the problem of remuneration of the board members. Furthermore, the discussion will be centered around the instrument of corporate governance good practice and its effectiveness.

Instructions: Read the recommended material and think about the answers to the questions.

Reading material:
LOEBBE, Marc, Corporate Groups: Competences of the Shareholders’ Meeting and Minority Protection – the German Federal Court of Justice’s recent Gelatine and Macrotron Cases Redefine the Holzmueller Doctrine, 5 no.9 German Law Journal 1057 (2008).

A. Position of the General Meeting of Shareholders

Questions:

1) Recently, in the course of discussion around corporate governance the term of “shareholders’ spring” can be heard? How do you understand it?

2) See the competences of GMoS in few different European countries. What are your observations? What are the similarities/discrepancies?

3) "Vorstand" - Management Board vs. "Hauptversammlung" - Shareholders’ Meeting: in what kind of MB's actions SM's approval should be required? When SM can make a decision binding upon MB? What practical significance does it have? Assuming that there is an important matter arising that may have a significant impact on the company's business or financial situation - what do you think MB should do?
What are the possible dangers of the strong position of "Vorstand"?

¹ Here, the term is used to refer to all the boards (SB, BoD, MB).
B. Remuneration issue

Reading material:

There is a noteworthy problem of excessive remuneration of board members (executives), as well as high compensation in case of their departure.

In Anglo-American systems directors and executives, being charged with the management of the companies determine their own levels of pay because deciding about salaries and remuneration is seen as a managerial task (in other words, “managing” of the company). In Germany the issue is decided by the supervisory board.

What is more, there is an obvious discrepancy between the remuneration of board members and the average salary of employees. E.g. in the USA, board members' remuneration is often 400 times (!) higher than the average salary of the employees. In Germany "only" 53 times higher in the DAX companies. However, the remuneration of VW's (Volkswagen) chief executive's remuneration is 171 times higher than the average salary of the employees.

Questions:

1) What dangers can you see in the situation described above?

2) Who should determine the remuneration of board members (executives)? In other words, who should have the final “say on pay”? Should it binding or advisory vote?

How do you see this issue in accordance with “the theory of agency”?

3) What factors should be taken into consideration when determining remuneration of board members (executives)?

4) Should the information regarding remuneration be publicly disclosed? If so, in which form?

5) Remuneration committee – what is its role?

6) It is said that it is important that the non-executive directors should not be reliant on the company for a significant part of their income? Why?

To sum up: How realistic are these postulates in Europe and in China?

C. Casting vote of the chief executive officer

Until now the following decision could be decided by the board of directors, respectively by the CEO using his casting vote:

= to formulate the operation plan of the company
= drafting all the rules and regulations of the company
= to determine the pricing of the products
Questions:

1) What do you think – aren’t the competencies of CEO going too far? If yes, who should take over the above mentioned competencies?

2) How broad should be the competencies of CEO? Do you represent far-reaching or limited approach?

D. Separating the roles of the board chair and CEO

In the Anglo-American systems separating the board chair and CEO roles still remains an ongoing debate. The main questions relate to potential conflicts of interest when the roles are combined, as well as to appropriate balance of power between the CEO and the independent board members.

One of the analysis of this problem starts with the following words:

"By limiting the ability of CEOs to dominate the governance process and giving directors increased separation and independence from the CEOs’ influence, boards will be better equipped to ask the tough questions of management and hopefully discover problems before they occur."

Questions:

1) What are the pros and cons of CEO as a board member? What solution is in the best interest of the company's shareholders?

2) Assuming that a company has the right to decide to combine the roles of chairman and CEO, what recommendations would you propose?

E. Corporate governance good practice and its effectiveness

Reading material & Questions:

There is a number of instruments used in order to develop good corporate governance practices in Europe. There are, for instance, numerous EU (Commission) recommendations and - so called - “codes of good practice” (given e.g. by OECD or nationally – like UK Corporate Governance Code). Basically, these are non-binding instruments.

1) Do you think that following / non-following the above-mentioned guidelines can have an influence on how particular company is perceived in the market? Hence, do you think that in practice the guidelines are obeyed?

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In the field of corporate governance there is a concept called "COMPLY OR EXPLAIN" which means “follow the corporate governance codes or explain why you departure from them”. The purpose of "comply or explain" is basically to "let the market decide" whether a set of standards is appropriate for individual companies.

2) Do you agree that companies departing from the recommendations of corporate governance codes should be required to provide detailed explanations for such departures and describe the alternative solutions adopted?

3) Do you agree that monitoring bodies should be authorized to check the informative quality of the explanations in the corporate governance statements and require companies to complete the explanations where necessary? Who could do it? (Company auditors?)

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2. LEWIS, Rhidian *et al.*, *The European Private Company: An Opportunity from an Economic Crisis?*, 3 no.8 International Journal of Humanities and Social Science 106 (2013). P. 17


The New Unternehmergesellschaft (Entrepreneurial Company) and the Limited – A Comparison

By Jessica Schmidt*

A. Introduction

One of the probably most groundbreaking – and at the same time also most contentious – issues of the German reform of private limited companies by the Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG – Law for the Modernization of the Private Limited Companies Act and to Combat its Abuse)¹ is the introduction of the Unternehmergesellschaft (UG – Entrepreneurial Company). This new sub-type of the Gesellschaft mit beschränkter Haftung (GmbH – Private Limited Company) is specifically designed for entrepreneurs and has already unofficially been dubbed the “Mini-GmbH” and “GmbH light”. It can be seen as the centerpiece of the legislator’s overall aim to facilitate and accelerate the formation of companies and the underlying motive of increasing the international competitiveness of the German GmbH.

The main competitor of the GmbH in the regulatory competition of company laws is undoubtedly the British private limited company (UK Limited). Metaphorically speaking, the new UG can therefore be seen as “Germany’s answer”² to the enormous number of UK Limiteds which have been set up by Germans during the

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¹ Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG – Law for the modernization of Private Limited Companies Act and for combating abuses), (BGBl. reference not yet available at time of editorial deadline); draft law reference: BR-Drucks. 354/07; See also the Bericht des Rechtsausschusses (report of the Committee on Legal Affairs), BT-Drucks 16/9737. For an overview in English see Ulrich Noack & Michael Beurskens, Modernising the German GmbH – Mere Window Dressing or Fundamental Redesign?, EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (EBOR) 97–124 (2008); Jessica Schmidt, German Company Law Reform: Makeover for the GmbH, a new “Mini-GmbH” and some important news for the AG, 18 INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW (ICCLR) 306–311 (2007); Frank Wooldridge, Proposed Reforms of the German GmbH, 28 COMPANY LAWYER (CO LAW) 381–383 (2007).

last few years. However, the British legislator has not been idle either: The UK Limited has recently been subject to a major reform. Notably, some of the main objectives of the new Companies Act 2006 (CA 2006), which will be fully implemented by 1 October 2009, are also to “ensure better regulation and a ‘Think Small First’ approach” as well as “to make it easier to set up and run a company.”

The most important reforms of the UK Limited include the abolition of the need for a company secretary (Sec. 270(1) CA 2006), the simplification of the rules on meetings, capital reductions, accounts and reports and the abolition of the prohibition of financial assistance. Furthermore, the Secretary of State plans to use his powers under Sec. 19 CA 2006 to prescribe separate model articles for private companies, catering to their specific needs.

With this new “improved Limited” the bar for the success of Germany’s new entrepreneurial company has been raised even higher. This article will undertake a comparison and attempt to analyze whether the new “Mini-GmbH” will have a real chance to compete effectively against the “improved UK Limited” of the CA 2006.

B. Outline of the Central Features of the New Unternehmergesellschaft (UG)

The quintessential feature of the new UG is the waiver of the traditional German minimum capital requirement by the new § 5a (1) GmbHG. This is also the main demarcation line between the UG and the “regular” GmbH, for which the MoMiG retains the minimum capital requirement of € 25,000 (cf. § 5 (1) GmbHG).

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3 In 2006, nearly one in four private limited companies set up by Germans was not a GmbH but a UK Limited. See in detail and with more data Horst Eidenmüller, Die GmbH im Wettbewerb der Rechtsformen, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 168, 173 (2007).

4 Companies Act 2006 (CA), ch. 46.

5 Some of the provisions are already in force. However, a large part of the Act will only enter into force on 1 October 2009; the final implementation timetable is available at http://www.berr.gov.uk/files/file46674.doc.


7 For a comprehensive outline of the reforms brought about by the CA 2006 see ALAN STEINFELD ET AL., BLACKSTONE’S GUIDE TO THE COMPANIES ACT 2006 (2007).

Yet the UG will not be an entirely new form of company, but actually only a new kind of sub-type of the well-tried GmbH. Except for the special provisions set out in the new § 5a GmbHG, the UG will be subject to the same rules and regulations which are applicable to the “regular” GmbH. Thus, the UG will make it possible to “start small” and then gradually expand the business to a “full-grown” GmbH without the need for re-registration (cf. the new § 5a (5) GmbHG). In fact, both the MoMiG and the explanatory notes convey the notion that, to a certain extent, the legislator seems to perceive the UG as a kind of “interim solution” for entrepreneurs on their way to a “genuine” GmbH. Yet, the MoMiG does not contain any kind of “time limit” for the UG or any other indirect means which would force the shareholders to raise the registered share capital later on. But as long as the registered capital stays below the threshold value of € 25,000 for a GmbH, the UG must comply with the special requirements set out in § 5a (1) – (4) GmbHG.

The first, and outwardly most apparent, of these special requirements for the UG is the obligation to trade under the designation “Unternehmergesellschaft (haftungsbeschränkt)” [Entrepreneurial company (with limited liability)] or the abbreviation “UG (haftungsbeschränkt)”, which is laid down in the new § 5a (1) GmbHG (discussed in detail infra at section C.I. of this article). Further special provisions applicable only to the UG are the prohibition of non-cash contributions and the requirement to pay up the entire amount of the registered share capital before registration (cf. the new § 5a (2) GmbHG; discussed in detail infra at section C.II. of this article). In addition, a UG will be required to set up a reserve equal to a quarter of the annual surplus minus the accumulated deficit of the preceding year (cf. the new §5a (3) GmbHG; discussed in detail infra at section C.VIII.1. of this article). Finally, the new § 5a (4) GmbHG requires a general meeting to be called

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9 The idea of establishing a completely new form of company, which was promulgated in particular by Jürgen Gehb, a member of the Bundestag (German parliament), did not prevail. The Gehb draft law is available at www.gebh.de.

10 Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG – Private Limited Companies Act).

11 See Begründung zum Regierungsentwurf (Begr Reg) (legislator’s explanatory notes), BR-Drucks 354/07, 71.

12 Id. at 71–72.


14 See Begr Reg, supra note 11, at 72.

15 See infra C. VIII. 1.
forthwith in case of an imminent inability of the UG to pay its debts (discussed in detail infra at section C.VII.2. of this article).

C. The New Entrepreneurial Company in Comparison to the UK Limited Under CA 2006

I. Company Name

The first important difference that catches one’s eye when comparing the UG with the UK Limited is the requirement imposed on the UG to trade under the designation “Unternehmergesellschaft (haftungsbeschränkt)” or the abbreviation “UG (haftungsbeschränkt)” (cf. the new § 5a (1) GmbHG). The purpose of this special transparency obligation is to make it clear for the public that one is dealing with a company which is potentially endowed with very little capital.16 For a small UK Limited there is no comparable special transparency requirement; section 59(1) CA 2006 only provides that the name of a UK Limited must – regardless of the amount of its share capital – end with “limited” or “ltd.” There are some commentators who believe that the mandatory special company name of the UG may actually be a marketing advantage.17 However, it seems a lot more likely that the mandatory special company name will actually turn out to be a “stigma”18 carrying a negative connotation of financial weakness which will ultimately reduce the attractiveness of the UG for incorporators and business partners.19 In addition, the designation “Unternehmergesellschaft (haftungsbeschränkt),” as promulgated by the MoMiG, seems per se not be a very lucky choice and has already been heavily criticized as being both misleading and unsuitable.20 However, even if the final law

16 Begr Reg, supra note 11, 71. See further Ulrich Seibert, Der Regierungsentwurf des MoMiG und die haftungsbegrenzte Unternehmergesellschaft, GmbHR 673, 675 (2007).
20 See Hoffmann-Becking, supra note 19, at 2; Handelsrechtsausschuss des DAV, Stellungnahme zum Regierungsentwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG), NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 735, 736–737 (2007); Rüdiger Veil, Die Unternehmergesellschaft nach dem Regierungsentwurf des MoMiG. Regelungsmodell und
had substituted another designation – for example the term “Gesellschaft mit beschränkter Haftung (ohne Mindestkapital)” / “GmbH (o.M.)” (“limited liability company (without a minimum capital)” as suggested by the Bundesrat or the term “Gründer-GmbH” (founder company) as suggested by the Handelsrechtsausschuss (Committee for Commercial Law) of the Deutscher Anwaltverein (DAV – German Lawyers’ Association) – the requirement of a special company name imposed on the UG would still have put it at a disadvantage in comparison to the UK Limited.

II. Minimum Capital and Capital Contributions

As already mentioned, one of the prime features of the UG is that it does not have a minimum capital requirement of € 25,000 like a “regular” GmbH (cf. the new § 5a (1) GmbHG). The only constraint applicable to the UG is the new § 5 (2) GmbHG, which provides that the nominal amount of each share must be at least 1 Euro. Thus, a UG can be set up with only 1 share of 1 Euro. In terms of minimum capital therefore, the UG (almost) measures up with the UK Limited (which can even be established with a share capital of only 1 pence – but 1 Euro or 1 pence should not really make a difference in practice!).

However, in terms of the provisions on the payment for shares, the rules applicable to the UG are a lot stricter than those for the UK Limited. First of all, the new § 5a (2) sentence 1 GmbHG provides that the share capital of the UG must be fully paid up before registration. By contrast, English law does not provide any fraction of the share capital of a UK Limited to be paid up before registration. Furthermore, the new § 5a (2) sentence 2 GmbHG specifically prohibits non-cash contributions. Here again, the UK Limited offers a lot more freedom: English law not only allows for both cash and non-cash contributions (or a mixture of both); in fact, a UK Limited may even accept a promise to do work or perform services for the company or for


22 Handelsrechtsausschuss des DAV, supra note 20, at 736.

23 See Seibert, supra note 16, at 675; Wilhelm, supra note 20, at 1510.

24 See CA 2006, Explanatory Notes, n. 835.

25 S. 586 CA 2006 (shares to be at least one-quarter paid up) is only applicable to public companies.
any other person as a contribution (which is prohibited even for the “regular” GmbH and thus also for the UG). The explanatory notes to the MoMiG argue that part payment or non-cash contributions are not necessary for the UG since the incorporators are completely free to choose the amount of the share capital (and can thus set it at an amount which they are able to pay up in cash). While this argument may be valid in most cases, it is certainly not unassailable. There may be incorporators for whom the option of a non-cash contribution (even in the relatively small amount of € 1,000) may be essential and for whom the UK Limited would thus seem much more attractive. In addition, it is somewhat unclear whether the German doctrine of the “verdeckte Sacheinlage” (hidden non-cash contributions) will apply in case of the UG.

III. Constitution

Despite the recent reforms of the law on the constitution of English companies, the UG and the UK Limited also exhibit differences with regard to the company constitution. English law traditionally pursued the approach of a “two-document constitution,” consisting of the memorandum of association and the articles of association. Under the new CA 2006, however, the company’s constitution consists only of the articles (and certain resolutions, see Section 17 CA 2006), while the memorandum merely serves the rather limited role of evidencing the intention of the subscribers to form a company. In this respect, English and German law

26 Id. s. 585, Argumentum e contrario e (which specifically prohibits these forms of contributions for public companies).

27 § 27 (2) of the Aktiengesetz (AktG) (German Stock Corporation Act) by way of analogy; See Marcus Lutter & Walter Bayer, § 5, in GMBH-GESETZ. KOMMENTAR, margin number 17 (Marcus Lutter & Peter Hommelhoff eds., 16th ed. 2004).

28 See Begr Reg, supra note 11, at 71; See also Joost, supra note 13, at 2244; Seibert, supra note 16, at 676; Veil, supra note 20, at 1081.

29 With respect to this problem see in detail the expert opinion of Tilman Götte for the Committee on Legal Affairs of the Bundestag, available at http://www.bundestag.de/ausschuesse/a06/anhoerungen/28_MoMiG/04_Stellungnahmen/Stellungnahme_Prof_Goette.pdf; 5; Michael Bormann, Die Kapitalaufbringung nach dem Regierungsentwurf zum MoMiG, GMBHR 897, 901 (2007); Joost, supra note 13, at 2244-2245; Eckhard Wälzholz, Das MoMiG kommt: Ein Überblick über die neuen Regelungen, GMBHR 841, 843 et seq. (2008).


31 See CA 2006, Explanatory Notes, n. 32; BLACKSTONE’S GUIDE, supra note 7, at 3.10 and 4.05; DEREK FRENCH, STEPHEN W. MAYSON & CHRISTOPHER L. RYAN, MAYSON, FRENCH & RYAN ON COMPANY LAW 2.2.1.3 and 3.3.2 (2007–2008).
have converged because German company law has always only provided for one single Satzung (constitution).

But there are still rather significant differences with respect to the formal requirements. Whereas Section 18(3) CA 2006 only stipulates that the articles must be in a single document and that they are to be divided into paragraphs numbered consecutively, § 2 (1) GmbHG requires the constitution to be notarized and signed by all shareholders. Yet, the law is also converging in this respect – at least to some extent. In fact, the government’s original proposal for the MoMiG had even provided for the possibility of incorporation only by way of an (unnotarized) constitution in written form. However, after fierce criticism from both scholars and practitioners, the final law now generally retains the notarization requirement. But the new § 2 (1a) GmbHG at least provides for a simplified incorporation procedure (available not only to the UG, but to every GmbH) by use of the Musterprotokoll (sample statutes) in the new annex 1 to the GmbHG. For German law, the instrument of sample statutes, which has a long tradition in English law, is an absolute novelty. But, unlike the very comprehensive sample statutes of English law, which cover virtually all aspects of the “life” of a company, the sample statutes in the new annex 1 consist of only 7 paragraphs. The legislator expressly wanted to limit the use of this “Gründungs-Set” (“incorporation kit”) to uncomplicated “standard cases” where special legal advice was deemed to be


33 They date back to the Joint Stock Companies Act 1856, see MAYSON, FRENCH & RYAN, supra note 31, at 3.3.1.

34 Table A CA 1985 consists of 118 clauses, the draft for the new separate model articles for private limited companies under CA 2006 consists of 54 very detailed clauses (The Companies (Model Articles) Regulations 2008, supra note 8).

35 Seibert, supra note 16, at 674.
unnecessary.\textsuperscript{36} Thus, the sample statutes allow for only 1 director (§ 4) and a maximum of 3 shareholders (cf. the new § 2 (1a) GmbHG), who may only be natural persons or bodies corporate (but not partnerships). In addition, the incorporators can only specify the company name and the registered office (§ 1), the share capital and the amount of the shares to be taken up by the first shareholders (§ 3), and the objects of the company (§ 2). But at least the restriction to three standard types of objects ("trading in goods", "production of goods" and "services"),\textsuperscript{37} which the original draft law had envisioned and which had been severely criticized, has fortunately not been included into the final law after all. Nevertheless, if the incorporators wish to have statutes which are only slightly more sophisticated than those set out in annex 1 and/or tailor-made for their specific needs (e.g. even if they only wish for a standard clause restricting the transfer of shares),\textsuperscript{38} the cost-saving simplified incorporation procedure will not be available.

All in all, the new option of a simplified incorporation procedure by use of sample statutes is therefore de facto restricted to a rather small array of cases.\textsuperscript{39} And even where this new option is applicable, there is still the need for notarization, so the formal requirements are still more onerous than those for the formation of a UK Limited.

\textbf{IV. Speed of Incorporation}

The different formal requirements are also among the main factors for the differences in the speed of incorporation. Companies House (the official UK government register of UK companies) not only offers the option of an electronic

\textsuperscript{36} See Begr Reg, supra note 11, at 61; Bericht des Rechtsausschusses (report of the Committee on Legal Affairs), BT-Drucks 16/9737, 93. See also J. Schmidt, supra note 1, at 307; Bayer, Hoffmann & Schmidt, \textit{supra} note 32, at 953.

\textsuperscript{37} See Oliver Schröder & Klaus Cannivé, \textit{Der Unternehmensgegenstand der GmbH vor und nach dem MoMiG}, NZG 1, 3 et seq. (2007).

\textsuperscript{38} Almost 75\% of the statutes of GmbHs currently contain clauses restricting the transfer of shares, \textit{see} Bayer, Hoffmann & Schmidt, \textit{supra} note 32, at 955.

\textsuperscript{39} See J. Schmidt, \textit{supra} note 1, at 307; Bayer, Hoffmann & Schmidt, \textit{supra} note 32, at 593.
incorporation, but for an additional fee it is even possible to opt for a same day incorporation, either in paper (£50) or in electronic form (£30).

Despite the conversion of the Handelsregister (German register of companies) to electronic form by the Gesetz über das elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG – Law on the Electronic Register of Companies and the Electronic Register of Cooperatives as well as on the Register of Businesses) and the reforms brought about by the MoMiG – in particular the decoupling of registration and regulatory licenses – the new UG will not be able to compete even if the new model articles are used. Notwithstanding the recommendations of renowned scholars, the legislator has not provided for the use of online forms for incorporation. Moreover, some experts doubt that the reforms brought by the EHUG and MoMiG will lead to any significant acceleration in the speed of incorporation. And even if the optimistic predictions of some experts that incorporation times will generally be reduced to a few days come true, there will still be no “same-day-service” like in the UK.

V. Number and Qualification of Shareholders

The MoMiG does not stipulate a special minimum number of shareholders for the UG. It can therefore be incorporated as a single-member company, just like any “regular” GmbH (cf. § 1 GmbHG). The same is true for the UK Limited (Section 7(1) CA 2006).
In principle, there is also no maximum number of shareholders for either the UG or the UK Limited, nor are there any special legislative requirements in respect to the shareholders. However, if the UG is to be incorporated by use of the simplified procedure with model statutes (cf. the new § 1 (2a) GmbHG and annex 1) there may, as already noted above, only be three shareholders, who, moreover, may only be natural or legal persons (but not partnerships).

VI. Internal Structure

With regard to the internal structure, in principle both the UG and the UK Limited give entrepreneurs a lot of leeway. Since the new § 5a GmbHG does not stipulate any special rules for the management of the UG, the general rules of §§ 35 et seq. GmbHG apply. Hence, the UG is managed by one or more Geschäftsführer (directors), who must be natural persons (§ 6 (2) sentence 1 GmbHG). If there is more than one director, they are empowered to represent the UG jointly (§ 35 (2) sentence 2 GmbHG), but the constitution may provide for a different mode of representation. However, if the UG is to be incorporated using the simplified procedure and the model statutes in the new annex 1, it may only have one director (discussed in detail at infra section D.III. of this article).

The UK Limited is managed by one or more directors, who – in contrast to the directors under German law – may also be legal persons. However, section 155(1) CA 2006 now provides that at least one director must be a natural person. The management powers of the directors are governed by the articles; the model articles provide that the directors are to act collectively, but may delegate any of their powers to such persons as they think fit. Under the new CA 2006, private limited companies no longer need to have a company secretary, although they still may opt to have one (section 270(1) CA 2006).

Overall, both the UG and the UK Limited thus offer incorporators a lot of flexibility with regard to management structure, particularly since the UK Limited no longer

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48 See supra C. III.
49 In respect of the character of the UG as merely a subtype of the GmbH. See supra B.
50 See Lutter & Bayer, supra note 27, at margin notes 26 et seq.
51 Re Bulawayo Market and Offices Co Ltd (1907) 2 Ch 458.
52 See the rr. 3, 5 and 7 of the draft model articles supra note 8; MAYSON, FRENCH & RYAN, supra note 31, at 15.8.1. See Table A CA 1985, supra 34, rr. 70 and 72.
needs a company secretary. However, only the UK Limited offers the possibility of legal persons as directors. In addition, the general flexibility of the UG is significantly curtailed if the incorporators wish to make use of the option of the simplified incorporation procedure with model statutes provided by the new § 2 (1a) GmbHG.

VII. Shareholder Decision-making

1. General

The new § 5a GmbHG also does not stipulate any special rules on shareholder decision-making. Hence, the general rules in §§ 45 et seq. GmbHG apply. Paragraph 48 (1) GmbHG provides that resolutions are to be passed at the meetings of the shareholders. However, § 48 (2) GmbHG dispenses with the requirement of a meeting if all shareholders consent to the resolution or to voting in writing. In addition, the constitution may provide for different forms of decision-making, for example even for a “virtual shareholder meeting”, telephone conferences or voting by e-mail.53

For the UK Limited, the new CA 2006 has significantly simplified the rules on decision-making.54 The previous requirement for an annual general meeting (section 366(1) CA 1985) has been abolished. Section 281(1) CA 2006 now allows for resolutions of the members to be passed either at a meeting or as a written resolution. The term “written” resolution is understood in a very wide sense in this context: section 299 CA 2006 provides that the company may send the resolution to a member by means of a website and section 298 offers the members the option to signify their consent by electronic means if the company has provided an electronic address. Hence, although both the UG (and the GmbH in general) as well as the UK Limited offer the possibility of very informal forms of shareholder decision-making, English law is actually even somewhat more liberal because there is no need for a special provision in the statutes in order to allow voting by electronic means.

2. In Particular: New § 5a (4) GmbHG

53 See Lutter & Hommelhoff, § 48, in GMBH-GESETZ. KOMMENTAR, margin number 12a (Marcus Lutter & Peter Hommelhoff eds., 16th ed. 2004).

54 For a detailed account of the new rules see BLACKSTONE’S GUIDE, supra note 7, at 12.03, 12.07 et seq.; MAYSON, FRENCH & RYAN, supra note 31, at 14.5, 14.7.1.
As mentioned above, one special feature of the UG is the requirement laid down in the new § 5a (4) GmbHG to call a general meeting forthwith in case of an imminent inability of the UG to pay its debts. This constitutes a significant deviation from the general rule in § 49 (3) GmbHG, which requires a general meeting to be called forthwith only if there is a loss of half of the registered share capital. But, due to the lack of a minimum capital requirement, the legislator believed that this requirement would not make much sense in case of the UG and therefore designed the special rule in § 5a (4) GmbHG in order to ensure that a general meeting is convened in time for the shareholders to take the steps they consider necessary.55

For the UK Limited, CA 2006 does not contain a comparable provision. In UK law, a special duty to call a general meeting in case of a serious loss of capital only exists for public companies (section 656 CA 2006, implementing art. 17 of the 2nd directive).56 Since the Act expressly limits this duty to public companies, it is also more than doubtful whether one could generally construct the failure of the directors of a UK Limited to call a meeting in such circumstances to be a breach of their duty to promote the success of the company.57

VIII. Maintenance of Capital

1. Distributions

Restriction of distributions is actually one of the areas where English law is in some respects stricter than German law.58 A company may only make distributions out of profits available for this purpose (section 830(1)) and section 830(2) CA 2006 provides that the profits available for distribution are only the accumulated, realized profits, so far as not previously utilized by distribution or capitalization,

55 See Begr RegE, supra note 11, at 72. See also Handelsrechtsausschuss des DAV, supra note 20, at 737; Joost, supra note 13, at 2247–2248; Seibert, supra note 16, at 676; for a rather critical assessment see Veil, supra note 20, at 1083.

56 Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, (1977) O.J. L 26/1.

57 However, this seems to be the interpretation of Joost, supra note 13, at 2248.

less the accumulated, realized losses, so far as not previously written off in a
reduction or reorganization of capital duly made.

By contrast, § 30 (1) GmbHG, which – absent any special provisions to the contrary –
is also applicable to the UG, only prohibits the distribution of assets which are
necessary to maintain the registered share capital. However, in addition to this
general rule applicable to all GmbHs, the assets available for distribution by a UG
are further restricted by the new § 5a (3) GmbHG, which requires an UG to include
in its annual accounts a reserve equal to a quarter of the annual surplus minus the
accumulated deficit of the preceding year. Sentence 2 expressly provides that this
reserve may only be used for purposes of § 57c GmbHG (i.e. for a capital increase
from the company’s own resources, i.e. by way of commuting reserves into
registered capital) or for offsetting an annual loss or a loss carried forward from the
preceding year. The purpose pursued by the legislator with this reserve is to ensure
that companies incorporated with a relatively small amount of registered capital
will reach a higher equity base within a few years by retaining profits.59 This
 corresponds with the legislator’s apparent perception of the UG as a kind of
“interim solution” for entrepreneurs on their way to a “genuine” GmbH.60 Yet, as
already briefly indicated above,61 the MoMiG does not force a UG to convert itself
to a GmbH by commuting the reserve into registered share capital once it reaches
the GmbH-threshold of € 25,000. Rather the shareholders are free to keep the
registered share capital below the threshold (and thus be subject to the special
requirements of § 5a (1) – (4) GmbHG) indefinitely. This has been a major point of
criticism during the legislative process.62 Moreover, the reserve clause can easily be
circumvented by relatively simple “creative” accounting arrangements, for example
by reducing profits by fixing unrealistically high salaries for shareholder-
directors.63

Nevertheless, compared to the restrictions imposed on distributions by a UK
Limited by section 830 CA 2006, the legal framework for the UG is (despite the
special mandatory reserve) still a lot less strict.

59 See Begr RegE, supra note 11, at 71–72. See further Christoph Schärtl, Unternehmergesellschaft
60 See Joost, supra note 13, at 2245.
61 See supra B.
62 See Bormann, supra note 29, at 899; Handelsrechtsausschuss des DAV, supra note 20, at 737.
63 See Detlef Kleindiek, Die Unternehmergesellschaft (haftungsbeschränkt) des MoMiG – Fortschritt oder
Wagnis?, BETRIEBSBERATER (BB), Die erste Seite, issue 27 (2007); Veil, supra note 20, at 1083.
2. Eigenkapitalersatzrecht

One of the major disadvantages of German GmbH law cited by critics in the past has always been the infamous German Eigenkapitalersatzrecht (law on shareholder capital substitution). But – as Prof. Dirk Verse lays out in detail in his article in this Special Issue of the German Law Journal – this complex and burdensome area of the law has been radically restructured and simplified. Nonetheless, the new subordination provisions in § 39 of the Insolvency Code – despite their comparative simplicity in relation to the old “legal tangle” – still have no (not even an approximate) counterpart in English law. So, in this respect, the new UG – or the GmbH in general – can still not measure up with the Limited.

D. Conclusion

It goes without saying that the preceding attempt at comparing the new UG and the UK Limited had to be focused on the most important and ostensible points and is certainly not exhaustive.

Given that in the past the prime incentive to opt for a UK Limited instead of a GmbH certainly seems to have been the possibility of incorporation without any minimum capital, the UG prima facie probably has a great appeal for entrepreneurs. This apparent attractiveness will be further increased by the new simplified incorporation procedure by use of sample statutes. Limitation of liability “for free,” simplified incorporation procedure, no need for translations, the comparatively less strict German rules on distributions (albeit with the “UG-twist” of the mandatory reserve) – what more could an entrepreneur want?

However, if one takes a closer look, the advantages of this new subtype of the GmbH must be put in perspective. First of all, there is the mandatory special company name – a “stigma” the UK Limited does not require. Second, there is the prohibition of non-cash considerations and the need to pay up the registered share capital in full. In case of a relatively small share capital this will (at least in most cases) not appear to be a significant burden. Nonetheless, the upshot again is: the UK Limited knows no such restrictions. Furthermore, although both the UK Limited and the UG give entrepreneurs a lot of flexibility with respect to the

64 English law only knows two instances where a subordination of debts owed to shareholders may occur: ss. 74(2)(f), 215 Insolvency Act 1986. See also Jessica Schmidt, “Deutsche” vs. “Britische” Societas Europaea (Se) – GRÜNDUNG, VERFASSUNG, KAPITALSTRUKTUR 464 (2006); Jan-Philipp Hoos, Gesellschafterfremdfinanzierung in Deutschland und England: Risiken und Haftung, 145 et seq. (2005).
internal structure, the number of shareholders and shareholder decision-making, this is only true as long as the UG is not incorporated by means of the simplified procedure with model statutes, which drastically limits the options available. Moreover, despite the recent conversion of the commercial register to electronic form, German law still does not offer same-day incorporation and the practice of at least some of the registry courts seems to be (yet) far off from the goals envisioned when the EHUG came into force.

On the other hand though, one should also not forget that the UK Limited – especially if it is incorporated by Germans for the sole purpose of doing business in Germany – also has its drawbacks. Among these disadvantages, which have been the subject of extensive discussion in German literature, are especially the costs for translations, the fact that the reputation of the UK Limited has been somewhat tainted because of some well-publicized cases of abuse, the need for German tax accounts in addition to the accounting duties under English law, the legal uncertainty concerning the applicability of a variety of German liability rules, etc. Plus, there is always the threat of the UK Limited being struck off the register if it does not fulfill its filing obligations – a hazard which has already been painfully experienced by many “German” Limiteds, as two recent cases have colorfully demonstrated.

All in all therefore, the preceding synopsis shows that the UG will undoubtedly not be a kind of “magic bullet” against the “invasion” of the UK Limited. However, at least for a certain category of incorporations, it may be an attractive option, especially if the drawbacks of operating a UK Limited in Germany are taken into account.


The European Private Company: An Opportunity from an Economic Crisis?

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Abstract

The European Commission is undertaking a legal modernisation initiative in order to facilitate small and medium-sized enterprises in unlocking their full potential as active players on the Single Market, being also the backbone of the Union’s economy. The flagship of this initiative is going to be a novel European legal form - the European Private Company (EPC) or as it is known the Societas Privata Europea (SPE). Designed as an instrument to do business in the Single Market the SPE aims to be transparent, flexible and offer a strong label everywhere. As with the Societas Europea, there are certain gaps in the SPE Statute, which prompt for the application of national laws. This could result in 27 different SPE forms in the EU, which leads to financial implications regarding the formation and day-to-day operations of the company. A detailed exploration of the corporate finance issues is followed by plausible solutions based on corporate governance theories.

Keywords: European private company, Societas Privata Europea Regulatory Competition, Corporate Finance, European Community Forms of Incorporation, European company law

Introduction

The European Union at a Glance

The European Union is a unique economic and political partnership of twenty-seven independent states. The synergy between Member States is created via a whole range of principles, policies, laws, practices, obligations and objectives, commonly known as acquis communautaire (Fairhurst, 2012). With an overall population of more than 500 million citizens the European Union has more citizens than in the USA and Japan put together (http://epp.eurostat.ec.europa.eu, 2011). The great variety of the Union’s population is accompanied by a variety of “juristic personalities” including companies, corporations, trade unions, political parties and a number of other entities. This list is dominated by a relatively small number of national company forms, such as the British Ltd, the German GmbH and the French SARL in addition to which supranational company forms such as the European Economic Interest Group, the European Public Company and the European Cooperative Society exist. The dynamic, multifaceted relationships between business entities continue to shape an agenda of modernization of the legal frameworks surrounding the business enterprise, ultimately shaping both the economic and legal structure of the European Community and subsequently the European Union.
The driving forces behind company law reform initiatives have over time been influenced by different economic and socio-political factors such as internationalisation, the development of financial markets, the switch from agriculture-based economies to newer industries including communications and information technologies. In the period between 1975 and 1985 the governments of the Member States became increasingly focused towards European-level, market-oriented solutions as opposed to exclusive, national, strategies as a consequence of the collapse of the different national strategies for economic growth and development (Sandholtz and Zysman, 1992). However, to maximise the opportunities available within an integrated European market place a need exists to implement mechanisms that support entrepreneurial activity across the spectrum of enterprise forms. It is against such a background that the limitations of corporate mobility within the EU are considered. With the bulk of entrepreneurial activities within the EU accounted for by the small/medium enterprise sector (SME) (Makowicz and Saifee, 2009) it appears almost inevitable that modernisation of the European business landscape would look to establish the European private company (Societas Privata Europaea SPE). However, the fate of this new European legal form will be ultimately determined by its capacity to encourage economic growth within the European marketplace as well as cutting operating costs which are often limiting factors for the SME sector. In proposing a statute for the SPE an attempt to develop the principles already established for larger, public limited companies through the statute for the SE (Makowicz and Saifee, 2009) and therefore encourage flexibility and mobility to those entrepreneurs who wish to participate in European, cross border activities.

**Obstacles and Costs Facing European Small/Medium Enterprises**

In preparing the underlying principles of the statute for the SPE impact assessments scrutinised the potential of the SPE form in respect of the expectations of the interested entrepreneurs (eur-lex.europa.eu, 2008). This working paper underlined the importance of the SMEs to the overall economy of the EU as the sector represents 99% of all European companies and approximately 70% of all jobs in the Union. In addition to which the overarching ambition of the Lisbon Agenda in which greater dynamism and competition within the business sector both within and beyond the EU will ultimately depend on the ability of the SME sector to maximise opportunities irrespective of national boundaries (http://europa.eu/legislation_summaries/employment_and_social_policy, 2005).

Further evidence from public consultation identified that the most significant obstacle for companies to operate beyond their own national markets, is actually the lack of European instruments that favour such operations (www.businesseurope.eu, 2007).

Options available to entrepreneurs wishing to expand their business across EU borders include the creation of branches that do not have a separate legal personality or to form foreign subsidiaries with their own legal personality. The introduction of a foreign subsidiary may be regarded as more appropriate for entrepreneurs wishing to engage in cross-border activity as the subsidiary may adopt a cultural personality more in keeping with localised markets and gain potential advantage over other organisations more closely associated with transnational providers. In turn, this may enable the subsidiary an increased element of acceptance amongst local stakeholder groups and benefit from localised taxation regimes which may be more attractive than those in the state in which the parent company is based (Simon, 2006). However, the introduction of a subsidiary whose sole purpose is to have company recognition within another member states brings with it the stigma of a “brass plate” or “letter box” company which may limit the attractiveness to potential business partners (Teichman, 2004). The persistent legislative environment within the EU underpins a range of problems often faced by SMEs wishing to expand beyond their national boundaries through the introduction of secondary establishments. Other issues related to the setting-up of a small subsidiary in the EU, such as high costs to enter new markets, regulatory restrictions, administrative burdens, tax compliance obstacles, limited access to information and others have also caused the low participation on the Single Market by SMEs (Radwan, 2007).

The financial burdens SMEs are facing in their creation and their day-to-day operation of business impede their development and drain their resources. This effect increases when relatively small enterprises with limited financial and human resources have to comply with different company law regimes regulating the formation, cross-border mobility and management of a company (Peters & Wullrich, 2009). Furthermore, company forms from Central and Eastern Europe are less known to their trading partners and customers from the western countries and hence cannot realize their full potential in cross-border activities.
The equivalents to the Limited or the GmbH from the new Member States of the Union (EU12) are less recognisable abroad, which automatically makes them less competitive, because their trading partners would have to spend financial resources on investigating legal questions related to their liabilities and other matters (Radwan, 2007). A uniform SPE would provide entrepreneurs from this less economically developed part of the continent with a potent vehicle to conduct cross-border activities. A strong echelon of internationally-active SMEs based in Central and Eastern Europe would inevitably promote sustainable growth and social welfare on a regional basis. Thus, these economically under-developed regions would no longer be a burden to the European Union by draining one-third of its budget through the EU structural funds (www.ft.com, 2010).

The creation and management of companies in different Member States, each complying with a different legislative framework is a heavy burden for entrepreneurs wishing to manage SMEs. First of all, they have to deal with the minimum capital requirement, which has different margins across the Union. There is a great diversity ranging from £1 for a British Ltd., to 35 000 Euro for an Austrian GmbH. It is interesting to note that the Austrian government is planning a company law reform, which proposes to lower the minimum capital to 10 000 Euro in order to incentivise entrepreneurs from Austria and other countries to use the Austrian GmbH as a vehicle to operate their businesses. Nevertheless, there is still a strong scepticism in Austria regarding such a high requirement for a minimum capital, even if it is being lowered by over two-thirds. Scholars argue that the reform should introduce a similar entity to the German Mini-GmbH form, which requires only 1 Euro for incorporation (www.consistro.at, 2010). One argument of the Austrian representatives when criticizing the minimum capital requirement for establishing the SPE as formulated in the Commission’s proposal was that there would be no barriers for entrepreneurs, who would rather abuse the market, if allowed to create companies with practically no start-up capital. Nevertheless, there are other expenses that would increase the overall costs for setting up a company far more than 1 Euro. Such expenses cover registration and notary fees, administrative and publication fees, indispensable on the formation of a new company. Therefore, one of the arguments of the proponents for the SPE is the cost-savings effect of the latter regarding the incorporation of companies in each of the Member States.

Reducing the compliance costs arising from the operation of businesses in different Member States with diverse legal frameworks should be a priority in the company law modernization agenda, part of which is the SPE Statute (http://ec.europa.eu/yourvoice/ebtp/consultations, 2007). The introduction of a uniform SPE could, theoretically, reduce the costs of setting up a company or a subsidiary abroad, in particular costs related to the formation of companies and the drafting of articles of association regulated by diverse legislation. Furthermore, the SPE could reduce costs related to the management of companies in other Member States, in particular including the cost of expensive legal advice on diverse national legislation regulating the company organization and structure, shares and shareholders’ rights. This issue has been referred to in the European Business Test Panel (EBTP) survey by 65% of the respondents (http://ec.europa.eu/yourvoice/ebtp/consultations, 2007). Finally, these objectives would be accomplished through the use of a transnational legal entity, rather than by the imposition of significant amendments to the legal systems of the Member States. If we consider the situation regarding the SE and the reduction of the costs of running groups by making it possible to reduce existing national subsidiaries into a single SE, we might come to a different conclusion. According to Kirshner (2009), the intra-group impact of the SE has been rather insignificant compared to the former expectations. Nevertheless, in highly regulated industries, the SE seems to reduce compliance costs, because the company has to comply with only one set of rules rather than with the different rules applicable to each subsidiary.

**Administrative requirements for the formation of the SPE**

The formation of the SPE is intended as a quick and inexpensive process, which will further incentivise investors with limited financial capacity. The proposal incorporates a closed list of all required documents upon registration, consisting of information about the name of the company, its address or addresses, depending on the outcome of the seat debate, the share capital and the articles of association (Article 11 of the Proposal for a Council Regulation on a European private company, 2011). Consistent with the approach under s.31 of the UK Companies Act 2006, the proposal for the SPE Statute does not require the shareholders to specify the objects which the company will pursue while it is active on the market. This is a delicate touch by the legislator, which may be regarded as insignificant compared to other issues surrounding the corporate governance of the SPE. Nevertheless, the deliberate omission of such a requirement enables a wider spectrum of options available to the SPE, which would presumably be very active on the field of European tenders.
Thus, theoretically SPE's can have unrestricted initial access to various bid procedures and win them, if they have the capacity to do so. Another attempt to relieve entrepreneurs from administrative burdens is the incorporation of the ‘one-stop-shop' (Walke, 2009) and the ‘e-justice’ (EU, DG Justice, Freedom and Security, 2008) initiatives, which provide companies with the option to comply with all formalities needed as a requisite for the establishment of a legal entity at a single point by electronic means. The registration document and particulars of the SPE are subject to either administrative/judicial check or a certification process. From a UK perspective the formation of the SPE will depend on the written statement of compliance to the Registrar of Companies.

**Minimum capital requirements for the incorporation of the SPE**

In its initial proposal the Commission set up the minimum capital requirement at €1.00, thus demarcating its formation from the more conservative approach which considers that a high initial commitment by the company’s shareholders inevitably guarantees strong creditor protection. A second proposal opted for a minimum capital requirement ranging from €1.00 to €8000, depending on the applicable national law. A third proposal provided a more sophisticated approach, interrelating concepts within the areas of freedom of establishment and creditor protection. It proposed for a diversification between Member States which forbid or allow a company to have its registered office and central administration in different countries. Thus, companies registered in countries that negate this freedom would be subject to a lower minimum capital requirement, while the incorporation of an SPE in Member States of the second group would be possible only if €8000 are being provided as a start-up capital. The long-awaited meeting of the Competitiveness council on 30th May 2011 dismissed all the aforementioned options. Unfortunately, and rather unexpectedly, at the meeting which took place in June 2011 the delegations did not debate this issue regarding the SPE and the matter of minimum capital requirement remains unresolved (European Council, 2011).

One concept that plays a vital role for private companies is the legal capital, as a means of creditor protection. Prior to modernizing company laws around Europe, many regulatory frameworks have used the 2nd Company Law Directive as a legal reference beyond its pre-defined margins set out by the Commission. Thus, the complex system of legal capital for public companies was applied to private companies, whose shareholders had to invest a minimum level of equity capital in their company. This concept of creditor protection was influenced by the German model and opposed the Anglo-American model, which promoted creditor protection mostly by contract, rather than by law. The position towards legal capital vis-à-vis creditor protection regarding public companies is not going to be changed in the foreseeable future, according to DG Internal Market and Services (2009). Nevertheless, legal capital regarding private companies in Europe has been the object of modernization in the last decade and different countries have chosen various regimes of capital and creditor protection. In the context of the SPE, this diversification of regimes has been detrimental to the adoption of it statute. The proposal of the Competitiveness Council to allow a wider margin for a minimum capital requirement ranging from 1 Euro to 8000 Euros according to the applicable national law, as discussed above, was dismissed by the German delegation. The reasons behind this decision can be understood only if the concepts of the German and Anglo-American doctrine regarding equity capital and creditor protection are being distinguished and compared. This is the purpose of the following analysis.

**Corporate governance pre-defines corporate finance**

The EU Commission (http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf) proposed that creditors nowadays are more interested in the cash-flow of a company and protect themselves by contract rather than mere reliance on the legal capital. Furthermore, the relatively small amount of legal capital cannot provide sufficient protection for creditors, but can prove highly burdensome for entrepreneurs with limited financial capabilities at the outset of their business endeavour. The function of the ‘equity cushion’ does not provide efficient creditor protection in the case of insolvency. Involuntary debtors to the company, who are not protected by any contract with the company, can nevertheless find protection within compulsory insurance. These factors underpin the importance of retaining the initial concept of an insignificant legal capital required for the formation of the SPE. However, after the latest failure of the Council to reach agreement towards the requirement for a legal capital, it seems rather unlikely that the German legal doctrine can be completely ignored. Hence, any subsequent compromise proposal has to bear this in mind and work towards a model of convergence. One possible solution could be the partial implementation of the concept, which has been introduced with the new corporate form in Germany, namely the *Unternehmergesellschaft (UG)*, also known as the *Mini-GmbH*.  

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The rules regulating the UG require no minimum legal capital on the formation of the company. However, the company has to save one quarter of its yearly income in order to raise its capital until it reaches the sum of 25 000 Euros. If this concept, slightly amended, can be implemented unanimously in the regulation for SPE Statute, this might still provide SMEs with a potent, yet accessible vehicle for their cross-border activities. The proposal could set a lower limit for the capital that has to be reached and for the percentage of yearly saved income in order to reduce the negative financial impact of setting-up and managing a SPE. On the other hand, one of the major incentives for entrepreneurs to form a SPE is the lack of requirement for investments towards the legal capital. Even the less burdensome concept of the UG could hinder the financial condition of the majority of newly formed small companies, which would rather suffer losses in their first years of business activity or in some limited cases would register limited profit.

The German company law model has had a somewhat weak reformatory spirit and has moved slower through the modernization agenda of the European institutions in many aspects, such as freedom of establishment, minimum capital requirements and employee participation. The legal framework behind the SE has been influenced strongly by the German doctrine, in order to be adopted with the required unanimity. Nevertheless, the Report on the European Company Statute in 2010 showed that many problems still exist in practice (European Commission Report, 2010). One of the negative drivers and a major practical implication are the set-up costs faced even by financially capable entrepreneurs aiming to set-up a large company. The same problem would be faced by entrepreneurs willing to form a SPE, if the German approach regarding the legal capital is implemented. Since its enactment in 1892, the GmbH Act provides strong creditor protection on the basis of statutory minimum capital requirement. The required legal capital in 1892 was 20 000 Deutsche Mark, which is comparatively a much higher burden than the capital required nowadays. The rationale for this was the social disapproval regarding a company with limited liability, which at that time was a novel form that was met with suspicion within commercial circles (Leuering, 2006). Thus, the introduction of the equity capital in limited liability companies was necessary for their affirmation. However, the market has evolved at a rapid pace and nowadays the concept of limited liability is the norm, rather than the exception, in a sense that in addition to SMEs, many large businesses choose this model of incorporation (Koch Industries, Chrysler, PricewaterhouseCoopers International).

The function of the minimum capital requirement can be observed as three-fold. It provides the company with a working capital, which is fully available to the company’s business and serves as a first basic asset. Furthermore, it provides precautionary creditor protection as a capital buffer against the risk of insolvency, which promotes financial stability and indirectly protects the stakeholders. A third function of the legal capital is that it establishes a seriousness threshold (Dähnert, 2009). The latter feature is considered by Hommelhoff and Teichmann (2008) as very important regarding the SPE in which they observe that there is a strong correlation between the concept of minimum capital requirement and the seriousness test and an entrepreneur, who cannot provide sufficient equity capital for his company, should not have the privilege of a limited liability. German law provides mechanisms of creditor protection based on the above mentioned three-fold pillars of minimum legal capital requirement. However, the German legislator seems to apply this concept somewhat inconsistently, if we observe the Unternehmergesellschaft (UG), which requires no initial investment at all. It is true, that the shareholders have to increase the capital during the first years of the life of the company, until it reaches 25 000 Euro. Nevertheless, a fraudulent entrepreneur would theoretically be able to raise this amount, or otherwise his venture would be rendered insolvent by himself or the shareholders. Another argument against the seriousness test, if we observe the GmbH, which requires 12 500 Euro initial investment, is the fact that this sum is easily achievable by shareholders, who might wish to be involved in a criminal activity. Once again, this measure proves to be inappropriate mainly because of its disproportionate effect.

Another aspect of the legal capital is its role as a substitute to the limited liability of the shareholders. If we scrutinize the first function, we may ask ourselves the question, whether it is necessary that the issue of legal capital is regulated? If there is no such necessity, than the removal of the minimum capital requirement should be to a great extent satisfied. A comparison of the financial implications that German private companies have been facing upon formation in the beginning of 20th Century and are facing now might provide the correct answer. In the beginning of the 20th century the average level of legal capital raised by the shareholders has been 10 times higher than the statutory minimum of 20,000 Deutsche Mark.
In the beginning of 21st century, only 13.8% of the SMEs in Germany invested their own resources in the form of private equity capital (Meyer and Hermes, 2005) of which 68% had to rely on loans from the banking sector in order to meet the capital requirements, secured through the German equivalent of fixed and floating charges (ibid). A similar process can be expected to take place regarding the SPE, if we scrutinize the Compromise proposal, which repeats the Parliament proposal, even though both were refuted by the German delegation. Where the management body have not signed a solvency certificate, the capital of the SPE should be at least 8000 Euro. The majority of small enterprises would still have to seek a bank loan in order to raise the capital. This mechanism has been supported in 2008 by the Committee on Legal Affairs (CLA), the Committee on Employment and Social Affairs (CESA) and the Committee on Economic and Monetary Affairs (CEMA). Nevertheless, the CLA expressed its view, that the equity capital should not represent a serious obstacle to the establishment of SMEs. Moreover, the present economy environment, shaped by the latest economic crisis, requires business-friendly legal frameworks, which would promote the incorporation of SMEs and their successful management.

Another argument against the German model is the fact that the legal requirement for a minimum capital rarely satisfies the debtors of an insolvent company. In addition to that, it is not either economically optimal for most SMEs, because the majority of them can function with limited financial instruments. Hence, entrepreneurs who plan to set-up a small company are facing a highly burdensome requirement, which might prevent them from establishing a company in a Member State with higher capital requirements. The factual financial requirements for the setting-up of different SMEs and their effective management vary greatly and therefore any imposition of legal capital would be a great disincentive for most entrepreneurs. The majority of SMEs are service businesses, which require very small initial investment. Furthermore, it is not uncommon for British companies, which are practically formed without minimum capital, to increase their capital shortly after incorporation, thus providing some minimum creditor protection by means of equity capital. There seems to be a major disproportion between the attained efficiency of the minimum capital and the negative effect on economic activity, where the latter is much stronger. Moreover, the concept of creditor protection is also undermined, because even 25 000 Euro do not offer the required level of protection for the debtors of a company. Furthermore, it has been suggested that SME's which go into liquidation pose no systematic risk to the economy hence the application of rules regulating financial institutions such as high levels of minimum capital remains disproportionate (Armour, 2006).

As seen from the discussion above, the concept of minimum capital requirements for newly formed private legal entities has become a highly criticized topic. Hence, many European countries have chosen to abolish this concept, in order to promote efficiency and performance of SMEs. A prominent team of scholars, analysing the SPE also welcomed the abolition of legal capital, which overly deters entrepreneurs from establishing companies, while it does not offer single-handed creditor protection (Zaman et al., 2010). The negative effects of the minimum capital requirement are amplified vis-à-vis the current European economic environment. Only an economic analysis that can outline the extent of creditor protection needed for SMEs, without hindering its formation and operation, can have a strong political impact on the SPE agenda. If a future proposal for an SPE Statute wants to succeed in gaining unanimity, while still deflecting the concept of creditor protection away from the minimum capital requirement, the legislator should provide other workable solutions for unsecured creditors. There should be a shift from the concept of minimum capital requirement as means of creditor protection in SMEs, towards enhancing the regime of capital maintenance. While these concepts may seem interrelated, each of them is self-sufficient and can be implemented separately to the required extent. If equity capital appears to be irrational for SMEs, than focusing on capital maintenance should be a priority for the legislator.

**Conclusions**

The latest compromise proposal of the Hungarian presidency was rejected in May 2011 by the German and Swedish delegations. The minimal capital requirements turned out to be one of the greatest hurdles on the road to the SPE, because of the notion that the formation of a SPE with a minimum capital of 1 Euro would create a market with numerous underdeveloped, yet active companies (www.gmbrecht.at, 2011). Almost simultaneously in Germany, a company law reform has introduced a novel company form UG (Unternehmergeellschaft), which does not require initial investment. The legislative framework behind this limited liability company has not entirely embraced the Anglo-American model for a minimum legal capital and still requires yearly financial contributions up until the capital reaches 25 000 Euro.
Nevertheless, the reform indicates that even the most conservative legal systems are evolving under the pressure from other company law regimes. The prospects for diminishing the capital requirement for the formation of an SPE are plausible, since this is the trend for the European company law. After all, high minimum capital requirements are neither an effective means of creditor protection nor a plausible seriousness test as observed above. It should be stressed that the basic level of creditor protection provided by the SPE Statute can be improved by adopting mechanisms such as personal guarantees, floating charges or retention of title. SMEs would welcome the adoption of an SPE Statute that would deal with the aforementioned issues in a business-friendly way. This would reduce the costs of setting up a company and the compliance costs resulting from diverging company law regimes throughout the Union.

A single legal form across the Union would also greatly reduce the cost of operating a group of companies in different Member States while at the same time promote legal certainty. Initially, the SPE model is expected to be adopted by SMEs that are already involved in cross-border activities and wish to enhance their operations abroad. In the medium and long turn, when more entrepreneurs become aware of the new corporate form, the SPE would display its full potential by facilitating cross-border investment and joint ventures. From a sociological perspective, the economic growth resulting from the increase of cross-border activities conducted by SMEs, would potentially foster job creation and employment in the Union.

It is to be hoped that agreement upon the SPE Statute can be achieved in the subsequent meetings of the Competitiveness Council and that the broadly supported idea by both entrepreneurs and scholars would manifest into an optimus legal entity that can mitigate the damage caused to the Community by the current on-going financial crisis. By encouraging entrepreneurs from all Member States to establish new businesses that can grow rapidly and compete effectively on the global market, the European Union will be able to effectively boost economic growth and employment rates, thus reaching another milestone on the way to becoming the most competitive and dynamic knowledge-based economy in the world. But it may be tempting fate to speak of an economic placebo just as the continent experiences its biggest financial crisis in decades. These are straitened times and entrepreneurship has never been a more risky endeavour. But as we have seen SME’s could thrive in the face of different political and economic conditions Perhaps the continent’s present crisis could actually be the impetus for a new generation of European entrepreneurs.

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Corporate Groups: Competences of the Shareholders’ Meeting and Minority Protection – the German Federal Court of Justice’s recent Gelatine and Macrotron Cases Redefine the Holzmüller Doctrine

By Marc Löhbe

A. Introduction

There are few cases in the law of corporate groups that have provoked as much interest, applause and critique as the Holzmüller decision of the Federal Supreme Court. On February 25, 1982, the 2nd Zivilsenat (Chamber of civil cases) of the Bundesgerichtshof (BGH – Federal Court of Justice), the highest court with assigned competences for company law, adopted what would later be known as the Holzmüller doctrine. Since then the Holzmüller case has influenced the course of countless shareholders’ meetings, been relied on in numerous shareholder actions and has initiated intensive academical as well as practical debate. What is it all about? At the core, Holzmüller deals with the balance of power between the Hauptversammlung (shareholders’ meeting) and the Vorstand (board of directors) of a German Aktiengesellschaft (AG – stock corporation) within the context of corporate groups. Practically, the protection of minority shareholders of a corporate group’s parent company is a major underlying issue.

While we are here concerned with German stock corporation law (Aktienrecht) as it is laid down in the Aktiengesetz 1965 it is worth while to note, that the questions raised by Holzmüller affect nearly all jurisdictions, be they common or civil law based. During the 19th century when many jurisdictions developed their foundations of company law, shareholders were thought of natural persons. Now,
At the beginning of the 21st century, such company law is faced with multi-layer groups of companies, companies having replaced natural persons as shareholders. Some specific issues of corporate groups within the context of the Aktiengesetz (AktG) have been dealt with by legislation (cf. §§ 16 et seqq., 291 et seqq. AktG). Others remained unsolved, a gap the BGH tried to solve with the Holzmüller case.

While almost all commentators agreed that Holzmüller had identified an important issue, opinions differed whether the court’s solution really rebalanced the relationship between the Vorstand and the Hauptversammlung or rather unbalanced it. Recently, more and more voices suggested that Holzmüller had to be construed restrictively. Some of them expressed this view pretty frankly. Rosengarten, for example, titled an English written essay: “The Holzmüller Doctrine: Still Crazy after All These Years?”. Meanwhile the practice of company law was aching under the incertitude of how Holzmüller had to be construed. Keeping in mind the enormous practical relevance of Holzmüller, it need not be said, that interest rose when it became clear that the BGH would redefine this doctrine in a recent judgement. On 26 April 2004 it was again the 2nd Zivilsenat to take the opportunity to clarify the state of law in two (largely identical) judgements known as the Gelatine cases.

While the Gelatine cases are the target of this essay, they cannot be understood without the background of the Holzmüller case and the discussion during more than 20 years that have passed since the decision in 1982. This is especially true as Gelatine – as we will see below – clarified Holzmüller, rather than overruling it. This paper thus first sets out to retrace the Holzmüller decision and tries to explain the fundamental issues involved. Then the following discussion and practical consequences of Holzmüller shall be reported as they set the background against which Gelatine was decided by the BGH. Then another case, Macrotron, needs to be mentioned, as it helps to clarify the approach and perception of the BGH. Then the Gelatine judgements will be displayed as the current state of law. Finally, conclusions regarding company law practice and further developments will be drawn.

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B. Holzmüller

I. Essential issues

The Holzmüller decision deals with the delineation of competences between the Vorstand and the Hauptversammlung within the organizational structure of a German Aktiengesellschaft (AG). The essential balance of power between these two organs of an AG is regulated in §§ 76 and 119 AktG. According to § 76 AktG, the Vorstand runs the company in its sole responsibility. The Hauptversammlung may only decide on managerial aspects if the Vorstand asks the Hauptversammlung to do so (§ 119 Abs. 2 AktG). In particular, as far as the management of the company is concerned, the Hauptversammlung neither has the right to take the initiative nor the right to give directions to the Vorstand. The strong position given to the Vorstand by statute comes with far reaching competences, which, on occasion, may detrimentally and substantially affect the economic value of the shares in an AG.

Up to the Holzmüller decision the courts in the context of corporate groups had rather focused on the protection of subsidiaries. The phenomenon of parent companies extracting the value out of their subsidiaries and leaving the debt-loaded empty shell to deceived creditors had been well known. It was only in the 1970s that commentators noted that corporate group structures could also be dangerous for the shareholders of the parent company, especially if they were minority shareholders. By hiving parts of the business from the parent down to the subsidiary, the influence of the parent’s shareholders can be significantly watered down. Thus now, it is for the Vorstand of the parent to exercise all rights in the subsidiary while the parent’s shareholders are restricted to exercise their rights on the parent company’s level. This phenomenon has become known as ‘mediatisation’ of the parent’s shareholders membership rights. It was in the Holzmüller case that the BGH recognized the potential dangers following from the strong position of the Vorstand in corporate group structures. In the highly remarkable decision the BGH reshuffled the ‘separation of powers’ between Vorstand and Hauptversammlung as it is laid down in the wording of §§ 76, 119 AktG. It has been the first case of highest authority to recognise non-codified competences of the Hauptversammlung.

5 For details, see KUBIS, 4 MÜKO-AKTG § 119 Rn. 31 (2nd ed. 2004) (with further references).

6 For the principle of ‘separation of powers’ in the AG see KARSTEN SCHMIDT, GESELLSCHAFTSRECHT § 26 IV 781 (4th ed. 2002).
II. The Facts

The J.F. Müller & Sohn AG, a company established under the AktG, initially focussed on trade and brokerage of wood and related products including the financing of such contracts. In 1972 the Hauptversammlung resolved under approval of the later claimant to extend the companies objects. The relevant clause now read:

“The Aktiengesellschaft may additionally establish or acquire other enterprises and take an interest in such other enterprises. The company may cede its business to such companies or associations entirely or in parts.”

The purpose of the resolution that changed the company’s Satzung (constitution) was to allow for the spin-off of a harbour operating business, which the company had developed in the meantime. The harbour business had developed into an organisationally autonomous business division after the company had acquired the transhipment rights in 1967. By now the harbour business amounted to about 80% of the company’s assets. Thus it had become the most valuable part of the company’s estate.

After the Satzung had been changed the Vorstand transferred the harbour business to a subsidiary, which at the time of the claimant’s action was a 100% subsidiary of the J.F. Müller & Sohn AG. The AG’s Hauptversammlung was not involved in the process.

The claimant applied to the court to assert that the transfer of the harbour business to the subsidiary was legally void. In the alternative, he applied to order the defendant AG to retransfer the harbour division to the parent company. Ancillary and alternatively the claimant applied for an order obliging the defendant to ask for the approval of the defendant’s Hauptversammlung in every case that required a 3/4 majority resolution in the subsidiary, especially as far as increases in the subsidiary’s capital were concerned. The claimant pointed out that the harbour division was the heart of the enterprise while the wood trade and brokerage had become relatively irrelevant as to substance and profit. The harbour business had been transferred to the subsidiary – so the claimant alleged – to effect an increase in

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7 The display of facts is reduced to the legally essential parts, for further details see BGHZ 83, 122 (123-125).

8 The original German version was: “Die Aktiengesellschaft ist ferner berechtigt, andere Unternehmen zu errichten und zu erwerben sowie sich an anderen Unternehmen zu beteiligen. Sie kann ihren Betrieb ganz oder teilweise solchen Gesellschaften überlassen.”
capital of the subsidiary of which the minority shareholders of the parent should be excluded. The claimant held about 7.8% of the defendant company’s shares.9

III. The Court’s Decision and Reasoning

The BGH held that the claimant’s application to declare the transfer to the subsidiary completely void was not based on a proper understanding of the law. However, the court also held that the defendant company had to get the approval of its Hauptversammlung for intended increases of the subsidiary’s capital, requiring the same quorum as needed in the subsidiary.

The court set out by stating that the Aktiengesetz did not contain an express rule requiring the AG to submit the decision about the spin-off to the Hauptversammlung for approval. In particular, § 119 Abs. 1 AktG containing competences of the Hauptversammlung and § 179a AktG10 referring to the transfer of all assets of a company were held not to be applicable. It is worth noting that the BGH expressly ruled out an analogous application of what is now § 179a AktG.11

The BGH did, however, hold that outside the competences expressly laid down in the AktG the approval of the Hauptversammlung could be required. According to the judges on the 2nd Senate of the BGH, the Vorstand can be obliged to ask for the Hauptversammlung’s approval if there is a substantial interference with the shareholders’ membership and the economic interest embodied in their shareholdings. In such cases the Vorstand’s discretion to precipitate a decision of the Hauptversammlung codified in § 119 Abs. 2 AktG is reduced to nil, if and because the Vorstand cannot reasonably assume that it might take such fundamental decisions on its own responsibility.12

In Holzmüller the Court recognized an action of such importance, since the spin-off of the harbour division and its transfer to the subsidiary touched the core of the company’s business activities, affected the most valuable business section and fundamentally changed the enterprise structure.13 In the Senate’s view this measure of forming a group structure went far beyond the usual frame of managerial actions, even if managerial competences generally comprise the establishment and

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9 The claimant held shares in the nominal value of 250,000 DM out of an issued capital of 3,200,000 DM.
10 At the time of the judgement contained in § 361 AktG.
11 BGHZ 83, 122 (129).
12 BGHZ 83, 122 (131).
13 BGHZ 83, 122 (131).
acquisition of subsidiaries and their endowment with capital. This evaluation was not changed by the fact that all shares in the subsidiary belonged to the parent company. Even the change in structure amounted to a weakening of the legal position of the parent’s shareholders, since important decisions went along with the transferred assets out of the parent into the subsidiary, thereby depriving the parent’s Hauptversammlung of the possibility to exert influence.14

The Court, however, while the Vorstand’s discretion pursuant to § 119 Abs. 2 AktG was reduced to nil and, therefore, the Vorstand had not fulfilled its duties, still held the transfer to the subsidiary to be valid. Non-compliance with the internal duty to submit the decision to the Hauptversammlung would not annihilate the external validity of the transfer, since according to § 82 AktG the external power of representation could only be restricted by statute.15 The measure having been taken by the Vorstand would only be void in exceptional, blatant cases of abuse of representational power recognisable also by the third party (so called “Mißbrauch der Vertretungsmacht”).16

Further, the BGH held that the application for retransferring the harbour operations to the parent could not be successful as the claimant had waited for too long to bring his claim. Generally, the violation of unwritten competences of the Hauptversammlung could justify a shareholder’s application for forbearance or restoration.17 As every cause of action such application for restoration could only be brought, if it was not abusive and not violating the duty of each shareholder to take into regard the interests of the company.18 In the opinion of the Court, such action had to be brought without undue delay. As a measure of orientation the Court pointed to § 246 AktG which prescribes a one month period for actions concerning the avoidance of resolutions. The Court recognized such undue delay in the fact that since the spin-off about three years had already passed until the shareholder had eventually brought his action.

Finally, the judges considered the Vorstand’s power of direction in corporate groups. The BGH held, that before raising new equity capital in the subsidiary the J.F. Müller & Sohn AG had to obtain the approval of its Hauptversammlung. This

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14 BGHZ 83, 122 (136).
15 BGHZ 83, 122 (132).
16 BGHZ 83, 122 (132).
17 BGHZ 83, 122 (134).
18 For the following aspects see BGHZ 83, 122 (135).
requirement of approval, though, was not held to be applicable for every measure, which required a qualified (3/4) majority in the subsidiary. Such measures and resolutions by and large would be changes of considerate impact even for the shareholders of the parent company. To require the approval of the Hauptversammlung of the parent in each and every case would, however, be an unjustified limitation of the power of direction of the Vorstand, which pursuant to § 76 Abs. 1 AktG was to be executed at its sole responsibility.

The capital increase planned for the subsidiary, on the other hand, was thought to contain specific dangers for the shareholders of the parent company. Here the approval of the parent’s Hauptversammlung was necessary. The court saw the – at least indirect – danger of an adverse effect on the membership of the shareholders, as the value of their shareholding could be watered down and their subscription rights washed out. Without application on the concrete case the BGH referred to academic writers, who had formulated rules for situations in which shareholders could require to participate in important decisions in the subsidiary, which could impact lastingly on their membership. Then, before changes would be effected in the subsidiary, those shareholders had to be given internal participation possibilities in the same form and the same majorities as it was stipulated for corresponding measures in the parent. Further important and fundamental decisions, which demanded for the approval of the parent’s Hauptversammlung, are agreements between business enterprises, the admission of third shareholders (e.g. in the course of a capital increase), the transfer of all assets of the subsidiary according to what is now § 179a AktG and the winding-up of the subsidiary.

IV. The Reception of Holzmüller

While the lower courts decided their cases along the lines of the BGH’s landmark case and, now, an important precedent, Holzmüller met with harsh critique from the academy and legal practitioners – for many years, indeed. The amount of comments and essays written on Holzmüller is immense. In this light, it is important
to revisit the main points of criticism discussed with regard to the Holzmüller decision.

1. Promotion of Legal Uncertainty

The first reactions to Holzmüller directly after its publication were negative.25 One of the main criticisms referred to the very wide and generic formulation that the Court had allegedly adopted. After requiring the approval of the parent’s Hauptversammlung in cases of “fundamental decisions”26, where “the Vorstand reasonably could not expect, that it may take them exclusively at its sole responsibility without precipitating the participation of the Hauptversammlung”27 the BGH was accused of having created a ‘desert of legal uncertainty’28. Some critics considered the judgement of the BGH to be an unacceptable judicial law-making as the decision infringed on the distribution of competences in the case of an Aktiengesellschaft as laid down in the AktG.29 Other commentators in principle accepted the necessity to protect shareholders in certain situations of corporate groups and the need for a solution identified by the BGH.30 However, the Court was still criticised for not taking the chance to define clear principles to delineate the competences of the Vorstand from those of the Hauptversammlung. Commentators regretted that the BGH had confined itself to the decision of the single case being heard. As a result corporate practice suffered from a crucial degree of legal uncertainty since the Holzmüller decision. Now, in cases of slightest

25 Some of the few positive voices were Lutter, Organzuständigkeiten im Konzern, in FESTSCHRIFT STIMPEL 825 (Lutter et al eds.) and Großfeld/Bondics, Die Aktionärsklage – nun auch im deutschen Recht, JZ 589 (1982).

26 BGHZ 83, 122 (130): „grundlegende Entscheidungen“.

27 BGHZ 83, 122 (130): „der Vorstand vernünftigerweise nicht annehmen kann, er dürfe sie in ausschließlich eigener Verantwortung treffen, ohne die Hauptversammlung zu beteiligen.“


doubt, measures would be submitted for the approval of the Hauptversammlung, even though from an objective standpoint the approval did not seem necessary at all.31

2. Further Conclusions from Holzmüller Regarding the Situations of Unwritten Competences of the Hauptversammlung

After the heat of first critique had subsided, the commentators (and there were always some) then took a more constructive approach and tried to draw further conclusions from the judgement. New situations, in which the Hauptversammlung should have a non-codified right of participation, were identified. In analysing the literature on this practically important issue two aspects have to be distinguished. On the one hand side, authors tried to identify in an abstract way categorised decisions or measures of the Vorstand, that would trigger the unwritten competence of the Hauptversammlung. On the other hand, they went on to elaborate which quantitative resp. qualitative importance of such decisions was needed to trigger the participation of the Hauptversammlung.

The BGH gave some valuable hints regarding the categories of decisions and measures, which would require approval of the Hauptversammlung. Expressly, the BGH mentioned the transfer of the most valuable division of the parent AG’s business to a subsidiary (spin-off). Further actions calling for Hauptversammlung approval are in the opinion of the highest court: capital increase in the subsidiary32, agreements between business enterprises,33 transfer of all assets of the subsidiary according to § 179a AktG34 and the liquidation of the subsidiary35. Some voices concluded from these arguments that each spin-off from the parent to the subsidiary, however it was structured in detail, as well as comparable measures in the subsidiary were ‘Holzmüller cases’.36 Some commentators even suggested that – mirroring spin-offs – also sales of business divisions and enterprise interests (e.g. shareholdings) could form cases of unwritten competences of the

31 See only Lutter/Leinekugel, ZIP 805 (1998) with further literature; for examples in corporate practice, see Groß, Verbreitung und Durchführung von Hauptversammlungsbeschlüssen zu Erwerb oder Veräußerung von Unternehmensbeteiligungen, AG 111, note 4 (1996).

32 BGHZ 83, 122 (143).
33 BGHZ 83, 122 (137).
34 BGHZ 83, 122 (140).
35 BGHZ 83, 122 (140).
Finally, others equated spinning off a business division with the acquisition of enterprise participations. By acquiring the participation the AG would change former free capital into an interest in a company, partnership, association etc. thereby reducing the possibilities of participation of the parent’s members.

Any further extension of non-codified competences of the Hauptversammlung to other important management decisions was, however, denied by most authors. A new strategic orientation or entering major speculative transactions might have a considerable economic impact on the company – as well as on the shareholders’ participation. Giving the Hauptversammlung a say would, however, create practical problems (such as the prior information of members). Additionally, the majority understood the Holzmüller case to protect shareholders’ rights, but not provide shareholders with new rights of participation.

Having discussed the nature of the situations, that were to be qualified as ‘Holzmüller cases’ the second question was which quantitative or qualitative requirements had to be met. All commentators of the decision agreed that not every measure described above – disregarding its extent or volume – could trigger the participation of the Hauptversammlung. Rather a ‘significant importance’ had to be given, while commentators could not agree on how exactly this criterion had to be defined in detail. The following quantities were proposed to objectively measure ‘significant importance’: 10% (plus) of the assets as shown on the balance sheet resp. the aggregate value of the corporate group, 15% to 50% (plus) of the corporate assets, 50% (plus) of the nominal share capital, 25% (plus) of revenues

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37 Lutter, Zur Binnenstruktur des Konzerns, in Festschrift Harry Westermann 365 (Hefermehl et al. eds.); Krieger, in MÜNCHHoD AG § 69, Rn 38 (2nd ed.) with further details also covering opposing views.

38 Habersack, in AKTIENKONZERNRECHT, supra note 29 at § 311, Rn. 16; Koppensteiner, in KÖLNKOMM AktG § 291, Rn. 24 (2nd ed.); Zimmermann/Pentz, “Holzmüller” – Ansatzpunkt, Klagefristen, Klageantrag, in Festschrift Welf Müller 155; against this view Semler, in MÜNCHHoD AG § 34, Rn. 40 (2nd ed.).

39 Semler, in MÜNCHHoD AG, supra note 38 at § 34, Rn. 40.

40 Habersack, in AKTIENKONZERNRECHT, supra note 29 at § 311, Rn. 15.

41 Lutter, Das Vor-Erwerbsrecht/Bezugsrecht der Aktionäre beim Verkauf von Tochtergesellschaften über die Börse, AG 342, 343 (2000).

42 Wollburg & Gehling, Umgestaltung des Konzerns, in Festschrift Lieberknecht 149 (Niederleithinger et al. eds. 1997).

or aggregate value of the corporate estate, forty-four point five percent (plus) of the assets and relevance to the business core of the enterprise. Others demanded the participation of the Hauptversammlung only if a change of profile or imprint of the enterprise or the structure of its strategic business units was imminent. Others again required blatant cases, close to the transfer of all assets. It reveals that a consistent approach could not be developed in academic writing, thus even increasing legal uncertainty. The only threshold one could agree on was, that below a fraction of ten percent of assets, revenues or profits the Holzmüller doctrine would not bite.

3. The Criticism Regarding the Theoretical Foundations of the Holzmüller Case

Further disapproval concerned the theoretical foundations of the Holzmüller judgement. Methodically, the BGH had legitimated the non-codified participation competence of the Hauptversammlung with a reduction of the discretion of the Vorstand pursuant to § 119 Abs. 2 AktG. This was opposed by a majority view in academic literature, the proponents of which suggested justifying such competence with an analogy (Gesamtanalogie) to all codified Hauptversammlung resolution requirements regarding changes of the constitution and measures changing the corporate structure, according to §§ 179, 182 et seqq., 222 et seqq., 291 et seqq., 319 et seqq. AktG as well as §§ 13, 123 Abs. 3, 125, 65 Umwandlungsgesetz (UmwG – Company Transformation Act). This discussion is not only academic in nature, since the theoretical foundation of the competence of the Hauptversammlung influences the majority needed for the relevant resolution. In the Holzmüller case, the BGH did not need to discuss this question as it was not relevant. Still, in obiter the Court mentioned that a participation right of the Hauptversammlung might not

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44. LIEBESCHER, KONZERNBILDUNGSKONTROLLE 88 (1995).
46. Wiedemann, in GROßKOMM AKTG § 179 Rn. 75 (4th ed.).
47. HÜFFER, AKTG § 119 Rn. 18a (6th ed.).
48. Gessler, Einberufung und ungeschriebene Hauptversammlungszuständigkeiten, in FESTSCHRIFT STIMPEL 787 (Lutter et al eds.).
49. BGHZ 83, 122 (131).
50. See instead Habersack, in AKTIENKONZERNRECHT § 311, Rn. 18 (Emmerich/Habersack eds.) with further details and literature.
51. Further analogies to the UmwG, such as the requirement of a Spaltungsbericht shall not be dealt with further here, cf. only Joost, ZHR 163 (1999), 164 with further literature.
exist, if the *Hauptversammlung* prior or later had approved the spin-off with the majority necessary to change the constitution.52

If one was to follow the Court’s opinion and rely on § 119 Abs. 2 AktG, a simple majority pursuant to the basic rule in § 133 Abs. 1 AktG would be enough.53 Instead, should one rely on an overall inclusive analogy (*Gesamtanalogie*) to the bundle of rules concerning changes in constitution or structure, the resolution would need a qualified 3/4 majority of the capital being present to pass.54 Commentators criticised the reference to § 119 Abs. 2 AktG by pointing at its function and purpose. Accordingly, § 119 Abs. 2 AktG with a view to § 93 Abs. 4 S. 1 AktG served as protection for the *Vorstand*. Additionally, the rule operated as a delineation of competences between *Vorstand* and *Aufsichtsrat* (supervisory board) keeping in mind § 111 Abs. 4 AktG. With these arguments looking at the purpose of § 119 Abs. 2 AktG such commentators denied that the rule could be used for the purpose of shareholders’ protection.55 Having said that, the analogy solution was criticised, too, as the rules referred to gave an external effect to the various resolutions of the Hauptversammlung, while the BGH had adopted an internal effect only.56

4. Reception of Procedural Aspects of Holzmüller

Compared to the substantial law aspects the procedural issues of *Holzmüller* got less attention in academic literature. Not all writers shared the Court’s approach that the shareholders’ actions had to be directed against the company itself as far as the application for the retransfer of assets was concerned. Some suggested that the

52 BGHZ 83, 122 (140).


55 Summarising ZIMMERMANN & PENTZ, “HOLZMÜLLER” – ANSATZPUNKT, KLAGEFRISTEN, KLAGEANTRAG, Festschrift WELF MÜLLER 158.

56 Reichert, *Ausstrahlungswirkungen der Ausgliederungsvoraussetzungen nach dem Umwandlungsgesetz auf andere Strukturanänderungen*, in *Die Spaltung im neuen Umwandlungsrecht und ihre Rechtsfolgen* (Symposium Ulmer) 45 (Habersack et al eds., 68 ZHR-Beihfett (1999)); criticising this opinion, however, ZIMMERMANN & PENTZ, “Holzmüller” – Ansatzpunkt, Klagefristen, Klageantrag, in Festschrift WELF MÜLLER, 159.
action should rather be directed against the Vorstand, that broke its duties. \(^{57}\)
Limiting the time in which the action can be brought in analogy to § 246 AktG, however, has found general approval in literature and practice. \(^{58}\)

5. Open Questions in Corporate Practice and the Application of Holzmüller by the Lower Courts

After initially rejecting the Holzmüller doctrine as it had been adopted by the BGH commentators later moved on to establish in detail under which circumstances such a ‘Holzmüller constellation’ was given and which thresholds of significance had to be reached. A further aspect was to determine the necessary majority if the consent of the Hauptversammlung was required. While the business community was waiting for a clarification of the open questions, it got customary to get the Hauptversammlung involved as soon as the slightest doubt occurred in order to avoid later court actions.

The lower Courts did not contribute substantially to solve the outstanding issues. While they followed the Holzmüller case in arguments and results, they did not provide answers to the questions raised by academics and practice. \(^{59}\) Finally it might be interesting to note, that in 1996 the Österreichische Oberste Gerichtshof followed the Holzmüller decision of the BGH. \(^{60}\)

C. Macrotron

Before we turn to the Gelatine cases, it is worthwhile to have a brief look at the Macrotron\(^{61}\) case decided on 25 November 2002 by the same 2nd Senate, that over 20

\(^{57}\) Sünner, Aktionärschutz und Aktienrecht, AG 169, 170 (1983); opposing Rehbinder, Zum konzernrechtlichen Schutz der Aktionäre einer Obersgesellschaft, ZGR 92, 106 (1983); Semler, in MÜNCHHDB AG § 34 Rn. 44 (2nd ed.) seems to allow an action either against the Vorstand or against the AG.

\(^{58}\) Instead of many see, only, Kubis, 4 MUKO-AKTG § 119 Rn. 37, note 110 (2nd ed., 2004); for an opposing few, see Zimmermann/Pentz, ‘Holzmüller’ – Ansatzpunkt, Klagefristen, Klageantrag, in FESTSCHRIFT WELF MÜLLER 172.


\(^{60}\) ÖOGH AG 1996, 382, 383.

\(^{61}\) BGH, Az. II ZR 133/01, ZIP 2003, 387.
years ago had adopted the Holzmüller doctrine. Macrotron is another case that deals with non-codified competences of the Hauptversammlung. The defendant Aktiengesellschaft conducted business under the name of ‘Ingram Macrotron AG für Datenerfassung’ and had applied for cancellation of its listing at two German stock exchanges. In a previous resolution the Hauptversammlung had authorised the Vorstand to file such applications. The claimant, a minority shareholder, challenged the validity of the resolution for grounds of lack of timely restriction, objective justification and formal procedure.

Interesting about the Macrotron case is the Court’s opinion that in cases of delisting there as well was an unwritten requirement for a resolution of the Hauptversammlung. At this point one would have thought of a new category under the Holzmüller doctrine. Instead, the BGH expressly negated the applicability of the Holzmüller principles. The BGH judges held in fact that the delisting did not have an impact on the internal structure of the AG or on administrative shareholder rights. Over and above, the Court negated an interference with the existence of membership, the watering down of the value of membership and the ‘mediatisation’ of shareholders’ participation rights. Instead, the BGH founded the participation requirement in Art. 14 Abs. 1 Basic Law (Grundgesetz - GG), the constitutional guarantee of property rights. This guarantee, according to the Court, did not only protect the property of the shares as such, but also the market value of the shares and the possibility to realise the economic value through sale at the stock exchange at any time. Added surprise comes from the majority requirement referred to by the court. Without giving any reason, the BGH settles for a simple majority, which was easily given in the Macrotron case.

In a nutshell, delisting is a further case of non-codified competences of the Hauptversammlung. However, the jurisdiction does not rely on the Holzmüller doctrine, but developed an new category of an unwritten participation requirement now based on the constitutional rule Art. 14 Abs. 1 GG. Macrotron shows that the BGH does not regard the categories of unwritten competences elaborated in the Holzmüller case to be conclusive. Instead of taking this opportunity to further fleshing out the Holzmüller principles, the BGH rather reveals an ambivalent approach to determining the balance of power between the Vorstand and the Hauptversammlung. The different theories followed in Macrotron as opposed to

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63 BGH ZIP 2003, 387, 389.
64 BGH ZIP 2003, 387, 389 f.
65 BGH ZIP 2003, 387, 390.
Holzmüller also show that by requiring the participation of the Hauptversammlung the BGH realised different purposes resp. aspects of shareholder protection. It may not surprise that the majority of comments on Macrotron qualified the delisting as an impact on the structure of the AG in the light of Holzmüller. According to these authors the necessary resolution of the Hauptversammlung should rather require the qualified 3/4 majority. To sum up, one might say that at this point the legal uncertainty caused by Holzmüller had not been cured, but rather increased by the Court’s introduction of a second foundation for unwritten competences of the Hauptversammlung.

D. The Gelatine Cases

Against this background it is well understandable that the Gelatine cases have been anticipated by practitioners and academics like a long hoped for medicine that would bring about the cure of such uncertainty. Even though ‘gelatine’ is defined by the Oxford English Dictionary as “amorphous, brittle, without taste or smell, transparent” – adjectives that would rather suit the uncertainty of the Holzmüller doctrine – the cases were expected to substantiate the Holzmüller principles and bring increased legal certainty and predictability. Other than the case names would have us expect, the Gelatine cases indeed clarified the Holzmüller doctrine to a good extent.

I. The Facts

The Gelatine cases both concern the defendant ‘Deutsche Gelatine-Fabriken Stoess AG’ (DGF) and share the following essential facts. The objects of DGF contain the production and sale of gelatine and by-products. § 2 Abs. 2 of the constitution reads:

“The company may enter all transactions whatsoever, which are incidental or conducive to the attainment of the objects of the company. It may establish branches at home and abroad, take interests in other enterprises at home and abroad, acquire or establish such enterprises and integrate such enterprises partly or wholly under uniform control.”

66 See the summary of Schlitt, Die gesellschaftsrechtlichen Voraussetzungen des regulären Delisting, ZIP 533, 534 (2004) in note 11 with further comments and literature.
Regarding the majorities of shareholder resolutions, in § 19 Abs. 2, the constitution reads:

“The resolutions of the Hauptversammlung are passed by simple majority of the votes cast and, if a capital majority is needed, with simple majority of the capital being present, unless constitution or statute coercively provide otherwise.”

The DGF pursues its objects through its own operations and additionally through subsidiaries. Regarding the first of the Gelatine cases (Gelatine I) three of these 100% subsidiaries are the German Gelita Internationale Gesellschaft Gelatine mbH (Gelita), the Swedish Extraco AB (Extraco) and the English DGF Stoess Holdings Ltd. (DGF Stoess Holdings). In 1998 the Vorstand of DGF transferred the shares of the Swedish Extraco and the English DGF Stoess Holdings to the German Gelita by way of a share deal and a capital increase in Gelita. The Hauptversammlung of DGF was not involved. As the claimant regarded this to be illegal the Vorstand asked the Hauptversammlung in 2000 to approve the restructuring. With a majority of about 70% the resolution passed. The claimants had their protest entered in the minutes citing the Holzmüller case and requiring a 3/4 majority for a passed resolution.

Concerning the second of the Gelatine cases (Gelatine II) the claimants opposed the Vorstand’s plan to transfer the interests in a 49% subsidiary in the form of a German GmbH & Co. KG to a 100% subsidiary for tax reasons. The Vorstand had asked the Hauptversammlung to authorise this transfer. 66,4% of the capital being present agreed, the claimants and some minority shareholders, together 30,02%, opposed. Again they protested claiming the resolution failed as a majority of 3/4 of capital being present had been needed for a pass.

II. The Court’s Decisions and Arguments

In both cases the BGH decided against the claimants. The court used the possibility to clarify some of the open issues regarding the Holzmüller principles.

70 BGH ZIP 2004, 993: “Die Beschlüsse der Hauptversammlung werden mit einfacher Mehrheit der abgegebenen Stimmen und, soweit eine Kapitalmehrheit erforderlich ist, mit einfacher Mehrheit des vertretenen Kapitals gefasst, falls nicht die Satzung oder das Gesetz zwingend etwas anderes vorschreiben.”

71 BGH ZIP 2004, 993.

72 BGH ZIP 2004, 993, 994: 905.519 votes cast with 270.805 (claimant) and about 1.000 (other minority shareholders) opposed.

73 BGH ZIP 2004, 1001.
1. No change of Constitution Pursuant to § 179 Abs. 2 AktG

Firstly, the judges had to address whether or not the question if a change of the constitution had occurred, which would require a 3/4 majority resolution according to § 179 Abs. 2 AktG. The Court held that in both Gelatine cases the resolutions did not amount to a factual change of the constitution. Instead both resolutions were held to be covered by § 2 Abs. 2 of DGF’s constitution. The constitution envisaged – the court argued – besides DGF’s own operations that DGF would be engaged in the acquisition and establishment of other enterprises. Within these limits the Vorstand could manage the business at its sole responsibility according to § 76 AktG without any participation of the Hauptversammlung. Thus, the decision to manage some of the participations not through DGF directly, but on a lower hierarchical level, was to be taken by the Vorstand only (in a responsible way). A change in constitution pursuant to § 179 Abs. 2 AktG had not been necessary.

2. Prerequisites for the Unwritten Competence of the Hauptversammlung

Having considered the reception of the Holzmüller case the judges then turn to the prerequisites for the unwritten competence of the Hauptversammlung to clarify the Court’s understanding of this doctrine. The BGH emphasises that in Holzmüller the Court did not wish to establish rules for the internal order of corporate groups. The court acknowledges that the requirement of the group-internal participation of the parent’s Hauptversammlung increases its influence on the establishment and direction of corporate group structures. This is, however, only a reflex of the exceptional participation of the shareholders, which the court deems to be necessary. Such participation through the unwritten competence of the Hauptversammlung is required if:

“the actions of the Vorstand are still formally covered by its power of representation, the wording of the constitution and the management authority internally limited according to § 82 Abs. 2 AktG, yet these actions impact “that strongly on the membership rights of the shareholders and their economic interest embodied in the shareholding” (cf. BGHZ 83, 122, 131) that these effects come close to the requirement of a constitutional change.”

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75 BGH ZIP 2004, 993, 995 and BGH ZIP 2004, 1001, 1003.
76 BGH ZIP 2004, 993, 996; Gelatine II is identical as far as the courts arguments under III 2 a and b are concerned and insofar is not mentioned anymore hereafter.
77 BGH ZIP 2004, 993, 996: “das Handeln des Vorstands zwar durch seine Vertretungsmacht, den Wortlaut der Satzung und die nach § 82 Abs. 2 AktG im Innenverhältnis begrenzte Geschäftsführungsbeufg-
The judges then set out the two purposes of the participation of the Hauptversammlung. Firstly, this participation serves to secure the influence of the shareholders in situations where their possibilities of control are jeopardized due to the mediatisation caused by the spin-off of important business divisions to subsidiaries on a lower level. Secondly, the Holzmüller and Gelatine principles intend to protect the shareholder against a lasting degradation of the share value caused by fundamental decisions of the Vorstand.78

The Court, however, did not go beyond these abstract criteria to illuminate further the Holzmüller case. The 2nd Senate expressly excluded the need to define certain cases in which the Hauptversammlung had to be asked for approval. The distinguished judges only explained that a ‘mediatisation’ effect, that triggered the approval requirement, was not restricted to a situation as it was dealt with in the Holzmüller case. A mediatisation could also result from restructurings of corporate shareholdings as they had occurred in the Gelatine I case.79 Here the mediatisation was a consequence of transferring the shares from the parent to a lower hierarchical level. Thus, the influence of the parent and its Hauptversammlung on the business management, distribution of profits and other measures regarding Extraco and DGF Stoess Holdings was reduced. Now, the organs directing Extraco and DGF Stoess Holdings would not be controlled anymore by the Vorstand of the parent, itself being controlled by the Hauptversammlung, but by the directors (Geschäftsführer) of the subsidiary acting as an intermediary between the parent and Extraco as well as DGF Stoess Holdings. The directors of the subsidiary, however, owed their position to a decision taken by the parent’s Vorstand according to § 76 AktG.80 With the same arguments the court also saw a Holzmüller case being given in Gelatine II. There the Court had to decide on the transfer of the parent’s shareholdings in a subsidiary downwards to a 100% subsidiary of the parent. The additional hierarchical layer amounted to a mediatisation of the influence of the parent’s shareholders, too.81

nis formal noch gedeckt ist, die Maßnahmen aber “so tief in die Mitgliedsrechte der Aktionäre und deren im Anteilseigentum verkörpertes Vermögensinteresse eingreifen” (vgl. BGHZ 83, 122, 131), dass diese Auswirkungen an die Notwendigkeit einer Satzungsänderung heranreichen.”

78 BGH ZIP 2004, 993, 996.
79 BGH ZIP 2004, 993, 996.
80 BGH ZIP 2004, 993, 999.
81 BGH ZIP 2004, 1001, 1003.
3. The Theoretical Foundations of the Non-codified Competence of the Hauptversammlung

The case then moves on to comment on the theoretical foundations of the non-codified competence of the Hauptversammlung. The BGH accepts the criticisms raised against the reference to § 119 Abs. 2 AktG in academic literature. Nonetheless, the court calls attention to the advantage the approach through § 119 Abs. 2 AktG offers. § 119 Abs. 2 AktG reveals that the Vorstand’s restriction is limited to the internal relations of the AG, while its breach normally does not have external consequences. The analogy (Gesamtanalogie) solution suggested by many authors might help to define the elements of Holzmüller cases, but its legal consequences did not fit with the Holzmüller doctrine. Consequently following the analogy solution, the measures taken by the Vorstand would have to be treated as void. Thus, different from the Holzmüller decision the Vorstand’s power of representation would be affected externally.\(^{82}\) Therefore, the court was neither fully convinced by the approach using § 119 Abs. 2 AktG, nor by the analogy solution proposed in literature after the Holzmüller decision. Consequently the Court decides

“to [absorb] the applicable elements of both approaches, viz the internal effect on the one side and the orientation of the possible cases at statutory participation competences on the other hand […] and qualify this extraordinary competence as a result of an extrapolation of the law”.\(^{83}\)

4. Threshold of Significance to Justify the Unwritten Competence of the Hauptversammlung

The Court further considers the threshold of significance resp. minimum impact to justify the unwritten competence of the Hauptversammlung. The BGH cites the thresholds offered by various authors, which range between 10% and 50% and refer to different yardsticks.\(^{84}\) Such thresholds – the judges argue – cannot justify the exception to the statutory division of competence and division of authorities. Such an exception, according to the Gelatine cases, can only be made,

\(^{82}\) BGH ZIP 2004, 993, 997.

\(^{83}\) BGH ZIP 2004, 993, 997: “die zutreffenden Elemente beider Ansätze [aufzunehmen], nämlich die bloß das Innenverhältnis betreffende Wirkung einerseits und die Orientierung der in Betracht kommenden Fallgestaltungen an den gesetzlich festgelegten Mitwirkungsbefugnissen auf der anderen Seite, und diese besondere Zuständigkeit der Hauptversammlung als Ergebnis einer offenen Rechtsfortbildung anzusehen”.

\(^{84}\) BGH ZIP 2004, 993, 998.
“if the field to which the measure relates reaches by way of importance for the company the extent of the spin-off decided upon in the Holzmüller case.”

This is the case, if the measures taken by the Vorstand touch

“the core competence of the Hauptversammlung to decide upon the constitution of the company and in their effects nearly equal a state, which can only be brought about by a change of the constitution.”

In the Gelatine cases the Court did not see these requirements to be fulfilled. The Court in an abstract way recognized these cases as constituting Holzmüller cases. The structural measures being attacked by the claimants, the BGH held, did not impact on the position of the shareholders to the necessary extent. In Gelatine I the decisive yardsticks balance sheet total, nominal equity capital, revenues and income before tax were “with a maximum of 30% far below the threshold that has to be crossed, to justify a non-codified competence of the Hauptversammlung regarding the restructuring of the Swedish subsidiary, which would continue to belong to the corporate group and which was subject of the approving resolution.”

In Gelatine II the BGH decided that the required threshold was not reached either. The interests in the enterprise to be transferred contributed less than a quarter of the corporate group’s income before tax. A special key role of the transferred enterprise for the group could not be established. Also, the lease and trade relationships of the transferred enterprise were not touched by the restructuring.

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85 BGH ZIP 2004, 993, 998: “wenn der Bereich, auf den sich die Maßnahme erstreckt, in seiner Bedeutung für die Gesellschaft die Ausmaße der Ausgliederung in dem vom Senat entschiedenen “Holzmüller”-Fall erreicht.”

86 BGH ZIP 2004, 993, 998: “die Kernkonpetenz der Hauptversammlung, über die Verfassung der Gesellschaft zu bestimmen, […] und in ihren Auswirkungen einem Zustand nahezu entsprechen, der allein durch eine Satzungsänderung herbeigeführt werden kann.”

87 BGH ZIP 2004, 993, 999: “mit maximal 30 % weit unter der Grenze, die überschritten sein muss, um eine ungeschriebene Hauptversammlungszuständigkeit für die zum Gegenstand des Genehmigungsbeschlusses gemachte Umgliederung der weiterhin zum Konzern gehörenden schwedischen Tochtergesellschaft begründen zu können.”

88 BGH ZIP 2004, 1001, 1003.
5. Majority Requirements in Cases of Non-codified Competences of the Hauptversammlung

Finally, the Court deliberates the majority requirements in cases of non-codified competences of the Hauptversammlung. The Court expressly follows the majority view in the academic literature, holding that the approval of the Hauptversammlung requires a 3/4 majority of capital being present. Such a majority is necessary because the resolution concerns a measure, which does not yet require a change of the constitution, but comes so close to a constitutional change due to the strong impact on the membership position of the shareholders, that the power of direction of the Vorstand has to stand back behind the necessary participation of the Hauptversammlung. According to the 2nd Senate the existence of a so called 'Konzernklausel' (corporate group clause) or a constitutional clause, which provides that all resolutions of the Hauptversammlung pass with a simple majority, does not change the majority requirement in Holzmüller cases. The protection of shareholders takes priority over such clauses. Considering the seriousness of possible impacts on membership rights, the 3/4 majority requirement has to be considered as coercive.

E. Practical Importance of the Gelatine Cases and Outlook on Further Developments

The Gelatine cases have brought a considerable degree of legal certainty into the discussion on non-codified competences of the Hauptversammlung, a discussion that had been initiated by the Holzmüller case and lasted for over 20 years. Thus, the predominantly positive echo the Gelatine decisions received in first comments of academics and practitioners is hardly surprising. The Gelatine cases have pinned down that non-codified participation competences of the Hauptversammlung are recognised only exceptionally and in narrow confines. The BGH explicitly disapproved of an extensive interpretation of Holzmüller, a view so far taken by parts of the literature.

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89 BGH ZIP 2004, 993, 998.
90 BGH ZIP 2004, 993, 998.
91 BGH ZIP 2004, 993, 998.
92 Altmeppen, ZIP 999 (2004); Bungert, BB 1345 (2004); Fuhrmann, AG 339 (2004); Götze, NZG 585 (2004); upcoming Liebscher, ZGR 2004.
93 See Lutter, in FESTSCHRIFT STIMPEL 825, 833; TIMM, DIE AKTIENGESELLSCHAFT ALS KONZERNSPITZE, 135, 165; U.-H. Schneider, in FESTSCHRIFT BÄRMANN 873, 881.
Indeed, the BGH has not used the Gelatine cases to set up a conclusive catalogue of managerial measures, which oblige the Vorstand to request the prior approval of the Hauptversammlung. However, the court has clarified that an approval requirement in favour of the Hauptversammlung only comes into consideration if the relevant activity belongs to the core of the business and reaches dimensions of about 80%. At the same time the BGH therewith has clearly rejected those notably lower thresholds (sometimes lower than 50%) discussed in literature after the Holzmüller decision. What the threshold now applicable refers to cannot be concluded definitely from the Gelatine cases. In corporate practice one will still have to take into account all parameters discussed in literature like value of the activity concerned, balance sheet total, equity capital, revenues and number of employees.

The ‘prophylactic’ submission of management measures in dimensions which are clearly below the threshold of 80% should belong to the past considering the ‘containment’ of the Holzmüller doctrine by the Gelatine cases. This is to be welcomed, last but not least, since such submissions to the Hauptversammlung always lead to timely delays due to the time-intensive preparation procedures before a Hauptversammlung can be held. With such submissions often came along abusive actions to set aside the resolutions of opposing ‘professional shareholders’ (Berufsaktionäre). Such abusive actions could jeopardize the implementation of such measures, especially if they were time-critical, and held a formidable potential for blackmailing. Nevertheless, in particular cases it may still make sense in the future for the Vorstand to submit measures below the ‘Holzmüller-threshold’ to the Hauptversammlung voluntarily in order to safeguard against potential liability risks. According to § 93 Abs. 4 S. 1 AktG the Vorstand is under no indemnification liability, if an actions is based on a resolution of the Hauptversammlung, which is in compliance with the law. This aspect especially gains in importance, if we consider the envisaged facilitated possibilities to bring liability actions against directors (Organmitglieder) under the ‘Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG)’.95

Furthermore, the Court used the Gelatine cases to elucidate that the quantitative volume only of the relevant measure ist not enough to justify an unwritten competence of the Hauptversammlung. Accordingly, the BGH additionally to the quantitative 80% element requires a qualitative element. The measure requiring approval has to constitute a drastic impact on the membership rights of the parent’s

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94 For a comprehensive view on literature and opinions, see Reichert, in BECK´SCHES HANDBUCH DER AG § 5 Rn. 72.

95 Seibt, NJW-Spezial 77; upcoming Liebscher, ZGR 2004, VI 1.
shareholders. If such drastic impact on shareholder rights is absent, the relevant measure is not governed by the Holzmüller doctrine even though the 80%-threshold is met. In the Gelatine cases – like in the Holzmüller decision – the BGH concentrates materially on the ‘mediatisation’ effect of the relevant measure. In which cases the judiciary would see such a ‘mediatisation’, triggering the approval requirement, has not been established conclusively by the Gelatine cases. The only certain cases are those of the Holzmüller and Gelatine decisions, i.e. the spin-off to a subsidiary as well as the restructuring of a corporate group, in which a subsidiary of the parent is hived down on a lower level of the corporate group. Vice versa, such a mediatisation effect does not exist, if the restructuring happens on the same level of subsidiaries of the corporate group. Still open, even after the Gelatine cases, are the sale and acquisition of participations in companies, partnerships, associations etc. by the parent, such cases being discussed controversially in literature.96

With the Gelatine cases, corporate practice has also won clarity regarding the necessary quorum for a (so called) Holzmüller resolution. By requiring a 3/4 majority of the equity capital being present, the BGH has made clear that the Holzmüller doctrine is not only to be understood as a delineation of competences between Vorstand and Hauptversammlung, but simultaneously is an instrument for the protection of minorities. Therefore it is only consequent that the requirement of a 3/4 majority cannot be lowered by the constitution.

The legal certainty won in the Gelatine cases is partly thwarted by the fact that the BGH has opened another gateway for non-codified competences of the Hauptversammlung of German stock corporations in the Macrotron case. The criteria to limit the Holzmüller doctrine found in the Gelatine cases cannot simply be copied to the Macrotron principles, because there the BGH has founded the approval requirement not on the Holzmüller doctrine, but instead on Art. 14 GG.97 Therefore, one may hope that the judicial principles developed in Macrotron are not interpreted as extensively as Holzmüller in the past. Macrotron should be limited to cases of the delisting of quoted stock firms to spare corporate practice decades of legal uncertainty as we have just experienced after the Holzmüller decision.

96 See Bungert, BB 1345, 1349 (2004) and, upcoming, Liebscher, ZGR 2004 under VI 3. a), each with further information on other opinions.

97 However, Liebscher ZGR 2004, under VII 3 d), argues for a subsumption of the Macrotron decision under the Gelantine decisions.
Table 2: Overview of current powers of the general meeting in five European countries

<table>
<thead>
<tr>
<th>Current Items</th>
<th>Belgium</th>
<th>France</th>
<th>Germany</th>
<th>The Netherlands</th>
<th>UK</th>
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<td></td>
<td>one tier</td>
<td>two tier</td>
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<tr>
<td>approve annual financial statements</td>
<td>x</td>
<td>x</td>
<td>(x***)</td>
<td>(x)</td>
<td>(x)</td>
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<tr>
<td>approve consolidated financial statements</td>
<td>x</td>
<td>(x***)</td>
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<tr>
<td>approve the allocation of income</td>
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<tr>
<td>approve the dividend</td>
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<td>x</td>
<td>x</td>
<td>x*</td>
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<tr>
<td>elect and revoke board of directors</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x*</td>
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</tr>
<tr>
<td>Provide in vote of no confidence in member management board</td>
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<td>x</td>
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<tr>
<td>elect and revoke management board</td>
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<td>x</td>
<td>x</td>
<td>x*</td>
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</tr>
<tr>
<td>elect and revoke supervisory board</td>
<td>x</td>
<td>x</td>
<td>(x**)</td>
<td>(x)</td>
<td>(x)</td>
</tr>
<tr>
<td>determine compensation of directors</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x*</td>
<td></td>
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<td>determine compensation of supervisory board</td>
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<tr>
<td>determine compensation of auditor(s)</td>
<td>x</td>
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<tr>
<td>approval of the remuneration report</td>
<td>x</td>
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<td>approve remuneration policy of the board</td>
<td>x</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approval of the remuneration system of the members of the management board (optional)</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>approve large severance pay for board members or senior executives</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Share and share price related incentive scheme</td>
<td>x</td>
<td></td>
<td>x</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>(LSE)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>approve service contract of more than two years with director</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>discharge the liability of directors (related to the disclosed information)</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>ratify conduct by a director amounting to</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Activity</td>
<td>A</td>
<td>B</td>
<td>C</td>
<td>D</td>
<td>E</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>negligence, default, breach of duty (or waive a claim)</td>
<td>x</td>
<td>x</td>
<td>(x)</td>
<td>(x)</td>
<td>x</td>
</tr>
<tr>
<td>start a claim against directors (in name and on behalf of the company)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>discharge the liability of supervisory board</td>
<td></td>
<td>x</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>discharge the liability of auditors</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL OF ITEMS</td>
<td>10</td>
<td>8</td>
<td>12</td>
<td>9</td>
<td>10</td>
</tr>
</tbody>
</table>

Source: own research based on the analysis of the Belgian Companies Act, the French Commercial Code, the German Aktiengesetz and Handelsgesetzbuch, the Dutch Civil Code (Book 2) and the UK Companies Code 2006 and LSE listing requirements;
*: delegation of power is possible; ** removal requires supermajority; ***: only if required by boards or supervisory board did not approve the accounts