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Martin Löhnig, Anna Moszyńska (eds.)

RECEPTION OF THE ‘LIMITED LIABILITY COMPANY (GMBH)’

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Wir Wilhelm, von Gottes Gnaden Deutscher Kaiser, König von Preußen ꝛc.

verordnen im Namen des Reichs, nach erfolgter Zustimmung des Bundesraths und des Reichstags, was folgt:

Erster Abschnitt.

Errichtung der Gesellschaft.

§. 1.

Gesellschaften mit beschränkter Haftung können nach Maßgabe der Bestimmungen dieses Gesetzes zu jedem gesetzlich zulässigen Zweck errichtet werden.

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Legal Area Studies

Edited by
Martin Löhnig and Anna Moszyńska

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Introduction

The limited liability company (*Gesellschaft mit beschränkter Haftung*, GmbH) was created by the German legislature in 1892 as a company form without any historical forerunners or suggestions from the comparative law. Thus, unlike *societé anonyme*, the GmbH was not created through centuries of evolution. With some exaggeration, it was said that the GmbH was 'invented at the green table', thus emphasizing that it owes its creation to the 'spectacular ingenuity (cleaverness) of lawyers'.[1]

This new company form brought about a readjustment of the relationship between the chance of profit and the liability risk. Previously, an economically active legal person could be created in Germany only as a joint-stock company (*societé anonyme*). This required a high start-up capital. In addition, numerous other requirements had to be met, especially on the basis of the amendment to stock corporation law in 1884 triggered by the *societé anonyme* start-up crisis (*Gründerkrise*).

For the creation of the GmbH, reference is often made to the colonial context; an Imperial Act (*Reichgesetz*) of 1888 already allowed franchised colonial companies, also with a view to the English Limited (Ltd). From the start, the GmbH was not limited to such activities and did not celebrate its triumphal march in the (soon lost) colonies. Rather, there was a need for a less cumbersome and less complicated form of company with limited liability, especially in the German Reich itself. In the legislative process, the models of a modified partnership (general partnership with limited liability) and a simplified joint-stock company had competed with each other. The law on GmbH of 1892 contains a synthesis of both models.

The GmbH quickly enjoyed great popularity in German legal practice. Its success is best demonstrated by the numbers. After the law of 1892 went into force in Germany, 63 GmbHs were established (with a share capital of 28 million marks), but after 20 years of this legislation in force – in 1912 there were already 21 000 of them in Germany, with a capital exceeding 4 billion marks, at the end of 1924, so 12 years later – it was 4 times more of GmbHs in Germany.

This visible success, however, did not prevent the GmbH from being an object of critique. Criticism from the jurisprudence, that had not been included in the quick legislative process, was heard from the start. As early as 1892, Levin Goldschmidt expressed concern that the GmbH would replace 'principally more solid forms of company' such as the general partnership (*Offene Handelsgesellschaft*, OHG) and the limited partnership (*Kommanditgesellschaft*, KG). Shortly before the outbreak

1 A. Doliński/A. Górski, Zarys prawa handlowego, vol. 1, Lviv 1912, p. 521.

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of the First World War, a reform of the GmbH law was discussed, but the German Jurist Association Conference in 1914, which was supposed to focus on this topic, did not take place.

At the 5th German Jurist Association Conference in Czechoslovakia (1931), the GmbH was described as a ‘pest’ because it encouraged thoughtless foundations, dishonest business practices and improper use. It enables to ‘do risky business while passing on the risk to the creditor with their own unlimited chance of gaining’ and thus violate two principles of free market economy, the principle of unlimited asset liability and the identity between formal and material corporate bodies.

However, this criticism did not prevent the company form of GmbH from being adopted in numerous European countries, or at least seriously considering its reception. Finally GmbH not only survived but became the most popular legal form of a commercial company in the world. This success is due to its features: fewer formalities (by comparison with the joint-stock company) and the exclusion of the shareholders‘ liability for the company's obligations.

This success of GmbH form prompted us to ask about history and development of GmbH in different European countries: Germany, Austria, Czech Republic, France, Hungary, Poland, Belgium, Italy, Spain, Netherlands, Latvia and Ukraine. Of the many related questions, the following should be addressed:

1) *Initial situation*: What is the economic and social situation of the respective state at the time of the adoption decision? What is the general historical background of the development? What is the respective starting point under company law? Which types of companies with which characteristics existed at the time of the reception decision?
2) *Powers and arguments*: Why was the GmbH adopted (or not) in each case? Why was it believed that this type of company was not needed? How did the debate about reception of the GmbH go? Which driving forces and which opponents existed? What arguments have been put forward?
3) *Experts*: Who was involved in developing the regulations for the introduction of the GmbH? Scientists, practitioners, ministerial bureaucracies, economists? Did these experts have special connections to the German or another legal system?
4) *Content*: How were the German regulations assessed? Were changes made in comparison to German law during an adoption? How did the GmbH fit into national corporate law? Were further changes in the law required?
5) *History of impact*: How was the acceptance of this new form of company in practice and what are the reasons for this? What criticism was raised after the adoption of this corporate form? Which reforms were later attempted or at least proposed? Was the abolition of the GmbH considered? What role does this type of company play today?

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These research questions were answered by the contributors of this book – outstanding specialists in the field of legal history, commercial law and economic history. Their contributions enabled not only to trace the development of GmbH in many European countries but also to place the GmbH as an element of a transnational European company law. In our book we also looked at the birth and rise of the GmbH from an economic perspective.

This book is result of cooperation of academics from twelve European countries. We very much appreciate their effort and scientifical expertise. In the final words we would like to express our gratitude to Dominic Bielby for his excellent proof-reading work.

Professor Dr. Martin Löhnig
Professor Dr. Anna Moszyńska

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Martin Löhnig

Privatisation of opportunities, socialisation of risks?

Emergence and development of the GmbH under German law up to the Second World War

1. The crisis of company law ...

The "invention" of the GmbH is closely related to the development of stock corporation law. Before the introduction of the GmbH, the joint-stock company was the only legal form of capital company and thus the only form of company with privileged liability. Because capital was the primary factor driving industrialisation in the 19th century, entrepreneurs who wanted to attract capital investment needed to offer investors a form of investment that was at least equivalent to common options such as government securities or mortgages. The joint-stock company provided the legal framework for this by offering - in addition to appropriate returns – limited liability as security for the investors, who were investing money without any possibility of influence over the company. Hans-Ulrich Wehler sees this form of company as one of the "ingenious key innovations of the 19th century" and attests to its "breath-taking pumping effect" with which it sucked in small and large sums from the capital market until efficient large-scale capital was accumulated.[1]

The General German Commercial Code (ADHGB), which came into force in 1862, codified uniform German company law for the first time.[2] Although the German Confederation lacked the legislative competence to enact such a code, almost all federal states introduced the ADHGB as state law. Additionally, the ADHGB was extended the entire Prussian monarchy, including the provinces of Posen and Prussia (East and West Prussia) which did not belong to the German Confederation. In the Empire of Austria, the ADHGB also applied as the General Commercial Code (AHGB) not only in the territories belonging to the German Confederation, but also in Veneto, Dalmatia, Galicia and Bukovina. The Hungarian Commercial Code of 1875 and the Commercial Code for Bosnia-Herzegovina of

1 Hans Ulrich Wehler, Deutsche Gesellschaftsgeschichte, vol. 2, München 2008, p. 103.

2 On the developments in the first half of the 19th century, cf. Martin Löhnig, Die Sätze 29 ff. des Anhangs zum Badischen Landrecht von 1810: Die erste Kodifikation des Aktienrechts in Deutschland, in: Lukas Gschwend/René Pahud de Mortanges (eds.), Wirtschaftsrechtsgeschichte der Modernisierung in Mitteleuropa, Zurich 2009, p. 191 ff.

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1883 largely followed the ADHGB. Thus, a uniform company law existed in large parts of Central Europe.[3]

However, this unity was soon broken up. Prussia destroyed the German Confederation in 1866 with the Prussian-Austrian War and founded the North German Confederation in its place. However, unlike the German Confederation, the North German Confederation was not a confederation of states; rather it was the core of a German nation state under Prussian leadership. With the accession of the southern German states, the North German Confederation became the German Empire in 1871. As early as 1870, the stock corporation law in the North German Confederation was amended.[4] The amendment was underpinned by liberal economics and it was to perform a deregulating function: previously, the concession system had applied in stock corporation law, i. e. the founding of a stock corporation could only be considered based on a state concession after thorough examination. This investor protection instrument had now been dropped. Now the normative system applied, i. e. a catalogue of statutory formation requirements;[5] state involvement was no longer required. However, due to the great legislative haste with which the reform was enacted and inexperience with the mechanisms of the normative system, these requirements were "often half-hearted and often ineffective"[6] .

The founding of the German Empire triggered an economic boom in Germany. It was fuelled by technical innovations, as well as France's reparations payments from the Franco-German War of 1870/71. Hundreds of often highly speculative or even fraudulent companies (Gründerschwindel) were founded in the form of the now easy-to-found joint-stock company. The bubble soon burst and the founders' boom was followed in 1873 by the founders' crash and several years of crisis. Share prices collapsed, companies went bankrupt, banks collapsed. Notwithstanding these problems, the 1870 amendment's introduction of the normative system, paved the way for the modern economic importance of the public limited company in Germany.

3 In 1862, this commercial code, adopted as a model law in the German Confederation, came into force in almost all federal states, see Stephan Wagner, Einführung, in: Martin Löhnig/Stephan Wagner, Das ADHGB als gemeinsames Obligationenrecht in Mitteleuropa, Tübingen 2018, p. 1 ff. Through the Act Concerning the Introduction of the General German Code of Bills of Exchange of the Nuremberg Bills of Exchange Amendments and the General German Commercial Code as Federal Laws of 5.6.1869, Federal Law Gazette of the North German Confederation 1869, p. 379 ff., the Code became federal law first in the North German Confederation and later in the German Empire.

4 Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften v. 11.6.1870, BGBl. des Norddeutschen Bundes 1870, p. 375 ff.

5 Jan Lieder, Die 1. Aktienrechtsnovelle vom 11. Juni 1870, in: Walter Bayer/Mathias Habersack (ed.), Aktienrecht im Wandel, vol. 1, Tübingen 2007, marginal no. 2 ff.

6 Lieder, Aktienrechtsnovelle (o. Fn. 5), marginal no. 119.

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2. … as the birth of the GmbH

Soon after the end of the economic crisis in 1879 (more than a third of the newly founded joint-stock companies had been liquidated in the meantime[7]), another reform of the law on joint stock companies took place. The Stock Corporation Law Amendment of 1884[8] tightened up the foundation requirements and added various investor protection mechanisms to the foundation law (foundation audit, publicity of the foundation, liability for founders). In addition, there was a refined organisational constitution, which specified and intensified the supervisory duties of the now obligatory supervisory board. Shareholder protection was the focus of the amendment, which admittedly left the normative system as such untouched. What seemed appropriate and necessary for large public companies, however, prevented small and medium-sized enterprises from accessing to a limited liability form of management due to the Law's cumbersome requirements. Therefore, the creation of a new form of company was considered for those enterprises that did not want to finance themselves through free capital market, but nevertheless want to benefit from limited shareholder liability. Making it more difficult to transfer shares was intended to make it possible to dispense with the strict institutional safeguards of current company law.

In this context, however, the legal limitation of liability could not be justified by the consideration that investors without influence should not be exposed to unlimited liability (in many cases, one probably had smaller companies with a thoroughly personalistic touch in mind), but rather with an economic-political control function. In the years following the founding crisis, the willingness to take undertake entrepreneurial endeavours with unlimited liability (and the risk of the loss of one's entire assets, especially because of mistakes made by the co-shareholders) had decreased significantly.[9] In this context, the Imperial Bankruptcy Code, which came into force in 1879, may also have played a role due to its hostility towards reorganisation of companies.[10] Mindful of the founders' crisis and the "founders' swindle" which was one of the causes of this, despite corresponding demands from business circles, it was decided, following the example of the laws of Prussia and Bavaria (and rejecting the regulations in the Hanseatic cities[11]) not to standardise

7 Sibylle Hofer, Das Aktiengesetz von 1884 – ein Lehrstück für prinzipielle Schutzkonzeptionen, in: Bayer/Habersack, (o. Fn. 5), marginal no. 2.

8 Gesetz, betreffend die Kommanditgesellschaft auf Aktien und die Aktiengesellschaften v. 18.7.1884, RGBl. 1884, p. 123 ff.

9 Cf. Peter Koberg, Die Entstehung der GmbH in Deutschland und Frankreich, Cologne 1992, p. 69 f.

10 On this and the causes now in detail Verena Niebler, Die Entstehung der Reichskonkursordnung von 1877 – Liquidation statt Sanierung?, Regensburg 2021.

11 Niebler, Reichskonkursordnung (o. Fn. 10), C II 4.

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a compulsory settlement mechanism to avert bankruptcy (Präventivakkord) and thus to keep the risk of doing business under unlimited personal liability very high. Bankruptcy meant not only economic catastrophe but also, as a rule, the permanent loss of social honour.[12]

As early as 1884,[13] the industrialist and national liberal member of the Reichstag Wilhelm Oechelhäuser[14] presented a bill for the introduction of a "trading company with limited liability".[15] In the following years, he also pointed to the model of the English limited liability company as attractive.[16] The competition between company forms, intensified by Centros,[17] Überseering[18] and Inspire Art[19] at the turn of the millennium, already played a considerable role in the globalised capital market of the late 19th century. Initially, however, only the colonial legislation on company forms was amended in 1888.[20] The Federal Council could now make colonial companies, legal entities with liability limited to the company's assets, following the approval of a company agreement by the Imperial Chancellor. This was not a new process as the joint-stock company, first regulated in the French Code de Commerce of 1807, also had predecessors in colonial companies whose liability could be limited by royal privilege.[21] Also in 1888, the Deutscher Handelstag presented a short draft law,[22] which was based on Oechelhäuser's draft and subsidiary declared the regulations for the Offene Handelsgesellschaft (OHG), the basic type of commercial partnership, to be applicable. Thus, the draft law ultimately proposed a commercial partnership with limited liability, which was not only to apply in the colonies.

A differently conceived type of limited liability company, based on the more capitalistically-oriented stock corporation rather than the OHG and thus clearly

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12 Niebler, Reichskonkursordnung (o. Fn. 10), C IV 4.

13 Werner Schubert, Die Gesellschaft mit beschränkter Haftung: Eine neue juristische Person, Quaderni Fiorentini 11/12 (1982/83), pp. 589 ff., 594.

14 Wolfgang v. Geldern, Wilhelm Oechelhäuser als Unternehmer, Wirtschaftspolitiker, Sozialpolitiker und Kulturpolitiker, Munich 1971.

15 Reprinted in Wilhelm Oechelhäuser, Die Erweiterung des Handelsrechts durch Einführung neuer Gesellschaftsformen, Schriften des Vereins zur Wahrung der wirtschaftlichen Interessen von Handel und Gewerbe, Berlin 1891, pp. 50 ff., 59 f.

16 Wilhelm Oechelhäuser, Gesellschaftsformen (o. Fn. 15), pp. 50 ff., 58.

17 ECJ v. 9.3.1999, Centros, Case C-212/97, ECLI:EU:C:1999:126.

18 ECJ v. 5.11.2002, Überseering, Case C-208/00, ECLI:EU:C:2002:632.

19 ECJ v. 30.9.2003, Inspire Art, Case C-167/01, ECLI:EU:C:2003:512.

20 Law on the Amendment of the Law on the Legal Relations of the German Protectorates of 17.4.1886 (RGBl. 1886, 74), of 15.3.1888, RGBl. 1888, p. 71 ff.

21 Cf. Rothweiler/Geyer, Von der Compagnie de commerce zur société anonyme: Die Geschichte der Aktiengesellschaft in Frankreich bis zum Code de commerce, in: Bayer/Habersack, (o. Fn. 5), para. 4 ff.

22 Reprinted in Entwurf eines Gesetzes betreffend die Gesellschaften mit beschränkter Haftung nebst Begründung und Anlagen, Berlin 1891, Annex B, p. 137 ff.

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more capitalistically oriented, was presented in 1890 in the draft of the Reichsjustizamt: a "small" or "non-capital-market-capable AG". All in all, however, according to the justification of the draftsman Eduard Hoffmann, the limited liability company concept elucidated in the draft occupies a "middle position between the strictly individualistic corporate forms of the current law and the joint-stock company, which is the ultimate consequence of the capitalist principle".[23] Nevertheless, in contrast to Oechelhäuser's model, the limitation of liability proposed was not based on the idea of granting a limitation of liability for small personally organised companies (Offene Handelsgesellschaft mit beschränkter Haftung, "OHG-mbH"). Instead, the new form of company was to be open to companies whose number of shareholders was "not quite small" and in which no shareholder wished to take over the management.[24] Here the criterion of control and liability under company law returns. "In the majority of cases, on the other hand, the choice of limited liability will only be the expression of the participants' will to limit their participation for the purposes of the company to the payment of the assumed contribution and a more or less emphatic participation in the overall management and supervision of the business."[25]

This "original creation"[26] was hardly changed in the course of the legislative process and finally passed in 1892, following swift parliamentary consideration, as the GmbH Act.[27] The limited liability company (Gesellschaft mit beschränkter Haftung, GmbH) was thus created by the German legislator as a new form of company without any historical precursors or decisive inputs from comparative law. Legal practice had indeed been waiting for such a corporate form: in the first ten years after the GmbH Act came into force, more than 6,000 companies were founded in the German Reich, and soon there were more GmbHs than stock corporations in Germany.[28]

23 Entwurf eines Gesetzes betreffend die Gesellschaften mit beschränkter Haftung nebst Begründung und Anlagen, Berlin 1891, p. 35.

24 Entwurf eines Gesetzes betreffend die Gesellschaften mit beschränkter Haftung nebst Begründung und Anlagen, Berlin 1891, p. 27 f.

25 Entwurf eines Gesetzes betreffend die Gesellschaften mit beschränkter Haftung nebst Begründung und Anlagen, Berlin 1891, p. 34.

26 Werner Schubert, Das GmbH-Gesetz von 1892 – "eine Zierde unserer Reichsgesetzsammlung": Das historische Geschehen um die GmbH von 1888 bis 1902, in: Marcus Lutter/Peter Ulmer/Wolfgang Zöllner (eds.), Festschrift 100 Jahre GmbH-Gesetz, Cologne 1992, p. 1 ff., p. 23.

27 Gesetz, betreffend die Gesellschaften mit beschränkter Haftung v. 20.4.1892, RGBl. 1892, p. 477 ff.

28 Schubert, GmbH-Gesetz (o. Fn. 26), pp. 1 ff., pp. 30 f., 36.

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3. Structural features of the GmbH under German law

The GmbH Act (GmbHG) already contained all the structural features that still characterise the GmbH under German law today:

1) The GmbH – like the Aktiengesellschaft (AG) – is a legal person, which was by no means self-evident: the legislator had left this question open and paraphrased in § 13 GmbHG the parallel provision from the law on companies limited by shares, Art. 213 ADHGB. In the ADHGB, this question had also remained open. Until 1890, however, the view had prevailed that the AG was a legal entity.[29]
2) The GmbH is a corporation. It can therefore attract a very large anonymous group of shareholders (public limited company) or serve as an umbrella company or building block in a group structure, but also as a form of company for small companies with a strong personalistic touch (which is also predominantly the reality today),[30] right down to companies that have only one shareholder[31] (one-man limited company).
3) The GmbH is a merchant by virtue of its legal form. Commercial law therefore always applies to it either.
4) The GmbH is limited by liability. Thus, only the company's assets are liable to the company's creditors for the company's debts, while the GmbH shareholders are, in principle, not subject to any personal external liability. In reality, credit institutions routinely had shareholders provide personal securities for small and medium-sized enterprises.[32]
5) The internal relationship between the partners can be very freely and flexibly arranged in the articles of association, § 45 (1) GmbHG. This is precisely why this form of company is suitable "for very different circumstances and purposes"[33] .
6) In contrast with partnerships, the principle of third-party management applies. Therefore, there are no managing directors by virtue of their position as partners (although the position of partner and managing director are not incompatible with each other).

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29 Schubert, Quaderni Fiorentini 11/12 (1982/83), 589, 591 ff..

30 HCL/Ulmer/Habersack, GmbHG-Kommentar, 2. ed., Tübingen 2016, Einl. A, marginal no. 8 and 18.

31 Approved for the first time in a judgement of the Reichsgericht of 20 June 1904, RGZ 23, 202 ff. for the subsequently created one-man GmbH, whereas the original one-man formation (i. e. without a straw man) has only been possible since the new version of § 1 GmbHG in 1980.

32 This was already the finding of Hachenburg, Aus dem Rechte der Gesellschaft mit beschränkter Haftung, LZ 1909, Sp. 15, 27.

33 Entwurf eines Gesetzes betreffend die Gesellschaften mit beschränkter Haftung nebst Begründung und Anlagen, Berlin 1891, p. 35.

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7) The majority principle applies, § 47 (1) GmbHG. Here the legislator utilised many of the regulations applicable to the AG, although these were largely dispositive.

4. The GmbH – an unsound corporate form?

It soon became apparent that the GmbH was not predominantly used as a "small AG", but rather as a corporate form for companies with a strong personalistic character, especially since the GmbH Law did not provide any safeguards against this.[34] The authors of the Law had possibly assumed that companies that did not correspond to the "small AG" model would be regarded as less creditworthy and thus the market would draw the boundaries. Perhaps, however, the move away from the prevailing control/liability model, which was seen as desirable from an economic perspective at the end of the 19th century and was demanded by business circles, was simply not intended to be openly communicated.[35] In any case, a central point of the reform discussion that continues to the present day was pre-programmed by the GmbH Act of 1892: the inadequate protection of the company's creditors, on whom the risk of failure of an entrepreneurial initiative was passed when the GmbH was chosen as the legal form for a company.

The GmbH brought about a readjustment of the relationship between profit opportunity and liability risk. Profits could be privatised, but risks could be passed on to the company's creditors while protecting the private assets of the shareholders. This was the main reason why criticism was voiced from the outset by legal scholars, who had not been included in the rapidly conducted legislative process and were therefore probably offended. The most prominent critic was Levin Goldschmidt.[36] Even during the GmbH Law's legislative process in 1892,[37] he expressed concern that the GmbH was displacing "in principle more solid forms of company" such as the general partnership (Offene Handelsgesellschaft, OHG) and the limited partnership (Kommanditgesellschaft, KG). Thus, according to Goldschmidt, there was no justification to extend the limitation of liability to companies in which the

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34 Cf. Levin Goldschmidt, Alte und neue Formen der Handelsgesellschaft. Vortrag in der Juristischen Gesellschaft zu Berlin gehalten den 19. März 1892„ Berlin 1892, p. 22 ff.; Franz Fränkel, Die Gesellschaft mit beschränkter Haftung – Eine volkswirtschaftliche Studie, Tübingen 1915, p. 43.

35 Susanne Kalss/Georg Eckert, Zentrale Fragen des GmbH-Rechts, Wien 2005, p. 35 ff.

36 On the person: Lothar Weyhe, Levin Goldschmidt. Ein Gelehrtenleben in Deutschland. Grundfragen des Handelsrechts und der Zivilrechtswissenschaft in der zweiten Hälfte des 19. Jahrhunderts, Berlin 1996.

37 Goldschmidt (o. Fn. 34).

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partners conducted the business themselves and therefore had sufficient monitoring possibilities. Otto Bähr[38] also voiced fundamental criticism.[39] The laboriously restored "cleanliness" of the public limited company would be endangered because many companies would now migrate to the new corporate form, because there the limitation of liability could be gained without having to comply with the cumbersome forms of the law on public limited companies. Furthermore, the use of the GmbH would not stop at the corporate purposes envisaged by the legislator. Sole traders would be able to enjoy the benefits of limited liability by setting up straw men. Bähr was thus very clear-sighted in identifying the arguments during the legislative process that were later repeatedly used against the GmbH as a corporate form, because he recognised the great potential of this form. The criticisms of Goldschmidt and Bähr did not result in any changes to the GmbH Law.

5. Semper reformanda – but never reformed

After a few years of practice (and the entry into force of the Austrian GmbH Law in 1906), Max Hachenburg[40] provided renewed criticism of the GmbH in 1909[41] and presented a reform proposal. Unlike Goldschmidt or Bähr, however, he did not take a fundamentally oppositional standpoint, but saw the GmbH as a boon for the middle class.[42] However, he wanted to improve creditor protection through stricter liability for shareholders and founders. The GmbH would have to move away from the AG model on this point, and "turn more towards the general partnership".[43] This was followed by an extensive discussion[44] on the partly diagnosed "GmbH-disease"[45], in which a "flight from the public"[46] was feared through the conversion of joint-stock companies into limited liability companies (and in many cases proposals

38 On the person: Birgit Binder, Otto Bähr (1817–1895): Judge of universal spirit, mediator between dogmatics and practice, Frankfurt am Main 1983.

39 Otto Bähr, Gesellschaften mit beschränkter Haftung, Die Grenzboten 51 (1892), p. 210 ff.

40 On the person: Jörg Schadt (ed.), Max Hachenburg, Lebenserinnerungen eines Rechtsanwalts und Briefe aus der Emigration. Kohlhammer, Stuttgart 2001.

41 Max Hachenburg, LZ 1909, Sp. 15 ff.

42 Hachenburg, LZ 1909, Sp. 15 ff., 24.

43 Hachenburg, LZ 1909, Sp. 15 ff., 29 and 35 ff.

44 Cf. for example Neukamp, Bedarf die G.m.b.H. einer Reform?, LZ 1909, p. 417 ff.; Sontag, G.m.b.H.-Krankheit, DJZ 1909, p. 538 ff.; Liebmann, Die Reform der Gesellschaften mit beschränkter Haftung, DJZ 1910, p. 675 ff.; Dalberg LZ 1912, p. 611 ff.

45 Sontag DJZ 1909, Sp. 538 (title).

46 Thus in Walther Hasenclever, Die Umwandlung einer Aktiengesellschaft in eine Gesellschaft mit beschränkter Haftung auf Grund der §§ 80, 81 des Reichsgesetzes vom 20. April 1892, Borna/Leipzig 1908, formulation on p. 84.

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oriented towards Austrian law[47]) to improve creditor protection were put forward, until finally the German Jurists' Congresses of 1912[48] and 1914[49] had several expert opinions on the reform of the law governing limited liability companies drawn up, which were to be discussed at the Jurists' Congress of 1914, which, however, did not take place due to the outbreak of war. Fraenkel's criticism pointed in a different direction. In his monograph published in 1915,[50] he complained that, by circumventing the formal requirement of § 15 GmbHG and contrary to the legislative intentions, extensive trading in GmbH shares was taking place on the grey capital market.[51]

In the interwar period, the German Jurists' Congress twice (1924 and 1926) dealt with questions of a reform of stock corporation law, but not with the - closely related – reform of the law on limited liability companies. The Fifth German Jurists' Conference in Czechoslovakia (1931) was different,[52] where Hans Großmann-Doerth,[53] one of the founders of the ordoliberal Freiburg School, succinctly summarised the criticism of the GmbH in his report. He described the company form as a "pest" because it invites frivolous foundations, dishonest business practices and abusive use. It allowed "risky business to be done while passing on the risk to the creditor with unlimited chances of profit" and thus violated two principles of a free trade economy: the principle of unlimited liability for assets and the principle of identity between the formal and the material owner of the company. For Großmann-Doerth, it was not the Austrian law – reformed in 1924 – that was the model for reform, but the "laws and draft laws that emerged after the war in Switzerland, Liechtenstein, Italy, France and Hungary", because these represented a "conscious, more

47 Cf. for example Karl Obst, Die Geschäftsanteile der Gesellschaft mit beschränkter Haftung nach deutschem und österreichischem Recht, Leipzig 1911; Hermann Pusch, Zur Reform der Gesellschaft mit beschränkter Haftung, Borna-Leipzig 1912; Ludwig Ostner, Die Pflichten und Rechte der Mitglieder einer GmbH nach deutschem und österreichischem Recht, Nürnberg 1913.

48 Neukamp, Gutachten zum 31. DJT, Vol. 2, 1912, 221 ff.; Pitreich, Gutachten zum 31. DJT, Vol. 2, 1912, 314 ff. each on the question: "Is it advisable to unify the law of limited liability companies applicable in the German Reich and in Austria and which special provisions of the Austrian law of 6 March 1906 would preferably be suitable for inclusion in the uniform law?"

49 Crüger, Gutachten zum 32. DJT, Bd. 1, 1914, 24 ff.; Pitreich, Gutachten zum 32. DJT, Vol. 1, 1914, 313 ff. each on the question: "Is it advisable to unify the law of the company m. b. H. applicable in the German Reich and in Austria and at the same time to subject it to a reorganisation?"

50 Fränkel, Die GmbH (o. Fn. 34), p. 156 ff.

51 For warnings against such investments, see J. Witthöft, Taschen zu! Schwindelhafte Zeitungsannoncen im Dienste der Geschäfts- und Kapitalvermittlung, Karlsruhe und Leipzig 1913, p. 9 ff.

52 Hans Großmann-Doerth, Reform des Gesetzes betreffend die Gesellschaft mit beschränkter Haftung, Gutachten, erstattet auf dem 5. Dt. Juristentag in der Tschechoslowakei, 1931, pp. 165 ff., 239.

53 In depth on the person Uwe Blaurock, Nils Goldschmidt, Alexander Hollerbach (eds.): Das selbstgeschaffene Recht der Wirtschaft – Zum Gedenken an Hans Großmann-Doerth, Tübingen 2005.

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far-reaching reorganisation of the German law taken as a model, based on German experience”,[54] while Poland and Bulgaria had been less innovative.

In the years following the world economic crisis, which drove numerous corporations into bankruptcy, some legislative measures were taken (expansion of accounting regulations, compulsory auditing by independent auditors), which, however, only affected stock corporations and partnerships limited by shares,[55] but not the GmbH at the same time. A major reform of GmbH law was attempted in Germany against a very different constitutional background but with similar objectives and regulatory proposals in 1939[56] and 1969[57] in vain, while reforms of the public limited companies were carried out in each of these phases (1937 and 1965). However, in the first years of National Socialism, the prospects for the continued existence of the GmbH seemed quite unfavourable. Some protagonists of the Weimar discourse now offered their criticism of the GmbH to the new rulers and their (apparent) ideological guidelines, in the hope that they could now achieve their legal policy goals.[58] Großmann-Doerth, for example, served as a member of the GmbH Committee of the Academy for German Law. The GmbH, he argued, was a typical creation of 19th century liberal legal thinking that opened the door to abuse and was incompatible with national-socialist views because its limitation of liability ran counter to the principle of entrepreneurial responsibility.

In 1934, the legislator attempted to make the conversion of corporations into partnerships or sole proprietorships attractive through a law on the conversion of corporations[59] in “appropriate cases” (preamble) by means of tax[60] and commercial law incentives. This law seemed to be only a first step[61] and indeed set a remarkable dynamic in motion: about one third of the existing GmbHs were converted.[62] However, the National Socialists later abandoned their reservations and merely attempted a (failed) reform, the preparatory work for which in turn led to a trend towards the conversion of joint-stock companies into limited liabil-

54 Großmann-Doerth, Gutachten (o. Fn. 52), p. 172 .

55 Decree of the Reich President on Stock Corporation Law, Banking Supervision and on a Tax Amnesty of 19 September 1931, RGBl. 1931 I p. 493 ff.

56 Cf. Werner Schubert (Hrsg.), Akademie für Deutsches Recht 1933–1945, vol. 2: Ausschuß für G.m.b.H-Recht, Berlin 1986, Introduction.

57 A private draft had already appeared in 1948 which continued the reform discourse, cf. Curt Fischer, Die Gesellschaft mit beschränkter Haftung, Göttingen/Heidelberg 1948, p. 127 ff.

58 Curt Fischer, GmbH (o. Fn. 57), p. 50; Kalss/Eckert, Zentrale Fragen (o. Fn. 35), p. 161.

59 Law on the Conversion of Corporations of 5 July 1934, RGBl. 1934 I p. 569.

60 Law on Tax Relief in the Conversion and Dissolution of Corporations of 5 July 1934, RGBl. 1934 I p. 572.

61 Fischer, GmbH (o. Fn. 57), p. 53; Stupp, GmbH-Recht im Nationalsozialismus 79.

62 Cf. the overview in Fischer, GmbH (o. Fn. 57), p. 165.

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ity companies in order to circumvent accountability and mandatory auditing.[63] Reichsminister Frank now highlighted the GmbH before members of the GmbH Committee of the Academy for German Law as a legal form that - if properly understood - was particularly popular (volkstümlich) and conducive to economic development.[64] The work of the Committee is today described as probably the most fruitful and knowledgeable legal-political debate on the GmbH since the GmbH Act was promulgated.[65]

Far-reaching changes to protect legal transactions, such as the introduction of a licensing obligation, the increase of the minimum capital requirement, the imposition of publicity or auditing obligations along the lines of company law, or the restriction of far-reaching contractual freedom, were not proposed in the draft reform of 1939. This was not to be expected, because the Committee chairman Klausing aimed for a prudent reform from the beginning in accordance with the political guidelines,[66] which for the committee meant a slight approximation of the regulations to partnership law (compared to the French model, for example) not only in the area of liability, but also in the organisational constitution (individual and minority rights) and the transfer of shares, which can be found in the 1939 draft as well as echoes of the 1937 stock corporation law reform. In the future, the GmbH was to be a company with its own legal personality in which two or more persons joined to promote a common purpose (§ 1 GmbHG-E 1939) and was to be regarded as a "partnership with tied capital".[67] In this way, the GmbH law would not have fought the poaching of the GmbH in original partnership terrain, which had already been correctly predicted in 1892, but on the contrary would have recognised personalistic structures as the main area of application of the GmbH and oriented the GmbH towards this type.[68]

Unprincipledness or pragmatism of the NS – however, one may see it – are characteristic not only of this phase of the GmbH's legal history, but also characterised the legislative process in 1892. Every legislator thereafter was faced with the problem that this form of company, on the one hand, harboured considerable dangers for legal transactions, but, on the other hand, in its existing form, had become indispensable for the national economy. Simultaneously, the introduction

63 Fischer, GmbH (o. Fn. 57), p. 54.

64 Reich Minister Frank in the opening session of the committee deliberations of 8 June 1937 in Schubert, GmbH-Ausschuß 6 ff.; likewise Friedrich Klausing, Die Neuordnung der Gesellschaft mit beschränkter Haftung – Erster Arbeitsbericht zur "Reform" der GmbH, Frankfurt/Main 1938, p. 11 ff.

65 Kalss/Eckert, Zentrale Fragen (o. Fn. 35), pp. 160, 177.

66 Klausing, Arbeitsbericht, (o. Fn. 64), p. 12.

67 Begründung zum Entwurf 1939, reprinted in Schubert, Entwurf, 151.

68 Kalss/Eckert, Zentrale Fragen (o. Fn. 35), p. 169.

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of sustainable precautions against dangers faced by creditors meant the end of the GmbH as an attractive form of company. "Some urgent changes to the GmbH law in need of reform"[69] such as the improvement of creditor protection and the protection of minority shareholdes were only brought about by an amendment of the GmbHG in 1980. This was followed by the Act to Modernise GmbH Law and Combat Abuses (MoMiG) in 2008. But that is another story.

6. Dynamic development beyond the normative text

6.1 Economic approach of the jurisdiction

The decisive impulses for development were recognised early on[70] by the case law of the Reich Court and later the Federal Court of Justice. Without precise knowledge of the case law, the wording of the GmbHG of 1892, which has hardly changed to this day, is no longer comprehensible in many places. Sources of further development of the law are often both stock corporation law and partnership law, whereby case law very carefully takes into account the respective special features of the GmbH as a corporate form. Analogies to stock corporation law can be found, for example, in the areas of financial constitution, managerial responsibility, the law on defects in resolutions and liquidation.[71] The closeness of the GmbH to the partnership leads to analogies with partnership law, especially with regard to the internal relationships of the company, for example, the exclusion of shareholders, compensation claims, fiduciary duty and shareholder action.[72]

As predicted by Bähr, legal practice has made use of the new corporate form with great imagination because the great flexibility of the GmbH's internal constitution has allowed this freedom of design. This applies not only to the one-man GmbH, but also to the form which embodies the capitalist limited partnership, the GmbH & Co KG In addition, as Ernst Fuchs[73] noted as early as 1923 under the title "Die

69 Begr. RegE 1977, BT-Drs. 8/1347, 77.

70 Cf. the overview of the relevant decisions of the Reichsgericht already in the first ten years of the validity of the GmbHG in: Schubert, GmbH-Gesetz (o. Fn. 26), p. 1 (37 ff.) or the overview of the case law of the Federal Supreme Court from 1950–2000 in Peter Ulmer, Recht der GmbH und GmbH & Co. ach 50 Jahren Rechtsprechung, Claus-Wilhelm Canaris (ed.), in: 50 Jahre Bundesgerichtshof. Festgabe aus der Wissenschaft, München 2000, p. 273 (282 ff.).

71 Cf. MünchKomm-GmbHG/Fleischer Einleitung, marginal no. 166 ff.

72 MünchKomm-GmbHG/Fleischer Einleitung, marginal no. 181 ff.

73 On the person of Ernst Fuchs: Albert S. Foulkes (ed.), Gesammelte Schriften über Freirecht und Rechtsreform, vol. 3, 20 smaller essays, reviews, tributes and obituaries, letters, index of persons to all 3 volumes, Aalen 1975.

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GmbH als Kulisse"[74], it was possible to "thumb one's nose" at a whole series of mandatory standards with the help of the GmbH.

6.2 Legal transfer is not a one-way street

As a source for the further development of GmbH law, the forms that the GmbH has found in other European legal systems should not be underestimated. They flow back to Germany in the form of a legal transfer in the opposite direction - successful legal transfers are never a one-way street. Above all, the provisions of the Austrian law, which may have appeared to German academics and practitioners to be a better and more detailed edition of the GmbH Act, built on an identical basis, were perceived in the German reform discourse as setting an example for a reform of the GmbH Act.[75] Testimony to this is provided by the expert opinions of the German Jurists' Congress in Vienna in 1912, which examined the question: "Is it advisable to unify the law of limited liability companies in force in the German Empire and in Austria and which special provisions of the Austrian law of 6 March 1906 would preferably be suitable for inclusion in the unified law?" But Austrian law also directly served as a source for the correct understanding of the German law, as can be seen from some decisions of the Reichsgericht from the years preceding 1915. These cases illustrate that the Central European legal unity in the field of capital company law, which had been destroyed by the German amendments to company law in 1870/1884, had now been restored at the level of GmbH law.

Some of the relevant decisions relate to questions concerning the exclusion of voting rights. In 1910, four years after the Austrian law came into force, the II Civil Senate of the Reichsgericht[76] had to decide whether a member of a GmbH was allowed to vote on his election as managing director and also on the regulation of his remuneration. First of all, the Senate stated that the abstention provision of § 47 (4) GmbHG serves to prevent a threat to the interests of the company; in the opinion of the Senate, such a threat does not exist in the case of the election of a shareholder as managing director. "These legal and practical considerations are in agreement with § 39 (5) [öGmbHG], which stipulates that a shareholder shall not be restricted in the exercise of his voting right in the passing of resolutions if he himself is appointed managing director or supervisory board or liquidator. In the explanatory notes to § 88 of the Austrian draft law it is noted that the shareholder's

74 Ernst Fuchs, Die GmbH als Kulisse, ZfDR 1923, Sp. 525 ff.

75 Hermann Staub/Max Hachenburg, Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung, 5th ed., Berlin/Leipzig 1926, Introduction Note 27; Bernhard Aubin, Die rechtsvergleichende Interpretation autonom-internen Rechts in der deutschen Rechtsprechung, RabelsZ 34 (1970), pp. 458–480.

76 RGZ 74, 276 ff. = Reichsgericht, judgement of 18 October 1910, II 660/09.

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co-voting in his own election does not mean any advantage for him in his capacity as shareholder and that he also does not enter into any contractual relationship."[77] Two years later, the Senate,[78] in determining whether a shareholder may vote in a general meeting if it concerns the revocation of his appointment as a member of the supervisory board, again referred to § 39 para. 5 öGmbHG, which directly followed the substance of Art. 190 para. 3 ADHGB or § 252 para. 3 HGB standardised in para. 4.[79]

Other decisions concern the question of which regulations may or must be agreed in the articles of association. In 1911, the Senate[80] had to answer the question of whether a private limited company could claim payment from a person who, on the occasion of an increase in the share capital, undertook to take over a share in the company for a certain amount, on the basis of this undertaking, after bankruptcy proceedings had been opened against the company's assets without the resolution to increase the capital having been entered in the commercial register. The Senate saw the increase of the share capital according to § 3 no. 3 GmbHG as an amendment of the memorandum and articles of association with the consequence that the corresponding regulations must be applied. "In order to avoid any doubt as to the application of these provisions, the Austrian legislator, who took the German law as a model, gave its Art. 52 para. 1 [ÖGmbHG] the wording: 'The increase of the share capital requires a resolution to amend the memorandum and articles of association'. In the motives for §§ 46 and 47 of the Austrian draft law, explicit reference is made to the intention pursued by the draft law through this wording."[81] In the following year, the Senate[82] had to consider the question of the extent to which obligations of the members of a GmbH to deliver their production to their company, which are subject to contractual penalties, require inclusion in the articles of association. The Senate answered the question in the affirmative, especially with regard to the determination of the contractual penalty. "§ 8 [öGmbHG] expresses this principle with all sharpness to the effect that the scope and prices of the services in question here as well as the penalties imposed for default must be precisely determined in the articles of association."[83]

In November 1912, the Senate[84] was confronted with the question of whether a private limited company can stipulate by amending the articles of association

77 RGZ 74, 276, 279.

78 RGZ 81, 37 ff. = Reichsgericht, judgement of 29 November 1912, II 369/12.

79 RGZ 81, 37, 39.

80 RGZ 77, 152 ff. = Reichsgericht, judgement of 20 October 1911, II 68/11.

81 RGZ 77, 152, 154.

82 RGZ 79, 332 ff. = Reichsgericht, judgement of 10 May 1912, II 43/12.

83 RGZ 79, 332, 336.

84 RGZ 80, 385 ff. = Reichsgericht, judgement of 12 November 1912, II 291/12.

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that the shareholders who are in competition with it must be represented at the company meetings by members of the management or the supervisory board who are not competitors of the company. The Senate first stated that § 252 HGB regulates the voting right as an irrevocable special right of the shareholder, whereas § 47 para. 3 GmbHG only requires that the authorisation for participation in the general meeting and the exercise of the voting right must be in writing; the provision also states that the delegation of a representative is permissible. This was expressly regulated by § 39 (3) öGmbHG, which - just like § 45 (2) GmbHG – permitted the articles of association (or a later amendment) to require that a competitor could only exercise certain rights through a neutral authorised representative. The limit, as the Austrian draft shows, is "that no shareholder has to put up with an amendment to the articles of association which has as its object an impairment of his special right or a reduction of his general membership rights which does not affect all members equally".[85]

The last issue is liability. In 1913, the Senate decided[86] whether, after an increase in share capital, the transferees of the new share capital contributions are also liable for deficits in already existing share capital contributions.[87] It answered the question in the affirmative, pointing out, among other things, that § 24 GmbHG had also served as a model for the creation of the öGmbHG and had been understood in this sense. "In the preparatory work for this law it is stated quite generally and without differentiation between the original and the later increased share capital that each shareholder must stand in for all other shareholders as a kind of guarantor if the shortfall of a contribution cannot be covered otherwise."[88] Two years later, it had to be decided[89] whether the other shareholders of a GmbH can be held liable for an uncollectible capital contribution before the defaulter has been declared to have lost his share. The Senate considered the exclusion of the defaulting shareholder to be regulated in § 21 GmbHG as a prerequisite for liability. "This is even expressed in the Austrian law, which is modelled on the German law. It says there in § 70 (4): 'If the share in the company has not been sold, the shareholders acquire a claim to the profit and liquidation proceeds accruing to this share in proportion to their contribution.'"[90]

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85 RGZ 80, 385, 389.

86 RGZ 82, 116 ff. = Reichsgericht, judgement of 1 April 1913, II 580/12.

87 On this, cf. from contemporary literature the criticism by Otto Zorn, Die Deckungspflicht der Gesellschafter einer Gesellschaft mit beschränkter Haftung im Falle der Erhöhung des Stammkapitals, Hamburg 1915.

88 RGZ 82, 116, 124.

89 RGZ 86, 419 ff. = Reichsgericht, judgement of 11 June 1915, II 105/15.

90 RGZ 86, 419, 420 f.

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