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Main Features of the German Law on Combines (Konzernrecht)

Honoured ladies and gentlemen,

already the second time I have the pleasure and the honour to participate at your meeting. Last year as a newcomer, who where just appointed as the local head for the GTZ legal advice project in Belgrade, this year as somebody who could take a small insight into the events of the back year. A lot happened since then. In spite of the in part terrible events my positive impression, which I already had during the last meeting, was confirmed.

I may remind you of an remark which I had done in my last contribution. There it was pointed out that there is a need of an entire reform of the Law on Company. Since then a working group was formed and start to work. As a small side remark it is to be noticed, however, that the danger contains the separate processing in regard of the business registration and the reform of the Law on Companies. If a homogeneous reform can be a result from that, is an actual problem, especially when you had a look on the actual Draft Law on Company registration.

The indication of the Law on Companies within the framework of this contribution that wants to represent the main features of the German Law on Company groups is not an accident. Since no full legislative act consists in Germany on the Law on Company groups, the Law on Company represents a starting point of the processing of this legal field. Despite of this there is an approach in literature and jurisdiction to understand the Law on Company groups as a general legal institute.

1. Starting point in the German right

The starting point for handling of Law on Combines in Germany is the independent legal person.

The German Company Law represents a numerus clausus of legal forms, but no basic limitation with regard to the motivation of the use of these legal forms. To make a reference to the general subject of this meeting the non-regarding of the motivation for the use of legal forms is an expression of the freedom of contract in German Law. Limitations with regard to the use of specific legal forms are in general from administrative law nature. For example the banking law (Kreditwesengesetz, KWG) that constitutes among other things a need for permission for enterprises in the bank field regulates a limitation in such a way, that in accordance with § 2a KWG such businesses can not be carried out in the legal form of the single businessman.

The motivation for the formation of legal constructions that are designated as combines is most different. These motives can result within an enterprise, so for instance in the distribution into different, organizational units; in the limitation of specific commercial risks through the foundation of sub-companies which have limited liability but also to use opportunities, given by the existent tax law regulations; or for instance for the expansion into other markets that often requires a foundation of an own legal entity in these markets. However, also the influence into other enterprises, to distribute investment risks or to control or take over competitors can be motivation for the arising of a company group.

The so created constructions osculate a whole line of legal fields in Germany. This is clear in case of a take over. Here the antitrust law is touched, to prevent the creation of excessive market power.

A further affected legal field is the entire field of enterprise taxation that often give the reason for the formation of company group structures.

The ongoing and increasing importance of legal case in the field of combines, led to far-reaching evolutions in the German (and European) Company Law. An actual example could be the new Law on Take over in Germany[1)] (and the related tendency all over Europe). Before that, the Law on Transformation of legal forms (Umwandlungsgesetz) where an example for a necessary reaction of the legislator on actual developments.

Because of the focus onto the self-sufficiency of enterprises in a company group the Law on Company groups the German legal practice create this so to speak "from below" therefore from the viewpoint of the subordinate enterprise. Starting position is accordingly the protection of these enterprises and basically, the protection of creditors and minority shareholders of these subordinate enterprises.

In total it must be said that the law on combines develops continuously. As a last state in this field one could take the so-called "Bremer Vulkan" case of the Federal Court of Germany[2)] that took back according to opinion of authoritative authors[3)] some outgrowths of the jurisdiction into Germany.

1. Wertpapiererwerbs - und Übernahmegesetz, enacted 20.12.2001 (Bundesgesetzblatt I, 3822)
2. NJW 2001, 3622

2. Legal basics in Germany

2.1 The company law in general

The German company law is, different as in Serbia not controlled in a single law. Essential legal sources are the German Civil Code (BGB), the Commercial Code (HGB) and a line of special laws.

In the German Civil Code some legal forms where regulated which were not already controlled by a line of laws to cover these forms for the German empire (Deutsches Reich) shortly after his origin in the year 1871. These legal forms are the association (Verein, § 20 - 79 BGB), the foundation (Stiftung, § 80 - 88 BGB) and the simple society (Gesellschaft bürgerlichen Rechts, § 705 - 740 BGB).

In the Commercial Code there are regulations for the single businessman (that has, as a natural person, with regard to his legal form no exceeding regulation opposite to the natural person in the German Civil Code (§ 1 - 19 BGB). Despite this a line of regulations is to be applied (for instance the use of the company name (Firma), § 17 ff. HGB)), the simple partnership (offene Handelsgesellschaft, § 105 - 160 HGB), the limited partnership (Kommanditgesellschaft, § 161 - 177 A HGB) and the silent society (§ 230 - 236 HGB).

The limited liability company was controlled in a corresponding law that first composure dates from the year 1892.

The joint stock companies are also controlled in a special law. Differently than in the Law of the limited liability companies there was a line of legal regulations, before the German empire exists. From those ones the regulations in the Code du commerce from 1807 are to emphasize. After the foundation of the German empire the joint stock company was regulated in the HGB (at that time in the § 178 - 334 HGB). In 1937 a special Law on Joint Stock Companies was created. A comprehensive new regulation occurred with Law on Joint Stock Companies from 1965.

Next to these archetypes of the companies special laws exist for the cooperative (Genossenschaft) and the insurance association on mutual agreement (Versicherungsverein auf Gegenseitigkeit). Latter is controlled within the Law on Supervision of Insurances.

During this enumeration it becomes in turn clear how closely the Serbian Law is combined with the German Law. This appears less on general society forms. The simple partnership regulated in Art. 105 of the current Law on Companies, that corresponds with this form in the German Commercial Code (offene Handelsgesellschaft), and the limited partnership, regulated in Art. 168 of the current Law on Companies, that corresponds also with this German form (Kommanditgesellschaft), are regualted in every company law, known to me. Also the limited liability company (Art. 332 of the current Law on Companies), and the joint stock company (Art. 187 of the current Law on Companies) correspond mostly also with the their counterparts in the German law, find similar regulations in all developed legal systems. But a legal form, as the insurance association's on mutual agreement, which

3. See Karsten Schmidt, Gesellschafterhaftung und „Konzernhaftung“ bei der GmbH, NJW 2001, 3577 ff

can be found in Art. 2 Par. 2 of the Serbian Law on the insurance of estate and persons is a clear dependence in both legal systems. As in the Serbian legal system, this legal form is regulated in the special laws on insurance companies.

2.2 The combines law in particular

As already reported there is a line of legal fields, which are touched by combines. Starting point of the legal processing with combines, are in the German Law on Joint Stock Companies which already contains after his basic reform in the year 1965 regulations on combines.

A legal definition of the combine (Konzern) can be found in § 18 Par. 1 of the German Law on Joint Stock Companies (AktG):

"§ 18 AktG combine and combine enterprises

(1) Are one prevailing and one or several dependent enterprises under the homogeneous management of the prevailing enterprise, they form a combine."

For the presence of a combine accordingly at least a relationship between two enterprises and the homogeneous management is needed. The terms of the prevailing one and the dependent enterprise already regulated in § 17 AktG. A dependent enterprise exists in accordance with § 17 Par. 1 AktG, if another enterprise can perform a dominating influence. It is presumed with enterprises, which stand under the majority shareholding of another enterprise that it is a question of a dependent enterprise.

Next to the presence of the dependence, a combine can arise in accordance with § 17 Abs. 2 AktG also then, when there is a qualified homogeneous management. In accordance with § 17 Par. 1 sentence 2 AktG this can be the case if between the enterprises a control contract exists, or if an enterprise was integrated in the other one.

Next to the regulations on combined enterprises in the §§ 15 ff. AktG there are detailed regulations in the third book of the German Law on Joint Stock Companies (§ 291 - 328 AktG).

The regulations to the Common annual balance sheet and the combine situation report, also formerly included in the AktG, can be found in the § 290 - 315 of the German Commercial Code, after the European Law on Accounting was reformed in the middle eighties.

3. Development of the combine law in Germany

Despite the regulations in the Law on Joint Stock Companies a marked jurisdiction for combines was developed in the German Law from cases where enterprises were involved that are not joint stock companies. This occurred next to an analogue using of the regulations in the Law on Joint Stock Companies from general basic principles in Company Law.

3.1 Main features of the combine law for stock companies

The German law on Joint Stock Companies contains § 291 ff extensive regulations for the case in which a stock company is a dependent enterprise in the combine.

3.1.1 Regulations for the contract combine

First the case of the combine is controlled, which is based on a contract between the prevailing and the dependent enterprise. With regard to § 291 and 292 AktG these can be a control contract (Beherrschungsvertrag), different forms of contracts with regard to the transfer of profits and contracts, where the enterprise is leave to he prevailing one.

With regard to the prevailing enterprise, no special legal form is required. By the way, the term enterprise in this connection is not that one, which is widely used in German commercial law for a functional unit, which is allocated to an legal subject. Rather it is used as a term for the prevailing enterprise as an independent legal person that pursues own entrepreneurial destinations. This means that the majority stockholder whose economical interests exhausts in this stake cannot be considered as prevailing enterprise. This restriction follows the purpose of the combine-legal regulations. Only if the danger that with the controlling stake an enterprise pursued interests, different from those of the dependant enterprise, an action of the legislator is needed since only then the combine-particular dangers must be countered. From the court practice[4)] also the state or other public entities can be prevailing enterprises, what led to special regulation for the German Treuhand Anstalt in order to prevent that this can be defined as prevailing enterprise.

Next to the already in § 20 and 21 AktG controlled notification duties that are not valid, by the way, for Enterprises, which are traded by the stock exchange, at first extensive approval requirements of the General Assembly of the dependent joint stock company are regulated (§ 293 AktG), that are complemented by report duties (§ 293 A - 293 g AktG). For the effectiveness of these contracts their registration into the Commercial Register is needed, because of their statutes changing character (and from that for the protection of the creditors).

Essential results of the presence of a contract combine are the duties for the formation of a reserve (§ 300 AktG), for paying of losses (§ 302 AktG) and the duty to give securities (§ 303 AktG).

In the case of an enterprise contract it is furthermore necessary to plan a settlement or an adequate compensation for external stockholders (§ 304 and 305 AktG).

In addition to the liability of the executive board members (§ 93 AktG) and the supervisory board members' (§ 116 AktG) for failure in the management also the liability for executive board members and supervisory board members of the prevailing society is necessary (§ 309 and 310 AktG). It is to be considered, however, that with control contracts a substitute duty does not already just arise from that that an instruction disadvantageous for the governed society is given (§ 308 AktG), because this danger is already regulated through the above-described regulations.

4. See BGHZ 69, 334

3.1.2 Regulations for the factual stock-combine (Faktischer Aktienkonzern)

If in a combine, where the dependent enterprise is a joint stock company, no combine contract was concluded, the Law call this a factual stock-combine. The §§ 311 ff. AktG obviously accept, that this is possible.

In § 311 the disadvantageous practice of factual management power is only authorized, if a compensation for this disadvantage is conceded. The § 312 - 316 AktG create corresponding report duties near to those ones in contract combines.

The factual dependence in addition leads to a comprehensive liability of the prevailing enterprise and his legal representative for disadvantageous instructions, as far as these can not disburden themselves with that, that also a carefully active representation person entitled would have given the same instruction (§ 317 AktG).

While therefore the contract combine knows a general duty to pay for losses, the factual combine knows only fault-dependent claims against the prevailing enterprise. This follows from the fact that a similar situation to the control contract cannot take place. While with presence of a control contract the general meeting was agreeing and in fact the statutes of the joint stock company were being changed, in the case that there is not any control contract, it is possible to forbid the executive board such a behaviour. This does not help, if one cannot proceed against the prevailing enterprise. From that it is recognized in the meantime that the prevailing company cannot be put better through that than if the very formal way of the enterprise contract would have been taken. From that it is generally accepted in applying § 302 AktG in analogue mode that a duty to pay for the losses exists[5)]. Condition is, that there is a qualified dependence in regard to the situation of § 311 AktG. Condition is, that the management power is actually no more with the executive board, but rests with the prevailing company. A bare controlling stake never suffices for that since influence onto the daily business of the society cannot be made through the general meeting of the Joint Stock Company. The question seems to be a theoretic one, because of the factual prohibition the qualified stock-combine does nearly not exists in practice. Otherwise the danger exists at any time that a minority stockholder acts against this state and endangers the combine structure in total.

3.2 Main features of the GmbH combine law

To the legal regulation model the GmbH is almost ideally suitable for a combine, because the shareholders have in accordance with § 46 No. 5 GmbHG influence on the management power.

Also at the GmbH-combine a distinction was made between contract combines and factual combines. Not every contractual agreement does suffice to establish a contract combine. Rather it must be a question also here of an enterprise contract. Next to a contract, which transfer profits to the prevailing enterprise this can be a control contract, in which an independent enterprise is under the management of the prevailing enterprise.

5. Karsten Schmidt, Gesellschaftsrecht, 4. Issue, p. 965

General it is recognized, that such contracts is intervened so intensely into the structure of the company, that it is a question in fact of some statutes change near the dependent company. To be valid, this must be registered in the Commercial Register[6].

The jurisdiction to GmbH combines was created, however, not at contract combines, but rather at non-contract combines. This is the case if a prevailing enterprise can take an influence as if there was an enterprise contract. Here it can be demonstrated by the jurisdiction that at first an analogous using of the § 302 and 303 AktG was favoured.

Nevertheless the newer discussion and jurisdiction refers to the opportunities regulated in the Law on Limited Liability Companies[7].

So in the GmbH the shareholders have duties of good faith in relation to the other shareholders. A voting of a majority shareholder, where a business against the interests of the society was decided can be a offend against this duty of good faith and can result in the consequence of compensation claims for the minority shareholders against the majority shareholder. Claims of the society itself can be able be used basically then, when it is a question of existence endangering. Payments at combine enterprises are under the rules on prohibited redemptions from the capital stock (§ 30 I GmbHG) and the rules on the redemption of loans which replacing the capital stock (§ 32 A GmbHG).

These claims are, however, not specific ones for combines. Rather they are suitable to establish claims with single measures against the prevailing shareholder. Next to that a particularly liability in the combine was developed in a line of court decisions.

The processing of GmbH-combines starts in the middle of the Eighties. In the famous "Car Crane"- decision[8] the Federal Court of Justice a particular combine liability was accepted analogous to the stock-legal regulations. In this case an entrepreneur had set up 7 Ltd. that had leased from the complainant in total 39 car cranes. During the legal proceedings to get 700.000 DM it became clear, that those Ltd. had no or not enough assets. The complainant proceeded now within the framework of jurisdiction related to the direct liability of the shareholders, against the alone shareholder of all Ltd.´s. The Federal Court rejected that a case, where the direct liability of the shareholder can take place, was given and started from that that also the normal claims from the Law on Limited Liability Companies where not possible. Rather a combine liability is given if the prevailing enterprise has led the businesses of the GmbH permanently and comprehensively itself and could not demonstrate that a carefully active manager would have acted exactly the same.

This jurisdiction was expanded in spite of strong criticism so that the saying found itself in a very controversial decision, the so-called "Video"- judgment[9], "that a shareholder that has a majority in a Ltd. and is only manager has to pay for the losses in person if he acts next to the shareholding as an Entrepreneur."

This was patched in turn in such a way, that an enterprise that governs a Ltd. as shareholder can be according to § 302, 303 AktG if he performs a management power, that does

6. See Baumbach/Hueck, Kommentar zum GmbH-Gesetz, GmbH-Konzernrecht, RdNr. 37
7. See Footnote 1
8. NJW 1986, 188
9. NJW 1991, 3142

not take any sufficient regard from that one onto the intrinsic interestes of the dependent company and the from that showing disadvantages can be compensated not within the framework of single claims[10].

Up to now last state of this jurisdiction is the already mentioned "Bremer Vulkan" decision[11] that sets their attention to the possible single measures because of offends against duty of good faith and applies the threshold for a particular combine liability again more highly with that.

A graded liability of the prevailing Company in a dependent Ltd. was developed from that in the literature:

- In a qualified factual combine exists a fault-independent duty to pay for losses of the prevailing enterprise. Conditions are:
  - A prevailing enterprise in the sense of § 17 AktG;
  - The management of the Ltd as a component, as a company department, of the prevailing enterprise.

Always the dependant company is entitled for the claim. If a insolvency is refused for lack of assets, creditors can make claims against the prevailing enterprise, as this is also possible within the contract stock-combine[12].

- In the factual combine claims can be arise from offends against duty on good faith. On the one hand in a factual combine a controlling stake satisfies, on the other hand it presupposes fault. Creditors can have claims only if it is a question of existential damages. Then they can have claims in accordance with § 32a Par. 2 GmbHG .
- It remains with the direct liability of the shareholders. This liability cannot be described here, but it is to say, that this can be valid only in very limited cases.

3.3 Combine right with other legal forms

Little is clarified whether it is a question of combine-law cases also during the control of other legal forms.

This is accepted anyway for hybrid types mentioned. Since in Germany the formation of a limited partnership with a Ltd. (or joint stock company) as full liable partner is possible and realized very often in practice, the described rules are also valid for those forms.

Also in regard to other partnerships a using of the basic principles described for the GmbH- combine is possible. It is to be considered, however, that direct claims of creditors cannot be used regularly since in pure partnerships protection of the creditors does not have the importance as for the capital companies. Creditors can claim from this only through resigned rights.

10. NJW 1993, 1200
11. See Footnote 1
12. Analogue § 308 Par. 4 AktG

4. Look onto the arrangements in the current Law on Companies

Also the valid Law on Companies in Serbia has regulations on combined enterprises, as this is regulated by in German law only for joint stock companies.

Essential differences in relation to the German law consist in Article 406 Law on Companies, where only a majority of shares is needed. Also Article 406 Law on Companies knows contractual reasons to create a combine. It is a question in this case, however, only of contracts in which the parent company has the right to appoint a specific part of the persons in the management. It is not referred in this article onto the practice of management power.

In Articles 413, 414 Law on Company rather questions of the take over are regulated.

With regard to the described liability in the German law the Serbian law knows in Art. 412 of the Law on Companies only the liability for single measures for disadvantageous influence as in § 317 of the German Law on Joint Companies.

Art. 414a Law on Companies controls only the contract combine. In his new composure Art. 414a Law on Companies knows a direct claim of the creditor for all duties of the enterprise. The German right does not know such a claim in this way.

Faced with the recent changes it remains to wait how the Serbian courts will react to cases of factual combines. In the same way it has to be shown how these courts reacts in the cases in which not joint stock companies but other legal forms are dependent enterprises in the sense of the Article 406, and if Article 414a Law on Companies will be used.