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

[*] Dr. iur., LL.M. (Nottingham), research associate at the Friedrich-Schiller-University Jena. E-Mail: jessica.schmidt@uni-jena.de.

[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).

[2] *See Die deutsche Antwort* (The German Answer), FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), 24 May 2007, 13; Robert Freitag & Markus Riemenschneider, *Die Unternehmergesellschaft – "GmbH light" als Konkurrenz für die Limited?*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1485 (2007).

https://doi.org/10.1017/S207183220000033X Published online by Cambridge University Press

last few years.[3] 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),[4] which will be fully implemented by 1 October 2009,[5] 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."[6]. 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.[7] 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.[8]

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).

---

[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.

[6] *See* Companies Act 2006, Regulatory Impact Assessment, January 2007, 1, available at http://www.berr.gov.uk/files/file29937.pdf.

[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).

[8] *See* the draft for The Companies (Model Articles) Regulations 2008, available at http://www.berr.gov.uk/files/file45533.doc.

Yet the UG will not be an entirely new form of company,[9] 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,[10] the UG will be subject to the same rules and regulations which are applicable to the "regular" GmbH.[11] 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).[12] 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.[13] Yet, the MoMiG does not contain any kind of "time limit" for the UG[14] or any other indirect means which would force the shareholders to raise the registered share capital later on.[15] 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

---

[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.

[13] *See* Detlev Joost, *Unternehmergesellschaft, Unterbilanz und Verlustanzeige*, ZIP 2242, 2245 (2007).

[14] *See Begr Reg, supra* note 11, at 72.

[15] *See infra* C. VIII. 1.

https://doi.org/10.1017/S207183220000033X Published online by Cambridge University Press

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 haftungsbeschränkte Unternehmergesellschaft,* GmbHR 673, 675 (2007).

[17] *See* Volker Römermann, *MoMiG: Regierungsentwurf mit "Überraschungs-Coups"*, GMBHR R193 (2007).

[18] *See* Ulrich Noack, *Der Regierungsentwurf des MoMiG – Die Reform des GmbH-Rechts geht in die Endrunde,* DER BETRIEB (DB) 1395, 1396 (2007).

[19] *See* Thomas Wachter, *Die neue Drei-Klassengesellschaft im deutschen GmbH-Recht*, GmbHR R209, R 210 (2007); and the expert opinion of Michael Hoffmann-Becking for the Committee on Legal Affairs of the *Bundestag* (BT – Federal Diet), available at http://www.bundestag.de/ausschuesse/a06/anhoerungen/28_MoMiG/04_Stellungnahmen/Stellungnahme_Prof__Hoffmann-Becking.pdf, p. 2.

[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[21] or the term "*Gründer-GmbH*" (founder company) as suggested by the *Handelsrechtsausschuss* (Committee for Commercial Law) of the ***Deutscher*** Anwaltverein (DAV – German Lawyers' Association)[22] – 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.[23] 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[24] – 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.[25] 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

---

Praxistauglichkeit, GmbHR 1080, 1082 (2007); Jan Wilhelm, "*Unternehmergesellschaft (haftungsbeschränkt)*" – *Der neue § 5a GmbHG in dem RegE zum MoMiG,* DB 1510, 1511 (2007).

[21] Statement of the *Bundesrat*, BR-Drucks 354/07, 4–5.

[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[26] (which is prohibited even for the "regular" GmbH[27] 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).[28] 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.[29]

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.[30] 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.[31] 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).

[30] *See* PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW 57 (2003).

[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,[32] 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,[33] 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,[34] 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*"[35] ("incorporation kit") to uncomplicated "standard cases" where special legal advice was deemed to be

[32] Very critical *e.g.* Freitag & Riemenschneider, *supra* note 2, at 1486–1487; Heribert Heckschen, *Die GmbH-Reform – Wege und Irrwege,* DEUTSCHES STEUERRECHT (DStR) 1442–1444 (2007); Peter Ulmer, *Der "Federstrich des Gesetzgebers" und die Anforderungen der Rechtsdogmatik*, ZIP 45, 46 *et seq.* (2008). For a restriction to one-member-companies: Walter Bayer, Thomas Hoffmann & Jessica Schmidt, *Satzungskomplexität und Mustersatzung,* GmbHR 953, 958 (2007); Fredrik Karsten, *Kann man eine GmbH auf einem Bierdeckel gründen?,* GmbHR 958, 966–967 (2007); Marcus Lutter in his expert opinion for the Committee of Legal Affairs of the *Bundestag,* available at http://www.bundestag.de/ausschuesse/a06/anhoerungen/28_MoMiG/04_Stellungnahmen/Stellungnahme_Prof__Lutter.pdf, 4. *But see* for a generally positive view the expert opinions of Eckart Sünner of the BDI and Barbara Grunewald for the Committee on Legal Affairs of the *Bundestag*, available at http://www.bundestag.de/ausschuesse/a06/anhoerungen/28_MoMiG/04_Stellungnahmen/Stellungnahme_Dr__S__nner.pdf, 3–5.

[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.[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"),[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),[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.[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.

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 offical UK government register of UK companies) not only offers the option of an electronic

---

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

[37] *See* Oliver Schröder & Klaus Cannivé, *Der Unternehmensgegenstand der GmbH vor und nach dem MoMiG*, NZG 1, 3 *et seq.* (2007).

[38] Almost 75% of the statutes of *GmbHs* currently contain clauses restricting the transfer of shares, *see* Bayer, Hoffmann & Schmidt, *supra* note 32, at 955.

[39] *See* J. Schmidt, *supra* note 1, at 307; Bayer, Hoffmann & Schmidt, *supra* note 32, at 593.

incorporation,[40] 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).[41]

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)[42] and the reforms brought about by the MoMiG – in particular the decoupling of registration and regulatory licenses[43] – the new UG will not be able to compete even if the new model articles are used. Notwithstanding the recommendations of renowned scholars,[44] 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.[45] And even if the optimistic predictions of some experts that incorporation times will generally be reduced to a few days[46] 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).[47]

---

[40] As of 1 January 2007, The Companies Act (Commencement No. 1, Transitional Provisions and Savings) Order 2006, SI 2006/3428, brought in force ss. 1068(5), 1078 CA 2006, requiring the Registrar of Companies to provide for the possibility of electronic delivery of the constitutional documents.

[41] Price List available at http://www.companieshouse.gov.uk/toolsToHelp/productPriceListCompare.shtml.

[42] *Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG)* of 10 November 2006, BGBl. I, 2553.

[43] *See* in more detail J. Schmidt, *supra* note 1, at 307.

[44] Eidenmüller, *supra* note 3, at 199; Noack, *supra* note 18, at 1398.

[45] *See* Eidenmüller, *supra* note 3, at 198–199; Noack & Beurskens, *supra* note 1, at 108. The BDI even complains that at many register courts incorporations take even longer (!) than before. *See* Sünner, *supra* note 32, at 5.

[46] *See* Heckschen, *supra* note 32, at 1447.

[47] The equivalent provision in CA 1985 was s. 1(3A).

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,[48] 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.[49] 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.[50] 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.[51] 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.[52] 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

---

[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.

[58] *See generally* Wilhelm Happ & Lorenz Holler, "*Limited" statt GmbH – Risiken und Kosten werden gern verschwiegen,* DStR 730, 733 (2004); Wolfgang Kessler & Rolf Eicke, *Die Limited – Fluch oder Segen für die Steuerberatung?*, DStR 2101, 2102 (2005); Joost, *supra* note 13, at 2246.

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 (haftungsbeschränkt) – innovatives Konzept oder "typischer Kompromiss"?*, GmbHR R305 (2007).

[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.[64] 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).

https://doi.org/10.1017/S207183220000033X Published online by Cambridge University Press

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,[65] 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.[66]

All in all therefore, the preceding synopsis shows that the UG will undoubtedly not be a kind of "magic bullet" against the "invasion"[67] 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.

---

[65] *See* Jochen Dierksmeier, *Die englische Limited in Deutschland – Haftungsrisiko für Berater,* BB 1516 (2005); Happ & Holler, *supra* note 58, at 730 *et seq.*; Kessler & Eicke, *supra* note 58, at 2101 *et seq.*; Klaus J. Müller, *Die englische Limited in Deutschland – für welche Unternehmen ist sie tatsächlich geeignet?*, BB 837 (2006); Volker Römermann, *Die Limited in Deutschland – eine Alternative zur GmbH?*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2065 (2007).

[66] See the decisions of the *Oberlandesgericht* (*OLG*) (Higher Regional Court) Jena of 22 August 2007, 6 W 244/07, ZIP 1709 (2007) and of the *OLG* Nürnberg of 10 August 2007, 13 U 1097/07, GmbHR 41 (2008). For a detailed discussion of these cases and the legal concept of the "*Restgesellschaft*" ("relic company") see Stefan Leible & Matthias Lehmann, *Auswirkungen der Löschung einer Private Limited Company auf ihr in Deutschland belegenes Vermögen*, GmbHR 1095 (2007); Jessica Schmidt, case note on *OLG* Jena of 22 August 2007, ZIP 1712 (2007); Rüdiger Werner, case note on *OLG* Nürnberg of 10 August 2007, GmbHR 43 (2008).

[67] *See* Torsten Koller, *The English Limited Company – ready to invade Germany*, 15 ICCLR 334 (2004).

https://doi.org/10.1017/S207183220000033X Published online by Cambridge University Press