Management Buy-Out, Cash Pooling, Up-Stream Loans and Guarantees in German Group Companies: Old Concepts – New Developments

By Jochen Herbst[*]

A. Introduction

For more than a century, the cardinal provision ensuring the preservation of the capital reserve in the registered share capital amount in a *Gesellschaft mit beschränkter Haftung (GmbH* – German company with limited liability) has continued unaltered. This is the payout prohibition contained in § 30 (1) *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (*GmbHG* – German Act on Companies with Limited Liability), which the *Bundesgerichtshof* (*BGH* – German Federal Court of Justice) has identified as a "cornerstone of the *GmbHG.*"[1] In consideration of the impressive period of applicability and evident resistance of the provision against legislative encroachments, the lay person, for example a managing director of a *GmbH* as primary addressee of the provision, is now supposed to be able to assume that at least the fundamental legal issues concerning the provision have been sufficiently clarified through jurisprudence and legal practice in the meantime.

This assumed first impression shall be refuted in this contribution on the occasion of a seminal judgment by the BGH of 24 November 2003.[2] This decision concerned the case of the granting of a loan to a shareholder in a GmbH. Since the famous *Helaba/Sonnenring* judgment by the BGH regarding a purchase price deferral of payment for real properties owned by a GmbH and sold to its shareholders,[3] the controversial debate about permissibility and boundaries of the granting of loans

[*] Dr. iur. Research and Teaching Assistant at the Institute for Public International Law, University of Cologne, and Of Counsel at the law firm PPR & Partner, Düsseldorf. Email: jochen.herbst@ppr-partner.de.

[1] *See* BGHZ 28, 77 (78).

[2] *See BGH* Wertpapier-Mitteilungen (WM) 325 (2004) = Betriebs-Berater (BB) 293 (2004) = Der Konzern 196 (2004) = Neue Zeitschrift für Gesellschaftsrecht (NZG) 233 (2004) = GmbH Rundschau 302 (2004) = Zeitschrift für Wirtschaftsrecht (ZIP) 263 (2004) = Der Betrieb 371 (2004).

[3] *See* BGHZ 81, 311 = NJW 1982, 383.

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by a GmbH to its shareholders has never been laid to rest. The same chamber has now handed down a fundamental decision on this legal issue. The new decision has given unmistakable impulses regarding an essential reorientation of the formerly well-established dogmatic concept of § 30 (1) GmbHG. Due to this fundamental reorientation, the judgment is, however, having consequential effects which are scarcely to be underestimated, particularly in the areas of the financing of and cash pooling in *Konzerne* (groups of companies) and management buy-outs (MBO) as well as in other particularly practice-relevant areas, both for the GmbH and also for the *Aktiengesellschaft (AG* – German stock corporation). The judgment has, therefore, caused a lively and controversial debate among both German legal scholars and practitioners.[4] Beyond the case, such debate also may well have significant impacts on the more general debate on corporate liability and creditor protection concepts in the European context.[5]

Against the background of former positions in the legal literature (see B. below), the ground-breaking decision by the BGH and its reasoning are critically appraised in the following (see C. below). The starting point is the highlighting of practice-relevant consequences of the new case law in the area of Group financing, cash pooling and MBO, as well as the question of the transferability to the stock corporation (see D. below)

B. Overview: Granting of Loans by a GmbH to its Shareholders

The question of permissibility and boundaries of the granting of a loan by a GmbH to its shareholders in the area of the committed company assets was discussed in the former literature both controversially and in a lively manner. The starting point of the considerations in this regard is the payout prohibition pursuant to § 30 (1) GmbHG. This provision strictly forbids payouts from the committed assets

[4] For comments on the judgment, *see* Binz *Darlehen an Gesellschafter als verbotene Auszahlung i.S. von § 30 GmbHG und Folgen für Bilanzierung und Berichterstattung* DER BETRIEB (DB) 2004. 1273-75 ; Cahn *Das richterrechtliche Verbot der Kreditvergabe an Gesellschafter und seine Folgen* DER KONZERN 2004, 235-45 ; Langner/Mentgen *Aufsteigende Darlehen im physischen Cash Pooling und die neue Rechtsprechung des BGH* 95 GmbH Rundschau (GmbHR) 1121-1127 (2004); Helmreich *Die Gewährung von Darlehen durch die GmbH in der Situation der Unterbilanz an ihre Gesellschafter nach der aktuellen Rechtsprechung des BGH* 95 GmbH Rundschau (GmbHR) 457-462 (2004); Reidenbach *Cash Pooling und Kapitalerhalt nach neuer höchstrichterlicher Rechtsprechung* WERTPAPIER-MITTEILUNGEN (WM) 2004, 1421-29; Schilmar *Kapitalerhaltung versus Konzernfinanzierung? – Cash Pooling und Upstream-Besicherung im Lichte der neuesten BGH-Rechtsprechung* DER BETRIEB (DB) 2004, 1411-16 ; Vetter *Darlehen der GmbH an ihren Gesellschafter und Erhaltung des Stammkapitals* BETRIEBS-BERATER (BB) 2004 1509-17; Wessels *Aufsteigende Finanzierungshilfen in GmbH und AG* ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 2004, 793-97.

[5] *See* E. below. On this context, *see also* Helmreich (*supra* at note 4) at 457-58.

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of the GmbH in the amount of the registered share capital.[6] Another central provision in this regard is the regulation contained in § 43a GmbHG on inadmissible loans.[7] Above all, two legal questions arise in this context: firstly, the question whether or not the express strict prohibition against the granting of any loan from committed company assets to managing directors and people on a par with those individuals pursuant to § 43a GmbHG should and can be extended to a corresponding granting of a loan to shareholders by way of analogous application *rationae personae* (see I. below); and, secondly, whether and, if so, to what extent the payout prohibition pursuant to § 30 (1) GmbHG impedes the granting of a loan by a GmbH to its shareholders (see II. below).

I. Analogous Application of § 43a GmbHG to Shareholders?

The only explicit statutory boundary for the granting of a loan by a GmbH is found in the provision of the first sentence of § 43a GmbHG, inserted by the GmbHG Amendment 1980.[8] The provision includes a textually-unrestricted prohibition against the granting of a loan from the assets necessary to preserve the registered share capital.[9] What is restricted, however, is the area of applicability of that loan-granting prohibition in a personal respect: it expressly only covers the granting of a loan to managing directors, other legal representatives, *Prokuristen* (i.e., holders of general signing powers) or authorised agents empowered regarding the entire business operation. In particular, the granting of loans to the GmbH's shareholders which do not as such belong to the representatives of the GmbH is not expressly addressed. From a historical perspective, it is to be noted that on the occasion of the GmbHG Amendment 1980, the Federal Government rejected an inclusion of the shareholders in the sphere of addressees of the loan-granting prohibition, with the following rather remarkable explanatory statement: "A special regulation concerning loans from the company to shareholders should be refrained from [...], as in this regard the general regulation contained in § 30 GmbHG provides protection against impermissible loans."[10]

[6] § 30 (1) GmbHG provides: „The assets of the company required to preserve the registered share capital may not be distributed to the shareholders:"

[7] § 43a, sentence 1 GmbHG provides: „The assets of the company required to preserve the registered share capital may not be used to grant loans to managing directors, other legal representatives, *Prokuristen* (holders of general signing powers) and authorized signatories with powers extending to the whole business."

[8] *See* Amendment Act dated 04 July 1980; BGBl. I 1980 at 836.

[9] For the text of § 43a GmbHG, *see supra* at note 5 .

[10] *See* RegE BT-Drs. 8/1347 at 74.

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Notwithstanding, according to one opinion in the literature, the provision in § 43a GmbHG should be analogously applied to cases of the granting of loans to GmbH shareholders.[11] In so doing, the proponents of an analogous application in no way mistake the contrary will of the historic legislator as expressed in the respective *travaux préparatoires*. However, the proponents of this viewpoint accuse the legislator of the GmbHG Amendment Act 1980 of not having given sufficient consideration to the structural difference between the capital maintenance principle and the payout prohibition on the one hand, and the principle of liquidity preservation on the other hand. According to this opinion, the general payout prohibition only covers the case where the company, in return for the cash-payout from the committed company assets, obtains a claim against the shareholder for repayment of a loan which is not a "full-value" claim, for example due to lacking creditworthiness of the shareholder. While if the claim of the company for repayment of the loan value is said to be "full-value" due to the creditworthiness of the shareholder, the general capital maintenance provisions, according to the narrow reading of § 30 (1) GmbHG, do not apply from the outset, due to lack of the existence of a payout. Rather, the credit transaction with the shareholder then constitutes a neutral asset exchange from the perspective of balance-sheet law.

For this reason, ultimately everything rests on the question as to which level of protection the general payout prohibition (pursuant to § 30 (1) GmbHG) provides in the area of the granting of loans to shareholders. This question shall now be pursued.

II. Granting of Loans to Shareholders in Light of the General Payout Prohibition, § 30 (1) GmbHG

The debate about the problem on the basis of the (general) provisions for capital preservation usually consolidates into the question whether or not the granting of loans from committed company assets to a shareholder constitutes an "impermissible payout". In the following, firstly some basic issues regarding the payout prohibition pursuant to § 30 (1) GmbHG shall be clarified on the foundations of the prevailing literature viewpoint (see 1. below), before addressing the special problem of granting loans to shareholders (see 2. below).

[11] *See* KARSTEN SCHMIDT, GESELLSCHAFTSRECHT, 4TH ED.1149 (2002) ; Uwe H. Schneider *in* SCHOLZ (ED.) KOMMENTAR ZUM GMBH-GESETZ 9TH ED. § 43a at note 61 (2000); SOTIROPOULOS, KREDITE UND KREDITSICHERHEITEN DER GMBH ZUGUNSTEN IHRER GESELLSCHAFTER UND NAHESTEHENDER DRITTER (1996) at pp. 45 et seq.

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1. Payout Prohibition

The payout prohibition pursuant to § 30 (1) GmbHG serves in the preservation of the company assets corresponding to the stated share capital as registered with the commercial register and reflected in the articles of association. Accordingly, the norm has been identified as a central creditor protection provision. The aim of the creditor protection is supposed to be achieved through a prohibition against the payout of company assets which are necessary for the maintenance of the minimum reserve in the amount of the registered share capital.

First of all, the term "payout" is not entirely clear. At the starting point, one might assume that the term "payout" is open to an extensive interpretation, taking the object and purpose of the payout prohibition into account. In this regard, the payout prohibition covers every reduction in the company assets. Payouts are consequently not solely monetary payments, but rather cash-value payments of all kinds for which no equivalent value consideration is given, and which reduce the company assets necessary for the maintenance of the registered share capital.

a) Balance-sheet-law approach

A further aspect is to be separated from the question of the existence of a payout in the broadly understood sense. This is the question whether or not the payment rendered entails capital-protection-relevant effects of such a kind that payouts appear to be *impermissible*. In this regard, the payout prohibition is made more specific and restricted by the predominant literature viewpoint. According to this prevailing opinion, a reduction in the company assets is (only) impermissible if an adverse balance or a level of debt of the company would be precipitated or exacerbated as a result.[12] In particular, in this further contouring of the prohibition by the prevailing opinion, a balance-sheet-law approach is clearly expressed. Even for this reason alone, the provision was labelled in a trivialising manner by one author as a "balance-sheet-technical piggy bank."[13] A potential adverse balance is determined on the basis of the annual financial statements, in which a comparison is made between the net assets of the company and the registered share capital figure as re-

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[12] *See* Goerdeler/Müller *in* HACHENBURG (ED.) KOMMENTAR ZUM GMBHG vol. I (§§ 1-34), 8th ed. § 30 at note 56 (1992); Heidinger *in* MICHALSKI (ED.) KOMMENTAR ZUM GMBHG VOL. I (2002) § 30 at note 13 in connection with note 30; Roth *in* ROTH /ALTMEPPEN (EDS.) GMBHG-KOMMENTAR 4TH ED. § 30 at note 6 (2003); each author provides further references.

[13] *See* Wiedemann, Gesellschaftsrecht vol. I, at 557 (1980),.

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corded in the commercial register. "Net assets" in this context refers to the assets[14] minus the liabilities including the reserves.

According to this viewpoint, which one could describe as a theory of balance-sheet asset reduction, what is protected is the calculated value of the assets necessary for the maintenance of the registered share capital as determined in accordance with balance-sheet law.

b) Theory of the real asset reduction

That the payout prohibition is based on a strict balance-sheet based approach to the provision regarding the necessary company assets is, however, challenged in the literature at an early stage with substantial arguments. In particular, former Supreme Court judge *Stimpel* has called for "liberation" of the payout prohibition from balance-sheet thinking in a rather fundamental way.[15] However, these basic issues raised by highly-reputed authors have found scarce affirmative expression in the established commentary literature.

2. Payout Prohibition and the Problem of Granting Loans to Shareholders

The discussion described above about the decisive approach for the appraisal of the necessary company assets pursuant to § 30 (1) GmbHG continues also regarding the question whether or not the granting of a loan to a shareholder from the committed assets is always impermissible. Proceeding from a balance-sheet based approach, the prevailing viewpoint logically answers this question in the negative if the repayment claim is a full-value one and the loan conditions (in particular the interest levied) withstand a third-party comparison.[16] The *Reichsgericht* (*RG* – Supreme Court of the German Reich) put forward a corresponding opinion.[17] As justification, it is argued that because it is a mere exchange of assets, the granting of a loan with full-value repayment claim constitutes a usual, unobjectionable balance-

[14] Pursuant to § 42 GmbHG in connection with §§ 242 et seq. *Handelsgesetzbuch* (*HGB* – German Commercial Code).

[15] *See* Stimpel *Zum Auszahlungsverbot des § 30 Abs. 1 GmbHG* Festschrift 100 Jahre GmbH-Gesetz 335-61 at 36 (1992). *See also*, Schön *Kreditbesicherung durch abhängige Kapitalgesellschaften* 159 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 351-74 at 59(1995).

[16] *See* the authors references in note 12 *supra*. *See also* Fastrich *in* BAUMBACH/HUECK (EDS.) GMBHG-KOMMENTAR 17TH ED. § 30 at note 16 (2000); LUTTER/HOMMELHOFF GMBHG-KOMMENTAR 15TH ED. § 30 at note 13 and note 26 (2000); KLAUS J. MÜLLER DARLEHENSGEWÄHRUNG DER GMBH AN IHREN GESELLSCHAFTER 1804-07 at 05 (Betriebs-Berater (BB) 1998); Pentz *in* ROWEDDER/SCHMIDT-LEITHOFF (EDS.) KOMMENTAR ZUM GMBHG 4TH ED. § 30 at note 30 (2002).

[17] *See* RG HRR 1935, no. 1403. *See also* RGZ 150, 28, 34 et seq.

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sheet-law neutral act. With the reference to the third-party comparison, in addition the potential accusation of a so-called *verdeckte Gewinnausschüttung* (hidden distribution of profits) should thereby evidently be precluded. The full value of the repayment claim is assumed if the shareholder is creditworthy from an *ex ante* perspective; in which regard the latter can admittedly only be challenged in the event of clear indications on a case-by-case basis.

In contrast, the critics of a balance-sheet way of thinking consequently advocate a general impermissibility of the granting of loans to a shareholder from the committed company assets. The critics argue that asset protection is not merely the guarantee of a balance-sheet-compliant account figure, but rather also consists of the maintenance of a liability guarantee mass which covers the debts. The creditor's protection cushion as reflected in the figure of the registered share capital, however, is clearly reduced through the replacement of a respective cash reserve by a deferred *in personam* settlement claim.

C. The Judgment by the BGH of 24 November 2003

The BGH has now taken a position regarding the two contested issues discussed above. The case decided on involved, *inter alia*, a compensation claim by an insolvency trustee directed personally against the managing director of a real estate GmbH. The managing director of the GmbH had diverse company-loans paid out to shareholders (or to indirect shareholders) in the total amount of about EUR 436,000.00 to the detriment of the committed company assets.

I. No Analogous Application of § 43a GmbHG to Shareholders

The BGH firstly raised § 43a GmbHG (analogously) as a potential basis for the compensation claim against the managing director. According to the Court, however, the area of applicability of § 43a GmbHG could not be extended by way of analogous application to the shareholders of the GmbH. In the view of the Court, the fact that the legislator had rejected the inclusion of the shareholders argues decisively against an extension of the application area *rationae personae*.[18]

II. Extensive Interpretation of the Payout Prohibition: Theory of the Real Asset Reduction

The Court then examined the existence of a compensation claim as brought by the insolvency trustee against the managing director on the basis of a breach of the

[18] *See* II 2. a) of the judgment. On the legislative history of § 43a GmbH Act, see above II. 1.

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payout prohibition.[19] As a result, it answered the question whether or not the payout prohibition was infringed in the affirmative and, consequently, held the managing director personally liable. The following passage of the reasons for the judgment has been adopted by the Court as a guiding principle in this regard:

"The granting of loans to shareholders which do not take place from reserves or accumulated profits, but rather to the detriment of the committed assets of the GmbH, are in principle also to be assessed as forbidden payouts from company assets even if the repayment claim against the shareholder in the individual case should be full-value."[20]

Thus, the formerly-predominant literature viewpoint regarding the granting of loans to GmbH shareholders has been given a clear rejection. Even more interesting than this result is the reasoning of the Court. In accordance with the object and purpose of the payout prohibition, the BGH firstly rejected a purely balance-sheet based approach. Instead, the BGH stated that the purpose of the payout prohibition was not only the guarantee of a balance-sheet account figure, but rather also the maintenance of a liability guarantee mass which covers the registered share capital figure. Through the protection of the minimum operating assets, the creditors' interests should be protected in such a way that a satisfaction reserve remains to these parties in all circumstances. With the reference to the theory of the real asset reduction, citing *Judge Stimpel* and *Professor Schön*,[21] the Court contradicted the idea that a violation of the payout prohibition ultimately depends on a purely balance-sheet based approach.

In fact, a strict protective purpose-oriented interpretation of the payout prohibition may not be intent on the taking into account of the balance-sheet asset situation. Even from a methodological perspective alone, an interpretation of the capital maintenance norms is assailable by appeal to balance-sheet law as pure (auxiliary) law to follow the asset and relief right of corporate law. This conclusion was rightly formulated to the effect that balance-sheet law explains and expresses the matters of fact of corporate law, but does not construct them. If in contrast one makes the breach of the payout prohibition dependent on a reserve to be made in accordance with commercial accounting principles, then this leads to a questionable weakening of the capital maintenance standard. Starting from a strictly balance-sheet-oriented view, for example, the risk of an erroneous estimation about the amount of neces-

[19] *See* II. 2. b) and c) of the judgment.

[20] *See* II. 2. c) of the judgment.

[21] *See* note 15 above.

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sary impending or loss reserves (i.e., reserves for threatened losses)[22] was completely to be borne by the capital commitment and thus ultimately to be borne by the company's creditors. Accordingly, an interpretation of the payout prohibition strictly directed towards creditor protection must unavoidably regard mere exposure situations as also being forbidden if a worsening of the satisfaction prospects of the company's creditors appears to be likely. In core, this means nothing else but an inclusion of structural risk situations in the prohibition elements. The theory of the real asset reduction applying to the true values of the asset items given away is thus basically to be followed; because only this approach appropriately takes into account the obligation standing as correlative behind the GmbH's limitation of liability, *viz* not to encroach on the guaranteed sum as published in the commercial register as the last liability guarantee reserve.[23]

Concretely based on the case of the granting of a loan to shareholders, the BGH presumes a typical risk situation for the GmbH liability guarantee fund. The BGH decided that even just the exchange of liquid liability guarantee mass characteristic of a loan in exchange for a temporally-deferred *in personam* claim worsened the company's asset situation and the satisfaction prospects of the company's creditors in an impermissible way.[24] Furthermore, a derogative effect on the interests of the company's creditors also exists because the giving away of company capital – due to insolvency-law special features – is associated with a displacement of the senior-ranking access right to the creditors of the shareholder to the company's creditors' detriment.[25]

The BGH, however, was not content with this rationale. Rather, the BGH also drew attention to the fact that only this strict application of the payout prohibition in cases of the granting of loans was appropriate to effectively prevent potential circumvention structures.[26] In this context, what is to be taken into account is the fact that according to the present case law of the BGH, the recovery claim is immediately due and the shareholder cannot be released from such claim by way of waiver, nor can this claim be deferred.[27] Due to this risk of a balance-sheet-neutral

[22] According to § 249 (1) *Handelsgesetzbuch* (*HGB* – German Commercial Code).

[23] This basic approach of real asset reduction as applied by the BGH is critizised, in particular, by Cahn (note 4) at pp. 238-243.

[24] *See* II. c) bb) of the judgment.

[25] *See* II. c) bb) of the judgment.

[26] *See* II. c) cc) of the judgment.

[27] Pursuant to § 31 GmbHG. *See* BGH BGHZ 144, 336 at 341.

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obfuscation of the deferral of payment as loans, the granting of loans to shareholders ultimately cannot be approved, either.

Despite these categorical statements disallowing the granting of a loan to shareholders from committed company assets as a matter of principle, the BGH nevertheless appears to wish to keep open one last, even if narrowly-outlined loophole for this kind of loan granting. Accordingly, the issue whether the granting of a loan to a shareholder from committed company assets might remain open in exceptional circumstances, i.e., where it will be considered, subject to the three below-detailed prerequisites to be fulfilled cumulatively: (i) the granting of the loan is in the company's interest; (ii) the loan conditions withstand a third-party comparison; and (iii) the shareholder's creditworthiness is beyond any doubt, even upon imposition of the most stringent standards, <u>or</u> the repayment of the loan value is fully guaranteed through intrinsically-valuable securities.[28] In addition, the onuses of presentation and proof of compliance with the three above-named conditions are borne by the shareholder benefited.

The awarding conditions defined by the BGH in this regard are composed in such a narrow way that a consequential theoretically-possible loan seems scarcely financially-advantageous any longer for the shareholder benefited; also, a granting of a loan appears to be too high-risk from the GmbH's managing director's perspective. For these reasons, the exceptional elements of the permissible granting of a loan to shareholders in the zone of the adverse balance which were mentioned by the BGH in an *obiter dictum* as theoretically possible can barely rescue the formerly applied and well-established loan practice.

The shifting of the burden of proof for the exceptional circumstances to the shareholder benefited by the payout is also noteworthy. If not working at the same time as sole managing director or as competent managing director in the financial area of the GmbH anyway, a shareholder will in its own interests in future have to give careful consideration to the company's (real) asset situation even more thoroughly than usual before availing itself of a loan. If it wants to be certain about excluding the risk of an – immediately-due and non-deferrable – repayment claim of the company, in the view of the BGH, the shareholder cannot ultimately be content particularly with an inspection of the current annual financial statements in the framework of a "financial due diligence" of the company.

[28] *See* II. c) dd) of the judgment.

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D. Overview: Further Consequences of the Judgment

Apart from the wide-reaching consequences of the payout prohibition already described, inevitably consequences also arise for other practice-relevant areas. In the following, as examples from the area of Group financing, the cases of so-called up-stream loans (see I. below), up-stream guarantees (see II. below) and cash pooling (see III. below) as well as external financing in the event of a so-called management buy-out (MBO; see IV. below) shall be succinctly discussed against the background of the new BGH decision by way of an overview. Finally, the applicability of the guiding principles found to the *Aktiengesellschaft* (AG – German stock corporation) will be assessed (see V. below).

I. Granting of a Loan by a GmbH to the Parent Company in GmbH-Vertragskonzernen (Contractual Group Companies) – up-stream loans

Whether the principles of the new BGH case law also apply to *GmbH-Vertragskonzerne* (contractual group companies involving GmbH's), in particular thus also to the loans granted by GmbH subsidiaries to their parent company (up-stream loans) is firstly dependent on whether one considers the provision contained in § 291 (3) *Aktiengesetz* (*AktG* – German Stock Corporation Act) to be analogously applicable; the latter provision provides for an exception from the capital preservation principles in *AG-Vertragskonzernen* (stock corporation group companies).

Firstly, in case of a dominated GmbH in a *Vertragskonzern* (contractual group company), the permissibility of detrimental instructions in principle derives from the second sentence of § 308 (1) of the Aktiengesetz. Furthermore, the capital preservation provisions of §§ 57, 58 and 60 Aktiengesetz regarding AG's (stock corporations) are relaxed in the event of the existence of a controlling and/or profit and loss transfer agreement pursuant to § 291 (3) Aktiengesetz.

However, according to the more convincing school of thought, the provision contained in § 291 (3) Aktiengesetz, directly applicable only to the *AG-Vertragskonzern* (contractual AG group company), cannot be applied by way of analogy to the *GmbH-Vertragskonzern* (contractual GmbH group company).

The contrary view that the dependent GmbH is permitted, by virtue of instruction by the dominating (parent) company, to create loan securities in favour of the parent company, irrespective of the registered share capital of the subsidiary GmbH, is propounded customarily above all through the loss equalisation obligation of the

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dominating (parent) company.[29] This is intended to compensate the GmbH company's creditors as correlative for the loss of the committed assets. This should apply at least in case where the loss equalisation claim is "full-value".

In light of the principles of the new BGH decision, this argumentation formerly used by legal scholars of a contrary view can no longer convince. The argument of the "structural junior-priority ranking" of the subsidiary's creditors due to the creditors' direct option of recourse to the parent company's assets indeed does not apply here. However, the worsening of the satisfaction prospects of the company's creditors in the sense of the new BGH case law is derived even just from the fact that the loss equalisation claim, comparable to a temporally-deferred contractual loan recovery claim, is not immediately due; this is because the loss equalisation claim would be due on the balance sheet effective date at the earliest.

In addition, the contrary view has also had its dogmatic foundation removed through the new *Bremer Vulkan* decision by the BGH pertaining to the qualified-factual group companies; because the dominating company may not destroy or only put at risk the existence of the dominated (inferior) company in a *GmbH-Vertragskonzern*, nor in a *qualifiziert-faktischer Konzern* (so-called contract-less qualified-factual group company) outside the realm of a proper liquidation.[30] Consequently, the cases of impermissible destruction of the dependent GmbH or the putting of the dependent GmbH at risk which have been developed by the *BGH* for the *qualifiziert-faktische Konzerne* permit themselves to also be extended to the *GmbH-Vertragskonzerne*.

Thus, the above-detailed principles of the new BGH case law concerning the granting of loans to shareholders are also applicable to company group-internal up-stream loans.

II. Loans Granted to the Parent Company of a GmbH (up-stream guarantee)

In the broad field of Group financing, the constellation of the so-called centralized group financing might be the most frequent in practice. In this case, the parent company takes the credit needed, loans this amount on to a subsidiary in need of external capital, and allows security to be provided for the loan by that subsidiary (or by another subsidiary). Having regard to liablility issues, the case where the

[29] Pursuant to § 302 and § 303 Aktiengesetz (as applied analogously).

[30] For details on the *Bremer Vulkan* judgment by the BGH, *see* e.g. 3 German Law Journal No. 1 (01 January 2002), directly available at: http://www.germanlawjournal.com/article.php?id=124.

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parent company acts just as a holding company which not infrequently has no or no noteworthy assets of its own at its disposal is particularly virulent.

Firstly, in this regard it is to be noted that the providing of security by a subsidiary GmbH in order to secure the Group controlling (parent) company by way of a guarantee, letter of comfort or other *in personam* or *in rem* collateral security for the benefit of the creditor of such parent company is to be assessed as the giving of an asset benefit to the shareholder; this form of a "payout" is to be measured on the basis of § 30 (1) GmbHG. However, in this constellation, the payout date was formerly disputed. While the current predominant view wants to assume a "payout" only at the time of the availing of the security, according to a contrary view, the "payout" is to be regarded as having already occurred at the time of the creation of the security obligation already.

This formerly prevailing opinion no longer permits itself to be harmonised with the decision by the BGH rejecting a purely balance-sheet based approach. Rather, the creation of a security obligation in favour of the parent company controlling the group is eliminated in principle accordingly in the area of the committed assets of the GmbH due to § 30 (1) GmbHG. In addition, according to the view represented herein,[31] such violation of the payout prohibition is *not* superseded by § 291 (3) Aktiengesetz (applied analogously).

III. Cash Pooling

It is commonly accepted that any transfer of cash by the subsidiary to its parent company is economically tantamount to granting a loan to the parent company.[32] Accordingly, the above principles also apply in case of the traditionally used "hard" cash pooling system (often also referred to as "zero balancing") where subsidiaries effectively (wire) transfer money in violation of payout prohibition (i.e., where its minimum reserve as reflected in the amount of the registered share capital is affected) to the bank account of its parent company.[33] Group companies applying such "hard" cash pooling system, sometimes even on a daily basis, therefore, need to carefully review such practice having regard to the latest decision by the BGH.

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[31] *See* D. I. above.

[32] *See* Cahn *Kapitalaufbringung im Cash Pool* 166 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 278-306 at 279 (2002); Reidenbach (*supra* at note 4) at 1423; Schilmar (*supra* at note 4) at 1413; Vetter (*supra* at note 4) at 1509, each with further references.

[33] *See* Langner/Mentgen (*supra* at note 4) at 1122-1124; Reidenbach (note 4) at 1423-1425.

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While the principles developed by the BGH in its new decision apply to "hard" cash pooling, a purely "notional" cash pooling, as sometimes applied in group companies for the purpose of transparent cash management, will not be affected by the precedent. In case of the "notional" cash pooling, no monies are actually transferred; but a cash consolidation of the various group companies is reached by a virtual or simulated transfer of the cash available in each individual company of the group company to a (virtual) central pool account of the group company.

In result, however, the new decision by the BGH leaves only very little leeway for cash pooling systems in group companies.

IV. Management Buy-Out

Finally, in the practice-relevant area of Management Buy-Out (MBO) also there are numerous case constellations which appear problematic in light of the new decision by the BGH. What is meant here is especially the usual case where the purchase price to be paid for the target company is externally-financed. The external capital provider usually arranges for the creation of first-ranking securities (senior debt) for itself; in which regard often the shares in the target company are rarely suitable to act as securities due to reasons of economic risk distribution. Of more interest from the perspective of the external capital provider are, of course, the capital assets and the current assets of the target company. In a direct take-over MBO structure, the purchase price to be paid by the acquirer is rendered in such a way that the target company for its part takes out a loan secured by its assets from an external investor. This loan is then passed on to the acquirer (preferably, on better conditions) for settlement of the purchase price for the shares; this is then a loan from the company to the acquirer.

Even if the acquirer was not yet a shareholder of the target GmbH on the date of the granting of the loan, for example due to the usual condition precedent that the acquisition (share deal) shall occur at the time of the purchase price payment pursuant to the share purchase agreement (SPA), the payout prohibition applies: in order for the payout prohibition to apply, it is sufficient that there be a close association between the shareholder capacity being considered and the establishment of the payment obligation; in case of a share deal subject to a condition precedent agreed upon in the SPA, the latter may be assumed. The same applies correspondingly also to the structure frequently found in practice of an acquisition of the target company via a special-purpose vehicle (NewCo), which functions as acquirer of the target company and loan recipient.

However, the (formerly) prevailing viewpoint based purely on the balance-sheet approach proceeds from the assumption that the payout prohibition is not affected

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if the claim of the target company for settlement of the loan is full-value. The contrary viewpoint concludes that there is a breach of the payout prohibition due to adverse effect or the lack of adequate compensation of the creditors' interests through other claims.

The perception of the current prevailing opinion can scarcely be reconciled with the new *BGH* decision. In particular, it is extremely doubtful whether the concerns regarding the external MBO financing permit themselves to be vanquished with the consideration that an asset reduction of the acquirer is not to be expected in view of the MBO-specific interest situation: notwithstanding the correct observation that an MBO would in practice not occur in the event of an identifiable economic weakness of the acquirer, the effective level of protection in favour of the company's creditors which is demanded by the BGH does not offer the prospect of a potential recourse of the company to the acquirer. As a result, to say the least, the currently well-established structures of an external MBO financing are also to be made subject to a very critical appraisal from the perspective of the payout prohibition.

V. Applicability of the Above Principles to Aktiengesellschaften (AG – German Stock Corporations)

It has been rightly pointed out that the above principles (I.-III.) equally also apply to up-stream financing instruments (i.e., up-stream loans and guarantees, cash pooling and external MBO financings) granted by *Aktiengesellschaften* (*AG* – German stock corporations).[34] Excluded from the above principles are, however, financings within *AG-Vertragskonzernen* (contractual AG group companies) in accordance with § 291 (3) German Stock Corporation Act.[35]

Special rules apply, however, with respect to German banks having the legal form of an AG. Otherwise, a bank, e.g., the Deutsche Bank AG, were not generally permitted to grant loans to persons which are at the same time shareholders of such bank (e.g., shareholders in the DAX 30 publicly listed Deutsche Bank AG).[36] In this context, it needs to be kept in mind that liquidity, solvency and creditor's protection of banks is subject to a special regime under the Kreditwesengesetz (KWG – German Banking Act).[37]

[34] *See* Reidenbach (*supra* at note 4) at 1426-1428; Wessels (*supra* at note 4) at 796-797.

[35] On § 291 (3) Aktiengesetz, *see* I. above.

[36] This problem is highlighted by Cahn (*supra* at note 4) at 244.

[37] In particular, *see* §§ 10, 11 KWG (including the respective regulations thereunder) on liquidity and solvency requirements for German banks. For details, *see* Gruson *in* GRUSON/REISNER (EDS.) REGULATION OF FOREIGN BANKS VOL. 2, 3RD ED. 368-98 (2000). But *see also* Cahn (*supra* at note 4) at 244. In

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E. Conclusion

Not without astonishment, 11 years after the issuing of the *Helaba/Sonnenring* judgment, the absence of literary-scholarly debate has been noted with the basic theses of that decision on the part of a superior judge. In the subsequent literature, those cues have only been taken up in exceptional cases and then frequently rejected. This is also remarkable because, with the new decision, the jurisprudence is - not for the first time – in alignment with the previous literary legal viewpoint presaged by a member of the Chamber.[38] In any event, the BGH has renewed and strengthened its commitment regarding the theory of the real asset reduction in the new decision with particular clarity.

Beyond the case, the judgment must accordingly entail a clear signal for other practice-relevant constellations as well. By way of consolation, however, one may bring to mind the fact that the erstwhile "weir" against indiscriminate capital outflows from the committed assets in the amount of the previously lofty 20,000 Marks – and this regardless of the interim increase to DM 50,000 or EUR 25,000 – as a result of the currency depreciation over the last 110 years, in the meantime only has reached a very modest water level, which continues to decrease. Accordingly, an appropriate equity position of the GmbH is usually scarcely able to be represented by the emergency reservoir of the statutory minimum registered share capital any longer anyway.

The new judgment may, however, further promote the current debate on a fundamental reform of the GmbH law and the competition of legal orders for companies in the European Union, which is, of course, closely related with the respective jurisprudence of the European Court of Justice.[39]

this context, Cahn discusses § 15 (1), sentence 1, no. 10 KWG; according to this provision, the granting of loans to companies holding more than 10 per cent of the stated capital of the bank needs to be approved by both the bank's management and supervisory board.

[38] Previously, this happened *e.g.* in the *Bremer Vulkan* judgment (*see supra* at note 30); in this judgment, the legal viewpoint as earlier expressed in an article by Judge *Röhricht* , acting president of the competent court chamber, was later applied by the court, published in the *Festschrift* for the 50th Anniversary of the *Bundesgerichtshof.*

[39] See European Court of Justice, Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., 2003 ECR I. In addition, see Baelz/Baldwin The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law 3 GERMAN LAW JOURNAL (2001) no. 12 (http://www.germanlawjournal.com/article.php?id=214); Helmreich (supra at note 4) at 457-58.; and the contributions in ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) no. 4 (2004).

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