



INSTITUTE FOR LAW AND FINANCE  
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*Melanie Döge*

**The Financial Obligations of the  
Shareholder**

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# The Financial Obligations of the Shareholder

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## I. Introductory Remarks

The vast theme “Financial obligations of the shareholder” requires some restrictions. This means that a comparative overview and comparison with other legislatures will not be presented in the following; my remarks are based on and confined to German corporate law. While it is true that basic traits of our European company law systems are commonly shared (as regards financial obligations of the shareholders, in particular due to the 2nd Company Law Directive of the EU),<sup>1</sup> many differences remain. Hence it is left to the foreign reader to find similarities or differences in her or his own system with what follows here.

A second restriction has to be made and mentioned. The chapter does not deal with the well-known debate about the usefulness of the traditional European system of a nominal capital which of course has implications for the financial duties of shareholders as regards the formation of a company; the raising of fresh capital; and for distribution of profits and assets to the shareholders (“capital maintenance”). The general debate about this has stalled meanwhile as the results of the various studies on the pros and cons of the different systems were inconclusive.<sup>2</sup>

An interesting side issue in this debate is the usefulness of a minimum capital requirement for smaller corporations which do not fall under the provisions of the 2nd Company Law Directive. Like other European legislations Germany has reacted to the regulatory competition triggered by the rulings of the EU Court of Justice in the well-known cases on the “immigration” of foreign companies by the introduction of the “One Euro-Company” (*haftungsbeschränkte*

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<sup>1</sup> Second Council Directive 77/91/EEC of 13. December 1976 (Kapitalrichtlinie), O.J. EEC No. L 26 (1977), p. 1 et seq.; The Directive has been substantially amended several times, so it has been re-codified: Directive 2012/30/EU of the European Parliament and of the Council of 25. October 2012 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 Art. 54 of the Treaty on the Functioning of the European Union, 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, O.J. EU No. L 315 (2012), p. 74 et seq.; for an overview on that topic see *Habersack/Verse*, *Europäisches Gesellschaftsrecht*, 4th ed. 2011, sec. 6, p. 139 et seq.; *Grundmann*, *Europäisches Gesellschaftsrecht*, 2nd ed. 2011, sec. 10, p. 155 et seq.; *Eidenmüller/Grunewald/Noack*, *Das Mindestkapital im System des festen Kapitals*, in: Lutter (ed.), *Das Kapital der Aktiengesellschaft in Europa*, 2006, p. 33 et seq.

<sup>2</sup> On this discussion with further references in: *Bachmann/Eidenmüller/Engert/Fleischer/Schön*, *Rechtsregeln für die geschlossene Kapitalgesellschaft*, 2012, p. 146 et seq.; cf. also *Ventoruzzo/Conac/Goto/Mock/Notari/Reisberg*, *Comparative Corporate Law*, 2015, p. 144 et seq.

*Unternehmergeellschaft; UG*). The *UG* is a limited liability company (*GmbH*) with a stated capital below EUR 25,000 and not less than EUR 1. Hence the financial obligations of the founding shareholders are reduced accordingly. As the *UG* makes profits, however, it has to set aside one-quarter of the annual distributable profits into a special reserve until the amount of EUR 25,000 has been reached.<sup>3</sup> I will get back to that in more detail below. After the introduction of this form of company the “invasion” of foreign companies (mostly British Ltds.) has come to a halt, due perhaps both to the attractiveness of this new form and because the market found out that the foreign company forms are not all that attractive (foreign company law is applicable; difficult and unsettled conflicts of laws arise; there is a costly duty to file annual accounts drawn up in English and reviewed by foreign accountants with a foreign commercial register).

Another issue relating to financial obligations of the shareholder concerns open or hidden disbursements of company assets outside regular distribution of profits, the sanctions for such disbursements as well as other actions which lead or may lead to damages for creditors of the company. Apart from the sanctions provided for explicitly in our company and civil law the German Federal Supreme Court (Civil Matters) has developed recently a claim based on the reproach of an intervention of shareholders which destroyed the very existence of the company (“existenzvernichtender Eingriff”).<sup>4</sup> This fits into the general discussion about in which cases German company law acknowledges a direct liability of the shareholder, a discussion which cannot be taken up here.

The chapter refers to the legal framework in Germany; an English version of the laws mentioned in the following can be accessed on the homepage of the EMCA group.<sup>5</sup> The chapter will first deal with the financial duties of shareholders when forming a company (see II.). In a further section, the duties when new shares are issued will be discussed (see III.). Of particular interest for the foreign reader may prove the new regulation of shareholder loans as a financing tool (see IV.). If the company is in financial distress, the shareholders may provide voluntary bridge support and waive certain rights (see V.). The question of whether there is an obligation of the shareholder to finance a company in financial distress will then be dealt with (see VI.). The chapter will end with a summary and conclusion (see VII.).

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<sup>3</sup> Cf. Limited Liability Company Act (GmbHG) para. 5a.

<sup>4</sup> Cf. *Fastrich*, in: Baumbach/Hueck, GmbHG, 21th ed. 2017, para. 13 rec. 49, 57 et seq.

<sup>5</sup> See: <http://law.au.dk/en/research/projects/european-model-company-act-emca/national-companies-acts-of-eu-member-states/germany/>.

## II. Formation of the Company

“Company” refers to the stock corporation (*Aktiengesellschaft/AG*), the partnership limited by shares (*Kommanditgesellschaft auf Aktien/KGaA*), the European Stock Corporation (*Societas Europaea/S.E.*), and the limited liability company (*Gesellschaft mit beschränkter Haftung/GmbH*). The special characteristics of partnership law will not be covered in the following. As the regulation of the S.E. and, as regards shareholders’ duties, also of the *KGaA* refers mainly to the rules applicable for the *AG*, these forms of company (*KGaA*; *S.E.*) will also be left out here.

German company law comprises the *AG* and the *GmbH* as “Kapitalgesellschaften” (capital companies) to express that in these forms of company all shareholders have the duty to contribute capital, be it in cash or in kind irrespective of whether additional contributions like providing services are admissible and are being made or not.

### 1. Contributions and Other Considerations

Regarding contributions of shareholders, one can in principle differentiate between cash contributions, contributions in kind and others like, e.g., services.<sup>6</sup> However, as will be shown later in detail,<sup>7</sup> in an *AG* contributions are restricted by law to considerations which have a measurable present value. Hence services and the like are not suitable contributions. In the *GmbH*, each shareholder has to sign up for a minimum amount of cash (or a comparable contribution in kind) but may also take on the obligation to serve, e. g., as a manager of the company as a shareholder’s duty. In regular cases, however, such contributions are not formulated as outright shareholder’s duties’ and enshrined in the articles of association but are usually based on a civil law service contract. The following remarks starts with observations on the *GmbH*.

### 2. Formation of a GmbH

#### a) Overview

The *GmbH* is the legal of company form which has been developed and structured for the needs of small and medium-sized firms. Unlike in an *AG*, the shares of the *GmbH* cannot be registered and traded as securities at the stock exchange. In addition, the transfer of shares in a *GmbH* must be certified by a notary public,<sup>8</sup> and the articles of association often stipulate that the transfer may only be effected with prior consent of the company.<sup>9</sup> A list of shareholders as well as the nominal values and the numbers of shares to which each of the shareholders has subscribed must be submitted to

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<sup>6</sup> Cf. for more details *K. Schmidt*, *Gesellschaftsrecht*, 4th ed. 2002, p. 566 et seq.

<sup>7</sup> Below II. 2. b)-d) (*GmbH*); II. 3. a) and b) (*AG*).

<sup>8</sup> *GmbHG* para. 15, sec. 3.

<sup>9</sup> *GmbHG* para. 15, sec. 5. In an *AG* such a restriction can only be imposed on the transfer of registered shares, not bearer shares. See *Stock Corporation Act (AktG)* para. 68, sec. 2.

the commercial register.<sup>10</sup> Due to the fact that the *GmbH* – unlike the *AG* – is normally closely held by a defined group of shareholders, it is not subject to a strict legal regime as regards the rights of the shareholders.<sup>11</sup> The regulation of the internal relationships of the company is mostly left to private autonomy and therefore to the parties. As said above, other obligations vis-a-vis the company may be imposed on the shareholders in addition to the payment of a capital contribution. However, these provisions must be included in the articles of association if they are to bind also future successors of the shareholder.<sup>12</sup>

With regard to the legal rules applicable to the formation of a *GmbH*, they are for the most part identical to the ones applicable to *AGs*. In order to protect future creditors' interests, company law requires shareholders that form a *GmbH* to contribute a share capital which acts as a loss and risk buffer. In the *GmbH* the share capital is called nominal share capital (*Stammkapital*). The capital contribution is paid up by the shareholder on the basis of the number of shares he has subscribed to.<sup>13</sup> The number and the nominal amounts of the shares subscribed to by each shareholder (original share contribution) must be stated in the articles of association.<sup>14</sup> The share capital equals the sum of the nominal values of all shares and must amount to a minimum of EUR 25,000.<sup>15</sup> In derogation of that provision, the minimum share capital in a limited liability entrepreneurial company (*haftungsbeschränkte Unternehmergeellschaft (UG)*) may be set as low as EUR 1.<sup>16</sup> If there is more than one founder, each founder has to contribute at least EUR 1, hence the stated capital will be higher than EUR 1, accordingly. In this form of company, the minimum legal capital must be built up by building up reserves from profits in the following years.

#### b) *Formation by Cash Contribution*

In order to register the *GmbH* with the commercial register, at least one-quarter of the cash contributions must be paid in.<sup>17</sup> In total, at least as much of the share capital must have been deposited that the total amount of the cash contributions paid in plus the total nominal capital of the shares for which contributions in kind are to be paid amounts to EUR 12,500, which equals 50 % of the minimal initial share capital. An *UG* may not be registered until the full amount of the share capital has been paid in.<sup>18</sup> The shareholders have the competence to call in missing capital

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<sup>10</sup> GmbHG para. 8, sec. 1, no. 3.

<sup>11</sup> See in comparison AktG para. 23, sec. 5.

<sup>12</sup> GmbHG para. 3, sec. 2. This is not possible in an *AG*, see AktG para. 55.

<sup>13</sup> GmbHG para. 14.

<sup>14</sup> GmbHG para. 3, sec. 1, no. 4.

<sup>15</sup> GmbHG para. 5, sec. 3, sentence 2, para. 5, sec. 1.

<sup>16</sup> GmbHG para. 5a.

<sup>17</sup> GmbHG para. 7, sec. 2, sentence 1.

<sup>18</sup> GmbHG para. 5a, sec. 2, sentence 1.

contributions if deemed necessary.<sup>19</sup> A shareholder who fails to pay his share contribution may – like in an *AG* – forfeit his share.<sup>20</sup> Liable for the outstanding initial contributions are – unlike in an *AG* – not only legal successors<sup>21</sup> but also all other remaining shareholders.<sup>22</sup> There is no exemption from the obligation to make the capital contributions.<sup>23</sup> The shareholder may only offset a counter-claim against the company’s claim for payment of the share contribution if that counter-claim resulted from the transfer of assets whose crediting against the obligation to pay capital contributions had been agreed upon.<sup>24</sup>

When filing the formation of the *GmbH (UG)* with the commercial register, the managers must certify that the value of the initial share capital has not already been reduced or depleted by encumbrances or losses.<sup>25</sup> The shareholders and the managing director are liable for false statements.<sup>26</sup> The registrar examines whether the company has been properly formed and registered.<sup>27</sup>

### c) *Contributions in Kind*

Unlike in an *AG*, contributions in kind must be made in full before the company has been registered.<sup>28</sup> The founding shareholders are required to file a formation report setting forth the circumstances relevant to assessing the value for contributions in kind.<sup>29</sup> There is no formal requirement to have an external formation audit for contributions in kind. Even though, it is required that the registration documents certify that the value of the contributions in kind equals the nominal value of the shares issued therefore.<sup>30</sup> If the value falls short, the shareholder is liable for the difference of such an overvaluation.<sup>31</sup> If a shareholder signs up for a cash contribution and at the same time agrees with the company that this amount be paid back to him in full or partially this is considered to be a “hidden contribution in kind” and treated accordingly.<sup>32</sup>

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<sup>19</sup> GmbHG para. 46, no. 2.

<sup>20</sup> GmbHG para. 21.

<sup>21</sup> GmbHG para. 22.

<sup>22</sup> GmbHG para. 24.

<sup>23</sup> GmbHG para. 19, sec. 2, sentence 1.

<sup>24</sup> GmbHG para. 5, sec. 4, sentence 1, para. 19, sec. 2, sentence 2.

<sup>25</sup> Otherwise this would bar the registration: BGHZ 80, 129 (143); BGHZ 80, 182 (184 et seq.). See also *Fastrich*, in: Baumbach/Hueck, GmbHG, 21th ed. 2017, para. 8, rec. 14, para. 9c, rec. 11, with further remarks.

<sup>26</sup> GmbHG para. 9a, sec. 1.

<sup>27</sup> GmbHG para. 9c.

<sup>28</sup> GmbHG para. 7, sec. 3.

<sup>29</sup> GmbHG para. 5, sec. 4, sentence 3.

<sup>30</sup> GmbHG para. 8, sec. 1, no. 5.

<sup>31</sup> GmbHG para. 9, sec. 1, sentence 1.

<sup>32</sup> For the details GmbHG para. 19, sec. 4. The shareholder liable for the contribution cannot fulfill his obligation by entering into an agreement to contribute cash which, from an economic point of view, needs to be treated as a contribution in kind, a so-called hidden contribution in kind (*verdeckte Sacheinlage*).

d) *Services in a GmbH*

The obligation to provide services, for example managing the company, cannot be counted as a cash or in kind contribution in a *GmbH*, and, hence, not to be treated as a “hidden contribution in kind”.

This was the holding of the Federal Court of Justice (*Bundesgerichtshof (BGH)*) in its decision “Quivive”.<sup>33</sup> According to the Federal Court of Justice in “Qivive”, the rules on hidden contributions in kind are not applicable to services which a shareholder in a *GmbH* is required to perform in return for remuneration. In this case, the shareholder paid EUR 5 million in cash to the *GmbH* as part of a capital increase. In addition, she entered into an agreement with the company to perform advertising services in return for payment. When insolvency proceedings were instituted for the company, the insolvency administrator demanded the payment of her cash contribution from the shareholder. The insolvency administrator argued that the shareholder had not fulfilled the obligation to make a contribution, because, from an economic point of view, she had provided the advertising services instead of the cash contribution and therefore a hidden contribution in kind. The Federal Court of Justice held that even though the parties might have intended a “de facto return of the contribution”, such an arrangement does not result in the company receiving a service which can serve as contribution in kind. An obligation to perform a service is difficult to enforce and is therefore unsuitable as contribution. The Federal Court of Justice has therefore clarified that the shareholder can agree to perform a service for the company in exchange for payment in connection with the payment of a cash contribution. This is particularly relevant with regard to employment contracts which a managing director enters into with the company.

e) *Liability for the Time Prior to Formation and To Cover Losses*

It happens quite frequently that the company enters into obligations during the formation phase, so that the capital of the company falls short of the required original share capital. The courts have developed a framework which holds the shareholders and the managing directors liable for obligations entered into prior to formation (*Vorbelastungshaftung*).<sup>34</sup> According to that doctrine, shareholders are liable for these obligations in proportion to their initial contributions and not jointly and severally. The amount might be higher than the original share capital; this being the case when the liabilities of the company exceed the net assets. This deficit has to be offset. If an

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<sup>33</sup> The Federal Court of Justice (BGH) has derived this fact from the GmbHG para. 19 sec. 4, see *BGH*, NJW 2009, p. 2375 et seq. The *BGH* has it extended to an *AG* in the decision “Eurobike”, see *BGH*, NJW 2010, p. 1747 et seq. The fact that an obligation to provide services cannot be counted as contribution is explicitly codified in AktG para. 27 sec. 2.

<sup>34</sup> BGHZ 80, 129 et seq.; BGHZ 165, 391 et seq.

individual shareholder cannot pay his share, the remaining shareholders must pay the shortfall in proportion to their shares.<sup>35</sup>

If the company cannot be registered due to flaws in the formation documents or process, the concept of “liability to cover losses” (*Verlustdeckungshaftung*) which has been developed by the courts applies.<sup>36</sup> According to that doctrine, the shareholders are liable to the non-registered company for all liabilities which result from the commencement of business activities; the share capital does not have to be adjusted.

### 3. Formation by Contribution in Cash or Kind in an AG

An *AG* comes into existence by formation<sup>37</sup> or by change of its legal form;<sup>38</sup> the latter appears to be the regular case. The nominal share capital (*Grundkapital*) is set forth in the articles of association and may be contributed in cash or in kind.<sup>39</sup>

#### a) Formation by Cash Contribution

The *AG*'s capital is divided into shares which must be denominated in Euro.<sup>40</sup> The minimum par value of the share capital is EUR 50,000;<sup>41</sup> the amount must be included in the articles of association<sup>42</sup> and in the commercial register.<sup>43</sup> The share capital also has to be included in the opening balance sheet<sup>44</sup> and in the following annual financial statements.<sup>45</sup>

There are two types of shares, nominal value shares (*Nennbetragsaktien*) and quota shares (*Stückaktien*); an *AG* can only issue one type.<sup>46</sup> Nominal value shares must have a value of at least EUR 1;<sup>47</sup> that nominal value must be specified in the articles of association.<sup>48</sup> Quota shares have no

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<sup>35</sup> GmbHG para. 24.

<sup>36</sup> BGHZ 134, 333 et seq.

<sup>37</sup> AktG para. 23 et seq.

<sup>38</sup> Transformation Act (UmwG) para. 190 et seq.

<sup>39</sup> AktG para. 27, 36a.

<sup>40</sup> AktG para. 1, sec. 2, para. 6.

<sup>41</sup> AktG para. 7.

<sup>42</sup> AktG para. 23, sec. 3, no. 3.

<sup>43</sup> AktG para. 39, sec. 1.

<sup>44</sup> Commercial Code (HGB) para. 242, sec. 1.

<sup>45</sup> HGB para. 242, sec. 2, para. 266, sec. 3, A. I.

<sup>46</sup> AktG para. 8, sec. 1.

<sup>47</sup> AktG para. 8, sec. 2, sentence 1, para. 4.

<sup>48</sup> AktG para. 23, sec. 2, no. 2.

par value; the articles of association have to state their number.<sup>49</sup> Quota shares are, however, not true no-par-value shares.<sup>50</sup>

In the case of formation by cash contribution, the filing with the commercial register can only be made<sup>51</sup> once at least one-quarter of the par value has been paid-in; in the case of quota shares once at least one-quarter of the portion of the share capital has been paid.<sup>52</sup> The shareholders may not be released from their obligations in any way; a setoff against a claim of the AG is prohibited.<sup>53</sup>

b) *Formation by Contribution in Kind*

The AktG differentiates between contributions in kind and acquisitions in kind.<sup>54</sup> *Contributions in kind* are contributions which are not made by cash payment of the issue price of the shares; an *acquisition in kind* takes place when the AG purchases assets from the shareholder. The articles of association must contain the objects of such contributions or acquisitions in kind, the person from whom the AG acquires the object, and the nominal value or, in the case of quota shares, the number of shares to be issued for such contribution, or the amount of consideration to be paid in exchange for such acquisition. Only assets whose economic value can be ascertained are contributable; obligations to provide services cannot constitute a contribution or acquisition in kind.<sup>55</sup>

Like in the *GmbH*, the shareholder liable for the contribution cannot fulfill his obligation by entering into an agreement to contribute cash which, from an economic point of view, needs to be treated as a contribution in kind, a so-called hidden contribution in kind (*verdeckte Sacheinlage*).<sup>56</sup> Such an arrangement does not release the shareholder from his obligation to make a contribution. The obligation is only fulfilled by contributions that are intended to stay permanently with the corporation and are at the free disposal of the management board.<sup>57</sup> Of course, the value of the contribution has to equal the amount for which the shareholder has signed up.

<sup>49</sup> AktG para. 8, sec. 3, para. 23, sec. 2, no. 2.

<sup>50</sup> Cf. on the difference between true no par value shares and quota shares and on the new Finnish company law which provides for true no par value shares *Airaksinen*, in: Krüger Andersen/Engsig Sørensen (eds.), *Company Law and Finance*, 2008, p. 311 et seq.; see also Chapter 5 Sec. 5 of the European Model Company Act (EMCA), [law.au.dk/forskning/projekter/europeanmodelcompanyactemca/](http://law.au.dk/forskning/projekter/europeanmodelcompanyactemca/).

<sup>51</sup> According to AktG para. 63, the management board may call in capital contributions from the shareholders; according to AktG para. 64, defaulting shareholders may be excluded from the company (forfeited).

<sup>52</sup> AktG para. 36, sec. 2, para. 36a, sec. 1.

<sup>53</sup> AktG para. 66, sec. 1.

<sup>54</sup> AktG para. 27, sec. 1.

<sup>55</sup> AktG para. 27, sec. 2.

<sup>56</sup> AktG para. 27, sec. 3. For an illustrative example see *Baums*, *Recht der Unternehmensfinanzierung*, 2017, para. 5, rec. 36 et seq. (AG) and para. 42, rec. 64 et seq. (concern).

<sup>57</sup> AktG para. 36, sec. 2.

#### **4. The Principle of “Actual Payment of Share Capital” (*reale Kapitalaufbringung*)**

The share capital is intended to serve as a loss and risk buffer – “guarantee capital” – for the creditors of the company. The principle of “actual payment of share capital” (*reale Kapitalaufbringung*) applies. The shareholder of a *GmbH* cannot be released from his obligation to pay the capital contribution; he cannot offset a claim against the company’s claim for payment of the capital contribution; and he does not have a right of retention that he can assert with regard to the object of a contribution in kind on the basis of claims which do not refer to the object.<sup>58</sup>

In an AG, the same rules as discussed above for a *GmbH* apply for the release of the shareholder from his obligation to make his contribution and for the offset of a claim against the company’s claim.<sup>59</sup> In a partnership limited by shares (*KGaA*), the shareholders that have unlimited liability with respect to the creditors of the limited partnership (general partners) can be obligated to contribute assets in addition to the obligation to subscribe to the shares. These contributions are not counted towards the share capital. The amount and the kind of assets that are contributed have to be determined in the articles of association.<sup>60</sup>

In the case of a subsequent increase of the share capital, the contribution has to be actually paid and made in full as well. The law generally provides that the formation rules apply also in this case.<sup>61</sup>

### **III. Capital Increase**

#### **1. Capital Increase in an AG**

##### *a) Ordinary Capital Increase*

There are various forms to increase the stated capital of an AG: The “ordinary” or regular capital increase; the use of a so-called authorized capital by the management of the company; the so-called contingent capital increase which depends on how many new shares will be needed in the future; and, finally, the capital increase by transforming reserves into share capital. As we are looking at the financial obligations of shareholders here some remarks on the regular or ordinary capital increase may suffice.

The ordinary capital increase in an AG takes place in two steps: a shareholders’ resolution to increase the capital and the execution of the capital increase. First, a resolution to increase the

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<sup>58</sup> GmbHG para. 19, sec. 2.

<sup>59</sup> AktG paras. 66, 36a.

<sup>60</sup> AktG para. 281, sec. 2.

<sup>61</sup> For information on capital increases see above at II. 2. c) and d).

capital has to be made which requires a majority of three quarters of the share capital represented.<sup>62</sup> The resolution must state the amount of the new share capital;<sup>63</sup> the assessment of a maximum amount is sufficient, which is convenient in practice. The capital increase must be registered with the commercial register. As a second step – the execution of the capital increase – the new shares are subscribed to either by the current shareholders or by third parties that the shares have been offered to, and the contributions (cash contribution or contribution in kind) are made.<sup>64</sup> The capital increase becomes effective upon registration of the completion of the process; the share capital is increased and new rights arise.<sup>65</sup> Shareholders in an *AG* have subscription rights to the new shares which may be excluded for good reason, however. Of course no shareholder is obliged to subscribe to and pay up for new shares; we will get back to this point later.

*b) Capital Increase with Contributions in Kind*

The rules for a capital increase with contributions in kind correspond for the most part to the formation rules.<sup>66</sup> The resolution to increase the capital must determine the object, the person from whom the *AG* will acquire the object, and the par value, or – in the case of quota shares – the number of shares to be issued for the contribution in kind.<sup>67</sup> The fact that a contribution in kind will be made has to be published before the resolution can be passed;<sup>68</sup> in addition, an audit of the contributions in kind has to be performed.<sup>69</sup> The rules for hidden contributions and back and forth payments apply *mutatis mutandis*.<sup>70</sup>

## 2. Capital Increase in the GmbH

*GmbH*-law also knows various forms of increasing the stated capital. We confine our remarks on the regular or ordinary capital increase. The ordinary capital increase in a *GmbH* also takes place in two steps – similar to the ones in an *AG*. In practice, most of the time new shares are issued, but it would also be possible to increase the par value of the existing shares. It requires a resolution to amend the articles of association with a majority of three quarters of the votes cast.<sup>71</sup> The amending shareholders' resolution must contain the nominal amount of each new share<sup>72</sup> and – in the case of a capital increase with contributions in kind – the object and the nominal value of the shares to be

<sup>62</sup> The articles of association may provide that a simple majority suffices, AktG para. 182, sec. 1, sentence 1, 2.

<sup>63</sup> AktG para. 23, sec. 3, no. 3.

<sup>64</sup> AktG para. 188, sec. 2 in conjunction with para. 36, sec. 2, para. 36a.

<sup>65</sup> AktG para. 189.

<sup>66</sup> AktG paras. 183, 183a.

<sup>67</sup> AktG para. 183, sec. 1, sentence 1.

<sup>68</sup> AktG para. 183, sec. 1, sentence 2.

<sup>69</sup> AktG para. 183, sec. 3 in conjunction with para. 33, sec. 3-5. An exception is codified in AktG para. 183a, which applies if the requirements of AktG para. 33a are fulfilled.

<sup>70</sup> AktG para. 183, sec. 2.

<sup>71</sup> GmbHG para. 55, sec. 1, para. 53, sec. 2.

<sup>72</sup> GmbHG para. 55, sec. 4, para. 5, sec. 3, 4.

issued for the contribution in kind.<sup>73</sup> The original shareholders are not obliged to sign up for the new shares; this is explicitly stated in the GmbHG.<sup>74</sup> If there is a difference between the share capital and the nominal value of the new shares, a share premium (*agio*) needs to be set determined in the shareholders' resolution to increase the capital.

Unlike in an AG, there is no explicit subscription right of the existing shareholders in a GmbH; but the existing shareholders or third parties who have declared that they are also willing to participate in the subscription have a right to equal treatment.<sup>75</sup> Due to the fact that the existing shareholders have a legitimate interest that their shareholding ratio or their share value is not diluted, the courts<sup>76</sup> and an emerging view in the scholarly literature<sup>77</sup> hold that they have a right to subscribe (even without a registration resolution).

In addition to the resolution setting forth the capital increase, a capital increase will not become effective unless there is also a notarized or notarially certified individual declaration for each new share or shares – a signed declaration of subscription to the new share by the person entitled to the new share.<sup>78</sup> After that, the contributions have to be made. As regards the implementation of the capital increase, the law generally refers to the formation rules.<sup>79</sup> Once the capital increase has been registered in the commercial register, it becomes effective, and the new shares are created.

### 3. Agio

#### a) Shareholders' Agio

The nominal value of the shares does regularly not correspond with their “true” (market) value. The subscribers will therefore be required to pay a share premium to the company on top of the nominal value. In the GmbH an *agio* is not counted formally as a contribution, because here the shareholder's contribution is equal to the nominal value of the share.<sup>80</sup> The strict rules on payment

<sup>73</sup> GmbHG para. 56, sec. 1, sentence 1.

<sup>74</sup> GmbHG para. 53, sec. 3. According to that provision, an increase of the obligations which the shareholders are bound to perform in accordance with the articles of association may only be passed with the consent of all the involved shareholders.

<sup>75</sup> GmbHG para. 55, sec. 2.

<sup>76</sup> BGH, GmbHR 2005, p. 925 (926) = NZG 2005, p. 551 (552).

<sup>77</sup> Bayer, in: Lutter/Hommelhoff, GmbHG, 19th ed. 2016, para. 55, rec. 19 et seq.; Priester, in: Scholz, GmbHG, 11th ed. 2015, para. 55, rec. 42 et seq.; Fastrich/Zöllner, in: Baumbach/Hueck, GmbHG, 21th ed. 2017, para. 55, rec. 20, providing further citations which suggest the application of AktG para. 186 by analogy. For a different view see Ulmer, in: Ulmer/Habersack/Lobbe (eds.), GmbHG, Großkommentar, 2nd ed. 2016, para. 55, rec. 45 et seq. providing further citations, and at rec. 51 et seq. where he arrives at the almost same conclusion but by applying the principles of non-discrimination and proportionality.

<sup>78</sup> GmbHG para. 55, sec. 1.

<sup>79</sup> GmbHG para. 56, sec. 2, para. 57, sec. 2, 4, para. 57a.

<sup>80</sup> GmbHG para. 14, sentence 2.

of share capital (*Kapitalaufbringung*) and capital maintenance (*Vermögensbindung*)<sup>81</sup> are not applicable to a shareholder's *agio*; different rules for payment and utilization can be agreed upon. In the *AG*, the *agio* has to be paid up fully and is considered to be part of the contribution in its legal sense. As this can prove to be impractical the "contractual *agio*" (cf. below) has been developed.

b) *Contractual Agio*

Due to the rather strict rules how to use the shareholder *agio* in the *AG* it is also possible to agree on a contractual *agio*. In such a case, the obligation to pay does not result from the individual declaration to subscribe,<sup>82</sup> but from a separate contractual agreement with the company. In general, it only applies between the parties – the shareholder and the company – and does not transfer with the shares to a buyer of the shares. In the case of a contractual *agio*, the subscriber of the shares agrees to provide additional consideration in excess of his obligation to pay a contribution. A contractual *agio* is not considered to be an illegal circumvention of the company law, even though, according to company law, a shareholder's obligation to make a contribution in an *AG* is limited to the issue price of shares and no other obligations can be imposed on the shareholder.<sup>83</sup>

#### IV. Shareholder Loans in Corporate Law

##### 1. Overview

In addition to contributing equity, shareholders in a company with limited liability – this applies to a *GmbH*, *AG*, *S.E.*, *KGaA*, *GmbH & Co. KG* (limited partnership with the sole general partner being a limited liability company), *S.E. & Co.* – may also decide to extend a loan to the company to finance its operations, a so-called shareholder loan. Such loans are frequent, but it should be mentioned that there is no (fiduciary) duty for the shareholder to provide such additional finance to the company, even not in times of financial distress. The general rules on contracts apply between the parties, supplemented by sections of the German Civil Code. The company can elect to provide collateral in exchange for the shareholder loan.<sup>84</sup> The claim for repayment cannot – like is the case with contributions – be offset against losses; even if the company is in financial distress, the

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<sup>81</sup> See for example, *GmbHG* para. 7, sec. 2; paras. 3, 9, 19-24 (payment of share capital) and para. 30 (asset commitment).

<sup>82</sup> *AktG* paras. 2, 29, para. 185 (subscription of shares); *GmbHG* para. 3, sec. 1, no. 4, para. 55, sec. 1 (subscription of shares).

<sup>83</sup> *AktG* para. 54, sec. 1, para. 55.

<sup>84</sup> *Insolvency Code (InsO)* para. 135, sec. 1, no. 1.

shareholder loan can be terminated and has to be repaid if the parties have not decided differently.<sup>85</sup> The rules on capital commitment for share capital do not apply to shareholder loans.<sup>86</sup> This is the reason why the company – even in the case of a deficit balance – may not assert the prohibition to pay out the share capital<sup>87</sup> when it pays interest on the principal of the loan or when the loan is called in.<sup>88</sup> Payments to and other benefits for the shareholders are only prohibited if they would clearly cause the company to become insolvent.<sup>89</sup> This includes claims for repayment from a shareholder loan.<sup>90</sup>

## 2. Special Rules

There are however, special rules for limited liability companies with regard to insolvency proceedings.

If the company becomes *insolvent*, shareholder loans will be subordinated, i. e. they will only be repaid once all claims from insolvency creditors are satisfied,<sup>91</sup> irrespective of whether the shareholder loan was extended to the company before or during its financial crisis. This rule only applies to loans given to limited liability companies, which are those that neither have a natural person as general partner (*GmbH, AG, S.E.*) nor a company in which a general partner is a natural person as general partner (*KGaA, GmbH & Co.KG, S.E. & Co.*).<sup>92</sup> The same applies with regard to claims arising from legal transactions which – from an economic perspective – correspond to a shareholder loan.<sup>93</sup> However, so-called restructuring loans (*Sanierungsdarlehen*), where a creditor acquires shares during the crisis of the company for purposes of restructuring, and loans extended by non-managing shareholders of a company who hold minority interests are not subordinated.<sup>94</sup>

<sup>85</sup> This legal situation has been introduced by the Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG), 23. October 2008, BGBl. I at p. 2026. See also *Kleindiek*, in: Lutter/Hommelhoff (eds.), *GmbHG*, 19th ed. 2016, annex to para. 64, sec. 93 et seq. A right to terminate the shareholder loan only exist if there is or if there threatens to be a substantial deterioration in the financial circumstances of the borrower, Civil Code (BGB) para. 490, sec. 1. The right to termination can be abrogated in the contract, see *Weidenkaff*, in: Palandt, *Bürgerliches Gesetzbuch*, 76th ed. 2017, para. 490, rec. 1.

<sup>86</sup> For information on capital commitment see above at II. 4.

<sup>87</sup> *GmbHG* para. 30, sec. 1, sentence 1; *AktG* para. 57, sec. 1. A deficit balance exists when the amount of company's net assets falls short of the amount of its registered/original share capital, but when the net assets are not completely depleted.

<sup>88</sup> This is explicitly stated in *GmbHG* para. 30, sec. 1, sentence 3 (for the *GmbH*) and in *AktG* para. 57, sec. 1, sentence 4 (for the *AG*).

<sup>89</sup> *GmbHG* para. 64, sentence 3; *AktG* para. 92, sec. 2, sentence 3.

<sup>90</sup> On the applicability for shareholder loans see *Reiner/Buck*, in: Ekkenga/Schröer (eds.), *Handbuch der AG-Finanzierung*, 2014, p. 1328 et seq.

<sup>91</sup> *InsO* para. 39, sec. 1, no. 5 in conjunction with sec. 3.

<sup>92</sup> *InsO* para. 39, sec. 4, sentence 1.

<sup>93</sup> For example rent or lease of an object belonging to the shareholder to the company, silent partnerships resembling loans, atypical silent partnerships, supplier credits, deferred payment of the managing director's salary, see on that topic and for further information see *Baums*, *Rechts der Unternehmensfinanzierung*, 2017, para. 31, rec. 58.

<sup>94</sup> *InsO* para. 39, sec. 4, sentence 2, para. 39, sec. 5. Subordination of the claim can be agreed upon between the creditor and the debtor, see *InsO* para. 39, sec. 2.

If *insolvency proceedings* take place, the special contestation rule for repayments before the proceedings has to be observed.<sup>95</sup> According to that rule, the repayment of the loan can be contested by the company if insolvency proceedings are opened before one year has lapsed after the repayment took place. The same applies to collateral for a loan if it had been granted during the last ten years prior to the opening of insolvency proceedings. “Contestation” means that the funds must be returned to the insolvency estate (*Insolvenzmasse*).<sup>96</sup> In the event of enforcement proceedings against the property of the company, similar rules found in the German Contestation Act (*Anfechtungsgesetz*) apply.<sup>97</sup>

## V. Restructuring I: Voluntary Contributions

### 1. No Obligation to Replenish the Coffers of the Company

The counterpart of the principle of actual payment of share capital is the rule on capital maintenance. In a *GmbH*, the assets needed to maintain the share capital must not be paid out to the shareholders; the same applies in an *AG*.<sup>98</sup> Shareholders are required to repay the company any benefits they have received in violation of that rule.<sup>99</sup> In an *AG*, the principle of strict capital commitment is further strengthened by the fact that the corporation is prohibited to promise shareholders interest payments and that the distribution of profits to the shareholders is limited to disburseable profits of the *AG*. Unlike in a *GmbH*, the prohibition to distribute profits is not linked to the assets of the company necessary to maintain the share capital, but applies to all assets of the *AG*. This is due to the fact that the *AG* has a different corporate structure. The goal is not only to protect the creditors of the company, but also the interests of the (minority) shareholders against an erosion of the company’s assets by the (majority) shareholders.

It should be noted that the principle of capital maintenance does not include an obligation of the shareholders to keep the equity capital shown in the balance sheet permanently at the level of the original share capital. There is no obligation to make additional contributions in corporate law. In an *AG* this can be inferred from the fact that the obligation of the shareholders to make a contribution is limited to the issue price of the shares (including an agio) for which he has signed up; in addition there is a prohibition to distribute assets of the company other than profits.<sup>100</sup> In a *GmbH* there is generally freedom of contract with regard to the articles of association as long as the

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<sup>95</sup> InsO para. 135.

<sup>96</sup> InsO para. 143, sec. 1.

<sup>97</sup> Contestation Act (AnfG) paras. 6, 6a.

<sup>98</sup> GmbHG para. 30, sec. 1; AktG para. 57, sec. 1.

<sup>99</sup> GmbHG para. 31, sec. 1; AktG para. 62, sec. 1, sentence 1.

<sup>100</sup> AktG para. 54, sec. 1, para. 57, sec. 3.

stated capital remains untouched.<sup>101</sup> But it is still unlikely that an unlimited obligation to make additional contributions will be agreed upon by the shareholders; this would run contrary to the principle of limited liability. Nonetheless, there is the option that the shareholder and the company enter into an individual agreement to provide collateral or additional finance.

## 2. Voluntary Bridge Support and Waivers

If a company is in financial distress, the question arises whether the company should be restructured and continue its operations or whether the remaining assets or the enterprise as a whole should be sold and the proceeds used to satisfy the creditors and the company liquidated. If the current company continues its operations, it will be necessary to determine how the financial crisis can be resolved and the earning capacity restored. *Crisis* means that there is a need for restructuring of the company, and that a diligent and conscientious managing director will take necessary precautions to avoid an exacerbation of the profit, liquidity, and financial situation of the company to prevent insolvency.<sup>102</sup>

If autonomous operational including financial measures of the company do not succeed in managing the crisis, then the company has to be restructured with the help of investors and creditors. The restructuring can be achieved in several different ways. Insolvency law offers two possibilities. The restructuring can either be achieved through an “insolvency plan” approved by the insolvency court<sup>103</sup> or through “selfadministration” by the insolvency debtor.<sup>104</sup> This requires that the company is actually insolvent (*Insolvenzreife*) and that insolvency proceedings have been opened.<sup>105</sup> If the company is supposed to be helped prior to that, there is the possibility to cope with the crisis outside of formal legal proceedings in court through an out-of-court restructuring (*freie Sanierung*).<sup>106</sup>

In order to successfully restructure the operations of the company, it is often necessary to provide the company with new equity or loans. Most of the time, this can only be achieved if the current investors contribute funds for the restructuring or if they waive certain rights or claims that exist between them and the company in favor of new investors. Problems arise when individual investors

<sup>101</sup> GmbHG para. 3, sec. 2, paras. 26, 27.

<sup>102</sup> AktG para. 93, sec. 1, sentence 1; GmbHG para. 43, sec. 1.

<sup>103</sup> InsO paras. 2, 3, 217 et seq.

<sup>104</sup> InsO paras. 270 et seq.

<sup>105</sup> Actual insolvency exists when one of the insolvency criteria (illiquidity; imminent illiquidity; or overindebtedness) is fulfilled; see InsO paras. 16 et seq.

<sup>106</sup> For a comprehensive description of the initiative, competence, design, and the procedure of a restructuring according to insolvency law and outside of court proceedings see *Baums*, *Recht der Unternehmensfinanzierung*, 2017, paras. 57, 58, 59.

object to the restructuring. The following section will examine the resulting collective difficulties to act alongside the restructuring measures.

a) *Voluntary Financial Support*

Voluntary bridge support can be realized with the help of current or new investors. Some possibilities are subordination agreements, additional payments into the equity capital, standstill agreements, bridge loans, and collateral provided by the shareholders.

One possibility for voluntary financial support is making additional payments into the equity capital. This increases the equity but not the amount of the share capital. Such payments can either be made into the capital reserves of the company or recognized as a “lost financial aid” (*verlorener Zuschuss*).<sup>107</sup> This approach avoids the cumbersome procedure of a capital increase. The injection of additional funds into the equity capital can also be limited.

A bridge loan could be another choice. The bank that grants the loan usually receives real property as collateral, or the existing creditor banks extend a syndicated loan as liquidity support. Such bridge loans are generally limited until the final restructuring decision is made. Such bridge loans can also be made by shareholders. Of course then the aforementioned rules on shareholder loans (subordination when the company becomes insolvent)<sup>108</sup> will apply.

Typical financial support measures by shareholders are the granting of collateral for the creditors in the form of a declaration of suretyship<sup>109</sup> or an intra-corporate comfort letter (*Patronatserklärung*)<sup>110</sup> which is given to the company. As opposed to a declaration of suretyship, an intra-corporate comfort letter is not loan collateral in the classical sense of the term, but rather leverage or equity payment to which the creditors have no claim; the comfort letter can – depending on the terms of the agreement – be terminated at any time.

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<sup>107</sup> For more information see *Baums*, *Recht der Unternehmensfinanzierung*, 2017, para. 11, rec. 14 et seq. and para. 11, rec. 20 et seq.

<sup>108</sup> Cf. supra IV. 2.

<sup>109</sup> A declaration of suretyship is a unilateral contract in which the surety commits him- or herself with regard to the creditor of a third party (in this case the company) to fulfill the obligation of the third party (the company). The declaration of suretyship is codified in the BGB paras 765 et seq.

<sup>110</sup> The comfort letter (*Patronatserklärung*) is a non-codified declaration governed by the laws of obligations. Comfort letters come in two forms: The shareholder may guarantee the creditor that he will provide the company with enough equity and financing to fulfill its obligations resulting from the loan agreement. The shareholder may also refine himself to an intracorporate comfort letter (cf. the text).

b) *No Obstruction to Capital Increases*

When the company is supposed to receive new equity during the restructuring phase, the amount of the registered share capital is decreased initially. The difference between this “simplified capital decrease”<sup>111</sup> and an “ordinary capital decrease”<sup>112</sup> is that it is done not to pay out funds to the shareholders but to implement a mere “technical restructuring” (*Buchsanierung*), because the decrease of the amount of share capital eliminates the losses reported in the balance sheet<sup>113</sup> or because the capital decrease was necessary prior to an injection of equity. This is done for the following reason: if the amount of the company’s net assets falls short of the registered share capital – meaning in the case of a deficit balance – the situation can only be remedied by decreasing the amount of share capital down to the amount of the company’s net assets as shown in the balance sheet – if necessary down to zero – prior to performing a capital increase. Due to the fact that the amount of share capital acts as a reference for the nominal value of the shares, the capital decrease also reduces the nominal value of the current shares.<sup>114</sup> New capital investors or investors providing a contribution in kind will most likely insist on an adjustment of the nominal value of the shares anyway. A co-shareholder who does not want to go along with such a plan can be restricted from exercising his voting rights by stipulating that he cannot use his share in violation of his duty to act in good faith against the capital decrease resolution (so-called obstruction prohibition).<sup>115</sup>

An exclusion of subscription rights might also be necessary in a restructuring situation. This could be the case during a simplified capital decrease in an *AG* when the banks are not ready to subscribe to and place the new shares which result from the ensuing capital increase unless the *AG* agrees to a purchase guarantee. If the existing shareholders will not subscribe to the new shares in full, but there is an outside investor willing to do so, the *AG* may pass a resolution with a three-quarters majority of the share capital represented which excludes the subscription rights of the existing shareholders.<sup>116</sup> Because such an action results in a (substantial) reduction of the shares of the existing shareholders, a resolution to exclude subscription rights will only be valid if it is suitable,

<sup>111</sup> BGHZ 187, 69 et seq. “STAR 21”. For the process of performing a simplified capital decrease see *Baums*, *Recht der Unternehmensfinanzierung*, 2017, para. 23, rec. 19 et seq. (for the *AG*) and para. 23, rec. 60 et seq. (for the *GmbH*).

<sup>112</sup> AktG paras. 222 et seq., GmbHG para. 58. For the reasons to perform an ordinary capital decrease see *Baums*, *Recht der Unternehmensfinanzierung*, 2017, para. 23, rec. 5 et seq. (for the *AG*) and para. 23, rec. 54 et seq. (for the *GmbH*).

<sup>113</sup> For more details on a “technical restructuring” (*Buchsanierung*) see *Baums*, *Recht der Unternehmensfinanzierung*, 2017, para. 23, rec. 20 et seq. (for the *AG*) and para. 23, rec. 60 et seq. (for the *GmbH*).

<sup>114</sup> GmbHG para. 58a, sec. 3; AktG para. 229, sec. 3 in conjunction with para. 222, sec. 4, sentence 1. For no-par value shares, the number of shares and the current value of the shares stay the same even after a capital decrease.

<sup>115</sup> See the fundamental “Girmes” decision of the Federal Court of Justice, BGHZ 129, 136 et seq. See also *Andreas Cahn’s* contribution for a discussion on the “Girmes” decision in: Birkmose (ed.), *Shareholders’ Duties*, 2017, p. 347 et. seq.

<sup>116</sup> AktG para. 186, sec. 3, sentence 2.

necessary, and proportionate to achieve an objective which is in the best interests of the company.<sup>117</sup>

## VI. Restructuring II: Obligation to Finance the Company?

### 1. General Rule

Voluntary financial support and waivers need to be distinguished from the separate question of whether there is an *obligation* of the shareholders to finance the company in financial distress. As already mentioned, in general, there is no obligation of shareholders in business corporations to inject additional equity (or debt) funds in excess of their contributions in order to keep the equity capital shown in the balance sheet permanently at the level of the original share capital; there is no obligation to replenish the coffers of the company.<sup>118</sup> However, the articles of association in a *GmbH* may provide for an anticipated consent of the shareholders to increase the required contribution with a simple majority of the share capital if needed. This context raises the question of whether the fiduciary duty of the shareholders to act in good faith obligates them to agree to a capital increase if it is indispensable to restructure the company. This gives rise to the additional question whether and under which circumstances a shareholder can be expelled from the company if he does not agree to the increase of his contribution. The aforementioned points will be discussed in more detail below.

### 2. Consensus with Regard to an Increase of the Obligation to Pay Contribution

The question of whether the articles of association may provide that the shareholders can pass a resolution to call in additional contributions has to be answered separately for an *AG* and the *GmbH*.

In the case of a *GmbH*, the law provides that the articles of association may determine that the shareholders can agree to call in additional payments (“additional contributions”; *Nachschüsse*) in excess of the nominal value of their shares.<sup>119</sup> Such additional contributions have to be paid in proportion to the shares; they do not increase the share capital but will be entered as capital reserves.<sup>120</sup> The obligation to pay an additional contribution can be limited to a specific amount in the articles of association.<sup>121</sup> This will usually be the case as an unlimited obligation to pay

<sup>117</sup> On the substantive legal requirements for such a resolution to exclude subscription rights with an illustrative example see *Baums*, *Recht der Unternehmensfinanzierung*, 2017, para. 59, rec. 9 et seq.

<sup>118</sup> See above at V. 1. Exceptions are obligations to inject additional funds which are codified in the articles of association and obligations resulting from restructuring agreements.

<sup>119</sup> *GmbHG* para. 26.

<sup>120</sup> *GmbHG* para. 42, sec. 2. For information on capital reserves in a *GmbH* see *Baums*, *Recht der Unternehmensfinanzierung*, 2017, para. 21, rec. 47 et seq.

<sup>121</sup> *GmbHG* para. 28.

additional contributions contravenes the principle of limited liability. It has to be noted that the authorization in the articles of association to agree on additional contributions may be revoked at any time without the consent of the creditors of the company. On the other hand, it is also possible to amend the articles of association with the consent of all shareholders so that they will be obligated to contribute additional funds in a restructuring situation due to a majority resolution (implementing resolution). If the articles of association do not contain such a provision, an amendment with such an authorization or a provision that contains a payment obligation will only be possible if each affected shareholder agrees.<sup>122</sup>

For an *AG*, company law does not allow a statutory obligation to pay additional contribution.<sup>123</sup> Additional payments in excess of the initial contribution cannot be agreed as statutory obligations upon even with the consent of all shareholders. Of course, each shareholder can agree to additional payments by individual contracts with the company.

### 3. Obligation to Consent (Blockade Prohibition)

Nevertheless, the question remains whether the fiduciary duty of the shareholder to act in good faith obligates him to agree to a capital increase and to subscribe to new shares in proportion to his existing shares. On this topic, it has to be said that an obligation to agree to a capital increase and to participate with a contribution does not exist in an *AG*. This is even the case if the participation of all shareholders would have resolved the crisis of the company. Even though the shareholder can be restricted from exercising his voting rights to the detriment of his co-shareholders in violation of his duty to act in good faith to prevent shareholder conclusions for the purpose of restructuring the company (“obstruction prohibition”), this does not mean that his fiduciary duty to act in good faith also obligates him to make additional payments in excess of his contribution.<sup>124</sup> Such an exception would violate mandatory provisions of company law<sup>125</sup> and would contravene the principle of limited liability. The assumption of a “fiduciary duty” of the shareholder does not lead to a differing result.

In a *GmbH*, the question also arises whether the fiduciary duty of the shareholder to act in good faith obligates him to agree to an amendment of the articles of association or directly to a capital increase or to an obligation to pay additional contributions if it is necessary to restructure the

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<sup>122</sup> GmbHG para. 53, sec. 3.

<sup>123</sup> AktG paras. 54, 55, 23, sec. 5.

<sup>124</sup> On the obstruction prohibition, see supra n. 115. For citations for the “duty to vote in favor” (*positive Stimmpflicht*) in an *AG* see *Schuster*, Zur Stellung der Anteilseigner in der Sanierung, ZGR 2010, p. 325 et seq. (333, fn. 38, 39).

<sup>125</sup> AktG para. 54, sec. 1; see also AktG para. 180, sec. 1.

company and if its liquidation cannot be otherwise averted. The answer though cannot be different, because the shareholders of the *GmbH* may – as mentioned above – agree in the articles of association that they can make a decision to call in additional payments in excess of the nominal values of the shares. If an obligation to make additional contributions is not provided in the articles of association, every amendment of the articles of association to introduce such an obligation will require the consent of all the involved shareholders.<sup>126</sup> This legal provision would be circumvented if the fiduciary duty to act in good faith required the shareholder to provide additional consideration to the company.<sup>127</sup> Nonetheless, the shareholder might be obligated not to block a capital increase which does not obligate him personally to make additional payments, even though it reduces his share (“obstruction prohibition”). The principles developed by the Federal Court of Justice in its “Girmes” decision for an *AG* can be applied to a *GmbH*.<sup>128</sup>

#### 4. “Restructure or Leave”

Lastly, the question arises whether a shareholder can be expelled from the company if he refuses to make an additional contribution which is needed to restructure the company, and, on the other hand, a co-shareholder or a third party is only willing to finance the capital increase if the shares of the unwilling shareholder are revoked or given to him instead (in return for remuneration).

It has to be noted that in an *AG*, a capital decrease affecting all shareholders equally can be agreed upon. If a simplified capital decrease is coupled with a capital increase, the share capital can even be reduced down to zero.<sup>129</sup> This ultimately results in a cancellation of the old shares.<sup>130</sup> If the existing shareholders do not exercise their right to subscribe to the new shares, it will result in their de facto expulsion. This is also the case if a third party willing to restructure the company insists on subscribing to all the new shares, meaning that an exclusion of subscription rights should take place.<sup>131</sup> On the other hand, it is not possible to make the existing shareholders chose to either participate in the capital increase or wait to be expelled from the company. Even though it is possible to provide for a mandatory redemption of shares of individual shareholders in the articles of association, the majority opinion among legal scholars holds that such a redemption cannot be

<sup>126</sup> GmbHG para. 53, sec. 3.

<sup>127</sup> *Kleindiek*, in: Lutter/Hommelhoff (eds.), GmbHG, 19th ed. 2016, para. 43, rec. 36, providing further citations; Lutter, *ibid.*, para. 58a, rec. 4. On the fiduciary duty of the shareholder in a *GmbH* to act in good faith see *Raiser/Veil*, *Recht der Kapitalgesellschaften*, 6th ed. 2015, para. 38, rec. 33 et seq. (providing further citations).

<sup>128</sup> For the “Girmes” decision of the *BGH*, see *supra* n. 115; on the obligation of the shareholder of a *GmbH* not to block decisions which are necessary to keep the company solvent *BGH*, ZIP 2016, p. 1220 et seq.

<sup>129</sup> AktG para. 229, sec. 3 in conjunction with para. 228, sec. 1. See also above at V. 2. b).

<sup>130</sup> BGHZ 119, 305 (319 et seq.); BGHZ 142, 167 (169 et seq.).

<sup>131</sup> The shareholders’ resolutions necessary for that are subject to strict control by the courts, see *Hüffer/Koch*, AktG, 12th ed. 2016, para. 228, rec. 2a.

used as a “sanction” for not agreeing to make additional contributions.<sup>132</sup> The same would be true if the shareholder could be expelled from the company for good cause without a corresponding provision in the articles of association.<sup>133</sup>

In conclusion, individual shareholders unwilling to participate in a capital increase for restructuring purposes can neither be obligated to do so nor can their shares be redeemed or they be forced to surrender their shares to the company or a third party. However, they have to accept that their – from an economic perspective – worthless shares are eliminated via a capital decrease. If they do not want to participate in the subsequent capital increase, they are also not allowed to block the capital increase in violation of their fiduciary duty of good faith.<sup>134</sup>

For a *GmbH*, the aforementioned principles apply by analogy. A difference to an *AG* is the fact that the articles of association may provide that the shares can be redeemed if the shareholder is unwilling to participate in a capital increase which is considered necessary by a majority or if he is unwilling to make additional contributions.<sup>135</sup> In addition, a shareholder can be expelled for cause without a corresponding provision in the articles of association.<sup>136</sup> Such good cause must exist with regard to the person or to acts of the shareholder which make it unbearable for the other shareholders to continue the corporate relationship as shareholders of the company with the shareholder in question. Whether good cause exists when the shareholder unwilling to restructure remains part of the company and thereby renders a continuation of the company impossible shall not be answered at this point.

## 5. Insolvency Plan

If a company is restructured with the help of an insolvency plan within formal court-based insolvency proceedings, the same considerations as discussed for restructuring or expulsion will apply. Using an insolvency plan enables the parties to waive certain mandatory statutory provisions and find a solution which focuses on the continuation of the company as a restructured business.<sup>137</sup>

An insolvency plan may be used when the restructuring is accomplished with the help of an

<sup>132</sup> *Lutter*, in: Zöllner/Noack (eds.), *Kölner Kommentar zum Aktiengesetz*, 2th ed. 1993, para. 237, rec. 39; *Henze*, in: Hopt/Wiedemann (eds.), *Aktiengesetz, Großkommentar*, 4th ed. 2008, para. 54, rec. 48; *Hüffer/Koch*, *AktG*, 12th ed. 2016, para. 54, rec. 9; para. 237, rec. 13 (providing further citations).

<sup>133</sup> See *Grunewald*, *Der Ausschluß aus Gesellschaft und Verein*, 1987, p. 50 et seq., p. 55; see also *Lutter*, in: Zöllner/Noack (eds.), *Kölner Kommentar zum Aktiengesetz*, 2th ed. 1993, para. 237, rec. 118 et seq. (providing further citations).

<sup>134</sup> See already above at VI. 3.

<sup>135</sup> For more information see *Ulmer*, in: *Ulmer/Habersack/Lobbe* (eds.), *GmbHG, Großkommentar*, 2nd ed. 2016, para. 34, rec. 40 et seq.

<sup>136</sup> Majority opinion among legal scholars; see for example *Ulmer*, in: *Ulmer/Habersack/Lobbe* (eds.), *GmbHG, Großkommentar*, 2nd ed. 2016, annex to para. 34, rec. 9 et seq.

<sup>137</sup> The insolvency plan is codified in *InsO* paras. 217 et seq.

insolvency administrator or when the self-administration procedure is chosen. It consists of a part describing and analyzing the past and current state of the company as well as a part laying out a plan for its future. In the present context, it is worth exploring whether an obligation to finance the company may be included in the insolvency plan without the approval of the existing shareholders, if the articles of association do not contain such a provision. The question that arises from this scenario is whether the insolvency plan can provide for the expulsion of a shareholder that refuses to contribute additional funds.

As already mentioned, the shareholders in an AG cannot be compelled to make additional payments in excess of their contribution. Shareholders can also not be forced to choose between participating in the capital increase or – if they refuse – accepting an expulsion from the company. Such an insolvency plan would violate mandatory provisions of insolvency law.<sup>138</sup> However, the shareholders might have to accept that the capital decrease to zero will reduce the value of their economically worthless shares and that they are not allowed to block a subsequent capital increase in violation of their fiduciary duty of good faith, if they do not want to participate in it.<sup>139</sup>

Similar rules apply with regard to a *GmbH*. The shareholder in a *GmbH* is also not obligated to make additional payments in excess of his contribution as long as it is not mandated by the articles of association. But he also might have to accept that his economically worthless shares are de facto eliminated through a capital decrease to zero and that a capital increase decision taken in connection with it may not be blocked by him in violation of his fiduciary duty to act in good faith.<sup>140</sup> If the shares are worthless, the insolvency plan may obligate the shareholders to make additional contributions or to subscribe to new shares with corresponding obligations to make contributions and – if individual shareholders refuse to agree to such an arrangement – provide for their expulsion.<sup>141</sup>

## VII. Conclusion

The chapter has shown that German company law provides a plethora of financial obligations for the shareholder while also ensuring that his decision to limit his financial engagement is respected. For one thing, there are obligations with regard to the formation of a *GmbH* or an AG. The shareholders are obligated to make a contribution in either cash or kind. The principle of “actual payment of share capital” (*reale Kapitalaufbringung*) applies. During the formation phase, the

<sup>138</sup> InsO para. 225a, sec. 3.

<sup>139</sup> See already above at VI. 3. See also InsO para. 225a, sec. 2, sentence 3, which explicitly states that the insolvency plan may the plan may provide for a decrease in capital.

<sup>140</sup> See above at VI. 3.

<sup>141</sup> *Baums*, *Recht der Unternehmensfinanzierung*, 2017, para. 62, rec. 28.

shareholders are liable for obligations entered into prior to formation of the company and to cover losses which resulted from the commencement of business activities (*Vorbelastungs- und Verlustdeckungshaftung*). A capital increase in an *AG* as well as in a *GmbH* can be achieved with either cash contributions or with contributions in kind – or with mixed contributions. If the share capital does not correspond to the value of the new shares, the subscriber will have to pay a so-called agio (share premium) to the company. This obligation can also be based on an individual (civil law) contract which gives more flexibility.

In addition to the obligation to make a contribution, other (voluntary) types of financing to provide the company with capital are possible, for example the provision of debt capital in the form of shareholder loans. In such a case, it is necessary to differentiate between a shareholder loan granted outside of, during and in the vicinity of insolvency proceedings. Furthermore, there are voluntary bridge support and waivers to restructure the company. The principle of capital maintenance corresponds to the principle of actual paying up the share capital. It has to be noted though that there is no obligation to make additional contributions.

In general, there is no obligation to inject additional funds when the company is in financial distress. Nonetheless, the articles of association in a *GmbH* may provide for an increase of the obligation to pay a contribution; but not in an *AG*. Even though an obligation to agree to a capital increase during a restructuring cannot be imposed on a shareholder, he must not use his voting rights to the detriment of other co-shareholders in violation of his fiduciary duty to act in good faith. If a shareholder is unwilling to participate in a restructuring, he cannot be forced to do so, but he has to accept that his shares will become economically worthless and that this will result in his expulsion from the company.

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A large, stylized graphic of the letters 'ILF' in a bold, serif font. The letters are set against a background of a complex, overlapping grid of blue lines that form a series of concentric, curved patterns, creating a sense of depth and movement. The graphic is positioned on the left side of the page.

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