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CAPITAL MAINTENANCE IN GERMAN COMPANY LAW

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A. The Function of Capital Maintenance in a Legal Capital Regime

Capital maintenance rules are part of a legal capital regime that consists of rules on raising capital and rules on maintaining it. The function of these rules is the protection of the corporation's creditors. This is evidenced by the fact that in public as well as private companies the provisions on legal capital are not open to disapplication or variation even with unanimous shareholder consent. Thus, providing the company with a minimum of funding and ensuring equal treatment of shareholders are mere reflexes of creditor protection or, at best, ancillary purposes of legal capital.

Legal capital is part of a corporation's equity. The key feature of equity is that it ranks behind the claims of other stakeholders in the distribution of a corporation's assets. Consequently, equity will also be the first part of a corporation's funds to be depleted by losses. Capital maintenance rules seek to enforce this order of priority of different groups of stakeholders by restricting distributions to shareholders. Such restrictions are not unique to legal systems that have adopted a legal capital regime. A prominent example of a statute that has eliminated mandatory legal capital is the Delaware General Corporation Law. § 154 DCGL leaves it up to the directors to decide whether any part of the consideration received by the corporation for its shares shall be attributed to capital. Thus, a Delaware corporation need not have any stated capital. This has significant impact on the funds available for distribution to shareholders. Pursuant to § 170 (a) DGCL dividends may only be paid out of surplus or, in the absence of surplus, out of net profits of the current or the preceding fiscal year. § 154 DGCL defines surplus as the excess of a corporation's net assets over the amount of its capital, and net assets as the amount by which total assets exceed total liabilities. A corporation without stated capital may, therefore, distribute all of its net assets to its shareholders and continue business without any equity on its balance sheet. This highlights the difference between the different approaches to creditor protection in Germany and the U.S. Both legal systems acknowledge the priority of creditors over shareholders in corporate distributions. However, German law

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seeks to give creditors additional comfort by requiring companies to raise and maintain additional layers of assets above and beyond those corresponding to the company's liabilities that may not be depleted by way of distributions to shareholders. While private companies must merely raise and maintain their stated capital, public companies are required to raise and maintain additional equity accounts unavailable for distributions to shareholders such as the share premium account[1] and the legal reserve.[2]

In recent years a number of objections have been raised against this concept of creditor protection. Critics argue that contractual arrangements are a more efficient means for protecting the interests of creditors.[3] Capital maintenance does not prevent creditors from negotiating for more stringent protection of their claims such as collateral or financial covenants. It does, however, provide a minimum standard of protection for the benefit of creditors who lack the commercial experience or the bargaining power or who, like tort victims, are simply unable to negotiate for contractual safeguards. Capital maintenance ensures that their protection against excessive distributions does not depend on large creditors who are free to waive covenants that, in effect, benefit all creditors in exchange for individual arrangements that work exclusively in their favour.

Another objection is that the capital maintenance rules are likely to deceive creditors because they restrict only distributions to shareholders but not the use of funds in other ways, such as payment of the company's operating expenses.[4] Thus, the actual funds contributed towards the company's capital are depleted over time while capital will remain unchanged on the company's financial statements.[5] "Capital" is an accounting item on the equity side of the balance sheet. The concern that creditors might confuse capital accounts with the company's assets can hardly be reconciled with the argument that legal capital should be eliminated because creditors are sufficiently sophisticated to negotiate for more efficient contractual protection. The further argument that restricting distributions to shareholders cannot save a company from a depletion of its assets in the course of business and from eventual bankruptcy[6] is misguided because it assumes a policy purpose that capital maintenance cannot, and in fact does not, seek to, achieve. Capital maintenance is not concerned with

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[1] §§ 272 para. 2 No. 1 HGB, 150 para. 3 and 4 AktG.

[2] § 150 AktG.

[3] *Armour*, EBOR 7 (2006), 5, 11 and 18; *Manning*, Legal Capital, 3rd ed. 1990, passim.

[4] See *Ferran*, Company Law and Corporate Finance, 1999, p. 47.

[5] *Enriques/Macey*, Cornell Law Review 86 (2001), 1165, 1186.

[6] For a discussion of this argument see *Mülbert/Birke*, EBOR 3 (2002), 695, 718.

avoiding insolvency because of business failure but, more modestly, with giving effect to the rule that the claims of creditors take priority over those of shareholders. It does so by ensuring that company funds are not distributed to shareholders up to the very limit where the balance sheet value of the company's assets barely suffices to cover its liabilities. In theory even such a level of distributions should not compromise the creditors' interest. In practice, however, the priority of creditors over shareholders becomes an issue mainly, if not exclusively, in the company's bankruptcy where going concern values of the assets are substituted by their usually much lower break-up values, with the consequence of an immediate and generally severe shortfall of asset values.[7] Thus, it can turn out that prior transfers of value to shareholders have, in effect, been made at the expense of creditors. While capital maintenance cannot, and does not seek to, prevent bankruptcy of companies it does restrict transfers of value to shareholders, particularly in times of decline of the company's net value rather than relying on ex post measures such as the avoidance of fraudulent transfers in bankruptcy.

The argument that the statutory one-size-fits-all minimum capital of 50.000 Euro does not substantially enhance creditor protection beyond the standard applicable in jurisdictions without such a minimum capital requirement[8] does not take into account that companies will generally not be able to obtain debt financing unless they raise their equity to a level adequate in relation to the size and risk of their business.[9] Once such additional capital has been raised, it will usually bolster up the equity accounts unavailable for distribution, including the share premium reserve. Thus, capital maintenance does, in fact, impose significant restrictions on distributions to shareholders, thereby giving effect to the priority of creditors over shareholders.

Another concern voiced against capital maintenance is that its reliance on the balance sheet is misplaced because accounts are not an appropriate tool to determine the amount of assets a company can afford to distribute to its shareholders since the relevant accounting rules serve a number of purposes other than creditor protection.[10] The determination of distributable profits does, indeed, heavily depend upon the way company assets and liabilities are processed through accounting principles. The higher the values assigned to assets and the lower the values assigned to liabilities, the greater will be the distributable profit. The annual accounts

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[7] *T. Bezzenberger*, Das Kapital der Aktiengesellschaft, 2005, p. 184 et seq.

[8] *Mülbert*, EBOR 7 (2006), 357, at 386 et seq. with further citations.

[9] See *Eidenmüller/Engert*, AG 50 (2006), 97, 100 et seq.

[10] For a detailed discussion see *Ferran*, ECFR 2006, 179, 200 et seq.; *Rickford*, EBOR 7 (2006), 135, 166 et seq.

on which distributions are based must be prepared according to the German accounting principles under the HGB. These principles are designed to minimize the available profits. The HGB includes a principle of conservative valuation,[11] and a realization principle, and a lowest value principle for assets,[12] which together with the principle of highest value for liabilities, work to decrease assets and increase liabilities in comparison to the results achieved through accounting principles designed to present a true and fair view.[13]

Traditional capital maintenance seeks to ensure that a layer of assets above and beyond those corresponding to the company's liabilities will not be distributed to shareholders. However, the balance sheet value of a company's assets does not necessarily mean that liquidity will be available to pay the company's debt as and when they fall due. German legislation has, therefore, added new solvency restrictions on distributions as part of the 2008 MoMiG[14] reform. Pursuant to § 92 para. 2 sentence 3 AktG and § 64 sentence 3 GmbHG, directors are liable for payments to shareholders that would render the company insolvent, unless a prudent and diligent director was unable to foresee the company's insolvency. Unlike the capital maintenance provisions, these solvency restrictions are not concerned with preserving company assets with sufficient value to cover liabilities and capital but rather with the company's ability to pay its debts as they fall due. The scope of these new provisions has, however, turned out to be rather limited. Pursuant to §§ 15 a, 17 InsO, directors of a company must file for insolvency if the company is unable to pay its debts as they fall due. In order to assess whether the company's solvency will be impaired more than just temporarily,[15] directors must prepare a cash budget which must also account for shareholder claims against the company. If the company is unable to honour these claims as they fall due, the company's insolvency will already be triggered by their entry into the cash budget rather than by their subsequent settlement.[16]

[11] § 252 para. 1 No. 4 HGB.

[12] § 253 para. 1 and para. 5, § 280 para. 1 HGB.

[13] *See* e.g. *Cahn* and *Donald*, Comparative Company Law, 2010, p. 225.

[14] Law for the Modernisation of the Limited Liability Company Act and the Prevention of Abuse – Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) of 23 October 2008.

[15] According to the jurisprudence of the High Federal Court solvency impairments of up to three weeks are deemed to be merely temporary and don't trigger the duty to file for insolvency, provided that the shortfall of liquidity does not exceed 10% of the liabilities that are due during this period, see BGHZ 195, 42, 44 marg. no. 8 with further citations.

[16] See BGHZ 195, 42, 45 et seq. marg. nos. 9 et seq.

B. The Scope of the Capital Maintenance Rules

The capital maintenance provisions are not very specific as to the scope of their application. § 57 para. 1 AktG provides that contributions may not be refunded to shareholders, and pursuant to § 58 para. 5 AktG distributions may be made in kind rather than in cash if the articles so provide. Finally, § 57 para. 3 AktG states that prior to the dissolution of the company only balance sheet profit may be distributed to shareholders. The rules for private companies are even less detailed. § 30 para. 1 GmbHG merely prohibits the distribution of assets that are required to maintain the company's share capital.

These provisions give rise to a number of questions. By definition, only shareholders can be recipients of dividends or the purchase price paid in a share repurchase. It is clear that the capital maintenance rules apply to such distributions (I). But do they also catch transfers of value to shareholders through transactions on other than an arm's length basis, so-called disguised distributions (II.)? If so, do they apply to all such transactions, even if the agents acting on behalf of the company are not aware of the fact that the terms of the transaction are unfavourable or that the receiving party is a shareholder, or only to transactions designed to benefit a shareholder because of his capacity as a member of the company (III).

I. Open Distributions Through Dividends or Share Repurchases

The prohibition of § 57 para. 1 AktG to refund contributions is not limited to a shareholder's actual contribution or its value but covers all company assets other than those expressly permitted to be distributed.[17] Pursuant to § 57 para. 3 AktG only so-called balance sheet profit is available for distributions to shareholders. Calculation of balance sheet profit begins with the annual net profit or annual net loss as determined in the profit and loss statement. Then profit or loss carried forward from the previous year and transfers to and withdrawals from certain reserves are added and subtracted in accordance with §§ 150 and 158 para 1 AktG. Distributions to shareholders of an AG may only be made if and to the extent that the value of the company's assets as recorded on the balance sheet exceeds liabilities, stated capital and mandatory reserves. While other reserves may be used to fund distributions, they may only be appropriated for this purpose on the basis of an audited financial statement and a directors' resolution to make a withdrawal from such reserves. Finally, § 174 AktG requires a formal resolution of the shareholders' meeting on the payment of a dividend, thereby, in effect,

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[17] BGH NZG 2008, 106, 107 marg. no. 16; OLG Hamburg AG 2010, 502, 504 marg. no. 73; *Cahn/v. Spannenberg*, in Spindler/Stilz, Aktiengesetz, 3rd ed. 2015, § 57 marg. no. 14.

ensuring that dividends will be declared only once a year at the annual general meeting. Thus, the Aktiengesetz creates both substantive and procedural checks on distributions.[18] Since share repurchases are an alternative to dividends as a means to transfer value from the company to its shareholders, a similar regime applies to such transactions. Pursuant to § 71 para. 2 sentence 2 AktG, a stock corporation may repurchase shares only if it could create a reserve in the amount of the expenses for such acquisition without reducing the share capital or an undistributable reserve. Thus, only funds that would be available for dividend distributions may be paid as consideration in a share repurchase. Share repurchases are, therefore subject to essentially the same substantive safeguards as dividends as well as to a set of procedural checks set out in detail by § 71 AktG.

In contrast, the distribution regime applicable to private companies is far more relaxed in substance as well as procedure. Provided that a distribution to shareholders does not reduce the balance sheet value of companies' assets below the level required to cover liabilities and stated capital, directors may distribute funds to its shareholders at any time without having to have regard to formalities as prescribed by the AktG for stock corporations. Just as stock corporations, private companies may pay the consideration for a share repurchase only from assets that would be available for distribution to shareholders.[19]

II. Disguised Distributions

1. The Concept of Disguised Distributions

According to established German doctrine the scope of the capital maintenance provisions is not limited to open distributions but encompasses all transfers of value to a shareholder through transactions without adequate consideration for the company, so-called disguised distributions because the transfer of value is concealed by a transaction on other than an arm's length basis.[20] The adequacy of the consideration received by the company is assessed by applying the business judgment of a diligent and prudent director.[21] In the straightforward case of the purchase of an asset from a shareholder, a diligent and prudent director would

[18] *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 10; *Cahn* and *Donald* (note 13), p. 223.

[19] *See* § 33 para. 2 GmbHG.

[20] *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 14; *Drygala*, in Kölner Kommentar zum Aktiengesetz, 3rd ed. 2010, § 57 marg. nos. 3 et seq., both with further citations.

[21] OLG Köln AG 2009, 584, 587; OLG Koblenz AG 2007, 408, 409; *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 19.

usually not pay more than the market price of the asset.[22] Similarly, a diligent and prudent director would not sell a company asset for less than its market price unless it were commercially advisable to grant the shareholder a discount.[23] If a market price comparison is not feasible because of the specific, individual features of the asset, management has wider discretion with regard to the purchase or sales price. The transaction with a shareholder will not be deemed to violate the capital maintenance rules as long as its terms are not unreasonable.[24] Generally accepted methods of valuation can provide guidance for the assessment of whether a prudent and diligent director exercising due care would have agreed to the terms of the transaction.[25]

2. Book Values, Market Values and Business Interests of the Company

As the preceding remarks on sales to a shareholder or purchases from a shareholder indicate, the assessment of whether value is transferred from the company to a shareholder in violation of the capital maintenance rules is based on market values rather than book values. While the book value that a shareholder has attributed to an asset is, obviously, irrelevant for the scrutiny of the purchase price paid by the company, it is not self-evident that the value attributed to an asset in the company's accounts is immaterial for the assessment of whether the sale of the asset to a shareholder amounts to a distribution. After all, the concept of capital maintenance is based on a comparison of items – assets versus liabilities and equity – on the company's balance sheet. One might, therefore, well argue that the legitimate interests of creditors are not compromised if the consideration paid by the shareholder equals the book value of the asset he acquired from the company, since such a transaction will not reduce the overall value of company's assets as recorded in its financial statements.

U.K. legislation has adopted this view for cases where a company has profits available for distribution.[26] Sec. 845 (2) (a) CA 2006, dealing with distributions consisting of or including, or treated as arising in consequence of, the sale, transfer or other disposition by a company of a non-cash asset states that the amount of a distribution is taken to be zero where the amount

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[22] *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 21; *Drygala* (note 19), § 57 marg. no. 61, both with further citations.

[23] *Bayer*, in Münchener Kommentar zum Aktiengesetz, 3rd ed. 2008, § 57 marg. no. 38; *Cahn/v. Spannenberg* (note 16), § 57 marg. no. 21.

[24] *Bayer* (note 23), § 57 marg. no. 40; *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 22; *Drygala* (note 20), § 57 marg. no. 64 et seq.

[25] OLG Koblenz AG 2007, 408, 409 et seq.; *Fleischer*, in K. Schmidt/Lutter, Aktiengesetz, 3rd ed. 2015, § 57 marg. no. 13.

[26] Cf. *Gower & Davies*, Principles of Modern Company Law, 9th ed. 2012, marg. no. 12-11.

or value of the consideration for the disposition is not less than the book value of the asset. In contrast, German law takes a stricter approach to creditor protection by comparing the consideration for the disposition with the "real" value of the asset.[27] This understanding of the term "distribution" reflects the fact that creditors may look to the full value and not just to the book value of the company's assets for the satisfaction of their claims so that any transfer of value to a shareholder without full consideration impairs the priority of creditors over shareholders. It also takes into account that it is not unusual for assets to be recorded at less than their market value as a consequence of the conservative German accounting principles under the HGB that seek to minimize the amount of profits available for distribution to shareholders in order to effectively protect creditors. Since assets may not be recorded at more than their historic acquisition cost, assets that do not depreciate but rather tend to increase in value over time, such as real estate, are frequently shown in the company's accounts at unrealistically low values. Similarly, the choice of a declining method of depreciation that companies may prefer for tax reasons can result in a substantial undervaluation of depreciable assets. The creditor protection intended by these accounting principles would be at the disposal of management if such unrealized profits could be distributed to shareholders through a sale of assets at their book value.

Contracts for services provided by the company to a shareholder are another example for disguised distributions the impact of which is not reflected on the company's balance sheet.[28] Consider the case of employees providing services to a shareholder during times when they could not be gainfully deployed on company business. Since the company would be liable to pay the employees' salaries even if they had not worked on behalf of the shareholder, the arrangement does not increase the company's expenditures. Nevertheless, the fair value of the services is deemed to have been distributed to the shareholder.

While the capital maintenance provisions thus apply to transfers of value from the company to a shareholder irrespective of their impact on the company's balance sheet, they are not designed to catch transactions for fair value merely because such transactions may be incompatible with business interests of the company.[29] Thus, directors may be liable for mismanagement if they purchase from a shareholder an asset of which the company has no need or if they sell a company asset that the company requires for its business, and the sale or

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[27] *T. Bezzenberger* (note 7), p. 220 et seq.; *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 16; *Drygala* (note 20), § 57 marg. no. 54; *Fleischer* (note 25) § 57 marg. no. 17.

[28] *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 16.

[29] *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 17.

purchase may even be void or voidable if the agent acting on behalf of the company evidently abused his power of representation. However, such transactions do not amount to a violation of the capital maintenance rules if the company receives fair value.

3. Examples

a) Company Loans to Shareholders

As the recent history of the treatment of company loans to shareholders shows, the departure from a strictly balance sheet based approach to capital maintenance tends to introduce an element of uncertainty into the application of the statutory regime. In what is referred to as its 2003 "November" judgment the High Federal Court held that for capital maintenance purposes loans to shareholders were to be assessed as if the company did not have a claim for repayment, thus treating loans like gifts.[30] The court based its holding on the arguments that (a) deferred claims for repayment were not as valuable for the corporation's creditors as liquid assets and that (b) with respect to the loan the corporation's creditors lost their priority over the shareholder's creditors. This disregard of a valuable claim constituted a departure from the balance sheet approach to capital maintenance and presented a major obstacle to corporate finance techniques such as cash pooling. In 2008 the legislature reversed the November judgment by adding a new provision to the AktG and GmbHG capital maintenance rules. Pursuant to § 57 (1) AktG and § 30 (1) GmbHG,[31] a loan to shareholders is not an illegal distribution if the claim for repayment is unimpaired (*vollwertig*). In a judgment concerning the responsibility of a subsidiary's management pursuant to §§ 311, 318 AktG, the Court explicitly abandoned the principles developed in its November judgment and adopted the view expressed in the new statutory rules.[32] The High Federal Court acknowledged the return to the traditional balance sheet approach and suggested that the relevant test is whether the claim for repayment is impaired by a concrete probability of default (*konkrete Ausfallwahrscheinlichkeit*). Since neither the statute nor the new judgment explain the circumstances under which a "concrete probability of default" is to be presumed, the new rules have introduced substantial legal uncertainty for managers faced with the decision of whether to approve a company loan to a shareholders.[33] The High Federal Court has clarified,

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[30] BGH, Der Konzern 2004, 196.

[31] These provisions were added by art. 1 no. 20 and art. 5 no. 5 of the MoMiG.

[32] BGHZ 179, 71, 76 et seq. marg. nos. 10 et seq. (MPS).

[33] *Cahn*, Der Konzern 2009, 67, 69 et seq.

however, that failure to agree on an arm's length interest rate will not per se not disqualify the loan as an illegal distribution.[34]

b) Collateral for Shareholder Loans

Similar considerations apply when a company provides collateral for loans that shareholders obtain from third parties. A majority of courts and scholars agrees that a transfer of value to the shareholder occurs already at the time when the company furnishes the collateral rather than at the time when the financial situation of the shareholder deteriorates or when the creditor ultimately realizes the security interest provided by the company.[35] The relevant test appears to be whether at the time when the security interest is established the company's claim against the shareholder for recourse is unimpaired, even though there still is some debate as to whether this takes proper account of the risk incurred by the company in view of the fact that collateral is usually enforced when the debtor is unable to discharge the secured liability.[36]

c) Assumption of Prospectus Liability in a Secondary Placement of Shares

The wide scope of capital maintenance is aptly highlighted by the so-called Deutsche Telekom III case.[37] Deutsche Telekom AG (DT-AG), the largest German telecommunications company, was initially a state owned enterprise of the Federal Republic of Germany (FRG). In two offerings conducted in 1996 and 1999 DT-AG offered shares resulting from capital increases in the national and international capital markets. With the second offering the existing shares held by the FRG and KfW, Germany's largest state owned bank, were also admitted to trading. During the year 2000, DT-AG, the FRG, KfW, who together still owned a majority of DT-AG's shares, and a group of underwriters entered into an agreement for a third share offering, in which 200 million DT shares owned by KfW would be publicly offered globally to private investors. The agreement provided that each party would be liable to the underwriters for the information provided by that party. This arrangement was to be additional to, not in lieu of, any other liability that the parties would be subject to. DT-AG attempted but failed to obtain an agreement with the FRG and KfW in which these shareholders would indemnify the DT-AG from prospectus liability with respect to any claims

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[34] BGHZ 179, 71, 80 marg. no. 17 (MPS).

[35] OLG Koblenz AG 1977, 231 et seq.; OLG München AG 1980, 272 et seq.; OLG Düsseldorf AG 1980, 273, 274; OLG Hamburg AG 1980, 275, 278 et seq.; *Bayer* (note 23), § 57 marg. no. 104; *Drygala* (note 20), § 57 marg. no. 79; for a detailed discussion see *Mülbert* ZGR 1995, 578, 586 et seq.

[36] Cf. e.g. *Laubert* in Hölters, AktG, 2nd ed. 2014, § 57 marg. no. 21 with further citations.

[37] BGH NJW 2011, 2719.

made by investors. DT-AG filed the necessary registration statement including a prospectus required by U.S. law for an offering of shares to private investors in the U.S. and assumed responsibility for the content of the registration statement and the prospectus in the U.S. The FRG and KfW shared the proceeds of the U.S. placement of DT-AG shares owned by KfW. U.S. investors sued DT-AG because of alleged misrepresentations in the prospectus. DT-AG agreed to a settlement of the lawsuit and paid a total of $ 120 million to the U.S. plaintiffs. It then proceeded to sue the FRG and KfW for reimbursement of this amount as well as of its alleged legal costs for a total of almost € 113 million, based, inter alia, on §§ 57,62 AktG.

The District Court held in favour of DT-AG, the Court of Appeals reversed. Upon DT-AG's further appeal the High Federal Court held that the company's assumption of the cost for drawing up the prospectus and of the liability to investors in a secondary offering of shares constituted a distribution to the shareholders whose shares were placed because the benefits of the placement, in particular the proceeds from the sale of the shares to investors, accrued to these shareholders rather than to the company.[38] According to the High Federal Court neither the inability of the shareholders to provide and to verify the information required for a prospectus nor negligence of the company in drafting the prospectus affects the character of the assumption of prospectus liability as a distribution within the meaning of the capital maintenance provisions.[39] The fact that the secondary placement may benefit the company by virtue of a diversification of its shareholder base or by facilitating its presence on a foreign stock market are not deemed to be sufficient compensation for the assumption of the risk of prospectus liability because the value of such potential advantages is not quantifiable.[40] As a rule, a violation of the capital maintenance provisions can only be avoided if the relevant shareholders agree to indemnify the company from prospectus liability.[41] The decision has triggered a lively scholarly debate and its implications of this decision for secondary placements are not yet entirely clear.[42]

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[38] BGH NJW 2011, 2719, 2720 marg. no. 15.

[39] BGH NJW 2011, 2719, 2721 marg. no. 22.

[40] BGH NJW 2011, 2719, 2721 marg. no. 25.

[41] BGH NJW 2011, 2719, 2721 marg. no. 25.

[42] Cf. Arbeitskreis zum „Deutsche Telekom III-Urteil" des BGH, CFL 2011, 377, 378; *Arnold/Aubel* ZGR 2012, 113, 144 et seq.; *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 40; *Habersack*, in Festschrift Hommelhoff, 2012, p. 303, 312; *Krämer/Gillessen/Kiefner* CFL 2011, 328 et seq.; *Schäfer*, in Festschrift Hoffmann-Becking, 2013, p. 997, 1005 et seq.

4. Disguised Distributions and Transactions with Shareholders in Their Capacity as a Third Party Distinguished

a) Nexus between Transaction and Shareholder Status

While only shareholders can be entitled to receive dividend payments by virtue of their equity investment in the company, sales and purchases, loans, service contracts and other types of agreements that may be used to disguise distributions are typically concluded with third parties. Such agreements between the company and an unrelated party are valid and binding even if the terms are unfavourable for the company because the agents acting on its behalf were negligent or incompetent or because the third party was particularly shrewd. It is still subject of debate whether the mere fact that the counterparty happens to be a shareholder is sufficient to trigger the application of the capital maintenance provisions or whether a disguised distribution requires a specific nexus between the shareholder status of the counterparty and the conclusion of the agreement. The controversy is relevant for transactions that are unfavourable for the company but have, nevertheless, not been motivated by the fact that the counterparty is a member of the company, either because the counterparty's stake in the company is clearly insignificant or because the agents acting on behalf of the company were not even aware of the fact that they were dealing with a shareholder. Examples are the purchase of an asset for more than its market price or fair value or excessive remuneration for a director where the recipients of the benefit happen to own some of the company's shares.

Advocates of the traditional strict approach argue that creditor protection should depend neither on the motivations of the parties nor on the diligence or foolishness, as the case may be, of the agents acting on behalf of the company. Just as objective criteria rather than the estimate by the (future) shareholder or the company determine the valuation of contributions to the company's capital, the application of the capital maintenance provisions to transactions between the company and its shareholders must depend solely on an impartial assessment of the consideration received by the company.[43]

In contrast, proponents of a less rigid interpretation of the statutory regime submit that the capital maintenance provisions are not meant to protect the company from normal business risk in its dealings with shareholders. In their view, the concept of disguised distributions is only supposed to ensure that shareholders do not receive undue benefits at the expense of the

[43] RGZ 150, 28, 35; BGHZ 31, 258, 276; BGH NJW 1987, 1194, 1195; BGHZ 121, 31, 41 et seq.; BGH NJW 1996, 589; *Bayer* (note 23), § 57 marg. no. 45; *Grigoleit/Rachlitz*, in Grigoleit, Aktiengesetz, 2013, § 57 marg. no. 16; Hüffer/*Koch*, Aktiengesetz, 11th ed. 2014, § 57 marg. no. 11.

company and its creditors because of their membership in the company. In particular, the capital maintenance provisions seek to prevent that the influence that shareholders may have on management and their superior information in company matters are abused to the disadvantage of the company's creditors. Therefore, only transfers of value that are attributable to the fact that the recipient is a shareholder (*causa societatis*) are in violation of the capital maintenance regime, while genuine mistakes in business judgment are not sufficient to qualify a transfer of value as a disguised distribution.[44] The practical difficulties of proving the causal nexus between membership in the company and transfer of value can be addressed by placing the burden of proof on the defendant and by applying the capital maintenance provisions unless it is certain that the membership of the recipient was irrelevant for the transaction.[45]

b) Claims of Investors Because of Fraud or Misrepresentation

Tort liabilities are typical examples of such claims. Even the majority view acknowledges that claims for damages based on torts attributable to the company are not subject to capital maintenance restrictions.[46] Thus, even controlling shareholders are not estopped from enforcing claims for damages against the company if they are victims of injuries caused by goods produced or services rendered by the company in the course of its business. Presumably, this consensus is due to the fact that no one chooses to be a tort victim so that there can be no question of whether the establishment and terms of the legal relationship are affected by the shareholders status of the injured party. Claims for damages by investors who have acquired shares due to misrepresentations attributable to the company are the only case where the application of capital maintenance to tort liabilities is intensely discussed. Unlike other types of tort injuries which can be suffered by shareholders and third parties alike, only shareholders can assert to have been lured into acquiring shares. The question of how claims based on intentional fraud and deception of investors rank in relation to claims of other creditors has been subject of debate since the times of the Imperial Court.[47] While a majority of authors argues that the capital maintenance provisions never apply to claims of deceived

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[44] *T. Bezzenberger* (note 7), p. 232 et seq.; *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 25 et seq.; *Drygala* (note 20), § 57 marg. no. 89; *Flume* ZHR 144 (1980), 18, 19 et seq.; *Verse*, Der Gleichbehandlungsgrundsatz im Recht der Kapitalgesellschaften, 2006, p. 196 et seq.

[45] *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 28; *Drygala* (note 20), § 57 marg. no. 90; *Fleischer* (note 25) § 57 marg. no. 20.

[46] *Lutter*, in Kölner Kommentar zum Aktiengesetz, 2nd ed. 1988, § 57 marg. no. 22.

[47] See RGZ 71, 97, 98 et seq.; RGZ 88, 271, 272 et seq.; for a detailed review of the Imperial Court's jurisprudence cf. *Bayer* WM 2013, 961, 962 et seq.

investors against the company[48] others submit that reimbursement of damaged shareholders would be in violation of § 57 AktG,[49] or that only claims arising from an acquisition on the secondary market are exempt while those of subscribers to shares from the company are not.[50] Yet others propose that compensation may only be paid from funds available for distribution to shareholders[51] or that the investors' claims for damages are subordinated to those of other creditors in the company's insolvency.[52] The High Federal Court tends to agree with the majority of scholars,[53] and the European Court of Justice has recently ruled that compensation of defrauded investors from company funds is compatible with the European Law capital maintenance framework.[54]

5. Disguised Distributions Involving Third Parties

Capital maintenance provisions are designed to prevent transfers of value from a company to its shareholders and they are worded accordingly, mentioning the company as the transferor and its shareholders as the transferees. The effect of such transfers can, however, easily be achieved through transactions involving substitutes for the company as well as the recipient shareholder. A straightforward example is a transaction between a nominee of the company and a nominee of the shareholder. The company reimburses its nominee for his expenses while the recipient passes on the benefit to the shareholder. If such evasions were allowed to stand, the creditor protection which capital maintenance is seeking to ensure would be at the disposal of the company and its shareholders. In order to give effect to the rationale of enforcing the priority of creditors over shareholders the scope of the relevant provisions must, therefore, be expanded beyond their narrow wording.

German courts and scholarship have adopted a principle-based approach in order to distinguish evasions of the capital maintenance rules from transactions where the application of the relevant provisions would be inappropriate. The relevant criteria for applying the capital maintenance provisions to transactions with third party transferees is whether the

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48 *Bayer* (note 23) § 57 margin note 29; *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 49; *Fleischer* (note 25) § 57 marg. no. 66 et seq.; *Grigoleit/Rachlitz* (note 43) § 57 marg. no. 6.

49 *Kindler*, in Festschrift Hüffer, 2010, p. 417, 421 et seq.

50 *Krämer/Baudisch* WM 1998, 1161, 1169; *Schwark,* in Festschrift Raisch, 1995, p. 269, 287; this view is shared by English courts, see Soden and another v. British and Commonwealth Holdings plc [1998] AC 298, 4 All ER 353.

51 *Henze* AG 2004, 405, 407 et seq., 410.

52 *Baums* ZHR 167 (2003), 139, 170; *Langenbucher* ZIP 2005, 239, 244 et seq.

53 See BGH NJW 2005, 2450, 2451 et seq. "EM-TV".

54 ECJ, C -174/12 marg. nos. 22 et seq.

economic benefit of the transaction has accrued – albeit indirectly – to the shareholder or, alternatively, whether the transfer of value is due to the shareholder having exercised his influence on the company, the latter case being treated as if the benefit had been transferred to the shareholder and then passed on to the third party.[55] Examples for the direct or indirect accrual of benefits to a shareholder are transfers of value to his nominees or agents,[56] to related parties including companies in which the shareholder has a controlling stake[57] or the payment of a debt of the shareholder.[58] As mentioned above, the economic effect of a distribution can also be achieved if a third party rather than the company itself acts as the transferor. Besides transactions with nominees or agents of the company the most relevant cases of this category are transfers by direct or indirect subsidiaries of the company.[59]

C. Legal Consequences of Violations of the Capital Maintenance Provisions

§ 62 (1) AktG provides that shareholders shall make restitution to the company for benefits received from the company contrary to the provisions of the AktG. Pursuant to traditional doctrine, distributions in violation of the capital maintenance provisions are void.[60] The company retains ownership of assets it has transferred to a shareholder. Consequently, the term "restitution" is to be interpreted literally so that the recipient of the benefit is liable to return in kind the asset he received from the company and the company can enforce its claim in full even in the shareholder's bankruptcy.[61] The traditional understanding of the term restitution does, however, entail a number of unattractive and inappropriate consequences. Capital maintenance is concerned with transfers of value to shareholders rather than with the preservation of specific assets. Thus, the objections against transactions with shareholders at other than arm's length are directed against the inadequacy of the consideration received by the company rather than against the acquisition from or disposal of assets to shareholders. Frequently, such transactions serve a legitimate business interest of the company which would

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[55] Cf. *Bayer* (note 23), § 57 marg. nos. 56 et seq.; *Cahn*, Kapitalerhaltung im Konzern, 1998, p. 16 et seq.; *Cahn/v. Spannenberg* (note 17), § 57 marg. nos. 72 et seq., all with further citations.

[56] BGH NZG 2008, 106; OLG Hamburg AG 1980, 275, 278.

[57] Cf. *Cahn/v. Spannenberg* (note 17), § 57 marg. nos. 77 et seq. with further citations

[58] BGHZ 60, 324, 330 et seq.

[59] Cf. *Cahn/v. Spannenberg* (note 17), § 57 marg. nos. 59 et seq. with further citations.

[60] *Henze*, in Großkommentar zum Aktiengesetz, 4th ed. 2000, § 57 marg. no. 203 et seq.; *Lutter*(note 46) § 57 marg. no. 63.

[61] *Wiedemann*, Gesellschaftsrecht I, 1980, page 442.

be impaired if the company were required to unwind such transactions. Moreover, transactions such as contracts for services, leases or the sale or acquisition of assets that have perished or depreciated since the time of the transfer cannot be unwound by simply returning the items that have been exchanged to their original owners.

These reasons have lead the High Federal Court and a majority of scholars to develop an alternative interpretation of the term "restitution" in the context of capital maintenance. According to this concept the meaning of "restitution" must be determined so as to give effect to the purpose of capital maintenance to prevent the transfer of value to shareholders. This purpose requires that the company is adequately compensated for any transfer of value to a shareholder.[62] Whether such compensation is made in kind or in cash is irrelevant. While this generic understanding of the term "restitution" avoids the necessity for distinctions between different types of distributions it does give rise to a number of issues that have not yet been resolved, the most urgent of which is whether the company or the recipient of the distribution has the right to choose if restitution is made in kind or in cash.[63]

D. Intra-Group Transfers and Modifications of the Capital Maintenance Regime by the Law of Corporate Groups (Konzernrecht)

I. The Issue of Intra-Group Transfers

Corporate groups consist of a controlling shareholder (the parent) and one or more companies over which he can exercise control (the subsidiaries). Typical examples of intra-group transactions that can affect capital maintenance on the subsidiary level are upstream loans and upstream securities for debts of the parent. As mentioned above (B. II. 5.), the scope of the capital maintenance provisions as interpreted by German courts is not limited to transactions between the company and its shareholders but extends to transfers of value between related parties. The most relevant examples of such transfers are transactions involving subsidiaries of the company or the shareholder. If, for instance, a wholly owned subsidiary rather than the company itself enters into a transaction at other than arm's length with a shareholder of its parent company, the economic effects of the transfer of value on the parent company are very similar to those of direct transfer from the parent company to its shareholder. The value of the parent's stake in the subsidiary decreases by the amount of the distribution, thereby reducing

[62] BGHZ 196, 312, 316 et seq. marg. nos. 15 et seq.; *Bayer* (note 23), § 57 marg. nos. 157 et seq.; *Cahn* (note 55) p. 114 et seq.; *Drygala* (note 20), § 57 marg. nos. 133 et seq.; Hüffer/*Koch* (note 43), § 57 marg. no. 32.

[63] Cf. *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 96 with numerous citations.

the funds available for the satisfaction of the parent's creditors. Similar concerns for the protection of creditors arise if two subsidiaries of the same shareholder enter into other than arm's length transactions. The fact that value has remained within the corporate group is of no avail for the creditors of the transferee company, since only assets of their debtor but not those of other group members are available for the satisfaction of their claims. Typical examples of intra-group transactions involving several subsidiaries are contracts for goods and services at transfer prices or cash pooling schemes.

Pursuant to the capital maintenance rules, transfers by a subsidiary to the shareholder of its parent company would trigger the transferee's liability to reimburse the subsidiary, thereby compensating the indirect outflow of funds from the parent company on the level on which it occurred. Whether or not the parent company itself were liable to the subsidiary would depend on the capital maintenance regime applicable to the company and on the parent company's responsibility for the transfer to its shareholder, namely on whether the transfer is due to the parent company having exerted its influence on the subsidiary.[64] The assessment of transfers between companies with the same controlling shareholder (sister companies) is highly controversial. While some authors argue that such transactions should be treated as if the transfer had been made to the common parent and then passed on to the recipient company, with the consequence of the parent's liability to reimburse the transferor,[65] others submit that the parent should only be accountable if the transaction is due to its influence on the transferor company, so that, for example, genuine mistakes of business judgment on the part of the transferor would not give rise to liability of the parent.[66]

II. The Transferee's Liability Under Group Law

1. The Bifurcated Statutory Group Law Regime of the Aktiengesetz

Unlike most other countries Germany has introduced a body of statutory provisions regulating groups of companies. This group law (Konzernrecht) of §§ 15-19 and 291-328 AktG modifies the rules applicable to independent stock companies in order to strike a balance between the protection of dominated stock companies, their minority shareholders and their creditors from

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[64] Cf. *Cahn/v. Spannenberg* (note 17), § 57 marg. nos. 59 et seq. with numerous citations

[65] *See* e.g. *Bayer* (note 23), § 57 marg. no. 72; *Grigoleit/Rachlitz* (note 43) § 57 marg. no. 32.

[66] *Cahn* (note 55) p. 66 et seq.; *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 79; *Drygala* (note 20), § 57 marg. no. 128.

exploitation by a controlling shareholder and that shareholder's interest in integrating the dominated company in a group of companies. Integration can – and in fact frequently does – entail transactions at other than arm's length and, thus, transfers of value within the group. In sum, the losses and benefits of such intra-group transactions may well balance out over time. However, the capital maintenance provisions look at individual transfers of value without regard to unrelated transactions between the company and the same shareholder that may, in effect, eventually compensate the original loss.

Under the Aktiengesetz a parent-subsidiary relationship is either based on the influence the controlling shareholder has by virtue of his voting rights (de facto group or *faktischer Konzern*) or on an enterprise agreement between the parent and the subsidiary (*Vertragskonzern*). Different sets of rules apply to either type of relationship, each of them modifying the capital maintenance regime applicable to the relationship between a company and a non-controlling shareholder.

2. Enterprise Agreements and Capital Maintenance

Enterprise agreements may subject the subsidiary's management to the instructions of the parent (domination agreement – *Beherrschungsvertrag*) or oblige the subsidiary to transfer its entire annual profit to the parent (profit transfer agreement – *Gewinnabführungsvertrag*). §§ 57 (1) sentence 3, 291 (3) AktG expressly exempt transfers from the subsidiary to the parent from the capital maintenance rules. While this exemption appears to be at odds with the restrictions on distributions to shareholders under art. 15 of the Second Directive (now art. 17 of the Directive 2012/30/EU), German courts and scholarship agree that national legislators have retained the competence to introduce special provisions on corporate groups[67] and that, in substance, the parent company's obligation under § 302 AktG to compensate the subsidiary for any annual net loss incurred during the duration of the enterprise agreement, irrespective of its cause, is a sufficient substitute for capital maintenance. Thus, if an enterprise agreement between the subsidiary and the parent is in place, the capital maintenance provisions do not apply to transfers of value to the parent or to third parties with the consent of the parent, the latter case being assessed as if the subsidiary had made the transfer to the parent and the parent had passed it on to the third party.

[67] *Schön*, in Festschrift Kropff, 1997, p. 285, 299; *Veil*, in Spindler/Stilz, Aktiengesetz, 3rd ed. 2015, § 291 marg. no. 75.

Some scholars submit that the disapplication by of the capital maintenance rules by §§ 57 (1) sentence 3, 291 (3) AktG should be suspended if it is unclear whether the parent will be able to satisfy the subsidiary's claim for compensation of its annual net loss pursuant to § 302 AktG.[68] Enterprise agreements are, however, meant to provide legal certainty for the dealings between the company and its controlling shareholder. Legal certainty would be severely impaired if the duty of the subsidiary's management to comply with instructions of the controlling shareholder were open to discussions about the controlling shareholder's future ability to compensate the subsidiary for its future annual net loss.[69]

3. De Facto Control and Capital Maintenance

§ 17 (1) AktG defines domination as the ability of an enterprise (the parent) to exercise control over another enterprise (the subsidiary). § 17 (2) AktG in conjunction with § 16 (1) AktG presumes that this ability exists if an enterprise owns the majority of the shares or voting rights in another enterprise. If a controlling shareholder actually exercises his influence to the disadvantage of a controlled stock corporation, § 311 AktG requires that he compensate the subsidiary for any loss incurred as a consequence of the parent's interference. Unlike restitution pursuant to § 62 AktG for a violation of capital maintenance, compensation for the exercise of controlling influence to the disadvantage of a stock corporation may be deferred until the end of the business year and may be postponed even further, provided that a claim of the subsidiary against the parent, specifying the time, amount and type of compensation is established by the end of the business year in which the parent has exerted its influence. The objection that this relaxed standard of liability is incompatible with the European capital maintenance framework[70] has not been adopted by German courts and scholarship.[71]

Since disadvantages will frequently consist of transfers of value to the parent or to third parties at the instruction of the parent, enforcement of capital maintenance provisions which would call for immediate restitution to the subsidiary would conflict with the deferral of compensation allowed by § 311 AktG. According to the majority view, shared by the High

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[68] E.g. *Altmeppen* NZG 2010, 361, 364; *Fridrich*, Der Schutz des Kapitals der Aktiengesellschaft bei fremdfinanzierter Übernahme, 2010, p. 354 et seq.; *Habersack/Schürnbrand* NZG 2004, 689, 690.

[69] *Cahn/v. Spannenberg* (note 17), § 57 marg. no. 136; *Fleischer* (note 25) § 57 marg. no. 17; *Gelhausen/Heinz*, in Festschrift Hoffmann-Becking, 2013, p. 357, 371;*Grigoleit/Rachlitz* (note 43) § 57 marg. no. 4; *Stephan* Der Konzern 2014, 1, 22.

[70] *Schön*, FS Kropff, 1997, p. 285, 294 et seq.

[71] See e.g. *T. Bezzenberger* (note 7), p. 325 et seq.; *Mülbert*, in Festschrift Lutter, 2000, 535, 536 et seq.

Federal Court, the special rules of group law override the general capital maintenance provisions,[72] with the somewhat peculiar consequence that the controlling shareholder's liability for transfers that occurred as his bidding is less stringent than his liability for transfers in which he was not involved.[73]

Unlike directors of a company bound by a domination agreement who must comply with the instructions of the other party's management, the responsibility to manage a de facto subsidiary remains with its directors. They are not under an obligation to follow instructions of the controlling shareholder and are not immune from liability if compliance with such instructions has damaged the company. The directors of the subsidiary are, therefore, responsible for the assessment of whether it is compatible with the interests of their company to comply with suggestions of the controlling shareholder because he will be in a position to compensate potential disadvantages caused by such compliance.

E. Conclusion

As the preceding remarks have shown the capital maintenance provisions as construed by German courts and scholarship restrict not only dividend payments but also transfers of value that are disguised as alleged arm's length transactions, including contracts to which neither the company nor a shareholder is a party. This aspect of capital maintenance appears to have been neglected by its critics who advocate the elimination of the current mandatory capital rules in favor of contractual creditor protection based on covenants. In order to catch disguised distributions as effectively as the statutory capital maintenance regime covenants would have to cover all such transactions between the company and its shareholders including transactions between related parties. It is not clear whether covenants could effectively address all transactions that are caught under the principle-based interpretation of the capital maintenance rules and whether it would be feasible for a creditor to monitor all such transactions. Arguably, the remedies available would not be as effective as those available under the capital maintenance regime since the obligation of the transferee to return an illegal distribution cannot be replicated in agreements between the company and its creditors.

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[72] BGHZ 179, 71, 77 marg. no. 11; Hüffer/*Koch* (note 43), § 311 marg. no. 49.

[73] Since the application of §§ 311 et seq. AktG is triggered by an exercise of the controlling shareholder's influence, even the advocates of the majority view agree that these provisions do not replace the capital maintenance provisions with respect to transactions in which the controlling shareholder was not involved.

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