



Universität Hamburg
DER FORSCHUNG | DER LEHRE | DER BILDUNG



La mini - GmbH in Germania

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Overview

A. Prelude - The Limited at the Gates

B. Alternative Concepts

C. Basic Features of the Mini-GmbH

D. Open Questions and Developments

A. Prelude – The “Limited” at the Gates

- Application of the Real Seat Theory as a fundamental principle of German corporate law established by the case law of the Imperial Court of Justice (*Reichsgericht*) and the Federal Court of Justice (*Bundesgerichtshof*) → almost no foreign corporations with real seat in Germany
- Fundamental change due to the case law of the European Court of Justice regarding the Freedom of Establishment (*Centros, Überseering, Inspire Art*)
- Tremendous increase of the number of English Private Limited Companies with real seat in Germany in 2002/2003
- Formation of approximately 4.000-5.000 (additional) English Private Limited Companies per week with “unclear” destination in Europe

A. Prelude – The “Limited” at the Gates

- Start of an debate about the (missing) **benefits of this development** in German corporate law in 2003 with the attempt to slowing down this development with several legislative measures
- General increase of the **political pressure** due to a rise of the unemployment numbers to five Million in 2005 (= 13%) → development of the idea of the simplification of the founding process for corporations in order to reduce unemployment
- Largest reform of the GmbH-Gesetz since its enactment in 1892 with the MoMiG (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* of 2008 [**Law for the Modernization of the German Closed Corporation Code and the Prevention of Abuses**])
- General **reform of the GmbHG** and **introduction of the Mini-GmbH**

B. Alternative Concepts

- Reducing the Minimum Capital of the "regular" GmbH to one Euro (announcement of the German Chancellor *Gerhard Schröder* in 2005)
- Introduction of the so called "Merchant with Limited Liability" in the Commercial Code (de facto introduction of the "single shareholder corporation")
- Waiting for the European harmonization of the closed corporation
- Waiting for the introduction of a European supranational closed corporation
- Undoing the case law of the European Court of Justice by pushing the European legislator to enact an European regulation dealing with international corporate law
- Doing Nothing! → English Private Limited Companies as some kind of "lightning conductor" or "outlet" for unfit founders of corporations

C. Basic Features of the Mini-GmbH

I. Regulatory Concept

- Implementation of the Mini-GmbH (*Unternehmergeellschaft haftungsbeschränkt [UG]*) in § 5a German Closed Corporation Code (GmbH-Gesetz) → **no creation of a complete new corporate form!**
- **Application of all provision of the GmbHG** except stated otherwise in § 5a GmbHG
- **Limited unique regulatory features** in § 5a GmbHG
 - Duty to use the designation “Mini-GmbH” (*Unternehmergeellschaft haftungsbeschränkt*)
 - Stated capital of at least one Euro + several special provision on capital maintenance
 - Duty to convene a shareholder meeting without undue delay in the case of a threat of illiquidity (§ 5a subs. 4 GmbHG)
- **Option to transfer the Mini-GmbH into a regular GmbH** by increasing the capital to 25.000 € (§ 5a subs. 5 GmbHG)

C. Basic Features of the Mini-GmbH

II. Creditor Protection

- Duty to use the designation "Mini-GmbH" (*Unternehmerge-sellschaft haftungsbeschränkt*) instead of GmbH in the companies name (§ 5a subs. 1 GmbHG)
 - but no regulation of sanctions for the violation of that duty
 - Federal Court of Justice (12. 6. 2012 - II ZR 256/11, NZG 2012, 989 → direct and personal liability of the director up to an amount of 25.000 € in the case of using the designation (regular) GmbH instead of Mini-GmbH
- No registration of the Mini-GmbH before the complete deposition of the share capital (§ 5a subs. 2 GmbHG)
- No contribution in kind (§ 5a subs. 2 GmbHG) → but no regulation of the problem of hidden contributions in kind
- Application of all other instruments of creditor protection in German law

C. Basic Features of the Mini-GmbH

II. Creditor Protection

- Duty to transfer one quarter of the annual surplus to the statutory reserves and limitations on the use of the statutory reserves (§ 5a subs. 3 GmbHG)

	2011	2012	2013	2014
Stated Capital	1.000 €	1.000 €	1.000 €	1.000 €

Annual Surplus	28.000 €	20.000 €	40.000 €	36.000 €
Amount to be transferred to the statutory reserves	7.000 €	5.000 €	10.000 €	9.000 €
Distributable Surplus	21.000 €	15.000 €	30.000 €	27.000 €

Statutory Reserves	7.000 €	12.000€	22.000 €	31.000 €
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C. Basic Features of the Mini-GmbH

III. The Reality after Seven Years

- Formation of about 104.000 Mini-GmbHs from 2008 till the end of 2014
- About 8.500 cases of a transfer from a Mini-GmbH to a regular GmbH
- Tremendous decrease of the number of English Private Limited Companies with real seat in Germany (reduction to several hundreds) - disappearance of the "Limited-Problem"
- Fewer insolvencies of the Mini-GmbH than expected (only 1500 in 2013) but opening of insolvency proceedings in only 58% of the cases due to insufficient funds to finance the insolvency proceedings (70% with the regular GmbH)

D. Open Questions and Developments

- success of the Mini-GmbH heavily debated
- Increase of the general reputation of the GmbH compared to the Mini-GmbH
- Mini-GmbH as a personal liable member of a private limited partnership (*Mini-GmbH & Co. KG*)?
- development of other non-corporate concepts in order to deal with the Mini-GmbH and its typical lack of capital
→ duty of the member of the corporation to forward the amount of capital necessary to fund the insolvency proceedings
- unclear future of the Mini-GmbH regarding the Societas Unius Personae (SUP)