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Doing Business in the Federal Republic of Germany

Georg Kutschelis

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DOING BUSINESS IN THE FEDERAL REPUBLIC OF GERMANY*

GEORG KUTSCHELIS**

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* This article is the second in a series on doing business abroad. In our last issue we focused on joint ventures in the Republic of China. This issue contains, in addition to Mr. Kutschelis' article, a comment on investments in Thailand.

** Referendar, University of Bochum; LL.M., University of Georgia. Legal intern, Bruckhaus, Kreifels, Winkhaus & Lieberknecht, in Duesseldorf, Germany.

I. INTRODUCTION

This article is designed as a practical guide for U.S. companies contemplating business in the Federal Republic of Germany. It represents a brief survey of the law as of September 1973.

As a reference tool it must be emphasized that it is an introduction only.[1] It does not replace specific expert advice,[2] particularly in

1. The following volumes are cited repeatedly; they provide good information in English: E. COHN, MANUAL OF GERMAN LAW, VOL. I (2d ed. 1968), VOL. II (2d ed. 1971) [hereinafter cited as COHN; citations are to textual paragraphs]; R. MUELLER, E. STIEFEL, & H. BRUECHER, DOING BUSINESS IN GERMANY (7TH ED. 1972) [hereinafter cited as MUELLER]; CURRENT LEGAL ASPECTS OF DOING BUSINESS IN EUROPE (L. Theberge ed. 1972) [hereinafter cited as Theberge]; E. STEIN & P. HAY, LAW AND INSTITUTIONS IN THE ATLANTIC AREA (1963) [hereinafter cited as STEIN & HAY]; E. STEIN & P. NICHOLSON, AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET, 2 vols. (1960) [hereinafter cited as STEIN & NICHOLSON I and II]; R. SCHLESINGER, COMPARATIVE LAW (3d ed. 1970) [hereinafter cited as SCHLESINGER]; C. FULDA & W. SCHWARTZ, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT (1970) [hereinafter cited as FULDA]; D. SPETHMANN, WEST GERMANY IN LEGAL ASPECTS OF FOREIGN INVESTMENT 670-90 (W. Friedmann and R. Pugh eds. 1959) [hereinafter cited as SPETHMANN]; G. ZAPHIRIOU, EUROPEAN BUSINESS LAW (1970) [hereinafter cited as ZAPHIRIOU]; INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL GUIDE TO COMPANY FORMATION (1970) (available from the United States Council of the International Chamber of Commerce, New York 10036) [hereinafter cited as ICC GUIDE]; HAMBURG CHAMBER OF COMMERCE, CARRYING ON BUSINESS IN GERMANY (1969) (manuscript available from the German American Chambers of Commerce in New York, Chicago, or San Francisco) [hereinafter cited as HAMBURG].

See also U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW (1972); INTERNATIONAL TRADE, INVESTMENT AND ORGANIZATION, (P. Hay & W. La Fave ed. 1967); W. BALEKJIAN, LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE EUROPEAN COMMUNITY (1967); INTERNATIONAL MANUAL ON THE EUROPEAN ECONOMIC COMMUNITY (H. Junckerstorff ed. 1963); Spier, *an Analysis of Legal Forms of Business Organization in West Germany and the United States*, 3 AM. BUS. L. J. 287 (1965); Shartel & Wolff, *Civil Justice in Germany*, 42 MICH. L. REV. 863 (1944).

The reader sufficiently versed in German can find concise and accurate information in C. CREIFELDS, Rechtswoerterbuch (2d ed. 1970) (C. H. Beck Verlag, Muenchen/Germany) [hereinafter cited as CREIFELDS]; O. Model & C. Creifelds, STAATSBUERGERTASCHENBUCH (12th ed. 1973) (C. H. Beck Verlag, Muenchen/Germany). A. GOERLITZ, HANDLEXIKON ZUR RECHTSWISSENSCHAFT (1972) (Wissenschaftliche Buchgesellschaft, Darmstadt/Germany) [hereinafter cited as GOERLITZ] is recommended more for its poignant criticism of the present law's weaknesses than for its informative value.

On trading with East Germany, *see* Drobnig & Waehler, *Legal Aspects of Foreign Trade in East Germany*, 2 J. WORLD TRADE L. 28 (1968); Supranowitz, *The Law of State-Owned Enterprises in a Socialist State*, 26 LAW & CONTEMP. PROB. 794 (1961); Grimes, *The Changing Structure of East Germany Industrial Enterprises*, 17 AM. J. COMP. L. 61 (1969); Drobnig, *Soviet Corporations in Eastern Germany*, 17 CENT. EUROP. AFF. 150 (1957); Wiegand, *Business and Finance in Communist Germany*, 46 ILL. L. REV. 851 (1952).

2. *Cf.* Ketcham, When to Use a European Lawyer, in Theberge, *supra* note 1, at 96; FULDA, *supra* note 1, at 773 n.1; A. Conard, *Organizing for Business*, in Stein & NICHOLSON, *supra* note 1, at 66 [hereinafter cited as Conard]; Murphy, *Investment in an Offshore Subsidiary: A West German Prototype*, 5 INT'L LAW. 690, 704 (1971) [hereinafter cited as Murphy].

such intricate areas as company law, taxation, or antitrust, to name only three subjects of obvious and extreme complexity. Therefore, the following observations will often have the character of generalizations. It is hoped, however, that they will provide some basic insight into the problems relevant to doing business in Germany.

Other shortcomings of these comments will relate directly to the difference, both in language and legal tradition, between the U.S. and German systems of law. Although it is a matter of common knowledge, it should be emphasized that few legal terms can be translated literally without losing some or all of their precise meaning.[3] The problem is further complicated by the fact that publications on the subject do not share a common terminology[4] since some publications are aimed at British readers and others at U.S. readers. Still, in order not to make language a barrier, every legal term is followed by a German translation or approximation of the English term.

II. PRELIMINARY FORMALITIES

Before considering questions directly related to setting up a foreign company in Germany, brief mention must be made of preliminary formalities such as permits and registration.[5]

A. *Residence Permit (Aufenthaltserlaubnis)*

Section 2 of the Aliens Statute[6] (Auslaendergesetz)[7] requires all

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3. *Cf.* LEGAL ASPECTS OF FOREIGN INVESTMENT ix (W. Friedman & R. Pugh eds. 1959); COHN, *supra* note 1, at 1., 2.; Conard, *supra* note 2, at 48 n.67; ICC GUIDE, *supra* note 1, at 8; Schlesinger, *supra* note 1, at 618-22.

4. One particularly discouraging illustration is furnished by the Betriebsverfassungsgesetz (*see infra* note 229) which has been translated as Shop Constitution Law by MUELLER, *supra* note 1, at 96; Enterprise Constitution Act by SPETHMANN, *supra* note 1, at 673; Law on the Organisation of Enterprises by Fabricius, *The German Law of 1972 on the Organisation of Enterprises*, 1972 J. BUS. L. 340; Works Constitution Act in COHN, *supra* note 1, at 7.246.; Labor Management Relations Act in M. PELTZER, LABOR MANAGEMENT RELATIONS ACT (1972).

5. *Cf.* MUELLER, *supra* note 1, at 48, 93; HAMBURG, *supra* note 1, at 1-4; ICC GUIDE, *supra* note 1, at 11.

6. Aliens Statute (Auslaendergesetz) of April 28, 1965, [1965] BGBl. I 353; *also* in C. SARTORIUS, VERFASSUNGS UND VERWALTUNGSGESETZE 565 (35th ed. 1972).

7. All codes and statutory material are cited by their concise unofficial title used almost exclusively in legal writing. The official titles, in the rare cases where they do not coincide with the unofficial ones, are lengthy and are, therefore, avoided.

To be sure one actually has the latest version of a statute, one has to consult the Federal Legal Gazette (Bundesgesetzblatt), abbreviated BGBl. (COHN, *supra* note 1, at 87). One has to be careful not to confuse the Federal Legal Gazette (Bundesgesetzblatt) with the Federal Gazette (Bundesanzeiger), which publishes excerpts from the commercial registers. (MUELLER, *supra* note 1, at 13, makes a clear distinction between the two, while COHN, *supra* note 1, calls both "Official Gazette," although at 81. he talks about the Federal Legal Gazette and at 7.24. and 7.204. about the Federal Gazette).

For virtually all purposes it is sufficient to consult one of the unofficial but widely used looseleaf collections of statutory law by C. H. Beck Verlag, Muenchen/Germany. These collections are updated one or more times a year. Throughout this article, four

aliens planning to enter and stay in the Federal Republic of Germany to apply for a residence permit (Aufenthaltserlaubnis). Initial contacts with the German diplomatic or consular services nearest the applicant's domicile should prove helpful, as will inquiries to one of the three German-American Chambers of Commerce in New York, Chicago, and San Francisco. The diplomatic or consular authorities will advise the applicant and obtain the residence permit from the appropriate German authority. The permit authority cooperates, in turn, with the local chamber of commerce (Industrie und Handelskammer) and the local labor authority (Arbeitsamt).

In the case of a first application, the permit is usually granted for three to twelve months. After five years of residence an unrestricted permit (Aufenthaltsbewilligung) may be granted.

Upon arrival, the alien is required to register with the local aliens authority (Auslaenderbehoerde). Its offices are either with the local police or the local administration: county administration (Kreisverwaltung) in rural areas, and the city administration (Stadtverwaltung) in urban districts. Nationals of member states of the European Economic Community and tourists are exempt from these regulations.

Evasion of the Aliens Statute may be prosecuted as illegal entry. On the other hand, administrative authorities are generally liberal in their policy of admission. Other than the residence permit, foreigners must comply with but a few additional procedures.

B. *Labor Permit (Arbeitsgenehmigung)*

Section 19 of the Labor Support Law (Arbeitsfoerderungsgesetz)[8] requires prospective employees to apply for a labor permit. Only holders of residence permits are eligible, and because of the prior checks made in connection with the residence permit, the labor permit is granted as a routine matter by the local labor authority (Ar-

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of these collections will be referred to in order to make the job of finding the law easier: H. SCHOENFELDER, DEUTSCHE GESETZE (47th ed. 1972) [hereinafter cited as SCHOENFELDER]; C. SARTORIUS, Verfassungs und Verwaltungsgesetze (35th ed. 1972) [hereinafter cited as SARTORIUS]; H. NIPPERDEY, ARBEITSRECHT (11th ed. 1972) [hereinafter cited as NIPPERDEY]; STEUERGESETZE (24th ed. 1972) [hereinafter cited as STEUERGESETZE]. *See also* COHN, *supra* note 1, at 85. on how to find the law.

English translations of statutes—if known to exist—will be pointed out, but the danger of obsolescence is obvious; see also COHN, *supra* note 1, appendix II in vol. I, at 310, (5.); *id.* at 86.-90.; J. HARTMANN, BIBLIOGRAPHY OF TRANSLATIONS OF LAWS AND REGULATIONS, GERMAN-ENGLISH-FRENCH-SPANISH (1971); Majoros, *Zur Krise der internationalen, Kodifikationspolitik*, 6 ZEITSCHRIFT FUER RECHTSPOLITIK 65 (1973); Sprudzs, *Status of Multilateral Treaties—Researcher's Mystery, Mess or Muddle?*; 66 AM. J. INT'L L. 364 (1972); SCHLESINGER, *supra* note 1, at 637-39, 656-58, 666-67.

8. Labor Support Law (Arbeitsfoerderungsgesetz) of June 25, 1969, [1969] BGBl. I 582; *also* in NIPPERDEY, *supra* note 7, of 700.

beitsamt). Numerous exemptions exist, such as for trainees not paid in Germany, alien officers of German companies, and for non-domiciled aliens servicing imported equipment for a limited period of time.[9]

C. *Registration of Business (Gewerbeanmeldung)*

Apart from the manufacture of and trade in weapons, which are prohibited to foreigners,[10] all branches of business are as open to foreigners holding an unrestricted residence permit as they are to Germans, so long as any special requirements, like professional qualifications, are met.

Registration[11] of the prospective business or trade with the local commercial or police authority is followed by the issuance of a certificate of registration (Gewerbeanmeldeschein).[12] The internal revenue service is notified of the registration, but it remains every individual's duty to comply with his obligations as a taxpayer.

Certain trades can be carried on only with a special permit. These include trades which, if exercised improperly, could endanger the general public (food, pharmaceutical and medical services, pawnbroking, and common carriers). Commercial installations which are inherently dangerous because of noise, vibration, or fumes are subject to stringent controls and supervision.[13] Other permits depend on the applicant's particular qualification or personal reliability, or both.[14]

As to domicile of company partners, German law requires the company to designate a representative domiciled in Germany who is responsible to the authorities.

D. *Registration of Foreign Corporate Bodies*

Section 12 of the Trade Regulation (GewO) provides that foreign corporate bodies, as "legal persons" (juristische Personen),[15] must apply for a permit to either set up business or to participate in one.

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9. Ordinance of March 2, 1971, [1971] BGBl. I 152. §§ 5 and 9 of the Ordinance apply in particular.

10. Section 6 (3) Federal Arms Statute (*Bundeswaffengesetz*) of September 19, 1972, [1972] BGBl. I 1797; *also* in SARTORIUS, *supra* note 7, at 820; § 6 (2) Statute on War Weapons (Kriegswaffengesetz) of April 20, 1961, [1961] BGBl. I 444; *also* in SARTORIUS, *supra* note 7, at 823.

11. On registration in the commercial register *see infra* III (B)(2). On domicile of a company *see* Winkhaus and Stratmann, *GmbH: The Close Corporation in Germany-Management and Capitalization Problems for U. S. Controlled Subsidiaries,* 29 BUS. LAWYER 1275, 1279-80 (1973) [hereinafter cited as Winkhaus].

12. Sections 14, 15 Trade Regulation (Gewerbeordnung) of July 26, 1900, [1900] RGBl. 871; *also* in SARTORIUS, *supra* note 7, at 800 [hereinafter cited as Trade Regulation/GewO].

13. Section 16 *et. seq.* Trade Regulation (GewO), *supra* note 12.

14. *Id.* at Sections 29-40.

15. On "legal persons," *see infra* III (C).

The permit must be given unless the foreign corporate body's activity is contrary to the public interest, as when reciprocal rights of establishment are not guaranteed or regulations relating to capital, applicable to German domestic companies, are not met. The authority competent to grant trade permits is the Ministry of Commerce (Wirtschaftsministerium) or its equivalent in each federal state (Bundesland).[16] Foreign corporate bodies, founded in accordance with the laws of a member state of the European Economic Community are exempted from the trade permit regulation.[17]

Although the formalities of permits and registration necessary to do business in Germany constitute a considerable amount of "red tape," the attitude of federal, state, and local authorities is liberal, so as to render many restrictions insignificant.[18]

III. LEGAL ORGANIZATION OF A BUSINESS

German law recognizes many types of legal associations and companies which differ according to the needs of society in general, or of the business community in particular. Additional variety results from the non-mandatory character of considerable portions of German law. Moreover, the principle of freedom of contract allows the parties to create their own particular form of association or company.

There is a sharp distinction in German law between companies structured like an association, the archetype of which is the personal association (Verein), and those organized as companies in the strict sense (Gesellschaft).[19] The legal problems of the two basic types of business organizations, associations and companies, are examined in

16. Section 12 (3) Trade Regulation (GewO), *supra* note 12.

17. *Id.* at Section 12 (a).

18. *Cf.* Marty-Lavauzelle, *Local Law Problems in Acquiring European Corporations*, in Theberge, *supra* note 1, at 26, 29.

19. The reader must be cautioned against some particularly confusing terminology. German company law (Gesellschaftsrecht) usually comprises companies (Gesellschaften) only and excludes associations (Vereine). Yet in describing the different companies one takes recourse to the criterion of how many characteristics of a company (Gesellschaft) or of an association (Verein) a company has. In other words, the test is whether a given company, in the general sense, is more a company in the strict legal sense, or more an association. This is not exactly a contradiction because not all companies are companies in the strict sense, whereas some "companies" strictly speaking are associations. This problem in terminology is further discussed *infra* III (C) (2) of this article.

Another misunderstanding may occur in reading SPETHMANN, *supra* note 1, at 670. In talking about "personal associations", Spethmann refers to personal companies which, since his writing, have come to be called person-companies by most writers including this author (*see infra* III (C) (4) of this article). Person-companies, of course, is the literal translation of the German "Personengesellschaften." Spethmann uses the word "association" in a very broad sense denoting any legally joint group. This writer, however, uses "company" in the general sense in translating the German (Gesellschaft).

this article;[20] three others, the personal association (Verein), the foundation (Stiftung), and the public corporation, will not be treated here since they do not lend themselves to foreign investment.

A. *Statutory Background*

Since German law consists largely of code law, the newcomer is well-advised to refer to the various codes early in his planning.[21] Sections 742-58 of the Civil Code (Buergerliches Gesetzbuch or BGB)[22] contain the general rules applicable to any group holding a legal right (Gemeinschaft),[23] unless possession of such right is expressly prohibited by law. However, since many kinds of legally joint groups have received the legislature's specific attention in different sections of the Civil Code (BGB), the Commercial Code (Handelsgesetzbuch or HGB),[24] and other particular codes,[25] Sections 742-58 enjoy only secondary importance.[26]

B. *Some Peculiarities of German Commercial Law*

Even to gain a fragmentary understanding of the available legal structures, one must understand a few characteristics of German

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20. *See infra* III (C)(2).

21. *See supra* note 7.

22. Civil Code (Buergerliches Gesetzbuch) of August 18, 1896, [1896] RGBl. 195; *also* in SCHOENFELDER, *supra* note 7, at 20 [hereinafter cited as Civil Code (BGB)].

SCHLESINGER, *supra* note 1, at 371-77, gives a detailed synopsis.

23. COHN, *supra* note 1, at 191., 355.; A. HUECK, GESELLSCHAFTSRECHT 51-55 (16th ed. 1972) [hereinafter cited as HUECK].

24. Commercial Code (Handelsgesetzbuch) of May 10, 1897, [1897] RGBl. 219; *also* in SCHOENFELDER, *supra* note 7, at 50 [hereinafter cited as Commercial Code (HGB)]. SCHLESINGER, *supra* note 1, at 377, gives a synopsis.

25. Notably, the Stock Corporation Law (Aktiengesetz) of September 6, 1965, [1965] BGBl. I 1089; *also* in SCHOENFELDER, *supra* note 7, at 51 [hereinafter cited as Stock Corporation Law (Akt G). It is available in two translations, one by R. MUELLER & E. GALBRAITH, THE GERMAN STOCK CORPORATION LAW (German-English ed. 1966), and the other by F. JUENGER & L. SCHMIDT, GERMAN STOCK CORPORATION LAW (1967); *also* the Law on Limited Liability Companies (Gesetz betreffend die Gesellschaften mit beschraenkter Haftung) of April 20, 1892, [1892] RGBl. 477; *also* in SCHOENFELDER, *supra* note 7, at 52 [hereinafter cited as Law on Limited Liability Companies (GmbHG)], available in a translation by R. MULLER, GERMAN LAW CONCERNING THE COMPANIES WITH LIMITED LIABILITY (1972).

26. In this connection, a similar technique of referring the reader back from specific codes to more general codes whenever general rules are applicable must be pointed out. Taking for an illustration the limited partnership [*see infra* III (D) (3)], a derivative of the partnership [*see infra* III (D)(2)], which in its turn is a derivative of the private law company [*see infra* III (D)(1)], we find that due to the reference in Section 161 (2) Commercial Code (HGB), the rules applicable to the partnership also apply to the limited partnership except in those respects in which the code specifically provides otherwise in Sections 161-77 Commercial Code (HGB). Questions not treated in Sections 161-77 are answered alike for both the partnership and the limited partnership. Correspondingly, gaps left by Sections 105-60 Commercial Code (HGB) regulating the partnership are to be filled [Section 105 (2)] by Section 705-40 Civil Code (BGB) regulating the private law company.

commercial law, including a number of criteria which serve to distinguish the different kinds of companies. These criteria as we shall see later, have some bearing upon liability, agency, taxation, and other important matters. Additionally, in examining these criteria, we also examine the range of company types suitable to varying conditions.

1. *Kinds of Merchants*

Sections 1-7 of the Commercial Code (HGB) distinguish between several kinds of merchants (Kaufleute)[27] in order to define their duties of registration and bookkeeping, and to make applicable specific rules different from, and stricter than, those found in the Civil Code (BGB).[28] Usually it is sufficient that one party to a contract be a merchant, as defined in those sections, for the diverging or supplementary rules to apply.[29] In rare cases, both parties must have the status of merchant in order to submit the contract to the stricter Commercial Code (HGB).[30]

The consequence of this categorization is the application of specific regulations under certain circumstances. The transaction in question must be one typically effected in the ordinary course of business. In short, it must constitute a transaction directly or indirectly promoting business. A direct promotion of business can be seen in contracts typical for the particular kind of business (e.g., sale of goods and shipping). An indirect promotion can be a contract which either renders possible or promotes the typical business transaction (e.g., employment contracts, leases and purchase of office supplies), or is a typical transaction entered into in the ordinary course of business, or similar to those entered into in the ordinary course of business.

Generally speaking, the specific rules are stricter because they make escape from legally binding relationships and transactions more difficult; the merchant is assumed to know the law. Thus, he can bind himself orally in cases where a writing is required for non-merchants. Stricter rules also apply to: (1) bail and commercial letters of confirmation (a valid contract unless the letter of confirmation

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27. *See* COHN, *supra* note 1, at 7.9. -7.15.; ZAPHIRIOU, *supra* note 1, at 41.

28. On the peculiar quality of commercial law as a branch of private law, *see* FULDA, *supra* note 1, at 775; SCHLESINGER, *supra* note 1, at 404; COHN, *supra* note 1, at 92., 7.1. - 7.8.

29. COHN, *supra* note 1, at 7.19.; SCHLESINGER, *supra* note 1, at 408.

This and all the following citations to code material in section III (B) of this article are to the Commercial Code (HGB) unless otherwise noted.

30. *E.g.*, section 346 requiring the merchant to respect commercial customs (*see* COHN, *supra* note 1, at 7.8.); sections 377-79 forcing the merchant-buyer to inspect delivered goods immediately and to notify the merchant-seller of any alleged defects; otherwise the buyer will forfeit his rights (*see* COHN, *supra* note 1, at 7.132.).

is duly revoked);[31] (2) the extent of commercial obligations; (3) the availability of the absence of contract; and (4) the provision of five percent, rather than four percent, interest as the basic rule.[32] Likewise, acquisition of title in good faith is easier at commercial law than at civil law, as is acquisition of a lien in personam, the merchant's right of retention.[33]

One who conducts a commercial business (Handelsgewerbe) is a merchant (Kaufmann) in the legal sense of the word. The law distinguishes among the "must-merchant," a merchant by virtue of the kind of business he conducts,[34] the "shall-merchant" who shall register in the commercial register[35] because of his business volume and thus acquires the status of merchant, the "may-merchant" who may become a merchant through registration if he so desires, and the "form-merchant," a merchant by virtue of his form of legal organization.[36]

Usually, all these are "full-status merchants" (Vollkaufleute), meaning that all particularities of commercial law, including mandatory registration and bookkeeping, apply to them. But, as the antiquated scheme also comprises a number of small traders such as street peddlers, Section 4 of the Commercial Code (HGB) exempts some of the "minor-status-merchants" (Minderkaufleute) from the regulations covering bookkeeping, commercial name (Firma),[37] commercial agency (Prokura),[38] and other matters.[39]

2. *Commercial Register*

The commercial register (Handelsregister)[40] contains a list of all full-status merchants and certain facts and legal relationships pertaining to them. It is kept by the local court of small claims (Amtsgericht) as the court of register (Registergericht). Only certain facts are admissible for publication while others must be published under all circumstances.[41]

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31. COHN, *supra* note 1, at 7.86. - 7.96.

32. *Id.* at 7.108. - 7.111.

33. *Id.* at 362., 7.113. [regarding section 366 Commercial Code (HGB) and section 932 Civil Code (BGB)]; *id.* at 210., 7.113. [regarding section 369 Commercial Code (HGB) and section 273 Civil Code (BGB)].

34. Enumeration of the kinds of commercial businesses in section 1 (2) Commercial Code (HGB).

35. *See infra* III (B)(2).

36. *See infra* III (B)(5) and note 104.

37. *See infra* III (B)(3).

38. *See infra* III (B)(4).

39. *See supra* III (B)(1) and note 32.

40. SCHLESINGER, *supra* note 1, at 407; COHN, *supra* note 1, at 7.20. - 7.27.; FULDA, *supra* note 1, at 775; MUELLER, *supra* note 1, at 12.

41. *E.g.*, all of the following companies have to be registered: partnership [section

The purpose of the register is to inform the public; therefore, changes are published not only in the Federal Gazette (Bundesanzeiger), but also in local newspapers. The task of keeping the commercial register updated belongs to the courts, the district attorney's office, the police, the local administration, the lawyers and the chamber of commerce. An entry into the commercial register always carries a presumption of admissibility and accuracy because it is made with an investigation, albeit a summary one. The registration may have confirmatory character, or it may have merely declaratory character, as when it makes visible a legally relevant fact.[42]

One very significant aspect of the register is the provision for so-called "negative publicity" (negative Publizitaet) which allows third parties to rely on the register's silence. Thus, an unregistered fact, which should have been registered, is no defense against a third party unless there is positive proof of the third party's knowledge. There is also the less important rule of "positive publicity" (positive Publizitaet). A registered and published fact is a valid defense unless the transaction takes place within 15 days after publication or the third party proves that he lacked knowledge of the published fact through no negligence of his own. This is an allegation the courts are reluctant to accept as proof because all merchants are presumed to know the contents of the commercial register at all times. A final provision allows a third party to invoke facts correctly published if he had no knowledge of their incorrectness.

Defenses based on the commercial register are known in German law as "public faith" defenses (oeffentlicher Glaube), a concept of clothing certain public registers with a rebuttable presumption of correctness.[43] This principle is even more prominent in the register of land (Grundbuch) which reflects transfers of title in real property.[44] This principle of public faith exists in several branches of the law. However, customary, uncodified commercial law supplements the restricted public faith in the commercial register by holding that a

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106 Commercial Code (HGB)], limited partnership [sections 161 (2), 162, 106 Commercial Code (HGB)], stock corporation [sections 36 *et seq.* Stock Corporation Law (AktG)], partnership limited by shares [sections 278 (2), (3), 282 Stock Corporation Law (AktG)], limited liability company [section 10 Law on Limited Liability Companies (GmbHG)].

42. This provision has been revised by the Law of August 15, 1969, [1969] BGBl. I 1146. Therefore, COHN, *supra* note 1, at 7.27. and SCHLESINGER, *supra* note 1, at 475 are slightly outdated. *See* CREIFELDS *supra* note 1, heading "Handelsregister" at 518-19; GOERLITZ, *supra* note 1, at 184, left column.

43. COHN, *supra* note 1, at 381., 7.27.; SCHLESINGER, *supra* note 1, at 466-75; CREIFELDS, *supra* note 1, heading "oeffentlicher Glaube" at 776-77.

44. SCHLESINGER, *supra* note 1, at 466-74; COHN, *supra* note 1, at 371. *et seq.* A model of a register of land (Grundbuch) is reproduced in German by COHN, *id.* appendix I in vol. I, at 303-07.

person who causes an incorrect entry or fails to have one cancelled is liable to those persons having relied "in good faith" on those incorrect facts.[45]

3. *Commercial Name (Firma)*

Section 17 (1) defines the commercial name (Firma) as the name under which a merchant signs and conducts his business.[46] It identifies and projects his image by distinguishing his person, his business, his products, and his services from others.

There are five legal principles which characterize commercial names: (1) uniqueness; (2) duty to register; (3) truthfulness in indicating the true owner or legal form of organization; (4) continuity; and (5) exclusivity. Exclusive use of a commercial name is an absolute right protected as strongly as privacy or property. Anyone impinging upon that right is subject to a penalty by the court of register, permanent injunction and damages.

4. *Commercial Agency*

In addition to the different kinds of agencies regulated in the Civil Code (BGB),[47] there are two others in commercial law. These are the power of procuration (Prokura)[48] and commercial authority (Handlungsvollmacht).[49]

Power of procuration (Prokura) is the broadest form of agency in German law. A Prokurist may engage in any business transaction, including litigation. Appointment as a Prokurist must be entered into the commercial register. A restriction of the Prokura, although valid between the Prokurist and his principal, is not binding upon third parties. The only exception may be in restrictions on the purchase of land, if expressly stated in the power of procuration.

Under the much more restrictive commercial authority (Handlungsvollmacht), the Handlungsbevollmaechtigte, may carry on only those transactions typical for the specific type or sector of business.

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45. CREIFELDS, *supra* note 1, heading "Handelsregister" at 519, left column.

46. SCHLESINGER, *supra* note 1, at 475 (asterisk); COHN, *supra* note 1, at 7.28. 7.32.; MUELLER, *supra* note 1, at 51, 72-73; Winkhaus, *supra* note 11, at 1278-79.

47. MUELLER, *supra* note 1, at 31-34; COHN, *supra* note 1, at 165.-172.; SCHLESINGER, *supra* note 1, at 537-42; *id.* 732 (citing four articles by Mueller Freienfels).

On power of agency and authority of management, *see* III (C)(3) and note 63, III (D)(1) and note 86, III(D)(2) and note 96, III(D)(3), first textual paragraph, III (D)(5), III(D)(7) and note 118.

48. COHN, *supra* note 1, at 7.39.-7.44.; SCHLESINGER, *supra* note 1, at 543 * (asterisk); MUELLER, *supra* note 1, at 34; CREIFELDS, *supra* note 1, heading "Prokura" at 837-38.

49. COHN, *supra* note 1, at 7.45. - 7.47.; MUELLER, *supra* note 1, at 34-35; CREIFELDS, *supra* note 1, heading "Handlungsvollmacht" at 522.

C. *Criteria of Companies*

To distinguish the different kinds of companies[50] one must rely on the following criteria.[51]

1. *Capacity to Hold Legal Rights (Rechtsfaehigkeit)*

Under German law, all natural persons and some corporate entities, so-called "legal persons" (juristische Personen),[52] have the capacity to hold legal rights (Rechtsfaehigkeit).[53] Under certain forms of organization, some associations or companies in the legal sense,[54] do not have the capacity.

To provide legal protection for both individual and collective interests, the law offers two basic schemes of organization, the principle of plurality (Vielheitsprinzip) and the principle of uniformity (Einheitsprinzip).[55] A company formed under the principle of plurality does not, in itself, become an independent legal person having its own legal rights. Such a company administers the sum of the individual rights of the partners as exercised by a plurality of the partners. This kind of organization requires a considerable degree of agreement among the partners and may be difficult for long-term projects, or where there is fluctuation of membership, or for activities that require an uncomplicated decision-making process.

When fast and efficient management is desired, an organization may be structured according to the principle of uniformity. Such a company becomes an independent legal person. Thus, it is possible to carry on legal activities without having in each case to consult the individual partners. The partners owe the company certain rights and obligations but the company leads a legal life of its own. Frequently the personal rights of the partners and rights of the company coincide with each other.

The type of organization controls the degree to which a partner can be held liable. Partners of a company without capacity to hold

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50. As mentioned *supra* note 19, this term in its general meaning comprises both associations and companies in the legal sense, only the latter of which will be discussed here [*infra* III (D)].

51. The following analysis III (C) relies heavily on HUECK, *supra* note 23, at 4-15.

52. COHN, *supra* note 1, at 111.-117.

53. Capacity to hold legal rights (Rechtsfaehigkeit) [sections 1 *et seq.* Civil Code (BGB)] must not be confused with capacity to act, *i.e.* capacity to evoke legal consequences (Handlungsfaehigkeit). The capacity to act can be divided into the capacity to enter into legal transactions (Geschaeftsfaehigkeit) [sections 104 *et seq.* Civil Code (BGB)] and the capacity to be responsible for delictual behavior (deliktsfaehigkeit, Zurechnungsfaehigkeit or Verschuldensfaehigkeit) [sections 827 *et seq.* Civil Code (BGB)]. *See* COHN, *supra* note 1, at 105., 135.-138., 321.; SCHLESINGER, *supra* note 1, at 621.

54. *See supra* note 19.

55. HUECK, *supra* note 23, at 5.

legal rights are held personally liable for company debts, while partners of a company with capacity to hold legal rights are not. These are the extremes, however, and between the two exist many variations. For example, the partnership, although not a legal person, by special provision in Section 124 of the Commercial Code (HGB), has legal standing. The partnership follows the principle of plurality, more typical of companies without capacity to hold legal rights than the private law company. In contrast, the limited liability company, more oriented towards the principle of uniformity, shows some elements of plurality whereas the stock corporation does not. The private law company and the stock corporation represent opposite ends on the scale of possible business organizations.

2. *The Dichotomy Between Company and Association*

Another distinction of considerable importance is whether a legal organization is an association (Verein), or a company in the strict sense (Gesellschaft).[56] This becomes a problem whenever a specific code regulating a particular legal organization leaves a question unanswered. When this occurs, the general rules in the Civil Code (BGB) in regard to either associations (Vereine) or companies (Gesellschaften) will prevail. These general rules are found in Sections 21-79 and 705-40, respectively.[57] If these sections fail to give an answer, then Sections 741-58 of the Civil Code (BGB) become applicable. These constitute the most general rules regulating groups jointly holding legal rights (Gemeinschaften).[58]

In general, associations have to be organized as a corporate entity. In an association, personal engagement and continuity of partners seem to enjoy only minor significance in contrast to a company in the strict legal sense, although this may not be so true in individual cases. The stock corporation (Aktiengesellschaft), the partnership limited by shares (Kommanditgesellschaft auf Aktien), and the limited liability company (Gesellschaft mit beschraenkter Haftung) are associations, although all of these legal terms contain the component "company" (Gesellschaft).[59] On the other hand, the private law company (Gesellschaft buergerlichen Rechts), the partnership (offene Handelsgesellschaft), and the limited partnership (Kommanditgesellschaft) are companies in the strict sense.[60]

3. *Internal and External Companies*

Company law labels the relationships between the partners of a

56. *Id.* 5-7; *see also supra* note 19.

57. They should not be confused with section 741 Civil Code (BGB). *See supra* III (A).

58. *See supra* note 23.

59. HUECK, *supra* note 23, at 7; *cf. supra* note 19.

60. HUECK, *supra* note 23, at 7.

company as the internal relations (Innenverhaeltnis) and those between the company and third parties as the external relations (Aussenverhaeltnis). This distinction exists in other areas, such as agency law. Correspondingly, there are internal companies (Innengesellschaften) and external companies (Aussengesellschaften).[61]

Companies which have the capacity to hold legal rights necessarily have external legal relations with third parties because only the corporate entity can exercise the company's rights and obligations. In contrast, companies not having the capacity to hold legal rights do not necessarily have external relations. A company may be created where the partners do not carry on any business under the company's name. They do not act in the company's name and no external company exists as a matter of law. Nevertheless, these individuals may be bound by a contract establishing an internal company subject to those rules of company law of general applicability. A prime example of an internal company is the so-called "silent partnership" (stille Gesellschaft).[62] Internally the silent partnership is subject to the general rules of company law, while externally the company is subject to no legal external rules.

Apart from reasons of business policy, the distinction between internal and external companies is legally important. Only external companies can have a commercial name. Similar restrictions apply to agency and the authority of management.[63]

4. *Person-Companies and Capital-Companies*

Another distinction on a different level is made between person-companies (Personengesellschaften) and capital-companies (Kapitalgesellschaften).[64] Person-companies (an obsolete term is personal companies),[65] which include the partnership, the private law company, the limited partnership and the silent partnership, are strongly shaped by the individual partners. Usually the partners themselves are responsible for, and actively engaged in, the company's business. There is personal liability, and with some exceptions, the membership is neither transferable nor inheritable.

Capital-companies, on the other hand, emphasize capital as the prime constituent element, thus assuming an investment character. Only the stock capital (Grundkapital), consisting of a fixed amount, is subject to liability. Membership in the company is not individually shaped; shares are transferable and the management is in the hands

61. *Id.* 7-8.
62. *See infra* III (D)(4).
63. *See supra* note 47.
64. HUECK, *supra* note 23, at 8-11; SPETHMANN, *supra* note 1, at 670.
65. *See supra* note 19.

of third persons. Examples of capital-companies are the stock corporation, the limited liability company and the partnership limited by shares.

In deciding whether to form a person-company or a capital-company, tax law is often the deciding factor. Person-companies are not subject to corporation income tax (only the partners' personal income is taxable), while capital-companies suffer the double burden of corporation and personal income tax. Naturally, there are offsetting benefits to capital-companies.[66]

5. *Ownership of Company Assets*

While companies exist which need no assets or which concentrate their assets in one place,[67] the majority of companies have distinct assets. Depending on the legal structure of the company, they will be held in one of three forms of ownership.[68]

a. *Fractional Ownership (Bruchteilseigentum)*

Under the principle of fractional ownership (Bruchteilseigentum) every member of the so-called fractional group (Bruchteilsgemeinschaft) is entitled to a fraction of every item of property of other asset. This of course is on paper, and is called an imaginary share (ideeller Anteil) in German law.

Fractional ownership is possible in regard to any legal right. The law regulating fractional groups is found in Sections 741-58 of the Commercial Code (HGB) with particular regulations applying to real property found in Sections 1008-11 of the Civil Code (BGB). Real property fractional ownership is called co-ownership (Miteigentum).[69] Fractional ownership of non-corporeal assets is described as common privilege (Mitberechtigung).

As a matter of principle, every member of the fractional group is free to use his fraction subject only to the other members' interests. Any transaction of a member contrary to the others' interests is legally valid although subject to an action for breach of contract.

Fractional ownership exists mainly in the ownership of real property (Miteigentum). For most kinds of companies this kind of ownership makes assets too readily transferable. Thus, fractional ownership of company assets is rare and requires express agreement. Fractional ownership in a company is typically found where fractional ownership of real property existed prior to the company's foundation, for example, where a loose group jointly holding a legal right (Ge-

66. *See infra* III (D) (8), IV (B)(8) and note 180.

67. *See infra* III (D) (4).

68. HUECK, *supra* note 23, at 16-19.

69. *Id.* 16-17; COHN, *supra* note 1, at 355.

meinschaft)[70] is upgraded to a company. On occasion, groups which set a significant number of rules may have inadvertently changed their legal status from that of a group jointly holding a legal right (Gemeinschaft) to that of some kind of company, most likely a private law company.[71]

Another example of fractional ownership is found in so-called incidental companies (Gelegenheitsgesellschaften). These are companies which exist for a limited time or purpose only, the most common of which are groups of banks issuing corporate bonds or securities (Emissionskonsortium). Unlike the group of real property owners who, in setting up rules of behavior, may unknowingly form a company, a group of issuing banks may create fractional ownership only by express agreement.[72] This is one of the few cases where fractional ownership is not the exception.

b. *Joint Ownership (Gesamthandseigentum)*

The most common form of ownership in German company law is joint ownership ("ownership to the joint hand" or Gesamthandseigentum).[73] Under this form no partner can unilaterally transfer his share of the company assets. Typical examples of joint ownership include the private law company, described in Sections 718-19 of the Civil Code (BGB), the partnership, governed by Section 105 (2) of the Commercial Code (HGB),[74] and the limited partnership of Section 161 (2) of the Commercial Code (HGB).[75] In other areas of law common examples are joint ownership between spouses requiring express agreement, and joint ownership between common heirs before settlement or liquidation.

Although there is some controversy as to whether shares in company assets exist at all,[76] the question is moot because in any case shares are never tangible. Every joint owner (Gesamthandseigentuemer) has a claim to the whole of the assets, but this claim is restricted by the other owners' claims. Title can only be transferred by all the owners jointly, although one or several owners can act as agents for the company. Transfer of the position of partner in a company is only possible under certain conditions. The principle that all the partners together, as a "joint hand", own the company assets

70. *See supra* III (A) and note 23 and III (C)(2) and note 58.

71. *See infra* III (D) (1).

72. HUECK, *supra* note 23, at 16.

73. *Id.* 17-18; COHN, *supra* note 1, at 355.

74. Section 105 (2) Commercial Code (HGB) refers back to sections 705-40 Civil Code (BGB).

75. Section 161 (2) Commercial Code (HGB) refers back to section 105 Commercial Code (HGB) which in its subsection (2) refers back to sections 705-40 Civil Code (BGB).

76. HUECK, *supra* note 23, at 17.

ensures that the assets are accessible in the company's interest only. They are safely out of reach of individual partners, and yet this construction does not require the company to have the capacity to hold legal rights.

c. *Ownership By the Legal Person*

If a company has the capacity to hold legal rights, its assets are owned by the company itself, as a legal person.[77] To an even greater degree than joint ownership, ownership by the legal person prevents possible undesirable use of the company assets by individual partners. A clear line is drawn between the partners' and the company's assets. The law gives control of the company's assets to the management and the partners have no way of directly interfering. The partners' rights and obligations are set out in the company's contract of formation.[78] It usually regulates contribution of capital, payment of dues, voting rights, and distribution of profits. The legal person is the only creditor for company debts and likewise it is the legal person, not individual partners, which, through its officers and agents,[79] conducts business with third parties.

The most common forms of companies having distinct legal personality and ownership of company assets by the legal person are the association (although not a company in the strict sense),[80] the stock corporation, the limited liability company, and the limited partnership.

D. *Kinds of Companies*

Against this background of significant principles of commercial and company law, the major forms of companies are now considered.[81]

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77. *Id.* 18-19.

78. While American law distinguishes between charter and by-laws and English law distinguishes between memorandum and articles of association, German law recognizes one document only, referred to as the "company contract" (Gesellschaftsvertrag). With regard to stock corporations, it is always called "*Satzung*"; with regard to limited liability companies, both terms "Satzung" and "Gesellschaftsvertrag" are used. *See* Conard, *supra* note 2, at 73 n.139; MUELLER, *supra* note 1, at 50; ZAPHIRIOU, *supra* note 1, at 107 n.14; ICC GUIDE, *supra* note 1, at 8; HAMBURG, *supra* note 1, at 12; SPETHMANN, *supra* note 1, at 685 n.6; CREIFELDS, *supra* note 1, headings "Aktiengesellschaft" at 24, right column, and "Gesellschaft mit beschraenkter Haftung" at 457, right column, and "Satzung" at 916, right column. Use of counsel in setting up the "company contract" is always recommended; *see infra* III (D) (7) and note 117.

79. *See supra* note 47.

80. *See supra* note 19.

81. COHN, *supra* note 1, at 111.-117., 7.216.-7.284.; MUELLER, *supra* note 1, at 45-62; SPETHMANN, *supra* note 1, at 670-85; ZAPHIRIOU, *supra* note 1, at 85-113; HAMBURG, *supra* note 1, at 10-17.

Leading authorities in German are HUECK, *supra* note 23, at 22-266; H. SUDHOFF, DER GESELLSCHAFTSVERTRAG DER PERSONENGESELLSCHAFTEN (4th ed. 1973) (treating part-

1. *Private Law Company (Gesellschaft Buergerlichen Rechts)*

According to Section 705 Civil Code (BGB), a private law company can be formed by at least two partners pursuing a common purpose, as defined in the underlying company contract.[82] In many respects it is comparable to a joint adventure.

The private law company[83] has no capacity to hold legal rights, and its assets are governed by the principle of joint ownership (gesamthandseigentum).[84] Its partners are joint and several debtors.[85] With regard to powers exercised by partners of companies, external relations are known as "power of agency" (Vertretungsmacht), and international relations as "authority of management" (Geschaeftsfuehrungsbefugnis).[86] Valid external and internal agreements of a private law company must be made by joint action of all partners or majority decisions. This arrangement is slow, but safe. It is desirable when partners are non-merchants or inexperienced in the law.

Private law companies exemplify the typical person-company. Its partners may sometimes even be unaware of their status, for ample, members of a car pool. Examples of private law companies include professional "partnerships,"[87] groups of businessmen who are not merchants in the legal sense, groups of underwriting banks or of issuing consortia, cartels, and holding companies. Temporary ventures and construction projects are often carried out by a so-called "work-team" (Arbeitsgemeinschaft or ARGE).[88] This consists of inde-

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nership, limited partnership, private law company, silent partnership); H. SUDHOFF, DER GESELLSCHAFTSVERTRAG DER GMBH (3d ed. 1973) (treating limited liability company); H. SUDHOFF, DER GESELLSCHAFTSVERTRAG DER GMBH & Co KG (2d ed. 1971) (treating limited liability company and partner [limited partnership]; *see infra* III (D)(8).

82. *See supra* note 78.

83. COHN, *supra* note 1, at 115., 191., 7.216. - 7.217.; SPETHMANN, *supra* note 1, at 670; MUELLER, *supra* note 1, at 46-47; HUECK, *supra* note 23, at 22-54. The private law company has no common abbreviation in German.

84. *See supra* III (C)(5)(b).

85. COHN, *supra* note 1, at 247.

86. *See supra* note 47.

87. Lawyers and other members of the professions cannot form "partnerships" in the legal sense (*see* infra III (D)(2) and note 94) because partnerships presuppose a commercial business (Handelsgewerbe), which, under German law, is incompatible with a profession.

However a bill was introduced in 1971 calling for the creation of a particular partnership for members of the professions which would be called Partnerschaft. Although liability would be limited, this form of partnership would legally be treated as a person-company in order to retain certain tax privilages (*cf. supra* III (c)(4) and *infra* III (D) (8), IV (B) (8) and note 180). Since the 1971 bill was tabled, a similar bill may soon be reintroduced. *See* Frankfurter Allgemeine Zeitung (Frankfurt/Germany), August 17, 1973, at 13, col. 4-5.

88. MUELLER, *supra* note 1, at 46-47.

pendent partners, usually legal persons, who join to form a private law company. Each partner is unrestrictedly liable, but the work-team (ARGE) cannot register under a commercial name since it is a private law company.[89]

2. *Partnership (Offense Handelsgesellschaft)*

A partnership[90] conducts a commercial business under a commercial name;[91] all of its partners are personally liable without limitation. If one partner enjoys limited liability it becomes a limited partnership.[92]

In terms of legal categories, the partnership is a company rather than an association; there is little emphasis on corporate structure. It is a person-company, that is, management is in the hands of the partners themselves.

Although as a matter of doctrine, the partnership is not a legal person, it can by special provision in Section 124 of the Commercial Code (HGB) sue, be sued, and acquire rights and obligations. As a result, the partnership holds an intermediary position in terms of legal capacity. Its assets are subject to the principle of joint ownership (Gesamthandseigentum),[93] while its legal structure is modeled after the private law company, with a few qualifications. The first one is that a partnership has to pursue a commercial business.[94] This provision ensures that small businessmen who do not conduct a commercial business in the legal sense are protected from the dangerous unlimited liability; such companies remain private law companies. Secondly, the partnership must not limit its liability toward third parties. Thirdly, any single partner can represent the partnership as an agent unless otherwise provided in the company contract and registered in the commercial register. And finally, the power of agency and authority of management cannot be limited, and may be exercised by any individual partner, subject to modification by the company contract.[96]

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89. On commercial name, *see supra* III (B) (3).

90. COHN, *supra* note 1, at 7.218. - 7.225.; SPETHMANN, *supra* note 1, at 670-72; MUELLER, *supra* note 1, at 46; HAMBURG, *supra* note 1, at 14-16; ZAPHIRIOU, *supra* note 1, at 87-91; HUECK, *supra* note 23, at 55-94. A. HUECK, DAS RECHT DER OFFENEN HANDELSGESELLSCHAFT (4th ed. 1971). The partnership is abbreviated as oHG in German.

91. On commercial name, *see supra* III (B)(3).

92. *See infra* III (D)(3).

93. *See supra* III (C)(5)(b).

94. This requirement of commercial business (Handelsgewerbe) bars members of the professions from forming partnerships in the legal sense; they can only form private law companies (*see supra* III (D) (1) and note 87).

95. On commercial name, *see supra* III (B)(3).

96. *See supra* note 78.

The partnership is the most widely used form of company. It serves the purposes of small and medium-size businesses, whereas limited liability companies and stock corporations are more common for larger businesses.

3. *Limited Partnership (Kommanditgesellschaft)*

The limited partnership[97] is one which has both general partners (fully liable partners called Komplementaere) and limited partners (Kommanditisten). Creditors are protected only to the amount of the general partners' assets plus the limited partners' contributions, an amount which is limited by the company contract[98] and published in the commercial register. The limited partners cannot be managing directors unless specifically authorized by provision in the company contract.

Like the partnership, the limited partnership carries characteristics of a company, not an association, and of a person-company (even though it strongly resembles a capital-company because of the position of the limited partners). The limited partners, because of the capital they bring into the company, often exercise considerable control by contract over the general partners who usually are internally responsible for management. This incorporation in the company contract of far-reaching responsibility is often balanced by a claim for compensation for financial losses suffered through the general partners' precarious position. If this concept is carried through, such a company is known as the capitalist limited partnership (kapitalistische KG).[99] Its internal arrangements are not far from an employer-employee relationship.

4. *Silent Partnership (Stille Gesellschaft)*

The silent partnership[100] normally consists of two partners only. The silent partner transfers assets to the active partner in return for a corresponding share in the company's profits. Although the silent partnership legally is a company because both partners jointly pursue a common purpose, the company itself holds no assets, only the active partner does. Legal relations between the partners exist only internally; externally the silent partner may remain unknown.[101] Ex-

97. COHN, *supra* note 1, at 7.226.-7.229.; SPETHMANN, *supra* note 1, at 671; MUELLER, *supra* note 1, at 46; ZAPHIRIOU, *supra* note 1, at 91; HAMBURG, *supra* note 1, at 16-17; HUECK, *supra* note 23, at 94-104. The limited partnership is abbreviated as KG in German.

98. *See supra* note 78.

99. HUECK, *supra* note 23, at 102-04; CREIFELDS, *supra* note 1, heading "Kommanditgesellschaft" at 613, right column.

100. COHN, *supra* note 1, at 7.230.; MUELLER, *supra* note 1, at 46; HUECK, *supra* note 23, at 104-12.

101. *See supra* III (C) (3) and note 62.

cept for the undisclosed existence of the silent partner, the silent partnership bears some resemblance to the limited partnership.

5. *Stock Corporation (Aktiengesellschaft)*

The stock corporation,[102] having the capacity to hold legal rights, is structured as an association and therefore has fluctuating membership (share holders). Its basic capital (Grundkapital) is divided into shares[103] and the sum of all the assets constitutes the maximum liability. The stock corporation is a typical capital-company and, through its structure, is always a merchant in the legal sense by operation of law.[104] It is the rough equivalent to the English joint stock corporation and the French *société anonyme.*

The stock corporation is regulated in detail in the 1965 Stock Corporation Law[105] which is an enlarged and revised version of earlier regulations originally contained in the Commercial Code (HGB).[106] Minimum requirements for the foundation of a stock corporation include at least five partners controlling all the shares, at least 100,000 DM basic capital, and preliminary proceedings.[107] During these proceedings the original members write the corporate charter (Satzung)[108] and appoint the supervisory board (Aufsichtsrat) which in turn appoints the management board (Vorstand). The compulsory inscription into the commercial register is not granted by the court of register until a so-called formation report (Gruendungsbericht) has been reviewed by members of the management and supervisory boards, and, under certain circumstances, by auditors appointed by the court. The functioning of a stock corporation requires three very distinct bodies: the management board (Vorstand), the supervisory board (Aufsichtsrat), and the general meeting (Hauptversammlung).[109] The supervisory board appoints and controls the man-

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102. COHN, *supra* note 1, at 7.244. - 7.282.; Steefel & von Falkenhausen, *The New German Stock Corporation Law,* 52 CORNELL L. Q. 518 (1967) [hereinafter cited as Steefel]; SPETHMANN, *supra* note 1, at 672-73; Fabricius, *The German Companies Act of 1965,* 1965 J. BUS. L. 274; MUELLER, *supra* note 1, at 54-62; HAMBURG, *supra* note 1, at 11-12; FULDA, *supra* note 1, at 780-82; Kohler, *New Corporation Laws in Germany (1966) and in France (1967) and the Trend Towards a Uniform Corporation Law for the Common Market,* 43 TUL. L. REV. 58 (1968); ZAPHIRIOU, *supra* note 1, at 86-87; HUECK, *supra* note 23, at 113-135. The stock corporation is abbreviated as AG in German.

103. Stock Corporation Law (AktG), *supra* note 25. Citations to code material within section III (D) (5) of this article are to that law unless otherwise noted.

104. *See supra* III (B)(1) and note 36.

105. *See supra* note 103.

106. SCHLESINGER, *supra* note 1, at 381 n.11.

107. Steefel, *supra* note 102, at 520-26.

108. *See supra* note 78.

109. Steefel, *supra* note 102, at 526 *et seq.*; Bruecher, *West Germany's Trade and Commerce,* 1 J. WORLD TRADE L. 511 (1967) [hereinafter cited as Bruecher]; Conard, *supra* note 2, at 100 *et seq. See also infra* III (D)(7) and notes 118, 119.

agement board which is the policy-making body representing the company in the business community and courts. The general meeting elects the supervisory board, subject to qualifications dealt with in the section on labor law of this paper.[110] The shareholders can exercise their rights in the general meeting.[111] Either they or the management board approve the yearly financial report (Jahresabschluss) and the business report (Geschaeftsbericht). The general meeting also decides how to distribute profits. The corporate charter can be changed by a three-quarters majority. This may apply to change of capital or liquidation due to bankruptcy, merger (Fusion) or consolidation (Verschmelzung).[112]

6. *Partnership Limited by Shares (Kommanditgesellschaft Auf Aktien)*

In the partnership limited by shares,[113] elements exist of both a limited partnership and a stock corporation. It is a corporate entity with its own capacity to hold legal rights, composed of at least one general partner and of limited partners not personally liable for the company's obligations. As far as the general partner is concerned, the law in Section 278 (2) and (3) of the Stock Corporation Law (AktG) refers back to Sections 161-77 of the Commercial Code (HGB), whereas the law of stock corporations is applicable in all remaining matters. The partnership limited by shares is not very common because it offers limited liability but requires minimum capital of 100,000 DM.

7. *Limited Liability Company (Gesellschaft Mit Beschraenkter Haftung)*

The limited liability company[114] was created by the legislature in

110. *See infra* VI (B) (2).

111. Steefel, *supra* note 102, at 539; FULDA, *supra* note 1, at 780-82.

112. *See infra* III (D) (7) but do not confuse with connected enterprises, *infra* III (E).

113. COHN, *supra* note 1, at 7.283. - 7.284.; MUELLER, *supra* note 1, at 47; ZAPHIRIOU, *supra* note 1, at 106; SCHLESINGER, *supra* note 1, at 569; HUECK, *supra* note 23, at 235-38. The partnership limited by shares is abbreviated as KGaA in German.

114. A most informative analysis has recently become available; Winkhaus, *supra* note 11. *See also,* COHN, *supra* note 1, at 7.231. - 7.243.; MUELLER, *supra* note 1, at 50-54; SPETHMANN, *supra* note 1, at 673-74; ZAPHIRIOU, *supra* note 1, at 95-97; HAMBURG, *supra* note 1, at 13-15; SCHLESINGER, *supra* note 1, at 567, 591-93; Haskell, *The American Close Corporation and Its West German Counterpart: A comparative Study,* 21 ALA. L. REV. 287 (1969); De Vries & Juenger, *Limited Liability Contract: The GmbH,* 64 COLUM. L. REV. 866 (1964); Schneider, *The American Close Corporation and Its German Equivalent,* 14 BUS. LAWYER 228 (1958); Fabricius, *The Private Company in German Law,* 1970 J. BUS. L. 229; McFadyean, Schneider, Houwink, Reverdin, & Homburger, *The American Close Corporation and Its European Equivalent,* 14 BUS. LAWYER 214 (1958); HUECK, *supra* note 23, at 238-53. The limited liability company is abbreviated as *GmbH* in German.

1892 to provide a form of business organization suitable for medium-size business which is less complicated and less costly than the stock corporation, while still retaining limited liability. This was done in the Law on Limited Liability Companies.[115] The limited liability company is the form of company most widely used by foreigners.[116]

While the stock corporation needs harsh controls to prevent the abuse of the wide powers granted to the management board, smaller companies are often closely-held corporations and do not present the risk of abuse to the same degree. Yet, partnerships or limited partnership are not always desirable for these people because at least one partner has to remain personally liable.

The limited liability company is a capital-company with certain traits of a person-company. It is always a merchant under Section 13 (3) of the Law on Limited Liability Companies (GmbHG), and Section 6 of the Commercial Code (HGB) and has the capacity to hold legal rights. It must be founded by at least two partners in a certified charter[117] with a minimum of 20,000 DM basic capital, the lowest possible share being 500DM. The limited liability company's name must carry the appendix "mbH" (with limited liability) and entry into the commercial register is mandatory. There must be at least one managing director (Geschaeftsfuehrer),[118] and the meeting of the partners is necessary to conduct serious business.[119] The managing director occupies the position of the company's agent (Vertreter) who is wholly responsible for the company's transactions. The appointment to the position of managing director can be revoked at any time unless the charter specifically provides otherwise. An additional supervisory board is required for limited liability companies employing over 500 people.

The partners' meeting enjoys wide powers, including auditing and the control of management. Change of the charter requires a

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115. Law on Limited Liability Companies (GmbHG), *supra* note 25.

116. Winkhaus, *supra* note 11, at 1275-76; MUELLER, *supra* note 1, at 50; LEGAL ASPECTS OF FOREIGN INVESTMENT 759 (W. Friedman & R. Pugh eds. 1959); BRUECHER, *supra* note 109, at 531; Frankfurter Allgemeine Zeitung (Frankfurt/Germany), April 14, 1973, at 17, col. 1-2; Murphy, *supra* note 2, at 705.

117. Many legal acts require public certification oeffentliche Beurkundung which is done by a lawyer-notary (Notar) or, in a few cases, by a court. In Germany only a fully-fledged lawyer can become a notary who is also responsible to his client for thorough counselling. *See* Conard, *supra* note 2, at 69; FULDA, *supra* note 1, at 775; SCHLESINGER, *supra* note 1, at 15-20, 622-24; MUELLER, *supra* note 1, at 14; COHN, *supra* note 1, at 72; Cohn, *The German Attorney — Experiences With a Unified Profession*, 9 INT. & COMP. L. Q. 580 (1960) and 10 INT. & COMP. L. Q. 103 (1961). On the terminology of charter *see supra* note 78. On details of the procedure of incorporation *see* Winkhaus, *supra* note 11, at 1277-78.

118. Winkhaus, *supra* note 11, at 1281-83; STEIN & HAY, *supra* note 1, at 760.

119. Winkhaus, *supra* note 11, at 1283-87; *see also supra* III (D)(5) and note 109.

three-quarters majority and calls for renewed certification by a lawyer-notary.[120] A partner may leave the company by transferring, in certified form, his share in the company, in case of substantial cause (wichtiger Grund), or by withdrawal or expulsion.

Liquidation is possible for several reasons specified in Sections 60-62 of the Law on Limited Liability Companies (GmbHG), among which are declaratory judgment, frustration, illegal decisions or acts, or bankruptcy. A limited liability company can, without prior liquidation, be changed in many ways, for example by merger (Fusion) or consolidation (Verschmelzung).[121] A change into a stock corporation is also possible in the reverse direction.

The German Federal Reserve Bank (Deutsche Bundesbank) in a recent report[122] emphasized the growing significance of the limited liability company which it said deserved the increased attention of entrepreneurs, legislators, and bankers alike. It regretted the insufficient disclosure of financial information due to lenient legislation. Only about 100 exceptionally large limited liability companies are obliged to publish substantial financial information.[123]

This form of company has become increasingly popular with foreign investors. From 1962 to 1972 the number of limited liability companies has more than doubled to 100,690 while stock corporations have diminished 11 percent to 2,271.[124] In late 1970, 25 percent of the basic capital of all limited liability companies was foreign-owned compared to only 15 percent of stock corporations' basic capital. It is presumed that limited liability companies tend to be created to set off profits of the foreign mother-company or to carry out operations burdened with a substantial risk. This is confirmed by the fact that

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120. *See supra* note 117.

121. On merger (Fusion or Umwandlung), *see* Merger Law (Umwandlungsgesetz) of November 12, 1956, [1956] BGBl. I 2081; *also* in Schoenfelder, *supra* note 7, at 52 a; sections 362-93 Stock Corporation Law (AktG); Merger Tax Law Umwandlungsteuergesetz of August 14, 1969, [1969] BGBl. I 1163; also in STEUERGESETZE, *supra* note 7, at 730; MUELLER, *supra* note 1, at 48, 114-15; COHN, *supra* note 1, at 7.279. - 7.281.; HUECK, *supra* note 23, at 267-74.

On consolidation (Verschmelzung), *see* sections 339-61 Stock Corporation Law (AktG); COHN, *supra* note 1, at 7.279. - 7.281. (It is to be noted that Cohn, like some other authors, understands the German "Fusion" as a consolidation, whereas this writer translates "Fusion" as merger); ZAPHIRIOU, *supra* note 1, at 124.

122. Contents reproduced in Frankfurter Allegemeine Zeitung (Frankfurt/Germany), April 14, 1973, at 17, col. 1-2.

123. Disclosure Law (Publizitaetsgesetz) of August 15, 1969, [1969] BGBl. I 1189. Disclosure is required if two out of three criteria apply: 1) balance sheet total over 125 million DM, 2) sales over 250 million DM, 3) over 5,000 employees. For details, *see* Winkhaus, *supra* note 11, at 1289-93.

124. *See supra* note 122. *Cf.* FULDA, *supra* note 1, at 770 n.14 who quotes 1963 figures.

during 1966-70 average profits of limited liability companies before taxes were considerably lower than those of other person-companies or stock corporations.[125]

There are discrepancies in the law because the 1892 Law on Limited Liability Companies, designed to modify the law of stock corporations, has undergone little change, while the law of stock corporations has often been revised. A proposed reform of the 1892 Law is legislatively quite advanced and may become law within a year or so.[126] This reform aims to strengthen the positions of minorities within the limited liability company, and creditors of the company. Minorities are to enjoy increased rights of information. Creditors should be benefited by four planned alterations of the law: (1) the requirement to bring in the basic capital completely, rather than at the present rate of 5,000 out of the required 20,000 DM; (2) mandatory evaluation of non-monetary capital by court-appointed auditors in case of dispute or doubt; (3) stricter control of the information given about the company prior to registration; (4) substantial responsibility of the founders for correct procedures of foundation. The eventual reform of connected enterprises[127] will also touch upon limited liability companies.

8. *Limited Liability Company and Partner (Limited Partnership)*

One particular kind of limited liability company is called a limited liability company and partner (limited partnership). This is an approximate translation of the German name Gesellschaft mit beschraenkter Haftung und Kompagnon Kommanditgesellschaft, almost exclusively referred to as a GmbH & Co. KG.[128]

The GmbH & Co KG is a complex legal structure owing its existence to the different rules of taxation for person-companies and capital-companies. Partners in a person-company pay personal income tax on their share in the profits, whether distributed or not; the person-company as such pays no taxes on profits. Capital-companies, on the other hand, are subject to corporation income tax. In addition, their partners are taxed for their share of the distributed profits.

A GmbH & Co KG can be formed by a limited liability company becoming the general partner of the new limited partnership and the

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125. *See supra* note 122.

126. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), March 23, 1973, at 17, col. 4-5.

127. On connected enterprises, *see infra* III (E). These must not be confused with merged or consolidated enterprises / companies, *see supra* III (D) (5) and note 112 and III (D) (7) and note 121.

128. Winkhaus, *supra* note 11, at 1276; *see also,* COHN, *supra* note 1, at 7.229., 7.243.; MUELLER, *supra* note 1, at 47, 106, 121; FULDA, *supra* note 1, at 772 n.17; SCHLESINGER, *supra* note 1, at 569 n.16; HUECK, *supra* note 23, at 10-11.

individual partners of the limited liability company becoming the new limited partnership's limited partners. Thus, advantageous taxation and limited responsibility are coupled together in an ingenious way. The GmbH & Co KG had been held to comply with civil law and to be consistent with tax law.[129] The danger is that for tax reasons this form of company may be chosen while providing an unsatisfactory vehicle for the company's aims. For this and other reasons the GmbH & Co KG may be done away with in the upcoming law. Its usefulness for the foreign investor or partner is doubtful because the favorable rate of 23.4 percent for corporation income tax on distributed earnings is forfeited and replaced by the regular rate of 51 percent plus surtaxes.[130] Yet, it is reported[131] that the GmbH & Co KG has found some followers in the American business community in Germany.

9. *Single Merchant and One Man Company*

Under certain circumstances a single person can conduct a business or even exist as a quasi-company. No particular rules apply to a single merchant who runs a business by himself.[132] He never can be a company, and his liability is always unrestricted. In his person all partners, agents, or similar persons coincide; the single merchant is like a partnership reduced to one person.

The situation is quite different with regard to one man companies.[133] While it is impossible for all person-companies to exist if the number of partners sinks below two, the stock corporation and the limited liability company can continue to exist in one person. As long as a stock corporation or a limited liability company once existed, these companies do not necessarily fold if all shares ultimately fall into one hand.

10. *Capital Investment Company (Kapitalanlagegesellschaft)*

A capital investment company[134] must be organized either as a

129. MUELLER, *supra* note 1, at 47, 106, 121; HUECK, *supra* note 23, at 10-11.

130. On surtaxes, *see infra* IV (B) (3); MUELLER, *supra* note 1, at 121.

131. FULDA, *supra* note 1, at 772 n.17; M. Laundry, *The GmbH & Co Kommanditgesellschaft: German Partnership Vehicle for Joint Ventures,* 23 BUS. LAWYER 213 (1967/68).

132. MUELLER, *supra* note 1, at 46.

133. COHN, *supra* note 1, at 7.252.; Fabricius, *The Private Company in German Law,* 1970 J. BUS. L. 229, 233; HUECK, *supra* note 23, at 48, 226-28, 243; CREIFELDS, *supra* note 1, heading "Einmanngesellschaft" at 306; J. BAERMANN, EUROPAEISCHE INTEGRATION IM GESELLSCHAFTSRECHT (1970) 201 n.35 [hereinafter cited as BAERMANN]; *cf.* ZAPHIRIOU, *supra* note 1, at 86.

134. CREIFELDS, *supra* note 1, heading "Kapitalanlagegesellschaft" at 587-88. *Cf.* SPETHMANN, *supra* note 1, at 677 *et seq.*; MUELLER, *supra* note 1, at 62-67; Butler and Thoma, *The Role of the Depotbank for a Mutual Fund Doing Business in Germany,* 26 BUS. LAWYER 1601 (1970/71); Mott, *Foreign Bond Issues on European Markets,* 24 BUS. LAWYER 1285 (1968/69).

stock corporation or a limited liability company, and must have a supervisory board.[135] Its purpose is to invest the investors' capital in stock or real estate, in accordance with the principle of spreading the risk (Risikomischung), and to issue shares to the investors. It must have a minimum capital of 500,000 DM. Its transactions are subject to the detailed provisions of the Law About Credit Banking.[136]

The sale and taxation of foreign investment shares are regulated by the Law on Foreign Investments.[137] It is mandatory to register with the Federal Reserve Bank (Deutsche Bundesbank), have an inland representative, make deposits with an inland depository bank, regularly publish returns, and regulate the sale of shares. Both domestic and foreign capital investment shares may be returned within two weeks if the prospectus was incorrect or if the shares were bought outside the seller's regular office.

E. *Connected Enterprises*

The problems relevant to mergers and consolidations in German law[138] must be distinguished from those of connected enterprises (verbundene Unternehmen), also treated under the heading of law of combines (Konzernrecht).[139] Belatedly recognizing the fact that today 70 to 80 percent of industrial capital is owned by connected enterprises,[140] in 1965 the lawmakers for the first time tackled many problems through Sections 15-22 and 291 et seq. of the 1965 Stock Corporation Law.[141] Naturally, this first legislative effort to deal with these very complex questions did not solve all the problems. The multinational enterprise[142] and the legal consequences of economic concentra-

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135. Law About Capital Investment Companies (Gesetz ueber Kapitalanlagegesellschaften) of April 16, 1957, [1957] BGBl. I 378, as amended January 14, 1970, [1970] BGBl. I 127; *also* in STEUERGESETZE, *supra* note 7, at 80.

136. Law About Credit Banking (Gesetz ueber das Kreditwesen) of July 10, 1961, [1961] BGBl. I 881.

137. Law on Foreign Investments (Auslandsinvestmentgesetz) of July 28, 1969, [1969] BGBl. I 986, *also* in STEUERGESETZE, *supra* note 7, at 85. A translation exists by H. BRUECHER & D. PULCH, THE GERMAN LAW CONCERNING THE DISTRIBUTION OF FOREIGN INVESTMENT SHARES (1970); Mueller, *supra* note 1, at 64-65.

138. *See supra* III (D)(5) and note 112 and III (D)(7) and note 121. On mergers under EEC law, *see* FULDA, *supra* note 1, at 643 *et seq.*

139. Bringezu, *Parent-Subsidiary Relations Under German Law*, 7 INT'L LAWYER 138 (1973); Haskell, *The New West German Law of "Related Business Units"*, 24 BUS. LAWYER 421 (1968/69); Bruno, *German Law of Affiliated Enterprises*, 8 AM. BUS. L. J. 157 (1970/71); ZAPHIRIOU, *supra* note 1, at 118-24; ICC GUIDE, *supra* note 1, at 36-37; MUELLER, *supra* note 1, at 58-61.

140. *Cf.* GOERLITZ, *supra* note 1, at 138, right column.

141. For citation of statute, *see supra* note 25.

142. *See* Vagts, Book Review, 67 AM. J. INT'L L. 185 (1973); Miller, *The Multinational Corporation and the Nation-State*, 7 J. WORLD TRADE L. 267 (1973); Troeller, *Multinational Corporations in a Changing Europe*, 7 J. WORLD TRADE L. 293 (1973); Farrell *et. al.*, *Mounting Attacks on Multi-National Corporations*, 28 BUS. LAWYER 241

tion[143] present continuing difficulties.

Sections 15 et seq. of the Stock Corporation Law (AktG) define connected enterprises as legally independent enterprises which in relation to each other are: majority-owned and dominated, dependent and dominating, combines, mutually participating at a rate of over 25 percent, or partners of contracts between enterprises. The most significant legal consequence of mutual participation between enterprises is the duty to disclose both participation and prohibition of the exercise of any rights beyond the point corresponding to 25 percent ownership of the shares.

Seven kinds of contracts between enterprises are described in Sections 291 and 292: contract of domination (Beherrschungsver-

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(March 1973); Kahn, *International Companies*, 3 J. WORLD TRADE L. 498 (1969); Litvak and Maule, *The Multinational Corporation*, 5 J. WORLD TRADE L. 631 (1971); Caves, *Industrial Economics of Foreign Investment: The Case of the International Corporation*, 5 J. WORLD TRADE L. 303 (1971); Tsurumi, *Japanese Multinational Firms*, 7 J. WORLD TRADE L. 74 (1973); W. FRIEDMANN & J. BEGUIN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES (1971); Miranda, *Problems of Joint International Business Ventures*, 4 INT'L LAWYER 550 (1970); Vagts, *The Multi-National Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970); Eisenberg, *Megasubsidiaries: The Effect of Corporate Structure on Corporate Control*, 84 HARV. L. REV. 1577 (1971); Tunc, *Multi-National Companies in French Law*, in LAW AND INTERNATIONAL TRADE 375 (F. Fabricius ed. 1973); J. BEHRMAN, NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE: TENSIONS AMONG THE NORTH ATLANTIC COUNTRIES (1970); Schmitthoff, *Multi-National Companies*, 1970 J. BUS. L. 177; Schmitthoff, *Multinationals in Court*, 1972 J. Bus. L. 103; C. SCHMITTHOFF, THE ROLE OF THE MULTINATIONAL ENTERPRISE IN AN ENLARGED EUROPEAN COMMUNITY (1972); H. KOPPENSTEINER, INTERNATIONALE UNTERNEHMEN IM DEUTSCHEN GESELLSCHAFTSRECHT (1971); M. LUTTER, RECHT UND STEUERN DER INTERNATIONALEN UNTERNEHMENSVERBINDUNGEN (1972); Arndt, *Jagdruende fuer Elefanten. Gefaehrden die multinationalen Unternehmen den Wettbewerb und den freien Welthandel ?*, Die Zeit (Hamburg/Germany), March 2, 1973, at 35; Kaps, *Multinationale Unternehmen: Die neuen Pruegelknaben*, Die Zeit (Hamburg/Germany), March 30, at 38, col. 3-5.

On international *public* enterprises, *see* C. FLIGLER, MULTINATIONAL PUBLIC ENTERPRISES (1967); further references by G. KEGEL, INTERNATIONALES PRIVATRECHT 236 (3d ed. 1971) [hereinafter cited as KEGEL]; BAERMANN, *supra* note 133, at 22 n.1.

143. Mestmuecker, *Concentration and Competition in the EEC*, 6 J. WORLD TRADE L. 615 (1972); 7 J. WORLD TRADE L. 36 (1973); D. MCLACHLAN & D. SWANN, COMPETITION POLICY IN THE EUROPEAN COMMUNITY (1967); Arndt, *Basic Problems of Concentration Policy*, 17 ANTITRUST BULL. 1107, 1122 (1972); Brown, *Recent Developments, Tendencies and Experiences in Antitrust and Related Government Policy Regulating Private Enterprises*, 17 ANTITRUST BULL. 597, 616-21 (1972); R. JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION (1970); J. RAHL, COMMON MARKET AND AMERICAN ANTITRUST, OVERLAP AND CONFLICT (1970); FULDA, *supra* note 1, at 652-53; Geitner, *Die Kontrolle von Unternehmenskonzentrationen im Recht der EWG-Mitgliedstaaten*, 19 WETTBEWERB IN RECHT UND PRAXIS 1 (1973).

On taxes and voting arrangements, *see* MUELLER, *supra* note 1, at 108-23; M. LUTTER, RECHT UND STEUERN DER INTERNATIONALEN UNTERNEHMENSVERBINDUNGEN (1972); Lutter, *Zu einigen Grundsatzfragen der Besteuerung verbundener Unternehmen*, 27 JURISTENZEITUNG 482 (1972); *see also infra* V (A) and note 188 and V (B)(3) and note 212.

trag), contract of transfer of profits (Gewinnabfuehrungsvertrag), contract of management (Geschaeftsfuehrungsvertrag), contract to share profits (Gewinngemeinschaft), contract of partial transfer of profits (Teilgewinnabfuehrungsvertrag), lease and other use of enterprise installations (Betriebspachtvertrag and Betriebsueberlassungsvertrag). All of these require approval by at least three-quarters of the share-holders and entry into the commercial register. Contracts of transfer or partial transfer of profits also need the consent of the dominated enterprise.

Since the position of the dominating enterprise largely excludes a distinct economic existence of the dominated enterprise, the law provides regulations protecting the rights of those share-holders and creditors with regard to liquidation, compensation, organization and responsibility of management, and integration of enterprises.

The law further provides that a section or department of a large integrated enterprise which may internally be completely integrated may also have a separate legal identity. This procedure usually involves a combination of domination and transfer of profits by contract and is referred to as a contract of integrated organs (Organschaftsvertrag).[144]

F. *Branch, Subsidiary or Association*

The decision whether to establish a company abroad as a branch, a subsidiary, or an associated company depends upon two major factors—legal framework and taxation.[145]

Branches are generally subject to comparatively high taxes. They are therefore advisable if a parent-company wants to set off domestic profits against the branch's losses. Also, some large enterprises find themselves opening foreign branches to boost prestige and good will in advertising and public relations.[146]

For the most part, subsidiary or associated companies carry less

144. HUECK, *supra* note 23, at 281; Karplus, *The German Integration Agreement as Corporate Guarantee*, 19 BUS. LAWYER 295 (1963).

145. Winkhaus, *supra* note 11, at 1275-76, 1293-1300; STEIN & HAY, *supra* note 1, at 737 *et seq.*; ICC GUIDE, *supra* note 1, at 9, 36-38; HAMBURG, *supra* note 1, at 17; MUELLER, *supra* note 1, at 49, 58, 126-28; C. SCHMITTHOFF, THE EXPORT TRADE 154 (5th ed. 1969); King, *Special Tax Problems Related to the Selection and Acquisition of Investments in European Countries*, in Theberge, *supra* note 1, at 38-39, 52; Wallace, *The Formation and Operation of Foreign Subsidiaries and Branches*, 16 BUS. LAWYER 403-516 (1961); Bruno, *German Law of Affiliated Enterprises*, 8 AM. BUS. L. J. 157 (1970/71); Bruno, *Checklist for Formation of a Foreign Subsidiary*, 24 BUS. LAWYER 493 (1968/69); Berens, *Foreign Ventures — A Legal Anatomy*, 26 BUS. LAWYER 1527 (1970/71); ZAPHIRIOU, *supra* note 1, at 132-37.

146. *Cf.* STEIN & HAY, *supra* note 1, at 743.

significant tax loads.[147] The advantage of the latter is that the shareholders' or partners' liability is limited. For entrepreneurs not depending on public financing, the limited liability company has been a very popular form.[148]

IV. TAXATION

Foreign investors must, of course, be well acquainted with their own tax regulations,[149] as well as with German tax law.[150] A major revision of German tax law is anticipated, although probably not in the immediate future.

Currently, taxes are regulated by several bodies of written law. There are also separate tax courts (Finanzgerichte) and the Federal Tax Court (Bundesfinanzhof).[151] These tax courts deal with taxes and tariffs, but certain matters of tax law may incidentally be heard before administrative or constitutional courts.

A. *Sources of Tax Law*

The most obvious sources of tax law are several federal codes, the most important of which are the Levies Regulation (Reichsabgadenordnung), the Tax Adjustment Law (Steueranpassungsgesetz), and the Valuation Law (Bewertungsgesetz).[152]

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147. MUELLER, *supra* note 1, at 126-28 calculates the tax burden of a company of an assumed net income of one million DM before taxes. For a subsidiary with full distribution but without reinvestment, 45 percent taxes are computed; for a subsidiary with full distribution and reinvestment, 51 percent; for a subsidiary with full retention of profit, 59 percent; for a subsidiary with hidden distribution of profit, 83 percent; and for a branch, 57 percent. This apparently does not take into consideration the surtaxes presently in force, *see infra* IV (B)(3).

148. *See supra* note 116.

149. On U. S. taxation of foreign income and related problems, *see* STEIN & HAY, *supra* note 1, at 762 *et seq.*; van Hoorn and Wright, *Taxation,* in STEIN & NICHOLSON II, *supra* note 1, at 343, 421 *et seq.*; SCHLESINGER, *supra* note 1, at 625; Slowinski & Haderlein, *U. S. Taxation of Foreign Income: The Increasing Role of the Foreign Tax Credit,* in INTERNATIONAL TRADE, INVESTMENT AND ORGANIZATION 137, 140 *et seq.* (P. Hay and W. LaFave eds. 1967); Harris, *Compensation Planning for the Europe-Bound Executive,* in Theberge, *supra* note 1, at 106; Voegelin, *Estate Planning for the Europe-Bound Executive,* in Theberge, *supra* note 1, at 114; FULDA, *supra* note 1, at 733 *et seq.*; B. SPITZ, SPITZ ON INTERNATIONAL TAX PLANNING (1972); van Hoorn, *Foreign Tax and Investment Incentives,* 1965 U. ILL. L. F. 488. *See also infra* note 157.

150. Winkhaus, *supra* note 11, at 1275-76, 1293-1300; MUELLER, *supra* note 1, at 100; BRUECHER, *supra* note 109, at 535; J. van Hoorn & L. Wright, *Taxation,* in STEIN & NICHOLSON II, *supra* note 1, at 343, 377 *et seq.*; HAMBURG, *supra* note 1, at 4-10; further references by SCHLESINGER, *supra* note 1, at 805 *et seq.*; H. GUMPEL, TAXATION IN THE FEDERAL REPUBLIC OF GERMANY (2d ed. 1969).

German literature: GOERLITZ, *supra* note 1, at 447-56; W. HARTZ, HANDWOERTERBUCH DES STEUERRECHTS, 2 vols. (1972); H. KRUSE, STEUERRECHT, (3d ed. 1973). *See also supra* note 143, last paragraph.

151. Hillhouse & Coperman, *Tax Courts in Western Germany,* 8 PUBLIC FINANCE 259 (1953); COHN, *supra* note 1, at 58.

152. Levies Regulation (Abgabenordung or Reichsabgabenordnung) of May 22,

Substantial portions of tax law are also found in Articles 104 (a) et seq. of the Constitution which is called the Basic Law (Grundgesetz).[153] Of the codes, the Levies Regulation (AO) provides rules of procedures and sanctions, the Tax Adjustment Law (StAnpG) provides definitions and standards of interpretation, and the Valuation Law (BewG) provides standards of valuation of objects relevant for tax purposes. The Basic Law (GG) contains the elements of budgeting and of the distribution of revenue for local, state, and federal spending. Thus the highest court in the country, the Federal Constitutional Court (Bundesverfassungsgericht),[154] often deals with tax law. The Court has the authority to declare tax laws unconstitutional. It is also often called upon to apply the test of Article 3 of the Basic Law (GG) which makes the principle of equal treatment before the law a basic right (Grundrecht).[155]

In addition, various other codes exist which deal with taxation in specific areas. The very number of tax laws has been a matter of complaint for years.

A second source of German tax law is contained in Articles 95 et seq. of the Treaty of Rome. They provide for far-reaching harmonization of indirect taxes within the European Economic Community. One example in recent years has been the substitution of the turnover tax by the value-added tax. For political and technical legal reasons, however, the process of harmonization is quite slow.[156] Beyond the Treaty of Rome there exist a number of international treaties dealing specifically with taxation, most of which are to avoid double taxation.[157]

1931, [1931] RGBl. I 161; *also* in STEUERGESETZE, *supra* note 7, at 800 [hereinafter cited as Levies Regulation AO)]; Tax Adjustment Law (Steueranpassungsgesetz) of October 16, 1934, [1934] RGBl. I 161; *also* in STEUERGESETZE, *supra* note 7, at 810 [hereinafter cited as Tax Adjustment Law (StAnpG)]; Valuation Law (Bewertungsgesetz) of December 10, 1965, [1965] BGBl. I 1861; *also* in STEUERGESETZE, *supra* note 7, at 200 [hereinafter cited as Valuation Law (BewG)].

153. Basic Law (Grundgesetz) of May 23, 1949, [1949] BGBl. 1, *as amended* July 28, 1972, [1972] BGBl. I 1305; also in SCHOENFELDER, *supra* note 7, at 1, and in SARTORIUS, *supra* note 7, at 1 [hereinafter cited as Basic Law (GG)]; *see also* STEIN & HAY, *supra* note 1, at 37; COHN, *supra* note 1, at 15, 48; Lenhoff, *The German (Bonn) Constitution with Comparative Glances at the French and Italian Constitutions,* 24 TUL. L. REV. 1 (1949).

154. STEIN & HAY, *supra* note 1, at 49; SCHLESINGER, *supra* note 1, at 332 nn. 36-37, 362-63 nn. 65-67 and 411 n.7; Rupp, *Federal Constitutional Court and the Constitution of the Federal Republic of Germany,* 16 ST. LOUIS L. J. 359 (1971/72). *See also* SCHLESINGER, *supra* note 1, at 759-62 for further references and *infra* XII and note 248.

155. *See infra* VII.

156. *See infra* IX.

157. Hadari, *Tax Treaties and Their Role in the Financial Planning of the Multinational Enterprise,* 20 AM. J. COMP. L. 111 (1972); Carroll, *International Tax Law: Benefits for American Investors and Enterprises Abroad, Evolution of U.S. Treaties*

B. *Kinds of Taxes*

One way to differentiate between taxes under German law is to distinguish between taxes on economic operations, so-called transfer taxes (Verkehrsteuern)[158] and taxes on income (Einkommensteuern). Transfer taxes include the turnover tax (Umsatzsteuer), capital investment tax (Kapitalverkehrsteuer), stock exchange turnover tax (Boersenumsatzsteuer), bills of exchange tax (Wechselsteuer), and real estate acquisition tax (Grunderwerbsteuer). Income taxes include the corporation income tax (Koerperschaftsteuer), personal income tax (Einkommensteuer) and trade tax (Gewerbesteuer).

1. *Personal Income Tax*

Persons who take up permanent residence in Germany are subject to unrestricted taxation unless otherwise provided by international treaty. The tax authorities determine whether there is permanent residence. While a period of six months residence can be taken as a general guideline, more specific advice must be sought from a CPA (Wirtschaftspruefer) or a tax counsellor (Steuerberater or Steuerbevollmaechtigter).[159]

No person earning less than 24,000 DM a year is subject to personal income tax.[160] However, they pay a wage tax (Lohnsteuer) which is automatically withheld by the employer.

Only income from seven specific sources is taxed; however, in the very unlikely case that a person acquires income from another source, he must still pay an estimated tax. Different regulations may apply to foreigners. There can be lump sum taxation (Pauschbesteuerung) under Section 31 of the Personal Income Tax Law (EStG) and Section 10 of the Law on Net Worth Tax (VStG) if a foreign person having particular skills (such as university professors, scientists, art-

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to Avoid Double Taxation of Income, 2 INT'L LAWYER 692 (1968), 3 *id.* at 129 (1969); Kalish, *Treatment of Intercompany Transactions When Doing Business Abroad (Avoiding Double Taxation): Section 482*, 27 N.Y.U. INST. FED. TAXATION 1032 (1969).

158. German tax law arrogantly disregards rules of spelling by leaving out the additional 's' normally required to connect two words into one. Thus transfer taxes (Verkehrssteuern) become (Verkehrsteuern), and this "rule" is likewise applied to all other taxes (Steuern).

159. MUELLER, *supra* note 1, at 129; HAMBURG, *supra* note 1, at 5.

160. On personal income tax generally, *see* Personal Income Tax Law (Einkommensteuergesetz) of December 1, 1971, [1971] BGBl. I 137; *also* in STEUERGESETZE, *supra* note 7, at 1 [hereinafter cited as Personal Income Tax Law (EStG)]; MUELLER, *supra* note 1, at 129; HAMBURG, *supra* note 1, at 5-6; CREIFELDS, *supra* note 1, heading "Einkommensteuer" at 303-05.

On inheritance tax, *see* Inheritance Tax Law (Erbschaftsteuergesetz) of August 22, 1925, [1925] RGBl. I 320 *as amended* December 23, 1970, [1970] BGBl. I 1856; *also* in STEUERGESETZE, *supra* note 7, at 250; Killius, *German Inheritance and Income Taxation of United States Estates*, 24 TAX. L. REV. 127 (1968).

ists, but not usually businessmen) so requests.[161]

Personal income taxation is based upon the personal income after allowances have been deducted. There are blanket deductions for professional people, special deductions such as interest on credits,[162] insurance fees, church taxes, charitable contributions, payments on savings to build private homes, and deductions for private homes recently built.[163] More deductions are made for dependent children, and old age before the taxable income found in the tax schedule is determined. Individuals and spouses filing separate returns are taxed upon the general schedule (Grundtabelle), spouses filing joint returns and widows upon the so-called splitting schedule. These schedules are found in Section 32 of the Personal Income Tax Law (EStG). Taxation of yearly income varies between 19 percent (incomes between 1,680 and 8,000 DM) and 53 percent (over 110,000 DM).

2. *Corporation Income Tax*

Corporation income tax[164] is based upon corporate income as calculated according to Personal Income Tax Law (EStG) and Sections 7-16 of the Corporation Income Tax Law (Koerperschaftsteuergesetz).[165] One starts with balance sheet profits, then adds certain non-deductible expenses (personal income tax, net worth tax,[166] gratuities of members of supervisory boards, etc.) and hidden distributed profits. Deductions are taken for expenses such as rehabilitation gains, charitable contributions, and intercorporate dividends. After deductions, the loss carry-forward is subtracted according to Section 10(d) of the Personal Income Tax (EStG) to form the income from which 30 percent capital yields are subtracted to arrive at taxable income. The tax rates for the different kinds of companies vary between 15 and 51 percent.

3. *Surtaxes on Income Taxes*

In 1967, a surtax on income taxes at the rate of three percent of

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161. Section 10 Law on Net Worth Tax (Vermoegensteuergesetz) of June 10, 1954, [1954] BGBl. I 137; *also* in STEUERGESETZE, *supra* note 7, at 220 [hereinafter cited as Law on Net Worth Tax/VStG]; Section 31 Personal Income Tax Law (EStG), *supra* note 160; MUELLER, *supra* note 1, at 132; CREIFELDS, *supra* note 1, heading "Pauschbesteuerung" at 801.

162. This will be abolished in 1974. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 19, 1973, at 19, col. 3-5; June 16, 1973, at 5, col. 1-2.

163. This will be suspended from May 1973 to April 1974. *Id.*

164. On corporation income tax generally *see* Corporation Income Tax Law (Koerperschaftsteuergesetz) of October 13, 1969, [1969] BGBl. I 1869; *also* in STEUERGESETZE, *supra* note 7, at 100 [hereinafter cited as Corporation Income Tax Law (KStG)]; BRUECHER, *supra* note 109, at 539; MUELLER, *supra* note 1, at 108-28; HAMBURG, *supra* note 1, at 6-7.

165. For citation of statute *see supra* notes 160 and 164.

166. *See supra* note 161.

the income taxes was introduced.[167] An additional surtax called stability surtax (Stabilitaetsabgabe) is tacked on all personal incomes over 24,000 DM (single) or 48,000DM (joint return) at the rate of 10 percent of the regular income tax. Similar rules apply to corporation income tax. Although this second surtax is to operate for about a year only, starting on July 1, 1973, as an effort to stop inflationary tendencies, it gives an idea of how similar measures might look in the future. Numerous other legislative efforts of May 10, 1973 are designed to stabilize the economy. This so-called stability program includes a tax of 11 percent on industrial investments for a period of two years and reform of the law of restrictive trade practices.[168]

4. *Trade Tax*

The trade tax covers stationary and migratory domestic trades. It is federally and uniformly regulated,[169] and accrues to the local communities where it constitutes the most significant source of revenue. It is designed to contribute to the costs of utilities and roads.

The applicable statutes include the Trade Tax Law (GewStg) with its enacting ordinances (Durchfuehrungsverordnungen) and directions (Richtlinien). The trade tax is five percent of the trade earnings (Gewerbeertrag) which are calculated by adding to the profits (after personal and corporation income taxes) certain sums such as payment of interests on debts and subtracting other sums such as tax-exempt donations. Trade capital (Gewerbekapital) is taxed in a similarly complicated computation.

Additionally, numerous communities impose a payroll tax (Lohnsummensteuer). Each community may set its own index which is applied to the rate of two percent of the total of the payrolls.[170]

At times there have been "arrangements" or reductions of these taxes in an effort to attract new industries. These manipulations have been declared illegal under most circumstances by the courts, but are still attempted from time to time.[171]

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167. Law of December 21, 1967, [1967] BGBl. I 1254.

168. Frankfurter Allgemeine Zeitung (Frankfurt/Germany) May 11, 1973, at 1, col. 2-4, at 4, col. 4-6, at 5, col. 1-2; May 19, 1973, at 19, col. 3-5; June 16, 1973, at 1, col. 2-4, at 5, col. 1-2.

The reform of the Law Against Restraints of Trade is about to be settled; *see infra* V(B)(3) and note 213.

169. Trade Tax Law (Gewerbesteuergesetz) of October 20, 1969, [1969] BGBl. I 2021; *also* in STEUERGESETZE, *supra* note 7, at 450 [hereinafter cited as Trade Tax Law (GewStG)]; MUELLER, *supra* note 1, at 123-25; HAMBURG, *supra* note 1, at 8-9.

170. MUELLER, *supra* note 1, at 131.

171. Judgment of December 1, 1964, *Oberverwaltungsgericht Muenster*, 21 ENTSCHEIDUNGEN DER OBERVERWALTUNGSGERICHTE 18 (1967/68); Judgment of December 1, 1969, *Oberverwaltungsgericht Rheinland-Pfalz*, 19 KOMMUNALE STEUER-ZEITSCHRIFT 96 (1970); H. WOLFF, II VERWALTUNGSRECHT 200 (3d ed. 1970).

5. *Value-Added Tax*

In compliance with the Treaty of Rome, on January 1, 1968, Germany changed from gross turnover tax to its present value-added tax.[172] Under the old system, each step in the production and marketing process involving a change of hands was separately and comprehensively taxed. This cumulative taxation technique led to distortions of competition whenever an enterprise concentrated several steps within its own production, and thus escaped repeated taxation.

The new system, by contrast, taxes the increase in value and not the increase in price. The difference in value between the incoming and outgoing product or service is taxed rather than the whole product or service. Thus gross prices which invisibly included turnover tax have been replaced by net prices to which the turnover tax is added. The value-added tax avoids taxing previously imposed tax.

6. *Real Property Taxes*

The real property tax,[173] like the trade tax, is regulated on the federal level, but collected by the communities. With the exception of real property belonging to charitable organizations, all real property is taxed on its value. The computation normally applies the tax index (Steuermesszahl) which is about one percent and the locally varying levying index (Hebesatz) to the unit value of the real property. The resulting tax rate is between 0.5 and 2.5 percent. The unit value (Einheitswert) is set at intervals of a decade or more, and is therefore hopelessly outdated. The last levying index dates from 1935 but is to be updated in 1973.[174]

Real property acquisition tax becomes applicable when domestic real property is sold.[175] It also applies where the possessor enjoys the economic and financial use of the land without being the owner. The present tax rate is seven percent, but it is likely that it may be raised substantially to curb sensational gains made by land owners in urban centers and other areas which have witnessed rapid multiplications in value.

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172. Turnover Tax Law (Umsatzsteuergesetz) of May 29, 1967, [1967] BGBl. I 545; *also* in STEUERGESETZE, *supra* note 7, at 500; MUELLER, *supra* note 1, at 102-05; King, *Special Tax Problems Related to the Selection and Acquisition of Investments in European Countries*, in Theberge, *supra* note 1, at 38, 48. *See also infra* IX and note 271.

173. Real Property Tax Law (Grundsteuergesetz) of December 1, 1936, [1936] RGBl. I 986 *as amended* August 10, 1951, [1951] BGBl. I 519, corrected *id.* 790; *also* in STEUERGESETZE, *supra* note 7, at 420.

174. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 12, 1973, at 1, col. 1-2; May 17, 1973, at 15, col. 1-4; June 15, 1973, at 17, col. 4-5.

175. Real Property Acquisition Tax Law (Grunderwerbsteuergesetz) of March 29, 1940, [1940] RGBl. I 585; *also* in STEUERGESETZE, *supra* note 7, at 600; MUELLER, *supra* note 1, at 107.

7. *Tax Incentives*

Federal legislation has been enacted to counterbalance the geographic and economic isolation of West Berlin by providing substantial tax relief and investment incentives. The Berlin Relief Law (Berlinfoerderungsgesetz)[176] reduces the value-added tax for transports to or from West Berlin, and allows for higher depreciations, tax reductions on long-term building contracts and reductions of 20 to 30 percent on corporation and personal income taxes respectively.

Similarly the Law on Investment Subsidies offers tax incentives of 7.5 percent of capital invested to establish or improve enterprises situated along the eastern border of the country.[177] Additional incentives or premiums exist to boost marginal industries such as coal,[178] ship-building, or investments in developing countries.[179]

8. *Additional Considerations*

Tax law is so complicated that only the most basic outline can be given here. This is particularly true with regard to taxation of corporate income. Such considerations as inter-corporate dividends, hidden profit distributions and the like can only be briefly mentioned.[180]

Uncer certain conditions tax credit may be given either for personal or corporation income tax paid abroad.[181] The new Tax Evasion Law is noteworthy for its introduction of the indirect foreign tax credit for profit distributions by controlled foreign subsidiaries.[182]

Some additional kinds of taxes should be mentioned. Three kinds of capital investment taxes (Kapitalverkehrsteuern) exist. Company tax (Gesellschaftsteuer) is imposed when capital-companies are formed or financially strengthened.[183] Negotiable in-

176. Berlin Relief Law (Berlinfoerderungsgesetz) of October 1, 1968, [1968] BGBl. I 1049, as amended October 29, 1970, [1970] BGBl. I 1482; *also* in STEUERGESETZE, *supra* note 7, at 711.

177. Law on Investment Subsidies (Investitionszulagengesetz) of August 18, 1969, [1969] BGBl. I 1211; *also* in STEUERGESETZE, *supra* note 7, at 740.

178. Coal Adjustment Law (Steinkohlenanpassungsgesetz) of May 5, 1968, [1968] BGBl. I 365.

179. *See* Section 82 (f) Personal Income Tax Law (EStG), *supra* note 160; Section 2 (3) Law on Net Worth Tax (VStG), *supra* note 161; Section 4 (4). Turnover Tax Law (Umsatzsteuergesetz), *supra* note 172; Section 9 (a) Law on Net Worth Tax (VStG), *supra* note 161; von Boetticher, *A New Approach to Taxation of Investments in Less Developed Countries*, 17 AM. J. COMP. L. 529 (1969).

180. MUELLER, *supra* note 1, at 108-28.

181. FULDA, *supra* note 1, at 733-55; Carroll, *IFA's Growth with International Tax Law*, 5 INT'L LAWYER 558 (1971).

182. Tax Evasion Law (Aussensteuergesetz) of September 8, 1972, [1972] BGBl. I 1713; *also* in STEUERGESETZE, *supra* note 7, at 725; MUELLER, *supra* note 1, at 111, 140.

183. Sections 2-10 Capital Transfer Tax Law (Kapitalverkehrsteuergesetz) of July 24, 1959, [1959] BGBl. I 530; *also* in STEUERGESETZE, *supra* note 7, at 610; MUELLER, *supra* note 1, at 105-06, 116.

struments tax (Wertpapiersteuer) is no longer applicable.[184] And stock exchange turnover tax concerns the sale of most kinds of shares.[185] This last type is a follow-up to the company tax after company formation and covers subsequent transfers. It ranges between 0.1 and 0.2 percent and is reduced by half if the agreement is concluded abroad and if one party is foreign.

Proposed tax reform would raise taxes on higher incomes and introduce measures to curb unusual profits.[186]

V. ANTITRUST LAW

A. *U.S. and German Approaches Compared*

Many commentators dealing with antitrust law[187] on both sides of the Atlantic allege a significant difference between U.S. antitrust laws (which prohibit almost any kind of restrictive trade practices) and European laws (which allow cartels in an "anything-goes-attitude"). To assume this to be true without reservations would be a misunderstanding.

In fact, results on both sides of the Atlantic are often identical in result, although the legal setting is quite different.[188] Most U.S. companies are eager not to attract too much attention from the Federal Trade Commission, and most German companies wish to avoid

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184. Law of March 25, 1965, [1965] BGBl. I 147 abolishing section 11, 13-16 Capital Transfer Tax Law (Kapitalverkehrsteuergesetz).

However, there is a 0.15 percent tax on bills of exchange which is reduced by one half if either the bill is drawn in Germany on a foreign drawee and payable abroad or drawn abroad on a domestic drawee and payable in Germany: Bills of Exchange Tax Law (Wechselsteuergesetz) of September 2, 1935, [1935] RGBl. I 1124 as amended July 24, 1959, [1959] BGBl. I 537; *also* in STEUERGESETZE, *supra* note 7, at 640.

185. Sections 17-25 Capital Transfer Tax Law, *supra* note 183.

186. *See supra* IV(B)(6).

187. On industrial property, *see* MUELLER, *supra* note 1, at 68-72, 85-92; COHN, *supra* note 1, at 7.182.-7.215.; S. Ladas, *Industrial Property*, in I STEIN & NICHOLSON, *supra* note 1, at 235; Lieberknecht, *Industrial Property Rights and the Rules on Competition in the Rome Treaty*, 27 BUS. LAWYER 811 (1972); Deringer, *A Practitioner Looks at the German and EEC Rules as Applied to Acquisitions, Mergers, and Joint Ventures*, in Theberge, *supra* note 1, at 64, 66-68 [hereinafter cited as Deringer]; Newes, *The EEC Treaty as Applied to Distribution Arrangements and Industrial Property Rights*, in Theberge at 72; Timberg, *Drafting Licensing Arrangements in the Seventies*, in Theberge at 134; Becher, *Law and Practice of Defensive Marks in Germany*, 48 TRADEMARK REP. 797 (1958); Jones, *Fundamentals of International Licensing and Their Application in the European Community*, 7 INT'L LAWYER 78 (1973); Galloway, *Trademark and Competition in the EEC*, 6 J. WORLD TRADE L. 550 (1972).

188. STEIN & HAY, *supra* note 1, at 524 *et seq.*; MUELLER, *supra* note 1, at 73-85; Deringer, *supra* note 187; FULDA, *supra* note 1, at 105; COHN, *supra* note 1, at 7.155.-7.181.; Schapiro, *The German Law Against Restraints of Competition*, 62 COLUM. L. REV. 1, 201 (1962); H. KRONSTEIN, THE LAW OF INTERNATIONAL CARTELS (1972); Riesenfeld, *The Protection of Competition*, in STEIN & NICHOLSON II, *supra* note 1, at 197 [hereinafter cited as Riesenfeld]; *see also supra* notes 143 and 187.

the German Federal Cartel Authority (Bundeskartellamt),[189] or the Commission of the European Economic Community. Certain large companies, on the other hand, which enjoy positions of oligopoly or near-monopoly are bold enough to almost defy the spirit if not the letter of the law. Car manufacturers in both countries have assumed a policy of raising prices in uncommon harmony, which in other industries would immediately stimulate a government investigation for alleged practice-fixing.

Most experts agree that even the stricter control of horizontal and vertical mergers envisaged both in German[190] and European Community law will not eliminate all loopholes, because prevailing considerations of the common good and compelling interests of the national economy will probably be a valid defense under the new law. The steel industry quite recently has set stupifying examples of mergers that would not be possible in the United States and have caused critics to contend that the new law will have little more bite than the old one. In this respect, mergers are not as suspect in Europe as they are in the United States.

Returning to the questionable observation, that the U.S. and German laws of restrictive trade practices are inconsistent, it should be noted that the U.S. military powers after World War II ordered the de-cartelization of the German industry.[191] Before the Law Against Restraints of Trade[192] came into being, military ordinances regulated the German economic scene. Thus, while legal methodologies are different, the results are not inconsistent with each other. Both systems have significant irregularities.

B. *Law Against Restraints of Trade*

The German antitrust law is embodied in the Law Against Restraints of Trade (GWB)[193] often called Cartel Law (Kartellgesetz).

1. *Theoretical Foundation*

German antitrust law is based on a system of "social market economy" (soziale Marktwirtschaft), an antithesis to laissez-faire.[194]

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189. MUELLER, *supra* note 1, at 11, 74; COHN, *supra* note 1, at 7.156., 7.167.

190. *See infra* V(B)(3) and (4).

191. Riesenfeld, *supra* note 188, at 213.

192. Law Against Restraints of Trade (Gesetz gegen Wettbewerbsbeschraenkungen) of July 27, 1957, [1957] BGBl. I 1087, *as amended* January 3, 1966, [1966] BGBl. I 37; *also* in SCHOENFELDER, *supra* note 7, at 74 [hereinafter cited as Law Against Restraints of Trade (GWB)]; Riesenfeld, *supra* note 188, at 207; MUELLER, *supra* note 1, at 73-85; COHN, *supra* note 1, at 7.155.-7.181.; FULDA, *supra* note 1, at 150-51; *see also supra* note 188. *But see supra* V(B)(4).

193. For citation of statute *see supra* note 192.

194. STEIN & HAY, *supra* note 1, at 606; Riesenfeld, *supra* note 188, at 216; *see also infra* VI(B)(1) and note 232.

Under this system, the legislature provides the legal framework designed to guarantee the functioning of the economy on the basis of the principle of free competition, but including certain protective and slightly directive measures. Direct interference with the economy is banned, as is certain discriminatory market behavior.

The system is based on a combination of liberalism and centralized planning. When interests of free competition conflict with the interests of a fair market and a sound economy, the latter will govern. The present neo-liberal system of a social market economy is not the only conceivable order in harmony with the Basic Law (GG).[195] The constitution remains neutral as far as the economic order is concerned, and the legislature is able to pursue whatever policy it deems appropriate. In recent years this has included indirect overall guidance to ensure a stable and well-balanced national economy.. The 1967 Stability Law (Stabilitaetsgesetz)[196] provides for coordinated budgeting and credit policies on the federal, state, and local levels, regular collection and evaluation of statistical data of the national economy, and the establishment of various advisory councils.

2. *Gist of the Law Against Restraints of Trade*

After these introductory remarks, the Law Against Restraints of Trade and some very recent amendments will be scrutinized in more detail.[197]

Sections 1-37 contain the substantive antitrust law. Of these, the first 14 deal with cartels which, as a matter of principle, are prohibited; but the law now enumerates a significant number of exceptions. Sections 15-21 deal with other agreements such as price-fixing, licensing, and protection of techniques. Restrictive practices in those areas are illegal, although "exceptions" are quite frequent. In contrast, a dominant position is not illegal per se, but according to Sections 22-24, abuse of dominance is illegal.

Sections 25-27 prohibit discriminatory behavior, boycotts and the like, while Sections 28-33 regulate codes of ethics which trade associations or professional organizations may develop in the interest of fair competition. Finally, Section 34 requires that cartels be in writing, and Section 35 contains the law's remedies available to private plaintiffs: actual or compensatory damages (regular—not treble), or injunctive relief. Sections 38-43 provide fines in analogy to those incurred for misdemeanors.

Section 1 declares that agreements are illegal which are likely to

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195. Judgment of July 20, 1954, 4 BVERFG 7, 17.

196. Stability Law (Stabilitaetsgesetz) of June 8, 1967, [1967] BGBl. I 582; *also* in STEUERGESETZE, *supra* note 7, at 910.

197. Riesenfeld, *supra* note 188, at 216; MUELLER, *supra* note 1, at 73-85; COHN, *supra* note 1, at 7.155.-7.181.; *see also supra* note 188. *But see infra* V(B)(4).

influence production or interfere with the functioning of the market by means of restrictive practices. The following are the kinds of cartels which are permitted:[198]

(1) Condition cartels (Konditionenkartelle), thus named for their use of standardized sales contracts with the terms of the agreement regulating mode of delivery, payment, etc.;

(2) Rebate cartels (Rabattkartelle), rebates with the delivery of goods; however, rebates to the final consumer are not concerned as those are exclusively subject to the Rebates Statute (Rabattgesetz);[199]

(3) Crisis cartels (Strukturkrisenkartelle), cartels to reduce production capacity in industrial branches that have been hit by economic decline (but not by a general recession);

(4) Standardization cartels (Rationalisierungskartelle), uniform use of standardized measures and patterns;

(5) Specialization cartels (Spezialisierungskartelle), standardization by specialization;

(6) Export cartels (Exportkartelle);

(7) Import Cartels (Importkartelle);

(8) Special cartels (Sonderkartelle), also known as Ministerkartelle because these are permitted only by express order of the Minister of Economics.

All of these are lawful only under certain circumstances. The Ministerkartell has been granted only twice[200] because it is meant as an ultima ratio.

"Other contracts" (sonstige Vertraege) in the language of Sections 15-21, if they restrain price setting or other terms regulating sale of goods or services, are void, subject to exceptions in Sections 16-21 relating to vertically fixed resale prices. Price recommendations are not automatically unlawful, but there is a strong presumption of illegality. Similarly, licensing agreements are prohibited (with certain reservations) if the restraint imposed on the licensee is greater than required by the scope of the license.[201]

The Federal Cartel Authority[202] acts as a supervisory body to prevent abuses by dominant companies and consolidated enterprises. Any consolidation of enterprises having more than 20 percent market share or more than 10,000 employees or more than 500 million DM

198. Riesenfeld, *supra* note 188, at 218; MUELLER, *supra* note 1, at 75-76.

199. Rebates Statute (Rabattgesetz) of November 25, 1933, [1933] RGBl. I 1011; *also* in SCHOENFELDER, *supra* note 7, at 78.

200. MUELLER, *supra* note 1, at 77.

201. FULDA, *supra* note 1, at 670 *et seq.*; *see also supra* note 187.

202. *See supra* note 189.

turnover or a balance sheet total of more than one billion DM must be reported to the Federal Cartel Authority.[203] Not surprisingly, many problems appear which are familiar to the American antitrust lawyer: determining the dominant position in the market (market power), relevant market, and interchangeability of products.

Non-contractual behavior restraining competition is covered in Sections 25-27. There must be no compulsion, threat, incitement, boycott, or other activity to accuse another of committing infractions of the Cartel Law. No enterprise may refuse to deal with or supply goods or services to another for the purpose of restraining competition, nor can trade associations or professional organizations refuse admission to applicants without justification. Section 28 et seq. concern less essential details previously mentioned.[204] Sections 44-109 contain numerous rules of procedure.

Special attention should be paid to Section 38(2). Its first clause forbids complicity in restrictive practices, the second prohibits instigation of practices by recommendations which have led in the past to evasion of the law by parallel behavior, and the third clause makes an exception for small and medium size enterprises which follow price recommendations in order to further competition against large enterprises.

3. *Weaknesses and Reform of the Law Against Restraints of Trade*

From the moment the Cartel Law became effective on January 1, 1958, much criticism has been voiced from many sources. One illustration is instructive. Although the "Tar-Dyes Judgment"[205] was decided only in 1972, it already has become an ill-famed case. The antitrust section of the highest court, the Federal Supreme Court (Bundesgerichtshof) refused to recognize blatant parallel behavior. It did not give proper attention to the defendants' behavior which, under German law, should conclusively infer an illegal meeting of the minds. The court's decision, called mechanistic and shallow by most observers, has lead to a significant reform of Section 25 dealing with discriminatory behavior.[206] This step has brought German antitrust law into closer harmony with Article 85 of the Treaty of Rome.

In addition, the abolishment of vertically fixed retail prices has long been proposed[207] and recently accomplished.[208] German enter-

203. FULDA, *supra* note 1, at 652. *But see infra* V(B)(4)(a).

204. *See supra* V(B)(2) first textual paragraph.

205. Judgment of December 17, 1970, 24 BGHSt 54; *cf.* Lieberknecht, *Antitrust Law in West Germany*, 27 BUS. LAWYER 803, n. 1 (1972). *But see infra* V(B)(4)(c).

206. Sandrock, *Die zweite Kartellnovelle*, 28 DER BETRIEBSBERATER 101 (1973) [hereinafter cited as Sandrock]. *But see infra* V(B)(4)(c).

207. Sandrock, *supra* note 206, at 105.

208. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 16, 1973, at 17,

prises have found it difficult to maintain fixed prices because reimports from other EEC member countries have upset the system and cannot be prevented under the law of the European Communities.[209] The definition of dominant position in the market is another point recently reformed.[210] Meanwhile, the far-reaching effects unfavorable to competition by licensing agreements have been attacked as undesirable.[211] But the most significant reform to be faced was that of economic concentration.[212]

4. *Recent Amendments to the Law Against Restraints of Trade*

The reform of German antitrust law became reality through a very recent amendment to the Law Against Restraints of Trade.[213] Its main features are the following:

a. *Preventive Merger Control*

The old Section 23 essentially corresponds to the new section

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col. 3; *id.* May 19, 1973, at 21, col. 1. *But see infra* V(B)(4)(e).

209. Sandrock, *supra* note 206, at 106. Consten & Grundig v. E.E.C. Commission, CCH Comm. Mkt. Rep. ¶ 8046 (1966); Deutsche Grammophon v. Metro, *cited in* Jones, *infra* note 215, at 613.

The rule in the Consten case has been somewhat undercut, if not undermined, by two exceptions granted by the Commission to Omega watches in 1970 and to French luxury perfume producers Lancome, Dior, Rochas, and Guerlain in 1973. In both instances the Commission authorized selective distribution to exclusive dealers only, the rationale in the watch case being that a high quality system of guarantee and repair required the singling out of the best retailers. While one may go along with that reasoning and accept it as a justification for actions which could be called quasi-price fixing and which result in eliminating competition to a substantial degree, the situation is even more doubtful with regard to luxury perfumes. The only service in question is to guarantee that because perfumes do not keep for an unlimited time, they will be replaced by new products of the same kind if necessary. A measure which would not lead to such a drastic decrease in competition would have been to have expiration dates imprinted as is the case already with many drugs, films, and food articles. However, this was refused by the producers for reasons of prestige; the Commission as a whole, against the opposition of the Commissioner for Competition, succumbed to the perfume producers arguments. [This attitude of the Commission stands in contrast to that of the German Cartel Authority which seems determined to take on a tough stand, especially since the enactment of the reform of German antitrust on August 4, 1973; *see infra* V(B)(4)]. Frankfurter Allegemeine Zeitung (Frankfurt/Germany), September 5, 1973, at 17, col. 1-2 and 3-5.

210. Sandrock, *supra* note 206, at 106. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 16, 1973, at 17, col. 3 reports that the future law will consider 33 percent market share as a dominant position. For the content of that new law, *see infra* V(B)(4)(b).

211. *Cf.* FULDA, *supra* note 1, at 676 *et seq.*

212. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 16, 1973, at 17, col. 3; *see also supra* III(E) and note 143; *but see infra* V(B)(4).

213. The Law Amending the Law Against Restraints of Trade of August 3, 1973, [1973] BGBl. I 917. The law became effective on August 4, 1973. The new sections 22, 23, and 24 were given retroactive effect as of June 7, 1973 to the degree that they deal with merger control; vertically fixed retail prices are legal until December 31, 1973.

which, now in some more detail, defines merger for the purposes of antitrust and provides for registration of mergers of companies together enjoying a market share of 20 percent or having at least 10,000 employees or turning over at least 500 million DM.

The old Section 24 somewhat resembles the new Section 24(a). It declares illegal a merger as defined in Section 23 unless there is proof that competition is advanced to a degree which outweighs the disadvantages of dominant position. In Section 24(3) one finds an exceptional tolerance of such a merger to be possible by permission of the Minister of Economics if the restraint of trade is balanced by advantages to the national economy or if the merger is justified by a paramount public interest (ueberragendes Interesse der Allgemainheit); this judgment is to take into account the competitiveness of the enterprises on extraterritorial markets. Permission can be granted only under the condition that the principle of a free market economy (marktwirtschaftliche Ordnug) remain untampered.

Section 24(7) gives ample powers to the Federal Cartel Authority (Bundeskartellamt) to enforce its orders by levying one or several fines between 10,000 and 1 million DM.

Section 24(a) requires registration of proposed mergers if two or more enterprises each had a turnover exceeding 1 billion DM during the previous year.

Section 24(b) for the first time establishes a so-called monopoly committee (Monopolkommission) which is to regularly supervise and comment on the development of mergers.

b. *Increased Supervision of Dominant Enterprises*

Section 22(1) defines a dominant enterprise as one which encounters no substantial competition or which has a superior (ueberragend) position vis-a-vis its competitors. The latter judgment is based upon market share, financial resources, access to supplying and sales markets, combinations with other enterprises, and legal or factual barriers to market-entry of newcomers.

Section 22(3) establishes a presumption of dominant position of an enterprise turning over 250 million DM if it holds one-third of the market. Up to three enterprises turning over 100 million DM are presumed dominant when holding one-half, and up to five enterprises of the same size when holding two-thirds of the market.

c. *Prohibition of Concerted Behavior*

Section 25(1) prohibits concerted behavior among enterprises or groups of enterprises which would be illegal if committed in accordance with an agreement, the so-called breakfast-cartels (Fruehstueckskartelle). This provision eliminates the problems created by

the Tar-Dyes Case[214] which left defendants-respondents untouched because the court failed to see an agreement despite supporting evidence of a tacit agreement clearly demonstrated by parallel behavior.

d. *Improved Conditions of Competition for Small and Medium Size Enterprises*

An attempt to protect small and medium size enterprises from the ever-growing industrial giants is made in Section 5(b). The regulation exempts agreements bringing about standardization (Rationalisierung) by some means of cooperation other than specialization (Spezialisierung), which are declared legal, from the general prohibition of Section 1 if competition is not substantially impaired and if the agreement is to promote small and medium size enterprises.

e. *Abolishment of Vertically Fixed Retail Prices*

Section 16 abolishes vertically fixed retail prices as of January 1, 1974, with the exception of products of publishing companies. In the remaining branches price recommendations will be permitted; however, no pressure on retailers is allowed. Two-fold abuse of price recommendations to coerce retailers will entail action prohibiting the enterprise from setting any recommendations at all. This provision is intended to do away with both artificially high recommendations called "moon prices" (Mondpreise) and loss leaders (Lockvogelangebote).

C. *European Antitrust Law*

Any analysis of German antitrust law is incomplete without reference to the European Community law.[215] As the Community law is more accessible to U.S. lawyers than the German law, it is sufficient to say it roughly follows the lines of German antitrust law. The European law of competition is codified in Articles 85 and 86 of the Treaty of Rome and in ordinances relating to them.[216]

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214. *See supra* note 205.

215. STEIN & HAY, *supra* note 1 at 612 *et seq.*; C. RUNGE, EINFUEHRUNG IN DAS RECHT DER EUROPAEISCHEN GEMEINSCHAFTEN 78-90 (1972) [hereinafter cited as RUNGE]; *see also*, Adeler & Belman, *Antimerger Enforcement in Europe—Trends and Prospects*, 8 J. INT'L L. & ECON. 31 (1973).

216. For an English language edition of the treaties, *see* EUROPEAN COMMUNITY TREATIES (Sweet & Maxwell's Legal Editorial Staff ed. 1972). A. CAMPBELL, COMMON MARKET LAW, 2 vols. (1969) provides both the text and annotations and reference material. *See also* Riesenfeld, *supra* note 188, at 200 *et seq.* (arts. 85 and 86 are translated at 200 and 201); FULDA, *supra* note 1, at 105 *et seq.* (arts. 85 and 86 at 108-09); J. HEATH, INTERNATIONAL CONFERENCE ON MONOPOLIES, MERGERS AND RESTRICTIVE PRACTICES (1971); W. ALEXANDER, THE E.E.C. RULES OF COMPETITION (1973); Jones, *A Primer on Production and Dominant Positions Under E.E.C. Competition Law*, 7 INT'L LAWYER 612 (1973); Canenbley, *Price Discrimination and EEC Cartel Law: A Review of the Kodak Decision of the Commission of the European Communities*, 17 ANTITRUST BULL. 269 (1972); Rahl, *Relationship of U.S. to EEC Antitrust Law*, in Theberge, *supra*

As to the relationship between national and Community law, the European Court of Justice attributes supremacy to Community law.[217] It does not hesitate to allow proceedings in the national courts while EEC proceedings are pending, and likewise it refuses to take into consideration fines already imposed by national courts when it sets fines under Community law.[218]

Many of the questions being discussed in German law were broached in the much publicized Continental Can Case, decided in February 1973.[219] In it, the European Court of Justice rules that Article 86 may apply to mergers if there is an abuse of dominant position. This is concluded by the legal uniformity of Articles 85 and 86. The aim of these articles is to assure the functioning of the market according to the principle of free competition, which can be achieved only by interpreting the law extensively so as to engulf all potentially harmful behavior.

VI. LABOR LAW

A. *General Survey*

Labor law[220] applies to employees who, under a labor contract, hold jobs which require subordination and execution of orders.[221] This

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note 1, at 79, 83-86 (with valuable further references at 86-88) [hereinafter cited as Rahl]. *See also supra* note 188.

217. STEIN & HAY, *supra* note 1, at 200 *et seq.*; Deringer, *supra* note 187, at 65; M. ZULEEG, DAS RECHT DER EUROPAEISCHEN GEMEINSCHAFTEN IM INNERSTAATLICHEN BEREICH (1969) (Heymanns Verlag, Koeln/Germany); RUNGE, *supra* note 214, at 108-12; *cf.* Zaphiriou, Note, 1971 J. BUS. L. 252, and 1973 J. BUS. L. 89.

218. Rahl, *supra* note 215, at 79; MUELLER, *supra* note 1, at 83; *see also infra* VIII and note 272.

219. Judgment of February 21, 1973, BGH in 26 NEUE JURISTISCHE WOCHENSCHRIFT 966 (1973); *see* Continental Can Co. v. E.E.C. Commission, 12 INT'L LEGAL MATERIALS 603 (1973); *cf.* on the Commission's decision 11 INT'L LEGAL MATERIALS 316 (1972), and Note, 1972 J. BUS. L. 263. *See also* Deringer, *supra* note 187, at 70; Frankfurter Allgemeine Zeitung (Frankfurt/Germany), February 23, 1973, at 19, col. 4-6.

220. *Generally see* Kahn-Freund, *Labor Law and Social Security*, in I STEIN & NICHOLSON, *supra* note 1, at 297 *et seq.*; MUELLER, *supra* note 1, at 92-100.

221. German law distinguishes between what may be described as ordinary workers or laborers (Arbeiter); employees, meaning white collar or at least gray collar workers (Angestellte); and civil servants (Beamte) who traditionally enjoy specific privileges (*e.g.*, permanent employment except in cases of severe crime, old age pension) and have certain duties (*e.g.*, loyalty towards the state as the employer). These principles are known as the "traditional principles of the professional civil service" (hergebrachte Grundsaetze des Berufsbeamtentums) and are anchored in art. 33 (5) Basic Law (GG.).

The civil service as an organizational and institutional principle is under attack for alleged inflexibility and lack of competitiveness (promotion by seniority rather than merit cannot lure qualified people from private employers), and substantial revisions are possible in the future.

The distinction between workers (Arbeiter) and employees (Angestellte) is fading away rapidly as many companies have promoted their workers to "honorary employ-

body of law has been developing since the late nineteenth century and is scattered in numerous codes, statutes and case law.[222] The First Labor Compilation Law of 1969[223] is a first step towards a comprehensive Labor Code (Arbeitsgesetzbuch). To interpret these laws, a separate system of labor courts exists (Arbeitsgerichtsbarkeit).[224]

For purposes of information, several legal rules will be mentioned without further comment on the legal problems involved.[225] Particular statutory provisions are designed to protect minors, pregnant women, and the disabled. Children are not allowed to work before the age of 14; pregnant women are excused from work six weeks before and eight weeks after childbirth; and private enterprises with more than 16 employees have to offer one job out of every 16 to a disabled person. Mass dismissals (more than ten percent of the employees) require notification to the enterprise council (Betriebsrat)[226] and clearance by the state labor authority (Landesarbeitsamt).[227]

B. *Co-Determination (Mitbestimmung)*

A characteristic of German labor law is the so-called co-determination (Mitbestimmung) of labor in the management of enterprises.[228] Any enterprise having five or more regularly employed workers or employees (arbeitnehmer)[229] must have an enterprise

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ees" (Ehrenangestellte) or plain employees for reasons of prestige.

When referring to either workers or employees, the law usually describes an individual as an "Arbeitnehmer" (one who takes work). Correspondingly, an employer because an "Arbeitgeber" (one who gives work).

222. For a collection of statutory law *see* NIPPERDEY, *supra* note 7. An excellent compendium is G. SCHAUB, ARBEITSRECHTSHANDBUCH (1972) [hereinafter cited as SCHAUB].

223. First Labor Compilation Law (Erstes Arbeitsrechtsbereinigungsgesetz) of August 14, 1969, [1969] BGBl. I 1106; *also* in NIPPERDEY, *supra* note 7, at 2001.

224. Cole, *The Role of the Labor Courts in Western Germany*, 18 J. OF POL. 479 (1956); COHN, *supra* note 1, at 59.; MUELLER, *supra* note 1, at 93.

225. A good compendium in German is SCHAUB, *supra* note 221.

226. On the enterprise council, *see infra* VI(B) and note 229.

227. Sections 17, 18 Law on Protection Against Dismissal (Kuendigungsschutzgesetz) of August 25, 1969, [1969] BGBl. I 1317; *also* in NIPPERDEY, *supra* note 7, at 152.

228. On co-determination *see* Winkhaus, *supra* note 11, at 1287-89; Beal, *Co-determination in German Industry: Origins of Co-determination*, 8 IND. & LAB. REL. REV. 483 (1955); Conard, *supra* note 2, at 102 *et seq.*; Steefel, *supra* note 102, at 537 *et seq.*; Winkhaus, *Co-determination of Employees in West German Companies*, 27 BUS. LAWYER 879 (1971/72); W. GARCIN, COGESTION ET PARTICIPATION DANS LES ENTREPRISES DES PAYS DU MARCHE COMMUN 15-267 (1968) (Editions Jupiter, Paris); Biedenkopf, *Mitbestimmung am Scheideweg*, Frankfurter Allgemeine Zeitung (Frankfurt/Germany), December 9, 1972, at 17; Ballerstedt, *Zurueck zue Klassenwahl?*, Die Zeit (Hamburg/Germany), March 23, 1973, at 42; Bucerius, *Der Krieg vom letzten Mal*, Die Zeit (Hamburg/Germany), May 4, 1973, at 48; BAERMANN, *supra* note 133, at 190-95, 257-59.

229. *See supra* note 220, last paragraph.

council (Betriebsrat).[230] This council plays a vital role in negotiating with the employer.

1. *Historical Background*

The roots of co-determination are found in canonical and constitutional law and efforts by papal or feudal subjects to take an active part in making political decisions.[231] Surprisingly, the German codifications implementing co-determination were enacted after World War II under strong influence and pressure by the Allied Powers in order to divest the coal mining and steel industries of their former power.

It is noteworthy to emphasize that the initiators of co-determination were opposed to the German postwar concept of the "social market economy" (soziale Marktwirtschaft).[232] Quite strangely, both of these concepts, supposedly irreconcilable with each other, have been co-existing since then.

2. *Present Law*

Co-determination is extensively regulated in the 1972 Labor Management Relations Act (Betriebsverfassungsgesetz).[233] This is an elaborate version of the 1951 Co-determination Law[234] and the 1952 Labor Management Relations Act.[235] The Co-determination Law provided that all capital-companies in the coal and steel industries with at least 1,000 employees create a supervisory council[236] composed of five share-owners, five employees, and one neutral member to be chosen jointly by the other ten representatives.[237] This is the so-called qualified co-determination (qualifizierte Mitbestimmung) whereas

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230. Labor Management Relations Act (Betriebsverfassungsgesetz) of January 15, 1972, [1972] BGBl. I 13; also in NIPPERDEY, *supra* note 7, at 570. The Act is commented on and translated by M. PELTZER, LABOR MANAGEMENT RELATIONS ACT (1972). On the Act's predecessors, *see infra* VI(B)(2) and notes 234, 235, 237.

See also Fabricius, *The German Law of 1972 on the Organisation of Enterprises*, 1972 J. BUS. L. 340; Ficker, *A Project for a European Corporation*, 1970 J. BUS. L. 156, 168-69; MUELLER, *supra* note 1, at 96-99.

231. Section VI(B)(1) of this article relies on BAERMANN, *supra* note 133, at 191-95.

232. *See supra* V(B)(1) and note 194.

233. For citation of the Act *see supra* note 229.

234. Co-determination Law (Mitbestimmungsgesetz) of May 21, 1951, [1951] BGBl. I 347; *also* in NIPPERDEY, *supra* note 7, at 573.

235. Labor Management Relations Act (Betriebsverfassungsgesetz) of October 11, 1952, [1952] BGBl. I 681. No translation of this first Act is known, however, the translation mentioned *supra* note 229 also casts some light on the 1952 Act.

236. On supervisory council, *see supra* III(D)(5) and notes 109, 110.

237. The regulation of the Co-determination Law of 1951 was extended to holding companies by the Co-determination Supplementing Law (Mitbestimmungsergaenzungsgesetz) of August 7, 1956, [1956] BGBl. I 707; also in NIPPERDEY, *supra* note 7, at 574. *See* Ficker, *A Project for a European Corporation*, 1970 J. BUS. L. 156, 169 n.14.

ordinary co-determination under the 1952 Labor Management Relations Act applied to enterprises in any industry of at least 500 employees where a third, rather than half, of the members of the supervisory board were labor representatives.

The 1972 law vastly strengthens the position of the labor unions in general and of the enterprise council in particular. Any enterprise of at least five employees must have such a council. The initiative to form one, however, is left to labor. The council enjoys extended rights in social, personnel, and economic matters. Co-determination in social matters covers working-hours and breaks, manner of payment, vacations and control of workers' performance. In personnel matters, the enterprise council must be informed about selection, training, evaluation, transfer, and dismissal of employees. Economic co-determination further manifests itself in the employer's duty to establish a so-called social plan (Sozialplan) which, in case of substantial changes in production methods or number of employees, is to protect the individual worker's financial and personal interests. Enterprises with 100 or more employees must form an economic committee (Wirtschaftsausschuss) which enjoys informative and consultative rights. In all matters there are compulsory arbitrational proceedings in case agreement between the employer and the enterprise council cannot be reached.

3. *Outlook*

Questions surrounding the future of co-determination take on an ever-growing significance with the emerging harmonization of law within the EEC member countries.[238] Thus, it will be helpful to look at some of the justifications and alterations that are suggested for co-determination of labor.

A good survey of the German legal scene is presented in a compendium prepared by a committee known as the Co-determination Committee (Mitbestimmungskommission or Biedenkopf-kommission, after its reporter Professor Biedenkopf).[239] The report,

238. *See infra* IX.

239. The reader is referred back to BAERMANN, *supra* note 133, at 191-95 where the voluminous report is condensed.

Professor Biedenkopf has lately put forward a slightly modified suggestion of his own. Out of twelve members of the supervisory board, six would represent the shareholders and six the employees; however, one of the latter would especially represent the executives [called "leading employees" (leitende Angestellte) in German law] and another one of the latter six would be assigned the financial interests of the employees. These interests typically concern the problems of employees' shares, pension funds, and other funds created for the purpose of accumulating assets to be put at the disposition of employees [the technical term is "accumulation of financial assets" (Vermoegensbildung)]. In proposing this 6:4:1:1 model, Biedenkopf also provides for procedures in case of a deadlock vote in the supervisory board which are basically designed

presented to the public in 1970, made an analysis of past developments and suggested solutions for the future. The principle of co-determination is well accepted; the discussions only center around the composition of the supervisory board. According to the committee's proposal, six representatives of the share-holders and four representatives of labor would jointly select two additional members of the supervisory board. The proposed preponderance of the influence of the capital is justified by the principle of the entrepreneurial risk.

Labor protection branches out into numerous areas: enterprise protection (Betriebsschutz) comprising safety standards on the job, protection of working-hours (Arbeitszeitschutz), protection of payment (Lohnschutz), protection against dismissals (Kuendigungsschutz), protection for women (Frauenarbeitsschutz), for juveniles (Jugendarbeitsschutz), for home workers (Heimarbeitsschutz), and for the disabled (Schwerbeschaedigtenschutz).[240]

Democratization is fundamentally incompatible with present company law because it is not the supervisory board but the general meeting which has the original power to control the managing board by its elective decisions. Those arguing in favor of extended co-determination in the supervisory board in order to curb the power of super-companies have been proven wrong by experience, at least up to the present. The concentration of economic power in ever fewer hands has not been prevented or even impaired by labor. Quite to the contrary, the German Federation of Labor (Deutscher Gewerkschaftsbund) owns some of the most influential oligopolistic enterprises, for example, the Bank for Common Economy (Bank fuer Gemeinwirtschaft), the New Home (Neue Heimat) home builders,[241] food chains, and travel agencies.

It is probably safe to suggest that the real justification of co-determination lies in the new understanding of the relationship be-

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to assure that the smooth functioning of the enterprise not be jeopardized by the principle of co-determination. Not surprisingly, this model has been criticized from both camps. Biedenkopf would stress the partnership character of the relations between employers and employees, enforce the protection of private property, integrate the law of companies and the law of labor management relations into one law of enterprises, and incorporate the principle of the free market policy into company law; Frankfurter Allgemeine Zeitung (Frankfurt/Germany), September 1, 1973, at 1, col. 2-4 and at 6, col. 5-6.

240. For further information, *see* the two volumes quoted *supra* note 221.

241. Eglau, "Koenig Alberts" *Allmacht, An der "Neuen Heimat" wird jetzt auch intern Kritik laut,* Die Zeit (Hamburg/Germany), May 4, 1973, at 33, col. 2-5; Broichhausen, *Der unersaettliche Bau-Loewe, "Neue Heimat" - ein Mammut-Unternehmen im Gewerkschafts-Auftrag,* Frankfurter Allgemeine Zeitung (Frankfurt/Germany), June 30, 1973, at 15. *See also* Der Spiegel (Hamburg/Germany), July 2, 1973, at 34 on labor problems of the Deutscher Gewerkschaftsbund in its own school of training.

tween employer and employees. Increasingly these groups are seen as partners rather than opponents in the production process.[242]

It must be made clear that any change in the present law of co-determination will require reforms of the law of stock corporations, of limited liability companies, and of company law in general. Almost all of the proposals in one way or another touch upon the number of members in the supervisory board, the duty of board members to keep secrets, the representation of executives (leitende Angestellte) and numerous other questions of the law of industrial enterprises.

The labor unions and many Social Democrats demand "co-determination on a par" (paritaetische Mitbestimmung), i.e. equal representation of labor and capital. In this regard they are opposed by their coalition partners, the Free Democrats, who advocate a 4 : 2 : 4 model, with two seats going to the executives.[243] Apart from the familiar problem of where to draw the line (between a regular employee and one with executive status)[244] this scheme is questionable because of its difficult applicability to limited liability companies and person-companies.

A similar critique would apply to a proposal to adopt a board-system comparable to Anglo-American law. This indeed would constitute a complete alienation from German company law which sharply distinguishes between the supervisory board (Aufsichtsrat), the managing board (Vorstand), and the general meeting (Hauptversammlung).[245]

Still another proposal[246] suggests a supervisory board made up in equal parts by representatives of capital, labor and of the representatives of the "enterprise interest." The latter would be outsiders chosen jointly by the representatives of capital and labor. Management would continue to work to make profit, while distribution or other use of profits would be decided by the supervisory board.

This brief survey shows that the race is still open to anybody with new ideas. Undeniably, mass-production has brought serious problems. Unusually high rates of illness, unexplained absence, and bad performance call for a reconsideration not only of production techniques, but also of labor law.

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242. *See* Engels, *Kompetenz und Verantwortung*, Die Zeit (Hamburg/Germany), October 13, 1972, at 46-47.

243. The government, consisting of a coalition between the Social Democrats and the Free Democrats, may soon be able to reach a compromise and suggest a 6:1:5 (share-holders: "leading employees": employees) model; Frankfurter Allgemeine Zeitung (Frankfurt/Germany), September 4, 1973, at 1, col. 2-4.

244. Steefel, *supra* note 102, at 537 n.149.

245. *See supra* III(D)(5) and note 109.

246. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), April 9, 1973, at 13, col. 3.

A number of private entrepreneurs are trying incentive programs which may one day become workable alternatives. Different models are being tested currently, mostly by medium sized companies owned by individuals or families. Payment is often partially in shares, or other devices are used by which the individual's and the enterprise's financial interests are interrelated. The experience so far has been favorable.[247]

VII. CONSTITUTIONAL PRIVILEGES AND ACCESS TO THE COURTS

The first part of the Basic Law (GG) contains what could be called a bill of rights.[248] Certain rights are declared basic rights (Grundrecht), and these rights enjoy constitutional status making them privileged over conflicting legal positions. They were originally designed to protect the individual citizen from interference by the government but have gradually taken on an affirmatory character by assuring, under certain conditions, positive rights both against the government and individuals. These basic rights play an extremely important part in German administrative and constitutional law.

A certain number of the basic rights may become relevant for foreign parties, especially Article 3 incorporating the principle of equal treatment before the law, and Article 14 guaranteeing private property. However, although many basic rights are granted regardless of nationality, on paper there remains some doubt as to exactly how far foreign parties can go in court in invoking basic rights. Article 19 (3) of the Basic Law (GG) attributes basic rights to domestic legal persons, but remains silent on foreign legal persons. Nevertheless, it is safe to suggest that German courts will give virtually identical legal protection to domestic and foreign parties regardless of capacity to hold legal rights. This analysis should be on safe ground because Article 25 of the Basic Law (GG) incorporates the generally recognized rules of international law into German law.[249]

Another significant constitutional provision is Article 19 (4) which allows recourse to the courts to anybody who has been denied his rights by public executive authorities. This rule is essentially a

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247. *Cf.* Braun, *German Legislation to Encourage Capital Accumulation by Employees*, 17 LAB. L. J. 371 (1966); G. SCHWERDTFEGER, MITBESTIMMUNG IM PRIVATEN UNTERNEHMEN (1972); M. JUNGBLUT, NICHT VOM LOHN ALLEIN (1973).

248. COHN, *supra* note 1, at 48; Barnet, *The Protection of Constitutional Rights in Germany*, 45 VA. L. REV. 1139 (1959); Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, 17 INT'L & COMP. L. Q. 571 (1968); *cf.* Doehring, *Non-Discrimination and Equal Treatment Under the European Rights Convention and the West German Constitution with Particular Reference to Discrimination Against Aliens*, 18 AM. J. COMP. L. 305 (1970). For citation of the Basic Law (GG), *see supra* note 153.

249. COHN, *supra* note 1, at 49. *But see* Mann, *The U. S. Treaty of Commerce with Germany and the German Constitution*, 65 AM. J. COMP. L. 793 (1971).

last resort which comes into play only after all other legal remedies have failed.[250]

In commenting on the problem of the "nationality" or "domicile" of a company under German law, the principal place of business is the point of domicile with regard to virtually all questions: capacity to hold legal rights, legal organization of a company, rights and duties of its partners and managing directors, and access to the courts.[251]

Recognizing a foreign corporation in German law means acknowledging the fact that the corporation or company is capable of holding legal rights under that foreign law.[252]

VIII. Control of Foreign Exchange

Until some years ago, control of foreign exchange in the Federal Republic of Germany was negligible.[253] But, since the international monetary crisis repeatedly caused a severe problem in recent years, Germany's foreign exchange has shifted from almost absolute freedom to some protection of the national economy and even international trade from speculation in national currencies.

Since 1961 the Law on Foreign Trade (Aussenwirtschaftsgesetz)[254] has given far-reaching powers to the government to regulate foreign trade. Restrictions may generally be imposed if Germany's obligations under international treaties or foreign restrictive activities so require—an extremely rare case so far. A list of specific transactions which may be restricted is similarly limited; at present it includes agricultural exports to countries outside the EEC.

Substantial restrictions do exist today in the import and export of capital. Of particular significance is Article 23 of the Law on Foreign Trade (Aussenwirtschaftsgesetz) which authorizes the government to prohibit the sale of real property by residents to nonresidents, the purchase of bonds, securities and shares by foreigners, and

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250. T. MAUNZ, G. DUERIG & R. HERZOG, GRUNDGESETZ, KOMMENTAR (1971) notes 52-61 on art. 19 (4) Basic Law (GG).

251. SCHLESINGER, *supra* note 1, at 288; FULDA, *supra* note 1, at 767 n.6; BRUECHER, *supra* note 109, at 533; ZAPHIRIOU, *supra* note 1, at 127; Conard, *supra* note 2, at 61 *et seq.*; MUELLER, *supra* note 1, at 24; Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983 (1962); Van Hecke, *Nationalities of Companies Analyzed*, 8 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 223 (1961); KEGEL, *supra* note 142, at 229-35.

252. KEGEL, *supra* note 142, at 233; ZAPHIRIOU, *supra* note 1, at 129-30.

253. *Cf.* Dagon, *Regulation of Capital Influx: Recent Developments in France, Germany, and Switzerland*, 14 AM. J. COMP. L. 38 (1965); STEIN & HAY, *supra* note 1, at 235 *et seq.*, 284 *et seq.*, 788 *et seq.*

254. Law on Foreign Trade (Aussenwirtschaftsgesetz) of April 28, 1961, [1961] BGBl. I 481, last amended by the so-called Cash Deposit Law; *see infra* note 258. *Cf.* M. PELTZER AND K. NEBENDORF, BANKING IN GERMANY (1973).

the payment of interest on foreign bank accounts.[255] Many restrictions are quite short-lived. A brief sketch of the restrictions in force in August 1973 is instructive. Foreigners cannot buy German bonds, securities, shares in stock corporations,[256] (shares in limited liability companies are exempt); foreign investments require clearance by the Federal Reserve Bank (Deutsche Bundesbank) and Germans cannot take out credits abroad totalling more than 50,000 DM. The last provision has been replaced, however, by the Cash Deposit Law (Bardenpotgesetz) which reaches the same result in a different way.[257] Since March 1972, the Cash Deposit Law has been stiffened several times;[258] at present, German residents, including German branches and subsidiaries of foreign enterprises, must deposit 100 percent of the amount of foreign borrowing exceeding 50,000 DM. The rate to be deposited changed from 40 to 100 percent, and the maximum amount allowed from 2 million to 50,000 DM. These developments clearly demonstrate that these restrictions are a reflection of the international monetary crisis. At present, regular reading of reliable newspapers[259] is mandatory to keep up with foreign exchange control.

IX. PERSPECTIVES FOR LEGAL HARMONIZATION

The Treaty of Rome[260] is to ensure within the member states the free circulation of goods,[261] persons,[262] services,[263] and capital.[264] Also,

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255. Art. 23 is translated by BRUECHER, *supra* note 109, at 523.

256. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), February 28, 1973, at 15, col. 4-5; June 14, 1973, at 13, col. 4-5; July 20, 1973, at 13, col. 4-5; *cf. infra* note 258.

257. Law of February 23, 1973, [1973] BGBl. I 109 (100 percent deposit over 50,000 DM).

258. The so-called Cash Deposit Law (Bardepotgesetz) of March 1, 1972, [1972] BGBl. 217 (40 percent deposit of the amount exceeding 2,000,000 DM) and numerous amending laws, *e.g.*, of June 29, 1972, [1972] BGBl. I 999 (50 percent deposit of the amount exceeding 500,000 DM). The current law is quoted at *supra* note 257. *Cf.* Winkhaus, *supra* note 1, at 1296, but note that the law is given as of June 29, 1972. Another effort to keep speculation out of Germany is being made by imposing on nonresident holders of German bonds a so-called coupon tax; *cf.* MUELLER, *supra* note 1, at 138.

259. The Frankfurter Allgemeine Zeitung (Frankfurt/Germany) is suggested as a reliable source of information. It is available in many foreign libraries and newsstands.

260. For English language editions of the Treaty *see supra* note 215.

261. FULDA, *supra* note 1, at 107.

262. STEIN & HAY, *supra* note 1, at 715 *et seq.*; FULDA, *supra* note 1, at 107; U. EVERLING, THE RIGHT OF ESTABLISHMENT IN THE COMMON MARKET (1964); RUNGE, *supra* note 214, at 65-69.

263. STEIN & HAY, *supra* note 1, at 765 *et seq.*; RUNGE, *supra* note 214, at 69-70; FULDA, *supra* note 1, at 107.

264. STEIN & HAY, *supra* note 1, at 788 *et seq.*; RUNGE, *supra* note 214, at 70-71; FULDA, *supra* note 1, at 107.

common principles are envisaged in agriculture;[265] coal, steel, and atomic energy;[266] traffic and transportation;[267] and foreign and domestic trade.[268]

The legislative bodies of the European Economic Communities are entitled to make new law or to harmonize or coordinate existing law. While few clear-cut definitions of harmonization or coordination exist, it is sufficient here to agree with the experts who suggest that harmonization is identical to coordination, approximation, or assimilation.[269] Substantial accomplishments in harmonization already exist or are about to materialize.[270] Examples are the introduction of the value-added tax,[271] the developments in the law of restrictive trade practices, company law, inter-community sales, and creditor-protection.

The present situation in the law of restrictive trade practices is still unsatisfactory because of double, or even multiple, barriers.[272] Enterprises may have to comply with one or several national and EEC antitrust laws; their actions may be legal under one system, illegal under another, and the companies may incur separate fines. This area of the law desperately needs harmonization which, unfortunately, will not come about in the near future. U.S. enterprises, of course, face the additional threat of U.S. antitrust laws.[273]

In company law, draft directives and other legislative projects produce quite an intelligible outline of the future law.[274] The First

265. STEIN & HAY, *supra* note 1, at 364 *et seq.*; RUNGE, *supra* note 214, at 90-96. For some of the more everyday consequences of a common agricultural policy *see* TIME, (European Edition), April 30, 1973, at 8-9.

266. RUNGE, *supra* note 214, at 96-101.

267. RUNGE, *supra* note 214, at 101-04; STEIN & HAY, *supra* note 1, at 913.

268. STEIN & HAY, *supra* note 1, at 378 *et seq.*; RUNGE, *supra* note 214, at 30-34; Kim, *The Common Commercial Policy of the EEC*, 4 J. WORLD TRADE L. 20 (1970).

269. BAERMANN, *supra* note 133, at 61; STEIN & HAY, *supra* note 1, at 776 *et seq.*; RUNGE, *supra* note 214, at 34-41; Chloros, *English Law and European Law: The Problem of Harmonisation*, 36 RABELS ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 601 (1972).

270. *Cf.* Sprudzs, *Status of Multilateral Treaties-Researcher's Mystery, Mess or Muddle?* 66 AM. J. INT'L L. 364 (1972); Majoros, *Zur Krise der internationalen Kodifikationspolitik*, 6 ZEITSCHRIFT FUER RECHTSPOLITIK 65 (1973).

271. C. SHOUP, FISCAL HARMONIZATION IN COMMON MARKETS, 2 vols. (1967); RUNGE, *supra* note 214, at 37-39; Massel, *Future Business Trends in Europe*, in Theberge, *supra* note 1, at 143, 145-46; Hall, Note, *"Value Added Tax,"* 1971 J. BUS. L. 326-28.

272. Schmitthoff, Editorial, 1973 J. BUS. L. 1 [hereinafter cited as Schmitthoff]; Rahl, *supra* note 215, at 79.

273. Rahl, *supra* note 215, at 79.

274. Schmitthoff, *supra* 272, at 2-4; E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS: NATIONAL REFORM AND TRANSNATIONAL COORDINATION (1971); BAERMANN, *supra* note 133; Massel, *Future Business Trends in Europe*, in Theberge, *supra* note 1, at 144-45.

Council Directive of March 9, 1970 on the capacity of the company and its directors has become Community law. Six other draft directives[275] and a proposal of a draft statute of the European Company based on Article 235[276] together with recent and future reforms of company law in member states[277] constitute further elements of harmonization. Interestingly, the European Company has adopted many traits of German law such as co-determination and the creation of two separate boards.[278] Likewise, in the law of inter-community sales and creditor protection, uniform laws, draft conventions, and conventions represent first steps on the long road to harmonized law.[279]

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275. *See* Schmitthoff, *supra* note 272, at 2-3 (draft directives on formation of the company and maintenance of the capital, on mergers, on the accounts of the company, on the organization of the company, on groups of companies, and on prospectuses of securities). *See also* Zaphiriou, *European Community Law*, 1973 J. BUS. L. 199.

276. On the European company, *see* Ficker, *A Project for a European Corporation*, 1970 J. BUS. L. 156; 1971 *id.* at 167; Mann, *The European Company*, 19 INT'L & COMP. L. Q. 468 (1970); *Baermann*, *supra* note 133, at 4, 50, 60, 143, 145; KEGEL, *supra* note 142, at 230-31; FULDA, *supra* note 1, at 767-69.

277. Schmitthoff, *supra* note 272, at 3-4; Schmitthoff, Editorial, 1973 J. BUS. L. 93; Sanders, *The Reform of Dutch Company Law*, 1973 J. BUS. L. 194.

278. Ficker, *A Project for a European Corporation*, 1971 J. BUS. L. 167, 174-80; RUNGE, *supra* note 214, at 41.

279. Schmitthoff, *supra* note 272, at 4; Zaphiriou, *European Community Law*, 1973 J. BUS. L. 199.