

The Menagerie of Organizational Forms in German Company Law

by

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Company law lives and breathes with its different forms of association. Consequently, the emergence and evolution of these forms is a central topic of research for company law scholars. This paper seeks to depict the panoramic landscape of German company and partnership law. Special attention is given to new and rediscovered forms of association as well as to the various regulatory techniques used to introduce novel types of business association. In addition, a comparison with the foreign repertoire of organizational vehicles shows in which respects there may still be room for the creation of new forms of association in Germany.

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I. The Zoo of Organizational Forms¹

Metaphors make an abstract object of study more vivid. For an exploration of company forms, the metaphor of a zoo² is apt for various reasons. The term encompasses the comparatively large variety of species in German company law and at the same time offers the possibility of dividing the zoo inhabitants into genera according to their similarity.³ In company law, as in the animal kingdom, there are primordial creatures and new artificially created breeds. As embodied in hybrids and combined forms, various crossbreeds are encountered here as well. And extending the metaphor further, legislators, collectively acting as the zoo director, ultimately decide which new species are to be admitted, whereas courts and practitioners are given the role of nurturing the welfare of the various legal creatures as animal keepers.

II. Emergence and Evolution of Organizational Forms

The evolution of organizational forms in Germany cannot be presented here in all its complexity and idiosyncrasy. For the purposes of this article – a concise survey of the assortment of organizational forms – an encapsulated and simplified grouping into three time periods must suffice.

1 For an earlier German version of this paper, *Holger Fleischer*, “Der Zoo der Gesellschaftsformen in Deutschland”, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2023, 1505.

2 Borrowed from Dennis R. Young/Elizabeth A.M. Searing/Cassidy V. Brewer (eds.), *The Social Enterprise Zoo*, 2016.

3 More generally and with numerous drawings from different centuries, *David Bainbridge*, *How Zoologists Organise Things: The Art of Classification*, 2020.

1. The Formative Period: 1861–1900

In retrospect, the four decades from 1861 to 1900 were seminal for the processes of shaping company and partnership law. During this comparatively short period, the basic forms of business association with which we are familiar today were introduced or were decisively consolidated. This applies first of all to corporations and cooperatives: the General German Commercial Code (“ADHGB”) of 1861 created for the first time a uniform legal basis for all stock corporations (“AG”) engaged in a commercial business.⁴ Separate laws were added for cooperatives (“Genossenschaften”) and limited liability companies (“Gesellschaften mit beschränkter Haftung”, GmbHs) in 1889 and 1892, which broke up the legislative unity of commercial forms of association at an early stage. There was a close economic and social historical connection between these three new organizational forms: the AG was a child of industrialization,⁵ serving as a “capital pump”;⁶ the cooperative was a self-help organization that saw small craftsmen and farmers band together in an attempt to combat – to some extent – the economic power of large companies;⁷ and the GmbH was a concession wrested from the legislature by commerce to enable small companies to benefit from limited liability as well.⁸

Also commercial partnerships (“OHG”) and limited partnerships (“KG”) – forms of association rooted in the Late and High Middle Ages⁹ – underwent a legal consolidation in the ADHGB before being assigned to their current legal regime in the Commercial Code (“HGB”) of 1897.¹⁰ Subsequently, the Ger-

4 In greater detail, *Louis Pablow*, Aktienrecht und Aktiengesellschaft zwischen Revolution und Reichsgründung. Das Allgemeine Deutsche Handelsgesetzbuch von 1861, in: Walter Bayer/Mathias Habersack (eds.), Aktienrecht im Wandel, Vol. I, 2007, ch. 8 mn. 3, with further references.

5 See *Erik Kießling*, Eisenbahnbau und Industrialisierung als Katalysator der Entwicklung des Aktienrechts, in: Bayer/Habersack (fn. 4), ch. 4 mn. 1 et seq.

6 *Eugen Schmalenbach*, Die Aktiengesellschaft, 7th ed. 1950, p. 12.

7 From an early 20th century perspective, *Franz Waldecker*, Die eingetragene Genossenschaft. Ein Lehrbuch, 1916, p. 14 et seq., with further references; considering cooperatives in hindsight, *Volker Beuthien*, in: Volker Beuthien (ed.), Genossenschaftsgesetz, 16th ed. 2018, Introduction mn. 1.

8 From an early 20th century perspective, *Franz Fränkel*, Die Gesellschaft mit beschränkter Haftung, 1915, p. 17, with further references; considering the GmbH in hindsight, *Holger Fleischer*, in: Münchener Kommentar zum GmbH-Gesetz, 4th ed. 2022, Introduction mn. 50 et seq., 60 et seq. (survey by the Prussian Ministry of Commerce).

9 In depth, *Holger Fleischer*, in: Holger Fleischer (ed.), Personengesellschaften im Rechtsvergleich, 2019, § 1 mn. 91 et seq., 130 et seq., with further references.

10 In greater detail, *Walther Hadding*, Die Initiativen des Reichsjustizamts und des Reichsjustizministeriums zur Gestaltung des Gesellschaftsrechts, in: Bundesministerium der Justiz (ed.), Vom Reichsjustizamt zum Bundesministerium der Justiz. Festschrift zum

man Civil Code (“BGB”) of 1900 created the basic type for corporate bodies in the form of an association (“Verein”), doing the same for partnerships with the civil partnership (“GbR”).

Overall, one can justifiably describe the period from 1861 to 1900 as “formative years”, this era being *the* defining period for the emergence of modern corporate forms in Germany.¹¹

2. *The Long Phase of Stasis: 1900–1985/1995*

In the 20th century, there followed a long period of time during which the canon of organizational forms did not change. From the beginning of the century until well into the 1980s, not a single new form of business association was added. There are various explanations for this long period of legislative “rest” (stasis) after the earlier period of “restlessness”.¹² First, there is much to suggest that the basic needs of entrepreneurial practice were for the time being satisfied with the range of entities that was offered. This saturation of organizational forms was further supported by the fact that lawmakers in the formative period also permitted hybrid forms, namely limited partnerships and partnerships limited by shares (“KGaA”), which bring together two different types of partners under one legal roof.

Most importantly, one must not lose sight of the fact that the evolutionary standstill affected only the outer shell of company forms. Within their legal shell, considerable changes had taken place in some cases. An early milestone in GmbH law worthy of mention is the concealed single-person-incorporation achieved by means of a straw man, which the Imperial Court of Justice (*Reichsgericht*) expressly permitted as early as 1905.¹³ Of equally broad impact was the GmbH & Co. KG, a limited partnership featuring a limited liability

100jährigen Gründungstag des Reichsjustizministeriums, 1977, p. 263, 274 et seq., with further references.

- 11 For a similar account of the evolution of the English ecosystem of business organisations, but limited to the UK “company”, *Susan Watson*, *The Making of the Modern Company*, 2023.
- 12 In general, *Marie Theres Fögen*, “Rechtsgeschichte – Geschichte der Evolution eines sozialen Systems”, *Rechtsgeschichte (Rg)* 1 (2002), 14, mn. 8: “If we now look at the social system of law over a shorter or longer historical period, we will be able to identify – not unlike the observation of living systems – periods of greater ‘rest’ (stasis) and periods of greater ‘restlessness’.”
- 13 See *Reichsgericht (Imperial Court of Justice)*, 20 June 1904 – I. 122/04, *SeuffArch* 60 (1905), 410 f.; continued in *Reichsgericht (Imperial Court of Justice)*, 20 March 1908 – Rep. II 586/07, *RGZ* 68, 172, 174.

company acting as general partner; this organizational form was recognized by the Bavarian Highest Regional Court in 1912¹⁴ and by the Imperial Court of Justice in 1922.¹⁵ Due to the 1934 law on the conversion of corporations¹⁶ and the politically motivated departure from anonymous capital companies,¹⁷ the phenomenon of a KG organized on capitalist principles gained practical importance.¹⁸ Since the late 1960s, public partnerships proliferated as tax-oriented vehicles facilitating loss allocation and depreciation.¹⁹

The case law of the high courts has not outright opposed this proliferation of hybrid forms and atypical structures, opting instead to occasionally police instances of abuse and to formulate accompanying refinements of the law. In legal literature, too, a resistance²⁰ to the inventiveness of contractual practice did not prevail. The ambitious proposal to develop unwritten limitations on freedom of organization based on institutional principles and legal classification was finally rejected at the start of the 1970s,²¹ and it would have come too late in any case. Apart from a few exceptions, combinations of basic forms of association and other atypical structures were not impermissible; quite to the contrary, they had become a characteristic feature of the German legal landscape.²² In light of

14 Bayerisches Oberstes Landesgericht (Higher Regional Court of Bavaria), 16 February 1912 – Rep. III. 12/1912, BayObLGZ 13 (1913), 69.

15 Reichsgericht (Imperial Court of Justice), 4 July 1922 – Rep. II. B 2/22, RGZ 105, 101.

16 RGBl. (Imperial Law Gazette) 1934, I, p. 571.

17 See the Official Explanation printed in *Deutsche Justiz* (DJ) 1934, 883, featuring the opening remark: “The purpose of the law is to facilitate, in appropriate cases, the abandonment of anonymous corporate forms and to promote their replacement by undertakings with the owner’s personal responsibility.”; similarly advocating this position, *Leo Quassowski*, “Die Neuerungen auf dem Gebiete der Umwandlungsgesetzgebung”, *Deutsche Justiz* (DJ) 1934, 1628.

18 Numerical data in *Herbert Steiner*, *Die Offene Handelsgesellschaft und die Kommanditgesellschaft in der deutschen Wirtschaft*, 1950, p. 41 et seq.; systematic classification in *Holger Fleischer*, in: *Münchener Kommentar zum Handelsgesetzbuch*, 5th ed. 2022, Introduction to § 105 mn. 188, 301.

19 See, for example, Bundesgerichtshof (Federal Court of Justice), 3 June 1970 – IV ZR 1046/68, *Neue Juristische Wochenschrift* (NJW) 1973, 1604: GmbH & Co. KG with 500 limited partners; a systematic classification can be found in *Fleischer* (fn. 18), Introduction to § 105 HGB margin no. 269 et seq.

20 Illustrative of the “rebellion of the legal sense of form” against combinations of basic organizational forms, *Daniel Damler*, *Konzern und Moderne*, 2016, p. 135 et seq., with further references, who speaks of a “lesson on the connotations of a legal aestheticism”.

21 Consistent in terms of the result, *Manfred Nitschke*, *Die körperschaftlich strukturierte Personengesellschaft*, 1970; *Arndt Teichmann*, *Gestaltungsfreiheit in Gesellschaftsverträgen*, 1970; *Harm Peter Westermann*, *Vertragsfreiheit und Typengesetzlichkeit im Recht der Personengesellschaften*, 1970.

22 On this, see the earlier contribution of *Holger Fleischer*, *A Guide to German Company Law for International Lawyers – Distinctive Features, Particularities, Idiosyncrasies*, in:

this, the introduction of new corporate forms simply proved superfluous; the elasticity of the existing organizational forms together with the liberality within commercial partnerships (§ 109 HGB) and limited liability companies (§ 45 para. 1 GmbHG) was fully sufficient for entrepreneurial practice.

3. *The New Period of Subtypes: 1985/1995 Until Today*

A new era has been marked across Europe with the introduction of supranational company forms.²³ First, the European Economic Interest Grouping (EEIG) was launched in 1985, followed two decades later by the European Company (SE) in 2004 and the European Cooperative Society (SCE) in 2005.²⁴ Of national origin were the partnership for the liberal professions (*freie Berufe*) (PartG) of 1995 and the partnership for the liberal professions with limited professional liability (PartG mbB) of 2013, as well as the entrepreneurial company with limited liability (UG) of 2008 – all of which were also driven by the desire to make limited liability more accessible. Under investment law, the Investment Stock Corporation (InvAG) and the Investment Limited Partnership (InvKG) were added in 2013 as vehicles for public investment funds in response to the AIFM Directive. The latest newcomer announced in the draft bill for the German Future Financing Act of August 2023 is the Joint-Stock Shell Corporation (BMAG), which is intended to facilitate IPOs of “Special Purpose Acquisition Companies” in Germany as well.²⁵

Holger Fleischer/ Jesper Lau Hansen/Wolf-Georg Ringe (eds.), *German and Nordic Perspectives on Company Law and Capital Markets Law*, 2015, p. 3, 10 et seq.

23 See *Holger Fleischer*, Ein Rundflug über Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht, *Neue Zeitschrift für Gesellschaftsrecht (NZG)*, 2022, 827, 828; for England, see the observation of *Lawrence Gower/Paul Davies/Sarah Worthington*, *Principles of Modern Company Law*, 10th 2016, mn. 1–47: “After a period of stability in the variety of legal forms on offer to those who wish to incorporate their businesses – before 2000 the last significant innovation had been the introduction of the private company at the beginning of the twentieth century – at least four significant new forms of incorporation have been made available in less than a decade: the limited liability partnership, the community interest company, the charitable incorporated organisation and the European Company (or *societas europaea*).”

24 On the theory and “architectural style” of the European Union’s own organizational forms, *Holger Fleischer*, “Supranational corporate forms in the European Union: Prolegomena to a theory of supranational forms of association”, *Common Market Law Review (CMLR)* 47 (2010), 1671.

25 On this, *Alexander Herzog/Bero Gebhard*, “Der aktienrechtliche Regelungsrahmen für SPACs im Entwurf eines Zukunftsfinanzierungsgesetzes”, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2023, 1055.

III. Occurrence and Usage of Forms of Association

If we look at the actual occurrence and usage of the corporate forms available in Germany, three lines of development stand out, each of which can be summarized by means of succinct “from-to” formulations.

1. From Unlimited to Limited Liability

With regard to the choice of a form of association, vast shifts can be observed over time from organizational forms having unlimited liability to those having (partially) limited shareholder liability. This is shown by a comparison of current legal statistics²⁶ with data from 1895, 1925 and 1939,²⁷ according to which the number of OHGs initially rose from 55,239 (1895) to 66,823 (1925), but then fell to 60,624 (1939) and 22,819 (2022). The development of limited partnerships (KGs) reflects an opposite course: they grew from 1,117 (1895) to 6,790 (1925) and 13,957 (1939) to over 291,714 (2022), of which today around 90 per cent are GmbH & Co. KGs.²⁸ The greatest fluctuations were registered for the GmbH, which initially rose from 1,028 (1895) to 38,294 (1925), but which then dropped to 18,217 (1939) due to the aforementioned fundamental criticism by the National Socialists;²⁹ thereafter, however, the number skyrocketed to 1,264,195, and even to 1,440,038 if one includes UGs (both figures from 2022). In contrast, the numbers of AGs in Germany have always moved within a relatively narrow range and, compared with our neighboring countries, exist at a fairly low level: from 4,798 (1895) to 11,964 (1925) and from 6,289 (1939) to 13,615 (2022).

	1895	1925	1939	2022
OHG	55,239	66,823	60,624	22,819
KG	1,117	6,790	13,957	291,714
GmbH	1,028	38,294	18,217	1,440,038
AG	4,798	11,964	6,289	13,615

26 Numerical data from *Walter Bayer/Jan Lieder/Thomas Hoffmann*, “Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand 1.1.2023)”, *GmbH-Rundschau (GmbHHR)* 2023, 709; *ibid.*, “Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand 1.1.2022)”, *GmbH-Rundschau (GmbHHR)* 2022, 777, 778 et seq.

27 Numerical data from *Steiner* (fn. 18), p. 34.

28 See *Udo Kornblum*, *Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht, GmbH-Rundschau (GmbHHR)* 2018, 669, 675.

29 Fn. 16.

2. From Basic Offerings to Product Differentiation

A continuous process of differentiation and variation in the basic forms of business association has, furthermore, been observed for decades. If one understands corporate forms as “legal products”,³⁰ then it becomes logical to adopt language from the economic process of product innovation and its various manifestations. According to the terminology of marketing studies, product variation occurs when a product that has already been introduced to the market is changed in one or another respect in order to attract new groups of buyers or to respond to changing needs.³¹ If the existing product is retained, this is referred to as product differentiation.

This phenomenon is particularly striking in the case of limited partnerships. Over the course of time, various types of structures have developed with the assistance of legal practitioners,³² ranging from the capitalistic KG³³ to the modern public KG and the large family KG³⁴ that spans several generations. Another special structural model is the GmbH & Co. KG.³⁵ As a result of sample contracts and practitioners’ manuals, the GmbH & Co. KG has today reached a degree of standardization which makes it appear to be an organizational form in its own right.³⁶ Nowadays, a GmbH & Co. KG can itself be

30 *Roberta Romano*, “Law as a Product”, *J.L. Econ. & Org.* 1 (1985), 225; carrying this discussion further, see e.g. *Horst Eidenmüller*, “Recht als Produkt”, *Juristenzeitung (JZ)* 2009, 641.

31 In depth, *Heribert Meffert/Christoph Burmann/Manfred Kirchgeorg/Maik Eisenbeiß*, *Marketing*, 13th ed. 2018, p. 457 et seq.

32 For the most recent empirical treatment, *Jan Lieder/Thomas Hoffmann*, “Kleine Phänomenologie der Kommanditgesellschaft”, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2021, 1045: “A brief phenomenology of the limited partnership”.

33 *Erich Boesebeck*, *Die “kapitalistische” Kommanditgesellschaft*, 1938. Boesebeck was a lawyer and notary in Frankfurt.

34 *Peter Ulmer*, “Die große, generationsübergreifende Familien-KG als besonderer Gesellschaftstyp”, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2010, 549.

35 Reappraising the historical origins and the spread of the GmbH & Co. KG, *Holger Fleischer/Till Wansleben*, *Portlandzementfabrik GmbH & Co. KG*, *BayObLGZ* 13 (1913), 69, in: *Holger Fleischer/Jan Thiessen* (eds.), *Gesellschaftsrechts-Geschichten*, 2018, p. 27, 31 et seq., 38 et seq.

36 Cautiously advancing this idea, *Karsten Schmidt*, *Gesellschaftsrecht*, 4th ed. 2002, p. 1623 et seq.: “Today, legal practice makes use of the GmbH & Co. KG as if it were a statutory legal form. [...] The standardization of GmbH & Co. contracts in manuals does not yet make the GmbH & Co. an organizational form of its own”; for a middle ground, *Christine Windbichler*, *Gesellschaftsrecht*, 24th ed. 2017, § 73 mn. 2: “de facto an additional corporate form”; more forcefully, *Mark Binz*, “GmbH & Co. KG – Quo vadis?”, *GmbH-Rundschau (GmbHR)* 1987, 39: “independent organizational form”;

divided into various sub-forms, which in turn have undergone a standardization process: the same-person GmbH & Co. KG, the single-member GmbH & Co. KG, the unitary GmbH & Co. KG and the star-shaped GmbH & Co. KG.³⁷ Similar differentiations can be found in the GmbH, for example in the form of the single-person GmbH, the non-profit GmbH or the GmbH in the hands of public bodies.³⁸

3. From the Historically Grown Centre to the Newly Blossoming Periphery

The third and most recent trend is the rediscovery of previously marginalized organizational forms. Although the GmbH, KG and AG still make up the bulk of business organizations, other vehicles are increasingly being used in certain niche markets. These include the KGaA, of which there are now 378, namely in the form of the GmbH or SE & Co. KGaA. As a bespoke legal construct, it is encountered mainly in listed family companies³⁹ and in professional soccer.⁴⁰ Even stronger growth is being seen in the European Company (SE), which now claims 801 entities. The growth in the number of KGaAs and SEs is an unmistakable sign that a significant group of market participants continue to regard the restrictions imposed by German stock corporation law – including mandatory employee codetermination laws – as a hindrance. In order to achieve greater freedom of organization, they are apparently prepared to accept the more complicated organizational structures of KGaAs and SEs. In addition, company-affiliated foundations are gaining in practical importance, of which there are now more than 300,⁴¹ and according to some estimates even more than 700.⁴² Their growing popularity is fed by various sources: As anchor shareholders, they ensure the long-term orientation of the company, they are committed to the omni-

see also *Hans-Joachim Mertens*, “GmbH & Co. und Gesellschaftsdogmatik”, *GmbH-Rundschau* (GmbHHR) 1967, 45, 48: “Legal phenomenon sui generis”.

37 In greater detail, *Fleischer* (fn. 8), § 1 GmbHHG mn. 24 et seq.

38 See *Fleischer* (fn. 8), § 1 GmbHHG mn. 90 et seq.

39 See *Holger Fleischer/Jannik Lucas Maas*, “Börsennotierte Familienunternehmen: rechtliche Grundlagen und Gestaltungsoptionen”, *Der Betrieb* (DB) 2021, 51; for monographic treatment, *Tobias Begemann*, *Die SE & Co. KGaA als Rechtsform für Familien-gesellschaften*, 2018.

40 See *Christian Weber*, “KGaA als Rechtsform eines Proficlubs der Fußball-Bundesliga”, *GmbH-Rundschau* (GmbHHR) 2013, 631; for monographic treatment, *Wolfgang Feldmeier*, *Die Kommanditgesellschaft auf Aktien unter der „50+1“-Regel*, 2020.

41 See *Jörn Block/Hermut Kormann/Reza Fathollahi*, “Stiftungsunternehmen in Deutschland”, *Zeitschrift für Familienunternehmen und Strategie* (FUS) 2023, 52.

42 See *Hans Fleisch*, „Unternehmensverbundene Stiftungen – ein Überblick“, in: *Hans Fleisch/Marc Eulerich/Holger Krimmer/Andreas Schlüter/Stefan Stolte* (eds.), *Modell unternehmensverbundene Stiftung*, 2016, p. 18, 19.

present corporate purpose by specifying a special foundation focus in their articles of association, and they also strive to combine profit generation with promotion of the common good.⁴³ Moreover, it remains to be seen whether cooperatives will attract even more attention in the future, also and especially as legal vessel for social enterprises.⁴⁴ In any case, their considerable importance, with over 7,000 entities, 23.5 million members and 900,000 employees,⁴⁵ stands in striking contrast to their step-motherly treatment in corporate law literature.⁴⁶

IV. Company Law and Numerus Clausus

A walk through the company law landscape in Germany cannot be undertaken without making reference to the numerus clausus principle, a notion whose foundations in case law and legal literature have thus far remained remarkably vague.⁴⁷

1. Numerus Clausus versus Numerus Apertus

As is the case in Austria⁴⁸ and Switzerland⁴⁹, the numerus clausus is an organizational principle of company law in Germany.⁵⁰ Figuratively speaking, law-

43 In greater detail, *Holger Fleischer*, “Unternehmensverbundene Stiftungen und Familienunternehmen: Kontrastmodell oder ‘Familienähnlichkeit’”, *Zeitschrift für Unternehmensrecht (ZIP)* 2022, 2045.

44 On cooperatives as a vehicle supporting sustainability, *Michael Deng*, “Genossenschaften als Vehikel der Nachhaltigkeit”, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2022, 1179, featuring the final sentence, 1185: “The ‘rediscovery’ and strengthening of this organizational form in business life is therefore desirable.”

45 Numerical data from *DGRV*, *Zahlen und Fakten der Genossenschaften in Deutschland*, 2022, p. 4.

46 Cooperatives are not, for example, treated independently in the (excellent) standard reference work by *Windbichler* (fn. 36).

47 For a recent and detailed treatment, *Holger Fleischer*, “Der numerus clausus im Gesellschaftsrecht: Rechtsdogmatik – Rechtsvergleichung – Rechtsökonomie – Rechtspolitik”, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2023, 261.

48 See *Eveline Artmann/Friedrich Rüdfler*, *Gesellschaftsrecht*, 2nd ed. 2020, mn. 16; *Susanne Kals*, in: *Susanne Kalss/Christian Nowotny/Martin Schauer* (eds.), *Österreichisches Gesellschaftsrecht*, 2nd ed. 2017, § 1 mn. 6.

49 See *Arthur Meier-Hayoz/Peter Forstmoser/Rolf Sethe*, *Schweizerisches Gesellschaftsrecht*, 12th ed. 2018, § 11 mn. 2 et seq.; in depth, *Peter Forstmoser*, *Abschied vom numerus clausus im Gesellschaftsrecht?*, in: *Robert Waldburger/Charlotte M. Baer/Ursula Nobel/Benno Bernet* (eds.), *Wirtschaftsrecht zu Beginn des 21. Jahrhunderts. Festschrift für Peter Nobel zum 60. Geburtstag*, 2005, p. 77.

50 See *K. Schmidt* (fn. 36), p. 96 et seq.; *Herbert Wiedemann*, *Gesellschaftsrecht*, Bd. II: *Recht der Personengesellschaften*, 2004, p. 137f.; *Windbichler* (fn. 36), § 1 mn. 5.

makers do not permit tailor-made suits, instead offering only *prêt-à-porter* garb. Even more vividly, a prominent Swiss author notes that a private law organization cannot appear in any costume: “It is not the Fasnachts (carnival) principle that applies, but that of the Opera Ball.”⁵¹ In contrast to contract law, the parties are therefore precluded from forming innominate organizations, whether on the basis of foreign models or without historical or comparative legal precedent.

Contrary to popular belief, however, the *numerus clausus* in company law cannot claim inevitability or its being without an alternative. This is shown by a comparative glance at neighboring Liechtenstein. To attract foreign capital to the then impoverished country, the legislature created a codification in 1926 featuring a globally unrivaled number of organizational forms.⁵² In the Materials on the Law of Persons and Companies (PGR), it was stated: “The draft is characterized by a particular richness of forms and thus meets the idea often expressed in practice, according to which the legislature should make as many forms as possible available to the economic man.”⁵³ In substance, the Liechtenstein PGR in its original version did not contain a *numerus clausus* principle in respect of corporate forms.⁵⁴ The situation was similar in Spain. There, the *Código de Comercio* of 1885 had deliberately opened up the catalog of company forms in a departure from the regulatory model of the French *Code de commerce*, invoking freedom of contract.⁵⁵ At the end of the 19th century notarial

51 *Jean Nicolas Druey/Eva Druey Just/Lukas Glanzmann*, *Gesellschafts- und Handelsrecht*, 12th ed. 2021, § 2 mn. 33.

52 See *Marxer & Partner Rechtsanwälte* (eds.), *Liechtensteinisches Wirtschaftsrecht*, 2021, § 5 mn. 5: “Company law should form the basis for bringing foreign capital to Liechtenstein.”; in detail, *Christoph Maria Merki*, *Wirtschaftswunder Liechtenstein*, 2007, p. 137 et seq.; on the reasons and backgrounds, also *Holger Fleischer/Claas-Lennart Götz/Christian Stemberg*, “Das liechtensteinische Gesellschaftsrecht: Miniaturwunderland der Rechtsformen”, *Wertpapier-Mitteilungen* (WM) 2023, 1819 (Part I), 1853 (Part II).

53 *Wilhelm Beck/Emil Beck*, *Kurzer Bericht über die Revision des Personen- und Gesellschaftsrechts*, 1925, p. 11.

54 See *Florian Marxer*, “Rezeption im liechtensteinischen Gesellschaftsrecht”, *Liechtensteinische Juristenzeitung* (LJZ) 2006, 56, 59; *Francesco Schurr*, “Die liechtensteinische Aktiengesellschaft und die Bindung ihrer Aktionäre”, *Zeitschrift für vergleichende Rechtswissenschaft* (ZVglRWiss) 111 (2012), 339, 342.

55 See *Luis Fernández de la Gándara*, *La atipicidad en derecho de sociedades*, 1977, p. 281: “[...] el ordenamiento positivo español se decide por la libertad de invención de las formas mercantiles de sociedad.”; in greater detail, *Susana Martínez-Rodríguez*, “Creating the Sociedad de Responsabilidad Limitada: The Use of Legal Flexibility in Spanish Company Law 1869–1953”, *Business History Review* 90 (2016), 227, 229: “The Spanish Commercial Code (1885) allowed *numerus apertus* for the legal form of enterprises. This means that Spaniards could import ideas from France and elsewhere.”, 234: “During the process of developing the 1885 code, the drafting committee included a modifi-

practice used the *numerus apertus* principle to create the Spanish limited liability company, which was not codified until 1953.⁵⁶ Finally, for a long time there was no *numerus clausus* for organizational forms in Denmark either.⁵⁷ Rather, in exercising their contractual freedom, parties were free to form a “company structure as they wished”.⁵⁸ However, an entry in the company register was required for a limitation of liability.

No less remarkable is the fact that the three mentioned legal systems, which previously assumed an open catalog of corporate forms, later moved away from this *numerus apertus* principle.⁵⁹ This was due in part to a lack of practical interest in innominate organizational forms and in part to identified abuses. Liechtenstein took this step in the context of its corporate law reform of 1980.⁶⁰ Since then, Art. 245 para. 2 PGR unambiguously stipulates: “Private law associations other than those provided for by law cannot exist.”

For an economic justification of the *numerus clausus* in company law, it is helpful to compare the parallel discussion in property law, which is already further advanced.⁶¹ Similar to the closed catalog of property rights, the closed

cation concerning *libertad de contratación* (freedom of contracting): the abolition of the *numerus clausus* principle for the menu of organizational forms. This change – set out in the preamble and § 117 and § 122 – meant that the forms listed in the code were not the only ones allowed (by law).”

56 Elaborated in detail by *Martínez-Rodríguez* (fn. 55) 227; *Susana Martínez-Rodríguez, A History of the corporation in Spain in the twentieth century: towards Europe*, in: Harwell Wells (ed.), *Research Handbook on the History of Corporate and Company Law*, 2018, p. 298.

57 See *Peter Alsted/Soren Friis Hansen*, Dänemark, in: Gerhard Hohloch (ed.), *EU-Handbuch Gesellschaftsrecht*, 2001, mn. 4: “As a special feature of Danish company law, it should be mentioned that there is no compulsory type of company form. An exhaustive list is therefore not possible.”

58 See *Florian Kuszner*, *Dänisches Kapitalgesellschaftsrecht*, 2003, p. 29: “Danish company law is characterized by the civil law principle of private autonomy and the principle of freedom of contract. In particular, Danish law allows companies to be established in an organizational form that was not previously represented in the legal system.”

59 See in greater detail, *Fleischer* (fn. 47), 261, 275 et seq., with further references.

60 See *Francesco Schurr*, Liechtenstein, in: Simon Laimer/Christoph Perathóner (eds.), *Gesellschaftsrechtliche Nebenabreden in Europa*, 2013, p. 217, 220: “With the company law reform of 1980, the *numerus clausus* controlling company forms was introduced in Liechtenstein [...].”; more generally, *Anton Gubser*, *Grundriss der Liechtensteinischen Gesellschaftsrechtsreform 1980*, 1980.

61 In greater detail as to the text that follows, *Fleischer* (fn. 47), 261, 275 et seq.; see also *Bram Akkermans*, *The principle of ‘numerus clausus’ in European property law*, 2008; *Christian von Bar*, *Gemeineuropäisches Sachenrecht*, vol. I, 2015, § 1 mn. 58 et seq.; *Holger Fleischer*, *Der numerus clausus der Sachenrechte im Spiegel der Rechtsökonomie*, in: *Thomas Eger/Jochen Bigus/Claus Ott/Georg Wangenheim* (eds.), *Internationa-*

number of permissible company forms promotes the ease and security of legal transactions by reducing through standardization the system costs of the commercial register and by lowering the information costs of all parties involved. Disadvantages of standardization from the point of view of innovativeness are mitigated in partnership and limited liability company law by the considerable freedom of organization that is afforded within the individual entity.⁶² In stock corporation law, one faces relentless reform legislation, with frequent reference made to the field's "perpetual state of reform" (Aktienrechtsreform in Permanenz).⁶³

2. Extensions and Reductions in the Supply of Organizational Forms

The canon of organizational forms is not fixed once and for all but is instead quite subject to change in the legal policy process. Legislators therefore have a responsibility to observe and adapt in order to prevent an undersupply as well as an oversupply of corporate forms.⁶⁴

There has already been mention of extensions to the range of organizational forms as done by the legislature.⁶⁵ In addition, the practice of the high courts can cautiously expand the available spectrum.⁶⁶ One example is a company in the process of formation ("Vorgesellschaft") as a "sui generis form of organization".⁶⁷ The GmbH & Co. KG, which is not strictly speaking an organiza-

lisierung des Rechts und seine ökonomische Analyse. Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag, 2008, p. 125, 127 et seq.; *Thomas W. Merrill/Henry F. Smith*, "Optimal Standardization in the Law of Property", *Yale L.J.* 110 (2000), 1.

62 See above II 2.

63 *Wolfgang Zöllner*, "Aktienrechtsreform in Permanenz – Was wird aus den Rechten des Aktionärs?", *Aktiengesellschaft (AG)* 1994, 336.

64 Like-minded in a larger context, *Christoph A. Kern*, *Typizität als Strukturmerkmal des Privatrechts*, 2013, p. 517: "Especially under the constraint of form, the ability to innovate must be ensured on the one hand by an attentive legislator who – supported by case law and literature – recognizes extinguished as well as new needs and adjusts the circle of available forms accordingly, without lapsing into actionism."

65 See above II 3.

66 See *Holger Fleischer*, "Gesetz und Vertrag als alternative Problemlösungsmodelle im Gesellschaftsrecht", *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 168 (2004), 673, 680; *K. Schmidt* (fn. 36), p. 97.

67 *Bundesgerichtshof (Federal Court of Justice)*, 23 October 2006 – II ZR 162/05, BGHZ 169, 270 mn. 10; *fundamentally Bundesgerichtshof (Federal Court of Justice)*, 12 July 1956 – II ZR 218/54, BGHZ 21, 242: "A GmbH in the process of formation is not a civil-law company but an organization subject to a special law consisting of the founding regulations given in the GmbH Act or in the articles of association and also in the law of the incorporated GmbH, insofar as it does not require registration."

tional form in its own right, acts like one de facto.⁶⁸ The situation is similar with the Kapitalgesellschaft & Co. KGaA.⁶⁹

An additional softening of the numerus clausus principle has taken place since the turn of the millennium through the back door of international company law. Following the ECJ's *Centros* ruling⁷⁰ on the freedom of establishment, the German Federal Court of Justice (BGH) saw itself obliged to switch from the long-standing real seat theory – which also meant the non-recognition of foreign companies in Germany⁷¹ – to the incorporation theory.⁷² Since then, this change in approach has applied not only to companies from EU states but also to EEA foreign companies as well as to companies from other states on the basis of international corporate conflict law.⁷³ Formally, this does not affect the numerus clausus limiting company forms in Germany because the incoming companies are recognized “as such”, i.e. as companies under foreign law.⁷⁴ In fact, however, the freedom of choice for company founders has been considerably extended: Although they still cannot create a Liechtenstein private law *Anstalt* in the costume of German law, founders can, by virtue of the EEA Treaty, have direct recourse to the Liechtenstein original.⁷⁵

In contrast with the inclusion of new forms of associations, legislators can also abolish old, obsolete organizational forms.⁷⁶ Some of them died out long ago and have been forgotten, such as the “Pfännerschaft”, in which people joined

68 On this point, see also the text corresponding to note 35 along with the provided references.

69 Pathbreaking Bundesgerichtshof (Federal Court of Justice), 24 February 1997 – II ZB 11/96, BGHZ 134, 392; on the 25th anniversary of this decision, *Daniel Otte*, “25 Jahre Kapitalgesellschaft & Co. KGaA – eine Rechtsformalternative mit Zukunft?”, *Betriebs-Berater (BB)* 2022, 461.

70 ECJ, 9 March 1999, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, C-212/97, ECLI:EU:C:1999:126.

71 On this topic, *Marc-Philippe Weller*, in: *Münchener Kommentar zum GmbH-Gesetz*, 4th ed. 2022, Introduction, margin no. 346: “Due to the numerus clausus limiting company forms under German corporate law, foreign corporations to which German law applies on the basis of the real seat theory are not recognized in Germany.”

72 See Bundesgerichtshof (Federal Court of Justice), 13 March 2003 – VII ZR 370/98, BGHZ 154, 185.

73 In greater detail, *Weller* (fn. 71), Introduction mn. 360 et seq.

74 See ECJ, 5 November 2002, *Überseering*, C-208/00, ECLI:EU:C:2002:632; taken up by BGHZ 154, 185 (fn. 72), 189: “This is because the plaintiff did not assert and sue for its rights as a partnership, but as a Dutch BV. It has thus made use of its freedom of establishment guaranteed by the EC Treaty. This means that the legal capacity of the plaintiff as a Dutch BV must be respected.”

75 See Bundesgerichtshof (Federal Court of Justice), 19 September 2005 – II ZR 372/03, NJW 2005, 3351: Liechtenstein stock corporation.

76 See *Fleischer* (fn. 66), 673, 680; *K. Schmidt* (fn. 36), p. 97.

together to exploit a salt spring.⁷⁷ Others, regardless of their considerable tradition, were later deleted from the catalog of corporate forms. This will be discussed separately, below.⁷⁸

V. Regulatory Techniques for New Organizational Forms and Other Frameworks

Where there is a need to make further additions to the array of legal forms in Germany, three statutory regulatory techniques are available for this purpose, supplemented by the possibility of private certification.

1. Entirely New Organizational Form

The most significant but also the most costly reform step is the creation of an entirely new organizational form. German lawmakers have not undertaken this step since they created the GmbH in 1892; formulated essentially without any practical clues (“gewissermaßen am grünen Tisch”),⁷⁹ it was an “artificial creation without historical or comparative legal model”.⁸⁰ Strictly speaking, the supranational companies do not constitute genuine new creations either, because their respective regulations or implementing laws refer broadly to national OHG law (§ 1 EWIVAG), stock corporation law (Art. 9 lit. c ii SE Regulation) or cooperative law (Art. 8 lit. c ii SCE Regulation). They therefore represent only the tip of an iceberg, the largest part of which remains hidden in the sea of national legal forms.⁸¹

More recently, though, the Stiftung Verantwortungseigentum has been seeking to create a completely new legal form with its project focused on a “corporation with tied assets” (“Gesellschaft mit gebundenem Vermögen, GmgV”).

77 See *Rudolf Müller-Erbach*, *Das Bergrecht Preußens und des weiteren Deutschlands*, 1916, p. 231 et seq.

78 Described in greater detail at VII, below.

79 *Ernst Neukamp*, “Die deutschen Gesellschaften mit beschränkter Haftung, eine neue Gesellschaftsform”, *Zeitschrift für Volkswirtschaft, Socialpolitik und Verwaltung* 8 (1899), 337, 338.

80 *Fleischer* (fn. 8), Introduction mn. 50; similar *Fritz Rittner*, “Die deutsche GmbH nach der Reform von 1980”, *Zeitschrift für schweizerisches Recht (ZSR)* 161 (1982), 171, 182: “Test-tube baby from 1892”.

81 For earlier observations in this sense as regards the project of a European company, *Paul M. Storm*, “Statute of a Societas Europaea”, *Common Market Law Review (CMLR)* 1967/68, 265, 275: “like the top of an iceberg whose greater part is submerged in an ocean of municipal law and social and economic welfare”.

Whereas the June 2020 and February 2021 drafts of an independent expert group still conceived the organizational structure as a subtype of the GmbH,⁸² a paper issued by the foundation in March 2023 concluded that this path was “not [any longer] practicable”.⁸³ Instead, an independent organizational form is to be developed because “none of the existing organizational forms meet the needs of entrepreneurial practice for an unbureaucratic, feasible – both financially and in terms of personnel – and legally secure structure satisfying the specified parameters”.⁸⁴ The paper then explains the proposed new organizational form in detail, differentiating it from a foundation, a cooperative or a gGmbH.⁸⁵

Legislators in Austria announced in 2020 the creation of a new capital corporate form for startups and innovative companies⁸⁶ which is to be marketed as an “Austrian Limited” and for which two law firms have subsequently developed a regulatory concept.⁸⁷ The preference for a completely new corporate form as opposed to a reform of the GmbH and the AG is explained by the volume of new regulations that have been proposed and by the interest and attention that the new form should generate for Austria as a hospitable location for entrepreneurs.⁸⁸ As in the case of Poland⁸⁹ and Greece,⁹⁰ the aim is to move away as far as possible from the mustiness of traditional organizational forms⁹¹ – it is,

82 See *Anne Sanders/Barbara Dauner-Lieb/Simon Kempny/Florian Möslein/Rüdiger Veil*, Entwurf eines Gesetzes für die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen; partly printed in *GmbH-Rundschau (GmbHHR)* 2021, 285; see also *Vera Obernosterer*, “Die GmbH mit gebundenem Vermögen – eine GmbH mit beschränkter Niederlassungsfreiheit?”, *GmbH-Rundschau (GmbHHR)* 2023, 434, mn. 10 et seq.

83 Stiftung Verantwortungseigentum, paper from 1 March 2023, p. 1; see also *Frankfurter Allgemeine Zeitung*, 14.3.2023: “Companies without dividends”.

84 Stiftung Verantwortungseigentum (fn. 83), p. 8.

85 See Stiftung Verantwortungseigentum (fn. 83), p. 8f.

86 For classification, *Sonja Bydlinski*, Einführung zum 9. Wiener Unternehmensrechtstag: Reform des Gesellschaftsrechts, in: *Susanne Kals/Ulrich Torggler* (eds.), *Reform des Gesellschaftsrechts*, 2022, p. 1 et seq. with further references.

87 *Johannes Reich-Rohrwig/Philipp Kinsky/Sixtus-Ferdinand Kraus*, *Austrian Limited. Eine Startup-freundliche neue Rechtsform*, 2021.

88 See *Reich-Rohrwig/Kinsky/Kraus* (fn. 87), p. 3, 23 et seq.

89 On the Polish PSA, *Ariel Mazgaj/Marcin Mucha*, “The New Kid on the Block on the European Market for Corporate Legal Forms: A Polish Laboratory for a Modern Close Corporation”, *European Company Law* 17 (2020), 46.

90 On the Greek IKE, *Evangelos Perakis*, *The New Greek Hybrid: The Private Company (“IKE”)*, in: *Helmut Siekmann* (ed.), *Festschrift für Theodor Baums zum siebzigsten Geburtstag*, 2017, vol. II, p. 903.

91 For a general discussion of this pro-argument – which also faces weighty contra-arguments – *Fleischer* (fn. 23) 827, 830: “This has the advantage that you can cast off the ballast of the old legal form(s) and leave behind their damaged reputation.”

however, a regulatory approach which has met with little approval in Austrian corporate law scholarship.⁹² To the surprise of many observers, the Ministry of Justice presented at the end of May 2023 a draft bill for a new company form called “Flexible Company” (FlexCo).⁹³ Contrary to the original plans, this is not an entirely new organizational form. Instead, it will be based on the Austrian Limited Liability Companies Act.

2. Subtype

The “small solution” is a subtype (*Rechtsformvariante*, literally “legal form variant”) that builds on the foundation of an established organizational form and adds some special rules to it.⁹⁴ In recent times, this has always been the method of choice for reform-minded legislators in Germany: according to the legislative materials, both the UG (§ 5 a GmbHG)⁹⁵ and the PartG and PartG mbB (§ 1 para. 4 PartGG)⁹⁶ belong to this category, as do the investment stock corporation (§ 108 para. 2 KAGB) and the investment limited partnership (§ 124 para. 1 sentence 2 KAGB).⁹⁷ The same applies to the Joint-Stock Shell Corporation (BMAG), although the draft bill refers to it terminologically as a “special organizational form” (*Sonderrechtsform*).⁹⁸

The charm of a subtype lies both in its regulatory efficiency for lawmakers and in advantages for legal practitioners: the latter have lower learning costs and

92 See *Simon Drobnik*, Discussion report, in Kalss/Torggler (fn. 86), p. 43: “Ulrich Torggler opened the discussions on the presentations made by Sonja Bydlinski and Chris Thomale and observed that there was a broad consensus among professors that there was actually no need for a new form of corporation – a good GmbH and a good AG was all that was needed.”; see also *Chris Thomale*, *ibid.*, p. 9, 28 et seq.

93 Entwurf eines Bundesgesetzes über die Flexible Kapitalgesellschaft oder Flexible Company (Flexible Kapitalgesellschafts-Gesetz – FlexKapGG), GesRÄG 2023, 276/ME.

94 Conceptually for Germany, *Jan Lieder*, Rechtsformvariante und Rechtsscheinhaftung: Ein Beitrag zur Institutionenbildung im Gesellschaftsrecht, in: Peter Limmer/Christian Hertel/Sebastian Herrler/Johannes Weber, Festschrift 25 Jahre Deutsches Notarinstitut, 2018, p. 503, 514 et seq.

95 See Begr. RegE MoMiG, BT-Drs. 16/6140, p. 32; see also Oberlandesgericht (Higher Regional Court) Nürnberg, 5 February 2014–12 W 351/14, *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2014, 422.

96 See Begr. RegE PartGG mbB, BT-Drs. 17/10487, p. 13, 17, 18.

97 See Begr. RegE AIFM-UmsG, BT-Drs. 17/12294, p. 241, 247, 249.

98 See BMF, RefE eines Zukunftsfinanzierungsgesetzes vom 12.4.2023, p. 88; critically, *Rafael Harnos*, “Unternehmensrechtliche Vorschläge im Referentenentwurf des Zukunftsfinanzierungsgesetzes”, *Aktiengesellschaft* (AG) 2023, 348, mn. 34 fn. 164.

can continue to draw on their accumulated wealth of experience in court decisions and contractual practice.⁹⁹

The distinction between an original organizational form and a mere subtype can sometimes create difficulties.¹⁰⁰ The issue is of practical relevance at the national level as relates to the generally applicable regime of rules,¹⁰¹ and it is relevant at the Union level in terms of the applicability of individual directives. In France, this issue played a certain role during the preliminary stages of the conception of the *société par actions simplifiée*,¹⁰² and in Germany, more recently, it was of significance in connection with the question of whether a company with tied assets is to be classified as a “GmbH” within the meaning of Annex II of the Company Law Directive, as such classification would have the consequence that the protection of tied assets by means of a conversion barrier would be contrary to Union law.¹⁰³

3. Legal Status

A third regulatory technique stands opposite these first two, and it is referred to internationally as “legal status”,¹⁰⁴ “legal qualification”¹⁰⁵ or “legal certifica-

99 See Holger Fleischer, “Internationale Trends und Reformen im Recht der geschlossenen Kapitalgesellschaft”, *Neue Zeitschrift für Gesellschaft (NZG)* 2014), 1081, 1089, with further references.

100 For a recent discussion on a company with tied assets, see *Obernosterer* (fn. 82), 434, mn. 10 et seq.

101 See *Lieder* (fn. 94), p. 503, 526: “Legal provisions and principles applicable to the basic form shall apply to the legal form variant, unless special rules conflict with them.”

102 See *Joelle Simon*, *La SAS: histoire d’un succès*, in: Pierre Henri Conac/Isabelle Urbain-Parleani (eds.), *La Société par Actions Simplifiée (SAS)*, 2016, p. 37, 44.

103 See *Obernosterer* (fn. 82), 34, mn. 23 et seq.; see also *Caspar Behme*, “Umwandlungssperre bei der Gesellschaft mit gebundenem Vermögen”, *Zeitschrift für Rechtspolitik (ZRP)* 2023, 37, 39: “If the German legislature wishes to avoid a conflict with the Company Law Directive, it would be advisable to establish a company with tied assets as an independent legal form outside the GmbHG.”

104 *Joseph S. Liptrap*, “The Social Enterprise Company in Europa: Policy and Theory”, *J. Corp. L. Stud.* 20 (2020), 495, 496 fn. 1; *OECD*, *Policy Guide on Legal Frameworks for the Social and Solidarity Economy*, 2023, p. 45 et seq.; see also *Sofie Cools*, “Social Entrepreneurship: The Choice Between Labels, Variants, Dedicated and Conventional Corporate Forms”, *European Company and Financial Law Review (ECFR)* 2023, 85.

105 *Antonio Fici*, *Models and Trends of Social Enterprise Regulation in the European Union*, in: Henry Peters/Carlos Vargas Vasserot/Jaime Alcalde Silva (eds.), *The International Handbook on Social Enterprise Law*, 2023, p. 153, 165 et seq.

tion”.¹⁰⁶ Here, the legislature provides certain special rules that are available to several or all company forms as a regulatory option. Early examples of this approach can be found in Belgium, where in 1995 the *société à finalité sociale* was created, and in Finland in 2003 with a law on social enterprises.¹⁰⁷ A better-known example is the Italian *società benefit* of 2016, which, unlike the U.S. benefit corporation, is not a subtype but, with its dual purpose, is available to all partnerships, corporations and cooperatives.¹⁰⁸ The same applies to the 2019 French *société à mission*, which is a status that all commercial companies can acquire.¹⁰⁹ Since 2017, AGs, GmbHs and cooperatives in Luxembourg have been able to acquire the legal status of *société d’impact societal*,¹¹⁰ and, since 2022, Spain has offered the *sociedade de beneficios e interès comun* for AGs and GmbHs,¹¹¹ a status which, however, still awaits further shaping through a regulation. In Germany, although operating from a somewhat different perspective, companies with tax non-profit status can be classified under a similar type of heading, the available forms being a gGmbH (§ 4 GmbHG), a gUG,¹¹² a gAG¹¹³

106 Carol Liao/Elsir U. Tawfik/Pat Teichreb, “The Global Enterprise Lawmaking Phenomenon: State Initiatives on Purpose, Capital and Taxation”, Windsor Y B Access Just 36 (2019), 84, 97 et seq.

107 For Belgium: Loi du 13 avril 1995; see David Hiez, The Suitability of Belgian Law to B Corp, in: Peters/Vargas Vasserot/Alcalde (fn. 105), p. 441, 445 et seq.; this legal status was abolished by the Belgian legislator in 2019; see Cools (fn. 104), 85, 98 et seq.; for Finland Law Nr. 1351/2003 from 31 December 2003; in greater detail, Harry Kostilainen/Eeva Houtbeckers/Pekka Pättiniemi, A New Typology of Social Enterprise in Finland: Capturing the Diversity, in: Jaques Defourny/Marthe Nyssens (eds.), Social Enterprise in Western Europe, 2021, p. 52, 55 et seq.

108 See Marco Cian, “La Nozione Di Società E I Principi Generali”, in: Marco Cian (ed.), Diritto delle società, 2020, p. 50: “non un nuovo tipo societario”.

109 See Jean-Noel Guérini, in Rapport Lescure et al., N° 1237, Assemblée Nationale, Enregistré à la Présidence de l’Assemblée nationale le 15 septembre 2018, Tome II, p. 127: “[Ce] statut se cumulera avec les statuts existants: société anonyme à mission; société par actions simplifiée (SAS) à mission; société à responsabilité limitée (SARL) à mission; entreprise unipersonnelle à responsabilité limitée (EURL) à mission. Il ne s’agit pas de créer un statut d’entreprise supplémentaire.”; for comparative treatment, Holger Fleischer/Yannick Chatard, “Gesetzliche Zertifizierung nachhaltiger Unternehmen: Die französische ‘société à mission’”, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2021, 1525.

110 Loi of 12 December 2016.

111 Ley no. 18/2022 of 28 September 2022.

112 Bundesgerichtshof (Federal Court of Justice), 28 April 2020 – II ZB 13/19, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2020, 781.

113 See Iris Rozwora, Die gemeinnützige Aktiengesellschaft als Akteurin der Zivilgesellschaft, 2021.

and, according to the prevailing view, a geG;¹¹⁴ they cannot however be classified as non-profit partnerships.¹¹⁵

The essential advantage of a legal status lies in its holistic and universal approach to business association: it is open to all forms of companies equally or at least to several of them.¹¹⁶ As a result, company founders can choose the organizational form that seems most suitable for their purposes.¹¹⁷ This makes a prior change of form unnecessary and also eliminates the need for further conversion processes if the status requirements are no longer met at a later date.¹¹⁸

4. Private Certification

Finally, the possibility of private certification should also be considered. This is gaining in importance internationally, especially in the area of sustainability: Instead of “good products”, “good (capital) companies” are certified.¹¹⁹ The prototype is the Certified B Corporation, or B Corp for short, a private seal of approval from the non-profit organization B Lab, headquartered in Pennsylvania.¹²⁰ This seal is awarded after successful completion of a standardized private certification process (B Impact Assessment) and should not be confused with the Benefit Corporation as a statutory organizational form, even though the same idea founders stand behind both.¹²¹ The B Corp is now a globally established seal of approval, with over 5,000 certified B Corporations being found in more than 70 countries and in over 150 different industries.¹²² For

114 See *Lena Oldemeier/Björn Seeck*, “Genossenschaft und Gemeinnützigkeit”, *Zeitschrift für das Recht der Non Profit Organisation (npoR)* 2023, 16.

115 See *Manfred Orth*, “Gemeinnützige Personengesellschaften”, *Deutsches Steuerrecht (DStR)* 2022, 864; for changes de lege ferenda *Frauke Wedemann*, “Gemeinnützige Personengesellschaften?”, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2016, 645.

116 See *Fleischer/Chatard* (fn. 109), 1525, 1531; *Karsten Engsig Sørensen/Mette Neville*, “Social Enterprises: How Should Company Law Balance Flexibility and Credibility?”, *EBOR* 2014, 267, 281.

117 Forcefully supporting this view, *Antonio Fici*, *A European Statute for Social and Solidarity-Based Enterprise*, 2017, p. 21.

118 See *Fleischer/Chatard* (fn. 109), 1525, 1531; *Sørensen/Neville* (fn. 116) 267, 277 et seq.

119 See *Martin Burgi/Florian Möslein* (eds.), *Zertifizierung nachhaltiger Kapitalgesellschaften*, 2021.

120 For monographic treatment, *Chris Marquis*, *Better Business. How the B Corp Movement is Remaking Capitalism*, 2020.

121 In greater detail, *Holger Fleischer*, “Die US-amerikanische Benefit Corporation als Referenz- und Vorzeigemodell im Recht der Sozialunternehmen”, *Aktiengesellschaft (AG)* 2023, 1, mn. 3 et seq., with further references.

122 In greater detail <https://www.bcorporation.de>, last accessed 9 November 2023.

Germany, the B Corp Directory now includes around 50 entries ranging across 12 different business sectors. In addition, interested companies can also make use of domestic certification mechanisms: TÜV Rheinland, for example, offers the “Sustainable Corporate Governance” seal,¹²³ and for non-profit companies there is the “PHINEO Wirkt!” seal.¹²⁴

One advantage of private certification is that it relies exclusively on market forces and does not require any legislative support.¹²⁵ In addition, competition between rival certifiers could facilitate the search for tailored certification criteria and effective autonomous control mechanisms.¹²⁶

VI. Comparative Templates for New Company Forms

Looking ahead, an appealing question is whether there is still room for new organizational forms in German law. This query will be addressed here by way of a brainstorming session. Foreign forms of association for which there is (as of yet) no equivalent in Germany may serve as a source of inspiration.¹²⁷ The focus is on collecting ideas; evaluation and criticism are reserved for future publications. However, in instances where corresponding proposals for a legal import to Germany already exist, this will be briefly noted.

1. The LLP and Civil Law KG

In the field of partnership law, one prominent author has for two decades unceasingly advocated a German LLP.¹²⁸ Alternatively, another legal commenta-

123 <https://www.tuv.com/Germany/de/znu-standard.html>, last accessed 9 November 2023.

124 <https://www.phineo.org/wirkt-siegel>, last accessed 9 November 2023.

125 In this regard, *Gerald Spindler*, Social Purposes in German Corporate Law and Benefit Corporations in Germany, in: Peters/Vargas Vasserot/Alcalde Silva (fn. 105), pp. 585, 595, concludes: “There is no need to introduce a specific benefit corporation form as long as certification mechanisms are in force and have a significant impact on the market.”

126 See *Florian Möslin*, Zertifizierung nachhaltiger Kapitalgesellschaften: Regimevergleich und flankierende Maßnahmen, in: Burgi/Möslin (fn. 119), p. 3, 11.

127 Many of them are discussed in Holger Fleischer (ed.), *Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht*, 2024 (forthcoming).

128 See *Martin Henssler*, Die “Limited Liability Partnership” des US-amerikanischen Rechts, in: Rolf Wank/Heribert Hirte/Kaspar Frey/Holger Fleischer/Gregor Thüsing (eds.), *Festschrift für Herbert Wiedemann zum 70. Geburtstag*, 2002, p. 907, 927 et seqq.; see additionally, *Sabine Otte-Gräbener*, Reform des Personengesellschaftsrechts,

tor argues in favor of a partnership with limited liability: In terms of added value as compared to the status quo of corporate law, it would be tailored precisely to the needs of owner-managed businesses having few partners and, in particular, it would provide founders with low-threshold and low-cost access to a partnership enjoying limited liability.¹²⁹ Following a similar approach, Austrian authors have recently proposed a KG mbH instead of the GmbH & Co. KG, which they claim is inefficient because it requires the establishment and maintenance of two legal entities and entails complicated contractual arrangements so as to operate as a single company.¹³⁰ For the time being, however, this proposal seems to be no more likely to materialize than a similar and previous push in Switzerland for a limited liability partnership¹³¹ or than the earlier German proposals for a commercial partnership on contributions.¹³² Legislators responsible for reforming the MoPeG have dismissed these and other proposals with silence, primarily for reasons of political expediency.¹³³

A second blank space in the tableau of legal forms in terms of partnership law concerns the unavailability of a combination of partners subject to, respectively, unlimited and limited liability in a civil law partnership, i.e. a type of civil-law limited partnership.¹³⁴ The regulation on the *società semplice* in

in: Alfred Bergmann/Michael Hoffmann-Becking/Ulrich Noack (eds.), *Recht und Gesetz*. Festschrift für Ulrich Seibert, 2019, p. 613, 621 et seq.

129 As contended by *Erik Röder*, “Die Personengesellschaft mit beschränkter Haftung”, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 184 (2020), 457.

130 *Ulrich Torggler*, KG mbH statt GmbH & Co. KG, in: *Kalss/Torggler* (fn. 86), p. 49.

131 *Peter Böckli*, Partnerschaft mit beschränkter Haftung – ein Vorschlag de lege ferenda, in: *Festschrift Nobel* (fn. 49), 2005, p. 18; *Dorothea Herren-Senn*, “Die vorgeschlagene Partnerschaft mit beschränkter Haftung (PGmbH)”, *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht (SZW)* 2008, 269.

132 See *Arbeitskreis GmbH-Reform*, *Handelsgesellschaft auf Einlagen: eine Alternative zur GmbH & Co. KG*, 1971; most recently, see also the proposal for a fully limited liability partnership (KGmbH) by *Hendrik Jacobsen*, “Vorschlag zur Ergänzung des MoPeG um eine KGmbH als vollständig haftungsbeschränkte Personengesellschaft”, *Deutsches Steuerrecht (DStR)* 2020, 1259.

133 From the internal perspective of the Federal Ministry of Justice *Eberhard Schollmeyer*, *Der Mauracher Entwurf*, in: *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)*, Special Issue 23: *Modernisierung des Personengesellschaftsrechts*, 2021, p. 29, 34: “On the other hand, the following should be considered with regard to the proposed legislation: For some companies, a partnership with limited liability would offer the prospect of being able to get rid of their general partners, who are subject to co-determination pursuant to Section 4 (1) of the German Co-Determination Act, without further ado. This would certainly become the subject of an intensive political discussion. Its outcome and thus the success of the entire modernization project would be uncertain.”

134 In this regard, see the earlier discussion of *Holger Fleischer/Peter Agstner*, “Personengesellschaften in Deutschland und Italien”, *Rabels Zeitschrift für ausländisches und*

Art. 2267 Para. 1 of the Italian *Codice civile* provides a comparative legal model for this.¹³⁵ The objection that an inexpensive subtype is already available in the form of the UG¹³⁶ ignores the fact that, from the point of view of demand, it is a question of recognizing the increased benefits that would result from having a *choice* between limited liability corporations and partnerships.¹³⁷

2. Benefit Corporations and Social Cooperatives

A “lack of ethical corporate forms”¹³⁸ has recently been diagnosed in the growing field of social enterprises in Germany. In seeking a remedy, one could think of a German version of the US benefit corporation¹³⁹ that was created in 2010.¹⁴⁰ Operating under company law, it would entail a legally prescribed dual purpose (“profit & purpose”) with mandatory reporting obligations and additional enforcement mechanisms; these properties could be replicated by means of party agreement – i.e. private autonomy – in the GmbH and AG, but not with the same binding force.¹⁴¹ Instead of being a subtype, a German benefit

internationales Privatrecht (RabelsZ) 81 (2017), 299, 328 et seq.; for the option of sum-limited liability according to the KG model, see also *Volker Beuthien*, “Was hat die ‘rechtsfähige Personengesellschaft’ Neues gebracht. Zur Entzauberung der Gruppenlehre”, *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2011, 481, 488.

- 135 See *Fleischer/Agstner* (fn. 134), 299, 337, offering the following addition: “There may also be a practical need for this in Germany, without it always being necessary to refer a small commercial GbR or an asset management company to the registration option under § 105 II HGB.”
- 136 As suggested by the *Federal Ministry of Justice*, *Mauracher Entwurf für ein Gesetz zur Modernisierung des Personengesellschaftsrechts*, 2020, Begründung, p. 116; see also *Begr. RegE MoPeG, BT-Drucks. 19/27635*, S. 165.
- 137 See *Holger Fleischer*, *Annäherungen an den Mauracher Entwurf für ein Gesetz zur Modernisierung des Personengesellschaftsrechts*, in: *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) Special Issue 23: Modernisierung des Personengesellschaftsrechts*, 2021, p. 1, 6 f.
- 138 *Christine Windbichler*, *Gibt es ein „Sozialmodell“ des Gesellschaftsrechts?*, in: *Antje G.I. Tölle/Jörg Benedict/Harald Koch/Stephan Klawitter/Christoph G. Paulus/Friedrich Preetz* (eds.), *Selbstbestimmung: Freiheit und Grenzen. Festschrift für Reinhard Singer zum 70. Geburtstag*, 2021, p. 731; more generally, see also *Anja Mittwoch*, *Nachhaltigkeit und Unternehmensrecht*, 2022, p. 260 et seq.
- 139 Most recently, *Fleischer* (fn. 121), 1, with further references.
- 140 See *Benjamin Momberger*, *Social Entrepreneurship: im Spannungsfeld zwischen Gesellschafts- und Gemeinnützigkeitsrecht*, 2015, p. 312 et seq.; rejecting the idea, *Mathias Habersack*, “Gemeinwohlbindung und Unternehmensrecht”, *Archiv für civilistische Praxis (AcP)* 220 (2020), 594, 646 et seq.
- 141 See *Fleischer* (fn. 121), 1, mn. 47.

corporation could also be constituted as a legal status, following the Italian and French models.

On the other hand, one might consider a German social cooperative, with priority given to the entity's social mission, to extensive restrictions on distributions, and to equal participation of all members,¹⁴² as was introduced in France, Portugal, Spain and numerous other jurisdictions on the model of the Italian *cooperativa sociale*¹⁴³ that was created in 1991.¹⁴⁴ The added legal value of such a cooperative would lie in the fact that it is not limited to promoting the interests of members but also allows the pursuit of independent social purposes, something which is not covered by § 1 GenG to date.¹⁴⁵

3. Business Trusts and Trust Enterprises

In the area of foundations and foundation substitutes, the U.S. business trust stands out in comparative law. Under the name "Massachusetts trust", it was a fierce competitor to the corporation¹⁴⁶ at the end of the 19th and the beginning of the 20th century, and it also attracted attention in Germany.¹⁴⁷ The Delaware legislature codified the organizational structure in 1988 in order to avoid any legal uncertainties.¹⁴⁸

Alternatively, one might think of legal reception of the Liechtenstein trust enterprise (*Treuunternehmen*), which was introduced there in 1928 on the model

142 *Momberger* (fn. 140), p. 307 et seqq.

143 Legge no. 381/1991; on its rapid acceptance, *Antonio Thomas*, "The Rise of Social Cooperatives in Italy", *Voluntas* 15(3) (2004), 243; for comparative treatment, see *Oscar Kiesswetter*, *Genossenschaften Made in Italy – Ein Erfolgsbericht*, 2018, p. 73 et seqq., 86 et seqq.

144 See *Daniel Hernández Cáceres*, *Social Enterprises in the Social Cooperative Form*, in: *Peter/Vargas Vasserot/Alcalde Silva* (fn. 105), p. 173 et seq.

145 See *Beuthien* (fn. 7), Introduction mn. 2: "They [= German cooperatives] therefore (unlike the French *économie sociale* in particular) do not pursue any public service objectives, and charitable activity may only be a secondary purpose for them"; in detail *Momberger* (fn. 140), p. 79 et seq., 308 et seq.

146 See *John Morley*, "The Common Law Corporation: The Power of the Trust in Anglo-American Business History", *Col. L. Rev.* 116 (2016), 2145.

147 See *Rudolf F. Goldschmidt*, *Investment Trusts in Deutschland, 1932*; *Ernst Heymann*, "Trustee und Trustee-Company im deutschen Rechtsverkehr", in: *Festschrift für Heinrich Brunner zum siebenzigsten Geburtstag*, 1910, p. 473.

148 See *James D. Cox/Thomas Lee Hazen*, *Business Organizations Law*, 5th ed. 2020, p. 42 et seq.

of the Massachusetts business trust.¹⁴⁹ It can be structured as a trust company without legal personality (a genuine business trust) or – more relevant in practice – as a legal entity (a non-genuine business trust) (Art. 932 a § 1 PGR). In the latter case, it is a legal entity that parallels an AG or GmbH, but with the special feature that trust law regulations are applicable to it.¹⁵⁰ Its possible fields of application lie in the operation of a business or in the long-term planning of family assets.¹⁵¹ In contrast to a trust enterprise, we also encounter trusts (trusteeship), which Liechtenstein was the first continental European country to regulate in the PGR¹⁵² and which are not a legal entity. In practice, they are, for instance, used instead of a foundation for the administration of family assets and generally as an instrument facilitating international estate planning.¹⁵³

4. Establishments and Segmented Legal Persons

From the rich treasure trove of the PGR, one could also consider reception of the private-law establishment (*Anstalt*),¹⁵⁴ a “genuine [Liechtenstein invention] without direct foreign ancestors”.¹⁵⁵ Its originality derives from its constituting an “intermediate structure between corporations and foundations”,¹⁵⁶ as it can be structured both with and without members. Art. 534 para. 1 PGR defines it as a legally independent and organized company having its own legal personality which is dedicated to permanent economic or other purposes. The supreme body are the “holders of the founder’s rights” (*Inhaber der Gründerrechte*), who – unlike in the case of a foundation – remain masters of the institution even after its establishment.¹⁵⁷

Also envisaged in the original version of the PGR of 1926 was a segmented entity having legally independent divisions, a structure which is experiencing a renaissance with the introduction of the Protected Cell Company (PCC) in

149 See *Marxer et al.* (fn. 52), mn. 11.1; *Alexander Schopper/Mathias Walch*, *Trusts, Treuunternehmen und besondere Vermögenswidmungen in Liechtenstein*, 2023, mn. 1278.

150 See *Schopper/Walch* (fn. 149), mn. 1263.

151 See *Schopper/Walch* (fn. 149), mn. 1291 et seq.

152 See *Marxer et al.* (fn. 52), mn. 10.2; on proposals for the introduction of a Swiss trust, most recently *Adrian Plüss*, “Einführung des Trusts in die schweizerische Rechtsordnung?”, *Schweizerische Zeitschrift für Wirtschaftsrecht (SZW)* 2023, 320.

153 See *Marxer et al.* (fn. 52), mn. 10.1.

154 Monographically, *Maximilian Dejaco*, *Die privatrechtliche Anstalt im liechtensteinischen Recht*, 2020.

155 *F. Marxer* (fn. 54), 56, 60.

156 *Beck/Beck* (fn. 53), p. 29.

157 See *Marxer et al.* (fn. 52), mn. 8.28 et seqq.

2014, based on models from Guernsey and Delaware.¹⁵⁸ Functionally related to corporate group law, it enables targeted risk management by allowing division into different segments with a liability-isolating effect under the umbrella of one and the same company. However, the Liechtenstein legislature has granted the PCC only a narrow scope of application, namely non-profit or charitable purposes; the acquisition, management and exploitation of holdings in other companies; the exploitation of copyrights, patents, trademarks and designs; and deposit guarantee and investor protection schemes (Art. 43 para. 1 PGR).

5. Decentralized Autonomous Organization LLC

As far as concerns new organizational forms for blockchain-based companies, a subtype from the United States has recently attracted attention also in Germany. Here, we are referring to the Decentralized Autonomous Organization LLC, which the state of Wyoming brought into being in mid-2021 through an annex to its LLC Act.¹⁵⁹ Following this model, one could also think about the introduction of a “crypto company” in Germany, which would create a legally secure organizational framework with DAO-specific regulations and limited liability for DAO participants.¹⁶⁰

VII. Elimination of Organizational Forms

Biodiversity is not an absolute value in the corporate animal kingdom. Traditional company forms therefore do not enjoy species protection at any price; rather, they must assert themselves in competition with other organizational forms.¹⁶¹ As a result, from time to time a thinning of the canon of legal forms

158 For a closer analysis, *Francesco Schurr/Ines Wohlgenannt*, “Einführung der segmentierten Verbandsperson in das liechtensteinische Personen- und Gesellschaftsrecht”, *Liechtensteinische Juristenzeitung (LJZ)* 36 (2015), 23

159 Wyoming Decentralized Autonomous Organization Supplement, SF0038, 66th Leg., Gen. Sess. 2021; for comparative analysis, see, for example, *Holger Fleischer*, “Ein erstes Rechtskleid für die Decentralized Autonomous Organization: Die Wyoming DAO LLC – Vorbild auch für Deutschland?”, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2021, 2205; monographically, *Björn Mienert*, *Decentralized Autonomous Organizations (DAOs) and Corporate Law*, 2022.

160 In greater detail, *Fleischer* (fn. 159), 2205, 2211 et seq.; *Sophia Schwemmer*, “Dezentrale (autonome) Organisationen”, *Archiv für civilistische Praxis (AcP)* 221 (2021), 555, 570 et seq.

161 See *Holger Fleischer*, *Entstehen und Vergehen von Gesellschaftsformen am Beispiel der bergrechtlichen Gewerkschaft*, in: Barbara Dauner-Lieb/Joachim Hennrichs/Martin

by removal of outdated corporate forms may also prove to be reasonable or even necessary.

1. Extinct Species

A striking example of an extinct species is the mining company (*bergrechtliche Gewerkschaft*).¹⁶² Hardly known today, it was the dominant form of organization for mining firms for almost 800 years¹⁶³ – long before the AG, the cooperative and the GmbH saw the light of day.¹⁶⁴ Its legal fate was sealed in Germany in 1982, and it had already been phased out in Austria in 1954.¹⁶⁵ The reason given by legislators was that the number of mining companies having typical mining purposes had been extraordinarily low in the preceding years and that corporate forms not specific to mining were quite sufficient for mining operations.¹⁶⁶ Independently of this, the explanatory memorandum accompanying the reform highlighted serious deficits in the mining companies – as existing under mining legislation – with regard to creditor protection.¹⁶⁷ The situation was quite similar for the partnership shipping company (“Partenreederei”). Because hardly any such companies had been newly founded and because its number continued to shrink, the organizational form was eliminated by the legislature in 2013.¹⁶⁸ The fact that both the mining company and the partnership shipping company were sector-specific legal forms is perhaps no coincidence.

Henssler/Thomas Liebscher/Alexander Morell/Hans-Friedrich Müller/Michael Schlitt (eds.), *Festschrift für Barbara Grunewald zum 70. Geburtstag*, 2021, p. 209, 222: “While one will not discard a historically evolved and proven form of organization without reason, there is in like manner no ‘species protection’ for endangered forms of corporations.”

162 In detail, *Fleischer* (fn. 161), p. 209.

163 Succinctly, *Gunther Kühne*, “Das Ende der bergrechtlichen Gewerkschaft”, *Zeitschrift für das gesamte Genossenschaftswesen (ZfgG)* 32 (1982), 183: “probably the most traditional legal institution of German corporate law”.

164 Providing an apt summation, *Helmut Pasdika*, *Wandlungen in Wesen und Bedeutung der bergrechtlichen Gewerkschaften*, 1960, p. 1: “Today, when the public speaks of mining unions, one has only the idea of an almost meaningless organizational form. Few are aware that it existed for centuries before the organizational forms common today were created.”

165 *Walther Kastner*, “Abschied von der bergrechtlichen Gewerkschaft”, *Österreichische Juristenzeitung (ÖJZ)* 1954, 297: “The idea of radical legal simplification therefore prevailed. A venerable old organizational form, which is retained by only a few companies, many of which no longer even operate a mine, has lost its *raison d’être*.”

166 Explanatory Memorandum to the BBERG, BT-Drucks. 8/1315, p. 72.

167 *Id.*

168 See the Explanatory Memorandum to RegE Reform des Seehandelsrechts, BT-Drucks. 17/10309, p. 43.

The next candidate for removal in the medium term could be the mutual insurance association (“VVaG”),¹⁶⁹ the “wallflower of all German commercial companies”,¹⁷⁰ a form whose number is steadily decreasing as entities are converted into stock corporations in the course of ongoing demutualization.

The decision to reduce the *numerus clausus* of organizational structures brings with it an obligation of legislative aftercare. Lawmakers must cushion the consequences of such an abolition for the involved parties by means of appropriate measures, e.g. through transitional rules or opportunities for conversion.¹⁷¹ With this in mind, the legislature provided a phase-out period of four years for mining companies, a period which was later extended by three years and then by a further five years.¹⁷² In the case of the partnership shipping company, lawmakers even granted permanent protection to already existing companies in accordance with Art. 71 of the Introductory Act to the German Commercial Code (“EGHGB”), an allowance whose significance is admittedly tempered by the fact that a partnership shipping company is linked to the life span of the associated ship.¹⁷³

2. Retention or Abolition of Organizational Forms?

The conditions under which it is advisable to narrow the range of organizational forms have not been widely discussed by commentators.¹⁷⁴ Food for comparative thought is provided by the partnership limited by shares (KGaA), which was abolished in Austria¹⁷⁵ and more recently also in Belgium.¹⁷⁶ In

169 *Bernhard Großfeld*, *Versicherungsverein auf Gegenseitigkeit im System der Unternehmensformen*, 1985.

170 *Udo Kornblum*, “Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht”, *GmbH-Rundschau (GmbHHR)* 2020, 677, 687, making reference to the current number of 87 registered exemplars, but also noting that there is a many times larger number of small VVaGs whose entry in the register is not required.

171 On this point, *Susanne Kalss/Georg Eckert*, “Das Vereinspatent 1852 und das Bundesrechtsbereinigungsgesetz”, *ecolex* 2001, 910, 912: “The members of legal entities can rely on the fact that, in the event of changes in the law on incorporation, the legislature will provide for a legal entity that adequately allows for the maintenance of established asset positions.”

172 In greater detail, *Fleischer* (fn. 161), p. 209, 218 f.

173 Expressly in this regard, Explanatory Memorandum to RegE Reform des Seehandelsrechts, BT-Drucks. 17/10309, S. 139.

174 On the text that follows, see in greater detail, *Fleischer* (fn. 161), pp. 209, 221 et seq.

175 See *Susanne Kalss/Christina Burger/Georg Eckert*, *Die Entwicklung des österreichischen Aktienrechts*, 2003, p. 334, 338.

176 See *Olivier Caprassé/Laura Léonard*, in *Roman Aydogdu/Olivier Caprassé* (eds.), *Le Code des sociétés et des associations*, 2018, p. 11: “La société en commandite par ac-

Switzerland¹⁷⁷ and Germany,¹⁷⁸ too, its removal has been proposed time and again, with legislators ultimately being unable to take this radical step. In Germany, retention of the KGaA has, in retrospect, probably been the right decision; the dry spell endured by the KGaA has seemingly been overcome, and it is a form which, as mentioned above, is experiencing a remarkable renaissance.¹⁷⁹ However, as the “Turandot of theory”,¹⁸⁰ it still poses many riddles for legal scholarship. More generally, assuming that a costly refurbishment of the legal framework is not required, it seems reasonable to retain an organizational form so long as it remains needed – at least somewhere.¹⁸¹

VIII. Conclusion

The walk through the corporate zoo in Germany has produced a colorful picture. Compared to other countries, the number of zoo inhabitants is quite high.¹⁸² It is, however, clearly difficult to engage in an exercise of Linnaean

tions (S.C.A.) est, elle aussi, supprimée.”; also *Hans de Wulf*, “An Introduction to and Evaluation of the 2019 Belgian Companies Act – Preparing for the Previous War?”, *European Company and Financial Law Review* (ECFR) 2023, 109, 129 et seq: “The Mistaken Abolition of the Public Partnership Limited by Shares”.

177 See *Meier-Hayoz/Forstmoser/Sethe* (fn. 49), § 17 mn. 6: “Since this organizational form was not very widespread at the time of the revision of the CO in the 1930s, its elimination from Swiss law had been proposed on various occasions. [...] The elimination of the KmAG was also considered in the course of the 1968/91 reform of stock corporation law, but it was ultimately rejected.”

178 See *Karsten Schmidt*, 150 Jahre Kommanditgesellschaft auf Aktien: Balanceakte eines Sonderlings, in: *Walter Bayer/Mathias Habersack* (eds.), *Aktienrecht im Wandel*, vol. II, 2007, ch. 26 mn. 3: “It is striking that hardly any of the reform discussions have omitted the question of whether the KGaA should not be abolished for lack of acceptance. Rationalizations on the meaningfulness of this organizational form, which has remained exotic, has been a fixed melody in explanatory memoranda since the 19th century.”

179 See the text and references corresponding to notes 38 and 39.

180 *K. Schmidt* (fn. 178), ch. 26, mn. 8.

181 In greater detail, *Fleischer* (fn. 161), p. 209, 222 et seq.; similarly *Meier-Hayoz/Forstmoser/Sethe* (fn. 49), § 11 mn. 11: “In general, it should be noted that there is no reason for the abolition of established organizational forms as long as there is a practical need for them (albeit perhaps a small one) and no abuses occur. The – popular – abridgement of laws in these cases would not result in greater freedom for private individuals but, on the contrary, in a restriction of their choices.”

182 Cf. *Fleischer* (fn. 22), p. 125, 128: “This multiplicity of company forms and type combinations, which is surpassed in Europe only by Liechtenstein’s joy in shaping the law, is not only found in the textbooks, but is lived practice. Unlike in the United Kingdom,

taxonomy and classify the population into a “Systema Naturae”¹⁸³ of genera, species and subspecies (in his terminology: varieties). This challenge is due above all to the recent and uncontrolled multiplication of subtypes, a pattern of growth which does not seem to be following the master plan of a zoo director. Just how many “legal animals” Germany’s corporate law zoo should ideally house and what the zoo of the future should look like still awaits further consideration.

for example, where the private and public company almost completely dominate the scene, company life in this country is colorful and diverse.”

183 *Carolus Linnaeus*, *Systema Naturae*, 1735.