Corporate Groups: Competences of the Shareholders' Meeting and Minority Protection – the German Federal Court of Justice's recent *Gelatine* and *Macrotron* Cases Redefine the *Holzmüller* Doctrine

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A. Introduction

There are few cases in the law of corporate groups that have provoked as much interest, applause and critique as the *Holzmüller* decision of the Federal Supreme Court. On February 25, 1982, the 2nd *Zivilsenat* (Chamber of civil cases) of the *Bundesgerichtshof* (BGH – Federal Court of Justice), the highest court with assigned competences for company law, adopted what would later be known as the *Holzmüller* doctrine.[1] Since then the *Holzmüller* case has influenced the course of countless shareholders' meetings, been relied on in numerous shareholder actions and has initiated intensive academical as well as practical debate. What is it all about? At the core, *Holzmüller* deals with the balance of power between the *Hauptversammlung* (shareholders' meeting) and the *Vorstand* (board of directors) of a German *Aktiengesellschaft* (AG – stock corporation) within the context of corporate groups. Practically, the protection of minority shareholders of a corporate group's parent company is a major underlying issue.

While we are here concerned with German stock corporation law (*Aktienrecht*) as it is laid down in the Aktiengesetz 1965[2] it is worth while to note, that the questions raised by *Holzmüller* affect nearly all jurisdictions, be they common or civil law based. During the 19th century when many jurisdictions developed their foundations of company law, shareholders were thought of natural persons. Now,

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[1] BGHZ 83, 122 ("Holzmüller").

[2] Aktiengesetz dated 6 September 1965, Bundesgesetzblatt (Federal Gazette) I, p. 1089. The other essential source of company law is the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (LLC Act) dated 20 April 1892, Reichsgesetzblatt (Reich Gazette), p. 477 in the version published on 20 May 1898.

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at the beginning of the 21st century, such company law is faced with multi-layer groups of companies, companies having replaced natural persons as shareholders. Some specific issues of corporate groups within the context of the Aktiengesetz (AktG) have been dealt with by legislation (cf. §§ 16 et seqq., 291 et seqq. AktG). Others remained unsolved, a gap the BGH tried to solve with the *Holzmüller* case.

While almost all commentators agreed that *Holzmüller* had identified an important issue, opinions differed whether the court's solution really rebalanced the relationship between the Vorstand and the Hauptversammlung or rather unbalanced it. Recently, more and more voices suggested that *Holzmüller* had to be construed restrictively. Some of them expressed this view pretty frankly. Rosengarten, for example, titled an English written essay:[3] "The Holzmüller Doctrine: Still Crazy after All These Years?". Meanwhile the practice of company law was aching under the incertitude of how *Holzmüller* had to be construed. Keeping in mind the enormous practical relevance of *Holzmüller*, it need not be said, that interest rose when it became clear that the BGH would redefine this doctrine in a recent judgement. On 26 April 2004 it was again the 2nd *Zivilsenat* to take the opportunity to clarify the state of law in two (largely identical) judgements known as the *Gelatine* cases.[4]

While the *Gelatine* cases are the target of this essay, they cannot be understood without the background of the *Holzmüller* case and the discussion during more than 20 years that have passed since the decision in 1982. This is especially true as *Gelatine* – as we will see below – clarified *Holzmüller*, rather than overruling it. This paper thus first sets out to retrace the *Holzmüller* decision and tries to explain the fundamental issues involved. Then the following discussion and practical consequences of *Holzmüller* shall be reported as they set the background against which *Gelatine* was decided by the BGH. Then another case, *Macrotron*, needs to be mentioned, as it helps to clarify the approach and perception of the BGH. Then the *Gelatine* judgements will be displayed as the current state of law. Finally, conclusions regarding company law practice and further developments will be drawn.

[3] BAUMS ET AL., CORPORATIONS, CAPITAL MARKETS, AND BUSINESS IN THE LAW: LIBER AMICORUM RICHARD M. BUXBAUM 445 (2000).

[4] BGH, II ZR 155/02, ZIP 2004, 993 and II ZR 154/02, ZIP 2004, 1001.

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B. *Holzmüller*

I. Essential issues

The Holzmüller decision deals with the delineation of competences between the *Vorstand* and the *Hauptversammlung* within the organizational structure of a German *Aktiengesellschaft* (AG). The essential balance of power between these two organs of an AG is regulated in §§ 76 and 119 AktG. According to § 76 AktG, the Vorstand runs the company in its sole responsibility. The *Hauptversammlung* may only decide on managerial aspects if the *Vorstand* asks the *Hauptversammlung* to do so (§ 119 Abs. 2 AktG). In particular, as far as the management of the company is concerned, the *Hauptversammlung* neither has the right to take the initiative nor the right to give directions to the *Vorstand*. The strong position given to the Vorstand by statute comes with far reaching competences, which, on occasion, may detrimentally and substantially affect the economic value of the shares in an AG.[5] Up to the *Holzmüller* decision the courts in the context of corporate groups had rather focused on the protection of subsidiaries. The phenomenon of parent companies extracting the value out of their subsidiaries and leaving the debt-loaded empty shell to deceived creditors had been well known. It was only in the 1970s that commentators noted that corporate group structures could also be dangerous for the shareholders of the parent company, especially if they were minority shareholders. By hiving parts of the business from the parent down to the subsidiary, the influence of the parent's shareholders can be significantly watered down. Thus now, it is for the *Vorstand* of the parent to exercise all rights in the subsidiary while the parent's shareholders are restricted to exercise their rights on the parent company's level. This phenomenon has become known as 'mediatisation' of the parent's shareholders membership rights. It was in the *Holzmüller* case that the BGH recognized the potential dangers following from the strong position of the *Vorstand* in corporate group structures. In the highly remarkable decision the BGH reshuffled the 'separation of powers' between *Vorstand* and *Hauptversammlung* as it is laid down in the wording of §§ 76, 119 AktG.[6] It has been the first case of highest authority to recognise non-codified competences of the Hauptversammlung.

[5] For details, *see* KUBIS, 4 MÜKO-AKTG § 119 Rn. 31 (2nd ed. 2004) (with further references).

[6] For the principle of 'separation of powers' in the AG see KARSTEN SCHMIDT, GESELLSCHAFTSRECHT § 26 IV 781 (4th ed. 2002).

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II. The Facts[7]

The J.F. Müller & Sohn AG, a company established under the AktG, initially focussed on trade and brokerage of wood and related products including the financing of such contracts. In 1972 the *Hauptversammlung* resolved under approval of the later claimant to extend the companies objects. The relevant clause now read:[8]

"The Aktiengesellschaft may additionally establish or acquire other enterprises and take an interest in such other enterprises. The company may cede its business to such companies or associations entirely or in parts."

The purpose of the resolution that changed the company's *Satzung* (constitution) was to allow for the spin-off of a harbour operating business, which the company had developed in the meantime. The harbour business had developed into an organisationally autonomous business division after the company had acquired the transhipment rights in 1967. By now the harbour business amounted to about 80% of the company's assets. Thus it had become the most valuable part of the company's estate.

After the *Satzung* had been changed the *Vorstand* transferred the harbour business to a subsidiary, which at the time of the claimant's action was a 100% subsidiary of the J.F. Müller & Sohn AG. The AG's *Hauptversammlung* was not involved in the process.

The claimant applied to the court to assert that the transfer of the harbour business to the subsidiary was legally void. In the alternative, he applied to order the defendant AG to retransfer the harbour division to the parent company. Ancillary and alternatively the claimant applied for an order obliging the defendant to ask for the approval of the defendant's Hauptversammlung in every case that required a 3/4 majority resolution in the subsidiary, especially as far as increases in the subsidiary's capital were concerned. The claimant pointed out that the harbour division was the heart of the enterprise while the wood trade and brokerage had become relatively irrelevant as to substance and profit. The harbour business had been transferred to the subsidiary – so the claimant alleged – to effect an increase in

[7] The display of facts is reduced to the legally essential parts, for further details see BGHZ 83, 122 (123-125).

[8] The original German version was: "Die Aktiengesellschaft ist ferner berechtigt, andere Unternehmen zu errichten und zu erwerben sowie sich an anderen Unternehmen zu beteiligen. Sie kann ihren Betrieb ganz oder teilweise solchen Gesellschaften überlassen."

capital of the subsidiary of which the minority shareholders of the parent should be excluded. The claimant held about 7,8% of the defendant company's shares.[9]

III. The Court's Decision and Reasoning

The BGH held that the claimant's application to declare the transfer to the subsidiary completely void was not based on a proper understanding of the law. However, the court also held that the defendant company had to get the approval of its *Hauptversammlung* for intended increases of the subsidiary's capital, requiring the same quorum as needed in the subsidiary.

The court set out by stating that the *Aktiengesetz* did not contain an express rule requiring the AG to submit the decision about the spin-off to the *Hauptversammlung* for approval. In particular, § 119 Abs. 1 AktG containing competences of the *Hauptversammlung* and § 179a AktG[10] referring to the transfer of all assets of a company were held not to be applicable. It is worth noting that the BGH expressly ruled out an analogous application of what is now § 179a AktG.[11]

The BGH did, however, hold that outside the competences expressly laid down in the AktG the approval of the Hauptversammlung could be required. According to the judges on the 2nd Senate of the BGH, the *Vorstand* can be obliged to ask for the *Hauptversammlung*'s approval if there is a *substantial interference with the shareholders' membership and the economic interest embodied in their shareholdings*. In such cases the *Vorstand*'s discretion to precipitate a decision of the Hauptversammlung codified in § 119 Abs. 2 AktG is reduced to nil, if and because the *Vorstand* cannot reasonably assume that it might take such fundamental decisions on its own responsibility.[12]

In *Holzmüller* the Court recognized an action of such importance, since the spin-off of the harbour division and its transfer to the subsidiary touched the *core of the company's business activities*, affected the most valuable business section and fundamentally changed the enterprise structure.[13] In the Senate's view this measure of forming a group structure went far beyond the usual frame of managerial actions, even if managerial competences generally comprise the establishment and

[9] The claimant held shares in the nominal value of 250.000 DM out of an issued capital of 3.200.000 DM.

[10] At the time of the judgement contained in § 361 AktG.

[11] BGHZ 83, 122 (129).

[12] BGHZ 83, 122 (131).

[13] BGHZ 83, 122 (131).

acquisition of subsidiaries and their endowment with capital. This evaluation was not changed by the fact that all shares in the subsidiary belonged to the parent company. Even the change in structure amounted to a weakening of the legal position of the parent's shareholders, since important decisions went along with the transferred assets out of the parent into the subsidiary, thereby depriving the parent's *Hauptversammlung* of the possibility to exert influence.[14]

The Court, however, while the Vorstand's discretion pursuant to § 119 Abs. 2 AktG was reduced to nil and, therefore, the Vorstand had not fulfilled its duties, still held the transfer to the subsidiary to be valid. Non-compliance with the internal duty to submit the decision to the *Hauptversammlung* would not annihilate the external validity of the transfer, since according to § 82 AktG the external power of representation could only be restricted by statute.[15] The measure having been taken by the Vorstand would only be void in exceptional, blatant cases of abuse of representational power recognisable also by the third party (so called "*Mißbrauch der Vertretungsmacht*").[16]

Further, the BGH held that the application for retransferring the harbour operations to the parent could not be successful as the claimant had waited for too long to bring his claim. Generally, the violation of unwritten competences of the Hauptversammlung could justify a shareholder's application for forbearance or restoration.[17] As every cause of action such application for restoration could only be brought, if it was not abusive and not violating the duty of each shareholder to take into regard the interests of the company.[18] In the opinion of the Court, such action had to be brought without undue delay. As a measure of orientation the Court pointed to § 246 AktG which prescribes a one month period for actions concerning the avoidance of resolutions. The Court recognized such undue delay in the fact that since the spin-off about three years had already passed until the shareholder had eventually brought his action.

Finally, the judges considered the *Vorstand*'s power of direction in corporate groups. The BGH held, that before raising new equity capital in the subsidiary the J.F. Müller & Sohn AG had to obtain the approval of its Hauptversammlung. This

[14] BGHZ 83, 122 (136).

[15] BGHZ 83, 122 (132).

[16] BGHZ 83, 122 (132).

[17] BGHZ 83, 122 (134).

[18] For the following aspects see BGHZ 83, 122 (135).

requirement of approval, though, was not held to be applicable for every measure, which required a qualified (3/4) majority in the subsidiary.[19] Such measures and resolutions by and large would be changes of considerate impact even for the shareholders of the parent company. To require the approval of the Hauptversammlung of the parent in each and every case would, however, be an unjustified limitation of the power of direction of the *Vorstand*, which pursuant to § 76 Abs. 1 AktG was to be executed at its sole responsibility.

The capital increase planned for the subsidiary, on the other hand, was thought to contain specific dangers for the shareholders of the parent company. Here the approval of the parent's *Hauptversammlung* was necessary. The court saw the – at least indirect – danger of an adverse effect on the membership of the shareholders, as the value of their shareholding could be watered down and their subscription rights washed out. Without application on the concrete case the BGH referred to academic writers, who had formulated rules for situations in which shareholders could require to participate in important decisions in the subsidiary, which could impact lastingly on their membership. Then, before changes would be effected in the subsidiary, those shareholders had to be given internal participation possibilities in the same form and the same majorities as it was stipulated for corresponding measures in the parent.[20] Further important and fundamental decisions, which demanded for the approval of the parent's *Hauptversammlung*, are agreements between business enterprises,[21] the admission of third shareholders (e.g. in the course of a capital increase),[22] the transfer of all assets of the subsidiary according to what is now § 179a AktG[23] and the winding-up of the subsidiary[24].

IV. The Reception of Holzmüller

While the lower courts decided their cases along the lines of the BGH's landmark case and, now, an important precedent, *Holzmüller* met with harsh critique from the academy and legal practitioners – for many years, indeed. The amount of comments and essays written on *Holzmüller* is immense. In this light, it is important

[19] BGHZ 83, 122 (140).

[20] BGHZ 83, 122 (138).

[21] BGHZ 83, 122 (137).

[22] BGHZ 83, 122 (137).

[23] BGHZ 83, 122 (140).

[24] BGHZ 83, 122 (140).

to revisit the main points of criticism discussed with regard to the *Holzmüller* decision.

1. Promotion of Legal Uncertainty

The first reactions to *Holzmüller* directly after its publication were negative.[25] One of the main criticisms referred to the very wide and generic formulation that the Court had allegedly adopted. After requiring the approval of the parent's *Hauptversammlung* in cases of "fundamental decisions"[26] , where "the Vorstand reasonably could not expect, that it may take them exclusively at its sole responsibility without precipitating the participation of the Hauptversammlung"[27] the BGH was accused of having created a 'desert of legal uncertainty'[28].
Some critics considered the judgement of the BGH to be an unacceptable judicial law-making as the decision infringed on the distribution of competences in the case of an *Aktiengesellschaft* as laid down in the AktG.[29] Other commentators in principle accepted the necessity to protect shareholders in certain situations of corporate groups and the need for a solution identified by the BGH.[30] However, the Court was still criticised for not taking the chance to define clear principles to delineate the competences of the *Vorstand* from those of the *Hauptversammlung*. Commentators regretted that the BGH had confined itself to the decision of the single case being heard. As a result corporate practice suffered from a crucial degree of legal uncertainty since the *Holzmüller* decision. Now, in cases of slightest

[25] Some of the few positive voices were Lutter, *Organzuständigkeiten im Konzern*, *in* FESTSCHRIFT STIMPEL 825 (Lutter et al eds.,) and Großfeld/Bondics, *Die Aktionärsklage – nun auch im deutschen Recht*, JZ 589 (1982).

[26] BGHZ 83, 122 (130): "grundlegende Entscheidungen".

[27] BGHZ 83, 122 (130): "der Vorstand vernünftigerweise nicht annehmen kann, er dürfe sie in ausschließlich eigener Verantwortung treffen, ohne die Hauptversammlung zu beteiligen."

[28] Heinsius, *Organzuständigkeit bei Bildung, Erweiterung und Umorganisation des Konzerns*, ZGR 383, 388 (1984): "Wüste der Rechtsunsicherheit"; recently Altmeppen referred to "a quarter of a century of legal uncertainty" when considering Holzmüller. Altmeppen, *Anm. zum Urteil des BGH v. 26.4.2004, Az. II ZR 155/02*, ZIP 999 (2004),.

[29] Joost, "*Holzmüller 2000" vor dem Hintergrund des Umwandlungsgesetzes*, ZHR 163, 164, 178 (1999); Hübner, *Die Ausgliederung von Unternehmensteilen in aktien- und aufsichtsrechtlicher Sicht*, *in* FESTSCHRIFT STIMPEL 795 (Lutter et al. eds.); Heinsius, ZGR 383, 393 (1984); Martens, *Die Entscheidungsautonomie des Vorstands und die "Basisdemokratie" in der Aktiengesellschaft*, ZHR 377, 383 (1983). See the summary given by Habersack, *in* AKTIENKONZERNRECHT § 311, Rn. 13 (Emmerich & Habersack eds.) with further details and literature.

[30] *See* only Großfeld/Bondics, JZ 589, 591 (1982) and the summary by Altmeppen, *Ausgliederung zwecks Organschaftsbildung gegen die Sperrminorität*, DB 49, 50, note 5 (1998).

doubt, measures would be submitted for the approval of the Hauptversammlung, even though from an objective standpoint the approval did not seem necessary at all.[31]

2. *Further Conclusions from* Holzmüller *Regarding the Situations of Unwritten Competences of the* Hauptversammlung

After the heat of first critique had subsided, the commentators (and there were always some) then took a more constructive approach and tried to draw further conclusions from the judgement. New situations, in which the *Hauptversammlung* should have a non-codified right of participation, were identified. In analysing the literature on this practically important issue two aspects have to be distinguished. On the one hand side, authors tried to identify in an abstract way categorised decisions or measures of the Vorstand, that would trigger the unwritten competence of the *Hauptversammlung*. On the other hand, they went on to elaborate which quantitative resp. qualitative importance of such decisions was needed to trigger the participation of the *Hauptversammlung*.

The BGH gave some valuable hints regarding the categories of decisions and measures, which would require approval of the *Hauptversammlung*. Expressly, the BGH mentioned the transfer of the most valuable division of the parent AG's business to a subsidiary (spin-off). Further actions calling for Hauptversammlung approval are in the opinion of the highest court: capital increase in the subsidiary[32], agreements between business enterprises,[33] transfer of all assets of the subsidiary according to § 179a AktG[34] and the liquidation of the subsidiary[35]. Some voices concluded from these arguments that each spin-off from the parent to the subsidiary, however it was structured in detail, as well as comparable measures in the subsidiary were 'Holzmüller cases'.[36] Some commentators even suggested that – mirroring spin-offs – also sales of business divisions and enterprise interests (e.g. shareholdings) could form cases of unwritten competences of the

[31] *See* only Lutter/Leinekugel, ZIP 805 (1998) with further literature; for examples in corporate practice, see Groß, *Verbreitung und Durchführung von Hauptversammlungsbeschlüssen zu Erwerb oder Veräußerung von Unternehmensbeteiligungen*, AG 111, note 4 (1996).

[32] BGHZ 83, 122 (143).

[33] BGHZ 83, 122 (137).

[34] BGHZ 83, 122 (140).

[35] BGHZ 83, 122 (140).

[36] ZIMMERMANN & PENTZ, "HOLZMÜLLER" – ANSATZPUNKT, KLAGEFRISTEN, KLAGEANTRAG, FESTSCHRIFT WELF MÜLLER 154 (2001).

Hauptversammlung.[37] Finally, others equated spinning off a business division with the acquisition of enterprise participations. By acquiring the participation the AG would change former free capital into an interest in a company, partnership, association etc. thereby reducing the possibilities of participation of the parent's members.[38]

Any further extension of non-codified competences of the *Hauptversammlung* to other important management decisions was, however, denied by most authors. A new strategic orientation or entering major speculative transactions might have a considerable economic impact on the company – as well as on the shareholders' participation. Giving the *Hauptversammlung* a say would, however, create practical problems (such as the prior information of members). Additionally, the majority understood the *Holzmüller* case to protect shareholders' rights, but not provide shareholders with new rights of participation.[39]

Having discussed the nature of the situations, that were to be qualified as '*Holzmüller* cases' the second question was which quantitative or qualitative requirements had to be met. All commentators of the decision agreed that not every measure described above – disregarding its extent or volume – could trigger the participation of the *Hauptversammlung*. Rather a 'significant importance' had to be given, while commentators could not agree on how exactly this criterion had to be defined in detail. The following quantities were proposed to objectively measure 'significant importance': 10% (plus) of the assets as shown on the balance sheet resp. the aggregate value of the corporate group,[40] 15%[41] to 50%[42] (plus) of the corporate assets, 50% (plus) of the nominal share capital,[43] 25% (plus) of revenues

[37] Lutter, *Zur Binnenstruktur des Konzerns*, *in* FESTSCHRIFT HARRY WESTERMANN 365 (Hefermehl et al. eds.); Krieger, *in* MÜNCHHDB AG § 69, Rn 38 (2nd ed.) with further details also covering opposing views.

[38] Habersack, *in* AKTIENKONZERNRECHT, *supra* note 29 at § 311, Rn. 16; Koppensteiner, *in* KÖLNKOMM AKTG § 291, Rn. 24 (2nd ed.); Zimmermann/Pentz, *"Holzmüller" – Ansatzpunkt, Klagefristen, Klageantrag*, *in* FESTSCHRIFT WELF MÜLLER 155; against this view Semler, *in* MÜNCHHDB AG § 34, Rn. 40 (2nd ed.).

[39] Semler, *in* MÜNCHHDB AG, *supra* note 38 at § 34, Rn. 40.

[40] Habersack, *in* AKTIENKONZERNRECHT, *supra* note 29 at § 311, Rn. 15.

[41] Lutter, *Das Vor-Erwerbsrecht/Bezugsrecht der Aktionäre beim Verkauf von Tochtergesellschaften über die Börse*, AG 342, 343 (2000).

[42] Wollburg & Gehling, *Umgestaltung des Konzerns*, *in* FESTSCHRIFT LIEBERKNECHT 149 (Niederleithinger et al. eds. 1997).

[43] WAHLERS, KONZERNBILDUNGSKONTROLLE DURCH DIE HAUPTVERSAMMLUNG DER OBERGESELLSCHAFT 220 (1995); Veil, *Aktuelle Probleme im Ausgliederungsrecht*, ZIP 361, 369 (1998).

or aggregate value of the corporate estate,[44] 50% (plus) of the assets and relevance to the business core of the enterprise[45]. Others demanded the participation of the Hauptversammlung only if a change of profile or imprint of the enterprise or the structure of its strategic business units was imminent.[46] Others again required blatant cases, close to the transfer of all assets.[47] It reveals that a consistent approach could not be developed in academic writing, thus even increasing legal uncertainty. The only threshold one could agree on was, that below a fraction of 10% of assets, revenues or profits the *Holzmüller* doctrine would not bite.[48]

3. *The Criticism Regarding the Theoretical Foundations of the* Holzmüller *Case*

Further disapproval concerned the theoretical foundations of the *Holzmüller* judgement. Methodically, the BGH had legitimated the non-codified participation competence of the Hauptversammlung with a reduction of the discretion of the Vorstand pursuant to § 119 Abs. 2 AktG.[49] This was opposed by a majority view in academic literature, the proponents of which suggested justifying such competence with an analogy (Gesamtanalogie) to all codified *Hauptversammlung* resolution requirements regarding changes of the constitution and measures changing the corporate structure, according to §§ 179, 182 et seqq., 222 et seqq., 291 et seqq., 319 et seqq. AktG as well as §§ 13, 123 Abs. 3, 125, 65 *Umwandlungsgesetz* (UmwG – Company Transformation Act).[50] This discussion is not only academic in nature, since the theoretical foundation of the competence of the *Hauptversammlung* influences the majority needed for the relevant resolution.[51] In the *Holzmüller* case, the BGH did not need to discuss this question as it was not relevant. Still, in *obiter* the Court mentioned that a participation right of the *Hauptversammlung* might not

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[44] LIEBSCHER, KONZERNBILDUNGSKONTROLLE 88 (1995).

[45] Reichert, *Ausstrahlungswirkungen der Ausgliederungsvoraussetzungen nach dem Umwandlungsgesetz auf andere Strukturänderungen*, *in* DIE SPALTUNG IM NEUEN UMWANDLUNGSRECHT UND IHRE RECHTSFOLGEN (SYMPOSION ULMER) 45 (Habersack et al eds., 68 ZHR-Beiheft 1999).

[46] Wiedemann, *in* GROßKOMM AKTG § 179 Rn. 75 (4th ed.).

[47] HÜFFER, AKTG § 119 Rn. 18a (6th ed.).

[48] Gessler, *Einberufung und ungeschriebene Hauptversammlungszuständigkeiten*, *in* FESTSCHRIFT STIMPEL 787 (Lutter et al eds.).

[49] BGHZ 83, 122 (131).

[50] *See* instead Habersack, *in* AKTIENKONZERNRECHT § 311, Rn. 18 (Emmerich/Habersack eds.) with further details and literature.

[51] Further analogies to the UmwG, such as the requirement of a Spaltungsbericht shall not be dealt with further here, *cf.* only Joost, ZHR 163 (1999), 164 with further literature.

exist, if the *Hauptversammlung* prior or later had approved the spin-off with the majority necessary to change the constitution.[52]

If one was to follow the Court's opinion and rely on § 119 Abs. 2 AktG, a simple majority pursuant to the basic rule in § 133 Abs. 1 AktG would be enough.[53] Instead, should one rely on an overall inclusive analogy (*Gesamtanalogie*) to the bundle of rules concerning changes in constitution or structure, the resolution would need a qualified 3/4 majority of the capital being present to pass.[54] Commentators criticised the reference to § 119 Abs. 2 AktG by pointing at its function and purpose. Accordingly, § 119 Abs. 2 AktG with a view to § 93 Abs. 4 S. 1 AktG served as protection for the *Vorstand*. Additionally, the rule operated as a delineation of competences between *Vorstand* and *Aufsichtsrat* (supervisory board) keeping in mind § 111 Abs. 4 AktG. With these arguments looking at the purpose of § 119 Abs. 2 AktG such commentators denied that the rule could be used for the purpose of shareholders' protection.[55] Having said that, the analogy solution was criticised, too, as the rules referred to gave an external effect to the various resolutions of the Hauptversammlung, while the BGH had adopted an internal effect only.[56]

4. *Reception of Procedural Aspects of* Holzmüller

Compared to the substantial law aspects the procedural issues of *Holzmüller* got less attention in academic literature. Not all writers shared the Court's approach that the shareholders' actions had to be directed against the company itself as far as the application for the retransfer of assets was concerned. Some suggested that the

[52] BGHZ 83, 122 (140).

[53] Joost, ZHR 163 (1999), 164, 171; Immenga, *Mehrheitserfordernisse bei einer Abstimmung der Hauptversammlung über die Übertragung vinkulierter Namensaktien*, BB 1992, 2446, 2448.

[54] *See* only Altmeppen, DB 49, 50 (1998); Hübner, *Die Ausgliederung von Unternehmensteilen in aktien- und aufsichtsrechtlicher Sicht*, *in* FESTSCHRIFT STIMPEL 795 (Lutter et al eds.,) Lutter/Leinekugel, ZIP 806 (1998).

[55] Summarising ZIMMERMANN & PENTZ, "HOLZMÜLLER" – ANSATZPUNKT, KLAGEFRISTEN, KLAGEANTRAG, FESTSCHRIFT WELF MÜLLER 158.

[56] Reichert, *Ausstrahlungswirkungen der Ausgliederungsvoraussetzungen nach dem Umwandlungsgesetz auf andere Strukturänderungen*, *in* DIE SPALTUNG IM NEUEN UMWANDLUNGSRECHT UND IHRE RECHTSFOLGEN (SYMPOSION ULMER) 45 (Habersack et al. eds., 68 ZHR-Beiheft (1999)); criticising this opinion, however, ZIMMERMANN & PENTZ, *"Holzmüller" – Ansatzpunkt, Klagefristen, Klageantrag*, *in* FESTSCHRIFT WELF MÜLLER, 159.

action should rather be directed against the Vorstand, that broke its duties.[57] Limiting the time in which the action can be brought in analogy to § 246 AktG, however, has found general approval in literature and practice.[58]

5. Open Questions in Corporate Practice and the Application of Holzmüller *by the Lower Courts*

After initially rejecting the *Holzmüller* doctrine as it had been adopted by the BGH commentators later moved on to establish in detail under which circumstances such a '*Holzmüller* constellation' was given and which thresholds of significance had to be reached. A further aspect was to determine the necessary majority if the consent of the Hauptversammlung was required. While the business community was waiting for a clarification of the open questions, it got customary to get the *Hauptversammlung* involved as soon as the slightest doubt occurred in order to avoid later court actions.

The lower Courts did not contribute substantially to solve the outstanding issues. While they followed the *Holzmüller* case in arguments and results, they did not provide answers to the questions raised by academics and practice.[59] Finally it might be interesting to note, that in 1996 the Österreichische Oberste Gerichtshof followed the *Holzmüller* decision of the BGH.[60]

C. *Macrotron*

Before we turn to the *Gelatine* cases, it is worthwhile to have a brief look at the *Macrotron*[61] case decided on 25 November 2002 by the same 2nd Senate, that over 20

[57] Sünner, *Aktionärsschutz und Aktienrecht*, AG 169, 170 (1983); opposing Rehbinder, *Zum konzernrechtlichen Schutz der Aktionäre einer Obergesellschaft*, ZGR 92, 106 (1983); Semler, *in* MÜNCHHDB AG § 34 Rn. 44 (2nd ed.) seems to allow an action either against the Vorstand or against the AG.

[58] Instead of many *see, only*, Kubis, 4 MÜKO-AKTG § 119 Rn. 37, note 110 (2nd ed., 2004); for an opposing few, *see* Zimmermann/Pentz, *"Holzmüller" – Ansatzpunkt, Klagefristen, Klageantrag*, *in* FESTSCHRIFT WELF MÜLLER 172.

[59] *See* OLG Frankfurt a.M., DB (1999), 1004, (1004) (sale of an enterprise interest); OLG Köln, DB (1996), 1713 (effects of a constitution prescribing full distribution of profits on the distribution of profits in the subsidiaries); OLG München, WM (1996), 1462, (1463) (sale of a majority stake); OLG München, AG (1995), 232, (233) (transfer of land to subsidiary); OLG Köln, ZIP (1993), 110, (113) (merger of a subsidiary); LG Düsseldorf, AG 1999, 94 (sale of an enterprise interest); LG Karlsruhe, ZIP 1998, 385, 387 (spin-off through asset deal); LG Hamburg, AG 1997, 238 (spin-off through asset deal); LG Frankfurt a.M., AG 1993, 287, 288 (sale of business part to subsidiary); LG Köln, AG 238, 239 (1992).

[60] ÖOGH AG 1996, 382, 383.

[61] BGH, Az. II ZR 133/01, ZIP 2003, 387.

years ago had adopted the *Holzmüller* doctrine. *Macrotron* is another case that deals with non-codified competences of the *Hauptversammlung*. The defendant Aktiengesellschaft conducted business under the name of 'Ingram Macrotron AG für Datenerfassung' and had applied for cancellation of its listing at two German stock exchanges. In a previous resolution the *Hauptversammlung* had authorised the *Vorstand* to file such applications. The claimant, a minority shareholder, challenged the validity of the resolution for grounds of lack of timely restriction, objective justification and formal procedure.

Interesting about the *Macrotron* case is the Court's opinion that in cases of delisting there as well was an unwritten requirement for a resolution of the *Hauptversammlung*.[62] At this point one would have thought of a new category under the *Holzmüller* doctrine. Instead, the BGH expressly negated the applicability of the *Holzmüller* principles.[63] The BGH judges held in fact that the delisting did not have an impact on the internal structure of the AG or on administrative shareholder rights. Over and above, the Court negated an interference with the existence of membership, the watering down of the value of membership and the 'mediatisation' of shareholders' participation rights.[64] Instead, the BGH founded the participation requirement in Art. 14 Abs. 1 Basic Law (*Grundgesetz* - GG), the constitutional guarantee of property rights. This guarantee, according to the Court, did not only protect the property of the shares as such, but also the market value of the shares and the possibility to realise the economic value through sale at the stock exchange at any time.[65] Added surprise comes from the majority requirement referred to by the court. Without giving any reason, the BGH settles for a simple majority, which was easily given in the *Macrotron* case.

In a nutshell, delisting is a further case of non-codified competences of the *Hauptversammlung*. However, the jurisdiction does not rely on the *Holzmüller* doctrine, but developed an new category of an unwritten participation requirement now based on the constitutional rule Art. 14 Abs. 1 GG. *Macrotron* shows that the BGH does not regard the categories of unwritten competences elaborated in the *Holzmüller* case to be conclusive. Instead of taking this opportunity to further fleshing out the *Holzmüller* principles, the BGH rather reveals an ambivalent approach to determining the balance of power between the *Vorstand* and the *Hauptversammlung*. The different theories followed in *Macrotron* as opposed to

[62] BGH ZIP 2003, 387, 389.

[63] BGH ZIP 2003, 387, 389.

[64] BGH ZIP 2003, 387, 389 f.

[65] BGH ZIP 2003, 387, 390.

Holzmüller also show that by requiring the participation of the *Hauptversammlung* the BGH realised different purposes resp. aspects of shareholder protection. It may not surprise that the majority of comments on *Macrotron* qualified the delisting as an impact on the structure of the AG in the light of *Holzmüller*.[66] According to these authors the necessary resolution of the *Hauptversammlung* should rather require the qualified 3/4 majority. To sum up, one might say that at this point the legal uncertainty caused by *Holzmüller* had not been cured, but rather increased by the Court's introduction of a second foundation for unwritten competences of the *Hauptversammlung*.

D. The *Gelatine* Cases

Against this background it is well understandable that the *Gelatine* cases have been anticipated by practitioners and academics like a long hoped for medicine that would bring about the cure of such uncertainty. Even though 'gelatine' is defined by the Oxford English Dictionary[67] as "amorphous, brittle, without taste or smell, transparent" – adjectives that would rather suit the uncertainty of the *Holzmüller* doctrine – the cases were expected to substantiate the *Holzmüller* principles and bring increased legal certainty and predictability. Other than the case names would have us expect, the *Gelatine* cases indeed clarified the *Holzmüller* doctrine to a good extent.

I. The Facts

The *Gelatine* cases both concern the defendant 'Deutsche Gelatine-Fabriken Stoess AG' (DGF) and share the following essential facts.[68] The objects of DGF contain the production and sale of gelatine and by-products. § 2 Abs. 2 of the constitution reads:

"The company may enter all transactions whatsoever, which are incidental or conducive to the attainment of the objects of the company. It may establish branches at home and abroad, take interests in other enterprises at home and abroad, acquire or establish such enterprises and integrate such enterprises partly or wholly under uniform control."[69]

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[66] See the summary of Schlitt, *Die gesellschaftsrechtlichen Voraussetzungen des regulären Delisting*, ZIP 533, 534 (2004) in note 11 with further comments and literature.

[67] Online edition: http://dictionary.oed.com.

[68] Cf. BGH ZIP 2004, 993 and BGH ZIP 2004, 1001.

[69] BGH ZIP 2004, 993: "Die Gesellschaft ist berechtigt, alle Geschäfte einzugehen, die geeignet sind, den Geschäftszweck der Gesellschaft zu fördern. Sie kann im In- und Ausland Zweigniederlassungen errichten, sich bei anderen Unternehmen des In- und Auslands beteiligen, solche Unternehmen erwerben oder gründen und solche Unternehmen ganz oder teilweise unter einheitlicher Leitung zusammenfassen."

Regarding the majorities of shareholder resolutions, in § 19 Abs. 2, the constitution reads :

"The resolutions of the Hauptversammlung are passed by simple majority of the votes cast and, if a capital majority is needed, with simple majority of the capital being present, unless constitution or statute coercively provide otherwise."[70]

The DGF pursues its objects through its own operations and additionally through subsidiaries. Regarding the first of the *Gelatine* cases (*Gelatine I*)[71] three of these 100% subsidiaries are the German Gelita Internationale Gesellschaft Gelatine mbH (Gelita), the Swedish Extraco AB (Extraco) and the English DGF Stoess Holdings Ltd. (DGF Stoess Holdings). In 1998 the *Vorstand* of DGF transferred the shares of the Swedish Extraco and the English DGF Stoess Holdings to the German Gelita by way of a share deal and a capital increase in Gelita. The *Hauptversammlung* of DGF was not involved. As the claimant regarded this to be illegal the *Vorstand* asked the *Hauptversammlung* in 2000 to approve the restructuring. With a majority of about 70% the resolution passed.[72] The claimants had their protest entered in the minutes citing the *Holzmüller* case and requiring a 3/4 majority for a passed resolution.

Concerning the second of the *Gelatine* cases (*Gelatine II*)[73] the claimants opposed the *Vorstand*'s plan to transfer the interests in a 49% subsidiary in the form of a German *GmbH & Co. KG* to a 100% subsidiary for tax reasons. The Vorstand had asked the Hauptversammlung to authorise this transfer. 66,4% of the capital being present agreed, the claimants and some minority shareholders, together 30,02%, opposed. Again they protested claiming the resolution failed as a majority of 3/4 of capital being present had been needed for a pass.

II. The Court's Decisions and Arguments

In both cases the BGH decided against the claimants. The court used the possibility to clarify some of the open issues regarding the *Holzmüller* principles.

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[70] BGH ZIP 2004, 993: "Die Beschlüsse der Hauptversammlung werden mit einfacher Mehrheit der abgegebenen Stimmen und, soweit eine Kapitalmehrheit erforderlich ist, mit einfacher Mehrheit des vertretenen Kapitals gefasst, falls nicht die Satzung oder das Gesetz zwingend etwas anderes vorschreiben."

[71] BGH ZIP 2004, 993.

[72] BGH ZIP 2004, 993, 994: 905.519 votes cast with 270.805 (claimant) and about 1.000 (other minority shareholders) opposed.

[73] BGH ZIP 2004, 1001.

1. No change of Constitution Pursuant to § 179 Abs. 2 AktG

Firstly, the judges had to address whether or not the question if a change of the constitution had occurred, which would require a 3/4 majority resolution according to § 179 Abs. 2 AktG. The Court held that in both *Gelatine* cases the resolutions did not amount to a factual change of the constitution.[74] Instead both resolutions were held to be covered by § 2 Abs. 2 of DGF's constitution. The constitution envisaged – the court argued – besides DGF's own operations that DGF would be engaged in the acquisition and establishment of other enterprises. Within these limits the Vorstand could manage the business at its sole responsibility according to § 76 AktG without any participation of the Hauptversammlung. Thus, the decision to manage some of the participations not through DGF directly, but on a lower hierarchical level, was to be taken by the Vorstand only (in a responsible way).[75] A change in constitution pursuant to § 179 Abs. 2 AktG had not been necessary.

2. Prerequisites for the Unwritten Competence of the Hauptversammlung

Having considered the reception of the *Holzmüller* case the judges then turn to the prerequisites for the unwritten competence of the Hauptversammlung to clarify the Court's understanding of this doctrine. The BGH emphasises that in *Holzmüller* the Court did not wish to establish rules for the internal order of corporate groups. The court acknowledges that the requirement of the group-internal participation of the parent's *Hauptversammlung* increases its influence on the establishment and direction of corporate group structures. This is, however, only a reflex of the exceptional participation of the shareholders, which the court deems to be necessary.[76] Such participation through the unwritten competence of the Hauptversammlung is required if:

"the actions of the Vorstand are still formally covered by its power of representation, the wording of the constitution and the managementauthority internally limited according to § 82 Abs. 2 AktG, yet these actions impact "that strongly on the membership rights of the shareholders and their economic interest embodied in the shareholding" (cf. BGHZ 83, 122, 131) that these effects come close to the requirement of a constitutional change."[77]

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[74] BGH ZIP 2004, 993, 995 and BGH ZIP 2004, 1001, 1003.

[75] BGH ZIP 2004, 993, 995 and BGH ZIP 2004, 1001, 1003.

[76] BGH ZIP 2004, 993, 996; *Gelatine II* is identical as far as the courts arguments under III 2 a and b are concerned and insofar is not mentioned anymore hereafter.

[77] BGH ZIP 2004, 993, 996: "das Handeln des Vorstands zwar durch seine Vertretungsmacht, den Wortlaut der Satzung und die nach § 82 Abs. 2 AktG im Innenverhältnis begrenzte Geschäftsführungsbefug-

The judges then set out the two purposes of the participation of the Hauptversammlung. Firstly, this participation serves to secure the influence of the shareholders in situations where their possibilities of control are jeopardized due to the mediatisation caused by the spin-off of important business divisions to subsidiaries on a lower level. Secondly, the *Holzmüller* and *Gelatine* principles intend to protect the shareholder against a lasting degradation of the share value caused by fundamental decisions of the *Vorstand*.[78]

The Court, however, did not go beyond these abstract criteria to illuminate further the *Holzmüller* case. The 2nd Senate expressly excluded the need to define certain cases in which the Hauptversammlung had to be asked for approval. The distinguished judges only explained that a 'mediatisation' effect, that triggered the approval requirement, was not restricted to a situation as it was dealt with in the *Holzmüller* case. A mediatisation could also result from restructurings of corporate shareholdings as they had occurred in the *Gelatine I* case.[79] Here the mediatisation was a consequence of transferring the shares from the parent to a lower hierarchical level. Thus, the influence of the parent and its Hauptversammlung on the business management, distribution of profits and other measures regarding Extraco and DGF Stoess Holdings was reduced. Now, the organs directing Extraco and DGF Stoess Holdings would not be controlled anymore by the Vorstand of the parent, itself being controlled by the Hauptversammlung, but by the directors (Geschäftsführer) of the subsidiary acting as an intermediary between the parent and Extraco as well as DGF Stoess Holdings. The directors of the subsidiary, however, owed their position to a decision taken by the parent's Vorstand according to § 76 AktG.[80] With the same arguments the court also saw a *Holzmüller* case being given in *Gelatine II*. There the Court had to decide on the transfer of the parent's shareholdings in a subsidiary downwards to a 100% subsidiary of the parent. The additional hierarchical layer amounted to a mediatisation of the influence of the parent's shareholders, too.[81]

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nis formal noch gedeckt ist, die Maßnahmen aber "so tief in die Mitgliedsrechte der Aktionäre und deren im Anteilseigentum verkörpertes Vermögensinteresse eingreifen" (vgl. BGHZ 83, 122, 131), dass diese Auswirkungen an die Notwendigkeit einer Satzungsänderung heranreichen."

[78] BGH ZIP 2004, 993, 996.

[79] BGH ZIP 2004, 993, 996.

[80] BGH ZIP 2004, 993, 999.

[81] BGH ZIP 2004, 1001, 1003.

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3. *The Theoretical Foundations of the Non-codified Competence of the* Hauptversammlung

The case then moves on to comment on the theoretical foundations of the non-codified competence of the Hauptversammlung. The BGH accepts the criticisms raised against the reference to § 119 Abs. 2 AktG in academic literature. Nonetheless, the court calls attention to the advantage the approach through § 119 Abs. 2 AktG offers. § 119 Abs. 2 AktG reveals that the Vorstand's restriction is limited to the internal relations of the AG, while its breach normally does not have external consequences. The analogy (Gesamtanalogie) solution suggested by many authors might help to define the elements of *Holzmüller* cases, but its legal consequences did not fit with the *Holzmüller* doctrine. Consequently following the analogy solution, the measures taken by the Vorstand would have to be treated as void. Thus, different from the *Holzmüller* decision the Vorstand's power of representation would be affected externally.[82] Therefore, the court was neither fully convinced by the approach using § 119 Abs. 2 AktG, nor by the analogy solution proposed in literature after the *Holzmüller* decision. Consequently the Court decides

"to [absorb] the applicable elements of both approaches, viz the internal effect on the one side and the orientation of the possible cases at statutory participation competences on the other hand […] and qualify this extraordinary competence as a result of an extrapolation of the law".[83]

4. *Threshold of Significance to Justify the Unwritten Competence of the* Hauptversammlung

The Court further considers the threshold of significance resp. minimum impact to justify the unwritten competence of the Hauptversammlung. The BGH cites the thresholds offered by various authors, which range between 10% and 50% and refer to different yardsticks.[84] Such thresholds – the judges argue – cannot justify the exception to the statutory division of competence and division of authorities. Such an exception, according to the *Gelatine* cases, can only be made,

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[82] BGH ZIP 2004, 993, 997.

[83] BGH ZIP 2004, 993, 997: "die zutreffenden Elemente beider Ansätze [aufzunehmen], nämlich die bloß das Innenverhältnis betreffende Wirkung einerseits und die Orientierung der in Betracht kommenden Fallgestaltungen an den gesetzlich festgelegten Mitwirkungsbefugnissen auf der anderen Seite, und diese besondere Zuständigkeit der Hauptversammlung als Ergebnis einer offenen Rechtsfortbildung anzusehen".

[84] BGH ZIP 2004, 993, 998.

"if the field to which the measure relates reaches by way of importance for the company the extent of the spin-off decided upon in the Holzmüller case."[85]

This is the case, if the measures taken by the Vorstand touch

"the core competence of the Hauptversammlung to decide upon the constitution of the company and in their effects nearly equal a state, which can only be brought about by a change of the constitution."[86]

In the *Gelatine* cases the Court did not see these requirements to be fulfilled. The Court in an abstract way recognized these cases as constituting *Holzmüller* cases. The structural measures being attacked by the claimants, the BGH held, did not impact on the position of the shareholders to the necessary extent. In *Gelatine I* the decisive yardsticks balance sheet total, nominal equity capital, revenues and income before tax were "with a maximum of 30% far below the threshold that has to be crossed, to justify a non-codified competence of the *Hauptversammlung* regarding the restructuring of the Swedish subsidiary, which would continue to belong to the corporate group and which was subject of the approving resolution."[87]

In *Gelatine II* the BGH decided that the required threshold was not reached either.[88] The interests in the enterprise to be transferred contributed less than a quarter of the corporate group's income before tax. A special key role of the transferred enterprise for the group could not be established. Also, the lease and trade relationships of the transferred enterprise were not touched by the restructuring.

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[85] BGH ZIP 2004, 993, 998: "wenn der Bereich, auf den sich die Maßnahme erstreckt, in seiner Bedeutung für die Gesellschaft die Ausmaße der Ausgliederung in dem vom Senat entschiedenen "Holzmüller"-Fall erreicht."

[86] BGH ZIP 2004, 993, 998: "die Kernkonpetenz der Hauptversammlung, über die Verfassung der Gesellschaft zu bestimmen, […] und in ihren Auswirkungen einem Zustand nahezu entsprechen, der allein durch eine Satzungsänderung herbeigeführt werden kann."

[87] BGH ZIP 2004, 993, 999: "mit maximal 30 % weit unter der Grenze, die überschritten sein muss, um eine ungeschriebene Hauptversammlungszuständigkeit für die zum Gegenstand des Genehmigungsbeschlusses gemachte Umgliederung der weiterhin zum Konzern gehörenden schwedischen Tochtergesellschaft begründen zu können."

[88] BGH ZIP 2004, 1001, 1003.

5. Majority Requirements in Cases of Non-codified Competences of the Hauptversammlung

Finally, the Court deliberates the majority requirements in cases of non-codified competences of the *Hauptversammlung*. The Court expressly follows the majority view in the academic literature, holding that the approval of the *Hauptversammlung* requires a 3/4 majority of capital being present.[89] Such a majority is necessary because the resolution concerns a measure, which does not yet require a change of the constitution, but comes so close to a constitutional change due to the strong impact on the membership position of the shareholders, that the power of direction of the Vorstand has to stand back behind the necessary participation of the *Hauptversammlung*.[90] According to the 2nd Senate the existence of a so called '*Konzernklausel*' (corporate group clause) or a constitutional clause, which provides that all resolutions of the *Hauptversammlung* pass with a simple majority, does not change the majority requirement in *Holzmüller* cases.[91] The protection of shareholders takes priority over such clauses. Considering the seriousness of possible impacts on membership rights, the 3/4 majority requirement has to be considered as coercive.

E. Practical Importance of the *Gelatine* Cases and Outlook on Further Developments

The *Gelatine* cases have brought a considerable degree of legal certainty into the discussion on non-codified competences of the *Hauptversammlung*, a discussion that had been initiated by the *Holzmüller* case and lasted for over 20 years. Thus, the predominantly positive echo the *Gelatine* decisions received in first comments of academics and practitioners is hardly surprising.[92] The *Gelatine* cases have pinned down that non-codified participation competences of the Hauptversammlung are recognised only exceptionally and in narrow confines. The BGH explicitly disapproved of an extensive interpretation of *Holzmüller*, a view so far taken by parts of the literature[93].

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[89] BGH ZIP 2004, 993, 998.

[90] BGH ZIP 2004, 993, 998.

[91] BGH ZIP 2004, 993, 998.

[92] Altmeppen, ZIP 999 (2004); Bungert, BB 1345 (2004); Fuhrmann, AG 339 (2004); Götze, NZG 585 (2004); upcoming Liebscher, ZGR 2004.

[93] *See* Lutter, *in* FESTSCHRIFT STIMPEL 825, 833; TIMM, DIE AKTIENGESELLSCHAFT ALS KONZERNSPITZE, 135, 165; U.-H. Schneider, *in* FESTSCHRIFT BÄRMANN 873, 881.

Indeed, the BGH has not used the *Gelatine* cases to set up a conclusive catalogue of managerial measures, which oblige the Vorstand to request the prior approval of the *Hauptversammlung*. However, the court has clarified that an approval requirement in favour of the *Hauptversammlung* only comes into consideration if the relevant activity belongs to the core of the business and reaches dimensions of about 80%. At the same time the BGH therewith has clearly rejected those notedly lower thresholds (sometimes lower than 50%) discussed in literature after the *Holzmüller* decision. What the threshold now applicable refers to cannot be concluded definitely from the *Gelatine* cases.[94] In corporate practice one will still have to take into account all parameters discussed in literature like value of the activity concerned, balance sheet total, equity capital, revenues and number of employees.

The 'prophylactic' submission of management measures in dimensions which are clearly below the threshold of 80% should belong to the past considering the 'containment' of the *Holzmüller* doctrine by the *Gelatine* cases. This is to be welcomed, last but not least, since such submissions to the *Hauptversammlung* always lead to timely delays due to the time-intensive preparation procedures before a *Hauptversammlung* can be held. With such submissions often came along abusive actions to set aside the resolutions of opposing 'professional shareholders' (Berufsaktionäre). Such abusive actions could jeopardize the implementation of such measures, especially if they were time-critical, and held a formidable potential for blackmailing. Nevertheless, in particular cases it may still make sense in the future for the Vorstand to submit measures below the '*Holzmüller*-threshold' to the Hauptversammlung voluntarily in order to safeguard against potential liability risks. According to § 93 Abs. 4 S. 1 AktG the Vorstand is under no indemnification liability, if an actions is based on a resolution of the Hauptversammlung, which is in compliance with the law. This aspect especially gains in importance, if we consider the envisaged facilitated possibilities to bring liability actions against directors (Organmitglieder) under the 'Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG)'.[95]

Furthermore, the Court used the *Gelatine* cases to elucidate that the quantitative volume only of the relevant measure ist not enough to justify an unwritten competence of the *Hauptversammlung*. Accordingly, the BGH additionally to the quantitative 80% element requires a qualitative element. The measure requiring approval has to constitute a drastic impact on the membership rights of the parent's

[94] For a comprehensive view on literature and opinions, *see* Reichert, *in* BECK´SCHES HANDBUCH DER AG § 5 Rn. 72.

[95] Seibt, NJW-Spezial 77; upcoming Liebscher, ZGR 2004, VI 1.

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shareholders. If such drastic impact on shareholder rights is absent, the relevant measure is not governed by the *Holzmüller* doctrine even though the 80%-threshold is met. In the *Gelatine* cases – like in the *Holzmüller* decision – the BGH concentrates materially on the 'mediatisation' effect of the relevant measure. In which cases the judiciary would see such a 'mediatisation', triggering the approval requirement, has not been established conclusively by the *Gelatine* cases. The only certain cases are those of the *Holzmüller* and *Gelatine* decisions, i.e. the spin-off to a subsidiary as well as the restructuring of a corporate group, in which a subsidiary of the parent is hived down on a lower level of the corporate group. Vice versa, such a mediatisation effect does not exist, if the restructuring happens on the same level of subsidiaries of the corporate group. Still open, even after the *Gelatine* cases, are the sale and acquisition of participations in companies, partnerships, associations etc. by the parent, such cases being discussed controversially in literature.[96]

With the *Gelatine* cases, corporate practice has also won clarity regarding the necessary quorum for a (so called) *Holzmüller* resolution. By requiring a 3/4 majority of the equity capital being present, the BGH has made clear that the *Holzmüller* doctrine is not only to be understood as a delineation of competences between Vorstand and Hauptversammlung, but simultaneously is an instrument for the protection of minorities. Therefore it is only consequent that the requirement of a 3/4 majority cannot be lowered by the constitution.

The legal certainty won in the *Gelatine* cases is partly thwarted by the fact that the BGH has opened another gateway for non-codified competences of the *Hauptversammlung* of German stock corporations in the *Macrotron* case. The criteria to limit the *Holzmüller* doctrine found in the *Gelatine* cases cannot simply be copied to the *Macrotron* principles, because there the BGH has founded the approval requirement not on the *Holzmüller* doctrine, but instead on Art. 14 GG.[97] Therefore, one may hope that the judicial principles developed in *Macrotron* are not interpreted as extensively as *Holzmüller* in the past. *Macrotron* should be limited to cases of the delisting of quoted stock firms to spare corporate practice decades of legal uncertainty as we have just experienced after the *Holzmüller* decision.

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[96] *See* Bungert, BB 1345, 1349 (2004) and, upcoming, Liebscher, ZGR 2004 under VI 3. a), each with further information on other opinions.

[97] However, Liebscher ZGR 2004, under VII 3 d), argues for a subsumption of the *Macrotron* decision under the *Gelantine* decisions.