Articles

The Limitations of the Management Board's Directive Powers in German Stock Corporations

By Lars Böttcher & Sebastian Blasche[*]

A. Introduction

The limitations of the management board's directive powers in German Stock Corporations are an important issue in German Corporate law. The German Stock Corporation or Aktiengesellschaft ("AG") is the corporate organizational form most directly comparable to the publicly held corporation in the U.S.[1] It is regulated by the German Stock Corporation Act (AktG). The defining feature of the AG is a two-tier board structure containing both a management board (Vorstand), which is in charge of managing the corporation, and a supervisory board (Aufsichtsrat), which is elected by the shareholders' meeting (Hauptversammlung) and which appoints and supervises the management board.[2] The two boards are completely separate from each other, no overlap in membership is permitted.

The AG is a legal entity distinct from its shareholders. The shareholders are entitled to hold certain rights and to assume obligations, but they are not personally liable to the corporation or to its creditors apart from their duty to fulfill obligations assumed for share subscriptions.[3] The shareholders are entitled to participate in the distribution of profits and to vote in the shareholders' meeting.

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[1] *See* Jonathan R. Macey & Geoffrey P. Miller, *Universal Banks Are Not the Answer to America's Corporate Governance "Problem:" A Look at Germany, Japan and the U.S., in* THE REVOLUTION IN CORPORATE FINANCE 552, 560 (Joel M. Stern & Donald H. Chew Jr. eds., 4th ed. 2003).

[2] *See* HANNES SCHNEIDER & MARTIN HEIDENHAIN, THE GERMAN STOCK CORPORATION ACT 3 (Kluwer Law International 2000).

[3] *See id.*

The rights of the shareholders' meeting are basically laid down in § 119 AktG. This Section contains a list of business measures for which a resolution of the shareholders' meeting is required. All of these explicitly regulated cases concern structural and fundamental decisions[4] including, for example, changes to the articles of association of the corporation. In general, the shareholders' meeting has no corporate authority with regard to the management of the corporation, as § 76 para. 1 AktG clearly states that it is the management board that has exclusive responsibility for managing the corporation.[5] Consequently, there is a clear separation of corporate responsibility between the shareholders' meeting and the management board.

Nonetheless, pursuant to § 119 para. 2 AktG, the management board is given an opportunity to submit questions to the shareholders' meeting relating to the management. This provision is an instrument of the management board designed to provide security for certain important management decisions. On the one hand, the management board is obliged to execute the respective resolution of the shareholders' meeting (§ 83 para. 2 AktG) but, on the other hand, any liability to pay damages resulting from the execution of such measures is excluded (§ 93 para. 4 sentence 1 AktG)[6].

Although § 119 paras. 1 and 2 AktG provide that the shareholders' meeting is only permitted to take a decision if this is (1) prescribed by law, (2) laid down in the articles of association of the corporation, or (3) if the management board submits a question to the shareholders' meeting relating to the management, it is generally agreed that the shareholders' meeting shall have more than just written authority pursuant to the AktG. However, the question of how to determine the limits of such unwritten authority is a highly controversial issue and identifying such limits is of critical importance as the widened reach of authority of the shareholders' meeting has narrowed the exclusive responsibility of the management board.

The unwritten reach of corporate authority of the shareholders' meeting and the ensuing limitations imposed upon the management board's directive powers are therefore still a relevant point of scientific dispute as well as a burning question in customary practice. Indeed, even the decisions of the German Federal Supreme Court (BGH) dealing with this question have given rise to a wide spectrum of interpretations in numerous publications.

This article will discuss and analyze the uncertainties in relation to the management board's directive powers under § 76 para. 1 AktG by utilizing classical juridical methods of

[4] *See*, *e.g.,* Peter O. Mülbert, *§ 119*, *in* GROßKOMMENTAR, AKTIENGESETZ n.14–16 (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. Supp. XIV 1999).

[5] *See* BARBARA GRUNEWALD, GESELLSCHAFTSRECHT 284 n.100 (7th ed. 2008).

[6] *See id*.

interpretation. Against the background of the decisions of the BGH, this article will, in a second step, offer a basis for further dogmatic consideration and, finally, will provide manageable results in customary practice.[7]

B. The Management Board's Directive Powers Pursuant to an Interpretation of § 76 para.1 AktG

Section 76 para. 1 AktG provides that: "The management board shall have direct responsibility for the direction of the company.'" The German language differentiates between the word *Leitung* (i.e. *direction*) and the word *Führung* (i.e. *management*). Therefore, the word *Leitung* in § 76 para. 1 AktG does not necessarily mean management. However, the AktG contains neither a definition of the concept *Leitung* nor a description of its contents. This leads to the question as to the extent to which management board decisions have to be regarded as the exercise of the original directive powers granted to the management board under § 76 para. 1 AktG. In this respect, it appears to be meaningful to reconsider the term *Leitung* by utilizing juridical methods of interpretation. Among these methods are the grammatical interpretation dealing with the wording, the systematic interpretation, which analyzes the provision seen against the background of other provisions, the historical interpretation in searching for the genesis of the provision and the teleological interpretation in considering the spirit and purpose of the term.

I. Grammatical Interpretation

According to the Duden (a German Dictionary), the concept of *Leitung* is explained, *inter alia*, by the term *management*.[8] As a concrete example, there are also other explanations such as the *direction of the company*[9] or *commercial direction.*[10] By that, it is clear that, if one follows the normal use of this language, the term *direction* in a business sense indicates that the *direction* of the respective legal entity *manages* the legal entity and thereby exerts a substantial influence on the latter's economic development. When the term *direction* is used in the German Stock Corporation Act, it can be assumed that the role of the management board is to determine the business development of the stock corporation.

[7] *See also* Lars Böttcher & Sebastian Blasche, *Die Grenzen der Leitungsmacht des Vorstands,* 15 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 569 (2006).

[8] *See* DUDEN, BEDEUTUNGSWÖRTERBUCH 584 (3d ed. 2002)(search keyword: "direction").

[9] *See* DUDEN, DEUTSCHES UNIVERSALWÖRTERBUCH 1011 (5th ed. 2003)(search keyword: "direction"). This explanation uses the term "company" in the entrepreneurial meaning.

[10] *See* DUDEN, STILWÖRTERBUCH 511 (8th ed., 2001)(search keyword: "direct")[This article will hereinafter use the English term *direction* for the German term *Leitung* pursuant to § 76 AktG].

Section 77 AktG deals with the *Geschäftsführung* (i.e. management) of the corporation. [11] This Section indicates a grammatical difference between the word *management* and the word *direction*, which the legislative body did take into consideration when drafting the law. However, dictionaries describe *management* as the *direction* of a business[12] and classify the term *managing director* as being the same as a *director.*[13] Therefore, due to the varying wording in §§ 76 and 77 AktG,[14] no strict conceptual separation of *management* and *direction* can be derived by considering this from a purely grammatical angle.[15]

II. Systematic Interpretation

Unlike the grammatical interpretation, the systematic interpretation depicts a clear conceptual separation between *direction of the corporation* (heading of § 76 AktG), *the management* (heading of § 77 AktG) and *the representation* (heading of § 78 AktG[16]).[17] In reality, however, there is no such strict differentiation between these terms. This is clarified somewhat by § 111 para. 1 AktG, which assigns to the *Aufsichtsrat* (i.e. supervisory board) the duty to supervise the *management*. However, within the scope of § 111 AktG, the *management* and the *direction* tend to be treated as being one and the same.[18] A uniform systematic use is, therefore, not guaranteed in the Stock Corporation Act, so that this systematic approach has come up against limiting factors.[19]

However, it is remarkable that under § 119 para. 2 AktG, the management board can present questions concerning the management (but not the *direction*) to the shareholders'

[11] *See* § 77 para. 1 AktG ("If the management board comprises more than one person, the members of the management board shall manage the company jointly. The articles or by-laws for the management board may provide otherwise; however, the articles or by-laws may not provide that one or more members of the management board may resolve differences of opinion within the management board against the majority of its members.").

[12] *See* DUDEN, DEUTSCHES UNIVERSALWÖRTERBUCH 638 (5th ed. 2003)(search keyword: "management").

[13] *See* DUDEN, SINN- UND SACHVERWANDTE WÖRTER 301 (2d ed. 1997)(search keyword: "direction").

[14] However, the AktG does not use both terms consistently. *See* § 2 para. 2 AKtG.

[15] *See* Hartwig Henze, *Leitungsverantwortung des Vorstands - Überwachungspflicht des Aufsichtsrats, 5* BETRIEBSBERATER (BB) 209 (2000).

[16] *See* § 78 para. 1 AktG("The management board shall represent the company in and out of court.").

[17] *See* Holger Fleischer, *Zur Leitungsaufgabe des Vorstands im Aktienrecht*, 1 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT UND INSOLVENZPRAXIS (ZIP) 1, 3 (2003).

[18] *See* Klaus J. Hopt & Markus Roth, *§ 111*, *in* GROßKOMMENTAR, AKTIENGESETZ n.160 (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. Supp. XXIV 2005).

[19] *See* Holger Fleischer, *supra* note 17, at 2; Hartwig Henze, *supra* note 15.

meeting. Beyond that right, this provision is mandatory pursuant to § 23 para. 5 AktG. Accordingly, the *direction* concerns a non-assignable entitlement within the sole domain of the management board. It is the management board alone that is permitted to decide on the *direction* of the corporation. However, it has to be emphasized that no central doctrine with a defined definition of issues pertaining to the core area of *direction* has yet been developed in stock corporation law.[20] Although a positive determination of the core area would create difficulties, a negative limitation can be determined.

The core area of the management board's authority cannot reasonably be subjected to issues that are assigned to other bodies under the law or the articles of association. In this respect in particular, one has to take a look at the function of the shareholders' meeting.[21] As mentioned before, the overall picture indicates that the authority of the shareholders' meeting is limited to important structural measures.[22] Accordingly, this duty cannot be entrusted to the management board.[23] In other words, the management board can wield a fundamental economic influence within the scope of its directive powers as long as this influence does not infringe upon any structural measures assigned to the shareholders' meeting or other measures which have been explicitly allocated to the latter. In this connection, it can be seen in particular from § 179a AktG[24] (which deals with contracts for the transfer of the entire assets of a company) just how far-reaching the directive powers of the management board actually are. A resolution of the shareholders' meeting is only required if the measure in question comes under § 179a AktG. The transfer of the entire assets is a fundamental decision which is not comparable to any decision normally taken by a corporation in its day-to-day business. Thus, if a resolution of the shareholders' meeting is only required for measures falling under § 179a AktG, the decision-making power of the management board in other instances would appear to be very broad.

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[20] *See* Fleischer, *supra* note 17, at 2.

[21] This can be seen, among others, from § 119 para. 1 AktG, which, however, is not conclusive. *See, e.g.,* Uwe Hüffer, *§ 119, in* AKTIENGESETZ n.7–9 (8th ed. 2008); Dietmar Kubis, *§ 119*, *in* 4 MÜNCHENER KOMMENTAR, AKTIENGESETZ n.6–9 (2d ed. 2004); Peter O. Mülbert, *§ 119*, *in* GROßKOMMENTAR, AKTIENGESETZ n.10–16 (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. Supp. XXIV 1999).

[22] *See* Peter O. Mülbert, *§ 119*, *in* GROßKOMMENTAR, AKTIENGESETZ n.14–16. (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. Supp. XXIV 1999).

[23] From this it does not follow that the management board is excluded from the implementation of such measures.

[24] *See* § 179a para.1 AktG ("A contract by which a stock corporation binds itself to transfer the entirety of its assets and whereby the transfer does not fall under the provisions of the German Transformation Act requires a resolution of the shareholders' meeting according to Section 179 even if it does not involve a change in the objects of the company. The articles may only provide for a larger majority.").

III. Historical Interpretation

The *direction* (i.e. *Leitung*) of the stock corporation was initially assigned to the shareholders' meeting under the Commercial Code[25] (before the creation of the AktG in 1937 corporate law was contained in the German Commercial Code). It was the task of the shareholders' meeting to pass resolutions on the *direction* of the corporation by a majority of the votes cast and the management board was responsible for implementing the measures resolved.[26] In practice, however, it often came to a de facto *direction* through the management board or supervisory board.[27] This was duly taken into consideration by the Company Law Reform Board in 1937, when it was determined, *inter alia*, that the *direction* would be in safe hands if the task were taken over by some individual, proficient entrepreneurs of good standing.[28] The newly-introduced § 70 AktG 1937 reads as follows: "*The Management Board shall direct the company on its own responsibility, as demanded for the welfare of the business and its personnel and the common benefit of the people and empire.*"[29] By virtue of this new section, the prior dominant position of the shareholders' meeting in stock corporation law was weakened and the legal position of the management board was enhanced, and it was from that time on that the management board alone was made responsible for the *direction* of the company.[30] The already noted concept of § 70 AktG 1937 was finally integrated into § 76 para. 1 AktG 1965 without further discussion.[31]

From a historical perspective it follows that by virtue of its favorable position of authority the management board can, as a rule, direct the stock corporation independently from the shareholders' meeting or the supervisory board without either of those two entities having any power to intervene. Individual parameters or limitations of the management board's directive powers cannot, however, be historically derived.

[25] First of all in Arts. 207 et seq. ADHGB (1861), later in §§ 178 et seq. HGB (1897).

[26] *See* Ernst Geßler, *Vorstand und Aufsichtsrat im neuen Aktiengesetz*, 9 JURISTISCHE WOCHENSCHRIFT 497 (1937); Michael Kort, *Before § 76*, *in* GROßKOMMENTAR, AKTIENGESETZ n.5 (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. Supp. XIX 2003).

[27] *See* Michael Kort, *id. See also* Gerald Spindler, *Before § 76*, *in* 2 MÜNCHENER KOMMENTAR, AKTIENGESETZ n.9 (3d ed. 2008).

[28] *See* Adolf Baumbach, Alfred Hueck & Götz Hueck, *Summary Preamble § 76*, *in* AKTIENGESETZ n.4 (13th ed. 1968); *cf.*, Aktiengesetz 1965, *in* AKTIENGESETZ 96 (Bruno Kropff ed., 1965)(providing the considerations in the ministerial bill).

[29] Printed in Herbert Wiedemann, GESELLSCHAFTSRECHT Volume 1, 337 § 6.III.2.b.aa (1980).

[30] *See* Ernst Geßler, *supra* note 26; Hugo Dietrich, *Zum neuen Aktiengesetz*, 11 JURISTISCHE WOCHENSCHRIFT 649 (1937); Gerald Spindler, *Before § 76*, *in* 2 MÜNCHENER KOMMENTAR, AKTIENGESETZ n.14–15 (3d ed. 2008).

[31] *See* Holger Fleischer, *supra* note 17; *see* Aktiengesetz 1965, *in* AKTIENGESETZ 97 (Bruno Kropff ed., 1965) (providing the reasoning of the Ministerial Bill). However, the aforementioned values are included in § 76 para.1 AktG for comprehensible reasons.

IV. Teleological Interpretation

Having only hitherto established that the management board's powers to direct are far-reaching without any distinctive limitations, an attempt will now be made to introduce limitations by way of teleological interpretation based on the spirit and purpose of this concept. The objective purpose of § 76 para. 1 AktG can be perceived to be the need to provide the management board with far-reaching authority. An objective variance would however occur if, on the one hand, the management board were to have tasks of its own to deal with which could not be assigned to another body and if, on the other hand, the range of those tasks were substantially limited. The allocated task of *direction*, which was initially not subject to any limitations, explains the enhanced strength of the management board in the company.

Section 76 para. 1 AktG also has to be viewed in the light of the professed aim of the Stock Corporation Act. The object of the stock corporation law is to offer an adequate platform to trading stock corporations in order to enable them to become entrepreneurially active and achieve an operating profit. Within this scope, the management board assumes the role of an entrepreneur[32] and steers the company in accordance with its economic goals. It can therefore be assumed that § 76 AktG has been put into place to enable the management board to make required *directive* decisions towards achieving economic success. As a logical conclusion, this also includes decisions with fundamental economic significance. In this respect, heed also has to be paid to the fact that a component part of commercial success is being commercially efficient and that the management board should thus also be enabled to act quickly in making decisions and getting them implemented in like manner. In particular, in this era of globalized economy, quite often short-term decisions can only be put into practice if the management board is not dependent on having to cooperate with other bodies.[33] Hence, in applying a teleological interpretation to § 76 AktG, it follows that the management board should be free to make its own entrepreneurial decisions even if these decisions should be of a fundamental nature.

[32] *See* Holger Fleischer, *Section 1*, *in* HANDBUCH DES VORSTANDSRECHTS n. 8 (Holger Fleischer ed., 2006)(providing using the interpretation of *direction* as the basis for the reasoning that the management board should assume the role of the entrepreneur). The Local Court of Frankfurt am Main recently stated that the political guidelines have to be purported by the shareholders and executed by the management board. *See* 13 WERTPAPIER-MITTEILUNGEN (WM) 618, 621 (2010).

[33] *See* Bundesgerichtshof [BGH - Federal Court of Justice], Apr. 2004, BGHZ 159, 30–44 [hereinafter *Gelatine*]; also any confidentiality obligations must be observed.

V. Result of Interpretation

Juridical methods of interpretation have revealed that the original directive power of the management board stems from the fact that it is the task of the management board to steer the company in a profitable manner and to be able to make significant economic decisions without having to invoke other statutory bodies. On the other hand, matters which according to the law or the articles of association require a resolution of the shareholders' meeting are not included in these directive powers, in particular, measures which signify a gross intervention in the membership rights of the shareholders.

C. The Decisions in the BGH: *Holzmüller*, *Macrotron*, and *Gelatine* Cases and Their Evaluation

On the basis of the aforementioned interpretation results, the decisions handed down by the BGH and commonly known by the names of *Holzmüller*, *Macrotron*, and *Gelatine* (all of which deal with the unwritten corporate authority of the shareholders' meeting) will be evaluated and discussed below on the basis of the dogmatic and unwritten authority of the shareholders' meeting. In effect, this is an acute practical problem because there is one question in particular which everybody is asking: whether it would make any difference to the external relationship of the corporation (or perhaps only to the internal relationship) if an approving resolution of the shareholders' meeting were not obtained and, moreover, whether, if the shareholders' meeting were to be invoked, what kind of a majority would be required in order to pass a resolution.[34] The internal relationship of the corporation comprises the legal relationship between the shareholders or the representatives of the company among themselves vis-à-vis the company. In contrast, the external relationship comprises the legal relationship between the company and a third party, i.e. for example, the customers and the creditors of the corporation. If failing to procure a resolution by the shareholders' meeting would have a knock-on effect on the external relationship of the company, this would mean that contracts concluded with third parties would potentially be invalid. On the other hand, if this were to only have an effect on the internal relationship, the actions of the management board would be valid vis-à-vis third parties, but other internal sanctions would be set in motion, for example:

I. The Macrotron Decision

The defendant in the *Macrotron* decision was a company listed on the stock exchange. The plaintiffs had, inter alia, challenged the resolution of the shareholders' meeting authorizing the management board to request the withdrawal of the company's listing from the stock

[34] *See* Thomas Liebscher, *Ungeschriebene Hauptversammlungszuständigkeiten im Lichte von Holzmüller, Macroton und Gelatine,* ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 1, 7 (2005); Michael Arnold, *Mitwirkungsbefugnisse der Aktionäre nach Gelatine und Macrotron*, 36 ZIP 1573, 1575 (2005).

exchange.[35] The argumentation put forward by the defendant to justify this decision was that the low free float would lead to a high volatility of the stock price and did not justify the high costs connected with the listing. The defendant furthermore feared price manipulations. In addition to this, the company had announced that its major shareholder was intending to execute an offer to buy all of the shares of the minority shareholders.

1. Shareholder Consent

In the view expressed by the BGH in this decision, a regular delisting (voluntary withdrawal of the company from the stock exchange) would not reduce the membership rights of the shareholders[36] nor would the membership position of the shareholders be weakened as a result thereof.[37] In the reasoning of the BGH in its earlier decision in the *Holzmüller*[38] case, such diminishment of membership rights of shareholders was a prerequisite for the unwritten authority of the shareholders' meeting. In the *Holzmüller* case, diminishment signified a weakening of the influence of the shareholders' meeting instigated by the restructuring of the corporation. Consequently, in the *Macrotron* case, no unwritten authority of the shareholders' meeting could be derived from a reduction of membership rights, as had been the case in the *Holzmüller* matter.

Be that as it may, the BGH still arrived at the conclusion that also in like manner to the *Macrotron*[39] case a decision as to a regular delisting had to be reserved to the shareholders' meeting. This reasoning is based on the fundamental right of ownership which also protects share ownership.[40] The fundamental right of ownership is laid down in Art. 14 para. 1 sentence 1 of the German Constitution, the *Grundgesetz*, which guarantees the right of ownership. Thus, as long as this right does not conflict with any laws or rights of other third parties, the owner is entitled to deal with his ownership at his own discretion and without the intervention of others. In the view of the BGH in the *Macrotron* case, a delisting would have made it impossible for the shareholder to realize the fair market value of his shares at any time because the market where he could have sold the shares was now

[35] *See* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. II ZR 133/01, 25 Nov. 2002, BGHZ 153, 47–48 [hereinafter *Macrotron*].

[36] *See* Gerald Spindler, *§119*, *in* AKTIENGESETZ n.49 (Karsten Schmidt & Marcus Lutter eds., 2008).

[37] *See Macrotron*, *supra* note 35, at 54 (referencing expressly to the *Holzmüller* decision). The BGH in this regard uses the German term *Mediatisierung* to mean, the interposition of an additional corporate body minimizing the direct influence of the shareholders.

[38] *See supra* Part III 2.

[39] *See Macrotron*, *supra* note 35, at 55–56.

[40] *See id.* at 55–56.

no longer available to him.[41] The fair market value of the shares and the capacity to realize their value at any time are a fundamental feature of share ownership, which, like share ownership itself, is protected under the Constitution.[42] The BGH argued in its decision that this right to constitutional protection of share ownership has to be integrated into the relationship between the shareholder and the corporation and that this consequently has to be accomplished by making the regular delisting of a corporation dependent upon the approval of the shareholders' meeting.

2. Compensation Requirement

The BGH furthermore rules that, in order to protect the rights of minority shareholders, minority shareholders shall be entitled to a claim for compensation equivalent to the value of their shares and shall also have the additional right to request that the accuracy of their value assessment be examined before a court.[43] In this respect, the BGH demands that a mandatory offer be made to the respective minority shareholders by the corporation or the majority shareholder and that the tenor of such offer can, if the need arises, be examined under the rules of the *Spruchverfahren* (i.e. court proceedings in Germany, *inter alia*, for the examination of the tenor of such mandatory offer).[44]

3. Comment

The BGH is correct in saying that the constitutional protection of ownership rights pursuant to Art. 14 para. 1 sentence 1 GG also includes the tradability of shares.[45] In this connection, it would be perfectly logical to re-adjust any serious negative effect on tradability by making a mandatory offer and by granting a further option to have the value assessment examined, if this should be required. In financial terms, the ownership of shares allows a certain element of individual freedom, which is based on the particularly unique tradability of shares.[46] For this reason it would also be in keeping with the concept of making good any impairment in tradability to replace that impairment with a compensation to cover any loss in value suffered.

[41] *See id.* at 54.

[42] *See id.* at 55.

[43] *See id*. at 56.

[44] *See id.* at 57–58.

[45] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1613/94, 27 Apr. 1999, BVerfGE 100, 289, 308.

[46] *See id.* at 305.

On the other hand, it is not conceivable why, in the event of impairment in tradability, this should have any effect on the prerogative of the shareholders' meeting to decide on a delisting. This interpretation shows that the management board's directive powers already extend to making far-reaching economic decisions. If the shareholders' meeting does indeed not possess any statutory authority, it would be a contradiction of the clear interpretation already outlined above if such statutory authority were nevertheless to be transferred to the shareholders' meeting.[47] Any impairment of tradability is taken into consideration in that a mandatory offer has to be made which offsets the loss of tradability by an equivalent compensation for any loss in value. If it is indeed true that such mandatory offer covers any impairment of tradability, it is not apparent why an additional resolution of the shareholders' meeting should be required. This applies in particular because–as already correctly recognized by the BGH–if there should be a delisting, this would not result in any reduction of membership rights nor would there be any weakening of the membership position of the shareholder.[48]

II. The Decisions in the Holzmüller and Gelatine Cases and Their Dogmatic Basis

1. The Decisions

The other two important decisions of the BGH regarding the unwritten statutory authority of the shareholders' meeting are the *Holzmüller* case and the subsequent decisions in the *Gelatine I and II* cases, all of which deal with the restructuring of a corporation.

a) The Facts of the Cases

In the *Holzmüller* case the defendant, a stock corporation engaged in the lumber trade, outsourced its maritime business by transferring this business to one of its wholly-owned subsidiaries.[49] The maritime business was a prosperous part of the corporation's business and represented approximately 80% of the defendant's assets. The management did not consult the shareholders' meeting. The plaintiff claimed that the outsourcing of the maritime business was invalid and argued that a resolution of the shareholders' meeting with a three-quarters majority was required in order to carry out this measure.

In the *Gelatine I and II* cases, the defendant was a corporation holding 100% of the shares in a German subsidiary and 100% of the shares in two further foreign subsidiaries,

[47] However, it must not be denied that also in the event of a missing legal provision under particular preconditions the necessity to consent is given. *See also id.* III 2(b) & 3.

[48] It would be different if the articles of association demanded a quotation. In this case the consent would be required because of the structural change.

[49] *See* OLG Hamburg 11 ZIP 1000, 1001 & 1005 (1980).

respectively.[50] Following a resolution of the management board, the two foreign subsidiaries were transferred to the German subsidiary and became sub-subsidiaries of the defendant. One shareholder criticized this measure and it was put before the shareholders' meeting. In the subsequent resolution, only approximately 70% of the shareholders voted in favor of the restructuring of the corporation.

b) The Reasoning

According to the reasoning of the BGH in the *Holzmüller* and *Gelatine I and II*[51] decisions, a resolution of the shareholders' meeting was necessary despite a lack of applicable legal provisions because if a measure is formally covered by the wording of the law but encroaches so deeply into the membership rights of the shareholders and their assets embodied in the share ownership, then this particular measure will require an amendment to the articles of association.[52]

The authority of the shareholders' meeting to resolve on amendments to the articles of association is laid down in § 119 para. 1 No. 5 AktG and in § 179 para. 1 AktG. The restructuring of a corporation like in the *Holzmüller and Gelatine I and II* cases does not constitute a change to the articles of association and would thus not normally fall under the wording of § 119 para. 1 No. 5 AktG. Notwithstanding, however, the BGH demanded a resolution by the shareholders' meeting because the membership rights of a shareholder were being materially impaired in the manner described above. By taking this line of approach, it was the BGH's intention to confront a diminishment of the influence of the respective shareholder evoked by the outsourcing or transformation of a subsidiary into a sub-subsidiary (because the shareholder would then not have had as much influence on the entity after such transformation as it would have had beforehand) and it wanted at the same time to provide guaranteed protection against a subsequent weakening of the share value, so that the justified interests of the shareholder would already have been taken into account as a preventative measure.[53]

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[50] *See Gelatine*, *supra* note 33, at 31.

[51] *See also* Wulf Goette, *Comment on BGH II ZR 155/02*, 22 DEUTSCHES STEUERRECHT (DStR) 927 (2004); Mathias Habersack, *Mitwirkungsrechte der Aktionäre nach Macrotron und Gelatine*, 5 DIE AKTIENGESELLSCHAFT 137 (2005); Andreas Pentz, *Übersicht zur höchstrichterlichen Rechtsprechung zum Aktienrecht* (2004); 26 BB 1397, 1401–1403 (2005); Jochem Reichert*, Mitwirkungsrechte und Rechtsschutz der Aktionäre nach Macrotron und Gelatine*, 5 DIE AKTIENGESELLSCHAFT 150 (2005).

[52] Bundesgerichtshof [BGH - Federal Court of Justice],Case No. II ZR 174/80, 25 Feb. 1982, BGHZ 83, 122, 131 [hereinafter *Holzmüller*]; *Gelatine, supra* note 35, at 40. The *Gelatine II* decision corresponds with the essential expositions of *Gelatine I.* 12 NZG 575 (2004); *see* 12 NZG 571 (2004).

[53] *See Gelatine, supra* note 33, at 40.

With regard to the globalized economy and the consequent ensuing necessity to take up business opportunities as soon as they are offered, the BGH clarifies in the *Gelatine I and II* cases that an involvement of the shareholders' meeting can only be permitted within narrow boundaries.[54] The disputed measures in question have to be connected to the core authority of the shareholders' meeting to resolve on the articles of association and, in consequence, virtually have to be comparable to measures impossible to implement without any amendment to the articles of association. The BGH then goes on to illustrate the various threshold values that are considered in the literature not to be sufficient.[55] In the view of the BGH, the described preconditions which have led to the split in the scope of authority provided by the law are normally fulfilled when the scope to which the measure extends and its significance for the company attain a degree of outsourcing which is on a par with the level decided by the Senate of the BGH in the *Holzmüller* case.

2. Critical Evaluation on a Dogmatic Basis

If seen on the basis of the interpretation outlined above, it follows from the decisions of the Court that the economic importance of a specific measure on its own would not suffice to justify having to obtain a resolution of the shareholders' meeting. In this latter decision, involving delimitation in the *Macrotron* case, one of the basic requirements was that there was indeed an impairment to membership rights. Referring to the protection of ownership under Art. 14 of the German Constitution, the BGH also extended its argument in the *Macrotron* case to the membership position.[56] Despite this, however, we are still waiting for some pronouncements as to the actual degree of impairment to the membership position which is required. Besides this, the perception that economic importance by itself would not suffice to invoke the necessity to obtain a resolution of the shareholders' meeting does not necessarily mean that the economic importance of the measure is of no consequence at all. For this reason, it also has to be examined to what extent (in addition to the reduction of the shareholders' influence) the fundamental economic importance of the issue at hand shall play a role in triggering the authority of the shareholders' meeting.

a) The Dogmatic Starting Point

In order to answer these questions it would appear to be auspicious to deal with the issue of the jurisdiction on which the BGH has based its findings. In this respect, it is noticeable that in the *Holzmüller* and *Gelatine I and II* decisions the BGH has proceeded on the basis of a uniform dogmatic origin, which can also be traced in the *Macrotron* decision. In the

[54] *See id. at* 44.

[55] *See id. at* 30–45.

[56] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1613/94, 27 Apr. 1999, BVerfGE 100, 289, 301.

Holzmüller decision, the BGH had discovered an unintended gap in the AktG (in the sense of a missing legal provision), which needed to be filled analogously in the system and judgments of the AktG.[57] This was followed in the *Gelatine I and II* decisions by the further discovery that, despite having been aware of the ongoing discussions in this respect, the legislator had not taken any initiative to regulate the problem.[58] In like manner a missing legal provision also served as a point of reference in the *Macrotron* decision.[59] The fact that legal provisions had been discovered to have been missing has now invested the BGH with the authority to further develop the law by setting out the prerequisites for the unwritten competency of the shareholders' meeting. [60]

b) The Constitutional Duty to Protect Fundamental Rights

This duty follows on from the protection[61] of shareholders' guaranteed rights of ownership[62] pursuant to Art. 14 para. 1 sentence 1 German Constitution. For this purpose, the BGH has structured the relationship of the subjects of civil law among themselves so that share ownership receives only minimum protection in private legal relations; in other words, in the present cases the BGH has acted in compliance with its constitutional duty to protect the fundamental rights of its citizens (*grundrechtliche Schutzpflicht*) which has enabled the BGH to structure the respective private legal relationships.[63] In general, fundamental rights do not apply between individuals, as they would only constitute defensive rights of the individual vis-à-vis the State. Nonetheless, the German Federal Constitutional Court ("BVerfG") has developed the above-mentioned doctrine on its constitutional duty to protect fundamental rights which thus enables the State to have an impact on legal relationships between individuals and thereby prevent infringements of

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[57] *See Holzmüller*, *supra* note 52, at 139.

[58] *See Gelatine*, *supra* note 33, at 42. *See also* Uwe Hüffer, *Zur Holzmüller-Problematik: Reduktion des Vorstandsermessens oder Grundlagenkompetenz der Hauptversammlung?*, *in* FESTSCHRIFT FÜR PETER ULMER ZUM 70. GEBURTSTAG AM 2. JANUAR 2003, 279, 301−303 (Mathias Habersack & Uwe Hüffner eds., 2003).

[59] *See Macrotron*, *supra* note 35, at 55.

[60] *See Gelatine, supra* note 33, at 42 (arguing for the particular competence of the shareholders' meeting should be viewed as a result of an open development of the law); *The Constitutional Duty to Protect Fundamental Rights 2.2 para. 1, infra*. *Contra Holzmüller, supra* note 52, at 131; Ernst Gessler, *Einberufung und ungeschriebene Hauptversammlungszuständigkeiten*, *in* FESTSCHRIFT FÜR WALTER STIMPEL ZUM 68. GEBURTSTAG AM 29. NOVEMBER 1985, 771, 780 (Marcus Lutter, Hans-Joachim Mertens & Peter Ulmer eds., 1985)

[61] This is evident in *Holzmüller, supra* note 52, at 137–141, 55; *Gelatine, supra* note 33, at 40.

[62] *See supra* Part III 1 & 2 (providing expositions for the scope of protection of Art. 14 para. 1 sentence 1 GG in reference to the share ownership under).

[63] *See* KLAUS STERN, 3 STAATSRECHT 1 (1988), § 67 para. 5 (dealing with the doctrine of the state's duty to protect fundamental rights); Sebastian Blasche, *Die Grundrechtsbindung der Tarifparteien*, 1 VERWALTUNGSRUNDSCHAU (VR) 1, 2 (2002) (dealing with the doctrine of the state's duty to protect fundamental rights).

fundamental rights by third parties. This duty of public bodies to augment and, more particularly, exalt these rights to a level beyond the reach of unlawful interference by third parties follows on from the objective legal tenor of the act on basic human rights.[64]

In as far as the constitutional duty to protect fundamental rights is concerned, one has to start from the assumption of a broad structural margin of state powers, whereby the so-called *Untermaßverbot* has to be observed.[65] In line with the *Untermaßverbot*, rules for the protection of fundamental rights by way of the legal system have to meet certain minimum requirements. Only in the event that the protection of fundamental rights were to be so inadequate as to make it possible for an individual to rebut the fundamental rights of another individual would the powers of state be obliged to intervene.[66] In this respect, the duty to protect is directed towards the legislator in the first instance.[67] Accordingly, the BGH is in any case entitled to act if the legislator has not warranted a minimum of adequate protection of fundamental rights.

At issue here is the fact that the legislator was aware of the problem, but still did not do anything to incorporate suitable legal provisions into the Stock Corporation Law to mend the *unintended* gap in the legal provisions. Generally speaking, it is required that a missing legal provision must have been unintentional, because a rectification of the absence of a required legal provision (in the sense of a missing legal provision) can only be undertaken if the gap had not been intended by the legislator.[68] Where an intended missing legal provision is concerned, the judicial power is not permitted to act as legislator and fill the gap itself due to constraints under the principle of separation of powers. Nonetheless, this would not pre-empt lawful action being taken by the BGH to protect such fundamental rights[69] because one can proceed from the assumption that the legislator will, on the one hand, have refrained from introducing a substitute legal provision in the full belief that a fitting court decision was soon to be expected and, on the other hand, if a minimum of adequate protection of fundamental rights should not be granted, the BGH would then be fully authorized to act to remedy this situation. In the opinion of the BGH, this minimum

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[64] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BVR 385/77, 20 Dec. 1979, BVerfGE 53, 30, 57.

[65] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 2/90 u. 4, 5/92, 28 May 1993, BVerfGE 88, 203, 254–258; *see* Christian Starck, *Art. 1 (3)*, *in* 1 GRUNDGESETZ n. 195 (Hermann von Mangoldt, Friedrich Klein & Christian Starck, eds., 5th ed. 2005).

[66] *See* Sebastian Blasche, *Die Grundrechtsbindung der Tarifparteien*, 1 VR 1, 2 (2002).

[67] *See* Horst Dreier, *Before Art. 1*, *in* 1 GRUNDGESETZ n.102 (Horst Dreier ed., 2d ed. 2004).

[68] *See* Bundesgerichtshof [BGH - Federal Court of Justice], 14 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 992, 993 (2007); *see* KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 373 (6th ed., 1991).

[69] *See Gelatine, supra* note 33, at 44.

standard of protection would not be achieved just because the strict prerequisites outlined above had not been met. In all other cases, the BGH concedes the priority of the management board's directive powers and in doing so demonstrates its shrewd economic standpoint.[70] When all is said and done, the dogmatic classification cited by the BGH has indeed turned out to be quite functional as an open development of the law. Besides, this is more preferable both with respect to the legislator's continued inactivity as well as with respect to the ensuing legal consequences vis-à-vis any analogies endorsed[71] in parts of the literature relating to individual legal provisions of the Stock Corporation Law, respectively concerning the standardized authority of the shareholders' meeting as a whole.[72]

c) Result

The *Holzmüller*, *Macrotron* and *Gelatine* decisions are testimony to the fact that the BGH has based its legal analysis on the state's duty to protect the fundamental rights of its citizens. In doing so, the BGH has conjoined its duty to protect such fundamental rights with the essential features of share ownership which have to be protected under the law. As in the *Macrotron* decision, any severe impairment of individual financial freedom in connection with the unique tradability of shares has to be set off against a compensation for any ensuing loss in value of shares.[73] If, on the other hand, membership rights have been negatively impaired, like in the *Holzmüller* and *Gelatine* decisions, this detrimental effect would have to be counteracted by the requisite need for a shareholders' resolution, provided, however, that the narrow prerequisites for such resolution are met.

III. Conclusions on the Prerequisites for the Unwritten Authority of the Shareholders' Meeting

In line with the doctrine on the state's duty to protect its citizens' fundamental rights, it is only in very rare cases that the state will actually have to intervene. Accordingly, actions to be taken by the management board would only then require consent if, by implementing such actions, the diminishment of membership rights were to reach such proportions that there simply could no longer be any question of membership rights being adequately protected. In other words, this would apply to cases in which the fundamental form of a

[70] Insofar, the expositions of Bundesgerichtshof [BGH - Federal Court of Justice], 12 NZG 571 (2004) are to be welcomed.

[71] *See* Peter O. Mülbert, *§ 119*, *in* GROßKOMMENTAR, AKTIENGESETZ n.21–24 (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. Supp. XIX 1999).

[72] *See Gelatine, supra* note 33, at 42–45. It remains to be clarified whether the BGH does not expressly justify its jurisprudence with the doctrine of the state's duty to protect the fundamental rights, but rather refers to the missing legal provision and an open development of the law.

[73] *See supra* Part III 1. It was already set forth under *Macrotron* III 1*,* that insofar it cannot convince if the BGH, in addition to the monetary value equalization, demands a resolution of the shareholders' meeting.

company has been altered to such an extent that membership rights will be persistently undermined. In cases like that, the management board's claim to nonetheless have the power to take important business decisions affecting the shareholders' rights can, in simple terms, be described as plain heteronomy.[74] An important indicator that such safety mechanism is required can be gleaned from the fact that responsibility for decisions relating to amendments to the articles of association has been allocated to the shareholders' meeting (§ 179 para. 1 sentence 1 AktG). The articles of association, in principle, determine the identity of the company and, by that, the nature of the constitutionally protected ownership of the shareholders. In this respect one can concur with the position adopted by the BGH in that the measure in question has to appertain to the core authority of the shareholders' meeting to determine the articles of association and would also have to correspond to a situation which could only arise by virtue of an amendment to the articles of association.[75]

In addition to the reduction of the shareholders' influence, there is another pending item that has to be resolved, and that is the dimension of fundamental economic effect a particular measure may have on shareholders' rights. It has already been determined that if the tradability of shares has been severely impaired, a compensation has to be paid to the shareholders for any potential loss in value of those shares and that a shareholders' resolution will be required if there should be any risk that the intended measure could result in material damage to such membership rights.[76] Thus, apart from the question of reduction of shareholder influence, one would also have to ask why the BGH is also demanding[77] that the economic[78] relevance of the outcome should be put on a similar standing with the situation[79] dealt with in the *Holzmüller* decision. In this connection it is worth noting that, along with this point, the BGH wants to build up a protective shield for the shareholders against any potential dilution in the value of their shares caused as a result of a fundamental decision by the management board.[80] This argument is not very

[74] The idea of heteronomy stems from the judiciary of the Federal Constitutional Court. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 26/84, 7 Feb. 1990, BVerfGE 81, 242, 255.

[75] *See Gelatine, supra* note 33, at 30, 44–45.

[76] *See supra* Part III 1 and 2.

[77] *See Gelatine, supra* note 33, at 45.

[78] *See Gelatine, supra* note 33, at 44–46 (stating that the BGH should first of all expressly speak of *economic* significance for the company). Although at first sight the BGH does not expressly refer to the economic significance for the company, this understanding is evident when the BGH examines the concrete lawsuit. *See id*. at 48.

[79] *See supra* Part III 2.

[80] *See Gelatine, supra* note 33, at 40. In addition, the BGH already observed in *Holzmüller* an encroachment upon the shareholders' membership rights and their assets embodied in the share ownership. *See Holzmüller, supra*

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convincing in that the directive powers of the management board also encompass economically crucial decisions[81] and hence this statement, in itself, is not very persuasive.[82] It should also not lead to the conclusion that the economic significance of such measures *ipso jure* requires a shareholders' resolution. In addition, it also has to be pointed out that, as a legal consequence, the BGH is not actually demanding a compensation for any potential loss in the value of shares, but is more likely seeking a consent obligation whereby the members would have to take action themselves and, as a consequence, the BGH may regard the impairment of membership rights to be at the root of the problem.

Despite this, the BGH's call for a level of economic significance commensurate with the level under discussion in the Holzmüller case is legitimate because this is in line with the exceptional character of the unwritten requirement to obtain approval through a corresponding shareholders' resolution. This requirement complements the statutory directive powers of the management board even where significant economic decisions are concerned and only limits those powers if the share ownership would otherwise be so detrimentally impaired that state intervention would be unavoidable in order to safeguard its citizens' fundamental rights. On the other hand, this court decision cannot be criticized[83] considering the fact that the constitutional obligation to protect fundamental rights is already being observed by a minimum of protection[84] and that there is no indication that the BGH, by virtue of its development of the law, would not provide minimum protection for share ownership pursuant to Art. 14 para. 1 sentence 1 German Constitution. Quite to the contrary, it noticeably evidences remarkable entrepreneurial acumen on the part of the BGH.[85]

IV. Legal Consequences of the Necessity to Obtain Consent

A three-quarters majority is required in order to obtain consent to a shareholders' resolution (in effect conveying the distinct character of an unwritten requirement for approval), as has been correctly pointed out by the BGH.[86] If there should indeed be a case

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note 52, at 181.

[81] *See supra* Part II 5 (providing the result of interpretation).

[82] Something else will apply if the scope of individual freedom provided by the tradability of the share ownership is severely affected. *See supra* Part III 1.

[83] The BGH would not be obstructed from wording lower barriers for an unwritten competence of the shareholders' meeting, insofar as the prerequisites for a legal development were given; however, this does not alter the situation that the BGH is only *obliged* to act if a minimum of adequate protection of the fundamental rights is not granted.

[84] *See supra* Part III 1.

[85] *See supra* Part III 2.

[86] *See Gelatine*, *supra* note 33, at 45.

that would so severely impair membership rights that it would be necessary to call upon the unwritten authority of the shareholders' meeting, then this latter body should be able to exert its influence as to the manner in which the resolution is to be passed.

On the other hand, the BGH starts from the assumption that no *external effects*[87] will result from not observing this requirement. Nonetheless, there is no doubt that there is a strict requirement for a three-quarters majority in favor, although adverse legal consequences can arise if there is a breach of § 179a AktG[88] in a similar context. The legal impact of a breach of § 179a AktG according to the prevailing opinion is that the contract would become null and void. The absence of an external effect is further supported by virtue of the concept developed in this essay,[89] which only requires minimal protection of the fundamental right of ownership (Art. 14 para. 1 sentence 1 GG). This would not warrant any external measures as a legal consequence thereof due to the fact that the interests of the shareholders have already been taken care of in that they have been given the option to defend themselves against any such actions solely within the internal relationship and through corresponding management board obligations and potential claims on their part to pay damages if these obligations are not observed.

D. Résumé

After having examined the question of the management board's directive powers against the background of the jurisdiction of the BGH and by interpreting § 76 para. 1 AktG and taking recourse to the doctrine of the state's duty to protect its citizens' fundamental rights, this issue has been settled and a solid, dogmatic footing has been established. The outcome of this examination also offers viable standards with regard to the scope of customary practice.

The directive powers of the management board include, *inter alia*, steering the company towards operating efficiency and profitability and such business measures will, at times, necessitate management actions that are of fundamental economic significance. On the other hand, it has to be emphasized in line with the guiding principles of the BGH that it is not solely the economic significance of a particular measure that can trigger the necessity to obtain prior consent for that measure from the shareholders' meeting, but this can also be the case if the membership rights of shareholders will be significantly curtailed thereby. If the prerequisites for such advance consent should be fulfilled, the shareholders' meeting will have to pass a resolution with a three-quarters majority in favor in order to protect share ownership rights pursuant to Art. 14 para.1 sentence 1 GG. In the absence of such

[87] *See Holzmüller*, *supra* note 52, at 132; *Gelatine*, *supra* note 33, at 40–41.

[88] *See* § 179a I AktG *supra* note 27.

[89] *See supra* Parts III 2 & 3.

resolution, this will only have an impact on the internal relationship but not on the external one.

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