The Acquisition of GmbH Shares in Good Faith

By Christian Altgen[*]

A. Introduction

It can take a lifetime from the recognition of a legal problem until it is finally solved. Seventy-nine years after Walter Grau[1] focused attention on gaps in the security of transactions of *Gesellschaft mit beschränkter Haftung* (GmbH – private limited company) shares, the GmbH reform intends to solve the problem.[2] Until this reform, a prospective buyer of a GmbH share ran the risk that the person transferring the share was, in fact, not the true shareholder and, thus, had no power to assign the share. While the former law did not provide for a *bona fide* acquisition, the new § 16 (3) of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (GmbHG – Private Limited Companies Act) protects the true shareholder while also taking into account the buyer's reliance upon the transferor, considering him or her to be the shareholder.[3] This little revolution results in a new kind of good

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[1] Walter Grau, *Lücken im Schutz des gutgläubigen Rechtsverkehrs bei unwirksamer Übertragung von G.m.b.H.-Anteilen,* in FESTSCHRIFT HERMANN OBERNECK 173 (Deutscher Notarverein ed., 1929).

[2] *Regierungsentwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (MoMiG – Government's bill for an Act to Modernize the Law Governing Private Limited Companies), BT-Drucks. 16/6140.

[3] § 16 (3) GmbHG as amended by the MoMiG (*supra*, note 2): "*Der Erwerber kann einen Geschäftsanteil oder ein Recht daran durch Rechtsgeschäft wirksam vom Nichtberechtigten erwerben, wenn der Veräußerer als Inhaber des Geschäftsanteils in der im Handelsregister aufgenommenen Gesellschafterliste eingetragen ist. Dies gilt nicht, wenn die Liste zum Zeitpunkt des Erwerbs hinsichtlich des Geschäftsanteils weniger als drei Jahre unrichtig und die Unrichtigkeit dem Berechtigten nicht zuzurechnen ist. Ein gutgläubiger Erwerb ist ferner nicht möglich, wenn dem Erwerber die mangelnde Berechtigung bekannt oder infolge grober Fahrlässigkeit unbekannt ist oder der Liste ein Widerspruch zugeordnet ist. Die Zuordnung eines Widerspruchs erfolgt aufgrund einer einstweiligen Verfügung oder aufgrund einer Bewilligung desjenigen, gegen dessen Berechtigung sich der Widerspruch richtet. Eine Gefährdung des Rechts des Widersprechenden muss nicht glaubhaft gemacht werden.*" (The transferee can acquire a GmbH share or a right in a share of an apparent shareholder by way of a legal transaction, provided that the transferor is entered in the shareholder list which is deposited at the commercial register. That does not apply if, at the time of the transfer and regarding the relevant share, the shareholder list is incorrect for less than three years and the incorrectness is not attributable to the rightful shareholder. Furthermore, an acquisition in good faith is not possible if the transferee knows or, due to gross negligence on his part, does not know about the transferor's lack of power or if an objection

https://doi.org/10.1017/S2071832200000365 Published online by Cambridge University Press

faith acquisition that mixes different elements of "traditional" *bona fide* rules and adds new details.

This article will first provide a brief outline of both the basic concept of acquisition in good faith in German private law and of the acquisition of GmbH shares. Subsequently, the main focus will be on a closer examination of § 16 (3) GmbHG.

I. Overview: Acquisition in Good Faith in German Private Law

The Roman law's basic principle that no one can transfer a better title than he himself has (*nemo plus iuris transferre potest quam ipse habet*) is not as rigidly followed in German private law today. Several rules enable *bona fide* purchasers to acquire ownership from an apparent owner. These rules balance the conflicting interests of the true owner, who loses his right by operation of law although he or she neither intends to transfer title nor knows of the transfer, and that of the *bona fide* transferee, who does not know that the transferor has no authority to transfer. The result is a "compromise between the sanctity of ownership and the security of transactions,"[4] which, *inter alia,* depends on how likely it is that the transferee's assumption is correct, the owner's chance to prevent a third person from an acquisition in good faith, and the transferee's possibility to find out that the transferor is not the true owner. A condition that all these *bona fide* rules have in common is the necessity of an objective basis on which the acquiring party may rely. Objectivity is found through the use of registration in state registers and in the possession of movable property, or securities, which indicates the transferee's assumption of the transferor's title is correct. In contrast to the common law doctrine of estoppel, no additional circumstances or *indicia* of ownership are necessary to confirm this assumption.[5] However, there has to be a legal regulation stating that the circumstances which indicate the transferor's ownership should give rise to a good faith acquisition. That is why, as a basic principle, assignees cannot acquire a claim or other non-chartered rights from an apparent holder.[6]

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is attached to the shareholder list. The attachment of an objection is subject to a temporary restraining order or the consent of the person against whom the objection is made. The objecting party does not have to substantiate an impending infringement of his right.).

[4] William Swadling, *Property*, in ENGLISH PRIVATE LAW, margin number 4.446 (Peter Birks ed., 2000).

[5] *See* Konrad Zweigert, *Rechtsvergleichend- kritisches zum gutgläubigen Mobiliarerwerb*, 23 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1, 7 (1958).

[6] But see § 2366 Bürgerliches Gesetzbuch (BGB – Civil Code) (Provided that the bequeather has been the holder of these rights, an exception is granted if the assignor holds an incorrect *Erbschein* (certificate of inheritance), stating that the assignor is the rightful heir).

II. The Acquisition of GmbH Shares

By acquiring a GmbH share the transferee becomes a member of the company. Both the contract that obligates the seller to transfer the share and the transfer itself have to be certified by a notary.[7] The function of this requirement is primarily to restrict trade in GmbH shares, since the GmbH is designed to be an alternative to *Aktiengesellschaften* (AG – stock corporation), whose shares are much more fungible.[8] Notwithstanding a considerable debate on the necessity of these notarization requirements, the legislator refused to facilitate the transfer of shares in this respect. Furthermore, it is important to note that the acquisition is still not subject to an entry of the transferee in the GmbH's *Gesellschafterliste* (shareholder list), registration in the *Handelsregister* (commercial register), or registration in a (non-existent) special register for GmbHs.[9] It is, rather, left to the shareholders to determine when the transfer will become effective, which leads to an increased flexibility for the parties.[10] The exercise of shareholder rights, however, is subject to the transferee's entry in the shareholder list. Moreover, the shareholders are not able to facilitate the transfer by chartering the shares. As a consequence, an *Anteilschein* (share certificate) is only a document of proof of the share ownership, not a negotiable instrument. Taken together in principle, the transfer of GmbH shares is solely the result of the contract between transferor and transferee in due form. Nevertheless, the GmbH's articles of association can limit the transferability of shares by fixing additional conditions to be fulfilled, especially the need for the GmbH's prior approval (*Vinkulierung*).[11]

B. B*ona Fide* Acquisition of GmbH Shares

The GmbH reform brings about a number of changes to the German GmbH law, which, *inter alia,* should make the GmbH more attractive as there is an increasing competition from other corporate forms in the European Union.[12] Legal certainty

[7] § 15 (3), (4) GmbHG.

[8] *See* Jochem Reichert & Marc-Philippe Weller, *§ 15*, in DER GMBH-GESCHÄFTSANTEIL: ÜBERTRAGUNG UND VINKULIERUNG, margin numbers 16 – 19 (Reichert/Weller ed., 2006).

[9] Jürgen Breitenstein & Bernhard Meyding, *GmbH-Reform: Die 'neue' GmbH als wettbewerbsfähige Alternative oder nur 'GmbH light'?*, BETRIEBSBERATER (BB) 1457, 1460 (2006) (recommending that the transfer should be subject to the transferee's registration in the shareholder list).

[10] Barbara Grunewald, *Der gutgläubige Erwerb von GmbH-Anteilen: Eine neue Option*, DER KONZERN 13, 15 (2007).

[11] § 15 (5) GmbHG.

[12] BT-Drucks. 16/6140, p. 58.

and the total transaction costs are important factors for corporate founders. Therefore, the new § 16 (3) GmbHG, which introduces the *bona fide* acquisition of GmbH shares, might help to achieve the legislator's aim.

I. Necessity for a Bona Fide Acquisition

There are many circumstances that may lead to a divergence between the true shareholder and the ostensible owner of the share. For example, the transfer may be void because of a defect in formal requirements, due to the GmbH refusing its consent or because of a failure to comply with conditions upon which the parties agreed. Moreover, the transferee cannot even be sure that the share exists, for example, as a consequence of an increase of the share capital's failure.[13]

Nevertheless, regarding the transfer of GmbH shares, there was no exception from the doctrine that a non-owner cannot give a good title, *nemo dat quod non habet*. As already shown, the acquisition is valid without completing a register or delivering a document of title. Therefore, the transferee's confidence in having effectively acquired an existing share from a true shareholder was not supported by any objective evidence, which the law accepts as a basis for a *bona fide* acquisition. If the true shareholder refused to subsequently approve the transfer, the parties had no power to remedy the transfer.[14] The *bona fide* purchaser neither benefited from a curing of the defect nor benefited from the principle of *fehlerhafte Anteilsübertragung* (that defective, but nevertheless carried out transfers of company shares, can be valid).

In practice, two alternatives protected the transferee. First, a due diligence investigation concerning the identity of the true shareholder was carried out. Such title research was time-consuming. Only a complete chain of declarations of assignment in due form, dating back to the articles of incorporation, could minimize the risk.[15] The older the company, the more unlikely it was that these documents still existed. However, this title research could not eliminate the risk of unknown transfers to third parties or other defects of an assignment. Thus, title searches were associated with a relatively high degree of uncertainty.

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[13] However, once being registered in the commercial register, only in exceptional cases the shareholder resolution can be challenged in the courts, *see* Hans-Joachim Priester, *§ 57*, in KOMMENTAR ZUM GMBH-GESETZ (Franz Scholz ed., 9th ed. 2002), margin number 44; Wolfgang Zöllner, § 57, in GMBH-GESETZ (Adolf Baumbach/Alfred Hueck eds., 18th ed. 2006), margin number 27.

[14] § 185 (2) BGB (the true shareholder may approve the transfer).

[15] Klaus J. Müller, *Der Entwurf des „MoMiG" und die Auswirkungen auf den Unternehmens- und Beteiligungskauf*, GMBH-RUNDSCHAU (GMBHR) 953, 954 (2006).

https://doi.org/10.1017/S2071832200000365 Published online by Cambridge University Press

Second, the purchaser could ask for the seller's guarantee that he or she, in fact, was the shareholder and that the share was free from encumbrances. If this was not the case, then the purchaser could seek a remedy. But, especially for purchasers pursuing strategic goals, damages did not put them in the position they would have been in if the seller had been able to transfer the share.[16]

II. Scope of Application of § 16 (3) GmbHG

§ 16 (3) GmbHG provides for the good faith acquisition of both the GmbH share itself and the *bona fide* acquisition of restricted rights *in rem*, for example a lien on the share from an apparent shareholder.[17]

According to the Government's bill, the share must fully exist. Even if the shareholder list contains a non-existing share (*i.e.* a share that not only the registered person does not hold but neither does anybody else), the *bona fide* transferee cannot acquire it. Although this seems to be a relatively obvious restriction, doubt remains as to how to distinguish between existing and non-existing shares. For instance, it is not clear if a share that exists in another denomination other than in the one in which it is registered is an existing share according to § 16 (3) GmbHG. This situation may occur if the person who deposited a new shareholder list at the commercial register inadvertently expected a share to be split into several shares or expected several shares to be consolidated. In this case, the registered shares exist only when taken together or only when divided into several shares. Although the Government's bill does not contain any hint regarding the application of § 16 (3) GmbHG, it has been suggested to accept a *bona fide* acquisition if the nominal value of the existing shares corresponds with the shares in the shareholders list.[18] This point of view strengthens the security of transactions and does not conflict with the wording in § 16 (3) GmbHG.[19] Moreover, the provision that the total nominal value of all shares must correspond

[16] Patrick Flesner, *Die GmbH-Reform (MoMiG) aus Sicht der Akquisitions- und Restrukturierungspraxis*, ***NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG)*** 641, 643 (2006).

[17] BT-Drucks 16/6140, p. 93.

[18] Lars Böttcher & Sebastian Blasche, *Gutgläubiger Erwerb von Geschäftsanteilen entsprechend der in der Gesellschafterliste eingetragenen Stückelung nach dem MoMiG*, NZG 565, 567 (2007); Cornelius Götze & Stefan Bressler, *Praxisfragen der Gesellschafterliste und des gutgläubigen Erwerbs von Geschäftsanteilen nach dem MoMiG*, NZG 894, 897 (2007).

[19] *See* the wording of § 16 (3) in note 3; Böttcher & Blasche, *supra* note 18.

with the nominal capital is not infringed.[20] Such an acquisition eventually results in a splitting or consolidation of shares by operation of law.

The new law does not provide for a *bona fide* acquisition of shares free from encumbrances, regardless of whether the transferor or third party is the true shareholder. Furthermore, the transferee is at risk of being obliged to pay capital contributions that his predecessors failed to make.[21] In this regard, a *bona fide* acquisition is also excluded.[22] This is due to the fact that encumbrances and capital contributions are not part of the shareholder list, which is, therefore, no basis for an acquisition in good faith in this respect. In addition, other provisions on the good faith acquisition usually contain a specific reference to an acquisition free from encumbrances, for example § 936 of the *Bürgerliches Gesetzbuch (*BGB - German Civil Code), whereas § 16 (3) GmbHG does not mention this alternative.[23] On the one hand, this may seem surprising. If the shares are not free from security interests, the transferee is at risk of losing them. If, for instance, the transferor's creditor enforces his lien, the share might be sold and the transferee can only seek remedy from the transferor. As a result, there can be no significant difference to a transferee who tried to acquire a share from a non-shareholder before the GmbH reform.

On the other hand, the registration of encumbrances in the shareholder list would result in an extensive disclosure. In light of the publicity of the shareholder list, which is published electronically, anybody might access the list and discover that the share serves as security.[24] A secret pledging would be impossible. In order to balance these conflicting interests it has been suggested in legal literature that encumbrances have to be registered in the list, while at the same time keeping the right of access limited to persons showing legitimate interest.[25] A similar provision can be found for the *Grundbuch* (land records).[26]

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[20] § 5 (3) GmbHG.

[21] § 16 (2) GmbHG.

[22] Ulrich Haas/Jürgen Oechsler, *Missbrauch, Cash Pool und gutgläubiger Erwerb nach dem MoMiG*, NZG 806, 812 (2006).

[23] Peter O. Mülbert, *Gesetzesreform ermöglicht Firmenkauf vom Nichtbesitzer*, 253 FRANKFURTER ALLGEMEINE ZEITUNG (FAZ) 31 (2007).

[24] Since 1 January 2007 (*Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister* – EHUG – Act on Electronic Commercial Registers and Company Registers) the German commercial register is available at: http://www.handelsregister.de.

[25] Désirée Rodewig, *Gutgläubiger Erwerb von GmbH-Anteilen. Diskussionsbericht*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 690, 691 (2006); Ulrich Noack, *Reform des deutschen Kapitalgesellschaftsrechts: Das Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen*, DER BETRIEB (DB) 1475, 1477 (2006) (points out the need to limit the right to access with regard to § 67 (6) *Aktiengesetz* (AktG –

A different approach would be to leave it up to the vendor whether encumbrances should be registered or not.[27] As a result, the vendor might provide a higher protection for the purchaser, and through this increase the purchaser's buying interest. Hence, the level of protection would depend on the transferor. This seems quite inconvenient for a provision safeguarding the security of transactions. In any case, it destroys the legal certainty that derives from a simplification and standardization of the good faith acquisition.

III. Acquisition in Reliance on the Shareholder List

1. Mode of Acquisition

The transfer has to be valid, except for the power of the transferor. If the GmbH's articles of association limit the transferability of shares (*Vinkulierung*), the additional conditions have to be fulfilled. Whether such a condition is met or not is not published in the shareholder list. Therefore a transferee cannot acquire a share without meeting these conditions, even in good faith.[28]

Transmissions due to an operation of law or an act of state, however, are not in accordance with § 16 (3) GmbHG. As a consequence, a *bona fide* heir cannot acquire shares in good faith. Moreover, according to settled case law (concerning other rules on good faith acquisition), the transferor and a *bona fide* transferee may not be identical from a legal or an economic point of view (*Verkehrsgeschäft*).[29] This restriction can be transferred to the good faith acquisition of GmbH shares because

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German Stock Corporation Act)); Hildegard Ziemons, *Mehr Transaktionssicherheit durch das MoMiG?*, 7 BB SPECIAL 9, 13 (2006); Stephan Harbarth, *Gutgläubiger Erwerb von GmbH-Geschäftsanteilen nach dem MoMiG-RegE*, ZIP 57, 64 (2008).

[26] § 12(1) Grundbuchordnung (GBO – Land Register Code).

[27] Stephan Rau, *Der Erwerb einer GmbH nach In-Kraft-Treten des MoMiG – Höhere Transparenz des Gesellschafterkreises, gutgläubiger Erwerb und vereinfachte Stückelung*, DEUTSCHES STEUERRECHT (DStR) 1892, 1899 (2006).

[28] Martin Schockenhoff & Andreas Höder, *Gutgläubiger Erwerb von GmbH-Anteilen nach dem MoMiG: Nachbesserungsbedarf aus Sicht der M&A-Praxis*, ZIP 1841, 1844 (2006) (pointing out that a publication of detailed information is undesirable, because clauses *e.g.* on preemptive rights, tag-along and drag-along rights can be found frequently); Christian Gehling, *Gutgläubiger Erwerb von GmbH-Anteilen nach wertpapierrechtlichen Grundsätzen*, ZIP 689 (2006) (prefering a *bona fide* acquisition of shares notwithstanding a *Vinkulierung*).

[29] *See* Andreas Wacke, *§ 892*, in MÜCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Kurt Rebmann, Franz Jürgen Säcker, Roland Rixecker, eds., 4th. ed. 2004), margin number 38.

the transferor does not need protection in cases of such identity.[30] Therefore, there is no acquisition if a company is the transferring shareholder and its sole shareholder is the transferee.

2. The Shareholder List – an Imperfect Link for a Good Faith Acquisition

The shareholder list constitutes the inevitable objective basis for the good faith acquisition. It is standardized, contains the consecutively numbered shares, and it is deposited at the commercial register. Since it is not part of the commercial register itself the publicity of the commercial register, covering cases of divergence between registration and legal situation, does not apply.[31]

a) Protection of the Shareholder List's Accuracy

If a notary is involved in changes concerning the ownership or the nominal value of a GmbH share, he or she is responsible for sending an updated version of the shareholders list to the registration court after the changes take place.[32] Moreover, the notary has to certify that this updated version corresponds with these changes and the old list. This applies to the certification of a transfer, a universal succession in consequence of a transformation, and an increase of the share capital leading to an increase in the amount of shares or in the nominal value of shares. In some cases, the notary cannot know whether or not a transfer becomes effective, especially if it is subject to a condition precedent. Hence, the parties should inform the notary about the fulfillment of the condition by sending him or her a closing memorandum.[33] If a notary is not involved, for example in an acquisition by way of succession, the managing director of the GmbH is similarly obliged to update the list receiving notice and evidence by the old or new shareholder.[34]

It is important to note that the registration court does not examine the shareholder list. As a result, a major distinction is drawn between the shareholder list and an

[30] Oliver Vossius, *Gutgläubiger Erwerb von GmbH-Anteilen nach MoMiG*, DB 2299, 2300 (2007).

[31] § 15 Handelsgesetzbuch (HGB – Commercial Code).

[32] § 40 (2) GmbHG.

[33] Liane Bednarz, *Die Gesellschafterliste als Rechtsscheinträger für einen gutgläubigen Erwerb von GmbH-Geschäftsanteilen*, BB 1854, 1860 (2008); Schockenhoff & Höder, *supra* note 28.

[34] § 40 (1) GmbHG. If a managing director deceases who at the same time is the sole shareholder, it is not clear who is obliged to update the list, *see* Mülbert, *supra* note 23. Furthermore there is no control concerning the authenticity of the managing director updating the list, *see* Statement of the *Bundesrat* (Federal Council) on the Government's Bill, BT-Drucks. 16/6140, p. 162; Heribert Heckschen, *Die GmbH-Reform – Wege und Irrwege*, DStR 1442, 1450 (2007); Bednarz, *supra* note 33, at 1858.

entry in the land record or a certificate of inheritance.[35] The *Grundbuchamt* (title registration office), which is part of the *Amtsgericht* (municipal court), only records a title to real property if several formal provisions are not infringed.[36] The transfer of real property is actually subject to registration in the land register. Furthermore, the certificate of inheritance is an official document issued by the probate court, which investigates the relevant facts.[37] As a consequence it is most likely that land records and certificates of inheritance correspond to the real legal situation. They are actually subject to a presumption of accuracy.[38] In clear contrast to that, the transfer of shares is not subject to entry in the list and no official control entity is involved in the creation of the shareholder list. Hence, in many cases the notary is solely responsible for the accuracy of the shareholder list and therefore occupies an important position.[39]

This raises the question of whether a transfer certified by a foreign notary is valid under German law. Historically, such a notarized transfer was considered to be valid if the foreign state had a similar method of notarization and a similar position for notaries.[40] As Germany cannot oblige a foreign notary to update the shareholder list, however, the accuracy of the list in these cases depends on the managing director.[41] Although this might reduce the reliability of the list, the following circumstances lead to a reduction of the resulting objections. Firstly, as already shown, the law considers the managing director to be able to safeguard the

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[35] Harbarth, *supra* note 25, at 58.

[36] *See* §§ 13, 19, 20, 39 GBO.

[37] *See* §§ 2358, 2356 BGB.

[38] *See* §§ 891, 2365 BGB.

[39] Vossius, *supra* note 30, at 2303; Rau, *supra* note 27, at 1892; Michael Bohrer, *Fehlerquellen und gutgläubiger Erwerb im Geschäftsanteilsverkehr – Das Vertrauensschutzkonzept im Regierungsentwurf des MoMiG*, DStR, 995, 998 (2007); Flesner, *supra* note 16, at 643, 648; Heckschen, *supra* note 34 (Flesner and Heckschen doubt the accuracy of a shareholder list which is updated by the managing directors. They therefore suggest to strengthen the participation of the notary).

[40] BGHZ 80, 76 (78) (concerning the amendment of the articles of incorporation); Bundesgerichtshof (BGH – Federal Court of Justice), GmbHR 25, 28 (1990); Martin Winter& Marc Löbbe, *§ 15*, in GMBHG GROßKOMMENTAR (Peter Ulmer, Mathias Habersack, Martin Winter eds., 2005), Margin number 135. A transfer notarized in the USA is invalid under German law, *see* Stephan Ulrich & Jens Böhle, *Die Auslandsbeurkundung im M&A-Geschäft*, GmbHR 566, 569 (2007).

[41] Breitenstein & Meyding, *supra* note 9, at 1460; Götze & Bressler, *supra* note 18, at 896; Wolfgang Zöllner, *Übertragung von GmbH-Anteilen – Zwei rechtspolitische Grundsatzfragen*, in DIE GMBH-REFORM IN DER DISKUSSION 175, 180 (Gesellschaftsrechtliche Vereinigung ed., 2006) (favoring a contractual obligation of the notary to update the shareholder list).

accuracy of the shareholder list in several other instances.[42] Secondly, according to § 40 (3) GmbHG, the failure to update the shareholder list gives rise to the former shareholder's claim for damages. In this respect, it is likely that the managing director has a high interest to fulfill his duty. Finally, the GmbH would not be more attractive if a transfer could only be certified by a German notary.[43] Nevertheless, this problem exemplarily shows that the shareholder list is not a very reliable basis for a good faith acquisition.

b) Attribution to the Shareholder and Three-Year Period

The protection of *bona fide* acquirers is severely limited. The mere entry in the shareholder list for a short period does not suffice unless the incorrectness of this entry can be attributed to the real shareholder. The concept of attribution is a fundamental issue in German law, though the various provisions that protect third party reliance on an ostensible existence of a legal situation differ in detail.[44] Regarding § 16 (3) GmbHG, it is not clear whether a chain of causation between the shareholder's conduct and the incorrect list entry is sufficient or not.[45] The criterion of attribution is not defined by the law and therefore it is left open to interpretation by the courts.[46] The Government's bill only gives an example of a rightful heir who does not care about the shareholder list, although a third person is registered as the shareholder.[47] Regardless, the law imposes the burden of proof on the true shareholder. It is up to him or her to prove that the incorrectness of the list cannot be attributed to his own person.[48]

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[42] Schockenhoff & Höder, *supra* note 28, at 1846; Ingo Saenger & Alexander Scheuch, *Auslandsbeurkundungen bei der GmbH – Konsequenzen aus MoMiG und Reform des Schweizer Obligationenrechts*, BB 65, 67 (2008); Daniel Schlößer, *Die Auswirkungen der Schweizer GmbH-Reform 2007 auf die Übertragung von Geschäftsanteilen einer deutschen GmbH in der Schweiz*, GmbHR 301, 304 (2007); Marc-Philippe Weller, *Die Übertragung von GmbH-Geschäftsanteilen im Ausland: Auswirkungen von MoMiG und Schweizer GmbH-Reform*, DER KONZERN 253, 259 (2008).

[43] Schockenhoff & Höder, *supra* note 28, at 1846; Saenger & Scheuch, *supra* note 42, at 67.

[44] Bohrer, *supra* note 39, at 999.

[45] According to Vossius, *supra* note 30, at 2302, causation does not suffice; unclear Götze & Bressler, *supra* note 18, at 897.

[46] Vossius, *supra* note 30, at 2301.

[47] BT-Drucks. 16/6140, p. 93.

[48] Ulrich Noack, *Der Regierungsentwurf des MoMiG – Die Reform des GmbH-Rechts geht in die Endrunde*, DB 1395, 1399 (2007); Vossius, *supra* note 30, at 2301.

If the true shareholder manages to prove this lack of attribution, shares can only be acquired in good faith if, prior to the transfer, the incorrect entry in the list exists for more than three years. Although § 16 (3) GmbHG does not provide for any kind of *Ersitzung* (acquisitive prescription) after three years, this period nevertheless seems like a *Ersitzungsfrist* (prescriptive period), and therefore clearly distinguishes § 16 (3) GmbHG from "traditional" rules on good faith acquisition. As a consequence, shareholders will have to check the list at least every three years.[49] Otherwise they won't be able to prevent the loss of their share by making sure that the managing director corrects the list.

The combination of an objective basis for a *bona fide* acquisition and a period of time is ambiguous. On the one hand, the relatively poor quality of the basis for the good faith acquisition is, in a way, compensated by this period.[50] On the other hand, such a three-year period might impede a rapid resale of the share. Although, for that reason a one-year period might be preferable,[51] the legislator rather intends to grant the security of transactions over a longer period.[52]

It is neither sufficient nor required that the seller be registered in the shareholders list for more than three years. Firstly, this type of entry also has to be incorrect for the three year period. Not even the registration of the seller for 100 years would result in a good faith acquisition if the registration was correct for 99 years. Secondly, the entry has to be incorrect regarding the specific share. If different persons in succession are registered instead of the true shareholder for the relevant period, it is irrelevant that the transferor himself is registered for less than three years.[53] To summarize, a chain of shareholder lists that, for a period of more than three years, does not contain the true shareholder constitutes the basis for the *bona fide* acquisition.

Finally, the acquirer of a GmbH share is in an odd situation.[54] Due to the incorrectness of the list marking the beginning of the three-year period, he might

[49] Bednarz, *supra* note 33, at 1856, fears that old and diseased shareholders are not able to do this.

[50] *See* BT-Drucks. 16/6140, p. 92.

[51] *See, e.g.*, Haas & Oechsler, *supra* note 22, at 812; Heckschen, *supra* note 33.

[52] BT-Drucks. 16/6140, p. 92.

[53] BT-Drucks. 16/6140, p. 93; Vossius, *supra* note 30, at 2303, mentions the idea underlying §§ 943, 900 (1) BGB, concerning the calculation of the period of prescription.

[54] Hanjo Hamann, *GmbH-Anteilserwerb vom Nichtberechtigten – Die Mischung verschiedener Gutglaubenstatbestände im MoMiG-Regierungsentwurf*, NZG 492, 493 (2007); Müller, *supra* note 15, at 959; Götze & Bressler, *supra* note 18, at 899.

wish to find out if the list is incorrect at all. The best situation for the acquirer emerges if he discovers that no changes occurred during the last three years. In this case the transferor is either the true shareholder or the transfer is valid because of the three-year period. But if the acquirer detects incorrectness, he or she acts in bad faith at the same time and cannot acquire the share. Therefore, the acquirer might tend to omit a title search. As a result, he or she still acts in good faith and can acquire regardless of the three-year period, provided that the incorrectness can be attributed to the true shareholder. Unfortunately in this case, the acquirer cannot be sure that the *bona fide* acquisition is valid because the attribution is a vague criterion. Moreover, the attribution again is dependent on the incorrectness of the list. That is why the acquirer also cannot check this criterion without acting in bad faith from then on. In view of this dilemma, it has been suggested that the relevant time period be assessed independently from the incorrectness of the list.[55] However, this solution conflicts with the legislator's aim to give the true shareholder a three-year period to correct the shareholder list.[56] If the (former) shareholder intends to assign the share a second time immediately after a transfer, while he or she is still registered in the list, the new shareholder will never have a real chance to correct the list.[57]

3. Good Faith

A good faith acquisition is ruled out if the transferee knows or, due to gross negligence, does not know that the registered owner is not the true shareholder. The burden of proof is on the true shareholder. According to settled case law (concerning the *bona fide* acquisition of movables) a lack of knowledge is caused by gross negligence if the acquirer disregards circumstances that anybody else would have realized.[58]

As already mentioned, prior to the GmbH reform a due diligence of checking the complete chain of transfers has been a convenient step of an acquirer. Hence, one might argue that the omission of due diligence efforts constitutes gross negligence if a title search clearly would have shown the legal situation.[59] This might, however, conflict with the GmbH reform's aim to facilitate the transfer of shares, thus

[55] Müller, *supra* note 15, at 957.

[56] BT-Drucks. 16/6140, p. 93.

[57] Grunewald, *supra* note 10, at 14.

[58] BGHZ 10, 14 (16).

[59] Harbarth, *supra* note 25, at 60, 63; Müller, *supra* note 15, at 956.

limiting the need to do a title search to a maximum of three years.[60] Furthermore, it is widely accepted that in the absence of suspicious facts even the *bona fide* buyer of movables is not obliged to make rigorous inquiries, although the mere possession is not a very reliable basis for a good faith acquisition. Nevertheless, the shareholder list is not very reliable either and therefore it remains to be seen what kind of due diligence efforts will be deemed appropriate by the courts.

Finally, the acquisition in good faith does not mean a transfer just because of the wrong registration in the shareholder list.[61] The acquirer neither has to know the apparent shareholder's registration or know about the existence of a shareholder list at all.

IV. The True Shareholder's Possibility to Inhibit a Bona Fide Acquisition

As a consequence of a good faith acquisition, the true shareholder loses his or her share and has to claim compensation from the transferor. To avoid that situation he or she can raise an objection to an incorrect entry in the shareholder list. The attachment of an objection to the list is subject to the apparent shareholder's consent or a temporary restraining order. As the objection is attached to the shareholder list, it is also published electronically and is open to inspection by anyone. It therefore destroys the appearance resulting from the transferor's entry in the list and thereby inhibits a good faith acquisition. However, the true shareholder has the continuing ability to transfer the share notwithstanding a false objection of a third person.[62]

C. Conclusion

§ 16 (3) GmbHG codifies a new model type of *bona fide* acquisition, mixing elements of "traditional" rules and adding new elements. The shareholder list is not a very reliable basis for a good faith acquisition. Therefore, the combination of a three-year period and the true shareholder's responsibility for the incorrect entry in the list is of particular interest. It remains to be seen whether or not the new law will result in a tremendously facilitated transfer of GmbH shares. In particular, the beginning of the three-year period (incorrectness of the shareholder list) causes difficulties.

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[60] Götze & Bressler, *supra* note 18, at 898.

[61] Bohrer, *supra* note 39, at 999; Schockenhoff & Höder, *supra* note 28, at 1842.

[62] BT-Drucks. 16/6140, p. 94.

Although compared to the former law there is an increase in the protection for good faith acquirers, the reform nevertheless does not reach the aim of making due diligence procedures, to a large extent, superfluous. The good faith transferee still runs the risk of buying a non-existing share. Moreover, the law unfortunately does not provide for an acquisition free from existing encumbrances.[63] In this respect, the concern that only small or medium-sized businesses benefit from the reform, because prior to major transactions a due diligence procedure still is necessary, is comprehensible.[64] However, an extension of the good faith acquisition would affect not only the true shareholder's position, but also other interests, especially those of creditors and even those of other shareholders. Therefore such an extension would necessitate further precautions safeguarding the correctness of the shareholder list.[65]

[63] Rau, *supra* note 27, at 1899.

[64] Bohrer, *supra* note 39, at 1003.

[65] Vossius, *supra* note 30, at 2304, suggests an increased involvement of the notary.