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# The Limited Liability Entrepreneur: Different Ways to Break the Synchronisation of Liability

## 1. Economically Desirable Realignment of Opportunity and Risk: The GmbH

The limited liability company (GmbH) was created by the German legislator in 1892 as a form of company without historical predecessors or inspiration from comparative law. Unlike the société anonyme, the GmbH is, therefore, not the result of centuries of development. This new corporate form led to a readjustment of the relationship between profit opportunity and liability risk. Previously, a commercially active legal entity in Germany could only be founded as a stock corporation. This required a high level of start-up capital. In addition, numerous other requirements had to be met, particularly on the basis of the amendment to German stock corporation law in 1884, which was triggered by the "*Gründerkrise*." There was therefore a need for a less cumbersome and less complicated company form with limited liability.[1] In the legislative process, the models of a modified partnership (Offene Handelsgesellschaft mit beschränkter Haftung[2]) and a small, non-capital-marketable stock corporation[3] had competed with each other. The GmbH Act of 1892[4] ostensibly contains a synthesis of both models, but in fact, the capitalist side clearly outweighs the personalist side. This is because the limitation of liability is not based on the idea of a limitation of liability for small, personally organised companies. Instead, the new company form should also be open to companies whose number of shareholders is "not quite

[1] W. Schubert, "Die Gesellschaft mit beschränkter Haftung: Eine neue juristische Person," *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 1982–1983, no. 11–12, p. 589.

[2] The draft from 1884 can be found in: W. Oechelhäuser, *Die Erweiterung des Handelsrechts durch Einführung neuer Gesellschaftsformen, Schriften des Vereins zur Wahrung der wirtschaftlichen Interessen von Handel und Gewerbe*, Berlin 1891, p. 50. The draft of the Deutscher Handelstag from 1888 based on this can be found in: Entwurf eines Gesetzes betreffend die Gesellschaften mit beschränkter Haftung nebst Begründung und Anlagen, Berlin 1891, Annex B, p. 137.

[3] The draft from 1891: Entwurf eines Gesetzes betreffend die Gesellschaften mit beschränkter Haftung nebst Begründung und Anlagen, Berlin 1891.

[4] Law concerning limited liability companies of 20 April 1892, RGBl. 1892, p. 477.

small" ("nicht ganz klein") and in which no shareholder wishes to take over the management.[5] Even though the legislator had left this question open in Section 13 GmbHG, the GmbH was quickly recognised as a legal person, following the example of the stock corporation, because of its capitalistic character.[6] The new company form soon enjoyed great popularity in German legal practice. In 1912, there were already 21,000 GmbHs in Germany. However, this visible success did not prevent the GmbH from being criticised. As early as 1892, Levin Goldschmidt[7] expressed the fear that the GmbH would replace more solid forms of company such as the general partnership (OHG) and the limited partnership (KG). However, this criticism did not prevent the GmbH model from soon being adopted in Austria (in 1906, with a much more detailed law that was able to respond to the shortcomings of the GmbHG[8]) and in the following decades in large parts of the continental European legal world[9]. In fact, the GmbH in Germany and Austria has proven to be primarily the organisational form for smaller, personalistically structured companies and not a model in which the shareholders do not want to take over the management.[10]

## 2. A Legal Trick: The Straw Man Foundation

Why this story? Because the introduction of the GmbH, and specifically the GmbH as a small corporation with its own legal personality, paved the way for a readjustment of the relationship between profit opportunity and liability risk not only for companies, but also for individual entrepreneurs. At the end of the nineteenth century, the permissibility of combining all shares in one company was recognised for stock corporations. However, the formation of a stock corporation for the purpose of limiting liability was hardly practicable for sole traders. So the time had come for the ingenuity of the legal profession, which devised the straw man model.[11] This model was as follows: two people set up a GmbH, but one of these people declares the assignment of their share to the other person when the articles of association are concluded.

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5 Entwurf eines Gesetzes betreffend die Gesellschaften mit beschränkter Haftung nebst Begründung und Anlagen, Berlin 1891, p. 27.

6 W. Schubert, "Die Gesellschaft…," p. 591.

7 L. Goldschmidt, *Alte und neue Formen der Handelsgesellschaft: Vortrag in der Juristischen Gesellschaft zu Berlin gehalten den 19. März 1892*, Berlin 1892.

8 K. Staudigl-Ciechowicz, "Limited liability company – Austria" [in:] *Reception of the Limited Liability Company (GmbH)*, eds. M. Löhnig, A. Moszyńska, Vienna 2024, p. 27.

9 Cf. *Reception of the Limited…*

10 *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG): Großkommentar*, Bd. 1: *Einleitung, §§ 1–28*, eds. P. Ulmer, M. Habersack, 2nd ed., Tübingen 2013, Einl. A 8 and 18.

11 See: H. Fleischer, "Kautelarpraxis und Privatrecht: Grundfragen und gesellschaftsrechtliche Illustrationen," *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2018, Bd. 82, H. 2, p. 255.

In 1908, the Reichsgericht (Imperial Court of Justice)[12] then had to deal with the decisive question: "Does a limited liability company continue to exist if all shares are united in the hands of one shareholder?"[13] The Higher Regional Court of Düsseldorf, as the court of appeal, had already stated that the consolidation of all company shares did not lead to the dissolution of the company, whose assets retained their independence.[14] The Reichsgericht follows this without further ado[15] with reference to two more recent decisions in which the court appears to have already assumed this, in particular in 1904.

> The Senate has already stated in 1888[16] that the rule of Roman law, according to which the *universitas* is not dissolved by reduction to one member, is to be applied to associations under modern law whose legal personality is not based on special conferment, and that therefore the union of all the *Kuxe* [shares] in the hands of one person does not terminate the trade union […]. The same principle was applied to stock corporations in a decision […].[17] The GmbH as such also has its own rights and obligations (§ 13). Although it requires a number of shareholders to come into existence, once it has come into existence it is independent of the persons to whom the respective shares belong, and the law contains no provision according to which the unification of all shares in one hand results in dissolution.[18]

The standard commentary on the GmbHG follows this.[19] In the background here is Friedrich Carl von Savigny's very influential "fiction theory" (Fiktionstheorie),[20] which

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12 RG, judgement of 20 March 1908, II 586/07, RGZ pp. 68, 172.

13 This is the first guiding principle of the decision.

14 RGZ pp. 68, 173.

15 RGZ pp. 68, 174.

16 RGZ pp. 23, 202.

17 RGZ pp. 28, 75.

18 RG, judgement of 20 June 1904, I 122/04, SeuffArch 60 (1905), p. 410: "Der erkennende Senat hat bereits im Jahre 1888 ausgesprochen, daß die Regel des römischen Rechts, wonach die universitas durch Herabminderung bis auf ein Mitglied nicht aufgelöst wird, anzuwenden sei auf die Vereine des neueren Rechts, deren Rechtspersönlichkeit nicht auf besonderen Verleihungen beruht, und daß daher die Vereinigung sämtlicher Kuxe in der Hand eines Gewerken die Gewerkschaft nicht beende […]. Derselbe Grundsatz wurde in einer Entscheidung […] auf Aktiengesellschaften angewandt. Auch die Gesellschaft m.b.H. hat als solche selbständig ihre Rechte und Pflichten (§ 13). Bedarf es zwar zu ihrer Entstehung einer Mehrzahl von Gesellschaftern, so ist sie doch, einmal entstanden, unabhängig von der Person derjenigen, denen jeweils die Geschäftsanteile zustehen, und das Gesetz enthält keine Bestimmung, wonach die Vereinigung aller Geschäftsanteile in einer Hand die Auflösung zur Folge hat" (translation by the author).

19 H. Staub, *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, vermehrte Auflage, bearbeitet von M. Hachenburg, 3rd ed., Berlin 1909, § 2 n. 38.

20 Cf. F.C. von Savigny, *System des heutigen römischen Rechts*, Bd. 2, Berlin 1840, p. 236: "Legal capacity was described above as coinciding with the concept of the individual human being. We now regard it as extended to artificial subjects assumed by mere fiction. Such a subject we call alegal person, that is, a person who is merely assumed for legal purposes. In it we find a bearer of legal relationships in addition to individual persons." [„Die Rechtsfähigkeit wurde oben dargestellt als zusammenfallend mit dem Begriff des einzelnen Menschen. Wir betrachten sie jetzt als ausgedehnt auf künstliche durch bloße Fiction angenommene Subjecte. Ein solches Subject nennen wir eine juristische Person, d. h. eine Person, welche bloß zu juristischen Zwecken angenommen wird. In ihr finden wir einen

did not rely on an entity of persons forming the "living body of the whole person."[21] This paved the way for risk-free straw man formations,[22] because previously either the straw man had to remain in the company in order for it to have two shareholders, which could lead to conflicts, or the risk had to be taken of having a one-person company, which had not yet been approved by the courts. Today, at least 50% of GmbHs in Germany are one-person companies.[23]

## 3. Straight and Crooked Paths

In 1910, Oskar Pisko published a "legislative study" (legislatorische Studie) on the "limited liability of sole traders" (beschränkte Haftung des Einzelkaufmannes) with regard to Austria.[24] The background to this was an identical practice of setting up straw men to create one-person companies and, thus, limit the liability of sole traders. This practice was also approved by the Oberster Gerichtshof (Supreme Court) in Vienna in a decision from 1911. According to the GmbHG, "a majority of persons is required as shareholders for the establishment of such a company, but not for its continued existence."[25] This follows from the law and its motives, so that recourse to the provisions on general partnerships is prohibited, especially since § 84 GmbHG does not regulate the acquisition of all shares by a shareholder as a reason for dissolution and, moreover, § 95 GmbHG expressly declares the acquisition of all shares by the state, a province, or a municipality to be permissible. In addition, § 61 GmbHG gives the company the legal nature of a legal person, because the company should have "the status of a special-purpose asset independent of the person of the participants," as is the case with a public limited company and a co-operative, "the necessary consequence of the disappearance of any shareholder liable with his entire assets."[26]

Pisko goes on to explain that if the legislator permitted limited liability not only as a correlate of limited influence, but also precisely for the purpose of limiting

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Träger von Rechtsverhältnissen noch neben den einzelnen Menschen" (translation by the author)]. Likewise *ibid.*, p. 275; G.F. Puchta, *Pandekten*, 12th ed., 1877 Leipzig, p. 45; B. Windscheid, *Lehrbuch des Pandektenrechts*, Bd. 1, Düsseldorf 1862, p. 136.

21 Thus O. von Gierke, *Die Genossenschaftstheorie*, Berlin 1887, p. 833.

22 See: H. Fleischer, "Kautelarpraxis…," p. 255.

23 *Gesetz betreffend die Gesellschaften*…, Einl. A 9.

24 O. Pisko, "Die beschränkte Haftung des Einzelkaufmannes," *Grünhuts Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 1910, Bd. 37, p. 699.

25 OGH, judgement of 20 September 1911, R III 307/11, AC 3050 [AC = *Sammlung von Entscheidungen zum Handelsgesetzbuche*, published by Adler and Clemens, continued by Friedländer], whereby this view is seen as already represented in OGH, decision of 18 January 1910, R V 1325/9, AC 2968: Nach dem GmbHG sei "zur Errichtung einer solchen Gesellschaft, nicht aber zu ihrem Fortbestande eine Mehrheit von Personen als Gesellschafter erforderlich" (translation by the author).

26 Weil der Gesellschaft "die Eigenschaft eines von der Person der Teilnehmer unabhängigen Zweckvermögens" zukommen sollte, wie dies bei der Aktiengesellschaft und der Genossenschaft der Fall ist, "notwendige Folge des Verschwindens jedweden, mit seinem ganzen Vermögen haftenden Gesellschafters" (translation by the author).

entrepreneurial risk,[27] it was a logical consequence to extend the principle of limited liability to a sole tradership,[28] but not in the form of a company that does not actually exist, but by forming a special asset without legal personality in the hands of the sole trader. However, for reasons of publicity, this would require a corresponding entry in the commercial register and the raising of a corresponding minimum capital as in the case of a GmbH.

Pisko writes that:

> If it really corresponds to the logical consequence that the legal benefit of limited liability attached to participation in a limited liability company should also be made available to the sole trader under the same conditions, then the legislator must also draw this consequence by creating a corresponding corporate form. In doing so, it opens up a new, straight path along which capital can flow to trade and industry; it does not force trade to take a crooked path by establishing external facts of legal relationships that do not actually exist. But if the aforementioned logical consequence does not exist, if the participation of several persons in an enterprise really forms a factual prerequisite for the harmlessness of limited liability, then it cannot be left to the individual to fulfil this prerequisite by merely substituting its external forms for the necessary association.[29]

Pisko's study was accompanied by a complete draft law and explanatory memorandum, which was unsuccessful in both Austria and Germany. But it should be noted that Pisko's comments were taken into account in Germany when drafting the failed GmbH reform of 1969, but as an argument in favour of still not allowing the original formation of a one-person company.[30] Although the one-person company had proven itself in practice and was to be recognised, the formation of a one-person company was legally impossible, so that a new legal form was required.[31] The opinion of the Bundesgerichtshof (Federal Court of Justice), which had stated in 1956, was preferred:

> The objections that have been raised against the one-person GmbH […] are directed against an entity that cannot be convincingly justified in terms of legal theory, but which is recognised by customary law and is harmless from an economic point of view, for which

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27 O. Pisko, "Die beschränkte…," p. 707.

28 *Ibid.*, p. 730.

29 *Ibid.*: "Entspricht es wirklich der logischen Konsequenz, der an die Beteiligung an einer Gesellschaft mit beschränkter Haftung geknüpften Rechtswohltat der beschränkten Haftung unter den gleichen Kautelen auch den Einzelunternehmer teilhaftig werden zu lassen, so muß der Gesetzgeber diese Konsequenz durch Schaffung einer entsprechenden Unternehmensform auch ziehen. Er gibt damit einen neuen geraden Weg frei, auf dem Kapital dem Handel und der Industrie Zuströmen kann, er zwingt nicht den Verkehr, auf krummem Wege, durch Setzung äußerer Tatbestände von in Wahrheit nicht bestehenden Rechtsverhältnissen zu erreichen, was ihm das Gesetz versagt hat. Besteht aber die erwähnte logische Konsequenz nicht, bildet die Beteiligung mehrerer Personen an einem Unternehmen wirklich eine sachliche Voraussetzung für die Gefahrlosigkeit und Unschädlichkeit der beschränkten Haftung, so kann es dem Einzelnen nicht überlassen werden, dieser Voraussetzung dadurch zu entsprechen, daß er an Stelle der notwendigen Assoziation bloß deren äußere Formen setzt" (translation by the author).

30 P. Ulmer, *Probleme der GmbH-Reform*, Köln 1970, p. 56.

31 BT-Drucks. 7/253, pp. 85, 267.

> there is a practical need and against which nothing compelling can be asserted apart from conceptual objections.[32]

According to Pisko, the Bundesgerichtshof, therefore, remained on the crooked path of straw man incorporation instead of opening up a straight path. It was not until a much smaller but successful reform attempt in 1977/1980 that the one-person foundation was established, looking back at the criticism[33] of the failed draft from 1969.[34] Suddenly, § 1 GmbHG reads: "Limited liability companies may be established by one or more persons in accordance with the provisions of this Act for any legally permissible purpose." But even this is actually a crooked path: an entrepreneur with limited liability in the form of a GmbH. The legislator's justification is laconic: "The new regulation on the admissibility of the formation of a limited liability company by only one person meets an economic need."[35] This is followed by a reference to current practice: "However, the practice recognised by case law already comes very close to the formation of a one-person GmbH under current law. It is not uncommon for founders to use a second person who only takes over a share for the moment of formation and then transfers it to the founder or transfers it in advance." Legal dogmatic concerns have now been set aside and the legislator has acted pragmatically:

> On the other hand, the draft GmbH Act refrained from legalising the formation of one-man companies because it would possibly be more appropriate to create a special legal form for the entrepreneurial activity of an individual, limiting his liability to a part of his assets, which is not a legal entity like the GmbH. On closer examination of this basic question, however, it has emerged that such an approach, without ultimately leading to better solutions, would give rise to a host of additional problems, so that in the end it appears more expedient to extend the regulations on the one-person GmbH.[36]

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[32] BGHZ 21, pp. 378, 383; in detail H. Fleischer, E. Dubovitskaya, "Faba Fahrradbau GmbH – BGHZ 21, 378" [in:] *Gesellschaftsrechts-Geschichten*, eds. H. Fleischer J. Thiessen, Tübingen 2018, p. 117: "Die Bedenken, die gegen die Einmann-GmbH erhoben worden sind […], wenden sich gegen ein Gebilde, das rechtstheoretisch zwar nicht überzeugend begründbar ist, das aber gewohnheitsrechtlich anerkannt und volkswirtschaftlich unschädlich ist, für das ein praktisches Bedürfnis besteht und gegen das außer begrifflichen Bedenken nichts Durchgreifendes geltend gemacht werden kann" (translation by the author).

[33] See, in particular, Arbeitskreis GmbH-Reform, pp. 35, 39.

[34] BGBl. 1980 I 836; in Austria only in 1996, öBGBl. 1996, 2409 in the course of the EU Company Law Amendment Act, which served to implement Directive 89/667/EEC, which formulated § 1 öGmbHG as follows: "Limited liability companies may be established in accordance with the provisions of this Act for any legally permissible purpose by one or more persons."

[35] BT-Drucks. 8/1347, p. 28.

[36] *Ibid.*: "Demgegenüber war im Entwurf eines GmbH-Gesetzes von einer Legalisierung der Einmann-Gründung abgesehen worden, weil es möglicherweise sachgerechter sein würde, für die unternehmerische Betätigung einer Einzelperson unter Beschränkung ihrer Haftung auf einen Teil ihres Vermögens eine besondere Rechtsform zu schaffen, die nicht wie die GmbH eine juristische Person ist. Bei näherer Prüfung dieser Grundfrage hat sich jedoch herausgestellt, daß ein solcher Weg, ohne letztlich zu besseren Lösungen zu führen, eine Fülle zusätzlicher Probleme aufwerfen würde, so daß es im Ergebnis zweckmäßiger erscheint, die Regelungen über die Einmann-GmbH herkömmlicher Art auszubauen" (translation by the author).

The GmbH is therefore ultimately no longer a company, even if it is called such, but an independent special-purpose asset with legal personality. The GmbHG regulates the requirements for the creation of this special-purpose asset without privileging or continuing to privilege partnerships.

## 4. It's the Economy, Stupid?

France adopted the GmbH in 1925, with the recovery of Alsace-Moselle after the First World War providing the final impetus, as numerous companies existed there in this organisational form.[37] However, this reception did not consist of a far-reaching adoption of the German GmbH law applicable in the regained territories, which would have had a strong impact on the system of French company law as a whole, nor did it consist of a complete incorporation of the GmbH into the applicable French law, which would have eliminated the peculiarities of this form of company. Instead, the French legislator chose the middle way of acculturation by hybridisation for the *société à responsabilité limitée* (SARL).[38] The result was a company form that was considered to lie between the *sociétés de personnes* and the *sociétés de capitaux*.[39] On the one hand, the limitation of risk to the amount of the deposits showed a relationship between the new company form and the *société anonyme*. On the other hand, the fact that the company remained a family asset (Article 22 of the 1925 law) indicated a relationship with the general partnership.[40]

Because of this relationship to partnerships, it was agreed that the company would be dissolved immediately if all shares were subsequently merged into one hand.[41] In 1966, the legislator mitigated this hardship and allowed the single-member partnership to continue to exist for a transitional period.[42] The regulation of the *société* can be found in Art. 1844-5 Code civil, dispositions générales:

> The consolidation of all shares in a single hand does not automatically result in the dissolution of the company. Any interested party may request such dissolution if the situation has not been regularised within one year. The court may grant the company a maximum period of six months to regularise the situation. It may not order dissolution if, on the date on which it rules on the merits of the case, such regularisation has taken place.[43]

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37 Cf. M. Löhnig, *Droit local*, Berlin 2023, p. 77.

38 A. Mages, "Acceptance in the French commercial law of the German GmbH" [in:] *Reception of the Limited Liability Company (GmbH)*, eds. M. Löhnig, A. Moszyńska, Vienna 2024, p. 129.

39 *Journal Officiel*. Sénat. Séance du 17 février 1925, p. 117.

40 J. Lafon, P. Lafon, *La société à responsabilité limitée: Commentaire doctrinal des lois des 7 mars 1925, 10 février 1926, 13 janvier 1927 et 30 décembre 1928 avec revue de la jurisprudence*, Paris 1929, p. 5.

41 Cass. com, 21 Nov. 1955, D.S. 1956, 162: "entraine de plein droit la dissolution immédiate de la société" (shall automatically result in the immediate dissolution of the company; translation by the author).

42 P. Merle, A. Fauchon, *Sociétés commerciales*, 28th ed., Paris 2024, N. 277.

43 "La réunion de toutes les parts sociales en une seule main n'entraîne pas la dissolution de plein droit de la société. Tout intéressé peut demander cette dissolution si la situati-on n'a pas été

Accordingly, straw man models were also practised in France, and this also applies to at least half of the SARLs today.[44] However, legal practice in France differed from the legal practice in Germany and Austria, because the straw man was not only required for the formation of the SARL, but on a permanent basis. In addition, certain standards had to be observed when drafting the contract so that the SARL was not considered a fictitious and, therefore, void company. This is because the possibility of a one-person company simply contradicts the French concept of the *société*.[45]

Nevertheless, a debate on the permissibility of a single-member company also began in France in the 1970s,[46] which ultimately did not lead to the creation of a new legal form, but instead adopted the pragmatic German approach in 1985.[47] Article 2 § 1 of the law states: "A limited liability company is established by one or more persons who are liable for losses only up to the amount of their contributions."[48] The legislator has therefore simply broken with the prevailing idea that a company can only be formed by contract. The conclusion could, thus, be as follows: Despite all the differences in legal culture between France and Germany/Austria and the different ideas of what a société/company is, in the end it is economic necessity that levels out the path differences if necessary. In other words, it's the economy, stupid.

## 5. *Entrepreneur individuel à responsabilité limitée* (EIRL) and *Entrepreneur individuel* (EI)

However, the creation of a special asset with legal personality by one or more persons, which is called a *société*, does not mark the end of developments in France.[49] With the law of 15 June 2010,[50] the legislator created the legal concept of the *Entrepreneur individuel à responsabilité limitée* (EIRL). The key feature is the *patrimoine affecté*, a special asset without legal personality that any sole trader can create for the advancement of their business operations. In this way, the legislator has broken with the principle set out in Art. 2284 of the Civil Code: "Anyone who has personally undertaken an obligation is bound to fulfil that obligation with all their movable and immovable property,

régularisée dans le délai d'un an. Le tribunal peut accorder à la société un délai maximal de six mois pour régulariser la situation. Il ne peut prononcer la dissolu-tion si, au jour où il statue sur le fond, cette régularisation a eu lieu" (translation by the author).

44 N. Jullian, S. Tisseyre, A. de Bissy, *Les structures individuelles*, Toulouse 2021, p. 265.

45 P. Merle, A. Fauchon, *Sociétés commerciales*…, N. 57.

46 N. Ezran-Charrière, *L'entreprise unipersonnelle dans les pays de l'Union européenne*, Paris 2002, p. 54.

47 Loi n° 85-697 du 11 juillet 1985.

48 "La société à responsabilité limitée est instituée par une ou plusieurs personnes qui ne supportent les pertes qu'à concurrence de leurs apports" (translation by the author).

49 For details, see: P.A. Hülse, H. Fleischer, Ch. Thomale, "Vom *entrepreneur individuel à responsabilité limitée* (2010) zur Haftungsbeschränkung *ex lege* beim *entrepreneur individuel* (2022)" [in:] *Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht*, ed. H. Fleischer, Tübingen 2024, p. 507.

50 Loi n° 2010-658 du 15 juin 2010.

present and future."[51] In contrast, the law refers to the sole trader's assets that are not allocated to a business operation as *patrimoine non affecté*. Similar to a partnership or corporation with limited liability, the *Entrepreneur individuel à responsabilité limitée* must also indicate its organisational form by means of a corresponding name affix when it appears in business dealings (Art. L. 526-6 Code de commerce). This is because the *Entrepreneur individuel à responsabilité limitée* is not liable with all of his/her present and future assets, but only with the assets to which a relevant claim is allocated.

However, the legal concept of the *Entrepreneur individuel à responsabilité limitée* was apparently not as well received as expected, probably because of uncertainties regarding the delimitation of assets and thus the limitation of liability.[52] The French legislator therefore created another new legal form in 2022 called the *Entrepreneur individuel*. The assets of the *Entrepreneur individuel* are also divided into *patrimoine professionnel* and *patrimoine personnel*. However, if a natural person takes up self-employment in their own name, this division of assets now applies *ex lege*. The content of *patrimoine professionnel* is defined in Art. L. 526-22 of the Code de commerce, although here too the distinction made by the term "utile" (useful) appears unclear:

> The assets, rights, obligations and securities held by the sole trader that are useful for his business or independent professional activities constitute the sole trader's business assets. Subject to Book VI of this Code, these assets may not be indexed. The sole trader's assets not included in the business assets constitute his personal assets.[53]

## 6. It's the Legal Culture, Stupid!

But why all this when it has been possible to set up a one-person company in France for forty years? Why, as Fleischer *et al.*[54] point out, "although the actual starting conditions in France are not fundamentally different from those in other countries," has "a particular discussion on the limitation of liability of the sole trader developed there that is unrivalled"? Is this because of a focussed economic policy that wants to provide low-threshold models to promote a start-up spirit?[55]

Or is it not primarily because the model of the original single-member company does not correspond to French legal culture with its concept of the *société* and has

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[51] "Quiconque s'est obligé personnellement, est tenu de remplir son engagement sur tous ses bien mobiliers et immobiliers, présents et à venir" (translation by the author).

[52] Projet de loi n° 869 (Sénat, 2020–2021), enregistré à la Présidence de l'Assemblée nationale le 29 septembre 2021, 7.

[53] "Les biens, droits, obligations et sûretés dont il est titulaire et qui sont utiles à son activi-té ou à ses activités professionnelles indépendantes constituent le patrimoine profes-sionnel de l'entrepreneur individuel. Sous réserve du livre VI du présent code, ce patrimoine ne peut être scindé. Les éléments du patrimoine de l'entrepreneur individuel non compris dans le patrimoine professionnel constituent son patrimoine personnel" (translation by the author).

[54] P.A. Hülse, H. Fleischer, Ch. Thomale, "Vom *entrepreneur individuel*…," p. 529.

[55] *Ibid.*, p. 531.

never enjoyed anywhere near the same popularity as in Germany or Austria? So is the reason perhaps an after-effect of the development of the SARL as a hybrid company form exactly one hundred years ago? Have the differences in pathways not been levelled out after all, because the French did not find their way to the one-person company?

Further developments remain to be seen, as the *Entrepreneur individuel* again has great potential for levelling out company law structures in France. French lawmakers envision the *Entrepreneur individuel* exclusively as a sole trader. He/she seems condemned to be alone, because as soon as he/she joins forces with another *Entrepreneur individuel*, a partnership is created and the liability privilege is lost. This unequal treatment suggests that the liability structure of the general partnership should be abolished, so that in the end there would only be traders with limited liability by law, regardless of whether they operate alone or jointly. That would really be the end of French company law as we know it…

## Literature

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## Summary

***Martin Löhnig***

**The Limited Liability Entrepreneur: Different Ways to Break the Synchronisation of Liability**

The starting point of this article is the fact that various continental European legislators have broken with the model of synchronisation of liability and influence by not only allowing limited liability as a correlate of limited influence, but also for the purpose of limiting entrepreneurial risk. A quantum leap the starting point of which is the German limited liability company (GmbH) can be found at the end of the nineteenth century. This liability privilege serves to motivate larger sections of society to engage in entrepreneurial activity, which is desirable from an economic point of view and may be at the expense of non-privileged creditors. Once this synchronisation has been broken, there are no longer any fundamental objections to extending the liability privilege to the operations of a sole trader. This study shows that although the path to the limited liability sole trader has been travelled throughout continental European legal culture, different paths have been taken and travelled at different speeds. This is illustrated by a comparison between Germany/Austria and France.

**Keywords:** limited liability company, GmbH, *société à responsabilité limitée*, legal culture, limited liability entrepreneur, *Entrepreneur individuel*.

## Streszczenie

*Martin Löhnig*

**Przedsiębiorca z ograniczoną odpowiedzialnością – różne sposoby na uniknięcie synchronizacji odpowiedzialności**

Punktem wyjścia niniejszego artykułu jest spostrzeżenie, że ustawodawcy z różnych państw w Europie odeszli od tradycyjnego modelu synchronizacji odpowiedzialności i kontroli. Nie tylko uznano ograniczoną odpowiedzialność za korelat ograniczonego wpływu (kontroli), lecz także rozszerzono ją jako instrument ograniczania ryzyka gospodarczego. Decydujący punkt zwrotny nastąpił pod koniec XIX w. wraz z wprowadzeniem w Niemczech spółki z ograniczoną odpowiedzialnością (GmbH). Przywilej ograniczonej odpowiedzialności miał na celu zachęcenie szerszych warstw społeczeństwa do podejmowania działalności gospodarczej – celu pożądanego z perspektywy ekonomicznej, choć mogącego odbywać się kosztem wierzycieli niekorzystających z takiej ochrony. Skoro zasada synchronizacji odpowiedzialności i kontroli została przełamana, nie istnieją już fundamentalne przeszkody dla rozszerzenia ograniczonej odpowiedzialności na działalność przedsiębiorcy indywidualnego. Niniejsze opracowanie pokazuje, że choć koncepcja przedsiębiorcy o ograniczonej odpowiedzialności rozpowszechniła się w kontynentalnej kulturze prawnej, drogi jej rozwoju oraz tempo zmian były zróżnicowane. Zagadnienie to zostało zilustrowane poprzez porównanie rozwiązań przyjętych w Niemczech, Austrii i we Francji.

**Słowa kluczowe:** spółka z ograniczoną odpowiedzialnością, GmbH, *société à responsabilité limitée*, kultura prawna, przedsiębiorca z ograniczoną odpowiedzialnością, przedsiębiorca indywidualny.