EUROPEAN COMPARATIVE COMPANY LAW

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subject to most of the rules applicable to an SNC.[201] The *commanditaires* or limited partners are liable up to the amount of their contributions. They need not be qualified as merchants, and cannot make a contribution consisting of services.[202] An SCS must have at least one general partner, but there can be as many limited partners as it thought desirable.

According to Article 222-6 of the Commercial Code, a limited partner may not enter into any transaction with a third party as part of the management of the partnership's affairs. He cannot do this by acting as an agent appointed by the general partners or the managers. If this rule is broken, the limited partners together with the general partners are jointly and severally liable without limit for the debts and obligations of the partnership which result from the prohibited acts. Furthermore, depending on the number and significance of such acts, he may be declared jointly and severally liable in respect of all the obligations of the partnership, or only certain of them. There is nothing in the law to prevent a limited partner participating in management decisions provided he does not enter into transactions with third parties. However, such participation is usually excluded by the statutes of the partnership, which generally reserve all management powers to the general partners or managers.

The contributions of both general and limited partners are represented by shares or participations (*parts sociales*). In the absence of different provisions in the statutes, such shares may be transferred only with the consent of all the general and limited partners. The articles may provide that the shares belonging to the limited partners are freely transferable as between the partners. They may also provide that the limited partners' shares may be transferred to a person who is not a partner with the consent of all the general partners, and of a majority in number of the limited partners who hold more than one half of the capital attributed to all the limited partners.[203]

3. Limited partnership in Germany

A partnership whose purpose is the operation of a commercial enterprise under a firm name is a limited partnership (*Kommanditgesellschaft*, KG), if the liability of one or more member partners is limited to the amount their contributions[204] and the other partners are liable without limitation

[201] Commercial Code, Art. L222-1, para. 1.
[202] Commercial Code, Art, L221-1(2). This is because that such a contribution might entail participation in management.
[203] *Ibid.*, Art. L222-8. [204] German Commercial Code, paras. 161 and 171.

for the debts and obligations of the partnership.[205] As is the case with the French SCS, the rules governing general partnerships are applicable to the KG, except where the law provides otherwise.[206] The special rules contained in paragraphs 162–177a of the Commercial Code are generally applicable to limited partners only. Both natural and legal persons may be members of a limited partnership. Since the 1998 reform the name of a limited partnership does not have to contain the name of at least one general partner anymore.[207] The application for registration must, inter alia, mention this name, the names of the partners, and the contribution due from each limited partner.[208] Limited partners are liable without limit with regard to transactions entered into by the partnership before the registration of the fact that their liability is limited unless they did not give their consent to the transaction or the creditor was aware of their limited liability.[209]

Limited partners are in principle excluded from the management of the partnership.[210] They may not oppose a transaction by the ordinary partners unless it goes beyond the scope of the ordinary business of the partnership.[211] A limited partner may request a copy of the annual balance sheet and determine its accuracy in the light of the books and records.[212] A limited partner is not authorised to represent the partnership.[213]

The above rules only apply if the partnership agreement fails to contain different provisions. In practice it always contains special provisions. Limited partners are sometimes given rights of management. If a limited partnership has a large number of partners, the partnership agreement often provide for a committee of limited partners exercising control over the managing partner, or taking part in the management of the partnership. The partnership agreement may provide that the share of a limited partner shall be transferable, in which case such transfer only takes effect in favour of an outsider when registered.

The commonest form of limited partnership met with in practice in Germany is the GmbH & Co. KG.[214] This entity together with certain

[205] *Ibid.*, para. 161(1). Cf. Kübler and Assmann, *Gesellschaftsrecht*, p. 100 f.
[206] German Commercial Code, Art. 161.
[207] Schmidt, *Gesellschaftsrecht*, § 53 II 3; Kübler and Assmann, *Gesellschaftsrecht*, p. 101.
[208] German Commercial Code, para. 162. [209] *Ibid.*, para. 176. [210] *Ibid.*, para. 164.
[211] *Ibid.*, para. 164. [212] *Ibid.*, para. 166.
[213] *Ibid.*, para. 170 states that limited partners are generally excluded from representing the partnership. Nevertheless, they can be individually given power to represent the partnership.
[214] Schmidt, *Gesellschaftsrecht*, § 56 I; Kübler and Assmann, *Gesellschaftsrecht*, p. 103.

other similar entities of a hybrid character of much less importance, the GmbH & Co. KGaA and the *société en commandite par actions à responsabilité limitée*, will be considered briefly, after limited partnerships have been fully discussed. The hybrid form of entity which has been described as the limited partnership with shares has already been considered above.

4. Limited partnerships in Italy

According to Article 2315 of the Italian Civil Code, the provisions relating to general partnerships apply to the limited partnerships (*società in accomandita semplice*) except where they are incompatible with the special rules contained in Articles 2316–2324 governing such limited partnerships. As follows from Articles 2293 and 2315, the rules concerning the limited partnership are to a considerable extent based on those governing the general partnership.

By Article 2314 of the Civil Code the business name (*ragione sociale*) must consist of the name of at least one of the general partners; with an indication of the limited partnership status. Once again, a distinction is made between the position of the general unlimited partners (*soci accomandatari*[215]) who are jointly and severally liable without limit for all the debts of the partnership, and the limited partners (*soci accomandanti*), who are liable to the extent of their contributions.[216] Limited partners who permit their name to be included in the business name, or who perform acts of management, lose their limited liability.[217] However, it follows from Article 2320(1) of the Civil Code that limited partners can perform managerial acts or negotiate or conclude business in the name of the partnership if they are fully authorised in respect of a particular such act or transaction by the general partners. The prohibition on assuming the powers of the managers does not prevent them from exercising certain powers and rights. Thus, by Article 2320(3) of the Civil Code, the limited partners are in all cases entitled to receive the annual accounts, and profit and loss statement, and to check their accuracy by consulting the books and other partnership documents. As is generally the case in other jurisdictions, the unlimited partners have the same rights and duties as partners in general partnerships. As already

[215] Because of linguistic similarities, one might well think that the *soci accomandatari* corresponds to the *commanditaires* in a French limited partnership (*société en commandite simple*). However, this is not the case: they actually have the same role as the *commandités* (limited partners) in such a partnership.

[216] Italian Civil Code, Art. 2313. [217] *Ibid.*, Arts. 2314(2), 2320(1).

indicated, the management of the partnership may only be conferred on an unlimited partner.[218]

It follows from Article 2317(1) of the Civil Code that an unregistered limited partnership is treated in the same way as an unregistered general partnership. Nevertheless, the liability of limited partners remains limited unless they have participated in partnership transactions.

5. Limited partnership in Spain

The limited partnership in Spain is governed by Articles 145–150 of the Spanish Commercial Code. The limited partners (*socios comanditarios*) do not involve themselves in the business transactions, and have a liability limited to their contribution: the unlimited partners (*socios colectivos*) have joint and several liability for debts and obligations of the partnership. At least one partner's name must be used in the partnership name, which may not include names of limited partners. The transfer of the participations (or shares) of a limited or unlimited partner is only permissible with the consent of all the other partners. According to Article 148(4), limited partners have no rights to participate in the management of the partnership, and may not represent or bind it by their acts. By Article 150(2) of the Commercial Code, limited partners are entitled to examine the accounts at the end of the year, unless the partnership agreement provides otherwise. However, limited partners have the same rights as general partners to participate in the partnership profits, and they participate on a pro rata basis in the liquidation surplus.

A limited partnership, like a general partnership, has to be formed by means of a public notarial deed, which must contain certain similar particulars to those required in the case of a general partnership.

Limited partnership with shares (*sociedades en comandita por acciones*) are rarely encountered in Spain, and are governed by the provisions of Articles 151–157 of the Commercial Code. They are thought of as a special category of limited partnerships, but they function in such a way so that they could also be regarded as a special type of public company with personally liable directors.

6. Limited partnership in Belgium

The Belgium limited partnership is called the *gewone commanditaire vennootschap* (GCV) or *société en commandite simple* (SCS). The names of the unlimited partners must be published in the Annexes to the

[218] *Ibid.*, Art. 2318(1).

Moniteur Belge together with the amount of the contributions and anticipated contributions of the limited partners.[219] Similar publicity must also be given to the name, registered office, and duration of the partnership, if this is not unlimited.

A judgment cannot be given against the partners by imposing personal liability on them until such time as judgment has been given against the partnership.[220] The general partners are jointly and severally liable without limitation for the partnership's obligations. The limited partners are only liable to contribute to the debts and losses of the partnership up to the amount of their promised contribution. However, according to Article 206(2) of the Belgian Companies Code, they may be required by third parties to pay them interest and dividends which they have received if these have not been paid out of real profits of the partnership. In such an event, if there is fraud, bad faith, or gross negligence, on the part of a manager or managing partner, the limited partner may bring an action against him for the restitution of the amounts he has had to pay to the third party. According to Article 207(1), limited partners may not, even when granted authorisation by the other partners, participate in any act of management. However, this prohibition does not apply to the giving of advice, the exercise of supervisory functions, and the authorisation of managers to do acts which are outside their powers. Nevertheless, they are jointly and severally liable without limitation to third parties for all the partnership's obligations in which they have participated despite the prohibition on their performance in managerial acts. They are jointly and severally liable without limitation to third parties even if they have not so participated if they have habitually managed the partnership, or if their name appears in that of the partnership.[221]

If the manager dies, or becomes subject to a legal incapacity or impediment, and it has been stipulated that the partnership shall continue, the president of the commercial court may, unless the partnership agreement provides otherwise, order the appointment of a limited partner as administrator entrusted with the task of carrying urgently necessary acts and simple administration for a period of no more than one month. The administrator may only carry out the tasks assigned to him. The commercial court's order may be opposed by any interested party. Such oppositional proceedings will be dealt with by the court entrusted with hearing urgent cases.[222]

[219] Belgian Companies Code, Arts. 69, 72 and 73.
[220] *Ibid.*, Art. 203. [221] *Ibid.*, Art. 207. [222] *Ibid.*, Art. 208.

7. Limited partnership in the Netherlands

When the Dutch *commanditaire vennootschap* (CV)[223] is formed, it is necessary to register the number, nationality and domicile of the limited partners, and also the amount of their contributions.[224] At present, unlike its Belgian counterpart, a Dutch limited partnership lacks legal personality. Once again, the limited partners are only liable to the extent of their contributions to the partnership, but they may not perform act of management on its behalf.[225]

F. Special type of limited partnership in Germany and France

1. GmbH & Co. KG and *société en commandite à responsabilité limitée*

The most common type of limited partnership in Germany is the GmbH & Co. KG. In recent years, a similar form, the *société en commandite simple à responsabilité limitée* has been in use in France, where it is much less commonly employed than its German counterpart. There appears to be considerably more literature on the German GmbH & Co. KG than on its French counterpart.[226] Many German jurists have expressed their disapproval of the hybrid form of business entity in the past, and there is a great deal of jurisprudential writing on this entity. It now must be regarded as a generally accepted business form. In 1933 the highest fiscal court, the *Reichsfinanzhof*, gave full recognition to the GmbH & Co KG.[227] This entity was often looked at with disapproval by the German tax authorities, as it appeared to constitute a means of tax avoidance. It is possible that the French courts might treat an *SCS à responsabilité limitée* as an entity the sole purpose of whose formation was to avoid mandatory

[223] The Dutch limited partnership is also called *vennootschap bij wijze van geldschieting.*
[224] Article 7 of the *Handelsregisterwet* (Dutch law on the Commercial Registry).
[225] Dutch Commercial Code, Art. 19.
[226] See, e.g. M. K. Binz and M. H. Sorg, *Die GmbH & Co. KG*, 10th edn (Munich: CH Beck, 2005); M. Hesselmann *et al.*, *Handbuch der GmbH & Co. KG*, 19th edn (Cologne: Otto Schmidt, 2005); H. Klauss and J. P. Birle, *Die GmbH & Co. KG. Gesellschaftsrecht, Steuerrecht*, 7th edn (Ludwigshafen: Kiehl Friedrich Verlag, 1988); K. Schmidt and W. Uhlenbruck, *Die GmbH in Krise, Sanierung und Insolvenz*, 3rd edn (Cologne: Otto Schmidt, 2003); H. Sudhoff, *GmbH & Co. KG*, 5th edn (Munich: CH Beck, 2000); H. Wagner and H. J. Rux, *Die GmbH & Co. KG*, 10th edn (Freiburg: Haufe, 2004); T. Raiser and R. Veil, *Recht der Kapitalgesellschaften*, 4th edn (Munich: Vahlen, 2006), § 42.
[227] Decision of 18 February 1933, RStBl 375. The Federal Supreme Court *Bundesgerichtshof* has continued to adopt the same approach.

rules of law.[228] Both the French and German entities consist of one or more limited partners and a general (or unlimited) partner or partners which is a private limited liability company.[229]

2. Uses and forms of the GmbH & Co KG

A GmbH & Co KG in which the limited partners are also the shareholders in the GmbH has been frequently used in Germany for the purpose of family businesses in the early stages of their development.[230] Many other types of GmbH & Co are met with in practice. This entity has been used to provide for the situation in which a general partner dies or departs from a family business taking the form of a KG by means of transferring his share to a GmbH which continues the business with the limited partners.[231] Certain large types of GmbH & Co. are quoted on a stock exchange. In such partnerships, a GmbH is usually the general partner and the investors are the limited partners.[232] Since such companies have lost the tax advantages which they enjoyed before 1976, when the new imputation system of corporation tax was introduced, they have tended to be used less frequently in recent years.[233] Although these undertakings have proved to have a successful role as finance companies, they have fallen into a certain amount of disrepute in Germany, owing to the frequency of insolvencies which have occurred.[234] The courts have been developing rules to protect investors in such companies.

One-man GmbH & Co. KGs are also recognised in which the sole shareholder of the GmbH, who is the general partner, is the same individual as the limited partner.[235] The sole shareholder may instead be the limited partnership itself. The formation of such entities has sometimes proved useful to sole traders. However, it has been suggested

[228] Note in this sense, A. Guineret-Brobbel Dorsman, *La GmbH & Co. KG allemande et la commandite à responsabilité limitée française* (Paris: LGDJ, 1998), p. 115.

[229] At least in Germany, it is possible to replace the GmbH by any other limited liability company. Therefore, it is equally permissible to form an 'AG & Co. KG' or a 'KGaA & Co. KG'. It is even allowed to use a foreign limited liability company, for instance the English private limited liability company (which would give the 'Ltd. & Co. KG'). See on the latter, M. K. Binz and G. Mayer, 'Die ausländische Kapitalgesellschaft & Co. KG im Aufwind? – Konsequenzen aus dem "Überseering" – Urteil des EuGH vom 5.11.2002' [2003] GmbHR 249. In more detail Raiser and Veil, *Recht der Kapitalgesellschaften*, pp. 625 ff.

[230] Schmidt, *Gesellschaftsrecht*, § 56 I; Kübler and Assmann, *Gesellschaftsrecht*, p. 350 f.

[231] The conversion of this capital is now permitted by para. 226 of the new Umwandlungsgesetz (UmwG, Conversion Act) of 1994, *Federal Law Gazette* (BGBl) 1994 I-3210.

[232] Schmidt, *Gesellschaftsrecht* (n. 230), § 56 II 1 a. [233] *Ibid.*, § 56 I. [234] *Ibid.*, § 56 I 3.

[235] *Ibid.*, § 56 II 3 c; Kübler and Assmann, *Gesellschaftsrecht* (n. 230) p. 351.

that French jurists would be likely to oppose the use of a similar entity in France on the grounds that what is in reality an entity composed of a single person cannot be treated as a *société des personnes*.[236]

The type of entity in which the sole shareholder of the GmbH is the same person as the limited partner, must be distinguished from the unitary type of GmbH & Co. KG (*Einheits-GmbH & Co KG*) in which the sole shareholder of the GmbH is the limited partnership itself.[237] The use of such an entity, which is acknowledged by paragraph 172(6) of the HGB, has the advantage of coordinating the activities of the GmbH and the limited partnership. Such coordination is sometimes difficult to achieve because of the differences between the law applicable to the private limited liability company and the limited partnership.[238] The employment of the unitary type of entity does however give rise to certain problems in relation to the use of voting rights by the manager(s) of the GmbH as representatives of the partnership in the general meeting of the GmbH.[239] Such managers are prevented by paragraph 47(4) GmbHG from voting on certain resolutions affecting them. Furthermore, the members of a GmbH are required to decide on the dismissal of its managers(s) by paragraph 46(5) GmbHG. This appears to entail that, because the GmbH has no natural persons as its members, the manager(s) must vote upon their own dismissal.

These difficulties are circumvented by permitting the limited partners to exercise voting rights in such circumstances. This pragmatic solution may well have an inadequate legal basis.[240]

A final rather curious variant of the GmbH & Co. KG which has been employed in Germany in the past consists of the three tier GmbH & Co. KG in which the general partner in the GmbH & Co. KG is itself a GmbH & Co. KG.[241] The use of this complex form of undertaking (which apparently is now only rarely employed) was explained by efforts to circumvent the rules which used to be contained in the former *Umwandlungsgesetz* (UmwG) (Conversion Law) concerning the change of form of a company as well as the rules governing employee codetermination.

[236] Note in this context, Guineret-Brobbel Dorsman, *La GmbH & Co. KG allemande*, (n. 228), 164.

[237] Kübler and Assmann, *Gesellschaftsrecht* (n. 230) p. 351; Raiser and Veil, *Recht der Kapitalgesellschaften*, p. 628.

[238] A. Guineret-Brobbel Dorsman, *La GmbH & Co. KG allemande et la "commandite à responsabilité limitée française"*, pp. 156–7.

[239] Schmidt, *Gesellschaftsrecht*, § 56 II 3 e. [240] Schmidt, *Gesellschaftsrecht*, § 56 II 3 e.

[241] *Ibid.*, § 56 II 3 f.

3. Advantages of the GmbH & Co KG and the corresponding French entity

Although the GmbH & Co. KG no longer has the advantage over capital companies of avoiding the double taxation of company profits since the imputation system of taxation was introduced in 1976, it may have other tax advantages. The tax position of its French counterpart, the *société en commandite à responsabilité limitée*, is rather complex, and may not offer any particular advantage which is not available to capital companies.

A GmbH & Co. KG and its French counterpart appear to have a number of advantages over an ordinary limited partnership and a private limited liability company.[242] As compared with an ordinary limited partnership, both entities have the advantage that all their members have limited liability.[243] As compared with a German KG, there is a greater freedom to choose a manager. This is because in principle, in the GmbH & Co. KG, a member having unlimited liability should be chosen as a representative of the partnership. Thus, the representative of a GmbH & Co. KG must be the unlimited partner, i.e. the GmbH. However, because the latter is a legal person, it has to exercise its task of management and representation through the medium of its manager(s), who may be any natural person (including a limited partner) of full legal capacity. Such managers do not have joint and several liability. The formation of a GmbH & Co. KG rather than a KG may thus be contemplated if none of the founders wish to incur unlimited liability, or if none of them feel capable of assuming managerial tasks.

The advantage consisting of a greater freedom of choice of the managers which applies to the German GmbH & Co. KG as compared with the German KG is inapplicable to the French *société en commandite simple à responsabilité limitée* as compared with the French SCS. In the latter entity, an outsider may be a manager if the articles so permit.[244] However, the use of the GmbH & Co. KG will permit a limited partner to act as manager of the constituent GmbH. Such a person cannot act as a manager of a SCS, even if he is given specific authorisation[245] by the general partners or managers. Both the GmbH & Co. KG and the corresponding French entity can be used to circumvent difficulties which sometimes occur on the death of general or unlimited partners. In France, unless the partnership agreement provides otherwise, the

[242] Note in this context, Guineret-Brobbel Dorsman, *La GMBH & Co. KG allemande*, 136–148.
[243] Schmidt, *Gesellschaftsrecht*, § 56 II 4 a.
[244] French Commercial Code, Arts. L221-3, L222-2.
[245] *Ibid.*, Art. L222-6.

death of such a partner entails the dissolution of the partnership.[246] In Germany, the contrary is true: unless otherwise laid down in the agreement, the death of a partner entails his retirement from the partnership.[247] A private limited liability company is not subject to mortality.

The use of the German GmbH & Co KG and the French *société en commandite simple à responsabilité limitée* appears to make possible the use of more flexible structures to meet the needs of particular businesses, than appears to be the case with the GmbH or SARL.[248] Furthermore, in both entities, those who provide capital may well be limited partners whose influence on the management of the partnership may not be significant. A person who holds the necessary majority of shares or capital in a GmbH[249] or SARL[250] which is the unlimited partner in one of the two special types of limited partnership mentioned above should be able to become manager of the GmbH or SARL and indirectly of the limited partnership. This might not be possible if the entity took a different form. This possibility of separating the managerial and capital providing functions explains the success of the large GmbH & Co. KGs which offer their shares to the public.

The *Drittelbeteiligungsgesetz* of 2004[251] which replaced the Works Council Act (*Betriebsverfassungsgesetz*) of 1952, is not directly applicable to GmbH & Co. KG, and thus this type of undertaking can be used to avoid employee codetermination when the number of relevant employees does not exceed 2,000. The limited partnership employees are attributed to the GmbH if a majority of the limited partners holds a majority of the shares or votes in the GmbH.[252] It follows from Articles L225-23 and L225-71 of the French Commercial Code that there is only limited scope for compulsory codetermination at board level in French public companies. Furthermore, the rules contained in Article L432-6, paragraph 1 of the Labour Code (*Code du Travail*) provide for a merely consultative role for the members of the works committee at the meetings of the executive

[246] *Ibid.*, Art. L222-10.
[247] This follows from para. 131 (3) no. 1 Commercial Code for the OHG and from paras. 161, 177 Commercial Code for the KG. See K. J. Hopt in A. Baumbach and K. J. Hopt, *Handelsgesetzbuch*, 32nd edn (Munich: CH Beck, 2006), § 139, para. 1. Instead of the retirement, the articles of association can provide for a continuation clause with the partner's heirs.
[248] Schmidt, *Gesellschaftsrecht*, § 56 III 4.
[249] German Private Limited Liability Companies Act, para. 6 al 5.
[250] French Commercial Code, Arts. L223-18, L223-29(1).
[251] *Drittelbeteiligungsgesetz* or DrittelbG, BGBl. 2004 S.974.
[252] Codetermination Act (*Mitbestimmungsgesetz*, MitBestG) 1976, para. 4(1).

board or supervisory board of a company. Thus the use of the French *SCS à responsabilité limitée* provides no great advantage from the viewpoint of codetermination at board level.

As already pointed out above, Council Directive 90/605/EEC, which amends Directive 78/660 on Annual Accounts and Directive 83/349 on consolidated accounts as regard the scope of the Directive has recently been implemented in Germany by the *Kapitalgesellschaften- und Co. Richtliniengesetz* (KapCoRiLiG) of 14 February 2000.[253] The former exemption of German GmbH & Co KGs from the accounting requirements of the Fourth and Seventh Directives have now ceased.[254]

4. Disadvantages

The French *SCS à responsabilité limitée* and the German GmbH & Co. KG have substantially the same disadvantages. This type of entity suffers from a certain lack of transparency insofar as it may be difficult to determine what or who lies behind the entity which is the unlimited partner. Furthermore, these entities have a complex structure and are governed by a complex legal regime and partnership contract. Although they have the apparent advantage of imposing limitations on the liability of members, such persons may often in practice be asked to give guarantees to banks or other creditors.[255]

5. Protection of creditors and the limited partners

The German GmbH & Co KG has acquired a somewhat dubious reputation which it does not entirely deserve, on the grounds that it is sometimes used as a vehicle for fraudulent practices.[256] However, many family undertakings which are run with scrupulous honesty take this form. Rules have been developed by the courts and the legislature which are intended to protect the creditors of and the limited partners in such an undertaking.[257] Similar rules to those governing the preservation of the capital of a GmbH have been applied to the GmbH & Co. KG. Thus, in a number of decisions, the Supreme Court has held that if a limited partner

[253] Act of 24 February 2000 transposing, inter alia, Directive 90/605 into German Law [2000] Federal Gazette I 154. See on this D. Eisolt and W. Verdenhalven, 'Erläuterung des Kapitalgesellschaften und Co-Richtlinie-Gesetzes (KapCoRiLiG)' [2000] NZG 130; D. Zimmer and T. Eckhold, 'Das Kapitalgesellschaften & Co. – Richtlinie-Gesetz – Neue Rechnungslegungsvorschriften für eine große Zahl von Unternehmen' [2000] NJW 1361.

[254] Schmidt, *Gesellschaftsrecht*, § 56 IV 6; Kübler and Assmann, *Gesellschaftsrecht*, 353.

[255] A. Guineret-Brobbel Dorsman, *La GMBH & Co. KG allemande*, 149.

[256] Schmidt, *Gesellschaftsrecht*, § 56 I 3.

[257] Kübler and Assmann, *Gesellschaftsrecht*, 357.

receives a payment out of the funds of a GmbH & Co. KG, he may be liable to refund it if such payment has the effect of making the liabilities of the GmbH exceed its assets.[258] It is noteworthy that the laws governing the preservation of the capital of a GmbH have been applied directly to the GmbH & Co. KG by way of analogy. Furthermore, paragraph 172a of the Commercial Code (HGB) makes the rules contained in paragraphs 32a and 32b GmbH, which are concerned with loans from shareholders of a GmbH applicable by way of analogy to loans from partners or shareholders in a GmbH & Co. KG in which no natural persons are unlimited partners. Under these rules, certain loans may be treated as if they were capital, and are not repayable in insolvency proceedings. It seems likely however that these rules may be repealed in the near future. The partnership agreements of publicly held GmbH & Co. KGs are frequently orientated in favour of the GmbH. They may be reviewed by the courts to protect the limited partners therein.

6. GmbH & Co KGaA and *société en commandite par actions à responsabilité limitée*

The above two entities which correspond with one another to a considerable extent are limited partnerships with shares, in which the unlimited partner is a private limited liability company.[259] Such a company is often managed by a person or persons who wish to expand their business and to obtain finance whilst maintaining control, such that they are not in danger of being outvoted or removed from their office. Under French law, the first managers of a *société en commandite par actions* are, according to Article L226-2 of the Commercial Code, appointed by the articles. Subsequent managers must be appointed by the general meeting with the consent of all the unlimited partners, unless the statutes otherwise provide. Furthermore, Article L226-2 provides that the removal of the managers is governed by the articles, which may provide that the unanimous consent of the partners is necessary for such removal. In the entity under consideration, the private limited liability company will be appointed as the managing partner; there may be no other unlimited partners. It will obviously be very difficult to remove it from office. For this reason, the French *SCA à responsabilité limitée* has been treated as providing a useful means of combating contested take-over bids in France. Such bids are still not very common in Germany, but it appears

[258] BGHZ 60, 324; BGHZ110, 342; Schmidt, *Gesellschaftsrecht*, § 56 V 1. b.

[259] Schmidt, *Gesellschaftsrecht*, § 32 I.

that the GmbH & Co. KGaA could be used for a similar purpose. Nevertheless, the use of the French entity has not shown itself to be an infallible protection against corporate 'raiders' in France. It also seems to involve the danger of entrenching an ageing and inefficient management.

French literature has generally welcomed the introduction of the *SCA à responsabilité limitée*: in one case, the Supreme Court (*Cour de Cassation*) condemned the formation of such an entity for the sole purpose of enabling the majority shareholder to appropriate power and dividends to himself.[260] The Stock Exchange showed itself reluctant to allow the admission of the shares of the *SCA à responsabilité limitée* (which are freely transferable) to quotation, on the official market, but permitted this step in 1988. An attempt to enact legislation introduced by Senator Dailly having the intention of drastically limiting the use of the *SCA à responsabilité limitée* failed.

A large number of German academics showed themselves opposed to the use of the GmbH & Co KGaA because of the circumventions of the law which it permitted. However, the German Supreme Court (*Bundesgerichtshof*), after having failed to pronounce on the matter in its judgment in *Holzmüller*[261] in 1982, held in a decision of 24 February 1997 that German law did not prevent a KGaA from having a private limited liability company as an unlimited partner, even if the company was the only unlimited partner.[262] In 1998, the German legislator followed this decision by amending paragraph 279(2) AktG.

7. French *groupement d'intérêt économique*

Unlike the French *SCA à responsabilité limitée* which is a hybrid form of business entity which owes its existence to the inventiveness of entrepreneurs, the French *groupement d'intérêt économique* (GIE), which is in more general use than the former type of entity, owes its existence to the French legislature. It was introduced by the Ordonnance of 23 September 1967, which was amended by the Law of 13 June 1989. The French GIE is a new type of business association which may be formed for a stipulated period of time, and which has fiscal transparency, and legal personality. It has some of the characteristics of a partnership and certain of those of a company and enjoys a considerable measure of flexibility. Thus, it can be set up without any capital, need not be designed to make profits, and may have commercial or civil objects. Its members may be individuals,

[260] Cass 24 January 1995 *Revue des Sociétés* 1995 46 (note by Jeantin).
[261] BGHZ 83, 122, 133. [262] BGHZ 134, 392; BGH [1997] NJW 1923.

partnerships or companies, whether civil or commercial, and may be of French or any other nationality. However, the objects of a GIE are subject to certain limits. These must be to facilitate or develop the economic activities of its members or to improve or increase the profits or benefits of such activities. The grouping is often used for the purpose of research activities and ancillary services.

One of the reasons for the invention of this new legal form in France was that at the relevant time, a company could not be set up for the purpose of providing economic benefits for its members. The only entity which could then be set up for this purpose was an *association* coming within the law of 1901. Law 78-9 of 4 January 1978 changed the definition of a company contained in Article 1832 of the Civil Code so as to include within this provision all contracts by which one or more persons combine their assets or activities in order to participate in the profits or to benefit from the economies which may result. This amendment of Article 1832 now allows companies to be formed for the purpose of providing economic benefits for their members. The *association* can be used for this purpose as well, provided that its object is not to obtain pecuniary gains or material gains which add to the assets of its members. However, the use of the *association* has certain disadvantages when compared with that of the company.

The French GIE formed the inspiration for the setting up of the European Economic Interest Grouping, which owes its existence to a Community regulation.[263] This entity, which was the first supranational business form to be set up within the Community, is governed by a rather complex legal regime, and does not appear to have enjoyed outstanding success, although it has been used by firms in the professions and in other activities situated in different countries as a means of cooperation. The EEIG is dealt with in a separate chapter, which also considers the European Company and the European private company.

[263] Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) OJ 1985 L199/1.