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The sale of a company's entire assets

*– An analysis of the law of the joint stock corporation, the limited liability company and the
commercial partnerships –*

– Summary –

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I. Introduction

Business transactions and corporate restructuring – Mergers & Acquisitions – are a pivotal element of handling the (continuous) structural change in economy. Of central importance to the management is under which circumstances the sale of a company's assets requires the shareholders' consent, and which formal requirements have to be fulfilled for such consent. These legal questions with respect to the sale of the "entire" assets of a company are resolved by the analysis "Die Veräußerung des ganzen Gesellschaftsvermögens" (in English: "The sale of a company's entire assets"). It discusses the premises of a sale of a company's entire assets (*vide sub II.*) as well as special issues arising in this respect (*vide sub III.*). Of particular practical importance is, furthermore, the analysis of the formal requirements of a legally valid shareholders' consent to the sale of the company's entire assets (*vide sub IV.*).

II. Interpretation of the term "a company's entire assets"

The core of the book is the investigation of the circumstances which qualify the sale of a company's assets as the sale of a company's "entire" assets. It is generally accepted that a sale of the entire assets is not limited to a sale of the assets in total without exceptions, but can also apply if a small amount of assets remains with the company – otherwise, the reservation of the shareholders' consent might be thwarted by excluding particular assets from the sale. Accepted is also that the question at which amount a sale is deemed to comprise the entire assets cannot be answered only "quantitatively" (*i.e.* by a comparison of the value of the sold with the total assets), but also pursuant to "qualitative" criteria.

Legal literature has developed the opinion that under the qualitative criteria a sale of a company's entire assets is given if a sale of assets triggers a factual amendment of the company's object (its business as defined in the articles of association; in German: "Unternehmensgegenstand"). The author proves that this opinion is based on a misunderstood statement of the German Federal Court of Justice which ruled in its well-known "Holzmüller" case that, for the question if a sale of the entire assets is applied, it shall be decisive whether "with the remaining assets the company still stays in the position to continue its statutory purpose,

even though to a limited extent".¹ However, the term company's object has to be distinguished from the company's purpose (in German: "Unternehmensziel"). While both elements are part the company's function (in German: "Unternehmenszweck"), the company's purpose is the "major line" for which the shareholders joined² – typically the realization of profits in favor of its shareholders³. In contrast, the company's object is the scope of occupation which was agreed by the shareholders to pursue the company's purpose. In a detailed analysis the author illuminates that the German Federal Court of Justice understood the term "purpose" actually as the major line for which the shareholders joined; furthermore, he demonstrates why it is preferable to base the qualitative criteria upon the company's purpose rather than upon its object.⁴ As a result by virtue of the qualitative criteria, it depends on whether the company, after the sale of assets, remains in the position to continue its purpose of profit realization in favor of its shareholders.

While by virtue of the quantitative criteria it is decisive whether the sold assets represent a certain high amount of the total assets' value, under the qualitative criteria it is decisive whether the sold assets represent a certain high amount of the total assets' earning power. The author answers the question under which circumstances each criterion is fulfilled in two steps: (i) by proving that a generalizing approach is preferable in comparison to a case-by-case view,⁵ and (ii) by a detailed investigation of the threshold, for both the quantitatively⁶ and qualitatively⁷ criteria, which has to be exceeded by a sale to be deemed as the sale of the company's entire assets. Based on a comparison with a multitude of regulations applying to the sale of assets, and various instruments of corporate restructuring (squeeze-out, legal integration, control and profit transfer agreement, and business sale liquidation), the author comes to the conclusion that a threshold of

¹ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 170-187.

² Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 126-133.

³ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 133-145.

⁴ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 170-196 and 201-209.

⁵ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 49-77.

⁶ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 79-113.

⁷ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 196-202.

95% is applicable. Hence, the sale of a company's entire assets is given pursuant to the quantitative criteria if the remaining assets amount to only 5% of the total assets' value⁸, and pursuant to the qualitative criteria if the remaining assets attain only 5% of the total assets' earning power⁹. Value and earning power of the respective part of assets have to be determined by a business valuation, whereupon exceptions have to be considered (regarding the entity resp. equity capitalization approach, the consideration of the shareholders' income tax, the consideration of the non-operating assets).¹⁰

III. *Special issues regarding the sale of a company's entire assets*

The author elaborates further particular questions with respect to the sale of a company's entire assets – notably whether the consideration for the assets' sale has to be taken into account¹¹, to what extent repeated sales, which do only conjunctly result in the sale of the entire assets, should be taken into account¹², and whether the purchaser's knowledge is relevant¹³.

IV. *Legal consequences with respect to the several companies including formal requirements for the shareholders' consent*

The sale of a company's entire assets without the required shareholders' consent causes the invalidity of the purchase agreement – not only under the stock corporation law¹⁴ but also under the laws of the li-

imited liability company¹⁵ and of the commercial partnerships¹⁶. Therefore, the author's statements with respect to the premises of a valid shareholders' consent are of specific practical relevance. While the law of the stock corporation contains explicit provisions in that respect¹⁷, the requirements for other legal forms are not explicitly regulated. For that reason, the author clarifies the premises with respect to the limited liability company¹⁸ and the commercial partnerships¹⁹ – in particular whether such consent has to be constituted by a shareholders' resolution, which majority applies, and which formal requirements have to be obtained for a resolution (resp. which formal requirements have to be obtained for the consent of those shareholders who were absent from the shareholders' meeting). Furthermore, the author illustrates whether the articles of association may deviate from the majority required by law.

⁸ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 79-113.

⁹ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 196-202.

¹⁰ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 114-122 and 213-218.

¹¹ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 224-226.

¹² Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, S. 226-234.

¹³ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 41-46.

¹⁴ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 235.

¹⁵ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 241-245.

¹⁶ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 270-287, with modifications.

¹⁷ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 235 f.

¹⁸ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 236-264.

¹⁹ Packi, Die Veräußerung des ganzen Gesellschaftsvermögens (*The sale of a company's entire assets*), 2011, p. 265-288.