

KATARZYNA SZCZEPAŃSKA¹

How to understand the principle of non-splitting of shares in Polish and German company law – a tale of historical equivalence and comparative importance

Abstract: The article examines the understanding of the principle of non-splitting, showcasing the historical and comparative equivalence of the German and Polish legal systems. It concerns the non-splitting of shares in Polish and German law, as applied to the limited liability company and the non-public joint-stock company. It is aimed at conceptualizing in a comparative manner the theoretical model of non-splitting, and encompasses discussions about its nature, content, and normative bases for its binding force. Under Polish law two different understandings of the principle of non-splitting of shares are distinguished: the principle of non-splitting in the strict sense, and the principle of non-splitting in the broad sense. It is argued that German law uses the concept of prohibition of splitting, while in the Polish legal system this concept has been further developed and is to be perceived as a principle of non-splitting of shares that is to be classified as general principle of company law.

Keywords: company law, share, limited liability company, non-public joint-stock company.

1 Katarzyna Szczepańska, Adam Mickiewicz University Poznań, Faculty of Law and Administration, Poznań, Poland. e-mail: katarzyna.szczepanska@amu.edu.pl, <https://orcid.org/0000-0002-3852-5078>.

Introduction

The inspiration for this article² is the view of S. Sołtysiński expressed in the Volume 17B of the Private Law System,³ which covers specifically issues related to the law of companies in Poland. Sołtysiński proposed that the theory of the Polish commercial law (company law) should recognize the principle of non-splitting as one of the fundamental principles governing companies.

More importantly, Polish scholars, including the above-mentioned Sołtysiński, utilized the German theoretical and legal concept of “*Abspaltungsverbot*” (“the prohibition of splitting”) as early as the 1990s, when it became apparent that such a formula, inspired from the German *Abspaltungsverbot*, has its place in the theory of company law in Poland and needs to play the important role of a systemic principle. Historically speaking, the theoretical and legal context of the Polish principle of non-splitting (previously also named by scholars in Poland as “prohibition of splitting”) was heavily inspired by German law.⁴ Indeed, the Polish principle of non-splitting has its comparable source equivalent in the German *Abspaltungsverbot*.

The juxtaposition of these two legal institutions – the Polish principle of non-splitting with the German “*Abspaltungsverbot*” (prohibition of splitting) – aims to help explain the meaning of this Polish systemic principle of company law. As explained in the article, the principle of non-splitting has not been comprehensively codified in the Polish Code of Commercial Companies, so this contribution aims to highlight its characteristics, the basis for its validity, and its practical value, thanks to the comparative analysis with the German counterpart.

Therefore, the choice of German law as a comparative equivalent for the purpose of this article seems clearly understandable. German company law

2 This paper is part of the research project funded by the National Science Center of Poland (Narodowe Centrum Nauki) UMO-2014/13/N/HS5/01442.

3 Stanisław Sołtysiński in *System Prawa Prywatnego*, vol. 17b, *Prawo spółek kapitałowych*, ed. S. Sołtysiński, 1st ed. Warszawa, 2010, 18.

4 Stanisław Sołtysiński in Stanisław Sołtysiński, Andrzej Szajkowski, and Janusz Szwaja, *Kodeks handlowy. Komentarz*, vol. 1. Warszawa, 1994, 136.

is not only a commonly used inspiration for the Polish legislator in general, but the concept of *Abspaltungsverbot* has been specifically mentioned in the doctrinal works concerning the Polish principle of non-splitting. The comparative study could be very fruitful food for thought since the institution of *Abspaltungsverbot* has been quite widely described in German legal scholarship,⁵ and in German jurisprudence.⁶ This comparative approach therefore aims to provide a better, more in-depth understanding of the principle of non-splitting in the Polish company law system.

In this article, this comparison is based on the comparative studies of legal institutions understood as sets of legal norms,⁷ as reflected by their functionality. This comparability related to the functions of the principle of non-splitting and *Abspaltungsverbot* concerns in particular the essence of share rights, as well as trading in share rights and its limitations.

The comparative method⁸ is applied in such a way that a representative legal order was selected for the system (legal culture) of civil law: German law. The choice of German law as the subject of comparative analysis relates direct-

5 i.e.: Christoph H. Seibt, “Verbandssouveränität und Abspaltungsverbot im Aktien und Kapitalmarktrecht Revisited: Hidden Ownership, Empty Voting und Kleinigkeiten”, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 39, no. 5. 2010: 795–800; Karsten Schmidt, *Gesellschaftsrecht*, 4th ed. Köln, Berlin, Bonn, München, 2002, 560–562; Hans-Joachim Fleck, “Stimmrechtsabspaltung in der GmbH?” in *Festschrift für Robert Fischer*, eds. Marcus Lutter, Walter Stimpel, and Herbert Wiedemann. Berlin, New York, 1979, 107–129; Harm Peter Westermann, *Vertragsfreiheit und Typengesetzlichkeit im Recht der Personengesellschaften*. Heidelberg, New York, 1970, 425; Herbert Wiedemann, *Die Übertragung und Vererbung von Mitgliedschaften bei Handelsgesellschaften*. München, Berlin, 1965, 282.

6 i.e.: judgment of BGH of 25 February 1965, II ZR 278/63 (Karlsruhe), NJW 1965, no. 30, p. 1378 – (NJW 1965, 1378); judgment of BGH of 10 November 1951, II ZR 111/50 (Celle), NJW 1952, z. 5, p. 178 – (BGHZ 3, 354, 357 = NJW 1952, 178); judgment of BGH of 14 May 1956, II ZR 229/54 (Karlsruhe), NJW 1956, no. 33, p. 1198 – (BGHZ 20, 363, 365 = NJW 1956, 1198); judgment of BGH of 11 October 1976, II ZR 119/75, DB 1976, no. 48, p. 2295–2298 – (DB 1976, 2295–2298); judgment of BGH of 17 November 1986, II ZR 96/86 (Köln), NJW 1987, no. 13, p. 780 – (NJW 1987, 780).

7 Roman Tokarczyk, *Komparatystyka prawnicza*, 8th ed. Kraków, 2005, 68.

8 Nils Jansen, “Comparative Law and Comparative Knowledge”, in *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann, and Reinhard Zimmerman. Oxford, 2008, 305–338.

ly to the roots of the Polish company law system, specifically the Polish Commercial Code of 1934 – the predecessor to the current Code of Commercial Companies of 2000. In fact, the structure of a joint-stock company and limited liability company in the Polish Commercial Code, just like the entire Code, was modelled on German law.⁹ The current Polish Code of Commercial Companies is an “heir”¹⁰ to the Commercial Code of 1934 since it was modelled in particular on the doctrinal and jurisprudence foundations developed under the rule of the Commercial Code¹¹. This approach is commonly referred to as the principle of the continuation¹² of the fundamental legal solutions of Polish company law.

Connecting those German influences and their effects on the Commercial Code and the current Code of Commercial Companies through the principle of continuation with the subject of this paper, it is worth noting that at the time when the Commercial Code was still in force, several important questions arose in connection with selling (trading) of shares, inter alia, whether a shareholder may dispose of individual rights incorporated in a share, or, in the event of selling of a share, disposing (transferring) of such rights must cover all rights related to that share (with the exception of claims arising from that share – e.g. due dividend instalments, which could be sold separately).¹³ This problematic question, which is relevant in practice, is still being contemplated under the current Code of Commercial Companies in Poland. In addition, under this Code, the scope of the disposal (of a share) is also a concerning issue. The question is therefore whether the disposal (of a share) must encompass all the rights enshrined in a share or could

9 Józef Frąckowiak, in *System Prawa Handlowego*, vol. 2B, *Prawo spółek handlowych*, ed. S. Włodyka, Warszawa, 2007, 24; Uzasadnienie projektu ustawy Kodeks Spółek Handlowych, Druk Nr 1687, Sejm Rzeczypospolitej Polskiej III Kadencji, p. 22.

10 Uzasadnienie projektu ustawy Kodeks Spółek Handlowych, Druk Nr 1687, Sejm Rzeczypospolitej Polskiej III Kadencji, p. 1.

11 Andrzej Szajkowski, in *System Prawa Prywatnego*, vol. 16, *Prawo spółek osobowych*, ed. A. Szajkowski, 2nd ed. Warszawa, 2016, 12.

12 Szajkowski, 2, 45.

13 Janusz Szwaja, and Iwona Mika, “Wpływ zabezpieczenia roszczenia przez zajęcie praw z akcji na wykonywanie tych praw przez akcjonariusza”, *Prawo Spółek* 4, no. 5(41). 2000: 6.

be limited specifically to one or more rights embodied in the share (partial rights). This concerns the idea that there exists a functional relationship between the essence of the share and those rights embodied in it.¹⁴

These two mentioned examples show how the theoretical problem elaborated in this article, through the comparative research, is directly translated into practical aspects of the application of rules governing the functioning of companies.

The concept of non-splitting (Abspaltungsverbot) in German law

To explain the *Abspaltungsverbot* in German law, it is necessary to explain that normally a shareholder owns a share in a company that encompasses the shareholder's rights. In other words, the share can be understood as including a bundle of rights. Under special circumstances, a question may appear, as already mentioned, as to whether particular rights could be separated from the bundle of rights, without the change of the ownership of the share as such. This means that even if the shareholder still owns the share, and therefore all the rights incorporated in such a share, another person might be able, under those special circumstances, to "acquire" a particular right incorporated in that share, without becoming a shareholder. In order to verify whether the so-called "splitting" of a right may occur, in special circumstances, in Germany¹⁵ the so-called "test of non-splitting" has been developed. According to its premise, it is proposed to test how voting right will act (the so-called voting right test), i.e. who will be entitled to it in the case of such special legal relationships as a pledge, usufruct or trust.

14 Andrzej Szumański, in *System Prawa Prywatnego*, vol. 19, *Prawo papierów wartościowych*, ed. A. Szumański, 1st ed. Warszawa, 2006, 297; Andrzej Szumański in Wojciech Pyziół, Andrzej Szumański, and Ireneusz Weiss, *Prawo spółek*. Warszawa, 2004, 659–660.

15 Schmidt, 561.

The linguistic approach to non-splitting in German legal language should be considered significant, as German law in this context consistently uses the term “*Abspaltungsverbot*”, thus emphasizing the element of the prohibition (“*Verbot*”).

In Germany, the idea of the non-splitting of company shares has been conceptually linked to the more general theoretical concepts governing private law. This idea is rooted in the BGB (German Civil Code) rules on civil partnership (that is, civil law partnerships— so-called “*BGB Gesellschaft*”). The German concept of *Abspaltungsverbot* has developed further on the ground of partnerships, and thereafter this concept has been transferred, with appropriate modifications, onto companies.

In German law, it is often understood that the origins (foundations) of the prohibition of splitting (*Abspaltungsverbot*) are set out in § 717 BGB (German Civil Code), which regulates civil law partnerships (*BGB Gesellschaft*).

The provision of § 717 BGB stipulates that, despite the consent of another partner of the civil law partnership (*BGB Gesellschaft*), the rights to manage the partnership that belong to a partner may not be transferred to a third party without transferring the membership rights. Moreover, the allocation of these rights to a third party (a non-partner in the *BGB Gesellschaft*) for the purpose of exercising them is always revocable (it may be revoked at any time). The *Abspaltungsverbot* therefore expresses the nature of the civil law partnership (*BGB Gesellschaft*), which encompasses not only management rights, but also the rights to run the civil law partnership’s affairs, the right to information, the right of control, and voting rights. All these rights are in fact related to participation. In other words, all the rights stemming from the membership (participation) in a civil law partnership (*BGB Gesellschaft*), which are dependent on and inherent to this membership, and therefore could not be separated from it.¹⁶

16 Peter Ulmer, “Zur Bedeutung des gesellschaftsrechtlichen Abspaltungsverbots für den Nießbrauch am OHG (KG)-Anteil” in *Festschrift für Hans-Joachim Fleck zum 70. Geburtstag am 30. Januar 1988*, eds. Reinhard Goerdeler, Peter Hommelhoff, Marcus Lutter, and Herbert Wiedemann. Berlin, Boston, 1988, 384–385.

When transposing these ideas derived from above-mentioned § 717 BGB onto partnerships and companies in Germany, the prohibition of splitting (“*Abspaltungsverbot*”) is perceived in the legal doctrine as one of the general construction rules¹⁷ for German commercial law (company law).

Through the lens of a company, it is emphasized that one of the basic features of the rights related to the membership (generally speaking, expressed by having a share – by being a shareholder) in a limited liability company, or in a joint-stock company, is that individual rights embodied in a share cannot be detached from that share as such. Consequently, those individual rights embodied in a share cannot be traded (sold) on their own (as separate rights), nor can they be encumbered. In other words, the individual rights embodied (incorporated) in a share cannot be detached from that share, and, in addition, as such separately isolated rights they cannot be transferred to a third party without the simultaneous transfer of the share (as a “whole”).

At the same time, it is argued in German law that the prohibition of splitting applies only to the core of rights embodied in a share, and not to individual claims arising from share, such as a dividend claim.¹⁸ Consequently, the shareholder’s rights pertaining to them through their share in a company, and the related obligations, are all inherent to their membership, and therefore they cannot be separated (extracted) from share or transferred individually (as separate rights) without a transfer of a share.

The principle of the non-transferability of (individual) membership rights resulting from § 717 BGB is absolute in relation to corporate rights and leads to the invalidity of actions that are contrary to it. This rule is confirmed in the jurisprudence and in doctrinal works.¹⁹ The dismemberment of the member-

17 Thomas Raiser, and Rüdiger Veil, *Recht der Kapitalgesellschaften, Ein Handbuch für Praxis und Wissenschaft*, 5th ed. München, 2010, 65–66.

18 Tim Drygala, Marco Staake, and Stephan Szalai, *Kapitalgesellschaftsrecht: Mit Grundzügen des Konzern- und Umwandlungsrechts*. Berlin, Heidelberg, 2012, 292.

19 Judgment of BGH of 10 November 1951; judgment of BGH of 14 May 1956; judgment of BGH of 22 January 1962, II ZR 11/61, NJW 1962, no. 16, p. 738 – (BGHZ 36, 292, 293 ff. = NJW 1962, 738); judgment of BGH of 17 November 1986, – concerns § 134 AktG; judg-

ship (participation) is therefore not possible, and is to be perceived as violating *Abspaltungsverbot*.

Although the norm expressed in § 717 BGB applies to all the rights arising from membership, as the rights resulting from membership are in principle non-transferable corporate rights, such as the voting right, the German doctrine also adopted the position, in principle, that the prohibition of splitting covers property rights as well, for instance, at least the right to profit. Consequently, the profit entitlement (right) itself can only be transferred jointly with the share and not as an isolated, separate right. This view on property rights is supplemented by a caveat, that it changes when a specific claim arises, for instance, a claim for payment of a particular amount of annual dividend.

To differentiate between the property rights embodied in a share, which cannot be disposed of separately, and the claims stemming from those property rights, the moment when individual property rights are specified must be properly and precisely estimated so that it can be converted into a claim. On the example of the right to profit (i.e. a property right embodied in a share), only when the right to profit is made concrete by a resolution on profit distribution and therefore materializes in the form of a specific claim, does such a claim become independent, and therefore it can be “separated” from the share. In fact, *Abspaltungsverbot* no longer encompasses those claims, as it would have the property rights incorporated in the share. In addition, future specified claims can also be transferable. They can be transferred to the assignee (transferee) as soon as they arise. However, the corporate rights related to the claim, e.g. voting rights in the case of a resolution concerning the distribution of profit, remain with the shareholder (and their share) and are non-splittable.²⁰

In German law, the applicability of § 717 BGB to other types of partnerships and companies than civil law partnerships (*BGB Gesellschaft*) results from the fact that the German Commercial Code (HGB) envisions in § 105

ment of BGH of 11 July 1960, II ZR 260/59, NJW 1960, no. 44, p. 1997 – (BGHZ 33, 105, 108 ff. = NJW 1960, 1997).

²⁰ Raiser, and Veil, 65–66.

para. 3 HGB that § 717 BGB applies to German general partnerships (“*Offene Gesellschaft*”) – § 105 (3) HGB and limited partnerships – “*Komandit Gesellschaft*” (§ 161 (2) HGB). In addition, it is assumed under the German stock law that § 8 sec. 5 AktG is the emanation of § 717 BGB in relation to a joint-stock company. According to this provision, shares are indivisible (non-splittable) – *Die Aktien sind unteilbar*. A comparable provision to § 8 sec. 5 AktG is in fact included in the Polish Code of Commercial Companies. Indeed, Art. 333 § 1 sentence 1 of Code of Commercial Companies has the same wording: “Shares are indivisible (non-splittable)”. Nevertheless, scholars in Poland have not provided any analysis whatsoever in the commentaries to this provision as to whether the principle of non-splitting in Poland could be inferred from this provision when it comes to Polish joint-stock companies.

In case of a German joint-stock company, it is rather unquestionably indicated that *Abspaltungsverbot* has a statutory basis. The splitting of individual rights and obligations incorporated in a share is inadmissible based on the already mentioned § 8 para. 5 AktG.²¹

Moreover, it is assumed that § 8 para. 5 AktG is an expression of the general rule contained in § 717 BGB under the German stock law. For this reason, § 8 para. 5 AktG is regarded as a rule regulating the prohibition of splitting in relation to a joint-stock company as an overarching construction rule of “company law” (more broadly, the law of “*Verbandsrecht*” – associations). This general rule states that the membership rights in the company may not be transferred to other persons without the simultaneous transfer of share. Both shareholders and the company are the addressee of this rule.

The highest German court in commercial matters, *Bundesgerichtshof* (BGH), has already expressed its views on *Abspaltungsverbot*, also applying the “non-splitting test”. In the judgment of October 11, 1976, II ZR 119/75 the BGH indicated that membership in a limited liability company

21 Stefan Vatter, “Commentary to § 8 AktG”, Nb 50, in *Kommentar zum Aktiengesetz*, vol. 1, §§ 1–178, eds. G. Spindler, and E. Stilz. München, 2007, 43.

(GmbH) is based on an internally consistent (fine-tuned) unity of rights, obligations, and responsibilities. A situation in which this unity would be disrupted by a long-term detachment of an essential membership right, which is the voting right, or its permanent exercise by a person who is not a shareholder, without the shareholder being able to restore it to its original condition (without the “return” of this right to the shareholder), could lead to significant disruptions to the company’s internal structure and to legal uncertainty. Similarly, in BGH’s judgment of November 17, 1986, II ZR 96/86²² in a joint-stock company case, BGH ruled that the voting right in a joint-stock company cannot be separated (“split”) from shares and transferred to another person without transferring shares.

However, considering the above-mentioned differentiation between the transfer of individual rights embodied in a share (which is contrary to *Abspaltungsverbot*) and the possibility of the exercise of un-splittable rights by a third person (in relation to shareholders), it needs to be underlined that the prohibition of splitting does not run counter to a general agreement, under which an individual shareholder’s rights will be effectively exercised by a third party (through a transfer under the mentioned special circumstances²³). This issue primarily concerns the rights to managing the company’s affairs and granting proxy rights. However, it also concerns the right to control the company or the voting right. The difference between the former and the latter is that the right to control the company and the voting right may not be perpetually transferred for exercise to a third party and shareholders may at any time deprive the third party of the possibility of exercising them if they wish to exercise these rights themselves again. Indeed, the delegation to exercise rights for a certain period of time to a third party does not contradict the prohibition of splitting because under such circumstances it is not a final transfer.

22 Judgment of BGH of 17 November 1986.

23 Carsten Schäfer, “Commentary to § 717 BGB”, Rn 9–10 in *Münchener Kommentar zum BGB, Schuldrecht. Besonderer Teil III*, ed. M. Habersack, 6th ed. München, 2013, 367–368.

The principle of non-splitting in Polish law

The above-mentioned model rooted in the German legal system in § 717 BGB can be found in the Polish legal system, showcasing that the German *Abspaltungsverbot* was the above-mentioned inspiration for Polish solutions in this regard. Broadly speaking, the principle of non-splitting in Polish company law can be characterized as the prohibition (impossibility) of disintegrating a share understood as a subjective right.

Historically speaking, the concept of § 717 BGB was first reproduced in Art. 565 § 1 of the Polish Code of Obligations of 1933.²⁴ Similarly to § 717 BGB, Art. 565 § 1 of Code of Obligations regulated the internal relations of the partnership of civil law (“*spółka cywilna*”).

Art. 565 § 1 of the Code of Obligations of 1933 stipulated that “in relation to the civil law partnership, a partner may not dispose of the rights (stemming from the civil law partnership contract), with the exception of rights to benefits in money or in other things, which they are entitled to as a share in profits during the civil law partnership’s lifetime, return expenses, remuneration for running the affairs, and rights arising from the division of property after the resignation of a partner or dissolution of the civil law partnership”. This provision was in force until 1965, when the Polish Civil Code of 1964 (“*Kodeks cywilny*”) came into force. The Civil Code of 1964, which is still binding in Poland, does not provide for a similar concept, when compared with Art. 565 § 1 of Code of Obligations. Currently, Art. 863 of the Polish Civil Code²⁵ seems to be most similar to Art. 565 § 1 of the Code of Obligations. This shows a semi-direct link between the solution envisioned under the BGB in Germany and potentially also under the current Polish Civil Code.

²⁴ Regulation of the President of the Republic dated October 27, 1933 – Code of Obligations (Journal of Laws of October 28, 1933, no. 82, item 598 as amended).

²⁵ Wojciech Górecki, “Dopuszczalność przenoszenia członkostwa w spółce cywilnej”, *Przeгляд Prawa Handlowego*, no. 1. 2000: 41.

In terms of definition, the principle of non-splitting can be characterized from two perspectives. It is customary in the scholarship²⁶ to differentiate between the understanding of the principle of non-splitting in the broad sense (*sensu largo*) and a comparable understanding of this principle in the strict sense (*sensu stricto*). The above-mentioned distinction seems to help to fully explain the content of the principle of non-splitting, so both aspects of this principle, i.e. the broad approach and the narrow one, are discussed below.

Non-splitting in the broad sense can be understood as a “prohibition” (impossibility) of splitting (separating) organizational (corporate) rights from obligatory property rights²⁷ embodied in a share.

Polish scholars articulate various positions as to how to correctly understand the principle of non-splitting in Polish company law.

S. Sołtysiński points out that traditionally the term “splitting of shareholders rights” (*Abspaltung*) is understood as the separation of rights incorporated in a share from the share itself, identified as membership in a company (German: “*Mitgliedschaft*”). Sometimes, however, this prohibition is reduced to the prohibition of splitting organizational (corporate) rights from obligatory property rights.²⁸

Ł. Gasiński seems to share the doctrine’s statements regarding the distinction between not-splitting *sensu stricto* and *sensu largo*. However, non-splitting in the broad sense is defined by Ł. Gasiński in a different way, i.e. according to him, it may be possible to separate corporate law (voting rights) from other property rights.²⁹

26 Andrzej Herbet, *Obrót udziałami w sp. z o.o.*, 2nd ed. Warszawa, 2004, 163.

27 Andrzej Herbet, in *System Prawa Prywatnego*, vol. 17a, *Prawo spółek kapitałowych*, ed. S. Sołtysiński, 2nd ed. Warszawa, 2015, 406.

28 Stanisław Sołtysiński in Stanisław Sołtysiński, Andrzej Szajkowski, and Janusz Szwaja, *Kodeks handlowy. Komentarz*, vol. 1. Warszawa, 1997, 152; Janusz A. Strzępka, and Ewa Zielińska in *Kodeks spółek handlowych. Komentarz*, ed. J. A. Strzępka. Warszawa, 2001, 107.

29 Łukasz Gasiński, *Umowy akcjonariuszy co do sposobu wykonywania prawa głosu w prawie polskim i prawie amerykańskim*. Warszawa, 2006, 200.

On the other hand, according to A. Herbet, the non-splitting directive in the broader sense is a criterion for assessing the admissibility of performing other legal acts (than the transfer of separate rights embodied in a share), which results in a permanent “split” of all or some corporate rights from purely property rights.³⁰

Altogether, the principle of non-splitting in the broad sense states that it is impossible (it is in fact forbidden) to separate (split) organizational and property rights embodied in shares.

Secondly, the principle of non-splitting *sensu stricto* means the inadmissibility (impossibility) of a separation, disposition of corporate rights without the simultaneous disposal (transfer) of a share (all rights that make up this share).³¹

The principle of non-splitting *sensu stricto* (principle of non-splitting of corporate rights) will apply only to corporate rights. It therefore implies the impossibility of separating from a share, or of transferring or disposing of individual corporate rights, without transferring the share as such. A more radical (strict) version of the principle of non-splitting *sensu stricto* suggests the impossibility of permanently, continuously exercising corporate rights by non-shareholders, except in cases where such a possibility arises unquestionably from a provision (norm) or from the nature of the legal relationship that enables such exercise.

Despite the above commentaries, it still seems possible to distinguish general criteria for permissible splitting. The permitted scope of “splitting” would allow one to conceive of such legal acts that will, on the one hand, be in line with – and therefore will not violate – the principle of non-splitting, and will, on the other, simultaneously fall within the permitted framework of the principle of disposition of shares.³²

30 Andrzej Herbet in *System Prawa Prywatnego*, vol. 17a, *Prawo spółek kapitałowych*, ed. S. Sołtysiński, 1st ed. Warszawa, 2010, 372.

31 Grzegorz Kozieł, “Zakres przedmiotowy i podmiotowy przeniesienia praw i obowiązków wspólnika spółki osobowej”, *Przegląd Prawa Handlowego*, no. 12. 2003: 41.

32 Katarzyna Szczepańska, *Zasada nierozszczepialności w spółkach kapitałowych*. Warszawa, 2020, 136–164.

Justification for the binding force of non-splitting

In German law *Abspaltungsverbot* has already been justified by references to several theories.

The prohibition of splitting in German law is overwhelmingly referenced to § 717 BGB. However, despite this frequent mentioning, it is not entirely clear whether § 717 BGB in fact expresses such a prohibition, because this provision prohibits the transfer of claims arising from a civil law partnership (*BGB Gesellschaft*), while the prohibition on splitting concerns the problem of transfer (disposability) of corporate rights embodied in a share.

An explanation of why the abovementioned provision refers to a claim can be found by following the history of its creation. Originally, in fact this norm was not related to the prohibition of splitting understood as the prohibition on the transfer (disposability) of corporate rights. Moreover, it dates back to the time before the first BGB project, when the civil law partnership was understood in line with the Roman law model. According to this pattern, there were only (contractual) obligations between the parties of the civil law partnership, which were based on consensus between them, and which could be terminated at any time.³³

Another justification for the prohibition of splitting concerns the idea that the split, in particular of voting rights, would lead to a change in its content.³⁴ Paragraph 399 BGB refers to changes to the content with regard to voting rights.³⁵ The reference to the prohibition of splitting in this provision presupposes that the category of corporate rights is comparable with that of the claim. The basis of corporate rights is an obligation relationship as a special type of relationship between at least two persons, under which one person (the creditor) is entitled to demand that another person (the debtor) fulfils an obligation. The obligation is understood as the achievement of some benefit

³³ Max Kaser, *Römisches Privatrecht*, 18th ed. München, 2005, 226.

³⁴ Ulrich Huber, *Vermögensanteil, Kapitalanteil und Gesellschaftsanteil an Personengesellschaften des Handelsrechts*. Heidelberg, 1970, 51; Schmidt, 605.

³⁵ Fleck, 107.

for the creditor, and may encompass both the debtor's action or inaction in accordance with § 194 par. 1 BGB.³⁶

In contrast, corporate rights compensate (equalize) the will and legal capacity of a partnership/company. In this case, the actions taken by the “members” of the partnership/company have the same value (force) as the actions of the partnership/company. The legal order assigns decisions made by company members (partners) to the partnership/company.³⁷ Corporate rights are an instrument that allows participation in the creation of will in a partnership/company. Performing corporate rights then is a condition for the company to have the ability to build decisions and take actions, and thus prevent situations where third parties could influence the company or actually exercise control over it. Moreover, company/partnership operates thanks its partners (shareholders) (it exists and is perceived through the prism of its partners/shareholders). In this case the paradigm of the partial identification of shareholders with the company, and the partnership with its partners, becomes apparent. In summary, the corporate rights differ too much from the claims set out in § 399 BGB that the interpretation of this provision could justify the prohibition of splitting.

H. Wiedemann takes the view that the prohibition of splitting can be derived from § 137 BGB. According to this author, the corporate rights of a shareholder can be equated with the disposing rights expressed in this provision: each property right grants its owner similar management and ownership rights and thus guarantees him a certain freedom of action provided by the indicated norm. Due to the rights *in rem*, the entitled person has the right to dispose of the thing and is entitled to material-law authorizations resulting from these rights – they are comparable to management and corporate rights in the sense of the rights arising from membership (rights of being a member, being a shareholder) in the company. Moreover, according to H. Wiedemann, § 137 BGB neither rules out

³⁶ Helmut Heinrichs, “Commentary to § 241 BGB” in Otto Palandt, *Bürgerliches Gesetzbuch. Kommentar*. München, 2006, 239–240.

³⁷ Schmidt, 439.

nor excludes the possibility of undertaking disposable actions (transactions) and therefore it is also permissible to dispose of voting rights.³⁸

These views are, however, questioned by other authors. It is doubtful whether equating management and corporate rights with the right to dispose is justified.³⁹ At the time of the splitting of the voting right, the shareholder is not deprived of the possibility of disposing of his “membership” (share) in company.⁴⁰ Only in the case of partnerships is the consent of the other partners required for the transfer or the encumbrance of membership rights.⁴¹

Moreover, the prohibition of splitting is justified in Germany by the reference to § 985 BGB and § 894 BGB. The starting point in this instance is that it is impossible to split the right to disclose in the land and mortgage register from the ownership of the property, and that it is impossible to split the claim for release of the goods from the ownership right to this property.⁴² From this standpoint, a general rule is derived that any splitting of individual rights from a bundle of rights should not be allowed, and this is what the prohibition of splitting serves for. Pursuant to § 985 BGB and § 894 BGB, the fundamental aspect of the impossibility of splitting of entitlements is the function of these provisions to guarantee ownership in the sense of being disposable. This feature is transferred to justify the prohibition of splitting in the sense that in the event of splitting there would be a situation in which there would be a permanent separation between the disposition of the right and the right itself.⁴³

One of the possible functions of the prohibition of splitting is to protect the shareholder who would cede (split) the rights arising from their share. This is because in this way they devote, (takes from themselves) certain rights, un-

38 Wiedemann, *Die Übertragung und Vererbung von Mitgliedschaften bei Handelsgesellschaften*, 283.

39 Westermann, *Vertragsfreiheit und Typengesetzlichkeit im Recht der Personengesellschaften*, 425.

40 Fleck, 112.

41 Schmidt, 1321–1324.

42 Harm Peter Westermann, *Sachenrecht*, 7th ed. Heidelberg, 1998, 421.

43 Wolfgang Schön, *Der Niessbrauch an Sachen: Gesetzliche Struktur und rechtsgeschäftliche Gestaltung*. Köln, 1992, 252. .

derstood as means that could serve them in the future to exercise their rights resulting from membership in the company.⁴⁴ Thus, the function of the prohibition of splitting could be described as the protection of the shareholder against self-incapacitation.⁴⁵

To support this position, the judgment of BGH of July 12, 1965, II ZR 118/63⁴⁶ can be cited. In this case, the partner of a (general) partnership transferred all his rights to the trustee for a lifelong term. Consequently, the partner had no influence on the actions taken by the trustee, could not give orders or “dismiss” him, while he was still, as a partner, subject to unlimited personal liability. This situation can be boiled down to the sentence “there is no power without responsibility”. In this way, the partner has economically “incapacitated” himself, which is incompatible with the fundamental values of the legal order and is therefore considered contrary to good customs.

Another justification for the prohibition of splitting in the jurisprudence is based on the so-called doctrine of the core of rights, which states that there is an inalienable core of the rights incorporated in a share.⁴⁷

The principle of the company’s organizational sovereignty is also referred to as the justification for the prohibition of splitting.⁴⁸ In this case, it has a protective function over the company. Indeed, the principle of the organizational sovereignty of the company should protect it from the influence of third parties and should guarantee the company’s right to self-determination.

Similarly, in Polish company law several normative bases justifying the principle of non-splitting can also be found. The justification can relate to a set of spe-

44 Wiedemann, *Die Übertragung und Vererbung von Mitgliedschaften bei Handelsgesellschaften*, 282.

45 Christoph Weber, *Privatautonomie und Außeneinfluss im Gesellschaftsrecht*. Tübingen, 2000, 252.

46 Judgment of BGH of 12 July 1965, II ZR 118/63, NJW 1965, no. 46, pp. 2147–2148 – (BGHZ 44, 158 = NJW 1965, 2147–2148).

47 Judgment of BGH of 14 May 1956.

48 Herbert Wiedemann, “Verbandssouveränität und Außeneinfluss” in *Gesellschaftsrecht und Unternehmensrecht: Festschrift für Wolfgang Schilling zum 65. Geburtstag am 5.6.1973*, eds. R. Fischer, and W. Hefermehl. Berlin, Boston, 1973, 111, 114.

cific provisions contained both in the Code of Commercial Companies and in the Civil Code, or can be derived from other systemic principles of Polish company law. In this way, the principle of non-splitting fulfills the generalizing and unifying function in the system of commercial companies in Poland, thus contributing also to higher trading security in the country. One of the grounds for the binding force of the principle of non-splitting can be derived, *a contrario*, from Art. 187 § 2 and Art. 340 § 1 of the Code Commercial Companies. Since the pledgee and usufructuary may exercise their voting rights in strictly defined circumstances and after meeting the conditions provided for by these provisions, *a contrario* it is not possible for third parties other than the pledgee or usufructuary to exercise corporate rights on their own behalf (unless clearly foreseen by other legal provisions). At the same time, both provisions provide for the possibility of only exercising, and not of transferring (selling) voting rights to the pledgee or usufructuary. Art. 242 of the Code of Commercial Companies, which binds the voting right to a share, i.e. the voting right is related to the share and cannot be traded on its own, could also be mentioned to justify the principle of non-splitting. Another possibility to justify the principle of non-splitting in Polish company law is to invoke Art. 3531 and Art. 509 of the Civil Code in connection with art. 2 of Code Commercial Companies. These provisions limit the autonomy of will of the parties and the freedom to dispose of isolated rights included in the bundle of indivisible (non-splittable) share rights, which is dictated by the properties of the relationship arising within the company. The principle of non-splitting in the Polish legal order can be also further strengthened and confirmed by allocating it within other principles of Polish corporate law, such as the principle of uniformity of membership, the principle of personal exercise of corporate rights, the principle of the indivisibility of participation rights, or the principle prohibiting the abuse of subjective rights. As already mentioned, the principle of non-splitting helps to supplement those fundamental principles of company law in Poland. Their interactions help to indicate the need to recognize the principle of non-splitting.⁴⁹

49 Szczepańska, 317–318.

Final remarks

The development of the principle of non-splitting in Polish law took place by transposing the concept of the “inseparability, indivisibility of the share and stock right” which had appeared as the prohibition of splitting (*Abspaltungsverbot*) in German law. One can perceive the similarity and assume that there is a common ground of “non-splitting” in the analyzed civil law systems. It should be acknowledged that there is some kind of connection (mutual interpenetration) between these two legal systems, which can be combined with the fact that non-splitting appears as a constructive assumption of company law. German law uses the concept of prohibition of splitting, while in the Polish legal system this concept has been further developed and is to be perceived as a principle of non-splitting of shares that is to be classified as general principle of company law.

References

- Drygala, Tim, Marco Staake, and Stephan Szalai. *Kapitalgesellschaftsrecht: Mit Grundzügen des Konzern- und Umwandlungsrechts*. Berlin, Heidelberg, 2012.
- Fleck, Hans-Joachim. “Stimmrechtsabspaltung in der GmbH?” In *Festschrift für Robert Fischer*, edited by Marcus Lutter, Walter Stimpel, and Herbert Wiedemann. Berlin, New York, 1979: 107–129.
- Frąckowiak, Józef. In *System Prawa Handlowego*, vol. 2B, *Prawo Spółek Handlowych*, edited by Stanisław Włodyka. Warszawa, 2007.
- Gasiński, Łukasz. *Umowy akcjonariuszy co do sposobu wykonywania prawa głosu w prawie polskim i prawie amerykańskim*. Warszawa, 2006.
- Górecki, Wojciech. “Dopuszczalność przenoszenia członkostwa w spółce cywilnej.” *Przeгляд Prawa Handlowego*, no. 1. 2000: 38–43.
- Heinrichs, Helmut. “Commentary to § 241 BGB.” In Otto Palandt, *Bürgerliches Gesetzbuch. Kommentar*. München, 2006.
- Herbet, Andrzej. In *System Prawa Prywatnego*, vol. 17a, *Prawo spółek kapitałowych*, edited by Stanisław Sołtysiński, 1st ed. Warszawa, 2010.

- Herbet, Andrzej. In *System Prawa Prywatnego*, vol. 17a, *Prawo spółek kapitałowych*, edited by Stanisław Sołtysiński, 2nd ed. Warszawa, 2015.
- Herbet, Andrzej. *Obrót udziałami w spółce z o.o.*, 2nd ed. Warszawa, 2004.
- Huber, Ulrich. *Vermögensanteil, Kapitalanteil und Gesellschaftsanteil an Personengesellschaften des Handelsrechts*. Heidelberg, 1970.
- Jansen, Nils. “Comparative Law and Comparative Knowledge.” In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann, and Reinhard Zimmerman. Oxford, 2008: 305–338.
- Kaser, Max. *Römisches Privatrecht*, 18th ed. München, 2005.
- Kozieł, Grzegorz. “Zakres przedmiotowy i podmiotowy przeniesienia praw i obowiązków wspólnika spółki osobowej.” *Przeгляд Prawa Handlowego*, no. 12. 2003: 39–44.
- Raiser, Thomas, and Rüdiger Veil. *Recht der Kapitalgesellschaften, Ein Handbuch für Praxis und Wissenschaft*, 5th ed. München, 2010.
- Schäfer, Carsten. “Commentary to § 717 BGB”, Rn 9–10. In *Münchener Kommentar zum BGB, Schuldrecht. Besonderer Teil III*, edited by Matias Habersack, 6th ed. München, 2013.
- Schmidt, Karsten. *Gesellschaftsrecht*, 4th ed. Köln, Berlin, Bonn, München, 2002.
- Seibt, Christoph H. “Verbandssouveränität und Abspaltungsverbot im Aktien und Kapitalmarktrecht Revisited: Hidden Ownership, Empty Voting und Kleinigkeiten.” *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 39, no. 5. 2010: 795–835.
- Szajkowski, Andrzej. In *System Prawa Prywatnego*, vol. 16, *Prawo spółek osobowych*, edited by Andrzej Szajkowski, 2nd ed. Warszawa, 2016.
- Sołtysiński, Stanisław. In *System Prawa Prywatnego*, vol. 17B, *Prawo spółek kapitałowych*, edited by Stanisław Sołtysiński, 1st ed. Warszawa, 2010.
- Sołtysiński, Stanisław. In Stanisław Sołtysiński, Andrzej Szajkowski, and Janusz Szwaja, *Kodeks handlowy. Komentarz*, vol. 1. Warszawa, 1994.
- Sołtysiński, Stanisław. In Stanisław Sołtysiński, Andrzej Szajkowski, and Janusz Szwaja, *Kodeks handlowy. Komentarz*, vol. 1. Warszawa, 1997.

- Strzępka, Janusz A., and Ewa Zielińska. In *Kodek spółek handlowych. Komentarz*, edited by Janusz A. Strzępka. Warszawa, 2001.
- Schön, Wolfgang. *Der Nießbrauch an Sachen: Gesetzliche Struktur und rechtsgeschäftliche Gestaltung* Der Nießbrauch. Köln 1992.
- Szczepańska, Katarzyna. *Zasada nierozszczepialności w spółkach kapitałowych*. Warszawa, 2020.
- Szumański, Andrzej. In *System Prawa Prywatnego*, vol. 19, *Prawo papierów wartościowych*, ed. Andrzej Szumański, 1st ed. Warszawa, 2006.
- Szumański, Andrzej. In Wojciech Pyziół, Andrzej Szumański, and Ireneusz Weiss, *Prawo spółek*. Warszawa, 2004: 659–660.
- Szwaja, Janusz, and Iwona Mika. “Wpływ zabezpieczenia roszczenia przez zajęcie praw z akcji na wykonywanie tych praw przez akcjonariusza.” *Prawo Spółek* 4, no. 5(41). 2000: 4–14.
- Tokarczyk, Roman. *Komparatystyka prawnicza*, 8th ed. Kraków, 2005.
- Ulmer, Peter. “Zur Bedeutung des gesellschaftsrechtlichen Abspaltungsverbots für den Nießbrauch am OHG (KG)-Anteil.” In *Festschrift für Hans-Joachim Fleck zum 70. Geburtstag am 30. Januar 1988*, edited by Reinhard Goerdeler, Peter Hommelhoff, Marcus Lutter, and Herbert Wiedemann. Berlin, Boston, 1988: 383–400.
- Vatter, Stefan. “Commentary to § 8 AktG”, Nb 50. In *Kommentar zum Aktiengesetz*, vol. 1, §§ 1–178, edited by Gerald Spindler, and Eberhard Stilz. München, 2007.
- Weber, Christoph. *Privatautonomie und Außeneinfluss im Gesellschaftsrecht*. Tübingen, 2000.
- Westermann, Harm Peter. *Sachenrecht*, 7th ed. Heidelberg, 1998.
- Westermann, Harm Peter. *Vertragsfreiheit und Typengesetzlichkeit im Recht der Personengesellschaften*. Heidelberg, New York, 1970.
- Wiedemann, Herbert. *Die Übertragung und Vererbung von Mitgliedschaften bei Handelsgesellschaften*. München, Berlin, 1965.

Wiedemann, Herbert. "Verbandssouveränität und Außeneinfluss." In *Gesellschaftsrecht und Unternehmensrecht: Festschrift für Wolfgang Schilling zum 65. Geburtstag am 5.6.1973*, edited by Robert Fischer, and Wolfgang Hefermehl. Berlin, Boston, 1973.

Judgment of BGH of 10 November 1951, II ZR 111/50 (Celle), NJW 1952, z. 5, p. 178 – (BGHZ 3, 354, 357 = NJW 1952, 178).

Judgment of BGH of 14 May 1956, II ZR 229/54 (Karlsruhe), NJW 1956, z. 33, p. 1198 – (BGHZ 20, 363, 365 = NJW 1956, 1198).

Judgment of BGH of 11 July 1960, II ZR 260/59, NJW 1960, z. 44, p. 1997 – (BGHZ 33, 105, 108 ff. = NJW 1960, 1997).

Judgment of BGH of 22 January 1962, II ZR 11/61, NJW 1962, z. 16, p. 738 – (BGHZ 36, 292, 293 ff. = NJW 1962, 738).

Judgment of BGH of 25 February 1965, II ZR 278/63 (Karlsruhe), NJW 1965, z. 30, p. 1378 – (NJW 1965, 1378).

Judgment of BGH of 12 July 1965, II ZR 118/63, NJW 1965, z. 46, pp. 2147–2148 – (BGHZ 44, 158 = NJW 1965, 2147–2148).

Judgment of BGH of 11 October 1976, II ZR 119/75, DB 1976, Nr 48, p. 2295–2298 – (DB 1976, 2295–2298).

Judgment of BGH of 17 November 1986 r., II ZR 96/86 (Köln), NJW 1987, z. 13, p. 780 – (NJW 1987, 780).

Regulation of the President of the Republic dated October 27, 1933 – Code of Obligations (Journal of Laws of October 28, 1933, no. 82, item 598 as amended).

Uzasadnienie projektu ustawy Kodeks Spółek Handlowych, Druk Nr 1687, Sejm Rzeczypospolitej Polskiej III Kadencji.