European Business Organization Law Review 1: 265-286

"Corporate Group Law for Europe": Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law

Christine Windbichler*

1. The project . . . 265
2. State of the discussion . . . 268
3. Comments on the particular chapters . . . 268
3.1 The group concept . . . 268
3.2 Group publicity . . . 270
3.3 Legal recognition of group management . . . 271
3.4 Special investigation . . . 273
3.5 Mandatory offer . . . 274
3.6 Buy-out; withdrawal by sell-out . . . 275
3.7 Group declaration . . . 276
3.8 The duties of management when insolvency is foreseeable . . . 280
4. General comment . . . 281
5. Summary perspectives . . . 284

1. THE PROJECT

The project "Corporate Group Law for Europe" is a joint effort of European specialists in company law, the "Forum Europaeum".[1] This Forum consists predominantly of legal scholars who, at the same time, enjoy close ties with corporate practice. We should welcome the initiative and appreciate the tremendous amount of careful work that went into producing this document.

The Forum's approach is truly European and is unburdened by political pressure to defend national idiosyncrasies. After an introduction stating the general purpose and philosophy of the project, each chapter starts with a

* Professor of Law, Dr. iur., LL.M. (Berkeley), Humboldt University, Berlin.

[1] The steering committee consists of Peter Hommelhoff, Klaus J. Hopt, Marcus Lutter, Peter Doralt, Jean-Nicolas Druey and Eddy Wymeersch. The "Forum Europeaeum" started its work in 1992; it has received financial support from the Thyssen Foundation. Corporate Group Law for Europe" is published in German (*ZGR* (1998) 672), French (*Rev.soc.* (1999) 43, 285), Spanish (*Rev.der.mercantil* (1999) 445), and Italian (*Riv.soc.* (2000) forthcoming).

functional analysis of a specific area of law in the tradition of comparative law. The general comparative analysis, it is stated, will be continued and intensified in later publications. Based on the presented overview, a draft recommendation follows, in most chapters for a EU directive. The reasons for the recommendation are given in the final passage of each chapter. The reasoning includes the choice of a directive, a recommendation or a call for other activities. The common structure of the chapters – analysis, draft, grounds – is a framework for quite differing results. In some fields, the emphasis is on mandatory minimum standards, in others on enabling or facilitating law.

Whether harmonization by a company law directive in general and group law in particular is necessary for the single market, is desirable, or even feasible at all is discussed at length in the opening chapter (section 1.5). Starting from the fact that the corporate group is the normal form of business organization (section 1.1), objectives of law can be addressed explicitly or implicitly but not completely denied. The protection of creditors and of minority shareholders in subsidiaries is clearly such an objective. The usefulness of corporate group law to facilitate group management is not as widely recognized but offered as an indirect purpose. The preparatory work on a Fifth and Ninth Directive and the Statute for a European Company were not blessed with success. Keeping this in mind and considering the subsidiarity principle as well as reasons of substantive law, the Forum Europaeum focuses on core areas (section 1.6) and refrains from drafting an all-encompassing systematic group law which would necessarily be purely academic anyhow. The description as "*pointillisme*"[2] applies here without irony.

The choice of topics is necessarily incomplete as the Forum itself points out (section 1.8). Some have been dropped as being of lesser interest, while others presented too wide an overlap with other fields of law. Given the stated purpose not to present a systematic structure, the Forum has protected itself against almost any criticism based on omission. And rightly so – (comparative) group law is so complex and intricate that it is legitimate, even wise, to start with a fraction of the topics concerned. In any case, the core areas defined are definitely not marginal but well chosen according to their impact on the single market, the necessity to provide a level playing field by regulation, and the principle of subsidiarity.

In the introductory chapter, one possible but rejected choice is of special interest: no special position is provided for the public sector (section 1.7). If the private legal form is employed "any special consideration granted to the public sector would distort its competitive position *vis-à-vis* the private sector". If public service objectives require the application of different rules then the private legal form is inappropriate and a special public sector framework should be chosen.

---

[2] Chaput, *Droit des Sociétés* (Paris: Presses Univ. de France 1993) note 718, with reference to an issue-oriented approach to group law.

The first of the substantive chapters (chapter 2) deals with the group concept. Even without any proclivity towards finely chiseled legal definitions, the Forum has to state what its subject matter is. It not surprisingly follows the concept of "control". In chapter 3, the questions of group publicity are addressed. Here, the Seventh Directive has already been groundbreaking. Even taken together with the Fourth Directive, the law on group annual accounts seems insufficient, though. As the international discussion on accounting standards is in full swing, draft recommendations are postponed to a later date.

The legal recognition of group management (chapter 4) touches upon the delicate question of when to regard or, alternatively, to disregard legal entities within a group. In order to legitimize the subordination of a subsidiary's interests to those of the parent company, the "*Rozenblum*" test is recommended. The concept is based on French criminal law and requires a balanced and firmly established group policy that includes the subsidiary in a long-term perspective reasonably expecting that disadvantages will eventually be set off by advantages, both based on integration of the subsidiary within the group.

As a protective device for minority shareholders, special investigations should be available if required by a quorum of not more than 5% of the stated capital or certain stakeholders (chapter 5). The special investigation looks very much like regular company law but includes the extension of the investigation to the relations between all companies within the group. As a more restrained alternative, special information procedures should be guaranteed at least in group situations. Chapter 6 deals with mandatory offers. Here, the overlap between company law and capital market law most clearly manifests itself. The Forum calls for a mandatory offer to minority shareholders but leaves most details to national law. Buy-out and withdrawal by sell-out (chapter 7) is the counterpart to mandatory offers to minorities. The squeeze-out of residual minorities should be legal. The main problems are fair procedures, reasonable price and effective supervision.

In chapter 8 we can witness the closest effort to a systematic group structure with a "group declaration". The suggestion of a recommendation (not a directive) is based on the German contractual concept of group organization but takes into account the fact that the parent usually holds a solid majority in the subsidiary. The contract therefore only amounts to a thin surface. The formal subordination is *de facto* unilateral. The Forum's recommendation goes straight to *de jure* unilateral action if certain protective requirements are met. From the intricate field of insolvency law, the Forum has chosen the special question of the duties of management when insolvency is foreseeable (chapter 9). The draft directive extends the obligations of a parent company in the case of crisis in a subsidiary. The parent has either to engage in a timely restructuring effort or to initiate the winding-up of the subsidiary. The final chapter (10) condenses the material into "Principles and Proposals for a European Corporate Group Law".

2. STATE OF THE DISCUSSION

The Corporate Group Law Principles and Proposals, first published in German in the *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (*ZGR*) (1998) pp. 672-772, were presented to an international audience at a conference in Bonn. In cooperation with the *Zentrum für Europäisches Wirtschaftsrecht* of the University of Bonn, members of the Forum Europaeum introduced the chapters; comments and a discussion followed.[3] Interestingly enough, the conference drew attention not only from within the circles of shrewd company law scholars. Representatives of the EU Commission, ministries, and other administrative bodies were involved as well.

One should note in this context, however, that one aspect of the Principles and Proposals emerged much clearer in the oral presentation and discussion at the conference than could be inferred from the written version. Concepts from one jurisdiction often seem especially attractive to people from another jurisdiction. The "*Rozenblum*" test for the recognition of group management (chapter 4), for example, was questioned by the French speaker Guyon as to its practicability. Similarly, the "wrongful trading" approach combined with the liability of "shadow directors", taken from English law in chapter 9, was exposed as being difficult to reconcile with entrepreneurial risk-taking and decision-making by the British speaker Rajak. In any case, the conference gave rise to a lively discussion of the Principles and Proposals. The following remarks may contribute to the ongoing debate. They follow the example of the subject reviewed and, like the Forum's agenda, take the liberty of choosing an incomplete list of topics.

3. COMMENTS ON THE PARTICULAR CHAPTERS

3.1 The group concept

The concept of control as defined in Article 1 of the Seventh Directive is the perfect stepping-stone for a European corporate group law. It is part of a body of law explicitly addressing parent and subsidiary situations. With some reservations as to the variations in wording it is pointed out (section 2.2.3) that Article 24a para. 3 of the Second Directive follows the concept of the Seventh Directive. Moreover, the concept of control is widely used in European

---

[3] The proceedings of the conference are documented in Zentrum für Europäisches Wirtschaftsrecht der Universität Bonn (Adenauerallee 24 – 42, D-53113 Bonn), *Symposion – Ein Konzernrecht für Europa*, brochure no. 109 (*Vorträge und Berichte*) (1999).

secondary law, especially in European competition law.[4] The definition stated in Article 2 of the Directive on the establishment of a European Works Council is said to be based on the Directive concerning the co-ordination of procedures for the award of public works contracts.[5] This may be a coincidence, however; the preamble of the Directive on European works councils expressly states that the definition pertains solely to this Directive and is not supposed to prejudge definitions of the concepts of group or control which might be adopted in texts to be drafted in the future. Nevertheless, the basic content of the definition is the concept of control. As the Forum has already noted as regards Article 24a of the Second Directive, the wording of the definitions are not exactly identical, though. There is no discernible reason for the variations found. The Forum declares that this unfortunate fact should be on the agenda for reform (section 6.5.1), a statement that deserves full support.

In other contexts, the concept of control is modified for good reason. This is the case within the Principles and Proposals themselves. In chapter 3, "reporting classes" are mentioned; the additional information required from a parent company to offset shortcomings of the group accounts shall be differentiated according to the group structure. The "control" threshold as proposed in chapter 6 for mandatory offers should be set between 25-50%. The buy-out of a residual minority (chapter 7) shall be available from a threshold of 90-95%. The "firmly established group structure" as the crucial element for legal recognition of group management (chapter 14) creates another kind of group, more closely-knit so to speak. Even closer are companies after a "Group Declaration" (chapter 8). The draft directive on the duties of management when insolvency is foreseeable (chapter 9) calls for a "qualified group". Detailed provisions on the qualification are yet to be elaborated after discussion with experts from the EU Member States.

The diversity of definitions shown is not a specialty of the proposed Corporate Group Law. In fact, according to the specific rationale of a provision, a specific variety of group relations may be called upon. On a comparative basis, many more variations can be identified. The concept of dependence or dominance, respectively, based on a stable voting majority in the annual general meeting[6] finds an interesting counterpart in French accounting law where domination is presumed when a minority shareholder owns 40% of the stock in a

---

[4] See Windbichler, "Vor § 15", in: *Großkommentar zum AktG* (Hopt and Wiedemann [eds]), 4th ed. (Berlin: de Gruyter 1999) note 62.

[5] Council Directive 89/440/EC of 18 July 1989; Blanpain and Windey, *European Works Councils* (Leuven: Peeters 1995) p. 68.

[6] See the case *VW* v. *Niedersachsen*, *BGHZ* 135, 107; also quoted in the Corporate Group Law Principles and Proposals (s. 2.2.2).

corporation and no larger holding exists.[7] Another detail not always clearly defined is whether the assumption of control is rebuttable or not. If the legal capital is to be protected against being watered down, voting rights as considered in the concept of control are less important than capital holdings in a company. Therefore, Article 24a of the Second Directive is not very convincing. A long list of such definitionary quirks could be produced here to further illustrate the inconsistencies of group related law.

In my view, a preferable approach would be to put together a set of uniform elements, like standardized building blocks, for various definitions of group relations. Such elements should be the same for tax law, competition law, labor law, etc. If, for instance, consolidated taxation is available only for rather closely-knit groups, and the same is true for co-determination rights going beyond information, differences in the definition of such groups should only occur when supported by a well-reasoned rationale as opposed to the rather accidental provisions we have now. The current situation in national as well as in European law resembles a jigsaw puzzle with overlapping and ill-formed pieces. The objective of the proposed Group Law to facilitate the work of management would be better served by clear-cut and fitting elements for group definitions. The concept of control as established in the Seventh Directive is certainly the obvious starting point. It is, however, not a final group concept. In my opinion, the necessary qualifications need standardizing as well.

3.2 **Group publicity**

Given the existing experience with the Seventh Directive on Consolidated Annual Accounts, the chapter on group publicity is relatively brief. It is restricted to some remarks the Forum would like to introduce in the ongoing debate on publicity reform. Among the special problems addressed is the fact that the erosion of the financial position of a parent company by losses occurred in a subsidiary cannot clearly be identified from either the consolidated annual accounts or the annual accounts of the parent company. This is interesting as the jurisdictions emphasizing group law focus mainly on the protection of the "endangered" subsidiary, its minority shareholders and creditors. Here, however, the risks of being a parent are clearly shown. In-depth case studies could help to identify and analyze such problems. Some cases are mentioned[8] but it is not clear to what extent a comparative analysis is intended as to which accounting standards and group-specific rules best serve the stated purposes.

---

[7] "Contrôle de fait", Chaput, *supra* n. 2, note 775.

[8] *Eumig* (Austria) and *Metallgesellschaft* (Germany).

The acquisition of information across the borders of the legal entities is an additional topic. The Forum asks for legal protection and enforceability of such information rights. Indeed, such information rights are often neglected.[9] The demand nevertheless requires some qualifications. Publicity requirements are geared towards the interests of creditors. If they lead automatically to information rights, the structural background of the parent-subsidiary relationship may be neglected. But I have doubts whether this approach is consistent with general company law. Information rights are not designed to influence or alter the group structure. They have to be expressly stated after careful consideration of their effects on parent-subsidiary relations, power structures and defense mechanisms. Accounting standards are to reflect a given situation and not to influence the intensity of integration within a group.

One of the items placed high on the agenda by the Forum is the policy of the management of the parent in relation to subsidiaries, especially with respect to the "*Rozenblum*" test presented in chapter 4. In my view, this chapter and the chapter on Group Publicity, if read together, raise additional questions. Certainly, a policy stated in the annual accounts and supporting information helps to make a *Rozenblum* case. But is it really practical? Annual accounts are to a large extent retrospective. Policy changes may come quickly – subject to a group version of the business judgment rule. And would the statement of management intentions in the future in relation to subsidiaries have the same character as similar policy statements with respect to the managed company itself? Group publicity is not the place for a (more or less hidden) structuring of group law.

3.3 Legal recognition of group management

In the introduction, the Forum pointed out that the management's work is facilitated by providing it with increased legal certainty. In the Forum's view, the management of a group subsidiary would benefit from rules that describe the circumstances which allow the subjection of the interests of its own company to group interests. However, the fact that most countries have no specifically stated rules to govern this conflict does not suggest that management gravely suffers from this uncertainty. German law is still the exception. The often-quoted Portuguese law on integrated groups never became practical: not a single corporate agreement is registered; in Brazil only 16 groups on a

---

[9] *Cf.* Art. 4 (2) Council Directive 88/627/EC of 12 December 1988 (Transparency): it is left to the Member States to provide for appropriate information rights when voting rights are attributed to a person other than the actual shareholder.

contractual basis are reported.[10]

The main incentive to choose the contractual form of group organization seems to be the availability of consolidated taxation; the relative popularity of corporate agreements in Germany can be attributed to such tax reasons. A majority of around 70% of groups subject to the Co-determination Law of 1976, i.e., large groups, are organized on a factual not a contractual basis.[11] Croatia and Slovenia are quoted by the Forum as other examples. Considering the time and amount of experience these two countries have with group law, they do not provide a model for the rest of Europe. If restoring management's equanimity is not the main issue, case law points toward other problems. These are the protection of minority shareholders and creditors, mainly in bankruptcy cases (see also chapter 9).

The Forum's proposal defines in an abstract way the requirements that have to be met in order to legitimize the subordination of a subsidiary's interests to the parent's or the group's interests. As already mentioned, the French "*Rozenblum*" concept does not seem to enjoy the same enthusiastic recognition in France as it found within German academic circles. What exactly is a "coherent group policy"? "A well-balanced solidarity of mutual benefit and burden sharing" is indisputably a valuable goal, but is it an "effectively and smoothly" applicable test? Under which circumstances may the management reasonably assume that losses incurred by a subsidiary will be set off by group-induced advantages within a reasonable period of time? The comparison with German law on *de facto* GmbH groups (section 4.1.2.1) is not quite complete. An analysis on a case-by-case basis would show that the judgments' *ratio decidendi* was predominantly the burden of proof and infractions of provisions governing the rules of capital maintenance.[12] Often enough, the so-called group law question boils down to Second Directive issues. When the Forum declares its proposal to be superior to the German approach (section 4.3.1), which "merely" identifies the subsidiary as an entity based on stated capital, it gives short shrift to the Second Directive. That the "*Rozenblum*" concept would be particularly beneficial to wholly owned companies may be doubted as well. What is the "interest" of a wholly owned subsidiary beyond its articles of incorporation and compliance with the law on legal capital? Moreover, the legal consequences of non-compliance with the "*Rozenblum*" conditions are left open (section 4.1.1.4).

---

[10] Gause, *Verbundene Gesellschaften im portugiesischen Recht – Ein europäischer Vergleich*, § 5 A (Berlin: Berlin Verlag/Nomos, forthcoming).

[11] Gerum, *Mitbestimmung und Corporate Governance* (Gütersloh: Bertelsmann Stiftung 1998) p. 10.

[12] Roth and Altmeppen, *GmbHG*, 3rd ed. (München: Beck 1997), Anh. § 13, notes 132 et seq..

Finally, in my view the Forum's confidence in the courts ("judges can be relied upon to deal reasonably and carefully with any such problems which come before them") betrays the purpose of the project to provide a firm legal basis for groups to operate on. Moreover, the German experience shows that the reception of sophisticated group law by courts specialized in other fields, e.g., labor and employment law, is a process which is prone to blunder.[13]

3.4 Special investigation

The availability of special investigations serves informal objectives as well as formal functions to help correct management's wrongful acts. Minimum standards would be very beneficial indeed for a level legal playing field in a single market. Companies, whether part of a group or not, should not be able to hide in the dark corner of a country with less demanding national law. The Forum's draft directive contains a main proposal, which is more general, and an alternative proposal, which requires information rights (in lieu of special investigation) for the protection of a minority of shareholders at least in group situations. The restriction to group situations may make the alternative proposal more palatable to jurisdictions where special investigations are not a familiar feature of general corporation law. However, if such rights and procedures as stated in the alternative proposal are uncommon, they will probably stay inefficient as a group-related specialty. Without a basis in general corporation law, the extension to the scrutiny of all relations between all companies within the group will be difficult to propagate. The alternative proposal is, therefore, definitely weaker, most likely too weak.

The main proposal oversteps the group approach with good reason. Most details, however, are left to national legislation. The quorum for a minority entitled to seek a special investigation is set at 5% of the capital or shares of nominal value of 500,000 ECU, which still seems rather high. The general problem of abuse of minority rights is addressed by the requirement of a court order and its prerequisites. National law will have to be rather narrow in this respect. The same caveat applies to the definition of the scope of the investigation to prevent fishing expeditions detrimental to group members (section 5.3.2). Other questions are only touched upon, e.g., who else but shareholders should be entitled to ask for a special investigation? The European Works Council, a representative group of debenture holders, and supervisory authorities are mentioned as potential applicants for special investigation. This is the

---

[13] See, e.g., Windbichler, "Arbeitsrechtler und andere Laien in der Baugrube des Gesellschaftsrechts – Rechtsanwendung und Rechtsfortbildung", in: *Festschrift Kissel* (München: Beck 1994) p. 1287, and Windbichler, "Durchgriffshaftung im horizontalen GmbH & Co. KG-Konzern" (case note), *RdA* (2000) 235 at p. 238.

whole enlightened shareholder value *versus* pluralist approaches debate in a nutshell. A plethora of intriguing particulars lies behind such seemingly mundane topics.

3.5 Mandatory offer

This "core area" most clearly shows the overlap between company law and capital market law. From the point of view of shareholders and companies, the specific legal pigeonhole for their rights and obligations is of minor interest. However, legal scholars as well as the lawmaker have to position their solutions. I feel that the methodology of functional analysis applied in comparative law may be put to use between fields of law as well. For instance, if the (British, capital market law)[14] buy-out approach is contrasted with the (German, company law) *ex-post* protection (section 6.1.3), then a never-ending discussion ensues. Instead, if both protective mechanisms are to be combined, their respective impact can be balanced. Most likely, *ex-post* protection will have to take into account whether the minority shareholders had had a fair opportunity to sell out, i.e., the level of protection probably needs scaling down. Vice versa, mandatory offers are especially important in jurisdictions without specified group law.

This interdependency between the capital market and the company law approach is not yet reflected thoroughly enough. The report of the Forum Europaeum eventually leaves an either/or debate. This is most welcome, but it is only a first step. The proposal does not comment on the interrelationships between mandatory offer and subsequent protection. The "*Rozenblum*" doctrine could serve the purpose of balancing the two approaches by allowing the leveling off of adverse effects on a subsidiary with group specific benefits only after a mandatory offer or an equivalent. Instead, the Forum treats the legal recognition of group management and mandatory offers as separate core areas of group law and, as stated in its introduction, does not attempt to build a systematic structure.

On the other hand, the Forum necessarily discusses the congruity of the proposal with the draft Thirteenth Directive. A crucial issue in this context is the threshold that constitutes "control" and triggers the requirement to make a mandatory offer. The proposal suggests as a guideline a threshold of between 25 and 50% (of voting rights or stated capital?), the later comment (section 6.3.2)

---

[14] Robert C. Clark, *Corporate Law* (Boston: Little, Brown 1986) has a whole chapter on "The Ground Rules of Corporate Combinations" in US law famous for the non-existence of group law. § 10.6 (pp. 443 – 458) deals with appraisal rights and MBCA § 13. "Today, the apologists for appraisal rights can proffer two serious arguments for them – one based on a claim of defeated expectations and one based on the risk of unfair treatment in major corporate transactions" (p. 444).

mentions 30-50% of voting rights. As mentioned above in this article (section 3.1) the definitions, thresholds, and qualifications need to be more standardized. A set of uniform elements to define "group" and "control" for various purposes does not predetermine substantive rules. It would, however, greatly facilitate day-to-day business as well as the legal process compared to the present unstructured mix of thresholds and other criteria.

3.6 **Buy-out; withdrawal by sell-out**

Squeeze-out provisions are the mirror image of appraisal rights. A company shall not be forced to deal (inefficiently) with a small residual minority that rejected a (mandatory) buy-out offer. The legislative transformation of this basic idea varies considerably from jurisdiction to jurisdiction.[15] The Forum addresses several of the problems found in many details, but restricts itself to a very general Draft Directive. The threshold for buy-out/sell-out rights should be 90-95% (of voting rights or stated capital?); fair procedures, a reasonable price and effective supervision shall be granted. This sounds pragmatic enough but leaves the real problems unresolved.

The 90-95% threshold is recommended in light of the comparative overview. In my view, the criterion for the exact figure should be other thresholds pertaining to minority rights (*cf.* section 7.3.3 where the right to demand a special investigation is mentioned) in order to avoid unnecessary inconsistencies.

Much more complicated is the compensation issue. The German experience in the comparable situation of compensation for minority shareholders is not very encouraging as is pointed out in chapter 8 (section 8.3.4.3). One case (*Sinalco*) came to an end after no less than seventeen (!) years of litigation.[16] Setting aside the substantive question of what constitutes the "full value" (or: "adequate value") of the shares, a timely and reliable procedure is still to be found. Moreover, I would not leave alternatives to court proceedings *a limine* out of consideration. The Forum mentions in its analysis of the situation as an exception that in some cases a commission of the stock exchange is in charge of determining the proper amount of compensation. This is comparable to the Takeover Panel, which administers the City Code on Takeovers and Mergers in the UK. Generally, specialized panels and independent committees seem to be efficient instruments to deal with highly technical issues. To give the evolution

---

[15] In addition to the laws quoted by the Forum (s. 7.1.2) the short-form merger according to MBCA § 11.04 may be mentioned, also Art. 490 of the Portuguese Company Law which is contested, however, as to its constituionality; *cf.* Gause, *supra* n. 10.

[16] The case is documented by *Deutsche Schutzvereinigung für Wertpapierbesitz* (DSW), Düsseldorf (2000).

of this kind of private infrastructure a chance for development, the legal framework should allow for such alternatives.[17] In this respect, the position of the Forum that a "specialist court or judicial body should have jurisdiction in these matters" seems to me to be too narrow. The wording is not absolutely clear, but the context still suggests a strong preference on the part of the Forum for court proceedings. The problem is again addressed later within the context of the "Group Declaration" (section 8.3.4.3), where the Forum seems to be more open to non-statutory bodies (court, arbitration tribunal or an official authority). However, self-regulation is not very high on the Forum's priority list as it points out in its introduction (section 1.5.2).

3.7 **Group declaration**

In this chapter, proposing a secure legal environment to the group as a centrally directed unit, it seems evident that this approach is advanced by the German authors of the Corporate Group Law for Europe. They give themselves away by propagating a structural concept, if not contractual, then, as a variation, in the form of an express declaration. The legal recognition of corporate agreements remained dead law on the books in Portugal;[18] in Germany tax law is still the major incentive to enter into such agreements. The "success" of this organizational instrument, therefore, can only in some rare cases be attributed to its organizational qualities. Moreover, the description as a legal framework for groups conceals the fact that the agreement or declaration is a bilateral device. Most groups consist of many, sometimes hundreds of companies. The horizontal relations and network aspects are not really covered by agreement or declaration. That management can legally subordinate the interests of a subsidiary bound by declaration (or contract) to the best interests of the whole group[19] addresses only a small portion of the multilateral issues.

However, the worldwide lack of popularity of structural concepts should not discourage lawmakers from putting devices like corporate contracts or the

---

[17] *Cf.* Windbichler, "Alternative Dispute Resolution v. Shareholders' Suits", in: *Corporations, Capital Markets and Business in the Law, Liber Amicorum Richard M. Buxbaum* (Baums, Hopt and Horn [eds.]) (2000) 617 at p. 627. See also Defriez, "Takeover Regulation in the United Kingdom", in: von Rosen and Seifert (eds.), *Die Übernahme börsennotierter Unternehmen* (1999) 30 at p. 39: "The composition and powers of the Panel have evolved over the years as circumstances have changed. Nevertheless, it remains a non-statutory body, which status allows it to operate with speed, flexibility and certainty and with minimal risk of interference by the courts."

[18] See Gause, *supra* n. 10.

[19] S. 8.3.4.1: whether such a thing as "group interest" exists is controversial. Based on the "*Rozenblum*" concept, the Forum seems to assume that such a group interest can at least be created.

group declaration on the market. If available as an option, the market may decide by practical acceptance or rejection. It therefore makes sense to discuss the benefits and drawbacks of such instruments. The market test of structural concepts requires a minimum amount of harmonization. In this respect, the inclusion of the "Group Declaration" within the scope of core areas is justified.

The notion that a legally structured parent-subsidiary combination has the effect of a temporary merger is the most interesting aspect in an international context. As long as cross-border mergers are still impossible then corporate agreements may serve this purpose (section 8.1.2). This may render the otherwise unmissed instrument attractive. The Forum does not suggest a legal framework for corporate agreements but resorts to a unilateral group declaration. Whether this declaration can serve as a temporary cross-border merger in the same way the sporadic German corporate agreements with a foreign parent do, is not quite clear. In the Forum's text, private international law questions are not thoroughly discussed (cf. section 8.3.9). Can a unilateral declaration that produces substantial consequences for the parent be subject to the subsidiary's law? What happens if the law governing the subsidiary, the supposedly protected part, does not provide for the Group Declaration or states different rights and obligations compared to the parent's law? Similarity of the substantive law renders international private law questions less crucial. But the suggested recommendation does not ensure the availability of the device in the same way a directive would do, and it leaves the details of measures necessary to protect the minority shareholders in, and creditors of, subsidiaries, to the national legislatures.

The notion that, given a majority that theoretically enables the parent company to merge the subsidiary, a contract is a mere sham and unilateral in substance seems straightforward. However, the Third Directive on mergers requires joint action of the management of both merging companies prior to the consenting vote of both shareholders' meetings. As dictatorial as this may be, the contract is more in line with the already existing Directive than the unilateral declaration, even if in fact the parent company controls both sides of the transaction.[20]

The same objection applies to the idea that approval of the organs of the subsidiary ((managing) board and shareholders' meeting) would be an excessively onerous and superfluous requirement (section 8.3.3.3). Firstly, the Third Directive provides in its Article 8 that under certain circumstances national law can eliminate approval of the shareholders' meeting of the company which another is merged in, i.e., usually the parent in a parent-subsidiary merger or the

---

[20] The remark of the Forum that the Group Declaration would be in place within EU law (s. 8.3.3.1) is therefore not convincing.

large company in a whale-minnow merger. The elimination of the approval of the subsidiary's general meeting would be inconsistent with the Third Directive. The Recommendation includes the Article 8-type of short-form merger in section 8.3.3.2 (*de minimis* clause); Article 11 of the Fourth Directive is not very helpful in this context, though, as the absolute size of the subsidiary says nothing about the size relative to the parent.

Secondly, the mere formal requirement of the general meeting's vote has a distinct protective function even in cases when the outcome is completely predictable. It opens up all the opportunities for judicial review of such resolutions given by national law. The same applies to information rights. Again, the Third Directive calls for a special report on the details of a merger and for an independent expert review. If the Group Declaration leads to a temporary merger situation, every departure from merger law needs reasoned justification based on the temporary character. In this respect, I submit that the Forum's Recommendation is not very convincing.

A third objection has to be raised against the form of recommendation (ex Article 189 (5) EC, now Article 249 (5)). As already pointed out, the recommendations seem too weak a means. A directive could follow the example of the Sixth Directive (De-merger, section 8.3.8). Split-offs and split-ups are not necessarily part of national company law. But if they are, they have to comply with the Directive. Given the objective to help out as long as cross-border mergers are not available, a straight directive would even be preferable. Minimum common standards and facilitating laws are no contradiction here, but rather two sides of the same demand. Why then this reserve? Those jurisdictions that already have structural instruments to organize groups would probably have to give up what they have, alter their concept or at least introduce additional alternatives, which would be a confusing accumulation. This is mere speculation as the Forum itself gives another reason: the fact that 13 of the 15 Member States do not have provisions for specific group law in their legal systems. So, one is inclined to add, the Forum's recommendations should be spared the fate of the initiative for a Ninth Directive.

Another problem pertains not only to the suggested Group Declaration but also to all situations when an obligation to compensate shareholders is stated: the valuation problem. Mandatory offers, buy-out and withdrawal provisions as well as the Group Declaration require "fair procedures, a reasonable price and effective supervision". In German law, we can find no workable precedent. The criticism of the contractual group based on lengthy and complex court proceedings to assess the compensation for minority shareholders is reported as a "rather technical aspect" (section 8.3.1). As mentioned above, however, litigation in one of those cases ended recently after seventeen years (see above section 2.6). My conclusion is that the very general language of the Forum Europaeum does not do justice to this intricate problem.

The issue of co-determination touches upon many questions of historically grown political and cultural singularities that prevented the enactment of the Fifth Directive as well as the Regulation on the SE. The Forum now claims that the fact that no company will cease to exist and therefore lose its co-determination status as in a merger under the Group Declaration, will resolve or at least circumvent the co-determination issue.[21] This is wishful thinking. German co-determination law contains special provisions for group situations, which are subject to the principle of territoriality. That means that a German subsidiary subjected to a foreign company by Group Declaration retains the German standard of co-determination but does not have access to the extension of co-determination to the foreign parent according to Section 5 of the 1976 Co-determination Law. Given the symbolic significance of co-determination,[22] the objection to the lack of transfer of influence to the (foreign) parent will cause enough repercussions. Vice versa, a German parent subject to co-determination legally grants election rights only to the workforce employed by the parent and by German subsidiaries, not to employees of foreign subsidiaries. DaimlerChrysler, for instance, tackled this problem pragmatically and ensured a seat on the supervisory board for a representative of the United Automobile Worker's Union. The legal technicalities of such a solution are, at least, unclear. And Section 32 of the 1976 Co-determination Law needs scrutinizing as to its applicability to the Group Declaration.[23]

In sum: the very formal notion that the co-determination status remains unchanged under the circumstances of a Group Declaration glosses over the intricate co-determination issues. That the very few instances of cross-border corporate agreements did not trigger a general debate is no guarantee that the Group Declaration will not be taken up under the co-determination perspective and suffer the same bad luck we are witnessing as regards the SE.

---

[21] S. 8.3.8: "The Group Declaration does not give rise to any of these problems. Both legal persons remain in existence in accordance with the laws and regulations of their respective States of incorporation. The co-determination rights whether in the parent or in the subsidiary are not affected. In Germany, on conclusion of a corporate agreement, no problems in connection with co-determination arise, and therefore there are no special legal provisions in Germany dealing with that situation."

[22] *Cf.* Kübler, "'Shareholder Value': Eine Herausforderung für das Deutsche Recht", in: *Festschrift Zöllner* (Köln: Heymann 1998) 321 at pp. 327 et seq. and p. 334; Windbichler, "Corporate governance und Mitbestimmung als 'wirtschaftsrechtlicher ordre public'", in: *Festschrift für Gerold Bezzenberger* (Westermann and Mock [eds.]) (Berlin: de Gruyter 2000) 797 at p. 803.

[23] If both parent and subsidiary are subject to co-determination according to the Law of 1976, the part of the parent's supervisory board that represents shareholders has to act on certain structural decisions with respect to the subsidiary.

3.8 The duties of management when insolvency is foreseeable

This chapter starts with a less stringent description and analysis of the area of law. It expressly takes up only some questions from the vast and arduous field of bankruptcy law, i.e., the unfortunate but frequent delay in filing for bankruptcy and resulting losses for the creditors. This restrictive approach is perfectly in line with the concept of Corporate Group Law for Europe to harmonize core areas only. It is not exactly clear, though, why the duties of management in the wake of insolvency should have a special impact on the single market. What constitutes a "core area" depends on, among other things, the findings from comparative efforts. Here, combining the British "wrongful trading" and "shadow director" approach offers an example, which is extended into a general recommendation. Similarities to Belgian and French law (the concepts of *action en comblement du passif* and *dirigeant de fait*) corroborate the proposal for generalization.

The duties of management, however, are only a fraction of the problems associated with bankruptcy. The relatively detailed proposal, therefore, covers only a rather narrow scenario, that is a healthy parent and an ailing subsidiary (section 9.3.1). How a thriving subsidiary can be protected from a failing parent is not discussed. Can the subsidiary break away from a "Group Declaration", driven by a frustrated management that joined forces with workers' representatives and minority shareholders? Does the parent company have the option to sell off its interest in the subsidiary at a low price and leave rescue attempts to the transferee? And, again, in real life, groups are not bilateral combinations but comprise many companies. There could be advantages in joining the bankruptcy proceedings of several companies or even a "group insolvency" may be considered.[24]

Even for its limited purposes, the Forum encounters the necessity to define the "qualified group" but leaves the particulars for further discussion. The elements of such a definition should be kept in line with other situations where the control concept is insufficient to describe a specific group situation.[25] Otherwise, group law becomes burdensome and intransparent, exactly the opposite of the Forum's objective. It seems that national law, even without regard to group law but dealing with individual companies only, has difficulties in drawing the line between worthwhile attempts at reconstruction and (wrongful) delay of dissolution of a company, likewise between "honest mistakes" of judgment and a lack of reasonable diligence. That the additional

---

[24] *Cf.* Ehricke, *Das abhängige Konzernunternehmen in der Insolvenz* (Tübingen: Mohr Siebeck 1998) pp. 457 et seq., comparing German and French law.

[25] See my comments above on the Group Concept, *supra* s. 3.1.

complications of group relations do not clarify things does not come as a surprise.

4. General comment

In a general comment on the Forum Europaeum Konzernrecht's Corporate Group Law for Europe, such as the present one, it cannot be emphasized enough how important it is to recognize the corporate group as the common type of business association. Corporate groups are nothing special, nothing dangerous, but different from the legal paradigm of the single and unattached company. By the same token, part of this normality is the diversity of such groups. They may be closely-knit or loosely organized, continue a long-standing tradition or be in constant rearrangement. In this respect, I feel the Forum is on the right track. Its Principles and Proposals allow a full range of group relations. They refrain from prescribing a specific organization or even from treating the group indiscriminatingly as a unit. The latter, for example, can be found in Blumberg's "enterprise concept"[26] which has a strong tendency to treat a group as a single enterprise. This would not do justice to the factual variety of groups and to some important developments.

Reflecting on the foregoing items of my commentary, it became clear that there are controversies on the national level about many of the critical concepts. Examples refer to the "*Rozenblum*" doctrine in French law as well as to the wrongful trading/shadow director approach in British law and the jurisprudence on qualified groups in Germany. In general, this is a fact of legal life and should not be used as an argument against the inclusion of a concept in a proposal, but rather as part of the necessary discussion about the pros and cons and the advisable changes. Here, the comparative aspect gains additional momentum.

For a long time, minority shareholders were considered an undue burden and wholly owned subsidiaries seemed more practical. In many cases, this may still be true. However, more and more subsidiaries are brought to the capital markets but still stay subsidiaries in a technical sense: the parent company retains a controlling interest. Even within a single company, the performance of certain divisions receives separate attention in the form of "tracking stocks".[27] This development goes beyond the common (but often neglected) notion that the

---

[26] Blumberg, *Law of Corporate Groups. Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* (Gaithersburg: Aspen Law & Business 1997) Supplement, pp. XII et seq.

[27] Analyzing the availability of this instrument under German law, Sieger and Hasselbach, "'Tracking Stock' im deutschen Aktienrecht – im Blickpunkt: Praktische Überlegungen zur Einführung von 'subsidiary' / 'divisional' shares", *BB* (1999) 1277 with further references.

boundaries between companies as legal entities are predetermined breaking points for spin-offs or other stock deals.[28]

We need to acknowledge, therefore, that the Forum was faced with a troublesome question at the beginning of its work, namely to determine the scope of its efforts. The pragmatic approach to limit the Principles and Proposals to companies as defined by the First Directive is not only acceptable but also welcome. The details of other forms of business associations would be a burden to the clarity of the still to be developed concepts.

On the other hand, a convincing concept for companies limited by shares may relatively easily be adjusted for other forms according to their particulars. Less self-evident, however, is the inclusion of all companies whether listed or not. Capital market law overlaps in many respects with company law. Harmonization of these two fields and an interest in their consistent development suggest a restriction of principles and proposals, to begin with, to listed companies. Again, this does not deny that the group phenomenon brings about quite a few questions for small and medium-sized businesses and their unlisted business associations.[29] The distinct features of the organized capital market deserve special attention, though, and it seems more effective to focus first on listed companies. The rules and regulations available for such companies, their shareholders and their creditors are practically one set and are not pigeon-holed in either company law or securities law. As I suggested for other forms of business associations, a convincing concept for listed companies may be adjusted in a second step for those that lack the control by an organized capital market and its regulations.

Focusing on listed companies, especially with respect to the current activities to float subsidiaries on the market without cutting them loose completely, another desideratum can be met more easily. That is the merger with the international corporate governance debate. The Forum touches upon this other strand of development in corporate law only lightly. It is unfortunate when the discussion of group law and of corporate governance is pursued separately. An almost comical example is the German Panel on Corporate Governance, which recently published Corporate Governance Rules of Quoted German

---

[28] The Forum formulates this as a benefit of the group structured by declaration or agreement, see s. 8.1.1. final para.: "The benefit gained in exchange for these legal obligations and cost factors is the considerable advantage of having a subsidiary which is legally and commercially securely based and which at any time could be again separated from the group, floated on the market or disposed of as a self-contained company." In jurisdictions without provisions for corporate agreements and the like, it seems to be possible to reap similar benefits.

[29] The major part of German law on "*qualifizierte faktische Konzerne*"(qualified *de facto* corporate groups) was developed on a case-by-case basis, pertaining to such small businesses and closely held companies.

Companies.[30] The German version contains a footnote to the effect that the suggested best practices are aimed at companies as well as at groups. If reference is made to companies, groups are addressed as well, unless stated otherwise. Such special mention of the groups is rather rare. In the English version, this footnote is missing.

We should not brush this aside as another example of the fact that legal thinking in terms of group law is a German idiosyncrasy.[31] The "Code of Best Practices" takes up the version of the OECD Principles for Corporate Governance of May 1999 and the topics covered are very similar to the issues discussed as group law: equal treatment of shareholders, disclosure and transparency, responsibilities and duties of the managing and supervisory board, committee structures, conflicts of interest and remuneration of individual board members. Moreover, such corporate governance questions predominantly arise in a context where controlled and controlling companies are involved. In the leading Spanish treatise on corporate governance of listed companies, a chapter is dedicated to "*Grupos y gobierno corporativo*".[32]

From the European perspective, some areas of law may have matured enough to be ready for harmonization by directive. The international analysis, necessarily in broader language and less specific, is then no disincentive. Principles and proposals for group law should be positioned as to where they stand in relation to, e.g., the OECD Principles. On the other hand, the corporate governance debate is not well served when the "fact of life" that groups are the predominant form of business association receives no adequate attention. Both strands of discussion should be merged, the fact that corporate governance is mostly treated in terms of "best practice" notwithstanding. Agreement on the substantive content is not prevented by a separate argument as to whether soft law, minimum standards or outright regulation is the means of choice.

Whoever deals with company law in Europe or with corporate governance worldwide cannot dismiss the group phenomenon. There is no way around the Forum Europaeum's Principles and Proposals in any further discussion. Considering the scope of the task, and despite the many steps ahead to be clarified, the Forum deserves to be congratulated. Torn between "core areas" and "systematic structure", we have to keep in mind the wonderful footnote

---

[30] Schneider and Strenger, "Die 'Corporate Governance-Grundsätze' der Grundsatzkommission Corporate Governance", *AG* (2000) 106.

[31] The consultation document from The UK Department of Trade and Industry's Company Law Review Steering Group, *Modern Company Law, For a Competitive Economy, The Strategic Framework* (Great Britain, Department of Trade and Industry 1999) at least points this out in an annex entitled "Other issues yet to be addressed: Groups" (p. 213).

[32] Embid Irujo, "Grupos y gobierno corporativo", in Esteban Velasco (ed.), *El gobierno de las sociedades cotizadas* (1999) 595. The lack of legislation in the field of group law is satirized as "*'permanente vacación' del legislador ... en la mayoría de los países*".

found in Robert C. Clark's *Corporate Law*:[33] "Also, achieving perfect consistency in a set of legal rules is costly, yet there is often no significant gain to be had from the achievement. There may even be losses, if the drive for consistency makes people neurotic."

5. Summary perspectives

1. The corporate group is the most common form of business association. Such groups are formed across national borders. The Forum Europaeum's efforts to address group-related law as crucial for a level legal playing field in a single market, therefore, deserve widespread attention.
2. In agreement with the Forum's approach, the discussion of "Core Areas" is preferable to academic attempts to construct an all-encompassing systematic group law.
3. The concept of control as defined in Article 1 of the Seventh Directive is a workable definition of "group" to start with. The Forum's Principles and Proposals, as is the case in national as well as European law, employ a variety of qualifications and additional definitions. These variations need harmonizing in a set of uniform elements.
4. Some of the key areas addressed by the Forum are part of an ongoing general debate. Group-related issues can be merged into such current discussions of general reform. This is the case with publicity and mandatory offers (takeover law). Instead of the description as specific group law, as suggested by the Forum, the reform efforts should be amended by the group perspective.
5. Other core areas can be seen as reflecting key issues of general company law. Such general issues need to add group-specific aspects. This is the case with legal recognition of group management if construed as a variation of the business judgment rule. The Forum's proposal to transform the "Rozenblum" concept into a directive, however, is not convincing. The proposal to establish a minority right to special investigation by directive deserves full support. Restriction to group situations is neither necessary nor desirable.
6. The issue of shareholders' compensation needs addressing in a more general way. Mandatory offers, buy-out and withdrawal provisions and corporate agreements require appraisal rights with "fair procedures, a reasonable price and effective supervision". More comparative research should be directed towards finding the procedures and institutions that efficiently serve this purpose.
7. If structural devices to organize group relationships are to be offered at all, the form of the directive, following the example of the De-merger Directive, is preferable to a recommendation. The "Group Declaration" suggested by

the Forum has some merits, but quite a few flaws as well. In the form presented, the Group Declaration is not convincing and hardly in line with the Third Directive.

8. Being the most common form of business association, the corporate group needs more attention in the international corporate governance debate.