FORUM internationale

Vol. 1, 1983, nr. 1

Contents

FORUM internationale

Vol. 1, 1983, nr. 1

Contents

The law of groups of companies in Europe

Professor Marcus Lutter*

Contents**

* Professor of Law, University of Bonn, Director Institute for Commercial and Economic Law of the University of Bonn.

** The author is indebted to Mr. *Björn Pirrwitz* for his help in translating this article.

Prof. Dr. Marcus Lutter

The law of groups of companies in Europe: A challenge for jurisprudence

The law of groups of companies in Europe

Professor Marcus Lutter*

Contents**

* Professor of Law, University of Bonn, Director Institute for Commercial and Economic Law of the University of Bonn.

** The author is indebted to Mr. *Björn Pirrwitz* for his help in translating this article.

A Introduction

1 It is now nearly 20 years ago that *Pieter Sanders* in his Rotterdam inaugural lecture, which later became very famous, invented the Societas Europae[1]. Since then his name is linked to the S.E. And only a little later in december 1966 he presented a completely outthought and well defined draft statute for the European Company.[2] Have these reflections already been full of imagination, strength and courage, so the principal data of the outline were no less: The foundation should – at least for the time being – only be carried out as a holding company; as to the administration, the so-called dual system, comprehending board of management, supervisory body and general meeting, was provided.
Factory-organization through the creation of works councils (Betriebsverfassung) and worker's representation on the supervisory board, the so-called co-determination (Mitbestimmung) were planned – and this at a time where these forms of organization played only a rather limited role in Europe and none at all outside this small peninsula. And finally, to top the whole concept, *Pieter Sanders* has made a proposition for an order of groups of companies, the much discussed 'organic group structure' – that went far beyond the pretension of the still young German 'Konzernrecht' of the public company Law of 1965, and that has found no parallel, not even an attempt of it, in any other national legislation: what a proud vision Pieter Sanders' draft of 1966 was (and still is)!

2 In the meantime more than 16 years have passed during which rich and lively debates about the group of companies have taken place in Europe[3]:

- The Commission of the European Communities adopted the Sanders' conception and therewith the organic group structure in its own draft for European Companies of 1970 and retained the concept in the revised draft of 1975.[4]
- Also the Commission's preliminary drafts for harmonization of the national company-group legislations[5] followed the same ideas and since company group legislation did – nearly – not exist in five of the then only six national legal systems of the Community, its proposal for harmonization was practically a proposal for a new, but, from the beginning on uniform national legislation[6]; these facts were only little affected, when the Commission of the European Communities later turned to the model of an improved company-group structure of the German public company law.[7]
- In 1970, 1975 and 1978 the french deputy *Cousté* submitted to his national parliament the Bill of a Law on groups of companies, which was based on the German public company Law;[8]
- since this time a 7th Directive of the EEC regarding group accounts has been under consideration[9], a Directive, which has only shortly been passed by the Council of Ministers;[10]

– at Rennes[11] and Louvain,[12] at Geneva[13] and at Florence,[14] at Luxemburg[15] and ultimately at Fribourg / Switzerland[16] broadly conceived and very stimulating academic congresses were held, where legal problems concerning groups of companies have been discussed, not to mention all the books and articles that were written in these barely 20 years about groups of companies and the connected legal problems.[17]

3 Yet the law in force has not – or merely not – changed during these years; the initiatives of the Commission of the European Communities and herewith the Sanders' draft fulfil a slumbering existence within the fold of the panels and committees of the Communities' bureaucracy; the Cousté Bill has never been dealt with by the French parliament; also the proposals of the French Commission for the reform of Corporation Law, the Commission *Sudreau,* were, as to these respects, never taken up.[18] Finally the broadly outlined attempt of a regulation of the law of private company groups in Germany (GmbH) did definitely fail.[19]
Beyond that, there have always been critics which thought a legal regulation for groups of companies to be superfluous or even harmful: to solve all the problems, it would be completely sufficient, according to them, to recur to the 'règles de droit commun' and to bind every board member by the 'intérêt social' of his company.
Even such a deserving and well known man as *Rodière* had only mockery and derision for the organic group structure in connection with the EEC's harmonization proposals:[20]
'Il est vrai que les sociétés dites dépendantes ne jouissent pas d'une 'liberté de gestion illimitée'. Mais une société indépendante de tout groupe a-t-elle cette liberté? Et fallait-il, sur la seule observation que cette liberté est sans doute moindre dans les premières, transformer en état de droit ce que les conditions historiques accidentelles de naissance et de développement des groupes avait fait de chacun de ses membres? Des mesures ponctuelles que n'essaierait pas d'assembler et de composer un rhétoricien ou un utopiste seraient préférables à cette fringale de réformes théoriques qui, à la suite de l'Allemagne, emporte les écrivains de la C.E.E.'

4 On the other hand, no other theme in the field of *Economic Law* has determined the national and international academic discussion more than the one of Multinational or Transnational Corporations, the *'Sociétés Multinationales':*[21] *Yet in what do they differ from groups of companies?*
Which are their particular problems? As everybody knows, nothing but the fact that the managements of French, Italian or Dutch companies do indeed follow instructions coming from the head offices of their parent companies in London, New York, Rome or Amsterdam.
Not only are groups of companies a reality of the western world, they are moreover *the center of very specific and particular juridical problems.* And these problems are not at all restricted to the amply known dangers for creditors and minority shareholders of the dependant company.
Let me show you this by three every day cases out of the German law practice:

Case 1
A normal public company has two fields of operation: on the one hand forwarding on

the other hand commerce. Based on various considerations the management body decides to separate the two fields of activity as to their legal organization, in making them independent in two subsidiaries.
So it happens: our company becomes the head of a group of companies, in the shape of a holding company.
Is the administration allowed in doing so without further ado? After all, the position of the shareholders changes considerably and it changes even more, if one follows the theory of legal separation, because actual management is no longer exercised by our public company but by the subsidiaries; yet *there* the shareholders are not associates, *there* they have no right to vote, etc.

Case 2
A big German public company operating in accordance with its by-laws in the car industry happened to be amply supplied with cash flow; yet instead of continuing to invest in the own field, it decided to diversify its activities. The board of directors therefore acquired the shares of a big producer of office machines and by means of this measure of so-called external growth expanded the group considerably. The decision turned out to be a desastrous flop, which cost the company hundreds of millions of DM. Besides that: was the board permitted to act like this?

Case 3
An old German company in the office supplies business acquired a controlling interest in a company which manufactured copying machines and was supposed to develop office computers. Both departments of the so purchased company showed a heavy deficit budget. For this reason the subsidiary should have gone bankrupt already three years ago. Yet every year the board of directors of the parent signed a statement wherein the company engaged to cover the subsidiaries' debts in the current business year. Now both undertakings are bankrupt.
Was the executive board permitted to sign such liability-declarations? Or is this question put incorrectly to the extend, that quite on the contrary our office supplies manufacturer had already been liable under the law for the losses of its subsidiaries, so that its declarations did not constitute the obligation but were only declaratory?

These examples were intended to show, that groups of companies give rise to questions which go far beyond the common aspects of minority shareholder's and creditor's protection.

[1] Naar een Europese N.V.? Intreerede Ned. Econ. Hogeschool 22 Oktober 1959; Vers une société anonyme européenne?, Rivista delle Società 1959, 1163; Auf dem Wege zu einer europäischen Aktiengesellschaft?, AWD BB 1960, 1.

[2] Preliminary draft Statute Societas Europaea i.c. DOK. KOM. 1100/IV/67, Brussels 1966.

[3] The law of the USA has been left out of consideration. See on this point recently: *Kronstein* und *Hawkins*, Die Haftung der Organwalter und Gesellschafter von Tochtergesellschaften in den USA, RIW 1983, 249, 253 seq. with many references to Court decisions and literature, see also *Feuerle*, RIW 1983, 89, 91 seq.

[4] Official Gazette EC of 10.10.1970 Nr. C 124 S. 1 seq.; Annex 8/1970 to Bulletin of the EC; Bundestags-Drucksache VI/1109. Annex 4/1975 to Bulletin of the EC; Bundestags-Drucksache VII/3713.

[5] See on harmonization of the national legislations on Groups of Companies *Gleichmann*, Überlegungen zur Gestaltung eines Konzernrechts in den Europäischen Gemeinschaften, in: Quo vadis, ius societatum? Liber amicorum Pieter Sanders, Deventer 1972, pp. 49 seq.; *Goerdeler*, Überlegungen zum europäischen Konzernrecht, ZGR 1973, 389 seq.; *Immenga*, Konzernverfassung ipso facto oder durch Vertrag, EuR 1978, 242 seq.; *Würdinger*, Eingliederung und Berherrschungsvertrag – Zwei Instrumente der Unternehmenszusammenfassung, in: Quo vadis, ius societatum? Liber amicorum Pieter Sanders, (supra), pp. 259 seq.; *idem*, Die Konzernregelung im Statut der 'Societas Europaea' und die Harmonisierung der nationalen Rechte in den Europäischen Gemeinschaften, EuR 1974, 25 seq.

[6] The result would in practice be approximately the same as in the case of the Geneva uniform laws for bills of exchange and cheques: obligation of the member states of the EC to bring about, on the basis of the Directive, a national law on groups of companies that is uniform in its main aspects. An advantage of the EC harmonization is the supervision of the European Court of Justice on the uniformity; see also the decision of the 'Bundesgerichtshof' to refer a question to the European Court of Justice and the decision of the European Court in this case of 12 november 1974, EuGH Slg. 1974, p. 1204 (Haaga).

[7] Preliminary Draft of a Directive on harmonization of the law of groups of companies, Part I DOK. NR. XI/32874-D and Part II DOK.NR. XI/59375-D, reproduced in: *Lutter,* Europäisches Gesellschaftsrecht, Berlin, New York 1979, pp. 192 seq.

[8] 'Proposition de loi sur les groupes de sociétés et la protection des actionnaires, du personnel et des tiers', introduced under no. 522 in the French Parliament on June 28, 1978. For Text and Development see *Brachvogel,* ZGR 1972, 87 seq. and ZGR 1980, 486 seq. as well as in Rivista delle Società 1977, 643 seq.

[9] See the position of the Government of the FRG of 18 February 1981, DB 1981, 569 seq. (not yet published).

[10] See the publication of the Council of the EC of 9. June 1983 7530/83.

[11] Droit des groupes de sociétés – Analyse et propositons, Centre de droit des affaires de Rennes et Association française des juristes d'entreprises, Paris 1972.

[12] Le séminaire postdoctoral de l'Université Catholique de Louvain sur le droit des groupes de sociétés, 1971, Rev.Prat.Soc. 1972, 1-102.

[13] Centre d'Etudes Juridiques Européennes de l'Université de Genève, Colloque international sur le droit international privé des groupes de sociétés, 1973, Etudes suisses de droit européen, Vol. 14, Geneva 1973.

[14] Colloquium European University Institute, 1980,concerning 'Multinational Corporations in European Corporate and Antitrust Laws', Groups of Companies in European Laws, (ed. *Hopt*), Vol. II, Berlin, New York 1982.

[15] Institut Universitaire International Luxembourg (ed. *Immenga*), Les groupes de sociétés, les sociétés multinationales - Company Systems and Affiliation, Multinational Enterprises, Luxembourg 1973.

[16] Report of the 114th annual meeting of the Swiss Lawyers Association, 1980 with opinions of *Druey,* Aufgaben eines Konzernrechts, and *Ruedin,* Vers un droit des groupes de sociétés?, ZSR 99 (1980), II Vol.

[17] The reports of *Raaijmakers* and *Roelvink,* published in 'Handelingen 1977 van de Nederlandse Juristenvereniging, Zwolle 1977' contain up to date references to literature on the law of groups of companies; so does the volume of *Pavone la Rosa* (gen. ed.); I Gruppi di società, Bologna 1982.

[18] La réforme de l'entreprise. Rapport du comité présidé par *Pierre Sudreau,* Paris: Documentation Française 1975; also *Overrath,* Zur Unternehmensreform in Frankreich, ZGR 1976, 373 seq.

[19] Bill for GmbH (private company), Bundestags-Drucksache VII/253. This project has not been continued since 1974. For discussion on group of company law for GmbH's (private companies) in the context of the renewal of GmbH-law comp. Arbeitskreis GmbH-Reform, Thesen und Vorschläge zur GmbH-Reform, II. Vol., Heidelberg 1972 pp. 45 seq.

[20] Rodière, Réflexions sur les avant-projets d'une directive de la Commission des Communautés européennes concernant les groupes de sociétés, Recueil Dalloz Sirey 1977 Chronique 137, 144.

[21] Comp. Colloques Internationaux du Centre National de la Recherche Scientifique, La croissance de la grande firme multinationale, Rennes 1972, Paris 1973; Institut Universitaire International Luxembourg (supra note 15); *Bayer/Busse von Colbe/Lutter,* Aktuelle Fragen multinationaler Unternehmen, ZfbF 1975, special issue 4; see also the comprehensive references to literature at *Wiedemann,* Gesellschaftsrecht, Vol. I, München 1980, pp. 130 seq.

German abbreviations used in these Notes

AWD BB = Aussenwirtschaftsdienst – Betriebsberater (German Monthly periodical)
RIW = Recht der internationalen Wirtschaft (German monthly periodical)
EuR = Europarecht (German monthly periodical of European Law)
EuGH = Europäischer Gerichtshof (Court of the European Communities)
ZGR = Zietschrift für Unternehmens- und Gesellschaftsrecht (German periodical)
DB = Der Betrieb (German weekly periodical)
ZfbF = Schmalenbach's Zeitschrift für betriebswirtschaftliche Forschung (German periodical)

B Basic legal statements on groups of companies

I Thesis

The following arguments are based on six assertions which are to be substantiated in the sequel.

Thesis 1
Groups of companies not only do de facto exist, they also are de jure a *legal phenomenon* in the laws of the western world.

Thesis 2
The group of companies *blasts the rules of classical company law.* Yet groups of companies are reality. It could then be tried to match reality with conventional law – which seldom succeeds; or it has to be undertaken to tie up reality in the existing law and its principles: only this seems to be a promising way.

Thesis 3
The group of companies is a *functional unit of several legal entities,* it is, as *Ludwig Raiser* put it 20 years ago, a poly-corporate association.[22] Like any association it pursues its own interests, that may not always correspond to those of the individuel member of the association, i.e. the single group company.[23] For this reason a group of companies gives rise to the same questions as any single company, without being a company itself. A group of companies is founded, it must be financed, it must be managed and supervised, it has to resolve internal conflicts of interests between its members, it has to render account and it finally has to be dissolved.
Now, all the national laws have detailed rules with regard to the questions mentioned above, yet only for the single company, whereas the same problems have nearly not been considered at all for the group of companies.

Thesis 4
In all European laws – and only these I shall deal with – groups of companies not only represent a problem of forthcoming law, they are even more a problem of existing law, since the plain acceptance of a discrepancy between reality and law endangers the latter and destroys its authority.

Thesis 5
The law in force is predominantly lacking codified rules, but this does not mean that the law on the whole is leaving us in the lurch; its principles are to be developed; besides this, all European legal orders[24] do accept the postulate, defined by *Eugen Huber* in art. 1 para. 2 of the swiss civil code: 'Kann dem Gesetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und, wo

auch ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde.'

Thesis 6
For a long time legislature has had the chance for a regulation of the law of groups of companies; it has not seized this chance. So by this time it is a task of jurisprudence to fill the gap and to prepare necessary jurisdiction and appropriate legislation.

II The group of companies as a legal appearance

If we beginn with the simple question, what a group of companies actually is, there nowadays is hardly any doubt that it refers to an *economic enterpreneurial entity,* which is composed of several legally independant links.
Hence we are dealing with a *functional entity* which has to be achieved an ensured by *uniform management* of the parent company, which is the head of the group.[25]
Yet each legal entity is itself – at least from the viewpoint of the historical legislator – at the same time also regarded as an economically autonomous entity.
But like many legislative plans this one too could not be implemented effectively in real life: a major cause for its failure was the majority rule – a principle which is scheduled in all the western laws.
On top of this, it did not succeed because of the allowance for a company to freely participate in another company provided by the majority of the legal orders.[26], [27]
The group of companies is reality; the existence of Shell and Ford, Bayer and ICI forbids any reasonable doubt about this. But the group of companies not only really exists; it is also the better form of organization as compared to the single company, because of it being the more appropriate and more competitive form.[28]
The great Austrian economist *J. Alois Schumpeter* taught, that the world changes in innovative thrusts.[29] Such innovations can be of technical but just so of social and in particular organizational nature. One of these innovations might have been the evolution from the single company to the group of companies, a development, which proceeded even as silent as extensively.
Though this innovative thrust has long since taken place, and though companies turned into big internationally active undertakings, still some law manuals don't take notice of this evolution: only the law of the single company is taught.
Sure, that it is important since it is the basis and the component of a group of companies.
Yet in fact the conversion of the autonomous single company into a group of companies has taken place long ago.

Groups of companies are also a *legal reality.* First of all, it would be unwise to qualify such a successful, competitive and vital phenomenon like the group of companies as illegal: only lawyers can think like that.
Yet even lawyers express this thought only half-heartedly; for single aspects of the group of companies have long since been responded to in all European legal systems – and be it only the works on the Seventh Directive of the EEC[30] or on the OECD Guidelines for Multinational Corporations,[31] which are accepted by all the countries.
But as the group of companies apparently plays an accepted and herewith legal

part within the legal system, so it is time for tieing it up in this legal system – according to its particularities and according to rules which are suited for it. This is required by the dictates of fairness. For how should top managements of groups of companies and especially managers of dependent companies actually behave? On the one hand they are told just to conform to the 'intérêt social' *of their company,* on the other hand another company exerts uniform management on them.[32] That is contradictory.[32a] Would these managers ask their legal advisers, they would get contradictory answers: it seems as if the law is uncertain and cannot give them plain rules.

III The group of companies as an explosive shell of classical company law

Companies are like atoms, which are capable to change into more and more complex structures within the molecule of the group of companies.[33] But as the molecule is more and different from the sum of its composing atoms, so the group of companies is more and different from the sum of its composing companies. In other words: The group of companies cannot live without conflicts in the fold of classical company law: it is impossible for it to exist and to realize the legal idea of its links at the same time without conflicts.

The example of financial management, which is indispensable for any group of companies, shall make this plain: every decision on investments in favour of subsidiary A is also a decision to the disadvantage of subsidiary B; by this way B would become the cow, to be milked in favour of other group members.

At this point one should remember the statement expressed by *Ernst Joachim Mestmäcker* already 25 years ago, according to which *a company alters its character when being tied up in a group of companies*[34]; from being a big or small, but nevertheless sovereign entity it becomes a satellite with restricted sovereignity – here in this small field of the law of business organization the *Breschnew-doctrine is valid.*

And every manager of a dependant company is aware about this. Yet, how will he have to behave in future *to conform to the law?*

IV The group of companies as a legal structure sui generis

In our view a group of companies is, *in the terms of company law, an independant, autonomous body.*

Although without legal capacity[35] it is still very similar to an ordinary company.[36] Its special feature compared to the 'normal' company is grounded in two elements.

In the first place *only companies,* which means only legal and no natural personae, *are members of a group of companies;* secondly, this structure is *organized like a hierarchy* and not, as companies usually are, like a partnership.[37]

If the group of companies is looked at from this point of view, that is to say from its similiarities to a normal company, it is not surprising that it gives rise in principle to exactly the same questions *as if* it were a normal company. Besides, this is also easy to give evidence of, for – quite apart from the German law – considerations about these aspects do actually exist de lege lata and de lege ferenda in all European laws:

1 So for instance the provisions relating to the 'prise' or to the 'cession de contrô-

le' in the Roman Laws,[38] are nothing else but a system of specific legal aspects on the occasion of the formation or expansion of a group of companies.
These rules might be motivated by the capital market, their real reason though lies in the group of companies.[39]
This is all the more valid for the *Sanders'* proposals concerning the formation of a group of companies[40] and the EEC's initiatives regarding the organic structure of a group of companies.[41]

2 Questions of management and supervision (surveillance) of a group of companies are in the centre of the prevailing legal considerations about the group of companies: Nearly all legal systems take more or less discontentedly notice of its existence but they don't accept an independant interest of the group as goal for its activity.
All these legal systems – and here the Roman laws are to be mentioned as well as the Dutch law, the Swiss law and the German law of the so called factual group of companies (faktischer Konzern) – oblige the managements of dependant companies strictly to safeguarde the interests of their own company.[42]
I shall talk of the problematical character of this solution later.
In clear contrast to this principal assertion, in all the above mentioned laws rules exist, which are based on the idea of uniform management, that is to say:

- Provisions concerning the rendering of accounts within groups of companies:[43] they are based on the idea that the group is a functional entity.
- Provisions of labour law concerning groups of companies:[44] they naturally proceed from the assumption, that employees can be transfered within the group if the head of the group is in favour of it.
- Regulations on worker's representation on board level in groups of companies:[45] these in turn assume the idea, that decisions are taken by the board of the parent company, that actually concern the subsidiaries.

But also there, were such partial regulations of the group of companies are still missing, they shall originate before long on a European level through the transformation of the regulation on group accounts, which has shortly been passed by the EEC: a thing, which is subject to a positive standardization cannot be illegal at once.

3 Finally financing and responsability within groups of companies are to be mentioned as a classical topic of company law. Rules on financing are missing completely, since a group is not a company and has no own capital stock; but not even an academic discussion has taken place thereon, although the nominal blow up of the capital within a group of companies is well known.
(Company A has a nominal capital of 100; it founds a subsidiary B with a capital of 100, which in turn founds a subsidiary C with a capital of 100 etc.)
Here we have the extensive academic debate on responsability of the parent for liabilities of its subsidiaries, and the much diverging rules of the German law as well as the *Sanders'* and the EEC's proposals on the S.E. and on harmonization of law.[46]

V The task of jurisprudence

1 Hence, the basis for my thesis 1 - 6 were already confirmed by this short overview: the group of companies is a generally known and generally accepted appearance under the law.
Only its legal regulation appears rather fragmentary, unsystematical, sometimes – like in Italy for instance[47] – more or less accidental and in part downright contradictory in itself. That applies, I would like to emphasize that explicitely, also for the 'faktischer Konzern' of the German law.[48]
The task of jurisprudence is to discover contradictions and to develop the law systematically. In this case the task turns into a challenge, since legislation seems to have reached an impasse: obviously political opposition and the disaproval of business men are so strong, that legislature at present lacks the necessary political strength. This means that henceforth probably the courts will have to deal with the recalled conflicts, which is exactly the development that took place in Germany: here four important law suits have been submitted to the Federal Court (Bundesgerichtshof) that were dealing with legal conflicts regarding groups of companies.[49] The Court was able to judge on these cases based on an accurate discussion led within the jurisprudence.[50]
Thus jurisdiction in this matter depends on systematical preparatory work on the part of jurisprudence.
I should like the task of jurisprudence in this matter not to be conceived as shaping forthcoming law. Proposals to the legislator have sufficiently been made and extensively been discussed in the past 20 years. This is not the point any more. What has to be done is to fill the *legal gaps*. That is what jurisdiction not only is permitted but is also bound to do. Here the courts have, as *Eugen Huber* put it in art. 1 para 3 of the Swiss Civil Code (ZGB), to consider 'sound doctrine and tradition'.
Yet even if one disregards such conflicts and tasks of jurisdiction there still remains the duty of jurisprudence to supply the persons concerned with at least half-way secured information about their duties, for it has to be supposed that managers are willing to behave correctly. Yet how should the law department of a controlling group company reply, if asked by the managers which – often unpleasant – measures it is allowed to carry out in its subsidiaries.
I guess that the answer would mainly consist in question-marks and that would support the prejudices of some managers towards lawyers in general.

2 The following considerations quite naturally take up suggestions given by the national laws. These considerations are not devoted to one specific national legal system, but to the *idea of a common European* legal order – similar to the approach made by the OECD-Guidelines and the EEC. Those guidelines have been elaborated by panels of experts and were explicitedly not passed as cogent law.[51]
The arguments presented here should be understood one step closer to an existing law even if this law is not yet practiced. That requires further substantiation.
The law within the European Communities is implemented on several levels. In all parts of the Communities the directly applicable provisions of the Treaty of Rome apply to homogenously;[52] that also applies for the secondary legislation of the Communities in regard to art. 189 para 2 of the Treaty of Rome, that is to say for the so-called Regulations. On a second level there is *national law* that has been

formed by Directives of the organs of the Communities: once set up, it is no more at the disposal of the national legislator;[53] also its interpretation and further development passed over into the hands of the jurisdiction of the Communities, the functions of which are exercised by the European Court of Justice.[54]
Only then in this hierarchy of legal rules follows pure national law.

The matter discussed here is subject to the second level, though no formal harmonization through Regulations has yet taken place. Hence *up til now* this branch of law is still of the national kind. But it is characterized by the *opportunity* (art. 54 para 3 lit g of the Treaty of Rome) and the *intention of its harmonization:*[55] therewith the tendency of integration into the second level of Community Law is inherent to this matter of law.
Therefore the national law is aimed at a future European law unity, or better: aimed to achieve similar results in national law cases. If we further take under consideration the 'duty of fair behaviour towards the Community' (art. 5 of the Treaty of Rome) imposed to the Member States, which means in this case the pursuit and promotion of the similarity of the Member States' regulations on groups of companies, we can deduce our jurisprudential approach: jurisprudence in the States of the Community is not only asked to develop systematical solutions for conflicts in the law of group of companies de lege lata; jurisprudence is also asked in regard to Community Law to *lay down the basis for a common European solution,*[56] an Ius Commune Europae.

3 The following part will therefore deal with some reflections on the course the above mentioned discussion of Europewide character might take, an academic discussion, that will have to stay as far as possible in the system of sound tradition and therefore will have to proceed carefully.

[22] *Raiser, Ludwig,* Die Konzernbildung als Gegenstand rechts- und wirtschaftswissenschaftlicher Untersuchung, in: Raiser-Sauermann-Schneider (eds.), Das Verhältnis der Wirtschaftswissenschaft zur Rechtswissenschaft, Soziologie und Statistik, Berlin 1964, p. 51, 54.

[23] As *Ludwig Raiser* (supra note 22) said: 'The polarity between the unity of the total and the multiplicity of the parts constitutes the central problem...'

[24] Comp. *Meier-Hayoz* in Berner Kommentar zum schweizerischen ZGB, Vol I/1, Bern 1962, Art. 1 Rdnr. 22 seq. 30; *Betti,* Ergänzende Rechtsfortbildung als Aufgabe der richterlichen Gesetzesauslegung, in: FS Raape, Hamburg 1948, pp. 379 seq., in particular 390 p. *Aubry/Rau,* Droit civil français, 7th edition, Paris 1964, § 5bis, Nr. 36, 37; restraining *Planiol/Ripert/Boulanger,* Traité de droit civil, 1, Paris 1956, p. 106.

[25] Uniform management is nowadays generally considered to be the decisive criterium for a group of companies. Comp. article 223 of the draft Statute for a European Company reproduced in *Lutter* (supra note 7), p. 329; Article 33 of the preliminary draft directive on groups of companies Part II, reproduced in *Lutter* (supra note 7) p. 217; Article 4 of the *Cousté draft,* reproduced in ZGR 1972, p. 76; Section 18 of the Aktiengesetz 1965; and finally *Druey,* Aufgaben eines Konzernrechts, ZSR 99 (1980) p. 273 and 336 seq.

[26] Today this is taken for granted, but this was not so when viewed upon in a historical perspective (see *Grossfeld,* Aktiengesellschaft, Unternehmenskonzentration und Kleinaktionär, Tübingen 1968, p. 163 as to the law of the USA). However, also today this is not yet generally accepted. For instance, Belgian law still prohibits exactly on these grounds that companies participate in a Société de personnes à responsabilité limitée (art. 119 of the coordinated laws on companies).

[27] The tendency of many developing countries to prohibit *foreign* companies to participate in domestic enterprises cannot be used as an argument against the acceptance in principle that one company can participate in another.

[28] In internationalibus there exists hardly an alternative for the formation of a subsidiary and, by doing so, the formation of a group of companies. See on this point *Lutter,* Die rechtliche Struktur multinationalen Unternehmen, in: ZfbF 1975, special issue 4, p. 61 seq.