The Many Facets of "Group Law"

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SUMMARY

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I. Introduction

Corporate law as part of commercial law denotes a part of private law closely interconnected with regulation, i.e., administrative law and, in case of wrongdoing, criminal sanctions. The main actors in today's economy are incorporated businesses. Despite the ubiquitous registration requirement, corporations are a product of private action and private law. But "the corporation", in the legal sense of a stand-alone entity as taught in law school classes, hardly exists. Even small and medium enterprises (SMEs), when incorporated, use structures that often consist of more than one legal person. Corporations usually come in groups; especially businesses with cross-border activities use local subsidiaries and not only branches. Moreover, "the corporation" as a legal entity is not necessarily identical to the business undertaken, e.g., in case of holding companies.

The law treats this normal phenomenon sometimes as an exception, sometimes as a specific application of general law, sometimes not at all, depending on the field of law and the jurisdiction. Changes in law and jurisprudence oscillate between attempts to formulate a more or less comprehensive group law, to specify group-related issues of general corporate law, or to lump the companies in a group rather indiscriminately together and treat them as one single entity.[1] This heterogeneous treatment of a quite usual fact creates confusing overlaps and sometimes even contradictions. So what is group law all about, and what are the commonalities and differences seen in comparison with diverse fields of law and diverse jurisdictions?

II. Group Law as Corporate Law

First and foremost, group law is viewed as a subsection of corporate law. Definitions of what constitutes a "group" vary considerably but typically we find a "parent"[2] company and one or more "controlled" companies, control based on holding more than 50% of the shares or other relations that ensure influence at the corporate level. Other relations (block-holdings, contracts, economic dependency) may be factored in; the current discussion about responsibility of large businesses for their chain of supply may further blur the lines.

1 Public international law, social theory and political science predominantly deal with "transnational corporations" (TNCs) or "multinational enterprises" (MNEs) as a single actor; e.g., Amstutz (2015), p. 191; Ratner (2001-1002), p. 452; Teubner (2011), *passim*.

2 In many countries the hierarchy is expressed in a matriarchal way: "société mère" in France, "Muttergesellschaft" in Germany, "sociedade-matriz" in Portugal, "sociedad matriz" in Spain.

Corporate law usually shapes the relations between parent and subsidiary and the protection of minority shareholders and creditors of controlled companies. Additionally, duties of care and loyalty in managing a controlled company raise the question of a "group interest". Both perspectives, the protective and the organizational, merge in the search for "group governance".[3] Despite many similarities, the area of corporate group law is far from settled. Time and again, legislation, academic discussions and recommendations of best practice deal with group issues in a more or less comprehensive way.

Even if not self-evident, accounting law should be considered part of corporate law. At least corporations using the capital market have to present audited group accounts; the respective EU legislation is based on Art. 50 TFEU; whether Member States implemented the Directive 2014/56/EU in a commercial code, company law, or in a separate statute makes no difference as to the qualification.[4] As to listed companies, capital market law also contains a considerable amount of corporate law cloaked in prerequisites for getting and staying listed.

Broad overviews over typical problems arising from the affiliation of companies and strategies to deal with such problems can be found in the Proposal for Reforming Group Law in the European Union by ECLE[5] and other publications.[6] The following summary, therefore, limits itself to only a few points relevant to the broader topic.

1. EU Law

Secondary EU law has no comprehensive ruling for corporate groups.[7] Early attempts, dating back to the early 1970s, failed for various reasons, one of them being too close to the unfamiliar German model widely held in contempt.[8] Yet, specific areas of corporate law considered important for the freedom of establishment and free movement of capital have been taken up in Directives and Regulations, and some of these areas cover characteristic group problems.

3 Overview at Szabó/Sørensen (2018).

4 Cf. CJEU 10.12.2015 C-594/14 Kornhaas, attributing laws to a certain field not by formal integration into a statute but by essence.

5 European Company Law Experts (2016).

6 E.g., Hopt (2015); Tröger (2015).

7 Cf. CJEU 20.6.2013 – C-186/12 – Impacto-Azul, § 35 noting the fact that rules concerning corporate groups are not harmonized at European Union level.

8 Tröger (2015), at 2.2.1.1.

The most topical area has been accounting and auditing, areas called "the centrepiece of European company law".[9] EU-law addresses these matters in Directives and, more recently, a Regulation pertaining to public interest entities. In 1983, the 7th Directive made consolidated group accounts and the statutory audit of such accounts mandatory; it has now been merged into the consolidated and amended Directive 2013/34/EU. Art. 22 of that Directive defines the group for the purpose of consolidated financial statements but serves also as a reference point for other rules. Art. 24 Sec. 7 prescribes a fiction: "Consolidated financial statements shall show the assets, liabilities, financial positions, profits or losses of the undertakings included in a consolidation as if they were a single undertaking," which, legally and in reality, they are not. This "enterprise approach"[10] is well established for information purposes, particularly for the capital market; consolidated accounts do not serve distribution purposes. The inclusion of a company in a consolidated financial statement does not release the individual company from preparing its own balance sheets.

Current shifts from financial accounting towards management accounting,[11] revealed in an ever-expanding management report, make adjustments that are relatively easy in figures much more difficult. Even under the entity approach, minority holdings are separately disclosed as non-controlling interests. Non--financial and diversity information[12] leaves little room for distinctions between wholly-owned subsidiaries, rather independent majority-owned, and other more or less micromanaged group members. Different management styles cannot be "consolidated" like the representation of transactions.

The amended Directive on shareholders' rights (SRD II)[13] focuses *inter alia* on related party transactions as defined in International Accounting Standard No. 24.[14] The standard covers, for disclosure purposes, an entity's subsidiaries, associates, joint venture interests, key management and close family members of key management. The consolidation process in group financial statements eliminates intragroup transactions; they do not form part of the consolidated financial statements. Consequently, such related party transactions and outstanding balances between group members are not disclosed under IAS 24.

9 Grundmann (2012), p. 356.

10 I.e., the group is seen as one enterprise; the opposite is the entity approach that looks at the separate legal persons; cf. Dir. 2013/34/EU recital 31; in EU-parlance the term "undertaking" is common for "enterprise", in American English "firm".

11 Windbichler (2012), p. 1395 *et seq.*; Windbichler (forthcoming 2019) at III. 3. b).

12 Dir. 2014/95/EU amending Dir. 2013/34/EU.

13 Dir. 2017/828/EU amending Dir. 2007/36/EC.

14 Made binding for listed companies by Reg. (EC) 1606/2002 and Reg. (EC) 1126/2008 with subsequent amendments.

Yet, the individual companies need to keep track in their records of transactions with subsidiaries, the parent company or associates of the parent company for their individual financial statements. In this respect, the standard has a group law dimension.

The combination of quite heterogeneous kinds of relations may be suitable for disclosure purposes. Yet, the transfer into organizational law requires modifications and is causing abundant controversies.[15] Art. 9c of SRD II separates various scenarios and strategies, with a partial exception for transactions within certain group situations in sec. 6. (a).

Other secondary EU law touches upon group problems in a similar piecemeal way. The EU Commission addressed corporate groups more or less in passing, e.g., in its Action Plan 2012.[16] Issues defined and strategies employed follow suggestions for core areas developed in many expert panels.

2. Expert Initiatives

Several expert groups and private initiatives tackled the intricate phenomenon of corporate groups. The project "Corporate Group Law for Europe", first published in 1998,[17] was a joint effort of European specialists in company law. In a sort of follow-up in 2015, a slightly different body presented a proposal aimed specifically at facilitating the management of cross-border groups.[18] Other highly committed ventures are the reports of the Reflection Group on the Future of EU Company Law (2011),[19] the Informal Company Law Expert Group,[20] and Chapter 15 of the "European Model Companies Act" (EMCA) by a Scandinavian-influenced consortium.[21] The latter is again an attempt to create a rather comprehensive group law whereas the other reports keep to the core area approach.

15 Hopt (2015) at IV.; Enriques/Tröger (2018).

16 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, COM (2012) 740 final.

17 Forum Europaeum Konzernrecht (1998); Forum Europaeum Corporate Group Law (2000); for comments, see Windbichler (2000).

18 Forum Europaeum on Corporate Groups (2015).

19 Reflection Group on the Future of EU Company Law (2011).

20 ICLEG (2016), ICLEG (2017).

21 EMCA (2017); for comments, see Conac (2016).

3. National Laws

The German stock corporation law of 1965 became famous as the first "comprehensive" regulation of group law – *Konzernrecht*. However, it turned out to be by no means comprehensive; it focused on protecting creditors and minority shareholders of subsidiaries in existing groups. The perspective of the parent company, its shareholders and creditors was added later, first in academic writing followed by case law and eventually, for listed companies, in take-over law. The law on close corporations (*GmbH*) refers only sporadically to group situations. A prominent feature of German group law is the agreement on domination and transfer of profit and loss that plays out not only on a contractual level but follows the regimen of a change of the articles of incorporation. Therefore, the law of incorporation applies and the choice of law under Rome I[22] is not available. The rules protecting a controlled stock-corporation are also *lex societatis* and cannot be contracted away.[23] Another much less controversial innovation of the 1965 law was the detailed specification of mandatory consolidated group accounts.

In 1986, after comparative groundwork and in the run-up to accession to the European Community, Portugal enacted a code for business associations (*código das sociedades comerciais*) that contains in its 6th division rules on combined corporations.[24] It followed the draft proposal for a 9th Directive that, at that time, was being discussed as cutting-edge. The code provides for affiliation agreements (following to a certain extent the German model); their practical significance, however, seems very limited.[25]

As part of their transformation from a socialist economy to market structures, Slovenia, Poland, Hungary and the Czech Republic[26] introduced more or less eclectic legal transplants of group law. The new Italian *codice civile* from 2001, which came into force in 2004, contains rules for the governance and co-ordination of corporate groups[27] mainly modelled on concepts from banking regulation. Turkey reformed its commercial code in 2011 establishing provisions on controlled companies and their management.[28]

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22 Art. 1 (2) (f) Reg. (EC) 593/2008.

23 Langenbucher (2016), presents a summary of the German system (without conflict of law implications); for conflict of law provisions concerning groups, see Gerner-Beuerle/Mucciarelli *et al*., pp. 150 *et seq*.

24 Antunes (2005), pp. 372 *et seq*.

25 Gause (2002), pp. 88 *et seq*., 161; critical Antunes (2005), pp. 376 *et seq*.: "No wonder that this regulatory strategy has failed".

26 Havel (2015), pp. 32 *et seq*., with references to later reforms.

27 Chapter IX (Art 2497 – 2497-*sexies*) *codice civile*; Cariello (2006).

28 Tekinalp Turkish Concepts and Approaches in Corporate Group Law, Festschrift für Claus Wilhelm Canaris Bd II, 2007, 849.

The overall impression might be that more and more countries feel the necessity to have a specific structure for business combinations in corporate law. As in the pioneering example of Germany, none of these statutes is truly comprehensive. Scattered rules for specific topics from contract law[29] to labour relations[30] come on top of or even interfere with corporate group law.

Other countries do not even attempt to find a blanket formula for group governance, but have a wide range of group-related laws and jurisprudence. In France, for instance, labour law recognizes an "*unité* économique *et sociale*" rather independently from corporate law (see III.3. below);[31] the commercial code calls for group-wide supervision of compliance with human rights in certain large businesses;[32] criminal courts acknowledge the recognition of group goals against the interest of the controlled company as admissible under certain circumstances.[33] British textbooks treat group issues explicitly but not separately and rather in context with general topics like directors' duties, proper purpose or success of the company for the benefit of its members.[34] American textbooks deal mainly with (fiduciary) duties of controlling shareholders and with gaining or changing control of a corporation, less with internal governance of groups.[35] Seen from the perspective of available remedies, piercing the corporate veil is ever-present for the protection of creditors; the criteria which allow the disregard of legal personality, however, vary considerably.[36]

29 E.g., § 449 sec. 3 of the German civil code (BGB): extended retention of title in contracts of purchase and sale based on all obligations to affiliated companies is not allowed.

30 E.g., § 40 Austrian ArbVG: group-wide representation of employees.

31 Cozian/Viandier/Deboissy (2012), § 1589 *et seq*.; LeCannu/Dondero Droit des sociétés, 6th ed. 2015, § 1545.

32 *Code de commerce L 225-102-4; restricting the reach of the law Conseil constitutionnel*, *23.2.2017 [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-750-dc/decision-n-2017-750-dc-du-23-mars-2017.148843.html] (23.12.2018);* Barsan (2017), pp. 422 *et seq*.

33 In the famous *Rozenblum* criminal case, the court considered the pursuit of a group interest as defense against otherwise unlawful waste of corporate assets; however, the judgment did not turn on these criteria in the absence of the least hint of such justification; Cass. crim., 4 February 1985 (Rozenblum) in: https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007064646 (23.12.1018); Cozian/Viandier/Deboissy (2012), § 1585-1588.

34 E.g., Hannigan (2016), § 3-60, 9-59, 10-16.

35 E.g., Allen/Kraakman (2016), chapter 11; Cox/Hazen (2003), pp. 589 *et seq*.; O'Kelley/Thompson (1999), pp. 675 *et seq*., 807 *et seq*.; Palmiter (2006), pp. 579 *et seq*.; Ventoruzzo/Conac/Goto/Mock/Notari/Reisberg (2015), pp. 471 *et seq*., 519 *et seq*.

36 Allen/Kraakman (2016), 4.3.3.2; Hansmann/Squire (2018), pp. 252, 269 *et seq*.; Ventoruzzo/Conac/Goto/Mock/Notari/Reisberg (2015), pp. 151 *et seq*.

III. Treatment of Corporate Groups in Other Fields of Law

The corporate group as the normal form to do business is subject to many laws other than corporate law. Some of such laws may address the group as a unit; others refer solely to the individual legal entities. Somewhere in the middle we find rules and principles of attribution and imputation. Some examples shall illustrate this phenomenon.

1. European Anti-trust and Competition Law

In a well-established line of cases, the CJEU holds that the term "undertaking" in competition law designates an economic unit even if in law that economic unit consists of several persons, natural or legal. Therefore, it is justified to treat a closely-knit group (e.g., with wholly-owned subsidiaries) as one undertaking; agreements or concerted practices within that group, e.g., assigning prices and specific areas of distribution to subsidiaries, are not in restraint of competition. The subsidiaries do not determine their own course of action.[37] Competition between subsidiaries would be a mere management decision of the parent. The designation of the economic unit defines the scope of application of the competition rules. As plausible as this may be, in the context of group law the crucial point is the definition of the group as an "economic unit" taking into account the various stages of integration and diversification among legally separate units.

The "economic unit" perspective looks different when applied to perpetrators of infringements of competition law. Price-fixing committed by a subsidiary is imputed to the parent and other subsidiaries; the members of the group are liable for fines jointly and severally.[38] The legal problem of the enterprise methodology presents itself clearly in this context: The group is not a legal entity; in its role as addressee of (competition) law it is nevertheless not an adequate subject for sanctions. Fines need a legal subject that can be liable, otherwise enforcement is impossible. The CJEU resorts to the legal entities forming the group; the consequences in corporate law of such joint and several liability are left to national law governing the internal workings of the group.[39] And, as before, the criteria for the "economic unit" are controversial. The Court uses assumptions that are

37 CJEU 24.10.1996 C-73/95 P – Viho, with further references.

38 CJEU 10. 9. 2009 – C-97/08 § 54 – Akzo Nobel; CJEU 29.9.2011 – C-521/09 P – Elf Aquitaine; CJEU 27.4.2017 – C-516/15 P – Heat stabilizers (Akzo Nobel); EGC 13.7.2011 – T-144/07 § 92 ff. – Thyssen Krupp elevators.

39 CJEU 10.4.2014 – C-231/11 § 59 *et seq*. – Siemens Österreich; CJEU 26.1.2017 – C-625/13 § 151 – Villeroy & Boch.

allegedly rebuttable, but such a rebuttal never occurred. That may have been a matter of fact; more likely the standards of proof[40] are impossible to meet. One prominent author called the rebuttal requirements a "*probatio diabolica*".[41]

2. Sector Specific Regulation

Prominently in the financial services area, prudential regulation covers corporate groups. The Solvency II-Directive,[42] e.g., points out in recital 3: "It is in the interests [*sic*] of the proper functioning of the internal market that coordinated rules be established relating to the supervision of insurance groups". In the same vein, the CRD IV-Directive[43] states in recital 47: "Supervision of institutions on a consolidated basis aims to protect the interests of depositors and investors of institutions and to ensure the stability of the financial system. In order to be effective, supervision on a consolidated basis should therefore be applied to all banking groups, including those the parent undertakings of which are not credit institutions or investment firms." As comprehensive organizational rules are a vital part of prudential regulation, the internal structure of a group needs to ensure compliance with such rules. "Member States should be able to refuse or withdraw a credit institution's authorisation in the case of certain group structures considered inappropriate for carrying out banking activities, because such structures cannot be supervised effectively."[44] Whether national corporate law allows for the respective organizational structures is of no concern to sector-specific regulation. Even within Solvency II itself the friction between enterprise and entity approaches shows: Art. 73 (1) asks that "[i]nsurance undertakings shall not be authorised to pursue life and non-life insurance activities simultaneously"; and "[t]he separate management referred to in Article 73 shall be organised in such a way that the life insurance activity is distinct from non-life insurance activity" (Art. 74 (1)). The long-term business shall be separated from other risks. Here, asset partitioning and the respect for the legal entity hardly harmonize with consolidated organization.[45]

40 Cf. CJEU 8.5.2013 – C-508/11 § 64 *et seq*. – Eni; CJEU 16.6.2016 – C-155/14 P – Evonik Degussa; EGC 13.7.2011 – T-144/07 § 122 ff. – Thyssen Krupp elevators.

41 Fleischer (2017), p. 13.

42 Dir. 2009/138/EC.

43 Dir. 2013/36/EU.

44 Rec. 49 of Dir. 2013/36/EU.

45 Hausmann/Bechtold (2015), pp. 347 *et seq*.

Art. 45 (1) of the Directive on the prevention of money laundering[46] demands group-wide policies and procedures, including data protection policies and policies and procedures for sharing information within the group for AML/CFT (anti-money laundering and countering the financing of terrorism) purposes; those policies and procedures shall be implemented effectively at the level of branches and majority-owned subsidiaries in Member States and third countries. Again, whether national corporate law allows the implementation of policies and procedures based on majority ownership does not seem to matter; which legal entity ultimately has to bear which costs is left open.

3. Labour and Employment Law

In this area, we find a whole range of mixed enterprise and entity methods. Group-wide organizational elements are a widespread notion when it comes to employee information and representation. Just to give some examples regardless of differences in detail: France knows the *comité social et économique commun* for the *unité* économique *et sociale*;[47] Germany has the *Konzernbetriebsrat*[48] and Austria the *Konzernvertretung.*[49] In the last-mentioned two countries, employee representatives on the supervisory board of parent companies come from the whole group.[50] Information and consultation of employees is facilitated by European Works Councils on the group level.[51] The establishment of an SE involves the formation of a special negotiating body representative of the employees of all participating companies.[52]

On the other hand, employment relations are usually local and firmly tied to employer and employee as parties to a contract. The employer is necessarily a legal unit; the group, lacking legal personality, is unfit for contractual relations. The transfer of an employee from one subsidiary to another means switching the employment relation to another employer. Contractual arrangements can change this basic pattern, e.g., provide for variable employment within a group or parts of a group, but this is the exception. Not the fact that there is a group

46 Dir. 2015/849/EU; see also Art. 13 (1) b) of said Dir. in conjunction with Art. 7 (5) a) Reg. (EU) 2015/847 on transfers of funds.

47 Art. L2313-8 French code de travail, ordonnance no 2017-1386 of 22.9.2017, in: https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000035607348 (23.12.2018).

48 § 54 German BetrVG.

49 § 88a Austrian ArbVG.

50 § 5 German MitbestG, § 110 (6) Austrian ArbVG.

51 Art. 1 (5) Dir. 2009/38/EC superseding Dir. 94/45/EC.

52 Art. 3 (2) Dir. 2001/86/EC.

justifies such flexibility but the terms of the agreement, unless there is cause for attribution or relevant statutory or case law provisions referring explicitly to a group situation.[53]

Employment is embedded in local protective laws, collective representation and agreements. When a multinational enterprise wants to implement "worldwide" standards for behaviour in the workplace, it has to comply with local laws. This was made evident in a case where *Honeywell* wanted to introduce its universal code of conduct into its three German subsidiaries. The works council of the German subgroup took exception to the top-down imposition as some provisions of the code of conduct were subject to shop-floor co-determination, and prevailed in court.[54] The case did not go into the particulars of the code of conduct; these were subject to mandatory negotiation between the works council and the German holding subsidiary. However, it may be an educated guess that mandatory whistleblowing in a prescribed procedure does not sit well with a works council in a country whose culture reflects the catastrophic experience of the Nazis and the Stasi enticing everybody to spy on everybody. There, whistleblowing is considered a voluntary act deserving protection.[55]

The principle of territoriality applies not only in labour and employment relations but pervades many fields of law. It prevails over direction rights in corporate law and limits the "enterprise approach".

III. Analysis

1. Characteristics of Corporate Groups

Corporate groups are normal. No one in his right mind would call them generally "good" or "bad". Maybe some specific forms of groups are suspicious; so-called pyramids denote an intrinsic imbalance of equity at risk and governing

53 Example: In France, a redundancy notice is allowed only after all possibilities for placement in an available position with the employer or other enterprises of the group – as defined in the *code de commerce* – are exhausted, Art. L1233-4 French *code de travail.*

54 BAG (German federal labour and employment law court) 22.7.2008 – 1 ABR 40/07, *Neue Zeitschrift für Arbeitsrecht*, 2008, p. 1248; see also LAG (Landesarbeitsgericht) Düsseldorf 14.11.2005 – 10 TaBV 46/05, *Zeitschrift für Wirtschaftsrecht (ZIP)*, 2006, pp. 436 *et seq*. (Wal-Mart).

55 Cf. German Corporate Governance Code 2018, No. 4.1.3: "…Employees shall be given the opportunity to report, in a protected manner, suspected breaches of the law within the company; third parties should also be given this opportunity.", available at https://www.dcgk.de/en/code.html; unchanged in the draft amendment 2019 at A. 3., in: https://www.dcgk.de/en/consultations/current-consultations.html (23.12.2018).

power.[56] Also, certain opportunistic behaviour like "tunnelling"[57] is objectionable. Such problems and imbalances need addressing but abuse does not dominate the nature of corporate groups in general. It all depends on context and purpose of rules applied.

For the single business corporation, despite all differences from jurisdiction to jurisdiction, some commonalities have been identified. According to a prominent publication one can call them the "anatomy" of corporations.[58] Five basic characteristics are legal personality, limited liability, transferable shares, delegated management with a board structure, and investor ownership. For listed companies, one may add mandatory and standardized financial statements, external audit and disclosure of such accounts.[59] Yet, the corporate group seems to defy such commonalities. A first attempt to identify universal traits is the notion of the absence of legal personality and the basic legitimacy of the group.[60] That leaves plenty of room for variation, be it in the direction of the closely-knit enterprise-like group or the very loosely organized financial conglomerate with almost no internal connections in day-to-day business.

2. Functions of Corporate Groups

Whereas legal problems of corporate groups are amply discussed, their practical business functions[61] are seldom addressed. Scandals, fraud, and dysfunctionality get a lot of attention. But in reality, most groups seem to navigate the treacherous legal waters quite well – and go unnoticed.[62] This does not mean that the current legal treatment of groups is flawless and needs no improvements. Endemic sources of opportunism, contradictions of laws and other legal frictions cause avoidable transaction costs. There is no reasonable binary choice between a strict entity approach and an enterprise perception of the group as a unit. The challenge is rather under which circumstances the entity perspective prevails or a more consolidated view is vindicated.

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56 E.g., Morck/Tian (2015).

57 Misappropriation of value of a corporation by insiders, cf. Enriques/Hertig/Kanda/Pargendler in *Anatomy* (2017), p. 146.

58 Kraakman/Davies/Hansmann/Hertig/Hopt/Kanda/Rock in: Kraakman/Davies *et al*. (2004), pp. 5 *et seq*.

59 Windbichler (2012), pp. 1391 *et seq*.

60 Hopt (2015), p. 9.

61 The term "function" is used here as described by Armour/Hansmann/Kraakman/Pargendler in: Kraakman/Armour *et al*. (2017), pp. 3 *et seq*.

62 Cf. Cheffins (1997), p. 26: "Like other areas of commercial endeavour, the law's role in company's affairs is often a marginal one", p. 28: "… the law's impact on company affairs is often insubstantial".

Whether a company merges with another or keeps an acquisition as a subsidiary, opens a branch in another country, or forms a local corporation are business decisions driven by various factors, last but not least tax purposes. The implementation of such decisions needs private law forms, mostly contracts or corporate patterns. The corporate group provides for organizational options which the stand-alone company does not offer. Doing business in the form of a group uses tools from the private law toolbox. None of these tools is intrinsically "good" or "bad".

One basic function of the corporate group is the provision of a plurality of incorporation laws.[63] A local subsidiary offers organizational opportunities different from a branch and allows for closer adaptation to locally trusted structures. Since the group itself is not incorporated, it has no homogenous incorporation law.[64]

The separate legal entities offer pre-determined breaking points. The term comes from engineering and means a notch or device that is weaker than the rest of a part; there, an element can break apart in an orderly and predictable way. The grooves in a bar of chocolate give a common example. When a conglomerate wants to divest activities that are too remote from its core business it can sell the stock in the respective company, even float the subsidiary in the capital market or place the equity in a run-off company. Such transactions are relatively uncomplicated compared to asset deals.[65] Corporate spin-offs that first create a parent-subsidiary structure may precede such changes. In case of bankruptcy of a parent, healthy subsidiaries can survive separately. If an acquisition does not yield the expected synergies, as many acquisitions do, the buyer can market the acquired shares again. After a full-fledged merger the separate legal entity of the acquired business is lost and makes divesting much more complex. Stock deals leave contractual relations of the legal entity with third parties untouched whereas asset deals may provoke unwanted renegotiations. Moreover, acquisitions as well as spin-offs allow for a plurality of investors, e.g., retaining a significant block of shares. Asset deals, by comparison, are all-or-nothing decisions.

Ownership of 100% of another company's shares is just one possibility of a parent-subsidiary relationship. It eliminates the minority-shareholder problem but also foregoes the governance aspects of a plurality of shareholders. EU law requires the availability of single-shareholder corporations and disclosure of sole ownership;[66] the SUP (*Societas Unius Personae*) should diminish set-up and operational costs for foreign subsidiaries, especially of small and medium

63 Hansmann/Squire (2018), p. 266.

64 Menjucq (2016), § 25 *et seq.*

65 Hansmann/Squire (2018), pp. 266 *et seq.*

66 Dir. 2009/102/EC.

enterprises;[67] the attempt to introduce this form, however, failed last but not least because of unresolved general corporate law problems outside of the group context. National laws vary on special laws concerning single-shareholder companies. The model act EMCA introduces an assumption that the company follows the parent's instructions, with the consequence of the parent's liability for the subsidiary's debt under certain conditions.[68] The FECG suggests a simplified type of subsidiary: the Service Company which is wholly-owned, not larger than mid-size according to EU definitions, and serves exclusively the interests of the parent or other companies of the group.[69]

Such attempts to deal with the phenomenon of the wholly-owned subsidiary show the common recognition of the significance of the separate legal entity despite centralization of certain matters within the group. The function of a pre-determined breaking point may not be prevalent but is still available. More important is the fact that separate legal entities allow for co-ordination by contract. Within a legal entity, exchanges are matters of cost centres and management tools but, for the lack of a counterpart, not legally relevant matters. Without a plurality of actors, the topic of related party transactions would not exist. The group combines contractual relationships between the companies forming the group and the organizational co-ordination by corporate means, like voting power and organ competencies.

IV. Conclusion

The corporate group succeeded as the pervasive form of business association; it is a product of private law, private autonomy, and resourcefulness. Regulation should not undermine its success but channel undesired side effects and ensure effective compliance with sector specific law. Scandal-driven legislation often reflects political power struggles and lacks consistency.[70] Sector-specific regulation may reduce the range of appropriate structures for carrying out certain business activities as pointed out above for financial services; the assumption of rather strict hierarchies may become a self-fulfilling prophecy.[71] A general

67 COM(2014) 212 final, 9.4.2014; extensive discussion of the proposal in issue no. 2 of vol. 12 *European Company and Financial Law Review* (2015).

68 EMCA (2017), Sec. 15.09 (4) 1: "In the absence of a contrary disclosure, a wholly-owned subsidiary is presumed to be subject to instructions of its parent company and does not need to make a disclosure in the Commercial registry, except to disclose that it is wholly-owned."

69 Forum Europaeum on Corporate Groups (2015), par. 10.

70 Spindler (2005), pp. 105 *et seq*.

71 Hausmann/Bechtold (2015), pp. 355 *et seq*.

call for group-wide compliance with whichever law or standard, organized by a parent company, lends itself to concentration and ever larger and tightly knit units. The *probatio diabolica* in competition law, the burden of negative proof (no guidance or influence) combined with group-wide compliance expectations, may have a similar effect.

Corporate group law identifies typical conflicts of interest and develops strategies of governance. Here, too, cookie-cutter-like solutions, like automatic liability of a parent for debt of a subsidiary or automatic direction rights[72], run the risk of undermining the functionality of asset partitioning and legal personality. The comparison of subsidiaries with stand-alone corporations, as required in some related-party transaction laws and standards, has its limits, too. Some controlled companies owe their existence to the life-saving interception in a crisis. The escape to the recognition of a "group interest" opens a rather bottomless pit in view of the difficulty to define the "interest of the corporation". Technically, the so-called *Rozenblum* concept[73] is an elaboration of the business judgment rule.

The task of legal scholarship lies in recognizing, harmonizing, and developing the various strategies informed by practical experience but not confined to the most recent scandal or an isolated focal point. The major challenge is not the creation of a new legal instrument called "corporate group", but the adequate adjustment to the characteristics of the group at hand. Corporate groups are a multifaceted phenomenon;[74] they will remain a moving target.

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72 Cf. EMCA (2017) sec. 15.09.

73 See above at fn. 31.

74 Druey (2012), p. 144: *Konzern als Multifacettenproblem* (group as multifaceted problem), pp. 150 *et seq.*: *Dichte der Konzernorganisation als Unterscheidungskriterium* (extent of organizational integration as criterion for differentiation).

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