Unitas Multiplex: Corporate Governance in Group Enterprises

Gunther Teubner, Bremen/Firenze

1. *Industrial Organization – Evolution, Theory, Law*

Two problems have from the beginning fascinated scholars when they were dealing with corporate groups – their paradoxical character of multiplicity and unity and their simultaneous closure and openness toward the environment. Both problems are at the same time central subjects of the theory of autopoietic systems. The term "autopoiesis" has been recently coined in order to denote systems that reproduce their elements by the network of their elements (Maturana and Varela, 1980; Förster, 1981; Luhmann, 1984). Autopoiesis has been applied not only to social phenomena in general but also to formal organizations in particular, by constructing them as closed networks of self-reproducing decisions (Probst and Scheuss, 1984; Gomez and Probst, 1985; Teubner, 1985 a, 1985 b, 1988 a, 1988 b; Luhmann, 1986 b, 1988: ch. 8, 9; Probst, 1987; Knyphausen, 1988). Similarly, contractual phenomena have been reinterpreted in autopoiesis terms (Deggau, 1987; J. Schmidt, 1987, 1989; Teubner, 1989 a: 420 ff.). Since corporate groups are hybrid arrangements between contract and organization, the autopoiesis paradigm might find here another field of application.

What it the potential role of autopoiesis theory in explaining and designing the law of corporate groups? Despite widespread expectations of ambitious technocratic solutions that could be translated into legal instruments, autopoietics starts off with a disclaimer. Concerning the control potential of both, law and theory in regard to industrial organization autopoietics suggests rather skeptical expectations. This is due to an important reorientation of systems theory by the concept of autopoiesis, a reorientation from planning to evolution, from control to autonomy (Varela 1981: 14; Luhmann, 1984: 27; Teubner and Willke, 1984; Willke, 1990). To put it briefly: In the evolutionary processes of industrial organization, law's role is rather limited. Given the intrinsic dynamics of legal practice in corporate groups, the possibilities of guidance from theory are also rather limited.

If the recent history of industrial organization is seen as a process of "blind" evolution, that is, a process of uncoordinated variation, selection and stabilization (see e. g. the evolutionary approaches in Alchian, 1950; Nelson and Winter, 1982; Hutter, 1989), then law appears to have played only rarely the part of a driving, innovative force that advances evolution. Variation and selection have regularly been determined by non-legal factors. The great legal innovation of the 19th century, the organization and liberation of the corporation as a legal person (e. g. Ott, 1977: 43 ff.) was initially nothing but the legal form for newly emerging industrial action centers, although it did in turn accelerate the dynamics of capital concentration by allowing for such events as group formation. The legal autonomization of the executive and supervisory board in the reforms of the first third of the 20th century was also only the formalization of the long-continuing process of separating ownership and control. Even the recent European laws of labor participation on company and plant level, hailed as major legal policy innovation, ought more realistically to be seen as a kind of rubber stamping of changed relationships between capital and labor, between firms and unions, and within the firm, between hierarchy and functional democratization (cf. Krause, 1985: 154 ff.). The repercussions, however, of legally formalized power relationships on fluctuating market situations and the forces within organizations should not be underestimated (see Wilpert and Rayley, 1983; cf. also Teubner, 1986: 261 ff.).

On the whole, the law of corporate governance has always performed the evolutionary function of stabilizing organizational forms that had emerged through other mechanisms of variation and selection. This certainly does not suggest devaluing the role of stabilizing mechanisms. Stabilization is always connected with repercussions on economic dynamics, since a level of development stabilized by legal norms in turn opens up new, unpredictable possibilities of development. *Fatta la legge, trovato l'inganno* – this is not just a famous motive of Italian legal history, but a constitutive principle of the law of corporate groups. At the same time, possibilities of influence and control over on-going evolutionary processes always exist but only under the condition that they are suited to the evolutionary dynamics, an idea illustrated most clearly, perhaps, by considering the effects of co-determination legislation (see Streeck, 1984: 391 ff.; Krause, 1985: 147 ff.; Teubner, 1986: 261 ff.). As a consequence, gauging the controlling capacity of corporate law depends in great part on which evolutionary model is used to interpret events.

This point is precisely the one from which theory should start. Nevertheless, theoretical thinking to accompany such developments is subject to manifest restrictions. For all the grandiosity of the schemes of

Savigny and Gierke on the autonomy and reality of the legal person, for all the novelty value of the "enterprise *an sich*", "separation of property and control" and "private government", theory has always had to leave the "invention" of regulatory patterns up to legal practice. It was not specifie regulatory proposals but the construction of novel realities that was the business of theory. A view of the firm's reality, of its developmental trends and internal problems, when based on any perspective other than an everyday one inevitably entails the caprice and limits of theory. The possibility exists that the fusion of practice and a new view of the firm will generate a different, and perhaps better, law of corporate governance.

Given the nature of the restrictions described above, law and theory have in common the opportunity to choose a reality construction of organizational evolution that offers law the possibility of stabilizing efficient forms of industrial organization and, to a limited extent, influencing them for purposes of legal policy. This is the starting point from which the following theses in this article will be developed. That this opportunity is, in fact, a choice of models can be seen from a glance at competing theories (section II and III). On legal issues of corporate governance in group enterprises, for example, 'organizational autopoietics' offers a reality construction of organizational evolution quite different from economic 'theories of the firm' or political theories of 'private government'. Economic theories characterize the enterprise as a contractual network of resource holders and make participation in corporate governance dependent on transaction cost considerations (section II). Political theories stress power relations in economic action centers and pose the question of political legitimation (section III). Against these models organizational autopoietics locates the legal problems of corporate governance in group enterprises at the point where two evolutionary processes intersect (section IV). One process is the involution of neo-corporatism, that is, its shift in emphasis from macro-corporatist to micro-corporatist arrangements (section V). The other process is the development of group enterprises as hybrid forms of industrial organization, whose essential characteristic is a strategically planned blending of market and organization (section VI). If, thus, corporate governance in group enterprises lies at the intersection of the decentralization of corporatism and the centralization of industrial organization, then the legal goal of the law of corporate governance becomes the legal stabilization of micro-corporatist arrangements in a way that can account for the group enterprise's nature as an "organized market" (section VII and VIII). What lies in the foreground then is not safeguarding the autonomy of the subsidiary as the "dependent firm", nor

the legal constitution of the corporate group hierarchy as a new "unitary enterprise", but the constitution of the "polycorporative network" itself, a network of intersystemic relationships between autonomous action centers. The question for legal policy then arises involving a constitution for a coalition of producers in an *unitas multiplex* network.

2. *The Firm as "Contractual Nexus"*

Before discussing the polycorporate network thesis, competing theories require brief examination. What reality constructions offered by the economic theory of the firm could support a legal company constitution (e. g. Alchian and Demsetz, 1972; Jensen and Meckling, 1976; Fama, 1980; Fama and Jensen, 1983; Grossman and Hart, 1986; Alchian & Woodward, 1987)? Oliver Williamson has produced the most ambitious scheme to date within the domain of economic theories (Williamson 1975, 1985, 1988). His starting point is the dissolution of the organization into a nexus of exchanges among resource holders. This approach allows the organized firm to be seen within a spectrum of various types of contractual relationships, from the spot-market transaction up to the multinational group distinguished by "governance structures" of differing quality and intensity. The choice among various contractural arrangements is made on the basis of an efficiency directive: "minimize transaction costs". Three factors are decisive for the formation of governance structures as opposed to purely contractual structures: uncertainty, opportunism and, most important for organizational differentiation, "asset specificity".

> "The reason why asset specificity is crucial is that once the investment has been made, buyer and seller are effectively operating in a bilateral exchange relation for a considerable period of time thereafter . . . they are locked into the transaction" (Williamson, 1981: 1546).

This theory is important for the law of corporate groups because it helps to break down reservations about hybrid forms of organization present in company law and anti-trust law. When Williamson shows that specific forms of group organization, in particular the decentralized form of multi-divisional organization, help to minimize transaction costs and thereby increase efficiency, he means to question any legal assessment that would regard group formation as either harming a dependent firm in the interest of the dominating company or as a clear expression of concentration and monopolization.

Of similar relevance are the consequences of the transaction cost approach to the law of corporate governance. Williamson assesses the question of whether resource bearers should be allowed participatory rights in internal decisionmaking processes. With low asset specificity, a combination of contract and market controls is appropriate; with high asset specificity additional governance structures are necessary in order to set controls on the opportunistic exploitation of temporary advantages ("opportunism with guile"). This necessity leads, in the case of employees, for example, to the finding (see in addition Alchian & Woodward, 1987: 120, 130) – somewhat surprisingly for an economic theory – that the employees' relationship to the firm should not be regarded as purely contractual. Instead, the integration of particular groups of employees into the governance structure should be promoted, perhaps not in bodies like a supervisory board, but at least in grievance procedures and similar resource-specific organizational mechanisms.

The richness and poverty of the transaction cost approach however lies in its contractualistic aspect. The dissolution of economic organizations into a complex contractual nexus makes sense only with respect to member recruitment and the utilization of individual motivation for the purposes of the organization. But as soon as the contractual mechanism becomes universalized, as soon as the whole of the organization is dissolved into exchange relations among resource holders, it becomes fatal. Corporative and collective aspects of the organization are systematically ignored.

Sociological theory suggests that contractualism amounts to an unjustified privileging of some forms of social action over others. A theory starting from the initial condition of "double contingency" (Parsons and Shils, 1951: 16; Luhmann, 1984: 148 ff.) sets up three types of social action as, in principle, equally entitled: exchange, competition, cooperation (Luhmann, 1984: 522; 1988: 101 ff.). But the contractualist viewpoint starts from exchange and competition as normal conditions of social action. Cooperation appears only secondarily as compensation for market failure, that is, contract failure and competition failure. Correspondingly, Williamson conceives of governance structures only as compensatory mechanisms that intervene when asset specificity makes the normal functioning of contractual mechanisms and market controls impossible. In a remarkable narrowing of viewpoint, governance is seen onesidedly as the guaranteeing of transaction-specific investments against excessive advantage ("opportunism with guile"). Portraying governance structures as an antidote to excessive advantage implies a drastic underestimation of the pre-conditions and consequences of cooperation as a basic form of organization.

Williamson's perspective, thus, systematically ignores many relevant

aspects of formal organization: decisions as autonomous elements of organization, guided by organizational structures; goal orientation by the actors towards the purposes of the organization; adjustment of resource bearers' agreements to the organization's goal and its internalization in contractual relationships; subjection of the actors to the norms of the organization; membership in the organization as a combination of belonging and subjection to rules; power as a communication medium of the organization, and corresponding forms of coordination of action; informal relationships inside the organization (cf. Granovetter, 1985: 481 ff.; Behrens, 1986: 307 ff.; Kay, 1986; Schanze, 1986: 212 ff.; Knyphausen, 1988; Tirole, 1988; FitzRoy and Kay, *infra*).

To be sure, the contractualist viewpoint allows the "transaction" to be regarded as common to contract and organization which makes their direct comparison possible. However, at the same time it covers up fundamental differences rooted in the fact that the elementary unit of the market is the monetary transaction, whereas that of organization is the decision. It also ignores the fact that action on markets is oriented primarily to prices, whereas action in organizations is directed to expectations produced within the organization. Finally, it overlooks the situation that the calculation of action on the market depends on the individual actor's advantage, whereas in an organization calculation depends primarily on the advantage to the organization itself (see Luhmann, 1986 b, 1988: 272 ff.).

These remarks bring us to the second essential criticism. A contractualist viewpoint systematically underestimates the role of the "corporate actor". Certainly, Williamson forcefully describes the differences between contract and organization against the background of a "fundamental transformation". While market controls operate before the conclusion of a contract, after conclusion, in the case of contracts with high "asset specificity", the situation changes into a bilateral monopoly. The contractual relation is helplessly exposed to opportunistic action by the parties unless countermeasures of "governance structures" are built in. What this analysis lacks, however, is consideration of a second "fundamental transformation" which occurs when the contractual network becomes autonomous as a collective actor. Lawyers speak of corporate elements, of '*Gesamthand*', of the legal person; sociologists of the 'corporate actor', of the collectivity (see Teubner, 1988 a: 133 ff., 1988 b: 66 ff. with further references). Economists with a contractualist approach are more or less blind to this imputation of action to collective actors. Williamson's organization is nothing but a multiplicity of long term contracts. However, those theoreticians who are sworn to methodological individualism cannot entirely do without the logic of the collective.

Correspondingly, in Williamson's picture, too, collective units appear, albeit in primitive form, such as "unified corporate governance", "common profit seeking", and the "firm" as a partner in resource agreements. But they are introduced *ad hoc*, and without any roots in a theory that remains individualistic and contractualistic.

This approach, thus, forfeits several important collective characterictics of the organization (see Selznick, 1969; Coleman, 1974, 1982, 1985; Dan-Cohen, 1986; Mayntz, 1986; Teubner, 1988 a; 133 ff., 140 ff., 1988 b: 66 ff.; Hutter, 1989): the operative social fiction of the "corporate actor" as a new and different point of attribution, by comparison with the parties to a contract, for profit maximization and transaction cost minimization; the concept of corporate interest as an independent criterion in resolving conflicts among resource holders, as something more than and different from a mere balancing of individual interests against the background of real or fictitious market mechanisms; the collective binding effect of the corporate actor in the actions of company gremiums; and the external effect of the corporate actor, which makes possible a new type of relationship between the firm and its environment (Teubner, 1985 b: 470 ff., 1988 b).

For our topic of corporate governance in groups, two consequences of the contractualist downplaying of the corporate actor are particularly important. First, the tension between unity and diversity in the group enterprise (Raiser, 1964; Bälz, 1974, 1985; Assmann, *infra*, Vardaro, *infra*) cannot be adequately treated by a theory that describes this tension only in terms of decentralization and the inclusion of market elements in the organization, as Williamson does. What is missing is the multiplication of imputation for collective action – an operative fiction that cannot be reconstructed by contract theoreticians (for more see below, section VII). Second, the principles of corporate governance are looked at onesidedly from the viewpoint of the resource holders as contract partners, for protection against excessive advantage on either side. This perspective is not an unimportant viewpoint, but it ignores decisive aspects. The orientation of corporate governance towards the collective interests of the corporate actor, for example, is overlooked, as are the orientations towards efficiency advantages for the whole organization and towards its social functions and performances (for this see Buxbaum, 1984, 1986: 470; Teubner, 1985 a, 1988 a).

In sum, the clarifications that the transaction-cost approach brings to the issue of choosing organizational forms are purchased at the price of myopia towards corporative and collective aspects of the firm. This problem drastically restricts the usefulness of the theory for the purposes of company law.

No less deficient is the tunnel vision of those political theories that see industrial organization as "private government" (e. g., Mason, 1959; Dahl, 1973; Ott, 1977; Ulrich, 1977; Steinmann, 1985; Bercusson, *infra*). The political theory's chief merit lies in its treatment of private economic organizations as para-political systems (Easton, 1965: 51), that is, as systems with the function of building up organizational power in order to bring about collectively binding decisions throughout the organization. This approach brings the phenomenon of power into the foreground. Theories of private government enrich analysis by revealing political power processes in economic organizations oriented allegedly only to market efficiency, thereby enabling parallels with larger political systems to be drawn. Consequently, a whole spectrum of political phenomena in the economic firm opens up to analysis: hierarchy, bureaucracy, power accumulation, division of powers, group competition, political coalitions, negotiating systems and logrolling, to mention only a few.

Group enterprises, too, are interpreted essentially as a power phenomenon (Hadden, 1983, 1984; Bercusson, *infra*). Internally, they appear as the use of company law participation to build up super-hierarchies in industrial empires, and, externally, as the building up of market power and political power. Correspondingly, legal policy is concerned with breaking down economic power, or at least legitimizing it by a para-political constitution.

The problematic thing, though, is the associated abhorrence and absolutizing of the power phenomenon. While in the political sphere legitimized power is largely accepted as political rule and is evaluated by its use to bring about positive social change (e. g., Bercusson, 1987: 58), the phenomenon of power in economic organizations is treated quite critically. A sociological theory of power, defining power as medium of communication – in analogy to money and law – would be less moralizing and would judge power phenomena in economic organizations less harshly but without necessarily defending them as "functional". Still more burdensome is the absolutizing of the power phenomenon, which sees hybrid forms of economic organization, such as the phenomenon of group enterprise, solely as instruments of economic power, as organizational forms able to withdraw economic action from governmental or social control (see again, Bercusson, in this volume). This viewpoint fails to consider efficiency gains through organization and positive social effects and to weigh them against negative effects.

The company constitution too – the core of the legitimation of "private

government" – is made to lean to one side by this theoretical load. In the foreground stands worker's council and worker's participation, that is, the legitimation of power in the firm through the participation of those directly involved. But this means that those aspects of economic organization that affect society as a whole are left out. The company constitution then becomes oriented no longer towards the primary aspects of any organization, namely the social function of enterprise and what it does vis-à-vis social subsystems, but towards the rather secondary aspect of the welfare of the organization's members (see Teubner, 1983, 1985 a, 1988 a).

4. *The Enterprise as an "Autopoietic System"*

While economic transaction cost theory regards industrial organization merely as a contractual relationship, and while the political theory of "private government" analyzes industrial organization as quasi-political power, autopoiesis theory regards organization as a process of the internal differentiation of the economic system into an organized and a "spontaneous" area (Luhmann, 1981: 393). By contrast with a view that resolves the opposition between contract and organization into a sliding scale, along which are transitions marked only by differing governance structures, this theory insists on a fundamental distinction between contract and organization (see Teubner, 1979: 719 ff.).

According to this view, contracts are formalizing the exchange processes that organize the autopoietic reproduction of the economic system, that is, the reproduction of acts of payment by acts of payment. They are built up upon a basic form of social action, namely exchange against a background of competition (Luhmann, 1964). By contrast, organizations formalize cooperation as a basic form of social action. Organizations are not – as economists tend to see it (see e. g., Grossman and Hart, 1986) – merely contracts enriched by governance structures or decision rights over noncontractibles, with payment flows continuing to pass undisturbed, but rather constitute a mode of system formation within the economic system that is in principle different. They are themselves autopoietic systems whose elements are not payments but decisions. Organizations are "systems that consist of decisions and themselves produce the decisions of which they consist out of the decisions of which they consist" (Luhmann,

1986 b: 2; cf. also Teubner, 1985 b: 471, 477; Gomez and Probst, 1985: 22; Probst, 1987; Knyphausen, 1988: 238 ff.; Hutter, 1989; Clune, 1990). "At the same time they utilize their self-organized structures in order to specify expectations that guarantee that action – every action – can be treated within the system as a decision" (Luhmann, 1986 b: 3).

This analysis does not mean that the role of contracts among resource holders is underestimated or that they are simply reinterpreted *in toto* as organizational structures. They are, however, relegated to the environment of the organization. Resource holders, that is, capital owners, workers and management, are, just like suppliers or customers, a part not of the organization but of its environment. Agreements among them or with them are therefore regulations of the environmental relationships of the organization. For lawyers, this separation of contract and organization is quite familiar, although this insight is only available *ad hoc* for the various groups of participants with differing legal constructions. German company and labor law, for example, provides quite different legal constructs for the same distinction. In the case of workers, a separation is made between the labor contract and the worker's integration *(Eingliederung)* into the organization; for management between appointment and assignment *(Anstellung and Bestellung)*, between the employment relationship and the agency relationship (e. g., K. Schmidt, 1986: 312 ff.). In the case of shareholders, the separation is less clear. The area of the member's contractual relationships with the firm, however, can be separated from that of action as an organ of the firm (for subtle distinctions, see Bälz, 1980: 43).

Autopoietics treats organization and contract in terms of system and environment. The contractual network among resource holders regulates the environmental relationships of the organization to its members, while the organization itself constitutes an autonomous action system, reproducing itself not through contractual transactions but through the recursive linkage of organizational decisions. The contractual and decisional networks pursue very different logics. Admittedly, Williamson's transaction approach attempts to grasp one aspect of this difference with the help of the distinction between high-powered and low-powered incentives (Williamson, 1988: fn. 23), but the conceptual apparatus used is not complex enough to take account of the different dynamics of self-reproduction. While the contractual nexus serves the structure of motivation, i. e. the provision of motivation for the effective contributions made by the resource holders, the decision network of the organization is oriented toward the organization's rationality structure, primarily towards autopoietic reproduction and secondarily towards the

rationalization strategies being pursued, that is to organization goals, ends/means relations, hierarchical instructions, informal expectations, and so on. Bringing them both together again in the concept of a comprehensive contractual nexus would make purposive and motivational structure coincide. It would reverse the separation of goal and motive that characterizes modern organizations. To put the issue more polemically, it would downgrade industrial organization to a private club (on the separation of goal and motive, see Gehlen, 1956: 35; Luhmann, 1973: 128 ff.).

The boundary between the economy's spontaneous and organized areas, the boundary between "market and hierarchy", is defined not as economists see it (except e. g. Nelson and Winter, 1982), by rationality, but instead by evolution. The rational actors' role in evaluating decisions for their consequences on the basis of a preference order and taking their decisions accordingly is drastically overestimated in processes of choosing between contract and organization. The "chaos theories" of organization that have been going around for years (Simon, March, Olsen; for a recent overview, see, March, 1988) have thus had only little effect on economic theories of industrial organization (see Brunsson, 1982, 1985). Their key concepts, beside "bounded rationality", are: "loose coupling, disorderliness, nondecisions, problematic attentions, learning and garbage-can decision processes" (March and Shapira, 1982: 94). To be sure, Williamson's consideration of decisionmaking under uncertainty and of "bounded rationality" is an attempt to take "chaos theories" into account. But the consequences are not drawn radically enough. "The semantics of rationality is practiced as it were like singing or whistling in the dark in order to drive out uncertainty and anxiety" (Luhmann, 1984 b: 602). The radical consequence is a shift from rational action to blind evolution (cf. Aldrich, 1979; Weick, 1979; Nelson and Winter, 1982; Kelvey and Aldrich, 1983). It is the uncoordinated interaction of mechanisms of variation, that is, the trial-and-error strategies of economic actors, and of selection mechanisms, that is, the interplay of competition and power processes on the market, with stabilization mechanisms, that is, institutionalization of organizational arrangements, that decides the choice of market and hierarchy. That decisions of actors claiming to be rational play some part here, especially in variation, is not disputed.

The sole criteria of success are survival advantages of specific institutional arrangements in the evolutionary process. Among these, transaction costs – the highlighting of which is the great merit of recent economic theories of the firm – certainly play an important part. It must, however, be doubted whether this category fully exhausts the relevant differences in

performance between market and hierarchy. The theory of autopoiesis, for instance, works with a distinction between redundancy and variety which could be mapped onto the dichotomy between hierarchy and market (Luhmann, 1986 a, 1986 b). "Redundancy" means structural restriction of decisionmaking contexts with the result of concentrated power for the organization, albeit at the expense of other, better decision possibilities. By contrast, "variety" means an increase in diversity of decisions and flexible adaptation to turbulent environments, something more available to decentralized contractual coordination than to hierarchical organization. Other criteria for evolutionary success have to do with economies of scale, cooperation advantages of coordinated behavior, synergetic effects of joint-venturing, decisions on motivation, and bureaucratic effects. These phenomena work partly against, partly for formal organization. This bipolar benefit effect is at the same time the explanation for the unlikeliness of the economy as a whole developing into a huge formal organization. The interplay of redundancy and variety prevents the merger of market and hierarchy.

5. *Microcorporatism*

This briefly-sketched autopoietic reinterpretation of the relationship between firm and market approaches corporate governance in group enterprise in a specific way. Once the evolution of market and firms had established the differentiation of the economy into organized and spontaneous areas, further development was characterized by multiple trial-and-error sallies in an attempt to seek evolutionary advantage by combining (not: blending) the two institutional arrangements. The history of industrial organization shows many experiments with hybrid forms, with the organization of markets and with the marketing of organizations. We need not list here the vast number of market concentration movements on the one hand, and of decentralization efforts in big organizations on the other. What is of interest in our context are the two lines of development within which relatively stable institutional arrangements have formed: neo-corporatist arrangements on the one side and the decentralization of large corporate hierarchies on the other side. The problem of corporate governance in group enterprise lies at the intersection of the two developments.

Among the many attempts at organizational penetration of markets, neo-corporatist arrangements have received the most attention of late (see the

collective volumes, Streeck and Schmitter, 1985; Grant, 1986; Vardaro et al., 1990). This new "voluntary" symbiosis of capital, labor, and government seemed by comparison to older corporatist experiments to offer the advantage of being able to build on the historically grown hierarchies of employers' associations, trade unions and governmental bureaucracies. Neo-corporatism thereby acquired a procedural flexibility that tended to make it more compatible with the structures of the economic system than other political arrangements of political interest-mediation (Streeck and Schmitter, 1985; for a critique, see Streit, 1987, 1988).

Corporatist arrangements were formed at three levels. At the center of attention were macrocorporatist institutions (Social and Economic Councils, *Konzertierte Aktion*, Social Contract, *Patto Sociale, Paritätische Kommission*), which, more or less formally organized and juridified, sought on a national level to harmonize corporate strategies, trade union strategies and governmental economic policies with each other (Schmitter and Lehmbruch, 1979). At the same time, however, meso-corporatist arrangements, the coordination of collective actors at the branch and regional level, acquired new importance (Rogowski, 1985, 1989: 256 ff.). A final part of the corporatist set-up was the micro-corporatist arrangement at the level of industrial organizations, including not only legally-enforced models of participation as in Germany, the Netherlands and Sweden, but also *cogestion à la française* and rather informal participatory rights for the workers' side developed out of collective bargaining (on the corporatist aspects of co-determination, see Wassenberg, 1978: 8; Panitch, 1979: 123; Czada and Lehmbruch, 1981: 4 f.; Erd, 1982: 148; Dittrich, 1985; Teubner, 1986; Simitis, 1987; Sciarra, 1990).

In the mid-seventies – the high point of "neo-corporatism" – its two leading proponents, Philippe Schmitter and John T. Winkler, argued not only about the academic discovery of the phenomenon, but also about its definition and its prospects for success. While Schmitter (1974, 1977) termed it a new "mode of political interest mediation" and ascribed to it the potential for overcoming the governability crisis, Winkler (1976: 109) saw "neo-corporatism" as the successful new form of political control of the economy, as an "economic system of private ownership and state control". Both authors, despite differing views, emphasized macro-corporatist structures. By contrast, others saw the future of corporatism in an interweaving of the various levels. Wassenberg (1978: 8) ventured the following prediction:

> Corporatism seems more and more to develop as an interorganizational-interassociational search-strategy of accommodation-prone while highly interdependent groups that export conflicts of identity and interest – suppressed but unresolved on the corporatist meso level – either to the micro level of individual firms or to the macro level of the parliamentary area.

Today we know better. The development of the corporatist experiments proved neither Schmitter nor Winkler right, but resulted in a shift of emphasis: as an involution from macrocorporatism to microcorporatism (see Sciarra, 1990).

Following the economic crisis and the thorough restructuring of industrial organizations and regulatory systems in Western Europe (see Sugarman, *infra*) silence about macrocorporatist arrangements has prevailed. In part these arrangements were pulled down into the maelstrom of deregulation and deinstitutionalization; in part, despite continuing formally to exist, their real importance was reduced. For the most part, they are off the economic policy agenda (see Streeck, 1987 and *infra*). But that does not mean that the corporatist syndrome has disappeared; instead it has undergone a shift in emphasis. By contrast with macro and meso structures, microcorporatist arrangements have not only survived crisis and reorganization, but have precipitated out as stable producers' coalitions at the level of big firms, and as state-encouraged, efficiency- and success-oriented organized units operating on the world market (Streeck, 1984). Microcorporatist arrangements at the firm level have emerged as an interesting strategy for industrial flexibility.

Macrocorporatist strategies are not presently in fashion. In a period of extremely rapid market changes, heightened competitive pressure and weakening or collapsing governmental regulatory regimes, macrocorporatist arrangements appear rigid, centralist and immobile (see Simitis, 1987: 134 ff.). Decentralization and increase of flexibility through contractual arrangement is the new tactic, applied to financing methods, technologies, customer relationships and labor relationships (Piore and Sabel, 1984; Strauss, 1984; Willmann, 1985). The goal of the new industrial policy is flexibility as an end in itself, "a general capacity of enterprises to reorganize in close response to fluctuations in their environment" (Streeck, 1987 and *infra*).

While flexibility through contract is today's prevailing demand, microcorporatist arrangements may offer an alternative in the heated debate on "Americanization" or "Japanization", namely flexibility through organization (Gutchess, 1985; Streeck, 1987). Flexibility can be achieved not only through contractual arrangements but also by decentralizing the organization. A policy that concentrates on

organization can additionally exploit the productivity advantages of a "producers' coalition" (capital, management, labor, state framework), which are increasingly required under conditions of the new industrial divide.

This industrial policy position is very close to the ideas developed here. In fact, the privileging of one group of participants, whether it is shareholders or management, in such a way that it can acquire flexibility using contractual arrangements would be less than optimal for the organizational interests of the "corporate actor". The advantage of contractual arrangements lies in quick responsiveness to fluctuations in environmental conditions. The drawback, however, is that contractual solutions cannot exhaust the "organizational surplus value" (on this see especially Selznick, 1969: 54 ff.; Streeck, 1987). "Organizational surplus value" arises from three sources: (1) from the building up of long-term relationships of cooperation, which would be continually broken down again by contractual flexibility; (2) from the diffuseness of "commitments" in the organization that, in comparison with rigid, firmly specified contractual obligations, provide much more situational flexibility; and (3) from the orientation toward the organization's interests, which has more pulling power than mere contractual binding.

These ideas suggest a legal conception for corporate governance centered around a microcorporatist producers' coalition. According to this proposal, none of the resource contributors, whether capital, labour, management, or even the state has any natural claim to "sovereignty within the group". In principle, the connection between resource holding and control rights is broken, and total control over all resources are assigned to the "corporate actor". The idea of "organizationally bound property rights" (Krause, 1986: 219 ff., 225) is diametrically opposed to the idea that the firm constitutes a mere "contractual network". The allocation of control rights within the firm would then be arranged neither by priority of one resource interest nor by the logic of exchange within the contractual network, but according to efficiency viewpoints oriented towards the interests of the "corporate actor", which is different from that of any participant.

Even admitting the external integrative effects and internal motivational effects of microcorporatist arrangements, the external disadvantages of producer coalitions require examination. Chief among the disadvantages is that these coalitions reach their agreements at the expense of third parties and the public interest (cf. the discussion of empirical material in Hopt, 1984; Streeck, 1984; Krause, 1985; Teubner, 1986). From the legal policy viewpoint, this difficulty is in fact the weakness of corporatism within the firm. Nevertheless, the emergence level of the "corporate

actor", the real existence of which is asserted against all methodological individualism, points to the legal policy direction: the institutional strengthening of the "corporate actor" as the liberation of an impersonal action context which imposes effective constraints on the action of the individual participants.

6. *Group Enterprise between Market and Organization*

In light of neo-corporatist trends towards involution from the macro level of coordinated economic policy to the micro level of the producers' coalition, it appears that the corporatist triangle has found its optimum application at the level of the large corporation. In the hierarchy of company organization, it has found the highest possible point at which strategic planning in the economic system appears effective and at which it can effectively bring to bear its mechanisms of interest aggregation and of policy implementation within interest groups.

The question remains, however, whether it does not ultimately start one step too low; whether it does not leave largely unexploited a development potential that the strategic planning center of industrial organization has long shifted to a higher level (Eisenberg, 1976: 277 ff.; Herman, 1981: 187 ff.; Sapelli, *infra*). Here we immediately come up against the second evolutionary trend in the blending of market and organization: the development of group enterprises as "organized markets" in which microcorporatist negotiating practices already play an important part, but corporate governance law has been unable to adequately track.

The interesting thing about group formation is not the fact that it is a movement towards concentration in which use of the private law instruments of membership and contract can lead to the formation of enormous business empires, but rather the fact that competition occurs between institutional arrangements within group forms. As a crude subdivision, three group forms can be distinguished: the H-form ("holding form"), a loosely organized form of pure administration of assets; the U-form ("unitary form"), a tightly constructed hierarchical form of the unitary group; and the M-form ("multidivisional form"), a largely decentralized group type in which the subunits act as autonomous "profit centers" on the market. The most efficient organizational form has proved to be the M-form, which combines high concentration and far-reaching decentralization (Chandler, 1966: 382 f.; 1977; Williamson, 1981: 1555 ff.; Hedlund, 1986; Jacquemin, 1987: 139 ff.; Palmer et al., 1987; Jarillo, 1988; Lorenzoni, 1989).

From the autopoiesis viewpoint, three remarkable things about the M-form phenomenon emerge in sharp relief.

a) *The Need for Contextual Control*

Beyond a certain threshold of organizational size and complexity, direct hierarchical control either runs into difficulties, or else fails altogether. Under the heading of control of autopoietic systems, this problem has been comprehensively discussed (e. g., Probst and Scheuss, 1984; Knyphausen, 1988: 317 ff.), with the conclusion that in such situations direct hierarchical control must be replaced by "contextual control" (Willke, 1990). Complex organizations cannot be controlled from outside at all, except by allowing the organization wide autonomy and by giving the system only general restrictions for structuring its action contexts (for empirical material see Hedlund, 1981: 21 ff.; van den Bulcke, 1986: 222 ff.; Gatignon & Anderson, 1988). The control mechanisms frequently employed in the M-form, namely strategic planning of general group policy, coordination by defining top personnel policy and indirect profit control, exactly correspond to this postulate of contextual control (Williamson, 1981: 1555 ff.; Scheffler, 1985: 2009 ff.; 1987: 469 ff.).

b) *Re-entry of the Market*

Frequently, decentralization is emphasized as the decisive aspect of the M-form (e. g., Hommelhoff, 1982: 231 ff.). A far more important fact, however, is that in the M-form the group repeats within its own boundaries the internal differentiation of the economy into a formally organized sphere and a spontaneous sphere. This amounts to a "reentry" of the system/environment distinction into the system itself (Spencer Brown, 1972). The distinction between market and organization is repeated yet again within the organization. The 'market principle' penetrates the 'organizational area' (Imai & Itami, 1984: 285). The group thereby makes use of the above-mentioned dynamics of redundancy and variety. "The more large-scale organizations influence economic and political action the more important is it for them to repeat internally the interplay of variety and redundancy" (Luhmann, 1986 a: 19; Luhmann, 1987: 48). Markets are organized within the organization. In the relationship between the parent company and the subsidiaries, a kind of capital market is simulated. Within the group, labor markets, manager markets, resource markets and product markets also appear.

The proportion of the blend of market and organization in the group organization is not fixed. It can vary according to strategic viewpoints (see Assmann and Sapelli, *infra*). Management can choose whether the group enterprise acts as a whole or whether the subsidiaries act autonomously. This pattern characterizes the group enterprise as a multi-stable system (Pausenberger, 1975: 2243). Market and hierarchy can be used alternatively and complementarily (Kirchner, 1985: 226). The choice between market and hierarchy in the group does not follow blind selection in the economic evolutionary process, but becomes an object of planned decision – making which has to be justified, and – this point is particularly important – is an object of constant change.

Group organization thus accords with the general insight that no general preference exists for one or the other principle in the relationship between redundancy and variety; nor does any "optimal mix" exist. The proportion between redundancy and variety requires constant adjustment oriented to environmental conditions. "According to what noises are experienced within the system, what irritation is perceived, what changes by comparison with previously are recorded, one orientation or the other may take the lead. The decisive aspect for rationality (if it may be so termed) remains that the system should remain capable of shifting the lead between redundancy and variety. The system ought, accordingly, be able to see high redundancy also as a chance to allow itself more variety, and vice versa perceive trends towards dissolution into *ad hoc* rule and purely situation-dependent decision – making as a reason for tightening up – whether by changes of programs, networks or personnel" (Luhmann 1986 b: 31). In the decentralized group, then, a "navigational rule" becomes a principle built into the hybrid organizational form. The chameleon-like changing of organizational form becomes a leading characteristic of the group enterprise. Choosing the color that fits the environment is one of the main tasks of group management.

c) *Eigen-dynamics of a Self-observing Process*

The third striking characteristic of group organization involves the autonomy of the subunits vis-à-vis the hierarchical group management. This autonomy gives the organizational form of the group the specific eigen-dynamics that produce evolutionary advantages in comparison to purely hierarchical coordination or purely market-type coordination (Hommelhoff, 1982: 229; Kaneko & Imai, 1987; Bartlett, 1986; Kogut, 1987; Jarillo, 1988). Eigen-dynamics means the phenomenon of a process entering into a self-referential relationship, or, more exactly, observing

itself and using this self-observation to control itself (for recent sociological debate on eigen-dynamics, cf. Mayntz and Nedelmann, 1987; Teubner, 1989a). Hierarchical systems have only limited eigen-dynamics in this sense, since the observational center of the process is located at the top of the hierarchy. Other observational centers that may emerge through the division of functions within the hierarchical organization are, in a certain sense, dysfunctional because their observational and control criteria are constituted only suboptimally as measured against the organization as a whole. The managers of such subunits are "likely to be overconcerned with their functional goals" (Jacquemin, 1987: 142). A different situation exists in a group decentralized not along functional lines but through profit centers. Such a group is characterized by a multiplication of observing centers whose observational and control criteria are oriented towards the objective of global profits.

7. *Legal Images of Group Enterprises*

What legal consequences emerge from this view of the group? Which of the various "legal images" of the group that underlie legal regulations appears most suitable for our reconstruction in the framework of autopoietic theory? What follows from our reconstruction for the group's regulatory problems, in particular for the tasks of future corporate governance in group enterprises?

So far the legal debate has been between fronts that have been wrongly drawn up, namely between the legal image of the "dependent company" on the one hand and that of the "hierarchical unity of the group" on the other. Other kinds of directions could be given for the law of corporate groups if a third legal image were chosen: the image of a "polycorporative network".

"The dependent legal person" – the title of Kronstein's famous work (1931) – clearly expresses the historically most influential legal image of the group, an image which has decisively shaped the view of the problem and the regulatory mechanisms of emerging group enterprise law. Its starting point is the historical liberation of the legal person and the appearance of the corporation as the typical large enterprise; in other words, it is concerned with the position of the firm's autonomy vis-à-vis the environment and, in particular, vis-à-vis the shareholders. This perspective is directly contradicted by the new tendencies of group formation, which produces "dependent legal persons" as subsidiaries of

corporate groups. These tendencies downgrade the autonomy of the legal person into an spurious autonomy, transfer the corporate sovereignty to third parties and destroy the internal balance of power of the company constitution (cf. Antunes, 1988).

This legal image of the "dependent company" furnishes a viewpoint based on a comparison between the legal constitution of an autonomous firm and the *de facto* position of a subsidiary that has become dependent through group formation. If this comparison shows that disadvantages have arisen through the loss of the subsidiary firm's autonomy – the argument goes – then the law must ensure either that the *status quo ante* is restored or that the disadvantages are compensated by legal compensatory mechanisms.

The paradigmatic example here is "piercing the corporate veil". The normal case is taken as the autonomy of the legal person; in exceptional cases, among them particularly tight forms of a subsidiary's control through the parent company, action can be taken against the parent company, in accordance with the "reality of life". But thinking in terms of "agency" also belongs here, since it dictates that the group be treated as a unit only if the subsidiary company has acted as a "quasi-agent" of the controlling company (cf. Blumberg, 1983: 20 ff.). In Europe, the image of the "dependent firm" is even more influential. French group enterprise law, for example, thinks entirely in categories of "*entreprise dépendante*" (cf. Houin, 1982: 45 ff.; Cozian & Viandier, 1987: 440; Jeantin, 1988: 677 ff. and *infra*). Similar is the situation in other European countries, for example in Italy (see Alessi, 1988: 221, and *infra*), in Portugal (Antunes, 1988), and in the Netherlands (Franken, 1976: 22). Even the German *Konzernrecht* of 1965, often praised as highly advanced, remains largely stuck with the legal image of the "dependent company", at least so far as the legal position in the *de facto* group is concerned (see Hommelhoff, 1982: 33 ff.). Compensation for disadvantage, for instance, which is provided for in the case of disadvantageous instruction by the parent company to subsidiary, is oriented towards the image of a company acting autonomously in the market (Rehbinder, 1986: 87).

The unsuitability of this legal image requires no separate demonstration after what has been said so far about the new type of organizational unity of the group enterprise. The only surprising thing is that legal regulations so frequently take this image as a basis and allow it to guide approaches and solutions. Only gradually has an opposite view made headway, a view that looks at the group not from "below upwards" but "from above downward", that is, a view of the group as a legal unit from the perspective of the group parent company. Early endeavors at a unity theory of the group, such as Isay's (1910), remained unsuccessful. Today,

instead, a unitary view is coming to prevail across the board. In Germany, Marcus Lutter and his school occupy the forefront of change (Lutter, 1974 a, 1974 b, 1977 b, 1985; Timm, 1980; Schneider, 1981; Hommelhoff, 1982). French labor law, which in contrast to French company law takes the unitary view seriously, has also shown considerable vigor in pressing for change (cf. Savatier, 1986; Supiot, 1986; Rodière, *infra*). In the Netherlands, *"De Structuuregeling"* that introduces compulsory supervisory boards into large corporations was based on the legislator's view "that the group of companies had to be seen as a unity" and thus exempts subsidiaries from this requirement (Honnée, 1981: 40). In the United States, it is particularly Blumberg (1983, 1985) who criticizes the "piercing" image and advocates a unitary view of the "corporate group" as a single enterprise. And of course the recent reforms of company constitutions in Dutch, French and German law, whether they focus on worker participation via work councils or supervisory boards, tend to treat the group as a unitary enterprise (cf. Birk and Rodière, *infra*; de Knijff, 1988: 71 ff.). They aim at locating codetermination models at the parent company level as the group's decision making center (cf. de Knijff, 1988: 71 ff.; Supiot, 1986: 621 ff.; Lutter, 1975, 1977 a). Another prominent example is California with its principle of "unitary taxation" for multinational enterprises (U.S. Supreme Ct., Container Corporation v. Franchise Tax Board (1983), International Legal Materials, 855).

However appropriate the unitary view is in drawing legal consequences from the fact that the group represents an economic unit, its concept of the group as a hierarchy and its corresponding concentration on the group parent as center of action and accountability is problematic. This difficulty emerges clearly in the work of the Lutter school. Here, too, a comparison is regularly drawn, but this time between the parent firm and a "classical" corporation. The leading question is: What distortions does the parent company's constitution undergo from group formation? What disturbances, what asymmetries arise in the internal power balance of the company bodies? What compensatory regulations are needed to balance out these disruptions? This latter question is posed particularly with respect to the parent company's general meeting; this forces a redefinition of its powers with regard to the group. In the well-known *Holzmüller* case, this "top-down" thinking entered into case law. Here the German Federal High Court strengthened the powers of the parent company's general meeting (*Bundesgerichtshof – BGHZ* 83, 122).

Despite undeniable progress, though, this view that symbolizes the group's unity in the hierarchy, misses the point. It does not really account for the three group characterictics that we picked out as essential: contextual control, re-entry of the market, eigen-dynamics of the group.

Hierarchical thinking, locating power and accountability at the group parent, fails to take seriously the need for power decentralization arising from the fact that hierarchical control of complex systems is rational only as indirect contextual control (budget, top personnel). In addition, it does not do justice to the fact that the group, because of the internalization of market structures in the organization, has to be understood less as a hierarchy than as an "organized market". Finally, it fails to do justice to the eigen-dynamics of the group because it focusses on the power of the group parent instead of focusing on the dynamic interplay of a multitude of autonomous action-centers that can be coordinated by the top only with great difficulty.

A similar critique applies to the doctrine of the group's economic unity developed in labor law. Labor law usually searches for the power center of the corporate group where the relevant decisions are made. Labor law generally identifies the parent company as this power center. Kahn-Freund (1972: 353) has clearly pointed out how such an identification of power and hierarchy can be wrong: ". . . the state of power may be at the center or at the periphery, or may be divided." In fact, empirical analyses of decision-making in corporate groups should have discredited those simple hierarchy images (see e. g., van den Bulcke, 1986).

It is not hierarchy, accordingly, that should define the group's legal image, but network; not the control power at the top, but the coordination of autonomous action-centers. Nor can the concept of enterprise be directly transferred to the group as a whole, as for example Blumberg (1983: 23 ff.; 1985) proposes. On the other hand it is not sufficient to react to recent tendencies of decentralization with the concept of "*Unternehmensgruppe*" that simply stresses decentralization (Wiedemann, 1988). Instead, the point is coordination of a multiplicity of firms by a higher-order firm, the group (Bälz, 1974, 1985). The group not as "corporate actor" but as "polycorporative network" is the formula that perhaps best characterizes the new qualities of the group as a developmental stage of industrial organization.

This suggestion means that the group network will have to be treated as a legal subject differing significantly from traditional legal subjects, namely the natural and the legal person. (The furthest advance in this direction is by Bälz, 1974, 1985.) The group as network overcomes the traditional anthropomorphic concepts of the legal person and the corporate actor in two ways: (1) Unitary imputation yields to multiple imputation; (2) personification yields to autonomization. These transformations are the only way to do justice to the network nature of the group.

Unitary imputation has been one of the strongest constraints of anthropomorphic thinking in the context of corporate personality. The

social fiction of a corporate actor as well as the legal construction of the legal person allow for the existence of one and only one center of action and will – the "person" – that has to be conceived as point of attribution for actions, rights, duties, and liabilities. Either the subsidiary is responsible or via piercing her corporate veil, the parent company. *Tertium non datur.* However, if the group is to be understood as a network of autonomous action centers, then this constraint towards unitary imputation must be broken, and a simultaneous multiple imputation of actions and legal positions can be taken as the starting point. The unitary imputation that is always present in the case of the legal person must in the case of the group be distributed over three levels: group member companies, group parent, and the network of the group itself. Three types of accountability have to be kept separate: cumulative, in which imputation is multiplied; alternative, in which accountability is applied at only one level of the group; and complementary, in which partial imputations at various group levels are combined into a whole only in a comprehensive view.

The legal imputation technique itself needs to be chameleon-like. It needs to adapt itself to the flexible practice of corporate groups that chooses *ad hoc* and opportunistically the suitable blend between market and organization as well as the necessary degree of centralization. The legal imputation of actions, rights, duties and liabilities must, if it wishes to react at all to the chopping and changing of the group, detach itself from ideas of tying down accountability once and for all. Legal imputation of accountability must proceed itself *ad hoc* and opportunistically. One proven available model is of course the case method, which makes the question of to which group level to assign a particular action or legal position dependent on the circumstances of the individual case, so that it has to have a whole bundle of criteria of imputation available.

The fact that operative and flexible decisions can be arrived at this way is illustrated by Blumberg's (1983: 456 ff.) checklist of unity and diversity in the group.

Formalities of the Subsidiary's Operation

(1) Separate books of account;
(2) Separate bank accounts;
(3) Separate meetings of the board of directors;
(4) Separate meetings of the shareholders.

Physical Separation between Parent and Subsidiary

(5) Separate directors;
(6) Separate officers;
(7) Separate employees;
(8) Separate offices;

(9) Separate telephone numbers;
(10) Separate address;
(11) Separate letterhead.
Integration of the Business Activities of the Subsidiary and the Group
(12) Percentage of total sales represented by sales to the parent and affiliates or sales of products of the parent and affiliates;
(13) Percentage of total purchases represented by purchases of the parent and affiliates;
(14) Performance of services for the parent or affiliates that they would otherwise have to perform directly;
(15) Coverage of warranties by the parent or affiliates for customers of the subsidiary.
Integration of the Internal Operation of the Subsidiary and the Group
(16) Loans, guarantees, or other financial assistance from the parent or affiliates;
(17) Inclusion of the subsidiary in the insurance coverage of the parent or affiliates;
(18) Participation in group employee retirement, profit-sharing, insurance, or other benefit plans;
(19) Participation in group employee training programs;
(20) Exchange and rotation of personnel among the parent, subsidiary, or affiliates;
(21) Exchange of information and reporting;
(22) Group visitation and inspection programs;
(23) Group auditing controls;
(24) Consolidated tax returns;
(25) Subsidiary's reliance on constituents of the group for essential administrative supporting services, including:
(a) general administration,
(b) accounting,
(c) financial,
(d) budgeting,
(e) personnel,
(f) advertising,
(g) credit,
(h) purchasing.
Integration of the External Operations of the Subsidiary and the Group
(26) Common corporate names;
(27) Common logo;
(28) Common trademarks;
(29) Common national advertising campaigns;
(30) Consolidated annual reports;

(31) Representations to the public that the constituent companies are offices, branches, divisions, or integral parts of the group.

Extent of Participation by the Parent in the Decisionmaking of the Group

(32) General policies;
(33) Capital and operating budgets;
(34) Prices;
(35) Commitments;
(36) Salaries of officers;
(37) Self-dealing transactions involving officers and directors of the subsidiary;
(38) Other more intrusive participation in decisionmaking.

Other

(39) Independent existence of the subsidiary before acquisition by the parent;
(40) Different nature of the businesses of the subsidiary and affiliates within a conglomerate group.

According to its regulatory goals, legal policy should apply these imputation criteria flexibly and not embark on *"la vaine recherche d'une définition du group"* (Jadaud, 1975: 193; cf. also Jeantin, *infra*) applicable in company law just as much as in labor law, in tax law, in environment law, in law of contract and tort (see, Kronstein, 1931: 6; Wiedemann, 1988: 25). In response to the network character of the group the law should develop a "net of liabilities" (Sciarra, *infra*). Requirements of legal certainty can, to a certain extent, be met by introducing a minimal set of facts establishing group formation for all areas of law, focusing on "unitary control", or better, on unitary network coordination. In building on this starting condition, however, the accountability criteria must be kept flexible and the choice and combination of group levels as objects of imputation must be guided by regulatory context. This construction should be prevented from ending in arbitrary "*khadi* justice" by orientation towards two criteria: 1) maintenance of the efficiency advantages of decentralization and 2) control effectiveness of regulation as implementation of norm policy (Blumberg, 1983).

If, then, the first distinction between the network and the legal person lies in a shift of focus from unitary imputation to simultaneous multiple imputation, the second major difference results from the distinction between the identity of a network and that of a collective. The flexible, mobile character of a network requires legal autonomization but not complete personification. Complete personification, indeed, would be counterproductive, since it would interfere with the three characteristics of the group that have been picked out, namely contextual control, market internalization, and eigen-dynamics. The following elements of a

personification of the network can probably be taken as sufficient: 1) legal recognition of the collective identity of the group as a network of interorganizational relationships; 2) recognition of a unified group interest as the interest of the network, identical with neither the company interest of the group parent nor the sum of company interests of group members; 3) use of the consolidated annual reports of the group as a tool of accountability for the network; 4) recognition of the capacity to act for the network, mediated through the action of the group parent and/or of group members; 5) recognition of the legal responsibility of the network in addition to traditional responsibility of parent company and/or subsidiary.

8. *Constitutionalizing Corporate Groups*

To define the tasks of corporate governance law in groups, a comparison needs to be drawn between the *de facto* position of the group and the legal constitution of a unitary enterprise. But this comparison must start neither from the "dependent company" of group member companies nor from the "group parent", but instead must grasp the network itself or, more precisely, the action-system of interorganizational relationships within the group. The point is therefore to develop guidelines for a legal constitution of the network itself.

In Europe, the internal constitution of multinational corporate groups is on the political agenda again. After early initiatives in the seventies (cf. Stein, 1971; Lutter, 1978; Lutter, 1984), the issue of special structures for European companies has gained new prominence in the European integration process. In June 1987 the European Council requested "to make swift progress with regard to the company law adjustments required for the creation of a European company". In July 1988 the Commission of the European Communities responded with a new initiative for a European company statute in its Memorandum to Parliament, Council, industry and labor, "Internal Market and Industrial Cooperation – Statute for the European Company" (Com (88) 320, 15. 7. 1988). After deliberations with the European and national institutions concerned, the Commission in August 1989 proposed a Statute for a European Company (Proposal for a Council Regulation on the Statute for a European company and a Proposal for a Council Directive complementing the Statute for a European company with regard to the involvement of employees in the European company: Com (89) 268 – final SYN 218 and 219).

Thus, the question reemerges if corporate groups have to be treated as "corporations *sui generis*" that require constitutional rules of their own. The frequently expressed objection to this approach, an objection already becoming dogma, is that the creation of company bodies specially for the group is a wrong tack (e. g., Bälz, 1974: 329; *Unternehmensrechtskommission*, 1980: 654 ff. 667). The group as such is alleged to act through the company bodies of its members. This objection has to stand up to the counterquestion whether *de facto* development has not already produced network bodies, the legal remoulding of which is being blocked by the objection itself. But the objection is right in the following respect: the group as a whole ought not to be compared with the classical, hierarchically structured corporation acting through its central bodies. The result of such a comparison would be the bureaucratic rigidification of the group into a hierarchical organization. Instead, the legal image of the "polycorporative network" has to be taken seriously. The maintenance, indeed the legal encouragement, of the extremely flexible nature of network organization can be achieved only by systematically taking into account the three characteristics of the group set out above: contextual control, market internalization, and eigen-dynamics of a multiplicity of action-centers. This means that the classical organizational principles of the large corporation – division of powers and differentiation of functions – must be considerably modified if they are to be valid for the constitution of the network.

If one looks closer to the *de facto* constitution of the network it becomes clear that, contrary to the above-mentioned position of the irrationality of separate bodies for the group, separate corporate institutions for the network have in practice been formed (cf. Lutter, 1985: 829 ff.; Schneider, 1981: 249 ff.; Kuhn, 1987: 457 ff.; Theisen, 1988: 280). The parent company's "right to instruct" the subsidiary is simply the embodiment of such a network institution which, according to classical company law, should really be illegitimate. At the same time it becomes clear that asymmetries have arisen in the *de facto* group constitution. Correcting these would be the task for a future group enterprise law.

From the division of powers' viewpoint, analysis of how the functions of operation, control and legitimation are balanced in the *de facto* constitution of a group shows a clear dominance of the operative functions and a loss in weight of the control and legitimation functions. In fact, the operative function has created separate institutions for the group network, embodied in the controlling company's right to instruct, in its control over the general meetings of subsidiaries, in filling supervisory and management posts in subsidiaries, and in group contractual structures and interlocking directorates (Lutter, 1985). By contrast, the supervisory

and legitimation functions have clearly lost their weight. Not only are corresponding control and legitimation networks hardly present in the network; in the subsidiaries control and legitimation have become more or less functionless, and in the group parent too they are mediated because access to the network and to the subsidiaries in principle passes through the executive of the group parent.

If the group is analyzed from the resource holders' viewpoint, a clear increase appears in management power over that of shareholders and workers (Trescher, 1989: 64). Loss of power by minority shareholders of subsidiaries is, as it were, the classical topic of group enterprise law; but it is only recently that similar losses of power and influence by shareholders in the controlling company vis-à-vis group management have been considered (Lutter, 1985; Timm, 1980; Hommelhoff, 1982). The mediation of the workers' influence, whether by the employees and their representative bodies or by the organized trade unions, has been worked out clearly in the literature on codetermination in groups. In light of the codetermination debate's "producers' coalition" idea, whereby the firm's resource holders transfer their property rights to the corporate actor, which in turn are distributed to organization members as "organizationally bound property rights" in accordance with efficiency criteria (Krause, 1986: 229 ff.), the task for a company constitution becomes one of transferring property rights to the group network.

The legal policy response to this finding about resource-related and function-related asymmetries in the group should be to build up countervailing power networks of control and legitimation in the corporate group. In a legal policy perspective, the point is to develop, as a counterpart to the fully developed "operational system" in the group, a "political system" to work against the power asymmetries among sets of resource holders and to bring about a functional equilibrium between operation, control and legitimation. However, in contrast to traditional conceptions of company bodies (control and legitimation bodies for the whole group), the stress should be on the flexible network character of such counter-institutions, to allow them to perform control and legitimation operations that can keep up with the chameleon-like changes of the operational network (see especially Treu, *infra*).

Among the rudimentary outlines of group enterprise constitution that currently exist, the Vredeling Directive (OJ 1980 C 297 p. 3; OJ 1983 C 217 p. 3), which provides information rights for workers in complex companies, best meets the requirements for flexibility in the control network (see Blanpain, 1986; Vandamme, 1986; Pipkorn, Treu, *infra*). Against the parent company's right to instruct it sets up a network of information rights and duties that could be a starting point for building a

political system within the group. The flexible contractual mechanisms of collective bargaining can be extended to cover rights of information, of consultation, even of negotiations, in order to win influence on management decisions (Blanpain, 1986: 30). In particular, by not bothering to fix the legal form of the group or the institutional competencies of bureaucratic bodies, it frees itself from the rigid constraints of German-style institutionalized codetermination. This change in principle makes possible flexible adjustment to changing organizational forms of the group. At the same time, this gives the chance to make it relatively immune to circumvention strategies by the operational system.

This approach's problems, to be sure, lie in the relative weakness of mere information duties in comparison to genuine codetermination rights and – still more important – to the lack of a coordinating center for the counter power network. Its anchorage in collective bargaining highlights its dilemma of being a purely contractual strategy without the backing of formal organization (Vardaro, *infra*).

In this connection institutionalized solutions starting at the group center clearly have the advantage. The French *comité d'entreprise*, like the Dutch *centrale ondernemingsrad* and the German *Konzernbetriebsrat* in their combination with labor respresentation in the supervisory board forcefully aim at influencing coordination in the network by concentrating on the group center. What makes these solutions particularly interesting is that, while institutionally located in the parent company, their focus is (contrary to the system but right for the network) on the network itself. They represent not only the employees of the parent company, but also, against the principles of classical corporate governance the work forces of the subsidiaries. In addition, in their combination of plant work council and central work council, as well as in their combination of subsidiary co-determination and group co-determination they show properties of an authentic "countervailing network" focusing their control on the actual point of decisionmaking.

All the same, their network character is confined to the functions of recruitment and representation, whereas their network related powers are underdeveloped. It is here, in their powers of control over the network, in particular with regard to staff sovereignty over subsidiaries, that their future opportunities lie. As has been said, their central problem lies elsewhere: in their fixation on a company or plant body with more or less rigidly predefined powers. This fixation makes them relatively inflexible in their ability to respond to reorganization by management seeking to escape their control.

Far greater flexibility in this connection can be expected from contractual

arrangements growing out of the collective bargaining system, which can continually adjust control, legitimation, and participation possibilities to newly emerging organizational needs. Collective bargaining flexibility appears to be ideally suited to the group's network nature (see Sciarra, Vardaro, *infra*). But, of course, contractual arrangements, too, have their Achilles heel. Their extreme dependency on changes in the economy and the market makes their control capacity look highly problematic, especially in times of crisis. They do not have the formalized power positions of institutional codetermination systems, which make these systems relatively independent of power and market fluctuations (Streeck, 1984; 1987).

In this perspective, the above-mentioned new proposal for a *Societas Europaea* is of special interest. Since it offers different options for worker participation among which the collective actors have to choose it forces people to think in terms of functional equivalents. The focus of legal attention shifts from institutional design to equivalent levels of control. This is more adequate to cope with the chameleon-like character of corporate groups. Moreover, the proposal provides for a contractualist option for worker participation. Art. 6 of the proposal for a new regulation (Com (89) 268 final SYN 219) enables management and labor to work out a collective agreement on worker participation, but defines at the same time minimum standards of information and control that have to be fulfilled by the concrete arrangement. This regulatory technique seems to be ideally suited to fast changes in the corporate group structure. It requires, however, a firm and sufficient definition of the minimum conditions. In addition, this technique of optional solutions and contractualist arrangements requires legal mechanisms of conflict resolution. And this is the weak point of the SE-proposal.

This paper will end with an open question. The future of a counterpower network lies perhaps in an intelligent combination of both regulatory efforts attempted so far (for similar considerations, see especially Vardaro, *infra*). But then, might the solution for the future governance of group enterprises lie in the formation of a center for control and legitimation that does not lay down a rigid catalogue of competencies and that possesses the legal equipment of contractual arrangements for legitimation and control?

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