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GROUPS OF COMPANIES - THE GERMAN APPROACH:

"Unternehmen" versus "Konzern"

("Enterprise" versus "Combine")

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and Organization", "Konzernrecht".
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Introduction

This seminar is concerned with the research project into the legal constitution of the multinational enterprise within the overall framework of European Economic Community law. This goal is connected with the equally ambitious aim of developing a general legal theory of affiliated enterprises. My task now is to give a critical outline of the possible contribution of German company law to the achievement of this objective.

The materials relevant for this purpose of a common European company law in the process of creation - in particular the proposed fifth directive (structural directive), the preliminary draft of a directive for group law, and the proposed statute for the European stock corporation (*Societas Europae*) - show clearly a number of influences of German company law. It is, however, precisely in the sphere of groups of companies or, as the German company law calls it, affiliated enterprises that this influence is strongest. You know the reason for this: in secs. 291-338 of the Stock Corporation Act of 1965 (*AktG* 1965), German legislation attempted for the first time without recourse to an international model to produce comprehensive legal regulation of the interconnections of business enterprises in the form of combines.

20 years of experience with this law do not give German jurists cause for unalloyed pride at this pioneering achievement. There are too many problems of interpretation that have not been cleared up so far. In number of points the regulation of specific technical details has proved in urgent need of improvement. Indeed, even the whole approach of the

legislative solution is not undisputed even today. In what follows, I shall have to confine myself to a brief account of this legislation and its very complicated problems. I will, however, attempt to place the questions that arise consistently in the perspective of your general topic, and hope that this will make for a more intensive discussion of the individual problems subsequently. In the first part of my paper I will say something about the historical basis of the present legislation. The second part will deal with the fundamental concept of this legislation and its main theoretical and practical problems. Here I mean particularly to go more closely into the fact that the German legislation can provide at least an outline of a legal model for the polycorporate enterprise, with its structures of organisation and control: that is to say, following the enterprise of the individual merchant as the first step, considered historically, and the development of the public joint-stock company as the second, a third step in the shape of the development of an enterprise which, on a still higher level, brings together individual corporately constituted enterprise units in a unified manner in what is once again a totally new legal form - a possible model for the legal structure of the multinational enterprise, among others. The third part of the paper, finally, is devoted to the main future tasks involved in the further development of this legal model.

I. Historical Foundations

German law relating to affiliated enterprises is located in the centre of a broad development from company law to enterprise law. This development is still actively taking place today, and is treated in detail in the report of a commission appointed by the Federal Ministry of Justice¹⁾. One important task of the commission has also been to propose further preparatory legislation, as long as the progressive alignment of European legislation permits freedom of movement to the national parliament. The main points of interest here can be treated, very summarily, under the headings of "Contract" (1.), "Organisation" (2.) and "Organisation by Contract" (3.).

1. Contract

The German law of affiliated enterprises - "group law" ("Konzernrecht") in the broadest sense - is characterised by the instrumentalisation of the contract²⁾.

After the abolition of the granting of concessions by the state in 1870, the activity of the individual entrepreneur and the morphological intermediary stage of the enterprise run as partnership were complemented by the joint-stock company, made independent as a legal person and made accessible to the free decision of its founders as the modern major form of enterprise. Soon after this, it could be observed to an increasing extent - in Germany as well as in other countries - that stock companies took control of other stock companies by the acquisition of shares. And even before there emerged a clear separation between the capital ownership of the shareholders and the control of the enterprise,

which went increasingly into the hands of the administrators, the tying of the enterprise to a common interest of all shareholders yielded to external planning by the combine management: the stock company became an element of unified entrepreneurial planning for large pyramid-shaped structures of economically dependent though legally independent companies. In Germany, however, in contrast to other countries, the techniques of power deployed here did not remain limited to one-sided or even mutual share ownership, but were increasingly complemented by contracts concluded between the enterprises. If one disregards a further morphological intermediary stage of development in the form of a "combine of coordination" in which several stock companies amalgamate to form a partnership (sec. 291 par. 2 AktG), such "enterprise contracts" are geneally aimed at creating or consolidating a "combine of subordination" (Unterordnungskonzern). Here one can have recourse to known forms of contractual exchange and contractual combination of performance, which are thus above all applied for "shop leasing contracts" ("Betriebspacht") and business transfer contracts ("Betriebsüberlassung") or the agreement of a "profit pool" ("Gewinnngemeinschaft") (sec. 292 AktG). Fiscal law, however, permits the offsetting of profits or losses only in cases where the connection between the superior and the inferior company is unambiguously delimited from legal forms of exchange and cooperation in the market. For this reason, a quite different, novel kind of enterprise contract has been developed: a control agreement - the so-called contract of domination, with which a company places its management under the control of another enterprise. The AktG 1965 "adopted" this

type of contract originating in fiscal law, and placed it in the forefront of group law (sec. 291 par. 1 AktG). This was done with full circumspection: the contract of domination is conceived as the centre-piece of the whole system of group law⁴⁾.

2. Organisation

The German Stock Corporation Act does not speak of affiliated "companies" ("Gesellschaften"), but affiliated "enterprises" ("Unternehmen"), - "enterprise" being first of all merely a technical concept intended to determine the sphere of application of the law⁵⁾. However, behind it there is in fact the question as to a generally valid, material or substantive concept of the enterprise, which in the meantime has become a question of faith for a whole generation of German jurists. In our context, the question is whether an "enterprise" is the property of a "company", or an organisation which encompasses the "company" of the shareholders as well as its employees⁶⁾.

The continuous development from the individual enterprise via the unincorporated partnership enterprise to the large industrial enterprise of the last 200 years rests on the combination, concurrent from the beginning, of those three factors that only separated with full clarity within the highly complex social configurations of modern industrial organisation: even the individual entrepreneur - usually still personified in this way - manifests himself as enterprise only by reason of the combined application of his labour, his assets and his planning initiative. Instead of the merchant satisfying his extra requirements of capital and labour in the market, we find at the other end of the scale gigantic aggregates

their functions fully distinct by reason of the separation of control from ownership, which provide an institutional connection between capital owners, suppliers of labour, and those responsible for entrepreneurial planning and decisions. This development was also responsible for the striving to change the system of legitimation structures in the enterprise with the requirement, first voiced in Germany as early as 1868⁷⁾, that the enterprise be considered no longer as merely an association of owners of capital, but as a "social union enterprise" in which providers of capital and providers of labour cooperate. This was brought to a conclusion for the time being by the Act on employee co-determination of 1976, which assigns half of the seats on the supervisory board to the shareholders and half to the employees⁸⁾.

Nevertheless, even the confirmation of this law by the Federal Constitutional Court⁹⁾ has not quelled the argument about the relationship between company law and enterprise law. To many, if not most, German colleagues the co-determination legislation has, as it were, merely been grafted on to company law from outside, while the latter has been left untouched, including its foundations¹⁰⁾. At the other extreme is the view that company law must in the future be dissolved in a uniform enterprise law independent of the forms of company law. There is a middle view - which I share, also under suspicion of an ideologically inspired bias - that proceeds from the legal forms of company law, but would dissolve them by the inclusion of the employees' side as well in specific legal forms of the enterprise¹¹⁾. For this reason, in conformity with the Co-determination Act of 1976 the number of legal forms available is necessarily limited - apart from the stock company, there is the

limited liability company and the co-operative. But if the employees take part in elections to the supervisory board, they have, at any rate factually, become "members" of the enterprise together with the shareholders, by reason of the labour they contribute. This can only be meaningful for them, however, if, like the shareholders who have contributed the capital, they are not also themselves liable for the obligations of the enterprise, with its independence as a legal person.

We may at this point exclude the individual enterprise and the partnership enterprise from further consideration; even so, the development of an enterprise constitution complete in itself leaves many questions open. To mention only the most important of these: the organisational attachment of co-determination to the supervisory board must not destroy the division of functions between the general meeting of shareholders, which is competent for fundamental questions and would require to be expanded into a "enterprise assembly", on the one hand, and on the other the management board with its tasks of running the enterprise¹²⁾. The members of the management and the advisory board must let their behaviour be governed by an "enterprise interest" shared by both employees and shareholders. Whether still further interests (creditors, consumers, further representatives of the public) should be "represented" in the enterprise is, to say the least, doubtful; at any rate, only those should be entitled to vote who can be regarded as a member of the enterprise by reason of contributing either capital or labour¹³⁾. A question particularly difficult of solution on the level of legal technicality, finally, is that of the

participation not only of the shareholders, but also the employees, in the profits made from the assets - which belong to the enterprise as such; for this presupposes - parallel to a shareholder receiving interest from loan granted by the enterprise - the splitting of the employee status into a membership relationship and an exchange contract directed towards a fixed labour wage.

It needs no stressing that all these difficulties are multiplied as soon as the questions are extended to embrace groups of enterprises. Despite - or perhaps precisely because of - this, the discussion is regularly broken off at this point¹⁴⁾.

3. Organisation by Contract

Seeing that, as is the case in the Federal Republic of Germany, approximately 70% of stock companies are "affiliated" enterprises, these difficulties can no longer be ignored. Their solution must proceed from the notion of organisation by contract, which in legislation is recognised by the organisation contract of sec. 291 AktG¹⁵⁾.

The law of affiliated enterprises makes a sharp distinction between dominating and dependent enterprises and the formation of a combine. "Dependent" enterprises are legally independent enterprises on which a "dominating" enterprise can - usually by means of a majority stockholding - exercise a controlling influence directly or indirectly (sec. 17 AktG)¹⁶⁾. A "combine" ("Konzern") is only involved when several legally independent enterprises are in fact combined under one management. If the enterprises thus combined under one management are not dependent from each other, we have a combine of coordination

("Gleichordnungskonzern") (sec. 18 par. 2 AktG). Where one dominating enterprise and one or more dependent enterprises are combined under the central management of the dominating enterprise, they form a combine of subordination ("Unterordnungskonzern") (sec. 18 par. 1 AktG). Thus a combine comes into existence only with the factual exercise of controlling power over one or more enterprises, and not by reason of the mere possibility of the exercise of influence on another enterprise: it forms a complex power structure combining to form a unit of economic effectivity¹⁷⁾.

If the combine is regarded not as an evil to be resisted, but as the norm today for large economic units with divisions operating decentrally, it must be given a legal constitution. This constitution cannot be derived from its factual power structure itself. It can only consist in the integration of this power structure in a legal organisation, whilst the combine as such does not represent a form of legal organisation. In the case of the combine of coordination this organisation comes about when the enterprises involved regulate their common management in an organisation contract concluded for this purpose. This organisation contract, to which the law has given no particular name (sec. 291 par. 2 AktG), is a further development of the articles of a partnership. In the case of the combine of subordination, corresponding organisation is created by the conclusion of a contract of domination (sec. 291 par. 1 AktG). This organisation contract represents a further development of the articles of a joint-stock company. In both cases there results a polycorporate enterprise, which legally regulates the relationship to one another of the enterprise corporations concerned

as different entrepreneurial units¹⁸⁾.

The difference between the factual "existence of a combine" ("Konzernatbestand") (sec. 18 AktG) and the legally organised polycorporate enterprise requires particular note: the power structure of the combine can be of varying degrees of rigidity - from very close-knit to quite loose - and the intensity with which the management power is exercised may also be subject to considerable deviations over a period of time¹⁹⁾. The organisation contract (sec. 291 AktG) provides for the legal organisation and canalising of the decision processes of the polycorporate enterprise durably, independently of the combine's constant fluctuations and further developments²⁰⁾.

A further difference, already alluded to above, also needs to be stressed: only organisation contracts according to sec. 291 AktG make "polycorporate" enterprises out of "affiliated" ones. Other types of enterprise contracts existing between the enterprises in an enterprise group (sec. 292 AktG) do not have this effect, but remain restricted to the exchange or combination of performances between the enterprises in the group²¹⁾.

4. Questions to be Excluded

This, then, was an attempt to explain the most important concepts and notions of German combine law against the background of their development. One main conclusion was that contract and organisation, as basic types of legal structures, are not in contrast to one another here, but combine together. At the same time, we can thus disencumber our further considerations of spheres of questions the legal provisions in respect of which are related immediately

to the factual existence of a combine (sec. 18AktG). These affect the rendering of accounts within the combine (sec. 329 et seq. AktG)²²⁾, but especially the merger control (sec. 23 et seq. GWB (Act Against Restrictives of Competition))²³⁾ and plant co-determination in the combine (sec. 54 et seq. BetrVG (Plant Co-Determination Act of 1972)) - which is clearly to be distinguished from co-determination in the enterprise²⁴⁾.

II. Basic Conception and Main Problems

Jurisdiction pronounced since 1965 does not give a representative picture of experience in practice with the law of affiliated enterprises; however, we shall have reason to give particular consideration to a recent noteworthy decision, the "Holzmüller" case. The report of the Commission on Enterprises shows that many of the problems, which in some cases affect the fundamental conception of the law, are still not completely solved or not, at any rate, placed by consent out of dispute²⁵⁾. The legal provisions centre on the "contractual combine" ("Vertragskonzern"), or more precisely the structuring in organisational law arrived at under private autonomy of the economic operation unit formed by dominating and dependent enterprise by means of the conclusion of a domination contract or the accomplishment of a so-called integration. In both cases, the law justifies the controlling powers in such a combine of subordination - the coordination combine shall remain unaccounted for in this part of my remarks - by the fact that it lays down the conditions of forming a common legal organisation and at the same time attaches imperative legal consequences to it (1.).

This leaves the question open, for the time being, under what circumstances and with what legal consequences positions of power among affiliated enterprises can be exploited without legitimation by either domination contract or integration. As the possibilities of influence in this case do not rest on an act of submission under private autonomy, but on factually given circumstances - in most cases a majority stock-holding - one speaks of a "de facto combine" ("faktischer Konzern") (2.). It is, however, only in the case of the contractual combine that one can enquire after an enterprise legally organised on the level of the combine in its totality (3.).

1. Contractual combine

A contractual combine is, strictly speaking, only created by a domination contract (or a contract equivalent to such in accordance with sec. 291 par. 1 AktG). In a broader sense, integration is also included here (sec. 391 AktG)²⁶⁾.

a) Contract of Domination

The conclusion of a contract of domination between two enterprises requires the consent of both general meetings, with a majority adequate for a change in articles, and an entry in the trade register. According to sec. 308 AktG, the agreement authorises the dominating enterprise to exercise management powers over the dependent enterprise, including instructions that may be to the latter's disadvantage. This right of instruction is matched by a duty of compliance on the part of the management board of the dependent enterprise, inasfar as the instructions serve the interest of the dominating enterprise or another affiliated enterprise ("Konzerninteresse") - the "combine interest" (sec. 308 AktG). The more precise

conditions of the conclusion and the termination of the contract are also regulated by the law. The creditors of the dependent enterprise are protected by the duty of the controlling enterprise to take over losses. The so-called outside shareholders must be offered an exchange of shares for those of the dominant enterprise or a settlement in cash and in addition and at their election, a fixed or variable indemnity²⁷⁾.

b) Integration

Integration according to sec. 319 AktG requires the dominating enterprise to possess at least 95% of the shares of the dependent enterprise. In this case, the organisation contract is replaced by the mere resolution of integration by the general meeting of the dependent enterprise. On entry in the trade register, all shares are transferred to the dominating enterprise. The outside shareholders are to be given compensation in shares of the dominating enterprise or in cash. The dominating enterprise incurs by law co-liability for the obligations of the dependent enterprise. As in the case of the contract of domination, so also in the case of integration the dependent enterprise remains in existence as a legal person with its own organs (management board, supervisory board, general meeting). The same applies also for the exercise of the power of management in the relations between the organs of the dominating and the integrated enterprise (sec. 323 AktG)²⁸⁾.

c) Overall Area of Organisational Change

The regulation by law of the contractual combine is primarily directed against possible disadvantages for the dependent enterprise with regard to the authorisation of the powers of management of the dominating enterprise. In the theory, however,

increasing attention has been paid to the high risks taken over by the dominating enterprise with the expansion of the powers of management to the dependent enterprise. Thus the formation of a contractual combine is to be regarded as a profound change in the organisational structure not only of the dependent enterprise, but also that of the dominant one.²⁹⁾.

d) Assessment

The contractual combine, which is created in the form of domination and incorporation, but can also be dissolved again, has, according to almost unanimous opinion, proved itself on the whole. This does not mean that details of its legal regulation are not in need of improvement³⁰⁾.

2. De facto Combine

By contrast to this, the figure of the "de facto combine" has been violently disputed since the inception. The debate, which in the meantime has taken on vast proportions, is reflected in the report of the Commission on Enterprises, too. The roots of this dispute lie in differing views from the angle of legal policy of the relevant legal prescriptions. Having been newly stirred up by the "Holzmüller" decision of the Federal Supreme Court, the argumentation ranges openly in the border area between analyses de lege lata and requirements de lege ferende, and the Federal Supreme Court in its decision has gone over to open remodelling of the law.

I must deal more closely with this dispute, since the whole conception of German group law stands or falls with it³¹⁾. According to the original plans for this legislation, only a contract of domination or an integration gives the dominating enterprise

the right to place the dependent enterprise under its control and to give the latter instructions that may also be to its disadvantage. It is only by reason of a contract of domination or an integration that the management board of the dependent enterprise may defer to the interests of the combine. It is here that the decisive difference is seen between a contractual combine and a purely de facto combine. Where there is neither a contract of domination nor an integration, the formation of a combine is to be legally demonstrated and made visible by a compulsion to conclude a contract. This compulsion to contract is effected by a prohibition directed to the dominating enterprise to oblige the dependent enterprise to take disadvantageous measures, and is guaranteed by liability to damages. It is, however, still in dispute whether this conception has not been turned inside out even during the process of legislation. If, however, the exercise of the same combine power is also possible without a contract of domination or integration, and thus without guarantee for the outside shareholders and creditors, the figure of the contractual combine is necessarily increasingly devalued. This applies all the more since the liability obtaining in the absence of a contract of domination or integration and codified in sec. 311 et seq. AktG has shown itself to have little effect.

This, however, in turn strikes at the sense of combine legislation as such. I shall therefore attempt to sketch briefly the course of the debate on this problem, probably the most important in current German company law.

a) Protective Regulations for the Dependent Enterprise
German combine legislation did not proceed from the

aim of altering the historically developed structure of far-reaching interdependence among enterprises. Its aim was and still is to place this structure under legal control. Where there is neither a contract of domination nor integration, the independence of the dependent enterprise should be preserved as far as possible³²⁾.

For this reason, the law forbids the dominant enterprise to disadvantage the dependent enterprise. Because, however, it was wished to avoid a rupture with traditional combine practice, it was simultaneously provided that the dominating enterprise can avoid this prohibition by compensating for the disadvantage (sec. 311 AktG). In order to guarantee this duty of compensation, the dependent enterprise must produce an annual "dependence report" (sec. 312 et seq. AktG). The dominating enterprise and its organs remain liable to the dependent enterprise for any disadvantage remaining hereafter, according to secs. 317 and 318 AktG³³⁾.

According to a view which has persisted until now, this compensation for disadvantage, which was introduced during the process of legislation, has not altered the fact, that sec. 311 et seq. AktG are by their nature exclusively to be understood as protective regulations for dependent enterprises: the compensation of disadvantage is only a component of the establishing of a possible disadvantage to the dependent enterprise. The organs of both the dependent and the dominating enterprise remain obliged to further the interest of the dependent enterprise. This expresses the fundamental undesirability of the exercise of management power over a dependent enterprise without the conclusion of a contract of domination or an integration³⁴⁾.

b) "Legal Constitution of the de facto Combine"?

On the other hand, the view has increasingly gained ground, not only in combine practice but also in doctrine, that the introduction of the compensation of disadvantage in sec. 311 AktG means an express legitimation of the de facto combine, too³⁵⁾. This is in line with the view of the Enterprise Commission, which unanimously rejected a prohibition of the de facto combine³⁶⁾. One should, certainly, be careful about seeing in this, as some have, a "rejection of the contractual combine". For one thing, it only confirms once again that it should not be the task of the group law to alter the actual power structures among affiliated enterprises. They should simply be placed under legal control. And in order to achieve this without either a contract of domination or an integration, a number of proposals have been made which are meanwhile usually summarised by the formula "legal constitution of the de facto combine". They range up to an analogous application of the regulations for the contractual combine. However, there is agreement that one cannot derive from this a right of instruction for the dominating enterprise and a duty of compliance for the dependent one³⁷⁾.

c) Protective Regulations for the Dominating Enterprise

In the attempt to develop such a "constitution of the de facto combine", the considerable risks have again become apparent that arise even for the dominating enterprise itself in the exercise of management power over another enterprise. This has led among theorists to the stipulation that the division of powers in stock company law in the dominating enterprise should be extended to the process of combine formation and combine management³⁸⁾.

In the "Holzmüller" Case, decided in 1982, which despite such preparation was felt to be sensational among theorists generally, the Federal Supreme Court took up this notion³⁹⁾. A joint-stock company had, through its management board, transferred a flourishing section of the firm to a 100% subsidiary. The Federal Supreme Court sees here a gap in the law, and requires as an extension of sec. 119 par. 2 AktG the assent of the general meeting of the parent company for such a measure.

In practical business circles, this decision was received with dismay as a frontal attack on the possibility of effective combine formation. Even if the battle for its interpretation is still in full swing at conferences of experts in group law, it is at least possible to state today that, in a de facto combine, the organs of the dominating enterprise too are to direct their activities basically only to the interest of the dominating enterprise. This shows a tendency to return to the view, thought superseded, that the exercise of controlling power over another enterprise is undesirable, not in itself, but failing the conclusion of a contract of domination or integration⁴⁰⁾.

d) Assessment

As it is not possible to resume the debate on these difficult questions in detail, I will restrict myself to an outline of my own position⁴¹⁾.

The combine as such, as a factual power structure subject to constant fluctuation and further development, can in law be neither legitimated nor prohibited. That which is supposed to be accounted a "legal constitution of the de facto combine" divides in reality into - separate - legal protective regulations for the dependent enterprise and for the dominating enterprise: the organs of the affiliated

enterprises are only ever to safeguard the interest of their individual enterprise corporation. That is, they are to proceed as if non-affiliated enterprises were involved. These protective regulations are of a reactive kind. They cannot form constructive material for a legal organisation comprehending and amalgamating the dominating and the dependent enterprise as units of a comprehensive polycorporate enterprise.

The evolution of protective regulations for the dominating enterprise has considerably increased the incentive, hitherto borne only by sec. 311 et seq. AktG, to conclude a contract of domination or undertake integration for the exercise of controlling power - something not in itself regarded with disfavour - over the dependent enterprise. Certainly, these protective regulations require further refinement. Nor does anyone dispute that the technical conditions of sec. 311 et seq. AktG have remained the weak point of German combine legislation and are in urgent need of improvement. At any rate, however, the tendency has already been overcome to increasingly devalue the contractual combine and beyond that group law as such, because the liability in the case of the absence of contract of domination or integration is not very effective⁴²⁾. The future in the law relating to affiliated enterprises belongs to the contractual combine, which is what lay in the original conception of the legislation.

3. Contractual Combine and Polycorporate Enterprise

We may now state, to sum up, that the German law of affiliated enterprises confronts the factual power structure of a combine with two legal models of organisation of the enterprise which are clearly to be distinguished. One of these models is corporate enterprise under stock law on which the non-affiliated

enterprise was already based, developed as an autonomous decision unit. This legal person is, either as a dominating or a dependent enterprise, the point of reference of the protective regulations in case where there is neither contract of domination nor integration. The other model consists in the combination, created by contract of domination or integration, of two or (in most cases) more such individual legal persons, normative in themselves and adjusted among themselves to a relationship of superordination and subordination, which only represent an autonomous decision unit again, outwardly as well, in this totality. The legal organisation formed from such a totality of individual enterprise units is the polycorporate enterprise. For such an enterprise it is decisive that the position of the individual enterprise units here can be determined in law as well purely on the basis of their combination⁴³⁾.

a) Contract of domination and Act of Integration:
the "Articles" of the Polycorporate Enterprise

In contrast to a contract directed towards the exchange or combination of performance, such as the shop leasing contract or the profit pool (sec. 292 AktG), the contract of domination (sec. 291 par. 1 AktG), as a contract of organisation, directly affects the system of competence of the partners to the contract, transforming it and concentrating it in an organised social system. In the case of integration, the contract of domination is replaced by the resolution of integration as an act of organisation (sec. 319 AktG)⁴⁴⁾.

It should particularly be noted that not only the dependent enterprise, but equally the dominating enterprise, is thus transformed in its structure from a corporate enterprise into a mere "enterprise unit" of the polycorporate enterprise so created. The contract of

domination or resolution of integration, as the case may be, thus forms the articles of the polycorporate enterprise and thus remains to be distinguished from the articles of the individual enterprise units. The "combine interest", to which the enterprise units and their organs are pledged according to secs. 308, 323 AktG, concentrates the goals pursued by the individual enterprise units into the enterprise interest of the polycorporate enterprise.

Inasmuch as the law expressly includes also the enterprises which are again on their part affiliated to the combine with the dominating and dependent enterprise, it thus expressly refers to the possibility of using the effects in organisation law of the contract of domination or resolution of integration for the formation of a multilateral organisation: the relations of dependence on the same level or on several levels between the individual enterprises can, from the point of view of organisation law, be either immediately included or else short-circuited among themselves.

b) The Polycorporate Enterprise as a Social System

Like the enterprise as such, the polycorporate enterprise can certainly only be spoken of as an organised social system with the reservation that the corresponding legal structures are still in a stage of development⁴⁵⁾.

It needs here to be noted to begin with that the polycorporate enterprise as such possesses no organs of its own. As far as the individual enterprise units are concerned, there remains the division of functions provided for by company law among management board, supervisory board and general meeting. In particular, tasks of management here too are performed exclusively by the management board of the dominating enterprise and the management boards of the dependent enterprise or enterprises. These organs of management are directly

interconnected in organisation law by the authority to issue directives and the obligation of compliance (sec. 308 AktG), the extent and limits of which can be laid down more precisely in the contract of domination. The exercise of control power over the polycorporate enterprise in its totality lies with the management board of the dominating enterprise, not with its supervisory board or general meeting. In contrast to the de facto combine (cf. the "Holzmüller" decision), the management board in this case does not require the cooperation of the other organs of the dominating enterprise in taking decisions of management of the combine.

Although these divisions of function derive from company law, the development from company law to enterprise law is much more palpable than in the case of not affiliated enterprises: the figure of the "company" is clearly too narrow to cover in a uniform way within organisation law the uniform controlling power exercised by the central management of the combine over all the directly or indirectly dependent "companies" involved. This can only be achieved with a conception which takes account not only of the capital contributed to the individual enterprise units, but also the labour contributed to them. This is an even stronger reason to proceed from the enterprise in this case too. When the contract of domination and integration transfer the legally regulated power of control from the dependent to the dominating "company", and extend it further beyond the dominating "company" to the dependent "company", they in fact comprehend the corporate enterprises involved in their totality as social systems, and now fit them, as enterprise units, into the still more complex social system of a polycorporate enterprise.

c) The polycorporate Enterprise: a not exactly
new kind of legal subject

This raises the question whether the polycorporate enterprise too can be seen as a legal subject. The step of recognising not only natural persons but also social systems as legal subjects was taken long since with the creation of the legal person. Mere habits of thought are not enough to justify stopping at this point⁴⁶⁾.

Here it may be useful to keep in mind the various stages of development. The individual enterprise already assumed organlike characteristics with the increasing differentiation of the "proprietorship". To this extent it is possible to speak of a still "undeveloped", subjectivised legal form of enterprise and an equally still "undeveloped" set of organs. The enterprise as legal form was not fully mature until the stage of the corporate enterprise recognised under stock company law as a legal person and acting through its organs. But this was followed by a tertiary stage, in the form of the polycorporate enterprise resulting from the amalgamation of such individual legal persons. This polycorporate enterprise in its totality, though not a combine, is in turn a legal subject, without the individual enterprise units for this reason losing their character as subjects with their own assets: an organisation - as a rule not only bilateral, but multi-lateral - which consists of legal persons, but does not itself represent a legal person. The peculiar type of this legal subject is shown in the manner of its acting: just as the legal person and thus also the individual enterprise unit of the polycorporate enterprise acts in its organs, the polycorporate enterprise, possessing no organs of its own, acts in its individual units.

On this basis, more assurance can be brought to bear on the difficult problems that result from the affiliation of enterprises to combines as far as their legal external relations to third parties are concerned. These questions are still almost always treated with regard to whether and to what extent the contract partner of an enterprise affiliated to a combine can, by means of piercing the veil of legal entity, also make demands on the liability of another enterprise in the shape of a combine behind this enterprise. On the other hand, the limiting of obligations and liability to the individual combine enterprise and its assets has always been one of the most important motives for the formation of combines at all. If one proceeds not from the combine but from the polycorporate enterprise, the restriction of obligation and liability to the individual enterprise unit finds its appropriate form. Just as the polycorporate enterprise, possessing no assets of its own, can only act in its units, it can incur obligations and liability for such action only in these units and their assets. To put the dominating enterprise unit in a position to do this, its authority to issue directives to the dependent enterprise units is sufficient. In order to achieve the same for the dependent enterprise units too, there are operative in the case of the contract of domination the transfer of losses to the dominating enterprise (sec. 302 AktG) and in that of integration the co-liability of the dominating enterprise unit (sec. 322 AktG).

The concept of the "polycorporative legal subject" will, it seems most probable, only very gradually gain general acceptance. But at any rate the category of the "legal person" itself became established only in the course of a long-drawn-out historical process. To German jurists, the figure of the polycorporative legal subject is basically not all that new at all: it is also

enshrined in the legal organisation of the federal state, with the relation between federation ("Bund") and states ("Länder").

d) Provisional Nature of the Conclusion

It is necessary, finally, to draw attention to the contractual combine of coordination. This further variant of the polycorporative enterprise can in turn be connected with the multilateral organisation structures already outlined. This incidentally would seem to be the most that can at present be said on the legal structures of the polycorporate enterprise, which are still in the process of evolution. That the points outlined above are by no means generally thus perceived may be seen in the fact that the enterprise commission rejected the introduction of corporative structures for the combine - quite failing to notice that the Stock Corporation Act of 1965 laid the foundation for these structures long ago⁴⁷⁾.

4. Limits of Group Law

In order to avoid possible misunderstanding, I should like to stress once more in conclusion that German group law limits itself strictly to providing legal regulations for existing combine structures. It is not the task of combine law to form, alter or dissolve combines themselves. The whole sphere of the regulation of trading in corporate power (take-over bids, sale of control, insider trading, etc.) is, on the other hand, the affair of a capital market law which is increasingly becoming independent of company and enterprise law. It need hardly be remarked that group law cannot be instrumentalised for purposes of the labour market either⁴⁸⁾.

III. Main Tasks for the Future

In the third part of my paper I should like at least briefly to describe the main future tasks that arise in the further development of group law. In contrast to the report of the Enterprise Commission, however, I shall not place the emphasis on problems of detail, but solely conceptional questions. One aspect is the relationship between the combine and the market (1.). Another set of questions relates to employee co-determination in the combine (2.). A third and final area is that of the classification of the combine within the overall legal constitution of the economy (3.).

1. The Combine and the Market

The combine, being an economic decision unit whose degree of unification is very varied and subject to constant fluctuation, cannot be definitely delimited over against the market. This raises the question under what conditions business relations on an internal level between enterprises affiliated - at the same or different level - to a combine can be regarded as contracts or practices in restraint of trade that are legally prohibited or requiring special permission. German doctrine has attempted so far to solve this question solely with the instruments of competition law. In doing so, it has been guided by the notion - correct in itself - that group law is conceived as neutral in relation to the whole of antitrust law, that is, both to merger control and to the restraints of competition that concern us here. This is also the reason why the Enterprise Commission did not take up a position on this point⁴⁹⁾.

Attempts made so far to master these problems, however, make it increasingly clearer that a reliable solution must also include group law itself, the

combine as such remaining unaffected. The sole decisive point is whether it is possible to proceed beyond the constantly changing factual power structure of the combine to a polycorporative enterprise forming a comprehensive legal unit, or whether it is necessary to stop at individual corporate enterprises that can eliminate the market among themselves in an impermissible manner⁵⁰⁾.

This means that the organisation contract is in future to be made the decisive instrument of the delimitation sought - for the combine of subordination just as much as for the combine of coordination and especially also for joint ventures. Inasfar as the agreements between the participating enterprises cannot be evaluated as the articles of a polycorporate enterprise, we have a cooperation contract regulating only the exchange or the combination of performances, and subject to the control of the law of competition⁵¹⁾.

2. The Combine and Employee Co-determination

The next problem complex to be mentioned, that of co-determination of employees in the combine, is to be seen here solely as co-determination in the enterprise in the sense of the 5th directive. It must be stressed once again that this is in sharp distinction to co-determination in the plant as intended by the Vredling proposal. The two sets of problems are almost completely separated from one another in German legislation. It is admittedly not very easy to justify this separation. Put briefly, co-determination in the plant has its roots in the collectively uniform realisation of the employer-employee relationship as a contract of exchange. Entrepreneurial co-determination following the Co-determination Act (MitbestG) is, as was already explained, finally only to be justified with reference to a membership of the employee, too, in the enterprise; thus it presupposes that the

employer-employee relationship has in addition a side within organisation law. In the combine, entrepreneurial co-determination acquires a considerably increased effect by reason of the repercussions of the decision processes on the affiliated enterprises. For that reason, the Enterprise Commission dealt with this in detail⁵²⁾.

Co-determination in the combine would be largely empty if it did not already take place in the supervisory board of the controlling enterprise. Thus the applicability of the co-determination law is ensured inasmuch as the employees of the dependent enterprises are also included under the dominating enterprise (sec.5 MitbestG). In order to avoid a possible multiplication of co-determination when the dependent enterprise itself is also subject to co-determination (the so-called "cascade" or "waterfall" effect), the management board of the controlling enterprise is tied to decisions of its own supervisory board in the appointment and recall of members of the administration and in fundamental decisions in the dependent enterprise; for these decisions, a simple majority of shareholders is required (sec. 32 MitbestG)⁵³⁾.

This rule is generally criticised as hard to understand and unconvincing. It divides the supervisory board of the dominating enterprise, and thus creates, at least in embryo, an organ belonging to the combine as such, which furthermore is occupied, for no clear reason, exclusively by representatives of the shareholders. This special organ is also assigned tasks of management, thus breaking down the division of functions between the supervisory board and the management board. Where instructions to the management board of the dominating enterprise involve disadvantages for the dependent enterprise, and where the latter is

neither integrated nor partner in a contract of domination, the controlling enterprise is threatened with liability under secs. 311 et seq. AktG if the instructions are carried out; furthermore, the protection of the dominating enterprise has also then to be borne in mind, which can require the co-operation of its general meeting⁵⁴⁾.

If one disregards the fact that co-determination begins with a minimum number of employees, rather than simply with the organisation of the enterprises concerned as legal persons, this unfortunate legal regulation suffers still more from the fact that it proceeds from the combine instead of the enterprise. To put it more precisely, only in a contractual combine, which comprehends the organised social systems involved in a polycorporative enterprise, can co-determination be fully effective. It is part of the functional logic of these still more complex social system that shareholders and employees are counted and elect members of the supervisory board exclusively in the enterprise unit of which they are members, that the tasks of management board, supervisory board and general meeting (expanded to include the employees) remain separate in all enterprise units, and that no management measures can be taken on by the supervisory board of the dominating enterprise. This logic is particularly opposed to the tendency to re-model the supervisory board of the dominating enterprise unit, whose members are on a basis of parity, into an independent central organ of the polycorporate enterprise as such, having not only supervisory, but also management rights over against the management board and the right to make fundamental decisions over against the general meeting of the dominating enterprise unit. Finally, it is only in a contractual combine that the management board

of the dominating enterprise has a free hand in management measures that are disadvantageous to either the dominating enterprise or a dependent one, as long as the combine interest is protected⁵⁵⁾.

These are, certainly, only broad outlines of the future development. However, it is here that the strongest impetus of a decision for the contractual combine is already found at the present time⁵⁶⁾.

3. The Combine and the Legal Constitution of the Economy

Thus the possibilities of making the external delimitation over against the market and of solving the still remaining problems of internal structure show in the contractual combine a new legal dimension of the enterprise, and furthermore an important element of the overall legal constitution of the economy.

Proceeding from the distinction between combine and enterprise - it may be stressed one final time - the decisive step towards this polycorporate enterprise lies in the fact that group law does not stop at protective regulations for the individual affiliated corporate enterprises and their shareholders, employees and creditors, but places the affiliated enterprises on the foundation of an organisation contract below the roof of a common legal organisation. On the other hand, in the case of the de facto combine, clearly-marked protective regulations for the individual enterprise are indispensable if the contractual combine is not to remain an empty option.

The preliminary group law directive has not only kept this dialectical solution open, but - as its inclusion in the Report of the Enterprise Commission shows - also had fruitful repercussions on the proposals for the necessary technical improvement of German group legislation⁵⁷⁾. These proposals,

which cannot be gone into in detail here, do however make it clear that we have a long way to go before the time when the bilateral or multilateral organisation of a contractual combine is accepted as a legal subject of its own in a comparable way as it has become established in the case of the legal person.

4. Future Prospects

Beyond the framework of my topic lie the proposals for a transnational group law such as are to be found in the draft statute of the European Stock Corporation, but also in that of the European Cooperation Union. You will have readily concluded from what I have said that I place no trust in the legal operability of the "de facto" or "organic" combine according to articles 223 et seq. of the *Societas Europaea*. If this scepticism, which I think is shared by most of my German colleagues, is justified, the question will have to be raised all over again where the foundation stones for a European legal constitution of multinational enterprises that holds water on a theoretical level as well may lie⁵⁸⁾. In this situation, we may take little comfort in the words of a famous German jurist whom you might hardly expect to meet in this connection: "You must have found something in order to know where it is" (this was said by Goethe: "Man muß eine Sache gefunden haben, wenn man wissen will, wo sie liegt"). Nevertheless, the history of the development of German group law may perhaps yield some indications of where the foundation stones we are looking for can be found.

Notes

- 1) Bundesministerium der Justiz (Ed.), Bericht über die Verhandlungen der Unternehmensrechtskommission, Cologne, 1980, No. 1244 et seq.
- 2) See for this development esp. Emmerich/Sonnenschein, Konzernrecht, 2d ed., Munich 1977, p. 21 et seq. - so far the most comprehensive presentation of German group law. For a shorter survey: Kübler, Gesellschaftsrecht, Karlsruhe 1981, §§ 28-30 (pp. 338-364); Wiedemann, The German law of Affiliated Enterprises, in Hopt (Ed.), Groups of Companies in European Laws, Berlin/New York 1982, pp. 21-43.
- 3) Cf., on the interrelation of group law and tax law, esp. Sonnenschein, Organschaft und Konzerngesellschaftsrecht, Baden-Baden 1976; more recently Wiedemann, supra note 2, at pp. 29-31.
- 4) For the purpose of this paper, the so-called transfer-of-profit contract (sec. 291 par.1 AktG) will be left aside. If there is a contract of domination, the dominating enterprise is legitimated also to take over the profits of the dependant enterprise. Cf., on this point, Kübler, supra note 2, at p. 350 (with references).
- 5) See for "enterprise" (Unternehmen) in this technical sense Kübler (supra note 2), pp. 341-343, and Wiedemann (supra note 2), pp. 31,32; with further references therein.
- 6) The conception of "enterprise" as organisation has been more broadly developed esp. by Raiser,

Das Unternehmen als Organisation, Berlin 1969.

- 7) Gierke, Das deutsche Genossenschaftsrecht, vol.I, Berlin 1868, p. 1029.
- 8) For an evaluation of this development and the present state of German legislation on employee-codetermination see Kübler, supra note 2, § 32 (pp. 376-393) and Wiedemann, supra note 2, pp. 41-43, with references. Cf. also Kübler, 1981 ZGR 377 on the Bericht der Unternehmensrechtskommission (supra note 1).
- 9) 50 BVerfG 249 (1979).
- 10) See, for instance, Wiedemann (supra note 2), at p. 43: " ideologically motivated doctrine of the unified and integrated 'social union enterprise'".
- 11) See the comprehensive report on the discussion by Raiser, Die Zukunft des Unternehmensrechts, in Festschrift für R.Fischer (Berlin/New York 1979), pp. 561-578.
- 12) Cf., on this point, Kübler (supra note 2) pp. 381-386; Wiedemann (supra note 2) at p. 43.
- 13) For the "enterprise interest" (Unternehmensinteresse) see esp. Brinkmann, Unternehmensinteresse und Unternehmensstruktur, Frankfurt/Bern 1983 and Jürgenmeyer, Das Unternehmensinteresse, Heidelberg 1984.
- 14) Raiser, Das Unternehmen als Organisation (supra note 6) p. 133 et seq., 160, 166 et seq.; Rehbinder, Konzernausserrecht und allgemeines

Privatrecht, Bad Homburg 1969, p. 50 et seq.; Bericht der Unternehmensrechtskommission (supra note 1), No. 1246 et seq.; Wiedemann (supra note 2) p. 23. See contra, Bälz, Einheit und Vielfalt im Konzern, in Festschrift für L.Raiser, Tübingen 1974, pp. 287- 338.

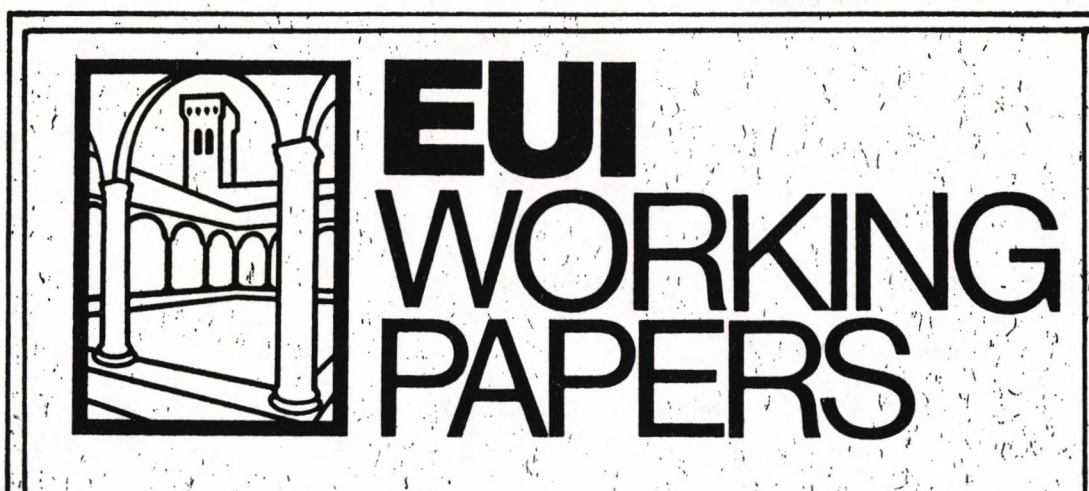
- 15) Würdinger, Aktienrecht und das Recht der verbundenen Unternehmen, 4th ed., Karlsruhe 1981, § 70II (p. 323).
- 16) For details see Dierdorf, Herrschaft und Abhängigkeit einer Aktiengesellschaft auf schuldrechtlicher und tatsächlicher Grundlage, Cologne/Bonn/Munich, 1978; Sura, Fremdeinfluß und Abhängigkeit im Aktienrecht, Constance, 1980.
- 17) See, for instance, Kübler (supra note 2), § 28II4 (pp. 344, 345).
- 18) Bälz (supra note 14), p. 320.
- 19) See esp. Würdinger, 1973 DB 45 at 49; Bericht der Unternehmensrechtskommission (supra note 1), No. 1379 et seq.
- 20) Cf. Würdinger, 1974 EuR 25 for the parallel problems in the group law of the Societas Europaea.
- 21) See Kübler, supra note 2, § 29II (pp. 349-351).
- 22) Wiedemann (supra note 2), p. 27; Kübler (supra note 2), § 18VI (pp. 255, 256).
- 23) Hopt, Merger Control in Germany, in Hopt (Ed.), European Merger Control, Berlin/New York 1981, pp. 71-100.

- 24) Cf., most recently, Hanau, 1984 ZGR 468 (with further references).
- 25) See Bericht der Unternehmensrechtskommission (supra note 1), no. 1295 et seq.
- 26) Bericht der Unternehmensrechtskommission (supra note 1), no. 1312 et seq.; Wiedemann (supra note 2), p. 33 et seq.; Kübler (supra note 2), § 29 (pp. 348-356).
- 27) Kübler (supra note 2), § 29I-IV (with references).
- 28) Kübler (supra note 2), § 29V.
- 29) Cf., on this point, esp. Lutter, Die Rechte der Gesellschafter beim Abschluß fusionsähnlicher Unternehmensverbindungen, Supplement no. 21 to 1973 DB.
- 30) For a general evaluation see Sonnenschein, 1981 ZGR pp. 429-454 (concerning the Bericht der Unternehmensrechtskommission; supra note 1). By far more critical Wiedemann, supra note 2, pp. 33-36.
- 31) See, for the de facto combine, Bericht der Unternehmensrechtskommission (supra note 1), no. 1379 et seq. More details and further references: Wiedemann (supra note 2), p. 36 et seq.; Kübler (supra note 2) § 30 (pp. 356-364).
- 32) For the underlying policy of the Aktiengesetz 1965, on this point, cf. Kropff, Aktiengesetz, Düsseldorf 1965, p. 373 et seq.

- 33) For details, see Kübler (supra note 2), p. 357 et seq. (with further references).
- 34) Mestmäcker, Zur Systematik des Rechts der verbundenen Unternehmen, in Festgabe für H.Kronstein, Karlsruhe 1967, p. 129 et seq.; Bälz (supra note 14), p. 303 et seq.; Emmerich/Sonnenschein (supra note 2), § 8 B VII (p. 196 et seq.); Kübler (supra note 2), § 30II (p. 360); Würdinger (supra note 15), § 72 (p. 340 et seq.).
- 35) See, for instance, Wiedemann (supra note 2), pp. 36,37.
- 36) Bericht der Unternehmensrechtskommission (supra note 1), no. 1435.
- 37) Cf. Strohn, Die Verfassung der Aktiengesellschaft im faktischen Konzern, Cologne 1977.
- 38) Lutter, supra note 29; Timm, Die Aktiengesellschaft als Konzernspitze, Cologne 1980; Hommelhoff, Die Konzernleitungspflicht, Cologne/Berlin/Bonn/Munich 1982; Wiedemann (supra note 2), p. 23; Bericht der Unternehmensrechtskommission (supra note 1), no. 1258 et seq.
- 39) 83 BGHZ 122 (1982).
- 40) See, most recently, Westermann, 1984 ZGR 352 and Heinsius, 1984 ZGR 383, with further references.
- 41) For the following see already Bälz, supra note 14.
- 42) For a general evaluation of the de facto combine see Wiedemann (supra note 2), pp. 37,38; K.Schmidt, 1981 ZGR 455-486 (concerning the Bericht der Unternehmensrechtskommission, supra note 1).

- 43) Bälz, supra note 14, p. 317 et seq.
- 44) Bälz, supra note 14, p. 323 et seq. Cf. also Praëel, Eingliederung und Beherrschungsvertrag, Berlin 1978.
- 45) Bälz, supra note 14, p. 327 et seq.
- 46) Bälz, supra note 14, p. 329 et seq.
- 47) Bericht der Unternehmensrechtskommission (supra note 1), no. 1294.
- 48) For the interrelation between company and capital market law, see Kübler (supra note 2), § 31 (p. 365 et seq.) with further references.
- 49) Wiedemann (supra note) p. 23; id., Gesellschaftsrecht, vol. I, Munich 1980, § 13 (p. 712 et seq.).
- 50) Harms, Konzerne im Recht der Wettbewerbsbeschränkungen, Cologne/Berlin/Bonn/Munich, 1968; id., Die Entwicklung des Wettbewerbsrechts der Konzerne und Gemeinschaftsunternehmen in der EWG, in Festschrift für G.Hartmann, Cologne 1976, pp. 165-186; Gansweid, Gemeinsame Tochtergesellschaften im deutschen Konzern- und Wettbewerbsrecht, Baden-Baden 1976; Gromann, Die Gleichordnungskonzerne im Konzern- und Wettbewerbsrecht, Cologne/Berlin/Bonn/Munich 1979.
- 51) Bälz, supra note 14, p. 332 et seq. Cf. also: Kübler (supra note 2), § 29II (p. 349 et seq.); v.Bar, 1980 BB 1185-1191.
- 52) Bericht der Unternehmensrechtskommission (supra note 1), no. 1476 et seq.

- 53) Lutter, Mitbestimmung im Konzern, Cologne/
Berlin/Bonn/Munich, 1975; Wiedemann (supra note 2),
pp. 41-43; most recently, Hanau, 1984 ZGR 468-494.
- 54) Kübler (supra note 2), § 32 V (p. 389 et seq.);
Wiedemann (supra note 2), p. 43.
- 55) Cf. Bericht der Unternehmensrechtskommission
(supra note 1), no. 1476 et seq.
- 56) Cf. Wiedemann (supra note 2), p. 42; Martens,
1984 ZGR 417-459.
- 57) Bericht der Unternehmensrechtskommission (supra
note 1), no. 1418 et seq., 1449 et seq.;
K.Schmidt, 1981 ZGR at pp. 460-470.
- 58) See esp. Würdinger, 1974 EuR 25-35; Lutter,
Europäisches Gesellschaftsrecht, Suppl. vo. I
ZGR (2d ed. 1984), at p. 47 et seq.



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