Of Groups and Ostriches

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It is a well known fact that the EU project of designing a legal framework for the operation of groups of companies proved to be a bridge too far. The Commission's Action Plan states in footnote 21: 'The consultation on the draft (9th) Directive showed that there was little support for such a comprehensive framework on group law: such an approach was largely unfamiliar to most Member States, and the business sector viewed it as too cumbersome and too inflexible. As a consequence, the decision was made not to issue an official proposal.' Nevertheless the Commission intends to come up with a proposal for a Directive in the medium term requiring the Member States 'to provide for a framework rule that allows those concerned with the management of a company belonging to a group to adopt and implement a co-ordinated group policy, provided that the interests of that company's creditors are effectively protected and that there is a fair balance of burdens and advantages over time for that company's shareholders'.[1] The Commission here seems to have chosen the same option policy as has been followed in the final draft of the Takeover Directive; meaning it will be basically at the discretion of the companies themselves to decide whether they will use the national legal framework for group law or not. Consequently, just as we now have optional European takeover law there will be optional European group company law in the near future.

Although this law-making, by creating optional frameworks, certainly has its advantages – e.g. it confronts management with some basic regulative choices and their possible impact on the company's perceived market position[2] – this policy also has its limitations and even downsides. The key question here is: can you really leave the application of corporate rules aimed at safeguarding the position of minority shareholders, creditors and employees, fully up to the company's own discretion? And if you do, how must a judge weigh the sometimes fundamental principles and ideas behind the relevant EC Directive in a situation where the company has opted not to apply the national legal framework? Should these principles not override such choice? For instance, in the *ABN AMRO* case, could the Dutch Supreme Court not as easily have ruled, provided that it had regarded the LaSalle agreement as a defensive measure, that this agreement did require prior approval of the shareholders after all, based on the directly applicable and fundamental principles laid down in Article 3 of the Takeover Directive?

One may expect that an optional system of European group company law will raise similar questions. Let us assume that a national legal framework, based on the future optional EC Directive, contains provisions against central group management instructions that are detrimental to the subsidiary. Can one really expect that such provisions would have no impact on a judge's ruling in a situation where a holding company has opted not to apply this legal framework, but where it is clear that it has exercised a strong influence over its subsidiary, perhaps causing serious damage and financial losses to the latter? Of course the national judiciary, as in Germany, will not turn a blind eye and is likely to apply the optional legal group law provisions analogously to these factual group relations. In this light one could say that the growing European legislature's preference for optional frameworks can be characterized as an ostrich policy, as it pushes the difficult decisions onto the judge's plate. But then, that is not such a rare phenomenon after all.

1 EC Commission's Corporate Governance Action Plan, 2003, para. 3.3.

2 *Cf.* my contribution to the collection European Company Law in Accelerated Progress, CECL Book Series, part 1, Kluwer Law International, 2006, pp. 1-7: The EC Directive on Takeover Bids: Opting in as a Token of Good Corporate Governance?