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**LABOUR AND THE GLOBAL CRISIS: SHARING THE BURDEN (!) SHAPING THE FUTURE (?)**

**Analysis, Short-Term Stabilisation and Long-Term Options**

**Labour and the Locusts: Trade Union responses to corporate governance regulation in the European Union**

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**Please note – this is very much still a draft, and due to time constraints the second part of the paper focusing on the regulatory responses to the crisis is still somewhat lacking the labour dimension promised in the abstract**

**Abstract:**

In the immediate aftermath of the financial and economic crisis, many observers argued that there was now a ‘window of opportunity’ for organised labour, and the left in general, to formulate and push for alternatives to neoliberal hegemony with regard to the regulation of financial markets and regulatory oversight. Corporate governance, in particular the debate over executive remuneration, constituted a central focus in this discussion. In the crisis it had become abundantly clear that perverse incentive structures the financial crisis had aggravated the excessive risk-taking that fuelled financialisation.

In the European Union, corporate control and corporate governance have become politicised and contested even before the crisis, often in tandem with the broader debate about corporate ownership and the debate about alternative investment structures (i.e. the so-called ‘locust’ debate about the role of private equity and hedge funds). Organised labour at the EU level, e.g. the ETUC, and the European Parliament criticised the neoliberal policies of the European Commission in this policy domain. This paper investigates these processes before and after the crisis. While there have been several policy initiatives at the EU level imposing stricter (re)regulation on financial markets and corporate governance, do these initiatives indeed point towards a fundamental change in EU policy?

*A crisis occurs, sometimes lasting for decades. This exceptional duration means that incurable structural contradictions have revealed themselves (reached maturity) and that, despite this, the political forces which are struggling to conserve and defend the existing structure itself are making every effort to cure them, within certain limits, and to overcome them. These incessant and persistent efforts [...] form the terrain of the 'conjunctural' and it is upon this terrain that the forces of opposition organise. (Gramsci 1971: 178)*

## **1. Introduction**

In the context of the current financial and economic crisis, many observers have looked to the 'left' for alternative strategies to deal with the fallout of the collapse of finance-dominated, market-driven policies. A common assumption holds that the current crisis not only corroborates the analyses and arguments of critics of unfettered market capitalism, but that we are indeed witnessing a conjunctural 'window of opportunity' for alternative policy proposals and political strategies to enter into the policy-making arena. Organised labour, in particular trade unions, perceived as 'regulated representative constituencies of the Real Economy' (TUAC 2008), here represents a central node of agency in emerging networks of contestation, on the national as well as the European and international level. As John Monks, secretary general of the European Trade Union Confederation (ETUC) declared, 'the conditions are there for a trade union counter attack' (Monks 2008).

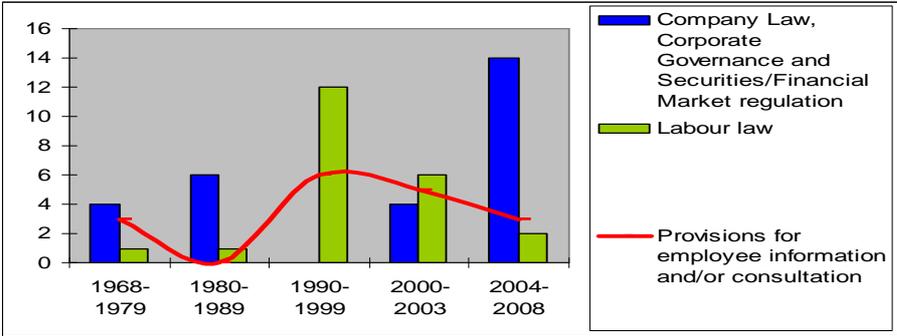
At the same time, rising job losses and unemployment levels, and pressure on real wages have put organised labour (once again) in a defensive position. Employers have stepped up political pressure on unions to acquiesce to intensifying policies of labour flexibilisation in order to save existing jobs and prevent further outsourcing. None of the bailout plans discussed so far have been initiated through pressure from below, that is from trade union associations or civil society networks. Labour representation and interests are becoming more and more fragmented at the company and the national level, while the institutional configuration of the European Union has been permeated deeply with governance structures that are conducive to market-making, neoliberal policies rather than strengthening the alleged 'European Social Model'. In a recent contribution, Fritz Scharpf, a leading scholar of the political economy of European Integration, has even gone so far as to call trade union enthusiasm about the European Social Model a 'delusion' (Scharpf 2008).

What then is the role of organised labour at the European level, and in how far does Europe indeed constitute an important political and institutional terrain for alternative socio-economic perspectives and initiatives? As Strange and Worth point out in a recent special issue on *The Left and Europe* (2007: 2), 'a key question for research and more direct organisational interventions concerns the extent to which [...] Europe can (or cannot) be a progressive space for labour and wider oppositional social forces.' In order to understand the role and counterhegemonic potential of organised labour in the

emerging state EU formation, the neoliberal restructuring of the European Union should be seen as a contested project, rather than a linear, inevitable and unchangeable trajectory. At the same time, the agency of organised labour has to be understood within the institutional and political structures of the European Union.

This paper seeks to engage with the agency and strategies of organised labour at the European level by mapping and analysing trade union responses to EU corporate governance regulation. Corporate governance here refers to those practices that define and reflect the power relations within the corporation and the way, and to which purpose, it is run (Van Apeldoorn and Horn 2007). As Horn (2008) has shown, corporate governance regulation in the European Union is increasingly shifting towards financial market imperatives, that is towards a regulatory perspective focusing exclusively on the interests of shareholders. Labour law, once an integral part of regulating the modern corporation, is more and more relegated to the area of social affairs and employment law, and provisions for workers' rights with regard to corporate control are increasingly marginalised. Based on explorative research, graph 1 shows this development in absolute numbers of legislative initiatives.

*Graph 1 - Employee Information and Consultation in EU Labour Law, Corporate Governance and Financial Market Regulation*



Questions of corporate control, as expressed in corporate governance regulation, go to the very heart of late industrialised capitalism. It is in this arena that contesting ideological perspectives on ownership and socio-economic organisation collide most immediately. Yet labour law in the European Union has a representational rather than redistributive character - whereas collective bargaining, the right to strike and working conditions have been at the centre of trade union strategies and demands, corporate governance and financial market regulation on the EU level has often come about outside the focus of trade unions.

It was only in recent years that corporate control and corporate governance have become more politicised and contested, often in tandem with the broader debate about corporate ownership and the debate about alternative investment structures (i.e. the so-called 'locust' debate about the role of private equity and hedge funds). In fact, the publicly staged struggle against alternative investors

seems to have become a key strategy in trade union resistance to capitalist restructuring. National, European and international trade union associations discuss and publish highly visible statements and strategies. Rather than solely through ‘traditional’ trade union instruments such as strikes and demonstrations, organised labour is now acting in concert with a range of groups and organisations, for instance with the Socialist group in the European Parliament or Attac, a transnational civil society organisation.

The paper is structured as follows. The next section offers an overview of the conceptual and political discussions surrounding the agency of organised labour at the European level. Subsequently, corporate governance regulation is introduced, conceptually as well as a crucial element of neoliberal restructuring at the European level, in particular with regard to the marketisation of corporate control (Horn 2008). Here, the shift from a focus on ‘industrial democracy’ at the European level in the 1970s towards a ‘shareholder democracy’ in the mid-2000s serves as a storyline for the following section. The paper then concludes with a view on recent developments, in particular with regard to the financial and economic crisis.

## **2. Perspectives on organised labour at the European Level**

International political economy approaches have long focused on the agency of transnational capital and business actors, while a focus on labour as a political actor has been fairly marginalised (Harrod 2002: 15). A common perception is that organised labour, despite its often internationalist ideology, is still rooted on the national level and has become a conservative and inflexible force with dwindling membership, unable to adapt its strategies to the new supra- and transnational realities. And indeed, as Hyman sums up (2004: 19-20), the challenges to traditional unionism have been manifold, ranging from external factors such as the intensification of competition across countries, regions and sector, the internationalisation of chains of production, and the deregulation of the labour market, to internal challenges such as the erosion of the ‘normal’ employment relationship, extensive social and generational changes and hence decline of trade union membership.

Trade unions, as the primary manifestation of organised labour in industrialised capitalism, are faced with a fundamental dilemma. While on the one hand their objective is to at least negotiate the worst social consequences of capitalism with a focus on the underprivileged, at the same time the majority of their file and rank is constituted by the relatively advantaged, core section of the working class. This of course differs according to the political and confessional orientation of trade unions. The question then is whose interests trade unions represent, and which interests take precedence in the immediate and long-term actions of trade unions. Hyman here identifies four interest constellations of relevance for trade unions (Hyman 2004: 23): first, and most immediately, ‘bread and butter’ collective

bargaining, focusing mainly on pay and wage negotiations; secondly, procedures, status and opportunities with regard to workers rights; thirdly initiatives and claims that address the role of the state (e.g. social welfare and taxation), the politico-legal framework of trade union organisation and macroeconomic policies that shape circumstances of labour market; and lastly issues not directly linked to core trade union issues, such as the environment.

*How* these interests are represented depends upon organisational and political choices of trade unions. Here unions often find themselves in a situation as *managers of discontent*. As Mills argued in 1948, 'business-labour co-operation within the place of work [...] means the partial integration of company and union bureaucracies. The union takes over much of the company's personnel work, becoming the disciplining agent for the rank and file [...] Company and union [...] are disciplining agents for each other, and both discipline the malcontented elements among the unionized employees.' (Mills 1948).

In order to comply with their own political and social goals, and maintain the allegiance of their members, trade unions have to articulate (elements of) the class struggle at the individual, firm, sectoral or national level. Yet at the same time, in order to maintain a standing in which they are indeed a political actor and recognised for their intermediary role between workers on the one hand, and employers and the state on the other, they need to constrain this class struggle and channel it into manageable compromises to maintain the class compromises that underlie much of the advanced industrialised capitalist societies. Whether this takes place in more oppositional or conciliatory ways depends on unions' ideological position, as well as the institutional and politico-legal structures in which unions operate.

There are different mechanisms through which organised labour can seek to advance these objectives. Traditional union strategies have been class action at the firm, sectoral or national level, as well as close political cooperation with social-democratic or other (confessional) parties. Here, organised labour has long represented an interest group in national politics, manifest in e.g. corporatist concertations. Increasingly, trade unions have also become engaged in 'partnerships' with business at the firm level, in firm specific agreements (which in the case of multinational corporations can take on a transnational character). International cooperation between trade unions through eg International Union secretariats or the TUAC has become more important for the coordination and organisation of union strategies, however the main space for action remains at the national level. As will be discussed in some more detail in the following section, in recent years unions have increasingly established cooperation with social movements (cf Bieler 2008). However, as Hyman points out, engaging in 'contentious politics' potentially 'redefines unions as outsiders in a terrain where until recently the role of insiders was comforting and rewarding' (Hyman 2004: 22). As the next section shows, with regard to organised labour at the European level, the insider role seems to have been more appealing indeed so far.

Organised labour at the European level, in particular the ETUC, has been perceived as, put bluntly, coopted into the project of neoliberal restructuring. The European Trade Union Confederation and the European Industry Federations, set up as lobby organisations for worker interests at the European level, have been implicated into the emerging system of labour relations, characterised through the Social Dialogue and firm-level agreements.

As Streeck and Schmitter have pointed out (1991: 147) that changes in social structures, in particular a weakened social democratic movement and more flexible labour arrangements, concurred with a changing character and role of trade unions in the 1980s. In particular under the promises of Delors' vision for a *European Social Model*, trade unions entered into a tacit agreement that intensified market competition and deregulation were unavoidable (Bieling 2001: 100). The institutionalisation of the Social Dialogue in the Maastricht Social Chapter in 1991 has led to what Bieling and Schulten have called symbolic Eurocorporatism, incorporating trade union associations into the hegemonic bloc supporting neoliberal restructuring, while all the same 'keeping alive their functionalist hopes of a slow but steady expansion of European social regulation' (Bieling and Schulten 2003). The Social Dialogue channelled conflicts between capital and labour into a non-binding social partnership forum, effectively blurring the antagonistic relations resulting from the neoliberal restructuring. Concessions to labour have been mostly symbolic (cf. Tidow 2003). EU level trade union associations have also been criticised for being integrated into the EU system of decision making also through funding and institutional networks, with ambivalent consequences - while the financial and institutional support from e.g. the Commission increases the organisations' scope for action, it also creates political dependencies.

Trade union strategies at the European level mainly take place within the institutional framework of the European level. This, however, means that initiatives and policy objectives also remain *within* the broader political context of neoliberal restructuring, rather than pose a fundamental alternative to it. Hyman's critique is rather to the point here: 'Working for marginal adaptations to the dominant orthodoxy of actually existing Europeanisation is the line of least resistance, the new realism and practicality of a trade unionism that has lost its former utopian inspiration' (Hyman 2005: 22). The question then remains in how far organised labour can indeed be seen as a potential counter-hegemonic actor, and in how far the institutional terrain of the European level (cf disciplinary neoliberalism, Gill) would be the appropriate place for social struggles. Yet even though the space for agency for organised labour is limited, there remain avenues for trade unions. As Erne points out, unions are not passive victims of the EU integration process but agents that are also capable of politicising its contradictions (Erne 2008: 199). While labour has, in the absence of strong uniform representation on the EU level and framed in the soft model of the 'Social Dialogue', acquiesced to the previous programme under the promise of competitiveness and job growth, there is now increasing

disillusionment with the flanking measures of the European Social Model. In the discussion we need to distinguish between (organised) labour as a political actor in the regulatory process, and underlying structural changes with regard to the social power and interests of labour actors, and concomitantly in industrial relations (although analytically these two are of course very much related).

### **2.1. A Historical materialist framework**

The emphasis in this paper is on the social struggle underlying the political project of neoliberal European integration. Rejecting pluralist notions of agency at the European level, Van Apeldoorn et al argue (2008: p), that, in order to analyse the potential for contestation of and resistance to socio-economic restructuring, the position and agency of subaltern classes in European governance have to be seen from a perspective that acknowledges the fundamental power asymmetries in the EU. Most critical political economy studies of European integration processes have so far focused on the role of transnational capital (fractions) and the emergence, consolidation and reproduction of hegemonic discourses and ‘concepts of control’. This paper to contribute to an understanding of how these hegemonic discourses are actually maintained and disseminated with the support of subaltern classes. At the same time, as the terrain of class struggle is increasingly shifted beyond the nation state, the European state formation becomes more and more important as a locus for counter-hegemonic strategies.

It is through the articulation of, and struggle between, concrete political projects that social forces shape European integration. While there is an analytical distinction between the historic bloc and political projects, these concepts are in fact interrelated (Bieling 2003: 206). Political projects are embedded in, and at the same time shape, the conjuncture of a given historic bloc; this corresponds to Drainville’s call for an analytical focus on broader structural changes, as well as on concrete political projects, manifested in ‘negotiated settlements [and] concessions to the rigidities and dynamics of structures, as well as the political possibilities of the moment’ (Drainville 1994: 116).

With regard to the EU context, this focus on concrete political projects is all the more important as the EU state formation stipulates a certain market-making focus in the first place. As Van Apeldoorn’s analysis (2002: 78) of rival projects of European Integration shows, the crucial question is *what kind* of market is being promoted. Regulation here represents a juridico-political manifestation of the struggle between particular political projects, albeit subject to political concessions and compromises. Rather than perceiving of regulation as a functional outcome or the drive to improve efficiency by correcting market failures, in the understanding of this study regulatory developments are perceived of as part and parcel of political projects. Here, in order to discuss the transformation of a regulatory framework, it is indispensable to analyse *qualitative* changes, as well as the underlying configuration of social forces. This focus transcends a state-centric perspective, as regulatory

transformation must be viewed as a transnational process where changes take place simultaneously at different levels. Not only 'hard' regulation is taken into account, but also how political projects are being discursively formulated, as well as disseminated and contested within capitalist society.

The concept of the political project here serves as a starting point for the analysis, as its discursive and operative dimensions can be investigated empirically, while at the same time seeing it in the context of wider structural changes. As concrete, and more or less coherent, manifestations of social interests with regard to particular socio-economic issues, political projects are subject to internal contradictions as well as contestation by contending social forces. As such, it is through an analysis of political struggle, as well as the compromises and consensus necessary to sustain hegemonic projects, that the contours of rival political projects become most clear. Hegemony in a Gramscian sense is in fact never complete, and subordinate groups and classes may always struggle to redefine the terms of the dominant discourse and transform underlying social practices. This, again, points towards the open-ended nature of the process of European integration, as well as the emancipatory potential within the European arena.

However, the EU's institutional set-up constitutes a complex arena for strategic-relational decision-making, a form of state with its own inherent strategic selectivity (Ziltener 2000: 78-81). The concept of strategic selectivity (Jessop 1990) is essential to understanding the nature of European integration. While the state is structurally dependent on the dynamics of capitalist (re)production, the strategic-relational perspective emphasizes that selectivity is not simply given, but subject to struggle. The neoliberal strategic selectivity of the European state formation must thus not be assumed, as is often the case, but rather needs to be established through the analysis of political struggles between contending social forces over the content and trajectory of European integration (cf Van Apeldoorn 2002).

Jessop's compelling, if a bit intangible, identification of the European polity as a 'crucial political site in an *evolving system of multi-scalar meta-governance*, organized in the shadow of post-national statehood'(Jessop 2006: 141, emphasis added) underlines the significance of institutional developments of the European state formation within this process. However, as Ziltener has pointed out, the institutional configuration of the European state formation, that is, form and function of supranational institutions and actors, is still in need of further conceptualisation within this perspective on European integration (Ziltener 2000: 82-83). Only through an understanding of how the EU polity as a form of state (cf. Cox 1987), that is, in its integral relationship between civil society and the state apparatus, is structured and delimited also through the very institutional configuration of the polity, can the particular manifestation of policies and political strategies be analysed. Organisational competences of institutions and state actors, as well as legislative procedures and regulatory delegation (trivial as they might seem in relation to, for instance, transnational class formation), have to be taken into account.

### 3. The Transformation of Corporate Governance Regulation at the European level

#### 3.1. Corporate Governance as social relations

Corporate governance here refers to *those practices that define and reflect the power relations within the corporation and the way, and to which purpose, it is run*. This understanding of corporate governance differs from a law and economics perspective through a focus on the social power relations in the corporation, rather than perceiving of corporate governance mainly as technical solution for agency problems, i.e. how ‘investors get the managers to give them back their money’ (Shleifer and Vishny 1997: 737). This constitutes the main concern in a narrow definition of corporate governance, premised upon the ubiquitous agency problems arising from the separation of share ownership and management.

As Berle and Means famously claimed (1991:8), in a corporation with dispersed share ownership and an autonomous management, the ‘old atom of ownership was dissolved into its component parts, control and beneficial ownership.’ This had fundamental implications for the social power relations within the corporation. As the managerialist literature argued, the class ownership of the means of production was thus transcended – a sort of ‘capitalism without capitalists’ (Berle 1954; see also Burnham 1975; Chandler 1977; Dahrendorf 1959). The main assumption underlying the managerial thesis was that the dispersion of share ownership, due to resulting collective action problems, meant that, as Galbraith put it, ‘the decisive power in modern industrial society [...] is exercised not by capital but by organization, not by the capitalists but by the industrial bureaucrat’ (Galbraith 1975: xix).

In contrast to the managerial thesis, however, the corporate form did not lead to the dissolution of the capitalist class. As Marx observed (1991: 567), the corporate form entailed a *socialisation of capital* through ‘the abolition of capital as private property within the confines of the capitalist mode of production.’ This, he argued, implied a significant departure from the ‘old [organisational, LH] form, in which the means of social production appear as individual property’ (1991:571). However, the socialisation of capital through the externalisation of the ownership of the means of production into a commodity remains

trapped within the capitalist barriers; instead of overcoming the opposition between the character of wealth as something social, and private wealth, this transformation only develops this opposition in a new form (Marx 1991: 571).

The socialisation of capital through the corporate form thus pertains to socialisation *within one class* (Roy 1997:12). Corporate ownership was separated from the social context in which it was formerly embedded – that is, the social relations in which the firm was owned and managed by a single owner-entrepreneur. Marx saw this separation as leading to a bifurcation of the capitalist class because it

implied the '[t]ransformation of the actual functioning capitalist into a mere manager, in charge of other people's capital, and of the capital owner into a mere owner, a mere money capitalist' (Marx 1991: 567-8). It is this separation between management and 'owners', and the potentially conflicting interests of these two social groups, that is generally seen as constituting the core of power struggles over corporate control. Here, corporate control, as all forms of social power, is a relational concept, and should be seen in relative, rather than absolute terms (Zeitlin 1974: 1090-1).

In this regard, the corporate form has also fundamentally transformed the relations between capital and labour. As Marx argued, 'in joint-stock companies the function is separated from capital ownership, so labour is also *completely separated* from ownership of the means of production and of surplus labour' (Marx 1991: 568, emphasis added). Through the socialisation of capital, the social relations between the actual producers of surplus value and the owners of capital became indirect and obscured, mediated by the bureaucracy of professional management. As corporate control was legally established as based on proprietary rights, that is, tied to share ownership, labour became further subordinated vis-à-vis capital. However, actual social relations between shareholders and labour are not necessarily purely antagonistic (Jackson 2000: 280, see also Gourevitch and Shinn 2005: 205-207). Just as capital is not a homogeneous social group, labour interests cannot be assumed but need to be established conceptually and empirically.

Share ownership, particularly in its liquid rather than committed form (Jackson 2000: 271), represents money capital in its most general and abstract form embodying the total process of capital accumulation (Overbeek and Van der Pijl 1993: 3). As David Harvey writes, money capital 'express[es] the power of capitalist property outside of and external to any specific process of commodity production' (Harvey 2006: 284). In relation to production, money capital is external and purely appropriative, 'an antithesis as another's property to every individual actually at work in production, from the manager down to the last day labourer' (Marx 1991: pp). The money capitalist stands outside of this concrete production process and its material, technical and social requirements, whereas the productive capitalist does not. In Marx' writing, it is in money capital that 'the relations of capital assume their most externalised and most fetish-like form. [...] This automatic fetish is elaborated in its pure state, it is self-expanding value, money generating money, and in this form it does not carry any more scars of its origin. [...] It becomes a faculty of money to generate value and yield interest, just as it is a faculty of a pear tree to bear pears' (Marx 1991).

In concrete processes of class formation, these abstract categories have been manifested in the class fractions of industrial and financial capital; however these categories must be understood in their historically specific configuration and cannot simply be assumed (Van Apeldoorn 2002: 27; cf. Van der Pijl 1998). Particularly important with regard to the rise of the shareholder value model, industrial capitalists can also take on a financial perspective, e.g. when their specific interest are tied to financial capital through for instance incentives and structural relations. Still, as Van Apeldoorn points out,

there are structural limits to which extent industrial capitalists can adopt a financial capital perspective, as *industrial capital* ultimately remains tied to the production process. Concomitantly, in order to maintain the production process, industrial capital is more tied to social protection, that is, it is more ‘embedded’ than the ‘autonomous’ structures of the money commodity fetish that sustains financial capital (Van Apeldoorn 2002: 28-29). As power struggles and conflict between labour and capital are mainly taking place in the production, it is from an industrial capital perspective that concessions to and compromises with labour need to be negotiated to ensure production. In contrast to this, financial capital does not need to maintain an element of ‘embeddedness’. In ideal-typical terms, money capital tends to have a more liberal perspective than productive capital (Van der Pijl 1998: 51; cf. Harvey’s discussion of finance capitalism, 2006: 316-324). As such, a financial capital perspective is potentially at odds with an industrial capital perspective on labour relations and the ‘disembedding’ of production from national, more protective structures. At the same time, as financial capital has to compete, to some extent, with industrial capital over the profits of the production process, it needs to ensure that its interests, in particular with regard to the distribution of surplus, are maintained.

With the marketisation of corporate control the perspective of financial capital increasingly comes to reign over industrial capital. At the level of the firm, this is expressed most clearly in the rise of ‘shareholder value’ as the new ideological paradigm for corporate governance (Lazonick and O’Sullivan 2000; Aglietta and Reberieux 2005). The marketisation of corporate control puts the corporation, its management and workers more firmly under the discipline of the capital market. It implies a *deepening* of the commodification of the social relations constituting the corporation, in that they are exclusively mediated by the market. This deepening commodification resides in the transformation of the corporation into a *fictitious commodity*. Marx, writing on the commodity fetishism of capitalism, argued that ‘once assigned a value, it is difficult to conceive of commodities as having a meaning outside the market space since they suddenly appear to have an intrinsic value separate from their societal embedding (Marx 1990: 167). As Polanyi argued, this ‘commodity fiction’, in particular with regard to land and labour, is fundamental to the extension of the market principle and the rise of market society.

The commodity fiction, therefore, supplies a *vital organizing principle* in regard to the whole of society affecting almost all its institutions in the most varied way, namely, *the principle according to which no arrangement or behaviour should be allowed to exist that might prevent the actual functioning of the market mechanism on the lines of the commodity fiction* (Polanyi 1957: 73, emphasis added).

As a consequence of the ‘organizing principle’ compelled by the commodity fiction, that is the consolidation of the market mechanism in all domains of social (re)production, ‘society must be shaped in such a manner as to allow that system to function according to its own laws’ (Polanyi 1957: 57). In other words, the conditions for markets to function need to be created *prior* to the exigencies

of the ‘commodity fiction’. This, in turn, points to the role of the state in creating and maintaining the legal and regulatory underpinnings that sustain the ‘legal fiction’ of the corporation.

### **3.2. Corporate Governance Regulation**

However the organisational form of the modern corporation did not come about as the inevitable outcome of economic processes, in which it emerged as the most efficient, that is, transaction cost-minimizing, way of organising production. Rather, the modern corporation was a creation of the state (Roy 1997). Its organisational form, as well as its purpose, that is, in which interest it should be run, is continuously sustained by the legal framework provided through the state.

Rather than seeing corporate governance regulation in terms of de- or reregulation, as is often the case, it is the *qualitative change* in corporate law and other regulatory domains pertaining to the social relations of the corporation that needs to be explained. The conceptualisation of the corporation as a social relation, rather than a neutral ‘legal fiction’ or even nexus of contracts facilitates a discussion of the social purpose of the corporation which transcends efficiency and transaction costs arguments and takes into account the unequal social relations of production that sustain the corporate form. Here, Hirst (1979:137) has critically observed that ‘marxists have treated the form of organisation as necessarily given in the system of production and so have neglected debates and struggles concerning the legal regulation and economic organisation of capital as objects of political struggle.’ Hence the regulation of corporate governance, aimed at advancing a particular, inherently political idea of the role and purpose of the corporation, needs to be analysed in its specific historic conjuncture, and with a view on how it relates to the state, as well as to different social forces and class interests. As Hirst argues, in many Marxist discussions of the modern corporation the genesis of law is ‘explained in terms of the functional exigencies of the mode of production: law is their ‘expression’ and the mode of legislation is at best a secondary matter’ (Hirst 1979: 98). Rather, the focus here needs to be on the *political* process through which a particular regulation regime emerges, with law as a fundamental arena for political struggle.<sup>1</sup>

### **3.3. Corporate Governance Regulation and Labour – From industrial to shareholder democracy?**

In a 1975 Green Paper on Employee Participation and Company Structure, the European Commission argued that ‘employees are increasingly seen to have interests in the functioning of enterprises which can be as substantial as those of shareholders, and sometimes more so’ (European Commission 1975: 9). Now, just three decades later, little is left of this strong emphasis on the role of workers in company-level decision-making. Rather than *industrial democracy*, the Commission has been pushing for a *shareholder democracy* (European Commission 2005).

The focus on industrial democracy had emerged from a conjunctural shift in the power relations between (organised) labour and industrial capital in the European Union, while the demise of the corporate liberal compromise initially forced industrial capital to make concessions to labour on the national level. However, the struggle about industrial democracy abated towards the end of the 1970s (Streeck and Schmitter 1991:139). After the Commission's failed attempt at coordinating corporate control systems in the European Community with regard to board structure and workers' participation, the diverging national systems of 'industrial citizenship' were no longer to be harmonised from the late 1980s onwards. Rather, the objective was to ensure that these different systems could be integrated in, and made to sustain, the single market, and that to this end a minimum level of workers' rights were guaranteed. Mandatory provisions were abandoned in favour of a more flexible approach providing national policy-makers and companies with alternative solutions to implement information and consultations rights. Worker rights were increasingly relegated to the area of labour law, covered by DG Social Affairs (Streeck 1997). Company law and corporate governance regulation was the exclusive remit of DG Internal Market. Consequently, the focus changed towards establishing information and consultation rights, rather than participation rights with potentially redistributive consequences.

While aspects of corporate control had been present in early debates on company law, for instance with regard to worker participation or board structure, corporate governance was now increasingly perceived in a narrower sense, that is pertaining solely to the internal and external control mechanisms between shareholders and managers. Crucially, the relation between shareholders and managers came to be understood as a principal-agent one, with the share price as prime mechanism to align shareholder and manager interests (here, the market for corporate control as disciplining device plays an essential role). The objective of regulation thus turned away from protection of 'stakeholders', for instance creditors (which were increasingly to be covered by transparency provisions) or workers, towards a focus on creating a framework conducive to the 'efficient' functioning of capital markets. With worker rights consigned to social policies, this elimination of regulatory focus on any other relation than the shareholder-manager constitutes an important precondition for the establishment of the marketisation project. As Zumbansen points out, 'the claim to fame of the corporate governance movement at the beginning of the twenty-first century might be the flipside of the longstanding deterioration of labor rights and an effective labor rights regime' (Zumbansen 2006: 14). To be sure, labour law as a legal field is of course far broader than questions of employee participation and works councils.<sup>ii</sup> As such, however, the institutional and legal separation of employee rights and shareholder rights within the regulatory context of company law reflects, and at the same time perpetuates, the conceptual dichotomy between the interests of shareholders and other stakeholders of the corporation.

A narrowly conceived perception of corporate governance advances an understanding of the role of regulation that precludes the inclusion of labour into the regulatory focus.

#### **3.4. Concessions for Labour at the EU level? Social Dialogue, European Works Councils, *Societas Europaea***

With the deepening of the European market in the Single Market Programme, qualified majority voting had been introduced in the area of economic integration, while social policies continued to be underpinned by intergovernmentalist principles (cf. Scharpf 1999). The Social Dialogue, set up in 1985 between employer and employee associations on the European level (that is, BusinessEurope (previously UNICE) and ETUC, as well as the CEEP), has led to the implementation of three directives; none of them, however, related to questions of the governance of, and control over, corporations.<sup>iii</sup> As the developments with regard to the proposals for a 5<sup>th</sup> Directive and the Vredeling Directive have shown, employee consultation and participation rights have been highly politically contested.

In the mid-90s, the European Works Council Directive was adopted. Its principal requirement is the establishment of an EWC, or equivalent information and consultation procedures, in multinational companies only (with more than 1000 workers). This includes an information and consultation meeting with central management at least once a year. However, most of the procedural and substantive details of the EWC have been left to negotiations at company level. European Works Councils are limited to operative, plant-level decisions, rather than being involved in strategic decision-making at company-level. Streeck has called the EWC ‘extremely modest in its ambitions’ (Streeck 1997: 651), arguing that ‘all it does is create an obligation in international law that Member States make it obligatory in national law for nationally based firms with significant employment in other EU countries to negotiate, with a body representing their entire European workforce, on a European-wide workforce information arrangement’. While there is more to EWCs than just the three T’s of operational plant-level decision-making,<sup>iv</sup> they arguably also serve as an instrument to establish an ‘infrastructure of labor-management cooperation in pursuit of consensual adjustment to the new competitive conditions’ (Streeck 2001: 14). Crucially, employee information and consultation, even in the form of negotiated EWCs, are always partly conceived as concession of management, voluntary or not. As the Commission itself acknowledged, ‘the Commission believes it to be no accident that the measures to establish employee information and consultation rules at European level have been virtually a total success, while the more ambitious measures to expand the coverage of the traditions and practices of employee involvement to the whole Community, especially by incorporating workers into: supervisory boards or boards of administration, have failed’ (European Commission 1995: 8). Workers’ rights were increasingly seen in the context of minimum concessions to labour to keep industrial relations stable, to facilitate smooth, non-conflictual management. Also, while company law

directives had established several minimum provisions for companies, workers' rights had to be asserted and negotiated anew with every new legislative proposal of the Commission.

These regulatory developments provided at best *flanking measures* which served to bind labour into the emerging project of neo-liberal restructuring. As Streeck argues, 'what used to be industrial citizenship is turning from a publicly guaranteed right of workers [...], into an economically expedient internal arrangement strategically chosen by firms in pursuit of improved productivity and competitiveness' (Streeck 2001: 25). Instead of the supranational harmonisation envisaged, an increasingly complex level of coordination arrangements allowed firms to negotiate their own frameworks of worker rights. In contrast to Reberieux's conclusion that 'the shift towards workplace democracy [...] consolidates the notion of a social Europe' (Reberieux 2002:130), the increasing integration of capital markets was thus concomitant to an increasing *fragmentation* of workers rights on the European level.

The European Company Statute (*Societas Europaea*, SE) represents an attempt to fundamentally regulate the structure and governance of public companies at the *European* level. The aim, as the preamble to the regulation on the European Company Statute, eventually adopted in 2001, points out, was to facilitate 'the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law' (SE regulation 2001, recital 7). Reflecting the problematic character of any debates on legislative safeguarding of worker rights, the Commission had split the proposal into a Regulation on the SE, and a supplement Directive dealing with worker representation. This meant that the Directive could be dealt with based on Art 54(3)(g) which only required a qualified majority – in contrast to the treaty base for regulations, Art 235, which required unanimity (the Company Statute itself was then based on Art 100; see Streeck 1997: 651).

Following this principle, companies engaging in a merger have to ensure that the given level of employees' representation which existed before the merger will be guaranteed afterwards (Leca 2007: 411). Essentially, this means that the SE does no longer aim to uniformly introduce a minimum level of employee representation, instead refraining from imposing representation in cases where, before the formation of an SE, employee representation had not been established before. Bolkestein, then Commissioner for the Internal Market, saw this as a major achievement in the negotiations of the SE, asserting that 'there will be no worker participation in the organs of the European Company, if no agreement was found in the negotiations between management and employees and if there was no arrangement for worker involvement in the companies that set up the *Societas Europaea*' (Bolkestein 2002a). In this regard, Villiers points out that the economic objectives of the SE undermined the potential support for a more participatory corporate environment (Villiers 2006: 201).

With regard to labour law, corporate governance regulation is at best *defensive*, to the extent that workers are to keep acquired rights, and are guaranteed consultation rights in a process of corporate restructuring (e.g. in the formation of an SE). In general, however, with the regulatory framework granting more and more scope for firm-level arrangements and self-regulatory corporate governance standards and codes, employee protection has been more and more dislodged from the regulatory focus on corporate governance. Rather, it is in the shallow waters of Corporate Social Responsibility (CSR) that we find employees as ‘stakeholders’ in a pluralist conception of the corporation, as for instance advanced in the Commission’s Green Paper on CSR (2001).

In addition to that, financial participation of workers was increasingly emphasised, for instance in Employee Stockownership Plans (ESOPs). As the High Level Group established to deal with ‘cross-border obstacles with regard to financial participation of employees for companies having a transnational dimension’ points out, the objective of financial participation with regard to corporate governance was that ‘financial participation can be used to promote good corporate governance, by making it possible for the employees to participate as shareholders, ready to promote socially responsible corporate behaviour or even to become board members of enterprises’ (European Commission 2003b). Employee participation, it seemed, was no longer to be established by mandatory law, but rather through turning workers into shareholders. This is indicative of the broader shift in the social purpose of company law – rather than integration the perspectives and rights of stakeholders, and in particular workers, into the regulatory framework, the focus came to be primarily, and almost exclusively, on the rights of shareholders.

### **3.5. Corporate governance regulation and organised labour at the European level**

As noted above, organised labour on the European level, most notably the ETUC, has been integrated in the coalition of social forces carrying the broader project of ‘relaunching’ the Single Market since the late 1980s. In particular through the ‘symbolic Euro-corporatism’ (Bieling and Schulten 2003) within the structure of the Social Dialogue, organised labour had been implicated in the restructuring of social relations according to the requirements of increasingly integrated European financial markets. The marketisation project, as outlined above, has been an important part of this integration process; however as workers’ rights were relegated to social policy and employment, organised labour did not concentrate so much on the company law programme as such. The struggle over the Service Directive or the right to strike occupied labour associations on the EU level more than the Commission’s initiatives with regard to corporate governance.

When as the Commission presented its Company Law Action Plan in 2003, there was no mention of worker rights at all in the policy programme. This was a turning point for the ETUC’s position on the Commission’s project. As a senior member at the ETUC’s research institute points out ‘we realised

that we as a trade union didn't have anything to do with this – there is this Action Plan but we're doing Social Dialogue'<sup>v</sup>. The ETUC strongly opposed the underlying orientation of the Action Plan, arguing in its reaction to the consultation that 'governance is presented as a problem limited solely to the relationship between shareholders and management, as though an enterprise were a private entity that concerned the interests of shareholders alone' (ETUC 2003b: 4).

In May 2006, the ETUC Executive Committee adopted a resolution on 'Corporate Governance at the European Level', in which it was cautiously argued that the 'European corporate governance framework should lay down proper institutional conditions for companies to promote long-term profitability and employment prospects, define mechanisms that prevent mismanagement and guarantee transparency and accountability with regard to investments and their returns' (ETUC 2006).<sup>vi</sup> The strategy through which the ETUC seeks to proceed is twofold. On the one hand, it emphasizes that Art 138 provides for the consultation of social partners on a range of issues concerning employment and social affairs. However, the structural separation of worker rights and company law/corporate governance regulation means that actual company law issues are outside the reach of social partnership now.<sup>vii</sup> At the same time, organised labour is trying to preserve existing worker rights (for instance through the provisions in the European Works Councils and the European Company Statute), and raise people's awareness that corporate governance is more than just about shareholders. As mentioned above, the former secretary general of the ETUC, Emilio Gabaglio, has been a member of the Corporate Governance Forum, and has liaised frequently with the ETUC; in addition to this, the ETUC has set up its own expert groups on corporate governance (ETUI-REHS 2008). In its recent strategy and action Plan 2007-2011, the ETUC stepped up the rhetoric, demanding that

it should not be left to managers and investors – nor the European Commission – alone to define what companies do for society. Workers participation is not a private affair in the hands of employers. It is a public matter which, if need be, must be politically imposed against the wishes of employers and investors (ETUC 2007: 79).

However, as the structural separation between company law and labour law/employment policies has proceeded rather fast, organised labour actors are more or less consigned to writing position papers and participating in consultations where labour is seen as but one stakeholder of the modern corporation. There is however an emerging cooperation between labour and the European Parliament, which could potentially be more of an actual obstacle to the marketisation project.

In the context of an own initiative report on corporate governance, the Parliament called on the Commission for 'taking the European social model into consideration when deciding on further measures for the development of company law; this also involves the participation of employees' (European Parliament 2006). In marked contrast to the Commission's programme, the Parliament stressed that

corporate governance is not only about the relationship between shareholders and managers, but that other stakeholders within the company are also important for a balanced decision-making process and should be able to contribute to decisions on the strategy of companies; [...] in particular, there should be room for the provision of information to, and consultation of, employees (European Parliament 2006).

With regard to the regulatory developments in company law and corporate governance, organised labour is still mainly politically active in the national arena, while the control over corporations, and, crucially, the regulation thereof, is becoming increasingly transnationalised. The institutionalisation of the remnants of corporatist consensus in form of the Social Dialogue, in concert with the relegation of worker rights from the company law agenda to social policies, meant that organised labour has been implicated in the restructuring of corporate governance without much institutional power to influence or even oppose the regulatory trajectory. Also, soft law and regulatory mechanisms such as expert groups and consultations advance and encourage the participation and representation of particular interest groups, rather than a fundamentally redistributive process on the basis of mandatory regulation.

The structural selectivity of the European state formation here clearly disadvantages labour interests. What is more, the depoliticisation inherent to the expert-driven process of regulatory articulation renders concrete political contestation more difficult, in particular in a discursive context in which the boundaries of corporate governance, and the regulatory debate in general, are predominantly being defined following the exigencies of capital markets. The structural position of labour actors in the framework of EU industrial relations has changed in that, as Streeck points out, ‘material rewards for workers and the institutional influence for labor are more than before tied to a joint commitment with employers to success in competitive markets’ (Streeck 1998: 15). Also, developments that are seen as a success for labour at the EU level can in fact weaken the position of organised labour at the national level, as in the example of the European Works Councils, where collective agreements are undermined through firm-level concessions (Bieling and Schulten 2003).

However, in the absence of a real European Social Model that could, in a Polanyian vein, mitigate the social implications of the marketisation of corporate control, the limits of this consensus, as well as the repercussions of this process in the European political arena are becoming increasingly manifest. In 2006 the ETUC agreed upon a common position on corporate governance which fundamentally conflicts with the marketisation project; Labour associations and representatives, mainly in concert with the socialist group (PES) of the EP, have also challenged the regulatory process as such. The market-oriented common sense articulated through expert groups and corporate governance conferences is being challenged by organised labour and members of the European Parliament. The role of expert knowledge in the regulatory process is questioned (Alter EU 2008), and ‘critical expert groups’ provide alternative expertise (cf. PES 2007; Euromemorandum 2007).

#### **4. After the Crisis? Regulatory reactions in corporate governance at the EU level**

What began as subprime crisis increasingly spread through the global financial system as crisis of liquidity as inter-bank lending dried up and several high-profile financial institutions had to file for bankruptcy. The collapse of Lehman Brothers in September 2008 indicated the systemic effect of these developments. While the crisis had until then been seen as mainly confined to the housing market and specialized finance, it became painfully clear that this was indeed not just a case of tremendous market failure, but rather a manifestation of the underlying crisis tendencies inherent in financial capitalism, premised upon the continuous extension of financial markets. The expansion of financial markets is predicated on a political project establishing necessary legal and economic conditions; hence it is only through focusing on these processes, and the regulatory counter-reactions after the onset of the crisis, that we can understand in how far we are now witnessing a fundamental change in neoliberal capitalism. As Helleiner et al (2010) have shown, responses to the financial crisis have indeed affected the public-private debate in the regulation of financial markets. New markets have been regulated (e.g. over the counter (OTC) derivatives), there is an increasing level of public monitoring of financial intermediaries, e.g. credit rating agencies, as well as mandatory regulation instead of selfregulation, e.g. with regard to hedge funds. It became abundantly clear in the crisis that capitalism indeed needs the state to maintain itself.

While the financial crisis has been most prominently a crisis of liquidity, it has also revealed the pathologies of market based corporate governance. Regulatory reactions however have without exception adopted a problem-solving approach focusing on ‘fixing the flaws’ in the system rather than reconsidering radically different policy choices. Given the firm entrenchment of the shareholder value paradigm within the regulatory domain, this does not really come as a surprise. Rather, it is a continuation of the corporate governance discourse that has already been articulated in response to the corporate scandals in the early 2000s. As Soederberg argues,

the state finds fault almost exclusively with the misalignment in principal-agent relations, and therefore concentrates attention on issues of fraud, accountability of boards and CEOs and lack of transparency, as opposed to neoliberal-led forms of capitalist restructuring that have benefited a relatively small number of powerful and wealthy people (Soederberg 2010: 55).

The question regulators are confronted with is thus not whether marketised corporate governance regulation can (or should) be maintained, but how to find best practices to make the system work better; how to fine-tune technical issues and if necessary, how to insert regulatory gussets to ensure supervision that could pre-empt market failures. This is rather well illustrated by the OECD’s identification of the issues most immediately linked to financial crisis: the governance of remuneration process; effective implementation of risk management; board practices, and the exercise of

shareholder rights (OECD2009:2). In particular this last aspect is instructive for the limits of regulatory responses in the corporate governance domain.

#### ***4.1. Failure of external control - how to turn shareholders into good corporate citizens?***

The marketisation of corporate control has been a fairly successful political project to subject the control over listed companies more and more to 'the market', aimed almost exclusively at generating shareholder value. However, as has become abundantly clear even before the crisis, 'the market' does not appear to be so keen on making necessary investments in time and information to exercise these control rights in voting and monitoring companies. As the OECD points out, 'shareholders have contributed importantly to failures of boards and companies by being too impassive and reactive' (OECD 2009: 53). Investors are often highly concentrated or have holdings across the market so that it cannot be assumed that they have a strong interest in a particular company. It requires expertise and comprehensive information for shareholders to take a position on strategic issues, in particular in opposition to the board's plans – 'ok for Warren Buffet or more aggressive hedge funds, but not for conventional managers' (Financial Times 2010). There have of course been prominent cases of shareholder activism in recent years, but it is very much the question whether activist shareholder indeed represent the interests of (minority) shareholders in general. It is quite instructive in this context that shareholder activism is often portrayed as an act of emancipation, echoing the parallel to voting rights in a liberal democracy. Indeed, the Economist already detected a 'a glimmer of hope for corporate democracy' (The Economist 2009a). That one of the core constituencies of the company, that is the workers, are indeed excluded from the corporate democratic utopia seems to be irrelevant.

So what can be done to encourage shareholders to take a long-term perspective and exercise their control rights? A range of regulatory proposals have been suggested to get shareholders, in particular the rather unwilling institutional investors, to become 'good corporate citizens' (The Economist 2009b). It has been suggested to give shareholders of longer tenure extra voting rights (as is the case e.g. in several French corporations), or to barr new shareholders from voting until they have held the stock for a certain amount of time (The Economist 2010). In the US, the ERISA legislation obliges investors to use their voting rights and publicly disclose. A new rule at the New York Exchange ends discretionary voting by brokers who hold shares on behalf of their clients ( The Economist 2009b). In the UK, the 2009 Walker report has argued that 'board and director shortcomings [...] would have been tackled more effectively had there been more vigorous scrutiny and engagement by major investors acting as owners' (Financial Times 2010). The then business secretary Lord Mandelson echoed this by announcing that the City of London was to 'set a new standard for high-quality, long-term engagement between investors and company owners (ibid). As in most other national contexts, concrete regulatory measures still have to be introduced. Most

problematic, as The Economist points out is that these initiatives would run counter the ‘*moral* argument against depriving property-owners of their rights’ (The Economist 2010, emphasis added). The limits of the marketisation of corporate control clearly demonstrates the contradictory nature of regulatory projects geared at safeguarding the rights of owners of capital – having pushed an extensive political project to hand the control of companies to the shareholders, the state is now at a loss as it simply cannot force them to then exercise prudential ownership. This is a development we see in most capitalist market economies where the shareholder value paradigm has become dominant . In the same vein, we can observe a common trajectory in the regulatory reactions to the corporate governance dimensions of the current crisis. As Macartney points out (2009: 115), crisis management has remained within a variegated neoliberal paradigm. The regulatory initiatives with regard to corporate governance regulation at the EU level are a case in point.

Initial reactions to the financial crisis came from the Member States, in the form of bank bailouts and rescue programmes, rather than as a concerted European action.<sup>viii</sup> Following the report by the *De Larosière* group, a reconstruction of financial market supervision at the European level has been initiated.<sup>ix</sup> The Commission has also drawn up regulatory initiatives as direct response to the failure of several external corporate governance mechanisms that have become central in corporate governance practices in the European Union. It should be noted here the discussion about corporate governance in the crisis has so far mainly referred to the corporate governance of financial institutions. While banks are not fundamentally different from listed corporations with respect to corporate governance, there are important differences with regard to the level of risk, which in some cases might even be systemic, and in the role of stakeholders (i.e. depositors) and implicit or explicit government guarantees with respect to liabilities which might change the incentives facing boards, shareholders and managers. However the crisis prompted the OECD to announce that it would also re-examine its general corporate governance principles, arguing that ‘ineffective board oversight, significant failures in risk management in major financial institutions, incentive systems that encouraged and rewarded high levels of risk taking [...] are also relevant for non-financial systems’ (OECD 2009: 3). In this context, the *De Larosière* group also noted that corporate governance failures in the unfolding of the credit crunch and the subsequent crisis have to be seen against the background of the broader financial and macroeconomic system.

It is clear that the financial system at large did not carry out its tasks with enough consideration for the long-term interest of its stakeholders. Most of the incentives – many of them being the result of official action – encouraged financial institutions to act in a short-term perspective and to make as much profit as possible to the detriment of credit quality and prudence (De Larosiere 2009: 9).

While the actual impact of the Recommendation on Executive Remuneration of 2004 has been minimal (European Commission 2007), the EU has launched several initiatives in this field in the wake of the crisis.<sup>x</sup> The *Recommendation on Remuneration in the Financial Services Sector* advises

Member States to improve risk management in financial firms by aligning pay and bonus incentives with sustainable and effective risk-management.<sup>xi</sup> Another recommendation complements the 2004 and 2005 Recommendations, with the objective to further align remuneration with a long-term/sustainable company perspective.<sup>xii</sup> The Commission has announced that it will pursue further legislative proposals, in particular with regard to the revision of the Capital Requirements Directive. Most provisions for more disclosure and control mechanisms over executive remuneration however pertain to shareholders and the board only, rather than granting other stakeholders voice, or at least a consultation status (outside boards where employee representatives are present) on these important issues.

Market-based corporate governance relies on disclosure and transparency, as well as fundamentally the share price as indication of the ‘value’ of a company. Accounting standards were not the only market mechanism where conflict of interest and the lack in international regulation contributed to the crisis. In particular, credit-rating agencies have been singled out as important culprits in the aftermath of the financial crisis. The Commission put forward a proposal for a regulation in November 2008 which was agreed by the European Parliament and the Council on 23 April 2009. Under the provisions of this regulation, credit-rating agencies operating in the EU are obliged to register their operation and comply with transparency guidelines and provisions for independence and good governance. It is notable that the bulk of regulatory initiatives in response to the crisis have been regulation of policy areas pertaining to market mechanisms, which had previously been brought up by a variety of actors, but were only taken up by the Commission in reaction to the crisis. At the same time, though, the *De Larosière* group made it very clear that the failures and excesses in risk management and executive remuneration were also closely related to the failure of a corporate governance system that increasingly relied on independent directors. In particular in financial services, boards did not grasp the complex structure of financial instruments and exposure of banks and companies to financial markets. As the new Commissioner for the Internal Market, Michel Barnier, argued, ‘we need stronger corporate governance’ and to consider ‘targeted measures’ to strengthen the independence of boards and look at the role played by shareholders and external auditors’ (Financial Times 2010b).

Parallel to these immediate reactions to the crisis, the Commission is also developing its broader company law and corporate governance agenda further, for instance with recent developments such as the consultation process on the future of the Company Law Action Plan, the proposal for the Private Company Statute (SPE) of 25 June 2008 and the main results of a commissioned study on *Monitoring and Enforcement Practices in Corporate Governance in the Member States*. At the same time, the discussion about corporate governance has become increasingly politicised, with the European Parliament taking an ever more critical position on the Commission’s policy initiatives. The

case of the Commission's decision to drop the 14<sup>th</sup> Company Law Directive for the cross-border transfer of the registered office of a company, which resulted in an EP resolution, or the debates over the Alternative Investment Fund Manager Directive demonstrate that in contrast to just a decade ago, corporate governance has indeed become a contested concept also at the EU level.

### *Another corporate governance is possible?*

And yet the European Commission seems to have developed doubts about its own policies, as a recent Green Paper by the Commission confirms:

the financial crisis has shown that confidence in the model of the shareholder-owner who contributes to the company's long-term viability has been severely shaken, to say the least [...] The Commission is aware that this problem does not affect only financial institutions. More generally, it raises questions about the effectiveness of corporate governance rules based on the presumption of effective control by shareholders (European Commission 2010).

This is quite remarkable, given that just a couple of years ago the then Commissioner McCreevy was still keen on declaring shareholders 'king or queen' of the corporation. However this tentative expression of a potential change in regulatory orientation raises several important questions. At this stage, it remains to be seen whether the by now firmly embedded marketisation of corporate control will prove resilient to these regulatory changes spurred on by the immediate and mid-term regulatory responses to the crisis. Is the European Commission, situated as it is within the terrain of strategic selectivity, indeed backpeddling on its earlier programme, or is this mainly a discursive shift, a concession to assuage public criticism until neoliberal order is restored? It is important to note here that while the Commission's statement is very interesting indeed, as argued above the 'common sense' of corporate governance had not changed in its core.<sup>xiii</sup> Despite the public discreditation of underlying dogma's such as e.g. the Efficient Market Hypothesis, corporate control is still perceived as bifurcated – control for shareholders within the corporate governance and company law domain, while all issues pertaining to 'stakeholders' are situated within Social Affairs and Employment. Corporate social responsibility, environmental reporting and socially responsible investing might all be significant avenues to explore within the regulatory terrain of the European Union, but as long as control remains firmly isolated and exclusively allocated to owners of capital, the core of the marketisation project remains intact.

However, as the financial crisis and its consequences have exacerbated the growing asymmetries in the European Union, class inequalities have become more and more apparent. Initially through the socialisation of banks' losses incurred through excessive risk-taking served as short-term crisis management, but as a monetary response was impossible for the members of the Eurozone (and other Member States, in particular in the Baltic and CEE region, suffered severe currency depreciation), fiscal reactions have now initiated welfare cuts and higher taxation. In the context of the

sustained legitimacy crisis of the European Union, these initiatives also provide more opportunities for political contestation. Several ideas and demands that have been put forward by organised labour, the European Parliament and NGOs are now being openly discussed – who would have ever expected to see governments and the European Commission embracing the idea of a financial transactions tax just. However, with the ‘obvious’ culprits, that is in the case of this financial crisis investment bankers and credit-rating agencies dealt with, the scope for further regulatory action is increasingly limited by the established market-making regulation and the legal basis of European integration. What is more, the assumption that the crisis would be a turning point for neoliberal market integration is premature as long as the structural dominance of financial capitalism is still prevalent in the European Union. More concretely in the context of corporate governance, strategic selectivities are still at play when it comes to the politics of resistance. As Soederberg argues, ‘resistance of corporate power [...] framed by, and limited to, a structured and sanitized exchange between those who own and those who control’ (Soederberg 2010: 4). By flanking issues of corporate control with CSR, consultations and stakeholder dialogues, class struggle is obscured from the political process.

## **5. Some concluding remarks**

Whether the current financial and economic crisis represents indeed a conjunctural terrain upon which opposition to neoliberal European governance can be formed remains to be seen. However as the previous discussion has shown, it is very much the question whether organised labour at the European level can indeed (and aims to) assume a stronger role in a counter-hegemonic struggle. With regard to corporate governance and company law at least, organised labour has been mainly struggling to maintain and defend the concessions made by capital at the European level, rather than establishing an alternative to neoliberal restructuring. As the paper has argued, here we also need to look at the institutional and structural forms of state power, which renders it even more questionable whether the European level can indeed be turned into a space for Social Europe. As recent rulings by the European Court of Justice (Viking, Laval, Rüffer, cf. Höpner 2008) have indicated, the tension within the politico-legal framework of the European Union between the ‘capitalist’ freedoms of movement and establishment and the fundamental lawfulness of industrial actions that could potentially limit those freedoms is increasingly decided towards the benefit of economic liberalisation. However, this does not necessarily mean that trade unions have no option but to revert to mainly national strategies, as Scharpf implied by stating that ‘hoping for a Social Europe actually prevents politicians from taking the action that is still possible at the national level’ (Scharpf 2008: 16). Trade unions are increasingly using the European level as an alternative space for mobilisation, and are also increasingly voicing criticism about European governance. At the same time, the European Parliament is becoming an important ally for trade union organisations (e.g. the call for a Social Progress Clause in the Lisbon Treaty). However, in order to overcome the neoliberal bias of the European state formation, trade

unions would indeed have to participate, or even initiate, in the articulation of a counterhegemonic project that would transcend their respective particularistic interests. While there have been successful cooperations with social movements (e.g. against the Services Directive), there are also wide-ranging internal discussions and tensions within the labour movement. Further research on the agency of organised labour would hence be necessary to understand its role at the European level.

## References

- Berle, A. A. and Means, G. C. (1991 [1932]) *The Modern Corporation and Private Property* (New York: Transaction Publishers).
- Bieler, A. (2007) 'Co-option or resistance? Trade unions and neoliberal restructuring in Europe' *Capital and Class* 93, pp. 111-124.
- Bieling, H.-J. and Schulten, T. (2003) 'Competitive Restructuring and Industrial Relations within the European Union: Corporatist Involvement and Beyond' in: Cafruny, A.W and Ryner, M (eds.), *A Ruined Fortress? Neoliberal Hegemony and Transformation in Europe*, (Lanhan: Rowman & Littlefield), pp. 231-260.
- Burnham, J. (1975 [1941]) *The Managerial Revolution* (Greenwood Press: Westport).
- Dølvik, J. E. (1999) *An emerging island? - ETUC, Social Dialogue and the Europeanisation of Trade Unions in the 1990s* (Brussels: ETUI).
- Drainville, A. C. (1994) 'International political economy in the age of open Marxism', *Review of International Political Economy*, vol. 1(1), pp. 105-32.
- ETUC (2007). Strategy and Action Plan, 2007-2001. Seville, 21-24 May 2007, available at [http://www.etuc.org/IMG/pdf\\_Rapport\\_congress\\_EN.pdf](http://www.etuc.org/IMG/pdf_Rapport_congress_EN.pdf) (last accessed 21 July 2008).
- European Commission (1975) *Employee representation and company structure in the European Community*. COM (75) 570, 12 November 1975.
- European Commission (2003a) *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward*, COM (2003) 284, 21 May 2003.
- European Commission (2003b) *Report of the High Level Group of independent experts, on cross-border obstacles to financial participation of employees for companies having a transnational dimension*, 18 December 2003.
- European Commission (2004) *Industrial Relations in Europe 2004* (Luxembourg: Official Publications of the European Communities)
- European Commission (2010) *Corporate governance in financial institutions and remuneration policies*, Green Paper COM(2010) 284, Brussels, 2.6.2010
- European Parliament (2006) *Recent developments in and prospects for company law*, INI/2006/2051, Brussels 4 July 2006.
- Galbraith, J.K. (1975[1967]) *The new industrial state* (Harmondsworth: Penguin Books).
- Gourevitch, P. A. and Shinn, J. (2005) *Political Power and Corporate Control. The New Global Politics of Corporate Governance* (Princeton and Oxford: Princeton University Press).
- Harrod, J. and O'Brien, R. (eds.) (2002) *Global Unions? Theory and strategies of organised labour in the globalpolitical economy* (London; Routledge)
- Helleiner, E., Stefano Pagliari and Hubert Zimmermann (eds) (2010) *Global Finance in Crisis. The Politics of International Regulatory Change* (London and New York: Routledge)
- Hirst, P. (1979) *On Law and Ideology* (New Jersey: Humanities Press).
- Hyman, R. (2005) 'Trade Unions and the Politics of the European Social Model' *Economic and Industrial Democracy* 26(1), pp. 9-40
- Hyman, R. (2004) 'The Future of Trade Unions' in Anil Verma and Thomas A. Kochan (eds) (2004) *Unions in the 21<sup>st</sup> Century* (Basingstoke: Macmillan)
- Hyman, R. (2001) *Understanding European Trade Unionism: Between Market, Class and Society* (London: Sage)
- Jackson, G. (2001) 'Comparative Corporate Governance: Sociological Perspectives' in: Gamble A. et al. (eds) *The Political Economy of the Company*, Hart Publishers Oxford, pp. 265-287.
- Jessop, B. (1990) *State Theory: Putting the Capitalist State in its Place* (Cambridge: Polity).

- Jessop, B. (2006) 'State- and Regulation-theoretical Perspectives on the European Union and the Failure of the Lisbon Agenda' *Competition and Change* 10(2), pp. 141-161.
- Gajewska, K. (2008) 'The Emergence of a European Labour Protest Movement?' *European Journal of Industrial Relations* 14(1), pp. 104-121
- Larosière, J. De (2009) *Report of the High-Level Group on Financial Supervision in the EU* (Brussels, 25 February 2009)
- Martin, A. and G. Ross (eds) (1999) *The Brave New World of European Labour* (New York: Berghahn Books)
- Marx, K. (1990 [1867]) *Capital. Vol.1*(London: Penguin).
- Marx, K. (1991[1894]) *Capital, Vol. 3* (London: Penguin).
- Mills, C.Wright (1948) *The new men of Power*
- Neocleous, M. (2003) 'Staging Power: Marx, Hobbes and the Personification of Capital' *Law and Critique* 14(2), pp. 147-165.
- OECD (2009) 'The Corporate Governance Lessons from the Financial Crisis' (2009) *Financial Market Trends* 01/2009
- Rebérioux, A. (2002) 'European Style of Corporate Governance at the Crossroads: the Role of Worker Involvement' *Journal of Common Market Studies*, 40 (1), pp. 111-34.
- Scharpf, F. (2008) 'Der einzige Weg ist, dem EuGH nicht zu folgen' *Mitbestimmung* 7(8)
- Schroeder, W. and R. Weinert (2004) 'Designing Institutions in European Industrial Relations: A Strong Commission versus Weak Trade Unions' *European Journal of Industrial Relations* 10(2), pp. 199-217
- Shleifer A. and Vishny, R.W. (1996 and 1997) 'A Survey of Corporate Governance' in: *NBER Working Paper*, No. 5554, and *Journal of Finance* 52(2), pp.737-783.
- Soederberg, Susanne (2010) *Corporate Power and Ownership in Contemporary Capitalism. The Politics of Resistance and Domination* (London and New York: Routledge)
- Strange G. and Owen Worth (2007) 'The Left and Europe: Editorial Introduction' *Capital and Class* 93, Autumn 2007
- Streeck, W. (1998) *The Internationalization of Industrial Relations in Europe: Prospects and Problems* MPIfG Discussion Paper 98/2, Cologne
- Streeck, W. and Schmitter, P.C. (1991) 'From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market' *Politics and Society* 19(2), pp. 133-164.
- Taylor G and Mathers A (2002) 'The Politics of European Integration: A European Labour Movement in the Making?' *Capital and Class* 78, pp. 39-69
- Taylor, G. and A. Mathers (2004) 'The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism' *European Journal of Industrial Relations* 10(3), pp. 267-285
- The Economist* (2009a) 'Sinecures in peril' 29 October 2009
- The Economist* (2009b) 'Now for the long term' Matthew Bishop, 13 November 2009
- The Economist* (2010) 'A different class. Would giving long-term shareholders more clout improve corporate governance?' 18 February 2010
- Tidow, S. (2003) 'The emergence of European employment policy as a transnational political arena' in: Overbeek, H. (ed) *The Political Economy of European Employment. European integration and the transnationalization of the (un)employment question* (London: Routledge), pp. 77-98.
- Van Apeldoorn, B.; Drahokoupil, J. and L. Horn (eds) (2008) *Contradictions and Limits of Neoliberal European Governance: From Lisbon to Lisbon* (Basingstoke: Palgrave Macmillan)
- Van Apeldoorn, B. and Horn, L. (2007a) 'The Marketisation of Corporate Control: A Critical Political Economy Perspective', *New Political Economy* 12(2), pp. 211-35.
- Van Apeldoorn, B. (2002) *Transnational Capitalism and the Struggle over European Integration* (London and New York: Routledge).

Zeitlin, M. (1974) 'Corporate Ownership and Control: The Large Corporation and the Capitalist Class' *American Journal of Sociology* 81(4): 1073-1119.

Ziltener, P. (2000) 'Die Veränderung von Staatlichkeit in Europa – regulations- und staatsrechtliche Überlegungen' in: Bieling, H.-J. and Steinhilber, J. (eds), *Die Konfiguration Europas: Dimensionen einer kritischen Integrationstheorie* (Münster: Westfälisches Dampfboot), pp. 73-101.

Zumbansen, P. (2006) *The Parallel Worlds of Corporate Governance and Labor Law* CLPE Research Paper No. 6/2006.

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<sup>i</sup> As such, to understand the politics of corporate governance regulation, we also need to move beyond Marx' focus on the commodity form as 'elementary' form of the capitalist mode of production (Marx 1990: 125), at least conceptually, and focus on how the commodity form of the corporation is established and advanced. Neocleous makes the important point that 'the process of personification of capital [...] is the flip side of a process in which human persons come to be treated as commodities. [...] as relations of production are reified so things are personified – human subjects become objects and objects become subjects' (Neocleous 2003: 159).

<sup>ii</sup> See (Zumbansen 2006) for an overview of the 'parallel worlds' of labour law and company law. As he points out, this separation is also prevalent in most textbooks and law courses (Zumbansen 2006: 16-17).

<sup>iii</sup> On parental leave in 1995, on part-time work in 1997 and on fixed-term contracts in 1999. The Social Dialogue has been criticised as 'symbolic Euro-Corporatism' (Bieling and Schulten 2003; cf Streeck 1998)

<sup>iv</sup> i.e. 'Tea, towels and toilets'; see McGraw and Palmer (1995) 'Beyond Tea, Towels and Toilets? Lessons from a Top 500 Company in Using Joint Consultative Committees for Enterprise Bargaining' *Asia Pacific Journal of Human Resource* (32): 97-104

<sup>v</sup> Interview with senior researcher at the ETUI-REHS, 22 November 2006

<sup>vi</sup> available at <http://www.etuc.org/a/2250> (last accessed 21 July 2008)

<sup>vii</sup> As a member of the ETUI puts it, 'we complain that they should have consulted the Social Partners under Art 138, but they tell us that employee participation wasn't concerned, and we should go and talk to DG V (Employment) about consultation information' (Interview with a senior researcher at the ETUI-REHS, 22 November 2006)

<sup>viii</sup> In several Member States of the European Union, governments partially renationalised or became large equity holders in major financial institutions. This of course raises very interesting questions about corporate governance and control.

<sup>ix</sup> For detailed analyses of the regulatory reactions in financial market integration, see the special issue 'European Perspectives on the Global Financial Crisis' *Journal of Common Market Studies* 47(5), edited by Dermot Hodson and Lucia Quaglia.

<sup>x</sup> For an explanatory statement, see European Commission, Communication accompanying Commission Recommendation complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies and Commission Recommendation on remuneration policies in the financial services sector, COM(2009) 211 final, Brussels, 30.4.2009

<sup>xi</sup> European Commission, Recommendation on remuneration policies in the financial services sector, C(2009) 3159, Brussels, 30.4.2009

<sup>xii</sup> European Commission, Recommendation complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies, C(2009) 3177, Brussels, 30.4.2009

<sup>xiii</sup> And, it should be noted, expert groups are still very much at the centre of policy formulation. The European Corporate Governance Forum has issued several statements on executive remuneration and voting, and the De Larosiere group is a case in point within the financial markets domain.