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The Transformation of Corporate Governance Regulation in the European Union: From Harmonization to Marketization

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Abstract

In the last couple of years, a broad range of regulatory initiatives with regard to company law and corporate governance has been taken by the Commission. These efforts, we shall argue, mark both a continuation – with respect to some of the issues involved – and a fundamental break – regarding both form and content – with earlier attempts at company law harmonization within the European Community. This transformation of corporate governance regulation at EU-level may be seen as a reflection and at the same time as an important cause of a broader, transnational transformation of corporate governance regulation in the European political economy. This paper argues that the EU has not only increased its attention to corporate governance regulation, but that, in terms of its *content,* the European approach to regulating the governance of corporations has shifted from a focus on harmonization, aimed at the prevention of regulatory competition, to a focus on promoting the marketization of corporate control, in part making use of market-based regulatory mechanisms.

This shift cannot be simply explained either as a result of exogenous globalization pressures or as response to the recent wave of corporate scandals, but has to be interpreted as bound up with a coherent transnational political project constructed from the late 1980s onwards. This project can be understood both more broadly as a neoliberal project aimed at the marketization of the European socio-economic order in general – that is, promoting the market mechanism as the organizing principle (Polanyi 1957) of this order – and more narrowly, as a project aimed at the marketization of corporate control. As this papers argues, the latter has been increasingly articulated with, and made an integral part of, Europe's strategy for creating a single financial market.

The Transformation of Corporate Governance Regulation in the European Union: From Harmonization to Marketization

> *The virtual unification of national company laws in all essential aspects […] is a deliberate act of policy on the part of the Community. In fact, it is a political act necessitated by the desire to accomplish the aims of the Community*
>
> (Schmitthof 1973: 89)

> *The responsibility of the regulator is to set up the framework, which then enables the markets to play their disciplining role in an efficient way*
>
> (Bolkestein 2003a)

INTRODUCTION

Corporate governance regulation forms an integral part of the socio-economic configuration of the European Union (EU). Within the EU, national corporate governance regulation has developed along trajectories of path-dependence and institutional complementarities (see Hall and Soskice 2001). Yet while institutional diversity remains considerable, there have been far-reaching and fundamental changes in the Member States' approaches to corporate governance regulation. At the same time, with the progression of market integration in the EU, the regulation of corporate governance at the European level has become more significant both in scope and in impact on national systems. In particular over the past five years or so, a broad range of regulatory initiatives with regard to company law and corporate governance has been taken by the Commission. These efforts, we shall argue, mark both a continuation – with respect to some of the issues involved – and a fundamental break – regarding both form and content – with earlier attempts at company law harmonization within the European Community (EC). This transformation of corporate governance regulation at EU-level, then, may be seen as a reflection and at the same time as an important cause of a broader, transnational transformation of corporate governance regulation in the European political economy. Indeed, the argument that the European integration process is a significant driving force of changes in national regimes of corporate governance is well established in the literature (Story and Walter 1997, Rhodes and Van Apeldoorn 1998, Lannoo 1999, Bieling and Steinhilber 2002).

Given the obvious importance of corporate governance regulation at the EU level, it is somewhat surprizing that thus far little attention has been given to the nature and origins of this emerging European regulatory framework (but see Bieling and Steinhilber 2002 for an important partial exception). With regard to its nature, most analyses remain limited to the question whether or not current changes imply a convergence of the Rhenish national varieties of capitalism on the so-called Anglo--Saxon model (Albert 1993, Hall and Soskice 2001), or whether we are witnessing a new, 'hybrid' form of European corporate governance (Cernat 2004, Rebérioux 2002). Although this is an important debate, it tends to bypass a more thorough understanding of the nature of the European project itself, in particular of its specific socio-economic and political content. This is all the more the case since, to the extent that an attempt is made to explain changing corporate governance regulation, whether at the EU or at the national level, it is seen as due to exogenous pressures stemming from 'globalization' in general, and recent corporate scandals in particular (Lannoo 1999, Lannoo and Khachaturyan 2003). What this argument ignores, we suggest, is the fundamentally political and ideological nature of the regulatory initiatives on the part of EU pertaining to corporate governance.

This chapter seeks to set a first step towards filling these lacunae in the literature by moving beyond the 'convergence debate', outlining and interpreting the development of and changes in corporate governance regulation at the EU-level, and by showing that they in fact constitute part of a broader political project of socio-economic restructuring in the European Union. This perspective acknowledges the political underpinnings of the changes in corporate governance regulation, rather than merely perceiving them as inevitable results of reactive processes. Analyzing, then, what we see as the pro-active nature of the EU's efforts to create a regulatory framework for European corporate governance, and analyzing the political trajectory of the policy and regulatory developments preceding these recent initiatives, will provide a more thorough understanding of how and why the regulatory framework is evolving the way it does. The analysis thus undertaken will show that we have witnessed a shift from a regulatory approach aimed at the harmonization of company law in order to prevent regulatory competition in this area to a regulatory framework aimed increasingly at the establishment of a market-oriented corporate governance regime, in part through promoting market-based forms of regulation (compare the case of competition policy as analyzed in Wigger's contribution to this volume).

The central argument we put forward is thus that the social purpose of EU corporate governance regulation has changed. We view this changing social purpose in terms of a transnational European political project aimed at a fundamental socio-economic restructuring of European capitalism. In essence, this project can be described as a neoliberal marketization project, which, in the area of corporate governance, is aimed at turning (pieces of) corporations into commodities freely sold on an integrated capital market, which can thus effectively discipline both management and workers in terms of orienting them to the maximization of so-called investor returns. This *marketization project* is neither caused by an exogenous globalization process nor by the obvious superiority of market-based corporate governance (cf. Hansman and Kraakman 2001), but rather must be understood in terms of the outcome of political contestation in what Gramsci (1971) called the realm of hegemony.

This chapter is structured as follows. The next section presents a brief outline of the theoretical framework guiding our interpretation of the changes in corporate governance regulation. While on the one hand drawing on Polanyi and critical political economy approaches to the issue of corporate governance, and what we interpret as the marketization of corporate control, we also turn to a neo-Gramscian understanding of the process of European integration as a political project of socio-economic restructuring. Adopting this perspective, the main body of this chapter then comprises a delineation and interpretation of key developments in European corporate governance regulation in the last decades. Taking as a starting point the initial attempts by the European Commission to harmonize European company law, we show how this approach has fundamentally changed in later years, with the launch of the neoliberal integration project through the completion of the Single European Market and, most of all, its blueprint for financial market liberalization, the Financial Services Action Programme (FSAP). A prime example of how the underlying principles and rationale of the regulatory framework for corporate governance are reoriented to the interests of transnationally mobile 'investors', is here formed by the Takeover Directive. As part of this shift, company law is increasingly subordinated to the wider objectives of financial market integration and thus to capital market law. This also transpires from the Corporate Governance Action Plan, published by the Commission in 2003, which will provide the framework for an analysis of some other key recent developments and initiatives in corporate governance regulation. The conclusion we draw from this analysis is that these developments indeed constitute a political project, aimed at the marketization of European corporate governance.

MARKETIZATION AS A POLITICAL PROJECT

The European regulatory framework pertaining to corporate governance currently taking shape is in our view aimed at the `marketization of corporate control', which we define as: `a process through which who controls the corporation and to what purpose it is run becomes increasingly mediated by the stock market, that is, through the share price as the regulative mechanism' (Van Apeldoorn and Horn 2006). The issue of corporate control – which came into being with the modern corporation or joint-stock company – is in fact at the heart of what has now come to be known as corporate governance. In fact, it goes to the heart of the debate on the nature of capitalism inasmuch as private ownership and therefore control over the means of production can be seen as the defining feature of a capitalist market economy. The debate on corporate control goes back at least to Berle and Means who in their classic study *Modern Corporation and Private Property* (Berle and Means 1991 [1932]) advanced the thesis that with the rise of the modern corporation, or joint-stock company, ownership has been separated from control as the former had come into the hands of countless small shareholders unable to overcome their collective action problems, and control shifted to a new class of professional managers (see also Burnham 1975 [1941], Chandler 1977, Dahrendorf 1959).

In the ubiquitous neoclassical economics understanding, corporate governance serves as a mechanism to mitigate the agency costs arising from this alleged separation of ownership and control. The firm or corporation is seen as a 'nexus of treaties' (Jensen and Meckling 1976: 8) between rational agents in which shareholders have the contractual right to residual profits, and, accordingly, the control rights over the way the corporation is run. Here, the `market for corporate control' serves as the external corporate governance mechanism *par excellence* to ensure the protection of shareholder interests, by aligning managerial strategies with the latter (Jensen 1993). It is a market in which control over a corporation (in the sense of a majority of vote-carrying securities) can be bought through a variety of methods, ranging from open market purchases to negotiated share swaps (Bittlingmayer 1998). Analytically a distinction can be made between capital markets and markets for corporate control (Höpner 2003b: 104 ff). In practice, however, the two largely overlap (Windolf 1994). We argue that capital markets and markets for corporate control, whereby the development of the former is also a necessary condition for the emergence of the latter, together form an integral part of the `marketization of corporate control'. Marketization here has to be understood to mean that the market-based mode of control, that is, control by 'outsiders' who are mobile and can 'vote with their feet' by selling their shares, is being strengthened. Shares then become property titles that not only give the right to a dividend but also to (potential) control over a firm's governance. In the market for corporate control, the firm as a whole becomes a commodity (Windolf 1994: 90). The marketization of corporate control thus puts the firm, its management, and workers more firmly under the discipline of the capital markets.

The share price thus becomes a disciplinary device *vis-à-vis* management inasmuch as '[t]he lower the stock price, relative to what it could be with more efficient management, the more attractive the take-over becomes to those who believe that they can manage the company more efficiently' (Manne 1965: 113). The evaluation of company performance takes place purely on financial criteria - any technical or structural barriers to takeovers are thus perceived as detrimental to shareholder interests, and to undermine the efficient allocation of capital. Since shareholders allegedly value 'good corporate governance' at a premium (McKinsey 2002), it is assumed that in a functioning market there will be a 'natural' process towards the corporate governance system which brings about the most ‘shareholder value’ (Hansman and Kraakman 2001). Public intervention in corporate governance systems is only tolerated where it serves to ease market failures. Any further public involvement potentially leads to market distortions in the assumedly apolitical market equilibrium, since regulation is perceived as captured by specific interests (Jensen 1988: 45).

Although we share the emphasis of the neo-classical perspective on the market for corporate control as critical to what can be called an exit (and hence market-) based system of corporate governance (see also Nooteboom 1999), we reject its normative commitment to this model, that is, the way, the disciplining of management by liquid capital markets is presented as a ‘natural’ and rational solution to the so called agency problem. We reject this discursive move as it presupposes the very fact that needs to be explained, which is that the shareholder is seen as sovereign with respect to the (control over the) firm. Here, corporate governance is thus reduced to the problem of ‘how investors get the managers to give them back their money’ (Shleifer and Vishny 1996: 4). In our view, such a definition of the problem reflects a particular conception of the firm, and is as such highly political and ideological. Furthermore, and, critical with respect to the current analysis, the extent to which that conception can be put in practice must be seen as dependent on a prior regulatory framework. The latter in turn requires a political explanation

Our point of departure here is a Polanyian understanding of markets as political and social constructs (Polanyi 1957, cf. Fligstein 2001). Thus, in contrast to the tendency of neo-classical agency theory to view regulation as intervening in the efficient allocation of capital through the market, we stress here the indispensability of public regulation in establishing this market (that is, a well-functioning capital market and a market for corporate control) in the first place. Markets do not create themselves, nor are they the spontaneous outcome of man’s allegedly innate entrepreneurial habits. Rather, they are created through the state, which needs to establish the necessary pre-conditions – such as the alienability of certain objects, that is, their capacity to be sold on the market and thus function as commodities; secure property rights; money as a medium of exchange and a sufficient degree of competition – for markets to emerge and develop (for a further conceptualization and analysis of these pre-conditions see Van Apeldoorn and Horn 2006.).

Drawing on Polanyi's insight that markets are always embedded in a societal context, and that the perception that the capitalist mode of production, and the capitalist market system, function outside society and provide a space for organizing economic life without any interference of social forces thus constitutes a 'stark utopia' (Polanyi 1957: 3), we argue that changes in corporate governance are by no means inevitable processes driven by apolitical market forces. Rather, as markets are always social and political constructs, the current marketization of corporate control must be understood in terms of a `political project'. Below we will apply this notion to the European arena and outline how we may theorize such a project within an EU context.

The European marketization project

Adopting a neo-Gramscian perspective, and applied to the European arena, we define a political project as an integrated set of 'initiatives and propositions that, as pragmatic responses to concrete national and European problems, conceptually and strategically further the process of socio-economic, societal and institutional restructuring' (Bieling and Steinhilber 2002: 41, our translation). As indicated in the introduction, within Europe it is no longer the national states that exclusively provide the regulatory framework of corporate governance – rather, increasingly, a key role here is played by the EU and by the process of European integration. In analyzing this role we adopt a transnational perspective (Van Apeldoorn 2002, 2004a) in which the institutional intergovernmental and supranational governance structures of the European multi-level polity are seen as embedded within a transnational political economy and a transnational civil society (see also Van Apeldoorn, Overbeek and Ryner 2003). Such a political project reflects the agency of a dominant set of transnational social and political forces. Concretely, a political project is articulated ideologically through the discursive and political practices of a multitude of (transnational) associations, lobby groups, think tanks, private forums and planning groups, and, as we shall see, in the case of corporate governance regulation, increasingly so-called 'expert groups', experts who are far from autonomous (inasmuch as such a thing exists) but are often directly linked to concrete (transnational) social forces. Through the transnational networks constituted by these actors (cf. Nölke 2003) certain interests are brought to the fore and come to underpin the EU's policy discourse and shape the content of the regulatory framework it seeks to put in place.

From this perspective, then, the European Commission, although indeed an important supranational public actor, whose role as policy-entrepreneur is also very much confirmed by our case of European corporate governance regulation, must not be interpreted as an autonomous actor in the way some 'supranationalist' accounts of European integration tend to do (e.g., Sandholtz and Stone Sweet 1998). Rather, the Commission can arguably be viewed as a key public actor within the EU as a 'multi-level state formation' (Jessop 2002a: 205, cf. Caporaso 1996), and as such embedded in a particular configuration of transnational social forces, and a concomitant (potentially hegemonic) construction and articulation of interests.

In capitalist societies generally, it is of course capitalist interests that are privileged through these processes. In the current European Union as a system of asymmetric socio-economic governance establishing a 'free space for capital' (Van der Pijl 2006: 32) it is in particular those interests bound up with the most transnationally mobile fractions of capital that are privileged (see also Van Apeldoorn 2002). At the same time this emphasis on the structural primacy of transnational capital must not be taken to imply that political projects, notwithstanding their presentation as coherent programmes, are free from contradictions and therefore uncontested. 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.

We thus claim that a critical role, both directly and indirectly, is played by the process of European integration, which, in our view, since the end of the 1980s has been driven by a broader (neoliberal) marketization project, of which the project of a marketization of corporate control must be seen as part and parcel. We do not, however, claim that the regulatory changes with regard to corporate governance exclusively emanate from the EU. Rather, this regulatory transformation must be viewed as a transnational process where changes take place simultaneously at different levels. What we see as a project of market liberalization at the EU level here is both an expression and a constituting force of this transnational process. In this sense many of the recent regulatory changes on the national level can only be understood in the context of the European integration process.

Yet at the same time, the European project of market liberalization can only be understood against the backdrop of a global capitalist restructuring process that has taken place since the 1970s and that has engendered a deepening of the transnationalization of capital. Focusing on financial liberalization in particular, the European drive to integrate capital markets only makes sense in a global context. The collapse of the Bretton Woods system was accompanied by a worldwide financial deregulation wave in which finance became once more detached from the real economy and liquid capital gained a new transnational mobility and hence exit power. The globalization of capital markets, in conjunction with the globalization of product markets, leads to a competition between firms to suit the interests of transnationally mobile investors (Jackson 1998, Rhodes and Van Apeldoorn 1998: 413). Although crucial as a context, globalization or global restructuring is at the same time also partly constituted by the European regionalization process, and the political choices made therein.

CORPORATE GOVERNANCE REGULATION IN THE EUROPEAN UNION – ANALYZING AN EMERGENT PROJECT

In this section, developments in corporate governance regulation and company law in the European Union are delineated and contextualized. We argue that a shift has taken place from a regulatory regime aimed at the harmonization of company law – with corporate governance still perceived as mainly a policy issue pertaining to company law – through public intervention and regulatory practices, to an increasingly market-regulated and market-based corporate governance system, the goals of which are defined in terms of financial efficiency and competitiveness.

Harmonizing European company law

There seems to be a consensus in the (political economy) literature that, as for instance Dewing and Russell state, ‘until relatively recently, the EC had not concerned itself with corporate governance issues' (Dewing and Russell 2004: 299). This perception might hold true when taking corporate governance as the comprehensive and interdisciplinary concept as it is used today, pertaining to securities as well as company law, to business and management studies as well as to political economy. Yet it can be argued that this perspective on corporate governance is itself a result of changes in the socio-economic configuration of capitalist market systems, inasmuch as corporate governance practices and regulation shape and in turn are shaped by changing conceptions of the role of the firm and how, and to which purpose, it should be run.

We argue that corporate governance issues have in fact been part of the European market integration process from an early stage on, albeit in a narrower sense than in the recent discussions. The Commission's attempt at harmonizing company law in the 1970s and early 1980s represents an early key development in this regard. As the Commission points out in the Corporate Governance Action Plan of 2003, most of the initiatives taken at EU level in the area of company law have been based on Article 44 (2) g (ex 54) of the Treaty establishing the European Community. Accordingly, the freedom of establishment within the EU is to be guaranteed 'by co-ordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 (ex 54), with a view to making such safeguarding equivalent throughout the Community' (European Commission 2003: 6, see also Wouters 2000). The first harmonization directive in the field of European company law was adopted in 1968 (Wouters 2000: 257), and until 1989 a total of nine directives and one regulation pertaining to the harmonization of company law were enacted (European Commission 2003: Appendix). Among the initiatives promoted by the Commission were proposals for a Takeover Directive and the European Company Statute. As the Commission argued, the harmonization of company law was strongly conducive to the further integration of European markets. 'Unity of law would not only promote integration, but would also give enterprises easier access to foreign capital markets, […] and to acquire an interest in or merge with enterprises from other Member States' (European Commission 1965: 106).

At the same time, the regulatory focus within the company law harmonization strategy was aimed at avoiding regulatory competition (Wouters 2000: 282). In a then authoritative textbook on European company law, it is argued that 'unless the national company laws in the Community are identical in all aspects, a movement of companies to the state with the laxest company law will take place in the Community. If it may be said without giving offence to our friends in the USA, `the Community cannot tolerate the establishment of a Delaware in its territory' (Schmitthoff 1973: 9). The fear of a 'European Delaware', in this regard, referred to the (re)incorporation of companies in Member States where company law provisions stipulated lower capital requirements and shareholder and creditor protection in general. To avoid the erosion of company law standards, and to achieve harmonization of company law, substantive regulation through legislative instruments was thus deemed necessary. To this end, the culinary strategy of the 'salami tactics' was to be employed, according to which:

> one slice of national company laws after the other will be harmonized, uniform minimum standards will be established in the national company laws of the Community with respect to all important areas. As these minimum requirements will be fairly detailed, what is taking place under the guise of harmonization is in fact a virtual unification of national company laws, leaving to different national regulation only unimportant matters of detail (Schmitthoff 1973: 7).

Yet while the harmonization of company law progressed in the 1970s, the process came to a grinding halt in the 1980s. As Lanoo and Katchaturyan (2003: 5) argue, 'the more they tried to harmonize corporate governance the less successful they were' (see also Wouters 2000: 271). In the 1985 White Paper, the Commission argued that the regulatory strategy 'totally based on harmonization would be over-regulatory, would take a long time to implement, would be inflexible and could stifle innovation' (European Commission 1985: 18). Harmonization, it argued, should rather be substituted by mutual recognition of national regulations and company laws, based on competition (in the sense of regulatory arbitrage by firms) as a mechanism for convergence rather than centralized top-down regulation.

Concomitant to a broader political struggle over the direction and aims of European integration (see Van Apeldoorn 2002), the strict harmonization approach to company law (and thus to corporate governance) was abandoned due to mounting intergovernmental contestation. The further harmonization had advanced, the more Member States realized how integral their national corporate governance configuration was to their national socio-economic system. Member States' concerns against and contestation of the harmonization approach, and the Commission's changing strategy have thus led to an approach to corporate governance regulation favouring mutual recognition over centralized coordination. As Rhodes and Van Apeldoorn argue:

> One of the reasons for the acknowledgement of subsidiarity at Maastricht was the battle waged in the 1980s and early 1990s over attempts to introduce a uniform system of corporate governance. Harmonization had been advocated from various quarters, but in fact the directives regulating European corporate space have either been blocked by national disagreements over surrendering national sovereignty or have been issued in a form that allows a degree of national diversity (Rhodes and Van Apeldoorn 1998: 422)

At the same time, increased transnationalization of business, and in particular an unprecedented increase in takeover activities in Europe in the late 1980s, led to a surge in public attention to corporate governance issues (Skog 2002: 302). Corporate governance regulation became more and more an issue of political contestation within the process of European integration. What explains this rising salience? Some downplay the role of the EU as such, by arguing, as Wouters for instance does, that 'unlike the 1960s and 1970s, the impetus for new company law no longer comes from Brussels, but from the practical needs in the Member States, and – particularly as far as corporate governance is concerned – from the globalization of financial markets' (Wouters 2000: 306). Yet as we would maintain, explaining the changing trajectory of corporate governance regulation on the basis of pressures emanating from the 'globalization' of financial markets means to ignore the role of political agency at the European level in 'translating' and formulating these (perceived) pressures into a regulatory framework. Here, the role of the Commission has been crucial for the re-orientation of corporate governance regulation.

Rather than advocating a 'positive' harmonization approach, the Commission's approach has become increasingly based on identifying and subsequently eliminating obstacles to the free movement of companies and capital. Whereas corporate control used to be very much located in the domain of company law, subject to 'positive' harmonization, it has become increasingly regulated under aspects of capital and financial markets law. In the next section, then, the shift of corporate governance regulation as a subfield of company law towards the regulatory overlap between, on the one hand, securities and financial market law, and corporate governance and company law on the other, will be examined.

Framing Corporate Governance Regulation – the Financial Services Action Plan

Financial market integration has been an integral part of the single market programme from the start. The speed with which financial market integration was implemented was at first rather impressive, helped along by the 'Europhoria' in the second half of the 1980s. However, it was only in the second half of the 1990s that the attempt to create an integrated European financial market really picked up speed and developed into a core project of European socio-economic governance (see also Bieling 2003). This next phase of the EU's drive to deepen financial market integration must be seen against the background of the following four factors. First, in spite of the earlier progress made, the integration of European capital markets was far from complete (Story and Walter 1997). Second, at the same time, the creation of EMU, the success of which was far from certain at the time, was expected to deepen capital market integration provided the right regulatory environment was put in place (see also Bieling and Steinhilber 2002: 48-9), and thus served as an impetus to further financial market integration. The single currency was expected to lower the transaction costs for cross-border trade in stocks and bonds and thus to lead investors to diversify their portfolios across the Eurozone, promoting the development of a pan-European capital market (Lannoo 1999; OECD 1998). Third, those neoliberal forces that sought to advance this market liberalization project first needed to overcome the crisis of confidence in the relaunched European integration process that beset the Community in the early 1990s in the context of an economic recession and the troubles regarding the ratification of the Maastricht Treaty, as well as growing social unrest in the face of rising mass unemployment (Van Apeldoorn 2002: 161ff, Bieling and Steinhilber 2002: 45).

Finally, and most importantly, the neoliberal project itself needed to be consolidated – reinforcing its societal consent – before financial market integration could be further advanced. Although the neoliberal discourse had been shaping European policy debates from the 1980s onwards, it was only in the second half of the 1990s that the neoliberal project fully took shape and rose towards hegemony, at least at the level of the European elite discourse (Bieling and Steinhilber 2002: 43). As Van Apeldoorn (2002) has argued, the neoliberal project first needed to neutralize the challenges posed by contending transnational projects, in particular that of a supranational social democracy as promoted by the Delors Commission, and a neo-mercantilist project promoted by those sections of European industry that wanted to use the internal market as a protected home market in the face of growing global competition. In contrast, the neoliberal project put the emphasis on enhancing the (micro-economic) efficiency of European industry through market liberalization in the context of a globalizing European economy.

At the discursive level, the ascendancy of this neoliberal project, and thus its (temporary) triumph over rival conceptions of the relaunched integration took place through a shift – effectuated in part through the transnational class agency of the European Round Table of Industrialists (ERT) – from a `neo-mercantilist' 'competitiveness discourse' advocating a strengthening of European industry through non-market means in order to enable it to better withstand the forces of global competition to a neoliberal competitiveness discourse in which competitiveness is precisely seen as benefiting from an unprotected exposure to global competition, in product as well as in capital markets (see Van Apeldoorn 2002: 173—80, also Van Apeldoorn 2003). In this discourse, then, – which effectively neutralized the opposition of alternative projects through the ideological appeal of the goal of competitiveness itself (an objective shared by social-democrats, neo-mercantilist and neoliberals alike) – globalization is constructed as an inevitable reality against which one cannot and should not (wish to) protect oneself but as a challenge that need to be confronted head on through an ongoing process market liberalization allegedly necessary to enhance competitiveness in the face of global competition. Complying with the perceived needs of global markets has hence become the primary goal of European socio-economic governance. What Watson and Hay (2003) have called 'rendering the contingent necessary', the Commission has thus increasingly come to legitimate its project in terms of promoting competitiveness defined in neoliberal terms.

In this context, a reinvigorated neoliberal project in the form of a number of new initiatives has been undertaken by the European Union to accelerate and complete the creation of the single financial market. This project started with the Cardiff Council of 1998, which called for the Commission to develop an action plan for removing the remaining obstacles to an integrated financial market (see Bieling and Steinhilber 2002). With this the Council followed a proposal from the Competitiveness Advisory Group (CAG), a transnational group of 'experts' and representatives from labour and above all from transnational business, which was created in 1995 following an initiative of the ERT (Van Apeldoorn 2002: 175--6). The CAG, like the ERT (ERT 1998), argued that financial market integration not only promoted efficiency of resource allocation but also would enhance the flexibility and the competitiveness of the European economy (Bieling and Steinhilber 2002: 49). These developments then led up to the Commission's *Financial Services Action Plan* (FSAP) drawn up in 1999 (European Commission 1999b). This plan, which turned financial market integration into one of the EU's top priorities, contained a blueprint for the realization of an integrated financial market by 2005, and has as its clearly defined rationale that 'integrated capital markets would enhance pressures for a market- and competition-oriented modernization of the whole mode of capitalist reproduction' (Bieling 2003: 212).

The FSAP also gave new impetus to the attempt to create a more market-driven European corporate governance regime. In fact, the latter was seen as an integral part of the former, that is, of the EU's strategy for financial market liberalization. This framing of corporate governance within the FSAP constitutes an important shift in the EU approach to corporate governance regulation. Corporate governance issues are increasingly articulated in the discourse of financial integration rather than solely in company law terms. Thus, for instance, the Takeover Directive became part of the legislative programme contained in the FSAP and was deemed crucial to 'facilitate the restructuring of the financial industry [..] and mark an important milestone in the emergence of an open market in EU corporate ownership' (European Commission 1999b). In other words, regulatory initiatives in the realm of corporate governance, also within what previously was rather narrowly conceived in terms of Europeanizing company law – like the Takeover Directive (see below) – were now discursively and politically integrated into a comprehensive plan for financial market integration. The latter goal moreover became clearly embedded within the 'master' policy discourse of neoliberal competitiveness.

The following quote from the then internal market Commissioner Frits Bolkestein provides a good illustration of the way the Commission invokes this competitiveness discourse. Referring to the FSAP, and articulating financial market integration with the need to create a European shareholder capitalism, Bolkestein argued that:

> Without a fully integrated financial services and capital market in Europe we shall be unable to release the economic opportunities that will underpin the Union's new competitiveness. Because the cost of capital will remain too high and the yields on assets unnecessarily low. The availability of pan-European risk capital will be sub-optimal and the attractiveness of IPOs limited. (Bolkestein 2000).

In other words, integrating financial markets is about 'sufficiently rewarding' holders of liquid assets. It is thus about redistribution from stakeholders to 'shareholders', though at the same time the claim is upheld that financial market integration 'will lead to a higher quality of life for all European citizens. A large, more liquid capital market in Europe will create investment, more growth, more innovation, more jobs and higher incomes' (*ibidem*). Similarly, Alexander Schaub, then Director General of the Commission's Internal Market Directorate, stresses that:

> The growing importance of corporate governance on the political agenda is not just a response to the recent wave of scandals in the US and in Europe. *First and foremost it is a key component of a strategy* to boost business' competitiveness and to foster efficiency in a modern economy (Schaub 2004, emphasis added).

We argue that by turning the establishment of a European regulatory framework for corporate governance into an integral part of its overall drive for the integration and liberalization of Europe's capital markets, and articulating this discursively with the overarching goal of promoting European competitiveness in the face of globalization pressures, the Commission has both changed the social purpose of European corporate governance regulation *and* widened its basis for organizing consent for this project. This way, earlier regulatory initiatives that got stuck because of a lack of intergovernmental consensus, acquired a new impetus. Issues that previously proved too politically sensitive in some Member States were depoliticized, or rather re-articulated in a different political project that, however, was presented in apolitical terms, that is, as objectively necessary to boost European competitiveness.

After being approved by the Council at critical the Lisbon summit of March 2000 (see below), the implementation of the project of the integration of European capital markets was further advanced – and, at the same time, depoliticized by turning it into a matter of seemingly apolitical, 'technical' regulation best left to experts – through the creation of another transnational 'expert group', the so called Committee of Wise Men (*sic*) on the regulation of European securities markets under the chairmanship of Belgian banker Alexandre Lamfalussy (Lamfalussy *et al.* 2000; see also Bieling 2003, Bieling and Steinhilber 2002).

The Lisbon summit and the subsequent so-called Lisbon strategy, itself also marked another key step in the development of the EU's marketization project, with financial market integration being a fundamental part of the comprehensive socio-economic agenda adopted in the Portuguese capital. The Lisbon strategy, proclaiming the goal for the European Union to become 'the most competitive and dynamic knowledge-based economy in the world by 2010' (European Council 2000), articulates the goal of competitiveness with that of social cohesion, but in a way of making the latter subordinate to the exigencies of the former as defined by the neoliberal competitiveness discourse (see Van Apeldoorn 2006). The Lisbon 'reform process' has recently come under much criticism because of the lack of progress with respect to its implementation. We maintain, however, that at the level of formulating an elite policy discourse and an integrated programme that can muster the consent within European transnational civil society, and that can thus carry the project of neoliberal European socio-economic governance forward, Lisbon has been rather successful. Moreover, the implementation of the Lisbon agenda is not lagging equally behind in all areas. Thus in the spring of 2004, some 70 directives had been adopted under the Lisbon process, mainly in the area of the internal market. Although transposition of these directives has been lagging, most progress has in fact been made in the area of financial market integration under the heading of the FSAP (see European Commission 2004a: 13; 2004b). As the Commission announced, nearly all legislative measures of the FSAP have been completed on time (European Commission 2004c); a first evaluation will soon be followed by an impact assessment of transposition and implementation. Thus, what Commissioner Bolkestein (2000) considered to be 'the core of the Lisbon strategy' remains intact. The promotion of market-driven corporate governance reform constitutes an increasingly central element of the Commission's overall strategy towards (financial) market integration in the European arena.

The takeover directive

The Takeover Directive may serve as an illustration of how the framing of corporate governance regulation within the context of the FSAP has re-oriented policy. Although, formally, the Takeover Directive is a directive on company law and part of the company law harmonization process, 'at the same time, it seeks to regulate an important element of the functioning of capital markets. Many features of the draft directive have been driven much more by capital market concepts than by company law thinking […] The reach of capital market law over subjects that traditionally fall within the realm of company law is expanding' (Winter 2004: 106). The directive seeks to regulate important elements of the functioning of capital markets, in particular the process of bidding for the majority or all of the shares of a listed company.

The 'never ending story' (Skog 2002) of the Takeover Directive, that is, its legislative history, started back in the 1970s with the Commission's plan to harmonize takeover regulation within the European Community.[1] Various legislative initiatives by the Commissions stranded, until, in 1989, it published its first draft proposal for a Takeover

Directive. Following objections of the European Parliament (EP) and the Council, the Commission subjected the directive proposal to ‘a drastic shot of subsidiarity therapy’ (Wouters 2000:263). Whereas the Commission argued that the Directive would create a ‘level playing field’ for takeover bids in the European Union, several Member States (notably Germany and Sweden) argued that, due to their national regulatory framework for corporate governance, implementation of the Directive would put them at a comparative disadvantage *vis-à-vis* other Member States’ regulations. The proposal that was eventually put to vote in the EP in 2001 contained several compromises and references to national regulatory exceptions, but was nonetheless rejected in a tied vote.

After the defeat in Parliament, a High Level Group of Company Law Experts (HLG) - both from academia and business and chaired by Dutch company law professor and legal advisor for Unilever Jaap Winter - was installed by the Commission with the mandate to ‘point out a new direction for the future’ of European Company Law and Corporate Governance (Winter 2004: 98) and thus prepare the ground for a reformulation of the Takeover Directive that would be able to break the political deadlock.[2] The Commission, in its subsequent 2002 Takeover Directive proposal (European Commission 2002c) and the ensuing Action Plan on Corporate Governance published in 2003 (European Commission 2003a), followed most of the recommendations and issues raised by the HLG. Indeed, the role and influence of the HLG was far more extensive than just the provision of nitty-gritty company law expertise to figure out the very details of new proposals – rather, by setting policy options and recommendations in a framework which entailed a considerable shift towards a more market-based corporate governance regulation they significantly shaped the parameters of the corporate governance regulation debate in the European Union (see Horn forthcoming). Although the new proposal by the Commission again met considerable objections in the Council and the EP, a diluted form eventually passed in the EP, and the Takeover Directive came into force in May 2004.

As the above brief account indicates, while it is important to acknowledge the intergovernmental dimension of the struggles over the Takeover Directive, including, indirectly, of the struggle taking place in the EP (cf. Callaghan and Höpner 2005), it is crucial to appreciate both the Commission’s role in pushing for the market-liberal content of the Takeover Directive, as well as the role of transnational private 'expert' groups in providing the 'epistemic' underpinnings – that is, producing the discourse and ideas and concomitant concrete policy proposals – of the marketisation of corporate control that the Commission had been promoting since the 1990s. As such, the struggle over the Takeover Directive serves as an example of the political nature of the changes in European corporate governance regulation. While Member States increasingly seek to safeguard their interests with regard to national corporate governance regulation, the Commission's objective is to create and promote international investment opportunities and market integration. It has repeatedly expressed its belief in the efficiency of the market for corporate control, or, as Frits Bolkestein put it, a market where 'the good can take over and improve the bad' (Bolkestein 2003b).

As pointed out above, the final form of the Takeover Directive is characterized by a compromise that has watered down its original market-liberal content.[3] Whereas the directive includes provisions on the neutrality of the board and the abolition of voting restrictions and multiple voting rights in the case of a takeover bid (Articles 9 and 11, respectively), Article 12 renders these potentially far-reaching provisions as optional. This means that Member States can decide whether they should be implemented when transposing the Takeover Directive into national law. This compromise form has led most observers to argue that the Takeover Directive was, as the *Financial Times* argued, toothless and 'a missed opportunity for open markets' (Dombey 2003). Arguably, however, the Takeover Directive, albeit not quite the far-reaching instrument for the marketization of European takeover regulation that the Commission envisaged, does in fact represent a stepping stone towards the further marketization of corporate control in the European arena (for a more elaborate account see Van Apeldoorn and Horn 2005). While it will only become clear after the full implementation of the directive in all Member States in how far the optional arrangements have actually been enforced,[4] the Takeover Directive indeed includes a number of provisions that do not fall under the optional specifications, such as broad transparency and disclosure provisions and a mandatory bid rule to enforce (minority) shareholder protection. As Maul and Kouloridas argue, 'transparency and disclosure is considered, beyond any doubt, as a cornerstone of the effective operation of capital markets and the market of corporate control' (Maul and Kouloridas 2004).

Its significance notwithstanding, the Takeover Directive is nevertheless but one example of the developments in corporate governance regulation within the EU. In the following section, the Commission's 2003 *Corporate Governance Action Plan* and several regulatory initiatives in its framework further illustrate the changes in regulatory orientation. They also serve to emphasize the political nature of the marketization project.

Modernizing company law and enhancing corporate governance? The Company Law Action Plan

The Commission's 2003 Action Plan for 'Modernizing company law and enhancing corporate governance' is partly based on a report from the same group of company law experts that has played a critical role in the development of the Takeover Directive (High Level Group of Company Experts 2002). Klaus Hopt points out the 'close connection' between the FSAP and the Company Law Action Plan:

> Mr. Bolkestein [Commissioner for the Internal Market] was highly successful with the former, but company law harmonization was unsuccessful for decades. Bolkestein's ingenious idea was to link both fields and both regulatory schemes by using the experience with and the political success of the Financial Markets Action Plan for progress in company law. This was politically very skilful and has also worked out well legally and economically (Hopt 2005: 5)

The Company Law Action Plan frames corporate governance reform in the same notions of competitiveness and efficiency that also underlie its agenda for capital market integration:

> A dynamic and flexible company law is essential for deepening the internal market and building an integrated European capital market. […] An effective approach will foster the global efficiency and competitiveness of business in the EU […] and will help to strengthen shareholder rights (European Commission 2003b).

As Bolkestein pointed out, the Commission sees itself in a key position for this reform agenda. '[O]ur challenge is to lead the debate in the European Union and beyond, and to adopt the right policy approaches to the different issues' (Bolkestein 2004). The Company Law Action Plan is based on a comprehensive set of proposals on corporate governance, capital maintenance, corporate pyramid structures and other corporate governance related issues. Within the framework of this plan, two different objectives have to be distinguished. On the one hand, most of the short-term measures introduced in the Plan are indeed very much aimed at re-establishing investor confidence after corporate scandals such as Parmalat and Ahold. This is reflected in the short-term priorities – enhancing the quality and independence of audit,[5] increasing the responsibility and independence of the board and making directors' remuneration more transparent. On the other hand, the overarching objective of the Commission remains the strengthening of shareholder rights and the fostering of efficiency and competitiveness of business (European Commission 2003a). Rather than just containing measures to prevent other corporate scandals, the Company Law Action Plan has thus a far more fundamental purpose, in tune with the overall political project of European integration. (For an analysis of how these two objectives might be contradictory, as shareholder primacy has in fact been a cause of the corporate scandals rather than that it can be part of the solution, see the chapter by Rebérioux in this volume). As Charlie McCreevy, Commissioner for the Internal Market, points out:

> The context in which we will set our priorities for the second phase is very different. The impetus for what we do next at EU level must now be the tandem of: 1) improving the competitiveness of EU companies – the so-called Lisbon agenda; and 2) the EU's push towards better regulation (MacCreevy 2005a).

Although the Company Law Action Plan itself is not very concrete on medium- to long-term measures (for an overview, see European Commission 2003a: 25-26), there is a whole range of initiatives already initiated within the broader framework of regulatory reform.[6] While the European Commission has repeatedly stated that it does not envisage a unified 'European code of corporate governance' (MacCreevy 2005b), it appears to be confident about a trend towards convergence of national corporate governance codes:

> Corporate governance practices vary among Member States because of their different economic, social and legal traditions. Nevertheless, there is a clear market-driven trend towards convergence in Europe. […] Market participants, including investors, have every interest in taking the view that such convergence is vital for integration of our capital markets – and even for economic growth (MacCreevy 2005b).

Member States are expected to establish unified national corporate governance codes that their companies will be obliged to apply (Maul and Kolouridas 2004: 1293). To promote the discussion and, ultimately, dissemination of ‘best practice’ of these national codes, it has set up an expert group in 2004, the European Corporate Governance Forum. Next to academics (often with links to the corporate world, though), the membership of this forum is predominantly made up of representatives of Europe’s largest transnational corporations as well as, and even more so, representatives of financial capital (institutional investors; shareholder associations).[7] A similar bias in terms of membership can be found in the Corporate Governance Advisory Group, which the Commission has set up to provide it with ‘technical advice’.[8]

The transnational politics of the transformation of European corporate governance regulation

As the above analysis shows, the Commission has been at the forefront of a number of EU-level regulatory initiatives constituting a political project aimed at the marketization of corporate control. At the same time, the Commission’s push has been facilitated and encouraged by a transnational network of interests and private bodies, most visibly in the form of so-called expert groups, in which the experts, however, often have ties to, or directly represent the interests and ideas of European transnational, and predominantly financial, capital. Next to the powerful interests from which their members are drawn, the significant role of these transnational expert groups may also be understood – linking form and content – in the light of how in the push for a more market-driven European corporate governance regime they usefully depoliticize what in fact is deeply political, and therefore often prevent overt political conflict, or, as was the case with the Takeover Directive, break the political deadlock over certain (potentially) contentious aspects of the marketization project.

The ideational shift underlying the changes in company law and corporate governance regulation in the EU has thus in part taken place through the agency of these transnational expert groups (for a more detailed analysis see Horn forthcoming). While these expert groups, on the one hand, represent the Commission's ambition - under the heading of the 'better regulation' approach – to consult with 'stakeholders' on regulatory initiatives, they, on the other hand, (re)produce and consolidate the dominant discourse on market-driven regulation. The European Commission's focus on facilitating cross-border transactions and the establishment of a truly integrated market to enhance the investment opportunities for transnationally mobile capital is partially instigated, and at the same time reinforced, by incorporation into the early phases of the regulatory process of these experts *cum* representatives of transnationally mobile capital (in particular, capital market actors). The Commission's initiatives, to a large degree, articulate the discourse engendered and disseminated by such transnational networks.

All in all, it appears that the Commission has indeed fully taken on a 'negative harmonization' approach to corporate governance regulation. Rather than insisting on concrete and definite regulatory coordination, it seeks to strengthen the position of shareholders, and ultimately the role of the market, by removing 'technical' obstacles such as multiple voting rights or facilitating cross-border transactions. The objective behind this is clearly that 'in the medium to long term our actions must respond to the needs of the market (MacCreevy 2005b). Apart from the Commission's push for a 'shareholder democracy' (European Commission 2005b), increased transparency and disclosure of corporate governance issues are supposed to advance the functioning of market control. As Frits Bolkestein argued: 'disclosure elements are a highly effective market-led way of rapidly achieving results [..] better disclosure will help the markets to play their disciplining role' (Bolkestein 2004). Within EU financial market and corporate governance regulation, several regulatory initiatives have been aimed at improving transparency and disclosure, most notably the 2003 Prospectus Directive (2003/71/European Commission) and the 2004 Transparency Directive (2004/109/European Commission).

In the field of regulating corporate governance, the EU thus increasingly only intervenes and provides a regulatory framework in cases where the market cannot provide for the conditions necessary for its proper functioning, which means that regulatory activities are increasingly assigned to the market and thus further removed from democratic control. National regulatory arrangements of corporate organisation are subjected to the scrutiny of the market in an environment of increasing regulatory arbitrage. As Jaap Winter contends, 'the picture emerges that the original legislative approach to harmonize company laws in Europe, in order to avoid 'bad' competition between Member States, has been supplemented by a judicial approach explicitly allowing for competition between the company laws of Member States' (Winter 2004: 107). From a market perspective, even regulation that might be considered 'efficient' in a national context ceases to be efficient if it does not provide for a basis for the further integration of a liquid transnational market. In the words of the High Level Group of Company Experts, 'these more and less developed markets must be integrated on a European level to enable the restructuring of European industry and the integration of European securities markets to proceed with reasonable efficiency and speed' (High Level Group of Company Experts 2002: 23). This means we are dealing with a process of transnational marketization, arguably disembedding the socio-economic organization of the EU.

CONCLUSION

[9]In this chapter we have sought to show that the EU has not only increased its attention to corporate governance regulation, but that, in terms of its *content,* the European approach to regulating the governance of corporations has shifted from a focus on harmonization, aimed at the prevention of regulatory competition, to a focus on promoting the marketization of corporate control, in part making use of market-based regulatory mechanisms. We have argued that this shift cannot be simply explained either as a result of exogenous globalization pressures or as response to the recent wave of corporate scandals, but has to be interpreted as bound up with a coherent transnational political project constructed from the late 1980s onwards. This project can be understood both more broadly as a neoliberal project aimed at the marketization of the European socio-economic order in general – that is, promoting the market mechanism as the organizing principle (Polanyi 1957) of this

order – and more narrowly, as a project aimed at the marketization of corporate control. As we have seen, the latter has been increasingly articulated with, and made an integral part of, Europe's strategy for creating a single financial market.

The currently hegemonic neoliberal policy discourse, subjecting the governance of corporations to the discipline of capital markets, and ultimately turning corporations themselves into commodities, is supposed to enhance the global competitiveness of the European economy in general. In other words, increasing the exit power of transnationally mobile shareholders and 'sufficiently' rewarding these 'investors' for the risks they have taken ('shareholder value') is presented as necessary in order to let Europe survive in the globalized world economy. Elsewhere in this volume, several arguments have been advanced to cast considerable doubt on this kind of logic. Here we have mainly claimed that this kind of discourse shows the ideological underpinnings and political contingency of the EU's attempt to create a European regulatory framework for corporate governance. At the same time, we have underlined the key role of EU regulation, and regulation in general, in constructing and promoting the development of markets. In as far as European corporate governance becomes more market-based and reveals some convergence among diverse national systems, this is not spontaneously brought about by market forces. Regulation, in providing the key pre-conditions for markets to arise and develop, is central here. The EU has set this task for itself with an impressive zeal. Paradoxically, as policy makers increasingly seek to ´leave things to the market´, the state, or in this case the multi-level polity of the EU, has to play an increasingly pro-active role in order to achieve this state of affairs. Partly for this reason the idea of a self-regulating market is ultimately, as Polanyi (1957) argued, a utopia. It is also a utopia because the destructive forces that the free market and its commodifying logic unleash will require a more protective role of the state as well, if the capitalist system is not to break down entirely. However, this part of the Polanyian ´double movement´ is as yet far from apparent at the level of EU socio-economic governance.

[1] For detailed accounts of the legislative history of the Takeover Directive, see e.g. Skog (2000); Berglöf and Burkart (2003); Wooldridge (2004).
[2] For a list of members and published reports see http://ec.europa.eu/internal_market/company/advisory/index_en.htm

[3] Directive 2004/25/EC of 21 April 2004 on takeover bids; for a detailed overview and discussion of the provisions see Maul and Kolouridas (2004); Wooldridge (2004)

[4] Implementation of the Directive has been rather slow (see Buck 2006). For an overview of the implementation process and which Member States have followed the optional arrangements, see a study conducted by the European Group for Investor Protection, available at http://www.egip.org/docs/Updated%20version%20of%20EGIP%27s%20survey%20on%20the%20implementation%20of%20the%20EU%20Takeover%20Directive.pdf (last accessed 11 September 2006).

[5] Agreement has recently been reached on the 8th company law directive on statutory audit (IP/05/1249).

[6] The European Commission has recently conducted a consultation on the 'future priorities' of the Company Law Action Plan. For the report of the consultation, see http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf (last accessed 11 September 2006).

[7] For the list of members see: http://ec.europa.eu/internal_market/company/docs/ecgforum/members_en.pdf (last accessed: 22 September 2006).

[8] See for information on the membership of this group and for its reports: http://ec.europa.eu/internal_market/company/advisory/index_en.htm (last accessed: 22 September 2006). In terms of the composition of both these groups, it is remarkable that labor organisations are only represented by one member in each group.

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