The Transformation of Corporate Governance Regulation in the European Union – Towards a Marketisation of Corporate Control

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The Transformation of Corporate Governance Regulation in the European Union – Towards a Marketisation of Corporate Control

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geboren te Freiburg

Promotor: prof. dr. H.W. Overbeek
Compromotor: dr.E.B. van Apeldoorn

For once man's activities have been organized through markets of various kinds based on profit motives, determined by competitive attitudes, and governed by a utilitarian value scale, his society becomes an organism that is, in all essential regards, subservient to gainful purposes.

(Polanyi 1977: xlvi)

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List of Abbreviations

ABI	Association of British Insurers
AGM	Annual general meeting
BDI	Bundesverband der Deutschen Industrie
CAG	Competitiveness Advisory Group
CBI	Confederation of British Industry
CEEP	European Centre of Enterprises with Public Participation and of Enterprises of General economic Interest
CEM	Control enhancing mechanism
CEO	Chief executive officer
CMEs	Coordinated market economies
DAI	Deutsches Aktieninstitut
DG	Directorate General
DTI	Department of Trade and Industry (now BERR - Department for Business, Enterprise and Regulatory Reform)
EC	European Community
ECB	European Central Bank
ECGI	European Corporate Governance Institute
ECJ	European Court of Justice
ECOFIN	Economic and Financial Affairs Council
ECSC	European Coal and Steel Community
EEC	European Economic Community
EMS	European Monetary System
EMU	Economic and Monetary Union
EP	European Parliament
ERT	European Round Table of Industrialists
ESOP	Employee Stock Ownership Plan
ETUC	European Trade Union Confederation
ETUI-REHS	European Trade Union Institute for Research, Education and Health and Safety
EU	European Union
EWCs	European Works Councils
FSA	Financial Services Authority
FSAP	Financial Services Action Plan
GATT	General Agreement on Tariffs and Trade
HLG	High Level Group of Company Law Experts
IAS	International Accounting Standards
ICGN	International Corporate Governance Network

IFRS	International Financial Reporting Standards
ISS	Institutional Shareholder Services (now RiskMetrics)
LMEs	Liberal market economies
M&As	Mergers and acquisitions
MEP	Member of European Parliament
MEDEF	Mouvement des Entreprises de France
MNCs	Multinational corporations
OECD	Organisation for Economic Co-operation and Development
OMC	Open method of coordination
PEPPER	Promotion of Employee Participation in Profits and Enterprise Results
PES	Party of European Socialists
SE	S*ocietas Europaea*
SEA	Single European Act
SEC	Security and Exchange Commission
SLIM	Simpler Legislation for the Internal Market
SMEs	Small and medium entreprises
TNCs	Transnational Corporations
UNCTAD	United Nations Conference on Trade and Development
UNICE	Union of Industrial and Employers' Confederations of Europe (now BusinessEurope)
VoC	Varieties of Capitalism
WFE	World Federation of Exchanges

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Acknowledgements

Every now and again I have to remind myself of what a privilege it is to do a PhD. In those desperate last weeks before handing in this dissertation, I wished I had stayed at the call centre I was working in when I received the call for applications for the PhD project that then became my own. Sometimes the drudgery of writing is only matched by the tediousness of rules and regulations of university life, and Susan Strange's piercing question of 'So what?' looms large in any abstract discussion of concepts, concepts and yet more concepts.

But to be able to read, and discuss, and think, and be taken seriously by far more knowledgeable people, and then to be paid for it, too!

I started my research without really knowing what I was doing, but thinking that well it can't be so difficult, can it? Some four and a half years later on, I can only say that the experience of doing a PhD has humbled me. We're of course all standing on the shoulders of giants, but to get the chance to engage more thoroughly with those giants really puts a smug student in her place. I hope I have honoured the trust that has been put in me – even if just by trying to 'fail better' (Beckett).

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1. Introduction

The modern corporation plays a central role in the organisation of advanced capitalism. Karl Marx, witness to the rise of the joint-stock corporation in the late 20th century, saw this development as a potential step towards a socialisation of the ownership of the means of production, and thus, ultimately, socialism. For the time being, though, it seems as if the corporation is here to stay. At the end of 2007, the World Federation of Stock Exchanges counted 45.257 companies listed on stock markets around the world, an increase of 30 per cent as compared to 1997.[1] In fact, the structure of the joint-stock company is attributed such an important position in capitalist development that *The Economist* was prompted to argue in a report on economic growth in the Arab peninsula that 'the regions' failure to develop joint-stock companies was one reason why it fell behind the West' (*The Economist* 2006a). Modern corporations, in particular Multinational Corporations (MNCs) with a turnover exceeding the combined GDP of several African states, have attained a position in the Global Political Economy which represents a potential challenge to traditional forms of political deliberation in the context of the nation-state. And as a commentator in the *Financial Times* enthused, even though 'the boundaries of the state have leapt forward' as the result of the financial crisis in 2007, 'companies will endure as a means of marshalling people and capital' (*Financial Times* 2008).

Who controls the modern corporation and how, and to which purpose, it should be run, has become an essential question for the organisation of production in a capitalist market economy. In recent years, public attention to the issue of corporate governance has increased significantly, also in the European Union. While at first it seemed that corporate scandals like Enron or Worldcom were mainly a manifestation of predatory capitalism in the US, cases such as Parmalat and Ahold have raised questions about managerial accountability and the protection of investors and workers in the European arena as well. Public outrage over ever-rising executive remuneration and growing profits despite large-scale employee lay-offs (euphemistically pronounced as 'restructuring') has led to heated debates about social justice and fairness.[2] As the number of takeovers and mergers and acquisitions (M&As) has soared to a level higher than in the US (*The Economist* 2007), and not only steel and mobile phones are seen as commodities, but also the companies that

[1] See the annual data at the WFE website , available at http://www.world-exchanges.org/WFE/home.asp?action=document&menu=10 (last accessed 21 July 2008).

[2] For instance the 2005 restructuring at the Deutsche Bank, see e.g. *Süddeutsche Zeitung* (2005) 'Deutsche Bank baut 6400 Stellen ab' Lothar Gries, 4 February 2005

produce them, even dairy has become a potentially strategic economic sector that needed to be protected against foreign raiders.[3]

However, while governments have stepped up the rhetoric of economic nationalism, and more and more national parliaments struggle over caps on management remuneration and restrictions on takeover bids from ‘locusts’ and foreign bidders, the European Commission is courting transnational investors such as hedge funds and private equity. With its ambitious plan to modernise company law and corporate governance in the European Union (EU) it has pursued policies aimed at strengthening the position of shareholders over workers and other stakeholders. In the context of financial market integration, the governance of corporations is increasingly assigned to ‘the stock market’ as the ultimate arbiter of corporate performance, through the share price as disciplinary mechanism. Crucially, though, it is *through regulation* that this market-based corporate governance regime is constituted.

Arguably, what is lacking from the current debates is an awareness of the fundamental role state regulation has for corporate governance, and, concomitantly, for the very foundation of the modern corporation as such. Rather than merely *intervening* in the governance of corporations, laws and regulations are actually *constitutive to* the modern corporation. As such, corporate governance regulation is not a regulatory mechanism to coordinate and increase the efficiency of economic organisation, but rather a fundamentally political expression of underlying capitalist principles, including property rights. As the distributional consequences of corporate governance, both in terms of material redistribution as well as, on a more fundamental level, the social power relations that constitute the modern corporation, have become more and more visible, political struggle over corporate governance regulation has intensified. How, then, can we understand the role of the capitalist state vis-à-vis the modern corporation, and what explains the trajectory and transformation, that is, the changing form, mode and content of corporate governance regulation?

This study seeks to contribute to an understanding of the political economy of corporate governance regulation. Drawing on a theoretical framework that perceives of the modern corporation as a social relation within the capitalist mode of production, rather than a functional outcome of organisational evolution, the study emphasizes the essentially political nature of corporate governance regulation. Empirically, the study focuses on the transformation of

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[3] As in the case of the French government, which at the mere rumour that its US competitor PepsiCo might be considering staging a takeover attempt in 2005 stepped in at the defense of Danone, prompting a resurgence of ’economic nationalism’ see e.g. *Financial Times* (2005) ‘French PM comes to the defence of Danone’, Adam Jones and Jenny Wiggins, 21 July 2005.

corporate governance regulation in the European Union, a process identified as the marketisation of corporate control. Departing from the central assumption that regulation comes about through political struggle between social forces in the European state formation, the analysis concentrates on the changing form, mode and content of corporate governance regulation, and seeks to discuss these changes against the broader background of capitalist restructuring in the European Union and beyond.

To address these developments, the central research question guiding the present study is *What explains the transformation of corporate governance regulation in the European Union?* The analysis, and concomitantly the main arguments are structured along a set of subquestions:

1. *What is the nature of the changes in corporate governance regulation in the European Union, in content as well as form?*
2. *How and through which mode of governance do these changes take place? Which actors are involved in driving or contesting these processes?*
3. *Why have these changes in both form and content of corporate governance regulation taken place? What explains the nature of the developments in the broader context of socio-economic restructuring in the EU?*

To locate the present contribution within the academic debates, the following section offers a brief overview of the main approaches to the study of the modern corporation and how it is, or should be, governed. While corporate governance has evolved as something of a growth industry with regard to academic output from various disciplines, corporate governance regulation as such has so far only received marginal attention. In recent years, however, approaches to corporate governance regulation have been put forward from several research perspectives. These then offer a point of departure for a discussion of some of the core issues that need to be considered for a more comprehensive understanding of the dynamics of this crucial dimension of capitalist restructuring. Subsequently, the next section proceeds with an outline of the scope and focus of this study, and engages with the key concepts employed in the analysis. Following a brief discussion of method and data collection in the empirical analysis, this introduction then concludes with an overview of the structure of this dissertation.

1.1 Approaches to Corporate Governance

The literature on corporate governance has increased exponentially in the last decades, an indication of the prominence of this debate over the organisation of capitalist production in various disciplines of the social sciences such as economics, law, politics and sociology. At the same time, this very focus on corporate governance, which after all is (implicitly) rooted in a tradition which narrowly defined it as mechanisms to mitigate conflicts between shareholders and managers, has obscured the fundamental power asymmetries in the political economy of the corporation. In contrast, the focus on corporate governance *regulation*, absent from most approaches, facilitates a discussion about these power struggles, fuelled by different perceptions of the nature, and the purpose of the modern corporation.

At the risk of providing undue attention to an approach actually espoused by only a very limited number of authors (Aglietta and Rebérioux 2005: 29), the section begins with an overview of 'agency theory' and the assumptions underlying the theory of the firm. It is intriguing, and of course not entirely by coincidence, that a marginal perspective in corporate economics has emerged as such a central and authoritative body of research for conceptualising the power relations within one of the central organisational forms in the modern market society. While moving beyond this perspective, the 'Law and Economics' literature, discussed next, is still characterised by its (more or less tacit) prescriptive agenda. However, even in this body of literature a growing number of authors now acknowledge the political, institutional, cultural and social determinants of corporate governance regimes. This development parallels the comparative political economy literature discussing corporate governance regimes, most prominently the by now extensive Varieties of Capitalism (VoC) literature (cf. Hall and Soskice 2001b). Crucially, the comparative focus on corporate governance systems has facilitated an analysis of production regimes without attributing superiority to any one model. Economic sociology approaches have provided an important contribution here in emphasizing the 'embeddedness' of economic practices within a social and institutional context (Granovetter 1985). While most comparative approaches, with a predominantly firm- or sector-level focus, still consider regulation at best as an exogenous influence, there is now a growing number of authors who acknowledge and analyse the nature and role of regulation as such (see Gourevitch 2007 for an in-depth discussion). Moreover, historical sociological scholarship has contributed to a better understanding of the social character of the modern corporation by challenging the view of the corporation as a functional, inevitable outcome, instead pointing towards the political processes enabling the rise of the publicly held corporation (cf. Roy 1997).

What most of these approaches have in common, though, is a focus predominantly limited to corporate governance regimes and developments in *national* contexts, with broader structural changes in the global political economy at best acknowledged as 'globalisation' pressures. In contrast to this, this dissertation draws upon a body of literature that has identified the transformation of corporate governance regulation as part and parcel of capitalist restructuring, in particular the ongoing process of financialisation. While the Marxist debates about the role and the governance of the modern corporation (cf. Baran and Sweezy 1966; Zeitlin 1974; Hirst 1979) have largely been superseded, these approaches offer critical political analyses of the changes in contemporary capitalism, with corporate governance as a concrete manifestation. Here, the work of the regulation school on finance-led capitalism (cf Aglietta and Rebérioux 2005) and the 'social accountants' (e.g. Froud et.al. 2000) on the nature and societal consequences of the financialisation process are of importance; as well as other critical political economy studies on corporate governance (regulation), in particular in the EU context (cf. Bieling and Steinhilber 2002; Beckmann 2007).

The Corporation as a Nexus of Treaties - From Agency Theory to Law and Economics

Following the seminal publication *The Modern Corporation and Private Property* by Berle and Means (1991[1932]), the 'separation of ownership and control' became a central issue of contention in organisational economics, legal studies and political economy. Berle and Means argued that due to the fragmentation of share ownership in the modern corporation it was managers, rather than the shareholders who controlled the corporation. The 'managerial revolution' (Burnham 1941; Chandler 1977) was perceived as giving rise to a relatively autonomous 'class' of professional managers.

The potential conflict of interest between shareholders and managers constituted the main focus for a small but influential body of literature emerging from the mid-60s onwards on the trails of structural changes in the US (see chapter 3). Following Coase's work on the 'theory of the firm' (1937), in which he established the elimination of transaction costs as the main explanation for the formation of the modern corporation, a small body of literature on 'agency theory' (Jensen and Meckling 1976, Fama 1980, Fama and Jensen 1983, Jensen 1993) was preoccupied with ways to resolve the principal-agent conflicts resulting from the separation of ownership from control. The corporation was seen as a 'nexus of treaties', a platform to facilitate the contracting for shareholders and managers out of rational self-interest to guarantee an efficient (re)allocation of wealth through the equilibrium of capital markets. Along these lines it is assumed that, as a matter of course, 'the capital market generally makes rational assessments of the value of the firm in the face of imprecise and uncertain information' (Fama 1980: 297). To guarantee that managers would act in the interest of shareholders, the carriers of 'residual risk', a range of mechanisms was suggested, most importantly an active market for corporate control (Manne 1965). The market for corporate control as an external control mechanism was assumed to 'give to shareholders both power and protection commensurate with their interest in corporate affairs' (Manne 1965: 112). Based on 'scientific evidence' mainly derived through formal modelling, takeovers were assumed to create value for shareholders - even though agency theorists were never actually able to pinpoint the actual 'source' of takeover gains (Jensen and Ruback 1983:47). Even where, as Shleifer and Summers' (1987) suggested, takeover gains accrued from a 'breach of trust' between labour and management, since in the case of a takeover considerable wage concessions can take place which would break implicit agreements between target management and workforce, takeovers were generally perceived as beneficial to societal welfare.

Agency theory has been subject to criticism from a variety of disciplines and perspectives, and hardly constitutes an ongoing research programme any more.[4] The criticism levelled at agency theory pertains to several crucial aspects. Empirically, the debate about the efficiency of the takeover mechanism has provided little support that takeovers are indeed aimed at 'underperforming' firms (cf. Burkart and Panunzi 2006). As Froud et al point out, 'the new corporate finance defence of restructuring was always strong on argument and internal coherence than on empirics and evidence' (Froud et. al. 2000a: 775). The assumptions underpinning agency theory have been forcefully taken apart, e.g. with regard to residual risk (cf. Aglietta and Réberioux 2005: 35); the assumed rational preferences of shareholders and managers and the functional explanation for the emergence of the corporate form (Roy 1997:9); the ideological foundations of agency theory (Lazonick and O'Sullivan 2000; Engelen 2002) or its failure to account for the variety of corporate governance regimes (Aguilera and Jackson 2003: 448).

Important in the context of this study, however, is that - this forceful criticism notwithstanding - the prescriptive agenda at the heart of the theory of the firm and agency theory *continues* to reverberate in contemporary debates on corporate governance regulation. Agency theory has declared shareholder interests to be the 'general interest', as they were assumed to be best suited to make decisions about corporate strategy (cf. Easterbrook and Fischel 1993). This is emphasized by Milton Friedman's famous statement that 'few trends

[4] For a more comprehensive critique of agency theory, see (Jackson 2000: 268ff) and (Gourevitch and Shinn 2005)

could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible' (Friedman 1962: 133). While the perspective on the corporation as a functional outcome implies that external interference should be minimal so as to not distort efficient arrangements, company law should none the less be structured to enable shareholder control mechanisms over management, in particular through a market for corporate control. Labour interests, on the other hand, do not feature in the prescription for efficient corporate governance structures, as the relation between management and labour is assumed to be settled contractually. Since workers have no issue with corporate control, there is no need for including labour in corporate governance arrangements and regulation. In an often cited statement, Jensen and Meckling (1979:474) have brought this prescriptive view on the assumed role of law and the position of labour to the point by arguing that 'if codetermination is beneficial to both stockholder and labour, why do we need laws which force firms to engage with it? Surely, they would do so voluntarily.'[5] 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). As simplistic as these assumptions might sound to political economists and legal scholars today, they continue to bear a mark on approaches on corporate governance, in particular the extensive 'Law and Economics' literature.

Towards the End of History for Corporate Law? The 'Law and Economics' Literature

Legal and economic approaches to corporate governance do not constitute a uniform body of literature. However, it is possible to identify a number of underlying assumptions shared by many authors, most prominently a more or less tacit normative assumption about the primacy of shareholder value, and, concomitantly, the question of how to enhance shareholder rights. Legal mechanisms to resolve agency conflicts, or, 'how investors get the managers to give them back their money (Shleifer and Vishny 1996: 4), here constitute the central focus. Shareholders are, in this context, perceived as the 'owners' of the corporation. While there are some approaches that advocate a 'stakeholder

[5] See (Höpner 2004) for a discussion of this argument, as well as an overview of the debate on co-determination.

perspective' (e.g. Blair 1995; Blair and Roe 1999), these are fairly marginalised in this field of literature. Rather, at the heart of the law and economic literature is the question why there are different corporate governance systems, and whether a particular system proves more efficient than the others.

In an influential series of papers, the 'law matters' school (La Porta et al 1997; 1999; 2000) argued, based on large scale statistical surveys, that the difference between dispersed and concentrated ownership, a central characteristic of corporate governance systems, can be accounted for by the origin of the legal system. Their main argument is that common law provides stronger protection for minority shareholders, which in turn promotes the separation of ownership and control. La Porta et al also provided important empirical evidence that the Berle/Means type of corporation is far from universal as regarding the organisation of economic production – rather, 'by far the dominant form of controlling ownership in the world is not that by banks and other corporations, but rather by families' (La Porta et al 1999: 496). As the legal framework is treated as an independent, or exogenous, variable, there is no explanatory focus on law and regulation as such (see e.g. Coffee 2001).[6] Moreover, their findings are marked by an underlying normative corollary that attributes economic superiority to the dispersed model of ownership, and consequently to a corporate governance system favouring (minority) shareholder protection.

This normative perspective is shared by a majority of 'mainstream' corporate governance scholars in the fields of law, economics and corporate finance.[7] In fact, the superiority of shareholder value is deemed so self-evident that two legal scholars provocatively proclaimed the 'end of history for corporate law', as in their view 'there is no longer any serious competitor to the view that corporate law should principally strive to increase shareholder value' (Hansman and Kraakman 2001:439). Following from this teleological assumption is a focus on the apparent convergence of corporate governance systems on the shareholder model. The main driving force of this convergence pattern is assumed to be external pressures from capital markets. As Hopt explains (2002: 193), 'most of this convergence will be market driven. The forces of globalisation and international competition are enormous, and have led or are leading to harmonization of legal and economic practice even under different legal systems and rules.'[8] Company law and regulation is mainly seen

[6] See (Fligstein and Choo 2005) and (Gourevitch 2003) for an in-depth discussion of this literature.

[7] For a good overview of the various approaches and disciplines, see the working paper section at the European Corporate Governance Institute (ECGI), available at www.ecgi.org

[8] A German legal scholar who has also been a member of the central expert group involved in the restructuring of European corporate governance regulation (see chapter five).

as instrumental; most studies focus on mechanisms to resolve conflicts between (different types of) shareholders, directors and mangers and to increase the external control of corporations through the stock market. Leaning on a finance perspective of the corporation, as well as broader neo-liberal assumptions about the role of the state, there seems to be deep seated scepticism about the role of corporate governance regulation. The shareholder value model, it is assumed, prevents 'regulatory capture' by 'reducing the role of the state in economic decision-making, by decentralizing such decisions to the level of the firm, and by subjecting such firm-level decisions to a neutral, transnational standard of the share price' (Gordon 2004: 162).

How to Explain Continuing Diversity in Corporate Governance Regimes?

As it has become apparent that the 'end of history' for corporate law and corporate governance systems has not happened yet, an increasing number of legal scholars is taking the institutional diversity of corporate governance systems into account (e.g. Noteboom 1999; Licht 2001). Here, path-dependency constitutes one of the main explanations for continuing diversity (cf. Bebchuk and Roe 1999). As far as the changing social and political environments in which corporations operate are concerned, rather than focusing on the actual political changes underlying the developments in corporate governance regulation, the mainstream corporate governance literature seems more preoccupied with bridging the space between corporate governance issues and the broadening societal apprehension of the shareholder value perception of the modern corporation, so as to safeguard the general thrust of the system. Here, the concept of corporate social responsibility (CSR) has emerged as one of the most discussed, and, arguably, most inflated concepts in the literature (see, e.g. Deakin and Whittaker 2007).

Mark Roe's 'politics matters' approach constitutes the most prominent perspective seeking to explain the differences in corporate governance regimes, using their political system as explanatory variable (Roe 2003). Drawing on his research on the political determinants of corporate governance reform in the US (1999), Roe argues that a strong element of what he calls 'social democracy', that is government intervention favouring stakeholders interests over private property rights has led to the sustained concentration of ownership, while in the absence of this political force, ownership has become dispersed and the role of the stock market increased (for an in-depth discussion of Roe's argument, see Gourevitch 2003). However, Roe's explanation cannot account for developments in several critical cases (cf. Cheffins 2002). As Cioffi and Höpner have shown, Roe's assumptions about social democratic policy preferences are rather crude; their analysis of the political processes underlying regulatory reforms in Germany demonstrates that is was in fact *social-democratic* forces who were driving market-oriented reforms (Cioffi and Höpner 2006).

The question of how to account for the differences in corporate governance systems and regulation continues to be a central issue for social sciences. Here, comparative political economy research offer fruitful research perspectives that move beyond the legal approaches in important ways.

Varieties of Capitalism and Beyond - Comparative Political Economy Approaches

Comparative political economy categorises, classifies and seeks to explain the differences in the institutional configuration of national models of capitalism. With a focus on predominantly firms, sectors or production regimes, comparative research has highlighted the continuing diversity of modern capitalism, reverberating in the broader convergence/divergence debate in International Political Economy (cf. Cerny 1990; Strange 1996; Berger and Dore 1996).

The debate about capitalist diversity (re)surfaced with Albert's *Capitalisme contre Capitalisme* (1993), outlining the 'battle of the systems' between the 'Rhineland' and the 'Anglo-Saxon' model of capitalism (cf. Story and Walter 1997). Yet whereas in Shonfield's earlier analysis on capitalism (1965) the role of the state had still been defining for the model he described, the focus of comparative scholars has predominantly shifted to the firm-level (Schmidt 2007:7). While Albert acknowledged that 'behind the debate […] lurks the question of the ultimate role and purpose of the company in the capitalist economy' (Albert 1993: 13), the legal framework and the role of (state) regulation are only perceived as independent variables.

Within the field of comparative political economy, the Varieties of Capitalism approach (VoC) has emerged as a central point of reference (cf Hall and Soskice 2001b). Following a broadly historical institutionalist framework, research in the VoC tradition has emphasized the path-dependent nature of national models of capitalism. The number of ideal-typical varieties employed in the literature differs (cf. Van Apeldoorn and Rhodes 1998; Schmidt 2002). Most prominent is Hall and Soskice's parsimonious dichotomy between coordinated market economies (CMEs) and liberal market economies (LMEs) (Hall and Soskice 2001b), which broadly mirrors Albert's categories of 'Rhineland' versus 'Anglo-Saxon' capitalism. Whereas in LMEs firms coordinate their activities primarily through formal contracting on the basis of arm's length relationships in highly competitive markets, firms in CMEs rely on long-term relationships, networks and cooperative interaction. Corporate governance, in this context, constitutes an essential element of the configuration of any variety of capitalism, sustained through strong 'institutional complementarities' with other central aspects of economic organisation. While in LMEs the outsider model of corporate governance prevails, with corporate control primarily structured through the stock market and external supervision from shareholders, the insider model in CMEs is based on corporate interlocks between banks and supervisory boards, strong managerial control and neo-corporatist arrangements with labour.

An important contribution of the comparative political economy literature is the emphasis on institutional diversity, rejecting the assumption of a particular 'best practice'. Rather, different production strategies related to these institutional configurations are attributed with comparative institutional advantages (Hall and Soskice 2001a: 36ff; Streeck 1991). However, the VoC perspective has been criticised for its emphasis on institutional stability, predicated upon a path-dependent trajectory and functionalist institutional complementarities (cf. Crouch 2005; Streeck and Thelen 2005). The central VoC focus on institutional structures, e.g. corporate governance, labour market regulation and education, is premised on the assumption that these are regulated on the national level (Hall and Soskice 2001a: 4). As Colin Hay (2004) has pointed out, while it might be analytically misleading to speak of convergence or divergence, there are *common trajectories* manifest in different varieties of capitalism which cannot be accounted for by pointing towards the persistence of national institutional configurations.[9] At the same time, where changes are identified, these are mainly attributed to exogenous 'globalisation' pressures; as Hall and Soskice argue, they perceive of 'national political economies as systems that often experience external shocks emanating from a world economy in which technologies, products and tastes change continuously' (Hall and Soskice 2001a:62). With globalisation as the main agent for change, the role of the state in mediating these global pressures, sustaining and changing the varieties of capitalist organisation is not problematised at all. As such, the classification of varieties of capitalism constitutes a fruitful, albeit descriptive, exercise in categorisation, but does not carry much explanatory value for the politics of corporate governance regulation.

[9] As Susan Strange has put it rather perceptively, 'most comparativists don't see the wood for the trees; they overlook the common problem while concentrating on the individual differences' (Strange 1997: 184).

Economic Sociology – the Social Construction of Markets

Economic sociology research stresses the embeddedness of economic action in social structures (Granovettter 1985). Corporate governance and the organisational structure of corporations has emerged as an important research focus for economic sociologists. Sociological perspectives on comparative corporate governance have emphasised the different network structures of corporate governance regimes (Whitley 1999), and have pointed towards crucial differences in shareholders' interests, based on identities, motivations, strategies and time horizons (Jackson 2000: 271-276). Economic sociology research based on extensive network analysis has shown the decline of corporate interlocks (cf. Heemskerk et.al. 2003; Heemskerk 2007).

Economic sociology has also made an important contribution in emphasizing the social, and thus ultimately political, construction of markets (Fligstein 2001; Fligstein and Choo 2005; cf. Polanyi 1957). As Fligstein and Freeland point out, 'the state's claim to set the rules for economic interaction is social in origin, and as such it is contestable. The process by which these rules are set up, transformed and enforced is therefore an inherently political process' (Fligstein and Freeland 1995: 31). Economic sociologists have focused on how the state has shaped and structured the organisational form of the corporation (Roy 1997, cf Gamble and Kelly 2000), for instance through property rights (Campbell and Lindberg 1990). Here, the historical dimension of many contributions from economic sociology, as well, increasingly, business history (cf Herrigel 2007), highlights the political, social and economic context of the emergence of the modern corporation, in particular the essential role of corporate law (Neocleous 2003: 155). As Van Apeldoorn et al (2007: 11) argue, however, economic sociology falls short of a systematic analysis, based on empirical evidence, of the *politics* of corporate governance regulation, most notably with regard to the qualitative changes in the current transformation of global capitalism.

Towards a Political Economy of Corporate Governance Regulation?

In recent years, more and more research on the politics of corporate governance regulation has emerged. While some studies have focused on the current transformation of corporate governance regulation in a particular national context (cf. Vitols 2001; Morin 2000; Ziegler 2000), most authors have taken a cross-national perspective in analysing regulatory developments in corporate governance systems (cf. Cioffi 2000; 2006; O'Sullivan 2003; Lütz and Eberle 2007; Beckmann 2007). Here, the work by Gourevitch and Shinn (2005) offers the most comprehensive account of the politics of corporate governance regulation - as they argue (2005: 89), 'if regulations and policy shape economic action [..] what explains the content of policy and regulation?' Their meticulous analysis seeks to explain the variety of regulatory regimes in terms of the interaction of economic preferences, resulting in coalitions among or across management, shareholders and workers, and political institutions, which in turn shape the formation of coalitions. Notably, the in-depth narratives complementing the statistical information provide crucial insights into the *politics* of corporate governance regulation between different interest groups.

While most of these studies have a purely national, or cross-national, focus, there is now a nascent body of literature focusing on corporate governance regulation from a perspective which transcends the level of the nation state, in particular with regard to developments in the European Union (cf Bieling and Steinhilber 2002; Rebérioux 2002; Beckmann 2007). However, there have been few points of contact between the legal scholarship on EU company law and political science approaches on European Integration.[10] While political scientists focused mainly on processes and actors within the dynamics of European integration, legal scholars predominantly concentrated on the social structures constituted through law developments. Yet recent research is promising in this regard. A number of exciting studies on developments in EU corporate governance regulation is now increasingly crossing this divide between law and politics (cf. Cioffi 2005; Zumbansen 2006; 2007). There is also an increasing emphasis on the underlying power relations, as well as the distributional effects of different systems of corporate governance regulation, in particular with regard to labour (cf. De Jong 1996; Gospel and Pendleton 2005: 66).

Here, a number of critical approaches have located the transformation of corporate governance regulation within the ongoing process of financialisation in contemporary capitalism. The work of the 'social accountants' (Froud et.al. 2000a, 2000b; Erturk et.al. 2004) offers a forceful critique on the discursive construction of the primacy of shareholder value, and highlights important political aspects of the changes in corporate governance regulation. The Regulation School has pointed to the rise of finance-led capitalism and how this shift is changing the power relations in the corporation (cf Boyer 2000; Aglietta 2002). Aglietta and Rebérioux's recent (2005) deconstruction of the (theoretical) foundations of the shareholder value discourse, and their subsequent discussion of the responses to financial

[10] (Wouters 2000) provides an excellent survey over the literature until then. Here, Villiers' work (1998) on the company law harmonisation and claims about democracy constitutes an important exception.

scandals, shows the contradictions of an external, finance-led corporate governance system. Yet the focus is here more on the consequences and implications of the shift in corporate governance regulation, rather than on its social and political origins.

The above overview and discussion of approaches to corporate governance and corporate governance regulation indicates that there is an emerging body of literature offering fruitful ways to advance the analysis of the politics of corporate governance regulation. In order to engage with the research questions guiding this study, though, the analysis needs to go beyond this literature, conceptually as well as empirically. To understand the current transformation of corporate governance regulation, it is crucial to identify and analyse the political processes and social forces driving these changes.

1.2 Research Scope and Focus – Key Concepts

To delineate the parameters of this study, in the following the key concepts, as well as scope and focus of the dissertation are clarified. In the understanding of this study, corporate governance is defined as the 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: 211). It is important to note here that, while corporate governance has predominantly been perceived as pertaining to shareholders and managers, in the understanding of this study, workers are included in this focus on corporate governance. At the same time, while workers constitute a crucial corporate constituency, the modern corporation is not a pluralist organisation. In contrast to other approaches mentioned above which argue for regulation based on particular underlying principles, most prominently pronounced in the stakeholder theory and arguments for corporate/industrial democracy, this study acknowledges that it is the social relation between capital and labour on which the corporation ultimately rests. To ignore this locus of power not only results in conceptual restrictions, but actually perpetuates the narrow perception of corporate governance as evidenced in the bulk of the literature.

Corporate governance regulation, the *explanandum* of this study, here refers to formal, as well as informal and self-regulatory rules that shape the governance and power relations within the publicly listed corporation. In other words, regulation engenders the framework in which corporate governance *practices* emerge. More specifically, regulation defines ‘the legal, institutional and discursive parameters, both constraining and enabling the agency of those actors […] that ultimately shape the governance of a particular firm’(Van

Apeldoorn et. al. 2007: 5). As corporate governance is located at the 'nexus of institutions defined by company law, financial market regulation and labour law' (Cioffi 2000: 574), these fields of public law domains form the main focus for this research. The changing regulatory balance between these three interrelated domains constitutes an important point in this study. In this regard, it is crucial to show how the primacy of shareholder interests has been constituted *politically* as well as *legally*.

An important point of reference for this study is the role of the capitalist 'state' in regulating the modern corporation. Yet while corporate governance regulation has until recently been the prerogative of the nation-state, concomitant to broader changes in the global political economy the *transnational* dimension of corporate governance regulation is becoming more and more central. While, as chapter three illustrates, national regimes are increasingly following a 'common trajectory' (Hay 2004) towards market-based corporate governance regulation, in a variety of supranational, international and global arenas selective regulatory initiatives are taking place, predominantly on the basis of self-regulatory mechanisms. If, as Streeck (2001: 25) points out, 'national regulation is losing grip on corporate organisation and behaviour', we need to understand how and where these regulatory processes are located.

For instance, the OECD Corporate Governance Code (1999; 2004) has served as a blueprint for a multitude of national corporate governance codes, while networks such as the International Corporate Governance Network (ICGN) or the European Corporate Governance Institute (ECGI) provide platforms for interaction at global and EU level. The transnational focus, here, is predicated upon an understanding of 'the transnational' as transcending territorial levels or arenas; political processes and structures are constituted in a social space transcending national borders (cf. Overbeek 2000, Van Apeldoorn 2004). While the empirical focus of this study is on corporate governance regulation *at EU level* as a regional state formation, it is important to acknowledge the transnational dimension of these actors and processes. In particular, as the discussion of strategic selectivity in chapters two and six will show, this perspective allows for an analysis which appreciates that the political process of corporate governance regulation in the European Union does not take place in a pluralist arena, but rather in a social space shaped by underlying transnational (structural) developments in the global political economy. This intersection between a transnational political economy perspective and the politics of European Integration constitutes an important point of departure for this study.

As for *research scope*, the study seeks to make a modest empirical contribution through offering an account of roughly fifty years of company law developments from a critical political economy perspective. This diachronic dimension is important, as it locates the political struggles and structural changes at hand within the broader context of the uneven and contradictory development of capitalism. As Harvey put it, 'the shifting patterns of control of corporations […] have also to be seen as a part of a perpetual process of probing for an organizational form that will enhance the capacity of capitalism to survive in the face of its own internal contradictions' (2006: 321).

It has been argued that EU level directives and regulations are at best 'trivial' in their effect on the 'agency problems' inherent to corporate governance, 'because there is very little they prohibit or enable to do' (Enriques 2005: 6). This dissertation does not aspire to offer an impact assessment of the EU company law programme, nor does it seek to evaluate the 'efficiency' of regulatory measures in terms of mitigating conflicts between shareholders and managers. As stated above, corporate governance regulation is perceived as an integral part of a broader development of capitalist restructuring in the European Union, and needs to be analysed as such.

A number of limitations should also be acknowledged. The study's focus on listed corporations implies the exclusion of small and medium sized companies (SMEs), which constitute a crucial form of socio-economic organisation, and are also increasingly regulated through EU measures. However, as the power relations within the company, that is the issue of corporate control, are structured through family or bank/debtor relations, the stock market has only an indirect impact on these companies (although they are of course very much implicated in regulatory developments such as e.g. Basel II regulation). In addition, the study only deals peripherally with accounting and auditing (Perry and Nölke 2006; Nölke and Perry 2007), competition policy (Wigger 2008) and corporate taxation (Vliegenthart and Overbeek 2008). While these are all crucial issues with regard to the governance and constitution of the modern corporation, for the sake of clarity the focus will be mainly confined to regulation pertaining to corporate control.

1.3 Methodology

The critical political economy perspective informing this study is marked by a commitment to a set of fundamental assumptions about social reality and the dialectical relationship between knowledge, in this context social science research, and historically specific processes. In the following, a brief epistemological discussion is formulated in reference to critical theory; this and, most importantly, the ontological assumptions of this study are further explored in chapter two.

The study is firmly situated in a reflexive philosophy of science, rejecting the positivism inherent to the 'scientific method'. The methodological imperatives of the falsification of theory and the generation of statements of universal regularities, with a premium on observation and generalisation, is illustrated perfectly by King, Keohane and Verba's statement that it '[..] may be correct that social scientists who focus on only overt, observable, behaviors are missing a lot, but how are we to know if we cannot see?' (King et al 1994: 41). Rather, this study is rooted in a research tradition which does not make claims about the 'truth' of social reality. Following the method of abstraction, as outlined by Marx in the *Grundrisse* (Marx 1963), concepts and analytical abstractions are appreciated as constructions, in themselves historically specific. The reconstruction of processes does not generate statements of universal validity, but rather shows the dialectical, that is, interrelated and mutually constitutive, nature of structure and agency, and points to contradictions in social power relations. In contrast to 'problem-solving theory', which seeks to 'solve', as it were, questions and problems within a given system without appreciating its historical specificity, and thus presents social formations and institutions as naturalised and universal, critical theory does not take institutions and social power relations for granted, but questions them through focusing on their social origins (Cox 1981: 129). Critical theory here embraces an emancipatory purpose – along the lines of Marx' proclamation that 'philosophers have only interpreted the world in various ways; the point is to change it' (Marx 1960: 585).

1.4 Research Methods and Data Collection

The empirical analysis rests upon a reconstruction of the transformation of company law and corporate governance regulation in the European Union. Here, the identification and collection of relevant data has been organised according to the information necessary to answer the research questions. Clearly, given the nature of the study, qualitative research methods offer the only satisfactory research strategy.

The explanatory narrative in chapter three, covering the unfolding of transnational political processes with regard to corporate governance, draws largely on previous research, as well as some additional statistical information on corporate ownership and performance. Following an outline of capitalist restructuring, on the global and European level, an overview of national level corporate governance developments in the US, UK, France and Germany is provided. These accounts are structured through the narrative's focus on the common trajectories underlying these developments.

Chapter four, also marked by a diachronic perspective, is mainly based on an analysis of official documents pertaining to the establishment and development of EU company law directives from the late 1950s to the 1990s. Resources here include archival material from the Commission, the European Parliament and the Council, as well as position papers by other (European) actors and interest groups. The extensive legal literature on the development of EU company law has provided important background information. At the same time, the 'European company law scene' (Schmitthoff 1975) itself serves as a proxy for examining the dominant discourses about company law in this period. To some extent, the approach in chapter four bears some resemblance to the method of 'process-tracing', an important research tool in qualitative case study research (cf. George and Bennett 2005:205ff). However, process-tracing clearly seeks to identify causal mechanisms between an independent variable and the outcome of the dependent variable; as such it suggests a linearity of social reality in conflict with the epistemological assumptions of this study outlined above. Correspondingly, while the narrative relies on an identification of conjunctural nodes in the developments covered, the concept of path-dependency (cf. Pierson 2004), central to historical institutionalism and many VoC approaches, does not carry much weight in the analysis. Rather, the reconstruction of the transformation of corporate governance regulation is crucially informed by the conceptual framework of this study.

In chapter five, then, the analysis of the policy-making process on the basis of qualitative document analysis is complemented with a range of expert interviews. With regard to the Takeover Directive and other policy initiatives in the context of the Company Law Action Plan, draft proposals, discussions in the EP and the Council, Commission position papers and consultations, as well as statements by industry associations and the discussions in the financial press demonstrate the political conflicts at the heart of the debate. The discussion of the role of the ECJ decisions on incorporation and golden shares rests on an interpretation of these decisions, as well as their reception in the academic and business literature.

The expert interviews provide vital information for the analysis. While the expert interviews as a research strategy raise important methodological questions (for a critical discussion see Bogner and Menz 2005:19), their function in the context of this study is twofold. Firstly, it is rather difficult to gauge the initiation and early stages of a particular policy debate, draft directive or regulation merely from document analysis and procedural records. Interviews with Commission officials and company law experts familiar with the process can provide crucial information here. More importantly, the interests and position of key actors in the policy process need to be identified, in order to analyse the articulation and formation of particular initiatives with regard to corporate governance regulation. In particular, company law experts who have been closely involved in providing recommendations and policy advice provide essential information on the 'organic' link between the experts and the Commission's orientation. At the same time, diverging views on the policy process, marginal in official documents and consultations but growing in the EP and labour associations, illustrate the limits of the marketisation project. Between May 2006 and December 2006, twenty in-depth interviews have been conducted, with a range of actors involved in the policy process: an official of DG Internal Market; members of various Commission expert groups as discussed in chapter five, as well as the author of an expert report commissioned by the European Parliament; as well as company law experts at the ETUI, the research institute of the European Trade Union Confederation (ETUC). A semi-structured questionnaire has been provided to the interviewees (Kruse 2006); all interviews have been transcribed and are on file with the author. On request of the majority of the respondents, interviewees are identified in the text by function and date only (see Appendix B for an overview of expert groups and interviewees).

1.5 Structure of the Dissertation

Next to this introduction, the dissertation is structured in five chapters and a concluding section. The study sets out in *chapter two* with a theoretical *tour de force* of the critical political economy perspective underpinning the empirical analysis. Engaging with a historical materialist framework, the dissertation insists on the fundamental role of the capitalist state in (re)producing the social relations that constitute the modern corporation. Following a discussion of the changing role of the stock market, the notion of the marketisation of corporate control, central to the analysis of this dissertation, is conceptualised. The chapter then proceeds to locate the transformation of corporate governance regulation in a broadly historical materialist understanding of the process of European integration. Drawing on a neo-Gramscian framework, it is argued that the political struggle between social forces shaping, and at the same time being shaped by, the restructuring of capitalism in the European arena and beyond takes place through the articulation and confrontation of concrete political projects. Here, Jessop's notion of the structural selectivity of the European state formation provides an important theoretical anchor for understanding the agency of these social forces.

Chapter three then provides the narrative background for the empirical analysis, locating the focus of this study within the broader process of global capitalist restructuring. The rise of the shareholder value paradigm in the US corporate governance system illustrates how the structural changes in global capitalism, following the breakdown of embedded liberalism and subsequent rise of global finance, have shaped the nature and governance of the modern corporation. The next section then turns to the process of European integration; here the changing capitalist dynamics driving the integration process, as well as the changing configuration of social forces will be discussed. To illustrate the translation of these changes in national corporate governance regulation, manifest in different institutional developments, yet at the same time also common trajectories, the third section then concentrates on the changes in company law and corporate governance regulation in the United Kingdom, France and Germany.

The empirical part starts out with a reconstruction of the establishment and nature of European company law in *chapter four*. The historical narrative sets the development of the early company law directives against the background of changing power relations between labour and capital. Following the transformation of company law from an emphasis on 'industrial democracy' in the 1970s to a regulatory focus on 'shareholder democracy' from the 1990s onwards, the chapter illustrates how company law, and even more so corporate governance regulation, has become increasingly focused on the rights of shareholders, while worker rights have been relegated to the area of social policies and labour law. Concomitant to these changes in regulatory content, the chapter traces the shift from a programme centred on company law harmonisation towards a regulatory approach based on minimum requirements and mutual recognition, increasingly geared at adjusting the governance of corporations to the demands of liberalised capital markets.

Chapter five constitutes the empirical core of this study. The chapter proceeds by outlining the increasing marketisation of corporate control through an analysis of several key regulatory developments in the area of company law, corporate governance and capital market regulation. In particular, the chapter covers the struggle over the Takeover Directive, the Company Law Action Plan, the debate over the proportionality of ownership and control and the decisions of the European Court of Justice on incorporation and golden shares. These developments, it is argued, are part of a political project conducive to the marketisation of corporate control, in content as well as through the changing form and mode of regulation. The chapter then seeks to identify the social forces articulating, driving and, increasingly, contesting this political project.

The analysis in *chapter six* centres on the political processes underpinning the transformation of corporate governance regulation, using the conceptual framework laid out in chapter two. The discussion proceeds in three steps, in line with the broad research agenda set out in the introduction. Following an analysis of the content as well as form and mode of governance of the marketisation project, the chapter then discusses how these political processes have unfolded. Here, it is in particular through a discussion of the agency of the European Commission as a 'European state actor', as well as the role of expert committees as 'organic intellectuals' that the link between concrete strategies and the social interests underpinning them is emphasized. The last section sheds some light on the consequences of the regulatory transformation, and puts these developments in a broader perspective. Through a discussion of the implications of the marketisation of corporate control, the analysis centres on a number of explanatory threads highlighting the changing role and nature of European 'statehood' and the modern corporation, and linking them to the concrete manifestation of the marketisation project. Pointing to the emerging opposition to this process, the chapter then concludes with a reflection on the contradictions inherent in this manifestation of global capitalist restructuring.

The *conclusion* returns to the underlying research question, and points towards the contribution this study has sought to make. Moreover, some further research avenues are explored. Addressing the main findings in the light of recent developments in the global political economy and the politics of European integration, the dissertation then concludes with an outlook on the implications of the marketisation of corporate control on the 'fabric of society' (Polanyi 1957) within the broader dynamics of capitalist restructuring.

2 Theoretical Framework

This chapter discusses the theoretical foundations that underlie and guide this study, and seeks to outline a historical materialist framework for analysing the transformation of corporate governance regulation in the European Union. In contrast to the approaches discussed in the previous chapter, which lack an explanation for the emergence and change in concrete regulatory regimes, a critical political economy perspective allows for an analysis of the *politics* of corporate governance regulation, as it ‘recognizes the power relations, special interests, and arbitrariness contained in market forces and civil societal relations [..], and seeks to relate these to state power’ (Van Apeldoorn et. al. 2003: 20).

The theoretical framework is advanced in three main parts – not so as to suggest an analytical decoupling of theoretical concepts, but rather to allow room for discussion on different levels of abstraction. Taking critical social theory as a point of departure, the first section outlines the (meta)theoretical, methodological and conceptual underpinnings of the historical materialist framework employed in the empirical analysis. This outline remains brief, if not crude, since several key concepts will be discussed in more detail in the following sections, as well as in the analysis in chapter six. In the second section, the nature of the (listed) corporation in capitalist social relations, and the role of regulation will be discussed. Central to this discussion is the concept of the marketisation of corporate control and the concomitant process of commodification. In the next section, then, a historical materialist critique of theories of European integration sets the stage for an engagement with the above concepts in the dynamics of European state-formation and social, political and economic processes.

2.1 A Critical Political Economy Perspective

This study is situated within a growing body of historical materialist approaches in International Relations, and more particularly, International Political Economy. Here, Robert Cox’s (re)interpretation of Gramsci’s *Prison Notebooks* in a field which was then, and arguably still is, dominated by rationalist approaches premised on a positivist epistemology, led the way for neo-Gramscian scholars to question the established (world) order through asking how it came about in the first place, rather than accepting it as a structural, and constant, given (cf. Cox 1981: 129). Crucially, this critical approach is also borne out in the reflexive understanding of theory, as expressed in Cox’ famous dictum that ‘theory is always for someone and for some purpose' (Cox 1981: 128). As Marx argued in the development of the method of abstraction in *Grundrisse*, there is no understanding of social reality outside a historically specific context.

> The real object retains its autonomous existence outside the head just as before; namely as long as the head’s conduct is merely speculative, merely theoretical. Hence, in the theoretical method, too, the subject, society, must always be kept in mind as the presupposition (Marx 1973: 101-2).

Social theories, concepts and abstractions are always a product of the society in which they originate (cf. Van der Pijl 2007). To understand social reality from a position *within* it, abstraction is a necessary step to analyse the nature and contradictions underlying the social relations of production.

It is through the social relations of production that specific social processes are engendered.[11] In Cox’ words, ‘production creates the material basis for all forms of social existence, and the ways in which human efforts are combined in productive processes affect all other aspects of social life, including the polity’ (Cox 1987:1). Crucially, the social relations of production pertain to all aspects of production and reproduction of social relations; they are not limited to material, but also pertain to institutional and discursive forms (Cox 1981: 135-138). In a dialectical understanding of social reality, social forces are *constituted* in the context of these historically specific social relations, but not *determined*. Rejecting a reductionist perception of structure and agency, historical materialism advances a historicised understanding of structure and agency, in that structures are a result of strategies (i.e. agency) in the past. As Gramsci puts it, each individual is ‘the synthesis not only of existing relations, but of the history of these relations. He is a précis of all the past’ (Gramsci 1971: 353). Social processes are seen as open-ended, rather than following universal laws, or a teleological trajectory towards an ‘end of history’. Such a non-deterministic understanding underlies Gramsci’s argument that ‘politics in fact is at any given time the reflection of tendencies in the structure, but it is not necessarily the case that these tendencies must be realised’ (Gramsci 1971: 408).[12]

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[11] However, this is not to say that production lies at the heart of *all* social relations (e.g. gender, ethnicity, religion (cf. Cox 1987).

[12] There appears to be a notable ontological affinity between neo-Gramscian approaches, and a critical political economy perspective in general, and Critical Realism as put forward by Roy Bhaskar (cf. Van Apeldoorn 2002, 2004).

Class (fractions) and Hegemony

Social class forces are engendered by exploitative social structures. In Van der Pijl's words, 'by embodying the structural inequalities of the social order, classes constitute the living reality of these structures' (Van der Pijl 1998: 31). In the capitalist mode of production, characterised by private ownership of the means of production, the process of capital accumulation generates conflicting interests and structural cleavages between capital and labour. However, the fundamentally *unequal* social relations of production between workers and owners of capital are obscured by the seemingly voluntary nature of the exchange of labour as a commodity on the market (cf Woods 2002). The historically specific constitution of strategies and interests of social class forces can not be explained through a deterministic focus on the *structural* power of capital over labour (in a capitalist system, that would not make for a particularly exciting story). Rather, it is through concrete agency engendered by these structures, and the concomitant construction and articulation of hegemony (through coercion and consent), that social struggle and processes become manifest.

According to the capital fractions approach formulated by scholars of the so-called Amsterdam School, the functional fractionation of capital in the process of capitalist reproduction into money capital, commodity capital and productive capital shapes class fractions 'which share common orientations, interest definitions, and collective experiences' (Overbeek 1990: 24; cf. Van der Pijl 1984, 1998). Fractional interests become apparent in political strategies and ideologies; however in order to generate support from other social forces, that is to become hegemonic, they need to transcend their narrowly defined fractional focus in a moment of class formation (cf. Van der Pijl 1984, Van Apeldoorn 2002) and formulate a programme purporting to represent a 'general interest' shared by other social forces.

Hegemony is a form of class rule based on a combination of consent and coercion, with the former being the primary mechanism and the latter 'always looming in the background' (Gramsci 1971: 169-70). Gramsci identified hegemony as 'ethical-political' (Gramsci 1971: 161), highlighting the ideological and ideational aspects of hegemonic projects and rejecting a reductionist perception of hegemony as based on structural dominance or coercion alone. The articulation of a hegemonic project, according to Jessop (1990:208),

> involves the mobilization of support behind a concrete, national-popular program of action which asserts a general interest in the pursuit of objectives that explicitly or implicitly advance the long-term interests of

> the hegemonic class (fraction) and which also privileges particular 'economic-corporate' interests compatible with this programme.

The emergence and maintenance of a hegemonic project in a social formation is crucial for the 'necessary reciprocity' between structural junctures, that is the social relations of production, and the political and ideological superstructures that are shaped by, and at the same time shape, them; in short, 'the real dialectical process'(Gramsci 1971: 366). The dialectical concept of the 'historic bloc' rests on this reciprocal relationship between political/ideological configuration and economic structures. Here the notion of comprehensive *concepts of control* as employed by the capital fractions approach helps us to understand the relationship between the substance of hegemonic ideas and the underlying dynamics of capital accumulation through its reference to two 'proto' configurations of control engendered by the functional fractionation of capital, namely a productive capital and a money capital concept (Van der Pijl 1984:33, see below).

The formulation, and indeed viability of hegemonic projects hinges on the *organic* articulation of these interests in strategic programmes. Hegemony is not static; it is based on political struggle between social forces and as such by definition temporary, fluid and contested. To advance and maintain a hegemonic project, the transcendence of fractional interests has to be negotiated and organised.

Organic intellectuals – the 'permanent persuaders'

Here, as Gramsci maintained, 'organic intellectuals' constitute a crucial node of agency within a social formation. Through the organic link of intellectuals to (fractional) class interests, a coherent articulation of class interests is formulated, 'not only in the economic but also in the social and political fields' (Gramsci 1971: 5). The translation of these class interests into a broader, hegemonic project highlights the social function of organic intellectuals in

> bringing about not only a unison of economic and political aims, but also intellectual and moral unity, posing all questions around which the struggle rages not on a corporate but on a 'universal plain', and thus creating the hegemony of a fundamental social group over a series of subordinate groups (Gramsci 1971: 182).

In this understanding, organic intellectuals play a crucial role in formulating and consolidating the ideological and strategic underpinnings of a political project. Citing Gramsci, Bieler and Morton (2008: 121) write that 'it is their task to develop the "gastric juices" to digest competing conceptions of social order in conformity with a hegemonic project.' The concept constitutes a crucial element of agency for a neo-Gramscian understanding of political processes, that is the struggle for hegemony between social forces.

Gramsci contrasted the notion of the organic intellectual with what he called 'traditional intellectuals.' With this distinction, he sought to expose the 'social utopia by which the intellectuals think of themselves as 'independent', autonomous, endowed with a character of their own' (Gramsci 1971: 7-8). This 'social utopia', it could be argued, is precisely what emerges in perspectives on the role of intellectuals that do not take into consideration the 'organic link' between 'intellectuals' and their socio-economic configuration. Drawing on Weber, Mannheim famously stated that intellectuals constitute a 'relatively classless stratum which is not too firmly situated in the social order […] *freischwebende Intelligenz*' (Mannheim 1976: 138). This 'free-floating' nature of intellectuals 'was possible for intellectuals because they could adapt themselves to any viewpoint and because they and they alone were in a position to choose their affiliation' (Mannheim 1976: 140). The notion of the organic intellectuals clearly rejects this perception of intellectuals as unanchored in wider social structures (cf. Kurzman and Owens 2002). As Gramsci argued,

> the most widespread error of method seems to me that of having looked for this criterion of distinction in the *intrinsic nature of intellectual activities*, rather than in the ensemble of the system of relations in which these activities (and therefore the intellectual groups who personify them) have their place *within the general complex of social relations* (Gramsci 1971: 8, emphasis added).

At the same time, the role of experts in the regulatory process cannot necessarily be identified as an *immediate* translation and articulation of class interests. That is to say, the social function of experts is not dependent on class-consciousness. As Bieler and Morton point out (2008: 120), interests and political strategies are not simply defined by location of social class forces in production processes. Rather, the concept of the organic intellectual actually helps to decouple the role of actors from a too narrow focus on certain class positions. The 'organicity' (what Gramsci called 'organicitá') of intellectuals is not an *intrinsic* quality, but resides in the concrete interaction between social forces articulating, reproducing, or contesting a given political project. As Gramsci pointed out, 'the relationship between the intellectuals and the world of production is not as direct as it is with the fundamental social groups but is, in varying degrees, "mediated" by the whole fabric of society' (Gramsci 1971: 12). To understand the agency of organic intellectuals, we need to look at this 'fabric of society', or social structures; in particular the role of the state.

A strategic-relational understanding of the State

State formation is set in the context of historically specific configurations of social forces. 'The state' is not a transhistorical category – as Jessop argues, it constitutes 'a specific institutional ensemble with multiple boundaries, no institutional fixity and no pre-given formal or substantive unity (Jessop 1990: 267). The 'formation and superseding of unstable equilibria' between hegemonic classes and subordinate social groups (Gramsci 197: 182) lies at the heart of state dynamics. Civil society and political society are organically connected within the state formation, related through the underlying social relations of production.

Jessop's 'strategic-relational' approach to the state extends this neo-Gramscian perspective, conceptualising state power as 'a form-determined condensation of the balance of political forces' (Jessop 1990: 149). The state, then, is understood as *social relation* that reflects the changing balance of forces in a determinate conjuncture (cf. Jessop 1990; Poulantzas 1978). The state is seen as a site of strategy 'upon which different political forces attempt to impart a specific strategic direction to the individual or collective activities of its different branches' (Jessop 1990: 268). The state constitutes an institutional framework for a range of different strategies available to social forces. State strategies are produced by social forces within the state in the context of a social struggle for hegemony. Ideas, institutions (most notably, state form), and the relations of production are constitutive of social forces and mediate their relative power and ability to influence state strategies. However, the state is a system of *strategic selectivity*, in that its structures are more open to some types of political strategy than others (Jessop 1990: 260). As Jessop points out, the state is not autonomous in developing strategies.

> The state is not a neutral instrument equally accessible to all social forces and equally adaptable to all ends [...] it has an in-built, form-determined bias that makes it more open to capitalist influences and more readily mobilized for capitalist policies (Jessop 1990: 147-8, emphasis added).

The Social Construction of Markets

The capitalist state plays a key role in the social construction of markets. Crucially, the capitalist market system is historically specific and just *a* form of organising socio-economic life. As Polanyi argued, 'the temptation, in our own age, to regard the market economy as the natural goal of some three thousand years of Western development is overwhelming [..] Nothing could be more mistaken' (Polanyi 1977: 125). The perception that the capitalist mode of production, and the capitalist market system, function outside society and provide a space for organising economic life without political interference constitutes a 'stark utopia' (Polanyi 1957: 3). *Marketisation,* the construction and extension of the capitalist market and its mechanisms, is a political process. At the same time, it is a precondition for, and reflected in, profound changes in the social relations within a capitalist society. As Polanyi observed, the market economy, with its profit imperatives and asymmetrical power relations, means 'the running of society as an adjunct to the market' (Polanyi 1957: 57). The invasion of more and more dimensions of human (re)production by market relations, most notably the commodity form, constitutes a process of *commodification*, in which 'the lives of ever more people are determined by tendentially world-embracing market relations [..] subjected to an economic discipline which defines and treats them as commodities' (Van der Pijl 1998:8). As such, commodification and marketisation reflect different aspects of a fundamental societal process.

In the following section, a theoretical conceptualisation of the nature of the capitalist firm shows how this process of commodification takes place, and discusses the role of the capitalist state, and various social forces for the marketisation of corporate control.

2.2 A Critical Political Economy Perspective on Corporate Governance Regulation[13]

The corporate form is one of the predominant features of advanced capitalism. Premised upon the capitalist mode of production, the corporation is a historically specific way of organising the production and distribution of surplus value. In this section, a brief discussion of the political economy of the

[13] Parts of this section have been published as Bastiaan van Apeldoorn and Laura Horn (2007) The Marketisation of European Corporate Control: A Critical Political Economy Perspective' *New Political Economy* 12(2), 211 - 235

corporation provides the basis for (part of) the conceptual framework of this study. Here, the role of regulation, and hence the state, is crucial for the constitution and configuration of the power relations in the corporation. In particular, the marketisation, and concomitant commodification of the social relations that characterise the corporation will be conceptualised.

The modern corporation

The emergence and subsequent rise to dominance of the modern corporation marked a new stage in capitalist development. Already Marx noted that the joint-stock corporation facilitated ‘tremendous expansion in the scale of production and enterprises which would be impossible for individual capitals’, while also acknowledging the creation of *private* ownership of corporations in that ‘at the same time, enterprises that were previously government ones become social’ (Marx 1991: 567). The increasing scale of economic production indeed transcended the dimensions of the ‘traditional’ family-owned capitalist firm and government agencies. 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.

Economic sociology scholarship has offered important insights on the embeddedness of corporations in social structures. As Gregory Jackson points out, ‘corporate governance arrangements are not just driven by agency costs, but by many dimensions of interdependence between firms and their market, technical, cultural, social, political and institutional developments’ (Jackson 2000: 266). However, it is crucial to appreciate the corporation as, first and foremost, a capitalist institution, and as such predicated upon capitalist social relations of production. In particular in popular debates based on a pluralist perception of shareholders and stakeholders (e.g. Hutton 1995), the underlying power relations in the corporation, engendered by the social relations of productions are reiterated, rather than analysed.

Social power relations in the modern corporation

The question of corporate control stands at the centre of the social power relations in the modern corporation. Following the seminal study by Berle and Means, *The Modern Corporation* (1991[1932]), the struggle over corporate control has generally been attributed to the separation of legal claims to residual profit (in form of share ownership) and management of the corporation, and the potential conflicts of interests arising from this 'separation of ownership and control'. As Berle and Means claimed (1991:8), 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.

Corporate Governance

These social relations constituting the corporation, then, are structured through, and at the same time shape, corporate governance practices. 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 the law and economics perspective discussed in the previous chapter 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. Noting that, at the end of the day, the corporation entailed 'private production unchecked by private ownership', Marx rather critically observed that the corporate form seemed to 'reproduce[s] a new financial aristocracy, a new kind of parasites in the shape of company promoters, speculators and merely nominal directors; an entire system of swindling and cheating with respect to the promotion of companies, issue of shares, and share dealings' (Marx 1991: 569).

The debates about the nature and efficiency of various corporate governance mechanisms are legion, focusing mainly on the internal contradictions in the corporate form between different interests of the 'owners' of the corporation, as well as between capital and management (see Shleifer and Vishny 1997 for an overview of corporate governance mechanisms). Corporate governance has an internal, as well as an external dimension, with the former pertaining to the practices monitoring, steering and influencing organisational relations and issues within the corporation, while the latter refers to control mechanisms exercised from outside the corporation. Here, the stock market and in particular the market for corporate control play a central role. In the following, this external dimension of corporate governance will be further discussed, as it is here that social struggles over corporate control are most fundamental. The notion of the marketisation of corporate control will then be put in the context of corporate governance regulation. As Van Apeldoorn et al. point out (2007: 4-5), corporate governance practices are rule-governed. Corporate governance regulation, then, shapes, and, arguably, generates, the framework in which corporate governance takes place.

The Stock Market and the Market for Corporate Control

The capital or stock market, where shares in a corporation are listed and traded, is one of the most important sources of corporate finance, and, according to finance economists, allows for an efficient allocation of capital (Fama 1970). In his astute, if brief, discussion of the joint-stock corporation, Marx was rather critical of the role of the stock market for corporate control.

> Since ownership now exists in the form of shares, its movements and transfer become simply the result of stock-exchange dealings, where little fishes are gobbled up by the sharks, and sheep by the stock-exchange wolves (Marx 1991: 571; see also Harvey 2006: 272)

As Harvey points out, the stock market developed into a 'mere market for the circulation of property rights as such' (Harvey 2006: 299).

Although institutionally overlapping, an analytical distinction must be made between capital markets and markets for corporate control (Höpner 2003:

104). The market for corporate control is a fairly recent development in advanced capitalist societies (Windolf 1994; Wildenberg 1990). As a secondary market, it is dependent on the existence of a liquid and functioning capital market, but the commodity traded here is control linked to shares rather than the share as bearer of certain rights to residual profits. There is thus a qualitative difference between the capital market and the market for corporate control in that, whereas the former provides liquidity, the commodity traded on the latter is (control over) the very producer of commodities - in other words, the corporation itself (Fitch 1971: 166; Windolf 1994: 81).

In the market for corporate control the share price becomes a disciplinary device vis-à-vis management; it is thus seen as the external corporate governance mechanism par excellence to ensure the protection of shareholder interests, aligning managerial strategies with the latter (Manne 1965: 113). The evaluation of company performance takes place on financial criteria only – in the case of a takeover, ‘shareholders are not asked to evaluate complex alternative business plans for the company. Rather, they need only assess who is offering a higher value for their shares’ (Pound 1993: 1018). From this perspective, technical or structural barriers to takeovers are seen as detrimental to shareholder interests.

The Marketisation of Corporate Control - Deepening the Commodification of the Social Relation of the Corporation

A functioning market for corporate control allows for investors to exercise their exit option through the market (Hirschman 1970, Noteboom 1999). Even if a particular corporation may not itself be exposed to the threat of a hostile takeover (for instance, because of certain anti-takeover defences), shareholders of that firm may still obtain leverage over its management through the threat of exit, submitting the performance of firms to monitoring by the capital market and thus to a form of market-based control. The share price as overarching indicator of the *exchange value* of the corporation as commodity (Fitch 1971: 169) is thus established as the principal, and often exclusive, regulatory compass for corporate control. The process through which who controls the corporation, and to what purpose it is run, become increasingly mediated by the stock market - that is, through the share price as the regulative mechanism-, is defined as the *marketisation of corporate control*.

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: check page).

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 Reberioux 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.

Corporate governance regulation is constitutive of the very subject it pertains to regulate. The 'basic legal characteristics of the business corporation', which, according to a standard textbook (Kraakman et al 2004: 1), comprise 'legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership', all have to be established and guaranteed through the state.

The role of (state) regulation for the development and governance of the corporate form has been widely acknowledged in economic sociology research (cf. Roy 1997; Fligstein 2001), tracing the historical development of corporate law and the political contestation of the corporate form. Campbell and Lindberg (1990: 635), for instance, demonstrate that the state influences economic activity through 'state activities that define and enforce property rights, i.e. the rules that determine the conditions of ownership and control over the means of production.' This emphasis on the role of the state in reinforcing property relations is also dominant in Roy's historical account of the rise of the large-scale joint-stock corporation in the US (1997).

Even from an orthodox perspective on the function of corporate law, the significance of the quality of property rights for the corporate form is highlighted.

> By making this form widely available and user-friendly – i.e., b*y altering background property rights* and providing off-the-shelf housekeeping rules- corporate law enables entrepreneurs to transact easily through the medium of the corporate entity, and lowers the costs of business contracting (Kraakman et al 2004: 2, emphasis added)

Yet, as Gourevitch and Shinn point out (2005: 89), if corporate governance structures are indeed the result of political decisions, what explains the *content* of these regulations? 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.[14]

2.3 A Critical Political Economy Perspective on Corporate Governance Regulation in the European Union[15]

In this section, an attempt is made at contextualising the analysis of corporate governance regulation within a broadly historical materialist understanding of European Integration processes. Drawing upon an emerging literature of neo-Gramscian and other critical approaches to European integration processes, the section sets out with a discussion of European integration theories, and the nature and role of European 'statehood'. In order to understand the *qualitative* changes in the EU integration project, the central focus then is on how to approach the changing balance of social forces and social power struggles within the institutional structures of the European Union. In this context, regulation can be seen as part, and indeed juridico-political manifestation, of broader political projects of European integration.

[14] 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).

[15] Parts of this section draw on (Drahokoupil et. al. 2008).

In recent years, European integration theories have evolved from the debates between neo-functionalist and intergovernmentalist understandings of the nature of European integration (for prominent texts see Haas 1958; Moravcsik 1998). Broadly, where neofunctionalism sees the supranational actors and institutions of the European Union as driving the integration process, from an intergovernmentalist perspective it is the preferences of Member States governments and elites that control the integration process. In both approaches, the nation-state serves as point of reference, whether in terms of a relative decrease in power vis-à-vis supranational institutions, or as an assertion of state power in driving regional integration. While in its liberal reformulation intergovernmentalism acknowledged the role and influence of international developments on state preferences, the state-centric focus remained. At the same time, mirroring the dominant paradigm in International Relations, European Integration theories were more often than not based on rationalist and ahistorical assumptions about social actors and political processes. Moravcsik's perception of European integration as a 'series of rational choices made by national leaders who consistently pursued economic interests' (Moravcsik 1998: 3) might serve as an illustration here.

This state-centric bias in the literature on European integration has been challenged by approaches highlighting the multi-level nature of governance in the EU, resulting in a 'dispersion of authoritative decision-making across multiple territorial levels (Hooghe and Marks 2001: xi). The nation-state is seen as a crucial, but not exclusive, node of power within the political process of integration. However, as Ziltener points out (2000: 78; see also Van Apeldoorn et al 2003: 27-28), this multi-level analysis does not (seek to) explain the aims and objectives of integration, and is restricted by its institutional bias, that is, the focus on institutional form and level of governance. While historical institutionalist accounts (e.g. Pierson 1996; Fligstein/Stone Sweet 2002) stress the incremental and path-dependent development of institutions, they also stop short of explaining how these institutions are linked to and shaped by social forces in the integration process. Constructivist scholarship on EU processes and policies, in contrast, has focused on the political practices and discourses underlying the European polity (e.g. Christiansen et al 2001; Rosamond 2002), and highlights the ideational dimension of political processes. However, constructivist approaches tend to overemphasize the ideational at the expense of the underlying social and political struggles for power; while the social construction of policies and discourses at the EU level is well covered, the question then remains why certain discourses indeed become more important than others.

Apart from these approaches with a fairly well-defined theoretical perimeter, the focus on the EU as a ‘regulatory state’ (Majone 1996) has become increasingly prominent in EU studies, to the effect that ‘regulation’ seems to have become the new ‘globalisation’ in terms of broad conceptual woolliness. Acknowledging that providing a regulatory framework for capitalist markets is no longer the exclusive prerogative of nation-states within the European polity, the functional delegation and transfer of state powers to the supranational level came to stand at the centre of scholarly attention. According to Majone, ’the continuous growth of supranational regulation is not easily explained by traditional theories of Community policy making’ (Majone 1994: 86). In a multi-level policy-making system, the core question then became which level should be responsible for regulation (Eberlein and Grande 2005: 90). The regulatory state is associated with independent regulatory authorities and a strengthened role of the European Commission, while regulation was, initially, perceived as a functional outcome of the constraints posed on redistributive policies through the budgetary limitations of the EU – as Majone maintained, the only way for the Commission to increase its role in EU policy-making was to expand the scope of its regulatory framework (Majone 1994: 87). In contrast to this rather functional perception, Scharpf’s analysis has pointed towards the asymmetrical relation between negative and positive integration (Scharpf 1999; see also chapter 3). Crucially, the penetration of (monetary and economic) European policies into the domestic context of the Member States has not been balanced with an equivalent social policy on the EU level, effectively subjecting domestic social policies to the necessities and constraints of economic policies sustained on the European level (cf. Holman 2004). Rather than taking policies, and indeed the European polity as such, as given, the question of how and *why*, as well as to whose benefit, they came about is central for understanding the political nature of European integration processes.

A Critical Political Economy perspective on European Integration

This study is premised upon an understanding of European integration processes developed in the emerging literature of neo-Gramscian approaches (e.g. Bieler and Morton 2001; Van Apeldoorn 2002; Ryner and Cafruny 2003; Van Apeldoorn et. al. 2008). As Van Apeldoorn argues (2002: 11-13), rather then focusing on the level and mode of governance, a critical understanding of European integration takes as point of departure, that is, as its *problématique*, the social purpose of European order. European integration is here seen as a 'relatively autonomous regional expression of an emerging capitalist global political economy' (Van Apeldoorn et al 2003: 34). Consequently, this calls for an analysis of the dialectical, or rather, as Jessop puts it, 'reciprocal' interaction between two related sets of relations:

> first, the complex interaction between the institutional reorganization of European statehood within a broader set of political changes and its articulation to the reorganization of the capitalist mode of production on a world scale; and, second, the changing balance of forces that are attempting to shape or resist this double reorganization and to deploy the changed state capacities to promote new accumulation strategies, state projects and hegemonic visions (Jessop 2006: 143)

In the context of this study, analytical primacy will be given to the concrete political projects and transnational social forces manifested with regard to corporate restructuring and regulatory changes in the European arena. Here, the *transnational* perspective developed by the Amsterdam School (e.g. Van Apeldoorn et al 2003; Van Apeldoorn 2004) avoids the methodological nationalism prevalent in many of the approaches to EU integration. The neo-Gramscian conception of agency, with its dialectical understanding of ideational and material power, accommodates an analysis of how political projects are constructed, consolidated and contested through transnational social forces. The nature of the European 'state' form as a multi-level arena for these political struggles is critical to this understanding.

European state formation

As Ziltener argues (2000: 78-81), 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. The concept of strategic selectivity, as outlined in the previous section, 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. As it will be argued below, 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. Here, in particular the role of the European Commission as the central node of supranational agency needs to be discussed.

Agency within the European State Formation

The political agency of the European Commission has been covered extensively in the literature on European integration (e.g. Cini 1996; Page 1997; Hooghe 2001; Smith 2003). The Commission's role as a 'policy entrepreneur' and its formal and informal agenda setting powers (Pollack 1998), as well as its pivotal position as central administrative body of the EU, constitute important areas of study for understanding the European integration process. While it is generally acknowledged that 'the Commission' is not a *unitary* actor (Hooghe 2001), it is often perceived as either a bureaucratic actor doing the bidding of Member States, as in a generic intergovernmentalist perspective, or as an autonomous actor within the European polity. In particular, the latter is the case with supranational accounts of European integration (e.g. Sandholtz and Stone Sweet 1998).

The often stated (self-)appointment of the Commission as 'Guardian of the Treaties' serves, in fact, as a case in point of how the Commission is embedded within a particular configuration of transnational social forces, and a concomitant construction and articulation of interests. The vigorously interpreted safeguarding of the liberal freedoms enshrined in the Treaty of Rome through the political agency of the Commission can not be explained through a functional perspective on the role of the Commission within the institutional set-up of the European Union, but rather needs to be interpreted with regard to the content and objectives of concrete political projects. Supranational public actors, have considerable autonomy within their institutional domain, but, ultimately, have to be understood as social forces with social interests transcending functional or institutional relevance. This particularly pertains to the Commission, which in its institutional set-up, as well as its practices, has considerable autonomy vis-à-vis broader societal interests, but at the same time constitutes a crucial site for the realisation of political projects driven by social forces in the struggle for hegemony.

The European Court of Justice comprises another crucial node within the European state formation, in particular through its constitutionalisation of the freedoms enshrined in the Treaty. The famous Cassis de Dijon case, in 1979, has led to the introduction of the principle of mutual recognition in the internal market (see chapter 3), effectively establishing the primacy of European over national law (cf Scharpf 1999). According to Holman (2004: 719), the ECJ forms part of a new *trias politica* in European governance through ensuring the free movement of market forces in a de-regulated single market. Within the changing mode of governance in the European Union, the role of the ECJ is part of a process Gill has identified as 'New Constitutionalism', that is 'the separation of economic policies from broad political accountability in order to make governments more responsive to the discipline of market forces, and correspondingly less responsive to popular-democratic forces and processes (Gill 2001: 47). Indeed, as Harvey's writes, 'the separation of key market institutions from democratic accountability lies at the heart of the general neoliberal discourse (Harvey 2005: 66).

The role of the ECJ in the integration process has been discussed at some length in the legal and political science literature (e.g. Dehousse 1998; Garrett et al 2003). So far, however, a critical in-depth discussion of the actual agency of the ECJ, in particular in a relational perspective as it is situated in the structures of the European state formation, is still lacking. As the role of the ECJ is first and foremost reactive, its interaction with the European Commission in safeguarding a particular perception of the significance, as well as interpretation, of the treaty freedoms, needs to be understood better. The Court's decisions cannot be seen as autonomous, outside the context of political struggle. The agenda of the ECJ is determined by the parties bringing cases before the Court or requesting opinions, and the step to request ECJ intervention (or, for that matter, not) is in itself eminently *political.* It needs to be analysed in how far the Court's interpretation of European law fits within a particular political project for European integration.[16]

The Politics of Expertise in the Regulatory Process

Apart from European state actors, it is crucial to acknowledge the politics of expertise within the regulatory process. How knowledge and expertise shape the formation of public policies through the involvement of experts in the policy making process is an issue central to understanding European Integration (for an overview of the literature see Radaelli 1999). The question of 'when and how does knowledge matter' (Radaelli 1995: 160) has lead to a broad range of approaches and knowledge-based explanations of policy change in the literature on European governance. Whereas (liberal) intergovernmentalism notoriously does not perceive any significant influence of private groups on the policy making process (other than at the national level), supranational institutionalist accounts recognize the function of expert groups in the policy–making process (Fligstein and Sweet 2002: 1225). Yet even so, the interests and substantial involvement of these experts are not problematised at all (Van Apeldoorn et.al. 2003: 23).

Within studies on the role of expert knowledge in the European Union, the epistemic community concept has taken a central place in recent years (see e.g.Verdun 1999; Zito 1999; Van Waarden and Drahos 2003). In 1992, Adler and Haas called for 'turning the study of political process into a question about who learns what, when, to whose benefit and why?' (Adler and Haas 1992: 370). The concept of an epistemic community as a 'network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area' (Haas 1992: 3) has since had a great impact on the way the influence of expert knowledge in political processes has been conceived. The involvement of epistemic communities in policy-making processes, it is argued, 'narrow[s] the range within which political bargains can be struck (Adler and Haas 1992: 378). Part of the appeal of the epistemic communities approach no doubt lies in its 'straightforward but painstaking' criteria for categorizing and analysing the role of epistemic communities, and thus its empirical applicability (Haas 1992: 34).

[16] Due to the limits of a PhD Dissertation the role of the ECJ will not be conceptualised further here. I am grateful to Henk Overbeek and Bastiaan van Apeldoorn for raising many interesting questions on the role of the ECJ when discussing this manuscript.

Yet although epistemic communities are acknowledged as 'channels through which new ideas circulate from societies to government as well as from country to country' (Haas 1992: 27), the actual *content* and purpose of these ideas is not in any way subject to further analysis. Rather, the *form* and *mechanisms* through which epistemic communities exert influence on policy-making bodies stand at the centre of attention.

The functional argument that policy-makers turn to epistemic communities and expert groups in a context of uncertainty and complexity (Haas 1992: 14, cf. Radaelli 1999) obscures the political nature of the experts' involvement. The ideas and conceptions through which epistemic communities influence and shape policy proposals are seen as exogenous to the expert community; they appear to be formed within a political vacuum. Epistemic communities seem to be standing outside or above the continuous contestation, struggle and compromise that constitute political processes. Although it is acknowledged that, most crucially, 'members of an epistemic community share intersubjective understandings' (Haas 1992: 3, ftn 5), just how these ideas and causal beliefs relate to social structures co-constitutive of them, is left out of the picture. This 'add ideas and stir' approach to the politics of expertise, together with its rather actor-centred perspective, is a serious shortcoming, as it renders the epistemic communities approach unable to account for the social function these ideas, and with it the role of epistemic communities, necessarily assume. While it is acknowledged that epistemic communities can be instrumentalised (Adler and Haas 1992: 381) and that the authoritative position and reputation of epistemic communities are crucial factors for their influence on policy-makers (see, e.g. Verdun 1999: 321), the actual politics of expertise thus remain obscured. In fact, Adler and Haas strongly cautioned against using the notion of 'epistemic communities' beyond identifying and categorising expert committees. Their position is unambiguous and worth citing at some length.

> Epistemic community should not be mistaken for a new hegemonic actor that is the source of political and moral direction in society. Epistemic communities are not in the business of controlling societies; what they control is international problems. Their approach is *instrumental*, and their life limited to the time and space defined by the problem and its solution. Epistemic communities are neither philosophers, nor kings, nor philosopher-kings (Adler and Haas 1992: 371, emphasis added).

In this functional understanding, epistemic communities, and the ideas advocated and reproduced by them, are perceived as detached from social structures. In contrast, as outlined above, Gramsci's concept of the 'organic intellectuals' provides a perspective on the role of experts in the regulatory process which allows for an analysis of the social structures (and thus ultimately class interests) that underlie their agency.[17]

Political projects and Regulation

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

[17] However, it should be noted that the notion of organic intellectuals does not make for a generic concept for 'experts' to the extent that the concept of 'epistemic communities' is now often used in the literature.

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.

3 Global Capitalist Restructuring and Corporate Governance Regulation in the European Political Economy

The shareholder-oriented model of corporate governance - the point of reference in most debates, regardless of whether they be critical or in support of this perceived ‘standard model’ (Hansman and Kraakman 2001) - is a relatively recent phenomenon. As Aglietta and Rebérioux observe (2005: 2), ‘until the 1970s, corporate governance, though assuming a different form on each side of the Atlantic, nevertheless concurred on one point: the weakness of market mechanisms in general, and of capital market mechanisms in particular.’ A comprehensive account of how the practices and discourses of the shareholder model came to dominate policy debates in most capitalist economies from the 1990s onwards is beyond the scope of this study (see e.g. Lazonick and O’Sullivan 2000; Aglietta and Reberioux 2005). Still, while the focus of this analysis is primarily on the politics of regulatory transformation within EU integration, these developments need to be contextualised in the broader process of global capitalist restructuring.

In this chapter, the narrative background for the analysis of the transformation of corporate governance regulation in the European Union is presented. The chapter sets out with a *mise en scène* of the structural changes following the breakdown of embedded liberalism (Ruggie 1982) in the 1970s, and the subsequent rise of global finance. Here, the case of the developments in the US corporate governance system illustrates how these changes have become manifest within the US context. The next section then proceeds with an outline of the European integration process against this structural background. Drawing upon Van Apeldoorn’s analysis (2002) of rival projects for European integration, the changes in the capitalist dynamics underlying the integration process, as well as the changing configuration of dominant social forces, will be discussed.

Corporate governance regulation has until recently been the prerogative of the nation-state, and the development of EU regulation is also closely linked to scope, content and timing of Member State regulatory initiatives. Hence, the third section then sketches the changes in the corporate governance systems of the United Kingdom, France and Germany. From a comparative focus, these specific corporate governance regimes are commonly understood as representative of the ideal-types of, respectively, market-based, or ‘Anglo-Saxon’; state-led, or ‘dirigiste’; and network based, or ‘Rhenish’, corporate governance systems. As the concluding section points out, despite the persistence of institutional diversity, there are several common trajectories (Hay 2004) which can be discerned in the changes in these national systems.

3.1 Global Capitalist restructuring

With the breakdown of the post-war economic order, global capitalism entered into a phase of fundamental restructuring.[18] Through the initiation of the Marshal Plan for European restructuring, as well as geopolitical strategies such as the establishment of NATO, Europe had increasingly been incorporated into the hegemonic sphere of the US, with a concomitant extrapolation of corporate liberalism to Western Europe (Van der Pijl 1998: 152-3; cf. Helleiner 1994). The historical configuration, or 'form of state' (Cox 1981: 138-9), of corporate liberalism (Van der Pijl 1984; 1998) rested on the sustained growth period of the Fordist production regime that lasted into the 1950s and 1960s, characterised by high growth and employment rates through Keynesian demand management, paired with mass production for mass consumers and rising real wages. Corporate liberalism was characterised by a synthesis between the interests of industrial capital and financial capital, with a regulatory framework in which the latter was linked to the interests of the former through state intervention. As Van der Pijl (1993: 33) argues, in this process the 'cadre class' of professional managers here played a crucial role as 'the foremost social force in the drive for regulating the capitalist world economy [..] Its preference for regulation over liberal capitalism was a function of its role in advanced capitalist society and in the course of a century had matured into a set of explicit doctrines, such as reformism, managerialism, technocracy and the 'end of ideology.'

With the rise of corporate liberalism, the modern corporation became the central organisation of industrialised capitalist societies. The 'heyday of managerial capitalism' (Dore et al 1999: 109) gave space to a relatively autonomous managerial cadre class which also had a key role in negotiating the class compromises on which post-war 'embedded liberalism' was based (Ruggie 1982). Fordism, as the dominant form of the organisation of economic production, concurred with an increasing elimination of barriers to international trade through the General Agreement of Trade and Tariffs (GATT) and stable exchange rates sustained by the Bretton Woods system at international level. At the level of the state and society, the post-war national welfare states were characterised by Keynesian macroeconomic and social policies. However, with

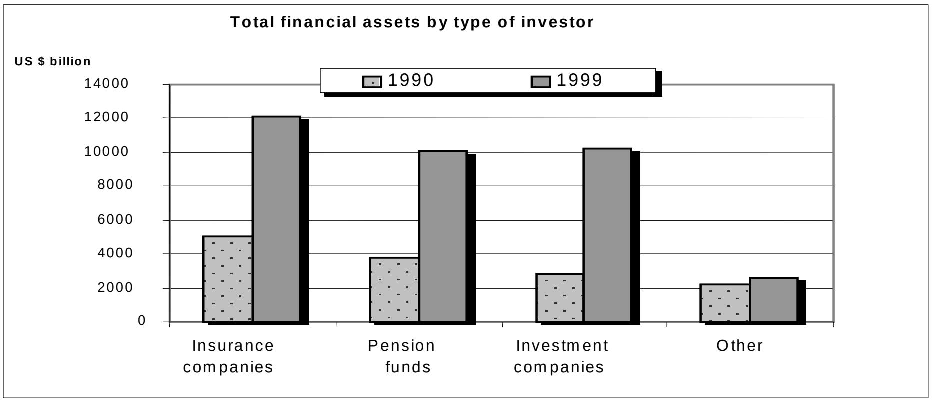
[18] For detailed studies on the post-war financial order and the political decisions contributinmg to the globalisation of finance see e.g. (Helleiner 1994).

the collapse of the international financial system in 1971-3, and the subsequent liberalisation of global capital markets, the political stability of corporate liberalism was increasingly undermined by political decisions for deregulating financial markets. While under the Bretton Woods system financial and monetary issues had been regulated at national level, the abolition of capital controls led to an increasing subordination of national financial and economic policies to the exigencies of global capital markets, as it became more and more difficult for governments to control financial markets (Helleiner 1994: 146-68). Crucially, the collapse of Bretton Woods coincided with the rise of (at that time predominantly American) finance, in an international as well as the domestic arena (see also the section on US corporate governance developments). The emergence of Eurodollar markets in the 1960s in London contributed to the destabilisation of the post-war financial order. The fixed exchange rate regime regulated through the Bretton Woods institutions was no longer sustainable. The economic growth of the post-war period had fuelled an increasing demand for capital, with more and more corporations involved in vertical and horizontal expansion, increasingly on an international scale. This expansion of the international economy increased the demand for international capital liquidity, which in turn entailed an increase in US dollar liquidity. The concomitant capital outflow, as well as the emerging trade deficit, put increased pressure on the US dollar. In 1971, under domestic political pressures, notably in the context of an increasingly neoliberal discourse on monetary policy, the Nixon administration reacted to these challenges to the position of the dollar by ending the convertibility of dollar to gold, followed shortly afterwards by dollar devaluation and the abolition of capital controls (Helleiner 1994, cf. Van der Pijl 1984). This move to abandon the gold standard has been interpreted by Gowan (1999: 19) as ‘part of a strategy for restoring the dominance of US capitals through turning the international monetary system into a dollar-standard regime.’

Concurrent to the breakdown of the post-war international financial order, the domestic, class-compromise based foundations of corporate liberalism were undermined. Towards the end of the 1960s productivity had slowed down, while wages had progressively increased owing to, amongst other reasons, the increased bargaining power of organised labour. This further exposed the contradictions between what the Regulation school has called the Fordist regime of accumulation, and the Fordist mode of regulation (cf Aglietta 1979; Boyer 1990).

The crisis of the Fordist system unfolded through the deregulation and liberalisation of financial markets (see also the sections on the US, UK, Germany and France below). As Overbeek and Van der Pijl point out (1993:13), 'capital embarked on a restructuration on a global scale, with money capital, freed from Keynesian controls since the 1960s, playing a crucial role.' The increased liquidity and growth of capital markets engendered a restructuring of corporate financing. In the 1980s, new financial actors emerged, in particular institutional investors, with shorter time horizons and higher expectations on return. Institutional investors are defined as 'specialised financial institutions that manage savings collectively on behalf of other investors based on specific objectives in terms of acceptable risk, return maximisation and maturity of claims (BIS 2007: 1; cf. Davies and Steil 2001). This includes insurance companies, pension funds and investment companies such as mutual funds and hedge funds. Table 3.1. indicates the rapid increase of the financial assets of institutional investors in the 1990s.

Table 3.1. Total financial assets by type of investor, OECD 1990/1999



Source: OECD Financial Market Trends (2001:50)

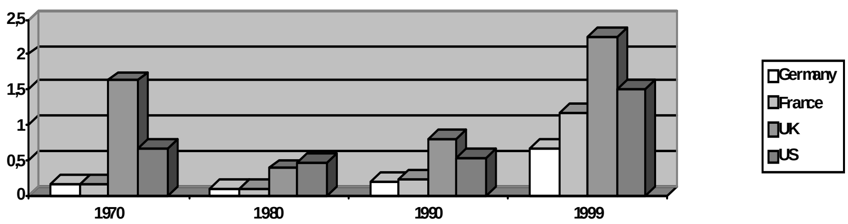
Within seven years, the total assets held by these institutional actors had doubled to 28 700 billion US$. In 2006, this figure had risen to 46000 bn US$ (BIS 2007: 5). On the supply side, the emergence of institutional investors, as well as the consolidation and reorientation of the banking system (Helleiner 1994: 186), led to a relative shift from 'traditional' bank loans towards shares and derivatives as sources of finance. This was reinforced through the concurrent globalisation of production and the rise of transnational corporations

(TNC), enabled by the mobility and liquidity granted to corporate strategies through the new forms of finance.[19] Global financial restructuring entailed an increasing competition for capital between corporations on globalised equity markets. At the same time, it facilitated a significant increase in cross-border mergers and acquisitions (M&As). The volume of M&As on a global scale increased from $bn 151 in 1990 to $bn 720 at the height of global corporate restructuring in 1999 (Unctad 2000: xix). Corporate expansion through acquisition became the corporate strategy of choice, or, rather, of necessity, as expressed in UNCTAD's observation that

> cross-border M&As allow firms rapidly to acquire a portfolio of locational assets which has become a key source of competitive strength in a globalizing economy. [..] Even firms that would not want to jump on the bandwaggon may feel that they have to, for fear of becoming targets themselves (Unctad 2000: xxi).

In this 'global market for firms', shares of corporations were also increasingly turned into the medium through which M&As were financed (Unctad 2000: 113).[20] As the rising stock market capitalisation ratio in table 3.2. illustrates, the role of the stock market has strenghtened considerably within industrialised market economies.

Table 3.2. Evolution of stock market capitalisation over GDP[21]



Source: (Rajan and Zingales 2003: 15)

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[19] The increased power of TNC's vis-à-vis both labour and the regulatory scope of the nation-state has been interpreted as contributing to the inevitable retreat of the state (cf. Strange 1996). Interestingly enough, the state is still more relevant then ever. For a broad overview of the discussion of the role of the state in the 'globalisation' debates, see (Bruff 2005).

[20] Several of the largest M&As in the 1990s such as the 1998 Daimler-Benz/Chrysler deal have been financed with stock rather than cash (Unctad 2000: 113). In contrast to that, until recently (that is, before the credit crunch in mid-2007), M&As have increasingly been cash-only deals, due to 'excess liquidity' on corporate balance sheets which increased the risk of becoming a target for bids.

[21] Stock market capitalisation to GDP is the ration of the aggregate market value of equity of domestic companies to GDP.

Banks and law companies increasingly focused on M&As, with investment banks becoming indispensable in supplying financial and organisational support to deals. As Dore argues (2002: 117), for the organisational form of the corporation, the process of financialisation implies

> the increasing dominance of the finance industry in the sum total of economic activity, of financial controllers in the management of corporations, of financial assets among total assets, of marketised securities and particularly equities among financial assets, of the stock market as a market for corporate control in determining corporate strategies, and of fluctuations in the stock market as a determinant of business cycles.

Crucially, this process needs to be facilitated through political agency, 'institutional reforms undertaken with the aim of favouring the tradability of securities and risks' (Aglietta and Reberioux 2005: 3). An important factor here is the diffusion of the shareholder value paradigm and financial media (through, for instance, corporate governance codes (see e.g. OECD 1999; 2004). The following endorsement by *The Economist* in 1994 serves as an illustration of the pervasive seductively simple logic of the shareholder value paradigm.

> Putting other stakeholders before shareholders would reduce share value, and so reduce the willingness of investors to buy shares. By putting shareholder value first, firms will encourage them to invest more. As a result, over the economy as a whole, there will be more jobs, more work for suppliers, and better products for customers.[22]

At the same time, this rise of the 'shareholder ideology' (Lazonick and O'Sullivan 2000) is engendered by the structural changes outlined above.

To put these structural developments into context, and illustrate in how far they have been the outcome of political choices, rather than a self-sustaining process, the following section briefly examines the developments in corporate financing and governance in the US. The US has played a dominant role within the restructuring of financial markets (cf. Gowan 1999), not only due to its structural power, but also due to the dominance and discursive diffusion of its institutional and regulatory framework. It is here that the concept of 'shareholder value' is most commonly understood to have originated.

[22] The discursive construction of shareholder value and how it links to the political project of the marketisation of corporate control will be discussed in a later chapter.

3.1.1 Corporate governance in the United States

The US corporate governance system constitutes a prime instance of how these structural developments have manifested in a national context, while, at the same time, due to the hegemonic position of the US political economy, domestic developments in the US, both regulatory as well as with regard to corporate financing and pension funding, have fuelled the rise of global financial markets. Crucially, the US system of corporate governance - which, at least until the corporate scandals of 2001, has been hailed as the 'standard model' of corporate governance by policy makers and many academics – has only come about from the 1970s onwards, with the political debate on corporate governance fuelled by hostile takeover wave in the 1980s. This section seeks to briefly sketch the regulatory developments enabling the shift from the Fordist US corporate governance system very much characterised by large corporations under managerial control, with long-term planning horizons and stable sources of capital (Cioffi 2006: 537) to a market-driven financial system with institutional investors as central actors, with management interests aligned through sky-high executive remuneration and an active market for corporate control (see Gourevitch and Shinn 2005: 241-259 for an in-depth discussion of the changing interest coalitions driving these changes).

The role of the state was critical for the inception of the US corporate governance regime. Against the backdrop of the 1929 market crash, and in the framework of the New Deal, US regulation of financial markets had been fundamentally restructured. As Roe (1993) shows, through a series of state laws in the 1930s the concentration of corporate control in the hands of banks and financial institutions was to be prevented. Under the Glass-Steagall Act, commercial banking was separated from investment banking, and the powerful Securities and Exchange Commission (SEC), established in 1934, monitored stock market transactions and enforced transparency requirements to safeguard shareholder protection. Ownership dispersion and legal protection from takeovers gave rise to, as Berle and Means observed in *The Modern Corporation,* a relatively autonomous managerial class. Relative, that is, vis-à-vis the shareholders of the corporation; workers and organised labour had no participation rights in US corporate governance to start with. The emergence of this managerial corporate cadre constituted a crucial element in the rise of 'corporate liberalism' (see also chapter 2).

From the mid 1970s onwards the growing dispersion of ownership, conglomerisation and subsequent managerial failures came under increasing criticism. Changes in pension fund legislation, most notably the 1974 Employment Retirement Income Security Act (ERISA), led to an exponential increase of pension fund finance, with pension funds emerging as institutional investors, and important political actors in the context of corporate governance and beyond. With the expansion and consolidation of investment strategies, pension funds expanded and began to seek a more active role in corporate governance (with CalPERS as a prime example). Concomitant to the rise of institutional investors and their increased 'shareholder activism' (Useem 1993), a wave of hostile takeovers occurred in the 1980s, at the heyday of Reagonomics.[23] In the 'deal decade', buy-out firms staged high-profile hostile takeovers financed through highly leveraged debt financing (Blair 1993). The often aggressive tactics of the 'corporate raiders', in concert with the astonishing leverage of many bids and the equally fantastic and creative repertoire of management defenses has been covered extensively in the literature (cf. Henwood 1999). The events also gave much currency to the agency perspective on corporate governance, which interpreted the takeover wave as a capital market response to corporate governance deficiencies (Jensen 1993). Despite public disapproval of corporate excesses and the consequences of corporate restructuring (in particular deconglomerisation and mass lay-offs), epitomized by Gordon Gecko in Oliver Stone's *Wall Street*, the shareholder value discourse had been introduced firmly into the broader discussion of corporate organisation in the US. As Lazonick and O'Sullivan argue (2000:18),

> In the name of 'creating shareholder value', the past two decades have witnessed a marked shift in the strategic orientation of top corporate managers in the allocation of corporate resources and returns away from 'retain and reinvest' and towards 'downsize and distribute.'

In the wake of the takeover wave, however, managers pushed back and lobbied for anti-takeover regulation (Roe 1993). While they had to make considerable concessions to activist stakeholders in the boardroom, extensive anti-takeover legislation was imposed across a range of several states in the late 1980s. In addition to that, US federal corporate governance policy paid increased attention to takeover practices and leveraged buyouts in the 1990s (Cioffi 2006: 544). As managers were free from takeover threats, executive remuneration,

[23] The Reagan period culminated in the rise of the Chicago-School and the general rentrenchment of the state from the enforcement of antitrust regulations (cf Wigger 2008).

which had until the 1980s not been closely linked to stock-market performance, increased dramatically, on the basis of salaries and bonuses but more importantly through stock options (cf. Erturk et.al 2004:689-693). At the same time, employee stock option plans (ESOPs) also became a wide-spread practice, which together with defined contribution (most prominently the 401(k) type) pension plans tied worker's interests closer to the performance of a corporation's market performance (Gourevitch and Shin 2005: 253-254). 'Creating shareholder value' (Rapaport 1998) through increasing share prices was elevated to the mantra of a decade

The US corporate governance model, as Aglietta and Rebérioux (2005: 56) point out, was increasingly 'characterized by the importance it accords to the liquidity of financial markets.' This resonates in, and is to some extent conditioned upon, the highly developed body of federal financial market laws, supervised by the SEC, whereas corporate law is mainly left to the state level. Following the rapid internationalisation of institutional investors' portfolio, increasingly investing in foreign shares and markets, as well as the growing number of corporations seeking a US listing, US capital markets and the regulatory regime came under increasing competitive pressure (Lütz 2002: 212-213). The central role of the SEC was here reinforced through the strong insistence on US financial market and accounting standards for foreign companies and financial service firms operating in US markets.

As part of the political drive for market deregulation under the Reagan administration, strong regulation and supervision were more and more perceived as obstacles. A political front of Wall Street intermediaries, accounting firms, securities industry representatives and academics (see also the discussion of the law and economic literature in the introduction) increasingly lobbied for deregulation and more competitive financial market structures (Gourevitch and Shinn 2005: 255). According to Cioffi (2006: 544-5), federal regulation was caught in a tension between the protection of shareholder interests through increased transparency, while at the same time encouraging the role of institutional investors in monitoring and cooperating with management.

Regulatory developments after the corporate scandals 2001-02

Following the burst of the stock market bubble in 2000, a series of corporate scandals in 2001 and 2002 led to frenzied regulatory responses, resulting in the most comprehensive corporate governance reform in the US since 1934 (Cioffi 2006:547). Auditing and accounting failures were at the heart of these corporate scandals: Enron had hidden massive balance sheet liabilities and constructed a fantastic network of financing around its credit rating, while WorldCom had manipulated earnings on a massive scale (see Sablowski 2003 for an in-depth discussion of Enron in the context of financial capitalism). These issues were not confined to governance problems with transparency or auditing. Rather, as Erturk et al point out (2004: 702), 'both Enron and WorldCom operated in an economic space created by neoliberal deregulation and privatisation.'

In response to these corporate scandals, in July 2002 the Sarbanes-Oxley Act (or 'Public Company Accounting Reform and Investor Protection Act of 2002') was signed, concerning all corporations listed on US markets and focusing mainly on accounting, auditing and corporate governance issues (see Gourevitch and Shin 2005: 256-259 and Cioffi 2006: 545–549 on the legislative process of Sarbanes-Oxley). Sarbanes-Oxley, amongst other provisions, created an oversight board for auditors, mandated enhanced financial disclosure and introduced corporate responsibility of senior executives for the accuracy of disclosure. While Sarbanes-Oxley was (and still is) highly controversial, in particular with regard to the additional costs corporations faced, from a critical view the question remains whether it was an appropriate response to the structural problems revealed in the corporate scandals. As Aglietta and Rebérioux argue, 'the Sarbanes-Oxley Act can be summed up as follows: shareholder value is good, but its monitoring system failed. It is thus advisable to reinforce shareholders' means of control' (2005: 246). Indeed, Cioffi suggests that Sarbanes-Oxley did not represent a 'fundamental break with the established institutional arrangements and power relations of American corporate governance as did the New Deal reforms of the 1930s' (Cioffi 2006: 560). According to him, the US corporate governance model now embodies a 'complementary and mutually reinforcing relationship between the market-driven financial system and a legalistic, transparency-based regulatory regime' (Cioffi 2006: 539). The role of the state, both on the federal as well as, with regard to corporate law, on the state level, in (de-)regulating corporate governance has been crucial. While regulation has often been reactive, at times it was state regulation which has brought about, or heavily influenced, the broader trajectory of corporate development and finance.

The following section now turns to the process of capitalist restructuring in European integration. On the one hand, this serves as background for the discussion of changes in the corporate governance system of the UK, Germany and France in the section thereafter. What is more, the following section also provides the structural frame for the concrete regulatory and legislative developments covered in chapter four and five.

3.2 Capitalist restructuring in the European Union

This section provides an overview of capitalist restructuring in the European Union, in particular following the 'extended relaunch' of the Single Market programme in the 1980s. Against the backdrop of the changes in the global political economy, the focus is here on the changing political dynamics, and concomitant regulatory governance, as well as on developments in market integration and corporate organisation in the European Union.

European integration and the crisis of the corporate liberal order in the 1970s

The post-war development of European economies was marked by 'embedded liberalism' (Ruggie 1982), or, as outlined above, a corporate liberal order. The creation of a customs union and enhanced cooperation within the iron, steel and coal sectors (ECSC) in the European Economic Community constituted an important aspect of the post-war project for capitalist restructuring in Europe. At the same time, European integration did not take place in a political vacuum, rather it has to be seen as a regional component in the post-war reconstruction of world capitalism (Cocks 1980: 26; cf. Van der Pijl 1998). The common market, anticipated in the Treaty of Rome (1957), was to facilitate competition and economies of scale for companies in the EEC. With increasing trade liberalisation in the context of GATT, European Member States were increasingly integrated into the global political economy. Against the background of Bretton Woods, there was little macroeconomic cooperation on the EEC level; governments retained direct control over fiscal and monetary policies (Tsoukalis 1993: 21). At the same time, Member States structured socio-economic regulation through welfare states based on predominantly Keynesian policies to ensure full employment and productivity. On the political level, the compromise of embedded liberalism, combining trade liberalism on the international level with demand-side economic policies on the national level, was sustained through a strong social-democratic momentum. According to Van der Pijl (1993: 35), 'social democracy after the war became the dominant political expression of the regulatory impulses of the capitalist cadre class.'

Within the emerging European institutions, in particular the European Commission - which was in that period strongly influenced by German Ordoliberals such as Walter Hallstein (1958-62) or Hans van der Gröben (1963-1967) - competition policy became a key supranational policy area (Wigger 2008: 142-150). As for corporate organisation, the Commission encouraged the opening of markets and the formation of Eurochampions in the 1960s.

Companies benefited from the removal of tariffs across the EEC and enhanced market access for trade. In the absence of highly developed capital market discipline, corporate control remained with large blockholders (e.g. banks, other industrial corporations, families, depending on the configuration of capitalist organisation) or the state. Corporate activities were thus embedded in a network of social and political relations, which constrained and at the same time enabled economic strategies.

Following the breakdown of Bretton Woods and the demise of 'embedded liberalism' on the international level, the end of the 'golden age' of corporate liberalism in Europe became manifest in the 1970s. Growth rates in Western Europe decelerated rapidly, from about 5 per cent to about 1 per cent in the early 1980s (Story and Walter 1997: 11). Concomitantly, declining rates of investment and productivity resulted in increased unemployment; paired with rising inflation rates this led to a period of sustained stagflation in 1973-1980 (Tsoukalis 1993: 36-37). Member States increasingly sought to protect national industries from the pressure from American, and later Japanese competition,[24] focusing on national protectionist strategies rather than EC level industrial policies. However, as Member States had already been integrated into a liberalised international trade regime (in particular through the GATT), and some coordination (in particular non-tariff agreements) on the Community level had been agreed upon, protectionist industrial policies proceeded mainly through encouraging the creation of national champions and far-reaching state aid. The Commission tried to strengthen the role of the Community through common EC policy, but in the wake of the economic crisis Member States were unwilling to commit to further integration. The economic crisis on the national level was often blamed on the extensive welfare state structures, in particular rigid labour markets and the strong position of organised labour in the welfare states. The corporatist organisation of labour in European welfare states was seen as serious obstacle for the restructuring of capital (Taylor and Mathers 2002: 43). At the same time, social and political unrest was high in the Member States, in particular manifested in strikes (such as the Miner's Strike in the UK, 1972/1974). Capital had to make concessions to labour in order to safeguard production. While social policy had always been the prerogative of the Member States, at least on the surface the role of labour was acknowledged in the EC context. At the 1972 Paris Summit, the Member States 'emphasised that vigorous action in the social sphere is to them just as important as achieving Economic and Monetary Union. They consider it absolutely necessary to secure an increasing share by both sides of industry in the Community's economic and

[24] Servan-Schreiber's political essay *The American Challenge* (*Le Défi Américain),* published in 1967, had set the tone of economic competition between the US and Europe

social decisions'(EC Bulletin 1972: 19). As it will be shown in chapter four, this process was also apparent in the development of company law.

Towards the late 1970s, with several conservative governments coming to power in Member States, national responses to the crises increasingly entailed changes in monetary and labour policies. In particular the shift towards monetarist policies with an emphasis on austere budgets, concomitant to the creation of the European Monetary System, pegged to the German Mark and mainly steered by the monetarist policies of the Bundesbank, constituted an important node in the emerging neoliberal restructuring of European integration (cf. Gill 1992: 169).

The Single Market Programme

From the early 1980s onwards, attempts were staged to establish the European Single Market, free from the interventionist, or market-correcting, mechanisms of the welfare state. The relaunch of European Integration in 1985 was committed to enhancing competition through deregulating the market for goods, capital, services and labour.

Van Apeldoorn's (2002) analysis of the process and social struggle over the relaunch of the Single Market has identified three political projects tied up with the Single Market programme. All three projects favoured a relaunching of Europe through a completion of the internal market, but they fundamentally differed on what kind of European market it was to be. In the neo-mercantilist conception, the objective of European integration was primarily seen as creating a big home market for European champions, which could then compete with American and Japanese competitors. In contrast, the social democratic project, illustrated in Delors' idea of a European 'organized space' (*espace organisé*), had as its aim to promote and protect a 'European Social Model', regulated on the supranational level. The neo-liberal project emphasized the liberalisation of European markets and advanced a competitive discourse promoting global competition, in product as well as capital markets (see Van Apeldoorn 2002: 78-82)

Van Apeldoorn has here pointed towards the crucial role of the European Roundtable of Industrialists in this process, in particular with regard to the dividing line between the 'globalist' fraction of European capital, including financial capital, and a 'Europeanist' fraction of industrial entreprises operating mainly on the European market. While the perspective of the former has tended towards neoliberalism, the latter promoted the neo-mercantilist project (Van Apeldoorn 2002: 117ff). As will be argued later on (see chapter five), within the marketisation of corporate control the agency of capital class fractions has been less direct in the political process, but is none the less apparent in the support and push for certain policies.

The 1985 White Book launched the Single Market programme and introduced the principle of mutual recognition as a mechanism for market integration, setting out an ambitious liberalisation programme. As mutual recognition did not apply to financial markets, a number of financial market reforms were instigated, in particular with regard to capital movement and the European banking sector (Tsoukalis 1993: 122f). Also, the 1989 merger control regulation constituted an extensive reinforcement of competition policy competences of the Commission (cf. Wigger 2008).

Concomitant to the neoliberal restructuring of the Single Market programme was the 'disciplinary neo-liberalism' (Gill 1998) of the Economic and Monetary Union (EMU). The constraints of the Maastricht convergence criteria and, later, the Stability and Growth Pact, with an emphasis on low public deficits and monetarist, anti-inflationary policies, made it more and more difficult for Member States to finance welfare state expansion, while the EU budget remains limited, or almost nonexistent, with regard to (redistributive) social policies. EMU here linked the process of European integration with retrenchment and cuts in welfare and public spending. As Taylor and Mathers argue (2002: 44), while there was resistance to this these developments (in particular related to fears of 'social dumping'), 'established forms of corporatism were transformed into mechanisms for facilitating neo-liberal restructuring and new forms of partnerships were introduced wherever the labour movement posed a substantial obstacle to the neo-liberal project' (Taylor and Mathers 2002: 44). Here, the role of trade union organisations on the EU level has to be seen in this context. 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 Partnership institutionalised in the Social Dialogue provided that 'the Commission shall endeavor to develop the dialogue between management and labor at European level which could, if the two sides consider it desirable, lead to relations based on agreement. Art 118 social dialogue'.[25]

However, the Social Dialogue is confined to a non-binding, consultative status. In this context, as Streeck and Schmitter have argued (1991: 141),

> to protect the Brussels body politic from contagion by the neocorporatist disease that befell European nation-states in the 1970s, all business had to do was refuse its European peak associations the competence to enter into binding obligations on behalf of their national constituents.

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 are mostly symbolic (cf. Tidow 2003). As labour market flexibility was seen as one of the main problems for European competitiveness, illustrated for instance in the 1994 White Paper on *Growth, Competitiveness and Employment*, the onus was thus on labour to bear the brunt of the social costs of the neoliberal project (van Apeldoorn 2002: 173-5). At the same time, under the 'new constitutionalism' underlying European integration (Gill 1998, see also chapter two), macro-economic decision making was increasingly isolated from democratic control. In this regard, as Schulten points out, 'unions are expected to support those integration projects which further undermine social regulation in Europe [..] but [..] lack the power to counteract the market-dominated form of integration' (Schulten 2003, cited in Hyman 2005: 20).

Financial market integration in the EU

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 (cf. Van Apeldoorn 2002; see also Bieling 2003).

[25] For more information on the Social Dialogue see (Bieling and Schulten 2003), or see the website of the Social Dialogue, available at http://ec.europa.eu/employment_social/social_dialogue/index_en.htm (last accessed 21 July 2008)

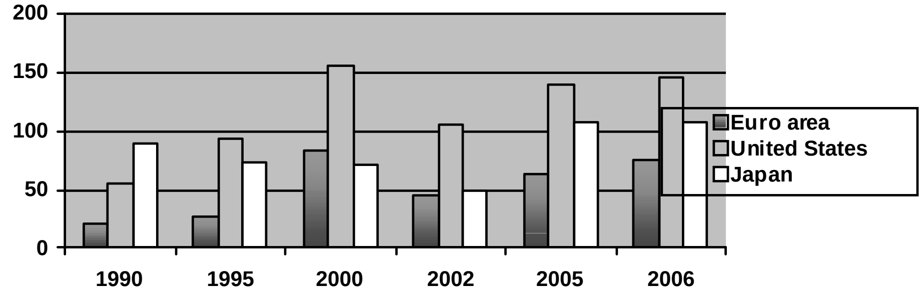
The reinvigorated neoliberal project to accelerate and complete the creation of the single financial market started with the Cardiff Council of 1998, which called for the Commission to develop an action plan for removing the remaining obstacles to an integrated financial market (see Bieling and Steinhilber 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). These developments then led up to the Commission's Financial Services Action Plan (FSAP) drawn up in 1999 (European Commission 1999). 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. The FSAP constitutes an integral part of the Commission's 'Lisbon strategy', which articulates the goal of competitiveness with that of 'social cohesion', but in a way that makes the latter subordinate to the exigencies of the former, as defined by a neoliberal competitiveness discourse underpinning the neoliberal integration project, and widening its appeal across different social forces (Van Apeldoorn 2002: 173-80). Although the Lisbon 'reform process' has recently come under much criticism because of its lack of implementation, most progress has in fact been made in the area of financial market integration under the heading of the FSAP.

The increasing integration of capital and financial markets in the European Union from the 1990s onwards was concomitant to, and to some extent also shaped, changes in corporate finance and restructuring.

> During a first phase, which lasted approximately until 2001, access to market financing in the euro area increased significantly, with corporations benefiting from the development of corporate bond and equity markets. The removal of currency risk in 1999 and the trend toward financial market integration also acted as catalysts for the development of market-based financing sources (ECB 2007a: 11).

Stock market capitalisation in the Euro area increased considerably until the stock market crisis of 2001 (see Table 3.3).

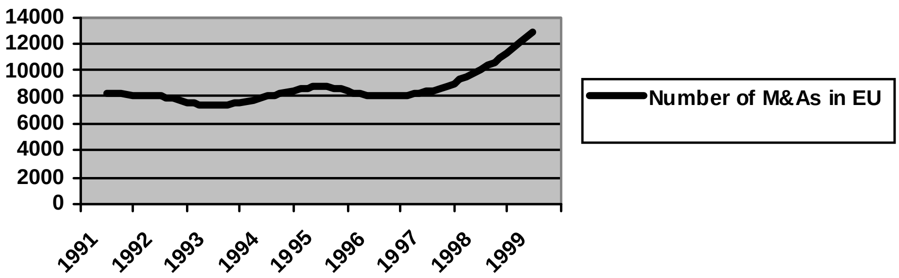
Table 3.3 - Stock market capitalisation as share of GDP in the Euro area, the United States and Japan[26]



Source: ECB 2007b

Changes in corporate finance were concomitant to corporate reorganisation in the EU in the 1990s (Streeck 2001), most notably far-reaching privatisation of state entreprises and a massive increase in mergers and acquisitions (M&As). Here, the introduction of the common currency has played an important role – M&A activity rose by 28 per cent between 1998-99 (European Commission 2000: 1, see also Table 3.4)

Table 3.4 Evolution of M&As involving EU firms[27]



Source: European Commission (2000: 4)

[26] End of year, as percentage of GDP. Stock market capitalisation is here used as a rough an indicator for the size relative to GDP, and thus the importance, of privately invested capital in the economy.

[27] It should be acknowledged, though, that the Mannesman Vodafone takeover represents 49% of total M&A activity in the Eurozone in 1999 (European Commission 2000: 11).

After peaking in 2000, in parallel with the economic slowdown and the fall in stock market prices, the external financing of companies decreased considerably (ECB 2007: 53). In general, a Barca and Becht (2001) have shown, the widely held corporation continues to be the exception rather than the rule in the European Union. Using data from 1997/1998, Faccio and Lang (2002:378) show that 44 per cent of listed companies in Western Europe are still family controlled, as opposed to 37 per cent widely held.[28] Moreover, the state remains an important shareholder in many European companies. The following statement by the OECD illustrates this, and at the same time indicates the OECD's orientation towards capital markets.

> In the EU, the state is still the largest direct or indirect shareholder in 45 out of 143 large privatised enterprises which sometimes represent a significant share of market capitalisation. In some cases, governments have pursued their own objectives regardless of minority (in some cases quite large) shareholders, and control devices such as golden shares have been, at least until recently, important. Such actions serve to reduce the firm's future access to capital markets and also to distort the European single market (OECD 2004b: 10, emphasis added).

It was against this background of financial market integration that the developments in corporate governance regulation in the Member States, discussed in the following section, have taken place.

3.3 Corporate Governance Regimes in the European Union

In this section, national corporate governance regimes in Europe will be outlined, drawing to some extent on the VoC classification between liberal and coordinated market economies (Hall and Soskice 2001b). Here, the ideal-typical CME and LME models provide a broader institutional context in which corporate governance models, and changes in corporate governance regulation, can be analysed (Vitols 2001: 338).[29] As maintained in the introductory chapter, rather than joining in the VoC's quest for finding convergence, divergence or

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[28] Ultimate ownership of 5,232 corporations in 13 Western European countries, corporate ownership is measured by cash flow rights and control is measured through voting rights (Faccio and Lang 2002: 369).

[29] For studies of European corporate governance regimes, see e.g. (Franks and Mayer 1990; Rhodes and Van Apeldoorn 1998; Lannoo 1999; Reberioux 2002; Dewing and Russell 2004; Cernat 2004).

hybridisation patterns this section simply seeks to sketch, albeit in a rather stylized and cursory manner, developments in corporate governance practices and regulation in the UK, France and Germany, and to point towards a number of issues that would indicate ‘common trajectories’ (Hay 2004). Recent changes in corporate governance regulation emanating from European legislators can only be understood against the broader background of the developments in Member States’ corporate governance systems. At the same time, this also serves to show that EU corporate governance regulation is indeed more than ‘the sum of its parts’, that is merely a compromise between dominant forms, or hybrid of, national corporate governance regimes.

In their analysis of financial integration in Europe, Story and Walter (1997: 136) argue that ‘a key dimension of financial integration in Europe is the complex relationship between the structure of the financial system, the control of enterprises and the role of the state.’ They distinguish between three different forms of corporate control (Story and Walter 1997: 136-144), which broadly correspond to the governance regimes that Aglietta and Reberioux identify (2005: 84-85). Here, particularly relevant is the distinction between bank and debt financing and stock market control, as well as the difference between insider and outsider shareholder systems. The following overview seeks to outline these elements with regard to Member State corporate governance regimes in the UK, France and Germany, followed by a brief discussion of the main regulatory developments and changes in corporate governance practices. A concluding section then examines the ‘common trajectories’ manifest in these corporate governance system, pointing towards the role of the EU level political project.

3.3.1 Market-based corporate governance in the United Kingdom

The UK comes close to the ideal-type for a liberal market economy (LME) with an outsider system of corporate control.[30] Equity markets are characterised by relatively dispersed ownership by financial institutions (Vitols 2001: 345). The rise of institutional investors in the 1950s and 1960s, among other reasons due to pension reforms, led to portfolio ownership at arm’s length from the corporation. The relationship between corporations and shareholders was regulated through well developed capital markets. The internal organisation of corporations was structured by a unitary board and strong managerial control.

[30] For an in-depth overview of UK corporate governance, see (Cheffins 2001; Armour et al 2003; Dewing and Russell 2004)

The market for corporate control, in turn, was supposed to provide the external control mechanism to align manager and shareholder interests. UK takeover regulation takes place under the self-regulatory framework of the City Code on Takeovers and Mergers, which is highly restrictive of the use of defensive tactics against takeover bids (Armour et al 2003: 534). Takeovers are indeed a frequent occurrence (Franks and Mayer 1997). Organised labour is not involved in corporate decision-making, and works councils remain rather weak. As Gamble and Kelly argue (2000: 42), 'the regulatory framework for companies in Britain has shown remarkably little change since it was set in place.' Rather, it was securities market regulation that has provided impetus for corporate restructuring in the UK.

With the 'Big Bang' of the Financial Services Act, that is, financial deregulation under the Thatcher government in 1986, competition between finance actors increased. The 'Big Four' Banks (Barclays, NatWest, Midland and Lloyds) entered investment banking and asset management activities (Vitols 2001: 353), and the privatisation wave in the 1980s fuelled the growth and liquidity of capital markets. According to Story and Walter (1997: 230), 'the net effect of this series of market- and policy-driven changes was to extend share ownership in the United Kingdom, provide a highly liquid market for corporate finance and make London the prime financial capital in the European time-zone.'

The concomitant short-term horizon of many institutional investors choosing the exit option over a more activist shareholder perspective led to an increase in cost of capital for corporations, as well as a corporate reorientation towards short-term goals such as share buybacks (Beckmann 2007: 86-87). This prompted a debate on the merits of a more pluralistic 'stakeholder capitalism', based on a critique of the strategies of financial actors (Hutton 1995; Kelly et al 2000). However, even though Labour had seemingly picked up on this stakeholder discourse, when it came into office in 1997, it emulated the self-regulatory, voluntaristic and shareholder–oriented model favoured by the finance industry, rather than enacting fundamental changes in corporate governance. Under the new Labour government, the framework for the regulation of financial services was revised, with the establishment of the Financial Services Authority (FSA) in May 1997. The FSA is a 'large and powerful institution', according to Dewing and Russell (2004: 112), serving as a model for corporate governance regulation, as well as monitoring and enforcing compliance with the corporate governance codes.

UK Corporate governance reforms since the 1990s

The Cadbury Code, published in 1992, constituted the first model of a self-regulatory corporate governance code in the European Union, and served as point of reference for many other national corporate governance codes (Cadbury 1992). It was also the first in a series of self-regulatory corporate governance reports in the UK. The Cadbury Committee was set up as in May 1991, following several corporate failures, for instance at Polly Beck, Maxwell or British and Commonwealth (Dewing and Russell 2004: 109). Its composition was entirely made up from private actors. The report was to address financial aspects of corporate governance to restore investor confidence, also in accounting and auditing (ibid). The Committee was set up as an initiative of the Financial Reporting Council, the London Stock Exchange and the accounting profession, and issued a report with best practice recommendations on, amongst other issues, the control and monitoring functions of independent non-executive directors. The Cadbury Code was followed by the Greenbury Report on directors' remuneration in 1995, and the Hampel Committee to review the implementation of the findings of the Cadbury and Greenbury Reports in 1998, which was subsequently published as Combined Code. From 2000 onwards, as recommended by the 1999 Turnbull committee, listed corporations have to specify how they comply with the Combined Code or else explain why they do not. The 2003 Higgs report, initiated by the Department of Trade and Industry (DTI), was a response to the corporate scandals in 2001. It made a number of recommendations, notably on the strengthening of the role of non-executive directors. While the Higgs Report was based the 'comply or explain' approach rather than legislation such as Sarbanes-Oxley, and thus more lenient in terms of the requirements imposed on corporations, as Armour et. al. point out (2003: 532), it very much 'shared its philosophy of shareholder primacy.' The Company Law Review, concluded in 2001, strengthened the recommendations made in the codes through further implementing directors' fiduciary duties in company law, and mandating further disclosure of corporate information.[31] Following heated public discussions about excessive executive remuneration (the so-called 'fat cat' debates), a law passed in 2002 also required shareholder approval of executive remuneration at the AGM. In this regard, the 2006 Companies Act, superseding the 1985 Companies Act, has been interpreted as striking 'a pragmatic balance' between providing legally binding guidelines for directors' duties towards (rather vaguely defined) stakeholder interests, 'and [..]

[31] Company Law Review Steering Group (2001) *Modern Company Law for a Competitive Economy*, Department of Trade and Industry Final Report URN 01/942 and URN 01/943, 26 July 2001

declining to interfere with substantive business decisions' (Wynn-Evans 2007:6). As such, the company law reform reinforces the 'enlightened shareholder value' approach (Gamble and Kelly 2000: 110-117).

The role of institutional investors mainly interested in (short-term) increases in the share price and intransparent governance structures, continues to raise problems in the UK system of corporate governance (Beckmann 2007: 95-99). With the Myners report in 2001, commissioned by the Treasury, an attempt was made to induce institutional investors to take on a more active role in the corporation through active, and in particular, long-term shareholding. Yet as Beckmann observes (2007: 99), attempts to mitigate the adverse consequences of the deliberate financial market-oriented policies since the 1980s have for the most part failed.

3.3.2 The French corporate governance system – from dirigiste economy to valeur actionnariale

In the post-war *dirigiste* economy of France, the state constituted the central node of control for corporate finance and corporate governance.[32] The governance of nationalised corporations hinged on government decisions and firm national industrial policies impacted on public corporations. By the end of the post-war nationalisation programme, the state owned 100 per cent of thirteen of the twenty largest French industrial firms, and was a controlling shareholder in many of the other public corporations (O'Sullivan 2003: 33). Public control over banking ensured state influence on corporate financing through close monitoring and control over the allocation of credit, and high corporate debt dependence. Capital markets played a negligible role; illustrated well by De Gaulle's famously resolute statement in 1966 that 'In France, politics is not made through the market place.'[33]

Public corporations in France are mainly organised as *sociétes anonymes* (SA). While French company law grants the choice between a monistic and a dualistic board structure, the majority of corporations is organised through a unitary board (*conseil d'administration*) and a CEO (*président directeur général*, PDG). Hierarchical management structures and the

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[32] For in-depth research on the French system of corporate governance of, see (Hancké 2001, Clift 2004, 2007; Aglietta and Rebérioux 2005; Morin 2000; Schmidt 1996, 2003).

[33] De Gaulle on 28 October 1996 to journalists, speaking about finanical markets "La Bourse, en 1962 était exagérément bonne. En 1966, elle est exagérément mauvaise, mais vous savez, *la politique de la France ne se fait pas à la corbeille"* Available as video recording at http://ina.fr/archivespourtous/index.php?vue=notice&id_notice=CAF88025594 (last accessed 21 July 2008)

strong position of the PDG, expressed in 'Napoleonic boardroom power relations' (Clift 2004: 93) were not balanced by influence on corporate strategies through minority shareholder protection, nor through other stakeholders, as was the case in Germany. The French system of industrial relations did not grant workers or unions much direct influence on corporate resource allocation (O'Sullivan 2003: 37). Works councils had information and consultation rights only. Substantial interlocks between the public administration and the corporate elite, through the *grandes écoles*, most famously the ENA (*Ecole Nationale d'Administration*), facilitated close coordination between managers and the state.

The failure of the 1981-1983 Keynesian macroeconomic programme by the left-wing Mitterrand government, paired with dramatically low profits and high corporate debt (Hancké 2001: 315), paved the way for a major restructuring of the French financial and corporate governance system. The expansionary, redistributive policies in the attempt to establish 'socialism in one country' led to pressure on the Franc in international exchange markets, and also proved incompatible with EMS (Clift 2004: 100). The government relented and instead initiated a deregulation programme which was characterised by privatisations and an increasing disengagement of direct state control from corporate governance. Notably, it was under French socialists that policies moved away from statism towards the market (Gourevitch and Shinn 2005: 270). The 1984 banking reform meant 'a revolution for banking in France' (Story and Walter 1997: 197) as it abolished the separation between bank divisions (i.e. investment and commercial banks), and lead to increased competition in the financial sector (ibid). Securities markets reforms in the late 1980s also increased the emergence of capital market strategies through strengthening disclosure requirements.

In the privatisation waves in 1986 and 1993, direct state control was replaced by a cross-shareholding system between major corporations and groups, the so-called *noyaux dur* (hard core) (e.g. Saint-Gobain, Paribas, Société Générale). Together with golden shares, corporate pyramids and limits to foreign share ownership, these structures were supposed to prevent takeovers of the newly privatised corporations, in particular through 'foreign' institutional investors (cf. Reberioux 2002: 121).

Corporate governance regulation in France since the 1990s

However, these cross-shareholding structures unravelled in the course of the 1990s. Cross-shareholding meant that substantial amounts of corporate capital were tied up in shares, and thus not available for investment. Here, Hancké points towards the role of large corporations in leading the dissolution of the corporate system orchestrated by the state (Hancké 2001: 312ff). As corporations sold their cross-shareholdings, foreign ownership rose significantly. Whereas foreign ownership had accounted for 10 per cent of stock market capitalisation in 1985, it was up to 25 per cent in 1997 (O'Sullivan 2003: 37-38). In 2000, almost 40 per cent of the shares of the 40 largest French corporation were held by non-French investors (*The Economist* 2000a; Schmidt 2003: 187). The increasing role of the capital market, as well as the influence and pressure of, in particular, institutional investors, had considerable influence on the corporate governance system. While in 2000 *The Economist* still detected 'ambivalence towards outside scrutiny' in French management (*The Economist 2000a*), there have been a range of regulatory developments that have strengthened the protection of minority shareholders through transparency and disclosure rules. The first initiative for a French corporate governance was business-led, and prompted by the 1992 Cadbury Code in the UK.[34] Chaired by the former CEO of a major French Bank, the Viénot I Report in 1995 outlined 'best practice' recommendations about the independence of board members and stipulated that directors should hold shares of 'their' company. Notably, the report stated in its preamble that it was the 'obligation of the firm to act in all circumstances in the social interest of the firm' (Viénot 1995: 6).[35] The revised Viénot II report, in 1999, recommended the disclosure of executive remuneration, as well as the separation between chairperson and CEO. However, due to the voluntary compliance provisions of the Viénot reports they had only limited impact.

In May 2001 several of the Viénot recommendations and a range of other measures were passed in the *Loi sur les nouvelles régulations économiques* (NRE). It provided for far-reaching disclosure of corporate finances and executive remuneration, and strengthened the role of independent directors vis-à-vis the *président directeur général.* As such, it displayed a considerable degree of minority shareholder protection; however dual voting structures and significant state share block holding remained. Following the corporate scandals in 2000/01, the Bouton report, published in 2002, laid down further recommendations on the independence of directors, as well as

[34] In cooperation between AFEP (*L'Association française des entreprises privée)* and MEDEF.
[35]'[…] l'obligation d'agir en toutes circonstances dans l'intérêt social de l'entreprise' (Vienot 1995 : 6). The Vienot Report, as well as all other corporate governance codes mentioned in this chapter, are available on the website of the European Corporate Governance Institute, at http://www.ecgi.org/codes/index.php (last accessed 16 July 2008)

accounting and auditing provisions.[36] The 2003 Financial Security Act (*Loi de sécurité financiere)* established the Financial Market Authority (*Autorité des marchés financiers, AMF*), an oversight body formed from several smaller market authorities to ensure the proper functioning of the capital market. The AMF sets rules for and monitors share transactions as well as tender offers, and supervises companies compliance with disclosure requirements; in represents a functional equivalent of the SEC or the FSA.

These regulatory changes aside, however, there have also been developments running against the prevailing tendency towards more market-oriented policies, in particular with regard to takeover regulation. The first French takeover law had been adopted in 1989; after the final form of the European Takeover Directive was adopted, French takeover regulation was revised. In December 2005, following rumours of a takeover bid by PepsiCo for Danone, which had sparked vehement protests from politicians and the public, it was announced that regulations would be adjusted to restrict foreign investment in eleven sectors (*The Economist* 2006b). In 2006, the steel-sector takeover battle between Mittal and Arccelor as well as several other takeover events spurred French *patriotisme economique*.[37] As the *Financial Times* concluded, 'France has always been quick to show its nationalistic instincts and rush to protect its corporate champions under threat from foreign predators' (*Financial Times* 2007a). The European Commission's rather strong reaction to French entrenchment and other displays of economic nationalism in Europe will be discussed in a later chapter.

3.3.3 Corporate Governance in the German Social Market Economy

In the Varieties of Capitalism taxonomy, Germany typically represents the standard model of a coordinated market economy with an insider corporate governance regime (e.g. Hall and Soskice 2001a: 21-27). German banks constituted a crucial node in the corporate financing system centred on concentrated ownership and widespread cross-shareholding between corporations and banks. Banks exerted influence on corporations through shareholding, representatives on the supervisory board and, crucially, proxy voting (*Depotstimmrecht*) at the annual shareholder meeting. The dualistic, or two-tier, board structure provided for a separation between management

[36] Following a request by the European Commission, the Viénot I and II and the Bouton report were combined in the 2003 Corporate governance code.

[37] For details on the Mittal/Arccelor takeover, see e.g. *Financial Times* (2006) 'Arcelor and Mittal agree to €27bn merger' Peter Marsh, 25 June 2006.

(*Vorstand*) as an executive organ, and the supervisory board (*Aufsichtsrat*), which nominated and formally controlled the former. Under the fairly stable interlocking directorates between supervisory board members, in particular bank representatives, and with the 'patient capital' provided by the *Hausbanken*, management could concentrate on long-term strategies, and retain and reinvest cash flow (Cioffi 2006: 540-543). Internal corporate financing meant that the role of the stock market was not very active, neither as a source of financing, nor to discipline management. Rather, in the insider system, corporate institutions such as the supervisory board meeting and the annual general meeting constrained managerial freedom. Accordingly, German corporate law was traditionally much more complex and developed than capital market laws. Crucially, it was complemented by a strong body of labour law stipulating, according to size and sector of a corporation, co-determination in the supervisory board, as well as works councils.[38] The German post-war social market economy (*soziale Marktwirtschaft*) rested on this system of close ties between industrial capital and financial capital (by way of bank-mediated corporate finance) on the one hand, and an institutionalised class compromise between owners, managers and employees on the other. Protected from capital market pressures, managers in Germany Inc (*Deutschland AG*), did not focus so much on the quarterly bottom line as on broader corporate objectives, reflecting the connections between economic strategies of the state, banks and industrial capital (Beyer and Höpner 2003: 183-184).

However, this ideal-typical model had already begun to transform when, in 1991, Albert praised the superiority of 'Rhenish' capitalism (Albert 1993). Even before reunification, high unemployment and growth problems put the German corporate sector under pressure and let to a debate about the *Standort Deutschland* (production location Germany), there had been several significant changes in corporate governance. Capital market reforms in the 1980s (Lütz 2002: 234-238) had led to increased competition between banks, and thus to lower profit margins in domestic corporate financing. In contrast to US banks, German universal banks had not been subject to a separation between bank divisions. Several of the largest German banks, emulating the example of US investment banks, increasingly readjusted their strategies towards investment banking (Beyer and Höpner 2003). Precipitating the 'unravelling of

[38] Under the *Montanmitbestimmung* law of 1951, applying to the steel and coal sector, equal representation of employees on the board was required.paritaetische mitbestimmung seit 1951, kohle und stahl mit mehr als 1.000 beschaeftigten (bontrup 2006:16) In the 1952 Works Constititution Act (*Betriebsverfassungsgesetz),* one third of the board was to be filled with employees, while under the 1976 Mitbestimmungsrecht almost equal reprsentation was mandated. However, in practice there was considerable diversity in actual co-determination patterns. (for a discussion of German co-determination, see (Bontrup and Müller 2006).

Germany Inc' (Streeck and Höpner 2003), that is the restructuring of corporate networks since the 1990s, this reorientation lead to tensions between the strategies of banks, and the traditional system, as illustrated by the role of the Deutsche Bank in the in the case of the Thyssen Krupp takeover (Höpner and Jackson 2003: 159).[39] About the same time, several major German corporations embarked on a realignment of corporate objectives towards redirection the shareholder model (e.g. Bayer, Daimler-Benz). A coalition of internationally oriented industrial and financial capital increasingly pushed for policy changes conducive to strengthening the role of financial markets in Germany (*Finanzplatz Deutschland*) (Cioffi 2006: 550). Several corporate scandals during the 1990s, due to failures of supervisory board oversight (e.g. Metallgesellschaft, Bremer Vulkan, Balsam) (Vitols 2001: 346), as well as the active promotion of a German equity culture (Ziegler 2000) led to increasing criticism on the traditional insider system. As Streeck points out (2001: 12), the developments around the three major hostile takeover cases in Germany in the 1990s is indicative for the broader perception of corporate governance: While the attempt by Pirelli to take over Continental in CHECK was prevented by government and the cross-holding of shares, the Thyssen/Krupp takeover in 1997 was, under pressure from organised labour, renegotiated into a merger. In the 1999/2000 Mannesmann/Vodafone takeover, then, opposition to the bid was primarily based on efficiency and shareholder value arguments, and neither the government nor organised labour intervened (*Financial Times* 2004a).[40]

Unravelling Germany Inc. [41]

With the unravelling of corporate networks, the role of banks in monitoring management declined considerably. New financial actors like institutional investors became more important (Beckmann 2007: 113), which, unlike the banks with their supervisory board representatives and insider access to corporate information, required transparent accounting and disclosure reports. While annual general meetings had traditionally been events where blockholders and banks used their considerable voting powers, minority

[39] See (Ziegler 2000) for an account of the Thyssen Krupp takeover (Cromme had been Krupps's CEO)

[40] See also (Höpner and Jackson 2003) for more detail. But as Höpner and Jackson point out, the Mannesmann Takeover might have been not the rule but exception due to its corporate finance structure.

[41] For in-depth case studies on the 'unravelling of Germany Inc' see (Streeck and Höpner 2003)

shareholder protection turned into a crucial issue for corporate governance reform.[42]

From the 1990s onwards, a range of reforms had precipitated these developments. The securities law reform in the 1990s (Lütz 2002: 235; Cioffi 2006: 553) had established a federal supervisory commission for securities (*Bundesaufsicht für Wertpapierhandel*), as well as encouraged the public listing of corporations. With the 2000 reform of capital gains tax, abolishing taxes on the sale of shares, the increase in share trading improved the liquidity of stock markets and accelerated the dissolution of cross-shareholdings. Under pressure of European legislation, privatisations took place in the - until then - highly sheltered German telecommunications and energy sector. The company law acts of 1998 constituted a major readjustment of corporate governance in Germany. The Capital Raising Facilitation Act (*Kapitalaufnahmeerleichterungsgesetz*, KapAEG,) permitted corporations to report under International Accounting Standards (IAS) rather than according to the *Handelsgesetzbuch* (HGB, German Commercial Code).[43] Under the *Gesetz zur Kontrolle and Transparenz im Unternehmensbereich* (KonTraG, Control and Transparency in Business Act), unequal voting rights were abolished, proxy voting was limited and share buybacks legalised. Its general aim was to strengthen and increase the accountability and transparency of supervisory boards and, as Beyer and Höpner point out (2003: 191), 'it lacked any reference to the stakeholder view of the firm.' Remarkably, debates in Bundestag showed that all political forces supported these market-driven arrangements (Ziegler 2000). Here, it is crucial to acknowledge that it was in fact a social-democratic government that advocated the break-up of corporate interlocks and bank power through advancing the role of stock markets as external control mechanism (cf. Cioffi and Höpner 2006).

Following the struggle over the Takeover Directive in the European Parliament in 2001 (see chapter five), the government also approved a German takeover code which was passed in the Bundestag at the end of 2001 (Cioffi 2006: 555). However, due to its diluted form and voluntary nature it did not have much impact, and was revised into the 2002 *Wertpapier und Űbernahmegesetz (WpÜG,* German Securities Acquisition and Takeover Act)*,* which, in contrast to the proposals for a European Takeover Directive, did not require strict management neutrality during a takeover. The government had

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[42] See here in particular the emergence of shareholder associations (e.g. DSW, Deutsches Aktien Institut)

[43] The accounting scandal around Daimler-Benz illustrated the potential impact of this law. In 1993, Daimler-Benz AG's financial statements adjusted to US GAAP revealed hidden reserves of DM 4 billion ($2.4 billion) and accounted for them as extraordinary earnings.

also appointed a commission to work out a German corporate governance code on a comply or explain basis. The *Transparenz und Publizitätsgesetz* (TransPuG, Transparency and Disclosure Act) of 2002 required corporations to publish a yearly statement whether they complied with the Code. The code entailed some fifty recommendations on the voluntary disclosure of executive remuneration, as well as, cautiously, on the independence of supervisory board members. In 2005, after the corporate scandals in the US and the EU, as well as the very public trial against directors and supervisory board members involved in the Mannesmann takeover (Ref), several reforms were to revive investor confidence through increased minority shareholder protection and disclosure. Following EU recommendations, laws on disclosure of executive remuneration (VorstOG), the facilitation of derivative suits against directors (KapMuG), as well as the right to challenge resolutions of shareholders' meetings (UMAG) were passed. As Baum observes, with German regulators 'adapting the regulatory model of the capital-market-based and outsider-oriented system, [...] the cornerstones of a modern market-based and supervisory regime are in place' (Baum 2005:21-2).

The issue of co-determination demonstrates the contradiction between the external control elements inherent to these corporate governance reforms and the class compromise still central to German industrial relations. At the same time as a decentralisation of wage bargaining is taking place (Hassel 1999), the overall coverage of co-determination is decreasing (O'Sullivan 2003:50). While an expert commission in 1998 concluded that 'strong rights of workforces to information, consultation and co-decision making had obviously not interfered with international competitiveness' of the German economy (cited in Streeck 2001: 17), co-determination has been highly politicised in recent years (*Financial Times* 2006a).[44] A former president of the German employer umbrella association (BDI) even called it 'an error of history' (Rogowski 2004). A particular point of contention in the corporate governance debate is the independence of supervisory board members (cf. Windbichler 2006: 231). A recent scandal at Volkswagen, with several employee representatives of the supervisory board involved in a major corruption incident, further fuelled public discussion about the merits of co-determination. As Streeck maintains, board level co-determination creates opportunities for varying interest coalitions between shareholders, managers and workers which guarantees (Streeck 2008). Also in the regulatory domain, the German corporate governance system is notably moving towards a 'transparency coalition' in terms of a cross-class

[44] That is not to say that co-determination has been widely accepted by employers and the business community in general (see e.g. Financial Times (2006) 'Beware, union on board? Why Germany's worker directors need to justify their jobs' 30 August 2006)

bargain between owners and workers, on the basis of far-reaching transparency disclosure and transparency provisions (Gourevitch and Shinn 2005: 160; cf. Höpner 2003).

3.4 'Common Trajectories' in Corporate Governance regimes

While the outline above has mainly focused on institutional and regulatory change, it is also important (and one of the main contributions of much of the VoC literature) to acknowledge institutional resilience to change. Despite the 'battle of the systems', European financial and corporate governance regimes so far have not converged on one uniform standard model. According to Story and Walter (1997: 136), however, this process would be inevitable 'if Europe is to have a truly integrated financial market in which capital is continuously allocated to the most productive uses (and, equally important, denied to the least competitive).' At the same time, though, there are considerable parallels in regulatory changes, as well as the emergence of new actors and issues in these corporate governance systems. Rather than convergence, then, the developments above display what Hay has called 'common trajectories,' emphasizing the importance of points of mediation for the eventual outcome (Hay 2004: 246; Nölke et al 2007: 204). It is in these common trajectories that the transnational nature of the restructuring of corporate governance regulation becomes manifest. Crucially, the EU here has a key role in mediating between broader global dynamics and national institutional configurations. Below, several of these 'common trajectories' are outlined.

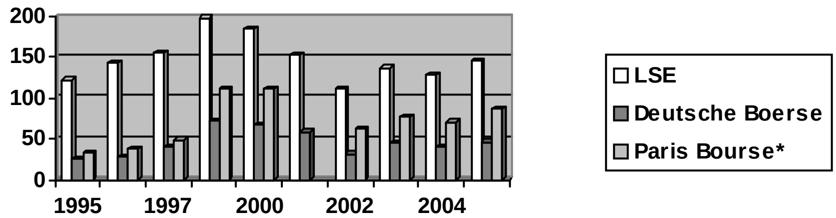
Cioffi observes a cross-national trend towards more legal protection of shareholders in capital markets, and the corporation itself (Cioffi 2006: 534). Convergence theories fail to explain the rapid increase in regulatory activities, such as the creation of new regulatory agencies and increasingly 'hard' bodies of securities and corporate law, supplemented by self-regulatory initiatives like codes and 'comply or explain' mechanism to ensure (minority) shareholder protection.

Cioffi and Höpner (2006; cf. Höpner 2003) emphasize the role of center-left parties play in advancing shareholder reforms. Pro-shareholder government policies peaked under leftist governments in several national corporate governance systems. It is of course debatable whether the third way labour parties in the UK and Germany still qualified as leftist government, but in the bigger picture this highlights that the changes in corporate governance regulation are not driven by a minority interest coalition, but have been constructed as political projects with a broad societal base. Here, the interplay between public and private actors is also increasingly pointing towards the role of private corporate governance committees, while at the same time the state shapes the regulatory environment in which these private initiatives take place.

The harmonisation of accounting standards (as well as, to some extent, auditing) across the European Union also constitutes an important transnational dimension in the development of national corporate governance systems. The implementation of the International Financial Reporting Standards (IFRS) set up by the private International Accounting Standard Board (IASB) has a major impact on the financial reporting of corporations, in particular in Germany (cf. Perry and Nölke 2006).

The increasingly central role of the stock market for the control of corporations also in 'insider' systems enhances the systemic, strategical and relational power of institutional investors. Table 3.5 shows the sustained role of the UK, French and German stock markets as share of GDP (that is, apart from the stock market crisis 2001).

Table 3.5 - Stock market capitalisation as share of GDP 1995-2005



*as of September 2000 Euronext (including Brussels and Amsterdam exchanges)
Source: World Federation of Exchanges (WFE) annual data 1995-2005 [45]

The growing role of institutional investors as one of the central driving forces behind market-oriented restructuring of corporate governance has become a common feature in EU corporate governance systems (Beckmann 2007). Here, we see a marked increase in the level of shareholder activism, even in Member States where shareholder activism has so far been the exception (*The Economist* 2008).

At the same time, there is a common trend towards a changing perception of the role of the board. Requirements for independent board

[45] Annual Statistics available at www.world-exchanges.org (last accessed 16 July 2008)

members and a stricter interpretation of the monitoring role of the board have been reinforced, with a focus on making the board more accountable to shareholders. Here, however, this trend has been limited through the specific national institutional configuration of corporations. The difference between one- and two-tier company boards persists, even though, as will be shown in chapter five, the EU is now implicitly promoting a monistic board structure. Also, the composition of the board remains a bone of contention, in particular with regard to worker representation on the board level (see, e.g. Leyens 2007: 27).

With regard to industrial relations in general, concomitant to a broader process of union decline, national systems of industrial relations become more fragmented due to a proliferation of firm-level bargaining and company-specific agreements. At the same time, as Streeck points out, ‘with company law beginning to converge on a more market-driven pattern, industrial citizenship became the main source of diversity in corporate organization’ (Streeck 2001: 13). Indeed, as will be discussed in the next chapter, industrial relations, in particular forms of co-determination, constitute one of the main ‘obstacles’ in the development of corporate governance regulation also on the EU level.

As argued above the, in the understanding of this research the politics of corporate governance regulation need to be perceived as an instance of transnational capitalist restructuring. Here, the EU constitutes a crucial regulatory domain mediating and translating global developments into national contexts. As the 2003 Company Law Action Plan by the European Commission has emphasized, ‘over the years, the EU institutions have taken a number of initiatives in the area of company law, many leading to impressive achievements [..] these European measures have had an important impact on national company law’ (European Commission 2003a: 2). It is not the objective of this dissertation to examine the ‘Europeanisation’ of company law, that is, to evaluate the implementation and impact of European regulation on national corporate governance regulation. As this study seeks to show, the developments in corporate governance regulation in the European Union are engendered by the emergence of a political project which is part and parcel of these transnational dynamics, while at the same the political processes driving these changes need to be understood in the specific context of European integration.

4 Company Law in the European Union – From Industrial to Shareholder Democracy?

In its 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 recently been pushing for a *shareholder democracy* (European Commission 2005). And while, in 1973, a then authoritative textbook argued that ‘the virtual unification of national company laws in all essential aspects [..] is a political act necessitated by the desire to accomplish the aims of the Community’ (Schmitthof 1973: 89), the then Commissioner for the Internal Market, Frits Bolkestein, claimed in 2003 that the objective of regulation was solely ‘to set up a framework which then enables the markets to play their disciplining role in an efficient way’ (Bolkestein 2003a).

This critical shift in regulatory *content* with regard to company law, together with equally significant changes in the *mode* and *form* of regulation, will be discussed in the following chapters. This chapter covers the company law harmonisation programme from its initiation in the EEC in the 1960s to regulatory developments in the late 1990s. In particular, the integration of company law in the industrial policy of the EC in the 1970s will be discussed. Here, the central issue of worker participation illustrates how the objective - as well as the subject - of company law has changed. Subsequent policy developments show how worker rights have been consigned to the area of labour law, while company law, and even more so corporate governance regulation, have become increasingly focused on the rights of shareholders, and have been integrated into capital market law.

4.1 Initiation and legal base for the Company Law Harmonisation programme

Company law harmonisation has been an important element in the drive to integrate the economies of the six founding Member States of the EEC into the single market, as stated in the Treaty of Rome. In fact, European company law long was considered the area of law most intensively harmonised (Grundmann 2004: 604). Competition policy constituted one of the core policy areas of the EEC, and the Commission was entrusted with far-reaching competences in this field (cf Wigger 2008). To create a market where companies could freely compete under equal circumstances, the harmonisation of company law in the Member States here constituted a central element in the market-making project (cf. Van Apeldoorn and Horn 2007b).

In the restructuring of the Commission following the 1967 merger of the three Communities (European Coal and Steel Community, European Economic Community and European Atomic Energy Community), company law harmonisation became part of the new Directorate General for the Internal Market and the Approximation of Legislation. The 'somewhat fuzzy mandate given to the Commission and the Council' (Wouters 2000: 268) in the area of company law, however, has been subject to legal debates from very early on (see Dine 1990:97). It has been argued that the discussion of the scope of harmonisation and struggle over competences, constituted 'without a doubt a major cause of the initial delay in the Commission's work' (Stein 1971, cited in Edwards 1999:5).

When the Treaty of Rome, establishing the European Economic Community, was signed, the freedom of establishment (Art. 52) was endorsed as one of the key principles for the single market. In this context, the basis for a harmonisation of company law was established in Art. 58(1), which included the legal personalities of companies and firms. As Schmitthoff points out, the inclusion of company law in the Treaty of Rome is noteworthy in itself, as written constitutions do not usually include references to company law (Schmitthoff 1973: 3). As the EEC has been established primarily as a market-making project (cf. chapter three), the company, and more specifically the diversity of legal forms in the Member States, represented a central issue for the creation of the single market. The harmonisation of company law is based on Art. 54(3)(g) of the Treaty of Rome,[46] according to which

> The council and the Commission shall carry out the duties evolving upon them under the preceding provisions in particular: [..]
>
> (g) 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 58 with a view to making such safeguards equivalent throughout the Community.

[46] Now Art. 44(2)(g) of the TEU

The interpretation of this article, in particular with regard to the meaning of *necessary extent,* and the protection of *whose interests*, has changed in the course of the developments in EU company law.

In the early years of company law harmonisation, the Commission set itself a comprehensive harmonisation programme. In 1961, the Council's General Programme for Removal of Restrictions on Freedom of Establishment announced an optimistic schedule for the harmonisation programme. A number of reasons prompted the Commission to launch the harmonisation initiative. Divergences in national company laws of the six founding Member States were likely to frustrate the aim of an optimally functioning internal market as articulated in the Treaty of Rome. The promotion of legal certainty was to improve intra-Community commercial relations and create a level playing field for competition. It was argued that 'unity of law would not only promote integration, but would also give enterprises easier access to foreign capital markets, and would enable them to transfer their headquarters from one country to another […] and to acquire an interest in or merge with enterprises from other Member States' (European Commission 1965: 106).

At the same time, an explicit objective of the early harmonisation initiatives was to make sure that there would not be a 'Delaware effect' in the EEC.[47] As freedom of establishment was to be substantiated, national legislators, in particular in Germany and France, feared that companies would (re)incorporate in the Netherlands, where public companies in the 1960s were still 'subject to more flexible and less onerous roles' (Edwards 1999: 9). The then Commissioner for the Internal Market, Hans von der Groeben , insisted that on 'equivalence between those conditions of company law under which enterprises operate and compete with each other in the various Member States and consequently throughout the Community. When choosing their location, companies must be guided by economic rather than legal considerations' (Von der Groeben 1969). This focus on substantial harmonisation also reverberated in the main academic view of the legal developments. As Schmitthoff argued in 1973, 'it is clear to every-forward looking lawyer that the degree of harmonisation must be considerable if the ambitious claims of the Community are to be achieved' (Schmitthoff 1973: vii). As the developments discussed in

[47] The Delaware effect (Cary 1974) refers to the (re)incorporation of US companies in the state of Delaware, as this jurisdiction facilitates management retrenchment. Here, two competing claims are made. On the one hand, regulatory competition is assumed to lead to a 'race to the bottom', as shareholders have insufficient control over the decision to reincorporate (cf. Bebchuk 1992). In contrast to this perspective, a 'race to the top' is assumed, as management, under pressure from market forces, would not retrench but rather opt for strategies beneficial to shareholders (Romano 2005). For a political economy discussion of the 'race to the bottom', see (Vogel 1996).

chapter five will show, few company lawyers, and even less so the Commission, would subscribe to this view today.

The Commission's strategy with regard to company law was to be two-pronged. The Commission envisaged the establishment of a *European* company law by means of regulations. Art. 235 (now Art 308) of the Treaty provides that

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

There have, however, only been two regulations in the area of company law. The regulation on the Statute for a European Company, first submitted in 1970, will be discussed in the next section.[48]

On the other hand, approximation of *national* company laws should be guaranteed by means of directives (Art 189(3) EEC); supranational standards to which national laws must conform. A directive is binding as to the result, but leaves national authorities the choice of form and method. The early company law directives were characterised by fairly detailed and prescriptive provisions (cf. Villiers 1998). Schmitthoff identifies the course of actions taken by the Commission in the area of company law as 'salami tactics', according to which 'one slice of national company laws after the other will be harmonised, uniform minimum standards will be established in the national company laws of the Community with respect to all important areas' (Schmitthoff 1973: 7). This perception very much summarises the supranational ambitions of the European Commission in the 1960s, and echoes a neofunctionalist understanding of European integration through spillover. However, even in a Community of six Member States, the differences in legal traditions, let alone the varieties of capitalism, were considerable. The Commission thus not only had negotiate about legal technicalities, but early on made fundamental decisions pertaining to the role and functioning of companies, which had a significant effect on the national company laws of the Member States.

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[48] The other regulation is Regulation No 2137/85 of 25 July 2985 on the European Economic Interest Group (EEIG).The EEIG is a 'legal vehicle with legal personality which shares some of the features of a company and some of an unincorporated association, intended to enable natural persons, companies and firms to cooperate in the conduct of business across borders without losing their independence (Edwards 1999: 2; a famous example of an EEIG is the Franco-German television channel ARTE). See Wouters (2000: 261) for a brief critical assessment of the EEIG. This regulation will not be considered here as it is does not pertain to publicly listed companies.

With regard to the preparatory and consultative work on the harmonisation initiatives, there has been a high level of involvement of company law experts from the very beginning of the harmonisation programme. As Schmitthoff argues (1976:100), ‘the eventual form in which the Council of Ministers approves an important legislative measure has often, in fact, been agreed between the officials of the Commission and the representatives of interested circles in the Member States.’ This was certainly due to the severe practical limitations of the early Commission directorates (see Edwards 1999: 11, ftn 58 for some interesting anecdotes). At the same time the experts involved in the consultation and negotiations more often than not favoured their ‘own’ company law system. This ensured Member States additional negotiating opportunities, and at the same time served to stall discussions Member States were not comfortable with. As Von der Groeben acknowledged, ‘the Commission has [..] made sure that it has the close collaboration of distinguished academic and technical experts in the Member States. These consultations and the research work involved take time. They can lead to certain theoretical ideas being dropped and to planned measures being implemented in several stages, or, initially, only in part’ (Von der Groeben 1969). In the early years of the company law harmonisation programme, the dominance of the German company law system, in particular the emphasis on minimum capital requirements and creditor protection, is clearly discernable, both in the academic debates as well as in the Commission’s proposals.[49]

The early Company Law Directives[50]

The Commission published an Explanatory Memorandum outlining the principles of the First Directive in 1964 (Schmitthoff 1976: 101). The First Directive, adopted by the Council in March 1968, harmonized rules on public disclosure of company documents, the legal validity of contracts and the nullity of companies.[51] It covered all limited liabilities companies, both private and

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[49] As a member of the High Level Group of Company Law Experts remembers, ‘in the 1970s and 1980s, the attitude of my German colleagues was that they had the answer, it was just a question of persuading everybody else to accept it (Interview with a member of the High Level Group, 18 October 2006)

[50] See the Annex for a complete list of Company Law Directives, Regulations and Recommendations.

[51] The ‘nullity’ of a company refers to rules pertaining to revoking the recognition of a company as a legal person. This requires a court judgement, for example when the legal formalities or the rules concerning the minimum amount of capital to be paid up were not complied with. For

public. However the Commission's focus narrowed down on public companies soon after that.[52] Hans von der Groeben summed up the Commission's reasoning, arguing that 'approximation of the law governing companies or partnerships with limited liability, and especially joint stock companies, has been given priority by the Commission because this type of enterprise accounts for the major part of all productive and moveable capital'(Von der Groeben 1969). As Villiers points out (1998: 88), the early harmonisation directives were detailed and prescriptive, and the influence in legislative process was mainly limited to the Council, as well as to the Economic and Social Committee.

One of the main difficulties for the harmonisation of company law, in particular with regard to the freedom of establishment, were, and to some extent still are, the conflicting laws of incorporation in the Member States. Under the 'real seat' doctrine, most continental Member States regard the location of a company's central management (*siège réel*) as determining the law to which a company is subject. According to the incorporation perspective (UK, DK, Spain, NL), however, a company is subject to the national laws where it is incorporate and where its registered office is located, nevermind where the company is actually managed or conducts its business (Edwards 1999: 335) This distinction between legal doctrines of incorporation has obvious repercussions on the freedom of establishment for companies.[53] Article 220 of the Treaty stipulates that

> Member States shall, so far as necessary, enter into negotiation with each other with a view to securing for the benefit of their nationals [..] the mutual recognition of companies or firms within the meaning of the second paragraph of Article 58, the retention of legal personality in the event of transfer of their seat from one country to another.

The Commission attempted to resolve this tension with a Convention on Mutual Recognition of Companies and Legal Persons, which was signed in 1968 by all six Member States but never ratified by the Netherlands, and thus never came into force (Edwards 1999:384-6).

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detailed information on this, as well as other legal aspects on the establishment and legal personality of the corporation, see Edwards (1999).

52 As recent developments with regard to the private equity industry and leveraged buy-outs in general illustrate, this almost exclusive focus on the publicly listed company constitutes a regulatory challenge now.

53 While incorporation is not per se a matter of corporate governance, it is crucial for the debate about regulatory competition in recent years. The European Court of Justice, with a range of case law on the issue, has had an important influence in the debate. This issue will be discussed later on.

The Second Company Law Directive on the formation of public limited liability companies and the maintenance and alteration of their capital, was eventually adopted in December 1976. Its provisions illustrate the beginning influence of UK company law following the UK's accession to the EC in 1973, which had until then been heavily influenced by German company laws (Schmitthoff 1976: 100).[54] In contrast to the First Directive, which dealt directly with the freedom of establishment in the EC as mandated under Art 54(3)(g), in subsequent company law directives, that is, the Second, Third and Fourth Directive, 'the emphasis is entirely on legislative policy aims of equivalent protection for shareholders and creditors in the common market' (Wouters 2000: 270). As they do not entail any redistribution of power in the company, they did not generate much controversy, at least compared with the Commission's proposal for a Fifth Directive, and the European Company Statute. [55]

4.2 Worker participation in European Company Law

In 1970 the Commission published the so-called Colonna Memorandum on industrial policy, in which it argued the need for the creation of a 'European industrial fabric' (European Commission 1970: 4). While the early company law initiatives had dealt with the establishment and technical features of companies, the Commission now sought to establish a harmonised level of worker participation, modelled upon the German system of company organisation. It argued that

> there is now a need for more active participation by workers in the selection of development targets and in the operations of firms [..] on the one hand, private enterprise and competition must be recognised and encouraged and the profit motive accepted; on the other hand, economic development must at all levels be guided by objectives agreed jointly. [..] Participation is not only a requirement for man's progress, but also a factor contributing to industrial efficiency (European Commission 1970: 7).

These developments have to be seen against the background of an increasing crisis of the corporate liberal arrangements that had underlined much of the

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[54] As this dissertation is mainly concerned with corporate *governance*, it would go beyond its scope to deal with all Company Law Directives in detail. In the following, the focus will be on legislative initiatives concerned with corporate control, rather than other company law issues.

[55] For a discussion of these directives, see, e.g. (Villiers 1998; Edwards 1999).

early European integration process. On the national level, as Streeck and Schmitter (1991:135) point out, Member States 'were almost universally turning to centralized bargaining between firmly institutionalized class and sectoral interest groups. [..] This bargaining emerged as a reaction to the turmoil of 1968 and 1969 and as a recourse against the dislocations of the economic crises after 1973.' This neo-corporatist moment also informed the Commission's initiatives to (re)integrate labour into an industrial policy which would ensure the competitiveness of 'transnational European companies' vis-à-vis their US counterparts (European Commission 1970). This meant that, as Streeck and Schmitter argue, 'for a short, intensive period between 1970 and roughly 1974, it seemed that labor was about to capture the same or similar substantive concessions and institutional privileges at the European level as it was picking up simultaneously in individual countries' (Streeck and Schmitter 1991:139).

The issue of worker participation constituted the main point of conflict in company law harmonisation in the 1970s and 1980s - that is, until it was relegated safely to the area of labour law. As the Commission acknowledged, 'the difficulty of moving forward on the fundamental issue of worker participation is a perennial problem in the harmonization of company law, and a bone of contention in the social dialogue' (European Commission 1988: 9). In the following, regulatory initiatives pertaining to worker participation and company structure will be discussed. Particular attention will be paid to the European Company Statute, the *Societas Europaea* (SE), since, in its legislative history of over three decades, it has had a central position in the debate on worker participation. In contrast to the SE, which has finally been adopted in 2004, the Fifth Company Law Directive has been shelved after years of controversy. Still, both initiatives are important here, as they constitute the most prominent attempts by the Commission to intervene in the *internal* control structures of corporations, rather than regulating the disclosure of certain types of information.

4.3 The European Company Statute

The European Company Statute 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).

The plan for a European Company was launched by French legal experts in 1959; the Commission took up the idea and prepared its own proposal, which was published in 1970. This proposal included provisions for a *mandatory two-tier board structure* and *board level employee representation* (to the effect that 1/3 of the supervisory board be elected by employees, and 2/3 by the shareholders). The proposal also contained specifications for European Works Councils (Works Councils were present in all of the founding Member States) and the role of trade unions. During the ensuing debates on the proposal, several of the Member States were rather hostile towards this proposal, albeit for different reasons – while the UK considered the provisions in the draft SE statute excessive, Germany was afraid that German companies might use the opportunity to form an SE as a way to get out of stricter German worker participation laws.

The reaction of the Parliament, however, was generally favourable. Its most important amendment was a tripartite solution for employee representation, under which employees and shareholders would each select one third of the supervisory board, and jointly elect the remaining third. As the Commission argued, it 'has fully taken up Parliament's recommendations as to the provisions governing worker participation. These recommendations were put forward by such an overwhelming majority of members of all political affinities and of all nationalities that they can be taken to be the expression of a European political will' (European Commission 1976: 72). The Commission submitted the amended SE proposal to the Council in 1975, who set up a working group to deal with the extensive provisions of the draft.

The Proposal for a Fifth Company Law Directive

Apart from a regulation to create a *European* company law vehicle, the Commission also sought to model company structures in *the Member States* with a proposal for a Fifth Company Law Directive. The purpose of the Fifth Directive, first proposed to the Council in 1972, was to harmonise rules for the internal structure and decision-making structures of public companies registered in a European Member State. This was a highly ambitious initiative, as it entailed *mandatory* provisions for a two-tiered board structure (i.e. management and supervisory board) and employee representation on the supervisory board (for companies with more than 500 employees).

During the debates on workers' rights in company law, the Commission upheld its commitment to worker participation and a dual board structure in the Green Paper it published in 1975, *Employee Participation and Company Structure in the European Community* (European Commission 1975). The aim of the Green Paper was to discuss fundamental questions with regard to worker participation, in particular with regard to the SE proposal and the Fifth Directive, as well as taking stock of legal and political developments in the enlarged Community. As the Commission acknowledged,

> The establishment of a common market for companies should not be approached as if it were a neutral, essentially technical matter. The way in which a legal system structures industrial and commercial enterprises is intimately connected with fundamental elements in the general society and economic policies adopted by the society in question (European Commission 1975: 8).

The following statement from the Green Paper is indicative of the reasoning behind the 'industrial democracy' discourse underlying the Commission ambitions for worker representation.

> A somewhat broader perspective should be taken of the concept of efficiency than the traditional concept of relative financial returns on the capital invested in particular enterprises. From the point of view of society as a whole, other elements need to be included in the calculation, as regards both inputs and outputs, not least the cost of industrial confrontation, not just for the enterprise in which it occurs, but for the social and economic system as a whole (European Commission 1975: 39).

The Commission's plan essentially represented a class compromise on the company level, combined with a company decision-making structure with a mandatory dual board to ensure the 'representation of a plurality of interests' in the company, 'with a homogeneous management in a way which unitary systems find difficult to duplicate' (European Commission 1975: 20). Not surprisingly, the attempt to engineer industrial peace through concessions of extending worker information, consultation and information in European companies met severe opposition from employer associations, both on the national level as well as from UNICE and other European level business associations.[56] The UK's accession to the EC in 1973 had also had an impact on the discussion on mandatory worker participation. In its opinion on the draft proposal for the Fifth Directive, the Economic and Social Committee was doubtful whether the mandatory two-tier board structure 'would be a responsible move at this juncture, especially in view of the new situation which has arisen since new Member States joined the Community' (Economic and Social Committee 1978:2-3). The UK, with its monistic corporate governance system, was indeed strongly opposed to the Commisson's initiative to harmonise national company laws along the lines of a German model of company laws.

At the same time, the fragmentation of labour movements (and, ultimately, interests) has also been an obstacle to this particular type of industrial democracy. The Commission's initiative for worker participation was not well received by trade unions which relied heavily on, for instance, collective bargaining, and thus more adversarial industrial relations like in the UK (Streeck 1997: 4-5). As Hopt points out,

> full harmonization as planned in 1972 might lead to less *real* homogeneity than that proposed in 1983 [renewed draft of the Fifth Directive, LH], since in some countries trade unions that are oriented towards conflict and class struggle in the Marxian tradition may use co-determination in quite a different spirit than, for example, the German trade unions' (Hopt 1984: 1347-8, emphasis in original).[57]

The proposals for the European Company Statute and the Fifth Directive were subject to lengthy discussions in Council and the European Parliament working groups, respectively. As both proposals were rather long and detailed (the proposal for the SE contained 300 articles), these debates took several years. The Economic and Social Committee, delivering its opinion on the 1975 Green Paper, was strongly divided over the 'comprehensive democratization of the economy' (Economic and Social Committee 1978: 11). At the same time, towards end of the 1970s the momentum for mandatory worker participation had weakened (see below, also chapter three). After the conclusions of the Council working group on the European Company Statute in 1982, negotiations were not resumed until the Commission, following its commitment to complete

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[56] UNICE had already been established in 1958. ETUC was founded in 1973. See (Callaghan 2007: 8-9) for some evidence on the EU and national employer association's positions against mandatory worker participation.

[57] Notably, the Commission's initiative also showed a lack of definitional nuance. For instance, as Roberts (1976:34) points out, the 5th Directive tends to speak of 'workers', while the European Company Statute uses 'employees'. In the increasingly fragmented industrial relations in a public company, this poses a question of the role of, e.g. senior managers.

the Internal Market by 1992, published a Memorandum on the European Company Statute in 1988.[58]

Following the Parliament's opinion on the proposal for the Fifth Directive in 1982, the Commission amended its proposal and submitted it again in 1983. The mandatory provisions had been rendered far more flexible and contained compromises on board structure, as well as several options with regard to employee participation. The Commission continued to amend the proposal in the beginning of the 90s, but due to political resistance from the Member States and employer associations, even against the substantially more flexible revised proposal, has now officially withdrawn the draft directive (European Commission 2001a).

It should be noted that industrial democracy, in the context of the political struggle between on the European level in the 1970s, did *not* entail a fundamental change of control within the corporation.[59] Perceived more as a means than an end, the concept was meant to alleviate the antagonism between capital and labour by steadily integrating the latter into the social relations of production organised and constituted by the former. Private ownership of the means of production was not questioned, nor was the corporate form as such. Rather, the fundamentally unequal social relations of production were, at least to some extent, obscured through a seemingly equal relation with capital in regard to corporate control. In particular, this focus on industrial democracy 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, see chapter three). The emerging European-level concertation in form of the Social Dialogue failed to 'safeguard' worker participation in the arena of company law, due to, at least to some extent, the lack of *actual* concertation in the European arena. While business and employer associations had established an extensive lobbying apparatus, as Streeck and

[58] The question of worker participation has also slowed down progress on the Tenth Directive on cross-border mergers. The issue had been on the negotiation table (in form of a Convention with regard to Art 220 of the Treaty) since 1967, in order to facilitate cross-border mergers and acquisitions in the Community. However, also in this instance Germany was anxious to ensure that international mergers would not amount to an opportunity to avoid the German system of worker participation. The Commission submitted a draft directive in 1985, but question of potential avoidance of stricter worker participation regimes continued to hold back progress on the directive. Its final form, adopted in 2005, is discussed in chapter five.

[59] For a recent overview of the debates about 'industrial democracy' and alternatives to 'shareholder capitalism' see (Demirovic 2006)

Schmitter (1991: 141) point out, 'to protect the Brussels body politic from contagion by the neocorporatist disease that befell European nation-states in the 1970s, all business had to do was refuse its European peak associations the competence to enter into binding obligations on behalf of their national constituents.' The Social Dialogue was confined to a non-binding, consultative status.[60]

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 alternatives 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). Consequently, the focus changed towards establishing information and consultation rights, rather than participation rights with potentially redistributive consequences. None the less, even under these circumstances worker rights proved to be controversial. The case of the Vredeling directive here illustrates in how far the corporate liberal push to institutionalise worker rights, however limited, into European law was contested and eventually defeated by the emerging neoliberal project for liberalising the European economy (see chapter three). As van der Pijl argues, the Vredeling Directive 'came at a moment when the regulation movement was losing momentum and the neo-liberal counter-offensive to restore the sovereignty of capital had gained the upper hand (Van der Pijl 1993: 43).

The Vredeling Directive

As Multinational Corporations (MNCs) were more and more active in the European market (see chapter three), the protection of worker rights was that severely hampered through the fact that many MNCs had their headquarters, or corporate decision-making centres, outside the EC, and thus outside the EC's jurisdictional reach (Durham 1984: 1466). In 1980, the then Commissioner for

[60] I will come back to the role of the Social Partners, and labour on the EU level in general, in chapter six.

Social Affairs, Henk Vredeling, presented a broad draft directive on harmonizing information and consultation rights for workers in multinational corporations operating in the European Community to the Council (notably under the aegis of the Directorate for Social Affairs). The Vredeling Directive was exclusively focused on information and consultation - participation rights, it seems, had been taken off the agenda of the Commission.

While the European trade union movements strongly supported this directive, during the legislative process the draft directive met with unprecedented hostility from European and American business in what turned out to be the 'most expensive lobbying campaign in the Parliament's history, mounted mainly by American-based companies' (*The Economist* 1982). The main concern for business was the disclosure of potentially confidential information to labour representatives, as well as firm secrecy in the boardroom.[61] It has even been suggested that in its opinion on the draft Directive, the Economic and Social Committee 'came down on the unions' side because of heavy lobbying' (*The Economist* 1984). As the socialist faction in the European Parliament rejected the changes made by the centre-right majority, however, the proposal did not pass. Although the Commission presented a significantly slimmed down draft Directive in 1983 (European Commission 1983), the proposal ultimately failed to be adopted in the Council. As *The Economist* reported (1984) 'employers' lobbies from Detroit to Birmingham to Osaka, which have spent a small fortune lobbying against the proposal, need not feel worried. Thatcher will block Vredeling for them.'. In fact, in addition to the UK, Germany and Denmark, then conservative governments, also voted against the draft directive. Even though the Directive in the end sought to establish only a relatively modest level of worker information and consultation, at least compared with existing provisions in several Member States, opposition to the proposal indicated that even information and consultation were perceived as inflicting unacceptable obligations on multinational corporations, and limiting the powers and discretion of management. Discussions on the Vredeling Directive were finally suspended in 1986.

[61]Which, not quite surprisingly, is an argument that has also come up in discussions on information and consultation rights in many struggles over worker rights in the national arena.

4.4 Struggling over Information and Consultation - The European Company Statute and the European Works Council Directive

The European company law programme changed significantly in the 1980s, in particular in the context of the programme for completion of the Single Market by 1992. The renewed impetus for market integration, manifested in the 1985 Single Market Programme, reinforced the shift towards a considerably less mandatory and harmonized company law. In the 1985 White Book *Completing the Internal Market*, the Commission argued that 'experience has shown that relying on a strategy based totally on harmonisation would be over-regulatory, would take a long time to implement, would be inflexible and would stifle innovation' (European Commission 1985: 18). Instead, harmonisation in terms of minimum requirements and the principle of mutual recognition – which Streeck and Schmitter (1991: 149) aptly call a 'subtle form of deregulation'- were to be applied wherever possible. This introduced an element of regulatory competition to the area of company law that marked a stark break with the previous harmonization programme, which had explicitly sought to avoid regime competition.

These changes are clearly discernable in the subsequent proposals for company law directives, as well as the revised draft of the European Company statute. The shift towards less mandatory regulation in the area of company law was justified by the Commission by pointing towards the EC's perceived lack of competitiveness.

> In the 1960s the main justification advanced within the Community was economic integration. This objective remains valid today. But there is now an even more pressing reason – namely that the Community's *competitive position* in world markets, both at home and abroad, is gravely at risk (European Commission 1988: 9, emphasis added).

The regulatory developments reflected the changed approach in the area of company law. In the 1985 White Paper the Commission again stressed the need for a legal framework for cross-border mergers and the European Company Statute (European Commission 1985: 35-36). In the following, regulatory developments after 1985 will be discussed. Here, the focus on the European Company Statute and the European Works Council Directive shows in how far workers' rights had already been separated from company law, and designated as 'social policy' instead.

Revision and Adoption of the European Company Statute

In 1988, the Delors Commission published a Memorandum to revive the debate on the SE Statute. Instead of a mandatory system featuring far-reaching provisions for worker participation, companies were now supposed to be given a choice between several alternative systems of employee representation, which were supposed to be functionally equivalent. The SE was deemed 'essential to the completion of the Single Market in 1992', with remnants of the industrial democracy discourse still apparent.

> In the Commission's view, worker participation is essential not just as a matter of social rights, but as an instrument for promoting the smooth running and success of the enterprise through promoting stable relationships between managers and employees in the workplace (European Commission 1988: 13).

However, the SE proposal was now increasingly discussed in the context of changing corporate structures and production regimes such as just-in-time and lean production strategies. As the Commission warned, 'European firms are placed from the outset at a serious disadvantage compared with their American or Japanese competitors who can mobilize human and financial resources from a much wider base' (European Commission 1988). These competitive pressures were passed on to workers by a shift from mandatory regulations and board-level representation, to arrangements which were largely voluntaristic in character and pertained predominantly to plant-level decision-making.

A revised proposal for the SE was submitted in 1989, whittled down from 300 to 137 articles.[62] The mandatory provisions on board structure had been abandoned, companies now had the choice between a monistic or dualistic structure. Different systems of board-level representation were given as alternatives, depending on the national law and industrial relations systems. This proposal was again slightly modified and revised in 1991 (most importantly, Member States could now prescribe the choice of board structure for SEs under their legislation). 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).

[62] For a detailed discussion of the legislative trajectory of the SE, see (Teichmann 2003).

Still, the 1992 Single Market programme has been completed without the European Company Law Statute. In 1996 the *Financial Times* commented on the 'birthpangs of a colossus' (*Financial Times* 1996) which had been in the legislative conduit for almost 30 years. To break the continuing legislative deadlock, the Commission commissioned a group of experts, chaired by Etienne Davignon, to propose ways to resolve the issue of worker participation. In its 1997 report, the group proposed 'free negotiations' between employer and employee representatives to arrange the extent and form of participation, within a period of three months after the registration of an SE. If negotiations failed to produce an agreement, a set of 'reference rules' were to apply by default with regard to both worker participation on the board, as well as information and consultation rights. In fact, the Davignon Group provided a telling rationale for the subordination of worker rights to the legal form of the SE by arguing that 'failure to negotiate an agreement on participation in the European Company must not preclude incorporation as a European company, *since this would have the effect of removing the owners' right to decide on the company's legal form and transferring it to the workforce*' (Davignon Group 1997:10, emphasis added). This argument clearly demonstrates the underlying class interests against concessions to worker participation.

Mario Monti, then Commissioner for the Single Market, in a speech to the members of the Kangaroo Group, reassured them of the Commission's awareness of

> concerns that an agreement on the European Company Statute could open the floodgates for provisions on worker participation to become generalised. There is in reality *no risk of this kind* since it is clear that there is no political appetite for this. In these circumstances, a revival for example of the participation proposals in the 5th Company Law Directive on company structure is no part of the Commission's agenda' (Monti 1997, emphasis added). [63]

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). Any form of worker involvement in the modern corporation (that is, other than in production), was seen as an instrument to the new ultimate goal of the European Union. As the Davignon Group argued (1997:20, emphasis added), 'a concerted approach to work organisation within the company will improve industrial relations, increase worker participation in decisions, and is likely to lead to an increase in product

[63] The Kangaroo Group is an informal 'intergroup' of MEPs promoting the Single Market programme – the group also has an impressive list of corporate member.

quality. The latter aspect is an essential factor in *boosting competitiveness* within the European economy.'

Under the 1998 UK presidency, the 'before and after' principle with regard to employee representation became part of the SE provisions (see Art 18 of the SE recital). It has since also been used in the cross-border merger directive, and has been an important factor in breaking the deadlock on the SE discussions. 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).

What this principle does is to *preserve* information, consultation and representation in case of the formation of an SE. As Davies points out, the policy behind the Directive had become *defensive* with regard to worker's rights, rather than proactive as it was before (Davies 2003: 84). These changes in the negotiations of the SE provisions and principles also proved to be important for the discussion of other directives and legal initiatives. As Wouters argues, 'the Commission hopes that in the wake of the de-blocking of the SE-dossier, all the other pending drafts which were infected with the "employee participation" bug can be approved in short term' (Wouters 2000: 305). In December 2000, a consensus on the SE was finally reached at the EU council of Nice. Due to various legal concessions, the SE constitutes a rather broad regulation, which leaves many aspects, most importantly taxation and competition law, to the national company law where the SE has been registered (Davies 2003: 77; for more detail on the actual formation of an SE, see Leca 2007: 412). This leaves considerable scope for regulatory arbitrage and frequently causes legal uncertainty and delay during the formation of an SE. As Davies concludes on the final form of the SE,

> the adopted version can be said to exemplify the development of community policy over the past four decades in this area. Consultation through machinery outside the corporate structure is now seen as the mechanisms of involvement of choice; substantial autonomy is conceded to the social partners; and board-level representation appears

> in a limited and defensive role, because without it, this agreement to the SE project could not be obtained (Davies 2003: 96).

None the less, the adoption of the regulation in 2001 was greeted from both labour and business actors (Leca 2007: 403). As for instance Rüdiger von Rosen, member of the shareholder organisation *Deutsches Aktieninstitut (DAI)* argued, 'the European statute is giving new impetus to the discussion about the right management structure for a modern company that operates internationally. It also places a question mark over the survival of the co-determination rules [..] one of Germany's sacred cows' (*Financial Times* 2004). Crucially, under the terms of the SE statute, each Member State has to allow for the monistic as well as the dualistic company structure. The *Financial Times* concluded enthusiastically that 'this means that in most countries the two systems will be competing directly with each other for the first time. Unitary system is much less geared to the participation of employees in company management [..]. Everyone with an interest in the future of German capitalism should be aware that with next weeks introduction of the European company statute, battle is about to commence' (*Financial Times* 2004b).

While many labour organisations, in particular the ETUC, have welcomed the SE as a moderate progress for worker information and consultation on a European level, criticism has been levelled at the 'lack of sincerity of intention with regard to establishing a continental-style industrial relations,' in particular as the directive does not *specify* employee involvement or degree of consultation (Villiers 2006: 195). In fact, as the 1999 report of the Competitiveness Advisory Group (CAG), an 'independent' expert group set up by the Commission, demonstrates, the European Company Statute was increasingly seen as a response to the 'apparently intractable competitiveness deficit between the European Union and its main trading partners and rivals, the United States and Japan' (CAG 1999). In this context, the European Company Statute was identified as 'priority for good corporate governance', in order to build on 'the emerging similarity in approaches to corporate governance, specifically in achieving a European-wide code of best practice, defining a rule book for Member States regarding public ownership of corporations and limiting protectionist obstacles to foreign ownership' (CAG 1999: Section 3).

The European Works Council Directive

The European Works Council Directive (EWC) has also been an important development with regard to company and labour law in the European Union.

Drafted by DG Employment and Social Affairs, it had been called for following the Community Charter of Fundamental Social Rights for Workers. Its legal basis is in Art 2(2) of the Maastricht Social Protocol (Villiers 1998: 189), rendering it a social policy directive rather than an issue in company law as the proposal for the Fifth Directive or the SE. The EWC has been strongly opposed by business associations, in particular UNICE, as it was seen as too costly for business, and should better be organised at plant level in each country (*The Economist* 1990). Still, the final form of the EWC has eventually been adopted on 22 September 1994.[64] 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,[65] 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.

The worker rights provisions made by the SE and the EWC have been interpreted by several observers to suggest 'growing emphasis put on the stakeholder approach in Europe. Workers' participation is indeed an integral part of corporate governance. The reforms [..] constitute a new corporate design – purely European – on the global market, that is a coherent alternative to the Anglo-Saxon model' (Leca 2007: 438; cf Reberioux 2002). However, as this chapter argues, the actual developments, and the underlying structural changes with regard to capital-labour relations on the European level do not

[64] For the creation of EWCs see the EWC database managed by the ETUI, available at http://www.ewcdb.eu/index.php

[65] 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

warrant such optimism. Rather, Streeck and Schmitter's prediction seems to hold true.

> European-level relations between capital and labor, instead of constituting the core of the European political economy, will for the foreseeable future remain compartmentalized in the private sphere of multinational enterprises and will thus be essentially nonpolitical and voluntaristic in character. Where labor-capital relations enter the political arena, they will mainly take the form of a set of discrete "labor"and "social policy" issues (Streeck and Schmitter 1991: 159).

While there had been significant legislative establishment of worker's rights in particular areas of industrial relations (notably, the 1975 Collective Reduncancies directive, the 1977 Transfer of Undertakings directive ('acquired rights directive') and the 1989 Health and Safety framework directive), these only pertain to certain areas of company organisation and do not interfere with actual corporate control decisions.

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.

4.5 Developments in company law and corporate governance in the 1990s

Following the abandonment of the harmonisation programme due to mounting intergovernmental contestation, the Commission did not have a coherent framework for the company law and corporate governance programme in the 1990s (Wooldridge 1991: 142; see also Wouters 2000: 272-3). Due to corporate restructuring manifested in an M&A wave and increasing privatisation, cross-border issues had become increasingly important to regulators (Skog 2002: 302, Timmermans 2003: 626; see also chapter three). However, at the same time Member States were more and more reluctant to concede control over what was left of national corporate governance systems to the European level. That is, starting with the Cadbury code in 1992, there had been developments of corporate governance codes in almost all company law jurisdictions which often preempted European level legislation (cf. Weil Gotshal Manges 2002). As Streeck argues, this development 'was probably the most important reason why a unified European company law seems to have become less urgent in the 1990s' (Streeck 2001: 13).

The further harmonization had advanced, the more Member States realized how integral their national corporate governance configuration was to their national socio-economic system. The introduction of the subsidiarity principle (Art 5(2) EC) has to be seen in this context. According to Rhodes and Van Apeldoorn (1998: 422),

> 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 which allows a degree of national diversity.

The Commission sought to reinvigorate the regulatory dynamics in company law with several initiatives. In 1996, it set up the 'Simpler Legislation for the Internal Market' Group (SLIM) which was to discuss the First and Second company law directives. The group consisted of Member State representatives and 'experts in and users of company law' (SLIM 1997). The purpose of the group was an explicit 'deregulation exercise' (SLIM 1997), rather than a perpetuation of the harmonisation programme. The SLIM recommendations entailed, for instance, electronic publication and registration for companies and company reports. The Commission also involved academics and practitioners in a company law conference in 1997 (Edwards 1999:406), where further initiatives were to be discussed. Initiatives were increasingly presented as 'framework directives' which were to establish only broad minimum requirements which were subject to considerable discretion under national company laws.

As will be discussed in detail in the next chapter, company law and corporate governance increasingly came to be dealt with under the developing framework of financial integration (cf Bieling 2003). This was also reflected in the institutional reorganisation of the Commission. As Wouters argues, 'the recent re-structuring within DG XV (now called: "Internal Market") of the Commission will lead to a new approach. The merging of the units which deal with company law and law of securities suggests that the Commission is opting for an approach focused on the financial markets' (Wouters 2000: 281). In the establishment of the Financial Services Action Plan in 1999, corporate governance played an important part in the restructuring of the regulatory framework to bring about financial market integration.

The increasing integration of corporate governance issues into the context of financial markets also led to the inclusion of initiatives for employee participation in terms of employee ownership and profit sharing. In a communication in 1992, the Commission had already proposed a general framework for financial participation of employees (the so-called PEPPER plan, 'Promotion of Employee Participation in Profits and Enterprise Results').[66] A revised version (PEPPER II) was published in 1997. 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.

4.6 European Corporate Governance Regulation at the end of the 1990s

How, then, can we explain the regulatory transformation outlined in this chapter? In contrast to the Commission's drive for harmonisation of national company law systems in the early phase, it was now assumed by policy-makers and market participants alike that market pressures would eventually bring corporate governance systems to converge. As Wouters argues, 'unlike the

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[66] See the Commission's website for the PEPPER programme at http://europa.eu/scadplus/leg/en/cha/c10138.htm (last accessed 21 July 2008)

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). The 'battle of the systems' was expected to bring about convergence on a best practice model of corporate governance, which in turn was considered crucial to the integration of financial markets (cf. Story and Walter 1997:136). However, it is crucial to see these developments as part of a broader political project of socio-economic restructuring in the European Union, rather than merely perceiving of them as inevitable results of reactive processes.

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. 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.

With regard to the establishment of workers' rights on the European level, rather than being an indication of an emerging 'European Stakeholder model', 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 Reberioux's conclusion that 'the shift towards workplace democracy [..] consolidates the notion of a social Europe' (Reberioux 2002:130), the increasing integration of capital markets was thus concomitant to an increasing *fragmentation* of workers rights on the European level. Rather than a comprehensive, mandatory Social Model, European social policy and industrial relations were increasingly characterised by 'voluntarism, neoliberalism and laissez-faire' (Keller 2002: 440; cf. chapter three)

The role of labour in these development has been important. The ETUC and other trade unions have been integrated into the framework of 'social partnership' at the European level – this has been an important factor in rendering the changes in regulatory focus legitimate by maintaining the 'social dimension' of the emerging project (Bieling/Steinhilber 2002: 64-66). While at first glance this might be interpreted as a radical break with its support for the Commission's 'industrial democracy' programme in the 1970s, it constitutes an illustration of the inclusion of 'core' labour representation into the political project of neoliberal integration. As a 'slow drip-feed of Anglo-Saxon corporate and competitive philosophies is filling up the European company law system (Villiers 2006: 209), the 'competitiveness' of European companies had become the ultimate objective of regulation, rather than a means for achieving stable employment, growth and social equality.

Consigning worker rights, in particular with regard to any participation issues, to social policy had been an important precondition for the marketisation of corporate control. In the next chapter, 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. Here, it will be argued that EU corporate governance regulation has become an integral part of the EU's attempt to liberalize its financial markets.

5 Corporate Governance Regulation in the European Union – From Harmonisation to Marketisation

The previous chapter has discussed the shift from company law harmonisation, with a strong focus on industrial democracy, towards a regulatory approach based on minimum requirements and mutual recognition. The focus of this chapter is now on the political constitution of the marketisation of corporate control, geared at adjusting the governance of corporations to the demands of liberalised capital markets.

The increasing incorporation of corporate governance into a framework for financial market integration and capital market liberalisation constitutes a crucial shift in the EU approach to corporate governance regulation. The framing of corporate governance within the Financial Services Action Plan (FSAP), and the subsequent regulatory linkages and overlap between corporate governance and capital market and securities law illustrate that 'the reach of capital market law over subjects that traditionally fall within the realm of company law is expanding' (Winter 2004: 106). Arguably, the Takeover Directive represents the most important development in this regard, as well as a prime example for the political contestation by various social forces. The Company Law Action Plan, published in 2003, further points toward an increasing regulatory focus on shareholder rights – in contrast to the regulatory developments in the earlier stages of company law harmonisation. Of particular significance in this context are the directive on *Fostering an appropriate regime for shareholders* and the far-reaching disclosure and transparency provisions. With regard to company law, the case-law of the European Court of Justice (ECJ) has had a key impact on the debate over the freedom of establishment for European companies. Essentially granting companies the freedom to incorporate in the Member State which offers the most favourable company law, the Court's decisions instil an element of regulatory competition with potentially far-reaching implications for national company laws. In a way, the ECJ has thus juridically confirmed the primacy of the freedom of capital in the EU over protective measures by Member States to guard companies from takeovers. The Court's ruling on golden shares, most recently on the Volkswagen Act (2007), has also contributed to the further liberalisation of corporate control.

The chapter proceeds by outlining the increasing marketisation of corporate control through an analysis of several key regulatory developments in the area of company law, corporate governance and capital market regulation. Mirroring Van Apeldoorn and Horn's (2007a) analysis of the marketisation project within the broader process of neoliberal restructuring on the European level, this chapter identifies concrete regulatory initiatives, as well as institutional preconditions conducive to the marketisation of corporate control. Following an overview of the integration of capital and financial markets in the European Union, it is clarified how the FSAP, the ‘programmatic and operative platform for financial market integration‘ (Bieling 2003: 211), represents a first, and crucial step towards integrating corporate governance into the framework of capital market law. Subsequent developments have to be seen in light of this, and, as the case of the Takeover Directive illustrates, reveal the extent to which financial market imperatives have already permeated into the socio-economic governance of companies. The attempt to establish a pan-European market for corporate control illustrates the nature and objective of the marketisation project, as well as the social and political struggles and contestation of this political project. The reports by the High Level Group of Company Law Experts and the subsequent Company Law Action Plan are then discussed as central examples of how the marketisation project has become more coherent, and the general focus on shareholders (excluding labour from the discussion of corporate governance) more and more dominant. Subsequently, transparency and disclosure provisions are discussed as an important enabling factor for (and link between) capital markets and the marketisation of corporate control. The debate on (cross-border) shareholder rights and shareholder democracy has been particularly promoted by the Commission and transnational investor associations, whereas national business associations as representatives of industrial capital have been rather hostile towards the Commission’s push for ‘one-share one-vote’ provisions. While all the above are regulatory developments within the scope of the Commission, with regard to European company law we will also take into account the ECJ case law on the freedom of establishment and golden shares. The chapter concludes with an outline of recent developments in corporate governance, and a discussion of the shape of the marketisation project.

5.1 Financial Market Integration

The Financial Services Action Plan

The FSAP constitutes a central element in the project of capital market liberalisation and financial market integration in the EU, next to the monetary project of EMU. While the first step towards financial market liberalisation has already been set out in the 1985 White Paper, regulatory progress only gained momentum in the late 1990s (see chapter 3). As Bieling argues, the rationale behind the FSAP was that 'integrated capital markets would enhance pressures for a market- and competition-oriented modernisation of the whole mode of capitalist reproduction, i.e. of national investment systems, of given structures of corporate governance, of industrial relations, and of social security provisions' (Bieling 2003: 212). As his analysis continues to show, this belief in the efficiency of capital markets (and, as will be illustrated below, the market for corporate control) has not only been evident among financial actors set to gain from increasingly integrated and competitive capital markets, such as institutional investors or financial companies, but has also been shared by a wide range of social forces, including European governments, social democrats and even trade unions (Bieling 2003: 216).

In order for financial market regulation to overcome the fragmentation of European financial markets, and at the same time deal with the rapid developments of financial instruments, an expert group led by Alexandre Lamfalussy was commissioned to suggest new legislative procedures for financial market regulation. The expert group suggested the setting up of two regulatory committees, the European Securities Committee (ESC) and the Committee of European Securities Regulators (CESR). As Bieling argues, in concert with the Commission these committees now constitute the main agents in the regulatory decision-making process, effectively reducing the role of the Council and EU Parliament to the definition of framework and implementation principles (Bieling 2003: 214). [67]

Integration of corporate governance into a financial market framework

European capital market integration and EMU have been important preconditions for the marketisation of corporate control (Van Apeldoorn and Horn 2007a). The European common currency has brought about an immense increase in cross-border investment, which led to a substantial increase in cross-border share ownership in European companies (*The Economist* 1999; see also Bieling 2003: 211).

Whereas company law and financial and securities market regulation had been distinct regulatory fields under the programme of company law harmonisation, with the integration of financial markets, and the increasing regulatory focus on corporate governance of the European Commission,

[67] The European Parliament voiced its concern that the procedures proposed by the Lamfalussy committee erode its right to review new European legislation (Financial Times 2001b).

corporate governance regulation was more and more seen as subject to capital and financial market imperatives. As will be argued below, 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.

Among the forty-two areas in which the FSAP pointed out the EU should take action, reference was made to both company law and corporate governance proposals. With regard to the European Company Statute, the FSAP argues that the draft regulation represents 'a useful contribution to an integrated primary market [which] will also serve as an important step towards (market driven) emergence of corporate governance patterns in the EU' (European Commission 1999:4). It also singled out the proposal for a Takeover Directive as 'an important milestone in the emergence of an open market in EU corporate ownership' (European Commission 1999: 4). The impetus behind the Commission's push already became clear in the FSAP, namely the 'much-needed legal underpinning for protection of minority shareholders and a *more rationalised organisation* of corporate legal structures in the single market' (European Commission 1999: 9, emphasis added). The Commission's 2003 Action Plan for 'Modernising Company Law and Enhancing Corporate Governance' uses essentially the same notions of competitiveness and efficiency that also underlie the agenda for capital market integration, arguing that '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 2003a:3). This 'modernisation' of company law, primarily by way of corporate governance measures under a framework of capital market law, is presented as necessary, self-evident step for European 'competitiveness'. However, the subsumption of company law and corporate governance under the imperatives of capital market integration has to be seen in the context of a political project, rather than a technical policy reorientation within the Commission's mandate.

5.2 The Takeover Directive

The Takeover Directive constitutes an essential part of the political project to restructure and liberalise European capital markets. With the objective to, as stated in the FSAP, '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 1999:4), and thus to promote the development of a pan-European market for corporate control, it represents a stepping stone towards the marketisation of corporate control in the EU in that it not only sets the regulatory stage for further advances in this direction, but also because it promotes the perception of corporations as commodities.

The legislative history of the Takeover Directive is a prime example of how regulatory initiatives in the realm of company law and corporate governance have been discursively and politically integrated into a comprehensive plan for financial market integration. The marketisation project, manifested in the Commission's push for a European market for corporate control, plays a crucial role within this broader project of market integration. Frits Bolkestein clearly summed up the Commission's underlying objective by arguing that 'an integrated financial market can only really work when all the major barriers are removed. When the good can take over and improve the bad' (Bolkestein 2003b).

The 'neverending story' of the Takeover Directive has been well documented, both in the law and economics literature (Skog 2002; Edwards 2004; Wouters 2000 etc) as well as in political economy research (e.g. Callaghan and Höpner 2005). What this section seeks to contribute is an understanding of how the Takeover Directive has evolved in the context, and represents a critical element of the marketisation of corporate control. To this aim, the legislative history of the directive will be discussed in the following, broadly structured in three parts - first, covering the early draft proposals up to the defeat of the proposal in the European Parliament (EP) in July 2001. Then the High Level Group of Company Law Expert (HLG) report on Issues related to Takeover Bids, and the subsequent revised Commission proposal will be discussed, with reference to the political struggle between the Parliament, the Council and the Commission over the Directive's final form. Subsequently, the provisions of the Directive which has finally been adopted in December 2003 will be considered in the context of the marketisation of corporate control, as well as the reception and implementation of the Directive. Then, the significance of the Takeover Directive for the marketisation of corporate control in Europe is discussed.

Legislative History of Takeover Directive

Already in the early 1970, the Commission had expressed its interest in takeover issues by asking a company law expert to draw up a draft for a directive on takeover bids (Skog 2002: 302, see also European Commission 1975: 14). The so-called Pennington report was strongly modelled upon the UK Takeover Code but due to lack if interest from Member States no further initiative followed. As outlined in the previous chapter, the 5th Company Law Directive and the Statute for a European Company were at the centre of the political struggle over industrial democracy at that time. As takeovers really only started to become an economic reality in Europe in the 1980s, takeover issues did not feature prominently on the political agenda. However, some ten years later, the 1985 White Paper on the Completion of the Single Market clearly stated the need for a minimum harmonisation of takeover regulation in the Community. The Commission expressed its intention ‘for making better use of certain procedures such as offers of shares to the public for reshaping the pattern of share ownership in enterprises. [..] Such operations should be made more attractive’ (European Commission 1985: 35). This represents an early policy commitment to corporate restructuring and the establishment of a market for corporate control in the European Union. Yet the establishment of a market for corporate control constituted a clear break from the focus on worker participation and industrial democracy, and as a political project first had to be established. In the context of the ‘social dimension’ of the European market, remnants of the industrial policy discourse of the 1970s still lingered on. For instance, while the Commission was revising its first draft proposal for a Takeover Directive, its 1988 Memorandum on the European Company Statute argued that ‘the takeover bid has [..] become one of the main means of restructuring, sometimes causing turmoil within a company in so far as the procedures used rule out the consultation and involvement of workers, *despite the fact that they are one of the keys to industrial success’* (European Commission 1985: 5, emphasis added). Worker consultation, and certainly *involvement*, however, did not play a significant role in the early draft directives, nor would it in the final form.

With the increasing politicisation of the issue due to a number of high-profile hostile takeovers in Europe (see e.g. Skog 2002: 303 on the case of the

Société Générale de Belgique takeover), the Commission's proposal in 1987, and, the revised versions in 1989 and 1990, met substantial criticism from the Member States. Although the UK Takeover Code had been the model for many of the provisions in the draft directive, the UK rejected the legislative approach of the draft proposal against the City Code's self-regulatory principles. As Callaghan shows, the draft directive was also not unanimously welcomed by business associations. As her discussion of employer associations' reactions to the draft takeover directive shows, the British peak employer federation (CBI) supported the initiative for a takeover directive early on, while German industry federation (BDI) was rather reluctant (Callaghan 2008: 4). As the struggle over the 2000 proposal illustrates, the increasing division of national business along the lines of industrial and manufacturing business, and financial corporations and (investment) banks has to be taken into account here.

The Commission submitted a revised draft for the Takeover Directive in 1996 – in contrast to the earlier drafts, the new proposal was presented as a 'framework directive'. Under reconsideration of the more detailed provisions of the 1990 proposal under the subsidiarity principle, as well as the general regulatory trend towards minimum harmonisation, the draft directive no longer entailed detailed instructions on how the implementation of the general principles on takeover should be implemented. As Mario Monti, then Commissioner for the Internal Market, argued, 'this new proposal is a further demonstration of the Commission's pragmatic approach to ensuring respect for subsidiarity [..] It reflects the results of extensive consultations with the Member States. We have responded positively to the Member States' desire for a new approach to co-ordinating rules on take-overs' (Monti 1990). The amended version, in 1997, sought to establish a mandatory bid offer, and included strict prohibition of any action by the target company's management which would frustrate a takeover bid.

Concomitant to the initiation of the Financial Services Action Plan, which lent further urgency to the draft directive, Council officials reached a common position on a revised version of the 1997 proposal in June 1999. However, ratification by the Council of Ministers was delayed by Anglo-Spanish disagreement over which authority would pertain to takeovers in Gibraltar (Skog 2002: 304). In June 2000 the Council finally adopted a common position. The Parliament, however, in its reply in December 2000 demanded substantive amendments, in particular with regard to Art 9 on the board neutrality rule, as well as to worker information and consultation.[68] In

[68] These articles provides for board neutrality when a bid is made by prohibiting the board from taking any measures which could result in the frustration of a bid without receiving the authorisation of the general meeting. Member States can provide that this authorisation be obtained even as soon 'as the board of the offeree company becomes aware that the bid is

particular, it argued that employees should have some voice in the decision-making process (European Parliament 2000). The Commission refused to take these into account on the basis that employee participation does not have a place in the decision-making process during a takeover bid – 'only the holders of securities can decide whether or not to sell [shares, LH] and they are therefore the only parties concerned by it' (European Commission 2001b:5). Also, the Commission's take on the notion of the 'level playing field' has to be taken into account. The concern about the 'lack of a playing field' in the EU originated in the European Parliament rather than within the Commission itself (European Commission 2002: 4); whereas the EP was worried that the diversity of structural and technical takeover defences would put certain companies (and Member States) at a disadvantage in case of a takeover bid, the Commission was more concerned about the market-opening attributes of a level playing field for takeovers. 'A more 'level playing field' for takeovers in Europe would enhance the EU's economic health by allowing better use of resources. This is precisely why this proposal is at the core of European economic reform' (Bolkestein 2003c).

Defeat of the proposal in the European Parliament

Under the Swedish presidency a process of conciliation was initiated in April to facilitate a common position between the Council and the EP - the Council insisted on board neutrality in case of a takeover bid, while the Parliament maintained that the general shareholder meeting should be able to approve in advance of measures taken by the board to frustrate a bid. At the end of April, Germany announced that it was no longer willing to back the draft directive unless Article 9 on the neutrality of the board be substantially changed or eliminated. The highly publicised Vodafone-Mannesmann takeover in Winter 1999/2000, which *The Economist* (2000b) had identified as 'turning point for European capitalism', had lead to growing politicisation of takeover issues. In particular in the German context, the fault lines between a more industrial and a financialised perspective became very clear. The German government had been lobbied by German industrialists, in particular from large manufacturers like VW, BASF and Porsche to oppose the board neutrality rule. Under a company law reform in 1998, the so-called KontraG, multiple voting rights and cross-shareholding had already been eliminated in Germany, while companies in

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imminent'. In this context, the shareholder meeting has to approve of any decision which is not 'part of the normal course of the company's business' To these purposes, the shareholder meeting may be called at short notice (at least 2 weeks' notice though).

other Member States could make use of these defensive measures. This would leave German companies at a disadvantage vis-à-vis companies that were protected from takeovers by these barriers. However, financial capital and *transnational* industrial capital in Germany very much supported the establishment of a market for corporate control (e.g. Rolf Breuer, then chief executive of Deutsche Bank; Paul Achleitner of Allianz; or Investment funds such as MLP or Union Investment, see *Spiegel* 2001).

Despite Germany's unwillingness to accept the board neutrality rule, a last-minute compromise was finally found in the conciliation process (in which the Council had successfully upheld its commitment to strict board neutrality). On July 4, the proposal was then put to vote by the European Parliament – as Hix, Noury and Roland argue, 'one of the most high profile pieces of legislation ever to pass through the European parliament' (Hix et. al. 2007:200). The draft directive was rejected by the smallest possible margin, with 273 votes in favour and 273 votes against, with 22 MEPs abstaining. As Callaghan and Höpner show, more than 90 per cent of German MEPs voted against the proposal, while more than 90 per cent of British MEPs voted in favour (2005: 324), regardless of party affiliation. MEPs had emphasized three main objections to the draft. The most contentious issue was (still) board neutrality in case of a takeover bid, which was considered unacceptable as long as there was still no level playing field in the European arena. The second issue challenged by the EP was the employee protection and voice the directive granted with regard to labour issues in the case of a takeover bid. Finally, concern was voiced over the fact that the directive did not provide any means to achieve a level playing field with the United States, thus effectively making European companies more vulnerable to takeovers than their American counterparts.

The defeat of the draft directive meant a serious setback for the Commission's push for a European market for corporate control. The *Financial Times* (2001a) even ventured so far as to call it 'a blow to Europe's competitiveness.'

The High Level Group of Company Law Experts and the revised 2002 proposal

However, the Commission was not about to give up on its plans for the Takeover Directive just yet. In September 2001 it announced a High Level Group of Company Experts to advise the Commission on the drafting of a new proposal. The group had been 'selected on the basis of their competence in company law and the Commission's desire that the members should have broad experience of the various legal and economic systems in the EU' (European Commission 2001c). The schedule for the group was to come up with a report on the Takeover Directive by the end of 2001, with a second mandate to issue a broader report on more general matters of company law by mid-2002. The group consisted of seven company law experts from the Netherlands, Spain, Germany, the United Kingdom, Italy, Denmark and France.[69] During its consultations, the group invited representatives of several organisations interested in the regulation of takeover bids within the EU to confidential hearings in Brussels.[70] Its final report on 'Issues related to Takeover Bids' was presented to the Commission on January 10 2002 and received a warm welcome by the company and securities law community (e.g. *Financial Times* 2002a).

The work of the High Level Group has been important in setting the parameters for subsequent policy debates on corporate governance (for a detailed discussion of the role of experts in the marketisation project see below). The underlying approach of the experts was indicated by the report's statement that

> the availability of a mechanism for takeover bids is basically beneficial. Takeovers are a means to create wealth by exploiting synergies and to discipline the management of listed companies […] which in the long term is in the best interests of all stakeholders, and society at large (High Level Group of Company Law Experts 2002a: 4).

The experts advocated a regulatory framework which essentially provided that 'in the event of a takeover the ultimate decision must be with the shareholders' (High Level Group of Company Law Experts 2002a: 2). This arguably constitutes a central principle of the marketisation project, and indicates the central role the High Level Group had at a crucial policy juncture.

The key recommendations by the HLG were the so-called 'breakthrough rule' in case of a bid, which would temporarily suspend structural barriers against takeover bids, such as multiple voting rights and voting ceilings (more on this below), as well as squeeze-out and sell-out provisions. The Commission drew heavily on the HLG report for the revision of the draft directive; however, aware of the high politicisation of the issue, it did not take up all of the group's recommendations. Most notably, the break-through rule in the proposal it submitted in October 2002 did not apply to multiple voting rights. As the Commission explained, this was a concession to severe opposition 'from virtually all member states and interested parties' against the break-

[69] See the annex for the list of names and affiliation of the HLG members.

[70] ETUC, Euroshareholders, FESE, and UNICE – for their comments see annex 3 of the HLG report (HLG 2002)

through rule (European Commission 2002). Apart from the breakthrough rule, the Commission's draft directive was 'following the logic of the Winter report' with regard to the perspective on shareholder rights and the role of the market for corporate control (European Commission 2002). This belief in the disciplining role of the market for corporate control has been at the heart of the Commission's push for the marketisation of corporate control. The following statement by Frits Bolkestein is a clear expression of this.

> Companies must be exposed not just to the scrutiny of their owners but also to that of the wider market. New management may be needed to improve the overall efficiency and thus real investor returns. Even what is sometimes seen as the menace of takeovers offers a valuable discipline to firms and their management (Bolkestein 2002b).

In reaction to the revised proposal, the European Parliament commissioned an expert group of its own to 'provide the EP with the information needed in order to properly evaluate the Commission's new proposal' (Dauner-Lieb and Lamandini 2003:9). In contrast to the HLG, the experts commissioned by the EP explicitly questioned the role of the market for corporate control by arguing that 'the idea underlying the directive, namely that takeovers are sensible from an overall economic point of view, and that European legislation to facilitate takeovers is therefore necessary, could perhaps be disputed in its very foundations' (Dauner-Lieb and Lamandini 2003: 13). However it argued that it was outside the scope of its report to review that issue. It concluded that the HLG's breakthrough rule was a 'thoughtful attempt to create a sufficiently level playing field also in respect of pre bid techniques' and argued that this was the first time that the traditional differentiation between company law and capital markets law was overcome by taking into account pre-bid barriers (Dauner-Lieb and Lamandini 2003: 13). However it criticised the Commission proposal for not including multiple voting rights in the scope of the breakthrough rule as 'inconsistent' with its policy objective of creating a level playing field for the contestability of corporate control.

The European Parliament criticised the Commission's proposal for this failure to create a level playing field, as well as the scope of employee information and consultation rights. As the Committee on Employment and Social Affairs (2003) argued, 'the good news is that the new proposal for the first time explicitly recognizes the effects on employment and restructuring from a takeover. [..] The bad news is that the rights for employees and their representatives are formulated too restrictive.' Conflict on the issue of multiple voting rights and the board neutrality rule also continued in the Council. Germany pushed for the inclusion of multiple voting rights in the draft directive. As a representative of the Federation of German Industries (BDI) told the *Financial Times*, the exemption of multiple voting rights was 'a mess [..]. You either have a level playing field for takeovers or you don't. You can't just be a little bit pregnant' (*Financial Times* 2002b). However, among several other Member States France and Sweden strongly objected to this scheme, as French double voting rights and Scandinavian multiple voting rights would have been affected.[71] Jacob Wallenberg, a Swedish investor with a large portfolio of various preferential shares, even called the inclusion of multiple voting under the breakthrough rule in case of a takeover 'expropriation' of shareholders owning these shares (*European Voice* 2002). The deadlock over pre-bid defensive structures proved to be difficult to negotiate, but the Commission did not budge from its position on the merits of the market for corporate control. It rejected a minimal compromise version of the directive, excluding both the neutrality rule as well as breakthrough provisions (Callaghan and Höpner 2005: 311). As the *Financial Times* warned, 'the credibility of its declared intent to open up capital markets as part of a wider economic liberalisation is at stake' (*Financial Times* 2003). In contrast to this link between the Takeover Directive and the broader project of economic liberalisation in Europe, the European Trade Union Confederation objected to the draft directive on the grounds that

> it is not acceptable that only shareholders can decide about the future of a company. It is even less acceptable that the workforce and other stakeholders are not even properly informed or consulted in time. This new directive, if adopted without workers' rights, would be another step further away from the European Social Model (ETUC 2003a).

In November 2003 the Council finally reached a compromise solution. Under an optionality arrangement, Member States were free to decide whether or not to require companies to apply the board neutrality and/or the breakthrough rule. The provisions of the final form of the Takeover Directive will be discussed below. The directive was approved by the Parliament on 16 December 2003, and adopted by the Council on 22 December 2003.

The 2004 Takeover Directive – Key Provisions

The most important provisions of the Takeover Directive are, arguably, Article 9 on board neutrality and Article 11 on the breakthrough rule. Article 9 requires

[71] The struggle over multiple voting rights was even dragged out in the European Commission, where the German commissioners, despite the obligation for the Commission cabinet not to vote along national lines, voted against the compromise proposal in 2002 (Financial Times 2002c)

the board of a target company (management or supervisory) to refrain from taking any measures which could result in the frustration of a bid without having received the authorisation of the general shareholder meeting. Article 11 of the directive provides that, once a bidder has reached a threshold of 75% of the capital carrying voting rights, no restrictions on voting rights (e.g. voting caps) or any other extraordinary rights of shareholders (e.g. to appoint or remove a board member) shall apply. Dual and multiple voting rights are subject to the 'one share one vote' principle at the first general meeting, where the successful bidder has the right to amend the company's 'articles of association' and to remove or appoint board members.[72] Also, during the time of the bid, any restrictions on voting rights do not apply at the general meeting during which the defensive measures mentioned in Article 9 are decided on. If applied, the breakthrough rule thus brings about a *temporary* level playing field. Under the compromise reached in the Council, Article 9 and 11 are subject to an optionality provision (Article 12), which states that 'Member States may reserve the right not to require companies which have their registered offices within their territory to apply Article 9 and/or Article 11.' Should a Member State decide not to require companies to apply the neutrality and/or the breakthrough rule, it is nonetheless obliged to allow companies to opt in if the company decides to do so. In addition to that, under the reciprocity clause, 'member states may […] exempt companies which apply Art 9 and/or Art 11 from applying Art 9 and or 11 if they become the subject of an offer launched by a company which does not apply the same Articles as they do.'

Although the compromise form of the directive provides a certain degree of optionality in the most controversial provisions, it introduces a regulatory setting which establishes a variety of measures conducive to the marketisation of corporate control, in particular disclosure and transparency rules pertaining to the takeover bid (Articles 6, 8 and 10). These constitute 'a cornerstone of the effective operation of capital markets and the market of corporate control' (Maul and Kolouridas 2004: 360). Also, despite the optionality provisions, the Directive does establish a *norm* with regard to Takeover regulation which, in the context of the marketisation of corporate control, helps to underpin the political construction of corporate control, and ultimately the corporation, as a commodity. As Jaap Winter, chairman of the HLG, points out, the 'A-regime [i.e. opt in, LH] sets the benchmark. Companies are not forced into the benchmark; the system relies on market pressure to

[72] This means that a successful bidder who has crossed the 75% threshold can substantially change the company without any chance for labour to be part of the process. While (minority) shareholders have the chance to sell their shares and exit, labour thus has to stick with the new owner /controlling shareholder.

provide incentives to elect the A-regime. [..] This may still prove to be a *significant step into the right direction*' (Winter 2004: 112, emphasis added).

A 'stepping stone' towards the marketisation of corporate control?

Frits Bolkestein again and again voiced his disappointment with the final outcome of the Takeover Directive, also in the context of broader financial market integration. His lament that 'by far the most regrettable example of the emasculation of an FSAP measure has been the unfortunate Takeover Bids Directive' (Bolkestein 2004a) is based on the optionality provisions, which, as the implementation process has shown, have been made extensive use of by the Member States.

The implementation of the Takeover Directive has been slow, and as was to be expected, the vast majority of Member States has not imposed the breakthrough rule, but has made it optional for companies (only the Baltic states have fully imposed the breakthrough provision). Also, no Member State has chosen to impose the board neutrality rule where it was not (fully) applied before transposition, except for Malta (European Commission 2007: 7). As the Commission admitted, 'the number of Member States implementing the Directive in a seemingly protectionist way is unexpectedly large' (European Commission 2007: 10). The Directive is scheduled for revision in 2011. However, despite the legislative compromise and the present resilience of national pre- and post-bid defensive structures to takeover, which prevent a European market for corporate control from fully being established, fundamental policy choices have now been ascertained with regard to the marketisation of corporate control. While the Member States and the Parliament rejected several draft proposals over national differences in takeover defences and other legal arrangements, the perception of corporate control as a commodity exchangeable on the market was not questioned at all. While the European Parliament and trade union representatives objected to the exclusion of workers from the decision-making process in case of a takeover, it is one of the fundamental principles of the market for corporate control that the only agents on the market are shareholders. The Commission has succeeded in establishing a regulatory framework in which the *norm* prescribes that in case of a takeover, it is only shareholders, and more particularly proportionally to their risk-bearing property, who get to make decisions on the company.

5.3 The High Level Group of Company Law Experts and other Expert Groups in the Policy-Making Process

As the HLG has had such a central role in the 'modernisation' of company law and corporate governance in the European Union, a discussion of their composition, policy recommendations and role within the regulatory transformation is warranted here.

Plans for setting up an expert group to give new impetus to the Commission's corporate governance programme had been set up in early 2001, but after the defeat of the Takeover Directive in the Parliament in July 2001, the group was given the mandate to come up with recommendations on a revised draft.[73]

'A Modern Regulatory Framework for Company Law in Europe'

Apart from its advice on the Takeover Directive, the High Level Group of Company Law Experts had also been asked to provide recommendations 'for a modern regulatory European company law framework designed to be sufficiently flexible and up-to-date to meet companies' needs' (European Commission 2001). Issues to be discussed by the HLG included shareholder rights (e.g. cross-border voting), and corporate restructuring and mobility. After Enron, at the Oviedo informal ECOFIN council in April 2002 the mandate of the High Level Group was extended to include the role of non-executive directors and of supervisory boards; management remuneration; and the responsibility of management for the preparation of financial information.

The second report by the HLG, published in November 2002, provided the blueprint for the Commission's Company Law Action Plan (see below). Crucially, the HLG's underlying approach signalled a significant break with the rationale underlying previous company law initiatives. According to Winter, 'the primary focus of the EU's involvement in company law should be to establish company law that facilitates efficient and competitive business across the EU, rather than focusing on harmonisation in order to create similar protection for shareholders and third parties for the sake of it' (Winter 2004: 108). While the HLG's report on takeover bids had dealt with external control mechanisms, the broader report focused more on internal corporate governance (High Level Group of Company Law Experts 2002b: 44). Rather than legislative proposals, the group promoted the role of disclosure for shareholder

[73] Interview with a member of the HLG, 11 December 2006.

protection. It argued that 'disclosure requirements can sometimes provide a more efficient regulatory tool than substantive regulation through more or less detailed rules' (High Level Group of Company Law Experts 2002b: 34). This emphasis on disclosure reinforces the link between corporate governance and securities regulation (as well as capital market law).

The Group's recommendations covered the fields of corporate governance, capital formation and maintenance, groups and pyramids, corporate restructuring and mobility, the European Private Company and co-operatives and other forms of enterprises. In the field of corporate governance, it recommended a mandatory annual corporate governance statement, to include information on 'key elements of their corporate governance rules and practices'. Further to this, the group made recommendations on disclosure of and decision-making on director remuneration, and the choice between a dualistic or monistic board structure.

With regard to shareholder rights, the HLG subscribed to a perspective of shareholder primacy, as illustrated by its statement that 'the holders of these rights to the residual profits and assets of the company are best equipped to decide on the affairs of the company as the ultimate effects of their decision will be borne by them' (High Level Group of Company Law Experts 2002a: 21). Since shareholder's focus is on wealth creation, the group argued, they are suited 'to act as "watchdog" not only on their own behalf, but also, in normal circumstances, on behalf of other stakeholders' (High Level Group of Company Law Experts 2002b: 47).

'Reframing' European Corporate Governance - the HLG's policy recommendations

The Group's terms of references did not 'specify any guidelines with respect to measures that might be considered in order to create a level playing field. By choosing particular guidelines […] the Group made fundamental policy decisions of its own choosing' (Mülbert 2003: 5). The HLG selected 'tools' which made their market-liberal stance quite clear. Notably, with regard to takeovers, the HLG argued that 'takeovers are a means to create wealth by exploiting synergies and to discipline the management of listed companies […] which in the long term is in the best interests of all stakeholders, and society at large' (High Level Group of Company Law Experts 2002a: 4). This clearly indicates a particular view of the role and purpose of a company, and the mechanisms advanced to ensure these reflected this thinking. In this vein, 'the goal of the break-through rule is the same as the overall rule of the Takeover

Directive – to transform control of listed EU firms into a commodity available for purchase throughout (and outside) the EU' (Coates 2003: 3).

Winter acknowledged the shift towards an increased orientation towards capital market law, rather than the traditional company law outlook that had been dominant in European Union company law. He argued that although, formally, the Takeover Directive is a directive on company law and part of the company law harmonisation 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, emphasis added). This represents a significant shift in the underlying perception of on which grounds and to which ends company law should be shaped. Capital market law follow considerably different imperatives than company law, in particular with regard to the transnational nature of capital and the distinctly national configuration of company laws in the European Union. The shift from the strive for harmonisation towards market-based concepts of 'level playing fields' or even regulatory competition can be seen within this context; here the HLG 'has been very reluctant to suggest new projects for harmonisation of company law at the EU level' (Winter 2004: 109).

The HLG advanced a strategy that rejected the traditional harmonisation approach in favour of the integration of national company laws into a presumedly efficient (transnational) market. Rather than harmonized regulation of company law, in the context of this market-oriented outlook, the HLG emphasizes the role of disclosure as a regulatory tool (High Level Group of Company Law Experts 2002b). This represents an important step in that the HLG asserts that disclosure requirements can sometimes provide a more efficient regulatory tool than substantive regulation through more or less detailed rules (Merkt 2004: 5). This rests on the assumption that 'where markets are 'informationally' efficient, in so far as information is reflected in the prices, disclosure serves to ensure that securities are correctly priced, in that they reflect the intrinsic value of the issuer and, in turn, given the role of securities-trading markets in allocating capital, that capital is allocated efficiently' (Merkt 2004: 10).

The Role of Corporate Governance Experts in the Regulatory Process

The HLG was essentially a private expert group (see Zumbansen 2002 for a critical analysis of private expert groups in national corporate governance commissions). The group had been selected carefully by the European

Commission - apart from one member, all members of the High Level Group were closely familiar with, and had an affinity to, Anglo-American company law.[74] At the same time, the members of the HLG all had broad practical experiences, and capital market expertise. This is a crucial factor for the group's standing – rather than just on academic merit, their authority was also based on their understanding of actual corporate governance practices.[75] Indeed, while some of the group's recommendations were rather controversial, the Group as such was generally welcomed as 'a very sensible way forward', and the *Financial Times* even hailed Jaap Winter, the chairman of the HLG, as the 'new guru of European corporate governance' (*Financial Times* 2003).

As a member of the group points out, the Commission 'deliberately chose people who were not afraid of changing, and who had no national agenda. [..] in that sense you must commend the Commission that they were brave enough to give *the key to European corporate developments* to a group of outsiders' (emphasis added).[76] Jaap Winter, chairman of the group, argued, 'our mandate was [...] basically to point out a new direction for the future development of company law in the European Union' (Winter 2004: 98). In the context of corporate governance regulation in the EU, the composition of the HLG comes as no surprise. Given the political struggle over corporate governance, the Commission had put together an expert group that was more than likely to advocate regulatory measures broadly in line with the Commissions' market-liberal plans. And indeed, by providing the Commission with a set of policy recommendations that clearly tied in with, and gave additional clout to, the perception that corporate governance regulation, through a focus on shareholder protection and transparency, should predominantly facilitate the functioning of capital markets and the market for corporate control, the expert group has set the parameters of the ensuing regulatory development.

The work of the HLG also corroborated the transnational dimension of the marketisation of corporate control, and the broader project of neo-liberal market integration in Europe in general. In the words of the High Level Group Company Experts, 'these more and less developed [securities, LH] 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 Law Experts

[74] One member of the HLG expressed this quite drastically, arguing that 'the most important single contributor to the change in the way in which these issues [company law, LH] are looked at in Europe has been the involvement of German professors in the United States Law and Economics Circuit' Interview with a member of the High Level Group, 18 October 2006.
[75] Interview with a member of the High Level Group, 6 November 2006.
[76] Interview with a member of the High Level Group, 11 December 2006.

2002a: 23). Here, the experts clearly favoured regulatory competition between corporate governance and company law regimes in the European Union.

> Where various alternative systems exist in Member States for elements of the Company's organisation and structure, the EU should as much as possible facilitate freedom of choice between these alternative systems for companies across Europe, rather than trying to agree upon one specific EU system or leaving the option to member States (High Level Group of Company Law Experts 2002b: 5)

It does not come as a surprise that the HLG in its report advised the establishment of further expert groups in company law and corporate governance. The majority of the HLG members are now members of the European Corporate Governance Forum or the Corporate Governance Advisory Group, expert groups established by the Commission in 2004 and 2005, respectively. In both groups, experts were chosen according to national representation, as well as their academic and/or professional expertise. The fifteen members of the Forum were appointed by the Commission, with several members of the HLG included. The selection of the twenty members of the Advisory Group took place on the basis of a list of applicants, suggested and supported by sectoral or professional organisations. Apart from several academic members, the participants of the Forum, as well as the Advisory Group, come from various industry associations and organisations. In contrast to the HLG, they are consultation bodies to the Commission, as well as a platform for the discussion and dissemination of corporate governance discourses. The Forum, by virtue of its members' expertise and status, has been set up as a high-level discussion forum. Participants discuss and issue statements on corporate governance issues, independently from the Commission. The Advisory Group, as one member put it, serves as a 'sounding board' for initiatives and proposals from the Commission.[77] Perhaps unsurprisingly, there is only one representative of trade union organisations in each expert group. The participation of these experts, in their own fora, as well as in conferences, workshops and consultations, serves to disseminate and consolidate a consensus on fundamental policy options with regard to corporate governance in the European Union. As a member of the High Level Group points out,

> people believe in markets in a way they didn't. People believe in choice, and that's the result of a transformation in company law

[77] Interview with a member of the Corporate Governance Advisory Group, 18 October 2006.

> thinking which has been brought about very largely by the Law and Economics people in the United States.[78]

Concomitantly, the Commission has stepped up its consultation procedures in this policy area. What is more, discussions on EU corporate governance now take place in an increasingly transnational arena, in particular, international shareholder associations such as the International Corporate Governance Network (ICGN), or the European Corporate Governance Institute (ECGI). Within these policy debates there is a notable lack of issues pertaining to worker rights (whether information, consultation or participation).[79] As a member of the Corporate Governance Forum argued, 'most of us are a probably a little bit uncomfortable, because most of us would recognize that stakeholders are important, and employees as stakeholders are important. [..] but in practice, we don't know exactly how to do that, because of issues of confidentiality and market sensitivity'.[80] Representatives of the European Trade Union Confederation (ETUC) have also repeatedly stressed that Commission consultations discount the weight of statements made by the ETUC on behalf of its member associations, as compared to reactions from individuals and small business associations.[81] This absence of the role of employees from regulatory focus is also notable in the Company Law Action Plan (Villiers 2006: 24).

5.4 The Company Law Action Plan

The emergence of the corporate scandals in the early 2000s gave a renewed impetus to the debate on corporate control mechanisms in the European Union. The auditing and accounting failures of Enron, WorldCom and other large listed companies in the US, which were followed by a number of corporate scandals in European states brought corporate governance to the attention not only of

[78] Interview with a member of the High Level Group, 18 October 2006

[79] In the Corporate Governance Forum, there has been one session where a member with a trade union background has attempted to shift the discussion to worker rights. However, as the minutes of the meeting illustrate, the other members of the Forum were clearly not willing to engage any further in such a debate (Minutes of the 5th Meeting of the European Corporate Governance, 1 June 2006, available at http://ec.europa.eu/internal_market/company/docs/ecgforum/minutes_01_06_2006_en.pdf (last accessed 21 July 2008)

[80] Interview with a member of the Corporate Governance Forum, 2 August 2006.

[81] Interview with senior researcher at the ETUI-REHS researcher, 22 November 2006

regulators and investors, but also of governments and the public at large. [82] As the ECOFIN council concluded in April 2002, 'Enron's collapse has increased awareness that proper corporate governance is essential to the efficient functioning of capital markets and high quality financial reporting' (ECOFIN 2002). A major part of the Commissions' response focused on accounting and auditing regulation, which had been of more consequence in the context of the corporate scandals (for an overview see Dewing and Russell 2004). However, rather than *causing* the emergence of the corporate governance programme, the corporate scandals have had a *catalytic* effect on developments. Alexander Schaub, former Director General of DG Internal Market, pointed out 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).

The Company Law Action Plan

As the previous section has argued, the role of the HLG has indeed been critical for the development of company law and corporate governance regulation in the EU. The Commission has frequently been accused of an incoherent, ad-hoc approach to corporate governance (e.g. European Parliament 2006). While the proposals for the Takeover Directive, from the late 1990s onwards, illustrate the Commission's ambition to bring about a European market for corporate control, it was only after the defeat of the Takeover Directive in the Parliament, and the ensuing reorientation of its policies on the basis of the reports by the High Level Group of Company Experts, that a more comprehensive programme for company law and corporate governance was drawn up. The Commission's Company Law Action Plan, *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward* (European Commission 2003a) draws heavily on the second report by the High Level Group. At the same time, the Commission also took into account the growing demand for more principle-based regulation from investors and financial corporations. An increasing number of studies and consultations sought to remodel policy 'on the demands of the market'. Bolkestein put this

[82] The US regulator set up the Sarbanes-Oxley Act of 2002, which prescribed far-reaching mandatory disclosure and liability provisions (see chapter three). While Sarbanes-Oxley does not address corporate governance directly, it places increased responsibility on directors and senior management (Dewing and Russell 2004: 302). These rules posed a major problem for European companies listed or wanting to be listed on US markets.

very bluntly by asserting that ‘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).

In 2002, a study commissioned by the Commission had given an overview of corporate governance codes in the Member States, and concluded that there was no need for a *European* corporate governance code (Weil, Gotshal & Manges 2002). In its communication, the Commission confirmed that it did not have any plans to introduce such a uniform corporate governance code, arguing that ‘there is little indication that the development of a European corporate governance code as an additional layer between principles developed at the international level and codes adopted at national level would offer significant added value’ (European Commission 2003a: 12). At the same time, it acknowledged the role of regulation for the functioning of markets.

> A self-regulatory market approach, based solely on non-binding recommendations, is clearly not always sufficient to guarantee the adoption of sound corporate governance practices [..] a common approach should be adopted at EU level with respect to a few essential rules and adequate co-ordination of corporate governance codes should be ensured (European Commission 2003a: 12)

Policy proposals and strategy

The 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-terms measures introduced in the Plan are very much aimed at re-establishing investor’s confidence after corporate scandals such as Parmalat and Ahold. Addressing the European Parliament after Parmalat, Bolkestein justified the measures in the Action Plan with the stern warning that otherwise ‘ scandal upon scandal will cumulatively weaken financial markets like the corrosive drip of a leaking fuel tank. Many sensible investors will pull out. Economic growth will be affected because the cost of capital will rise’ (Bolkestein 2004b). This is reflected in the short-term priorities – enhancing the quality and independence of audit, increasing the responsibility and independence of the board and making directors’ remuneration more transparent. On the other hand, the overarching objective remains what the Commission sees as strengthening shareholder rights and fostering the ‘efficiency’ and ‘competitiveness’ of business (Commission 2003:3). Rather than just containing measures to prevent other corporate scandals, the Company Law Action Plan thus has a far more fundamental purpose. It is complementary to the broader framework of financial integration in that it emphasizes the role of integrated capital markets for corporate governance, and correspondingly points towards the regulator's responsibility in facilitating efficient market functioning.

Underlying the Commission's approach of minimum harmonisation and mutual recognition is the perception that convergence on a more market-based system will eventually come about. As McCreevy argues (2005a),

> 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.

The Commission's emphasis on disclosure and a principle-based approach rather than further harmonisation reverberate the experts' recommendations. Assessing the Commission's Action Plan, a member of the HLG argues that 'enhancing shareholders rights by mandatory law fits into a corporate governance system that is more market-oriented because it strengthens self-help by shareholders and investors' (Hopt 2005: 12). In December 2005, after the period identified as 'short-term' by the Action Plan, the European Commission launched a consultation on 'future priorities' for the Action plan to reflect on what should be done in the second phase.[83]

5.5 Transparency and Disclosure Regulation

Cross-border transactions and shareholding first have to be facilitated through a European framework of disclosure and transparency provisions, as well as cross-border shareholder rights. The increasing regulatory overlap and complementarity between corporate governance and capital market law is most pronounced in transparency and disclosure provisions for listed companies. As Grundmann argues, disclosure had already been central in the First Directive; in fact information rules have been dominant in EU company law, as only the Merger Directive and parts of the Second (on capital maintenance) and the Takeover Directive deal with internal change in the corporation (Grundmann 2004: 617, 622).

[83] A report on the responses to this consultation, also based on a public hearing in 2006, is available at http://ec.europa.eu/internal_market/company/consultation/index_en.htm

Transparency of corporate governance practices and disclosure of financial assets are indispensable information for investors to make decisions about the 'value' of companies. According to Hopt, the objective is to 'give the investors and the market a *true and fair view* of the corporate governance situation of the company, thus enabling them to make a better and more competitive choice. Disclosure [..] if effective [..] may be the best way of regulating companies' (Hopt 2005: 10, emphasis added). While transparency of corporate practices and control, as well as disclosure of assets benefits not only shareholders, but potentially also other stakeholders in the company, the nature of the information to be disclosed suggests that it is primarily, if not exclusively aimed at shareholder interests.[84] The underlying assumption is that 'where markets are 'informationally' efficient, in so far as information is reflected in the prices, disclosure serves to ensure that securities are correctly priced, in that they reflect the intrinsic value of the issuer and, in turn, given the role of securities-trading markets in allocating capital, that capital is allocated efficiently' (Merkt 2004: 10). In how far the share price of a listed company correctly reflects the intrinsic value of it is of course a very contentious issue – and it reflects the principles on which the disclosure mechanism ultimately rests. These issues are of course also very much related to the question of accounting (see here e.g. Perry and Nölke 2006). Moreover, disclosure and transparency provisions are conducive to increasing the liquidity of investment, as such a precondition for the marketisation of corporate control.

Disclosure, in this context, is increasingly perceived as a regulatory tool. 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 2004c). This emphasis on disclosure is apparent in a range of legislative and non-legislative initiatives. The Prospectus Directive, adopted in 2003, regulates the publication of a company prospectuses when shares of that company are listed on a European market. The 2004 Transparency Directive is geared at enhancing transparency on EU capital markets by establishing minimum requirements on financial reporting and on the disclosure of major shareholdings (and changes in shareholding) in companies traded on European markets (amended in 2007). The annual corporate governance statement, under the framework of the amended Accounting Directive, should make reference to compliance with the corporate governance code that applies to the company, through the 'comply or explain' mechanism.

[84] Compare, for instance, the relative ease with which the Prospectus and Transparency Directives have been passed, with the strained discussion and implementation of the recommendation on disclosure of executive remuneration.

In the context of the Company Law Action Plan, the Commission has also issued two (non-binding) recommendations on executive remuneration and independent directors. With regard to remuneration, it argued that the company policy on remuneration should be included in the annual account and the corporate governance statement, and that individual remuneration for every director should be disclosed in detail. Crucially, it also recommended executive remuneration to be put on the agenda of the annual general meeting, to include shareholders in the decision-making. The recommendation on independent directors sought to strengthen the role of non-executive (or supervisory) directors by requiring a higher degree of independence for the supervision of management. As Aglietta and Rebérioux argue, the emphasis on independence of the board of directors implies an ex ante definition of the interest it should serve (namely, the shareholders') and means an increasingly *exteriority* for this *internal* mode of control' (Aglietta and Reberioux 2005: 267).

Transparency and disclosure, but also the increased emphasis on independent directors, are all external control mechanisms which arguably serve to curb manager discretion. Many disclosure provisions under voluntary corporate governance codes, depend on the 'comply or explain' mechanism. However, as Pannier and Rickford point out (2005: 1002), 'if company boards refrain from disclosing certain information especially in areas where conflicts of interest can typically arise the objective of disclosure rules to inform shareholders and third parties cannot be achieved. Disclosure rules therefore must be mandatory and not based on a 'comply or explain' mechanism.' Indeed, the *regulatory* establishment of a framework of information for investors and creditors is a *sine qua non* for the 'efficient' functioning of the market, which, subsequently is a necessary condition for a market for corporate control. This is also clearly expressed in the OECD Principles of Corporate Governance:

> The rules and procedures governing the acquisition of corporate control in the capital markets […] should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class (OECD 2004: 36).

5.6 Towards a Shareholder democracy?

The 2003 Action Plan has also made the case for a 'real shareholder democracy', albeit only with prior study (Commission 2003: 14). While McCreevy used the term 'shareholder democracy', in subsequent policy debates it was referred to as 'proportionality of ownership and control' instead of the politically loaded concept. In this regard, it has also been suggested that in fact the push for the one share one vote issue was indeed the responsibility of Commissioner McCreevy, while his staff were far more cautious about the objective and prospects of the initiative.[85] The question of the proportionality of ownership and control (the 'one share one vote debate'), which has emerged after the High Level Group's suggestion for a 'breakthrough rule' in case of a takeover, has involved a fundamental debate on the rights of shareholders by virtue of their share ownership. The underlying policy objective of the debate and regulatory initiatives on the issue of shareholder rights is to stimulate (cross-border) investment in integrated European capital and financial markets. What is more, the strengthening of shareholder rights is often assumed to preempt reduce the need for corporate governance regulation. This rather fallacious assumption is expressed well in the cheerful assertion by Peter Montagnon, Director of Investment Affairs at the Association of British Insurers (ABI) that 'shareholder rights are an antidote to company regulation' (*Financial Times* 2006b)[86]

When, in early 2002, the High Level Group published its report on takeover bids, its recommendation for a break-through rule caused heated discussions about the merits of and problems with structural barriers to takeover bids, such as multiple voting rights, voting caps and other 'pre-bid' measures (see the annex of (HLG 2002a) for an overview). In contrast to post-bid , mainly strategic, measures by the management of a target company in the case of a takeover bid, structural barriers are often embedded in, and play a significant role in a particular national corporate governance system. The HLG defined proportionality between ownership and control in that

> [S]hare capital which has an unlimited right to participate in the profits of the company or the residue on liquidation, and only such share capital, should normally carry control rights, in proportion to the risk carried. The holders of these rights to the residual profits and assets of the company are best equipped to decide on the affairs of the company as the ultimate effects of their decisions will be borne by them (High Level Group of Company Law Experts 2002a: 21).

The argumentation of the High Level Group also endorsed a perspective in which national barriers to takeover bids are subordinated (and consequently eliminated) to the exigencies of transnational capital markets. In the words of

[85] Interview with a Member of the Corporate Governance Advisory Group, 18 October 2006

[86] Incidentally, Montagnon has just been confirmed in his second term as member of the European Corporate Governance Forum.

the High Level Group 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 Law Experts 2002a: 23). This transnational outlook is an essential characteristic of the marketisation project, and reflected in the Commission's push for a European shareholder democracy.

In the Action Plan, the Commission claimed that 'there is a strong medium to long term case for aiming to establish a real shareholder democracy in the EU'(2003: 14). As the *Financial Times* (2006c) sums up, the Commission's initiative was 'designed to address the growing concerns among the rising number of institutional shareholders over their ability to influence companies in which they have cross-border holdings.' In the context of the Action Plan, the Commission had announced plans to come forward with a proposal for a directive on shareholder rights. In September 2004, the first public consultation on shareholders' rights and cross-border voting was launched, followed by a second consultation in May 2005. The directive on *Fostering an appropriate regime for Shareholders' Rights* was formally adopted in July 2007. It introduces minimum standards to ensure that shareholders of companies whose shares are traded on European market have access to the relevant information in time for the general shareholder meeting, and that cross-border voting is facilitated. It also abolishes share blocking (a common practice before the AGM) and introduces minimum standards for the rights to ask questions, put items on the agenda and table resolutions. There has been much debate on technical issues with regard to shareholders' rights, but in principle there was no objection to the Commission's push to encourage and facilitate cross-border shareholding in the EU.

The debate on the proportionality of ownership and control, however, illustrated the fault lines between social forces advocating a deepening of the marketisation of corporate control, and social forces in defense of national company law structures and their embedding in the broader socio-economic national context. When, in March 2005, the Association of British Insurers, a financial services association, published a study it had commissioned on the practice of the one-share one-vote principle in Europe, it pushed the Commission to intensify its plans with regard to one-share one-vote. The study, carried out by Deminor, showed that about a third of the biggest EU companies (of the FTSE Eurofirst 300) was not operating a one-share one-vote policy. The financial press jumped on the issue to deplore 'Europe's unfair voting rights' (*The Economist* 2005). Proponents of the principle of proportionality and control have successfully managed to turn this into one of the most debated issues in corporate governance. Shareholders, it is assumed, have a right to 'democratic' decision making with regard to corporate control based on their fundamental rights as property-owners; the debate is deliberately framed in a discourse which draws on notions of democracy and equality. Commissioner McCreevy was at the vanguard of the push for the one-share one-vote principle, arguing that 'the shareholder is king or queen. The shareholder should be able to exercise his rights and there should not be any restrictions' (*Financial Times* 2005a).

In order to break through the highly politicised discussion on the proportionality principle, the Commission announced a tender for a study on the practices, regulation and underlying principle of the proportionality of ownership and control. As the consortium in charge of the study states (ISS and ECGI 2007),

> The main objective of the Study is to identify existing diversions from the proportionality principle across EU listed companies; to analyse the relevant regulatory framework at Member State level; to evaluate their economic significance and whether such diversions have an impact on EU investors. [..] The Study was explicitly commissioned to be a factual, descriptive exercise.

The group's report showed that control-enhancing mechanisms (CEMs), that is, deviations from the proportionality principle, are still common in the sample of listed companies in European Member States. Of the 464 European companies considered, 44 per cent have one or more CEMs. Apart from this comparative legal study, and an academic overview of theoretical approaches to the proportionality principle, the Commission also 'considered it important to gather the market's views on the proportionality issue'. To this aim, a survey among institutional investors was conducted, to determine whether (and if so how) investment decisions are influenced by the ways companies apply the proportionality principle (ISS and ECGI 2007). Not surprisingly, a majority of the investors perceive all CEMs negatively, with some CEMs perceived as more negative than others (for instance golden shares, multiple voting rights and golden shares). In addition, 80 per cent of investors would expect a discount on the shares price of companies with CEMs.

Overall, however, in its report published in June 2007, the study found 'no economic evidence of a causal link between deviations from the so-called 'proportionality principle' and the economic performance of companies'. This took the wind out of the Commission's sails. A statement published by the European Corporate Governance Forum raised several concerns with regard to non-proportional systems, in relation to board entrenchment, extraction of private benefits by the controlling shareholder, incontestability of control and ineffectiveness of corporate governance codes based on the 'comply or explain' approach (European Corporate Governance Forum 2007), but also concluded that legislative action was not necessary. In October 2007, the Commission announced that it would abandon its campaign for the proportionality principle (McCreevy 2007a)

The reactions to the standstill of McCreevy's campaign for one share one vote illustrate the conflict between different capital perspectives. Investor and shareholder associations criticised the decision not move ahead with regulating one share one vote (even though McCreevy's proposal had been for a recommendation only). Peter Montagnon, the outspoken Director of Investment Affairs at the Association of British Insurers (ABI), and also a member of the Corporate Governance Advisory Group, argued that 'if companies are not accountable to their owners, they will need more regulation [..]. A democratic tradition is seriously lacking in European markets [..] voting restrictions that entrench management *at the expense of owners* should be progressively reduced and eventually eliminated altogether (emphasis added).'[87] In this context, as the *Financial Time*s (2007a) reported with some approval, the ICGN, 'a powerful group of some of the world's biggest investors called on the European Commission to respond to their concerns over distortions to shareholder democracy in European Member States.'

In contrast to financial capital, representatives of European industrial capital welcomed the Commission's admission of defeat. In fact, even in the discussions in the High Level Group, a member with a background in a business association actually supported multiple voting rights.[88] As the legal affairs director of BusinessEurope (formerly UNICE) told the *Financial Times*, for business 'this is good news [...] We have consistently said there is no one-size-fits-all in this area. It is up to each company to determine its structure. As long as there is transparency, shareholders know what they are investing in. If you don't like it you don't have to buy it' (*Financial Times* 2007b). Similarly, the Director General of the Confederation of Danish Industries argued that 'many European companies strongly believe that any legal initiatives from the

[87] See also, e.g. Guy Jubb, head of corporate governance at Standard Life Investments (Financial Times 2007d), asserting that 'one share one vote is a cornerstone of good corporate governance. It makes all shareholders equal and gives them an incentive to exercise their ownership rights [..] institutional investors do not like irrevocably committing themselves to continuous share ownership [..] shareowners who do not mind such impositions are – aside from the increasingly rare loyal private investor – non-financial investors who have some objective other than investment return.' In particular this last point is rather telling for the exclusive orientation on shareholder value, and actually reminds of Friedman's statement that the perception that a corporation should serve any other purpose than profit maximisation is 'fundamentally subversive' (Friedman 1962:133).

[88] Interview with a member of the High Level Group, 4 August 2006

European Commission should not be based on an ideology but instead on hard facts' (Financial Times 2007e). [89]

5.7 The role of the European Court of Justice

The Commission's push for a more market-based regulatory approach, as well as a focus on dismantling protective structures in national arrangements has been reinforced by case law by the European Court of Justice with regard to company law and corporate governance, introducing an element of regulatory competition among the national company law and corporate governance provisions in the European Union (see Edwards 1999:344 for an overview of EU case law). With its interpretation of the Treaty, most importantly the primacy of the movement of capital, the ECJ has provided a politico-legal confirmation of the attempts to bring about a European market for corporate control. At the same time, it has set the grounds for a fundamental challenge to the traditional continental-European perception of companies as embedded in national jurisdictions. As Kieninger argues,

> Practically everyone who acknowledged the impact of the ECJ's decisions on the real seat theory predicted a start of regulatory competition among the EU-Member States. Such competition would deregulate capital requirements and overcomplicated rules on capital maintenance and it would put an end to co-determination or at least test its asserted economic benefits (Kieninger 2005: 765).

Freedom of establishment

The ECJ's rulings on the freedom of establishment have had important ramifications for company law in the EU, and the perception of the 'nationality' of companies. Here, it is important to recall the distinction between company law regimes within the EU as pointed out in the previous chapter. Under the 'real seat' legal doctrine most continental Member States regard the location of a company's central management or place of business (*siège réel*) as determining the law to which a company is subject. The incorporation principle (as employed in the UK, Spain and the Netherlands), on the other hand, provides that a company should be subject to the national laws where it is incorporated and where its registered office is located, nevermind where the

[89] Scandinavian company structures still rely to a high degree on multiple voting rights.

company is actually managed or conducts its business. In effect, this leaves the choice of the applicable law to management and shareholders. With an increase in cross-border transactions and mergers, the incompatibility of the real seat doctrine with the legal freedom of movement (i.e. establishment of legal persons under national law) has become an increasingly controversial issue. In three landmark decisions within the last decade, the ECJ has 'enforced the right of incorporators to freely choose the corporate law system of any Member State of the EU' (Troeger 2005: 6).

In 1999, the ruling on the *Centros* case provided that companies should be able to incorporate under the law of any Member State inside the EU, regardless of their central place of business.[90] A Danish private company had incorporated in the UK (Centros Ltd) and then wanted to register a branch in Denmark. Centros did not have any business in the UK, though, and had been set up this way explicitly to circumvent Danish minimum capital requirements (which were much lower in the UK). Danish courts refused the registration of the branch, arguing that as Denmark was the actual principle place of business, the company was subject to minimum capital requirements (which have mainly been established for creditor protection) and registration would thus constitute a breach of law. The case was then brought to the ECJ – its ruling established an important precedence for company law. It argued that the refusal to register a branch of a company having its registered office in another Member State results in that companies registered in that other Member State are 'prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58 of the Treaty.'[91]

In its 2002 *Űberseering* ruling, the ECJ established that Member States are required to recognise the legal capacity of companies incorporated under the law of another Member State.[92] This, again, pertains to a case in which the real seat doctrine stipulated that a company incorporated in another Member State could not have been recognised as a legal person when the main seat of registration is actually in its own jurisdiction. In the concrete case, a Dutch limited liability company, Űberseering BV, was registered in the Netherlands, but its head office was located in Germany, and all its shareholders where German residents. Under the real seat doctrine, German courts ruled that German company law should be applied to the company, and denied the company incorporated under Dutch laws legal standing (the company had sued a German contractor). The ECJ judgment dismissed this ruling, arguing that the minimum capital requirement and creditor protection preserved in the real seat

[90] ECJ Case C-212/97 of 9 March 1999
[91] ECJ Case C-212/97 of 9 March 1999, paragraph 21
[92] ECJ Case C-208/00 of 5 November 2002

doctrine do not justify limitations on the freedom of establishment (for more detail, see e.g. Baelz and Baldwin 2002).

In the 2003 case of *Inspire Art*, a limited company incorporated in the UK had set up a branch in the Netherlands without actually engaging in business activities in the UK. It had commercially registered the branch, but was told that under a specific Dutch company act on formally foreign companies ('pseudo-foreign' companies), it would have to comply with Dutch minimum capital and disclosure requirements (which were the main reason the company had been incorporated in the UK). The ECJ ruled that this constituted a breach of the 11th Company Law Directive, which specified the scope for disclosure rules in national company law. It argued that 'pseudo-foreign' companies cannot be required to apply corporate laws of a Member State where they are not incorporated. As Kersting and Schindler argue (2003), 'with *Inspire Art*, the ECJ has widely opened the door for corporate restructuring within European company law, hereby undoubtedly increasing the competition among the legal systems'. Underlying the decisions by the ECJ was the assumption that, in contrast to substantive regulation to provide third party protection, it is satisfactory to provide the person to be protected with information to take a rational and sound decision (Pannier and Rickford 2005: 979). However, while this might well apply to shareholders and creditors, the protection of workers' rights is far more complex than the 'informed choice' principle, which ultimately rests on the assumption of free exchange of capital and contracts. This is of course not the case for labour.

The effect of these ECJ decisions is, according to Winter (2004: 103), 'potentially far-reaching' in that it creates a clear competitive advantage for Member States with 'less restrictive' company law. Under the legal precedence laid out in these cases, in the European Union 'incorporators can select a statutory domicile for their business entity independent of the location of the firm's physical assets and its place of business' (Tröger 2005: 7). While, in ECJ case law and certainly for the time being in corporate practice, primarily small limited liabilities and private companies have made use of this opportunity to register as a 'pseudo-foreign' company, the significance of the freedom of establishment for European company law and corporate governance is considerable. Clearly the Court has further promoted the principle of mutual recognition which has been introduced in its *Cassis de Dijon*, and institutionalised in the SEA. This stands in obvious contrast to the *prevention* of regulatory competition stated as one of the main policy objectives of the early harmonisation programme. As Streeck points out, 'what used to be regarded as inefficient legal fragmentation is increasingly seen as an opportunity for healthy regime competition ‘ (Streeck 2001: 5).[93] What is more, these decisions of the Court need to be seen in the broader context of liberalisation through judicial fiat in the European Union. Here, Höpner’s (2008) incisive discussion on the role of the ECJ with regard to the right to strike in the cases of Viking and Laval shows how the ECJ has *legally* reinforced the four freedoms., bypassing a political debate on the subordination of social policies and rights to capitalist freedoms.

Golden shares

Apart from the freedom of establishment, the ECJ has played a major role in enforcing the free movement of capital in the integrated European capital markets. Crucially, its rulings on golden shares have supported the Commission’s ambition to eliminate protective barriers against takeovers in the European Union. Whereas poison pills, multiple voting rights, voting caps and other measures were covered by the Takeover Directive (if only under optional provisions), golden shares posed a different challenge to a pan-European market for corporate control. Golden shares here refers to ‘legal structures applying to individual corporations for the purpose of preserving the influence of a public authority on the shareholder structure or the management of that corporation beyond the extent to which such influence would be afforded under general corporate and securities law’ (Adolff 2002: 4). Many golden share arrangements have been established during the privatisation of previously nationalised companies, and provided a way of maintaining an element of government/state influence on the decision-making of often very large listed companies.

In June 2002, the ECJ ruled on a number of golden share arrangements which had been brought to Court by the Commission on the basis that they constituted a breach of the principle of the free movement of capital.[94] In its judgements, the Court indeed reinforced the primacy of free movement of capital over national arrangements to shield companies from financial markets, confirming that the frustration of a level playing field for the market for

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[93] And it seems to be working, at least with regard to SMEs. The number of German (and Danish) companies registering in the UK to avoid minumum capital requirements has increased exponantially (Financial Times 2006d). See research on the massive increase in incorporation of companies under UK law which do not actually engage in business in the UK. As this really only pertains to small private companies so far, the main objective clearly is the circumvention of minimum capital requirements (Becht et. al. 2006). Potentially there could be problems with worker participation, but for small companies co-determination requirements do not apply.

[94] Case C-367/98: *Commission vs. Portugal*, case C-483/88: *Commission vs. France*; case C-503/99: *Commission vs. Belgium* of 4 June 2002

corporate control was incompatible with the Treaty. Here, a legal observer argues that ‘there appears to be little doubt about the Court's determination to establish a level playing field in the European financial markets in general, and the European “market for corporate control” in particular’ (Adolff 2002: 2). As Kübler points out (2005: 238-239), in the golden share cases the Advocate General in fact referred to Art 296 (TEU) which reserves a Member State the right to determine ‘the rules [..] governing the system of property ownership’. The ECJ, however, rejected this view, effectively restricting the Member States’ powers in influencing and determining corporate organisation in their jurisdiction in favour of the freedom of capital.

The recent decision of the Court on *Volkswagen* has again underpinned its role in institutionalising the free movement of capital in European company law. In the *Volkswagen* case, the European Commission had filed an action against the Federal Republic of Germany in March 2005.[95] In October 2007, the Court ruled that the Volkswagen statute indeed constituted ‘a manifestation par excellence of state authority’ and the provisions were in violation of the Treaty.[96]

5.8 Contestation and ‘growing pains’ of the marketisation project

While the European Court of Justice is constitutionalising the freedoms of establishment and capital, there are in fact signs that the marketisation project is meeting the limits of political space within the European state formation. On the one hand, organised labour on the European level has, in recent years, begun to contest the trajectory of the marketisation project, sometimes even in cooperation with factions of the European Parliament. At the same time, ‘economic nationalism’ has surfaced in several Member States, at a time when the number of hostile bids and cross-border M&As were at an all time high. It is through these limits of the marketisation project that we can indeed conceive its political nature. What is more, this contestation, also with regard to the intracapitalist struggle over the proportionality of ownership and control, shows that this particular perception of the role of the modern corporation and how it

[95] For an in-depth discussion of Volkswagen decision in context of EU corporate law, see (Zumbansen and Saam 2007).

[96] Case C-112/05 Commission of the European Communities v Federal Republic of Germany, 23 October 2007, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0112:EN:HTML (last accessed 21 July 2008)

should be regulated is not quite a hegemonic position just yet, but very much a project in the making.

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 (see chapter three). 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. In the context of the Takeover Directive, worker rights had indeed been an issue in the debates in the European Parliament, but after the draft compromise was adopted in December 2003, the discussion about the position of employees in a takeover case subsided.

However, 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'[97]. 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 entreprise 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).[98] The strategy through which the ETUC seeks to proceed is twofold. On the one hand, it emphasizes that Art 138 provides for the

[97] Interview with senior researcher at the ETUI-REHS, 22 November 2006
[98] available at http://www.etuc.org/a/2250 (last accessed 21 July 2008)

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.[99] 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.

Following consultation on the future of the Company Law Action Plan, the European Parliament has discussed an own-initiative report on future developments in EU company law (European Parliament 2006). MEPs also criticised the Commission's decision not to go ahead with a draft for a Fourteenth Company Law Directive on cross-border transfer of registered office, a Directive which has been demanded by the trade unions for fear that cross-border transfer of a corporation's office could undermine national worker rights arrangements. In its resolution on the own initiative report, 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

[99] 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 (Employement) about consultation information' (Interview with a senior researcher at the ETUI-REHS, 22 November 2006

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).

In this context, several MEPs of the Socialist Group in the Parliament have cooperated with academic experts and trade union representatives on an alternative report on Hedge Funds and Private Equity, which also touches upon the role and governance of the modern corporation (PES 2007).

Yet it is not just through direct contestation that the boundaries of the marketisation project become visible. As the project proceeds, it touches upon several key principles in the socio-economic configuration of capitalism in European Member States. Here, we can observe 'growing pains', as it were, of this transformative project.

In the 'takeover boom' deals reached the highest level since the stock market bubble in 2000 (*Financial Times* 2005b). The value of M&As in Europe even overtook the value of deals in America, peaking at $1.59 trillion (*The Economist* 2007). At the same time, several high-profile takeovers in the European arena in 2004-06 have further politicised the debate about corporate governance. The 2006 Mittal-Arccelor takeover has kept been at the centre of struggle between the French and Luxembourg governments and the European Commission. Within the ongoing process of banking consolidation in Europe, several takeover cases received much media and political attention, such as the ABN-Antonveneta case, which eventually led to the resignation of the governor of the Bank of Italy over accusations of protectionism (*Financial Times* 2005c). Dominique de Villepin, then French Prime Minister, openly embraced a policy of 'economic patriotism', while the Italian Minister of Economy and Finance even invoked war rhetoric and warned of an '1914 effect', referring to the eve of World War I, when economic protectionism was rampant in Europe (*Financial Times* 2006e). The Commission furiously complained to governments about plans for national, rather than European champions, and admonished government interventions in takeover bids. As McCreevy told French bankers during the Mittal Takeover, 'I do not believe in the efficiency of political intervention in business decisions [..] In response to globalisation, let us not fool ourselves by building up useless political Maginot lines' (McCreevy 2006a).

At the same time, business in Europe (and here mainly from an SME and industrial capital perspective) has become quite wary of the detailed regulatory initiatives pertaining to disclosure and transparency, as well as other corporate reporting issues. Speaking to the EP in 2006, McCreevy acknowledged this 'regulatory fatigue' and argued that the Commission's future initiatives would concentrate on 'enabling legislation' that would enhance the mobility of companies in the EU or facilitate company restructuring (McCreevy 2006b). 'Enabling law' refers to the state regulating only the framework and leaving the rest of the internal governance regulation to the firm's constitutional statutes (Zumbansen 2006: 20). This is generally within the broader 'better regulation' programme of the European Commission (European Commission 2006), but it remains to be seen whether the balance between strong regulatory initiatives driving and consolidating the marketisation programme, and this hands-off approach can be sustained.

Intermediate Conclusions – from harmonisation to marketisation

The shift from harmonisation of company law (chapter 4) towards the perception that the role of the state (i.e. here EU regulation) is only to set out a legislative/regulatory framework facilitating the functioning of capital markets (and the market for corporate control) is linked to the changing content in that this serves the interests of transnational investors who depend on transparency and disclosure for their investment decisions, but otherwise don't want to be confronted with hard law and regulation containing for instance provisions on protection or participation of workers. This increase in 'subsidiarity to the market,' leading to a situation where the supranational authority of EU regulation increasingly only intervenes and provides a regulatory framework in cases where the market cannot provide for the conditions necessary for its proper functioning, means that regulatory activities are increasingly assigned to the market and thus further removed from societal control. National regulatory arrangements of corporate organisation are subjected to scrutiny of the market in an environment of increasing regulatory competition. 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 capital markets. What we are dealing with here, then, is a process of transnational marketisation that transcends the boundaries of the nation-state and seeks to integrate the socio-economic organisation of the EU into these disembedded structures.

Clearly, however, the political project for the marketisation of corporate control is still in the making. Just as there has never actually been an 'industrial democracy' in the European Union, there is as of now no 'shareholder democracy'. In order to understand the political struggles and structural changes underlying the marketisation of corporate control, the next chapter now seeks to 'dissect', as it were, the nature of the marketisation project.

6 The Marketisation of Corporate Control as a Political Project

This chapter seeks to discuss the changes set out in the previous narrative about regulatory developments with regard to corporate governance and company law in the EU, using the conceptual framework laid out in chapter two. Crucially, the focus here is on the political processes shaping these developments. The central premise underlying this study is that these changes are indeed of a political nature, rather than functional or efficient outcomes of structural pressures; hence, it needs to be explained how this particular regulatory framework evolved, and why, for that matter, it prevailed over potential policy alternatives. The previous chapters have demonstrated how this regulatory project, as part of a larger programme for neoliberal restructuring, is being constructed on the European level. Here, the social forces involved in formulating, advancing and contesting this project will be discussed. The agency of these social forces has to be seen in the context of broader structural changes in the global political economy; the transformation of corporate governance regulation ultimately reflects a changing balance of social power.

The chapter proceeds in three steps, following the broad research agenda set out in the introduction. First, a brief recapitulation of the main developments outlined in chapters four and five serves to delineate the contours, that is, both the content as well as form and mode of governance, of this political project. Crucially, this analytical frame highlights the interplay between content and form of these regulatory changes, as well as the link between related policy areas. If, as posited by this study, regulatory changes are indeed political, then the form they take, and the mode of governance through which they are realised, must not be seen as mere functional outcomes. Rather than assuming that form follows function, the principle underlying the changing form of corporate governance regulation must be established in relation to the changing content that is being put forward in these changes, that is, reflecting a deepening marketisation of corporate control. At the same time, the notion of a political project implies some degree of internal coherence, as well as coordination with regard to broader policy issues in the context of financial market integration, such as accounting standards, competition policy and banking regulation. The analysis seeks to highlight these linkages, while primarily focusing on the shift within the trias of company law, labour law and securities market regulation that constitutes the central node of the regulatory framework.

Having established the content and form of this political project, the chapter then proceeds with a discussion of how these political processes have unfolded. This necessitates an analysis of the social forces articulating and promoting, but also contesting these developments. This focus on social forces in the construction of the marketisation project, however, should not obscure the underlying structural developments that engender them, as is often the case with studies on policy-making processes from an institutional, actor-centred perspective. Rather, it is essential to establish the processes through which these structural constraints are rendered into concrete policies. Here, it is in particular through a discussion of the agency of the European Commission as a 'European state actor', as well as the role of expert committees as 'organic intellectuals' that this link between concrete strategies and the social interests underpinning them is emphasized. The question of 'cui bono', of which actors are set to gain from these developments, both in material as well as in social power, is of obvious importance here. At the same time, however, the analysis needs to go beyond this focus (cf Nölke et.al. 2007: 212), as the marketisation project rests upon a succession of compromises and concessions that tie subaltern forces into support.

The last section discusses (some of) the consequences of regulatory changes, and seeks to put these developments in a global perspective. The question remains, then, how we can explain these changes. Having rejected an exogenous 'globalisation pressures' account, the study does not seek to offer an alternative monocausal explanation. Rather, through a discussion of the implications of the marketisation of corporate control, the analysis centres on a number of explanatory threads highlighting the changing role and nature of European 'statehood' and the modern corporation, and linking them to the concrete manifestation the marketisation project. Pointing to the emerging opposition to this process, the chapter then concludes with a reflection on the contradictions inherent in this manifestation of global capitalist restructuring.

6.1 Anatomy of the Marketisation Project

As the previous chapters have shown, company law and corporate governance regulation constitute an important intersection for the formation and consolidation of an integrated European market. The legislative and regulatory changes in corporate governance in the EU have to be seen against the background of broader, transnational developments – as chapter 3 has outlined, these developments have also become manifest in national corporate governance reform, albeit not as a clear-cut, somewhat deterministic convergence on one 'standard model', but rather in the form of a common trajectory that can be distinguished among the changes in corporate governance regulation and practice. The marketisation of corporate control currently unfolding at the EU level corresponds to and shapes this common trajectory, while at the same time it needs to be analysed as a *transnational* political project that transcends the boundaries of the national regulatory domain.

The legislative developments in EU company law have, broadly, followed the changing dynamics of European integration, or, more precisely, European market integration. Villiers' identification of four 'generations' of company law directives provides a neat categorisation of concrete legislative outcomes until the mid-90s (Villiers 1998). Seen thus, the first generation of directives are of a detailed, prescriptive nature, seeking to establish a uniform approach to fundamental issues. The second wave of directives, linked to corporate reporting and capital market law, as well as the proposals discussed in this period, displayed a more flexible approach by providing for several options corresponding to Member States' systems. Following the establishment of the Single Market programme, mutual recognition became the main principle informing company law, leaving Member States more scope to implement directives as they see fit. The fourth phase of company law-making is then characterised by framework directives and soft law. Yet, as the previous chapters have demonstrated, while this taxonomy of the shift from a mandatory programme aimed at harmonising Member States' company law towards an approach emphasizing mutual recognition and principles-based regulation might work well for a descriptive account, it falls short of explaining the political developments bringing about these changes, or the interplay between content and form with regard to the changing nature of these legislative and regulatory developments. It is the central premise of this study that this regulatory pattern reflects, and at the same time constitutes, a political project aimed at a comprehensive marketisation of corporate control. This marketisation transpires through a set of interrelated shifts in nature, substance and form of regulation; in the following, the core features of these shifts will be discussed.

Shift in the nature of company law

A central element of the marketisation of corporate control has been the marked shift within the relation between company law, labour law, and capital market and securities law, the main constituents of the regulatory framework for the modern corporation. In other words, the *social purpose* of company law has fundamentally changed.

While issues such as employee representation and participation rights have been discussed in the legislative framework of company law in most European national regulatory systems as well as in the supranational arena, with the emergence of 'corporate governance' as a regulatory field, labour law has been relegated to the area of social policy. 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.[100] 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. Corporate governance regulation, as illustrated in chapter 5, is increasingly seen as, ultimately, a mechanism to improve the functioning of capital markets, and thus following the logic and conditions of capital market law. The points of reference of company law and capital market law, however, are not synonymous. The latter broadly serves to facilitate efficient, well-functioning capital markets through safeguarding investor protection and providing the organisational 'infrastructure' for capital markets to operate. Company law, in contrast, covers a broader range of objectives, including the establishment and organisational structure of corporations, as well as a fundamental organising function with regard to institutional power between corporate constituencies (e.g. with regard to worker rights or board composition). While company and capital market law both emerge, as argued in chapter two, within particular politico-legal structures of historically specific social relations of production, capital market law is in itself far more limited in its legal objectives. What is more, it excludes a core constituency of company law from the legal focus altogether; worker as such do not have a direct stake in capital market laws, and are not recognised as relevant for shareholders.

The blurring of legal boundaries between company law and capital market law is well illustrated by the chairman of the High Level Group of Company Law Experts, stating that:

> There is a capital market regulatory response to perceived deficiencies in the corporate governance system […] from a substance point of view, regulating corporate governance through capital market law or through

[100] 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).

company law appears to be of little consequence. *It is as with age: if you don't mind, it doesn't matter* (Winter 2004: 106, emphasis added).

In the understanding of this study, however, this difference does matter indeed, as it has significant consequences both in terms of the political process of regulatory development, as well with regard to the content of concrete regulatory measures.

Under the Treaty of Rome, the Commission had been granted an extensive mandate to guarantee the four economic freedoms (see chapter 3) – social policies, however, have mainly remained a prerogative of the Member States. 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.[101] As the developments with regard to the proposals for a 5th Directive and the Vredeling Directive have shown, employee consultation and participation rights have been highly politically contested. Yet the debates about the Takeover Directive and the proportionality of ownership and control demonstrate that the decoupling of corporate governance and labour law from company law has far from curbed the politicisation of regulatory developments. Rather, with labour interests safely relegated outside the core discussion about corporate governance, the political struggle is increasingly located *between different capital actors,* as will be argued in more detail in a later section.

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.[102] Rather, it is in the shallow waters of Corporate Social Responsibility (CSR) that

[101] 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; see also chapter three).

[102] See, for instance, the hesitation of the corporate governance expert committees to discuss employee representation and consultation (chapter 5).

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 Barnard and Deakin’s rather positive assessment (2002: 497), ‘corporate social responsibility has the potential to bridge the gap between social policy and corporate governance.’ This gap, however, has played an important role in the progress of corporate governance regulation in the EU, as it has served to clear profound political deadlocks and highlight the primacy of shareholder interests - it is unlikely that CSR would ever be attributed a mandatory character on par with corporate governance regulation aimed at safeguarding the interests of capital market participants.

Towards the primacy of external control

Concomitant to this shift in underlying regulatory focus, corporate governance regulation is increasingly aimed at facilitating, or, in the case of the Takeover Directive, establishing, efficient markets for capital and corporate control. *External control* of corporations has become the central focus of regulatory activity, borne out in a range of policy instruments and initiatives. In order to enable ‘the market’ to play its envisaged disciplining role, a number of preconditions need to be established (cf. Van Apeldoorn and Horn 2007a; Fligstein 2001). The Commission’s push for a European market for corporate control constitutes an essential element of the implementation of these institutional preconditions in the broader context of Single Market integration. The Takeover Directive and the Commission’s initiative to introduce the ‘one share one vote’ principle here represent two key measures conducive to a comprehensive marketisation of corporate control. Moreover, the cross-border merger directive facilitates and encourages cross-border corporate restructuring, extending the investment and market opportunities for transnational investors. At the same time, provisions to guarantee far-reaching transparency and disclosure, as well as measures for the establishment of independent board members and audit committees, are crucial constituents of this regulatory shift towards a focus on external corporate governance.

The construction of a market for corporate control constitutes the core element of the marketisation project, to the extent that it is here that corporate control, and, ultimately the corporation itself, is turned into a commodity, an asset to be traded on the market. As the legislative history of the Takeover Directive has shown, the Commission has repeatedly expressed its belief in the efficiency of the market for corporate control. The construction of a pan-European market for corporate control necessitates the removal of structural and organisational barriers that would prevent a contest over corporate control. On the one hand, management entrenchment against a takeover bid was to be prevented (in particular through a neutrality rule, Art 9 of the Takeover Directive). Even more fundamentally, following the intervention of the High Level Groups of Company Law Experts, *structural* barriers to a functioning market for corporate control were to be dismantled. The proposed break-through rule of the Takeover Directive (Art.11) as well as the push for the proportionality of ownership and control point towards the perception of property rights underlying this regulatory project. The notion of 'shareholder democracy' reinforces the property rights discourse of the corporation as commodity. These arguments are based on the assumption that not only ought corporate control be exclusively in the hands of the shareholders, but also that no shareholders should be privileged over any other shareholders. This assumption crucially informs the regulatory initiatives aimed at strengthening the position of (minority) shareholders; as the Commission puts it, 'shareholders should be able to play an effective role as the owners of the companies in which they invest' (McCreevy 2005b). What is more, it aims at the constitution of property rights, detached from national concerns, on the basis of transnational capitalist interests. Member State regulation upholding 'national' interests clearly conflicts with the transnational orientation of the marketisation process - witness the Commission's crusade against 'golden shares' and other instruments allowing governments to retain majority control over corporations. In this vein, facilitating and improving cross-border voting issues for shareholders in order to make it easier for shareholders to exercise their 'rights' is important for facilitating smooth market access for transnational investors. The smoothing out of national differences in 'the rules of exchange' (Van Apeldoorn and Horn 2007a) for market participants here constitutes a vital aspect of the transnational marketisation of corporate control.

Transparency and disclosure provisions play a key role in supplying market participants with the information they need to make investment decisions. In this context, it is often argued that, following the well-worn dictum that 'sunlight is the best disinfectant', transparency can function as a complement, or even substitute to more mandatory measures in company law (Merkt 2004). Crucially, there has been a significant increase in regulatory activities with regard to transparency, corporate reporting[103] and disclosure, with many provisions going beyond the 'soft law' approach advocated in other areas of corporate governance (cf. Cioffi 2006). As the history of the political backlash surrounding the Takeover Directive has shown, reducing the strength of corporate insiders, in particular managers, proved politically controversial and had business associations rally to arms to defend their stakes. Yet through

[103] Such as the IFRS adopted by a regulation in 2003.

enhancing financial information and disclosure of corporate policies and assets, the promotion of the 'outsider' model of corporate control expands the reach of capital market discipline on corporate organisation. As chapter 5 has shown, transparency here pertains to issues of corporate structure, such as the independence of board members, executive remuneration or the auditing committee, as well as to enhanced financial reporting transparency for investors. This clearly ties in with the broader programme for European capital market integration.

Changing form of regulation

This shift towards a market-oriented content of regulation is reflected, and at the same time reinforced, in the increasingly market-based form of regulatory mechanisms. That is to say, governance mechanisms such as corporate governance codes or 'comply or explain' approaches have become more and more important in the regulatory debate. The underlying assumption here is that best practice will evolve through market arbitration, rather than through 'hard' regulation and legislation. This delegation of regulatory capacity to 'the market' constitutes a cornerstone in the establishment of the marketisation project. At the same time, as chapter 5 has shown this 'soft law' focus for the internal governance of corporations concurs with an actual *increase* in regulatory activity. It is here that the link between form and content of regulatory initiatives becomes most clear – accounting, auditing and transparency regulation are not so much concerned with *internal* governance, but rather with providing investors and other market participants with information facilitating *external governance.* Marketisation, in this respect, means increasing regulation *for* the market, *through* the market. In other words, the changing *form* of corporate governance regulation is interrelated to the *content* of regulatory initiatives – as in Beckett's famous dictum, form here *is* content, and content *is* form (Beckett 1929).

The regulatory principle of mutual recognition constitutes another crucial aspect of the changing form of corporate governance regulation. As chapters 4 and 5 have documented, EU corporate governance regulation no longer aims at a harmonisation of company laws and corporate governance codes. Rather than the negotiation and formation of a harmonised and prescriptive body of company law, requiring detailed implementation at the domestic level, the regulatory objective has become the formulation of directives and recommendations establishing minimum principles and allowing for national diversity – thus pitting the different regulatory systems next to, and, ultimately, against each other in the European arena.

To some extent, there is a tension between the 'soft law' approach operating through corporate governance codes, mainly based on the 'comply or explain' principle which requires management to either comply with the guidelines or justify any non-compliance to their investors, and the actual increase in regulatory activity. Despite the intensification of regulatory initiatives, the fragmentation and delegation of actual regulatory choices to the firm-level leads to a situation where corporate governance is less and less regulated through the public domain. Corporate governance codes, drawn up by (private) expert and business representative groups, adopted by stock exchanges, and enforced through reliance on the disciplinary role of 'the market' have by now taken on a role which partially substitutes for public policy measures. The proliferation of corporate governance codes in the EU from the mid-1990s onwards concurred with the withdrawal of the harmonisation programme; to the extent that the Commission also abstained from pursuing the introduction of a uniform European corporate governance code. And indeed, there was no need for the imposition of a uniform code on the EU level, as, at least in spirit, most corporate governance codes, inspired by the OECD code (2004), pointed in the same general direction; in fact, it could be argued that corporate governance codes per se are an expression of a more shareholder oriented perspective on the governance of corporations. Many corporate governance codes, typically negotiated on the margins of or outside the ambit of (organised) labour, have turned from voluntary guidelines into quasi-public conventions, more often than not sanctioned by the state. The motivation underlying the institutionalisation of these codes rests on the interests of investors and stock market participants. As Zumbansen points out, 'it is this removal of indirect corporate law regulation from the political sphere that provokes the question whose interests are really served in the long run' (Zumbansen 2007: 27).

As chapter 5 has shown, recent corporate governance regulation, as well as company law, not least in the revision process in the broader context of the 'better regulation' programme, is less and less focused on harmonisation of national company laws. The Commission's stance, as McCreevy (2007b) emphasizes, is to 'take action only if it is necessary, and in the least interventionist way, where we can promote positive convergence on corporate governance amongst Member States.' Through the underlying principle of mutual recognition, the Commission advances an approach that positions the different corporate governance and company law systems of the Member States next to each other, while at the same time the improvement of cross-border voting and corporate transactions, as well as the ECJ case law underwriting the freedom of establishment for corporations, render it possible for corporations to (re)negotiate national provisions, such as employee participation rights in particular corporate governance systems. As argued in chapter 5, the establishment of ECJ case law was crucial in this effective deregulation of company law; it initiated an element of *regulatory competition* into the European company law landscape. This of course stands in stark contrast to the objective of the harmonisation programme advanced in the 1960s and 70s.

The debate about regulatory competition has primarily focused on the development of US company law, but has, since the ECJ decisions, also surfaced in an EU context (cf Heine and Kerber 2002; Armour 2005). Regulatory competition refers to a system in which regulators compete in attracting corporations to their jurisdiction through revising their regulatory regime accordingly. In the US context, this process has been most prominent in the state of Delaware, which has attracted a large share of incorporations due to its company law statutes favourable to managers.[104] With regard to the transformation of EU company law and corporate governance regulation, however, regulatory competition has not (yet) emerged as a central regulatory mechanism, for a number of reasons. The comparison between US style regulatory competition and the emerging dynamics in the EU falls short as the state/federal law distinction in the US does not apply to the EU. A Delaware-style scenario in the EU is highly unlikely, as reincorporation is difficult and costly (Enriques 2004:1262). Moreover, the concept of regulatory competition departs from the assumption that regulators actively vie for companies to incorporate in their jurisdiction, mainly through revision of their regulatory system. In this regard, the company law measures already in place prevent Member States from exercising a high degree of autonomy about corporate governance regulation (McCahery and Vermeulen 2005: 801). However, through facilitating cross-border mergers and (re)incorporation in the European arena, the underlying principle of regulatory competition is in fact borne out in the form of *regulatory arbitrage* by corporations.[105] To some extent, this also allows corporations to bypass national company law provisions because of EU regulation (e.g. in the case of the European Company Statute).

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[104] See (Cary 1974) for the seminal work on the 'Delaware effect' through regulatory competition in US corporate law. There is an extensive debate on the nature of regulatory competition in the US corporate governance system (see e.g. Romano 1993). As Coffee points out (1987: 762), Delaware's corporate laws have been heavily influenced by the lawyer's lobby, with the succes to some extent due to the fact that it is otherwise a rather small and mainly agrarian state (compared to eg California or New York corporate law)

[105] However so far, this is mainly an option for companies at start-up or initial public offering (IPO) level.

While there is no active competition between jurisdictions, national systems of company law and corporate governance regulation are increasingly weighed up against each other. Deakin (2007) has here used the term ‘reflexive harmonisation’ to characterise the process of soft law and measures drawing on the Open Method of Coordination (OMC) such as the consultation and expert meetings on corporate governance; a process in which Member States are expected to gradually adopt best practices through mutual recognition, and most importantly, coordination. Even though not as explicitly as in direct regulatory competition, it is a particular perception of ‘best practice’ that is being promoted through this process – and as it has become apparent in chapter 5, these best practices clearly favour the interests of shareholders over other corporate constituencies. By setting national regulatory systems, embedded in the varying institutional configurations in the Member States, next to each other in the regulatory debate, features that do not comply with this perception of efficient regulation are increasingly seen as deviations. This in turn reinforces the trend towards more optional, voluntary and firm-level corporate governance rules which give more room to corporations to negotiate their regulatory environment. In contrast to this, worker participation rules, with co-determination as the prime example here, operate through *mandatory* company law. As Barnard and Deakin point out with regard to ECJ case law on the freedom of incorporation, ‘any threat to *siège réel* […] is also a threat to the imposition of mandatory legal rules on companies’(Barnard and Deakin 2002: 398).

In this vein, the marketisation project increasingly proceeds through targeting structural differences between the Member States’ corporate governance and company law systems. In what Höpner and Schäfer (2007) call the ‘post-Ricardian’ phase of market integration, it is no longer only through the underlying principle of mutual recognition (and hence, implicitly, the comparative advantage of a variety of capitalism), but by asymmetrically targeting the systemic institutions of organised capitalism that European corporate governance regulation progresses. Here, the ECJ case law on freedom of incorporation and the golden shares rulings again serve as a case in point. Similarly, the Commission’s push for the proportionality of ownership and control, primed on the break-through rule suggested by the High Level Group of Company Law Experts, exhibits an element of post-Ricardian strategy by seeking to dismantle protective barriers and voting restrictions. These structures impeding takeovers and often granting effective corporate control to blockholders are rejected on the grounds that they interfere with the project of transnational economic integration, regardless of whether they are thoroughly embedded in national regulatory models, and a broader socio-economic context.

Crucially, at this junction of the unambiguous intervention of EU regulation in nationally constituted and embedded systems, the marketisation project meets sustained resistance. It is in this process of what could be identified as the 'growing pains' of the marketisation project that the social forces driving or contesting these political changes become clearly visible.

6.2 Social Forces in the Making of the Marketisation Project

The marketisation of corporate control in the European Union has not progressed in a linear, inevitable fashion; it was through political processes and struggles that the outcomes observed in chapters four and five have emerged. As argued in the preceding section, we can discern in these changes a political project, manifested in regulatory content as well as form. To understand the multi-level nature of these processes, it is essential to identify the key actors involved in this marketisation project, and how they are embedded in the broader context of capitalist restructuring.

As the narrative in chapter four and five has demonstrated, a coalition of public and private actors has been carrying the marketisation project. Following the conceptual framework laid out in chapter two, it is crucial to understand how these actors are structurally linked to social interests. As a political project, the marketisation of corporate control has been endorsed, and carried, by European 'state' actors, in particular specific parts of the Commission and the ECJ. In this context, the role of transnational expert committees, such as the High Level Group of Company Law Experts, in formulating concrete regulatory proposals informing these regulatory changes is of particular significance. The ECJ has championed a particular perception of company law in its interpretation of the freedom of the incorporation, leading to a potential deregulation of national company law by, as it were, judicial fiat. We need to look at the broader setting of the neoliberal market integration programme in order to understand the agency of these public actors; as chapter 3 has outlined, at the same time it has to be taken into account that this programme is unfolding in, and at the same time reinforcing, the context of financialisation. It is in a political process marked by the strategic selectivity of the European state formation that these structural demands are translated and mediated into regulatory outcomes. Crucially, the marketisation of corporate control privileges the interests of transnationally mobile investors, holders of liquid capital rather than industrial capital tied to national/geographical settings. Here, the discursive aspect of the marketisation project, manifested in the spread of the shareholder value concept and a financial perception of the corporation, also needs to be highlighted; it is here that broader societal support for the marketisation project is generated.

At the same time, chapter 5 has pointed towards the (emerging) opposition to the marketisation project. The deepening and widening of the marketisation of corporate control has led to several instances where Member States defied the EU's regulatory stance, both in an EU institutional as well as in a domestic context. These 'growing pains' of the marketisation project are also an expression of increasing conflict between the orientation of the Commission, more and more geared towards the interests of transnationally mobile financial actors, and the outlook of predominantly industrial European capital, insisting on maintaining nationally embedded company law structures that have enabled blockholder control over corporations. Organised labour on the European level has also, if only fairly recently, begun to challenge the Commission's policies - in concert with the European Parliament, the compatibility between the projected regulatory framework and the European Social Model has repeatedly been questioned. It is vital to grasp the contestation emanating from these social forces in order to understand the recent trajectory of the marketisation project.

Marketisation as a European 'state' project

The marketisation of corporate control is a political project driven, within the European state formation, by public actors; that is to say, it is the Commission and, to some extent, the ECJ that have propelled the regulatory developments discussed earlier. While attributing a key role in state regulation to public actors might have a tautological ring to it, as argued in the theoretical framework in chapter two there is an important point to make here about the role of the state in corporate governance regulation, beyond the by now wide-spread assumptions about 'private authority', self-regulation and soft law approaches. Hence, the agency of these European 'state actors' needs to be analysed here; not just their institutional set-up, but rather how they are organically linked to certain social interests. In addition, a variety of social forces have been explicitly or implicitly implicated in the policy-making process, from financial actors and industry lobby groups to expert committees. However, drawing on an strategic-relational understanding of a state formation, as discussed in chapter two, we need to conceive of the European state formation, and thus the context for policy-making, not as a pluralist arena where policy outcomes are a function of the preferences of the actors involved, but as a form-determined condensation of social relations. It is these underlying social relations that engender concrete political projects at the state level; yet these policies are not an immediate translation of certain (hegemonic) class interests. As Jessop points out, ‘there can be no institutional guarantees that the legal and political spheres will [..] produce outputs which correspond to the needs of the economic system. At best one can treat the law and state as structurally or strategically selective’ (Jessop 1990: 100). Accordingly, in order to understand the regulatory trajectory, the structural selectivity of the state needs to be taken into account here. As will be discussed below, it is through this structural selectivity that certain social interests are mediated and articulated into the marketisation project, while other social forces are indeed excluded. At the same time, it is vital to note here that the structural selectivity discernable in the European arena is not a permanent inherent feature of the European state formation; it is engendered by the past strategies of social forces. As such, social forces are constrained through the structural selectivity inherent in a historically specific form of state, while it is eventually *through* the strategies of these social forces that this structural constraint is reproduced or changed, in that they privilege certain strategies, interests and institutional forms over others. This section seeks to discuss how the marketisation project has been articulated in the institutional setting of European policy-making, and how the strategies underlying the marketisation of corporate control are tied up with the social interest of particular social forces.

A key role in this context, as demonstrated in chapters four and five, is played by the European Commission. The agency of the Commission, and in particular of the Directorate General assigned the integration of the Single Market, in interpreting the fundamental freedoms protected in the Treaty has had a crucial bearing on form and content of regulation. While, as discussed in the previous section, the marketisation project entails regulation for the market through the market, it is first and foremost through the Commission that this project is being advanced. In other words, as a political project it puts the Commission in a position in which it can expand its institutional powers within Single Market integration, while at the same time engage in pursuing a regulatory framework geared at a comprehensive marketisation of corporate control. Crucially, as the changes in the Commission’s role and strategy have shown, it has moved through different stages in terms of its underlying orientation.

While, as chapter four has demonstrated, the Commission assumed a mediating function seeking to broker concessions between European industrial capital and organised labour in the area of corporate control in the 1970s, the subsequent developments have shown that, following the SEA and the shift from a harmonisation of company law towards an approach based on mutual recognition and best practice, the Commission has increasingly adopted a perspective aligned with, and indeed heavily influenced by, more globalised fractions of transnational capital. This stage broadly concurs with Van Apeldoorn's account of the struggle over rival projects for European integration, through which the neo-liberal project, albeit in an inflected form as 'embedded neo-liberalism', emerged as hegemonic project in the European state formation. As chapter three has argued, the cornerstones of 'embedded neoliberalism' have been the Lisbon agenda and EMU, as well as the developments in European governance such as the open method of coordination (OMC) and an increased reliance on other soft law mechanisms. In the area of Single Market integration, however, and in particular in company law and corporate governance regulation, recent developments point towards the changing strategy of the Commission, or rather, to be more precise, the strategy for corporate governance regulation put forward by the Directorate General for the Internal Market. What we see here is an increasing orientation towards, and alignment with, the interests of transnational financial capital, in that the scope and liquidity of capital markets (as well as markets for corporate control) is enhanced, and transnational (in the EU context, cross-border) transactions are rendered less costly. What is more, by transferring crucial regulatory oversight functions to capital market participants, corporate control is increasingly seen exclusively from a financial perspective, in which the only relevant actors would be the ones who are most set to gain from an increase in share prices. The Commission's push for a 'shareholder democracy' exemplifies this shift. Formulated more boldly, under the leadership of the two most recent Commissioners, the Commission seems increasingly eager in its role as a vanguard of financial capitalism in the European Union. This, of course, implies a major dissonance with the broader integration dynamics, which are still pegged to 'socially embedded' discourses as for instance the European Social Model.

The marketisation project has been advanced through a twin-strategy of depoliticisation of corporate governance regulation (discussed below) and an attempt at the dismantling of nationally embedded legal structures that would function as barriers to a comprehensive market-based framework. As a political project, the Commission could not have succeeded in this initiative without the coalition of other 'state' and expert actors. Within the European institutional setting, the role of the ECJ and its case law on incorporation has been central in providing a juridico-political fundament for the marketisation project. The Court has played a decisive role in shaping the debate on corporate governance (Barnard and Deakin 2002:494) by enforcing an interpretation of the Treaty freedoms that amounted to deregulation of (certain central characteristics of) national systems of corporate law. This reverberates Höpner and Schäfer's argument about the ‘post-Ricardian’ phase of European Integration; rather than competition between national varieties of capitalism on the basis of comparative advantages, the recent initiatives by the Commission, buttressed by ECJ case law, propel convergence on the market-based model (Höpner and Schäfer 2007: 6).

For the time being, this strategy is borne out more implicitly than explicitly, and, as chapter five has shown, it is heavily contested by both labour as well as certain capital forces. As the Commission’s reluctance to impose mandatory regulation other than transparency and disclosure provisions - let alone a European corporate governance code- indicates, the marketisation project is not aimed at initiating a *homogeneous* model of European corporate governance. As the backlash against the one share one vote proposal has shown, the political limits of the possible for the regulatory initiatives of the Commission have already been reached. However, the changes emanating from the EU nonetheless contribute to, and are at the same time reinforced by, the common trajectories identified in national corporate governance systems identified in chapter three.

The Role of Expert Groups

As such, the marketisation project might be stretching its political boundaries in the European state formation, but it has so far certainly been rather successful in catalysing conceptual changes in the debate on corporate governance. Here, we need to look at the discursive construction of the marketisation project, but also at how it is actually articulated and sustained through expert committees in the policy–making process. As outlined in the theoretical framework of this study, in order to become hegemonic, that is, viable as a political alternative, a political project needs to transcend the particular social interests that form the underlying driving force for action, and seek to garner support on a broader societal scale. As Jessop points out, this involves

> the mobilisation of support behind a concrete programme of action which asserts a general interest in the pursuit of objectives that, explicitly or implicitly, advance the long-term interest of the hegemonic class (fraction), and which privileges particular ‘economic-corporate’ interests compatible with this programme, whilst derogating the pursuit of other particular interests that are inconsistent with it (Jessop 1990: 161).

As has transpired from the empirical account in chapter five, expert groups have played a vital role in the articulation and consolidation of the marketisation project. These experts are predominantly 'independent' academics, representatives of financial industries or the law profession, and market participants. Expert fora, in particular the European Corporate Governance Forum, constitute a policy deliberation process corresponding to the OMC (Deakin 2007: 11). Indeed, as a member of the Corporate Advisory Group suggested, 'promoting these discussions between investors, companies and directors at meetings and conferences might well achieve a lot more than having a law that says you must do it this way.' [106]

However, the expert knowledge involved is not based on a plurality of expert actors, but in fact serves as a concrete manifestation of structural selectivity, in that the experts involved almost exclusively share a market-oriented perspective. Rather than taking their function as experts for granted, we thus need to problematise their *social function* in order to understand the vital role they play in the (re)production of the marketisation project. At the same time, the role of experts in the regulatory process cannot necessarily be identified as an *immediate* translation and articulation of class interests. As Bieler and Morton point out, interests and political strategies are not 'simply defined by location of social class forces in production processes' (Bieler and Morton 2008: check pp 32). Rather, we need to understand the role of these experts as 'organic intellectuals' (Gramsci 1971); that is articulating the particularistic interest of certain social forces in terms of a broader societal interest, and providing legitimacy and internal coherence to the political strategies necessary to advance the marketisation project.[107]

In the context of the marketisation process, the role of the High Level Group of Company Law Experts (HLG) in formulating the blueprint for the Commission's Company Law Action Plan here serves as a clear example. In addition to the European 'corporate governance scene', a loose network of academics, practitioners and policy-makers gathering frequently at conferences, consultation meetings and workshops, the expert fora serve as a transnational platform to facilitate discussion and, to some extent, coordination of corporate governance regulation and practices.[108] The participation of the members of the High Level Group, as well as of the members of other expert groups, in conferences, workshops and consultations serves to disseminate and consolidate a consensus on fundamental policy options with regard to corporate governance

[106] Interview with a member of the Corporate Governance Advisory Group, 18 October 2006)
[107] See (Horn 2008) for an in-depth discussion of the role of these expert committees
[108] As Wigger argues (2008: 323-326), in this context it is also important to acknowledge the role of the law profession, and in particular major law firms, in perpetuating this trend towards more and more involvement of transnational legal experts in the policy-making process.

in the European Union. While the Commission has stepped up its consultation procedures in this policy area, the increasingly 'scientific' discourse on corporate governance (in particular due to the shift towards financial market objectives) serves to further isolate the discussion and make expert involvement seem indispensable. Through the establishment of expert groups the European Commission seeks to depoliticise the debate on corporate governance regulation. At the same time, in the increasingly extensive consultation procedures in corporate governance, a variety of industry, academic and practitioner perspectives is being voiced, so as to guarantee some balance between the relevant constituencies to this debate. In this regard, there is indeed some correspondence to the mechanism of the OMC; yet as labour actors, as well as issues of co-determination and other worker rights, are suspiciously absent from most of the discussions, this in-built bias means that if there is any coordination taking place, it will most likely be towards a market-oriented perspective.

Transnational capital

The role of transnational capital in the formulation and implementation of neoliberal restructuring of the European political economy from the 1980s onwards has been well documented, with the European Roundtable of Industrialists (ERT) as a prime instance of the coincidence between social class interest and concrete political agency in this restructuring process (cf. Van Apeldoorn 2002). The marketisation project, as chapter 5 has set out, emerged as part and parcel of this restructuring programme, to the extent that it sought to contribute to making European corporations more competitive vis-à-vis US competitors, and to further integrating, that is, deepening European capital markets. However, as recent developments with regard to the marketisation of corporate control have shown, the marketisation project increasingly transcends the principle of 'embedded neoliberalism' which has sustained the Single Market programme and the Lisbon agenda. The policy objectives advanced through the marketisation of corporate control are more 'purely' neoliberal in character, structured more towards the interests of financial than industrial capital, whether transnational or European. This has to be seen against the broader background, outlined in chapter three, of the disintermediation, or decoupling, of financial capital from industrial capital, where capital assumes an increasingly appropriative character without direct reference to production (cf. chapter two). The ambivalence, and increasing opposition of industrial capital to the marketisation of corporate control (see, for instance, in the case of the Takeover Directive and the one-share one-vote initiative) point towards the conflicting interests of capital actors in this regard. The discussion here needs to differentiate between the fundamental social interests of different fractions of capital, and the concrete political agency in articulating and advancing these interests.

Crucially, in contrast to transnational industrial capital as represented in the ERT, financial capital is less directly politically active, more relying on its structural power. Whereas industrial capital has been very much involved in the (re)launch of the broader neoliberal European project, in concert with the Commission as well as national governments, and through transnational capital class networks, the ‘new’ financial actors are far less implicated directly in the political process (cf chapter two/three). As such, the correspondence between political agency and the capital interests ultimately privileged through the marketisation of corporate control is not as unambiguous as, for instance, in the case of the ERT. The coalition of social forces underpinning the marketisation project is more diffuse, and, in the case of financial capital, operates more through structural power and discursive practices rather than clearcut political articulation. To transcend the particular social interests of financial capital, the articulation of the marketisation project relies on a synthesis with, and link to, the broader neoliberal restructuring programme, most notably with regard to European competitiveness and growth. This again highlights the role of the Commission in mediating these particular interests, as well as the function of expert groups and discussion platforms in which a finance perspective on corporate governance regulation is articulated, and contrasted to a more industrial capital position. The discursive background for the marketisation of corporate control is established through an emerging transnational network of corporate governance conferences, workshops, consultations and expert reports. It is in this context that a consensus on ‘best practices’ of corporate governance is formed.

6.3 The Transnational Politics of Corporate Governance Regulation: The Marketisation of Corporate Control Revisited

The marketisation of corporate control reflects, and at the same time, advances a process of the commodification of the social relations of production that constitute the modern corporation (see the theoretical discussion in chapter two). Marketisation is here seen as a social, and fundamentally political, process through which (new) markets are constituted and the market mechanism extended as means to regulate socio-economic processes (cf. Nölke et.al. 2007:

209). Where marketisation has become institutionalised, that is, the main ‘organizing principle’ (Polanyi 1957: pp) within a capitalist society, the social relations of production are increasingly subject to commodification, in that they are seen as relations ‘between things’ rather than socially constituted. The market then becomes the final arbiter of social reality.

Within the modern corporation, and in the emerging finance-led mode of production in general, this commodification is manifest in the changing nature of the relation between capital and production.[109] Capital as private ownership becomes more and more external to the social process of production – as Marx (1991) put it, an ‘antithesis as another's property to every individual actually at work in production’- and thus takes on an increasingly appropriative character. What is more, as not only the rights to corporate profits, but also control rights are turned into a commodity to be sold and bought on the market, the corporation in itself becomes a commodity, and as such subject to the demands and constraints of the market.

These market mechanisms and requirements are increasingly internalised in the social processes of the corporation. Profit expectations of financial capital impose financial objectives, which subordinate other corporate strategies and put increasing pressure on labour. Processes of corporate restructuring are increasingly perceived as mandated by external exigencies outside the control of management, and where investors demand minimum profits, it is more and more on the back of the workforce (in terms of wage flexibility as well as job security) that these demands are realised. While, on the one hand, institutionally embedded forms of industrial relations have remained, at least to some extent, resilient to these pressures in the context of the decommodification enshrined in many European welfare state systems, as we have seen above the marketisation of corporate control is structurally encroaching on the structural position of labour vis-à-vis capital through a transformation of the political processes that determine these outcomes.

[109] This is of course not to say that the social relations of production that constitute the modern corporation could ever be ‘free from commodification’. In fact, as argued in the theory chapter, the very form of the modern corporation serves to obscure the underlying power relations in the corporate form. As Harvey points out (2006: 154-155), ‘the rise of a ‘managerial class’, separate and distinct from the owners of capital, of government structures of intervention and regulation, of increasingly hierarchical orderings in the division of labour; the emergence of corporate and governmental bureaucracies – all of these obscure the simple capital-labour relation that underlies the law of value itself.

The Marketisation of Corporate Control and the Transformation of EU socio-economic governance

One of the central objectives of this study has been to emphasize the political nature of these developments, that is the marketisation and, concomitantly, the commodification of corporate control. While the political agency of social forces, engendered through structural changes in the global political economy, has been discussed above, it is also important to examine how the marketisation of corporate control is actually reinforcing and perpetuating these processes. We need to look at how the changing relation between the state and the corporation, and the way this is borne out in the context of European integration, is also shaping European socio-economic governance. In the process of the transformation of corporate governance regulation, as a reflection of what Gill has identified as 'disciplinary neoliberalism' (2001), regulation is increasingly aligned with market principles, and less with formal political control, in particular on the level of the Member States. While the regulatory process includes more and more consultation stages and relies heavily on expert input, the seemingly pluralist policy-making arena is in fact heavily prestructured through the structural selectivities at play in the European state formation. At the same time as the regulatory trajectory is more and more aimed at undermining nationally embedded institutions of particular varieties of capitalism, elected governments have less and less leeway to diverge from the path towards 'shareholder democracy' laid down in the marketisation project. With corporations increasingly able to negotiate firm-level corporate governance arrangements following a range of codes and best practices regulated through 'the market', the margins for political intervention to safeguard previously guaranteed class compromises are becoming tight indeed. The concomitant restructuring of state-society relations, in particular with regard to labour, poses important points of discussion for the understanding of capitalist restructuring on the European level, and the nature of the European 'state' project. Crucially, the marketisation of corporate control points towards the changing content of neoliberal European governance, at least in the core areas of the Single Market Programme. This perspective points at the importance of identifying this transformation as a political project, that is a more or less coherent strategy by a coalition of social forces, rather than an inevitable 'next step' in European market integration. It also allows for opening up questions about the nature of the regulatory transformation with regard to the broader context of 'Social Europe' and the democratic legitimacy of this changing form of socio-economic governance. Through looking at the contestation of the marketisation of corporate control through a range of different social forces we can better grasp the political nature of these changes.

Contestation and Limits of the Marketisation Project

As argued above, the marketisation project has been articulated and relies on a concurrence of interests between various capital and European state actors. However, there are signs that, the marketisation of corporate control, at least as far as it privileges a financial capital perspective, has become contested by other capital actors. Within the discussion about the trajectory of regulatory reform, the fault lines between a more pure finance perspective and an industrial capital orientation are becoming more and more visible. Here, we need to look in particular at the role of business associations and, more specifically, managers. Managerial actors do not constitute a homogeneous cadre class to the extent that they always share a perspective still mainly focused on actually managing production. Rather, managerial interests are more and more aligned to the interests of financial capital through financial imperatives such as stock options and the increasing role of the share price as a measure of executive performance. These financial objectives also engender a more transnational outlook, focussing on cross-border and liquid investment, whereas an industrial perspective is more closely linked to a spatially confined (national or, to some extent, European) arena, and as such remains rooted in a particular socio-economic configuration. In this process, an industrial capital perspective is increasingly subordinated to processes where financial capital is becoming more and more dominant; potentially leading to conflicts between finance and production *within* the corporation. In the political process, the conflicting interests between different capital actors become apparent in the struggle over the core elements of the marketisation project, most notably the dismantling of protective barriers. From an industrial capital perspective, the regulatory objective is to ascertain the competitiveness of European business in the global political economy, while at the same retaining regulatory structures conducive to some degree of protection from global capital markets participants. Adopting a more financial perspective, in contrast, implies seeking to dismantle these nationally specific barriers to enhance transnational investment opportunities. Here, a financial capital perspective is predominantly displayed by institutional investors and investment funds, although of course these actors are in themselves not necessarily unified in their strategic objectives.[110] However, despite the emerging intra-capitalist conflict, in the broader context of neoliberal restructuring in the EU the marketisation project, clearly privileges capitalist over labour interests.

[110] See (Beckmann 2007) for an in-depth discussion of the strategies and objectives of financial actors in several European Member States.

Labour and the marketisation of corporate control

Even though it is predominantly capital interests that are set to benefit in the marketisation of corporate control, we need to see this project in the framework of the historically specific context of EU integration, and acknowledge the agency of other social classes. Here, organised labour, on the Member State but also on the EU level, has been implicated in the class-compromises underpinning the early stages of European integration, adopting a ‘yes, but…’ position (Dolvik 1999) towards the restructuring of the mid 1980s onwards (cf. chapter 3). Yet 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. Here again, 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).

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). At the same time, we need to differentiate between different labour actors; just like capital, labour cannot be assumed to constitute a homogeneous social class. In the context of financialisation, labour interests have been modified through e.g. pension reform, stockownership and financialised corporate strategies. Workers in the 'core' of the European economy can very well accrue financial gains from the marketisation of corporate control, and labour actors are combining forces with shareholders to demand transparency and corporate disclosure in what Gourevitch and Shinn (2005) call 'transparency coalitions'.

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). However, the changes in regulatory process and mechanisms render it difficult to establish a coherent critique on the content of regulation (cf. Zumbansen 2007: 27). The emerging coalition of organised labour and social-democratic MEPs on the European level has so far not formulated a coherent, operational programme with regard to corporate governance regulation. Moreover, with regard to the political spectrum, at least on the level of the nation-state corporate governance reform has largely been advanced by social-democratic, or rather, 'third way' parties (Cioffi 2006: 558; see also Cioffi and Höpner 2006). As such, the question is in how far the opposition to the marketisation project will be able to articulate a common platform from which to challenge the neoliberal restructuring, other than the highly publicised, but otherwise rather fruitless attacks on financial investors as locusts and asset-strippers.

As the Commission is now increasingly defining structural and institutional differences between corporate governance systems in the Member States as an obstacle to the free movement of capital, and, concurrently, the competitiveness of the European economy, nationally constituted varieties of capitalism are more and more subject to transformative pressures from the EU. It is here that the marketisation project has so far met its strongest boundaries. These 'growing pains' of the regulatory transformation have been most prominently manifested in the rise of economic nationalism in several Member States.[111] At the same time, the enlargement of the European Union has seen the accession of new Member States with an increasingly neoliberal regulatory framework, partly through the conditionality of EU (see Vliegenthart and Horn 2007). It remains to be seen how the marketisation of corporate control is proceeding within the context of the enlarged market. Here, we also need to keep in mind the transatlantic relations between EU and US corporate governance (cf. chapter 3). The increasing backlash against US corporate governance reforms, in particular the Sarbanes-Oxley Act and proxy voting, have led to a repositioning of European capital markets in the global political economy, in particular with regard to the City of London.

[111] See e.g. on the French debates about 'economic patriotism' see The Economist (2006) 'Colbert was here' March 25, 2006.

7 Conclusion

This dissertation has sought to contribute to an understanding of the transformation of corporate governance regulation in the European Union. The main argument of this study is that the transformation of corporate governance regulation constitutes an integral part of a political project advanced by social forces against the broader background of capitalist restructuring in the European Union.

Summarising the argument

Following the discussion in chapter six, this section offers a concise summary of the main findings of the dissertation. The shift in corporate governance regulation, the *explanandum* of this study, has been analysed from a critical political economy perspective, emphasising the political nature of these regulatory developments. The analysis of the changes in form, content and mode of regulation has shown that the changes are conducive to a marketisation of corporate control. In order to *explain* these changes, the study has addressed a set of subquestions on the political processes and struggles shaping these regulatory developments.

1. What is the nature of the changes in corporate governance regulation in the European Union?

The analysis of the regulatory developments has identified several key dimensions of the transformation of corporate governance regulation.

Firstly, there has been a shift in both *scope* and *object* of company law and corporate governance regulation, exemplified in the changing policy discourse from ‘industrial democracy’ to a ‘shareholder democracy’. Whereas the rights and position of workers in the modern corporation have formed an important part in regulatory debates until the 1970s, the focus of regulation is now predominantly, and increasingly exclusively, on the relation between shareholders and managers. Worker rights are more and more relegated to the area of social policies and labour law.

Moreover, concomitant to broader developments in European governance, there has been a shift in the *form* of regulation. The focus on company law harmonisation, at national level, as well as through the creation of legal instruments at European level, has given way to a regulatory approach based on minimum requirements and mutual recognition, increasingly geared at adjusting the governance of corporations to the demands of liberalised capital markets.

With regard to the changes in *content* of corporate governance regulation, the analysis of several key regulatory developments in the area of company law, corporate governance and capital market regulation has identified the *marketisation of corporate control* as the central principle emerging from these regulatory changes. Crucially, as the discussion of common trajectories in the corporate governance system of Member States has shown, these changes are not limited to the EU level, but need to be seen as transnational developments, taking place across, and at the same time transcending specific regulatory levels. Moreover, an important point of departure for this study is that content and form are very much interrelated; here the dissertation has demonstrated the increasingly market-based form of regulatory mechanisms. Marketisation, in this respect, implies increasing regulation *for* the market, *through* the market.

These regulatory changes, it is argued, are part of a political project advancing the marketisation of corporate control. The analysis has shown how this particular (neoliberal) project, as part of a larger European integration project, is being constructed at European level.

2. How and through which mode of governance do these changes take place? Which actors are involved in driving or contesting these processes?

The discussion of *how* these changes have taken place has been linked with the analysis of the social forces driving (or contesting) the regulatory transformation. Here, the *mode* of governance has been characterised by, on the one hand, an increasing depoliticisation and isolation of regulatory developments from the *political* arena. New fora for discussion and policy dissemination and convergence, in particular several expert groups as well as a broader 'corporate governance scene', have been created within the institutional arena of the European Union and beyond.

As it is, ultimately, the state that provides the necessary preconditions for markets, public actors have a fundamental position in the marketisation project. The *European Commission* has been identified as the central node within the regulatory developments. The role of the *European Court of Justice* in establishing core principles conducive to the marketisation of corporate control through juridical fiat, rather than political deliberation has also been highlighted. Crucially, the study perceived these public actors in the context of the European state formation, which structures (but does not determine) their interests.

The dissertation also identified the critical role of private *company law expert groups* in formulating and shaping the content and form of regulatory changes. Here, the *transnational* character of these expert groups has been discussed, as well as their role in depoliticising the regulatory debates and legitimating the Commission's initiatives through both academic and 'market' expertise. Crucially, the analysis of the agency of these expert groups as 'organic intellectuals' emphasized the link between concrete strategies and the social interests underpinning them.

Organic intellectuals played an important mediating role between the interests of specific *capital actors* and the regulatory debate. As the study has shown, in contrast to the direct involvement of (transnational or European) industrial capital in the political process of European Integration, the political agency of transnationally mobile, financial capital, engendered by structural changes in global political economy, in particular the process of financialisation, has (so far) been less direct. Moreover, there are signs of an emerging conflict between the interests of financial capital as articulated in the advance of the marketisation project, and the orientation of industrial capital within the European Union.

At the same time, while *labour* has been implicated in the class compromise in conjuncture with, and to some extent underpinning, the early harmonisation programme for company law, there is now increasing contestation of the marketisation project through factions of the European Parliament, as well as organised labour on the European Union level.

3. Why have these changes in both form and content of corporate governance regulation taken place? What explains the nature of the developments in the broader context of socio-economic restructuring in the EU?

To explain the nature and development of the marketisation project, these political actors and processes have been analysed in the context of historical structures. As the dissertation has been at pains to show, the transformation of corporate governance regulation reflects, and at the same time contributes to, broader changes in the capitalist political economy. The *transnational* dimension of these political processes to some extent also corresponds to the changing role and nature of the European state formation. Rather than submitting to a monocausal explanation of the changes in corporate governance regulation by pointing at pressures emanating from capital markets, the dissertation has shown the concrete agency of social forces in constructing and contesting the marketisation project, and consequently emphasized the contingency of these regulatory changes.

As the discussion of the political struggle has demonstrated, the marketisation project privileges the interests of financial capital over industrial capital and labour. To show what is at stake in this political process, the dissertation engaged with the implications of the marketisation of corporate control, most notably the *commodification* of the social relations that constitute the modern corporation. Here, the discussion of the nature of the political project has also contributed to an understanding on the particular kind of European Union that is currently being advanced. At the same time, the dissertation has emphasized the potential for contestation and alternatives to this particular political project, in content as well as form and mode of governance.

Research perspectives

The main contribution of this dissertation to an understanding of the transformation of corporate governance regulation lies in the emphasis on the *political* nature of these regulatory changes, and in providing an in-depth empirical analysing of the processes, as well as structural shifts and conjunctures through which they have come about in the European Union. However, as a dissertation can only reasonably deal with a limited range of empirical developments, a number of regulatory aspects of corporate governance could not be addressed. At the same time, the theoretical framework was kept at a level commensurate to the empirical focus. In the course of these theoretical and empirical discussions, a number of issues were raised which call for further conceptualisation and empirical research. Hence, it is pertinent here to point towards perspectives for further research.

On the theoretical level, the dissertation has stressed the role of 'organic intellectuals' as a central node of agency articulating and mediating the interests of social class forces (cf. Horn 2008). More conceptual discussion is needed to arrive at an in-depth explanation of the organic link between concrete agency and social interests. In this regard, the role of state actors is crucial for a *relational* understanding of the agency of these organic intellectuals, in particular pertaining to the structural selectivity of the capitalist state. The dissertation also points towards the need for more theorisation of the agency of these actors within the European state formation, in particular the European Commission and the European Court of Justice. So far, critical political economy approaches have mainly bypassed these actors by assuming a general capitalist, 'form-determined' bias of the European state formation (Van Apeldoorn et al. 2008); however, this needs to be confirmed and substantiated through a discussion of the concrete agency of these state organs.

Within the discussion on the nature of the modern corporation, the role of workers needs to be conceptualised further, in particular with regard to the shifts in the power relations that constitute the corporation. The dissertation has examined and highlighted the differences between the discourses of 'industrial' and 'shareholder' democracy, but has not further explored the specific links between corporate governance and the employment relationship (cf. Gospel and Pendleton 2005). In this regard, it seems crucial to understand how structural, as well as regulatory changes, have had an impact on the interests of workers, and how this has been reflected in the political agency of (organised) labour (for instance, the transparency coalitions between shareholders and labour discussed by Gourevitch and Shinn 2005). Here, the fragmentation and potentially schizophrenous identity of workers increasingly tied to the performance of a corporation not just through contractual employment, but also as pensioners, recipients of boni and performance-related pay, shareholders and stakeholders in corporate social responsibility fora, needs to be discussed further. This also points toward the empirical question of the role, and potential for resistance, of organised labour in the trajectory of European capitalism.

Then there is of course the question of the role of the modern corporation in the changing transnational political economy, and how these changes will shape regulatory developments, while at the same time being shaped by them. The emergence of 'new' financial actors, in particular hedge funds, private equity and sovereign wealth funds, engendered by the process of financialisation, has led to a range of regulatory debates in Western industrialised countries. The politicisation of the debate about the largely short-term focus of private equity and hedge funds, as well as the potential political objectives informing the strategies of sovereign wealth funds has brought to the fore a discussion on the role of the state in regulating the transparency, as well as the reach of these financial actors. Here, it is in particular the interface between corporate governance regulation and competition policy (Wigger 2008) as well as the regulation of accounting standards (Perry and Nölke 2006) which calls for further research.

Despite the transnational perspective of this dissertation, the actual empirical analysis was mainly confined to analysing European developments. Here, the 2004 enlargement, as well as the prospect of further widening of the Single Market, has posed important empirical questions about the regulation of corporate governance regulation in Central Eastern Europe, also warranting further investigation of the dynamics between the regulatory system emerging in the post-socialist countries and the 'old' Member States (cf. Vliegenthart and Horn 2007; Vliegenthart and Overbeek 2008).

At the same time, moving beyond a focus centred on the EU or OECD area is crucial to understand the rise of Multinational Corporations from the

Global South, in particular India, China and Brazil. The rise of these Non-Triad Multinational Corporations poses a challenge to established approaches on the role of these actors in the global political economy, in particular with regard to the regulation and governance of these corporations (cf. Nölke and Taylor 2009)

Concluding reflections

The modern corporation has become so pervasive in the configuration of advanced capitalism in the industrialised world that it seems inconceivable that it is but one possible form of organising production. Corporations are assumed to be powerful actors, autonomous from societal influences and increasingly beyond the reach of the state. In Roy's interpretation, 'like Dr. Frankenstein, the state created a creature which it lost control over and which grew formidable enough to challenge the power of its creator' (Roy 1997: 280). The (redistributive) implications of corporate governance regulation reach far beyond those who are directly affected by a shift in the power relations that constitute the modern corporation. The question then is, how and why has the corporation come to dominate the very society which generates it (cf. Neocleous 2003: 158)?

The role of the state in creating the legal and political preconditions for the modern corporation, and in encouraging the development of a particular form of governance of the modern corporation has been highlighted in this dissertation. Here, the de-naturalisation of the modern corporation constitutes an important first step towards understanding the role regulation has played. The crucial issue then is – whose interests should regulation take into account, and how, that is through which mode of governance, should it proceed? The dissertation has argued that this is a fundamentally political question – as the social purpose of a corporation is not congruent with any specific social interest, this needs to be negotiated in social and political struggles. The perception underlying the transformation of corporate governance regulation in the European Union, namely that regulation should follow the market's lead, means negating the fundamental social relations, and reinforcing the power inequalities, that lie at the heart of the capitalist mode of production. At the same time, clearly the marketisation of corporate control is still very much a project in the making, and the increasing contestation from a variety of social forces points towards the political struggles that will determine the trajectory of corporate governance regulation. Here, these processes have to be seen within a broader legitimacy crisis of the neoliberal European integration project (cf. Van Apeldoorn et.al. 2008).

On a more fundamental level, the sustainability of the marketisation project is also challenged by the inherent contradictions stipulated by the further extension of the commodification of the social relations of production. The enormous significance of the corporate form for contemporary capitalism is such that the social processes constituting the corporation are immediately related to other aspects of social reproduction. With the regulation of corporate control more and more based on market principles, and aimed at extending the discipline of the market to more and more areas of social life, the question is whether the marketisation project can overcome the potentially devastating consequences of these processes on the very fabric of society on which it is based.

8 Appendix

8.1 Appendix A - List of Company Law Directives, Regulations and Recommendations

In chronological order. Directives etc. discussed in some detail in chapter four and/or five are marked by grey background.

Directives

- **First Council Directive 68/151/EEC of 9 March 1968** on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community
- **Second Council Directive 77/91/EEC of 13 December 1976** on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent
- **Third Council Directive 78/855/EEC of 9 October 1978** based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies
- **Fourth Council Directive 78/660/EEC of 25 July 1978** based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies
- **Sixth Council Directive 82/891/EEC of 17 December** 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies
- **Seventh Council Directive 83/349/EEC of 13 June 1983** based on the Article 54 (3) (g) of the Treaty on consolidated accounts
- **Eighth Council Directive 84/253/EEC of 10 April 1984** based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents
- E**leventh Council Directive 89/666/EEC of 21 December 1989** concerning disclosure requirements in respect of branches opened in a

Member State by certain types of company governed by the law of another State

- **Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989** on single-member private limited-liability companies
- **Council Directive 94/45/EC of 22 September 1994** on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.
- **Directive 2001/86/EC of 8 October 2001** supplementing the Statute for a European company with regard to the involvement of employees
- **Directive 2002/14/EC of 11 March 2002** establishing a general framework for informing and consulting employees in the European Community.
- **Directive 2003/58/EC of 15 July 2003** amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies
- **Directive 2004/25/EC of 21 April 2004** on takeover bids (Text with EEA relevance)
- **Directive 2005/56/EC of 26 October 2005** on cross-border mergers of limited liability companies (Tenth Company Law Directive)
- **Directive 2006/68/EC of 6 September 2006** amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital
- **Directive 2007/36/EC of 11 July 2007** on the exercise of certain rights of shareholders in listed companies
- **Directive 2007/63/EC of 13 November 2007** amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies

Regulations

- **Council regulation (EEC) 2137/85 of 25 July 1985** on the European Economic Interest Grouping (EEIG)
- **Regulation (EC) 2001/2157 of 8 October 2001** on the Statute for a European company (SE)

Recommendations

- **Commission Recommendation of 14 December 2004** on fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC).
- **Commission Recommendation of 15 February 2005** on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC).

8.2 Appendix B – Members of Expert Groups in the process of European Corporate Governance Regulation

Members are listed as per expert group, with some overlap. Interviews have been conducted (June – December 2006) with those members marked by grey background. Information in tables from European Commission website (available at http://ec.europa.eu/internal_market/company/advisory/index_en.htm); ECGI website (www.ecgi.org) and interviews/own research.

The High Level Group of Company Law Experts 2001-2002

Name	Country	Position/Affiliation
Jaap Winter (Chairman)	Netherlands	Partner at law firm De Brauw Blackstone Westbroek, Professor of International Company Law at the University of Amsterdam, member of the Dutch Corporate Governance Committee, former legal advisor Unilever
José Maria GARRIDO GARCIA	Spain	Head of Legal Service and Secretary to the Governing Council, CNMV (Spanish securitiesand exchange commission). Professor at the University of Castilla-La Mancha, Spain
Klaus J. HOPT	Germany	Director at the Max Planck Institute of Foreign Private and Private International Law, Hamburg; member of the German Takeover Commission (1995-2001), member of the supervisory board of the Deutsche Börse AG
Jonathan RICKFORD	UK	Consultant for the DTI, Director of the Company Law Centre at the British Institute of International and Comparative Law, former Director of Corporate Strategy at BT (1993 to 1996)
Guido ROSSI	Italy	former President of the Italian stock exchange supervisory body CONSOB, former chairman of Telecom Italia (2006/2007), former commissioner of the Italian Football Federation (FIGC) during crisis in 2006.

Jan Schans CHRISTENSEN	Denmark	Professor at the University of Copenhagen,
Joëlle SIMON	France	Legal Affairs Director, Employers' Federation (MEDEF

The European Corporate Governance Forum, 2004 – 2008

Name	Nationality	Position/Affiliation
Members since 2004, mandate renewed 2008		
Antonio Borges	Portugal	Vice Chairman of Goldman Sachs International and board member for several corporations. Former Dean of INSEAD, Paris (1993-2000). Chairman of the European Corporate Governance Institute. As of June 2008, Chairman of the Hedge Fund Standards Board.
Bertrand Collomb	France	Chairman of Lafarge (until May 2007) and of Association Française des Entreprises Privées (AFEP) (until June 2007). Spokesperson of the Forum.
David Devlin	Ireland	Partner at PriceWaterhouseCoopers, (former) Chairman of the Federation of European Accountants (FEE), member of the Supervisory Board of the European Financial Reporting Advisory Group (EFRAG)
Jose Maria Garrido Garcia	Spain	Head of Legal Service and Secretary to the Governing Council, CNMV (Spanish securitiesand exchange commission). Professor at the University of Castilla-La Mancha, Spain
Peter Montagnon	UK	Head of Investment Affairs, Association of British Insurers, Member of the ICGN Board of Governors, former journalist at the *Financial Times*
Colette Neuville	France	Chairman of French minority shareholder association ADAM (*Association de défense des actionnaires minoritaires*), board member of Euroshareholders.
Roland Oetker	Germany	Chairman of German shareholder association DSW (*Deutsche Schutzvereinigung für Wertpapierbesitz*), Managing Partner ROI Verwaltungsgesellschaft mbH
Rolf Skog	Sweden	University of Stockholm
Jaap Winter	Netherlands	Partner at law firm De Brauw Blackstone Westbroek, Professor of International Company Law at the University of Amsterdam, member of the Dutch Corporate Governance Committee, former legal advisor Unilever
Eddy Wymeersch	Belgium	Chairman of CBFA (Belgian SEC) and member of the Committee of European SecuritiesRegulators (CESR), academic at Ghent Law School
Members until 2008		

Alastair Ross Goobey (†)	UK	Chairman of ICGN and of Hermes Focus Asset Management Ltd
Igor Adam Chalupec	Poland	President of the Management Board and CEO of PKN Orien (until January 2007); former deputy finance minister
Andreas Trink	Estonia	(former) Chairman of the Management Board of the Estonian Financial Supervision Authority
Emílio Gabaglio	Italy	Former general secretary of the European Trade Union Confederation (ETUC)
Gerhard Cromme	Germany	Chairman of the Supervisory Board of ThyssenKrupp, President of the 'Cromme' Commission (German corporate governance code 2002)
New Members as of 2 July 2008		
Bistra Boeva	Bulgaria	University for national and world economic studies SofiaIn 1996, Chair of Supervisory board of one of the Bulgarian privatization funds; 1997-2001 Commissioner at the Bulgarian National Securities Commission, 2001- 2003 consultant for USAID capital market projects.
Niklas Bruun	Finland	Professor in Private Law and Director of Intellectual Property Rights, Helsinki; 1999-2006 Professor of EU Labour Law, Helsinki, member of UN Committee monitoring the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Member of the ILO Committee on Freedom of Association.
Klaus-Peter Müller	Germany	Chairman of the Supervisory Board of Commerzbank, President of the German Corporate Governance Code Commission
Trelawny Williams	UK	Director Corporate Finance, Fidelity International (Investment Funds)
Marek Sowa	Poland	President of the Management Board of Agora SA (media corporation)

The Corporate Governance Advisory Group 2005-2008 (mandate extended until June 2009)

Name	**Country**	**Position/Affiliation**
Gintautas BARTKUS	Lithuania	Managing Partner, Professional Law Partnership Jurevicius, Balciunas & Bartkus; Lecturer, Faculty of Law, Vilnius
Theodor BAUMS	Germany	Professor, University of Frankfurt.
Francesco CHIAPPETTA	Italy	Secretary of the Board of Directors and General Counsel of Telecom Italia; Chairman of the Company Law Working Group of UNICE; Professor, University Bocconi (Milano).
Thomas COURTNEY	Ireland	Head of Legal and Compliance – Personal lending, Bank of Ireland Group; Chairman of the Company Law Review Group in Ireland.
Jean-Pierre HELLEBUYCK	France	Vice-president, AXA Investment Managers; Chairman of the Commission on corporate governance of AFG (French Association on financial management).
Erich KANDLER	Austria	Partner, Deloitte Group Austria; Chairman of the working party on corporate governance and company law of the European Federation of Accountants (FEE).
Mrs Vanessa KNAPP	UK	Partner, Freshfields Bruckhaus Deringer; Chairman of the Company Law Committee of the Law Society of England and Wales.
Vratislav KULHÁNEK	Czech Republic	Chairman of the supervisory board of Skoda Auto
Jukka MÄHÖNEN	Finland	Professor, University of Turku
Stilpon NESTOR	Greece	Principal, Nestor Advisors (Corporate governance advisory services to corporations). Until March 2002 head of the Corporate Affairs Division at the OECD (OECD CG Principles).
Jesper Bo NIELSEN	Denmark	International Coordinator, Danish Financial Services Employees' Union (Finasforbundet), affiliated to the Confederation of the Nordic Bank, Finance and Insurance Unions (NFU).

Josef OKOLSKI	Poland	Professor, University of Warsaw; Advisor to law firm Weil, Gotshal & Manges.
Leonardo PEKLAR	Slovenia	Chairman, Supervisory Board Telekom Slovenije; Vice president, Supervisory Board Members Association of Slovenia, CEO of Socius Consulting.
Colin PERRY	UK	Chairman of three SMEs in the UK, Member of the Council of the Financial Reporting Council in the UK (responsible for the UK's combined code on corporate governance).
Enrique PIÑEL LÓPEZ	Spain	Director, Banca March and Corporación Financiera Alba; Member of the European Banking Federation working group on company law and corporate governance.
Geert RAAIJMAKERS (NL),	Netherlands	Senior Legal Counsel, Investment Department of the ABP Pension Fund; member of the Working Group Corporate Governance-Pension Fund Governance of the European Federation for Retirement Provision (EFRP); Professor, University of Maastricht.
Joëlle SIMON	France	Legal Affairs Manager of MEDEF (French Business Confederation).
Mario STELLA-RICHTER	Italy	Legal Counsellor to Assogestioni (Italian Investment Management Association); Partner Studio Legale Stella Richter; Professor, Universities of Macerata and Bocconi (Milano)
Daniela WEBER-REY	Germany	Board Member of the German Private Equity and Venture Capital Association (BVK); Partner, Clifford Chance.
Patrick ZURSTRASSEN	Belgium	(BE), Managing Partner, Finor Luxembour; Chairman, The Directors' Office, Luxembourg; Professor, Catholic University of Louvain-la-Neuve.

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Samenvatting

Ontwikkelingen in de regulering van ondernemingsbestuur in de Europese Unie – de vermarkting van bedrijfscontrole

De controle over de onderneming is een van de belangrijkste vraagstukken in een kapitalistische samenleving. Was het twintig jaar geleden nog ondenkbaar dat ondernemingen zuiver georganiseerd waren ten faveure van aandeelhouders, vandaag de dag is dit steeds meer realiteit geworden. Aandeelkoersen bepalen het succes van de onderneming, en de markt heeft het voor het zeggen als het gaat om strategische beslissingen in de onderneming. De invloed van werknemers is significant afgenomen en managers worden door kritische aandeelhoudersvergaderingen en kwartaalcijfers gedirigeerd. Daarnaast zijn exorbitante optieregelingen meer regel dan uitzondering geworden. *Corporate governance*, oftewel ondernemingsbestuur, is al jaren een prominent onderwerp in de politieke en maatschappelijke discussie over de positie van de onderneming in de samenleving.

In dit proefschrift staan bovenstaande ontwikkelingen centraal. Het beoogt antwoord te vinden op de vragen welke ontwikkelingen tot de huidige constellatie hebben bijgedragen en welke structurele veranderingen plaats hebben gevonden.

Het proefschrift laat zien dat de antwoorden op deze vragen liggen besloten in de steeds verdergaande vermarkting van de onderneming, die vanuit de Europese Unie sterk is ondersteund. Sinds het begin van de jaren 80 heeft met name de Europese Commissie - onder het mom van de vorming van een gelijk speelveld - erop aangedrongen dat ondernemingen afstand zouden doen van

maatregelen waardoor de macht van de aandeelhouders beknopt wordt, zoals bijvoorbeeld preferente aandelen. Tegelijkertijd wordt de betrokkenheid van werknemers in het ondernemingsbestuur aan banden gelegd. Het beleid vanuit Europa om ondernemingen te 'vermarkten', valt grotendeels samen met de opkomst van het neoliberalisme als dominante ideologie, allereerst in de Verenigde Staten en het Verenigd Koninkrijk, en later in continentaal Europa. Dit heeft geleid tot uitholling van het Rijnlandse model en een Pan-Europese markt voor bedrijfscontrole. Dit vermarktingsproces zet de ondernemingen, haar bestuurders en werknemers, steeds verder onder druk, dat wil zeggen, onder de tucht van de financiële markten.

Ondernemingsbestuur is uiteindelijk vooral een verdelingskwestie. Deze studie benadrukt dan ook de politieke natuur van de regulering van ondernemingsbestuur, in het bijzonder de rol van de overheid en wetgeving in het proces van vermarkting. Op basis van tientallen interviews met corporate governance experts en beleidsmakers laat dit onderzoek zien hoe dit politieke proces vorm heeft gekregen. De wet- en regelgeving richt zich steeds meer uitsluitend op de relatie tussen aandeelhouders en managers. De rechten van werknemers worden meer en meer verplaatst naar de terreinen van sociaal beleid en het arbeidsrecht, waardoor werknemers minder of geen invloed op ondernemingsbestuur kunnen uitoefenen. Dit onderzoek wijst eveneens op de cruciale rol van private groepen van deskundigen bij het formuleren en vormgeven van wet- en regelgeving op het Europees niveau. Het centrale argument van deze studie is dat de veranderingen in de regulering van ondernemingsbestuur een integraal onderdeel vormt van een politiek project in het kader van bredere kapitalistische herstructureringen in de Europese Unie.

Dit proefschrift heeft een kritische benadering op de internationale politieke economie, met name geïnspireerd door theorieën van Gramsci, maar ook gebruik makend van andere kritische staatstheorieën. Door de regulering van ondernemingsbestuur vanuit een kritisch politiek-economisch perspectief te benaderen komt de onderneming als *sociale* relatie centraal te staan. Dit in tegenstelling tot de opvatting, dominant onder neoklassiek geschoolde economen en centraal in het Angelsaksische model, waarin de aandeelhouder wordt gezien als een alleenheerser over 'zijn' onderneming. De onderneming wordt in deze opvatting gezien als slechts een set van *contractuele* relaties waarin de aandeelhouders managers inhuren om zoveel mogelijk 'waarde' uit het productieproces te pompen en aan hen uit te keren (in de vorm van dividend of koersstijgingen). *Corporate governance staat* in dit perspectief voor een mechanisme dat de belangen van aandeelhouders en managers gelijkschakelt. Om dit te bereiken is het creëren van liquide kapitaalmarkten inclusief een overnamemarkt essentieel, zodat delen van bedrijven (aandelenpakketten) , maar ook hele bedrijven kunnen worden verhandeld. In deze vorm van aandeelhouderskapitalisme gaat het om de 'vermarkting' van de onderneming zelf. De onderneming is daarmee zelf tot waar geworden.