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# Employee representation in corporate governance: part of the economic or the social sphere?

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Aline Conchon

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**Working Paper 2011.08**

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**europaen trade union institute**

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Remarks and comments on this Working Paper are very welcome.  
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## **Abstract**

Observers of the European legislative strategy which drove the adoption of the European Company statute identified the then competing political projects in accordance with a dichotomy: the desire of harmonization vs. a flexible approach to employee participation. With the definitive adoption of the flexible approach by European institutions, this reading became obsolete. In this paper we propose the adoption of a new analytical framework in order to understand what is at stake in the production of European legal rules on corporate governance by placing the representations of the world of industrial relations actors at the centre of the analysis. We assert that these representations are based on a vision of the world which conceives the social and the economic spheres as embedded or disembedded. Moreover, we argue that these representations can be approached by an analysis of the conception of industrial relations actors based on whether they consider the fields of company law and labour law to be embedded or not. Application of this analytical framework to the examination of the positions of two key European industrial actors – the ETUC and the European Commission – on the regulation of board-level employee representation at European level reveals the extent to which their representations of the world are in conflict. In turn, this finding sheds new light on our understanding of the current legislative difficulties which the proposal for a European Private Company statute is experiencing.

## **Keywords**

Industrial relations, board-level employee representation, corporate governance, legislative strategy, ETUC, European Commission, company law, labour law, embeddedness.

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## Introduction

‘Reopening the employee participation debate in the context of the SPE (*Societas Privata Europaea* – European Private Company) would expose the SPE to an unreasonable political risk’ (European Commission 2008a: 33). Seven years earlier, the adoption of the European Company Statute<sup>1</sup> was yet considered a successful outcome of more than thirty years of intense debates which had focused precisely on the issue of employee participation: that is, board-level employee representation. The appearance, for the first time in European legal texts, of an institutionalised definition of this specific form of ‘employee involvement’<sup>2</sup>, combined with its flexible implementation in companies through negotiated tailor-made rules, have both been welcomed as satisfactory trade-offs. Therefore, what is the reason for the fears expressed by European institutions with regard to addressing this issue once again within the framework of a legislative process aimed at producing a new European legal company statute, the SPE? What are the grounds for the assessment that there is still a ‘political risk’, namely of potentially diverging and irreconcilable political views among the Member States, similar to those which slowed down the adoption of the European Company Statute? What is the nature of this so-called ‘political risk’? In other words, what are the political projects supposedly competing with regard to the regulation – in the sense of the ‘creation, preservation or transformation of rules’ (Reynaud 1997: 306) - on board-level employee representation at European level (henceforth BLER<sup>3</sup>)?

Observers of European legislative processes dealing with employee involvement (prominent among which have been those on the European Company and the European Works Council) analysed the then competing political projects in terms of two conflicting positions: a desire for the harmonisation of legal provisions on employee involvement and more specifically, on BLER, at European level *versus* a more flexible approach to BLER institutional

1. Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.
2. Article 2 of the European Company Directive indeed details that “‘participation” means the influence of the body representative of the employees and/or the employees’ representatives in the affairs of a company by way of: the right to elect or appoint some of the members of the company’s supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some of all of the members of the company’s supervisory or administrative organ’ (point ‘k’).
3. We will equally use both the expressions ‘BLER’ and ‘employee participation’ to mean board-level employee representation.

diversity<sup>4</sup> in terms of existing national provisions. Hall (1992) illustrated this thesis by deciphering the tension – or at least difference – between the positions adopted within the European Commission by two key involved General Directorates (DGs). On the one hand, DG Internal Market<sup>5</sup> advocated a normative approach aimed at implementing a unique model of corporate governance – hence of BLER – based on the German codetermination model: namely, a two-tier board structure (management board and supervisory board, as opposed to the one-tier structure composed of a single board of directors) with one-third of board members being employee representatives. On the other hand, DG Employment promoted a more pragmatic approach ‘relying on member states’ existing employee representation arrangements instead of specifying particular models’ (Hall 1992: 555).

While invaluablely informative with regard to the history of the European Company, this reading of the legislative strategy corridors can no longer help us to understand what is at stake today. Indeed, the competition between the two positions came to a definitive end when the flexible approach was ratified, even at a very large extent, by all key players within the European Commission involved in legislating in the field of BLER (Komo and Villiers 2009: 181). Villiers (2006: 187) supports this conclusion when looking at employee involvement provisions in the adopted SE (*Societas Europaea* – European Company) Statute which: ‘does not aim to introduce new or additional aspects of employee involvement but rather it seeks to prevent the disappearance or reduction of what already existed prior to the establishment of an SE. This specific regulation is not about any kind of European “harmonization” but about the preservation of nationally institutionalized rules and standards’ (Quoted in Keller and Werner 2008: 170). Streeck (1997: 91) makes the same assessment with regard to the European Works Council legislation when he asserts that ‘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’. The same goes for the European Cooperative Society Statute. In its first proposal for a Directive supplementing the statute with regard to employee involvement (European Commission 1991a), DG Enterprise expressed its willingness to refrain from harmonisation of employee participation arrangements, favouring reference to national provisions<sup>6</sup>. Again, the same approach can

4. For a synthetic overview of the institutional diversity characterising BLER provisions in Europe, see Kluge and Stollt (2009).

5. DG15 at that time. Throughout this paper, we shall use the short versions of DG names currently in force: ‘DG Internal Market’ will thus refer to ‘DG Internal Market and Services’; ‘DG Employment’, formerly DG5, will refer to the recently renamed ‘DG Employment, Social Affairs and Inclusion’; finally, ‘DG Enterprise’, formerly DG23, will refer to ‘DG Enterprise and Industry’.

6. In its adopted version – differing from the first proposal on the basis that participation arrangements are not defined according to a ‘simple’ reference to national legal provisions but, to put it simply, by the outcome of a ‘special negotiating body’ – one could even identify this acknowledged ‘flexible’ approach within recitals: ‘The great diversity of rules and practices existing in the Member States as regards the manner in which employees’ representatives are involved in decision-making within cooperatives makes it inadvisable to set up a single European model of employee involvement applicable to the SCE’ (recital 5, Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees).

be found in DG Internal Market's current proposal for a European Private Company Statute: 'In contrast to harmonization, this proposal leaves national law largely untouched' (European Commission 2008b: 3).

Since the understanding of the competing political projects – be they internal to the European Commission (henceforth EC) or between the EC and other European industrial relations actors (henceforth IR actors) – in terms of the harmonisation/flexibility dichotomy is obsolete, a new reading grid is required, one that goes beyond the examination of circumstance-related political projects to grasp a more fundamental competition with regard to the actors' positioning, thereby offering a more systematic analytical framework concerning the production of European legal rules on corporate governance.

In Part 1 we develop our related – and, we should stress, exploratory – proposal. In our view, the central dividing line between European IR actors – as it has been since the beginning of European legislative attempts in the field of corporate governance – concerns whether corporate governance is considered a component of a single legal field, labour law or company law<sup>7</sup> – or a transversal and overarching topic encompassing several legal fields. Because such a categorisation is not taken for granted but a social construction, this positioning takes on a strategic meaning which, in turn, provides information on a more fundamental project borne by IR actors: their representation of the world according to a normative conception of the linkage between the economic and social spheres. The cornerstone of the regulatory game with regard to corporate governance at European level is therefore located, as we shall show, in the IR actors' positioning between two competing representations of the world: one in which the economic and social spheres are considered distinct, as indicated by a great and impenetrable division of labour between company and labour law; and another in which both spheres are considered embedded, as revealed by the interdependence of the company and labour law fields.

Part 2 presents the application of this analytical framework to the specific case of the regulation of BLER at European level. The analysis of the positioning of two key IR actors – the European Commission and the ETUC – according to our reading grid helps to reveal the nature of the so-called 'political risk', as mentioned in the EC proposal for an SPE statute. Indeed, the EC and the ETUC hold two diverging positions as regards their interpretation of the appropriate way to regulate employee representation in corporate governance. From the EC's standpoint, BLER is part of labour law, as opposed to all other legal provisions regulating corporate governance, which fall under company law. From the ETUC's standpoint, the economic and the social spheres being considered embedded, BLER and other corporate governance provisions are interdependent and, therefore, should be handled in the same legal field.

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7. We here consider the two expressions 'company law' (UK) and 'corporate law' (US) as meaning the same thing.

# **1. A new reading grid of the production of European legal rules on corporate governance**

It is a key feature of industrial relations that it calls for a multi-disciplinary approach. We will thus draw upon work by various authors in the fields of law, corporate governance theories and sociology, as well as from economic sociology in order to fuel our demonstration. We shall approach the question of IR actors' positioning in the production of legal rules on corporate governance on the basis of an analysis not only of academic debates but also of the central dividing line between various schools of thought. We will, for instance, start deriving from debates in force among legal scholars what is the key problematic as regards the regulation of corporate governance.

## **1.1 Incorporating corporate governance in particular legal fields: boundaries between company and labour law**

The division of labour, first emphasised by Smith (1776) with regard to the universe of manufactures and further acknowledged by Durkheim (1893) as prevailing in all spheres of society, explains the specialisation of law in terms of several legal fields, such as social security law, superannuation law, tax law or family law. With reference to corporate governance issues, the most patent division of labour is between company and labour law scopes. It does so in the academic and scholar community: 'Corporate Law as it is presented in textbooks and classrooms will usually exclude labor law, and hence, the employee. [...] Within the academy and the law school's curriculum, corporate law is seen in concert with courses and issues in securities regulation and bankruptcy law, but not with labor law' (Zumbansen 2006: 16-17). But this division is also evident with regard to actors' practices of regulation, i.e. in how they produce legal rules, underpinned by the bureaucratic organisation of public institutions (an illustration at the national level resting on the specialisation of legal activities between the ministries of Labour and of Economy or Enterprises), as will be demonstrated below. 'It has been observed that corporate law and labor (or employment) law are, in essence, separate fields of legal scholarship and regulatory policy. [...] What the separation does mean, however, is that, generally speaking, the concerns and problems associated with corporate governance are regarded as separate from those problems associated with employment regulation' (Mitchell *et al.* 2005: 417). Other authors express even more straightforwardly that the explanation for excluding labour issues from corporate governance regulation relies on both

the strong division of labour between company and labour law and on the conception of corporate governance as falling exclusively within the scope of company law. 'Corporate law is primarily about shareholders, boards of directors and managers, and the relationships among them. Occasionally, corporate law concerns itself with bondholders and other creditors. Only rarely, however, does a typical corporate law course or a basic corporate law text pause to consider the relationship between the corporation and workers. [...] The justification for insulating the concerns of workers from the attention of corporate law is that such concerns are the subject of other areas of the law, most prominently labour law and employment law' (Greenfield 1998: 283).

On the basis of above statements about the sharp division of labour between company and labour law in both the teaching and regulation of corporate governance, criticisms arise which call into question the contemporary relevance of such a partition. As Deakin states: 'while labour law and corporate governance could once have been thought of as discrete areas for analysis, it is clear that this is no longer the case. The relationship between them has become both complex and paradoxical' (Deakin 2004: 79). According to Zumbansen (2009), the reason is to be found in growing globalisation alongside the growing importance of supra-national legal rule-makers. 'ECGR [European Corporate Governance Regulation] is informed by the policy and legislative dynamics between corporate law and capital-market law (securities regulation) as well as between corporate law and labour law, categorisations of functionally separable legal areas that can be found in all advanced industrialised societies and that are increasingly challenged through global forces of rulemaking' (Zumbansen 2009: 250). Deakin identifies a very useful indicator of the new challenge to this taxonomy in the form of difficulties now being faced by courts of justice. 'The implicit assumptions of company law, particularly during a period when shareholder value is to the fore, often run counter to those of labour law, so that complementarity is hard to achieve. This gives rise to interesting issues concerning which field has priority in specific contexts (corporate restructuring being the most obvious). Courts have to use techniques reminiscent of the conflict of laws to resolve these tensions, which cannot be solved by merging the two fields except in the sense of completely subordinating one set of values and goals to the other' (Deakin 2007).

Over time, the gradual blurring of the boundaries between labour and company law has therefore given rise to complications in the process of legal rule production (law promulgation) or transformation (jurisprudence). Greenfield develops even further criticisms, paying less attention to such procedural implications than to the questions raised with regard to the legitimacy of such a division of labour. Admittedly, corporate governance is regulated exclusively by company law provisions but 'this is despite the fact that, by any account, workers provide essential inputs to a corporation's productive activities, and that the success of the business enterprise quite often turns on the success of the relationship between the corporation and those who are employed by it' (Greenfield 1998: 283). He concludes that 'the taxonomy that insulates corporate law is artificial' (*ibid.*: 286). Indeed, it is so artificial that legal scholars have started to produce a growing number of

publications raising the questions concerning the boundaries and delimitation of the scope of company and labour law. Hansmaan and Kraakman (2004) ask ‘what is corporate law?’, while Hyde (2006) develops the same problematic in the labour field by asking ‘what is labour law?’. A recent Australian collective publication even suggests operating a paradigm shift in the field of labour law by broadening its scope through the inclusion, among other things, of company law (Arup *et al.* 2006).

## **1.2 Company law and/or labour law? A taxonomy with a strategic dimension**

The emergence and development of the above-mentioned criticisms of the division of labour and the permeability of the boundaries between company and labour law in the regulation of corporate governance underline the relativity of this peculiar taxonomy. Both the specialisation of each legal field on the one hand, and the incorporation of corporate governance matters into the scope of company law on the other, are by no means self-evident or natural and certainly not set in stone. Instead of being taken for granted, the two phenomena must be considered to be an outcome of social construction, as part of a process which is still on-going<sup>8</sup>. Cioffi (2000: 578) provides an enlightening illustration of this social construction, asserting that the nature of the interaction between the legal fields of company law and labour law is one of the discriminative features differentiating the various national political economies. According to this author, neo-liberal regimes, such as the US and the UK are, *inter alia*, characterised by a ‘strict separation of labour relations and firm management (sharp distinction between corporate and labour law); no form of board of works council codetermination’, while neo-corporatist regimes, such as Germany, are characterised by an ‘interpenetration of labour relations and firm management through board and works council codetermination (blurred boundaries between company and labour law)’.

The notion that the taxonomy with which are concerned is a social construction – or a product of collective regulation as Reynaud (1997) would call it – implies, in our interactionist perspective, that IR actors do not passively comply with a given division of labour between company law and labour law but contribute to its construction by their strategic actions. In other words, both the specialisation of legal fields and the incorporation of corporate governance matters in company law alone are not arbitrary but an outcome of actors’ strategies. ‘Industrial relations practices and outcomes [such as legal rules] are shaped by the interactions of environmental forces *along with* [authors’ emphasis] the strategic choices and values of American managers, union leaders, workers, and public policy decision makers’ (Kochan *et al.* 1986: 5).

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8. Ireland (1999) for instance has well illustrated the social construction which led to the development of the independent field of company law by tracing its historical emergence in the UK.

In turn, these strategies are governed by actors' projects, in the Reynaldian sense<sup>9</sup>, or, as we would rather say, by actors' representation of the world. Therefore, the construction of a systematic and comprehensive analytical framework aimed at grasping the IR actors' regulatory play with regard to corporate governance issues also requires the identification and conceptualisation of key differentiating feature(s) of these potentially competing representations of the world.

### **1.3 The strategic dimension rests on a representation of the world according to the linkage between the economic and social spheres**

The 'reflexivity of modernity', according to Giddens (e.g. 1990, 1991), makes research in the social sciences more complex than in the so-called 'hard' sciences since the social phenomena they analyse evolve as actors appropriate this production of knowledge and change the orientation of their actions accordingly. Consequently, the social sciences are prevented from producing analyses which would be universal and time-unlimited since their object changes as a consequence of research findings re-entering the system. 'Modernity's reflexivity refers to the susceptibility of most aspects of social activity, and material relations with nature, to chronic revision in the light of new information or knowledge. [...] The social sciences play a basic role in the reflexivity of modernity: they do not simply "accumulate knowledge" in the way in which the natural sciences may do' (Giddens 1991: 20). 'The knowledge claims they [social sciences] produce [...] become revised in a practical sense as they circulate in and out of the environment they describe' (Giddens 1990: 177). What could be considered a limitation in social sciences practice, will prove to be a resource within the framework of our demonstration.

Indeed, the permeability and circulation of concepts, beliefs and representations between the academic world and the world of practitioners enable us to transpose the model of competing representations of the world in force in academic debates to the sphere of IR actors themselves. Representations of the world which can be identified in scholarly debates can also apply to the understanding of the competing positions of actors involved in regulation. 'The main difference between social sciences and natural sciences lies in the 'reflexivity of the social': people learn and modify their behaviour and their beliefs as their knowledge increases. For this reason, the mere public promulgation of a law causes new behaviours which can invalidate the 'law' that has just been 'unveiled. There is thus a loop between theories and facts which is unique to the social sciences: statements are also social products which are used by economic actors' (Orléan 1999: 5-6) (own translation).

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9. For Reynaud, when looking at collective regulation, i.e. the process whereby industrial relations actors 'produce, sustain or change rules' (our translation), the researcher should bear in mind that 'rules have a meaning only in relation to a joint action (to simplify matters we shall say, regardless of the variety of purposes: to a project)' (Reynaud 1997: 80) (our translation).

Considering that they are identical to those of IR actors, we will therefore look at the determination of academics' representations of the world, which are key dividing lines when it comes to the problematic of corporate governance regulation.

## Representations of the world as composed of an economic and a social sphere: a structuring element in theoretical debates

We infer from teachings of both corporate governance theoreticians and legal scholars that debates on the regulation and conception of corporate governance within the framework of 'stakeholder-oriented vs. shareholder-oriented perspectives' or 'legal incorporation in company law and labour law vs. incorporation in company law or labour law' dichotomies mask a conflict concerning more fundamental representations of the world as they question the division of the world into an economic and a social sphere.

In studying the state of development of European regulations, and observing the sharp division of labour between the fields of labour and company law, Villiers (1998) introduces a new dimension to her analysis by transposing the dichotomy to one resting on the division of the world between economic and social matters. 'The two spheres of labour law and company law tend to be divided between social and economic goals. Generally, labour law is more concerned with social goals, aiming to regulate the relationship between employer and worker. [...] Company law, on the other hand, focuses more directly on economic issues and on the relationship between managers and shareholders. The traditional company law discipline of profit-maximisation, as Bercusson remarks 'goes to the heart of the economic system' (Bercusson 1986: 144). In correspondence with these general distinctions, the European Directives also tend to be categorised as social legislation in the labour law field and as single market (i.e. economic) provisions in the company law field' (Villiers 1998: 188-189). The author further confirms what we demonstrated when establishing that the split between labour law matters and company law matters – thus, between 'economic' and 'social' matters – should not be taken for granted but rather considered to be a social construction: 'this distinction does not explain why employee participation should be acceptable in the social sphere but not in the economic sphere, when the reality is that measures adopted in the social sphere will have an impact on the economic sphere' (*ibid.*: 190) - and we might add *vice versa*.

The representation of the world as composed of an economic and a social sphere is also revealed to be a structuring element in debates taking place between corporate governance scholars. At this point in our demonstration, a brief summary of these debates is needed. Among the variety of corporate governance theories, two main schools of thought have come to oppose one another: advocates of the shareholder-value oriented theory vs. advocates of the stakeholder-interests oriented theory. Rooted in Agency theory (first developed by Berle and Means 1932) supporters of the shareholder-value approach argue that the interests of shareholders, as the only actor bearing

risks, are the most representative of a company's interests. Therefore, the company's management must seek to satisfy shareholders' interests and new corporate governance designs – e.g. board composition – are needed to enforce top management compliance with this objective by reducing transaction costs (e.g. Jensen and Meckling 1976; Fama 1980; Fama and Jensen 1983a, 1983b, 1985). In this perspective, the core relationship on which scholars focus is the one taking place between the Agent (CEO and top management) and the Principal (shareholders). In the opposing camp, advocates of the stakeholder approach argue instead that corporate management should take into account the interests of those 'who can affect or [are] affected by the achievement of the organization's objectives' (Freeman 1984: 46). Consequently, corporate governance institutions should rather ensure the efficiency of relationships and transactions between a company's management and a number of other internal and external actors, such as employees, suppliers, customers, local community or society at large<sup>10</sup>. Since the set of stakeholders is substantial, a number of concepts – e.g. 'critical stakeholders' (Strebel 2010) - have been developed in order to identify the most prominent actors. Among them, a singular position is attributed to employees – as risk bearers because of their firm-specific human capital investments (Blair 1995) – legitimating their representation in boardrooms (Van Wezel Stone 1993; Aglietta and Rebérioux 2005; Greenfield 2005, 2008a, 2008b).

The nature of the relationships on which scholars focus– the single shareholders-managers relationship or the plural stakeholders-managers one – conveys the manner in which scholars incorporate corporate governance problematics in the economic sphere alone or in both the economic and the social realms. In particular, the stakeholder approach is developed as an alternative to a purely economic focus, by integrating elements specific to the social dimensions. 'The theoretical problem is that surely 'economic effects' are also social, and surely 'social effects' are also economic. Dividing the world into economic and social ultimately is quite arbitrary. Indeed, one of the original ideas behind the stakeholder management approach was to try to find a way to integrate the economic and the social' (Harrison and Freeman 1999: 483-484). This 'integration' is indeed lacking in the shareholder-value oriented perspective which concentrates on the economic dimension of corporate governance, relegating its social dimension to human resource management scholars<sup>11</sup>.

The analysis of these theoretical debates among corporate governance and legal scholars not only reveals the weight of a representation of the world – as composed of an economic and a social spheres – as a fundamental structuring element, but also the competition between two key related representations. On

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**10.** For a more detailed presentation of stakeholder approaches in corporate governance theory, we strongly recommend the brilliant analytical work of Friedman and Miles (2006).

**11.** An interesting illustration of this can be found in the emergence of a new trend entitled 'people governance', conceptualised as complementing corporate governance theories resting on the Agency theory with an – albeit not explicitly declared as such – human resource management perspective. See, for instance, information on the so-called 'first European People Governance Conference' held in 2009: <http://www.rhtribune.com/peoplegovernance/index.htm>.

the one hand, some scholars have a representation of the world in which the economic and the social spheres are separate from one another, as illustrated by a sharp division of labour between company and labour law or a sharp distinction between a core economic relationship (shareholders–managers) and a peripheral social one (managers–employees). On the other hand, other scholars conceive of the world as an interpenetration of the two spheres, on the basis of which they advocate the ‘integration’ of company and labour law fields or the ‘integration’ of the shareholders–managers and stakeholders–managers relationships.

### The nature of the linkage between the economic and the social spheres as a key problematic: input from the concept of embeddedness

We put quotation marks around the word ‘integration’ in the previous paragraph for a particular reason. Indeed, there is something more than a matter of wording here: a matter of relevant enlightening concept. And we owe to economic sociology the invaluable concept of embeddedness which sheds an analytical light on the nature of the linkage between the economic and the social spheres, this linkage being the differentiating element of the two competing representations of the world.

Adopting the perspective of economic sociology, Bandelj (2008) provides a clear-cut and synthetic analytical framework which brings the embeddedness concept to the forefront, as one of the key dependent explanatory variables of two different representations of the world which she designates by the expression ‘perspectives on economic issues’<sup>12</sup>. According to her, these perspectives differ, *inter alia*, with regard to their conception of the relationship between the social and economic spheres which could, from what Bandelj calls a ‘constructivist perspective’, be both embedded or, on the contrary and from an ‘instrumentalist perspective’, be viewed as separate and disembedded. The first row of Table 1, taken from Bandelj’s book, illustrates her analysis.

Bandelj goes into more details about what she means by ‘instrumentalist perspective’ as follows: ‘From the instrumentalist standpoint, economic action is perfectly possible without the interference of social structures, politics, or culture. Such may very well be the ideal conditions for economic exchange. This is because social forces are conceived as something separate from and outside of the economic sphere. Should they transgress into the economic domain, they can be accounted for as constraints that shape the structure of

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12. We could have referred to other prominent socio-economist researchers who also mobilised the embeddedness concept, irrespectively of their belonging to the *new economic sociology* (Smelser and Swedberg 2005) or to the French-speaking approach of the *nouvelle sociologie économique* (Lévesque *et al.* 2001). We are thinking here in particular of Piore (e.g. 2003, 2004, 2008) who devoted much of his work analysing and criticising the ‘distinction between the economic and the social realms’ (Piore 2003: 121) along the embeddedness-based reading grid. However, Bandelj’s synthesis appeared to us as the most comprehensive and systematic presentation.

incentives for rational actors. They either impede economic efficiency because they raise transactions costs, or they can be strategically employed as an efficiency-enhancing for rational actors' (Bandelj 2008: 5). This description corresponds well to our understanding of that representation of the world in terms of which the economic and the social are discrete spheres. From a legal perspective, this entails a division of labour between legal fields, and from a corporate governance perspective, it involves differentiation between economic relationships and social ones.

Table 1 Bandelj's description of "instrumentalist" and "constructivist" perspectives on economic issues'

Economic issue	Instrumentalist perspective	Constructivist perspective
Relationship between the social and economic spheres	Separated; if acknowledged, social forces considered as context for economic action	Permeated and embedded; economic action is social action; social forces constitute economic action
Nature of economic worlds	Objectively knowable	Inherently uncertain
Treatment of uncertainty	Uncertainty can be turned into calculable risk	Uncertainty necessitates reliance on social forces
Model of economic actor	Rational	Practical
Goals of economic action	Efficiency maximisation	Multiple goals, economic and noneconomic
Strategy of economic action	Means–ends instrumental rationality	Substantive and procedural varieties of action
View of economic change	Natural evolution to one best way of free-market organisation	Institutional transformation from one kind of embedded, socially constituted economy to another

Source: Bandelj (2008: 6).

In contrast, the 'constructivist perspective', according to Bandelj, 'treats economic behavior as fundamentally social. Social forces are not imagined as something separate from the economic sphere. Instead, the social and the economic worlds interpenetrate so much that economic action is impossible without social structures, politics of culture, which come to constitute economic behavior' (*ibid.*: 6-7). On first reading, this description closely fits the second potential representation of the world. However, we depart here from Bandelj's Granovetterian conception of embeddedness to advocate a Polanyian one. Indeed, Bandelj deduces this 'interpenetration' from the embeddedness of actors 'in social networks' (*ibid.*: 4 and 7) the same way Granovetter (1985) argues that economic actors' behaviours cannot be understood without taking into account their interaction with their own social relations<sup>13</sup>. However, this 'interaction' does not imply interdependency in terms of considering two elements as mutually constituting. On the contrary, and as Krippner and Alvarez (2007) demonstrate, the social, in a Granovetterian sense, is still viewed as a context – admittedly an interactive one – for economic action. 'Scholars working in the Granovetterian tradition document the myriad ways in which social relations leave their imprint on business relations, shaping economic outcomes in ways that run counter to the expectations of economic theory. In particular, social relations are typically seen to enhance rather than

13. Granovetter's definition of embeddedness can be found in the introduction of his seminal publication as follows: "embeddedness": the argument that the behavior and institutions to be analyzed are so constrained by on-going social relations that to construe them as independent is a grievous misunderstanding' (Granovetter 1985: 481-482).

detract from performance; trust is an effective lubricant of market exchange, allowing exchange partners to overcome market imperfections that would grind transacting to a halt in the pure neoclassical market. But perhaps most notable here is what is shared with the neoclassical perspective: Social relations affect the economy from the outside' (Krippner and Alvarez 2007: 232). Although Granovetter and, after him, Granovetterian researchers aimed at contradicting the neoclassical atomistic perspective of actors' behaviours, they ended up sharing a similar approach actually echoing Bandelj's description of instrumentalist perspectives.

Instead, we advocate the adoption of a conception of embeddedness following the approach developed by Polanyi (1944). According to the Polanyian tradition (e.g. Block and Evans 2005), a disembedded economy, or an analytically autonomous economy is impossible both theoretically and practically, since markets cannot exist either outside or without the regulatory framework provided by the state and, thus the 'social' sphere. 'For Polanyians, the notion that markets could exist outside of state action is simply inconceivable. This is not a matter of some markets being more or less social than others (in the same sense that some markets may be more or less personal in the Granovetterian tradition); nor is it a matter of the state simply setting the context for market transactions. Rather, as Block (2001) argues, the state's management of fictitious commodities places the state inside the market. This is an interior relationship of the economic and the social, and the metaphor of embeddedness here references the internal articulation of extraeconomic forms (e.g., a system of labor regulation) to market exchange (Jessop 2001)' (Krippner and Alvarez 2007: 233). Because the relationship between the economic and the social is interior and integrative, both spheres 'are seen as mutually constituting' (*ibid.*: 222) in the Polanyian perspective which we adopt.

To sum up, we borrow from Bandelj the conviction that the nature of the linkage between the economic and the social spheres must be understood in terms of embeddedness or disembeddedness. However, we amend her approach by advocating rather a Polanyian approach than a Granovetterian one. In this way, the competing representations of the world we identify can be summarised as follows: on the one hand, the economic and the social spheres are seen as disembedded, together with a differentiated treatment of regulation in each sphere; on the other hand, both spheres are considered so embedded that any production of rules encompasses both the economic and the social dimension. The latter is well illustrated by Elson, addressing the issue of social policies: 'the quotation marks placed around 'the economic' and 'the social' alert us to the fact that this is an abstract duality. People do not live their lives in two separate domains. The aspects of life that we label 'economic' and 'social' are intertwined. The policies we label 'economic' and 'social' each have ramifications for both the dimensions we label 'economic' and those we label 'social'. As Barbara Harriss-White points out in her contribution [Harriss-White 2000], 'social policy is economic policy'. But at the same time, as pointed out in Elson and Cagatay (2000), economic policy is social policy' (Elson 2002: 1).

## 1.4 Competing positions in the regulation of corporate governance: synthesis of our analytical framework

The demonstration we have engaged in so far could be summarised as follows. What is at stake in IR actors' play on the regulation – and especially the production of legal rules - of corporate governance is the confrontation of two competing representations of the world: one conceiving the world as composed of two distinct and disembodied spheres (the social and the economic spheres); the other viewing the world as a single embedded sphere encompassing both the social and economic dimensions. These competing representations of the world are to be discerned in how IR actors incorporate corporate governance matters in the legal domain, whether on the basis of a strong division of labour between company law and labour law, or on the basis of an interdependency of both legal fields. Table 2 presents a synthesis.

Table 2 Competing IR actors' positions with regard to the regulation of corporate governance

	Position 1	Position 2
<b>Representation of the world</b> Nature of the linkage between the Economic and the Social	Economic / Social => separate spheres	Economic & Social => Interdependent and embedded spheres
<b>Indicators</b> Nature of the linkage between company law and labour law	Company law / Labour law => Separate fields of regulation	Company law & Labour law => Interdependent and embedded fields of regulation

Source: author's design.

We indeed consider the nature of the linkage between company law and labour law in the corporate governance regulatory process as an indicator. We will thus be able to infer each actor's representation of the world depending on its treatment of this linkage. IR actors who make a sharp distinction between these two legal fields and treat their related production of rules independently will therefore be considered to hold a representation of the world in which the economic and the social spheres are disembodied, the former – the sphere of economic, strategic and financial decision-making – being the sole prerogative of the top management/shareholders duo, while the latter is referred to as 'social dialogue' between top management and workers on employment and working conditions, such as wages. Conversely, IR actors demanding the synchronisation of the production of rules in both company and labour law on the basis that no decision can be made in one field without involving the other, will be considered to hold a representation of the world in which both the economic and the social spheres are embedded.

## **2. Case study: production of legal rules on board-level employee representation in Europe**

Equipped with a renewed analytical framework, we should be better able to read between the lines of IR actors' game on the production of legal rules on corporate governance at European level. We propose doing so by focusing on one of the 'main outstanding issues' (Council of the European Union 2011a: 3) identified by European institutions in the enactment of a legal statute devoted to SMEs, the SPE: employee participation, meaning the representation of employees on the board (be it a supervisory board or a board of directors) in a deliberative rather than merely consultative capacity, i.e. with the right to vote. Application of our analytical framework to this case study is aimed at revealing IR actors' representation of the world and, more especially, finding out how competitive they are.

### **2.1 BLER: an illustrative case of the weight of social construction in the legal domain**

One of the reasons why employee participation – BLER – is still considered a 'main outstanding issue' in European regulation is the legal problematic of whether it should be incorporated in company law or in labour law.

This problematic is very specific to BLER in contrast to other modalities of employee involvement – such as information or consultation mechanisms – and is not self-evident. Indeed, at first sight, one might regard all employee involvement arrangements – information, consultation and participation – as pertaining to the same legal field (labour law), and for at least two reasons. The first rests on the representation of these three arrangements as all belonging to the same 'family' known as 'employee involvement', a representation underpinned by the theoretical conceptualisation of the 'employee involvement' – also called 'industrial democracy' – concept. Indeed, the numerous scholars who have analysed, deconstructed and described this concept (e.g. Blumberg 1968; Bernstein 1976; Dachler and Wilpert 1978; King and Van de Vall 1978; Locke and Schweiger 1979; Gold and Hall 1990; Kaler 1999; Salamon 1998; Marchington 2005; Van Gyes 2006) all ended up granting information, consultation and participation the same attribute of being different expressions of a unique range of interactions between IR actors at company level. This provides grounds for a perception of all three mechanisms as belonging to the same category, transposed in the legal domain as a category of provisions pertaining to the field of labour law. Indeed, all three aspects of employee involvement are regulated by a single Article of the now new Treaty on the Functioning of the European Union (TFEU): Art. 153 (former

Art. 137). Paragraph 1 states that ‘The Union shall support and complement the activities of the Member States in the following fields: [...] (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination [in the sense of BLER]’. Because of Art. 153’s integration in the Treaty through the incorporation of the Protocol on Social Policy to the 1992 Maastricht Treaty establishing the European Union, this Article is considered to pertain to the scope of labour law.

Consequently, BLER could be considered to be part of the European labour law in the same way as information and consultation. This assessment could well be unanimous and undeniable if it was not contradicted by at least two elements which differentiate, to a great extent, BLER from information and consultation: the determination of different legislative procedures for regulating information and consultation, on the one hand, and participation, on the other; and the anchorage of European Directives on BLER in a different legal basis from the one used in Directives regulating information and consultation mechanisms.

With regard to the first point, and as underlined by Dorssemont (2010: 35), Art. 153 introduces a differentiated treatment of participation – therefore helping to marginalize this mechanism from that of information and consultation – by stipulating the specificity of its related legislative procedure. Indeed, when it comes to legislating on BLER issues, unanimity is required in the Council after consultation with the European Parliament, the Economic and Social Committee and the Committee of the Regions (Art. 153, §5), following a newly called ‘special legislative procedure’. Conversely, Directives dealing with information and consultation provisions are subject to the newly called ‘ordinary legislative procedure’ (the former co-decision procedure), according to which the European Parliament and the (qualified majority of the) Council act jointly after consulting the above mentioned committees (Art. 153, §4).

The second and perhaps even more informative element of the singular position of BLER in the European legal domain lies in the legislator’s choice of legal basis for anchoring related Directives. We are obliged to Villiers (1998: 189) for having pointed this out straightforwardly. Indeed, and so far, the legal basis differs depending on the object of legislation: information and/or consultation, on the one hand, and participation, on the other. Directives specifically devoted to employee information and consultation at company level – that are, the European Works Council Directive<sup>14</sup> and the Directive establishing a general framework for employee information and consultation<sup>15</sup> – are both, and almost naturally, founded on the legal basis of Art. 153 TFEU. By contrast, Directives dealing with employee participation – Directives supplementing

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14. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 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 (Recast).

15. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

the European Company<sup>16</sup> and the European Cooperative Society<sup>17</sup> (henceforth SCE) with regard to employee involvement – are anchored in a totally different legal basis whose link with labour law is far from being obvious due to the fact that the chosen Art. 352 TFEU (former Art. 308) falls under a rather vague part of the Treaty headed ‘general and final provisions’ (Part 7 TFEU), and not the ‘social policy’ one (Title X TFEU)<sup>18</sup>. In fact, a closer look at this legislative choice instead highlights the existing link with the field of company law. First, the SE and SCE Directives, while devoted to the specific labour law-related issue of employee involvement, are both anchored in the same legal basis as their related Regulations<sup>19</sup> which, for their part, deal with pure company law matters such as legal registration, structure of managerial bodies, accounts, capital requirements and so on. Second, and before finally deciding in 1999 to anchor SE Directives and Regulations in Art. 352 TFEU (former Art. 308), European institutions viewed the SE Directive – and thus BLER – as pertaining to the regulation of the freedom of establishment, aimed at completing the single market since the SE Directive’s legal basis lies in the related Art. 54 of the founding Treaty establishing the European Economic Community<sup>20</sup>. The link with a typical labour law problematic was then put aside.

Against this background, both claims – the one perceiving BLER as part of European labour law and the one which perceived it as part of European company law – could find some grounds. The reason lies in the fact that BLER is indeed a topic at the crossroads of both legal fields. If company law has to be defined as the regulation of five basic legal characteristics of business corporations – namely ‘legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership’ (Hansmann and Kraakman 2004: 1) – then, board-level employee representation falls within its scope. If labour law has to be defined as the regulation of ‘three different but related relationships: the relationship

**16.** Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

**17.** Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

**18.** At the time of the adoption of Art. 352 TFEU as the SE Directive’s legal basis, in 1999, the Council Legal Service raised the question of anchorage in Art. 153 (former Art. 137), considering that ‘the processes of informing and consulting with employees and employee participation which are covered by the Directive do indeed come under Article 137’ (Council of the European Union 1999: 8). However, the same Council Legal Service, appreciating that ‘the rules *imposed* [author’s emphasis] by that Article on the exercise of these powers (“Community action which supports and complements the activities of the Members States”, minimum requirements and scope for introducing more stringent national measures) disqualify Art. 137 as the correct legal basis’ (*ibid.*) ended up advising the anchoring of the SE Directive in another Treaty Article. We call for a debate amongst legal experts to clarify the legitimacy of these arguments as they could well also apply to the European Works Council Directive, for instance.

**19.** Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE). These Regulations are considered to address the issue of company legal statutes as such, while the Directives specifically address the issue of employee information, consultation and participation in those European companies.

**20.** Article 54 indeed stipulated that ‘The Council shall draw up a general programme for the abolition of existing restrictions on freedom of establishment within the Community. [...] The programme shall set out the general conditions under which freedom of establishment is to be attained’.

between the employer and the worker (a relationship rooted in contract – the contract of employment); the relationship between the employer and the trade union (a relationship rooted in tort – interference with trade, business or employment by unlawful means); and the relationship between the trade union and the worker (a relationship rooted in contract – the contract of membership)’ (Ewing 2003: 138-139), then board-level employee representation, as a relationship between employer and employees or trade unions (depending on the manner in which employee representatives on the board are nominated), falls within its scope. The question remains, therefore, and it has been examined in various academic publications (e.g. Ballerstedt and Wiedemann 1977): is BLER part of European labour law alongside information and consultation mechanisms or is it part of European company law alongside the establishment of company legal statutes? There is neither an objective nor a neutral answer to this question because the problematic of the incorporation of BLER within particular legal fields is a social construction.

At least two indicators illustrate the weight of this social construction: the manner in which legal experts assess the affiliation of BLER in the labour or company law fields; and the ways national legislators have incorporated BLER in one field or the other. Looking at how legal experts classify employee participation in one category or another based on the SE Regulation and Directive, as well as on a preliminary and non-exhaustive literature review, as presented in Table 3, it appears that a great deal of leeway is available for interpreting the scope of each aspect of the SE statute. According to legal experts specialising in company law, both the SE Directive and the Regulation pertain to the scope of company law. On the other hand, the SE Directive is viewed as an independent element of labour law for the majority of jurists specialising in labour law. In other words, labour lawyers consider the SE Directive as pertaining to the field of labour law, whereas company lawyers view it as a piece of company law.

Table 3 Consideration of the SE Regulation and Directive within the content of legal experts’ publications

Scope*	Reference	SE Regulation	SE Directive
Company law	Andenas, Wooldridge (2009)	X	X
	Grundmann, Möslein (2007)	X	X
	Hopt, Wymeersch (2007)	X	X
<b>Total</b>		<b>3</b>	<b>3</b>
Labour law	Blanpain (2008)		X
	De Vos (2007)		X
	Neumann (2003)		X
	Blanpain, Hendrickx (2002)	X	X
	Neal (2002)	X	X
<b>Total</b>		<b>2</b>	<b>5</b>

Note: \*Inferred from the title of the reference, i.e. whether it contains the term ‘company law’ or ‘labour law’.  
Source: author’s own literature review and analysis of tables of contents.

Table 4 Classification of BLER national laws\* according to their related legal field (company law vs. labour law)

Country	Year	Law	Scope**
Germany	1951	Montan-Mitbestimmungsgesetz - Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie vom 21. Mai 1951 (Mining Co-determination Act - Act on the participation of employees in the supervisory boards and boards of companies in the mining and iron and steel industry of 21 May 1951)	Labour law
	1952	Betriebsverfassungsgesetz vom 11. Oktober 1952 (Works constitution Act of 11 October 1952)	Labour law
	1976	Mitbestimmungsgesetz vom 4. Mai 1976 (Co-determination Act of 4 May 1976)	Labour law
The Netherlands	1971	De Wet van 6 mei 1971 (S 289) houdende voorzieningen met betrekking tot de structuur der naamloze en besloten vennootschap (Structuurwet) (Act of 6 May 1971 (S 289) establishing provisions for the structure of public and private limited companies (Structure law))	Company law
Norway	1972	Lov om aksjeselskaper av 12. mai 1972 (Act on joint stock companies of 12 May 1972)	Company law
Denmark	1973	lov nr. 370 frá 13. juni 1973 om aktieselskaber (Act n°370 of 13 June 1973 on public limited companies)	Company law
		lov nr. 371 af 13. juni 1973 om anpartsselskaber (Act n°371 of 13 June 1973 on private limited companies)	
Austria	1974	Arbeitsverfassungsgesetz, ArbVG § 110 (Labour Constitution Act)	Labour law
Luxembourg	1974	Loi du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes (Act of 6 May 1974 establishing joint committees in the private sector and organising the representation of employees in public limited companies)	Labour law
Ireland	1977	Worker Participation (State Enterprises) Act No 6/1977	Labour law
Portugal	1979	Lei n° 46/79 de 12 de Setembro - Comissões de trabalhadores (Act n°46/79 of 12 September 1979 on works councils)	Labour law
Poland	1981	Ustawa z dnia 25 września 1981 r. o przedsiębiorstwach państwowych (Act of 25 September 1981 on state enterprises)	Company law
	1996	Ustawa z dnia 30 sierpnia 1996 r. o komercjalizacji i prywatyzacji przedsiębiorstw państwowych (Act of 30 August 1996 on the commercialisation and privatisation of state enterprises)	Company law
Greece	1983	Νόμος 1365/1983, Κοινωνικοποίηση των Επιχειρήσεων δημοσίου χαρακτήρα ή κοινής ωφελείας (Act 1365/1983, Socialisation of state-run undertakings and utilities)	Unknown***
France	1983	Loi 83-675 de Démocratisation du secteur public (Act 83-675 on the democratisation of the public sector)	Labour law
	1994	Loi 94-640 relative à l'amélioration de la participation des salariés dans l'entreprise (Act 94-640 on enhancing employees' participation in the company)	Labour law
Sweden	1976	Lag (1976:351) om styrelserepresentation för de anställda i aktiebolag och ekonomiska föreningar (Act 1976:351 on employee representation on board of companies and economic associations)	Labour law
Hungary	1988	1988. évi VI. Törvény, A gazdasági társaságokról (Act VI of 1988 on Business Associations)	Company law
Finland	1990	Laki 725/1990 henkilöstön edustuksesta yritysten hallinnossa (Act 725/1990 on personnel representation in the administration of undertakings)	Labour law
Czech and Slovak Republic	1990	Zákon č. 111/1990 z 19. apríla 1990 o štátnom podniku (Act n° 111/1990 of 19 April 1990 on state enterprise)	Company law
	1991	Zákon č. 513/1991 Sb., obchodní zákoník (Act n° 513/1991 Coll., Commercial Code)	Company law
Czech Republic	1997	Zákon č. 77/1997 Sb., o státním podniku (Act n°77/1997 Coll., on state enterprises)	Company law
Slovenia	1993	Zakon o sodelovanju delavcev pri upravljanju – ZSDU (Uradni list RS, št. 42/93 z dne 22. 7. 1993) (Act on Worker Participation in Management – SDU (Official Gazette RS, no. 42/93 of 22 July 1993))	Company law

## Notes:

\* Here, we only consider original legal sources, i.e. the initial Act, thus voluntarily excluding further amendments adopted since then (for instance, the 1981 Act for board-level employee representation in the board of parent company, in Denmark).

\*\* Scope: defined according to:

- the terminology used in the title of the legal text
- or, the source of the text itself which could be the public institution in charge of the legislative initiative (when it is the Labour Minister, we codified 'labour law', and when it is the Minister of Economy and/or Finance, 'company law'). It might also be the public institution which co-signed the Act along with the usual legislative authorities (the latter traditionally being the president of the republic/ *Bundespräsident*)
- or the inclusion of the legal text within the Commercial or Labour Code, when such codes exist in a given country.

\*\*\* Unknown: not enough information available (in the present case, lack of national legal text)

Source: HBS and ETUI (2004), SDA and ETUI (2005), Kluge and Stollt (2006), Calvo *et al.* (2008), as well as author's analysis of each legal act.

Both interpretations also co-exist when looking at national law framing BLER rights<sup>21</sup>, as shown in Table 4. From one country to another, legal provisions on BLER are considered to belong to the field of labour law or to that of company law, this taxonomy being discernible, *inter alia*, in which government department dealt with the promulgation of the domestic legal provision. Indeed, in some countries, the Minister of Labour was in charge of the legislation (whether at the stage of initiating the bill or at the final promulgation), thus leading us to classify BLER provisions within the field of labour law, while in other countries (e.g. Denmark, the Czech and Slovak Republics), BLER provisions constitute a sub-section of the commercial code.

As an ideal illustration of the blurred boundaries between company law and labour law with regard to corporate governance issues, board-level employee representation therefore constitutes an ideal focus by means of which regulations on corporate governance issues can be grasped. To this end, we propose to examine IR actors' representations of the world at stake at European level.

## **2.2 Understanding the regulatory game on corporate governance issues: European Commission and ETUC representations of the world**

We acknowledge that the traditional Dunlopian trilogy of IR actors – namely, employees and their trade unions; employers and their associations; and the state and its public institutions (Dunlop 1958: 47) – can no longer, by itself, help to unveil the collective regulation of work and labour (Legault and Bellemare 2008). It has been widely demonstrated that other actors may also play a major role in this game scene, such as, *inter alia*, citizen's advice bureaux for Abbott (1998), end users for Bellemare (2000), 'quasi unions' for Heckscher and Carré (2006), or student-customers for Sappey (2008). However, IR actors at the cross-industry level in Europe still are identified in accordance with the Dunlopian triptych, and even in a highly institutionalised way<sup>22</sup>, as follows: organisations representing workers (ETUC, Eurocadres, CEC); organisations representing employers (BUSINESSEUROPE – formerly UNICE –, CEEP, UEAPME); European institutions (European Parliament, Council and Commission)<sup>23</sup>. For the purpose of this paper, we shall concentrate our analysis on two of these nine

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**21.** In order to reveal the social construction underlying the classification of BLER as part of the labour law or company law scope, we indeed rely on national domestic legal provisions as they appear as the only data providing with an insight on the taxonomy specific to BLER. For instance, looking at the national law transposing the SE Directive would not have been of a relevant help as these laws are not BLER-specific but address all modalities of employee involvement, i.e. employee information, consultation and participation.

**22.** Articles 154 and 155 TFEU (former Arts. 138 and 139), and the 1993 EC communication concerning the application of the Agreement on social policy (European Commission 1993a) set out the fundamental rules of procedure for social dialogue at European level, including the list of representative 'social partners' – recently renamed 'stakeholders' – entitled to take part.

**23.** For a detailed presentation of each actor, please see the following European Commission webpage: <http://ec.europa.eu/social/main.jsp?catId=479&langId=en>.

players: the ETUC, since it represents more than 60 million workers – compared to the 5 and 1.5 million members, respectively, represented by Eurocadres and CEC – and the European Commission. Indeed, because of its crucial role in the European legislative process – the European Commission has a near-monopoly on initiating legislation and preparing draft proposals (Art. 294 §2 TFEU)<sup>24</sup> – the EC has to be considered a key player in the production of European legal rules. Undoubtedly, analysis of other IR actors' representations of the world – such as employers' associations, the Council of the European Union and the European Parliament – deserves the same attention and should be deciphered in order to provide a complete and exhaustive understanding of the regulation game. However, we have not yet considered their standpoint, something which shall be remedied in further researches. So far, we will concentrate exclusively on the two players who are the ETUC and the EC.

## European Commission: the representation of a disembedded world prevails

According to the analytical framework we developed in Part 1, the European Commission's representation of the world could be grasped thanks to the analysis of its consideration of the company and labour law fields as being embedded or, on the contrary, disembedded. Direct access to this EC consideration is provided by the highly-developed specialisation of legal expertise within the EC and, above all, its advanced organisational division of labour among separate units. Indeed, given the EC organisational chart, company law is the exclusive duty of DG Internal Market unit F2 'Company Law, Corporate Governance and Financial Crime', while labour law is the exclusive competency of DG Employment unit B2 'Labour Law'. Therefore, looking at the way these two units have been involved in the legislative process concerning BLER will enable us to infer how the European Commission views the link between company law and labour law.

Such empirical investigation is only partly feasible as there is, as far as we know, no tool enabling the attribution of an official EC text, such as an initial bill and subsequent versions, to its organisational author at the level of the above mentioned units. Conversely, European institutions do have a tool which clearly indicates, for each official document – be it a Communication (COM) or a Staff Working Document (SEC) for instance – the identity of its responsible DG: PreLex. This online database on inter-institutional procedures 'follows the major stages of the decision-making process between the Commission and the other institutions, and monitors the works of the various institutions involved' (PreLex's homepage), thus providing information on the nature and timing of

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**24.** Among the few exceptions to this right of initiative, we could mention a new mechanism introduced by the Lisbon Treaty, the 'citizens' initiative': 'Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties' (Art. 11 §6 Treaty on European Union). Even in such cases, the European Commission ultimately remains in the front rank of the legislative process.

different DGs' involvement in the legislative process. As the SE Statute remains the most prominent achievement of a European legislative process tackling the issue of BLER<sup>25</sup>, we will take it as our object of investigation. Table 5 presents the results as regards the DGs involved in the legislative process leading to the adoption of the SE statute.

Table 5 DG involvement in the legislative procedure leading to the SE Statute

Date	Reference (official documents)	Source (responsible entity)
30 June 1970	Proposal for a Regulation COM (70) 600 final	DG Internal Market
30 April 1975	Proposal for a Regulation COM (75) 150 final	DG Internal Market
8 June 1988	White Paper COM(88) 320 final	EC Vice-President Internal Market, tax law and customs
1989	Split between a directive and a regulation	
24 August 1989	Proposal for a Regulation COM (89) 268 final – SYN 218	DG Internal Market
24 August 1989	Proposal for a Directive COM (89) 268 final – SYN 219	DG Internal Market
6 May 1991	Proposal for a Regulation COM (91) 174 final - SYN 218	DG Internal Market
6 May 1991	Proposal for a Directive COM (91) 174 final - SYN 219	DG Employment
14 Nov. 1995	Communication on worker information and consultation COM (95) 547 final	DG Employment

Source: PreLex, Monitoring of the decision-making process between institutions, <http://ec.europa.eu/prelex/apcnet.cfm?CL=en> (consulted 8 November 2010).

Our aim is neither to provide an exhaustive account of the history of the SE legislative process nor to detail each of its legal provisions. Many authors have already provided a very comprehensive overview (e.g. Kolvenbach 1990; Edwards 1999; Barnard and Deakin 2002; Keller 2002; Stollt 2006; Blanpain 2008; Gold and Schwimbersky 2008; Fioretos 2009; Rehfeldt 2009; Dionisopoulou 2009; Schwimbersky and Gold 2009). Instead, we shall consider the SE statute as a relevant topic by means of which the EC's representation of the world might be revealed. Table 5 appears to be very informative in this regard.

Indeed, looking solely at the involvement of the European Commission once the final stage of the legislative process on the SE statute was reached, it appears that both DG Internal Market and DG Employment were key institutional actors: the former with regard to the SE Regulation, dealing with the pure company law components of the statute, the latter with regard to

<sup>25</sup>. The first Europe wide company legal statute enacted in 2001, and the most successful one in terms of implementation: as of 11 April 2011, there were 779 established SEs, compared to 26 established SCEs (European Company (SE) Factsheets, 2011).

the SE Directive, specifically devoted to the issue of employee information, consultation and participation in an SE. In fact, Table 5 gives grounds for a more complex reading. Firstly, in the initial stage, between 1970 and 1991, the SE statute, although containing provisions on BLER since the first bill, was considered to pertain exclusively to the field of company law since the only DG involved was DG Internal Market. Secondly, although DG Employment – and thus labour law expertise – ended up being equally involved in the drafting of proposals on employee involvement issues, this happened more than 20 years after the first SE statute draft.

This lack of synchronisation is the cornerstone in our characterisation of the European Commission representation of the world as one in which company and labour law are subject to a sharp division of labour, implying a representation of the social and the economic spheres as disembedded<sup>26</sup>. Moreover, this representation of the world persisted as lack of synchronisation could also be observed when looking at DG involvement in the SCE legislative process where, once again, only one – economic-oriented DG – was involved at the first stage: DG Enterprise (European Commission 1991a), before DG employment became involved on the occasion of the second and final proposal for an SCE statute two years later (European Commission 1993b).

This finding confirms the significance of intra-organisational regulation (Walton and McKersie 1965<sup>27</sup>) in the understanding of IR actors' game. Indeed, and as early as the first theorisation of industrial relations, it has been acknowledged that 'the view that a homogeneous union negotiates with a homogeneous management or association is erroneous and mischievous' (Dunlop 1967: 173). The same statement applies to the third IR actor, public institutions, whether national or supra-national. Just as the term 'European legislator' refers to an abstraction, it is difficult to see the European Commission as a uniform organisation. In other words, one should not underestimate the intra-organisational regulation in the form, here, of the division of labour among internal entities of the European Commission. Indeed, although the European Commission is statutorily defined as a collegial institution (Art. 1 of the European Commission's rules of procedure), some specific internal decision-making procedures, such as the so-called 'empowerment procedure' (Art. 13 of EC rules of procedures) chosen within the framework of the European Company Statute, provide responsible DGs with greater leeway. Moreover, the carrying out, by the responsible DG, of interservice consultations with other DGs does not grant consulted DGs an involvement equivalent to that of the DG placed at the forefront of the internal process. Therefore, the designation of the responsible DG has a political and strategic import.

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<sup>26</sup>. Komo and Villiers (2009) arrived at a similar conclusion about the sharp division of labour between legal areas. They deduced from their reading of European Commission policies in the fields of company law, labour law, corporate social responsibility and social dialogue that 'there is no clear identification of the connections between these different regulatory spaces. Such separate treatment does not generate a coherent policy' (Komo and Villiers 2009: 188).

<sup>27</sup>. In fact, Walton and McKersie talked about intra-organisational 'negotiation'. However, based on a reynaldian approach to industrial relations (Reynaud 1997), we advocate using of the term 'regulation'.

Indeed, this intra-organisational regulation demonstrates that the sharp division of labour between different DGs should be understood not so much in terms of organisational rationality in the taylorian sense of scientific management, but instead in terms of its strategic and political dimension. If the clear division of competencies between various DGs was aimed only at meeting technical requirements for the efficient organisation of services within a large public institution, then there will be no impediment in the concomitant involvement of several DGs in a legislative procedure. Hall (1992) as well as Moreno and Palier (2004) came to the same conclusion when looking at, respectively, the intra-organisational regulation taking place between DG Internal Market and DG Employment in the legal production of the SE Statute, each pursuing a different legislative strategy<sup>28</sup>, and the intra-organisational regulation in force between DG Economic and Financial Affairs and DG Employment's political orientation in legislating on welfare policies, which the authors qualified as 'competition' within the European Commission (Moreno and Palier 2004: 16).

There is one last lesson to be learned from Table 5: the involvement of both DG Internal Market and, on an equal basis, DG Employment appears to be a prerequisite for the successful adoption of a European legal rule including provisions on employee participation. Of course, adoption of a European legal text requires much more than input from EC intra-organisational regulation: for example, the importance of the political compromise between national governments in the Council and the European Parliament should not be minimised. However, it remains the case that the joint and concomitant action of DG Internal Market and DG Employment appears to be a distinctive element compared to similar legislative proposals which eventually failed. Indeed, the two successful attempts – the adoption of the SE and the SCE Statutes – saw the involvement of both an economic-oriented DG and DG Employment. In contrast, EC legislative proposals dealing, *inter alia*, with BLER and which involved only one DG – DG Internal Market –, and only developed a company law based approach, eventually failed. The most patent illustration is given by the historical genesis of what has been called the Fifth Directive concerning the structure of public limited companies and the powers and obligations of their organs, as shown in Table 6. The Fifth Directive, fairly close to the initial proposal for an SE Statute, aimed at imposing the German model of *Mitbestimmung*, i.e. a two-tier governance structure for companies with compulsory one-third employee representation (European Commission 1972). The dead-end reached in the legislative procedure caused the European institutions to give up in 2001 (European Commission 2001).

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<sup>28</sup> The then competing legislative strategies could be summarised in terms of the harmonisation/flexibility dichotomy we described in our introduction.

Table 6 DG involvement in the legislative procedure of the Fifth Directive

Date	References (official documents)	Source (responsible entity)
27 Sept. 1972	Proposal for a Directive COM(72)887 final	DG Internal Market
28 July 1983	Proposal for a Directive COM(83)185 final	DG Internal Market
13 Dec. 1990	Proposal for a Directive COM(90)629 final – SYN 3	DG Internal Market
20 Nov. 1991	Proposal for a Directive COM(91)372 final –SYN 3	DG Internal Market

Source: PreLex

Table 5 complements previous analyses of the various factors explaining the final successful adoption of the SE statute. Indeed, authors who have published on the specific issue of the SE and its history agree that the main difficulty in adopting the SE statute was the issue of worker participation (e.g. Horn 2008: 86; Fioretos 2009: 1177; Sasso 2009: 287). They do also acknowledge that the successful adoption of the SE has to be imputed to a combination of three elements: (i) the conclusions drawn in 1997 by the group of experts chaired by Etienne Davignon (European Parliament 1997), suggesting a more flexible and negotiation-based approach to BLER provisions; (ii) the adoption of the European Works Councils Directive in 1994 which created a precedent by institutionalising the practice of preliminary negotiations at company level in order to find tailor-made designs for employee information and consultation procedures; and (iii) the splitting of the SE legislation into a Regulation and a Directive, the latter being devoted entirely to employee involvement. On the basis of Table 5, we could add that adoption was achieved by the split between two pieces of law in 1989, but also by the division of competent and responsible entities within the EC in 1991. The same applies to the SCE statute, in respect of which the splitting of the text into a Regulation and a Directive as early as the first 1991 proposal was not enough by itself but needed to be followed by a split in 1993 between the entities in charge of each of the two new texts.

It is difficult to assess the weight of the constraints undergone by the European Commission which caused it finally to involve DG Employment in the SE and SCE legislative procedures at a late stage. The fact remains, however, that, given the manifest division of labour with regard to labour law and company law between DG Internal Market and DG Employment, the European Commission's position could be characterised as one in which the social and the economic spheres are perceived as disembedded.

### ETUC: embeddedness of the social and the economic spheres

Since the beginning, the ETUC has explicitly favoured the implementation of employee involvement rights, understood not only as information and consultation mechanisms but also as participation ones *via* BLER in companies operating on a European scale. For instance, on the occasion of its second

statutory congress, the ETUC demanded the inclusion of statutory provisions on BLER within the framework of a European law on multinational groups of companies<sup>29</sup>. 'The participation of employees and their trade unions in decisions taken at multinational level must be guaranteed within the framework of a European law on groups of companies by granting them representation on the management board [i.e. board of directors] of the dominant company of the group' (ETUC 1976, II.5). The tone of ETUC resolutions on BLER has evolved over time, passing through three stages clearly correlated, for the first two, with the European political project then in force.

Indeed, the first stage reflects the mainstream political orientation at the European level characterised by a desire for harmonisation, as illustrated by the SE Regulation and the Fifth Directive. ETUC claims then rested on the creation and development of new transnational BLER rights, as mentioned above. Thereafter, and once the European political project turned into the adoption of a flexible approach such as the one developed for the SE Directive on employee involvement, the tone of ETUC claims, in parallel, became more defensive, demanding the safeguarding of existing national provisions on BLER<sup>30</sup>. In 2007, the ETUC proclaimed itself as being 'on the offensive' – a slogan at the forefront in the documents of its 11<sup>th</sup> statutory congress – and, in so doing, reached the third mentioned stage characterised by a return to a demand for new transnational BLER rights in the shape of common 'minimum standards' on employee involvement, thus including BLER (ETUC 2010a: 4-5 and 2010b: 6).

Against this background, we propose to use ETUC resolutions – be they congress resolutions or resolutions adopted by the ETUC executive committee – as our object of investigation to reveal the ETUC's representation of the world, analysing its consideration of company and labour law fields in terms of whether it perceives them to be embedded or not. We will therefore analyse how the ETUC conceives of the place BLER occupies in the legal domain, i.e. how the ETUC situates its demand or defensive stance in favour of BLER rights *vis-à-vis* labour law or company law. Two indicators are particularly useful in this respect: (i) the broader topic to which ETUC official statements on BLER referred and, more specifically, the classification of ETUC demands according to the nature of the topic related thereto, that is whether it is a labour law-related topic or a company law-related one; and, (ii) the contents of ETUC demands, particularly the extent to which the ETUC mentions BLER as being a labour law or company law issue.

As regards the first indicator, we developed an empirical study based on the analysis of a corpus of documents comprising ETUC official statements – resolutions and positions adopted at its congresses or executive committee

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**29.** The so-called 9<sup>th</sup> Directive which not only has never been adopted but has not even reached the stage of being an official EC proposal.

**30.** For example, 'since a harmonisation of company law provisions concerning employee participation rights at board level has proven to be beyond reach so far, there is no other acceptable solution than to safeguard pre-existing rights and/or to require Member States to impose analogous application of the participation provisions of national company law' (ETUC 2006a: 2).

meetings. We made the corpus as exhaustive as possible by taking into account every official statement published since the ETUC's foundation in 1973<sup>31</sup>. Our study consisted in both a content analysis and a lexical analysis: the lexical analysis helped us to identify ETUC demands dealing with BLER, while the analysis of contents led to the classification of ETUC demands in accordance with the topic related thereto. Details of our methodology are presented below, and Table 7 presents the results.

### **Methodology used in developing Table 7**

#### *Column 'References':*

On the basis of a lexical analysis, we considered that an ETUC statement deals with BLER whenever one or more of the following expressions were found:

- 'workers' rights of representation and participation' / 'workers' rights to information, consultation and participation'
- 'representation at board level' / 'workers' participation at board level'
- 'employee representation on the supervisory board'
- 'workforce representation on the management board or supervisory board'
- 'codetermination rights'
- 'involvement in decision-making at board level or in supervisory boards'

Concerning the following two expressions:

- 'rights of participation' / 'employees' rights to participation'
- 'participation of workers' / 'worker participation'

we treated them differently because they both refer to a rather loose terminology, which might mean BLER as such or 'information, consultation and participation' practices in general. Therefore, we paid attention to the use of these expressions only on condition that there were explicit references to SE legal provisions and definitions according to which 'participation' exclusively means BLER.

#### *Column 'Topic related thereto':*

Here again, the analysis of content is based on a lexical frame of reference. Thus the topic related thereto is deduced from terminology appearing as such within the text and, most often, in its title.

#### *Column 'Scope':*

The scope was defined by the author as a means of categorising the field to which each topic – within which the ETUC statement broadly falls – refers.

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**31.** Unfortunately, finding the resolution adopted by the first and founding ETUC congress held on 7-8 February 1973 proved impossible. The corpus therefore comprises ETUC Congress resolutions from 1976 to 2007. Because ETUC executive committee resolutions have been compiled systematically only since 1995, the related corpus encompasses the time period 1995-March 2011. We would here like to thank the officers of the ETUI's documentation centre officers, especially Giovanna Corda.

Table 7 Classification of official ETUC statements on BLER, according to the topic related thereto

Scope	Topic related thereto	References	Occurrence
<b>European Legislation</b>			<b>27</b>
	10th Directive on cross-border mergers	ETUC 2004a: 32-33 ETUC 2004b: 35 ETUC 2004c: 45, 66 ETUC 2004d: 195 ETUC 2004e	5
	14th Directive on cross-border transfer of registered office	ETUC 2004b: 35 ETUC 2004d: 195 ETUC 2004e ETUC 2006a: 2 ETUC 2007a: 83	5
	EC Action Plan on the modernisation of company law and enhancement of corporate governance	ETUC 2004a: 33 ETUC 2006b: 35-39 ETUC 2007a: 79-83 ETUC 2010b: 6	4
	European Company Statute	ETUC 1997: 51; 55 ETUC 1999a: 51-52 ETUC 2003: 25 ETUC 2008a	4
	European private company statute	ETUC 2006a: 2-3 ETUC 2007a: 83 ETUC 2008b: 98-100 ETUC 2010a: 4-5	4
	EC Communication on corporate social responsibility	ETUC 2001: 52 ETUC 2004a: 33	2
	9th Directive on groups of companies	ETUC 1976: II.4-5 ETUC 1979: 13	2
	Directive establishing conditions for entry and residence for third-country nationals in the framework of an intra-corporate transfer	ETUC 2010c: 5	1
<b>General statements</b>			<b>6</b>
	Economic democracy	ETUC 1976: II.2 ETUC 1979: 15 ETUC 1988: 57 (and quotation by Buschak 1998 : 344)	3
	Waves of restructuring, mergers and takeovers of enterprises	ETUC 1991: 17 ETUC 2004a: 32 ETUC 2005: 75	3
<b>European Union policies</b>			<b>3</b>
	Lisbon Strategy	ETUC 2000: 8	1
	Treaty of Amsterdam	ETUC 1999b: 31-32	1
	Europe's social policy agenda	ETUC 2007b: 59-60	1

Source: ETUC resolutions and positions adopted by its statutory congress or executive committee, analysed by the authors.

Two findings could be drawn from Table 7. First, the great majority of ETUC demands with regard to BLER refer to it as a matter of European legislation, be it as the stage of a proposal or an adopted text (26 occurrences against 6 and 3 occurrences of topics referring, respectively, to general statements and EU policies). This finding confirms the relevance of looking at the production of legal rules at the European level so as to understand and reveal what is at stake in IR actors' regulatory game on corporate governance. The second finding is the most informative with regard to our problematic as it reveals that the majority of ETUC statements on BLER refer to company law topics. Indeed, the highest number of ETUC statements on BLER are found with reference to debates on the 10<sup>th</sup> and the 14<sup>th</sup> Directives (10 occurrences

altogether), on the DG Internal Market Action Plan on the modernisation of company law and corporate governance (4 occurrences), and on the SE and the SPE (4 occurrences each). There is no reference to any item of European law or legislative proposal pertaining to the European labour law field as characterised by its anchorage in Art. 153 TFEU. For instance, the European Works Council Directive or the Directive establishing a general framework for employee information and consultation are both absent from Table 7.

Must we conclude from this finding that the ETUC takes the view that employee participation pertains to company law? The answer is affirmative, except for one important qualification provided by the analysis of the second indicator, namely the contents of ETUC statements. The ETUC conception according to which BLER should be regarded as pertaining to the field of company law is illustrated, for example, by the following 2006 statement: ‘For the sake of fostering balanced corporate governance, employee participation rights at board level should be a benchmark for Community action in the field of company law and part of any initiative to enable or ease business operations in the EU’ (ETUC 2006a: 2). However, a qualification emerged when reading all the remaining ETUC statements addressing BLER: employee participation is not the only modality of employee representation the ETUC claims to be incorporated in company law, but also employee information and consultation. ‘The involvement of workers and their representatives must be a component of modern European corporate law. We find it unacceptable that the Communication makes no mention [in its ‘Action plan on modernising company law and enhancing corporate governance in the EU’] of the *information, consultation and participation* [our own emphasis] of trade unions and workers and provides no role for them to play’ (ETUC 2004a: 33). The link the ETUC makes between company law and these three modalities of employee involvement could even be found in its initial statements. ‘The Congress of the ETUC makes the following demands: [...] The Governments of the Member States of the EEC and EFTA must cooperate, particularly in questions concerning company law and *the related* [our own emphasis] workers’ rights of representation and participation, in order to arrive at similar and equivalent solutions’ (ETUC 1976: II.3).

Even if never labelled ‘labour law’ as such, BLER and, more broadly, mechanisms of employee involvement are perceived by the ETUC as interdependent with company law matters, with no regulation in the company law field being conceivable without including legal provisions on employee information, consultation and participation. From the ETUC standpoint, not only is there no sharp distinction between BLER and company law, but there is even a clear interrelation between the two. Our analysis therefore leads us to conclude that the ETUC representation of the world is one in which the social – BLER – and the economic – company law – spheres are embedded.

## Conclusions

According to the analytical framework we have developed, we can derive industrial relations actors' representation of the world in terms of the embeddedness/disembeddedness of the social and the economic spheres dichotomy from their conception of the linkage between the fields of company law and labour law. In so doing, we revealed that, in the context of corporate governance regulation, the European Commission holds a representation of the world in which the social and the economic spheres are perceived as disembedded given the sharp division of labour that exists between DG Internal Market and DG Employment. We also demonstrated that the representation of the world borne by the ETUC was one in which both the social and the economic spheres are so embedded that any company law rule at European level should include provisions on employee information, consultation and participation.

The competition between these two IR actors' positions therefore becomes evident. It explains, in turn, the current actors' regulatory game of corporate governance at European level, and more precisely around the proposal for a European Private Company Statute. At the time of writing (April 2011), its related legislative procedure is on-going but is deadlocked in the Council<sup>32</sup> after the European Parliament adopted a text in 2009 considerably amending the initial 2008 Commission proposal, notably on the regulation of BLER. The reading grid we propose helps us to understand that the cornerstone of this process of legal rule production lies in the actors' conception of the linkage between company and labour law. On the one hand, the European Commission –more precisely, DG Internal Market, as DG Employment has not so far been equally involved – made it clear that its proposal for a SPE statute 'does not regulate matters related to labour law, tax law, accounting, or the insolvency of the SPE' (European Commission 2008b: 2) and therefore focuses solely on company law matters, delegating the regulation of labour law elements to existing Community law instruments on employee information and consultation and to national legal provisions on employee participation. On the other hand, the ETUC keeps on demanding that European-level BLER be considered just as important as company law matters in such regulatory processes. 'The detailed and protracted debates on the SPE proposal have shown that it is precisely the absence of serious European-level reflection on

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<sup>32</sup>. The most recent Presidency compromise proposal for a Council regulation on a European private company has been issued by the Hungarian 2011 Presidency and accounts for the fifth attempt after the ones conducted by the successive French, Czech, Swedish and Belgian Presidencies.

co-determination [BLER] that hinders progress on European company law' (Picard<sup>33</sup> 2010: 106).

The attention we paid to the representations of the European Commission and the ETUC as two key European IR actors sheds new light on the reading of the regulatory game. However, for this reading to be complete all other actors involved in the production of European legal rules require the same attention. Some indicators might lead us to think that there is similar competition between the European Parliament and the Council's representations of the world<sup>34</sup>. Taking again the example of the legislative procedure on the SPE Statute, the fact that the European Parliament's resolution is based on a report by the Committee on legal affairs, including opinions from both the committee on economic and monetary affairs and the committee on employment and social affairs (European Parliament 2009), provides grounds for the view that the European Parliament holds an embedded conception of the social and the economic spheres. Conversely, the fact that no legal expert, or committee or working party specialising in labour law has been involved in the preparatory work of the Council<sup>35</sup> would indicate that this actor rather holds a disembedded perception of the economic and social spheres. Nevertheless, only an extended empirical investigation of each European institution's intra-organisational regulation could justify further assertions.

The final outcome of the legislative procedure on the SPE Statute as the production of a new European legal rule will therefore be very informative as regards whether the conception of corporate governance adhered to by European institutions will continue to develop on the basis of an even more disembedded representation of the world – illustrated by the lack of involvement of DG Employment at the EC level – or will switch to an embedded representation of the world in which both the social and the economic spheres are considered to be interdependent<sup>36</sup>. In other words, the topical question is whether the European conception of corporate governance will continue to result in the subordination of labour law to company law, as Deakin (2007) envisaged it, or in a representation of corporate governance no longer viewed as a sub-field of company law but as a transversal topic to be handled by several legal fields which could include '(i) corporate law, (ii) financial market regulation, and (iii) labour law' according to the 'tripartite

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**33.** Séverine Picard is legal adviser at the ETUC.

**34.** These representations of the world would have to be considered even more circumstance-related than those of the ETUC and the European Commission, since they depend to a very large extent on political considerations evolving over time in accordance with European and national election results.

**35.** Preparatory work at the Council has been delegated to the Competitiveness Council – the Employment, Social Policy, Health and Consumer Affairs Council, among others, not being involved – which, so far, relies only on the examination of the proposal by the sole Working Party on Company Law. No examination by labour lawyers has been planned or foreseen for the good reason that there is no Council preparatory body dealing with labour law (Council of the European Union 2011b).

**36.** The problematic of 'the interaction between social rights and economic freedoms within the EU system' (Monti 2010: 71) is at the centre of debates taking place around the recent 'Single Market Act' (European Commission 2011).

institutional structure' described by Cioffi (2000: 576) or the 'law of the productive enterprise' combining 'the insights of political economy, with aspects of company law, the law of contract, and labour law' as developed by Collins (1993:91, quoted by Ireland 1996:299).

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## Glossary

BLER	Board-Level Employee Representation
CEC	<i>Confédération Européenne des Cadres</i> (European Managers Confederation)
CEEP	European Centre of Employers and Enterprises providing Public services
CEO	Chief Executive Officer
DG	Directorate General
EC	European Commission
EEC	European Economic Community
EFTA	European Free Trade Association
ETUC	European Trade Union Confederation
EU	European Union
IR	Industrial Relations
SCE	<i>Societas Cooperativa Europaea</i> (European Cooperative Society)
SE	<i>Societas Europaea</i> (European Company)
SME	Small and Medium sized Enterprises
SPE	<i>Societas Privata Europaea</i> (European Private Company)
TFEU	Treaty on the Functioning of the European Union
UEAPME	<i>Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises</i> (European Association of Craft, Small and Medium-sized Enterprises)
UK	United Kingdom
UNICE	Union of Industrial and Employers' Confederations of Europe
US	United States of America

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