

# Chapter 3

## Regulating company law: the need for a holistic approach

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### 1. Introduction

‘In recent times ... the adoption of European company law initiatives has become more difficult’ states the European Commission as a preamble to its public consultation on the future of European company law launched mid-February 2012.<sup>2</sup> However, difficulties in implementing company law at European level are not a new phenomenon, as lengthy legislative processes have long been a characteristic feature of this field of law. For example, it took somewhat more than thirty years to adopt the European company statute (the *Societas Europaea* – SE)<sup>3</sup> (Schwimbersky and Gold 2009), twenty-one years separate the first proposal for a tenth directive (European Commission 1984) and the adoption of the Cross-border Merger Directive<sup>4</sup> in 2005, and after almost thirty years of harsh debates the proposal for a fifth directive was eventually abandoned (European Commission 2001).

A common element in these legal initiatives is a concern with the regulation of board-level employee representation (referred to here as ‘BLER’), i.e. the issue of employee representation on the board of directors or supervisory boards in a decision making (as opposed to purely consultative) capacity. It is precisely the difficulty in finding satisfactory

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1. This chapter is based in part on an earlier publication (Conchon 2011a) which has been revised for the purposes of this collection.
  2. The public consultation can be viewed on the Commission’s website: [http://ec.europa.eu/internal\\_market/consultations/2012/company\\_law\\_en.htm](http://ec.europa.eu/internal_market/consultations/2012/company_law_en.htm)
  3. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.
  4. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

legal arrangements in this matter which explains the length of debate in relation to the SE (Horn 2008a: 86; Fioretos 2009: 1177; Sasso 2009: 287). Specifically, the European legislative bodies faced the challenge of devising a legal framework which respected the national provisions on BLER existing in 17 Member States plus Norway in diverse institutional settings (Conchon 2011b) and, at the same time, did not impose this employee participation system on BLER-free countries.

Given that this challenge was taken up and solved in the case of the SE Statute, how should we understand the current deadlock in pending company law proposals, especially the one dealing with the European private company statute (*Societas Privata Europaea* – SPE)? We argue that the European legislative bodies failed to learn the main lesson from their previous experiences, which is that any EU legal initiative in the field of company law has to embrace a holistic approach that grants equal consideration to labour law elements, given that employee information, consultation and BLER are a core element of the European social model, as enshrined in EU fundamental rights charters.<sup>5</sup> By repeating the error already made at the initial stages of previous legal initiatives, i.e. by isolating company law from other legal fields instead of adopting an integrated approach, the European Commission, in particular, has embarked upon a flawed law-making process with regard to the SPE.

This chapter aims at demonstrating our argument and at inviting policy-makers to systematically endorse such a holistic approach to law-making in the realm of the regulation of companies. Section 2 will critically assess the sharp differentiation and division of labour between the realms of company law and labour law and reveal the extent to which these two fields have to be considered intertwined. In light of a review of previous legislative processes, Section 3 will conclude that the holistic approach is, in fact, the prerequisite for the successful achievement of European legislative initiatives in this field. Section 4 will draw some policy implications deriving from our argument before making a few concluding remarks.

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5. Article 27 of the Charter of fundamental rights of the European Union and Articles 17 and 18 of the 1989 Community Charter of fundamental social rights for workers.

## 2. Company law and labour law as intertwined legal fields

The division of labour in the legal domain reflects the same divisions as in wider society (Durkheim 1893), i.e. with distinct specialisation in sub-fields such as family law, tax law, consumer law, and so forth. However, this should not prevent, when it comes to corporate governance issues, consideration of the links between one specific sub-field – company law – and others. As Zumbansen notes, ‘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’, and, he stresses, ‘but not with labor law’ (2006: 16-17). As the mainstream conception of company law focuses on the regulation of the relationships between managers, shareholders and other financial partners of a company such as creditors, conventional scholars and law-makers might indeed consider links with other legal fields such as tax law and the law of financial markets as being self-evident. Conversely, the interdependencies of company law and labour law are far less frequently treated as being self-evident, as other authors have emphasised (Mitchell *et al.* 2005: 417; Greenfield 1998: 283).

Such a conception of company law and labour law as separate and distinct legal areas is increasingly subject to criticism, especially in light of the current ‘global forces of rulemaking’ (Zumbansen 2009: 250). As Deakin puts it, ‘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.’ (2004: 79). For Greenfield, on the other hand, ‘the taxonomy that insulates corporate law is artificial’ (1998: 286) as a consequence of the intrinsic constitution of the company which is not only composed of relationships between managers and financial actors but also of relationships between managers and workers, in the tradition of the stakeholder approach to firms (e.g. Blair and Stout 1999; Freeman 1984). Villiers follows Greenfield’s perspective when she states, ‘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. ... 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' (1998: 188-190). To this we can add: and vice versa.

Beyond scholars' debate, there are also pragmatic elements which point in favour of a holistic approach whereby company law and labour law are viewed as intertwined. The most relevant matter is BLER which is at the intersection of the two legal realms. Indeed, if company law is defined as the regulation of five basic legal characteristics of business corporations which are 'legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership' (Hansmann and Kraakman 2004: 1), then employee representation at board level pertains to company law. If labour law is defined as the regulation of 'three different but related relationships: the relationship between the employer and the worker; the relationship between the employer and the trade union; and the relationship between the trade union and the worker' (Ewing 2003: 138-139), then BLER, as a relationship between employer and employees or trade unions (depending on the manner in which employee representatives on the board are nominated), pertains to labour law. In fact, when considering the legal field in which BLER rights were enshrined in national legislation, it is clear that both interpretations coexist. As Streeck observed, 'workforce participation rights came to be written either in company law or in labour law' (1997: 644). Indeed, having regard to the 17 European countries with such legal provisions,<sup>6</sup> BLER rights are regarded as pertaining to the area of company law in 8 of those countries (the Netherlands, Norway, Denmark, Poland, Hungary, Slovenia, Czech Republic and Slovakia) while they are regarded as pertaining to the area of labour law in the 9 remaining countries (Germany, Austria, Luxembourg, Ireland, Portugal, France, Sweden, Finland).<sup>7</sup>

Thus, there is no self-evident ground for restricting the regulation of BLER to the sole area of labour law and to exclude it from the area of company law. On the contrary, as Hansmann and Kraakman argue, BLER has to be considered an integral element of company law irrespec-

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6. We exclude Spain from this empirical observation as BLER rights in this country are not enshrined in law but in collective agreements.

7. For a detailed presentation of these findings and the methodology used to establish this taxonomy, see Conchon (2011a: 22).

tive of its legal ‘origin’. ‘The statutory rules in many jurisdictions that require employee representation on a corporation’s board of directors – such as, conspicuously, the German or Dutch law of codetermination – qualify as elements of corporate law even though they occasionally originate outside the principal corporate law statutes, because they impose a detailed structure of employee participation on the boards of directors [or supervisory boards] of large corporations. ... These supplemental bodies of law are necessarily part of the overall structure of corporate law, and we shall be concerned here with all of them’ (Hansmann and Kraakman 2004: 16). Against this background, and in line with the North-American model of ‘progressive corporate law’<sup>8</sup> (e.g. Mitchell 1995; Greenfield 2006), we argue for a holistic or socio-economic approach to company law according to which relevant and meaningful law-making process requires company law, the law on financial markets, tax law, environmental law and, above all, labour law to be viewed as embedded, i.e. as mutually constitutive of companies’ regulatory framework. In fact, company law initiatives have only been successful when the European legislative bodies embraced such a holistic approach, as we shall demonstrate in the following section.

### **3. The holistic approach to law-making: the prerequisite for successful company law initiatives**

In this part, we undertake a comparison of the law-making processes of successful and failed EU initiatives in the area of company law seeking to establish the element which accounts for the difference between failure and success. The SE Statute, the SCE Statute<sup>9</sup> (*Societas Cooperativa Europaea* – European Cooperative Society) and the Cross-Border Merger Directive represent successful initiatives here, whereas the Fifth Directive on the structure of public limited companies illustrates a failed initiative.

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8. In short, progressive corporate law rejects the notion of the firm as characterised by mere agency relationships based on a nexus of contracts and advocates instead a notion of companies as ‘institutions with public obligations’ (Mitchell 1995: xiii).

9. Council Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society and Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

Because of its crucial role in the European legislative process, having a near-monopoly on initiating legislation and preparing draft proposals (Article 294(2) TFEU), we will pay particular attention to the law-making process taking place within the European Commission. We do so also for methodological convenience. Indeed, the consideration paid to the role of company law and/or labour law is easier to grasp in an EU institution where these two legal areas are subject to a highly-developed specialisation given the advanced organisational division of labour between distinct units. According to the Commission's organisation chart, company law is the exclusive remit of Directorate General (DG) Internal Market and Services unit F2 which has been recently renamed 'Corporate Governance, Social Responsibility', while labour law is the exclusive responsibility of DG Employment, Social Affairs and Inclusion unit B2 'Labour Law'. Unfortunately, there is no tool, website or database which allows for the attribution of an official text – be it an initial legislative proposal or its subsequent versions – to one of these units. However, the European institutions have equipped themselves with a tool, PreLex,<sup>10</sup> which indicates for each official document (such as a Communication) the DG responsible and the internal decision making mode within the European Commission.

Table 1 presents the involvement of Directorates General in the legislative process which led to the adoption of the SE Statute. Observers and scholars who studied the history of the SE Statute acknowledge that its successful adoption has to be imputed to a combination of three elements: (i) the adoption of the European Works Council Directive in 1994 which created a precedent by adopting a flexible approach to the regulation of employee involvement with the institutionalisation of a practice consisting in preliminary negotiations at company level for the social partners to agree on tailor-made designs for employee information and consultation procedures; (ii) the conclusions drawn in 1997 by the group of experts chaired by Etienne Davignon (European Parliament 1997), suggesting the adoption of a similar flexible and negotiation-based approach to BLER arrangements; (iii) the splitting of the SE legislation into a Regulation and a Directive, the latter being devoted entirely to the issue of employee 'involvement'. Table 1 adds to that analysis by presenting a new explanatory factor which is the equal involvement through

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10. PreLex, Monitoring of the decision making process between institutions, <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>.

Table 1 DGs participating in the SE legislative procedure

Date	Reference (official documents)	Responsible DG	Commission decision-making mode
30 June 1970	Proposal for a Regulation COM(70) 600 final	Internal Market	Unspecified
30 April 1975	Proposal for a Regulation COM(75) 150 final	Internal Market	Unspecified
8 June 1988	White Paper COM(88) 320 final	EC Vice-President Internal Market, tax law and customs	Not applicable
1989 Split between a Directive and a Regulation			
24 August 1989	Proposal for a Regulation COM(89) 268 final – SYN 218	Internal Market	Empowerment procedure
24 August 1989	Proposal for a Directive COM(89) 268 final – SYN 219	Internal Market	Empowerment procedure
6 May 1991	Proposal for a Regulation COM(91) 174 final – SYN 218	Internal Market	Empowerment procedure
6 May 1991	Proposal for a Directive COM(91) 174 final – SYN 219	Employment	Empowerment procedure
14 Nov. 1995	Communication on worker information and consultation COM(95) 547 final	Employment	Oral procedure

Source: PreLex.

the empowerment procedure<sup>11</sup> of two different DGs. On the one hand, DG Internal Market took charge of the pure company law components of the statute (capital requirements, accounting, legal registration, etc.) and, on the other, DG Employment dealt with traditional labour law elements, that is issues of employee information, consultation and participation. The successful law-making approach identified here appears holistic, granting equal consideration to company law and labour law elements.

11. Under this decision mode, the Commission ‘empowers’ one of its Members (e.g. DGs) to take measures on its behalf (see Article 13 of the Rules of Procedure of the European Commission annexed to Commission Decision 2010/138/EU, Euratom) which provides the DG concerned with considerable leeway.

The same observation can be made when looking at Table 2 which presents the involvement of DGs in the legislative process relating to the SCE. Again here the success of this legal initiative cannot be said to rest exclusively on the involvement of two different DGs. However, the participation on an equal footing by DG Enterprise in charge of company law aspects<sup>12</sup> and by DG Employment in charge of labour law aspects, as both were empowered, undoubtedly contributed to the successful achievement of this legal initiative using a holistic approach.

Table 2 DGs participating in the SCE legislative procedure

Date	Reference (official documents)	Responsible DG	Commission decision-making mode
18 Dec. 1991	Proposal for a Regulation COM(91) 273 final – SYN 388	DG Enterprise	Oral procedure
18 Dec. 1991	Proposal for a Directive COM(91) 273 final – SYN 389	DG Enterprise	Oral procedure
6 July 1993	Proposal for a Regulation COM(93) 252 final – SYN 388	DG Enterprise	Empowerment procedure
6 July 1993	Proposal for a Directive COM(93) 252 final – SYN 389	DG Employment	Empowerment procedure

Source: PreLex.

The story looks a little different when it comes to the Cross-Border Merger Directive as only one DG – DG Internal Market – was involved as shown in Table 3. An important distinction here is that, in this case, the internal decision-making mode used within the Commission was the oral procedure and not the empowerment procedure. This oral procedure (Article 8 of the Rules of Procedure of the European Commission) entails that the draft text is submitted to the meeting of the College of Commissioners for oral discussion, thus allowing other DGs to present their opinions. Moreover, decisions under the oral procedure are usually adopted by consensus except when a Member requests a vote to take place in which case the decision is adopted by the majority of Members. Although it is not possible to know whether a vote took

12. We cannot find an explanation why the responsibility for handling company law matters in relation to the SCE was devolved to DG Enterprise and not DG Internal Market.

Table 3 DGs participating in the Cross-Border Merger Directive legislative procedure

Date	Reference (official documents)	Responsible DG	Commission decision-making mode
14 Dec. 1984	Proposal for a Directive COM(84) 727 final	Internal Market	Written procedure
11 Dec. 2001	Withdrawal of Commission proposals COM(2001) 763 final	Not applicable	Not applicable
18 Nov. 2003	Proposal for a Directive COM(2003) 703 final	Internal Market	Oral procedure
6 July 1993	Proposal for a Directive COM(93) 252 final – SYN 389	DG Employment	Empowerment procedure

Source: PreLex.

place,<sup>13</sup> use of this procedure means that DG Employment had the opportunity to influence the Commission's final proposal and, hence, for labour law matters to receive genuine consideration.

Of course, adoption of a European legal text requires much more than input from the European Commission alone. The importance of political compromises between national governments reached in the Council and the European Parliament should not be minimised. However, it remains the case that the joint and equal action of company lawyers located in one DG and labour lawyers located in another appears to be a distinctive element of proposals which finally made it into law. The most patent illustration of this proposition is given by the legislative procedure for the draft Fifth Directive shown in Table 4. This draft Directive, with proposals fairly similar to the initial proposal for an SE Statute, sought to establish throughout the EU the German model of *Mitbestimmung*, i.e. a two-tier governance structure composed of a supervisory board and a management board with compulsory one-third employee representation in the former. The dead end reached in the legislative procedure caused the European institutions to abandon the proposal in 2001. Unlike the procedures used in relation to the SE and SCE Statutes, in this case, the law-making process within the Commission involved only

13. Minutes of the College meeting that took place on 18 November 2003 do not specify this point.

Table 4 DGs participating in the draft Fifth Directive legislative procedure

Date	Reference (official documents)	Responsible DG	Commission decision-making mode
27 Sept. 1972	Proposal for a Directive COM(72)887 final	Internal Market	Unspecified
28 July 1983	Proposal for a Directive COM(83)185 final	Internal Market	Written procedure
13 Dec. 1990	Proposal for a Directive COM(90)629 final – SYN 3	Internal Market	Written procedure
20 Nov. 1991	Proposal for a Directive COM(91)372 final – SYN 3	Internal Market	Empowerment procedure

Source: PreLex.

one DG – DG Internal Market – which benefited from the empowerment procedure, i.e. there was no significant involvement of other DGs, and the approach was focused solely on company law.

Thus, there are convincing grounds for asserting that the holistic approach which combines the company law and labour law perspectives is one reason, even if not the main one, for the success of legal initiatives relating to the regulation of companies and for the resolution of related deadlocks. It is thus difficult to understand why the same path has not been followed in recent attempts. For instance, the proposal for a SPE Statute is in the sole hand of DG Internal Market, hence of company lawyers.<sup>14</sup> Aside from the debate on the relevance of a holistic approach i.e. the procedural path taken, it is also hard to understand why lawmakers decided not to repeat in relation to the substance the approach which had proved successful in previous legislative initiatives. Instead, and for a reason which is difficult to justify, when publishing its proposal for the SPE, the European Commission favoured the pure company law perspective and did not consider the existing model of the SE Statute on the ground that ‘reopening the employee participation debate in the context of the SPE would expose the SPE to an unreasonable political risk’ (European Commission 2008: 33). In fact, exactly the opposite has happened (the proposal for the SPE reached a dead end in May 2011 following the ninth attempt to find a political compromise at the Council under

14. PreLex does not specify the mode governing the decision making procedure followed within the European Commission.

the Hungarian Presidency<sup>15</sup>) as, in the words of Picard, ‘it is precisely the absence of serious European-level reflection on codetermination [BLER] that hinders progress on European company law’ (2010: 106).

The rationale for such a counter-intuitive approach might well be found in the influence of the expert groups advising the European Commission in the field of company law. In relation to the SPE, the minutes of a meeting of DG Internal Market’s advisory group indicate that a group member ‘underline[d] the importance not to impose any model of workers’ participation and in particular not to put in place the same regulation of the SE in this matter’ (Corporate Governance and Company Law advisory group 2008: 3). Experts’ discussion on a potential 14<sup>th</sup> Company Law Directive related to the cross-border transfer of company seats follows the same pattern: ‘There was also a suggestion that the issue of workers participation should be dealt with differently from the SE Statute and the cross-border mergers directive’ (Corporate Governance and Company Law advisory group 2006: 4). Such reluctance towards the repetition of a holistic approach is much less surprising when one learns of the composition of such expert groups, which are almost exclusively filled with company lawyers and the like.

#### 4. Some policy implications

At least two key policy implications derive from our analysis. The first relates to the law-making process within the European Commission and the second to the work and composition of expert groups advising the European Commission. As regards the first, it is clear that, for legal initiatives dealing with the regulation of companies to be successful, specialists from several legal fields have to be included, in particular labour lawyers and company lawyers. Given the organisational configuration of the European Commission, this implies that DG Employment and its labour law unit needs to be involved on an equal footing in the process leading to the drafting of proposals. In this regard, equal footing is the key as interservice consultations do not accord the DGs consulted an in-

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15. The Hungarian Presidency was the fifth successive presidency which attempted to reach a unanimous decision on the proposal. Earlier attempts by the French, Czech, Swedish and Belgian Presidencies all failed. For a history of the legislative procedure related to the SPE see <http://www.worker-participation.eu/Company-Law-and-CG/Company-Law/European-Private-Company-SPE/History>.

volvement equivalent to that of the DG heading the internal process. In one way or another, company lawyers have to act in concert with labour lawyers located in other Commission units.

The second implication associated with a holistic approach is that when a high-level expert group is convened to think about the perspectives for European company law, whether invited to reflect on ‘a modern regulatory framework for company law in Europe’ (Winter *et al.* 2002), or ‘on the future of EU company law’ (Antunes *et al.* 2011), its composition should reflect that integrated approach by gathering multidisciplinary experts, including labour lawyers. Reflection of previous endogamously convened expert groups suffered from groupthink which tended to overstate one particular notion of company law, namely the agency model with a shareholder-value orientation to corporate governance (Deakin 2009) situated within a market-based system of regulation (Horn 2008b). While in the integrated approach that we advocate stakeholders and, in particular, employment relationships are considered, the closed expert groups disregarded those issues. In fact, several members of the European Corporate Governance Forum [ECGF] ‘pointed to possible risks of including employees or other stakeholders into the corporate governance debate’ (European Corporate Governance Forum 2006: 2). This perspective was emphasised by an ECGF member at a 2010 meeting: ‘A member responded to the idea of empowering employees. He is not in favour of that. He also reminded the Forum that the behaviour of employees was one of the factors in the crisis. He also spoke about shareholder value. In the UK this is defined as long term value, implicitly protecting employees’ interests.’ (European Corporate Governance Forum 2010: 2).

Some would argue that stakeholders are granted significant consideration by being part of such groups. In that connection, it is interesting to observe that of the 50 individuals making up the various expert groups which advised DG Internal Market in the field of company law and corporate governance,<sup>16</sup> only two were labour lawyers and/or trade union representatives. Such a weak representation of labour law experts might

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16. Our analysis is based on the two experts groups mentioned above (Winter *et al.* 2002; Antunes *et al.* 2011), the members of the European Corporate Governance Forum which ran from the end of 2004 to July 2011 ([http://ec.europa.eu/internal\\_market/company/docs/ecgforum/new-meberlist\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/ecgforum/new-meberlist_en.pdf)) and the members of the group of non-governmental experts on corporate governance and company law set up in 2005 which ran until 2009 (see Commission Decision of 28 April 2005 establishing a group of non-governmental experts on corporate governance and company law (2005/380/EC). According to the register of

well explain why, despite the fact that the ‘influence of workers’ representation on companies’ boards’ was raised as an issue worth investigating as part of the 2008-2011 work programme of the ECGF (European Corporate Governance Forum 2008), no in-depth discussions took place. It might also explain why ‘the issue of employee representatives on boards was not looked into in the Green Paper [on an EU corporate governance framework]’ (European Corporate Governance Forum 2011: 2) as noticed by an ECGF member.

Furthermore, a more balanced composition of such expert groups might also help address the ‘democratic deficit’ in the ‘expertocratic’ policy-making process (Verdun 2005; Harcourt and Radaelli 1999, quoted by Horn 2008b), especially given the significant impact of such groups on actual policy-making. Indeed, the core issue arising from the composition of such expert groups is their legitimacy and accountability. As Barbier and Colomb put it: ‘The public space at the EU level is actually fragmented into a myriad of forums and arenas, where actors with unverifiable legitimacy and obscure and changing networks have their say in influencing the final substantive compromises which are transformed in draft legislation proposed to the Council.’ (Barbier and Colomb 2011: 11). The reflection of a holistic approach through a more diverse composition of expert groups could also help counterbalance the ‘democratic deficit’ in the use of public consultation in the field of company law (Cremers *et al.* 2010). Unlike the social policy field where the Commission is required to consult the social partners (Article 154 TFEU), in the area of company law they do not have any special voice. A requirement to consult the social partners in this area, too, would help ensure a more integrated approach to the regulation of companies.

## 5. Conclusion

‘The appropriate goal of corporate law is to advance the aggregate welfare of a firm’s shareholders, employees, suppliers, and customers without undue sacrifice – and, if possible, with benefit – to third parties such as

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16. (cont.) Commission expert groups and other similar entities (<http://ec.europa.eu/transparency/regexpert/index.cfm>), DG Internal Market is also assisted by an informal and permanent Company Law Expert Group (E01456). However, as this expert group is composed of ‘national administrations’, the register does not list the individuals involved and, hence, these experts could not be included in our calculations.

local communities and beneficiaries of the natural environment' (Hansmann and Kraakman 2004: 18). Sharing this definition, we invite policy-makers at European level to consider all these actors when it comes to regulation of company-related issues, i.e. to adopt a holistic approach which grants not only company law as such, but also environmental law and labour law an equal level of consideration. Corporate governance regulation can no longer be viewed as pertaining exclusively to the sub-field of company law but should be regarded as requiring an integrated and multidisciplinary approach. Such a holistic approach will have to encompass several legal areas such as '(i) corporate law, (ii) financial market regulation, and (iii) labour law' within the 'tripartite institutional structure' described by Cioffi (2000: 576) or could follow the 'law of the productive enterprise' which combines '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). To conclude, we would like to stress also that we assume that such a holistic approach would help counteract the current 'race to the bottom' which is emerging as a consequence of recent and pending European company law initiatives which are putting national regimes into competition on the ground that national differences can distort competition (Deakin 2009). The 'race to the top' should become once again the goal pursued by the European legislative bodies, and the holistic approach to law-making can help in achieving this.

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