

Introduction

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The political debate over the governance of the company and its proper role in society currently revolves around two broad alternatives. The *shareholder* concept of the firm prioritizes the role of shareholders in corporate governance and sees increasing shareholder wealth as the primary function of the company. Advocates of the shareholder model generally argue that competition between different systems of company law should be encouraged in order to maximize business choice. The *stakeholder* approach in contrast takes a pluralistic view of the groups ('stakeholders') that the company is responsible for and which should have a voice in corporate governance. Supporters of this view believe that company law should empower stakeholders and encourage companies to follow 'high road' strategies.

Since the 1990s initiatives to reform company law and corporate governance in Europe have been guided mainly by the shareholder concept of the firm. However, the financial crisis has seriously damaged the reputation of this model. The general view is that the crisis was caused (at least in part) by the obsession of many managers and investors with short-term share price performance. Frequent media reports of high executive pay and new bank bailouts continue to feed the public perception that things are 'not in order' with our present system of corporate governance. Misguided incentives in this system appear to be rewarding greedy and fraudulent behaviour. Criticism of shareholder models of the firm has also increased within the scientific community; econometric research shows that the crisis was linked to stock market-oriented remuneration schemes for managers, particularly in the financial sector. These results support the argument that the financial crisis would not have been as bad if the stakeholder model had been in place. Nevertheless, limited progress has been made in advancing the stakeholder approach to the firm, in part because those interests supporting the shareholder model

remain powerful, in part because the pro-stakeholder forces have not united around a single alternative.

In the book *The Sustainable Company: a new approach to corporate governance* (Vitols and Kluge 2011) members of the GOODCORP network of trade union and academic experts make a contribution to this debate by developing a vision of a company which is sustainable along social, ecological and financial dimensions. This concept of the Sustainable Company combines elements of the postwar stakeholder model of the firm with more recent concerns with sustainability. This distances it clearly from the shareholder value model of the firm. The book defines the core elements of the Sustainable Company as: 1) a commitment to stakeholder value, 2) stakeholder voice in governance, 3) reporting on social and economic impacts, 4) the adoption of a sustainability strategy and specific goals, 5) remuneration schemes based on sustainability instead of share price and 6) ownership by long-term responsible investors. Worker involvement in governance is emphasized since workers have a particularly long-term interest in the sustainability of the firm. Furthermore, the book outlines characteristics of the supporting framework needed to encourage the development and diffusion of the Sustainable Company, including strengthening worker rights through worker involvement and collective bargaining, reregulating the financial system, imposing financial transactions and carbon taxes and strengthening cooperation between trade unions and civil society actors such as NGOs.

In the year since the publication of *The Sustainable Company*, members of the GOODCORP group have worked hard to publicize this new approach. The book was launched at the Athens Congress of the European Trade Union Confederation (ETUC) in May 2011 and at a conference in Brussels in July 2011, which included members of the European Commission, European Parliament and ETUC. Since then it has been presented at numerous academic conferences, doctoral workshops and seminars for worker representatives. Overall the book has enjoyed a positive reception from policymakers, researchers and practitioners as a timely contribution to the debate on rethinking corporate governance.

The immediate political context of *The Sustainable Company* was a reopening of the debate on corporate governance and company law in the wake of the financial crisis. The last comprehensive statement on the EU's approach to governing the firm, it should be recalled, was the 2003 Action Plan on Modernizing Company Law and Enhancing Corporate

Governance in the European Union (COM (2003) 284 final). This Action Plan, which drew heavily on a report written by a High Level Group of Company Law Experts (2002) appointed by the European Commission, was inspired by a decidedly shareholder-value oriented approach which emphasized strengthening minority shareholder rights and encouraging competition between national company law regimes.¹ This Action Plan announced a series of initiatives to be undertaken in this area. Although not all proposals were passed, a number of important directives were implemented, such as the Takeover Bids Directive and the Cross-Border Mergers Directive. The result has been an important shift in many Continental European countries in the direction of an Anglo-Saxon, market-driven model of corporate control.

The reopening of this broad debate at the European level was initiated by the European Commission through the appointment in late 2010 of the Reflection Group on the Future of Company Law. This group, composed mainly of legal experts, was charged with analyzing current problems in European company law and suggesting initiatives to deal with these problems. The group's report (Reflection Group 2011) was presented and discussed at a major conference entitled 'European Company Law: the way forward' on 16/17 May 2011.

The Commission also organized two wide-ranging public consultations in this area. The first consultation, which took place in 2011, focused on the appropriate framework for corporate governance at the European level. Topics addressed included the organisation and role of boards of directors and issues such as recruitment and diversity; the rights and responsibilities of shareholders; the monitoring and implementation of corporate governance codes; and the scope of applicability of corporate governance regulations. In early 2012 a second consultation addressed the topic of the future of EU company law. This was also quite wide-ranging, including topics such as: the purpose of company law; action on specific directives such as the proposal on Cross-Border Transfer of Registered Seats and the revision of the Cross-Border Mergers Directive; and European company legal forms like the European Company (SE) and the European Private Company (SPE).

1. For a positive overall assessment of the Action Plan and its impact, written in part by some members of the High Level Group, see Geens and Hopt (2010). For a critical view see Horn (2011a and 2011b).

A distinct shift in public opinion on the stakeholder approach can be seen in the results of these consultations as well as in the broader political and scientific debate on corporate governance and company law. For example, Richard Lambert, head of the Confederation of British Industry (CBI), reports that his members expect that a 'more collaborative approach would emerge with different groups of stakeholders' (The Economist 2010: 1). Nevertheless, the bulk of the business community and a substantial minority of the academic community continue to resist the changes in company law needed to implement the stakeholder model. One argument frequently used by this group is that the shareholder model has only been partially implemented in practice and thus cannot be blamed for the financial crisis. For example, the head of corporate activism at CalPERS, America's largest public pension fund, was quoted in *The Economist* as claiming that '...this is a phoney war between shareholder capitalism and stakeholder capitalism, as we haven't really tried shareholder capitalism ... Rather than giving up on shareholder value, let's have a real go at setting up shareholder capitalism' (The Economist 2010: 4-5). Shareholder-oriented company law experts remain influential in policymaking networks. They were well represented in the Reflection Group, whose report emphasizes the desirability of using European law to increase competition between national regulatory regimes, which however significantly increases the pressure for a race to the bottom.

The continuing influence of the shareholder approach and the Commission's reopening of the debate on company law motivated the GOODCORP group to start work on this, the second volume in the Sustainable Company series. Although calls for an alternative to shareholder value are widespread, currently there is a deficit both in theoretical approaches to the firm which combine worker involvement and sustainability approaches, and in proposals for specific company law instruments (including EU legislation) which would help realize the vision of the Sustainable Company in practice. To help fill this gap, the GOODCORP group decided to follow up on the first volume (which outlined a general approach to the Sustainable Company and its governance) and write this new book to specifically address issues in the area of company law.

The first four chapters of the book address the important topic of theories of the firm and different approaches to company law. Andrew Johnston in Chapter 1 reviews developments in stakeholder theory. The theory of the productive coalition, which was formulated by Blair to address the deficits of the shareholder value model and earlier stakeholder theories,

has the advantage of clearly defining the central role of workers. A newer ‘governance of social cost’ approach also provides an interesting if not yet fully developed variant of stakeholder theory. In Chapter 2 Inger Marie Hagen and Bernard Johann Mulder draw on the work of Rawls and Elster on justice and fairness to develop an innovative approach which introduces a distinction between internal stakeholders (workers and shareholders) and external stakeholders. Thus both workers and shareholders have a right to representation on company boards. In the third chapter Aline Conchon contributes to this line of analysis by arguing for a holistic approach to company law. Up to now the tendency of most legal scholars and the European Commission has been to deal with company law separately from labour law. However, due to the central role of workers in the firm, company law and labour law should be seen as intertwined legal fields. Jan Cremers in Chapter 4 provides a historical account of the European-level approach to company law and its effect on national systems. Originally, the European Commission pursued a project of company law harmonisation on the basis of high standards which were designed to discourage competition between national regimes. However, in the past two decades there has been a clear shift away from harmonisation and towards promoting regulatory competition. This has helped erode standards in national systems of company law.

The next group of chapters discuss in detail how a new programme of harmonisation and the protection of stakeholders could be achieved in practice. In Chapter 5 Johannes Heuschmid examines how European company law could be improved by strengthening worker rights as a matter of good corporate governance. A first step in that direction would be to establish a pluralist notion of the company in EU company law, as is the tradition in many Member States. As a second step, flanking measures such as board-level participation rights are required in order to ensure that this principle is properly implemented. In the sixth chapter Jonas Malmberg, Erik Sjödin and Niklas Bruun outline the current discussion on company law and two possible routes to protect and enhance employee involvement in the EU. The first would be to adopt an EU-wide minimum standard for employee involvement through European legislation. The second would be to pursue the option defined in the Treaty on European Union (TEU) for enhanced cooperation between the EU member states that want to promote both social and economic integration. In Chapter 7 Marie Seyboth criticizes the sections of the Reflection Group report dealing with co-determination. The current challenges for the German system of co-determination are highlighted, including the

problem of avoidance of co-determination by foreign companies with administrative headquarters in Germany. The outlook for the future of worker participation as an element of democracy in Europe is also discussed. The next chapter, authored by Wolfgang Däubler, analyzes the potential of investor agreements as a new instrument for safeguarding worker rights. Recently, the German trade union IG BAU was able to negotiate an agreement with the Spanish construction company ACS, the new investor taking over the German construction company Hochtief. This instrument could be used in a number of restructuring situations and would be particularly interesting for protecting worker interests in countries without a tradition of board level employee representation. In Chapter 9 Ingemar Hamskär analyzes a legal case in which the European Court of Justice ruled that an employee representative violated insider information rules by communicating with his trade union about a planned merger with the bank he sat on the board of. This case shows that securities law overly restricts the rights of board level representatives from communicating with employees and trade unions. It is a pressing need to find a better balance between labour law on the one hand and company and securities law on the other hand. In the tenth chapter Isabelle Schömann discusses the current state of worker information and consultation rights as the ‘poor relation’ of EU social legislation. These information and consultation rights are fragmented over several directives, which contain different definitions and standards. The European Commission’s ‘fitness check’ of three directives dealing with information and consultation is criticized and the ETUC’s recent demand for European minimum standards for worker involvement is supported as a better way forward. In Chapter 11 Carsten Herzberg analyzes new approaches to involving the community in the governance and modernisation of public utilities. A number of innovative cases using different mechanisms for including community ‘voice’ are analyzed. These show that there are alternatives to privatisation of state enterprises which are in the interests of both employees of the public utilities and the community.

The next few chapters deal with specific topics in the debate on European company law. In Chapter 12 Janet Williamson critiques the UK Stewardship Code, which was launched in July 2010, as well as the concept and operation of ‘enlightened shareholder value’, introduced into the UK by the Companies Act 2006. This idea of enlightened shareholder value is based on a number of flawed assumptions about the behaviour of investors and companies. Although the idea of the Stewardship Code is welcomed, it cannot be expected to solve the problems caused by the gap

between the concept of enlightened shareholder value and reality. In the thirteenth chapter Beate Sjøfjell summarizes the motivation behind and tentative results of the ‘Sustainable Companies’ research project, which shares many of the same concerns of the GOODCORP initiative. The deficiencies of CSR, mainstream corporate governance and environmental law in achieving sustainability are core concerns of this research project. The project sees a pressing need to reform company law to fundamentally change the way our companies operate. Chapter 14, written by Janja Hojnik, analyzes the current state of practice in sustainability reporting, which is a key part of the Sustainable Company. Directive 2003/51/EC, which deals with accounting requirements, includes language on environmental and social reporting ‘where appropriate’. However, in practice this has not been interpreted as a binding norm. As a result most sustainability reporting has been done on a voluntary basis, resulting in low levels of transparency. Modernizing accounting rules through introducing binding obligations on companies would advance sustainability reporting considerably. The final chapter presents the ETUC’s analysis of the problems with the current system of worker involvement, corporate governance and company law at the EU level. A demand for European minimum standards for worker involvement as well as a list of proposals for the reform of specific company law directives are presented.

While the book does not offer answers to all theoretical and regulatory questions regarding company law, it does provide a general conceptual stakeholder approach to the firm and a number of specific legislative proposals. The hopes of the GOODCORP network are that this second volume will influence the debate on EU company law as well as further academic and policy-oriented work on sustainable alternatives to shareholder value. In doing so it will help keep the momentum going which was started with the first book in the series and will be continued in future activities of the GOODCORP group.

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References

- Geens, K. and K.J. Hopt (eds.) (2010) *The European company law action plan revisited: a reassessment of the 2003 priorities of the European Commission*, Leuven: Leuven University Press.
- High Level Group of Company Law Experts (2002) *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe*, Brussels, 4 November 2002.
- Horn, L. (2011a) *Regulating Corporate Governance in the EU: Towards a Marketization of Corporate Control*, Basingstoke: Palgrave Macmillan.
- Horn, L. (2011b) 'How did we end up here? The rise of shareholder value in EU corporate governance regulation', in S. Vitols and N. Kluge (eds.) *The Sustainable Company: A new approach to corporate governance*, Brussels: ETUI, 39-58.
- Reflection Group on the Future of EU Company Law (2011) *Report of the Reflection Group on EU Company Law*, Brussels: 5 April 2011.
- The Economist (2010) 'A new idolatry', online edition 22 April 2010, 1-5.
- Vitols, S. and N. Kluge (2011) *The Sustainable Company: a new approach to corporate governance*, Brussels: ETUI.