

Chapter 2

'More democracy at work' or 'more power for big corporations' – which is the new paradigm?

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Introduction: Digitalisation, political developments and more democracy at work

Is digital capitalism compatible with democracy at work? Digitalisation is a major global trend that poses a challenge to the future of work and the employment relationship. Neither technological determinism nor technological solutionism is going to help pave the way forward: a broad societal debate is needed on the use of modern technology. Debates are particularly necessary on the use of artificial intelligence, i.e. self-learning systems that can take over many human tasks. Artificial intelligence is about data: linking data, extracting information, putting information into context, applying knowledge and reflecting upon it. In this connection, philosophical and ethical issues are becoming increasingly important, but the key issue is to distinguish between that which should be regulated by law and that which can be left to non-binding ethics (Nemitz 2018). The use of artificial intelligence is a key concern for the future of work: will artificial intelligence be used to ensure the supervision and control of humans, or will it support (the coordination of) humans to be more creative and productive? Will it be used to take non-transparent decisions and shy away from responsibility or to support human decision-making? Will algorithms be coded in such a way that they render humans superfluous, or will we see the development of an inclusive robot agenda where the buzzword is 'complementarity' (Went *et al.* 2015)? Are we always going to be able to slam the emergency brake on artificial intelligence when we want to?¹

Is digitalisation a driver for more democracy at work, or does it create obstacles? At first glance, it appears to be causing problems: for example, a German online platform for delivery services, Lieferando, has declared that 'a works council does not fundamentally correspond to our culture as a young, modern and open company' (Kläsger and Öchsner 2018). Codetermination is regarded as an old-fashioned feature of a bygone age; the goal of democracy at work is being superseded in the new digital world of work by 'direct participation'.

Digitalisation permeates worker participation and vice versa. Digital devices, online platforms and apps can be used either to circumvent and block democracy at work or to facilitate and broaden it. In those Member States with robust industrial relations systems, for instance, the design of an app can be influenced through worker participation so as to ensure the protection of employee data and strong participation rights, whereas, in other EU Member States, the applications being used are the same as those developed in

1. The question of the weaponisation of AI has not been addressed in this study.

the US, Russia or China without any significant involvement of the workforce. Satellite navigation systems, video monitoring, handheld devices, touchscreens and touchscreen gloves, etc. can be used as a means of constantly monitoring workers in companies – the right to take the initiative and to enhance democracy at work is often lacking. Will digital capitalism be a hindrance to or a driver for more democracy at work?

Both political and economic democracy are at stake in Europe, the US and elsewhere. The belief in linear progress towards more democracy, more welfare and a more social Europe has been shaken, and it is clear that stagnation or regression are possible outcomes. For quite some time in academic circles in Europe and elsewhere, the belief in linear progress and the ‘irreversibility’ of European integration was part of the politically correct dogma of the day (Fukuyama 1992). Very little consideration was given to how to stabilise the basis of the integration process or how to counter centrifugal forces. Since an alternative model was unthinkable, it was simply superfluous. What can be observed is an incremental extension of internal market features. Behind the ‘euphemism’ of the ‘modernisation’ of company law, a battle is being waged between proponents of free regime shopping and those who wish to safeguard a social model that guarantees full protection of workers’ rights. The question is whether the new proposals for company law are simply consolidating a largely unregulated free market economy that prioritises the imperatives of the market and of business profitability over the requirements of democracy at work. Capitalism has no particular interest in democracy at work; on the contrary, it is actively seeking to avoid greater participation of workers and their representatives in the decision-making process. Although it requires the direct commitment of individual workers, it does not seek to give them a collective voice.

Times have changed profoundly; backlashes and even a return to digital fascism are possible responses to the challenges of the 21st century. The financial crisis of 2008 has led to a great recession – the worst since the 1930s – and has profoundly changed the global economic order, accelerating transformative shifts (or, in modern terminology, disruptions), including, in particular, a significant shift in geopolitical power. The consequences of the great recession are long-lasting. The convergence process in Europe turned into divergence, with an increasing divide between the centre and the periphery, between southern and northern Europe.² The European political landscape has changed in parallel, becoming more polarised and fragmented. Right-wing and left-wing populist movements and parties are on the rise, pitting the ‘elites’ against the ‘common people’; they are hostile towards migrants and are often anti-intellectual, thereby running the risk of being left behind. Adding to these post-crisis effects, the pace of digitalisation, automatisisation and robotisation, and the rumours surrounding artificial intelligence, have disoriented many people and exacerbated their doubts about the future. A vague ‘malaise’ is feeding into anti-establishment parties and anti-EU movements. After the First World War, Thomas Mann coined the phrase ‘Die große Gereiztheit’ [Hysterica Passio]; while, after the Second World War, Leonard Bernstein named it ‘The Age of Anxiety’. Disillusioned, irritated and angry citizens are joining forces with protesters and denouncing any form of political compromise, thus

2. ‘Northern Europe’ is characterised by the Scandinavian political economy, ‘southern Europe’ by a more clientelist political economy.

rendering democracy more vulnerable and democratic procedures less predictable. The emerging turbulent political environment is accompanied by disruptive economic developments.

The participation of angry citizens in these movements is, among other things, the result of many parents' belief that their children will be worse rather than better off, and will live in a less secure and more polluted world. This belief leads people to turn to anti-Europeanism and consider the poor handling of the crisis by the EU to be a sign of European failure; in the process, they seek a return to the nation state and its powerful tools, which are deemed to be more efficient. The neo-nationalistic approach has the potential to divide Europe even further. The German Chancellor, Angela Merkel, stood alone in her decision – one which was to have repercussions for the whole of Europe – to open Germany's borders to over a million refugees in 2015, whereas she previously would not have hesitated to convene a meeting of the European heads of government over a weekend in order to coordinate rescue packages for the banks or for Greece. This unilateral decision had negative repercussions not only in the United Kingdom in the final run-up to the Brexit referendum, but also in some Eastern European countries, while creating a profound malaise in Western and Southern Europe. After this unilateral and nationalistic – in any event non-European – decision had been taken, the same German Government turned to its flabbergasted European neighbours and asked them to show 'solidarity' – this, after years of European austerity measures imposed by the German Government and a number of other Member States without so much as a hint of solidarity. The term 'solidarity' is perverted – instead of the decision being taken by the German Government alone, a discussion should have taken place between the governments concerned, all standing in solidarity with a view to reaching a joint decision. After a decade of austerity that served only to prolong the economic crisis, the German Government imposed its will once again, allowing immigration without laying down any clear rules and without holding any discussions with the other Member States. It is hardly surprising that anti-German attitudes began spreading across Europe and having a direct impact on the politics of other Member States. Where is the German Government's roadmap presenting solutions to overcoming these nationalistic deviations? Why does the German Government keep silent on the European proposals put forward by the French President, Emmanuel Macron, with the effect of blocking the process of European integration?

Europe appears to be divided by ancient animosities and paralysed through introspection. It is sleepwalking through today's 'interregnum' where, beneath the superficial appearance of multiple crises, in the words of Antonio Gramsci (in a famous passage from his *Prison Notebooks*), 'the old is dying and the new cannot be born'. Gramsci coined the term 'organic crisis' to describe a crisis that differs from ordinary financial, economic, social or political crises. An organic crisis is a comprehensive and holistic crisis, encompassing a socio-economic system that is no longer able to generate societal consensus. Such crises are at once economic, political, social, cultural and ideological – in Gramscian terms, organic crises are crises of hegemony. A blanket rejection of established political parties, economic policies and value systems is generally linked to periods of high uncertainty and disorder. However, it does not necessarily or automatically lead to the swift collapse of the political system nor to victory for left-

wing political parties. Gramsci described such situations as *interregna* – a window of opportunity which will not stay open forever. Since the end of the financial crisis, this *interregnum* has been used by some who seek to establish a new world order.

The ‘Old West’ in Europe was based on the paradigm that a market economy embedded in a liberal democracy (based on the separation of power, rule of law, free media, etc.) is more successful and better than any other system. This assumption is being challenged by China and other authoritarian regimes (combining strong state influence in big companies and the banks with far-reaching control of the media, social networks and the justice system, often in conjunction with a one-party system). The battle between the two systems has not yet really begun, and there are some initial conflicts emerging in the developing world, in particular in Africa. China is challenging the US as an economic, political, technological and military leader, while Europe seems largely occupied with internal issues, with several years taken up by discussions on Brexit. China is increasingly competing with Western companies in the fields of digitalisation, supercomputers, artificial intelligence and aerospace. In its 16+1 initiative, China is seeking economic cooperation with 16 Eastern European countries, 11 of which are EU Member States. This ambitious strategy reflects the weakness of the EU in geopolitical, economic and industrial policy terms. The lack of a European vision makes China attractive to these countries and vice versa; through this intense cooperation, China can exert influence on European decision-making when unanimity is required. This is an issue that Europe must address (for instance by switching to qualified majority voting).

What is at stake in Europe now? The rhetoric of anti-European populism is spreading across the majority of EU Member States.³ Many citizens are convinced that the mainstream or orthodox credo about the rosy future of European integration is similar to that linked to globalisation, depicting it as simplistic and overzealous in terms of opportunities, while it minimises or overlooks possible risks, and is therefore unilateral and void of credibility. For a long period from the 1970s (moving away from a Keynesian framework to global capital mobility with fewer regulations and lower taxes) until the financial crisis of 2008, everyone was considered a winner and there were supposedly no losers – that was the key aspect of the *doxa*, which has since been abandoned. It became obvious that the benefits of globalisation were unevenly distributed. Globalisation exposed people to too much market; they began demanding protection from excessive commodification, and this demand was transformed into ‘a Europe that protects’. Big corporations used globalisation to push back democracy at work. Globalisation offered a window of opportunity for re-formatting capitalism in the digital era and, in particular, shaping the future of digital capitalism. Many companies in Europe went bankrupt or were forced to undertake massive restructuring, while other companies moved to new

3. The left-wing populist vote in Southern Europe and the right-wing populist vote in Northern Europe are indicative of specific national economic configurations. They represent a protest against a certain vision of Europe, rather than a reaction to the national political landscape, against globalisation and the free movement of goods, services, capital and people; in sum, it is a protest against a Europe which facilitates and intensifies these kinds of movements. This form of protest demonstrates that political support for this kind of Europe is shrinking rapidly, and the mainstream political parties either do not understand this trend or do not know how to respond effectively to it (Manow 2018: 138).

markets in South-East Asia or were simply taken over by Chinese investors (automobile manufacturer Volvo, robotics company Kuka, etc.) penetrating companies considered to be a worthwhile investment. As long as the bulk of EU competences and decision-taking are still geared towards 'the completion of the internal market' and are not suitable for other objectives, there is no way out of this vicious circle.

A 'market society' is impossible to achieve in a democracy because people resist commodification, i.e. labour being turned into a commodity. A recent example is online platforms which symbolise a rollback of decommodification, provoking a certain amount of resistance and opposition. This and other trends feed into the weakening of Europe: Brexit, transatlantic trade conflicts, global migration, right-wing populism, high unemployment at the periphery of the financial crisis, as well as its mid-term repercussions, and socio-economic divergence, not to mention long-standing key challenges such as ongoing climate change, digitalisation driven by big data monopolies and tech giants (Roose 2019), and rising social inequalities which, according to Thomas Piketty, exceed the inequalities of the *Belle Époque*. Europe is under threat from many sides.

Taken together, these trends amount to the biggest threat to political democracy since the Second World War. Political democracy is being increasingly challenged by modern right- and left-wing populism appealing to those 'left behind', and, to a similar extent, by biased perceptions and misperceptions of European integration. At the root of the support for right- and left-wing populism lies the disempowerment of broad segments of the workforce and the middle class. In parallel with the antagonism between authoritarian and democratic models, there is a rise in authoritarian initiatives by the EU establishment to circumvent democratic involvement: the dealings in connection with the Transatlantic Trade and Investment Partnership (TTIP) were quite symptomatic of feeding involuntarily into a more generalised public opposition to further integration. Some of the EU elites consider it functional and necessary to forge ahead with European solutions, legitimising their view with the old Thatcherian slogan 'there is no alternative' (also known as the 'TINA principle'). This slogan kills political debate, and yet citizens living in democratic systems want to have a choice. Modern policy-making is a process full of contradictions and antagonisms that are addressed through societal debate. The hegemony of a certain vision of Europe makes matters even more complicated: the unilateral emphasis on the strengthening of economic competitiveness as a key objective has harmed European integration, as it delivers no incentives for cooperation, more social participation (less exclusion), greater convergence, inclusive social policy or more democracy. Compounding this unilateral approach, the democratic deficit is also widening. The EU's powers have been growing for many decades now, but democratic legitimisation is still lagging behind.

Decision-making procedures are being increasingly moved to areas with no genuine possibility of democratic interference, thus contributing to a growing alienation from the European project and paving the way for nationalistic opposition. Permissive consensus is being transformed into open dissensus which, in itself, is not a bad thing. Instead of trying to overcome legitimate opposition by encouraging democratic involvement, the elites try to move ahead without any public involvement. A good

number of European decisions are not taken by democratically elected politicians but are delegated to technocrats acting beyond the will of the citizens⁴ – it is no wonder that the ETUC opposed the Fiscal Compact. Austerity is a striking example of far-reaching supervision and control of countries and their governments by small technocratic bodies evading democratic control. The EU's authoritarian tendencies unintentionally strengthen those forces that are opposed to European integration, leaving no room for pro-European forces to voice legitimate concerns or participate in contradictory pluralistic debates, forcing them instead to choose sides: either unconditional support for the EU establishment or general opposition (Scherrer 2018). This undemocratic behaviour is being concentrated down into authoritarian entities. The oft-used slogan 'there is no alternative' (TINA) is merely a symptom or indicator of this mechanism. The consequence is that, ultimately, many critics will either remain silent, abstain from taking action, become apathetic or join an anti-EU movement.

The main problem for political democracy concerns a lack of democracy at work. The issue of information, consultation and board-level participation in the workplace is linked to most of these challenges, if not directly then indirectly, as old corporate governance – together with short-termism and the shareholder value (or profit) maximisation principle – continues to generate inappropriate incentives. In this study, we will explore whether a new form of corporate governance with stronger information and consultation rights and broader board-level representation could help to steer company decision-making in the right direction and to reinvigorate social Europe and, in so doing, make it more resilient.

1. Revisiting European democracy at work in all its dimensions

The term 'democracy at work' covers several dimensions, in particular:

- (1) information and consultation procedures at national level, incorporated in works councils or similar worker representation bodies (as laid down in Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, but also in the Collective Redundancies and Transfer of Undertakings Directives);
- (2) transnational cross-border information and consultation at European level (as laid down in the European Works Council (EWC) Directive (94/45/EC) (modified in 2009 by Recast Directive 2009/38/EC) establishing a common floor of rights);
- (3) worker representation in company boardrooms, at national level as established in 18 out of 28 Member States (without any attempt at European harmonisation until now); and
- (4) board-level representation extended to other Member States through the 'before and after' principle laid down in the European Company (SE) Directive (2001/86/

4. For instance, key economic decisions ceded to an independent central bank, focusing exclusively on inflation, the austerity policy imposed by the Troika and the rescue policy for the banks paid by taxpayers, the many comitology decisions and the extension of post-democratic executive federalism into an outright intergovernmental rule, according to Habermas' criticism of the efforts made by Merkel, Sarkozy and others to gain more room for manoeuvre for executive action (Habermas 2011).

EC) and, subsequently, Directive 2005/56/EU on cross-border mergers of limited liability companies (European Parliament 2018: 29-35).

There is a significant difference between the quality of information and consultation procedures on the one hand and that of board-level representation on the other: the right to information and consultation involves guaranteeing the flow of information to the workforce and providing an opportunity to make the voice of the workers heard. The right to board-level representation is not limited to information and consultation, as it gives workers the power to influence the company's decision-making and strategic development. The goal of information and consultation is for workers to be consulted, while the goal of participation is to be part of the highest-level decision-making body and assume responsibility for it, contributing to the decision-making process or delaying, amending or even blocking decisions. Information and consultation are limited to cross-border issues in the company in the case of European Works Councils (EWCs), whereas board-level work involves the discussion of fully disclosed information on all strategic issues relevant to the company's life cycle. Board-level representation is not a simple extension of the information and consultation procedures; it also changes the quality of participation, involving a totally new set of opportunities to exert influence, as well as numerous obligations, responsibilities and duties.

Board-level representation in Europe can be defined as the 'phenomenon where employees elect or appoint representatives to the strategic decision-making body of companies', including situations where the workers have voting rights. In two-tier structures, this would refer to the Supervisory Board, in one-tier structures to the Board of Directors or Management Board. Whereas such structures exist in 18 out of the 28 (soon to be 27) EU Member States, there are a variety of different arrangements in place and, to date, no single European model exists.

The European social partners sat down for three meetings to negotiate an agreement on EWCs. However, the Confederation of British Industry (CBI) published a press release opposing the conclusions of a meeting approved by the Union of Industrial and Employers' Confederations of Europe (UNICE),⁵ which was not without blame, as each UNICE member organisation had a veto right. In view of this sword of Damocles, the ETUC decided to walk out of the negotiations. Immediately after this breakdown in negotiations, which can be considered to be the first failure of European social dialogue, the conservative Commissioner for Social Affairs, Pádraig Flynn, pushed the dossier forward, and, in September 1994, under the German Presidency led by the conservative Labour Minister, Norbert Blüm, the right to transnational information and consultation was recognised and a Directive adopted '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'. The adoption of the EWC Directive represented a victory for the ETUC's strategy of switching from a negotiating to a legislative approach (Degryse 2013: 150; Lapeyre 2018: 141-145). However, this strategy could work only as long as the Commission was proactive, and

5. These meetings were held between 23 February and 17 March 1994, and the UNICE press release was issued on 27 March 1994.

progress was made possible only ‘in the shadow of the (upcoming) law’. In 2008, a small step forward was made: the European social partners were involved in a ‘recast’ of the EWC Directive and succeeded in agreeing to a partial revision. However, demands for a comprehensive revision – repeated in 2017 by the ETUC (2017) – were not met with success.

In 2018, the European Commission published its EWC assessment (European Commission 2018a), which had been overdue since 2016, but refrained from proposing an EWC revision. The content of the assessment was quite disappointing, either largely ignoring any loopholes or non-functioning aspects of EWCs or simply drawing no conclusions whatsoever from their shortcomings. The lengthy assessment of the Quality Framework on Restructuring made the situation even worse: this had been overdue since 2016 but was published only in 2018 (European Commission 2018b, 2018c). One outcome was that the guidelines and principles laid down by the Commission were largely ignored. The document was spin-doctored in such a way as to camouflage and legitimise the inactivity of the Commission.

The history of transnational board-level representation began back in the 1970s with a first report on how to render such a provision in a new form: a European company statute. Some 30 years later, after numerous revisions, amendments, delays and fresh proposals, a political compromise was reached at the Nice European Council of December 2000, paving the way for the formal adoption by the Council in October 2001 of the Regulation on the Statute for a European Company (known by the Latin term ‘Societas Europaea’ or ‘SE’) and, in parallel, the Directive on the involvement of employees in the SE (Kowalsky 1999, 2000). ‘Participation’ was defined as a form of involvement in the supervisory or administrative board of a company, the development of its strategies and the key decision-making process and not in the day-to-day running of the company, which remains the responsibility of its management. In terms of worker participation, a balance had been struck between several models. The compromise stipulated that the standard rules concerning worker involvement would apply if at least 25% of employees enjoyed the right to participate in decision-making prior to the set-up of an SE. However, the Charter of Fundamental Rights of the EU does not provide for any threshold. There are four ways of setting up a European company: a merger of public limited liability companies; the creation of a holding company with subsidiary companies or branches in another Member State; the establishment of a joint subsidiary by at least two companies from different Member States; or the conversion of a public limited liability company that had a subsidiary in another Member State. In the meantime, there have been more cases of abuse through circumvention than there have been cases of genuine Europeanisation, as had been hoped for by the trade union movement when agreeing to this compromise after 30 long years of intense debate, and this has proved somewhat of a hindrance to the whole process. As a result of the wide range of participation systems and strong opposition from employers’ organisations firmly entrenched in 19th-century management methods, the Member States could not agree on European minimum standards, but decided, in the case of the SE, simply to extend national provisions to the European sphere.

An important but oft-overlooked question is 'What constitutes a European approach?' Ever since the adoption of the European company statute, many observers have conceptualised Europeanisation in relation to the European composition of boardrooms, or in terms of the prolongation or extension of national provisions in the European sphere, which in reality does not even come close to a genuine European approach based on minimum requirements. The SE is quite simply based on extended national provisions – it produces nothing other than a juxtaposition of extended national provisions, and does not provide a common floor of rights. In 2018, there are no more than 74 normal European companies with board-level representation of workers⁶ – not much of a success story there. Moreover, while there may be 74 companies with board-level representation of workers, more than 100 companies have switched from being a national company to an SE in order to evade national obligations to put worker representatives on their boards. Initially, a compromise was reached on the SE in order to protect workers' participation, but it soon turned into a tool allowing it to be circumvented. Is circumvention the real hidden success story here? Since the SE no longer constitutes progress towards Europeanisation but instead incorporates a defensive attitude in order to prevent more collateral damage and protect the different European social models, new avenues must be explored.

In November 2010, the European Commission issued a report on the application of the SE Regulation, and, in July 2011, the social partners were consulted on the need for and scope of a possible revision of the SE. In the following October, the social partners responded, with employers alluding to the protracted negotiations that had led to the compromise in 2001, and the ETUC qualifying the outcome as 'thoroughly designed'. In 2012, there followed a public consultation, and the Commission ultimately abandoned its intention to revise the SE Regulation and Directive. The ETUC maintained a relatively conservative position owing to the dissensus still reigning within the trade union movement over the question of how to devise a more tailored approach and how to resolve the impasse over the fact that an increase in the number of employees has no effect on workers' right to boardroom representation ("freezing"). The alternative of proceeding with a revision while stepping up efforts to establish a more appropriate minimum standard was not even taken into consideration. Could this despondent approach then be qualified as a missed opportunity or rather put down to a lack of imagination or flexibility? It is probably a combination of the failure to recognise and seize windows of opportunity, a lack of imagination regarding how to devise a sustainable approach and a 'business as usual' attitude which went unchallenged at the time. It was only at the subsequent ETUC Congress that an in-depth analysis of the issue was launched.

In the 2005 Cross-Border Mergers Directive (2005/56/EC), the compromise reached for the SE had been watered down: the percentage of the workforce that must be covered by codetermination in order to be entitled to protection was raised from 25% to 33⅓%, an increase which makes protection much more difficult. In parallel, the quality of

6. Thanks to national provisions, some 16,000 people serve as 'worker directors' (worker representatives) in company boardrooms, whereas the SE Directive has increased that number by only 240 since its adoption in 2001.

participation has changed: whereas before a merger, worker representatives are included in the highest decision-making body, after the merger they can be excluded from the newly formed highest governing body. For instance, in the case of the establishment of an overarching holding company, there is worker representation only at company-level and not in the supervisory board of the holding. The merger of Praxair and Linde is a good example of this: whereas workers have previously had a say in the highest decision-making body, this body will be downgraded to an executive body of the newly established highest decision-making body of the newly established holding. The Linde-Praxair ‘merger’⁷ is proof that the European company law package is not comprehensive: the establishment of a holding can provide a means of merging companies that not only allows a tax reduction but also makes circumvention of codetermination in violation of the spirit of the Directive possible. It appears that, by simply choosing a specific legal ‘merger’ status, the Cross-Border Mergers Directive is rendered null and void. Is this a genuine protection of rights or is it a case of downsizing and social dumping? European company law will never be watertight as long as such cases are permitted. The same is possible when converting to SE status, as is the case for Porsche which has no worker representation in the supervisory board of the holding.⁸ Such developments – based on a lack of understanding of the importance of budgetary control for future investments – jeopardise the very essence of trade union participation rights.

The business community and a large number of politicians consider the form of capitalism which is based on shareholder value maximisation to be a legitimate one. Stakeholder capitalism did experience an upswing in the wake of the financial crisis, but what has been the situation since then? Is there a new trend towards democratisation, or does democracy still stop at the factory gates? Is a new contradiction emerging between the European core and periphery, and can it be resolved in a productive, forward-looking way? Well, the post-crisis situation is hardly any different from that during the crisis: there is still no financial transaction tax, no European rating agency and no tax on digital oligopolies, thus allowing the system to continue operating like an open casino. There is clearly still a long way to go.

2. Beyond a national floor of board-level representation rights: how do we fill the gap?

Two contradictory tendencies are influencing the world of work: the rapid globalisation of business on the one hand and the limited, belated Europeanisation of workers’ participation on the other. National provisions for workers’ participation are still hegemonic over European ones, as European provisions are only complementary to existing national ones – a situation which is legitimated under the proviso of ‘subsidiarity’. However, there is an urgent need to catch up with developments in the business world.

7. The official website calls the merger first a ‘business combination between Praxair, Inc. (“Praxair”) and Linde AG (“Linde”)’ but then specifies: ‘A merger of equals between Linde and Praxair will provide a platform that harnesses both companies’ potential and delivers new value to stakeholders.’ <http://lindepraxairmerger.com/websites/lindepraxair/English/1000/home.html>

8. ‘Die Porsche SE schließt die Mitbestimmung aus’, *FAZ*, 19 November 2018.

The challenge is quite complex: whereas the compromise found for the SE in 2001 is based on the 'before and after' principle, the ETUC's 2016 proposal (ETUC 2016) is based on the principle of negotiation so that worker representatives can (almost) freely negotiate arrangements 'in the shadow of the law', in particular using the 'escalator approach', which involves sending worker representatives into company boardrooms in order to discuss company decision-making. The lack of democracy at work can be remedied with proposals such as the ETUC demand for a horizontal framework for information, consultation and participation together with an escalator for board-level representation rights. The 'escalator' proposes a lower proportion of worker representatives in small enterprises that increases to higher proportions depending on the size of the company (applicable to both the monistic and the dualistic systems)⁹ and provides minimum requirements, in other words a floor of rights. Workers' board-level representation is not about transplanting a single, identical model into all Member States. The ETUC proposal takes into account the wide variations in national provisions on thresholds in relation to company size (these vary from 25-50 employees to 50-500 employees to 1 000, 2 000 or even 5 000 employees), where the proportion of representation varies from 1-3 representatives to a third or even half of the members of the boardroom. For the time being, the ETUC proposal simply leaves open the questions of election or appointment and eligibility. It is about unity in diversity.¹⁰ The 'escalator' proposal thus has the advantage of anchoring the negotiation principle in the 'shadow of the law', with the added benefit of allowing for maximum flexibility.

Indeed, one of the most contentious and lively debates on corporate governance concerns the role of workers in company boardrooms. It took considerable efforts to overcome longstanding internal trade union divergences and hesitations and to adopt a courageous and ambitious approach to board-level representation in relation to the SE and any companies using European company law instruments. Finally, after years of lengthy and controversial discussions within the European trade union movement, there was overall agreement and a unanimous decision. The final outcome was the development of a new EU framework for information, consultation and board-level representation rights, adopted in 2016. Some hesitation still remains because of the different industrial relation systems, trade union cultures, ideologies and, in particular, the assumption that representation in boardrooms may lead to co-management. Indeed, it should be about participating in company decision-making, contributing to company strategy and influencing or even opposing decisions which might prove harmful to the workforce. In other words, it should be about control and supervision, not interference in day-to-day management.

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9. The ETUC proposal specifies that:
- small companies with 50 to 250 employees (within the company and its direct or indirect subsidiaries) should have a low proportion of workers' board-level representatives (2 or 3 representatives)
 - companies with 250 to 1 000 employees (within the company and its direct or indirect subsidiaries) should have one-third participation
 - big companies with more than 1 000 employees (within the company and its direct or indirect subsidiaries) should have parity (half of the seats).

The Directive should not lead to a situation where workers' board-level representatives have no works councils to report to.

10. The official motto of the European Union is 'In varietate concordia' or 'In varietate unitas' – 'United in diversity'.

The ETUC's call for a 'renewed effort to ensure board-level participation through binding EU law' was qualified as innovative but was also said to come into conflict with national models. Article 153 of the TFEU provides a mandate to legislate, stipulating that 'the Union shall support and complement the activities of the Member States' in the field of 'representation and collective defence of the interests of workers and employers, including codetermination'. The 'escalator' mechanism would 'give parity on boards at a new level for all European countries, including Germany' and would be 'a considerable development of employee board-representation rights in any country, including Germany' (Munkholm 2018: 12, 14). Such an extension was indeed the strategic objective of the ETUC proposal. The strength of the workers' voice (Hassel and Helmerich 2017) and access to collective representation is one of the contributing factors to a low level of inequality: increasing and extending workers' involvement at the workplace and, in particular, in company boards should be among the top policy measures aimed at reducing income inequality, mitigating wage excesses and increasing social cohesion and convergence.

At the ECE Annual Conference 'Perspectives of collective rights in Europe' in March 2018, the ETUC proposal was presented and discussed, but no political conclusions were drawn on whether or how to drive the proposal forward. Ultimately, the discussions that took place at the conference were a nice gesture, but they were no indicator of a policy shift: the Commission's style of governance, which has been to kick the can down the road and to 'wait and see', remains unchanged. The still quite scattered landscape will be maintained as long as no common floor of rights exists. It should be clear that such a floor of rights for board-level representation rights is urgently needed. The European approach to board-level representation as laid down in the 'before and after' principle of the SE Directive is quite different compared to the approach laid down in the EWC Directive or the general framework on information and consultation; both establish minimum standards through material EU law. The conclusion is that Europe is still a long way from achieving equal rights for all workers with regard to democracy at work. When will the Commission get off the fence?

For over a decade, there has been no progress on transnational information and consultation, and yet a number of loopholes and disadvantages of worker participation continue to exist. There is still no framework for restructuring as demanded by the Cercas report,¹¹ to which the Commission responded with a non-binding Quality Framework for Anticipation of Change and Restructuring. Meanwhile, in the European Parliament, there has been no follow up to the Cercas report, and the 2015 Händel report on the board-level representation of workers was abandoned. The positions expressed by the main political parties with regard to democracy at work are void of substance. Against this background, in spring 2018, the ETUC decided to launch a campaign calling for more democracy at work in Europe (ETUC 2018). A cornerstone in the framework of the ETUC Strategy was the European Appeal.¹² On the first day of the Annual EWC Conference in 2018, the handover of more than 900 signatures took place with Stefan Olsson, Director for

11. European Parliament resolution of 15 January 2013 with recommendations to the Commission on information and consultation of workers, anticipation and management of restructuring.

12. www.european-appeal.org published in *Le Monde*, *El Diario*, *Süddeutsche Zeitung* and a number of other newspapers and websites. The EWC Conference and rally took place on 10 October 2018.

Employment at the European Commission, and representatives of all the major political parties in the EP during a rally in front of the European Parliament in Brussels.

3. The new Company Law Package: towards less democracy at work, or business takes it all?

There have already been some casualties in the field of European company law: both the European Private Company (EPC) and the Single Member Company (SUP) are dead and buried. These earlier initiatives of the European Commission were designed without any specific provisions to protect existing workers' participation rights. Due to its 'open business' policy, both initiatives failed in the European Parliament in the face of broad opposition to such an unbalanced approach. It is not known whether a self-critical assessment has ever been made, but at least the Commission recognised the need to prepare more carefully and to consult main stakeholders during the preparation of the new company law package.

While this preparation was under way, the European Court of Justice handed down its judgment in the Polbud case¹³ – its ruling may be interpreted as granting a licence for fiscal evasion, the Company Law Package provides no tools to curb such evasion. The key question, moreover, is whether there are to be any new tools to circumvent or downsize. The Company Law or Mobility Package published in April 2018 seeks to establish European rules for business mobility in three areas: company conversions, mergers and divisions. On the one hand, there is a threefold delivery to the business community in terms of replacing national rules with European ones in order to facilitate cross-border company activities. But, on the other, no real progress has been achieved for workers – only the temporary and limited survival of national provisions for information, consultation and participation. In the past, only the strict minimum has been done to retain workers' participation rights in a European context. The new Company Law Package offers limited protection, but it seems this is only because the European Commission had no wish to renew efforts to remove worker representatives from the company boardroom.

The business community has now been given a major boost, while the workers get nothing more than what they already acquired a long time ago at national level. Why is it that we are facing such a one-sided, unbalanced approach yet again? A solution to the dilemma could lie in applying the 'real seat' principle in order to protect board-level representation and prevent the establishment of letterbox companies, money laundering and regime shopping. However, this option is not on the cards, as both tax and wage competition are considered to have positive effects and be instrumental in achieving greater efficiency.

There are two possible explanations for this: either the Commission is biased and overly business-friendly with regard to company law and considers that, following the publication of the European Pillar of Social Rights, the time is ripe to improve

13. <http://curia.europa.eu/juris/documents.jsf?num=C-106/16> (2017).

company mobility regardless of the need to improve democracy at work; or the Juncker Commission simply wasted its first years in office before coming up with a Social Pillar which, whether intentionally or not, is not the least bit concerned with promoting workplace democracy. It is indeed quite bizarre that the European Commission missed the opportunity presented by the Social Pillar in failing to introduce any changes related to workers' participation rights.¹⁴ It might even be the case that the Directorate-General for Employment, Social Affairs and Inclusion simply forgot about the plan put forward by the Directorate-General for Justice and Consumers to deliver a Company Law Package – that would be a typical example of silo thinking. Whatever the explanation, it would have been more logical to adopt a dual-track approach, making life easier for businesses whilst, at the same time, providing workers with opportunities to influence company decision-making. However, this even-handed approach – one previously adopted in relation to the European Company Statute (SE) in 2001 – was overlooked. Does this come across as an intelligent and sustainable way of working?

The discrepancy between national and European regulations is quite striking. The legislative proposals concerning business activities are genuinely 'European' in their aim to establish European rules and regulations. The proposals concerning workers' rights, however, are a mere extension of any pre-existing national rules into the European sphere, complete with a sunset clause. While the Commission is proposing new European rules for business activities, the 'country of origin' principle applies to democracy at work: companies must comply with certain rules of the country of origin, and they have to adhere to those same rules in the country of destination. This means that each company must comply with a different set of rules depending on the country of origin. This situation may result in an internal market for business, but it does not create a level playing field for workers. When the Commission began working on the issue of cross-border mobility, the rules on mergers, divisions and transfers of seat varied significantly from one country to the next. The same could be said about the state of play of democracy at work, given the wide range of rules within the EU. The Commission decided to harmonise the rules for business activities. This time, unlike the earlier proposals for the EPC or SUP, the Commission has acknowledged the rules and sought to ensure their temporary and limited survival; however, it has done nothing to ensure the equal treatment of workers. This response on the part of the Commission is incoherent – while it may be European, it also forms a scattered landscape of different national rules, all remaining totally unaffected. Therefore, this discrepancy between a national and a European approach must be challenged and rectified.

The European Commission is well aware of the loophole. At the Company Law Conference organised by the Estonian Presidency in September 2017 in Tallinn, one of the debates focused on the Company Law Package which was then in the process of preparation. One of the problems of European company law – besides letterbox

14. https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en Principle 8 on workers involvement is window dressing – as it repeats only the current state of play and makes no indication of any forthcoming initiative: 'Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies.' This shows a complete disregard for participation rights.

companies, tax and social security dumping – is the fact that it allows for circumvention and evasion of national regulations. At the conference, Professor Christoph Teichmann declared that there are two solutions to circumvention: one is to fight it, and the other is to have the same level of worker participation across Europe. He added that the latter is 'impossible for political and cultural reasons'; therefore, the only option is to 'fight circumvention' (Estonian Presidency 2017: 26, 24 et seqq.). I disputed the view that there could be no uniform rules or co-determination on the grounds that the rules around worker participation currently differ across Member States: 'The same is true for the rules for company law [...]. Division is quite different from one country to another. The question is: Do you want a European approach? If so, why do you want to apply it only to company law and not for the rest? If we want to go forward, we have to find a European solution for board-level representation.'

Ignoring this and many other debates, the Commission decided to forge ahead unilaterally. The Tallinn conference is only one example, but many others could easily be found, for instance in the countless other conferences or in the business-friendly composition of numerous Commission expert groups.¹⁵ This path could turn out to be a dangerous one. It is hardly surprising that people are turning away from Europe or are disappointed by social Europe. In the area of democracy at work, there is a great deal more evasion and circumvention going on than there is Europeanisation with regard to the protection of national rules. The Company Law Package increases this bias by delivering opportunities and even incentives for more company mobility without simultaneously delivering on democracy at work. Delivering on both issues in parallel would have constituted a more balanced approach.

It was no surprise that BusinessEurope welcomed the Package: 'For decades companies have been waiting to fully benefit from their fundamental freedom of establishment within the European Single Market. Finally, this empty space in EU law will now be filled with new legal frameworks on divisions and conversions of companies.'¹⁶ This euphoric statement from the business community highlights the need to pursue a dual-track approach, as once the 'empty space' is filled, there will no longer be any reason to accept a compromise. In the context of the Package, there has been an opportunity to strike a deal with a view to making some progress towards democracy at work. Hence, the ETUC sent an open letter to Commissioner Marianne Thyssen and Commission President Jean-Claude Juncker with regard to the Company Law Package (ETUC 2018b), asking the Commission to deliver not only on company mobility but also on more democracy at work. The ETUC presented its views at a hearing on the Company Law Package organised by the Legal Affairs Committee of the European Parliament in June 2018.¹⁷ Some progress was subsequently achieved in the work of the parliamentary committees: the ETUC proposal for an 'escalator' was adopted in the Employment and Social Affairs Committee

15. <https://corporateeurope.org/power-lobbies>. The goal of Corporate Europe Observatory is to expose the heavy influence of corporate interests on EU policies.

16. Press release: <https://www.busineurope.eu/publications/open-digital-door-and-bring-eu-company-law-21st-century>.

17. Draft programme of the hearing of 21 June 2018: <http://www.europarl.europa.eu/cmsdata/149414/juri-hearing-conversions-digitalisation-company-law.pdf>; recorded hearing: <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20180621-0930-COMMITTEE-JURI>; vote in EMPL on 15 November, in JURI on 6 December.

in November and again in the lead Legal Affairs Committee in December 2018, which in itself was quite an achievement.¹⁸ The European Parliament set about performing the necessary repair work. However, the final outcome of the trilogue negotiations between the European Parliament, the Commission and the Council is disappointing: the uncertainty over the future political composition of the European Parliament and errors in political priority setting allowed the Commission and Council to block any further progress towards more democracy at work. This also meant that the delegation of the EP was unable to push it through, effectively undoing the positive results already achieved in the EP. Parliament had introduced several important measures to prevent the establishment of artificial arrangements and letterbox companies in its report, but these provisions were significantly watered down in the course of the negotiations. Moreover, the most ambitious proposals put forward by the EP were not taken on board, in particular the creation of European Works Councils in the resulting companies and the establishment of board-level participation rights (along the lines of the ‘escalator’-proposal) in all companies that move from one EU country to another. In short, this was yet another missed opportunity to move towards more democracy at work and towards sustainable corporate governance and the stakeholder approach. Streeck (2018: 18) would conclude that, once again, market freedoms took precedence over social rights.

4. Business-friendly company law forever or move towards a rethinking of internal market policy?

Over the past decade, the internal market has been profoundly dysfunctional – the financial crash of 2008 led to the deepest and longest depression in recent modern history since the Second World War. European capitalism has not been functioning well over the past few years. Internal market policy has not been successful, and the same can be said of fiscal austerity. Unemployment rose substantially, especially in Spain, Portugal, Italy and Greece, and remained above its pre-crisis rate for an entire decade. Governments had been forced to use taxpayers’ money to bail out the banks.¹⁹ Investments declined in response to the rapid ‘financialisation’ of the corporate sector. Wealth inequality has grown even more than income inequality. The share of labour in GDP has fallen, whereas the top 1% of income-earners have done exceedingly well (Jacobs and Mazzucato 2016: 8). A total of 82% of the wealth generated in 2017 went to the richest 1% of the global population, while the 3.7 billion people who make up the poorest half of the world saw no increase in their wealth.²⁰ Rising inequality stems from the very high incomes of corporate executives. Labour markets became more polarised, segmented and insecure with a growing proportion of low-paid, precarious and platform

18. See for instance: Report on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (A8-0002/2019): <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2019-0002+0+DOC+PDF+Vo//EN>.

19. Initial action taken to rescue the banking system cost around €1 trillion, subsequent action around € 400 billion (Schumann 2018).

20. Oxfam report, 22 January 2018: ‘Oxfam’s report outlines the key factors driving up rewards for shareholders and corporate bosses at the expense of workers’ pay and conditions. These include the erosion of workers’ rights; the excessive influence of big business over government policy-making; and the relentless corporate drive to minimize costs in order to maximize returns to shareholders.’ <https://www.oxfam.org/en/pressroom/pressreleases/2018-01-22/richest-1-percent-bagged-82-percent-wealth-created-last-year>.

workers. The trend towards social and economic divergence has not only replaced that towards convergence but has even become a feature of the EU since the crisis.

The fundamental aim of the internal market is to create a level playing field for companies. The underlying reasons for the orthodox approach run much deeper than the intellectual framework of internal market policy. This objective has the much overlooked side effect of being invasive towards employment and social legislation, including workers' participation. Internal market theory coupled with the distinctively hypertrophic interpretation of fundamental freedoms laid down in some ECJ cases (*Laval*, *Viking*, etc.) legitimise the Commission's action to establish borderless competition with the effect of there being no 'win-win' but instead a situation where 'business takes it all'. It is not out of the question that this invasive character of the internal market will become explosive in the context of an old corporate governance system based on the search for short-term shareholder value maximisation. Mainstream internal market discourse rests on a very simple underlying conception of how the internal market works. According to this conception, the internal market system is characterised by competition as a driver for economic efficiency and the search for maximum profits for shareholders, leaving aside the main societal challenges. The orthodox model provides an attractively simple framework for thinking about the internal market and internal market policy.

The conceptual assumptions on which the Company Law Package is based are internal market theory and the idea of the 'fundamental freedom of establishment', both of which are shared by the Commission, BusinessEurope and many orthodox economists. Mainstream economic thinking on the internal market is based on the notions of 'market completion' and 'market failure'. However, the concept of 'market failure' fails to provide an understanding of the threats to the functioning of the system as a whole, as occurred during the 2008 financial crisis, and therefore is not a useful tool. The company mobility package is considered by its proponents as a key step towards 'market completion'. However, (completion of) the 'internal market' is neither a value nor an objective as such; it should serve as a tool to achieve more innovative and sustainable forms of production, employment and prosperity. Mainstream economists think of a company's shareholders as its owners and characterise them as principals who engage agents to manage the company in the shareholders' interests. The logic of shareholder value maximisation dictates that shareholders own companies. In reality, however, 'Shareholders own shares. No one owns a company. Despite this legal reality the myth that shareholders are the owners of companies continues to prevail.'²¹ The problem with the corporate purpose of maximising shareholder value is that this way of thinking is intrinsically linked, as a causative factor, to the financial crisis. It is also linked to the claim that only owners and their representatives have the right to sit in company boardrooms. The question is whether an unrelenting Commission will continue to be an institutional bastion of belief in the free internal market, defending the idea that workers' representatives should not intervene in company decision-making, and believing in the superiority of flexibility, liberalisation and privatisation over fundamental social rights.

21. 'Shareholders own shares, not company', from Christopher Halburd (Frank Bold Society) <https://www.ft.com/content/74a46bc8-cbco-11e3-8ccf-00144feabdco>. Cf. http://www.purposeofcorporation.org/documents/project_outputs/purpose_project_concept_note.pdf.

What are the alternatives? The mindset of and concepts used by the Commission and mainstream economists have to change. A more sustainable and inclusive system is possible but will require fundamental changes to how the internal market works and to how public policy is made so that it can create and shape a new framework for corporate governance. Policy measures are needed in order to reverse recent trends towards excessive executive pay schemes modelled on the precepts of neoliberal theory. One important tool to help reverse these trends is the promotion of democracy at work and, in particular, the extension of workplace democracy to the company boardroom.

5. New debates on putting workers in boardrooms

Fresh debates are emerging over putting workers on company boards: in 2016, the British Prime Minister, Theresa May, planned to reform board-level governance and put workers in boardrooms (Pratley 2016), but dropped the idea like a hot potato when faced with opposition from the UK's leading business organisation CBI. However, two years later, the UK's independent regulator Financial Reporting Council (FRC), in its updated Corporate Governance Code, recommends raising the number of employee seats on company management boards.²² During a Labour Congress in September 2018, Jeremy Corbyn, Leader of the Labour Party, unveiled a new plan that would force businesses to reserve one third of the seats on their boards for workers in all firms with 250 or more employees. In a commitment that echoes Theresa May's abandoned proposals to give workers representation in company boardrooms, Corbyn promised to give workers a 'real say' in how companies are run: 'Labour believes a worker's position is on the board. That's why we're proposing to give the workforce of all large UK businesses the right to elect a third of the seats on the board, giving employees a genuine voice and a stake, shifting the balance at work in favour of the wealth creators, improving both decision-making and productivity in the process. Decisions taken in boardrooms affect people's pay, their jobs and their pensions. Workers deserve a real say in those decisions. That's nothing for businesses to be afraid of. They should welcome the expertise and understanding that workers will bring to the company board.'²³

The French President, Emmanuel Macron, went even further during his election campaign in March 2017, promising 50% of boardroom seats for trade unions,²⁴ yet he never returned to the issue. This was followed by an appeal by politicians and intellectuals,

22. This non-binding code is based on the 'comply or explain' principle and is closely followed by listed companies. The Code recommends that companies enable staff to raise issues and problems. To this end, they are encouraged to appoint a director from the workforce, nominate a formal workforce adviser, or designate a non-executive director tasked with representing employees (*Planet Labor*, article No. 10764, published on 17 July 2018. <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF> (16 July 2018)).

23. On 23 September, 'Corbyn says Labour should welcome having workers on boards': <https://www.theguardian.com/politics/blog/live/2018/sep/26/corbyn-speech-labour-conference-set-to-address-labour-conference-as-party-rejects-mps-call-for-general-strike-politics-live?page=with:block-5bab75e2e4b072dfb217d0d9#block-5bab75e2e4b072dfb217d0d9>; <https://www.thetimes.co.uk/article/jeremy-corbyn-at-labour-party-conference-we-will-put-workers-on-company-boards-rp95pjtr6>; <https://www.independent.co.uk/news/uk/politics/jeremy-corbyn-workers-boards-labour-conference-one-third-union-a8550946.html>

24. *Présidentielle 2017, 'La mesure choc de Macron pour une "cogestion à l'Allemande"'*: https://www.challenges.fr/election-presidentielle-2017/la-mesure-choc-de-macron-pour-une-cogestion-a-l-allemande_457583 (1 March 2017).

published in October 2017 in *Le Monde*,²⁵ calling on Macron to keep his promises. Even in the USA, in April 2018, Democratic senators Elizabeth Warren, Tammy Baldwin and Brian Schatz introduced legislation mandating that employee representatives must comprise one third of the members of the board of directors in publicly listed US corporations.²⁶ In October, US Senator Tammy Baldwin led 12 of her Senate colleagues (including Bernie Sanders and Elizabeth Warren) in calling on the Securities and Exchange Commission (SEC) to allow workers to join directors in boardrooms.²⁷ In July 2018, US labour lawyer Thomas Geoghegan from Chicago recommended that US states should try out co-determination. He proposed that US states should offer tax breaks to companies that allow rank-and-file employees to elect a third to a half of its corporate board of directors. Doing so, said Geoghegan, would allow US companies to test drive an alternative model to the current dysfunctional stockholder model.²⁸ On 4 April 2019 the Greens in the German Parliament initiated a debate on the need to apply board-level representation to all companies with more than 1000 employees. Is it not a shame that we see discussions popping up in the UK, France and the USA, but not at European level? Is it surprising or actually quite logical that continental social democratic parties remain silent on the topic? Commission President Jean-Claude Juncker, during his own election campaign in 2014, did a one-off interview in which he promised to propose minimum standards for codetermination in European companies as part of the Social Pillar once he was in office,²⁹ but he never followed through on his promise. We see a long list of empty pledges, which ultimately benefit populist movements who blame the establishment for failing to keep its promises. This raises the question of how important democracy at work really is for the European Social Model and for the EU institutions in particular. Are the trade unions willing to invest in it? If new alliances are required, which allies need to join forces? If there is to be a future for democracy at work, we will need to fight for it. However, if we take a look at the possible scenarios for this future, is damage control all we can realistically do? The Commission needs more drive to reinvigorate the issue of workers' participation. It is high time to resume the debate on more participative corporate governance in Europe.

Is there any light at the end of the tunnel? The German Labour Ministry supports a European minimum standard for board-level representation: in order to embed corporate codetermination firmly in Europe in the long term, the Federal Ministry of Labour and Social Affairs also supports the European Trade Union Confederation's call for minimum standards of employee participation to be anchored in Europe. To that end, negotiations need to be launched on a directive on minimum standards. A directive

25. *Le Monde*, 6 October 2017 (also published in German: <https://www.mitbestimmung.de/html/die-mitbestimmung-muss-gesetzlich-6192.html>).

26. George Tyler, 'Codetermination Enters The American Political Debate', <https://www.socialeurope.eu/codetermination-enters-the-american-political-debate> 20 April 2018. A poll showed that Americans would support this idea: <https://www.vox.com/2018/4/6/17086720/poll-corporate-board-democracy-worker-council-codetermination-union-labor>; Steven Hill, 'Codetermination takes the spotlight in the US', 13.02.2019: <https://www.mitbestimmung.de/html/codetermination-takes-the-spotlight-in-10518.html>

27. 'US Senator Tammy Baldwin leads effort to give workers a greater voice at public companies': <https://www.baldwin.senate.gov/press-releases/baldwin-leads-effort-to-give-workers-a-greater-voice-at-public-companies>.

28. Steven Hill, 'Trump Attacks US Workers And Labor Unions': <https://www.socialeurope.eu/trump-attacks-us-workers-and-labor-unions> (23 July 2018).

29. 'Mindestnormen in Sachen Mitbestimmung in Europas Unternehmen könnten Teil dieses Sockels sein', Für dieses Europa streiten die Kandidaten, *Die Mitbestimmung*, May 2014, p. 16: https://www.boeckler.de/pdf/p_mb_5_2014.pdf.

of this kind could also respond to the issues raised in relation to the SE – the ‘freezing of co-determination’ and the call for adjustments in the event that national thresholds are crossed – without, however, calling into question the consensus achieved on the SE itself (BMAS 2017: 161ff.). It remains to be seen how far the Ministry will be able to go in an environment where there is no overwhelming support for co-determination. Corporate lobbying seems to have become so powerful that any steps towards more democracy are threatened or blocked from the outset. The conclusion is simple: no progress has been made towards board-level representation at EU-level since 2001.

Conclusion: How can we prevent post-crisis corporate governance from following in the footsteps of pre-crisis corporate governance?

The outdated assumptions of the orthodox approach fail to provide a proper understanding of how modern markets work or how modern capitalism and corporate governance work. Drawing on these assumptions, the old rules and regulations provide incentives to policy makers who use them for political guidance. A more powerful explanatory alternative is needed. As I have demonstrated, a company is not owned by its shareholders: this key insight underpins the need for a rethinking of the concept of the ‘company’. Companies and markets are embedded in broader societal structures and conditions. Companies are constrained by non-economic institutional frameworks as well as by social and industrial relations. Companies are better understood as the interaction between economic and social actors – capital and labour – and wider institutional structures – both public and private – which are embedded in bodies of legislation and regulation, industrial relation systems, specific cultural and historical contexts that shape and constrain the nature of company activities and, in particular, business transactions. Karl Polanyi argued that companies are not purely economic institutions to which economic models can be applied (Polanyi 1944). All this creates a powerful case for rebalancing the relationship between capital and labour, and for reversing the EU’s current set-up by replacing deregulated markets with the idea of a socially embedded market economy and reconstructing industrial democracy in the digital era.

The concept of the ‘sustainable company’ is one alternative that also expresses an objective (Vitols and Kluge 2011; Vitols and Heuschmid 2013; Vitols 2015). Proponents of the sustainable company concept draw on a model of the firm not as one that seeks to optimise profit-making or shareholder value at any price, in the process causing significant collateral damage such as externalisation, but one that is based on the three-dimensionality of sustainability and the interaction between environmental, social and economic systems which constrain the behaviour of companies in competitive markets. Sustainability underlines the importance of ‘long-termism’, social responsibility and commitment, whereas ‘short-termism’ has reduced the willingness of firms to invest in employment.

Another orthodox assumption is the shareholder approach. None of the problems associated with the shareholder approach to corporate governance with its fixation on short-termism look likely to be resolved by the Company Mobility Package currently

being proposed by the Commission. This does not mean, however, that no solutions exist. Democracy at work is, first and foremost, about human dignity – the reconstitution of the dignity of all workers damaged by the devaluation of work since the 2008 crisis (through precarity, unemployment, platformisation of the economy, etc.) in contrast to the great revaluation of capital (through the financialisation of the markets and the big tech companies), with both trends being accelerated by digitalisation, robotisation, cobots and artificial intelligence.

The Silicon Valley term 'disruption' has become a buzzword. In the olden days, the disruptive process was always referred to as 'industrial revolution'. Neoliberals have a clear preference for rapid transformation, as the fast pace of change destroys old 'social safety nets', contributing to a breakdown in longstanding social relations that leads to disempowerment and the erosion of social capital and social cohesion. The fundamental societal approach of the 'disrupters' establishes a link between disruptive processes, the organisation of work, society and societal choices. The democratic principle of publicly discussing societal choices cannot simply be replaced by the de facto attitudes of certain giant tech corporations that see themselves as disrupters. The often irresponsible disruption discourse stokes apocalyptic fear, and not only among truck drivers or in former industrialised regions. Corporate governance structures evolve as a result not only of markets driven by legislation but also of the co-evolution of industry structures, technological developments, industrial policy, the role of the public sector, public authorities, public services,³⁰ social, economic and cultural traditions, institutional contexts, social and economic capital, and workers' involvement, etc.

The orthodox view that the maximisation of shareholder value will lead to greater efficiency has become a key assumption of business theory. The financial crisis has led to a loss of credibility for banks, financial institutions and orthodox economists, as well as to the delegitimisation of the shareholder model. The stakeholder approach – a powerful alternative to shareholder governance – also requires some clarification. A company's multiple stakeholders combine to form its two 'constituent' parts, both of which must be given a voice by putting representatives of capital and labour on its board.³¹ The stakeholder approach as such may be too broad in scope and lead to a shift in company policy, but the focus on the two main players is essential in order to avoid any possible misunderstandings. The involvement of all the forces of civil society in company boardrooms would essentially bureaucratise the decision-making process. However, implementing change by improving the gender balance and increasing diversity in company boardrooms is vital: a homogeneous company board of white heterosexual businessmen will arrive at very different decisions than a gender-balanced one with women and men of different origins, backgrounds, etc.

The failings of modern corporate governance are not temporary but structural and long term. Another trend of modern capitalism is the rise in greenhouse gas emissions which must be reduced substantially. Growth has always been accompanied by environmental

30. Such as schools, universities, health and social care services, housing provisions, social security, transport, energy, water, waste systems, police and defence.

31. The French trade union CFDT speaks of 'la reconnaissance des travailleurs comme partie constituante de l'entreprise'.

damage, whether through air, water or land pollution. Structural deindustrialisation has led to the transfer of production to the developing world. Very little has been undertaken in recent times to avoid such trends. The increase in the average global temperature may lead to a higher incidence of extreme weather events, displacement of peoples, conflict and the accelerated loss of ecosystems and animal and plant species. Nevertheless, such trends should not be regarded as inevitable, as the structures of capitalism and corporate governance can be reshaped and made to change course. A major transformation of energy, transport and industrial systems and corporate governance structures is required in order to tackle the problem head on.

The disjunction between internal market theory and the reality of modern capitalism and corporate governance must be addressed. Only a consistent and coherent policy can help to make the shift towards a new form of corporate governance. Part of this shift would involve the Europeanisation of board-level representation and a better representation of women in boardrooms. The digital revolution could help to develop ICT systems linked to a radical reduction of carbon emissions and material use in production and consumption lines. The switch to sustainability and the goal of a sustainable company must be an integral part of this transition. A new approach to internal market and corporate governance can accelerate such transitions, including a shift from labour taxation to energy, resource and ICT taxation.

The Fourth Industrial Revolution is having profound gender-specific impacts. Levels of female employment in the ICT sector are falling, and many women disappear within the first couple of years of entering the industry. Reports on gender discrimination in big tech firms show that there is little sign of improvement despite voluntary commitments to improve the situation. While online platforms may appear to be gender-blind, research reveals a gender pay gap. Gender inequality is embedded in the operation of platforms, and change is urgently needed.

Returning to the issue of democracy at work, we have to realise that the European trade unions – the key proponents of information, consultation and participation – became increasingly embroiled in disputes after the adoption of the 2001 SE Directive and, in particular, the 2009 EWC Recast Directive. As a result, the Barroso Commission, which was in office for a decade, failed to deliver on social progress. A major difficulty for the trade unions lies in the dilemma of being caught between an offensive struggle for counter-power through Europeanisation and a defensive battle for acquired national rights. Is a change of tack from the defensive to the offensive going to be possible? And is there any chance of the trade unions' becoming agenda setters and steering European integration towards more democracy at work? At the same time, an intellectual battle for hegemony must be waged that will eventually transform into efforts to define alternative concepts in the boardroom such as the sustainable company and its specific meaning, dimensions and potential.

Political science theorists have conceptualised European integration in a linear manner as if it were irreversible. This dogma has had a longstanding impact: many Members of the European Parliament and many civil servants at the European Commission intuitively consider more integration to be good and disintegration or 'less Europe' to

be bad, regardless of the issues at stake. This dualistic view is too simplistic and often nostalgic, comparing the current situation to the supposedly 'good old days'. Moreover, it is because of Europe that a number of well-established political parties are suffering a loss of legitimacy: they emerged in response to the dynamics of national capitalism, but were relevant only as long as capitalism remained within the confines of the nation state. The absence of a European profile symbolises that the taming of European capitalism does not constitute one of their key goals.

What is the outlook for democracy in the workplace? There appears to be no progress being made, and democracy in general is experiencing backlashes in many parts of Europe and elsewhere. Anti-establishment parties and Eurosceptic movements in Europe and in the US are gaining influence. The combination of economic and social 'malaise' has led to volatile conditions in many countries. The surprising election results in the US and the Brexit referendum were followed by further political earthquakes in Italy, Brazil and elsewhere. The political establishment appears to be rather impotent in dealing with globalisation, and its attempts to propagate a unilateral, positive vision of globalisation and digitalisation has undermined credibility and trust, contributing to a loss of public support owing to the growing gap between the richest 1% and the 'rest' of society. A window of opportunity has opened for the populists who promise that they will fix everything. Instead of an enthusiastic, optimistic, euphoric atmosphere of change, there is a sense of foreboding ushering in a new, darker era. More and more people are feeling disillusioned and abandoned by the social democrats, the 'elites', Europe, etc. and are turning to populist alternatives. While the French President, Emmanuel Macron, is busy tabling proposals for moving Europe forwards, the *gilets jaunes* – or 'yellow vests' – protest movement is calling for a 'Frexit'. Meanwhile, the 'Alternative for Germany' far-right party has added a German exit from the EU – 'Dexit' – to its agenda for 2024 and is seeking to abolish the euro and the European Parliament, unless the EU succeeds in turning itself into a 'club of nation states'.

Who will be instrumental in calling for more democracy at work in the current political climate? The European Parliament will be newly elected in May 2019. Meanwhile, the Commission is beginning to prepare for its new term in office. Some of the key issues are fairly clear: the Commission must stop being the institutional bastion of belief in the free internal market and the 'organic intellectual of the one percent'³²; it must change tack before matters spiral out of control and destroy the European integration process. Shareholder value is not and never has been a good measure of company sustainability, nor even of company performance. The Commission must pause to ensure that corporate special interests always come first. For even the most deeply embedded corporate governance regimes will break down when they no longer deliver fair results.

There is currently no political movement in Europe aimed at unlocking the economic, social and environmental benefits of a new corporate governance regime based on the stakeholder approach. Political parties, the scientific community and other stakeholders have no time to lose in taking up the issue of democracy at work. There are some glimmers

32. The actions against Wallstreet took place under the slogan: 'We are the 99%. Against the most powerful and rich few, the 1%.'

of hope that the hitherto unrelenting European Commission might start listening to its critics: for the very first time, the Commission organised a conference on sustainable corporate governance that asked all the right questions.³³ Nevertheless, the relationship between ‘soft’ and non-binding corporate governance features and ‘hard’ company law remains unclear, and the incorporation of sustainability issues into company law is still pending. Another encouraging glimmer was that the European Parliament, in a plenary vote in January 2019, endorsed the committee vote on the Company Law Package complete with ‘escalator’ provision. However, the final outcome of the trilogue negotiations was disappointing. If the Commission does not change tack, more and more people will voice their disappointment by turning away from Europe and voting instead for those political parties willing to dismantle it. Ultimately, the trade union movement alone will not be able to stop this disintegration from occurring. However, without the European trade unions’ playing a critical role in helping to achieve these crucial goals, changing tack will not work. It is a major challenge for the European trade union movement to gain hegemony on an alternative vision of sustainable corporate governance with strengthened board-level representation rights and new sustainable company law at its core.

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