



Workers' Voice and Good Corporate Governance in Transnational Firms in Europe

Open Questions

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Preface

European policies on company law and market creation pose challenges for workers' voice. The *Expert Group on Workers' Voice and Corporate Governance* is tasked with addressing this issue and to have forward-looking discussions about possible solutions and strategies. These discussions are aimed at improving the understanding of the practice and reality of workers' voice in transnational firms. By assessing the practical evidence through the long-standing expertise of the members of the group and additional experts, a reassessment of the situation and current trends will emerge that hopefully goes beyond a mere legalistic and formalistic assessment of the current policy impasse. Informed by empirical research and theoretical consideration, deliberation within the group will address new scenarios and pathways. Ultimately, we aim to develop a conceptual framework on how to preserve and further develop core institutions of the European Social Model, focusing on the role of workers' voice.

A number of perspectives impact the conceptual discussion on workers' voice in transnational firms in Europe:

- the perspective on the mode of Europeanization between liberalization and the European Social Model;
- the perspective on local practices and their role in institutional change;
- the perspective on the relationship between corporate governance and the broader institutional framing of large corporations.

These different perspectives make the discussion more challenging, on the one hand, but also enrich the current discourse that is often trapped by arguments on legal definitions and the protection of national standards and traditions, on the other.

The *Expert Group on Workers' Voice and Corporate Governance* has the freedom and liberty to go beyond well-articulated positions and arguments that often dominate the policy discourse. The more the discussions are open for diversity, innovation and learning, the more effective they will be. The format of the discussions has the capacity to speculate and design future scenarios. All ideas and challenging thoughts will be noted and documented to use at a later stage. Most importantly, the members of the group have the expertise and experience to assess current trajectories and possible alternatives.

There is nothing inevitable in current policy developments within the EU and at the national level. But alternative developments will depend on new ideas and initiatives to overcome old stand-offs and make them happen.

1. Workers' voice, the European Social Model and market integration

Workers' rights and workers' voice in Europe have historically been more strongly institutionalized than in other regions of the world.¹ In many European countries, the practice of collective bargaining, workplace and board level representation and trade union membership has been institutionally enshrined and legal provisions for protecting workers' voice comprehensive. In addition, welfare provisions have been comparatively more encompassing and the welfare state more protective. The combination of a strong protection of workers' voice, strong trade unions and expansive welfare provision defines the core of the European Social Model (ESM).

In a global comparison, these underlying institutions of the European Social Model have been highly successful and generally beneficial in creating one of the most prosperous and egalitarian regions in the world. Measured by population, the European Union is not only the largest region of rich countries in the world, followed by North America and Japan, but also the most egalitarian, with high scores on quality of life, longevity, health and happiness.²

Regarding income and wage inequality, Europe has always been at the top of rankings. In a recent report by the OECD on income inequality, concerns were raised over the negative effects of rising income inequality for prosperity and growth (Cingano 2014). When ranking countries, based on the Gini coefficient for disposable income, the global top ten countries with the lowest level of income inequality include eight European countries which have laws on Board Level Employee Representation (BLER).³

The success of the European Social Model regarding economic innovation is shown by the example of the Global Competitiveness Report by the World Economic Forum (Forum, 2014). The 2015 report emphasizes the role of innovation and skills as key drivers for economic growth. It states: "The report remains the most comprehensive assessment of national competitiveness worldwide, providing a platform for dialogue between government, business and civil society about the actions required to improve economic prosperity. Competitiveness is defined as *the set of institutions, policies and factors that determine the level of productivity of*

¹ For our purpose here, workers' voice is conceptualized as the capacity and potential of employees and their representatives to influence strategic decisions in companies with regard to investment, restructuring and relocation. This definition primarily covers Board Level Employee Representation (BLER) in large firms but also other forms of voice such as transnational workers' representation in European Works Councils (EWC) and International Firm Agreements (IFA).

² See data on the Better Life Indicators from the OECD.
<http://www.oecdbetterlifeindex.org/de/#/111111111111>

³ Slovenia, Denmark, Norway, Sweden, Luxembourg, Slovakia, the Czech Republic, Finland.

a country. The level of productivity, in turn, sets the level of prosperity that can be earned by an economy.”⁴

Out of 144 countries, the report establishes a ranking of countries’ competitiveness. Among the global top ten countries, there are six Northern European countries. Of these six countries, four⁵ countries have extensive provision for workers’ representation on companies’ boards. Even more striking, among the European top ten countries, seven countries⁶ have legal provisions for Board Level Employee Representation (BLER).

Summing up: Not only are European economies among the world’s most competitive and prosperous countries, those countries within Europe that have a long and strong tradition of workers’ voice in firms are more likely to be among the most competitive countries than those who do not.

This data shows that despite the rise of global markets, financial liberalization and increasing competition by emerging economies, the European Social Model has not been relegated from the premier league of countries championing economic prosperity. Countries with strong workers’ voice continue to be among the most innovative and prosperous in the world. Moreover, the ESM is a role model for social equality and social inclusion. There is no empirical evidence or theoretical claim that these countries are economically and socially successful *despite* the strong presence of workers’ voice. In contrast to many discussions on the effects of globalization in mature welfare states, high levels of skills, capacity for innovation, cooperative labour relations and strong public policy have been found to be at least as conducive for the global competition of leading firms as more liberal models of economic development (Berger 2006). There is also no empirical evidence to suggest that the European Social Model is failing the quest for innovation and prosperity or undermines the capacity for change.

However, despite these achievements, the tone of policy discussions about the European Social Model and the prospect of European economies is often pessimistic. Among international and domestic policymakers, Europe is often seen as being out of touch with global developments regarding growth and innovation. Even before the Eurozone crisis, the policy debates surrounding the Lisbon Agenda and the subsequent Europe 2020 agenda were often highly critical. Europe was seen as an ageing and slowing region, with little capacity for innovation and growth.

⁴ <http://www.weforum.org/reports/global-competitiveness-report-2014-2015>.

⁵ Sweden, Germany, the Netherlands and Finland.

⁶ Germany, Finland, the Netherlands, Sweden, Denmark, Norway and Luxembourg.

In academic circles, the ESM was seen as being undermined by the market creation mode of European integration. As a policy consensus on harmonized standards of social protection at the European level was not forthcoming, European integration often took the course of market liberalization.

One highly influential analysis of European integration assumes that the EU is driven by market liberalization at the expense of the positive, standard setting harmonization of social protection. It argues that European-level rules of market integration, liberalization and market competition constrain national welfare policies. The European Commission, supported by the European Court of Justice (ECJ), pursues a liberalizing agenda of market creation at the expense of national protection of social standards. Following the logic of neo-liberal, economic policy, market creation is meant to be the engine that prompts growth but intensifies the economic integration of diverse European economies.

Meanwhile, the diversity of European welfare states impedes a policy consensus regarding social standards and welfare provisions. Fritz Scharpf coined the combination of market liberalization at the European level and national welfare states as “constitutional asymmetry”, thereby emphasizing the obstacles in overcoming social harmonization across the EU as not only caused by the lack of political will but in deep rooted constitutional questions (Scharpf, 2002). As the EU does not have the fiscal means for shock absorbing and regional redistribution, it has become a Hayekian political economy, where regional competition, rather than productive cooperation, dominates (Höpner and Schäfer 2012). A large literature on the European Social Model has since explored the dynamics of market liberalization through the EU with negative connotations.⁷

On the other hand, there is another strand in the discussion that has analyzed the evolution of the soft governance mechanisms of social and labour market policies as well as innovative governance mechanisms, such as the Open Method of Coordination and Social Action Programmes in the EU (Zeitlin, 2010; Anderson, 2015). Here, the assessment is more nuanced: in many areas, the EU competence on social issues has steadily expanded over the last four decades. Rather than being passive on social matters, the EU now shares many competences with Member States on employment, social security, health and pensions.⁸ The European level is, therefore, highly relevant regarding both the negative processes of liberalization and active policy-making.

⁷ Scharpf 2010, Höpner and Schäfer 2012.

⁸ See Anderson, 2015 for an overview.

The processes of Europeanization and globalization generally pose four key challenges to the core institutions of workers' voice: the increasing cross-border nature of European firms, the diversity of European corporate law traditions, the dominance of the shareholder model in corporate governance and the ambivalent policy stand on workers' voice by the EU.

- (1) It was the explicit aim of the Single European Act (SEA) to foster cross-border economic activities by facilitating the freedom of establishment and the freedom to provide services in other EU Member States. In the course of the creation of a common European market, barriers for incorporating firms from other Member States, including their domestic legal forms, have been abolished. Genuine European company laws were introduced to facilitate cross-border business, such as the SE⁹, SPE¹⁰ and SCE.¹¹ Directives were passed to enable firms to restructure their production across borders.¹² This process is not yet completed. Policy changes such as the Service Directive, Cross-border Merger Directive, the SUP¹³ and REFIT¹⁴, among others¹⁵, are likely to lead to a further deregulation of corporate law. As a consequence, the number of firms that are active in two or more European countries is constantly increasing. These firms can increasingly engage in institutional arbitrage: they can pick the most convenient regulatory system for their operation and combine various regional settings: Ireland for taxation, Romania for wages and Cyprus for social security contributions, in order to minimize costs.
- (2) Increasing cross-border economic activities take place against the background of a broad diversity of national practices, traditions and perspectives in industrial relations and trade union action. While workers' voice and workers' rights are present in all Member States of the EU, in one form or another, national systems vary significantly. The differences are particularly pronounced when it comes to BLER and workers' voice. Not only legal foundations range from no provision to very strong legal protection and rights, the relations between the social partners and the approach by trade unions vis-à-vis board level representation vary greatly between Member States. There is no clearly shared perspective among the social partners and even among trade unions in all EU Member States that workers' voice at the board level enhances and improves the European Social Model. While some Member States support workers' voice, others have either no

⁹ *Societas Europaea*, European Company.

¹⁰ *Societas Privata Europaea*, European Private Company.

¹¹ *Societas Cooperativa Europaea*, European Cooperative Society.

¹² For instance, through the Takeover Directive or the Transfer of Undertakings Directive.

¹³ *Societas Unius Personae*, a Europe-wide legal form for a single-member, private limited liability company.

¹⁴ REFIT is the European Commission's Regulatory Fitness and Performance programme.

¹⁵ There is a long list of directives and policies that contribute to market deregulation and facilitate corporate restructuring, including the Directive on Transfer of Undertakings and the Takeover Directive.

experience with it at the board level or reject the notion outright, as it does not fit with the general industrial relations framework.

- (3) The legal and institutional protection of workers' voice has long been seen by the business community and large parts of the political community as a historical legacy that is largely at odds with the trends towards a global economic model. Within the Anglo-American tradition of corporate governance and company law, the role of stakeholders (other than shareholders) is severely limited. The shareholder model of the firm that has informed policy-making with regard to international company law and capital markets throughout the 1990s and 2000s has no room for workers' voice. Even after the corporate governance flaws became evident after the financial crisis of 2008, when policy discussions started to ponder on more long-term approaches of investment, the inclusion of workers' voice never made it to the policy agenda. Short-termism of the firms' shareholder model is frequently lamented but rarely addressed. Certainly, the dominant discourse on corporate governance among economists and corporate law experts does not see a stronger role for workers' voice as a solution to the flaws of corporate governance legislation.
- (4) Finally, the policy record of the EU has been ambivalent towards workers' voice, which partly reflects the preceding issues of national diversity, economic integration and the dominant corporate governance discourse. Policymakers within the EU Commission and in Member States have struggled with the complexity of the issues when pursuing a policy agenda that combines deeper market liberalization with the protection of national institutions. In an institutionally diverse setting, the harmonization of standards has been proven impossible, as every step towards harmonization hurts national models. The solution found for European Works Councils, as well as for BLER in the SE, reflects a genuine European approach of negotiated solutions against the backdrop of domestic institutional guarantees. At the same time, liberalization and market creation proceeds, offering loopholes to firms that are unwilling to comply with stronger norms of workers' voice. As among the EU Member States, there is no clear commitment to protect strong forms of workers' voice in European firms within the EU Commission, but policy measures are a reflection of the struggles between different players who advocate either economic liberalization or the protection of national institutions.

These challenges frame the current policy discussion on workers' voice. They take place in the areas of company law, labour law and industrial relations within the EU. There is the danger that, with the increasing economic woes of the EU – also stemming from the crisis of the Eurozone – the liberalization agenda might win outright dominance in these policy fields and that the shareholder model of the firm, with very limited workers' rights, might become the standard model of corporate governance in Europe. Workers' voice and the stakeholder model

of the firm, which are a key component of the ESM, would be relegated to historical legacies that are confined to specific national models. New developments in transnational firms would be based on an Anglo-Saxon model of the firm, with a monistic board structure and strong shareholder rights.

The European integration process would, thereby, become an even more influential instrument in dismantling successful national institutions; institutions that have arguably contributed to both prosperity and social equality. This tension between beneficial constraint (Streeck 1992) through labour institutions and the urge to create a unified European market, which has been pointed out in the political economy literature on the EU for quite some time now, stands at the heart of the debate about the future of the ESM.

2. Diversity, history and complementarity

Beyond the immediate challenge to the institutions of workers' voice through EU integration, there are a number of other issues that influence the task of finding a European model of workers' voice. These can be discussed under the headings of *diversity*, *history* and *complementarity*. They are the – often hidden – background on which policy discussions within, but also outside, trade union circles and the centre-left take place. Without taking into account these more implicit and deep rooted issues, we run the risk of a superficial and empty policy debate.

Diversity: The industrial relations landscape in Europe is very varied, despite the fact that it is often described as one European Social Model. Workers' representation at the workplace and at the company level in collective bargaining and its role in labour law shows a wide degree of diversity. This not only influences the practice of workers' voice but also the normative orientation of trade unions and workers' representatives.

In some countries, only independent and autonomous representation by trade unions is seen as the best way of protecting workers. In others, legally regulated works councils and Board Level Employee Representation are key to the representation of workers. Sometimes it is a combination of both. Union membership rates vary between 5 and 80 percent. Collective bargaining can take place at the workplace level or the level of the entire economy. Trade union activists at the European level know about the difficulties in finding a unifying position given this diversity.

Therefore, defining the role and place of workers' voice in large firms at the European level is not an easy task. One key dividing line in judging the capacity of workers' voice is what researchers have coined "the level of articulation" of industrial relations (Crouch, 1993): workers' representatives are either oriented towards finding consensus and compromise in

formal institutions and centralized forms of decision-making or they focus on more decentralized and less organized actors who have more of a conflict-orientation. There are also mixed models and less clear cut cases.

Moreover, while the European Social Model, on the whole, is geared towards strong workers' rights, this is not the case for all Member States of the EU. Not only does the UK not subscribe to a continental social model, some new Member States, particularly the Baltic States, Romania and Bulgaria, do not have a history of cooperative and strong industrial relations. Southern European countries and France have strong workers' protection rights but weak traditions of workplace industrial relations. These are also the countries where BLER exists in state-owned firms but not in the private sector. In these cases, the relationship between corporate governance and industrial relations is not as straight forward as the theoretical considerations suggest. While we should not overemphasize the difference between industrial relations models in EU Member States, neglecting them, in an effort to find a shared model, would be a serious mistake.

History: Given this diversity, how can we define the role of workers' voice in the ESM? The practice of legally protected forms of workers' voice in large firms is situated in the context of wider, historically-constituted industrial relations and corporate governance systems. National industrial relations systems have evolved in the course of industrialization and, in particular, in the context of war mobilization and the response to the role of business in Nazi Germany (Vitols, 2001). Even though countries with strong labour institutions have a good economic performance, these strong labour institutions were not conceived or implemented in order to pursue better economic development. Rather, they were the result of social conflict and strife (Streeck and Yamamura, 2001). Politically, the introduction of BLER was an expression of the strength of organized labour, combined with political mistrust towards the owners of large firms, who had not lived up to their responsibilities of corporate oversight in the past. At the core of instituting workers' representatives at the strategic, decision-making place of large firms was to monitor corporate behaviour.

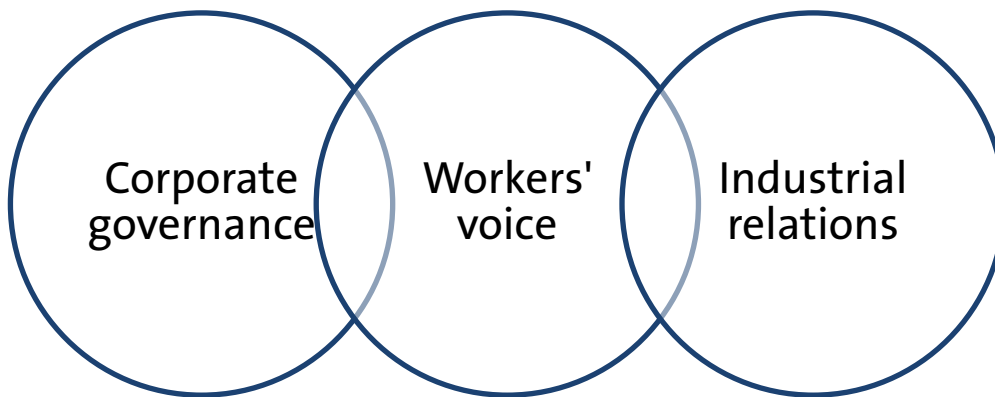
In this context, and pushed for political reasons, workers' participation was often highly contested at the time, even by trade unions. They saw BLER as attempting to buy the cooperation of workplace and company representatives at the expense of more autonomous and conflictual bargaining strategies. In countries with strong political trade unionism, particularly in Southern Europe, the implicit notion of co-management and responsibility that is embodied in BLER did not fit in with broader, trade union, political views. This has changed over time, as the political landscape shifted. The push towards pragmatic, corporate oversight instead of political opposition is, however, still a point of contention.

We should conceive the quest for a European approach to workers' voice as a long-term historical evolution and assess the broader political landscape regarding the role of large corporations in Europe.

Complementarity: After the introduction of board level representation, the role of workers' voice in large firms has taken on a different meaning. Rather than exercising political control of corporate behaviour, BLER has become an integral part of industrial relations **and** of the production models of European political economies. Workers' voice has contributed to particular practices of workplace employment relations, skill formation and specialization in specific industries.

Workers' voice in large firms works as a systematic linkage between corporate governance, on the one hand, and industrial relations, on the other (Höpner, 2005). In the economics literature, the linkage between corporate governance and industrial relations runs through the investment decisions by workers and managers in firm-specific skills and resources (Aoki, 1994; Amable, 2003; Hall and Soskice, 2001). The role of corporate governance and industrial relations institutions for investment decisions is as follows: workers invest in higher skills, if their investment is protected through extensive participation rights and centralized collective bargaining based on strong trade unions. Managers invest in resources, such as production sites and technology, if investors do not pressure them for short-term returns. Strong, comprehensive industrial relations institutions (highly-coordinated, wage bargaining systems and cooperative, workplace employment relations) and organized corporate governance with limited shareholder rights give rise to a production model, where investment in firm and industry-specific skills are high and shareholder pressure is low. Therefore, we find a complementary relationship between corporate governance and industrial relations (Amable and Hancké, 2001; Hall and Soskice, 2001), which jointly contributes to a specific production model.

Graph 1: Institutional context of workers' voice



This complementary relationship between industrial relations and corporate governance is only partially reflected in company law and labour law. Workers' voice legislation sits uneasily between company law and labour law. In all countries, company law mainly follows a shareholder perspective of the firm with some exceptions when it comes to the legal position of other stakeholders. Co-determination law constrains company law by securing seats for employee representatives on management boards. They generally do **not** constitute a legal stakeholder model of the firm. In mainstream corporate law, ownership rights usually beat stakeholder rights.

As a consequence, a conceptual discussion on the role of workers' voice in transnational firms in Europe will have to begin by situating the analysis of workers' voice in the wider institutional setting of industrial relations, on the one hand, and in corporate governance, on the other. The protection, expansion and conceptualization of workers' voice in European transnational firms needs to take the institutional setting into account at both the European and the national level.

Moreover, the conceptual discussion is not a legal discussion which concentrates on the definition of seat numbers and a specific set of rights for representatives on company boards. Rather, we need to better understand how different models within Europe approach the relationship between corporate governance and industrial relations. This includes a systematic analysis of those models in particular, which are between a more Anglo-Saxon, market-driven model, such as the British, and a stakeholder-focused model, such as the Nordic and continental European countries.

3. Open questions

Three factors shape the current trajectory of the development of workers' voice in Europe: the national diversity of industrial relations and corporate governance regulation, the increasing transnationalization of business and the Europeanization of company and competition law. These factors are interrelated and feed into a process of policy and institutional change. For instance, the Europeanization of company law changes national industrial relations institutions, by enabling firms to avoid national regulation. The transnationalization of businesses facilitates rapid relocation and strategic arbitrage of regulatory frameworks. Finally, higher levels of competition, due to the single market, put firms in a straightjacket of continuous improvement and short-term profitability and undermine the public status of the large firm. All factors combined in these trends might lead to an erosion of workers' voice, even in countries with strong industrial relations institutions. This is the pessimistic scenario.

In a more positive and optimistic scenario, transnational firms are the incubator for European practices that allow for policy learning and enable more productive firms and locations to pass on institutional knowledge to other regions of the EU. Countries with lower levels of institutionalization of workers' voice might benefit from higher levels of productivity in those regions where workers' voice is stronger. These experiences might be picked up by European legislation, and the specific European approach of negotiated adjustment might lead to stronger institutions rather than weaker ones.

To what extent, and through which mechanisms, workers' voice in Europe might follow the pessimistic or optimistic pathway is an open question, which needs to be assessed empirically. Even if some of the evidence of European policy-making points to regime competition and downward pressure on regulatory standards (Streeck 1992), we are interested in whether the effects of regulatory competition within the EU necessarily lead to downward deregulation (Delaware effect) or might even lead to upward regulation (California effect).¹⁶ Examples of counteracting strategies by unions and workers' representatives dealing with such competition can also give us clues for institutional change. Company examples, showing the variety and diversity of firm level practices, can help to identify best practices that can serve as role models. The lens through which we assess institutional pathways is, therefore, the practice, both by looking at empirical data but also by listening to testimonials of practitioners.

The themes which we will concentrate on are not the challenges themselves but are oriented to the most important topics of workers' voice practice today: 1. the role of workers' voice in the business models of firms, particularly regarding restructuring, 2. the role of workers' voice

¹⁶ David Vogel has described the upward regulation (race to the top) as the "California effect" because California has become a leader of environmental standards among the US states and subsequently pulled a number of other jurisdictions up to its level (Vogel, 1997).

in sustainability, 3. the reform of corporate governance and 4. industrial relations institutions and functional equivalents.

3.1 Restructuring, training and pay

Transnational firms have a great impact on working conditions, pay and training. They tend to be larger, more successful and more dynamic than purely domestic firms. Transnational firms set trends and standards. At the same time, transnational firms are at the heart of an integrated European economy. They unify production processes and consumption practices in a variety of very diverse Member States. They exploit opportunities and enable economic development across Europe.

The economic effects of workers' voice at the firm level are inconclusive. Research on German codetermination established that it has not had positive or negative effects strong enough to induce other companies or governments to either introduce or abandon it (Addison and Schnabel, 2009). Other studies looking at European firms have found that the strategic influence of workers may be associated with lower company value in good times, but may also provide a buffer against a loss of value in bad times (Kleinknecht, 2014). More recently, Vitols found that workers' voice is positively related to high-quality employment, measured as diversity policy, training and health and safety (Vitols 2015). This relationship should not surprise us: workers' voice at the board level can make sure that top management develops and implements policies for good practice in employment quality, including long-term business models that are less affected by market fluctuations. Moreover, board level representatives can monitor the implementation of these policies. They are usually supported by stronger workplace representatives and trade union representation.

The assessment of the company level effects of workers' voice is important as it provides leverage in policy debates. Positive effects of workers' voice on corporate performance, employment quality and sustainability will at least counteract a policy discourse that sees workers' voice as a source of inefficiency and red tape. The expert group is, therefore, encouraged to consider what new ways can be established to find evidence for the effects of workers' voice.

In addition to gaining research evidence, the processes of influence should be established more clearly through testimonials. They can serve as starting points and hypotheses for further research.

Corporate restructuring is necessary and natural in market economies. We cannot expect companies to remain as they are, but expect them to change and to adapt. However, restructuring is often seen as a threat to employment and working conditions, as plants might

be closed and jobs might be cut. Also, restructuring often goes hand in hand with outsourcing and cost-cutting. It often takes place in a process of competition between different locations that offer their services for less and promise to be more efficient. Negative examples of corporate restructuring include firms that go after subsidies for investment and close their operations once these subsidies run out. The process of restructuring in itself poses a threat to employees of firms who might be made redundant. For them, the form, process and compensation are crucial. Good performance standards in corporate restructuring include a) timely information and consultation, b) fair procedures and c) protection and opportunities for affected workers. How restructuring processes and their effects for workers can be improved through workers' voice is, therefore, a second topic in our discussions.

Open questions:

- In modern transnational firms, strategic decisions might be taken on boards where workers' voice might not exist and where it is only exerted at the lower level. Where do strategic decisions and workers' voice actually take place?
- How does workers' voice have an influence and what are the preconditions for such an influence?
- How deep is the involvement of workers' representatives regarding investment decisions?
- What are the best ways to establish empirical evidence on the effects of workers' voice?
- What are the trends regarding training, pay-setting and restructuring in transnational firms?
- Is there a mismatch between the decision-making level and the representation of workers?
- How can effective monitoring be ensured and enforced?
- What are the themes of strategic discussions among workers' representatives in large firms? Do these discussions exist?

3.2 Sustainability and corporate social responsibility

In recent years, the expectation regarding the social and environmental performance of large firms has fundamentally changed. Until the 1990s, it was commonplace that companies rejected any responsibility towards their supply chain, their effects on the environment and even the role of bribery in gaining government contracts. Today, corporate behaviour regarding non-financial performance is more clearly defined and codified. Environmental, social and governance (ESG) factors have become a standard way to evaluate firms, when considering socially responsible investing. A number of rating agencies have started to assess firms

according to their ESG performance. Bribery is internationally banned, and the UN Business and Human Rights Agenda has defined clear guidelines and principles which companies are meant to adhere to. Moreover, sustainability has entered the discourse on corporate social responsibility. The ESG performance of firms is guided largely by voluntary activities, multistakeholder initiatives, NGOs and soft law through International Organizations. Only the OECD guidelines for multinational companies are verging on hard law. The Guiding Principles on Business and Human Rights (Nations, 2011) are soft law that is only effective if companies voluntarily comply with them.

The policy instruments that guide the corporate sustainability discourse have become more sophisticated over the last two decades. Non-financial reporting (and accounting) has become a major tool for companies to prove their goodwill in environmental and social performance. Non-financial reporting is now being taken up by the EU Commission to strengthen the participation of firms in CSR. Moreover, the pressure on firms to introduce due diligence procedures and explain their policies vis-à-vis human rights has become more dominant.

The ESG/Business and Human Rights Agenda only partially overlaps with the trade union discourse on protecting workers' rights in transnational firms. For a long time, the lobbying efforts by NGOs to hold firms accountable and to commit to ESG performance standards were perceived as competition by trade unions, and rivalry dominated the discourse. Trade unions claimed the monopoly over social issues in companies, whereas NGOs did not see the special role of workers' representation in companies. CSR was often seen as a PR ploy and not as a serious exercise. While the criticism was often justified, the policies and multistakeholder initiatives around CSR have had a real impact on corporate behaviour.

However, there is great room for cooperation between these two avenues. At the global level, NGOs and multistakeholder initiatives on labour standards have become as important as international trade union activities for the behaviour of multinational corporations (Hassel, 2008). The relationship should be mutually beneficial rather than competitive. The expert group is asked whether, and to what extent, we can find avenues for cooperation with the policy community that focuses on CSR and soft law approaches. While reservations vis-à-vis the NGO and CSR community are well grounded, in the long run, sustainability arguments are an essential part of well-being and good employment. Moreover, we can engage in a mutual learning process regarding effective policy instruments and collective action.

Open questions:

- What are the trends in sustainability policies in transnational firms?
- Can corporate sustainability policy instruments be used by workers' voice? If so, how?

- How can workers' voice push the sustainability agenda within firms?
- How can workers' voice strengthen multistakeholder initiatives to set labour standards?
- How can multistakeholder initiatives strengthen workers' voice?
- What are the best practices of sustainability approaches from a workers' perspective?
- What are win-win scenarios between CSR and workers' voice and how can they be achieved?
- How can cooperation and learning between NGOs, multistakeholder initiatives and trade unions be organized?
- To what extent are CSR initiatives and BLER in competition with each other?
- Do CSR policies foster the creation of transnational settings for expressing workers' voice?

3.3 Corporate governance

Corporate governance denotes the allocation of rights, obligations and decisions among various stakeholders of a company. The relationship between these stakeholders – shareholders and managers, but also creditors, employees, customers and clients, government, regulators and wider society – has been at the centre of most discussions on corporate governance and has profound implications for the role of workers' voice.

The majority view of the legal and corporate finance literature has a very clear concept of corporate governance. It rests on the assumptions that investors (shareholders) are the dominant stakeholder in a firm. Corporate finance and ownership of firms and the preferences of investors (return on investment) deserve a higher degree of protection and greater levels of control in a company. Investors have difficulties in exercising their rights in publicly listed firms, as they have collective action problems (coordination among many investors) and problems of information asymmetries (principal agent). The law and management practice should, therefore, focus on solving these problems.

In practice, this model has a number of flaws. Firstly, it assumes that shareholders are a homogeneous group with short-term, financial preferences. It does not give consideration to more long-term, strategic investors, who have other means to monitor corporate behaviour. Secondly, the standard corporate governance model has not proven to be an effective instrument in controlling management. A number of corporate scandals throughout the 1990s and 2000s have shown that investors' monitoring of effectiveness is low, and corporate control is much more exercised through other firms rather than small shareholders. Thirdly, the short-termism of the standard corporate governance model is not only harmful to the economy but

also to society at large. Finally, the standard corporate governance model has contributed to higher levels of social inequality in firms due to the lack of management oversight and an emphasis of remuneration policies that link managerial pay to stock market performance.

However, despite ongoing criticism, reviews and legal reforms, there is no clear and forceful demand for a fundamental rethink of corporate governance. On the one hand, there are discussions addressing short-termism within the framework of a shareholder-oriented corporate governance model. Compared to the scale of the problems and the excesses of managerial power, these reform discussions are modest and timid.¹⁷ There is an underlying fear of upsetting international investors, who have not only become very rich during the last two decades but also politically influential in many OECD countries.

More far-reaching, alternative models are discussed primarily in the management and in some factions of the legal literature (Johnston, 2012; Vitols and Heuschmid, 2012). They address the imbalance between investors and other stakeholders and argue in favour of reducing the privileges of shareholders. As other stakeholders also take risks when investing in the firm through loans (creditors), skills (employees) or the tax base and local environment (local communities), their interests should also be protected and taken into account in corporate governance legislation and codes (Blair and Roe, 1999). The duty of management should be broadened, from only taking care of investors' return expectations to fulfilling due diligence to a wider set of stakeholders.

Within the management and industrial relations literature, the role of employees is privileged, by assuming that both shareholders and employees make major investments in the firm and need protection (Gospel and Pendleton, 2005). In the wider management literature, stakeholders usually include a wider set of actors. A wider stakeholder approach is usually used as a reference point for the ballooning practice of corporate social responsibility (CSR). This is, however, not a topic of corporate governance but discussed under management strategy and, more generally, under the 'licence to operate'.

These alternative contributions and discussions of enlarging the role of stakeholders within the firm and reducing the privileges of shareholders have **not**, however, had a major impact in the policy arena.

On the other hand, it is increasingly acknowledged in the small field of comparative corporate governance (Aguilera and Jackson, 2003; Aguilera and Desender, 2012) that there are a number of fundamentally different models of corporate governance, which only partially correspond to

¹⁷ A good example is the book by Colin Mayer, who points to many problems but shies away from a clear reform agenda (Mayer 2013).

the shareholder-oriented, ideal-type corporate governance model. Rather than converging on one single model of shareholder-oriented corporate governance, this literature underlines the national diversity and the existence of different understandings of corporate governance. In Europe, in particular, corporate governance is embedded in a broader set of regulations that define the firm as a public institution and not just as a nexus of predominantly private contracts. This literature makes clear that, rather than treating European corporate governance traditions as 'deviant' cases, the success of European firms gives evidence that different institutional set ups can co-exist.

Secondly, the practice of corporate governance might be more firm-specific than the analysis of corporate governance law implies. Depending on the product market and ownership structure of transnational firms, the monitoring of firms might be based on a stronger stakeholder approach, even without the legal requirements to do so. Aguilera et al. (Aguilera and Desender, 2012) have pointed out that the obsession with shareholder rights covers up important factors that determine the governance of firms in the real world. It is often more important for the governance of large firms who owns the firm, whether it is dispersed shareholders or a family company, than what kind of corporate governance regulations apply.

The corporate governance diversity in practice is, therefore, a useful starting point when discussing alternatives and road maps of development. This diversity underlines that a) there is no singular model of convergence and b) allows a discussion of the pros and cons of several models.

Therefore, the discussion of corporate governance diversity should start with the following issues and questions:

- What are the fundamental differences between corporate governance models?
- Is the role of workers' voice a key difference between them, or are other factors at work?
- Are these differences primarily due to country-specific legislation and institutions or to firm-specific factors, such as corporate finance, ownership structures and production models?
- How does the transnational nature of firms impact on the coexistence of different corporate governance models?
- How can workers' voice contribute to the reform and improvement of corporate governance?

3.4 Institutional trajectories and functional equivalents

As outlined above, the institutional diversity between different national models of industrial relations and corporate governance in Europe has, in the past, been a major barrier for developing a common European Social Model. Diversity has further hindered the Europeanization of industrial relations, as any standardization at the European level would lead to losses in some models and be seen as inferior to the current standards. Also, as approaches value different institutions very differently, some forms of Europeanization might be seen as steps in the wrong direction.

Given institutional and organizational diversity, how can a common European model be designed and achieved? The concept of functional equivalents denotes different institutional structures that perform the same functions. Once the function of workers' voice is defined and agreed upon, different institutions might work towards that function.

Workers' voice aims to influence and monitor strategic decisions at the corporate level for the protection of workers' rights and interests by autonomous workers' representatives. Workers' voice, therefore, is broader than just BLER. It can be exercised through EWC and IFAs in a similar way. A broadening of the definition of workers' voice allows us to move our attention away from a legalistic discussion on thresholds of company size, number of seats and legal rights for workers on the board. While these issues are important and need to be discussed, in particular with regard to policy proposals, the expert group has the space and intellectual freedom to contemplate other avenues to achieve the goal of ensuring workers' voice.

The advantage of a broader perspective is that it links European developments to domestic institutions. If domestic industrial relations do not prioritize BLER, but rather focus on workplace representation or collective bargaining, these institutions can be seen as equivalents.

This is not new to European policy-making. The mode of functional equivalent instruments has been at the heart of soft governance mechanisms within the EU. The open method of coordination is based upon the agreement of targets, with a plurality of methods of how to get there. If workers' voice is an agreed target among the Member States of the EU, the exact form of workers' voice can be left to national actors.

The sticking point in discussions on functional equivalents is those cases where no equivalent forms of workers' voice exist. We may assume that workers' voice might be performed by a number of organizational forms such as BLER, EWC or IFAs. But what if none of these instruments are available? Can we think of policy instruments that facilitate a similar function (corporate monitoring, long-term approach of corporate governance), for instance through

extended information, consultation duties, transparency obligations or restrictions of shareholder rights?

The EGWV should contemplate the precise meaning of equivalents and the various forms it can take. Secondly, it should think of instruments that do not yet exist but might in the future be seen as equivalents. Where trade unions are weak and works councils and BLER non-existent, companies might be charged with stronger information and consultation duties in order to establish functional equivalents.

Secondly, existing forms of European workers' voice have initiated processes of institutional learning at the national level. Europeanization allows for a meeting of national traditions and an exchange about different perspectives. Shared experiences and common practice might develop in transnational firms in Europe. These experiences will feed back into national institutions, policies and strategies. This is a breeding ground for European labour relations.

Open questions:

- What are the potential functional equivalents beyond BLER, EWC and IFA?
- How can the genuine 'European' experience of workers' voice in transnational firms be documented and analysed?
- Should there be more European-level support for workers' voice in transnational firms?
- Is there a European model of interest representation?
- What are the linkages between workers' voice and other industrial relations institutions?
- How many different approaches towards workers' voice can we find within Europe?
- What are the areas of overlap between different approaches?
- Do company agreements and EWCs have similar effects as BLER?
- How do workers' representatives deal with national diversity?

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