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Employee value 2.0

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'on the face of it, shareholder value is the dumbest idea in the world'

Jack Welch, former General Electric CEO, the inventor of the concept of 'shareholder value', in the Financial Times series on the Future of Capitalism

With respect to corporate governance and workers' influence at strategic board level we come from different traditions in the labour movement. My experience, rooted in a Dutch background where a particular mixture of Anglo-Saxon and Rhineland elements exists, is that trade unionists and labour politicians have too often entrenched themselves in ideological battles against each other's systems. Discussions about whether shareholder activism is good or bad, whether employee participation at boardroom level corrupts, or whether funded pension systems are objectionable capitalist inventions, are simplistic and obsolete in my view and should be banned from modern trade union discourse. Instead, I would say that it is imperative for the labour movement to use optimally the different positions and roles that we are now in in our respective traditions and aim for a convergence or even merger of good practices of the different traditions. We should explore the revived current debates on corporate governance and financial reform in respect of their opportunities to strengthen employee stakeholder positions and use the momentum to establish new strongholds that are complementary in the different contexts. If there is a real paradigm change taking place in the strategies of companies after the failure of the shareholder value approach (see the quote of Jack Welch above) it is imperative that employees and their organizations both from the labour side and from the capital side endorse that development and play a role in it as active stakeholders. It is more than worthwhile to investigate the challenges for the trade union and labour movement.

Supercapitalism 2.0

First, it is important to acknowledge that capitalism has changed. The simple capital-labour scheme with entrepreneurs borrowing capital and hiring labour has changed into a much more

¹ This article is written in the author's personal capacity and does not necessarily reflect the views of any of the organizations with which she is affiliated.

complex globally intertwined business world dominated by financial markets. These financial intermediaries are not simply the traditional banks and regulated stock exchanges, but a much more complex web of badly or non-regulated financial players and instruments – with a great supremacy behind all of this of the oligopoly of Wall Street investment banks, headed by Goldman Sachs. This phenomenon of financialization of the economy has been described in the Summer 2009 issue of *Transfer* in all its consequences for company decision-making structures and industrial relations. Footloose holding companies like Jack Welch's General Electric that buy and sell their daughter and parent companies without scruples, a 'caste' of business school educated managers that hire themselves out temporarily to make the highest and fastest return on equity per quarter, shareholder activism by hedge funds that force split-offs or mergers that suit their short-term financial interests, and a boom in private equity delisting of public companies with a subsequent debt burdening, corporate tax avoidance and rationalization and restructuring activities for the workforce: these are the features of the 'market of corporate control' and the Supercapitalism that Robert Reich describes in its consequences not only for industrial relations but also for democracy and society.

Capitalisme contre capitalisme

Secondly, we have to take into account the different traditions and backgrounds on the two sides of the Atlantic, and in Europe on both sides of the Channel. The Anglo-Saxon vs. the Rhineland tradition is described by Michel Albert in *Capitalisme contre Capitalisme*.

For the sake of brevity I will only mention four elements:

1. dispersed shareownership, which was much more an Anglo-Saxon than a continental tradition, but which has now also become dominant everywhere in Europe for most of the larger companies (unless they were taken off the stock exchange by private equity firms that financed their takeovers with tax deductible debts – one might term this dispersed taxpayers financing ...).
2. the drive from the UK in particular to make sure that company boards work under the authority of shareholders (deciding in the AGMs on the basis of a *one share one vote* 'democracy'), the so-called 'principal-agent theory' of corporate governance that has permeated the US and continental Europe as well. The continental tradition is that shareholders do not own the company, but merely take financial shares in it, and that they are just one of the stakeholders whose interests have to be weighed and balanced by company boards, supervised and advised by supervisory boards in the interest of the continuity and sustainability of the company.
3. the tradition in continental Europe of i) a right to information and consultation of workers (in the European Union now codified in the EU Charter of Fundamental Rights as a basic social right and elaborated in the European Works Council and other directives), ii) a social dialogue between employers' organizations and trade unions at different levels (also embedded in the EU Treaty) and iii) systems of employee participation at board or supervisory board level, which are non-existent and controversial for Anglo-Saxon traditions (including for trade unionists ...) and explicitly left out of EU competence in the Treaty and only recognized and safeguarded by defensive rules, such as the Directive on employee participation linked to the European Company Statute;
4. a last dividing line that runs not just between Anglo-Saxon and continental Europe but square through the EU is the one between countries with and without funded occupational pension systems, or, more precisely, the tradition of pension funds in which social partners and trade

union trustees are part of the governance. Here trade unionists also form part of the capital side with their 'workers capital'. Through their pension funds' voting rights they potentially may exert an enormous influence as shareholders. The movement to use this shareholder position more actively has started on the Anglo-Saxon side but is now becoming an integral part of socially responsible investment (SRI) and environmental, social and governance (ESG) policy also with pension funds in the Nordic countries and in the Netherlands.

To keep matters simple I leave out a fifth element where labour and capital coincide: employee financial participation and shareownership.

Corporate governance 2.0, two trends

Corporate governance 2.0 should be a broader and more comprehensive concept and encompass also corporate social responsibility and sustainability from a broader stakeholder perspective than simply the shareholder value and principal-agent approach. This should resound not only in the management boards of companies but appeal as well to investors and shareholders.

Currently, I see two trends to embark on for a trade union strategy to increase the influence from a workers' perspective on more sustainable and socially responsible companies' strategies worldwide.

The first is the growing pension fund activism and the second the corporate governance emphasis on a stakeholders' approach and diversity in the board rooms. Both may converge in an input from the trade union side in the revitalized debates on corporate governance on both sides of the Atlantic. Even the focus on *independent* directors, that may seem contradictory to direct forms of employee participation at board level, may be reconciled and taken 'on board' in such a strategy.

In the European Union the new Internal Market Commissioner Michel Barnier launched a consultation in June 2010 that is so far focused particularly on the financial sector, but scheduled to be extended to the whole corporate sector later on. In the US the trade unions and their pension fund trustees (partially) succeeded in including in the Dodd-Frank financial regulation package 'Say on Pay' and 'Access to the Proxy' arrangements that give them more tools to influence nomination and remuneration of (independent) directors.

The increased influence that trade union trustees through their positions in pension funds exert in favour of sustainable and socially responsible company strategies could go hand in hand with a relaunch of (voluntary or mandatory) rights to nominate employee representatives or employee-backed independent directors (in single-tier boards) or supervisory board members (in two-tier boards) at the highest strategic level.

Road 1: Pension fund stewardship

The 'stewardship' approach that was introduced in the UK with the Walker Review and recently laid down in the Financial Reporting Council's Stewardship Code of July 2010 requires investors to take an active role and responsibility as shareholders to engage in strategic discussions about companies' strategies and policies such as the remuneration of top executives.

So far this stewardship approach has been formulated in a rather neutral manner with respect to the content of such company strategies, but it may well be linked to the ethical and ESG (environmental, social and governance) investment policies that pension funds and other institutional investors are engaging on (*inter alia* under the umbrella of the UN PRI, the United Nations'

Principles for Responsible Investment). Here is the first challenge for trade unions to focus on in the coming period.

The second is not to limit the focus only to defining recommendations and best practices for portfolio companies' policies on climate change, child labour, remuneration, etc. As I mentioned above: the world is no longer that simple that direct shareholders gather, discuss and decide at AGMs. The first problem is already the fact that investment positions of pension funds are very widely dispersed. Even the larger pension funds, that hold equities in thousands of corporates worldwide, have only tiny equity packages per individual company. Even if they cooperate and coordinate amongst themselves (as far as is allowed under 'acting in concert' rules) the necessary majorities are scarcely achievable. Another barrier is that many (particularly smaller) pension funds rely almost completely on their asset managers, custodian banks or a handful of mighty proxy agencies. So a second big challenge is to disentangle the complex web of intermediary and complex structured financial relations. Pension funds should thoroughly review and scrutinize the dependence of their asset managers and other service providers on the international financial engineering network of Wall Street as well as their increased investments in alternative 'tactic' asset classes and reliance on complex financial products from an ethical and ESG perspective. This more macro- and systemic risk oriented review requires quite sophisticated know-how about the world of finance. I would urge trade unions and pension funds to cooperate worldwide to build up expertise and exert their influence both on the internal funds' strategies as well as on the regulatory context. At present it is more than often the case that what ESG pension fund departments preach for the portfolio companies is completely at odds with what the investment departments buy into with their transactions.

Road 2: Employee board-level representation

Nor is the second inroad into responsible company decision making an easy matter. The push from the activist pension funds for majority voting on directors' nominations and for 'proxy access' was only partially successful in the final Dodd-Frank reform bill. As this article was being written though (August 2010), it was reported that the SEC, the US corporate governance watchdog, agreed on this 'access to the proxy' for shareholders with a 3 percent or more shareholding lasting three years or more. Companies will be obliged to include proposals for alternative candidates of such a shareholder grouping in their official AGM agendas and documents. The SEC decision was very controversial and the vote was split between the three Democrat and two Republican members of the SEC board. Thus a debate on this issue will continue to rage in the coming months. US pension fund trustees may use it to propose their own board candidates in order to nominate candidates favourable to workers' interests and with an ESG perspective on the companies' boards.

My impression is that so far there has not yet been much debate about this particular focus on better representing employee interests at board level. Most examples of joint action of pension funds have so far been appointing for instance green experts on the boards of companies with a poor environmental record. The link with direct employee and sustainable employment and social policy interests has not been made explicitly enough.

Nor is the link made in the EU Corporate Governance debate. In the European Commission's Green Paper commitment is given to a broader stakeholder mission of company boards and to the desirability of more diversity in quality and backgrounds of board members. The issue of how to link board composition to this stakeholder mission and how to ensure that it is not only capital that exerts its influence through AGM voting but that labour also gets its say on board nominations, is not dealt with. So far there is also no connection to the discussion on company law. The SE, the

European Company Statute, which provides for the creation of European public companies, is currently being reviewed without any ambition for improving the arrangements for employee board representation, and a proposal for a European private company statute (SPE) is pending that completely ignores the problem of undermining Member States' national company law provisions for employee board participation or co-determination. The European Parliament amended and repaired this in its first reading and urged the European Commission to consult the European social partners on how to deal with the problems of cross-border transfers of corporate statutes from different company law and labour law traditions and their consequences for employee participation, in a resolution that was adopted together with this first reading of the SPE proposal. So far there is no indication of any action either from the Commission or from the social partners themselves.

Co-determination 2.0

The relaunch of the debate on how to continue and reinforce the tradition of employee board representation or co-determination (the translation of the German *Mitbestimmung*) is not only highly topical in relation to these European corporate legal forms and to recent case-law on cross-border company transformations, but could perfectly fit into the broader debate on corporate governance and sustainable socially responsible companies. To be successful though, a precondition is not to confine dealing with the issue to a defensive and conservative approach focused only on protecting existing rights. I hope that the ETUC will be able to align the different national traditions and positions of its affiliates towards the common interest of increasing workers' direct or indirect input and influence at the highest strategic decision-making levels of companies also through creative new forms of participation, nomination and/or proposal rights. It will be interesting to assess the first experiences with the agreements that have been concluded for the SEs that have so far been established based on case-by-case negotiations that took place in the preceding years. In a Conference in November 2010 in Amsterdam, entitled 'Final call: Now Boarding', we hope to draw inspiration from these experiences and build up new momentum to push for employee board influence in European company law.

For the worldwide debate about corporate governance and for the US elaboration of the Dodd-Frank legislative package and the new 'proxy access' opportunities, the Committee on Workers' Capital that brings together trade union trustees in pension funds (also meeting in Amsterdam in November) could discuss how to design a joint strategy to use pension fund investors' power to nominate labour allies on company boards.

My view is that both strategies may be converged and mutually reinforced, taking strong elements from the Anglo-Saxon and the continental traditions and stepping beyond the narrow nationally defined traditions. In particular, the apparent contradictory demand of more independence versus direct employee representation should be overcome. Also, trusted supervisory board members (in a two-tier board structure) or non-executive directors (in a single-tier board structure) with an *independent status* can be searched for, recruited and found, that are highly committed to the interests of labour stakeholders in the company. I have done my best to be one myself and hope to meet, stimulate and create a network of an increasing number of similarly motivated and committed non-executives and supervisory board members. In my view this could also be a viable road to create critical, diverse and competent boards focused on the long-term strategy of sustainable socially responsible companies. Proactive and conscious nomination of such candidates, be it by trade unions, works councils or pension fund trustees via proxy access actions and/or agreements between alliances of (trade union trustees in) institutional investors and (trade union reps and

works councils in) investee companies, may be part of the strategy of the labour movement in the new phase of capitalism 2.0 to exert influence in the boardrooms of multinational companies. This is a final call: we have to board now!

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