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Trade unions and the new corporate sustainability

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Introduction

The onset of the 2008 financial crisis and growing concerns about the state of the planet have increased the pressures for changing ‘business as usual’ practices. Traditional questions about corporate accountability – i.e. corporate externalities; shareholder primacy; executive remuneration – are becoming more and more prominent in regulatory debates. We are witnessing the convergence of corporate governance issues and broader issues of social, climate and energy governance. In this context, recent analyses have focused on the twin phenomena of financialization and marketization of climate change policies, mainly putting investors and business leaders in the spotlight. However, little academic work has been done on the agency and role of trade unions (TUs) and their potential in supporting a more green and just economy.

This paper contributes to a better understanding of the role of TUs in the corporate accountability domain, focusing mainly on EU-level debates. It does so by discussing and confronting two distinct perspectives. On the one hand, a critical-political strand of literature interprets the increasing policies overlap between corporate governance and corporate social responsibility as a regulatory attempt to deflect ‘hard’ questions of corporate control to a ‘softer’ domain of corporate accountability. In this process, TUs’ demands for e.g. worker participation become tied up or even coopted in discussions about reporting and accountability. On the other hand, a socio-legal perspective acknowledges the need for ‘harder’ corporate accountability regulation, nevertheless it also warns against the limits of traditional command-and-control regulation and shows the existence of alternative roots. In particular it highlights the opportunity for trade unions to play a stronger regulatory role within a ‘transparency coalition’ that promotes long-term investments and pension funds activism. The paper empirically focuses on recent developments in EU corporate accountability and corporate governance to discuss the two perspectives.

The paper is structured as follows. In the following section, we first offer a brief outline of the current debate on the regulation of corporate accountability. In particular it discusses several key issues with regard to TUs and corporate sustainability. This concerns in particular questions of TUs strategy and agency in the area of corporate governance and corporate sustainability, as well as the substantial overlap between these two areas of regulation. Subsequently, we introduce two theoretical perspectives mentioned above which, as we would argue, offer fruitful avenues for further exploring recent developments with regard to the concept of the sustainable company. While these approaches are to some extent alternatives, it is still worth to discuss them together as they highlight complementary angles of the social, legal and political challenges to a more equitable and sustainable manifestation of the corporate form. In the empirical section, we then provide a brief overview and critical discussion of key regulatory developments in the domain of corporate accountability at the European level. In particular we highlight the possible contribution of the socio-legal and political-economic focus of TUs in shaping EU regulatory initiatives on corporate accountability. The paper then concludes with an outlook on the role TUs could have in advancing the concept of the Sustainable Company at the European level and beyond.

1. Trade unions and corporate sustainability

One of the consequences of the complexity and expansion of the CSR and corporate accountability field is that the literature struggles to deal with such an interdisciplinary topic. Mainstream literature on corporate social responsibility burgeoned around 2000s following Enron-style corporate governance scandals and tends to overlook the role of organized labour and TUs in their analyses. A large number of contributions come from mainstream managerial and law-and-economics studies. Overall, they are rather under-theorized (see Unerman *et al.* 2007) and have been criticized for being subsumed under the dominant neo-liberal and business-oriented discourse (Gray *et al.* 2009).

The debate about Corporate Social Responsibilities (CSR) and accountability dates back, at least, to the 1920s and 1930s. Although any attempt to offer an historical overview of such a complex and debated issue would go beyond the scope of this paper, it is crucial to highlight that earlier ideas about CSR are not mere precursors of contemporary ones. On the contrary, as pointed out by Ireland and Pillay (2010: 77), 'the idea about the "socially responsible corporation" which emerged in the 1930s and rose to prominence in the decades after the Second World War were markedly more radical than contemporary ideas about CSR.' The former, according to the authors, entailed fundamental questions concerning the governance of the company; the principle of shareholder primacy; the aim and nature of corporate institutions and directors' duties towards employees, consumers, creditors and society as a whole, as well as shareholders. The latter, by contrast, tends to be premised on the dominant law-and-economics approach to corporate governance (CG) within which directors are only accountable to their shareholders and large corporations are private entities aimed at profit maximisation. This shift has been widely attributed to economic globalization and financialisation of the last few decades that has resulted in increased gaps in regulation and unprecedented growth in the power of the global corporate-financial nexus (see e.g. Soederberg 2010). From a political-economic point of view the development of the CSR discourse can be traced back to three intertwined roots: the development of a responsibility vacuum in complex societies connected by a global division of labour; the political problem of attributing responsibility to concrete actors; and strategies of the corporate sector motivated by their own political interests to prevent damage to their image and the threat of regulation (Ungericht and Hirt 2010: 1). It has been argued that contemporary CSR have modestly contributed to the first two issues, focusing too much on the 'company-level'. As maintained by the late John Parkinson (2006), the 'modest' approach to CSR prevails – aimed at ensuring that companies take full advantage of those situations in which there is a natural convergence of business and societal interests (the so-called 'business case for CSR') – rather than a more ‘radical’ approach creating appropriate governance and regulatory mechanisms to ensure effective corporate social and environmental accountability.

During the last decade a new ‘corporate accountability movement’ has emerged to fill this gap both in the architecture and agency of corporate (social and environmental) governance. Many authors suggest that we are witnessing a shift from responsibility to accountability and are discussing new ways to re-radicalize and re-politicize the debate (e.g. Sadler and Lloyd 2009). Overall, the concept of corporate accountability can be understood as ‘an attempt to re-engage CSR with its radical roots and to challenge some of the tenets of neoliberal consensus’ (Ireland and Pillay 2010: 96). The difference between accountability and responsibility can be identified along two changes in the mode of regulation: Firstly, corporate accountability views the corporate voluntarism which characterises contemporary CSR as insufficient or, in some versions, fundamentally flawed, therefore calling for a shift from self-regulation to hard(er) regulation; secondly it calls for a restructuring of the underlying corporate governance paradigm from a technical law-and-economics approach to the recognition of conflicts and political trade-offs. Both shifts are still widely debated, however, and are taking place in a complex, dense and fragmented regulatory regime in which public, private and hybrid institutions are interacting. In this context, this paper seeks to contribute to this debate by focusing in particular on a crucial socio-economic dimension, that is the position and role of TUs, within the social struggles over the form and outcomes in the emerging ‘new corporate accountability’ regime.

While the literature on CSR and corporate accountability is extensive, there is comparatively little attention to the agency and strategies of TUs with regard to CSR as a regulatory paradigm. This is particularly regrettable as the relationship between trade unions and CSR is ambiguous and potentially fraught with tensions. Two dimensions should be highlighted here. On the one hand the question of where to locate CSR and corporate accountability in the wider regulatory domain, but also more fundamentally the interest and strategies TUs actors have with regard to CSR.

1.1. Trade unions between CSR, Labour Law and Corporate Governance

The employment relationship is of course structured contractually, and regulated by a variety of labour laws within a multi-level legal framework. At the same time, with the emergence of the shareholder value discourse underpinning regulatory developments within the corporate governance and company law domain, there has been an increasing bifurcation of labour law and corporate governance regulation, in content as well as in institutionally (Horn 2011). Labour law is increasingly defensive and takes on a soft regulatory form, while regulation to ensure shareholder rights and establish transparent market mechanisms is generally mandatory and binding. In the context of this shift, CSR has emerged in the 'grey area' of these developments, covering a variety of aspects that are considered relevant to the legitimacy and functioning of a broader business environment, but without mandatory regulation.

Many observers see CSR as response of business to social pressures. Murphy and Bendell for instance insist that 'the challenge is therefore to seize the opportunities afforded by corporate environmental politics, not lament its existence' (Murphy and Bendell 1999: 57). However, to accommodate the distinction between CSR and corporate governance, that is the dichotomy between corporate control and a fuzzy notion of moral corporate obligation, implies an unquestioning perpetuation of fundamental power asymmetries within the social relations that constitute the corporation. This is very clear when CSR become an alternative venue for issues that had previously been organised through regulation rather than voluntary commitment, most notably with regard to workers' rights in corporate governance. Within the 'parallel worlds' of corporate governance regulation and labour law (Zumbansen 2006), CSR constitutes a discourse through which e.g. worker information and consultation rights can be relegated into softer forms of regulation and management dialogue, rather than being safeguarded by 'hard' legislation. In this case, the locus of authority, that is within the CSR domain, shifts towards the corporations and the business community rather than the state (cf Matten et al 2003), so it becomes increasingly more difficult to renegotiate these governance structures through democratic processes.

The emergence of a more radical conception of corporate social responsibility in the form of corporate accountability seeks to challenge this consensus about this role of the state. It 'calls for a restructuring and rethinking of the relationship between business and the state, for more *legal* regulation of corporations by the state and other agencies, and for a return to 'hard' (or, at least, 'harder') law' (Ireland and Pillay 2010: 96). In particular, corporate accountability focuses on the disclosure of non-financial information on corporation's operations, strategies and governance, as well as legal strategies such as collective redress and the establishment of legal structures conducive to holding corporations accountable for transgressions against social and environmental norms.

1.2. Trade unions as actors in the corporate sustainability debate

The positions trade unions have on CSR, in particular as concerns the environmental dimension, are not unambiguous, however. While generally in favour of corporate accountability, CSR initiatives are not necessarily core concerns of TUs strategies. Which role TUs have within the emerging corporate sustainability framework depends on a range of factors, not least the level of regulation/reporting, overall strategies and resources, structural constraints at the firm/sectoral/national level as well as cooperation with other actors.

To start with, there is the question of which interests TUs would represent and advocate. TUs, as the primary manifestation of organized labour in contemporary capitalism, are faced with a fundamental dilemma. While on the one hand their objective is to at least negotiate the worst social consequences of capitalist competition with a focus on the underprivileged, at the same time the majority of their rank-and-file membership is composed of the relatively advantaged, core section of the working class. (The pattern of course varies according to the political and confessional orientation of particular trade unions.) This dilemma raises the question of whose interests TUs represent, and which interests take precedence in their immediate and long-term actions (Hyman, 2004: 23). It also has far-ranging repercussions for TUs positions with regard to environmental concerns. The most obvious tension is between the focus on defending existing jobs, often linked to a fundamental commitment to economic growth, and a concern to make employment, and the economy as a whole, more sustainable through addressing environmental concerns. However this is a rather dichotomous, or black and white, perception of TUs strategies. In this context, the fragmented and fluid interests of workers in contemporary capitalism mean that there is no clear interest model which would serve as anchor point for 'greening' their positions, and by extension trade union strategies. With workers being employees, pension fund beneficiaries, receivers of performance-related/variable pay, stockowners/shareholders, consumers, concerned citizens as well as social organisms dependent on increasingly scarce resources, it is clearly not possible to perceive of the social, economic and environmental dimensions of social organisation as isolated and conceptually separate

Traditionally, environmental concerns have featured in TUs perspectives in two respects, 'as an element outside of their principal field of activity, which they need to deal with in terms of industrial risk; and concerning problems related to employee health and safety' (Decaillon 2004). In particular with regard to this latter aspect, that is health and safety, unions indeed have a history as environmental actors, with specific reference to the working environment; however, going beyond this poses several crucial challenges for TUs (see Snell and Fairbrother 2010 for an overview). Within the established institutions of social partnerships, social dialogue, sectoral agreements or at the firm-level, due to asymmetrical power relations compromises to secure jobs while addressing sustainability concerns are likely to benefit the employers/owners/shareholders. Traditional TUs politics remains mired in this fundamental dilemma. As Snell and Fairbrother (2010:xx) argue, 'the prevailing ways that most unions organize and operate in relation to environmental concerns are often quite limited. Different or distinctive forms of solidarity may be necessary to develop awareness and construct strategies to address'.

In terms of agency, we can indeed witness a changing role for TUs in this regard. TUs have in recent years increasingly established cooperation with social movements, not just with regard to CSR (see e.g. Bieler 2008). However, as Hyman points out, engaging in 'contentious politics'" potentially 'redefines unions as outsiders in a terrain where until recently the role of insiders was comforting and rewarding' (Hyman 2004:22). There are also limits to the cooperation between TUs and social movements/NGOs. Not just with regard to the fundamental interests underlying and motivating strategies, but also with regard to organisational questions and existing power structures in a multi-level political configuration (see Vitols 2011 for a good discussion of potential cooperation). In particular with regard to the emerging corporate sustainability framework, the question of which role workers should have, e.g. in the process of monitoring boards, remains central to the discussion. This then again brings us back to the concern that concrete corporate sustainability initiatives might actually be compromising existing workers' rights, or preclude the possibility to extend them.

2. Theoretical perspectives

In recent years, the question of corporate accountability has increasingly come to the attention of political-economic and socio-legal scholars that have introduced a more critical account of corporate accountability. Both perspectives share a critique of the dominant 'modest' approach to CSR, based on a narrow and under-socialized approach to the firm as a nexus of contracts between shareholders (principals) and directors (agents) (Soederberg 2010; Picciotto 2011). However, critical political-economic and socio-legal approaches differ in their analyses of power asymmetries and the role of the legal complex in holding corporations accountable. In fact, as we shall see, on the one hand, the former offers a convincing account that deconstruct the struggles and conflicts that lie behind the 'governance turn' that characterized the 1990s and early 2000s 'neo-liberal age'. Nevertheless, they often rely upon a descriptive account of the actual tools and power the law has in forcing or promoting a socially and environmentally sustainable corporate behaviour. As Doreen McBarnet points out they might ask from law more than the law can actually deliver (2007). Socio-legal scholars, on the other hand, would have the tools to fully understand the complexity of corporate accountability legal dilemmas and the effective role that the legal-complex can play (see Teubner 2011; Parker 2002; McBarnet *et al*. 2007; Picciotto 2011). Yet, except from a few authors (Shamir 2005; Ireland 2008), this perspective is still offering an approximate account of the conflicts and power asymmetries that characterize the emerging corporate accountability regime. As noticed by Terence Halliday (2009: 167), 'for too long, sociolegal scholarship concentrated on the shift from law on the books to law in action, conceding lawmaking to political scientists. Obversely, political scientists were too often content to explain moves from practice to lawmaking without considering whether new statutes or court decisions actually produced changes in practice.' Halliday concludes that neither side can avoid embracing the other if strong theories of legal change are to prevail.

Drawing on both socio-legal and critical political-economic theories the following section juxtaposes these two approaches to contribute to a better understanding of the underlying conflicts, opportunities and threats that characterize the emerging corporate accountability regime. Moreover, focusing on the role of TUs in shaping it , the paper aims to offer a point of view and a voice outside the dyadic 'managers-shareholders' relation that dominates the literature.

2.1. CSR and corporate accountability – a critical political economy perspective

The discursive constitution of contemporary CSR represents an attempt to incorporate and depoliticise more radical demands on the governance and purpose of corporations. A range of scholars have formulated trenchant critiques on CSR (for an overview see e.g. the contributions in Utting and Marques 2009). Levy and Kaplan (2008) argue that CSR should, in a Polanyian vein, be seen as double movement, an attempt to establish a more socially embedded form of economic governance, but by deliberately bypassing the state. In an earlier neo-Gramscian account, Levy and Egan (2003) point towards the political struggles over corporate strategy. Blowfield (2005) evaluates the problematic relation between CSR and globalisation discourses – while CSR is more often than not understood as technical fix and instrumental mechanism to *mitigate* some of the detrimental consequences of globalisation, it does not contribute to question these developments, nor to *solve* them. Hanlon's perceptive analysis (2011) exposes CSR as a sophisticated political mechanism engineered by (mainly) Western elites, business, international organizations, NGOs and governments. However, within the broader literature on CSR, critical voices, whether from the left or the right, are increasingly marginalised; in particular many of the more policy-oriented publications shy away from taking a strong normative position but rather exhaust themselves in discussing indicators and procedures rather then the fundamental question of social power relations at the very basis of the modern corporation. Rather than fundamentally questioning and repoliticising the social content of the institutions that govern economic activities, CSR constitutes an *adjunct* to shareholder value (Ireland and Pillay 2010: 78), legitimising and hence at the same time reinforcing the dichotomy between 'social' and 'economic' interests. The rate at which CSR has spread throughout the global political economy in conjunction with the rise of the shareholder value paradigm is certainly no coincidence in this context.

In particular with regard to the current financial and economic crisis, the painful inadequacy of the CSR discourse to address more fundamental issues of distribution of corporate power has been magnified by the contribution of a shareholder value-oriented paradigm of corporate governance to the systemic crisis. Once again it has become clear that the conceptual isolation of CSR from debates about corporate governance can only fall short of understanding the social power relations at the heart of the modern corporation.

2.1.1. EU Corporate social responsibility as transformism

Attention to the changing form, mode and content of regulation raises the question of how these changes come about. Drawing on a critical political economy perspective, the point of departure here is the focus on social power struggles at European level (see e.g. Bieler and Morton 2001; Cafruny and Ryner 2003; Van Apeldoorn et al 2008). Rather than taking regulation and legislation, and indeed the European polity as such, as given, the question of how and *why*, as well as to whose benefit they came about is, central for understanding the political nature of European integration. The European Union, in this understanding, constitutes a social terrain on which different social forces struggle about contending projects of European integration, which include strategies, policy choices and governance processes. Regulation can here be seen as part, and indeed a juridico-political manifestation of, broader political projects of European integration.

In this understanding, CSR initiatives at the European level constitute a moment of *transformism* (Gramsci 1971), in which contestation and opposition have been incorporated, and effectively depoliticised, within a broad and non-binding process of civil society dialogue. At the same time, as the empirical account in a later section displays, recent developments at EU level are a fascinating display of an attempt by subordinate groups to *overcome* this clear strategy of *transformism.* As a regulatory domain, CSR and corporate accountability hence constitute prime areas for analysing social struggles between socio-economic actors at the EU level. In this context, it is also crucial to look briefly at the agency and strategies of trade unions at the EU level, in particular with regard to the European Trade Union Confederation (ETUC).

2.1.2. Trade union representation at the EU level

Organized labour at the European level, in particular the ETUC, has been perceived as, put bluntly, co-opted into the project of neo-liberal restructuring (Bieling and Schulten, 2003; see also Taylor and Mathers, 2004). The ETUC and the European Industry Federations, set up as lobby organizations for worker interests at the European level, have been incorporated into the emerging system of labour relations characterized by the European Social Dialogue and firm-level agreements. In particular, reassured by the implicit promises latent in Delors' vision of 'European social model', trade unions entered into a tacit agreement that intensified market competition and deregulation were unavoidable (Bieling 2001: 100). The institutionalization of the Social Dialogue in the Maastricht Social Chapter in 1991 has led to what Bieling and Schulten have called symbolic Eurocorporatism, incorporating TU associations into the hegemonic bloc supporting neo-liberal restructuring, while all the same 'keeping alive their functionalist hopes of a slow but steady expansion of European social regulation' (Bieling and Schulten 2003). Trade union strategies at the European level are mainly articulated within the EU institutional framework. This means that initiatives and policy objectives also remain *within* the broader political context of neo-liberal restructuring, rather than posing a fundamental alternative to it. However, while labour has, in the absence of strong uniform representation on the EU level and framed in the soft model of the Social Dialogue, acquiesced in the neoliberal programme under the promise of competitiveness and job growth, there is now increasing disillusionment with the flanking measures of the European social model. We will return to this aspect in the empirical section.

2.2. CSR and corporate accountability – a sociology of law perspective

It has become a commonplace that financial markets de-regulation has gone way too far (Wade 2008; Turner *et al.* 2010), and that we need a more effective system to hold business accountable. Therefore a variety of regulatory initiatives have been proposed: a cap to bankers' bonuses; tighter national and international supervision; a financial transactions tax; improved accounting rules; the re-introduction of the Glass-Steagal Act. Similarly, regulators have been urged to introduce direct legal obligation for business' violation of international labor standards and human rights or legal obligations that would force multinational enterprises (MNEs) to tackle their impact on the environment. It has been argued, in fact, that while CSR is promoted only through self-regulation and soft law, investor rights and financial liberalization have been actively promoted and preserved through a 'new constitutionalism' (Gill 1995) that reduces the ability of nation states to intervene on financial markets.

Calls for harder regulation of business have been rightly promoted by a number of scholars, TUs leaders and NGOs. As mentioned above, they are at the heart of the new corporate accountability movement for promoting a more just and green economy. However, we should be cautious in oversimplifying the real effects of simple legal provisions. There is a whole strand of socio-legal studies that share a common emphasis on the limits of the law in holding corporations accountable for the environmental and social impact of their activities (e.g. McBarnet 2007; Parker 2002; Picciotto 2011; Teubner 2011; Morgera 2009). In particular, socio-legal researches are sceptical about the real chances of traditional command-and-control regulation to change business-as-usual practices. As pointed out by Teubner (2011), the regulatory proposals that have been put forward to enforce corporate and financial accountability do have one problem in common: *fatta la legge trovato l'inganno*. Meaning, 'no sooner has a law been passed than the loophole appears'. 'The Achilles heel of such regulation is that national or international rules can always be effectively avoided; in the face of such enormous efforts at avoidance, ex-ante regulation is impossible' (Teubner 2011: 3). Teubner highlights the systemic nature of the current crisis and affirms that it has been fuelled by a deep self-destructive addiction to growth. He affirms that rather than driven by the greed and irresponsibility of single bankers or CEOs, it is based on 'addiction mechanisms' promoting a ‘compulsion to grow’ that is stronger than any external regulatory imposition. ‘Political-legal regulation and external social influence are only likely to succeed if they are transformed into a self-domestication of the systemic growth dynamic. This requires massive external interventions from politics, law and civil society: specifically, interventions of the type suited to translation into self-steering’ (ibid). As McBarnet argues with regards to corporate (ir)responsibilities, ‘the pervasive nature of such an approach to law in business suggests the need for some further, extra-legal driver not only to secure a commitment in business to socially responsible policies beyond the law, but to secure business’s responsible compliance with the law’ (McBarnet 2007:13). Peter Utting (2008) also notices that ‘the route to justice through liability is fraught with obstacles’.

Traditional command-and-control regulation of MNEs according to authors such as Christine Parker, John Braithwaite and Fiona Haynes may work better if integrated with a meta-regulatory approach to corporate accountability. In fact, traditional command-and-control regulation operates after the facts have already taken place, imposing liability for single misconducts (i.e. pollution; workers’ death or injuries; use of harmful products), however this approach does not intervene neither on the processes that have create the wrongdoing nor on their outcomes. Meta-regulation, instead, ‘uses various mechanisms to encourage or enforce business to put in place internal governance structures, management practices and corporate cultures aimed to achieving responsible outcomes’ (Parker 2007: 208). As Parker crucially underlines, ‘meta-regulatory law is a response to the recognition that law itself is regulated by non-legal regulation, and should therefore seek to adapt itself to plural forms of regulation’ (Parker 2007: 213). Within this perspective the law finally reaches out to communities, networks and organizations, using their ability to regulate themselves or regulate one another responsibility.

The authors however acknowledge the critiques that, if CSR meta-regulation will focus on internal governance processes (‘self-regulation’), the law runs the risk of becoming ‘a substanceless sham, to the delight of corporate power mongers who can bend it to their interests’ (Parker 2007: 209). Therefore, they clarify that law that meta-regulates CSR should have three distinctive characteristics (Parker 2007: 215): 1. It must be aimed at making sure that companies meet ‘values that transcend narrow self-interest (e.g. a healthy environment; a fair and competitive market; human rights or labour rights). 2. It must be aimed at making sure these values are ‘built (institutionalised) into the practice and structure of the enterprise.’ There is an extensive literature on what it takes to ensure internal commitment and compliance (Haines 1997; Parker 2002; Prakash 2000). In general formal governance structures and management systems have to be put in place to produce a responsible management and culture in practice (i.e. performance measurement, reporting and monitoring systems). 3. It must recognise that ‘the main goals of the organisation’ are still to be pursued within the responsibility framework. Meaning, on the one hand, companies are allowed to tailor themselves how to institutionalise responsibility; on the other hand, it must happen within a legal corporate accountability framework. Then meta-regulating law is still law, not merely self-regulation. Overall, 'meta-regulation requires organizations to implement processes that are aimed at making sure they reach the right results in terms of actions that impact on the world' (Parker 2007: 217).

Comparing the critical political economic perspective outlined above with this socio-legal strand of literature we can highlight one main difference, in their analyses of the emerging accountability regime. The former account tends to dismiss it as 'soft law' and corporate 'self-regulation'. Their account is pivoted on the idea that there is hegemony of neo-liberal ideology and some socio-economic constituencies have imposed their interests through soft corporate accountability and strong protection of investor's rights. The latter, instead, assesses the emergence of the corporate accountability movement as the result of the exhaustion of the traditional state-centred hierarchical regime and the emergence of a new one (alternatively defined as 'regulatory capitalism' (Braithwaite 2008); corporate capitalism (Picciotto 2011); etc.). Overall, a strength of the socio-legal account lies in the recognition that going back to old-fashion command-and control market regulation is a delusional thought, it would be like trying to put the toothpaste back in its tube. Conversely, its weakness lies in their largely descriptive analysis of the conflicts and power relations that are shaping the emergence of corporate accountability regulation (see i.e. Levy *et al*. 2009; Newell 2008; Ungericht and Hirt 2010). In particular, contesting voices and positions are often overlooked and great emphasis is given to the *voluntary* role played by enlightened managers and investors in enhancing the accountability of business. Instead, as McBarnet points out

> the reality is that describing CSR as voluntary is a little misleading. The adoption of CSR policies by business has taken place in a very specific context. If CSR is self-regulation by business, it is nonetheless self-governance that has received a very firm push from external social and market forces. From the start, 'voluntary' CSR has been socially and economically driven (2007: 12).

In effect, the new consensus for regulating corporate accountability emerged in a particular politico-economic and politico-ideological context. The very public contestation by the Seattle movement; the onset of the Asian financial crisis and the Enron and WorldCom scandals delegitimized the public image of large corporations and strengthened the idea that financial-led capitalism was putting profits above people (Klein 2000; Bakan 2004) and were actually 'out-of-control' (see Strange 1998). In particular, the Enron case undermined investors and consumers' trust, further promoting the rise of corporate accountability regulation.

2.2.1 Trade unions and the emergence of a 'transparency coalition' for CSR

Drawing on Paterson (2010) corporate accountability can be better understood as a crucial field of 'legitimation and delegitimation' of the dominant regime of accumulation that in the 1970s was the Fordism and nowadays, in Western societies at least, is increasingly financial capitalism. Such an account may help us to overcome the limits of the analysis of power and conflicts as outlined by most of the socio-legal literature. Paterson maintains that the very first emergence of corporate accountability ideas, back in the 1960s and 1970s, resulted from the pressure that organised labour exercised on managers and block-holders during the Fordism. In a completely changed context, its current re-emergence during the last decade can be similarly understood as the attempt of institutional investors and financial analysts to legitimise their position of control over corporate resources, increasingly delegitimized by corporate scandals, financial instability and social and environmental disasters. In other words, a fundamental role in building the Fordist compromise – characterized by a more radical CSR ideas and practices as discussed by Ireland and Pillay (2010) – has been played by contestation of the dominant regime of accumulation by trade unions and organised labour. Dealing effectively with a complete transformation of society in the direction of a more just, ecological and financially sustainable future requires a dramatic restructuring of the global economy – starting from the complete dependence from fossil fuel – that, as Teubner affirmed, cannot be imposed to the corporate-financial nexus simply by law. However the emergence of an apparent contradiction between social and environmental challenges and the current regime of accumulation is creating a widespread realisation that 'business as usual' is no longer a feasible option. According to Paterson, the recent emergence of a broader consensus for corporate accountability regulation is 'capital's first attempt to suture this contradiction' between the forces of production and the ecological and social conditions of production (2010: 363). Its conclusion is that, given that such a contradiction might endanger the growth on which capitalism is systematically dependent, the task actors face is to construct a 'sustainable regime of accumulation' which can be viable economically and sustained politically in the face of opposition.

Turning to the role of TUs and organised labour within this situation, as we already noticed they struggle to be the driving force towards the creation of such a sustainable regime. First of all, there are different traditions and sensitivities among TUs with respect to the issue of corporate sustainability. Secondly, there is a traditional friction, not just within business but even within organized labour between growth and sustainability. Job creation and retainment – independently from its environmental and social impact – has always been the main priority for TUs. Furthermore, there are other actors, primarily NGOs, consumers and sustainable investors, that are particularly creative, keen and effective in dealing with the promotion of a more just and green economy. They represents, in the eyes of TUs leaders, both possible allies and potential competitors.

In particular we are witnessing a shift in the driving forces behind the emergence of the corporate accountability movement. TUs and NGOs used to be, until a few years ago, the main and only advocates of those policies. In the last decade, however, the role of investors has changed. Witness e.g. the creation of transnational initiatives such as the Carbon Disclosure Project (CDP) and the UN Principles for Responsible Investment (UNPRI) etc. Institutional investors are becoming enthusiast supporters of corporate social and environmental accountability regulation. Davis et al. (2006), for instance state that 'thanks to the rise of mutual funds and retirement plans, the actual owners of the world's corporate giants are no longer a few wealthy families. Rather, they're the huge majority of working people who have their pensions and life savings invested in shares of today's largest companies.' Hawley and Williams analyse 'the rise of fiduciary capitalism' and consider institutional investors as 'universal owners' (2000 and 2007). According to their argument, due to their size, which has grown immensely in the last three decades, large institutional investors have become 'universal owners'. Meaning that they have developed a natural interest in macro-economic performance of the economy as a whole, including infrastructures, fiscal and health policies, education and climate change. In fact, as they actually own a cross section of the whole world economy, they internalize both pecuniary and non-pecuniary externalities generated by individual companies that are in their portfolio. Universal owners, therefore, have a financial interest in reducing social and environmental negative externalities. Paradoxically, critical legal and political theories oppose those projects, exposing the 'marketization' of the social and environmental accountability movement, heavily criticizing regulatory initiatives such as the GRI (Dingwerth and Eichinger 2010) and the CDP (Bulkeley and Newell 2010).

However, considering corporate accountability as a field of legitimation and delegitimation this dynamic should not come as a surprise. The dominant law-and-economics literature attempts to use 'sustainability' to legitimise shareholders claims to be 'the owners' of corporations against managers and block-holders. Critical theories are, on the other hand, are using the 'sustainability' argument to legitimise the claims that corporations should be accountable to TUs and civil society. What is emerging is also a third way, an attempt to reach a compromise between the two positions, theorised by the advocates of 'regulatory capitalism' and meta-regulatory approaches (see Parker 2002; Braithwaite 2008). Drawing on their account and on Gourevitch and Shinn's 2005 study of corporate governance coalitions we can glimpse the emergence of a 'transparency coalition' including not just the 'usual suspects', trade unions and NGOs, but also long-term investors, such as pension funds and responsible investors. The origin of this coalition is in the 1990s CG reforms that strengthened the rights of minority shareholders and transparency and disclosure requirements across Europe. Overall, it promotes the adoption of environmental, social and governance (ESG) disclosure standards as it happened in Denmark in 2008, inspired by the CG reforms of the 1990s driven as well by institutional investors. This development leaves also greater room for manoeuvre to trade unions which can use this information and the recognition of the relevance of social and environmental issues as a way to affirm their role as stakeholders. In particular, through their positions in many boards of directors of pensions funds would be able to play a new, crucial role both as insiders and outsiders in promoting corporate accountability and sustainability. Unfortunately, trade union representatives in pension funds boards are more often than not acting only in a way that maximises their investments returns overlooking opportunities for ethical and responsible investments. The following part will now consider in more details the emergence of a new corporate accountability regulation at the European level, and the struggles of trade unions and other actors in shaping it.

3. Corporate social responsibility and corporate accountability at the EU-level

In this section, we provide an account of the developments in the area of CSR and corporate accountability at the European level. As the scope of this article does not allow for an extensive coverage (see e.g. De Schutte 2008 for an excellent overview), we have divided the analysis in three stages, focusing on the emergence of the CSR debate from around 2000 onwards, then the contestation and standstill of the process around 2006, and finally the rise of the corporate accountability concept following the manifestation of the financial and economic crisis from roughly 2008 onwards.

3.1. The emergence of a CSR debate at EU level

CSR came to the European level much later than in many national and international (and even global) contexts. Around 2000, in fact, both Norway and France had already approved new accounting laws mandating companies to include detailed non-financial information in their management reports. While many civil society organisations had long been arguing for a debate about EU-level CSR standards, and the European Parliament had already in 1999 called for creating a stakeholder forum for the monitoring of voluntary codes, it was only in the context of the Lisbon strategy that the European Commission began to engage with the possibilities of EU CSR. From the beginning, the Commission saw its role as merely facilitating a positive climate encouraging dialogue and learning about CSR, rather than mandating concrete outcomes.

Already in 2001, the Green Paper that had to translate the Lisbon commitment for CSR into policies opted for a 'modest' definition of CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis' (European Commission 2001: 366). In the subsequent 2002 Communication, the Commission confirmed that CSR is 'behaviour by businesses over and above legal requirements, voluntarily adopted' (European Commission 2002: 347). Following this framework, DG Employment, changed with the task to elaborate an ambitious EU framework on CSR, had to exclude *a priori* any proposal entailing direct legal obligations on companies. The DG faced the usual dilemma: how to enforce CSR by law if it is not law? As a solution, it was agreed to focus on meta-regulatory mechanisms of corporate accountability based on what was already the dominant regulatory principle in business regulation: transparency and disclosure. In fact, as explained by Parkinson (2006) 'while CSR refers to conduct that is voluntary, the techniques relied on to promote it might themselves involve the imposition of binding obligations' (Parkinson 2006: 6). The idea, therefore, became to create a European regulatory framework that would *encourage* corporations, through transparency and disclosure, to become accountable to their stakeholders. In October 2002, the Commission launched the EU Multi-Stakeholder Forum (MSF) on CSR open to all parties involved: NGOs, trade unions, companies, investors, etc. However, negotiations within the MSF proved to be very tough. The corporate side (i.e. BusinessEurope), in fact, on the basis of the Green Paper and Communication on CSR, stressed the voluntary nature of non-financial disclosure. Trade unions and NGOs, on the other side, blamed the Commission for failing to ensure that the EU would directly tackle the real issues of companies' misbehaviour within and outside the Union. For them transparency and disclosure talks were already perceived as renouncing the option of direct legal obligations. Therefore they insisted for obtaining at least binding and detailed disclosure rules that had to be independently monitored. The debate resulted in a deadlock on the issue of mandatory versus voluntary rules. The main result of this phase has been the Directive 2003/51/EC that introduced to EU Law the requirement on companies to include 'both financial and, *where appropriate*, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters' (emphasis added).

In contrast to this less of lukewarm development of CSR at the European level, the European Commission, under the remit of DG Internal Market, pushed forward a strong agenda of company law and corporate governance initiatives, in particular within the framework of the 2003 Company Law Action Plan (Horn 2011). It is rather remarkable, but of course not coincidental, that these two dimensions of the governance of corporations should have been discussed in complete isolation from each other.

3.2. Deadlock and contestation of the Commission's CSR agenda

While the EU Directive was meant to be the first step towards the creation of an EU framework on ESG disclosure, it turned out to be the only one. In fact, in 2005 the Barroso Commission replaced Prodi's, and the EU initiative on CSR lost momentum. In particular Barroso decided to 'brutally' transfer the mandate for elaborating CSR policies from the DG Employment to the (more business-oriented) DG Enterprise. This political decision was followed by a second Communication published on 22 March 2006 in which the new Commission strongly re-affirmed the voluntary nature of CSR by insisting that:

> because CSR is fundamentally about voluntary business behaviour, an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation (European Commission 2006: 2)

In response, the EU Parliament passed, by a large majority in plenary, a resolution urging the EU executive to extend legal obligations to some key aspects of corporate accountability, such as directors' duties, foreign direct liability and mandatory disclosure for lobbyists. The EU executive's reaction was to reaffirm once again, in March 2007, that CSR is a uniquely voluntary measure which 'should not be regulated at the EU level.' The MSF soon became a private partnership between companies and the DG Enterprises and, as a result, NGOs and TU started to boycott and, finally, abandon the Forum. The 1st of March 2008 a European Alliance for CSR led by corporate representatives was created by the EU Commission: corporate lobbyists had succeeded to keep European non-financial disclosure within a self-governance regulatory scheme. As requested by BusinessEurope, the Commission explicitly suggested that non-financial disclosure should be regulated through voluntary guidelines, principles and standards that had been created by global voluntary regulatory networks, such as the UN Global Compact, the GRI and similar. The Commission's CSR agenda, which had initially created the hope for a strong European legal framework on corporate social and environmental accountability, had become a disappointment for trade unions and NGOs.

3.3. Emergence of corporate accountability paradigm

The financial crisis and rising anxiety about climate change however revitalised the EU regulatory initiative on corporate social and environmental accountability. The new phase was mirrored firstly by a speech in February 2009 by the EU Commissioner on Enterprises and Industries, Günter Verheugen, which for the first time since the Barroso Commission were installed, openly highlighted the need for talks among all stakeholders on ESG disclosure. As a consequence, in September 2009, DG Enterprise took the initiative of hosting a series of workshops on ESG disclosure each exploring the position of six groups of stakeholders: enterprises, investors, TUs, NGOs, public authorities and professions (accountants, etc). Significantly, in the summary of discussion of the last workshop, it emerged that

> ‘a decision not to change EU policy would send a strong political message to enterprises and other stakeholders that the European Union believes business-as-usual is desirable and feasible, whereas the multiple sustainability challenges we face demand fundamental change. (…) ESG disclosure is a political issue not just a technical issue. *Tinkering is not a political message*. (EU 2009: 3, emphasis added)

The conclusions of these workshops have been discussed during the conference organised by the Spanish Presidency on 25-26 March and further debated in a plenary meeting of the European MSF on CSR in November 2010, confirming the broadening interest for reviewing the existing regulation on non-financial disclosure. Thereafter DG Internal Market launched a consultation open to all interested stakeholders ‘with the view of improving existing policies on disclosure of corporate social and environmental information, and respect for human rights, including possible proposals for new initiatives and/or revised legislative measures’ (EU 2011: 2). The consultation attracted an extraordinary number of responses - over 300 - and in April 2011 the Commission officially announced that will be advanced a legislative proposal by the end of the year on non-financial disclosure. This outcome represents a U-turn compared to June 2007 when it explicitly excluded the need for further legislative initiatives (‘CSR should not be regulated at the EU level’). The contradiction is even more apparent when recalling that the Commission has not changed neither its political majority nor its President, José Barroso.

These developments should again be seen in a wider context, in particular in relation to regulatory developments in the corporate governance domain. In the context of the financial and economic crisis, the European Commission seems to have developed doubts about its own corporate governance paradigm.

> The financial crisis has shown that confidence in the model of the shareholder-owner who contributes to the company's long-term viability has been severely shaken, to say the least […] It raises questions about the effectiveness of corporate governance rules based on the presumption of effective control by shareholders (European Commission 2010).

Indeed, in July 2011, the EU released a Green Paper on Corporate Governance, reviewing the Directive 2006/46/EC, explicitly warning that shareholders have to be more involved in CG issues if they want to be recognised as the owners of the company and they should also take an interest in sustainable returns and long-term companies' performances.

3.4. Analysis

After around a decade of CSR at the EU level, the debate has thus come a long way. De Schutter (2008: 235) here offers two explanations for the failure of CSR at EU level. Either the Commission, through setting up a multi-stakeholder forum without any strong mandate, in fact lost control of the process, which was effectively 'hijacked' by business. On the other hand, within the context of the reorientation of the Lisbon strategy after 2005, efforts refocused on growth and employment, rather than finding a balance between the parallel objectives of economic growth and job creation, environmental sustainability and social cohesion. How can we make sense of the developments, and what do they tell us about the prospects for a sustainable company?

3.5. Beyond transformism?

Given the central position of the European Commission within the governance of the Single Market, however, it seems unlikely that the process of CSR and corporate accountability would have indeed been simply appropriated or captured by business interests. The very real political conflicts between the Commission and the coalition of trade unions and NGOs indicate that the Commission indeed changed their perception of how to structure the regulatory debates at the EU level. To this extent, the transformism that has been apparent in the early stage of the process has successfully been contested by this coalition, as the outcomes of regulatory debates are much more likely to result in mandatory outcomes now. Also, for the first time, corporate accountability and corporate governance are now being discussed in the same forums, in particular with regard to non-financial disclosure requirements. As far as these debates go, the coalition of NGOs and trade unions has thus also succeeded in reasserting the role of the state, in this case the European Union, to establish mandatory requirements for certain dimensions of the governance of businesses. At the same time, as long as corporate control remains firmly isolated and exclusively allocated to owners of capital, the core of the neoliberal corporate governance project stays intact, and corporate accountability remains an *adjunct* rather than a mechanism to change the power relations in contemporary capitalism.

3.6. Towards the emergence of a transparency coalition?

Following from the socio-legal analysis outlined above, the recursive emergence of a EU corporate accountability regulatory debate (see Halliday 2009) as it has been unfolded in the previous section can be understood as a field of legitimation and delegitimation. Overall, we can identify a shift from an earlier phase driven by NGOs and TUs and the last episode, after 2008, driven by a broader coalition led by institutional investors. According to a series of preliminary interviews that have been conducted at the EU Commission and the main stakeholders involved, in fact, institutional investors and financial analysts have been the driving force behind this change. A top EC figure at DG Enterprises, in particular, recalled that the turning point happened at the MSF in 2009 as financial analysts and not just the 'usual suspects' (i.e. TUs and NGOs) came to demand for better ESG information. In effect, the Federation of European Financial Analysts has been very active in promoting ESG disclosure and in particular has elaborated 'a guideline for the integration of ESG into financial analysis and corporate valuation' (EFFAS 2010). The question is whether this unprecedented 'transparency coalition' that has supported the recent EU Commission's initiative on ESG disclosure can work as a constituency for broader and more ambitious transformations that would favour a more just and sustainable economy?

4. Some concluding remarks

The paper has discussed two perspectives – a critical political-economic approach and a socio-legal one, through which recent developments in the regulation of corporate accountability within the European Union regulatory arena can be assessed. In particular it has considered the role that trade unions can play in shaping this emergent regulatory regime.

Both perspectives share a critique of the dominant 'modest' approach to CSR, based on a narrow and under-socialized approach to the firm as a nexus of contracts between shareholders (principals) and directors (agents). However, critical political-economic and socio-legal approaches differ in their analyses of power asymmetries and the role of the legal complex in holding corporations accountable. In fact, as we have seen, on the one hand, the former offers a convincing account that deconstruct the struggles and conflicts that lie behind the 'governance turn' that characterized the 1990s and early 2000s 'neo-liberal age'. Nevertheless, this account often relies upon a descriptive account of the actual tools and power the law has in forcing or promoting a socially and environmentally sustainable corporate behaviour. Socio-legal scholars, on the other hand, would have the tools to fully understand the complexity of corporate accountability legal dilemmas and the effective role that the legal-complex can play. Yet, except from a few authors, this perspective is still offering an approximate account of the conflicts and power asymmetries that characterize the emerging corporate accountability regime.

Drawing on both socio-legal and critical political-economic theories the second section has juxtaposed these two approaches with the aim to contribute to a better understanding of the underlying conflicts, opportunities and threats that characterize the emerging corporate accountability regime. Moreover, focusing on the role of trade unions in shaping this process, the paper has attempted to offer a point of view and a voice outside the dyadic 'managers-shareholders' relation that dominates the literature. The critical political account maintained that rather than fundamentally questioning and repoliticising the social content of the institutions that govern economic activities, CSR constitutes an *adjunct* to shareholder value, legitimising and hence at the same time reinforcing the dichotomy between 'social' and 'economic' interests. In this understanding, CSR initiatives at the European level constitute a moment of *transformism* (Gramsci 1971), in which contestation and opposition have been incorporated, and effectively depoliticised, within a broad and non-binding process of civil society dialogue. While there has been successful contestation of the *process* of CSR at the EU level, the current regulatory debates with regard to corporate accountability are not essentially changing the *content* and *power relations* within the intertwined domain of corporate governance and corporate accountability.

The socio-legal account acknowledges that there is a need for hard(er) regulation and that the current approach to CSR is rather 'modest', however is rather sceptical about the real chances of traditional command-and-control regulation to change business-as-usual practices. According to Teubner's critique (2011), the regulatory proposals that have been put forward to enforce corporate accountability do have one problem in common: *fatta la legge trovato l'inganno*. Meaning, 'no sooner has a law been passed than the loophole appears'. An alternative root that has been proposed draws on meta-regulation (Parker 2002 and 2007) yet it has to be supported by a stronger analysis of the conflicts and power relations that are driving the emergence of corporate accountability regulation. Drawing on Paterson (2010) corporate accountability regulation can be better understood as a field of 'legitimation' and 'delegitimation' and TUs role can be seen within a broader 'transparency coalition' composed also by NGOs and responsible investors.

The narrative has outlined the history of the emergence of corporate accountability in the EU policy debate during the last decade. It is important to add here that recent developments tend to be focused on environmental rather than social information. The former are considered more 'material' and 'quantifiable' key performance indicators (KPIs), in particular considering carbon disclosure. Institutional investors are keeping and even strengthening their key position of control over company's resources and management, picturing themselves as 'enlightened shareholders' and referring to ideas of 'shareholders democracy'. Yet the emerging regime of ESG disclosure leaves also greater room for manoeuvre to NGOs and trade unions that can use this information and the recognition of the relevance of social and environmental issues as a way to legitimise their role as stakeholders. However, the current expansion of ESG disclosure risks hiding the expansion of a narrow, shareholder-centred fiduciary 'sustainable' capitalism and the dismantling of the Continental European approach to corporate accountability based on a plurality of interests, in particular on the supervisory role of employees. The key challenge for the emergence of a 'sustainable regime of accumulation' supported by a broad 'transparency' coalition of investors, trade unions and NGOs remains a strong definition of a new model of 'sustainable company' (see Vitols and Kluge 2011; Kruse 2010).

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