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The OECD Principles of Corporate Governance

An Evaluation of the 2004 Review by the TUAC Secretariat

October 2004

About TUAC...

The Trade Union Advisory Committee (TUAC) to the OECD is an interface for labour unions with the OECD. It is an international trade union organisation which has consultative status with the OECD and its various committees.

TUAC's origins go back to 1948 when it was founded as a trade union advisory committee for the European Recovery Programme - the Marshall Plan. When the OECD was created in its current form in 1962 as an intergovernmental policy making body, TUAC continued its work of representing organised labour's views to the new organisation. The OECD is now changing again, taking in new members and becoming a leading forum for intergovernmental policy making to manage globalisation. TUAC's role is to help ensure that global markets are balanced by an effective social dimension. Through regular consultations with various OECD committees, the secretariat, and member governments TUAC coordinates and represents the views of the trade union movement in the industrialized countries. It is also responsible for coordinating the trade union input to the annual G8 economic summits and employment conferences.

TUAC's affiliates consist of over 56 national trade union centres in the 30 OECD industrialised countries which together represent some 66 million workers. It is they who finance TUAC activities decide priorities and policy and elect the TUAC officers.

The majority of TUAC affiliates are also affiliated to the main international trade union confederation the International Confederation of Free Trade Unions (ICFTU), and some to the World Confederation of Labour (WCL). Most European affiliates also belong to the European Trade Union Confederation (ETUC). TUAC therefore works closely with these international trade union organisations as well as with the International Labour Organisation (ILO). TUAC also works closely with Global Union Federations to ensure effective trade union input to OECD sectoral work such as education, public sector management, steel, or maritime transport.

TUAC operates through a small secretariat, based in Paris, of 5 policy staff and 3 administrative staff. John Evans is the General Secretary of TUAC.

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Introduction

First agreed in 1999, the 2002 OECD Council meeting at Ministerial level agreed to revise the OECD Principles of Corporate governance. TUAC, our affiliates and partners participated actively in the process. The process which began in March 2003 resulted in a revised set of Principles being adopted at the May 2004 meeting of the OECD Ministerial Council. Overall the newly revised Principles should be seen as part of the continuing effort to reform corporate governance so as to ensure more accountable corporations. The improvements in the stakeholders chapter give trade unions a platform to take forward the debate to help ensure that they and the workforce have a voice in the corporate decision making process. However in other areas much more needs to be done beyond this review.

What follows is an evaluation of both the negotiating process and the outcome of the exercise, and has been prepared by the TUAC project post on corporate governance and accountability.

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Background to the 2004 Review of the Principles

The 1999 OECD Principles of Corporate Governance

Following the wave of financial crises that swept across developing regions in 1997/8, policy makers, under pressure from investors that had seen their investments crash, requested the OECD to develop a set of Principles of Corporate Governance. TUAC was invited on an informal basis to participate in the negotiations conducted by the then OECD Ad-hoc Task Force on Corporate Governance, established by the April 1998 OECD Ministerial Council meeting. Twelve months later in May 1999 Ministers adopted the OECD Principles of Corporate Governance, the first international standard in this area. Whilst they covered mainstream corporate governance issues; shareholder rights, boards, and disclosure and transparency, what really distinguished them was the inclusion, following trade union pressure of a chapter covering the Role of Stakeholders in Corporate Governance – in particular workers. More important than the contents of the chapter, which the international labour movement anyway saw as a ‘platform’ to build upon, was the recognition by the world’s leading industrial governments, that corporate constituents (workers), other than shareholders had rights within corporate governance, which had to be respected. Equally important, the chapter gave developing and transition country trade unions a seat at the table as part of the follow-up work by the OECD and World Bank to implement the Principles in their countries.

The 1999 Principles which contained five chapters was an attempt to strike a balance between Anglo-Saxon and Continental Rhineland models. The first two chapters addressed the “Rights of Shareholders” and “The Equitable Treatment of Shareholders”, while the last two chapters focussed on the role of the board (Chapters on “Disclosure and Transparency”, and “The Responsibilities of the Board”), whether single or two tier systems. A fifth chapter on “The Role of Stakeholders in Corporate Governance” was included, the focal point being workers. That was not without controversy, and the opposition of a number of governments, BIAC¹, and some representing the financial investor community led to it being deleted from the first negotiating draft prepared by the OECD Secretariat. However, it was possible to convince a sufficient number of governments to reinsert the chapter. That initiative was to transform the Principles from simply being a vehicle to promote shareholder rights, into one that recognised that other key corporate constituencies have corporate governance rights that have to be respected, as noted in the Preamble:

“Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring.”

Unfortunately, OECD governments narrowed the focus of follow-up work to implement the Principles, and the subsequent work programme was confined to developing and transition countries. On this a series of regional OECD Roundtables were established, whose work included among other things, the drafting of recommendations (White Papers) for corporate

¹ Business and Industry Advisory Committee to the OECD

governance reform to be presented to governments. TUAC gave priority to ensuring the participation of relevant trade unions in that process. In addition a number of governments gave voluntary contributions to create a joint World Bank-OECD Global Corporate Governance Forum (GCGF) that has undertaken work in developing and transition countries, and helped to finance the OECD Roundtables. Meanwhile, the World Bank proper and the IMF adopted the Principles as a benchmark instrument as part of their member countries' surveillance procedures: the ROSC (Reports on Standards and Codes) exercise. It has been difficult for trade unions to exercise influence over the World Bank related work, given that both are under the auspices of the International Finance Corporation (IFC), where a pro-business slant characterizes its work.

Beyond that, the UN Monterrey Consensus and the Johannesburg Declaration in 2002 highlighted corporate governance. In particular the Consensus Declaration agreed at the Financing for Development Summit in Monterrey 2002 recognised corporate governance as a priority area as regards the strengthening of regulatory frameworks (para 21 & 23).

Corporate governance following the Enron collapse

Despite repeated warnings from trade unions that their own systems of corporate governance were failing, the OECD implementation process remained on developing and transition countries. It took the implosion of Enron, and the subsequent series of corporate scandals to bring the message home to the most powerful governments in the world, that these scandals were not just random acts of criminality: most of them were in fact legal and sanctioned by the systemic failures of their own corporate governance systems. In response to the series of corporate scandals within the OECD – Enron, Worldcom, Tyco in the US, Parmalat, Ahold, Vivendi in Europe – legislative reforms have been put in place, beginning with the US Sarbanes Oxley Act of 2002, but then spreading across the globe. Market supervisory and regulatory institutions have come under greater pressure to upgrade their control procedures; stock exchanges have strengthened their listing requirements (NYSE, NASDAQ); while voluntary codes and standards have proliferated. From a labour perspective, however welcome, the reforms enacted to date have neither been wide, nor deep enough, with insufficient regulatory bite and enforcement. The main focus of reform has been on external accountability mechanisms, namely the independence of auditors and other requirements of corporate transparency. Internal accountability mechanisms, including the assurance of independent boards (from management), have been inadequately addressed so far. Much remains to be done at the national level to effectively strengthen a worker voice in corporate governance.

At the international level, it was the US administration that led calls for the OECD to undertake an “assessment” of the Principles, with the implicit objective of revising the text in the light of recent developments. The key challenge of the Review process was thus to respond to public outrage, and for any revised Principles to contribute to restoring confidence in, while accounting for the diversity of national corporate governance regimes across the OECD and beyond.

The 2004 Review of the OECD Principles

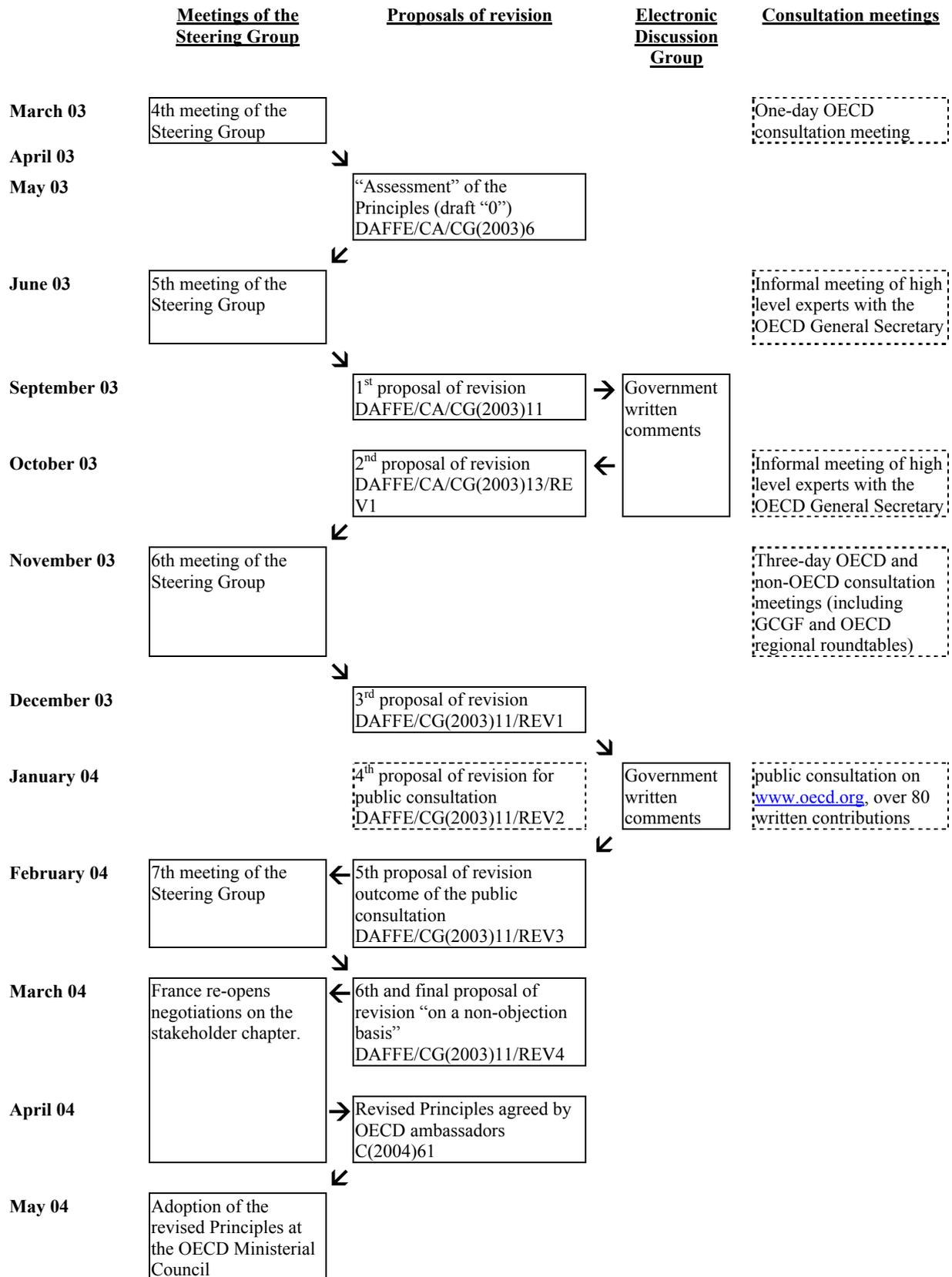
The institutional process of the Review, March 2003 – May 2004

The Review process was formally launched with the 2002 Ministerial Council's decision to mandate what had become the OECD Steering on Corporate Governance (thereafter "the Steering Group") to assess the 1999 Principles. Once again the TUAC participated on an ad-hoc basis. The issue of whether its status should be changed to that of a permanent Committee was raised at the 5th meeting of the Steering Group in June 2003, but a consensus could not be reached among governments. That issue is important, as it decides much of the scope and intensity of the follow-up process to implement the revised Principles.

Between March 2003 and May 2004, seven successive draft revisions of the Principles were submitted by the OECD Secretariat to the Steering Group (comprising OECD government representatives with ad-hoc consultative participation of the World Bank, the European Commission, the IMF and the Basel Committee along with the TUAC and the BIAC). Outside of the formal meetings, Steering Group members were able to submit their own comments and proposals on the various texts via a specific Electronic Discussion Group (EDG) purposely created for the Review. TUAC submitted its own detailed proposals and comments on other submissions.

As regards a non-OECD input, the GCGF network and participants to the OECD Regional Roundtables were consulted. Several consultation meetings were also organised between the Steering Group and wider stakeholders. Those included umbrella networks such as the ICGN, Euroshareholders, the World Federation of Exchanges. Institutional investors having a high-profile stance on the issue, such as Hermes and the Morley Fund were invited as well. In parallel, the OECD Secretary General Donald Johnston convened two Informal High Level Expert Group meetings (that included the AFL-CIO and the TUAC Secretariat) to discuss with the OECD Secretariat selective issues on corporate governance reform. The Review process also included a public consultation procedure that ran between January - February 2004, with the publication of a draft version of the draft text on the OECD website that received over 80 comments from various organisations worldwide.

The institutional process of the revision



Overview of the negotiations

Despite ambitious inputs by the OECD Secretariat, the process became increasingly narrow. The discussions rarely touched upon the broader picture of corporate governance and accountability, or fundamental questions relating, for example, to the economic or social mission of a corporation, or how to craft the Principles such that they ensure effective accountability to all relevant constituents, irrespective of the national regulatory framework.

Neither did the Steering Group address current and past corporate scandals. Those issues were raised by the trade union participants; however governments remained largely silent. Unfortunately, government representatives agreed early that the original Principles were simply in need of some fine tuning, and that many issues that could not be ignored should be buried within the annotations. They also sought to ensure that agreed revisions were either weaker than or in conformity with their domestic systems.

The United States administration was represented by the Treasury and the Securities and Exchange Commission (SEC), with the former taking the lead. The Treasury approach was that while there was room for improvement and more guidance on the Principles, the Review “should not reinvent the Principles”. The government of Japan’s approach to the Review was broadly in line with the US.

Some European governments were active in the review, such as Greece, Germany, Italy and Switzerland, while others adopted a more passive approach making comments where relevant to their own domestic situations. Much more could have been done by European governments and the European Commission to develop common positions on important issues. For example the UK proposal to include language promoting active informed shareholders and changing the title of the chapter to “The Rights and Responsibilities of Shareholders” should have been a common EU position.

Of most concern was the fact that most European governments did not initially take a positive position when it came to strengthening the Stakeholder chapter. Apart from Austria, none referred to their own legislative rights promoting worker representation and associated company level practices. Nor did they refer to relevant EU directives conferring information and consultation rights. Excluding the late initiative of France, Austria was alone in calling for the enhancement of stakeholders’ right beyond those as established by law.

TUAC: linking corporate governance and corporate accountability

TUAC considered the Review as an opportunity for industrialised countries to re-establish a public leadership role to implement effective corporate governance reform, including to strengthen the link between the internal governance mechanisms of the corporation, and its accountability to all relevant corporate constituents, not least workers, all based upon a regulatory framework. In the Initial Statement on the Review (October 2003), TUAC called on governments to target an overall improvement of national regimes rather than to entrench the status quo around the lowest common denominator. The statement concluded that the outcome “should send the right signals to global market institutions (including institutional investors), to the developing world and to the millions of workers and households who have been affected directly or indirectly by corporate governance failure.”

TUAC adopted a “twin-track” strategy to ensure a worker and trade union voice in corporate decision-making. This advocated revisions (1) to give workers generalised rights to participate in the corporate decision making procedures as internal constituents exposed to firm specific risk; and (2) to give active, long term and responsible shareholders real rights to affect board level decision making on key issues, while being accountable to the workers whose money they are entrusted to invest. TUAC also sought complementary action to strengthen the accountability of boards of directors, the diversity of non-executive directors, and in particular the separation of the role of CEO and Chair as a basic check and balance on the governing body of corporations.

That strategy led TUAC to call for extensive revisions to the Principles, and the inclusion of three new chapters covering the responsibilities of institutional investors, the Chief Executive Officer and mechanisms to implement the Principles (in effect international ‘soft law’) on key issues.

| TUAC Global objective: Governance and accountability of the corporation | | | |
|---|---|---|--|
| ↑ | ↑ | ↑ | ↑ |
| Enlarge stakeholders' rights | Promote responsible shareholder activism | Strengthen the accountability of the Board of directors | Ensure compliance with the revised Principles |
| <p>Objective: To enhance corporate accountability mechanisms</p> <p>Revision: Enhance the rights of stakeholders beyond those as established by law</p> <p>Revision: Distinguish between worker representation (ex. works council) and performance-enhancing mechanisms (ex. ESOP)</p> <p>Revision: encourage development of worker representation mechanisms</p> | <p>Objective: To assert the responsibilities of shareholders, especially institutional investors, to be active and informed ; and facilitate shareholder engagement in corporate governance</p> <p>Revision: Disclosure of institutional investors' voting policy and conflicts of interest</p> <p>Revision: Call for shareholder right to nominate independent directors, and for AGM resolutions be binding on the Board and the management</p> <p>Revision: Add new Chapter on "The Responsibilities of Institutional Investors"</p> | <p>Objective: To clarify the duties of directors toward the company as a whole, and to strengthen the accountability of the Board.</p> <p>Revision: Enhance the duties of directors to act in the long term interest of the company and its constituencies</p> <p>Revision: Disclosure of the remuneration of individual board members, and ensure its alignment with the company's long term interests</p> <p>Revision: Promote diversity of profiles and background of board members</p> <p>Revision: Add new principle on the separation of Chair of the Board and CEO functions</p> <p>Revision: Add new Chapter on "The Responsibilities of the Chief Executive Officer"</p> | <p>Objective: To acknowledge the implementation and the enforcement of the Principles as a new priority area.</p> <p>Revision: Add new Chapter on "The Implementation and Enforcement of the Principles"</p> |

Source: Key advocacy points for affiliates within the TUAC Initial Statement on the Review of the OECD Principles of Corporate Governance, TUAC Secretariat, October 2003

There was significant involvement by TUAC affiliates and Global Union Federations (GUF). In the public participation process of the review, around a dozen of affiliates and GUFs submitted written comments that were posted on the OECD website.

The outcome of the review: work in progress

A full description of the key changes in the revised Principles is provided in an annex to this document. In general, the revised Principles include several improvements regarding the involvement of responsible shareholders in determining board remuneration and nomination, disclosure of voting and management of conflicts of interests policies for institutional investors, and facilitating consultation among them, the protection of minority shareholders, the disclosure of remuneration policies and other company directorship. The revised Principles also call for market analysts to be free of any conflicts of interest, along with strengthened language on the accountability of external auditors, and include a new chapter on implementation.

From a labour perspective these revisions are welcome. For example, the involvement of responsible shareholders in the nomination of directors can help to ensure board diversity and combat self-perpetuating boards, where “imperial CEOs” have a decisive role in the nomination process. Similarly, the new text on the responsibilities of institutional investors are important for trade unions in pre-funded retirement systems that seek appropriate monitoring and stewardship of pension funds.

As regards the Stakeholders chapter significant progress was made following substantial lobbying by TUAC affiliates and a last minute intervention by the French government to strengthen employee rights to participate in corporate decision making procedures. However, in key areas much more needs to be done beyond the outcome of the Review. In particular, governments failed to agree on strong language regarding controversial issues such as the prevention of conflicts of interest, the control over individual director’s compensation, the diversity of board composition, or the separation of CEO and Chair in one-tier systems.

The newly revised Principles should therefore be seen as part of a continuing process to build trust for workers and the wider public in the role of corporate governance to build effective corporate accountability. Beyond the outcome of the Review, the process itself helped contribute to an increased internal dialogue within the international labour movement on the issues of corporate governance reform. Similarly, the Review process helped to build bridges between trade unions and active responsible institutional shareholders around key issues of mutual importance. The ability of the labour movement through TUAC, to effectively shape the outcome of an inter-governmental negotiating process (France re-opening negotiations on the Stakeholder chapter) was important also. These improvements give the international labour movement a strengthened platform on which to take forward the debate to ensure that employees have a voice in corporate governance and a say in the decision making processes that affect their working lives.

Annex: Key changes in the revised Principles

Chapter on the Rights of Shareholders: new responsibilities for institutional investors

Recent corporate scandals, and longer-term trends toward increased responsible shareholder activism, have prompted a debate on how to make this feasible. The outcome of the revision moves in that direction, although it falls below expectations. For example, changing the title of the chapter to “The Rights and Responsibilities of Shareholders” would have helped, but the Steering Group decided to adopt a ‘half-way’ solution with “The Rights of shareholders and Key Ownership Functions”, although those “ownership functions” are never specified in the text. A new Principle calls for “effective shareholder participation” in the nomination and the remuneration of directors, but it remains vague regarding the means by which shareholders can effectively access the nomination process, and in particular access the company proxy materials. Another improvement is the inclusion of a new set of Principles calling for an active ownership policy by institutional investors. These are particularly important for trade unions in pre-funded retirement systems campaigning for appropriate monitoring and stewardship of the pension funds.

Despite those improvements made to the Chapter, the revision process failed on a key aspect of the current debate on shareholder activism: the binding character of resolutions approved by the AGM.

| Original Principles (1999) | Key changes in the revised Principles (2004) |
|--|---|
| <ul style="list-style-type: none"> • A & B: the “basic” rights of shareholders • C, C.1 & C.2: specified the rights of shareholders at the AGM. • D: disclosure and transparency of the share capital structure • E: disclosure and transparency of rules applying to corporate control (including no benefit of “entrenched” management). | <ul style="list-style-type: none"> • New title, amended header to “facilitate ownership” • Amended C.2 includes reference to auditors • New C.3 on board remuneration and nomination • New F.1, F.2 on disclosure of institutional investors ownership policies (voting, conflicts of interest) • New G on consultation between shareholders |

Chapter on the Equitable Treatment of Shareholders: controlling shareholder under scrutiny

The revision of the chapter focused on the protection of minority shareholders which is mostly relevant in countries with concentrated ownership (and with controlling shareholders with disproportionate power and influence over the management of the company). The main revisions to the chapter were the new Principle on the protection of minority shareholders from abuse actions by controlling shareholders and strengthened language on the disclosure of material interest in transactions affecting the company.

| Original Principles (1999) | Key changes in the revised Principles (2004) |
|---|--|
| <ul style="list-style-type: none"> • A, A.1, A.2 & A.3: equal treatment of shareholders regarding voting and participation to the AGM. • B: prohibition of insider trading • C: disclosure of material interests in transactions affecting the company | <ul style="list-style-type: none"> • New A.4 on cross border voting • New A.2 on protection from controlling shareholder abusive action • Amended C with strengthened language on the scope of material interests (“directly and indirectly”) |

Chapter on The Role of Stakeholders: a breakthrough on the rights of stakeholders

Trade union attempts at the beginning of the Review to strengthen the rights of stakeholders, and workers in particular, were initially stalled. As the Review approached its end, and with the text almost unchanged, the only notable improvement as regards workers rights was a new Principle on the protection of whistleblowers. However following the intervention of TUAC's French affiliates, the government re-opened negotiations on the Stakeholder chapter. In addition, the TUAC Secretariat called the EU group of OECD Ambassadors to contact their capitals with a view to supporting the French intervention. Bi-lateral contacts were also made in Paris, and a number of affiliates were in direct contact with senior officials in their relevant ministries. This was successful and led to new consensus language that re-defined the rights of stakeholders beyond those as "established by law". That included "mutual agreements" – deemed as collective agreements (IV.A) – and employee "performance enhancing mechanisms" (coded language for works councils, board representation, employee share ownership & profit sharing, occupational pension funds) as being "permitted to develop" (IV.C) rather than simply "permitted". Those changes are more than marginal. The added language should help trade unions to pursue with added support the issue of worker participation in corporate governance.

| Original Principles (1999) | Key changes in the revised Principles (2004) |
|--|--|
| <ul style="list-style-type: none"> • A: rights defined by law should be respected • B: right to seek effective redress for violation of those rights • C: participation to corporate governance not outlawed • D: access to relevant information | <ul style="list-style-type: none"> • A: enhancing rights to include "mutual agreements" • C: participation focused on employees and permitted to develop • New E: on access of whistle blowers to the board and their protection • New F: rights of creditors beyond those as established by law |

Chapter on Disclosure and Transparency: new text on the prevention of conflicts of interest

The revision of the chapter led to changes that may help prevent some of conflicts of interest. New text includes the disclosure of directors' selection process and their independence (amended Principles A.4), the responsibilities and quality of the external auditors and a call for market analyst and advisers and other outsiders to be free from conflicts of interest.

| Original Principles (1999) | Key changes in the revised Principles (2004) |
|--|---|
| <ul style="list-style-type: none"> • A, A.1 to A.7 and B: content and quality of the disclosure policy the board of directors and the management should apply. • C: quality of the external auditing • D: access to and dissemination of information. | <ul style="list-style-type: none"> • Amended A.4: disclosure extended to the directors' qualification, other board membership, whether they are independent. • Amended C: auditors to be competent and qualified • New D: accountability of auditors to shareholders and duty to the company • New F: promotion free of conflicts of interest providers of corporate information (analysts, brokers, rating agencies) |

Chapter on The Responsibilities of the Board: no agreement on separation of power within the Board

The revised chapter is particularly disappointing. The responsibilities and the organisation of the board itself have and continue to lie at the heart of the majority of corporate scandals since, and including, Enron. The textual changes are confined to calling for more transparency regarding the nomination process and the committee structure and some marginal requirements to align remuneration with the longer-term interest of the company, or to ensure integrity of the internal risk management system.

| Original Principles (1999) | Key changes in the revised Principles (2004) |
|--|--|
| <ul style="list-style-type: none"> • A, B & C: responsibility to act in the interest of the company and shareholders, to treat all shareholders fairly and comply with ethical standards. • D, D.1 to D.7: key functions including determining corporate strategy and supervision and matters related to the organisation of the board, nomination, and remuneration. • E & F: the organisation of the board, their independence from management and the commitment of directors. | <ul style="list-style-type: none"> • Amended D.4: align remuneration with the longer term interest of the company • New D.5 & E.2: formal and transparent board nomination and election process • New annotation to E |

The Steering Group did discuss one key issue, i.e. how to ensure an appropriate balance of power within the board between those who develop and implement the strategy – the board executives and the CEO – and those who supervise the implementation of the strategy and represent the interests of corporate constituencies – the non-executive directors. However, the result is a one page annotation to Principle E with a discursive account of the various scenarios the board may adopt to ensure its “independence of judgment”. The essential requirement to include as a stand alone Principle the separation of the CEO and Chair functions in one-tier systems was rejected by the Steering Group². Neither do the Principles call for the prevention of interlocking directorships.

New Chapter on Implementation

A new chapter was also added on the implementation of the Principles (“Ensuring the basis for an effective corporate governance framework). But here too the result is disappointing.

| Original Principles (1999) | Key changes in the revised Principles (2004) |
|---|---|
| <ul style="list-style-type: none"> • N/A | <ul style="list-style-type: none"> • A. Objectives of overall economic performance, market integrity and transparency. • B. Consistency with rule of law, transparent and enforceable framework. • C. Division of responsibilities among authorities to serve the public interest is served. |

² At the time of the wrongdoings affecting their respective companies, Dennis Kozlowski (Tyco), Calisto Tanzi (Parmalat), Jean-Marie Messier (Vivendi), Kenneth Lay (Enron), John Rigas (Adelphia), Anne Mulcahy (Xerox), Richard Scrushy (Healthsouth) and Samuel Waksal (ImClone) had one thing in common: they cumulated the CEO and chairman functions.

| | |
|--|---|
| | <ul style="list-style-type: none">• D. authority, integrity, transparency and resources for Supervisory, regulatory and enforcement authorities |
|--|---|

TUAC had called for the inclusion of a new chapter on implementation mechanisms, and the outcome could be useful in developing and transition countries where the rule of law may be weak. However, as drafted it falls below that required within an OECD setting. A more proactive approach would have prioritised a public policy led regulatory approach to implementation, supplemented, but not substituted with voluntary codes and standards. That should have extended to, for example, stock exchange listing requirements, and other areas of enforcement. Furthermore, a clear reference to international standards would have been helpful, not least the OECD's own instruments, and how the latter affect the implementation of the Principles. Beyond that, we had urged the Steering Group to begin to discuss what the elements of a more binding international framework around corporate governance could usefully emerge over the coming years.