TRADE UNION ADVISORY COMMITTEE
TO THE ORGANISATION FOR ECONOMIC
COOPERATION AND DEVELOPMENT
COMMISSION SYNDICALE CONSULTATIVE
AUPRÈS DE L'ORGANISATION DE COOPÉRATION
ET DE DÉVELOPPEMENT ÉCONOMIQUES

Consultation with the OECD Steering Group on Corporate Governance

Written contribution by the TUAC

including comments on issues paper DAF/CA/CG(2009)1
Paris, 20 April 2009

Executive summary

(traduction française du résumé en annexe)

Rarely can we say with absolute certainty that a particular dogma has been "tested to destruction". Yet, a cursory glance around the wreckage of key elements of today's global financial services industry, reveals that truth: that the belief in maximising shareholder value as the guiding principle of corporate governance, aligned with self-regulation, has shattered parts of that industry.

OECD governments must craft a new corporate governance regime, one based on effective accountability, aligned with binding regulation. This might in reality occur in individual national settings. However, inter-governmental bodies have their role to play in developing a guiding framework to assist their members.

The OECD now has the opportunity to transform the corporate governance landscape. This TUAC paper sets out our initial thinking, which we hope will help shape the debate around the design and implementation of a new corporate governance paradigm. Should the OECD Steering Group on Corporate Governance begin that debate among government officials, then TUAC will supplement this paper with more detailed proposals.

TUAC recommendations:

- *The OECD Paper seems to be concerned about how to fix the 'old' model which is based on maximising shareholder value, a model that brought us to the crisis. Rather, a new corporate governance paradigm is required based on accountability to constituencies and to society at large, and with binding regulation as a core principle of effective implementation.*

- *The OECD should respect the diversity of corporate governance approaches, including mechanisms for worker information, consultation and representation.*

- *The OECD should investigate the procyclicality of shareholder remuneration policies that are based on the concept of "free cash flow".*

- *Beyond independence and competence, it is the accountability of the board to the core constituencies of the firm and to public authorities, and rights to relevant ex-ante information from management that need to be restored.*

15, rue La Pérouse - 75016 Paris - France
Tel: +33 (0)1 55 37 37 37 - Fax: +33 (0)1 47 54 98 28 - tuac@tuac.org -www.tuac.org

- *The issue of executive remuneration is a vivid example that self-regulation has failed. The OECD should develop meaningful policies to regulate executive remuneration, based on objective criteria for defining the long term interest of the company, while requiring an equitable ratio between executive pay and that of the workforce.*

- *Risk management issues require that regulators and supervisors are given the necessary tools to ensure that no enterprise is too big to fail (top-down approach) while empowering employee representatives and other constituencies to be a countervailing force (bottom-up approach).*

- *A bottom-up approach to risk would expand the parameters of risk management to include worker representation mechanisms, and their unions.*

- *The crisis points the way for a new system of active shareownership. The OECD must begin that debate, including around improved governance structures for institutional investors. In dealing with active shareownership, a fundamental distinction needs to be made between asset owners and asset managers.*

- *Responsible activism requires first and foremost adequate regulation of the asset management industry (including obligation to disclose voting records on behalf of their clients) and of private pools of capital (including transparency and accountability of their internal governance).*

- *Active ownership is a means to an end, not an end itself. The OECD should qualify activism according to the intended goals, and whether the latter serve the long interest of the company, or alternatively fuel short-termism.*

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1. The Issues paper “Corporate Governance and the Financial Crisis – Key Findings and Main Messages” (DAF/CA/CG(2009)1) – hereafter “the Paper” – which is for discussion at the 17th meeting of the OECD Steering Group on Corporate Governance addresses important corporate governance failures in the development of the current financial and economic crisis. TUAC has reservations with both the content and the guiding philosophy of the document.

A fundamental change is required in the way firms are to be governed

2. The current crisis requires a fundamental change of attitude from regulators and supervisors in the way financial and non-financial companies are governed. The main lesson

to be learnt from the current crisis is that the "shareholder value" model of corporate governance that has prevailed across the OECD must be replaced. In recent communications to the G20[1], TUAC and its Global Unions partners have highlighted the need to address the corporate short-termism and the pro-cyclicality of that model by engaging a fundamental rethink of corporate governance, a paradigm shift. In November 2008 TUAC wrote: "corporate short-termism and "shareholder value" governance [has undermined] market integrity and stakeholders' long term interests. The crisis has exposed weak risk management by ineffective Boards of Directors and turned the spotlight on the money that has been wasted in the past years in grotesquely large executive compensations, dividend proceeds and share buy-back programmes"[2]. Our affiliates too have stressed the need to rebalance corporate governance regime in the aftermath of the crisis[3].

3. The crisis has revealed the limits of the light and "delegated" supervisory approach, which prescribes that only small parts of the private sector and financial system require proper regulation and oversight, the rest being left to un-regulated markets or at best to 'voluntary codes'. Now is the time to reverse the trend and to restore the legitimacy of binding regulation to ensure public control and oversight of all institutions, products and transactions. For Nouriel Roubini the current model of supervision and regulation "relied on self-regulation that, in effect, means no regulation"[4]. It is this message – self-regulation does not work – that precisely is missing from the OECD issues paper, which overall seems more concern about how to fix existing market-based mechanisms and voluntary instrument rather than accept the needed re-regulation process of the economy.

> *The OECD Paper seems to be concerned about how to fix the 'old' model which is based on maximising shareholder value, a model that brought us to the crisis. Rather, a new corporate governance paradigm is required based on accountability to constituencies and to society at large, and with binding regulation as a core principle of effective implementation.*

4. The Paper gives the impression of dealing with corporations as if workers did not exist. As such, the text is in line with traditional "shareholder value" literature. Yet, this stylised model does not match any OECD member state corporate governance regime and practice. Around half of OECD countries supplement collective bargaining with worker information, consultation and/or representation mechanisms within the firm or at the board of directors. However, these mechanisms appear nowhere in the Paper. Board level employee representatives constitute one of the largest populations of directors in continental Europe. Similarly works councils have direct relevance in the organisation and functioning of the

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[1] See TUAC/ITUC/Global Unions Declarations ahead of the November 2008 Summit in Washington (http://www.tuac.org/en/public/e-docs/00/00/03/66/document_doc.phtml) and April 2009 Summit in London (http://www.tuac.org/en/public/e-docs/00/00/04/58/document_doc.phtml).

[2] http://www.tuac.org/en/public/e-docs/00/00/03/91/document_doc.phtml

[3] For example, RENGO the Japanese national trade union centre has called for a review of the corporate governance regime in Japan, to "change the interpretation of the nature of companies", away from "shareholder supremacy" and to "treat employees not as signatories of employment contracts" but as important actors (A RENGO Perspective on the corporate Legal Framework and Investment-Fund Regulations", Central Executive Committee, 16th session, 22 January 2009). Another example is given by the French CFDT for which "a new governance of the firm" that "better associate workers in the strategic direction of the company" is one of the three pillars that the union advocate in response to the crisis. http://www.cfdt.fr/rewrite/article/17838/actualites/la-cfdt-precise-ses-propositions-avant-le-sommet-social-du-18-fevrier.htm?idRubrique=6864

[4] Ft.com, 10 February 2009.

board. Both institutions have value in the on-going discussion on the independence and competence of the Board; they cannot be treated at the margin by the OECD, as if they were 'cultural exceptions'.

5. Even in the absence of regulated governance mechanisms, there is ample literature around the world that validates the stakeholder approach, but yet does not appear in the OECD work on corporate governance. This absence is detrimental not only to the relevance of the OECD in addressing the governance of the firm, in our views it also prevents the Organisation from engaging the much needed bridging with other OECD committees, and in particular to investigate the links between the Principles of Corporate Governance and the Guidelines for Multinational Enterprises. More broadly, in our view it does not play in favour of the "Merkel-Tremonti" initiative (reflecting the sponsorship of the German Chancellor and Italian Finance Minister) for a global "legal charter" to combine key standards of the OECD, IMF, World Bank, WTO and ILO. A compendium is being prepared by the OECD which brings together the major international economic, financial and social standards, including the Principles[5]. Inter-governmental bodies have their role to play in developing a guiding framework to assist their members.

The OECD should respect the diversity of corporate governance approaches, including mechanisms for worker information, consultation and representation.

The pro-cyclicality of the shareholder value model

6. The trend toward redistribution of corporate revenues from labour incomes to capital incomes and, within the firm, from the workforce to top managers, is concomitant to the rise of the shareholder value doctrine. It is based among others on the principle that "free cash flow" should be given back to shareholders to ensure, in line with the agency theory, optimal allocation of capital. The Paper does not depart from that view where it states that "firms [that are] characterised by high levels of free cash flow, [point] to agency problems" (#23). The current crisis and the problems of capitalisation of OECD financial companies point to methodological and conceptual weaknesses with the "free cash flow" argument[6]. As highlighted by TUAC at the last consultation with the Steering Group in November 2008, the parallel is telling between the huge payouts of Wall Street firms to their shareholders (dividends and share buy-backs) in the years preceding the subprime crisis and the capital injections, including taxpayer financed bailouts that they have benefited since then. For TUAC this points to potential pro-cyclicality problems of shareholder remuneration policies based on free cash flow principle and that grant unsustainable dividends and 'share buy-back' programmes during growth times, leaving companies with undercapitalised balance sheets during economic downturns.

The OECD should investigate the procyclicality of shareholder remuneration policies that are based on the concept of "free cash flow".

[5] See OECD webpage: A global standard for a stronger, cleaner, fairer economy? http://www.oecd.org/document/10/0,3343,en_2649_201185_42393354_1_1_1_1,00.html
[6] "The Quest for Shareholder Value: Stock Repurchases in the US Economy" William Lazonick, University of Massachusetts Lowell and Stockholm School of Economics, September 2008.

Boards without countervailing powers

7. Among the main governance failures exposed by the crisis, the Paper notes the absence of counter-powers at the board and the "bargaining power" of the CEO, the inability of the latter to ensure proper oversight of the company (#15-18). The text also reports on on-going debates on the potential conflict between independence from the company and competence (i.e. knowledge of the companies' activities) (#74). The paper suggests reinforcing the duties of directors and their enforcement (i.e. director's liabilities), but remain short of proposed specific direction, other than expressing scepticism at the notion of duties toward the "interest of the company" (by opposition to shareholders), which is seen as "weakening the clear specification of duties of board members" (#76). The Paper also recommends moving from a negative to a positive list of "fit and proper" criteria for director positions, suggesting more technical and professional competence, and argues in favour of separation of CEO and chair functions.

8. The Paper's discussion on independence and competence of the board is a crucial one. The proposed policy directions, it seems, would revolve around increasing further professionalism and expertise of board members, increasing directors' liability and consider CEO and Chair separation as a "best practice". These measures very much resemble post-Enron discussions in 2002-2003. Yet, taken together they are too narrow in scope to provide for the needed response to the board failures. For TUAC, the missing link between independence and competence is the accountability of the board to its core constituencies, which are diverse and do not boil down to shareholders, and to society at large via public supervisors. Within that board members should have adequate *ex-ante* rights to information in overseeing management. It is by strengthening board accountability and board *ex-ante* information rights, not by increasing the proportion of "professional" directors that confidence in the board will be increased.

9. While legal regimes are diverse, notably between common law and civil law jurisdictions, restoring board accountability and *ex-ante* information can be strengthening through a combination of the following:

- The functions of CEO and chair of the board are fundamentally incompatible and need to be strictly separated; moreover two-tier board structures should be revisited across jurisdictions with a view to ensure better countervailing powers to the CEO and top management;
- Shareholders who fulfil objective criteria for long term and responsible ownership must have the right to nominate directors of the Board;
- The duties of the directors must be enhanced to include the interest of the company, and where needed, fine tuned to specific long term economic, social and environmental performance criteria. Enforcement of directors' duties by public supervisors must be reinforced;
- The composition of the board should reflect the specific investment risk borne by the employees; in many countries this takes the form of regulated governance arrangements such as direct board representation in addition to shareholder-nominated directors, and specific rights, including recourse and veto, of the company's works councils.

Beyond independence and competence, it is the accountability of the board to the core constituencies of the firm and to public authorities, and rights to relevant ex-ante information from management that need to be restored.

Binding regulation of executive remuneration and the long term performance of the firm

10. In dealing with executive performance, the Paper adopts a rather technical approach to the issue. In doing so the Paper leaves aside the impact that grotesquely large CEO and top management remunerations have had on the public confidence in the wealth creating mission of the private sector. It notes that in the run-up to the crisis "managers […] have had too much influence over the level and conditions for performance based remuneration with the board", which design was "overly complicated or obscure in ways that camouflage the situation", and that in many cases "link between performance and remuneration [has been] very weak" including asymmetry in exposure to upside and downside performances (#43). It also provides a descriptive account of recent re-regulatory initiatives by OECD member states of top management remuneration (#32-35). The way forward as suggested by the Paper would include: improving transparency, encouraging lock-up and claw back provisions in remuneration contracts, ensuring "remuneration consultants" are hired by non-executive directors (i.e. not by management). In addition, the Paper suggests that tax systems have "an important influence", and that the submission of the remuneration policy to the AGM be considered as a good practice (#43).

11. Likewise board governance failures, the Paper's treatment of executive remuneration leads to recommendations which taken individually are valid – particularly ensuring at the minimum full asymmetry of upward and downside risks – but which collectively fail to provide for a comprehensive response to the crisis of confidence. In particular the Paper seems to underestimate the importance and implications of recent government and regulatory measures to rein in corporate remunerations. These are described in the Paper (#32-35) but fail to surface in the conclusions and key findings. Industry-led initiatives have failed and there is little doubt that simply relying on shareholder approval of remuneration packages, although needed, would alone not redress the procyclicality of compensation policies. For TUAC there is enough evidence pointing to the need to heavily regulate remuneration of top management and other "key personnel" such as traders. In recent submissions to the G20, we have argued in favour of caps in line with workers' pay and pensions and for remuneration schemes at large to be regulated by law to reflect and promote long-term economic, social and environmental performance, including adequate reallocation of profits to the company's reserves. Such regulatory approach would require in depth analysis of the relevant indicators and criteria that are to be used to measure long term performance of the company.

The issue of executive remuneration is a vivid example that self-regulation has failed. The OECD should develop meaningful policies to regulate executive remuneration, based on objective criteria for defining the long term interest of the company, while requiring an equitable ratio between executive pay and that of the workforce.

Moving beyond a management centred-approach to risk

12. Regarding risk management, the Paper provides with a description of various industry-led risk management frameworks in the US (COSO Enterprise Risk Management) and the UK (Turnbill report) and references similar initiatives in Australia and New Zealand (#56-63). It also accounts for a separate paper commissioned by the OECD to a consultant (#64). In its conclusions, the Paper recommends moving toward “organization-wide systems” – risk management policies of the past were segmented by division and/or product lines – and, within the board, to ensure lines of accountability regarding risk assessment and management that are separated from top management – in very much the same way as independent audit were advocated in the post-Enron era discussions (#66).

13. Overall the Papers’ handling of risk management seems exclusive centred on top executive model frameworks (hence the insistence on private sector models such as ERM) and, by contrast, does not pay sufficient attention to the perspectives of other stakeholders, including regulators, supervisors and workers.

14. A supervisor perspective to corporate risk management would consider the extent to which company-specific frameworks need to be supplemented by “risk-based” regulations. On that there is much to learn from the OECD Group on Regulatory Policy which recently discussed an issues paper[7] among others reading: “Trying to shoe horn equivalent approaches from the domain of private sector risk management onto the public sector produces its own problems […] governments are responsible for delivering public value, not shareholder value”. The G20 endorsement of the Financial Stability Forum (FSF) Principles for Sound Compensation Practices abounds in that direction. The FSF text calls for compensation schemes to be risk adjusted, for risk management staff to have sufficient authority and for shareholders to be actively informed. Yet the most telling decision by the G20 is its commitment to empower supervisory authorities to intervene in case of “deficiencies” in the implementation of FSF principles “with responses that can include increased capital requirements” for the targeted bank. This significant development constitutes a break with the shareholder value doctrine of the past, which prescribes that risk management within the firm is optimal as long as shareholders – and shareholders only – exercise active ownership and oversight over the board of directors. By contrast, the G20 believes that supervisors may need to intervene to redress failures in the company’s risk management, and hence that corporate governance and shareholders’ right do not suffice in ensuring proper risk management of the firm.

15. A regulator perspective would help draw limits to what risk management alone can achieve for large complex financial institutions that have become “too big to fail, too big to be governed”. Even the most sophisticated risk management techniques will not be able to cope with the complexity and opacity of global conglomerates that cumulate different lines of businesses which interest may run counter to each other – retail banking, insurance, trading, investment banking, etc – which are subject to different regulators and hence different supervisory authorities. The G20 decision to accelerate the creation of the group-specific ‘colleges of supervisors’ is a welcome initiative in the management of the crisis. Yet there is little doubt that such large conglomerates are not desirable for the future.

[7] “Risk and Regulation: Regulatory Systems and Tools to Manage Risk” SG/GRP(2008)2

Risk management issues require that regulators and supervisors are given the necessary tools to ensure that no enterprise is too big to fail (top-down approach) while empowering employee representatives and other constituencies to be a countervailing force (bottom-up approach).

16. Finally, an employee perspective would require integrating workers' concerns independently from those of management. Specifically in the financial sector, there are corporate governance implications to be drawn from the aggressive sales policies that have pushed credit-suppliers into predatory lending practices. This view appears to be shared by the OECD Strategic Response for which "the crisis has shown that innovations in the credit markets and mis-selling led to the development and distribution of inappropriate financial products to vulnerable retail consumers". Our sister organisation at the international level, UNI Global Union, which membership includes banks and insurance groups across OECD, have called for a 'bottom-up' approach to risk management[8]. UNI has issued guidance on appropriate incentive structures for employees in sales and advice functions and on rights for unions and other regulated employee representation mechanisms, including International Framework Agreements, to take actively part in risk management frameworks.

A bottom-up approach to risk would expand the parameters of risk management to include worker representation mechanisms, and their unions.

Responsible and long term oriented shareholder activism

17. In the final chapter, the Paper argues that there is "a growing body of research suggesting significant conflicts of interest on the part of institutional investors and only pro forma monitoring" (#92) and concludes that "shareholders have contributed importantly to failures of boards and companies by being too passive and reactive" (#95). The Paper further argues that high "cost of monitoring" alone does not suffice to explain shareholder passivity which is rather to be found in the "conflicts of interest arising from [institutional investors'] business model" (#95). The main recommendation arising from the Paper is to facilitate active voting by institutional investors by removing obstacles to voting (including cross-border voting), facilitating acting in concert, requiring "institutional shareholders acting in a fiduciary capacity" to publish their voting records, preventing conflicts of interest affecting proxy advisors. Rather surprisingly, the Paper also singles out private pools of capital (private equity and hedge funds) as positive examples of activism in AGM which should be supported and not "hampered as a side-effect of [post-crisis] regulatory reforms" (#95). Regarding enforcement, the Paper advocates for "stronger complementarity" between "private and public instruments" for "more favourable framework for active informed shareholders".

18. The TUAC broadly agrees with the measures aiming at enhancing active exercise of shareholders' voting rights. Yet we believe that this section could be considerably improved should it clearly distinguish between asset owners – pension funds, SWFs, insurance groups – and asset managers – mutual funds, private pools of capital – as well as discriminate between investors according to the intensity of regulatory oversight – high for pension funds and mutual funds, low to very low for SWF and private pools. Because the Paper does not operate

[8] "For a Responsible and Sustainable Finance Industry", UNI Global Union, March 2009 http://www.uniglobalunion.org/Apps/iportal.nsf/3100172b0315a124c125717d005dd9bb/0a5bb31add50855cc125758d0049479c/$FILE/UF,%20fin%20crisis,%20key%20issues%20paper,%20fin,%2019-3-09-en.pdf

such distinctions, but lumps all the above entities under a single term "institutional investors" it entertains confusion. For example, the paper rightly alerts on the risk of conflicts of interest. However these issues are specific to asset managers, financial conglomerates that have different business lines to different clients. Regarding pension funds they are relevant with commercial pension trustees – that is asset managers that hold investment mandates of individualised defined contribution (DC) pension schemes. However, and unless proven otherwise, they are not an issue for autonomous collectively organised defined benefit (DB) pension schemes funds which represent the bulk of pension fund ownership in corporate equities. Similarly, the concerns about the weak governance of pension funds are strongly correlated with size and are mainly with DC schemes and – comparatively – much less important for DB funds. Confusion culminates with the Paper's recommendation to support shareholder activism by private equity groups and hedge funds – entities which by far have the most opaque investment structures, especially compared with pension funds and which, precisely, are exposed to conflicts of interest.

> *The crisis points the way for a new system of active shareownership. The OECD must begin that debate, including around improved governance structures for institutional investors. In dealing with active shareownership, a fundamental distinction needs to be made between asset owners and asset managers.*

19. Also, a revised version of the Paper would benefit from a wider pool of research studies. Regarding the current sources of the Paper, we believe at least two studies are not reflected as they should in the Paper, namely Choi & Fisch 2008[9] and Stewart & Yermo 2008[10].

20. While asset owners, including DB pension funds, should not be absolved from their responsibilities in the run-up to the crisis, it seems that the perceived weakness of their internal governance is one among many reasons for their failures. Other causes, it seems,

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[9] Choi & Fisch, 2008 does indeed conclude that a majority of pension funds keep a low profile in AGM and in the run-up to AGM. Yet there are key exceptions that are singled out in the article: (i) trade union pension funds are "far more active" than other pension funds, as are social responsibility funds and religious organizations who altogether can make "effective use of shareholder proposals"; (ii) there is "substantial difference" between the funds' low profile in AGM and their "high participation" in securities litigation. Also, and unlike the OECD Paper, the article does find that cost and administrative burden, and not the governance of pension funds, are the root causes of AGM passivity, noting that "size is strongly correlated with non-litigation activism. Larger funds have a greater ability to spread the fixed cost of engaging in activism across their greater asset base".

[10] Stewart & Yermo 2008 is cited in support for the OECD Paper claim of poor governance arrangements of pension funds and of "rent capture by the administrators". Stewart & Yermo do indeed point to governance failures of pension funds. However the concerns are mainly with commercial trustees – and hence with individualised Defined Contribution (DC) schemes – and, comparatively, less with collectively organised Defined Benefit (DB) schemes. (Yet the DC schemes have across OECD restricted investment regulations and in general invest less in corporate equities directly than DB schemes do and accordingly are less exposed to shareholder responsibilities. In the US alone in 2007, DB pension plans allocated 53% of their portfolio in corporate equities and around 13% in mutual funds, while DC schemes (include 401k plans) allocated 37% in equity and 40% in mutual funds. Source: http://www.federalreserve.gov/releases/z1/20081211.) Likewise Choi & Fisch 2008, Steward & Yermo conclude that governance problems are correlated with the size of the schemes: "regulators and industry associations should also work together to promote pension funds that are large enough in size to facilitate their governance". Also, the OECD Paper omits an important conclusion of the report which is the positive contribution that member nominated trustees can have to the governance of pension funds: "some of the more serious cases of governance failures could be solved through a more balanced representation of stakeholders in the governing body. […] Employee or member representation can ensure a better alignment of the interest of the governing board with those of the fund's beneficiaries. […] They can also act as a conduit for delivering information to plan members, strengthening the accountability of the governing board".

would include the size of the schemes, the regulatory barriers to active ownership and in particular the lack of regulation of the asset management industry. For example the Paper suggests that pension funds should disclose their voting record to help build confidence with their members. In practice there will be little use of pressuring pension funds on voting transparency if asset managers themselves – who in effect hold the voting rights on behalf of their clients – are not required by law to disclose the voting records. Similarly, it is the very un-regulated nature of private pools of capital that needs to be tackled urgently to ensure their shareholder activism is in line with long term objectives of the target company.

> *Responsible activism requires first and foremost adequate regulation of the asset management industry (including obligation to disclose voting records on behalf of their clients) and of private pools of capital (including transparency and accountability of their internal governance).*

21. Moving beyond facilitating shareholder rights, the OECD should qualify certain forms of activism. For TUAC, shareholder activism is a means to an end, not an end itself and not all forms of activism are desirable. Activism ranges from regular 'engagement' with the company management, all the way to 'hostile' resolutions at the AGM which intended goals are not always in favour of the long term interest of the company. Some may aim at reinforcing the accountability of the board and management (board composition and remuneration), but others may fuel short termism and procyclicality of remuneration (boosting dividends and share buy-backs, forcing corporate restructurings, etc).

> *Active ownership is a means to an end, not an end itself. The OECD should qualify activism according to the intended goals, and whether the latter serve the long interest of the company, or alternatively fuel short-termism.*

The way forward

22. During the 2002-2003 revision of the Principles, the Steering Group believed that "no deep-drilling down [of the Principles] [was] needed". TUAC warned that the original Principles were lacking, both in terms of the content, and more crucially in terms of the guiding philosophy. Those concerns were echoed and constructive proposals made to rectify the shortcomings when the Principles were revised. Excepting at the margins, they were ignored[11].

23. The OECD is again at a cross-road. It can continue down the current "no deep drilling" path, amending the already voluminous annotations in the hope that policy makers and the wider public will pick up on the carefully constructed nuances contained therein. Or, the OECD could seize this opportunity and launch a global debate around the national and international systems of governance required to govern the activities of modern financial and non-financial corporations. TUAC hopes that the Steering Group takes the latter road, and stands ready to work with the OECD to achieve that aim.

[11] http://www.tuac.org/en/public/e-docs/00/00/01/0B/document_doc.phtml

Annex: Executive summary in French

Résumé

Il est rare de pouvoir affirmer avec une certitude absolue qu'un dogme a été "testé jusqu'à sa mort". Et pourtant, un rapide tour d'horizon des dégâts causés à l'industrie des services financiers ne laisse pas de place au doute: la croyance en la valeur actionnariale comme principe fondateur de la gouvernance des entreprises fondée sur l'autorégulation, a littéralement décimé cette industrie.

Les gouvernements de l'OCDE doivent travailler à un nouveau régime de gouvernance des entreprises, un régime fondé sur la responsabilité réelle et sur la réglementation contraignante. Certes, c'est avant tout au niveau national qu'un tel scenario prendra forme. Toutefois les organisations intergouvernementales ont un rôle à jouer en proposant des orientations politiques pour accompagner leurs membres.

Aujourd'hui l'occasion est offerte à l'OCDE de transformer le paysage de la gouvernance des entreprises. Cette contribution du TUAC fait état de notre réflexion qui – nous l'espérons – pourra contribuer à encadrer le débat sur la détermination et la mise en œuvre d'un nouveau paradigme sur la gouvernance des entreprises. Si d'aventure le Groupe de direction de l'OCDE sur le gouvernement d'entreprise devait entamer un tel débat entre représentants gouvernementaux, le TUAC apporterait alors des propositions détaillées en complément de cette contribution.

Les recommandations du TUAC:

- *Le document de l'OCDE semble avant tout préoccupé de réparer le 'vieux' modèle fondé sur la valeur actionnariale, un modèle qui nous a menés à la crise. Bien au contraire, c'est un nouveau paradigme de gouvernance des entreprises dont nous avons besoin, un modèle fondé sur la responsabilité vis-à-vis des parties constituantes et de la société en général, et sur la réglementation contraignante comme principe essentiel de mise en œuvre.*

- *L'OCDE doit respecter la diversité des systèmes de gouvernance des entreprises, dont les mécanismes d'information, de consultation et de représentation des salariés.*

- *L'OCDE doit examiner la procyclicité des politiques de rémunération des actionnaires fondées sur le concept de "free cash flow".*

- *Au-delà de l'indépendance et de la compétence, c'est la responsabilité du conseil d'administration vis-à-vis des principales constituantes de l'entreprise et de la puissance publique et des droits à l'information préalable par la direction qui doivent être restaurés.*

- *La question de la rémunération des dirigeants est un exemple frappant de la faillite de l'autorégulation. L'OCDE doit faire des propositions significatives pour la réglementation de la rémunération des dirigeants, selon des critères objectifs d'intérêt à long terme de l'entreprise, et en imposant des proportions équitables entre rémunération des dirigeants et rémunération de la main d'œuvre.*

- *La gestion du risque nécessite de munir les régulateurs et les autorités de supervision des instruments nécessaires à la prévention de groupes devenus « trop gros pour faire faillite » (approche descendante 'top-down'), tout en habilitant les représentants des salariés et d'autres constituantes à jouer un rôle de contre-pouvoir (approche ascendante 'bottom-up').*

- *Une approche ascendante 'bottom-up' du risque consisterait à élargir les systèmes de gestion du risque pour y inclure les mécanismes de représentation des salariés et leurs syndicats.*

- *La crise met en évidence la nécessité d'un nouveau système d'activisme actionnarial. L'OCDE doit entamer ce débat, notamment concernant l'amélioration de la structure de gouvernance des investisseurs institutionnels. Concernant l'activisme actionnarial, une distinction fondamentale doit être faite entre détenteurs et gestionnaires d'actifs.*

- *Un activisme responsable requiert en premier lieu une réglementation adéquate de l'industrie des gestionnaires d'actifs (dont l'obligation de divulgation des votes en AG pour le compte de leurs clients) et des fonds de capitaux privés (dont la transparence et la redevabilité de leur gouvernance interne).*

- *L'activisme actionnarial n'est pas une fin en soi. L'OCDE doit différencier les formes d'activisme en fonction des objectifs visés, ces derniers peuvent en effet servir l'intérêt à long terme de l'entreprise ou au contraire alimenter le court-termisme.*