



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 Committee on Corporate Governance

Written submission

Paris, 19 April 2011

TUAC welcomes the opportunity to comment on the documents that are for discussion at the 20th Meeting of the Corporate Governance Committee. The following outlines our comments on some items of the agenda. In addition, TUAC would like to share its concerns about the positions adopted by OECD business groups on corporate governance in the on-going negotiations on the 'Update' of the OECD Guidelines for Multinational Enterprises.

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Item 4. Corporate Governance in the MENA Region

The optimistic and positive tone of the paper (DAF/CA/CG(2011)1) appears rather anachronistic in light of the wave of democratic revolutions in the region and the exposure of collusion between political elites and big business. The OECD-MENA Investment programme, including its Working Group on Corporate Governance should reach out to independent and democratically organised civil society institutions, including trade unions.

Item 5. Thematic review: Institutional investors

We welcome the draft OECD Peer Review on "the role of institutional investors in promoting good corporate governance" (DAF/CA/CG(2011)2). We note with interest the sections on exchange traded funds (#79 et al) and on the industry for proxy advising (#118 et al). The paper also includes useful description of OECD member states regulatory frameworks and their alignment with key recommendations of the Principles (table 5). However the text suffers from three weaknesses:

Confusion between asset owners and asset managers. As in previous papers by the Corporate Affairs Division¹ the text does not make a clear distinction between asset owners – pension funds, SWFs, insurance groups – and asset managers – mutual funds, private pools of capital. Using the generic term "institutional investors" the confusion is apparent in #21, #23 and #30

¹ Written contribution by the TUAC including comments on issues paper DAF/CA/CG(2009)1, April 2009.
http://www.tuac.org/en/public/e-docs/00/00/04/A1/document_doc.phtml

et al. and in the discussion on remuneration incentives (#61). On a key aspect of the text however, namely the level of shareholder engagement, the text acknowledges the difference of behaviour between asset owners and asset managers (#54).

Investment regulation and plan design are not factored in. The discussion on the regulatory framework (#43 et al) and on portfolio composition (#64 et al) is silent on the role of investment regulation. In practice, shareholder engagement will to a large extent depend on investment regulation and, as far as pension funds are concerned, pension plan design and funding rules. The more risk averse or restrictive the funding rules are, the less scope there is for an active ownership-oriented investment policy. Insurance funding rules, such as EU-wide Solvency 2, are arguably less equity- and less private fund-friendly than equivalent pension funding rules. Regarding plan design, defined benefit schemes often will follow more aggressive and hence risky investment strategies than defined contribution schemes because of their pension liability structure.

The governance and accountability of asset owners matter. In line with the above, the text fails to distinguish between the various forms of governance frameworks that co-exist² as well as the composition and accountability of the governing body. This distinction is important because the governance regime will also have influence on the shareholder engagement policy. For example, it is not surprising that employer-dominated individual 401k pension schemes in the US are prone to side with management of the investee companies (#98). The text also does not recognise any role for trade unions in facilitating pension fund shareholder cooperation and activism (as seen in #54 et al). In the context of Australia for example, it is hard to contest the pivotal role of the Australian Council of Trade Unions and its affiliates in promoting active shareholder policy by pension funds.

Item 6. The European Commission's Green Paper

Given the short notice it has not been possible for the TUAC to consult with its European affiliates and with the ETUC on the substance of the EC Green Paper (DAF/CA/CG/RD(2011)1). At this stage we note the following:

The minimalist reference to board level employee representation in a footnote is indicative of a biased approach of the European Commission DG Internal Market. The suggestion that the Green Paper “has no bearing on the roles assigned to different company bodies and board-level employee participation under national law” does not hold. We would like to remind the staff of the DG Internal Market that board employee representation is widespread in 11 member states (Sweden, Finland, Denmark, Austria, Netherlands, Luxembourg, Germany, Slovenia, Czech Republic, Slovakia & Hungary), and exists in another 6 member states (Greece, France, Spain, Malta, Portugal, Ireland, Poland) as well as in Croatia and Norway.

The green paper does not address the specificity of the dual (or two-tier) board structure which in turn does not help recognising the diversity of systems across Europe. No one size fits all.

The failure of the “comply or explain” approach, which is acknowledged in the paper, should lead the DG Internal Market to favour binding regulation. That is not the case very unfortunately. Instead it is suggested to persist in the same direction and to move toward a sort of “more detailed comply or more detailed explain” approach.

² listed and limited liability, mutual or cooperative for insurance and asset management groups, private limited partnership for hedge funds and private equity, trust fund, foundations for pension schemes, etc.

Item 7. Thematic reviews: Future topics

One aspect that is missing in document “Next Peer Review Topics” (DAF/CA/CG(2011)6) on board independence is the status of board level employee representatives. The Principles’ annotations make it clear that independence is to be measured vis-à-vis management of the company, but not necessarily the company as a whole, or the entirety of its workforce. This is important for the way board level employee representatives are to be treated. If independence is vis-à-vis management only, then surely board level employee representatives qualify as independent directors. This view is supported by:

- The OECD Guidelines on Corporate Governance of State-owned Enterprises (Recommendation VI.D);
- The European Recommendation 2005/162/CE (annex 2) ; and
- in the US, an SEC Final Rule on the implementation of the Sarbanes Oxley Act (n°33-8220, Apr. 9, 2003, “Standards Relating to Listed Company Audit Committees”, File No.: S7-02-03) .

Item 8. Priorities for intermediate outputs

TUAC understands that decision has yet to be taken to review the Principles. Public trust in the governance of private corporations was seriously dented with the crisis. It would be a fitting response if the Committee provided for a review process that was participatory and transparent and included the representative constituencies of the private corporation, including trade unions of the OECD.

Items 9 & 10. World Bank report on the ROSC process, and country report on Indonesia

The failure to reference Chapter IV is of concern. We believe that the Principles are an integral package.

Item 11. Competitive neutrality

The concept of competitive neutrality as discussed in the paper DAF/CA/CG(2011)4 is much broader than that of the “level playing field”, as referred to in the OECD Guidelines on corporate governance of state-owned enterprises, Chapter 1. It goes beyond existing competitive markets to include competition within governments and between different levels of governments, including between central and local government entities (#2 & annex p10). The definition of “government businesses” (#4) – which is key to considering competitive neutrality – includes many government entities and administrations that otherwise would not qualify as commercial enterprises. Key recommendations include (i) the corporatisation of “government businesses” (#5) and the application of private corporate law regime to public entities “to the largest extent feasible” (#11); and (ii) eliminating access to cheaper finance stemming from government guarantees (#12).

The perspective given in the papers is that of the private sector and of enhancing government-sourced opportunities for businesses through greater competition. Missing from the papers is the public governance perspective on the implications of competitive neutrality for public administration and public services efficiency³. In sum, this project in our view is not

³ On the latter, the Public Governance Directorate issued a report in 2008, “Regulation Inside Government” (GOV/PGC/REG(2008)3), which includes a review of various public management tools, including competition within government and with the private sector. Competition is often associated with a large amount of reporting and increasing compliance costs and administrative burden (#169). The report further notes that competition leads to “disaggregation” of government institutions into smaller more fragmented entities which runs against

balancing government efficiency and private sector objectives as it should. It is biased toward private business interests only and has potentially deep implications for government and public services, which have not been taking into account.

Item 12. Guidelines on Insurer Governance

As noted on the cover page of (DAF/CA/CG(2010)1/REV1) “Delegates are invited to agree that the revised OECD Guidelines on Insurer Governance are fully compatible and consistent with the OECD Principles of Corporate Governance”. In our view they are not, or rather they portray a minimalist understanding of the Principles. In our submission to the OECD on-line consultation on a previous draft in October 2010⁴ we pointed to the following inconsistencies with the Principles:

- The notion of independence is defined as independence from the management and from the company. However, the Principles define independence vis-à-vis the management of the company, but not the company itself.
- By omission the text is not consistent with the Principles regarding the rights of workers as defined by IV.A and IV.C.

Review of the OECD ‘MNE’ Guidelines

The TUAC, alongside NGOs and business groups, have taken an active part in the negotiations on the ‘Update’ of the OECD Guidelines for Multinational Enterprises. These Guidelines constitute one of the ‘flagship’ instruments of the Organisation.

In the course of the negotiations, OECD business groups have taken an unhelpful, and rather surprising, stance *against* the inclusion of stronger corporate governance provisions in the Updated Guidelines. Indeed, as documented in OECD Investment Committee paper DAF/INV/WP/RD(2011)2, OECD business groups objected to:

- Referencing the SOE Guidelines in the preface of the text (amendment to #8, p7);
- Expanding good corporate governance principles “throughout enterprises groups”, i.e. including subsidiaries (amendment to G. n°6 ch. General policies, p10);
- Disclosing the “implementation process” of the company’s corporate governance code (amendment to G. n°3h ch. Disclosure, p11);
- Releasing “annual independent audit” of the company’s accounting (amendment to the Commentary to the Disclosure ch., #28, p34);
- Inserting SOE Guidelines VI.D on board employee representatives (Ch. Employment, new G. n°9, p69).

The above suggests that OECD business groups are not in favour of better corporate governance practices and greater visibility of the CG Principles and the SOE Guidelines. This is of concern.

recent developments toward “reintegration of government services” and “whole-of-government approaches” (#56).

⁴ Comments by TUAC and UNI Finance on Draft revised OECD Guidelines on Insurer Governance http://www.tuac.org/en/public/e-docs/00/00/07/DB/document_doc.phtml