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OECD Committee on Corporate Governance, 16-17 October 2018

TUAC Comments

Paris, 12 October 2018

Key Messages

On 16 October 2018, the TUAC held consultations with the OECD Committee on Corporate Governance and took part in a committee roundtable on company group structures, together with the business counterpart the BIAC. The TUAC shared the following submission, the key policy messages being:

- Current OECD reports suggest that minority shareholders are the only stakeholders to be impacted by complex company group structures. They are not. The widespread use of shell companies can contribute to minimising or avoiding liability of the whole group towards a range of stakeholders, including workers and the tax collector. The OECD should pay far more attention to complex group structures with a view to streamline them and to increase responsibilities of parent companies towards subsidiaries;
- Corporate governance and corporate laws need to be included in the OECD agenda for aggressive tax planning. The BEPS Action Plan will undergo a review by 2020. A key question in this context is why corporate laws continue to tolerate, if not encourage, the establishment of shell companies, with no real economic activities, for the purpose of avoiding tax, employment and transparency obligations;
- A broader discussion on the long term interest of companies, and their responsibilities towards stakeholders – in line with recent OECD countries initiatives, in the US and in Europe - is urgently needed. Such discussion would greatly benefit from an in-depth analysis of the positive impact of workers' participation on corporate governance.

Introduction

The TUAC welcomes the opportunity to participate into the discussions of the OECD Committee on Corporate Governance meeting on 16 October 2018. In our view, the key item on the agenda of the Committee meeting is the roundtable on duties and responsibilities of boards in company groups. In what follows the TUAC also comments on other items of the Committee's agenda, including on flexibility and proportionality, on recent national developments (in UK and France) and makes proposals for the committee's programme of work for 2019-20.

Roundtable on the duties and responsibilities of boards in company groups

Complex structures, an issue of crucial importance for stakeholders

The issue of responsibilities and duties within company groups is a topic of considerable importance to the trade union movement across the globe. Our hope is that this roundtable constitutes a first step towards new OECD research and recommendation on company group structures. A key objective should be to streamline complex group structures, with a view to increase transparency and accountability.

Complex group structures often accommodate shell companies, with no economic activity of their own. Current OECD reports suggest that minority shareholders are the only stakeholders to be impacted by complex company group structure. They are not. The widespread use of shell companies can contribute to minimising or avoiding liability of the whole group towards a range of stakeholders, not just minority shareholders. Human rights and environmental violation, tax avoidance and extreme workers' exploitation constitute important enough interest to leave aside the old shareholders agenda.

Aggressive tax planning. Company groups can rely on empty subsidiaries, with no or little economic activities, for the sole purpose of profit shifting from one jurisdiction to another. International tax matters are high on the political agenda, and the OECD is well placed to offer guidance with the implementation of the Base Erosion and Profit Shifting (BEPS) Action Plan of 2015. Regrettably enough, the Principles as revised in 2015 do not reflect best board practices as recommended by the OECD Guidelines for Multinational Enterprises. Another key question in this context is why corporate laws continues to tolerate , if not encourage, the use of empty shell companies that have no real economic purpose or activity.

To give a concrete example, on Tuesday 9 October 2018, trade unions filed a complaint under the OECD Guidelines regarding Chevron's aggressive tax planning. The complaint shows how Chevron breaches OECD Guidelines for multinationals on disclosure requirements in respect of its structure, as well as violating the spirit of Dutch tax law. Annex 1 exposes the incredible complexity of Chevron group structure (at least 600 shell companies – and likely hundreds more – registered in Bermuda and Delaware). Thanks to this artificial structure, the Chevron group reported over USD 35 billion in un-taxed revenues in off-shore accounts.

Escaping employer responsibilities. Group structures can be manipulated in such a way that employment relationships and their accompanying liabilities are blurred. Subsidiaries are being set up for the sole purpose of artificially shifting employer responsibilities to the most accommodating – but economically and socially irrelevant – jurisdictions. These are artificial constructions as employees perform their work in the country of the parent company, which also retains financial and human resource control.

Annex 2 illustrates the case of a road transport company, which holding company was based in the Netherlands and recruited its drivers through subsidiaries established in Romania and Lithuania. Human resources and financial control remained with the Dutch parent company. The drivers were paid €200 a month (less than the Dutch minimum wage) and received a bonus for driving extra kilometres, which is completely illegal in the Netherlands. Workers therefore drove for long hours, 8 weeks in a row, resting in their trucks during all this time¹.

As far as labour law and social security regulations are concerned, these arrangements are on the fringe of legality. Again, a key question is why corporate law would tolerate, if not encourage, the use of empty entities that have no real economic activity and that are set up for the sole purpose of regulatory arbitrage.

Human rights violation. As evidenced by a growing number of cases submitted under the OECD Guidelines, boards do not take sufficient responsibility to avoid and address adverse impact on human rights within company groups. It is significant that in most of the cases, it is the parent company itself which engages in the mediation process.²

Adapting corporate law to complex group structure. Overall, national corporate governance frameworks do not address this issue in a consistent manner. Frameworks therefore need to be adapted. TUAC affiliates report that corporate law is usually based on the theoretical assumption that a company is a single entity. Directors' duties of the parent company tend not to apply in subsidiaries.

The most important and urgent problem to tackle is the board's duty to govern the group. The lack of corporate accountability in company groups is an increasingly recognised phenomenon. Other OECD bodies covering tax, labour law, social security are working on policies to better enforce legal obligations. The OECD Corporate Governance Committee has a special responsibility to join these efforts.

Recommendations for future work on company groups and directors' duties

Considering the above and looking at next steps, the TUAC submits the following recommendations for consideration by the Committee.

¹ Source : *The impact of letterbox-type practices on labour rights and public revenue, SOMO-ETUC, June 2016*

https://www.etuc.org/sites/default/files/press-release/files/ces_letterbox_compagnies_gb_juin_ok_0.pdf

² <http://www.tuacoecdmneguidelines.org/home.asp>

Duty to develop a long-term strategy for the group and its subsidiaries. Lengthy considerations could be developed on whether a subsidiary should be responsible for its own interest, or the interest of the group. The point, however, is that all boards should be responsible for the long-term interest of both the group and the daughter companies. As an illustration for future discussions, the EU action plan on financing sustainable growth is looking at the need to require corporate boards to develop sustainability strategy and to clarify the rules according to which directors are expected to act in the company's long-term interest³.

Parent's responsibility in overseeing subsidiaries. According to a Deloitte survey⁴, the majority of boards spends significant time on the oversight of subsidiaries. If there is control, then it should go with accountability. The Committee must look at how the links between corporate governance and responsible business conduct can be tightened, in particular how the parent company can be bound by a due diligence principle throughout the group.

Transparency requirements. With a view to enable appropriate monitoring by the regulators, key information about company groups should be disclosed, including on beneficial ownership, profit, activities of the subsidiaries, their assets and number of employees. The OECD BEPS action plan nb 13 on country-by-country reporting should serve as an illustration. However, in the context of corporate governance such information should be made publicly available and without threshold. The issues to be addressed by the Committee would not only address tax matters, which are sometimes considered as confidential, but also workers' rights, environmental obligations, social security regimes etc. Such matters raise sufficient questions of general interest to justify unrestricted transparency.

Workers' participation. The TUAC has on many occasions provided evidence that social dialogue at enterprise level, as referred to under Principle IV.C, is a key factor towards sustainable corporate behaviour. When the board of the parent company, which takes decisions with regard to the general strategy of the group, is located in another jurisdiction than the one of the worker representatives, there is a broken link. Information, consultation and board level participation rights are then greatly undermined. These rights are acknowledged in principle IV.C, yet it is the TUAC understanding that the Committee has, so far, brought very little attention to these requirements and implications for the governance of companies.

The European Works Council Directive can serve as a useful source of inspiration to ensure that harmonious dialogue is taking place throughout the group. According to this EU Directive, dialogue with the works council takes place at the relevant level of management according to the subject under discussion. Special attention is paid to the "controlling undertaking" which is defined as the company exercising a dominant influence over another by virtue of ownership, financial participation or the rules which govern it⁵. We have seen that directors of subsidiaries are often grateful where such links

³ COM (2018) 97 final at p.11

⁴⁴ Deloitte : Governance of subsidiaries – a survey of global companies, September 2013, p.10

⁵ Directive 2009/38, Article 3

exist as they are in a position to obtain - from the work council - information about the situation of the group, which they would not obtain otherwise.

Other items

Flexibility and proportionality

With respect to the Committee on-going discussion on flexibility and proportionality, the TUAC recalls its strong caution towards this agenda. Transparency and other obligations which are crucial for safeguarding stakeholders' interests must remain the same for all companies alike. There is also a business case to be made: investors do need clarity to invest their funds, especially where SMEs are concerned.

A related issue is the increasing number of companies unlisting themselves, thereby getting rid of a number of disclosure requirements. This is becoming a sizeable problem for regulators and for all stakeholders, including institutional investors, who no longer have access to the information they need. The TUAC therefore urges the Committee to launch a reflection on whether the listed / non listed distinction is still relevant where large companies are concerned.

Recent national developments

The TUAC would like to report on developments in the France and the UK, from a trade union perspective.

In **France**, a legislative proposal (la loi PACTE) is reaching its final stages in parliament. This law among others would introduce workers' participation rights, with employees' representatives having the same rights and obligations as other board members. This measure is welcomed by a number of French trade union centres as a way to promote workplace democracy and long term interest and long term strategies in French boardrooms.

In the **UK**, increased concerns about the failure of the shareholder model is pushing corporate governance up the agenda: the increase of precarious work, "zero-hour" contracts, and a series of corporate scandals (Sportsdirect, BHS, Carillion) have caused more focus on a more stakeholder oriented approach. The Prime Minister Theresa May called for an end to "the excesses and irresponsibility" of some top executives whose actions were damaging "the social fabric of the country".

Of particular interest to the trade union movement was her pledge to place workers' directors on board. This proposal, however, has been significantly watered down. It has been suggested that the UK business community, with support of institutional investors, contributed to the demise of the proposal.⁶ Nonetheless, the 2018 corporate governance code now contains slightly stronger language on workers on board.

⁶ *Businesses wary of Theresa May's board reforms*, Financial Times, 11 July 2016

This appetite for a more stakeholders-oriented approach is felt everywhere. In the US, a recent draft bill on corporate governance raises questions about the need to introduce ground-breaking changes to US laws in order to increase corporate accountability⁷.

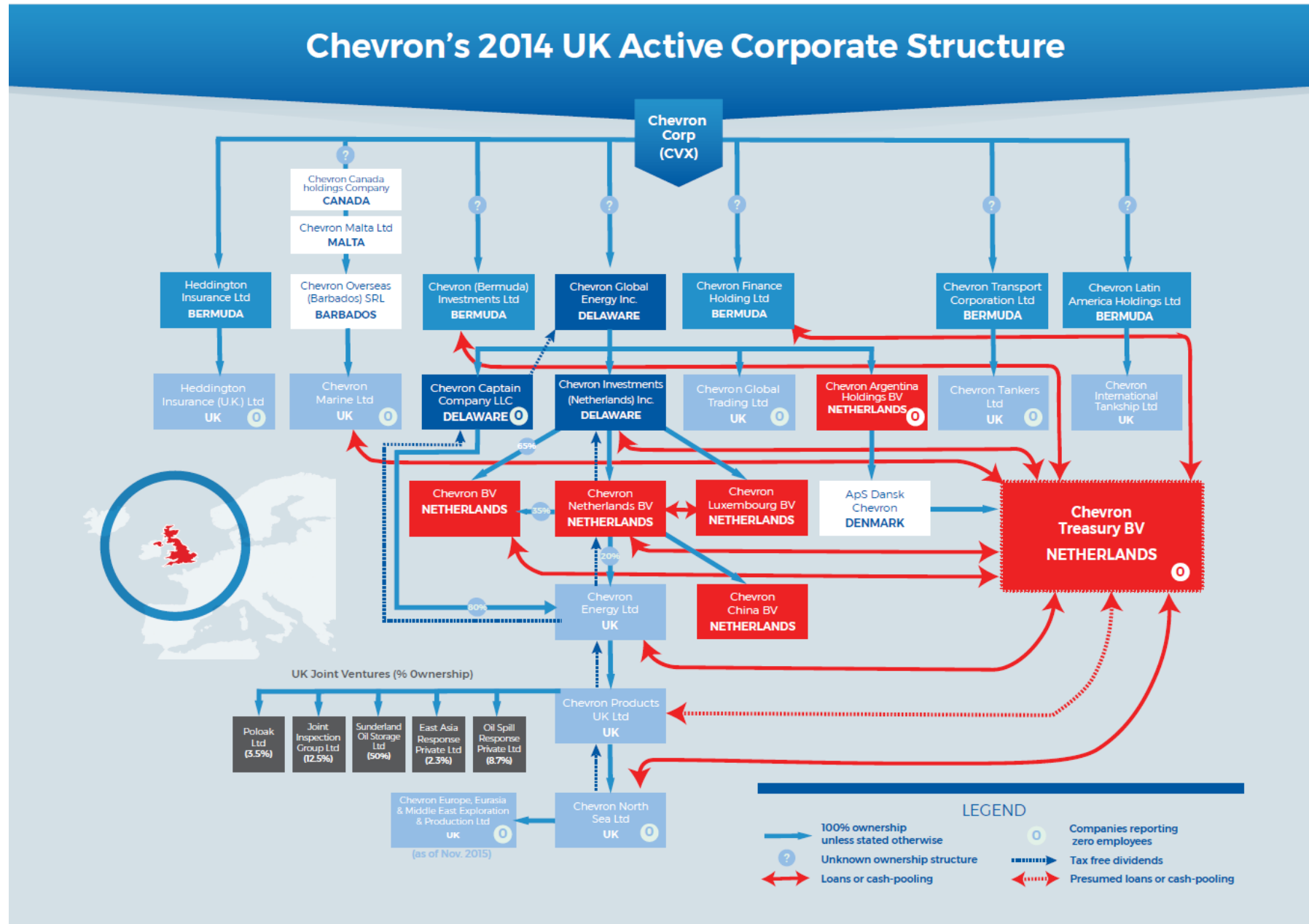
Priorities for 2019-2020

TUAC believes that an urgent OECD discussion on long-term business models is required in order to shift away from “corporate short-termism” – corporations under-investing in productive assets and R&D, the workforce (job quality, skills & training), and low-carbon transition while payments on dividends, share buybacks and executive compensation spiral out of control. Short-termism also fuels regulatory arbitrage for the purpose of evading the relevant or applicable national regimes: the tax collector (tax avoidance and evasion), workers (respect of labour law and collective agreements) and even minority shareholders and creditors (pyramid group structure, offshore financial centres). The key issues that the OECD could focus on would include:

- **group structures and responsibilities of parent companies** towards subsidiaries activities need to be addressed in a more challenging way;
- the **corporate governance implications of aggressive tax planning**. The BEPS Action Plan will undergo a review by 2020 with regard to the digital economy. But as every business is going digital, a wide encompassing discussion should be expected. There is a clear role for this Committee to play as it is corporate law which governs the establishment of special purpose entities for the purpose of tax avoidance. It is also corporate law which introduces disclosure obligations and lifts the corporate veil where appropriate. For the sake of consistency and improving OECD impact, parallel discussions should be held in this Committee;
- a broader discussion on the **long term interest of companies**, and their responsibilities towards stakeholders. The 2018 EU action plan on financial sustainable growth, as well as recent national developments in France and in the UK are evidence of the appetite for encouraging longer term sustainability interest;
- Last but not least, the OECD work on corporate governance would greatly benefit from an in-depth analysis of the **impact of workers’ participation on corporate governance**.

⁷ *The Accountable Capitalism Act, tabled by Senator Warren*
<https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations>

- ANNEX 1 : Chevron's 2014 UK active corporate structure
- Source : CICTAR, www.chevrontax.info



ANNEX 2 : 2015, VOS TRANSPORT STRUCTURE

Source: Orbis, Dutch Chamber of Commerce, extracted November 2015, graphics by SOMO.

