

Identified gap in the OECD Guidelines: labour rights

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on labour rights.

Problem: The OECD Guidelines do not set clearer expectations for MNEs to respect labour rights across their supply chains

Labour rights are at risk around the world in all sectors and supply chains. Unions are under threat and unionization in decline as workers have been deprived of their rights to form unions and collectively bargain. According to data of the Trade Union Advisory Committee of the OECD (TUAC), 424 million workers work without bargained workplace standards, and 18 million fewer workers are covered by collective bargaining agreements today than were covered in 2011.¹ MNEs frequently undermine freedom of association by firing or otherwise persecuting existing or potential union members and leaders, or by forming company-controlled unions. While it is already a labour rights abuse for MNEs to obstruct unionisation, this is also an observed strategy of MNEs to avoid the realisation of other labour rights.¹ Meanwhile, in 2020 the ILO documented² that two billion workers worldwide are informally employed, typically working in vulnerable positions with lower pay and scant access to social protections or rights at work. Over 630 million workers around the world live in extreme or moderate poverty, while a full 40 million people work in conditions of modern slavery and 152 million are in child labour.³ Severe wage and employment inequalities persist across geography, gender, and age lines, though the adverse impacts are felt more prominently by vulnerable groups such as workers in developing countries, women, and workers who are not unionized. Moreover, increased automation and digitalization of work, along with natural disasters such as climate change and the global Covid-19 pandemic, have exposed how systemically MNEs' unfair purchasing practices exacerbate impacts against already-strained workers, and show that guidance is needed to help MNEs anticipate and address impacts from such phenomena.

Chapter V of the OECD Guidelines on Employment and Industrial Relations seeks to protect the rights of workers by setting out expectations for MNEs to, for example, respect workers' rights and contribute to the elimination of child and forced labour. Chapter V presently sets a basic floor for labour rights, and a key priority of civil society and trade unions is to strengthen implementation of the chapter as it currently exists. Beyond implementation, however, the existing text also lacks focus on several key topics. The text does not adequately emphasize due diligence over labour rights impacts in MNE supply chains: currently, the term "supply chain" or, better, "value chain" does not appear in the principles of Chapter V, and several of the principles are directed too narrowly towards MNEs' "own operations" or conduct regarding their own employees. While language in Chapter II on supply chain due diligence applies to Chapter V, the lack of precise articulation between Chapters II and V creates confusion and a strategic gap. The Employment and Industrial Relations chapter does not discourage MNEs' mistaken reliance on auditors to fulfill a company's own due diligence requirements. The chapter does not mention a "living wage" and require support of collectively bargained wages that meet or exceed a liveable wage regardless of government policies or competitor practice, including by ensuring MNE purchasing practices allow them to pay a living wage. The chapter does not establish appropriate procedures for responsible disengagement/exit, including when exit results from economic and health crises such as global pandemics, from digitalisation and/or automation, and from business decisions or specific purchasing practices. The chapter does not highlight standards for RBC in relation to the rights of workers in P2P platforms and the digital

¹ Mind the Gap, "[Undermining unionisation](https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/undermining-unionisation/)", 2020, available at <https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/undermining-unionisation/>

economy. It also does not discourage the outsourcing of core business activities such as recruitment to uncontrolled external companies, an increasingly common tactic of MNEs to cut costs at the expense of worker welfare costs. The chapter does not adequately clarify the risks – and special due diligence needed – for disadvantaged or marginalised workers including women, homeworkers, people of low-caste, migrant workers, and others. Meanwhile, gaps in other chapters of the Guidelines, such as in Chapter I (Concepts and Principles) related to defining a broad scope of covered enterprises, Chapter IV (Human Rights) related to human and labour rights defenders, and Chapter III (Disclosure) related to disclosure of key information such as due diligence steps, wages paid, and identity of supply chain partners, also negatively impact the effectiveness of the Guidelines in advancing MNE respect for labour rights.

Impact of the problem: Lack of clear standards on labour rights for MNEs and remedy for impacted workers

The gaps in the OECD Guidelines text on labour rights have two main consequences:

- 1) A lack of specificity and completeness in norms and expectations for MNEs regarding respecting labour rights in the current global context; and
- 2) Diminished grounds on which to seek remedy via the National Contact Point (NCP) grievance mechanism and poor complaint outcomes.
 - a. According to TUAC's research, between 2011 and 2020, NCPs were 16% less effective than in the previous decade in helping parties reach agreement. Since 2011, only five freedom of association cases resulted in an agreement, while in 18 cases either the NCP (8) or the MNE (10) stymied the complaint by choosing not to proceed with mediation.⁴

Parallel laws and standards

Although the OECD Guidelines contain some language on labour rights, several other international instruments or standards address labour rights in greater specificity:

- The ILO Conventions, which have established modern standards on fundamental principles and rights at work;⁵
- The European Union Charter of Fundamental Rights,⁶ which establishes labour rights standards, as well directives such as Directive (2019/633) on unfair trading practices in the agricultural and food supply chain;⁷ and
- National standards and guidance, such as the Dutch Agreement on Sustainable Garments and Textile.⁸

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

Who needs to act?

OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society’s concerns regarding the current limitations in the Guidelines’ standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

About OECD Watch

OECD Watch is a global network with over 130 member organisations in more than 50 countries. Founded in 2003, OECD Watch’s primary aim is to help support CSO activities related to the OECD Guidelines and the work of the OECD’s Investment Committee. Membership consists of a diverse range of civil society organisations – from human rights to environmental and development organisations, from grassroots groups to large, international NGOs – bound together by their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their adverse impacts around the globe. For more information, please visit www.oecdwatch.org.

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¹ TUAC, “Reviewing the Guidelines for MNEs: Trade Union Key Messages, OECD Guidelines that Deliver,” December 2020, available at file:///Users/marianingrams/Downloads/2020_GuidelinesKeyMessages.pdf.

² ILO, “World Employment and Social Outlook: Trends 2020,” 2020, available at: https://www.ilo.org/wcmsp5/groups/public/--dgreports/-dcomm/--publ/documents/publication/wcms_734455.pdf.

³ ILO, “40 million in modern slavery and 152 million child labour around the world,” 19 September 2017, available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_574717/lang--en/index.htm?ssSourceSiteId=ipec.

⁴ TUAC, “Reviewing the Guidelines for MNEs: Trade Union Key Messages, OECD Guidelines that Deliver.”

⁵ ILO Conventions, available at: <https://www.ilo.org/global/standards/lang--en/index.htm>

⁶ European Union, Charter of Fundamental Rights (2016/C 202/02), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016P%2FTXT>

⁷ Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, available at: <http://data.europa.eu/eli/dir/2019/633/oj>

⁸ The Dutch Agreement on Sustainable Garments and Textile, available at: <https://www.imvoconvenanten.nl/en/garments-textile/agreement>

