

Advocacy brief: Arguments for revising the OECD Guidelines to improve business standards on labour rights

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises (Guidelines) to strengthen expectations for multinational enterprises' (MNEs') respect for labour rights.

Problem: The OECD Guidelines should 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 December 2020 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.² Meanwhile, in 2020 the ILO documented³ 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.⁴ 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. Digitalization and the rise of new peer-to-peer (P2P) work platforms are introducing new challenges for workers to access labour rights.⁵ Meanwhile, natural disasters such as the global COVID-19 pandemic have also exposed how deeply the system is tilted towards protecting shareholders rights versus the rights and well-being of workers.⁶

Chapter V of the OECD Guidelines 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 livable 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 responsible business conduct in relation to the rights of workers in peer-to-peer platforms and the digital 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. The chapter does not adequately clarify the risks – and special due

diligence needed – for marginalised and disadvantaged workers including women, homeworkers, people of low-caste, children, migrants, and others.

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.⁷

Solution to the problem: Update the OECD Guidelines to strengthen expectations for MNEs on respecting labour rights

An update of the OECD Guidelines is needed to strengthen standards for MNEs to respect labour rights. The following issues could be addressed:

Chapter V (Employment and Industrial Relations) could be updated, primarily in commentary, to:

- Call on MNEs to conduct due diligence over labour rights impacts in their supply chains. Commentary should clarify that MNEs cannot rely on the work of auditors to fulfil their own due diligence responsibilities;
- Ensure MNEs support (collectively bargained) wages that meet or exceed a liveable wage, regardless of government policies or competitor practice, including by ensuring their purchasing practices allow them to pay a living wage;
- Call on MNEs to responsibly manage employment transitions when they stop, reduce, sell, or transfer business operations due to economic and health crises such as global pandemics, digitalisation, conflict or sanctions in the host country, automation, or business decision (responsible exit). Companies should be expected to provide early notification to workers and their representatives of their intention to stop a work relationship; undertake due diligence before leaving to mitigate the effect of their exit such as by ensuring payment of severance and benefits; and avoid discrimination against certain workers (e.g. union members and leaders, women workers, etc.) of effects of disengagement. Companies should be encouraged to support opportunities for employment/re-education;
- Ensure MNEs incorporate and demonstrate credible workplace health and safety procedures in their own workplaces as well as those in their supply chains;
- Acknowledge vulnerabilities for growing numbers of workers in P2P platforms and the digital economy and establish clear expectations for MNEs to respect labour rights in this context;
- Call on MNEs to avoid outsourcing core business activities such as recruitment and employment to uncontrolled external companies as a means of cutting costs.
- Ensure additional attention to identifying and addressing impacts on disadvantaged or marginalised workers by including specific reference to such groups in a few places, such as in relation to principles 1e, 4c and 5, as well as in relation to commentaries 54 and 58.

Chapter III (Disclosure) could better reflect the expectation for MNEs to:



- Disclose the names and locations of their supply chain partners, as well as wages paid and how they relate to minimum and living wages,⁸ to enable outside verification and transparency of MNE due diligence.

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;⁹
- The European Union Charter of Fundamental Rights,¹⁰ which establishes labour rights standards, as well directives such as Directive (2019/633) on unfair trading practices in the agricultural and food supply chain;¹¹ and
- National standards and guidance, such as the Dutch Agreement on Sustainable Garments and Textile.¹²

Why address this issue now?

The OECD Guidelines, originally drafted in 1976, have not been updated 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 and laws 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 completed a comprehensive stocktaking to identify what gaps exist in the Guidelines and assess whether an update is needed to close them. The stocktaking results show broad consensus among NCPs, stakeholders, and the public that the Guidelines are not adequately clear on this and other issues. The Investment Committee is now considering whether to update the Guidelines, as it has done every decade since 2001 and before that as well. Such an update would provide an opportunity for OECD governments to address the problems OECD Watch and others have identified. ***Wholesale update is not needed. Instead, smart, targeted edits to principles and/or commentary in key sections would go a long way in closing the gaps.***

Who needs to act?

OECD governments should 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 over limitations in the Guidelines' standards and complaint system, by improving the Guidelines through a textual update. Governments have a critical opportunity right now to close the gaps identified by NCPs and stakeholders. OECD Watch asks all states to support ongoing discussion on specific textual edits on the issues civil society is prioritizing and encourages those states that wish to champion various concerns of civil society to present proposals to resolve the gaps found. OECD Watch stands ready to support individual states and the Committee during the anticipated update process.

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 Mind the Gap, “Undermining unionisation”, 2020, available at <https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/undermining-unionisation/>.

³ 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.

⁴ 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.

⁵ See, e.g., European Parliament Policy Department for Economic, Scientific and Quality of Life Policies, “The platform economy and precarious work,” study commissioned by the EMPL committee, September 2020, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652734/IPOL_STU\(2020\)652734_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652734/IPOL_STU(2020)652734_EN.pdf).

⁶ See, e.g. Joseph Wilde-Ramsing et al, *Responsible disengagement in the time of corona*, (April 2020), available at: <https://www.somo.nl/responsible-disengagement-in-the-time-of-corona/>.

⁷ TUAC, “Reviewing the Guidelines for MNEs: Trade Union Key Messages, OECD Guidelines that Deliver.”

⁸ See, E.g., Clean Clothes Campaign, Break the chains: transparency in 2020 supply chain(s), October 2020, available at: <https://cleanclothes.org/news/2020/break-the-chains-transparency-in-the-2020-supply-chains>

⁹ ILO Conventions, available at: <https://www.ilo.org/global/standards/lang--en/index.htm>

¹⁰ 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>

¹¹ 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>

¹² The Dutch Agreement on Sustainable Garments and Textile, available at: <https://www.imvoconvenanten.nl/en/garments-textile/agreement>