

# The growing interest in due diligence as an instrument for improving workers' rights and working conditions

Multinational companies source from countries where labour is cheaper and rights are not respected

Globalisation, and the accompanying threat of delocalisation or outsourcing has led to the sharp rise in the activities of multinational companies and the development of global supply chains. The diversity of entities involved in the supply chains (direct/indirect subsidiaries, contractors, suppliers and other intermediaries) and the increasing complexity of business models have made it harder to identify and hold 'parent' companies responsible for poverty pay or a lack of workers' rights. This has contributed to declining working conditions, wages, and to violations of labour rights, in particular the freedom of association and the right to collective bargaining<sup>1</sup>.

Moreover, the rise of global supply chains has also played a role in the growing inequality within countries (and also between countries) as states circumvent labour standards as a comparative advantage to attract direct investment, e.g. by setting up export processing zones where labour standards (especially freedom of association and the right to collective bargaining) don't apply and workers' rights are violated<sup>2</sup>.

As unionisation and collective bargaining has decreased, so the gap between increases in productivity and increases in wages has widened (with productivity increasing faster than wages)<sup>3</sup> and the share of wages as a proportion of GDP has declined. Multinational companies source goods from countries where labour is cheaper, where workers' rights are not respected, with much less protection, and much less bargaining power than in Europe and North America.

Facing this growing in-work poverty and inequality, trade unions at international, regional, European and national levels have increased their efforts to improve workers' rights and working conditions throughout global supply chains. Unions, civil society and international organisations have worked to hold multinational enterprises accountable for the conditions under which their subsidiaries, subcontractors and suppliers carry out their activities. In particular, by calling for the implementation of human rights due diligence as developed by various organisations, including the OECD.

This article looks at the growing interest in due diligence in relation to workers' rights, especially in the OECD.

## Due diligence and the OECD

The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the

OECD Guidelines), define due diligence as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts – in particular towards human rights and labour rights – as an integral part of business decision-making and risk management systems<sup>4</sup>. It is a process to manage business risks with six different steps outlined in the OECD due diligence Guidance for Responsible Business Conduct<sup>5</sup> and involves stakeholders, amongst them workers, workers' representatives and trade unions.

## OECD Guidelines for MNEs

At the international level, the due diligence instrument has been in the making for many years: in 1976, the OECD was the first international organisation to adopt guidelines for multinational enterprises on responsible business conduct. The guidelines have been continuously updated – with substantial input from TUAC - to remain fit for purpose in light of the evolving context for international business<sup>6</sup> (e.g. human rights violations, climate change and use of technology). Moreover, the OECD Guidelines are aligned with other international instruments, including the 2011 United Nations' Guiding principles on Business and Human rights<sup>7</sup>, and the ILO MNE Declaration<sup>8</sup> adopted in 1977 and lastly revised in 2022.

In 2023, the OECD revised and strengthened their guidelines which are widely accepted as a leading international standard for how companies and investors should address their impacts on people, the planet and society. Although they are specifically addressed to multinational enterprises, governments encourage all businesses to observe them regardless of their sector, structure and size. Multinational and domestic enterprises are "subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both"<sup>9</sup>.

The Guidelines, to which 51 governments adhere (including non-OECD members such as Morocco, Mauritius and Uruguay), make recommendations to MNEs covering all key sustainability issues – from climate change to technology, from anti-corruption to human rights and labour standards. The chapter on employment and industrial relations refers in particular to fundamental rights enshrined in the ILO Core labour standards<sup>10</sup>, "the highest standards of safety and health at work", best possible wages and conditions of work.

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According to the guidelines employers must not interfere with workers' right to be represented by trade unions of their choice and must respect and ensure the fundamental rights of all workers along the supply chain, not only their own direct employees.

Implementing the guidelines can be made a condition by retailers for making purchasing orders and supplier agreements, by lenders and investors for financing projects, and by government procurement agencies for awarding contracts. Similarly, institutional investors can seek guarantees from asset managers and private equity that they will ensure that companies they invest in uphold the guidelines including the right to join a union and collective bargaining.

The TUAC believes that the revised OECD Guidelines give workers and unions a renewed opportunity to insist on the right to join a trade union and to collectively bargain. The fact that the guidelines also give retailers, lenders and investors an opportunity to make sure that companies they do business with respect for workers' rights, removes any excuse for companies to claim they are powerless to act.

The OECD Guidelines are one of few international instruments available to trade unions to help ensure respect by MNEs of international labour standards and decent work.

### Using National Contact Points as a complaint mechanism for trade unions

The Guidelines are not just pieces of papers gathering dust in government and company offices. Governments adhering to the OECD Guidelines are obliged to set up National Contact Points (NCPs).

There are 51 countries with NCPs. The NCPs are far from perfect, they are little known and could be more effective, as well as better funded and staffed – a fact on which unions and business agree<sup>11</sup> - but nonetheless they are bodies dedicated to promoting and implementing the guidelines in all countries where businesses originating from adherent states carry out business activities. NCPs can, and do in some cases, include trade unions either as part of a tripartite (Belgium, France, Sweden) or a quadripartite (Finland) decision-making structure, or as part of an advisory body (Australia, Chile, Italy) set up to help and advise the NCP.

TUAC supports unions in bringing issues to the attention of NCPs and seeking greater involvement in the work of the NCPs and takes part in OECD peer reviews of the NCPs.

### OECD guidance on implementing guidelines

The OECD has also offered extensive guidance on implementing the guidelines. It has published a series of reports<sup>12</sup> on due diligence for responsible business conduct, and on responsible business conduct and responsible supply chains in different sectors (e.g. minerals and extractives, garment and footwear, finance, agriculture...).

The most recent is an OECD Handbook on due diligence<sup>13</sup> for enabling living incomes and living wages in agriculture, garment and footwear sectors. It recognises that preventing anti-union practices is a key strategy to enable living wages and stresses the responsibility of business in conducting due diligence on the right to freedom of association and collective bargaining. There is also a brochure<sup>14</sup> that summarises the Handbook.

The OECD is now working on a framework on responsible business conduct for a just transition, including principles for businesses in supporting a just transition and just transition FAQs to offer support and resources to businesses. It is also preparing guidance on responsible business conduct and artificial intelligence, for which unions are working to ensure strong references to the benefits of collective agreements on the introduction, use and monitoring of AI in the workplace.

### Due diligence initiatives developed on the OECD guidelines

Human rights due diligence is also a lever for global unions to negotiate Global Framework Agreements (GFAs) to protect the interests of workers across a multinational company's operations. The first GFA was adopted in 1988 by the International Union of Food (IUF)<sup>15</sup> and Danone, referring to the ILO core labour standards, and many refer to the OECD guidelines. More than 300 agreements<sup>16</sup> have been signed over almost 4 decades, and most of them by the Global Union Federations Industrial<sup>17</sup> and UNI<sup>18</sup> and more will follow as unions pressurise multinationals to uphold workers' rights throughout their supply chains. GFAs have a role to play in all stages of due diligence by providing a source of information on adverse impacts, a means of tracking responses, and a mechanism for providing remedy.

The fight for decent work throughout global supply chains is far from over, indeed it has barely started. Valuable as they are, global agreements are not substitutes for national agreements at sectoral and company level.

Alongside GFAs, important steps forward have taken place in recent years with the adoption of mandatory human rights due diligence legislation. In 2017 France adopted the first national law on due diligence covering human rights, health and safety and the environment<sup>19</sup>, followed by a law in Germany in 2021<sup>20</sup>. Both refer to OECD Guidelines.

In addition, just as significant as the OECD Guidelines, and efforts to explain, promote and implement them, is the adoption by the European Union of a Corporate Sustainability Due Diligence Directive<sup>21</sup> that the 27 member states have to transpose.

The European Trade Union Confederation (ETUC) proclaimed that it would pave the way “for a dramatic improvement in respect for the human rights of millions of workers in the supply chains of businesses operating in the EU” and that despite “reducing the number of companies initially covered

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by the Directive from 16,000 to under 7000, trade unions were able to win some important advances for working people.” The ETUC explained that “unlike in the Commission’s original proposals, trade unions and workers’ representatives will be involved in the development and implementation of an effective due diligence policy, plan and strategy in companies, their subsidiaries and throughout the supply chain”<sup>22</sup>.

Although it is likely to be rescinded in the coming months, President Biden issued a “Memorandum on Advancing Worker Empowerment, Rights, and High Labor Standards Globally” in November 2023, ordering “Agencies engaged abroad” to “use a variety of diplomatic channels, including at high levels, to elevate key labor issues; advance internationally recognized labor rights; prevent labor abuses; strategically address challenges to the exercise of labor rights”.

With these OECD, EU and White House initiatives, human rights due diligence is becoming more important for governments and therefore for companies. It offers a lever for trade unions to empower unions and workers in every country to achieve decent pay and working conditions through collective bargaining. This can be done by unions for workers in their own country, or by unions in countries where companies are based that have supply chains in which workers’ rights are not respected in other parts of the world.

Governments must step up the pressure on employers to engage in collective bargaining, and commitment to responsible business conduct and due diligence needs to be adopted across government departments, not just in employment ministries. For example, TUAC is working hard to persuade governments participating in the OECD Development Assistance Committee that a larger share of official development assistance should be invested in supporting unionisation and collective bargaining<sup>23</sup>, and social protection, as the most effective way to combat extreme poverty.

Human rights due diligence needs to be implemented not only in multinational companies supply chains but also to contracting authorities and entities. There are growing calls from unions for public procurement contracts to require suppliers to have a collective agreement negotiated with their workers’ unions or representatives. The EU Corporate Sustainability Due Diligence Directive requires Member States to ensure that environmental, social and labour rights due diligence obligations are taken into account as part of the award criteria for public and concession contracts, and as an environmental or social condition that contracting authorities may lay down in relation to the performance of public and concession contracts. Failing this, contracting authorities can exclude an economic operator from participation in a procurement procedure, including a concession award procedure<sup>24</sup> (e.g. the French law already provides for such an exclusion measure<sup>25</sup>).

There is a job to be done of spreading the word. Local and regional union representatives and members, especially in less developed economies and less unionised countries, need support to understand how due diligence can be used to their advantage. They need help to reach decision-makers in complex international ownership and management structures, to make an impact at home and at the headquarters of multinationals. Due diligence for responsible business conduct is here to stay as an instrument that unions can use to achieve what they have been grappling with for years – how to deliver decent work in global supply chains, and TUAC can help unions understand and use the guidelines.

It is not a substitute for the hard work of organising workers, building unions, negotiating and reaching agreement with governments and employers – but it can help unions get to the point where they are at the negotiating table.

- 1 Mathews, R. 2024. Trade Unions, Labour Governance and Economic Upgradation in Value Chains: Framing Intervention Amidst Emerging Human Rights Due Diligence Frameworks, ILO Working Paper 127 (Geneva, ILO). <https://doi.org/10.54394/XTNW2213>.
- 2 Cairola, E. (2015), “Back to fundamentals: Organizing, collective bargaining and promotion of a decent work framework in global supply chains”, *International Journal of Labour Law Research*, Vol. 7 (Geneva, ILO). <https://www.ilo.org/publications/decent-work-global-supply-chains>.
- 3 Soldani, E., et al. (2024), “Policy approaches to reduce inequalities while boosting productivity growth”, OECD Economics Department Working Papers, No. 1819, OECD Publishing, Paris, <https://doi.org/10.1787/af121c8f-en>.
- 4 OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, <https://doi.org/10.1787/81f92357-en>.
- 5 The six steps are: 1) embedding responsible business conduct into policies and management; 2) identifying and assessing actual and potential adverse impacts associated with the enterprise’s operations, products or services; 3) ceasing, preventing and mitigating adverse impacts; 4) tracking implementation and results; 5) communicating how impacts are addressed; 6) providing for or co-operating in remediation when appropriate.
- 6 OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, <https://doi.org/10.1787/81f92357-en>.
- 7 [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf)
- 8 [https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed\\_emp/%40emp\\_ent/%40multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_emp/%40emp_ent/%40multi/documents/publication/wcms_094386.pdf)
- 9 OECD Guidelines for Multinational Enterprises, 1.5.
- 10 That are: freedom of association and the right to collective bargaining, the abolition of child labour, the elimination of all forms of forced labour, the principle of equality of opportunity and non-discrimination, and the safe and healthy working environment.
- 11 <https://tuac.org/news/unions-business-and-civil-society-call-for-action-to-strengthen-ncps-for-responsible-business-conduct-2/>
- 12 <https://www.oecd.org/en/topics/due-diligence-for-responsible-business-conduct.html>
- 13 [https://www.oecd.org/en/publications/2024/10/handbook-on-due-diligence-for-enabling-living-incomes-and-living-wages-in-agriculture-garment-and-footwear-supply-chains\\_5d7867e7.html](https://www.oecd.org/en/publications/2024/10/handbook-on-due-diligence-for-enabling-living-incomes-and-living-wages-in-agriculture-garment-and-footwear-supply-chains_5d7867e7.html)

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Trade unions will be involved in effective due diligence policy and strategy in companies, their subsidiaries and throughout the supply chain

dissuasive sanctions (which is very often necessary in the case of multinationals);

- Recognise the role of “representatives of competent recognised Community-level trade union organisations” in the subsidiary requirements to allow trade union experts to participate in all meetings and have access to all sites;
- Guarantee access to justice by clarifying the legal status of EWC and, SNBs as legal actors and by defining the legal means to be used against the company to defend the rights conferred by the EWC directive;
- Ensure a more efficient coordination between the local, national and European levels to guarantee that the EWC can communicate with the national level whenever necessary, especially before and after meetings, and deliver its opinion before consultation is completed at the respective level;
- Consolidate the concept of “transnational character of a matter” which is broader and clearer in the recitals but not in the main body of the directive, leading to different interpretations between EWC and management;
- Prevent abuse of confidentiality clauses by clarifying more precisely on what grounds, under what circumstances and for how long a company may withhold information, and on what grounds the right of EWC members to share information with stakeholders (particularly employee representatives) may be restricted .

Early 2023, the European Parliament adopted a very welcome own-initiative resolution calling on the Commission to strengthen the role and capacity of EWCs. One year later, the Commission responded with a legislative proposal. At the time of writing this article, the trilogue negotiations between the EU

Commission, the Parliament and the Council have not yet begun, mostly because of the European elections in May 2024 which put the institutions on hold for a few months. Considering recent attacks of employers and the far-right on adopted legislations we need to be cautious. Yet, we hope that a new directive that meets the challenges will soon be adopted. 30 years after the adoption of the first EWC directive it is high time to finally make this tool effective and guarantee workers’ rights!

- 1 Council Directive 94/45/EC on the establishment of a European Works Council (EWC) or a procedure in Community-scale undertakings or Community-scale groups of undertakings for the purposes of informing and consulting employees.
- 2 As directives, both pieces of legislation had to be transposed into national legislation. Depending on the national system, transposition can be done either by the Parliament, the government, regional authorities or the social partners. Belgium and Norway are the only countries where transposition has been made by the social partners.
- 3 ETUI, European Works Councils Database, EWCDDB, [www.ewcdb.eu](http://www.ewcdb.eu).
- 4 The election or appointment of members of the SNB and EWC depends of national legislation and/or practice. In Austria, Belgium, Germany, Hungary, the Netherlands and Luxembourg the works councils appoint the persons. In Cyprus, Denmark, Finland, France, Greece, Italy, Lithuania, Poland, Portugal, Romania, Spain and Sweden it is up to the trade unions to nominate. In Czech Republic, Slovakia and Latvia the employee representatives (whether union or non-union) decide. Finally, in Bulgaria, Croatia, Estonia, Ireland, Malta, Slovenia and Norway election is made through the workforce (either at a general meeting or by secret ballot).
- 5 ETUI, Can anybody hear us? An overview of the 2018 Survey of EWC and SEWC representatives.
- 6 For more information see “ETUC position paper - For a modern European Works Council (EWC) Directive in the Digital Era”, adopted at ETUC Executive Committee on 15-16 March 2017 in Malta.

A proposal to strengthen the role and capacity of the EWCs is in process, and unions are hopeful that a new directive that meets the challenges will soon be adopted

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- 14 [https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/responsible-business-conduct/OECD-Living-Incomes-and-Living-Wages-Handbook-Brochure.pdf/\\_jcr\\_content/renditions/original./OECD-Living-Incomes-and-Living-Wages-Handbook-Brochure.pdf](https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/responsible-business-conduct/OECD-Living-Incomes-and-Living-Wages-Handbook-Brochure.pdf/_jcr_content/renditions/original./OECD-Living-Incomes-and-Living-Wages-Handbook-Brochure.pdf)
- 15 <https://www.iuf.org/>
- 16 See the ILO repository: <https://cbsd.ilo.org/category/transnational-agreements/transnational-company-agreements>.
- 17 <https://www.industriall-union.org/global-framework-agreements>
- 18 <https://uniglobalunion.org/workers-rights/global-agreements/>
- 19 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>

- 20 Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten, June 9, 2021, <https://dserver.bundestag.de/btd/19/305/1930505.pdf>
- 21 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL\\_202401760](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401760)
- 22 <https://www.etuc.org/en/pressrelease/due-diligence-major-boost-workers-rights-company-supply-chains>
- 23 <https://tuac.org/news/tuac-puts-case-for-workers-rights-and-bargaining-power-in-development-co-operation/>
- 24 Directive 2024/1760 on corporate sustainability due diligence, recital 92.
- 25 Article 3123-7-1 of the French Public procurement Code.