



OECD Week 2018

Implementing the OECD Due Diligence Guidance

Paris, 28 May 2018

Executive Summary

In May 2018, the OECD Council adopted a Recommendation to promote and implement the OECD Due Diligence Guidance for Responsible Business Conduct, which explains how companies should conduct diligence to avoid and adverse impacts under the OECD Guidelines for Multinational Enterprises. The OECD Guidance is expected to become *the* authoritative international reference on due diligence.

The Guidance sets out a six-stage due diligence framework to be used by enterprises to avoid and address adverse impacts in their operations, supply chains and business relationships on *all* relevant topics under the Guidelines: (i) information disclosure; (ii) human rights; (iii) employment and industrial relations; (iv) environment; (v) bribery; and (vi) consumer affairs. Companies cannot 'pick and choose' which adverse impacts to avoid and address, even if they have to prioritise on the basis of severity and likelihood.

It explains that stakeholder engagement is important *throughout* the due diligence process and that stakeholders include workers and their trade unions within the company *and* the company's supply chain. The Guidance recognises industrial relations as a form of stakeholder engagement and points to company-trade union agreements as a way for companies to avoid and address adverse impacts on workers: collective bargaining agreements, Global Framework Agreements, protocols and Memoranda of Understanding are all part of due diligence.

The adoption of the Council Recommendation promoting the Guidance is a significant milestone. The extent to which companies conduct effective due diligence, in line with the OECD Guidance, will ultimately depend on government action. A number of OECD countries have already taken steps, including introducing binding legislative measures. TUAC calls on adhering governments to implement the following *5-Point Plan*:

- 1.** Introduce mandatory due diligence that covers all topics of the OECD Guidelines and establishes corporate liability;
- 2.** Strengthen policy coherence by introducing binding due diligence clauses in trade and investment agreements, export credits, development finance and public procurement;
- 3.** Monitor company compliance with the OECD due diligence framework;
- 4.** Strengthen stakeholder engagement by supporting capacity-building on due diligence for trade unions and other stakeholders;
- 5.** Disseminate the Guidance, including by ensuring that National Contact Points have the necessary resources to do so, working with the social partners/stakeholders.

The OECD also has a central role to play in promoting the Guidance. It should draw up an implementation plan, building on the lessons learnt from its follow-up programmes for promoting the sectoral due diligence guidance, and involve TUAC, BIAC and OECD Watch. Effective implementation of the Guidance will require adequate resources.

Table of contents

Executive Summary1
 1. OECD Due Diligence Guidance2
 2. Due Diligence: the Role of Trade Unions4
 3. Due Diligence: Respect for Trade Union Rights.....5
 4. Implementing the OECD Due Diligence Guidance5
 About this Briefing7
 Annex I: The French “Duty of Vigilance” Law.....8
 Annex II: Examples of Adverse Impacts under the OECD MNE Guidelines9
 Adverse Impacts9

1. OECD Due Diligence Guidance

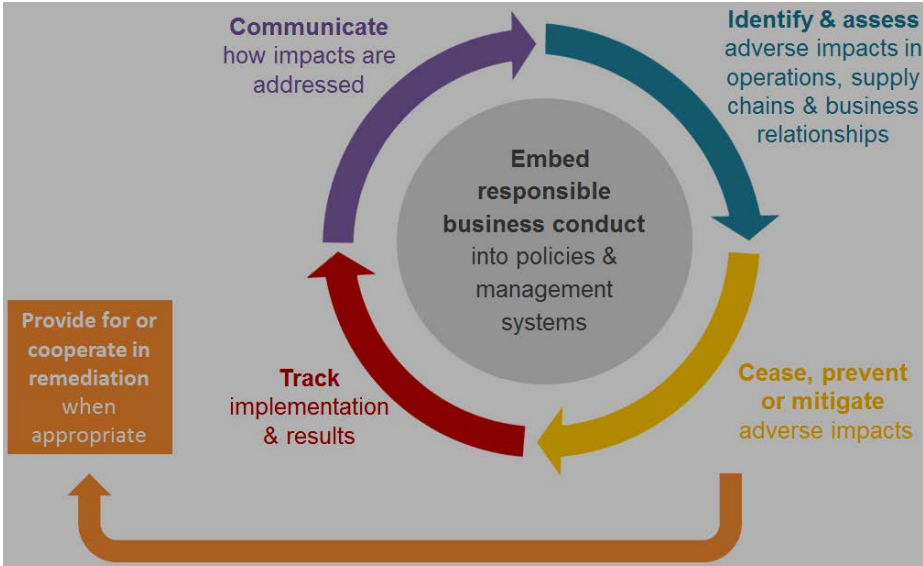
The General Due Diligence

1. Under the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, companies should conduct due diligence to avoid and address adverse impacts in their operations, supply chains and business relationships. At the 2017 OECD MCM, Ministers encouraged the OECD to develop “general due diligence guidelines that can be applied to any sector”.ⁱ

2. The OECD developed its general Due Diligence Guidance for Responsible Business Conduct with the support of a multi-stakeholder Advisory Group comprising government, trade union, business and NGO representatives. In April 2018, following approval by the Working Party on Responsible Business Conduct, the Guidance was finally approved by the Investment Committee. In May 2018, the OECD Council adopted a Recommendation to promote and implement the Guidanceⁱⁱ. The Guidance and its accompanying Recommendation will be key deliverables of the 2018 OECD MCM.

3. The OECD Guidance is expected to become *the* authoritative international reference on due diligence. It sets out a six-stage due diligence framework to be used by enterprises to avoid and address adverse impacts in their operations, supply chains and business relationships (see *Figure 1*). The Guidance makes clear that the main purpose of due diligence is to *prevent* adverse impacts. When adverse impacts occur, companies should provide remedy, where they have caused or contributed to those impacts.

Figure 1. The OECD Due Diligence Framework



Source: OECD Due Diligence Guidance for Responsible Business Conduct

Sectoral Due Diligence

4. The OECD has also developed sector-specific due diligence guidance for minerals, garment and footwear, agriculture,ⁱⁱⁱ extractives, and institutional investors. The new general guidance is aligned with and complementary to the sectoral guidance.^{iv} Importantly, the OECD has developed implementation programmes for its sectoral guidance for minerals, garment and footwear, and agriculture, so as to increase uptake and develop mutual understanding of due diligence among stakeholders.

Table 1: OECD Sectoral Due Diligence Guidance and Follow-up^v

<i>Sectoral Guidance</i>	<i>Implementation Programme</i>
Responsible Supply Chains in the Garment and Footwear Sector	<ul style="list-style-type: none"> • Annual, multi-stakeholder Round-tables at the OECD; • Country implementation in Bangladesh, China, India and Vietnam involving IndustriALL (the international union representing workers in garments and footwear) and TUAC; • Self-assessment tools; • Company surveys.
Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas	<ul style="list-style-type: none"> • Focused on the supply chains of Tin, Tantalum, Tungsten (3Ts) and Gold; • Annual, multi-stakeholder Forum at the OECD; • Supply chain assessments; • Company surveys.
OECD-FAO Guidance for Responsible Agricultural Supply Chains	<ul style="list-style-type: none"> • Pilot project involving 30 leading companies to strengthen the implementation of the due diligence guidance (launched February 2018).
Meaningful Stakeholder Engagement in the Extractive Sector	/
Responsible Business Conduct in the Financial Sector	/

2. Due Diligence: the Role of Trade Unions

OECD Due Diligence Guidance – the Role of Trade Unions

5. While the Guidance makes clear that the responsibility for conducting due diligence lies fully with the individual company, it also underlines the important role to be played by stakeholders and rights-holders. The Guidance explains that “[M]eaningful engagement with relevant stakeholders is important throughout the due diligence process”^{vi}, and in particular in the following stages:

- identifying actual or potential adverse impacts in the context of its own activities;
- engaging in assessments of business relationships with respect to adverse impacts;
- devising prevention and mitigation responses;
- identifying forms of remedy and designing processes to enable remediation;
- tracking and communicating on how adverse impacts are addressed.^{vii}

6. The Guidance defines stakeholders as, “persons or groups who have interests that could be affected by an enterprise’s activities”.^{viii} This includes workers and their trade unions within the company, as well as workers and trade unions in the company’s supply chain. The Guidance explains that some forms of stakeholder engagement, including the right to form or join a trade union and to bargain collectively, are human rights in themselves, and that on matters related to these rights, companies should engage with trade union representatives, instead of individual workers. The Guidance recognises that industrial relations is a form of stakeholder engagement.^{ix}

7. Importantly, the Guidance identifies company-trade union agreements (enterprise, sectoral, international) as a way for companies to avoid and address adverse impacts on workers: collective bargaining agreements, Global Framework Agreements, protocols and Memoranda of Understanding are all part of due diligence.^x

French “Duty of Vigilance” Law – Role of Trade Unions

8. The French “Duty of Vigilance” Law (2017)^{xi} also recognises the importance of stakeholder engagement. Under the law, companies are required to develop a “vigilance plan” setting out the steps by which the company will ensure respect for human rights, health and safety and the environment, throughout its subsidiaries, sub-contractors and supply chains (see *Table 2* below and *Annex I*). The vigilance plan should include:

- a risk mapping;
- regular assessment of subsidiaries, sub-contractors and suppliers;
- adequate actions to prevent and mitigate the risks;
- **an alert/warning mechanism, established with trade unions;**
- follow-up mechanism to measure implementation and effectiveness.

9. While the French law envisages that companies develop the vigilance plan in association with stakeholders, as well as with multi-stakeholder initiatives, this is not a legal obligation.^{xii} The law only imposes an obligation on companies to establish the alert/warning mechanism for collecting reports of actual and potential abuses/damage, jointly with trade union representatives.^{xiii}

10. The French trade unions consider that, in the future, the content of these vigilance plans, along with the monitoring, should be negotiated with unions in the parent company and its subsidiaries. European Works Councils, and in the case of transnational negotiations, Global Union Federations (GUFs), should also be involved.^{xiv}

3. Due Diligence: Respect for Trade Union Rights

11. Under the OECD MNE Guidelines enterprises should conduct due diligence to avoid and address adverse impacts on the following topics:

- information disclosure;
- human rights (*all* human rights);
- employment and industrial relations;
- environment;
- bribery;
- consumer affairs.

12. Companies cannot ‘pick and choose’ which adverse impacts to avoid and address, but may have to prioritise on the basis of severity and likelihood. The Guidance recognises that anti-union behaviour can result in severe adverse impacts and that companies should conduct due diligence to respect the rights of workers to form and join trade unions and to bargain collectively. *Annex II* provides examples from the Guidance of anti-union behaviour and other adverse impacts relating to disclosure, human rights, employment and industrial relations.^{xv}

13. The OECD’s due diligence guidance for the garment and footwear sector recognises that trade union rights are systemically at risk in this sector and should be included in the company’s due diligence. It recommends that companies include anti-union policies and practises in their supplier assessments:^{xvi}

- Intimidation of workers and anti-union behaviour, including threatening loss of livelihood, dismissal of union supporters, anti-union campaigns;
- Promotion of employer-dominated structures for engaging workers;
- Refusal to bargain in good faith;
- Effect of short-term contracts/casual contracts on the ability of workers to organise.

4. Implementing the OECD Due Diligence Guidance

Role of Governments

14. It is government action that will ultimately determine the extent to which companies conduct effective due diligence, in line with the OECD Due Diligence Guidance. TUAC considers that the adoption of the OECD Council Recommendation to promote and implement the Guidance therefore represents a significant milestone.

15. The Council Recommendation calls on OECD Member and non-Member countries to adhere to the Recommendation and to:

- Promote the use of the Guidance by companies operating in or on their territories so that they “observe internationally agreed standards of responsible business conduct in order to prevent the adverse impacts of their activities...”;
- Monitor the adoption of the OECD due diligence framework by companies;
- Disseminate the Guidance, including through their NCPs, to companies and promote use of the Guidance by industry associations, trade unions, civil society organisations, multi-stakeholder initiatives and sector-initiatives.^{xvii}

16. A number of OECD countries have introduced, or are in the process of introducing, measures aimed at strengthening due diligence conducted by companies operating in/from their territories, including binding legislative measures (see *Table 2*):

- In France the “duty of vigilance” law (2017)^{xviii} imposes a “duty of vigilance” on companies making it mandatory for them to conduct due diligence to prevent abuse/damage of human rights, health, safety and the environment. It establishes civil corporate liability for harm related to the failure of the company’s vigilance plan;
- Germany has set a target that at least 50% of large enterprises (>500 employees) based in Germany should be conducting human rights due diligence by 2020. From 2018, the Government will conduct annual monitoring. If this target is not met, the German Government will consider introducing legislative measures;^{xix}
- In The Netherlands, the Child Labour Due Diligence Law establishes a duty of care on companies to prevent child labour in their supply chains by conducting due diligence.^{xx} Multi-stakeholder Covenants are also being developed in sectors most at risk of violating the OECD MNE Guidelines. Companies conduct due diligence on all topics of the OECD MNE Guidelines to avoid and address potential and actual adverse impacts;^{xxi}
- In the UK, under the Modern Slavery Act (2015), companies are required to publish an annual statement describing the steps taken to prevent modern slavery. The obligation is for companies to report due diligence – not to conduct due diligence. A company meets its obligations under the Act, even if it reports that it has not conducted due diligence.

Table 2: Due Diligence: Legislative Developments in OECD Countries

Legislation	Rights	Disclosure Reporting	Mandatory Due Diligence	Corporate Liability	
				Civil	Criminal
France: Duty of Vigilance Law	Human rights, health, safety, environment	√ Annual	√	√	Earlier proposal
Netherlands: Child Labour Due Diligence Bill	Child labour	√(not Annually)	√		
Switzerland: the Swiss Responsible Business Initiative (proposal)	Human rights, environment	√	√	√	
UK : Modern Slavery Act	Forced Labour	√ Annual			

Source: adapted from a Table presented by Public Eye and the Swiss Coalition for Corporate Justice, 2018.

17. TUAC calls on governments to meet their obligations under the OECD Council Recommendation to promote, monitor and disseminate the OECD Guidance on Responsible Business Conduct and implement the following *5-Point Plan*:

1. Introduce mandatory due diligence:

- covers all topics of the OECD Guidelines, including all internationally-human rights, health and safety and the environment;
- applies to large and small enterprises, their supply chains and business relationships;
- requires enterprises to conduct due diligence, using the OECD due diligence framework;
- requires companies to disclose their supply chain;
- obliges companies to engage with trade unions, in the parent company, subsidiaries, subcontractors and supply chains at all stages of due diligence;
- establishes corporate liability for adverse impacts, adequate sanctions (fines that are percentage of sale revenue not fixed amount) and remedy.

2. Strengthen policy coherence by introducing binding due diligence clauses in:

- trade and investment agreements;
- export credits/insurance;
- development finance – contractual agreements with companies;
- public procurement law.

3. Monitor company compliance with the OECD due diligence framework, including as a priority State-owned Enterprises (SOEs).

4. Strengthen stakeholder engagement by supporting capacity-building on due diligence for trade unions and other stakeholders.

5. Disseminate the Guidance, including by ensuring that National Contact Points have adequate resources to do so, working with social partners and other stakeholders.

Role of the OECD

18. The OECD also has an important role to play in implementing the Due Diligence Guidance. A key lesson from the sectoral guidance on minerals and garments and footwear is the value of OECD follow-up: multi-stakeholder events to facilitate learning on due diligence and pilot projects involving specific companies/countries. The OECD should involve TUAC, BIAC and OECD Watch as a central pillar in the implementation plan – due diligence cannot be conducted effectively by companies unilaterally.

About this Briefing

This TUAC Briefing has been informed by: discussions at the TUAC Working Group on Multinational Enterprises and the ITUC-TUAC Trade Union Meeting on Due Diligence, Paris, 6-7 November 2017; sources including: “Implementing the new French law on multinational firms’ vigilance duty; CFDT, CFE-CGS, CFTC, CGT, FO, FSU, SUD, UNSA, 14 June 2017; Loi sur le devoir de vigilance, CFDT, mars 2018; Creating a Paradigm Shift, Legal solutions to improve access to remedy for corporate human right abuse, Amnesty International, the Business and Human Rights Centre.

Annex I: The French “Duty of Vigilance” Law^{xxii}

Law: La Loi relative au devoir de vigilance, 2017.

Scope: Internationally-recognised human rights, health and safety, and the environment.

Companies: Companies headquartered in France with more than 5000 employees in their headquarters and direct and indirect subsidiaries, or companies with more than 10,000 employees in headquarters, direct and indirect subsidiaries, based in France or abroad.

Business Relationships: Subsidiaries, subcontractors and suppliers.

Due diligence obligations: Requires companies to develop and implement a vigilance plan to ensure respect for human rights and the environment:

- a risk mapping;
- regular assessment of subsidiaries, sub-contractors and suppliers;
- adequate actions to prevent and mitigate the risks;
- an alert mechanism established together with trade unions;
- follow-up mechanism to measure implementation and effectiveness.

Reporting obligations: Publish in the annual report.

Stakeholder engagement: The French law envisages that companies develop the vigilance plan in association with stakeholders, as well as with multi-stakeholder initiatives. But this is not a legal obligation. The law only imposes an obligation on companies to establish the alert/warning mechanism for collecting reports of actual and potential abuses/damage, jointly with trade union representatives.

Sanctions: If a company does not develop an adequate vigilance plan stakeholders can make a formal request to the company. If the company fails to do so, then the stakeholder can request the Court to intervene. The Court can impose a daily fine for each day that the company does not comply with the Court request.

Corporate liability: Companies incur *civil liability* if adverse impacts to human rights, health, safety, and the environment can be shown to result from inadequacies in the vigilance plan. The draft law in its original form would have created *criminal liability*.

Remedy: If harm occurs that could have been prevented by an appropriately implemented vigilance plan, then the company will be required to provide compensation for that harm.

Burden of proof: The victim must show that the harm was linked to the failure of the vigilance plan. An earlier proposal would have reversed the burden of proof.

Duty of means not performance: Companies have a duty of means, not a duty of performance, meaning that if a company implements its vigilance fully, it will be able to escape liability. This underlines the importance of trade unions, and other stakeholders, being involved in developing the vigilance plan to ensure that it is sufficiently comprehensive/robust.

Annex II: Examples of Adverse Impacts under the OECD MNE Guidelines

Chapter	Adverse Impacts ^{xxiii}
Disclosure	<ul style="list-style-type: none"> ● Failing to disclose material information on the financial and operating results of the enterprise; enterprise objectives, major share ownership and voting rights, remuneration policy for members of the board and key executives, and information about board members, related party transactions, foreseeable risk factors, issues regarding workers and other relevant stakeholders, governance structures and policies. ● Failing to provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on the potential environment health and safety impacts of the activities of the enterprise.
Human Rights	<ul style="list-style-type: none"> ● Forced labour. ● Wage discrimination for equal work or work of equal value. ● Gender-based violence or harassment including sexual harassment. ● Involvement in reprisals against civil society and human rights defenders.
Employment and Industrial Relations	<ul style="list-style-type: none"> ● Failing to respect the right of workers to establish or join trade unions or representative organisations of their own choosing and have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining. ● Failing to engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment. ● Child labour, including worst forms of child labour. ● Discrimination against workers with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, or other status. ● Failing to adapt machinery, equipment, working time, organisation of work and work processes to the physical and mental capacities of workers. ● Failing to replace hazardous substances by harmless or less hazardous substances wherever possible. ● Payment of wages that do not meet the basic needs of workers and their families. ● Threatening to transfer the whole or part of an operation unit in order to hinder workers from forming or joining a trade union.

Source: OECD Due Diligence Guidance for Responsible Business Conduct

ⁱ 2017 OECD Ministerial Council Statement, <http://www.oecd.org/mcm/documents/2017-ministerial-council-statement.htm>

ⁱⁱ Draft Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct, 2 March 2018.

ⁱⁱⁱ The FAO-OECD Due Diligence Guidance for Responsible Agricultural Supply Chains.

^{iv} OECD Due Diligence Guidance for Responsible Business Conduct, 20 March 2018, p.3.

^v Information on OECD sectoral due diligence guidance can be found here: <http://mneguidelines.oecd.org/duediligence/>

-
- ^{vi} *Idem*, p.8.
- ^{vii} *Idem*, p.30.
- ^{viii} *Ibid.*
- ^{ix} *Ibid.*
- ^x *Idem*, p.31.
- ^{xi} LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1) :
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&dateTexte=&categorieLien=id>
- ^{xii} *Idem*, Art. 1.
- ^{xiii} *Idem*, Art. 1.4.
- ^{xiv} Implementing the new French law on multinational firms' vigilance duty; CFDT, CFE-CGS, CFTC, CGT, FO, FSU, SUD, UNSA, 14 June 2017.
- ^{xv} OECD Due Diligence Guidance for Responsible Business Conduct, 20 March 2018, p. 7, p.20-21.
- ^{xvi} This list is based on Table 12 of the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector; p. 149.
- ^{xvii} Draft Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct, 2 March 2018.
- ^{xviii} LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1) :
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&dateTexte=&categorieLien=id>
- ^{xix} German National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, 2016-2020, p. 12.
- ^{xx} The Child Labour Due Diligence Law is expected to come into force on 1 January 2020.
- ^{xxi} Information on the International Responsible Business Conduct Agreements can be found here:
https://www.imvoconvenanten.nl/?sc_lang=en
- ^{xxii} This analysis is based largely on: the discussion held at the ITUC-TUAC Trade Union Meeting on Due Diligence, Paris, 6-7 November 2017; Implementing the new French law on multinational firms' vigilance duty; CFDT, CFE-CGS, CFTC, CGT, FO, FSU, SUD, UNSA, 14 June 2017; Loi sur le devoir de vigilance, CFDT, mars 2018.
- ^{xxiii} This table is an extract from Table 2, OECD Due Diligence Guidance for Responsible Business Conduct, 20 March 2018, p.20-21.