



## Responsible disengagement in the time of corona

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***“Always remember that the most important thing in a good relationship is not happiness, but stability.”***

*Gabriel García Márquez, Love in the Time of Cholera*

The COVID-19 pandemic is a global crisis that has impacted people, governments, and economies alike. Understandably, much attention is focused on pains felt at home: rapidly rising infection and death rates, growing unemployment, and prospects of low economic forecasts impacting salaries and pensions for years to come. Yet it is critical in such a time of crisis for companies and policy-makers alike to understand and address the health and economic impacts COVID-19 is having on the workers that sustain the supply chains that feed, clothe, house and provide for the world. Workers in sectors such as textile, garment, mining, technology, transport, construction and hospitality are facing severe impacts from the COVID-19 virus and associated crisis. These are impacts that society must not tolerate.

As the COVID-19 crisis has gripped economies, companies in some hard-hit sectors are suddenly faced with vital decisions about whether to remain in supply chain relationships or to disengage from those business relationships to protect their profitability. Disengagement from business relation-

ships can take a variety of forms. As a response to demand-side shocks (for example, due to a sudden drop in demand), it can range from simply breaching contracts to the cancellation, suspension, amendment or postponement of orders that had already been made or planned. As a response to supply-side shocks (for example, due to the fact that a supplier can no longer meet contractual commitments to deliver products because its factories have been forced to close by a government-imposed lockdown), disengagement can take the form of refusing to pay for orders not received or terminating the relationship in order to find another supplier that can deliver the product. Disengagement in all of these forms has consequences for communities, workers and their families that depend on the income from the economic activity and enjoy little to no other safety net or social protection. Adverse impacts from disengagement that are already being experienced in many countries include loss of jobs and income for hundreds of thousands of workers, which can have ripple effects on the rights to health and education for workers and their families.<sup>1</sup>

Two of the most authoritative international normative standards for responsible business conduct – the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the UN Guiding Principles on Business and Human

Rights (UNGPs) – recognize the adverse human rights impacts that can result from disengagement and stress the need to prevent these. Furthermore, they expect companies that do disengage from business relationships to do so in a way that is responsible and avoids additional negative impacts on workers and communities. Even when disengagement is prompted by external events such as a public health crisis – indeed, perhaps more than, given the greater risks to people at such times – the international standards insist that companies must act responsibly and continue to respect the human rights of workers across their value chains.

SOMO previously explored the meaning of responsible disengagement, as well as the decision-making process and normative expectations associated with it, in its 2016 discussion paper, *Should I stay or should I go?*<sup>2</sup> The present paper provides deeper exploration and analysis of what responsible disengagement means in the context of the global public health crisis and economic shock caused by the COVID-19 pandemic.

## Impacts of the corporate response to COVID-19 on the human rights of vulnerable workers

Even before the pandemic broke out, the majority of workers in global manufacturing supply chains faced barriers or risks to their human rights as a result of conditions in current unsustainable supply chain business models. Most of these workers were already subjected to unstable contracts, long working hours, very low wages, dangerous work, and even forced or bonded labour before the pandemic began. Many faced additional risks due to intersecting factors of discrimination based on their gender, ethnicity, race, caste, age, social status, migrant or refugee status, informal employment status, union involvement, exposure to conflict or violence, or poverty. A high proportion of workers already had limited or no access to health services and social protection and few prospects of alternative employment. This was especially serious in countries with weak or absent state governance such as conflict-affected areas.

The COVID-19 virus has exacerbated these governance gaps and risks further locking workers in unacceptably precarious conditions. The impacts of the COVID-19 pandemic are deep, far-reaching and occurring at an unprecedented pace. On one level, the virus has helped clarify which workers are particularly important to enable a public response to the pandemic: those producing food for example, or certain textile and plastic materials needed for medical supplies. For these workers still required to engage in production, adequate health and safety protection is often not available<sup>3</sup>, forcing them to make an impossible

choice between risking their health and feeding their families. There is evidence that some companies have retaliated against workers advocating for safer conditions when forced to continue working.<sup>4</sup>

Other businesses and sectors have been impacted by the economic fall-out of the virus in different ways. Companies across numerous sectors whose operations have been disrupted, either by lack of demand or by government-imposed lockdowns, have fired their own workers and/or breached, cancelled or delayed contracts, forcing their business partners to do the same<sup>5</sup>. As a result, many workers, especially those at the upstream tiers of supply chains, find themselves unemployed without warning and adequate severance packages, leading to increased human rights risks. Risks of unemployment are particularly serious in areas already exposed to conflict, and in fact exacerbate such conflict.<sup>6</sup>

Loss of economic livelihood can be deadlier for more people than COVID-19 itself, and every effort to avoid this is essential to ensure a future sustainable economic system that protects human rights of the people who are its lifeblood. The sections below outline how companies should avoid or mitigate adverse impacts from disengagement.

## Heightened due diligence and focus on the most vulnerable

The OECD Guidelines and UNGPs deal with disengagement decision-making in the context of business responses to human rights impacts across their business relationships. When a supplier company is violating labour rights, the norms suggest that disengagement should be a credible option that companies can use to increase leverage and improve the practices of its supplier, but that this option should be carefully considered because of the potential adverse human rights impacts on workers often associated with disengagement.<sup>7</sup>

In the context of the COVID-19 crisis, it is not a human rights violation that triggers the disengagement decision-making processes, but rather an economic consideration such as a drastic reduction in demand, supply or capital. Nevertheless, the adverse human rights impacts resulting from these disengagement decisions are just as real, if not aggravated, by parallel pressure throughout the labour market and insufficient access to social protection and health care systems. In this situation, the normative framework calls for a heightened due diligence process focusing on the most vulnerable workers and communities: identification, prevention and mitigation of human rights risks to the greatest extent possible, including those risks resulting from disengagement.<sup>8</sup> Finally, companies need to communicate and account for actions taken.

## Assessing impacts associated with disengagement

Both the UNGPs and the OECD Guidelines require companies to conduct risk-based due diligence to identify risks and prevent negative impacts resulting from all of their actions and business decisions, which include both the decision to produce, build or buy something as well as the decision to stop producing, building or buying something. Before taking the decision to suspend or end a relationship, companies have a responsibility to consider, as part of their due diligence required by the OECD Guidelines, the potential negative impacts of the cancelling of orders and/or the cessation of the business relation.

Those potential adverse impacts of irresponsible disengagement on the human rights of workers and their families can be severe. Potential adverse impacts from disengagement include loss of jobs and income for workers, which can have ripple effects on the rights to health and education for workers and their families; loss of tax revenues affecting public services; and other local social, health and economic impacts resulting from a hasty departure. Indeed, the cancellation of orders due to the COVID-19 crisis has already led to massive lay-offs and a loss of income for workers around the globe. As with the entire due diligence process, (potentially) affected rights-holders and other stakeholders should be meaningfully involved in the decision-making process around disengagement.

### Prevention is better than cure



With proper and genuine risk-based due diligence, a company can avoid causing or contributing to adverse impacts from disengagement. The most straightforward way to prevent harmful impacts from disengagement is actually to avoid disengaging for economic reasons. If the due diligence process identifies that workers and communities would face heightened human rights risks following disengagement, the decision to disengage should be reassessed in light of the risk assessment.

Due diligence could lead a company to, in lieu of disengaging, ensure financing to sustain the business relationship during the crisis by suspending or reducing executive pay or dividend payments to shareholders, and/or seek loans from financiers. Companies can continue to accept and stock orders for post-crisis consumption, or creatively shift orders from products no longer needed by global markets to those under increased demand, such as medical equipment.<sup>9</sup> Where production activities will continue, it is essential that companies help suppliers ensure workers have adequate personal protective equipment and working conditions in fields, factories, and other production sites that meet World Health Organisation guidelines for safe distancing, hand-washing, and protective equipment.

Even if suppliers cannot continue production – for example, because suppliers cannot ensure safe conditions or factories are shuttered by government order – buyers can still prevent harms by maintaining a business relationship and finding measures to ensure workers' livelihoods are not affected during the time no production takes place. For instance, companies can help suppliers ensure workers receive a salary during the period of no production through payment for future orders, and guarantee continuation of the business relationship when the crisis has subsided.

### If prevention is impossible: mitigate, mitigate, mitigate

If prevention of impacts through avoidance of disengagement is not possible, or if it is necessary to avoid other adverse human rights violations being committed by the supplier, companies are expected to take measures to mitigate the impacts of disengagement. The OECD Guidelines insist that mitigation is especially important when disengagement decisions have "major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals" where companies need to mitigate impacts to the "maximum extent".<sup>10</sup> Measures to mitigate adverse impacts include providing reasonable notice to suppliers, workers and their representatives, and relevant government entities of the pending disengagement, continuing with and providing advance payments to suppliers for orders already made before slowly reducing orders, reducing or easing payment terms, and ensuring continued income and health benefits to workers during the pandemic and the reasonable absence of alternative employment. Companies should also collaborate with other companies, suppliers and state entities where needed to address challenges such as ensuring safe housing for workers previously housed in company facilities.

The extent to which concrete intervention is requested from companies, together with their supplier(s), depends on the specific context and availability of social protection coverage. In some sourcing destinations there is no or an insufficient social safety net or unemployment insurance coverage. Depending on the specifics, local employers may not have been obliged to, or have refused to contribute to, such systems. In other national contexts there is weak government regulation and enforcement due to lack of resources, corporate capture or corruption.<sup>11</sup> The OECD Guidelines make clear that “a State’s failure... to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights”.<sup>12</sup> It is therefore even more important that companies act responsibly to prevent adverse impacts from disengagement in some sourcing destinations altogether or for specific excluded groups such as migrant, informal and home-based workers.

The OECD Guidelines and UNGPs stress that companies should operate “in compliance with all applicable laws”, including with regard to ending business relationships. This means that disengagement should be done in a manner that honours contractual and legally-mandated terms and procedures. During the current crisis, some businesses are seeking to evade this responsibility by improperly invoking *force majeure* clauses. In fact, *force majeure* cannot be claimed as an escape from contractual duties in many cases; the specific contract phrasing may not allow it, or COVID-19 may not, for a particular contract, actually make fulfilment of the contract impossible as required to invoke *force majeure*.<sup>13</sup> Nevertheless many companies may be using such claims inappropriately to avoid their legal obligations when performance is simply less economical or impractical.<sup>14</sup> Businesses should refrain from breaking contracts or abusing contract provisions to evade their responsibilities.

## Remediation required if disengagement contributes to impacts

The international normative framework states that if a company fails to prevent adverse impacts by its decision to disengage, and instead causes or contributes to such impacts, it is responsible for remediating the impact to the extent of its contribution. This is the case even if the decision to disengage was prompted by external events such as a public health crisis. Indeed, an external crisis does not absolve a company from its responsibility to respect human rights and thus to remediate those impacts to which it contributed by disengaging. This also applies to adverse impacts to which a company contributed before the disengagement took place.

## Responsible disengagement in the time of corona

Drawing on the authoritative, government-backed standards for responsible business conduct contained in the OECD Guidelines and UNGPs, these are elements of what responsible disengagement looks like in the time of corona:

First, given the specific nature of the crisis and the fact that many negative impacts are shared within the same sector and/or region, it is important for business to work together at the industry level, together with relevant stakeholders and governments<sup>15</sup>. This will allow for the pooling of resources and leverage that might allow companies to avoid irresponsible disengagement.

Second, companies should communicate publicly about the risks (including those from potential disengagement) they identify following the COVID-19 pandemic and about the actions they have taken to prevent or mitigate these specific risks.

Third, companies should seek to avoid disengagement for economic reasons<sup>16</sup> altogether:

- Identify and assess, in consultation with workers and potentially affected communities, potential adverse impact associated with a decision to cancel orders or disengage from suppliers that cannot meet production targets due to government-imposed lockdowns;
- Evaluate all possible options for alternatives to disengagement, which could include:
  - suspending or reducing executive pay or dividend payments to shareholders in order to continue paying suppliers and workers;
  - seeking loans to continue to pay suppliers;
  - shifting orders from products no longer needed in global markets to those under increased demand during time of corona;
  - commit to future orders and providing workers ongoing compensation during the time of corona-prompted unemployment, and ensure workers can return to the same roles and seniority levels after the crisis ends.

Where companies receive government support, they have an added responsibility to use that to support suppliers in countries where governments are unable to provide bailouts to companies and workers.

Fourth, if cancellation of supplier relations and disengagement is absolutely unavoidable, companies should ensure it is done responsibly:

- Formulate and implement a responsible exit strategy in consultation with potentially impacted rights-holders and other stakeholders as well as suppliers; meaningful consultation should be timely and regular.
- Take measures to mitigate the adverse impacts of the disengagement, which could include:
  - ensuring reasonable notice to suppliers, workers, and relevant government entities of the pending disengagement;
  - ensure workers continue to receive income for the duration of the epidemic and its economic impacts;
  - collaborating with state entities where needed to address challenges resulting from the disengagement, such as ensuring safe housing for workers previously housed in company facilities;
  - continuing with and providing advance payments to suppliers for orders already made before slowly reducing orders;
  - reducing or easing delivery terms to allow suppliers to supply product over a longer period of time than originally agreed upon; and
  - offering to provide workers training and capacity building or microcredit to mitigate the loss of employment.
- Take measures to remediate adverse human rights impacts caused or contributed to by the decision to disengage, to include:
  - remediate impacts resulting from the disengagement itself; and
  - remediating any unremediated adverse impacts to employees that had been caused or contributed to by the company prior to the disengagement.

## Toward a stronger future: Responsible disengagement in the just transition

This paper focusses on the need for responsible disengagement during the COVID-19 pandemic; however, responsible disengagement will remain at the core of human rights due diligence processes long after the current crisis. This crisis shows us once again that our current globalized economy is unsustainable and places unnecessary hardship on the most vulnerable in our supply chains. This makes the entire economy vulnerable and underscores the need for a just transition towards cleaner, fairer and less volatile and vulnerable production and consumption models.

Companies should use this crisis as a wake-up call and begin developing a post-corona responsible business model. This will probably entail a fundamental rethinking and rebuilding of supply chains in a manner that ensures business do not exacerbate the gaps in the realization of human rights, such as the right to social security, freedom of association and health and safety at work. When factories reopen, it is important that deadlines for orders are reassessed to prevent workers from working mandatory overtime to make up for delays, and that workers facing debts are not subjected to bonded labour schemes. Finally, it is important to underscore that in a time of massive firing (and rehiring), respect for the fundamental right to freedom of association is now more important than ever. Companies should adopt proactive strategies to ensure the pandemic does not lead to a massive union-busting campaign in supply chains.

The imperative transition to a fossil free – and increasingly digitalized – economy will need to respect planetary boundaries and workers alike. Refining our understanding of the business responsibility to responsibly disengage, and then subsequently responsibly re-engage in new relationships that safeguard workers' rights in a healthy environment, should be the cornerstone of such a just transition. The days of mass exploitation of workers and nature and cut-and-run response to economic changes should be buried alongside the COVID-19 virus.

## Endnotes

- 1 M. Abi-Habib and S. Yasir, "India's Coronavirus Lockdown Leaves Vast Numbers Stranded and Hungry", 29 March 2020, New York Times, available at <https://www.nytimes.com/2020/03/29/world/asia/coronavirus-india-migrants.html>.
- 2 M van Huijstee and J. Wilde-Ramsing, 2016, Should I stay or should I go? Exploring the role of disengagement in human rights due diligence. SOMO, available at <https://www.somo.nl/nl/should-i-stay-or-should-i-go-2/>. In addition, the present document draws on a recent paper by ECCHR on the consequences for responsible business conduct of the COVID-19 pandemic in the garment sector (C. Ajder, M. Saage-Maaß and B. Vanpeperstraete, 2020, Garment supply chains in intensive care? Human rights due diligence in times of (economic crises), available at [https://www.ecchr.eu/fileadmin/Publikationen/ECCHR\\_PP\\_SUPPLYCHAINS\\_COVID\\_EN.pdf](https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_PP_SUPPLYCHAINS_COVID_EN.pdf)) and OECD Watch's 9 April 2020 submission to the OECD Working Party on Responsible Business conduct, available at <https://www.oecdwatch.org/wp-content/uploads/sites/8/2020/04/OECD-Watch-Submission-to-the-WPRBC-on-COVID-19.pdf>. SOMO and ECCHR are OECD Watch members.
- 3 See, e.g., M. Blomberg, "'Please, we are not animals': virus fears weigh on Cambodia's garment workers", 10 April 2020, Thomas Reuters Foundations News, available at: <https://news.trust.org/item/20200410111527-wbgsi>; and Swedwatch, "Agricultural workers exposed to COVID-19 infection risks in Ecuador and Peru", 2 April 2020, available at: <https://tinyurl.com/v8vr5ss>.
- 4 See, e.g. Business & Human Rights Resource Centre, "Slovenia: Dismissal process initiated against Lidl union leader in midst of COVID-19 organizing, allegedly due to negligence; company responded", March 2020, available at: [https://www.business-humanrights.org/en/slovenia-dismissal-process-initiated-against-lidl-union-leader-in-midst-of-covid-19-organizing-allegedly-due-to-negligence-company-responded?mc\\_cid=f6e0788bcc&mc\\_eid=%5bUNIQID%5d](https://www.business-humanrights.org/en/slovenia-dismissal-process-initiated-against-lidl-union-leader-in-midst-of-covid-19-organizing-allegedly-due-to-negligence-company-responded?mc_cid=f6e0788bcc&mc_eid=%5bUNIQID%5d).
- 5 See, e.g., Business & Human Rights Resource Centre, "Major apparel brands delay & cancel orders in response to pandemic, risking livelihoods of millions of garment workers in their supply chain," available at <https://tinyurl.com/tb93lqr>; J. Braaksma & G. den Brinker, "Action annuleert orders en gaat leveranciers later betalen", 18 March 2020, Financieel Dagblad, available at: <https://fd.nl/ondernemen/1338427/action-annuleert-orders-en-gaat-leveranciers-later-betalen>; J. Andersson, "Boycott Asos campaign launched after 70 workers face redundancy during coronavirus outbreak", 9 April 2020, iNews, available at: <https://inews.co.uk/news/asos-boycott-online-drivers-redundant-coronavirus-outbreak-2535040>; A. André, "Asia's clothing industry has been hit hard by canceled orders from Western brands", NOS News, 11 April 2020, available at: <https://nos.nl/artikel/2330183-kledingindustrie-azie-hard-geraakt-door-afgeblazen-bestellingen-westerse-merken.html>; Business & Human Rights Resources Centre, "World Cup and Expo 2020 Construction: COVID-19 and Risks to Migrant Workers in Qatar and the UAE", April 2020, available at: <https://www.business-humanrights.org/en/world-cup-expo-2020-construction-covid-19-risks-to-migrant-workers-in-qatar-the-uae>.
- 6 PAX, "PAX and the COVID-19 response", (7 April 2020), <https://www.paxforpeace.nl/stay-informed/news/pax-and-the-covid-19-response>.
- 7 OECD Guidelines for Multinational Enterprises, 2011, Commentary on Chapter 2, paragraph 22.
- 8 See OECD Due Diligence Guidance for Multinational Enterprises, 2018, pg. 27, stating that "Enterprises should pay special attention to potential adverse impacts on individuals from groups or populations that may have a heightened risk of vulnerability", and pg. 17, stating that "The measures that an enterprise takes to conduct due diligence should be commensurate to the severity and likelihood of the adverse impact."
- 9 See for more examples Better Buying Institute, "Guidelines for "Better" Purchasing Practice Amidst the Coronavirus Crisis and Recovery", 2 April 2020, <https://betterbuying.org/wp-content/uploads/2020/04/Better-Buying-Special-Report-COVID-19-Guidance-for-Brands-and-Retailers.pdf>
- 10 OECD Guidelines for Multinational Enterprises, 2011, Chapter 5, paragraph 6.
- 11 ILO C095 – Protection of Wages Convention, 1949 (No. 95) clearly places social security contributions as part of the wage package workers enjoyed. In cases where there was little or no past contributions, this has resulted in a reduced labour cost and therefore an economic advantage to companies, both suppliers and lead companies.
- 12 OECD Guidelines for Multinational Enterprises, 2011, Commentary on Chapter 4, paragraph 38.
- 13 N. Frost, "Businesses all over the world are learning that 'force majeure' is no get out of jail free card", 9 April 2020, available at: <https://qz.com/1833611/force-majeure-wont-help-most-coronavirus-hit-businesses/>. Also see: <https://apparelinsider.com/covid-19-force-majeure-what-lawyers-told-us/>.
- 14 Spiegel Economy, "Fashion chains cancel orders in South Asia", 12 April 2020, available at: <https://www.spiegel.de/wirtschaft/unternehmen/corona-krise-modeketten-stornieren-auftraege-in-suedasien-existenzen-bedroht-a-7df369df-f32a-4b4e-9959-1a901140aa90>.
- 15 See, e.g., in the garment sector, Traidcraft Exchange "Bailing out the Supply Chain" which provided a proposal for implementation by brands, governments and stakeholders to work together to address risks to garment supply chain workers, available at: <https://traidcraftexchange.org/s/Principles-for-a-supply-chain-bailout-package-during-COVID-19-pandemic.pdf>.
- 16 Note, responsible disengagement to prevent or mitigate adverse human rights and environmental impacts should remain a credible possibility, one that companies can use to increase their leverage and ability to prevent adverse impacts.

## Colophon

**Authors:** Joseph Wilde-Ramsing, Marian G. Ingrams, and Mariëtte van Huijstee (SOMO); Ben Vanpeperstraete (ECCHR); and Joris van de Sandt (PAX)

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Stichting Onderzoek Multinationale Ondernemingen  
Centre for Research on Multinational Corporations

Sarphatistraat 30  
1018 GL Amsterdam, The Netherlands  
T: +31 (0)20 639 12 91  
info@somo.nl – www.somo.nl

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EUROPEAN CENTER FOR  
CONSTITUTIONAL AND  
HUMAN RIGHTS

European Center for Constitutional and Human Rights e.V.  
Zossener Strasse 55-58  
Aufgang D, D-10961 Berlin  
T: +49 (0)30 400 485 90  
info@ecchr.eu – www.ecchr.eu

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PO Box 19318  
3501 DH Utrecht, The Netherlands  
T +31 (0)30 - 233 33 46  
info@paxvoorvrede.nl – www.paxvoorvrede.nl

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