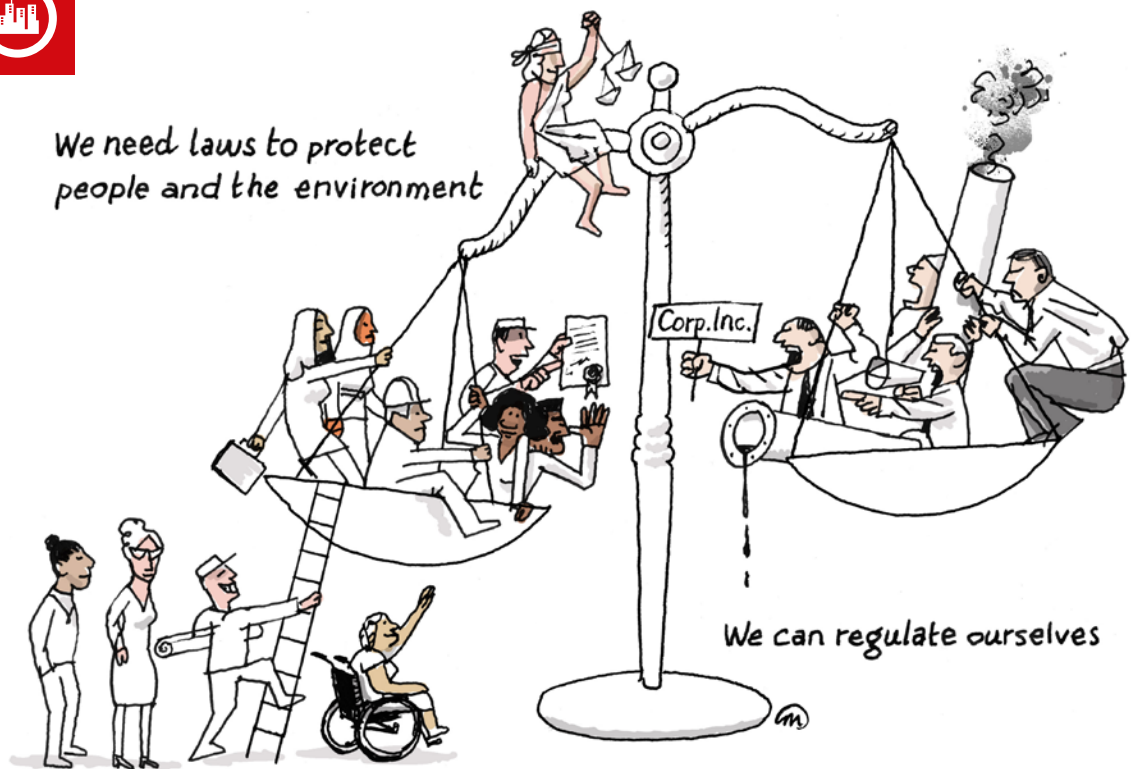


# A piece, not a proxy

The European Commission's dangerous overreliance on industry schemes, multi-stakeholder initiatives, and third-party auditing in the Corporate Sustainability Due Diligence Directive



Gabriela Quijano & Joseph Wilde-Ramsing

# Colophon

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November 2022

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### Authors:

Gabriela Quijano and  
Joseph Wilde-Ramsing

*Editing:* Vicky Anning

*Layout:* Frans Schupp

*Cover photo:* Milo Rottinghuis

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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  
F: +31 (0)20 639 13 21  
info@somo.nl  
www.somo.nl

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The perspectives and conclusions in this paper remain the full responsibility of the authors and SOMO.



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SOMO

Gabriela Quijano and Joseph Wilde-Ramsing

Amsterdam, November 2022

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## Executive summary

Introduced in February 2022, the European Commission (the Commission)'s Proposal for a Directive on Corporate Sustainability Due Diligence (the Proposal) places industry schemes, multi-stakeholder initiatives (MSIs), and third-party auditing at the heart of the due diligence process.<sup>1</sup> It allows companies to rely on these mechanisms to demonstrate compliance with their newly defined human rights and environmental due diligence (HREDD) obligations and, in certain circumstances, to use them as a legal defence against charges of liability.<sup>2</sup>

This briefing is intended to inform policymakers and civil society working on the Due Diligence Directive at the European Union level as well as those in European countries that are developing national due diligence legislation. The briefing explains why SOMO believes the Commission's approach is ill-conceived and risks replicating and crystallising in law a decades-long approach to corporate social and sustainability compliance which, according to Shift, "has been shown not to be effective in delivering improved outcomes for people".<sup>3</sup> Worse even, it is affording these measures significant legal effects, including the possibility of acting as a defence against charges of liability. While certain industry schemes, MSIs, and third-party auditing can help companies to implement aspects of HREDD, considerable research has shown that these measures are insufficient when it comes to discharging an adequate and comprehensive HREDD process that is capable of consistently and effectively identifying risks and preventing harm. It is largely because of the inherent flaws and limitations of corporate self-regulation that the need for public regulation was finally recognised by policy-makers. It is therefore ironic and illogical that public regulation might revert back to industry-only initiatives as a means of implementation.

For this reason, they should not be used as proxies for due diligence and should not play the dominant and defining role the Commission is giving them in its Proposal. This approach risks exacerbating rather than removing barriers to justice and ignores years of research and evidence showing the inability of industry schemes, MSIs, and auditing to detect risks of harm and prevent abuse reliably and consistently. This is because:

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- 1 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 1\_1\_183885\_prop\_dir\_susta\_en.pdf (europa.eu) (September 2022). In particular, see Articles 7(4), 8(5), and 22(2) of the Proposal.
  - 2 Article 22(2) of the Proposal, see footnote 1.
  - 3 Shift, "The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive – Shift's Analysis", March 2022, p.6, Shift\_Analysis\_EU\_CSDDProposal\_vMarch01.pdf (shiftproject.org) (September 2022). United Nations High Commissioner for Human Rights (OHCHR) Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, 23 May 2022, p.8 (noting that contractual assurances and auditing are "risk management techniques [...] that have been shown to be ineffective at driving up standards and delivering better human rights outcomes in practice"), OHCHR Feedback on the Proposal for a Directive on Corporate Sustainability Due Diligence (August 2022).

- ❑ **Industry-only initiatives are affected by inherent conflicts of interest.** While MSIs may, in theory, help to address this problem, in practice their governance, financing, and operating models – as well as internal power dynamics – often result in corporate interests prevailing or, at a minimum, not being in balance with other interests.
- ❑ **Industry schemes, MSIs, and third-party auditing typically operate with very limited transparency.** Most initiatives do not publish the results of their monitoring activities and full audit reports are rarely disclosed. This prevents adequate external scrutiny and accountability.
- ❑ **Industry schemes and MSIs tend to adopt weak standards** that are not in line with international law and standards, or they use vague and misleading language that gives a false impression of robustness and reliability. Where they adopt strong standards, they often fail to implement them adequately, using insufficient assessment methodologies.
- ❑ **Industry schemes, MSIs, and third-party auditing operate in a regulatory vacuum,** without effective government regulation, oversight, and accountability. Industry initiatives themselves do not tend to keep strong oversight over the behaviour of their members and frequently fail to oversee and monitor auditor practices. Their complaints mechanisms are typically ineffective.
- ❑ **The private, commercial, and highly competitive nature of the auditing market creates perverse incentives** against rigorous auditing practices. Market pressures to keep costs down, the need and desire of auditors to please clients, their lack of competence, inadequate methodologies, and the lack of participation of affected rightsholders all lead to extremely low-quality audits. Audit fraud is also common, often driven by lead buyers' exploitative purchasing practices.

Given the well-known structural and systemic flaws and weaknesses affecting industry schemes, MSIs, and third-party auditing, it is imprudent for Member States' enforcement authorities to rely on these mechanisms to determine whether a company is addressing risks and impacts effectively. Fitness criteria can help tackle some of the problems, but cannot tackle them all. This is because many flaws are inherent to the mechanisms and are therefore 'unfixable', or because tackling them meaningfully would require interventions that are too complex and unrealistic within the scope and timeframe of the European Union (EU) Directive.

In addition, relying solely or predominantly on these mechanisms for the purposes of monitoring and enforcing HREDD obligations – even if they met strong fitness criteria – would still be undesirable because of the negative repercussions that this would likely entail for the broader corporate accountability architecture. It would result in a transfer of international human rights and environmental obligations from states to the private sector. It would shift supply chain responsibilities away from companies that cause, contribute to, or benefit from adverse impacts. It would also promote a top-down approach to compliance and stifle innovation and ongoing improvements in corporate due diligence practices.

Assessments of initiatives against fitness criteria in themselves are by no means infallible. Putting aside the thorny questions of who develops these criteria, who performs the assessments, and how

these processes are undertaken, the assessments are limited in at least two important ways: they can only attest to the solidity and reliability of an initiative at one moment in time and not in the future; and they can only or mainly examine quality 'on paper', not in practice or in relation to actual effectiveness and impact 'on the ground'.

To avoid establishing an ineffective, potentially counterproductive and dangerous HREDD regime, the European Commission, Parliament, and Council must seriously reconsider the Proposal's entire approach to industry schemes, MSIs, and auditing and amend all relevant provisions based on, and expressly articulating, the following key principles:

- ❑ In line with the Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct, companies in scope of the Directive should remain individually responsible for HREDD along their supply chains, whether they are members of an industry scheme or MSI or not.
- ❑ Membership in industry schemes or MSIs (even those judged to meet certain fitness criteria), holding a certification from them, or achieving a positive audit result, should not be treated as substitutes for, equivalent to, or even indicators of HREDD.
- ❑ A company's or its business partner's membership in industry schemes or MSIs (even those judged to meet certain fitness criteria), their holding a certification from them, or achieving a positive audit result should not shield a company from liability, trigger a lighter monitoring or enforcement regime, or serve as a basis for establishing a presumption of compliance.
- ❑ Companies in scope of the Directive should be cautioned not to assume that business partners are in compliance with HREDD requirements and expectations simply because they are members of an industry scheme or MSI (even those judged to meet certain fitness criteria), hold a certification from them, or have achieved a positive audit result.
- ❑ Companies in scope of the Directive should be encouraged and expected to use the full range of available tools and mechanisms, and develop new ones where necessary, to better enable, assist, monitor, and verify compliance with HREDD requirements in their supply chains.
- ❑ Enforcement authorities responsible for monitoring and enforcing the EU's HREDD regime should focus on all due diligence measures taken, whether these have occurred within or outside the context of an industry initiative or MSI. They should assess the quality of these measures and whether they appear genuinely capable of meeting the goals of identifying, preventing, minimising, ceasing, or remediating harm. To the maximum extent possible, they should also seek to verify these results on the ground, including through field visits.
- ❑ In their examination of specific complaints or claims, enforcement authorities and courts should be required to focus on results on the ground and the extent to which companies' HREDD measures are effective and genuinely capable of addressing the relevant risks and impacts in practice.

- Member State regulators, enforcement authorities, and courts should not rely on industry schemes or MSIs (even those judged to meet certain fitness criteria), holding a certification from them, or achieving a positive audit result in assessing compliance and liability. At most, these schemes can be considered as elements of a broader assessment of due diligence, neither exhaustive nor decisive in themselves. This should equally apply to companies' business partners' membership in such industry schemes or MSIs, their holding of a certification from them, or having achieved a positive audit result, in relation to companies' HREDD responsibilities concerning them.



# 1 Introduction

On 23 February 2022, the European Commission (the Commission) published its long-awaited Proposal for a Directive on Corporate Sustainability Due Diligence (the Proposal).<sup>4</sup> The Proposal makes industry schemes, multi-stakeholder initiatives (MSIs), and third-party auditing central elements of the due diligence process, by allowing companies to rely on them to demonstrate compliance with their newly defined human rights and environmental due diligence (HREDD) obligations.<sup>5</sup> It also allows companies to use these mechanisms as shields against liability in certain circumstances.

This approach is ill-conceived and risks entrenching a system that has proven to be problematic. While certain industry schemes, MSIs, and third-party auditing can help companies to implement aspects of HREDD, they are insufficient means of discharging an adequate, comprehensive, and effective HREDD process and should therefore not be considered a proxy, substitute, or indicator of due diligence, nor play such a prominent and defining role in legislation.

The Commission's approach ignores years of research and evidence showing the inability of industry schemes, MSIs, and auditing to detect risks of harm and prevent abuse reliably and consistently. This briefing describes some of the key flaws and shortcomings of industry schemes, MSIs, and third-party auditing in relation to due diligence and the reasons why they should not be given a prominent role in HREDD legislation or be relied on for its enforcement. This description is by no means exhaustive, but it does include some of the most recurrent and pervasive defects and shortcomings in these mechanisms.

Specific initiatives and cases are highlighted to provide concrete, real-life evidence of the identified problems. The briefing then explains industry schemes, MSIs, and third-party auditing should still not be considered equivalent to, or even indicative of, due diligence.

Section five of this briefing suggests how the EU Directive should approach industry initiatives and third-party verification. While the briefing primarily focuses on the Commission's Proposal for an EU HREDD regime, its analysis and recommendations are applicable to any HREDD laws that are either already in place or being discussed, proposed, or tabled in Europe and other regions of the world. Finally, the annex provides concrete suggestions for adjustments to specific articles of the Commission's Proposal to make it more effective in promoting corporate sustainability due diligence.

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<sup>4</sup> The Proposal, see footnote 1.

<sup>5</sup> See, in particular, Articles 7(4), 8(5), and 22(2) of the Proposal, see footnote 1.

## 2 The European Commission's Proposal

The Commission's Proposal indicates that companies may rely on industry schemes and MSIs to support the implementation of their due diligence obligations "to the extent that such schemes and initiatives are appropriate to support the fulfilment of those obligations".<sup>6</sup> It then specifies that the Commission and Member States may facilitate the dissemination of information on such schemes and initiatives and collaborate to issue "guidance for assessing the fitness of industry schemes and multi-stakeholder initiatives".<sup>7</sup> The Proposal defines "industry initiative" as "a combination of voluntary value chain due diligence procedures, tools and mechanisms, including independent third-party verifications, developed and overseen by governments, industry associations or groupings of interested organisations".<sup>8</sup>

The Proposal establishes that companies may "refer to suitable industry initiatives or independent third-party verification" to verify business partners' compliance with contractual assurances (another pivotal and controversial element of the Proposal's due diligence regime).<sup>9</sup> Under the Proposal, 'independent third-party verification' means auditing by third-party auditors, a system of verification long used by industry schemes, MSIs, and companies individually.<sup>10</sup> The Proposal also establishes that companies will not be liable for harm resulting from the activities of indirect business partners where they have sought contractual assurances from direct business partners and verified compliance with such assurances through suitable industry initiatives or independent third-party verification, subject to certain exceptions discussed below.<sup>11</sup>

The Proposal does not expressly state that participation in an industry scheme or MSI will be considered equivalent to due diligence and therefore sufficient to meet the Proposal's due diligence requirements. However, the reference to such schemes and initiatives supporting implementation and fulfilment of obligations is open to this interpretation. If this is not clear in general terms, it is absolutely clear in relation to supply chain due diligence. Key articles in the Proposal make sufficiently clear that, at least in relation to business partners, contractual assurances coupled with membership in a relevant industry initiative or independent third-party verification – which, in the Proposal's terms, amounts to auditing – will be sufficient for the purposes of meeting the Directive's due diligence requirements and demonstrating compliance.<sup>12</sup>

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6 Article 14(4) of the Proposal, see footnote 1.

7 Article 14(4) of the Proposal, see footnote 1.

8 Article 3 (j) of the Proposal, see footnote 1.

9 Articles 7(4) and 8(5) of the Proposal, see footnote 1. While this briefing does not directly address the Proposal's use of, and overreliance on, contract and contractual assurances, this is nevertheless addressed in the discussion on auditing. This is because contractual assurances and auditing are made to go hand in hand in the Proposal and operate together as the key means through which companies ensure compliance with HREDD by business partners.

10 Article 3(h) of the Proposal, see footnote 1.

11 Article 22(2) of the Proposal, see footnote 1.

12 In particular, Articles 7(4), 8(5), and 22(2) of the Proposal, see footnote 1.

The Proposal goes even further, in effect establishing a presumption of compliance in favour of businesses.<sup>13</sup> Under its terms, companies that can show they sought contractual assurances from direct business partners and verified compliance through an industry initiative or independent third-party verification would be presumed in compliance with the law in situations where business partners further up or down the value chain cause harm. Claimants can overturn this presumption, but they would have to demonstrate that “it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact”.<sup>14</sup> Instead of facilitating access to justice for rightsholders, this provision does exactly the opposite, setting a very high evidentiary burden on claimants who already struggle to get hold of evidence to substantiate claims against corporations.

All in all, this ‘package’ of measures is doing no more than replicating and crystallising in law a decades-long approach to corporate social and sustainability compliance which, according to Shift, “has been shown not to be effective in delivering improved outcomes for people”.<sup>15</sup> Worse even, it is affording these measures significant legal effects, including the possibility of acting as a defence against charges of liability.

The Proposal attempts to insert some safeguards. The indication that schemes and initiatives must be “appropriate” to support the fulfilment of due diligence obligations and reference to the possible issuance of fitness guidance by the Commission and Member States suggest that not all industry initiatives will be considered suitable means of discharging due diligence obligations.<sup>16</sup> The Proposal’s requirement<sup>17</sup> that actions taken in relation to business partners should be reasonably capable of preventing, minimising, or ending harm caused by business partners again suggests that a minimum level of suitability would be expected.

However, it is not clear at present whether objective criteria for judging suitability will be in place. The Proposal does not include mandatory suitability requirements and only refers to fitness guidance that the Commission and Member States may produce, although they are not mandated to do so. In addition, there is no indication about how such guidance would be developed if the Commission and Member States decided to have such guidance in place, who should be involved in the process, or who would be expected to make the ultimate judgement as to whether a scheme or initiative met the relevant criteria.

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13 This is particularly the case with Article 22(2) of the Proposal, see footnote 1.

14 Article 22(2) of the Proposal, see footnote 1.

15 Shift, “The EU Commission’s Proposal for a Corporate Sustainability Due Diligence Directive – Shift’s Analysis”, March 2022, p.6, [Shift\\_Analysis\\_EU\\_CSDDProposal\\_vMarch01.pdf](#) (shiftproject.org) (September 2022). United Nations High Commissioner for Human Rights (OHCHR) Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, 23 May 2022, p.8 (noting that contractual assurances and auditing are “risk management techniques [...] that have been shown to be ineffective at driving up standards and delivering better human rights outcomes in practice”), OHCHR Feedback on the Proposal for a Directive on Corporate Sustainability Due Diligence (August 2022).

16 Article 14(4) of the Proposal, see footnote 1.

17 In Article 22(2) of the Proposal, see footnote 1.

While the Proposal's operative provisions are silent in this regard, the recitals indicate that companies could assess, at their own initiative, the alignment of schemes and initiatives with the obligations under the Directive.<sup>18</sup> This suggests two things, both of which are highly problematic. First, while there is no guidance, it will be down to the companies in scope of the Directive to judge whether schemes and initiatives are appropriate to support fulfilment of their obligations. Second, if and when guidance is in place, it might still be down to companies to assess whether schemes and initiatives meet this guidance.<sup>19</sup>

In any case, as this briefing will seek to demonstrate, even if objective criteria were developed and industry schemes, MSIs, and auditing firms met these criteria, it would still be inappropriate, ill-advised, and potentially counterproductive to make the EU's HREDD regime rely so heavily on these mechanisms as a means of ensuring compliance and preventing harm. The reasons for this are explained in Section 5 of this briefing.

As it stands, the Proposal is advancing a very dangerous cocktail. It relies heavily on unregulated, largely self-serving industry schemes and industry-influenced initiatives as a means of discharging HREDD duties along the supply chain. Without expressly saying so, the Proposal is providing businesses with a ready-made shield against charges of liability. It makes monitoring and verification hinge on a largely discredited auditing regime, which has proven by and large incapable of detecting and addressing risks of serious harm over the years.

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18 Recital 37 of the Proposal, see footnote 1.

19 A Commission Staff Working Document appears to confirm this view by referring to an "alignment methodology for self-assessment of industry schemes and multi-stakeholder initiatives". Commission Staff Working Document – Follow-up to the second opinion of the Regulatory Scrutiny Board accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, p.19, Sustainable corporate governance (europa.eu) (September 2022).

### 3 Why relying on industry initiatives and third-party verification is a bad idea

Industry initiatives and third-party auditing are notorious for their inability to detect and help to address environmental and human rights risks and impacts in supply chains. Over the last few decades, companies have frequently turned to these initiatives and tools to monitor conditions in their supply chains and demonstrate to the public that they are operating ethically and sustainably. However, time and again, research by non-governmental organisations (NGOs), academic institutions, and law enforcement has uncovered human rights abuses, environmental harm, and criminal conduct by companies that are members of relevant industry schemes or MSIs, or that hold certifications from these schemes.

The list of failures by these initiatives and the auditing regimes on which they rely is long, but we will mention just a few prominent examples here. On 11 September 2012, only three weeks after it was awarded the Social Accountability International (SAI) SA8000 certificate by auditing firm RINA, the Ali Enterprises factory in Pakistan burned down, killing at least 250 workers and injuring hundreds more. On 24 April 2013, the Rana Plaza building in Bangladesh collapsed, killing at least 1,134 workers and leaving thousands more injured. Prior to the collapse, Rana Plaza had been audited by numerous auditing firms including TÜV Rheinland and Bureau Veritas under the oversight of compliance regimes such as Amfori BSCI.<sup>20</sup>

Amfori BSCI members were also sourcing from the Tazreen factory at the time of the 2012 fire, which killed at least 112 workers.<sup>21</sup> In January 2019, the main tailings dam of the Córrego do Feijão mine in Brumadinho, Brazil, collapsed, killing at least 272 people and destroying the local environment. The dam had been declared safe by the German auditing company Tüv-Süd only seven months before.<sup>22</sup> In 2012, palm oil company Plantaciones de Pucallpa illegally acquired large parts of the ancestral territory of the indigenous Shipibo-Konibo community of Santa Clara de Uchunya, Peru, and subsequently decimated their forests. This did not prevent the company from becoming a member of the Roundtable on Sustainable Palm Oil (RSPO) just one year later.<sup>23</sup> In November 2016, Amnesty International uncovered severe labour rights abuses in oil palm plantations certified as producing 'sustainable' palm oil by the RSPO.<sup>24</sup> And these are just a few examples.

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20 Clean Clothes Campaign, "Fig Leaf for Fashion – How social auditing protects brands and fails workers", 2019, p.39, 57, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).

21 Ibid, p.29, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).

22 Fian International, "Could a UN Treaty make Transnational Corporations Accountable? – The Crimes of Vale Inc. in Brumadinho, Brazil", October 2020, p.6, Brumandinho\_Legal\_analysis.pdf (fian.org) (September 2022).

23 Forest Peoples Programme, FECONAU and Instituto de Defensa Legal, "Allegations Letter Related to the Ocho Sur P Palm Oil Plantation in Ucayali, Peru", 21 February 2022, Allegations Letter Working Group on Business and Human Rights Ocho Sur & Investors Eng 21.2.22 (c) April 01.pdf (forestpeoples.org) (September 2022). For many more examples, see Business & Human Rights Resource Center, "Beyond Social Auditing: Background Materials and Analysis," Background Materials & Analysis - Business & Human Rights Resource Centre (business-humanrights.org) (September 2022).

24 Amnesty International, "The Great Palm Oil Scandal – Labour Abuses behind Big Brand Names", 30 November 2016, p.11, 93, <https://www.amnesty.org/download/Documents/ASA2151842016ENGLISH.PDF> (September 2022).

Flaws in design, governance and funding, weak or misleading standards, failures in monitoring and verification, lack of transparency, and an overall absence of effective oversight and accountability make these initiatives unsuitable for detecting risks or preventing harm in a reliable and systematic way. As the analysis and evidence in this section demonstrate, these failures are not unique to one industry sector, initiative, country, or region, but are systemic and permeate all industry sectors and geographies. Before moving on to this analysis, it is important to make a few clarifications.

First, industry initiatives vary greatly. They differ in the way they are designed, governed, and funded. They vary in relation to the issues they focus on, or the part of the value chain they cover. They also vary greatly in the standards they apply, the way in which they monitor and verify compliance, the enforcement mechanisms they adopt, and the level of openness and transparency with which they operate. Some are controlled purely by businesses whereas others have a multi-stakeholder structure. Some address members' internal compliance programmes, whereas others focus on suppliers or production sites. Some provide certification, and others do not, although membership alone can sometimes entail or suggest adherence to standards. Partly as a result of how they address and balance all these factors, they also differ greatly in quality and reliability. For this reason, making generalisations about them is difficult. However, as referenced throughout this paper, extensive research and analysis by NGOs, academics, journalists, think tanks, and others on a broad range of initiatives over the last few decades has shown that there are certain common and recurrent defects and shortcomings that tend to affect the sector in general.

Second, the analysis below does not refer to worker-driven social responsibility (WSR) initiatives. These initiatives are qualitatively very different from traditional industry initiatives and MSIs. The WSR movement was born partly as a result of the failures of these initiatives and addresses many of their gaps and shortcomings.<sup>25</sup> Among their key differences are the fact that WSR programmes are designed, implemented, and monitored primarily by, or in collaboration with, rightsholders and they establish legally enforceable obligations on participating companies. While nothing in the Proposal prevents companies from joining these programmes, companies have so far proven reluctant to embrace the model of rightsholder leadership and rigorous enforcement backed by legally binding commitments. Unless the Proposal actively names and promotes them, they are unlikely to form the bulk of the industry initiatives that companies go to in order to comply with their HREDD obligations.

Third, some initiatives only provide a normative framework (i.e. a set of standards) that adhering members are expected to implement. This is the case, for example, of the Global Compact or the Voluntary Principles on Security and Human Rights. These initiatives do not provide any type of structure or regime for monitoring or enforcing implementation, or they provide very weak methodologies, (e.g. self-reporting). Other initiatives are limited to providing research, tools, methodologies, or templates to assist or facilitate due diligence, but do not do any monitoring,

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25 MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.46-47, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022). Angelini, A. and Curphey, S. "The Overlooked Advantages of the Independent Monitoring and Complaint Investigation System in the Worker-driven Social Responsibility Model in US Agriculture", in *Business and Human Rights Journal*, 2022, p.1-6, [The Overlooked Advantages of the Independent Monitoring and Complaint Investigation System in the Worker-driven Social Responsibility Model in US Agriculture | Business and Human Rights Journal | Cambridge Core](#) (October 2022).

verification, or enforcement of their own.<sup>26</sup> While some of the analysis below is applicable to these types of initiative, it is primarily focused on industry schemes and MSIs that include some form of monitoring, verification, and enforcement. These are the initiatives likely to fit the definition of ‘industry initiative’ under the Proposal<sup>27</sup> and to be advanced by companies and other proponents as “appropriate to support the fulfilment of (their due diligence) obligations”.<sup>28</sup>

Fourth, ‘third-party verification’, primarily in the form of third-party auditing, is the only or main means through which most industry schemes and MSIs verify compliance with due diligence standards in supply chains.<sup>29</sup> In addition, the Proposal itself makes ‘independent third-party verification’, which, as noted above, equates to auditing – a key mechanism for verifying compliance by business partners and proving due diligence. For these reasons, the analysis below pays particular attention to the many flaws and failures of the auditing industry in detecting risks and preventing abuses, regardless of whether it operates under the umbrella of an industry initiative or by commission from an individual company.

### 3.1 Conflicts of interest

Some industry initiatives are comprised of companies only. They are designed, governed, managed, run, and funded by their corporate members. Since it is their own practices or those of entities in their supply chains that these schemes are meant to monitor, their reliability as objective and impartial regulators is doubtful and the conflicts of interest apparent. Some of these challenges can be mitigated by putting in place certain safeguards, such as greater disclosure and transparency. However, the very nature of the schemes – with an industry-only composition, decision-making, and funding – ultimately means that the standards and approaches they adopt are, and must remain, palatable to their corporate members, even if this is at the expense of more rigorous and effective human rights and environmental protections.<sup>30</sup>

Because of their multi-stakeholder structure, some MSIs can offer greater credibility. However, MSIs can also present significant conflicts of interest. These can stem from the way in which their activities are financed or from governance issues and internal power dynamics, all of which ultimately make

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26 The OECD calls these initiatives “facilitation initiatives”. OECD, “The role of sustainability initiatives in mandatory due diligence: Note for policy makers”, 2022, p.6, [The role of sustainability initiatives in mandatory due diligence \(oecd.org\)](https://www.oecd.org/dai/doing-no-harm/sustainability-initiatives-in-mandatory-due-diligence/) (August 2022).

27 As per Article 3(j) of the Proposal, see footnote 1.

28 As per Article 14(4) of the Proposal, see footnote 1.

29 MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.128, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE_FINAL_.pdf) (msi-integrity.org) (September 2022). OECD, “Highlights Alignment Assessment of Industry Programmes with the OECD Minerals Guidance”, p.5 (finding it problematic that most programmes assessed relied on audits as the primary form of assessment of member companies’ implementation), [Highlights-Assessment-Alignment-of-industry-programmes-with-the-OECD-Minerals-Guidance](https://www.oecd.org/dai/doing-no-harm/highlights-assessment-alignment-of-industry-programmes-with-the-oecd-minerals-guidance/) (September 2022).

30 See, for example, Fountain, A. and Huetz-Adams, F. “Cocoa Barometer 2018”, p.27-28 (commenting on the industry-only CocoaAction initiative and the “considerable bias of solutions towards industry-favoured approaches”), [2018\\_PublicEye\\_Cocoabarometer\\_2018\\_Report.pdf](https://www.cocoaaction.org/wp-content/uploads/2018/08/2018_PublicEye_Cocoabarometer_2018_Report.pdf) (August 2022). See also Corporate Accountability Lab, “Empty Promises: The Failure of Voluntary Corporate Social Responsibility Initiatives to Improve Farmer Incomes in the Ivorian Cocoa Sector”, July 2019, p.13, [Empty Promises Report 2019 Final.pdf](https://www.emptypromisesreport.org/wp-content/uploads/2019/07/Empty-Promises-Report-2019-Final.pdf) (cocoainitiative.org) (August 2022).

or allow corporate interests to prevail. The Fair Labor Association (FLA), for example, is an MSI that receives the bulk of its income from member brands.<sup>31</sup> All social compliance initiatives, including multi-stakeholder ones, are majority financed by corporate money: membership fees from brands, registration fees from supplying factories, training fees, or a share of the profit from the auditing companies.<sup>32</sup> The need to recruit and retain corporate members to make these initiatives financially viable represents in itself a serious conflict of interest.

Beyond financing, governance structures or other factors often also mean that business interests end up prevailing even when civil society organisations and other non-business actors form part of an MSI. This might be due to resource constraints that undermine the ability of non-business participants to influence decisions in practice,<sup>33</sup> majority or consensus-based decision-making, which makes it necessary to win the support of corporations to make key decisions; or divergence of opinion among civil society participants given the diversity of groups they represent.<sup>34</sup> Some MSIs also include rightsholders in their composition, but they are typically drastically under-represented in governance bodies and decision-making processes, and their voice is even less influential than that of civil society members.<sup>35</sup> This means that, despite their appearance, many MSIs are still ultimately governed and steered by their corporate participants – calling into question how impartial, objective, and independent they really are.<sup>36</sup>

Conflicts of interest are also severe when it comes to auditing firms. Most auditing firms are commercial entities. They are typically paid by the brands or suppliers (e.g. local factories) that hire them, even if they operate under the umbrella of an industry initiative. Corporate members of RSPO, FLA, and the Forest Stewardship Council (FSC), to give a few examples, commission and pay for

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- 31 Clean Clothes Campaign, “Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers”, 2019, p.26, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).
- 32 Some also receive donor contributions. Ibid, p.17, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).
- 33 MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.66, 73, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022). See also KIT Royal Tropical Institute, “Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?”, July 2020, p.13 (noting capacity constraints of NGOs and unions hindering increased participation), [KIT-2020-Evaluation-of-RBC-agreements-FINAL.pdf](#) (August 2022).
- 34 While industry can also be diverse in its representation, it shares the common interest of preserving profit and ensuring decisions will ultimately be approved by their board or management. MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.66, 73, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022).
- 35 Ibid, p.67-68, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022). Clean Clothes Campaign, “Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers”, 2019, p.76-77 (explaining that workers and their representatives are typically marginalised in the design, monitoring, and follow-up of labour compliance initiatives), Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).
- 36 Greenpeace gives the example of the Rainforest Alliance Standards Committee, which it describes as “industry-heavy”. While only two industry members are required, the Standards Committee includes four. NGOs, producers and certification bodies have two, two and one, respectively, leading to an overrepresentation of corporate interests. Greenpeace International, “Destruction: Certified”, no date, p.63-64, [b1e486be-greenpeace-international-report-destruction-certified\\_finaloptimised.pdf](#) (August 2022).



their own audits.<sup>37</sup> This can compromise auditors' independence and expose them to conflicts of interest.<sup>38</sup> In a highly competitive market, keeping clients happy is paramount to remain in business and maximise the chances of being re-hired. The private, commercial, and highly competitive nature of the auditing market creates perverse incentives against rigorous, potentially damning audit reports. Coupled with the lack of transparency that characterises the sector, auditors have every incentive to be lenient with companies, disguise problems, and help brands preserve their reputation (see more on this in section 3.v. below).<sup>39</sup>

### Cosy relationships

The conflicts of interest between commissioning and auditing company were evident in the Brumadinho dam disaster case mentioned above. German-based auditing company TÜV Süd provided safety advice and oversaw safety measures on Vale's Córrego do Feijão mine dam during the time immediately preceding the disaster. Crucially, it certified the dam's stability, which allowed the mine to continue operating. TÜV Süd allegedly knew that the dam was unsafe but nevertheless issued a safety declaration by manipulating industry safety standards.<sup>40</sup> Vale was an important TÜV Süd client. As well as acting as Vale's external technical advisor, the auditing firm was also operating as an internal consultant. Internal communications revealed that Vale had put pressure on TÜV Süd to certify the dam as safe.<sup>41</sup> A parliamentary inquiry also revealed that a TÜV Süd manager had travelled to Brazil to attend a meeting with Vale just weeks before the auditing company's decision to sign

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- 37 European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, "Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses", 2021, p.57, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (7 September 2022). Also, Greenpeace International, "Destruction: Certified", no date, p.72, 86, b1e486be-greenpeace-international-report-destruction-certified\_finaloptimised.pdf (August 2022). For more cases evidencing conflicts of interest, see Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.14, EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022).
- 38 Greenpeace International, "Destruction: Certified", no date, p.11, 38, b1e486be-greenpeace-international-report-destruction-certified\_finaloptimised.pdf (August 2022).
- 39 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.38, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022). Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, p.24, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022). Sydow, J. and Reichwein, A. "Governance of Mineral Supply Chains of Electronic Devices", Germanwatch, June 2018, p.30-33, Governance of Mineral Supply Chains of Electronic Devices (germanwatch.org) (September 2022).
- 40 Fian International, "Could a UN Treaty make Transnational Corporations Accountable? – The Crimes of Vale Inc. in Brumadinho, Brazil", October 2020, p.16, Brumandinho\_Legal\_analysis.pdf (fian.org) (September 2022). Parliamentary Committee of Inquiry of the Minas Gerais legislature, "Minas Gerais' Parliamentary Committee of Inquiry into the causes of the tailings dam rapture, in the Municipality of Brumadinho. Final Report of September 2019, p.161-162. Summary Report of the Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies over the Collapse of the Brumadinho Dam, November 2019, p.39 and 51-53.
- 41 Fian International, "Could a UN Treaty make Transnational Corporations Accountable? – The Crimes of Vale Inc. in Brumadinho, Brazil", October 2020, p.6, 8, Brumandinho\_Legal\_analysis.pdf (fian.org) (September 2022). ECCHR: The Safety Business: TÜV Süd's role in the Brumadinho Dam Failure in Brazil. Case Report (October 2019).

the safety declaration.<sup>42</sup> TÜV Süd's business interests and the promise of ongoing contracts decisively trumped its professional integrity, with catastrophic consequences.<sup>43</sup>

## 3.2 Lack of transparency

Many industry initiatives operate in secrecy or disclose only limited and curated information. It is often very difficult for the public to know whether abuses are taking place in a company's supply chain, even when they participate in industry initiatives. This is mostly due to the fact that these initiatives do not publish the results of monitoring activities or audits.<sup>44</sup> For example, social compliance audits of factories are generally only disclosed to the factory that has been audited or the purchasing company that commissioned the audit.<sup>45</sup>

The NGO Clean Clothes Campaign (CCC) assessed a number of prominent social compliance initiatives in 2019, indicating that neither Social Accountability International (SAI), Worldwide Responsible Accredited Production (WRAP), nor Amfori BSCI – three of the most well-known and widely used initiatives – published their audit reports.<sup>46</sup> In a different field, a 2018 study by Germanwatch of a large number of industry schemes and MSIs in the minerals supply chain sector concluded that there was a general absence of transparency when it came to implementation, verification, and enforcement. It found that only one out of 18 initiatives it assessed required publication of full audit reports.<sup>47</sup>

Two prominent MSIs in the agri-business and tech sectors provide further examples of the opacity with which many of these initiatives conduct their work. The RSPO lacks transparency in the awarding of contracts, certification processes, audit reports, and the withdrawal of a contract, certification, or accreditation.<sup>48</sup> It is also highly secretive in the way it handles complaints, often failing to release

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42 Summary Report of the Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies over the Collapse of the Brumadinho Dam (November 2019), p.52-53.

43 Fian International, "Could a UN Treaty make Transnational Corporations Accountable? – The Crimes of Vale Inc. in Brumadinho, Brazil", October 2020, p.8, [Brumadinho\\_Legal\\_analysis.pdf \(fian.org\)](#) (September 2022). Summary Report of the Parliamentary Commission of Inquiry of the National Congress' Chamber of Deputies over the Collapse of the Brumadinho Dam, November 2019, p.39. See also ECCHR, "The safety business: TÜV Süd's role in the Brumadinho dam failure in Brazil", ECCHR: TÜV Süd's role in the Brumadinho dam failure in Brazil (September 2022).

44 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.77, [Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign \(September 2022\)](#). Sydow, J. and Reichwein, A. "Governance of Mineral Supply Chains of Electronic Devices", Germanwatch, June 2018, p.30-33, [Governance of Mineral Supply Chains of Electronic Devices \(germanwatch.org\)](#) (September 2022).

45 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.53, [Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign \(September 2022\)](#).

46 Ibid, p.31, [Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign \(September 2022\)](#).

47 Sydow, J. and Reichwein, A. "Governance of Mineral Supply Chains of Electronic Devices", Germanwatch, June 2018, p.30-33, [Governance of Mineral Supply Chains of Electronic Devices \(germanwatch.org\)](#) (September 2022).

48 European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, "Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses", 2021, p.58, [ECCHR\\_BfdW\\_MIS\\_AUDITS\\_EN.pdf \(September 2022\)](#).

documents, details of its own investigations and reports, and details of any compensation awards.<sup>49</sup> The Global Network Initiative (GNI) – an MSI on freedom of expression and privacy online – does not require member companies to share their assessment reports publicly. They only need to share their outcomes “using a format of their choosing”. For their part, GNI only provides public assessment reports with generalised or aggregated information.<sup>50</sup>

While some MSIs may have become more transparent in relation to suppliers’ performance, they may not be as transparent in relation to their members’ behaviour. For example, a large study of MSIs by the organisation MSI Integrity found that FLA, Rainforest Alliance, and Sustainable Forestry Initiative all publish the audit reports of individual producers, but do not publish information about their members’ behaviour. Out of eight supply-chain MSIs analysed, six did not disclose any information about the proportion of a member’s products that were certified, or the total number of abuses found in its supply chain. As a whole, MSI Integrity concluded that it was impossible, or very difficult, to establish whether participating brands were producing their goods in compliance with standards.<sup>51</sup> The study also found that only 11 of 18 MSIs assessed provided a list of members that had been suspended or expelled, and in most instances, this did not include the reasons for the decisions.<sup>52</sup>

Lack of transparency means that external actors cannot assess the level and extent of compliance by members of an industry scheme or MSI with these initiatives’ standards. It also impedes an assessment of whether the initiative itself is meeting its objectives. Where certification is issued, the lack of transparency means that the validity of any certification issued cannot be corroborated against the underlying audit report and that any corrective action plan recommended cannot be scrutinised, nor its implementation monitored. This level of secrecy would represent a major challenge for effective monitoring of corporate conduct under the EU Directive. In fact, monitoring by enforcement authorities can be rendered much more challenging by the fact that many of these initiatives and their monitoring practices obscure rather than illuminate what is really going on (see section 3.v below regarding auditing practices).

The Commission’s Proposal does not require transparency in the way industry initiatives operate or publication of audit reports. While relying heavily on industry initiatives and third-party auditing, the Proposal fails to require or encourage fixes to one of the most widely criticised defects in the

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49 Environmental Investigation Agency and Grassroots, “Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil’s (RSPO) assurance systems”, November 2019, p.13, [WWtW2-spreads.pdf](#) (eia-international.org) (September 2022).

50 Global Network Initiative, GNI Assessment Toolkit, October 2021, p.21, [AT2021.pdf](#) (globalnetworkinitiative.org) (September 2022).

51 MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.106-108, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022).

52 Ibid, p.144, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022). See also KIT Royal Tropical Institute, “Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?”, July 2020, p.80 (reaching similar conclusions regarding the Bettercoal Initiative), [KIT-2020-Evaluation-of-RBC-agreements-FINAL.pdf](#) (August 2022). For more examples of lack of transparency in monitoring and auditing practices, see Campos, A. “Café certificado, trabalhador sem direitos”, *Repórter Brasil*, January 2017, [Café certificado, trabalhador sem direitos](#) (reporterbrasil.org.br) (September 2022) and *Repórter Brasil*, “Café certificado, trabalhador sem direitos”, December 2016, [Café\\_PT\\_Web.pdf](#) (reporterbrasil.org.br) (September 2022).

sector. In light of such opacity, it is not clear how the Commission would expect Member States' enforcement authorities to discharge their own monitoring responsibilities.

### 3.3 Weak, unclear, or misleading standards

A recurrent problem with industry initiatives is the weak substantive standards they adopt and against which member companies they are judged. By definition, these initiatives are the result of negotiations and, therefore, represent a compromise.<sup>53</sup> While purporting to address human rights, they often do not adopt the same level of protection as that required by relevant international human rights law and standards. This can create an appearance of compliance and respect for human rights when member companies are actually abusing or contributing to abuse of human rights. To give one example, the Global Coffee Platform issues a certificate (called a 4C Certificate) even if collective bargaining agreements are being 'partially applied', child labour is happening (as long as children are not part of the regular workforce, or farmers from vulnerable regions are being 'encouraged' to send children to school), or a minimum – not to mention a 'living' – wage is being paid late, or in violation of a relevant sector agreement.<sup>54</sup>

This problem could theoretically be addressed with fitness criteria that include a requirement for substantive standards to be either equal to or stronger than international human rights and environmental standards. However, assessing whether initiatives meet this requirement will not always be a straightforward task. This is because many industry schemes and MSIs use vague, ambiguous, or misleading language in the description of what they do and the standards they apply.<sup>55</sup> Doing so can suggest a potentially much wider scope than what is actually covered by the standard and gives member companies or auditors a great deal of latitude in assessing compliance.

Until recently, GNI described its mandate as consisting of ensuring internet and telecommunications companies respected freedom of expression and privacy. Most of its communications materials did not clarify that this goal was circumscribed to government restrictions or demands and did not apply to the private sphere (i.e. when tech companies sell user data to other private actors or use this data for targeted advertising). The failure to be explicit about the boundaries of the work created a misperception that the initiative and its members were actively addressing a wider range of issues than they actually were. It took a direct communication from MSI Integrity for GNI to adjust its

53 KIT Royal Tropical Institute, "Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?", July 2020, p.11, [KIT-2020-Evaluation-of-RBC-agreements-FINAL.pdf](#) (August 2022).

54 Global Coffee Platform – 4C Code of Conduct Version 2.3, November 2018, p.6, 18, 23, [4C\\_Code\\_of\\_Conduct\\_v2.3\\_en.pdf](#) (4c-services.org) (September 2022). This example is quoted in MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.100, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022).

55 OECD, "The role of sustainability initiatives in mandatory due diligence: Note for policy makers", 2022, p.6 (noting that many initiatives do not clearly communicate their own scope and limitations and that, as a result, there is often very little understanding about what particular initiatives do or what specific audits, certifications or product labels mean). The role of sustainability initiatives in mandatory due diligence (oecd.org) (August 2022).

mission statement so that it more accurately reflected its focus on government demands. However, GNI did not change its wider communications materials to note its more limited focus.<sup>56</sup>

Many industry initiatives address a pre-selected range of issues, so they will be limited in scope, by definition, and not seek to detect or address all risks to, and impacts on, the environment or human rights. In itself, this is not a problem if the focus and limitations of the initiative, as well as the audits and verification underpinning any certification provided, are clearly articulated; the issues covered are not presented as being the only risks or challenges relevant for the industry, region, or supply chain; and parallel measures are taken to address all other issues. However, a problem does exist with initiatives that purport to cover the full, or a broad spectrum of social and environmental issues. Such initiatives are often broadly presented as ‘ethical trading’, ‘sustainable sourcing’, ‘social compliance’, etc., when in fact they exclude or miss many critical ethical, sustainability, and social issues. The use of such broad labels can also be misleading when initiatives declare or certify products or commodities as ‘sustainable’ or other such broad labelling but checks have in fact only been performed on a very limited portion of the supply chain, and this is not clarified.<sup>57</sup>

Some initiatives may adopt sufficiently comprehensive standards that are in line with international human rights and environmental law and standards, but their actual assessment methodologies fail to identify and address all relevant issues. This is often the case in relation to sensitive, not immediately visible human rights issues such as forced labour or workplace harassment. It also occurs in relation to issues such as customary land rights and Free, Prior, and Informed Consent (FPIC).<sup>58</sup> Issues can be hard to detect in these contexts without sustained, meaningful, gender-sensitive, and culturally-appropriate engagement with workers and communities – something third-party auditors are generally ill-equipped to do (see section 3.v. below).<sup>59</sup> The RSPO, for example, has very ambitious substantive standards, but very weak methodological procedures for audits.<sup>60</sup>

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- 56 MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.91-92, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022).
- 57 MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.87-88, 91, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022).
- 58 Grassroots and Environmental Investigation Agency, “Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO”, November 2015, p.19, 20-21 (noting the lack of guidance on the methodology for social and environmental impact assessments and for assessing FPIC), [EIA\\_Watchmen\\_Palm\\_Oil\\_report\\_1115\\_EIA\\_report\\_0208.qxd](#) (eia-international.org) (September 2022).
- 59 See, for example, Transnational Palm Oil Labour Solidarity (TPOLS), “Labour Rights Violation in the Global Supply Chain of the Palm Oil Industry”, 26 November 2020, [Labour Rights Violation in the Global Supply Chain of the Palm Oil Industry | Palm Oil Labour Network](#) (September 2022). Also Camargos, D. “Slave labor found at second Starbucks-certified Brazilian coffee farm”, *Repórter Brasil*, May 2019, [Slave labor found at second Starbucks-certified Brazilian coffee farm](#) (reporterbrasil.org.br) (September 2022). For more discussion on this, see Anti-Slavery International analysis of the European Commission proposal for a Directive on corporate sustainability due diligence, May 2022, p.10, [ASL\\_CS3D\\_.pdf](#) (antislavery.org) (September 2022) and Anti-slavery International, “The inadequacies of social auditing: why we need worker-led solutions”, February 2022, [The inadequacies of social auditing: why we need worker-led solutions](#) (antislavery.org) (August 2022).
- 60 European Center for Constitutional and Human Rights (ECCHR), *Brot für die Welt and MISEREOR, “Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses”*, 2021, p.19, 57 (noting that audits under RSPO consist mainly of check-lists, documentary evidence and announced visits), [ECCHR\\_BfdW\\_MIS\\_AUDITS\\_EN.pdf](#) (September 2022). See also, Greenpeace International, “Destruction: Certified”, no year indicated, p.68, [b1e486be-greenpeace-international-report-destruction-certified\\_finaloptimised.pdf](#) (August 2022).

### 3.4 Lack of oversight and accountability

Industry schemes, MSIs, and third-party auditing emerged as a result of the legitimacy and credibility gap of corporate self-regulation. However, they developed and continue to operate in a regulatory vacuum, without rigorous government regulation, oversight, or accountability.

At the same time, industry initiatives themselves do not tend to maintain strong oversight over the behaviour of their members.<sup>61</sup> Member companies routinely breach the standards they are supposed to uphold without significant consequences.<sup>62</sup> Industry initiatives monitor members' behaviour primarily or exclusively through third-party auditing, but this is a system that has proven to be highly ineffective. Apart from the fact that they take place infrequently, audits often fail to detect corporate breaches, or may actually intentionally overlook or hide them (see 3.v. below). While deficient, limited, and false audits are commonplace, industry initiatives do not tend to monitor auditor practices either. As a result, failures by companies to adhere to standards are often not detected. It is often when serious cases of abuse emerge that their practices receive more scrutiny, after the alarm has been raised by NGOs, unions, or affected rightsholders.

Based on an assessment of a large number of MSIs, the organisation MSI Integrity concluded in 2020 that the majority of assessed initiatives had failed to put in place robust monitoring of their members' performance and accountability mechanisms. It put this down largely to the need of these initiatives to retain members and shield them from the litigation, reputation, and financial risks that strong mechanisms might entail for them.<sup>63</sup> Indeed, there is an inherent tension between the goals of increasing membership to ensure the viability of a scheme on the one hand, and ensuring robust standards and effective implementation that can drive off existing or prospective members on the other. As noted by the evaluators of the 11 Dutch Responsible Business Conduct (RBC) agreements, "the implementation costs per signatory company decrease with more signatory companies due to high fixed implementation costs[...] It is thus imperative for the smaller agreements [...] to grow in order to become more relevant, effective, and efficient."<sup>64</sup>

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61 See, for example, KIT Royal Tropical Institute, "Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?", July 2020, p.13 (noting the limitations in what RBC agreements monitor, particularly concerning the quality of members' due diligence processes, their outcomes and impact), [KIT-2020-Evaluation-of-RBC-agreements-FINAL.pdf](#) (August 2022).

62 See, for example, Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.21, [EIA\\_Watchmen\\_Palm\\_Oil\\_report\\_1115\\_EIA\\_report\\_0208.qxd](#) (eia-international.org) (September 2022).

63 MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.147, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022).

64 KIT Royal Tropical Institute, "Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?", July 2020, p.10, [KIT-2020-Evaluation-of-RBC-agreements-FINAL.pdf](#) (August 2022).

## Monitoring the monitors

Industry schemes and MSIs often fail to oversee and monitor auditor practices or to perform their own additional checks to corroborate or counter auditors' findings.<sup>65</sup> Auditors may be accredited to perform audits under a scheme, but as practice demonstrates time and again, accreditation or licensing alone are no guarantee of reliable audits.<sup>66</sup> Audit methodology is often left to the auditor's discretion, which can result in superficial check-lists and substandard audits.<sup>67</sup> A study on the RSPO by Grassroots and Environmental Investigations Agency (EIA) in 2015 found that RSPO did not examine or act on clear evidence of failings by auditors.<sup>68</sup> A different assessment found that the FLA conducted annual spot-checks on less than five per cent of the facilities subject to internal monitoring by member brands.<sup>69</sup>

Complaints regarding defective audits could in theory be raised through grievance mechanisms. However, where these mechanisms exist, they are mostly directed towards member companies, not the auditors, and are nonetheless generally inadequate or ineffective.<sup>70</sup> A study on the minerals sector found that only four out of 16 initiatives that required audits offered a grievance mechanism to raise concerns about these audits. The others either offered regular grievance mechanisms that are generally geared towards member companies, or had no grievance mechanism at all.<sup>71</sup>

Even after major disasters or findings of serious human rights abuses, the auditing or certification firms that performed the relevant audit or certified adherence to standards typically continue in

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- 65 Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.20 (noting that the RSPO's Secretariat was only expected to check that verified environmental assessments were complete, but not to conduct proper reviews to identify problematic or high-risk submissions), EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022).
- 66 European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, "Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses", 2021, p.42, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022). Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.6, EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022). Some auditor accreditation bodies conduct checks on accredited auditors, but they do not necessarily respond to specific allegations of underperformance. Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.19-20, EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022).
- 67 European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, "Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses", 2021, p.58, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022).
- 68 Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.7, EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022).
- 69 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.26, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).
- 70 Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.21, EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022). European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, "Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses", 2021, p.24, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022). MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.159, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL\_.pdf (msi-integrity.org) (September 2022).
- 71 Sydow, J. and Reichwein, A. "Governance of Mineral Supply Chains of Electronic Devices", Germanwatch, June 2018, p.30-33, Governance of Mineral Supply Chains of Electronic Devices (germanwatch.org) (September 2022).

operation, often under the same scheme.<sup>72</sup> Following the Ali Enterprises fire, the auditing company RINA continued its certification services without consequence and remained an approved SAI auditor.<sup>73</sup> Despite having audited Rana Plaza just before the disaster, TÜV Rheinland continued to audit for SAI and industry schemes WRAP and Amfori BSCI.<sup>74</sup> From a legal point of view, auditors seldom face legal consequences for reporting inaccurate results that mask abuses and hazardous conditions.<sup>75</sup>

Article 3(h) of the Commission's Proposal defines 'independent third-party verification' as verification by an auditor that is "accountable for the quality and reliability of the audit". However, what this means from a legal point of view, who is meant or empowered to hold auditors accountable, before whom and how is not specified. Without additional provisions to operationalise this statement, it is meaningless. Once again, while relying heavily on third-party auditing, the Commission makes no attempt to set minimum legal standards for the sector or to lay the foundations for an effective accountability regime.<sup>76</sup>

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- 72 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.85, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).
- 73 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.48, 71, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022). RINA was, in fact, invited by the European Commission to become part of the Technical Advisory board developing its Product Environmental Footprint (PEF) and Organisation Environmental Footprint (OEF) methods. RINA, "Environmental Footprint: RINA is now part of the Technical Advisory Board", 5 June 2019, Environmental Footprint: RINA is now part of the Technical Advisory Board - RINA.org (September 2022).
- 74 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.71, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022). For another example, see Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.7-8 (explaining that, despite a successful complaint against RSPO assessors Bogor Agricultural Institute (IPB) for intentionally excluding indigenous voices that opposed oil palm developments, IPB continued to carry out environmental assessments for RSPO), EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022).
- 75 European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, "Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses", 2021, p.19, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022). See also Terwindt, C. and Saage-Maass, M. "Liability of social auditors in the textile industry," European Center for Constitutional and Human Rights, 2016, ECCHR: Liability of Social Auditors in the Textile Industry (September 2022). Auditors and auditing processes are regulated in certain fields. For example, the EU has regulated statutory financial audits and audits of public interest entities through EU Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts and EU Regulation No 537/2014 on specific requirements regarding statutory audit of public-interest entities respectively. However, the relatively newer sustainability or human rights auditing and certification fields remains largely unregulated.
- 76 Many activists and scholars are calling for a legally established duty of care of auditing companies and liability towards affected rightsholders for breach of this duty. Alternatives include strong administrative supervision and sanctions for non-compliance. See, for example, Südwind and Anti-Slavery International submissions to the Commission's consultation on the Proposal at Feedback from: SÜDWIND (europa.eu) (August 2022) and Feedback from: Anti-Slavery International (europa.eu) (August 2022) respectively.



## Ineffective complaints mechanisms

Where they do exist,<sup>77</sup> the grievance mechanisms of industry schemes or MSIs that address failures by member companies to adhere to standards are generally ineffective. They are often slow, only act when considerable damage has already been done, tend to favour compromise over sanctioning, and offer limited measures of reparation to rightsholders.<sup>78</sup> In addition, many fail to tackle the frequent barriers that prevent rightsholders from accessing or using them effectively, such as the fear of retaliation.<sup>79</sup>

MSI Integrity found that one-third of the 40 MSIs in its database did not have a process that enabled rightsholders to directly report alleged abuses of the MSIs' standards. Of those that did have complaint procedures in place, the majority had multiple barriers that prevented rightsholders from reporting abuses in practice, and did not require consultation with rightsholders regarding appropriate remedies.<sup>80</sup> The study also found that many grievance mechanisms suffered from the same structural problem affecting decision-making in general: the need for a majority or consensus vote on the board (or a board sub-committee involved in a specific dispute or grievance process), which means that civil society representatives are often over-ruled by the corporate-led majority or even a single corporate representative. These processes therefore often favoured the status quo.<sup>81</sup>

An analysis by Homeworkers Worldwide, India Committee of the Netherlands, and SOMO of the way in which SAI and Ethical Trading Initiative (ETI) dealt with specific complaints of serious labour rights abuses against women and girls in garment factories in South India illustrates recurrent challenges.<sup>82</sup>

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- 77 KIT Royal Tropical Institute, "Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?", July 2020, p.9, 15 (noting that only one out of 11 Dutch RBC agreements assessed had an independent complaints mechanism for external stakeholders), (KIT-2020-Evaluation-of-RBC-agreements-FINAL.pdf (August 2022).
- 78 See Environmental Investigation Agency and Grassroots, "Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil's (RSPO) assurance systems", November 2019, p.23 (noting that, "in many cases, the RSPO turns to compensation – a very opaque process in itself – to allow members to offset damage"), WWtW2-spreads.pdf (eia-international.org) (September 2022). MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.139-140, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL\_.pdf (msi-integrity.org) (September 2022). Sydow, J. and Reichwein, A. "Governance of Mineral Supply Chains of Electronic Devices", Germanwatch, June 2018, p.30-33 (finding that only seven out of 18 initiatives assessed had a permanent grievance mechanism), Governance of Mineral Supply Chains of Electronic Devices (germanwatch.org) (September 2022).
- 79 Human Rights Watch, "Combating Sexual Harassment in the Garment Industry", 12 February 2019 (describing the many obstacles and victimisation endured by women workers filing complaints of sexual harassment in garment factories), <https://www.hrw.org/news/2019/02/12/combating-sexual-harassment-garment-industry> (September 2022). MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.166-182, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL\_.pdf (msi-integrity.org) (September 2022).
- 80 MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.68, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL\_.pdf (msi-integrity.org) (September 2022).
- 81 MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.139, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL\_.pdf (msi-integrity.org) (September 2022).
- 82 Homeworkers Worldwide, India Committee of the Netherlands and SOMO, "Case closed, problems persist – Grievance mechanisms of ETI and SAI fail to benefit young women and girls in the South Indian textile industry", June 2018, Case-closed-problem-persist-def.pdf (somo.nl) (September 2022).

The organisations found that the SAI complaint procedure was unacceptably long-winded and failed to engage with the workers meaningfully. While the complaint eventually culminated in the withdrawal of a supplier certification, it did not lead to improvements in the working conditions of the complainants. The ETI procedure was equally drawn-out and ineffective. The organisations observed that ETI failed to take a leading role in resolving the dispute, leaving the matter entirely to the parties involved instead. They also pointed out that they found no evidence of any actual improvements in working conditions on the ground.

### Flaws in the Dutch garment agreement grievance mechanism

In May 2020, Arisa filed a complaint against C&A Netherland C.V. (C&A) with the Complaints and Disputes Committee (CDC) of the former Dutch Agreement on Sustainable Garments and Textile (AGT).<sup>83</sup> The complaint concerned serious human rights violations at a C&A supplier in Tamil Nadu, India.<sup>84</sup> In July 2020, SOMO, CCC and a Myanmar labour rights organisation filed another complaint against C&A with the CDC, this time alleging that C&A had failed to ensure respect for trade union and other labour rights at one of its supplier factories in Myanmar.<sup>85</sup> Neither complaint resulted in improvement in corporate behaviour or tangible remedy for the workers.

In the first case, the CDC failed to assess C&A's conduct against the OECD Guidelines for Multi-national Enterprises and other relevant OECD instruments on which the AGT purports to be based. While the CDC issued a non-binding recommendation to C&A, it failed to clarify how compliance would be monitored. Arisa also denounced a number of serious procedural defects, including insufficient and unclear communication about next steps, failure to assess all of Arisa's evidence, and a lack of opportunity to substantiate contested issues.

Regarding the second case, the CDC took almost two years to issue a ruling – an unacceptable time lapse for a mechanism that, unlike court claims, is meant to provide an agile and quick route for redress. The organisations that brought this complaint also found that the procedures were highly unpredictable and inaccessible, and that the mechanism had failed to create a safe space for rightsholders to engage freely and meaningfully. They also pointed out that CDC had failed to correctly interpret and apply the OECD Guidelines and other relevant OECD instruments.<sup>86</sup> Because of the delay in the handling of the case, the final ruling came after the AGT had come to an end, meaning that CDC had lost all power over C&A. While the decision confirmed that C&A had failed to ensure respect for trade union rights, this did not translate into any improvement at the factory level: no trade union was formed, and dismissed union members and union leaders were not reinstated.<sup>87</sup>

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83 The AGT was a multi-stakeholder initiative created in 2016 by business, NGOs, trade unions and the Government of the Netherlands. The initiative came to an end in December 2021.

84 Arisa, "Reaction of Arisa to the decision of the Complaints and Disputes Committee of the Agreement on Sustainable Garment and Textiles, concerning a complaint against C&A Nederland C.V.", 7 January 2021, *Reaction of Arisa | Arisa* (September 2022).

85 Pauline Overeem, "Comprehensive reaction to outcome C&A complaints procedure", SOMO, 11 July 2022, *Comprehensive reaction to outcome C&A complaints procedure - SOMO* (September 2022).

86 Pauline Overeem, "Interim decision on complaint against C&A leaves much to be desired", SOMO, 15 July 2021, *Interim decision on complaint against C&A leaves much to be desired - SOMO* (September 2022).

87 Pauline Overeem, "Comprehensive reaction to outcome C&A complaints procedure", SOMO, 11 July 2022, *Comprehensive reaction to outcome C&A complaints procedure - SOMO* (September 2022).

### 3.5 A deeply flawed ‘third-party’ verification regime

Industry initiatives rely heavily on third-party audits to monitor their members’ compliance with standards. This means that the success of these initiatives is inescapably tied to the success of third-party audits in ensuring corporate members uphold their social, sustainability, or human rights standards. As explained above, the Commission itself has made implementation of HREDD rely heavily on third-party auditing. Under the Proposal, third-party audits will become the key mechanism by which companies verify compliance with human rights and environmental standards in their supply chains and demonstrate due diligence. As stated from the outset, the Commission has adopted a highly problematic approach that ignores decades of evidence demonstrating the systemic failures of the auditing industry in detecting risk and preventing harm.

#### Lack of HREDD duties of auditing firms

As business enterprises, auditing firms also have a responsibility to respect human rights and to carry out their work in a way that causes no harm to the environment and human rights. However, human rights or sustainability auditing is still a largely unregulated field.

In an in-depth study of four cases involving the RSPO and three certification firms (RINA, Tüv Süd, and TÜV Rheinland), the European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt, and MISEREOR found that none of these four entities had a human rights due diligence policy or procedure in place, none required or had been required to have adequate human rights due diligence procedures as a condition for accreditation, and auditors were not required to have human rights expertise.<sup>88</sup> The organisations concluded that the absence of a human rights perspective and safeguard procedures in their own operations may have directly contributed to the human rights abuses caused by the companies they had assessed.<sup>89</sup>

Because of the high size threshold adopted by the Commission’s Proposal to determine the companies in scope of the Directive, only the very largest auditing and certification firms operating from or within the EU will be captured by it. Many, including those operating in high-risk sectors, will not. This is a problem because these companies will be called upon to provide assurances of compliance with HREDD duties without any concomitant obligations on them to ensure they do not cause harm in the way they carry out these tasks.

#### Poor-quality audits

For a variety of reasons, third-party audits are often of extremely low quality and miss critical risks, sometimes with lethal consequences.

88 European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, “Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses”, 2021, p.18, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022).

89 Ibid, p.19, 40-58, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022).

Poor auditing is often due to insufficient training of auditors and lack of understanding of key issues.<sup>90</sup> An assessment of five industry programmes covering tin, tantalum, tungsten, and gold supply chains carried out by the OECD in 2016 found that auditors were generally lacking in both competence and knowledge on mineral supply chains and the relevant OECD standards.<sup>91</sup> Often, human rights or labour rights auditing is an ‘add on’ service of commercial auditing companies whose main focus is financial auditing or quality control.<sup>92</sup> In these contexts, knowledge and understanding of critical social, human rights, or sustainability issues is low. Global auditing firms also often sub-contract audits, or delegate them to ill-equipped, poorly regulated, local subsidiaries.

### Deadly failures of poorly executed audits

Only three weeks before the fatal Ali Enterprises fire, the factory was awarded SA8000 certification by RINA, a global auditing and certification company.<sup>93</sup> While the audit was approved by RINA, the actual audit was performed by a RINA subsidiary, the Pakistani firm RI&CA. The audit report is of very poor quality. It does not describe the factory accurately, it fails to mention clearly visible hazards, and contains no picture of them, to the point that many questioned whether the auditor ever actually visited the building. The auditor failed to identify glaring safety defects, such as locked fire escapes, blocked windows, a defunct fire alarm system, and insufficient fire-fighting equipment.<sup>94</sup> Investigations later revealed that, despite RINA's certificate, the factory did not comply with the SA8000 standard or Pakistani Law.<sup>95</sup>

The poor quality of audits can also be the result of poor auditing methodologies that are either prescribed by the initiative for which the auditors are performing audits, or adopted by auditors themselves, without oversight. The 2016 OECD assessment, for example, noted that many audits were overly focused on documentation checks.<sup>96</sup> As will be described later in this section, poor

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- 90 Clean Clothes Campaign, “Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers”, 2019, p.73-74, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022). Ethical Trading Initiative, “Getting Smarter at Auditing – Tackling the growing crisis in ethical trade auditing”, Report from ETI members’ meeting, 16 November 2006, p.10, [DOC] Getting smarter at auditing - Tackling the growing crisis in ethical trade auditing - Business & Human Rights Resource Centre (business-humanrights.org) (September 2022), OECD, Highlights Alignment Assessment of Industry Programmes with the OECD Minerals Guidance, p.5, Highlights-Assessment-Alignment-of-industry-programmes-with-the-OECD-Minerals-Guidance (September 2022).
- 91 OECD, Highlights Alignment Assessment of Industry Programmes with the OECD Minerals Guidance, p.5, Highlights-Assessment-Alignment-of-industry-programmes-with-the-OECD-Minerals-Guidance (September 2022).
- 92 Ethical Trading Initiative, “Getting Smarter at Auditing – Tackling the growing crisis in ethical trade auditing”, Report from ETI members’ meeting, 16 November 2006, p.10, [DOC] Getting smarter at auditing - Tackling the growing crisis in ethical trade auditing - Business & Human Rights Resource Centre (business-humanrights.org) (September 2022). Brown, G. “Fatal Flaws of Foreign Factory Audits – A Spectacular Failure to Improve Conditions”, ISHN (Industrial Safety & Hygiene News), 1 February 2013, Fatal flaws of Foreign factory audits | 2013-02-01 | ISHN (September 2022).
- 93 Clean Clothes Campaign, “Time Line of the Ali Enterprises Case”, no date, Time line for the Ali Enterprises case — Clean Clothes Campaign (September 2022).
- 94 Clean Clothes Campaign, “Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers”, 2019, p.58, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022). European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, “Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses”, 2021, p.42-43, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022).
- 95 The Ali Enterprises Factory Fire ☒ Forensic Architecture (forensic-architecture.org) (September 2022).
- 96 OECD, Highlights Alignment Assessment of Industry Programmes with the OECD Minerals Guidance, p.5, Highlights-Assessment-Alignment-of-industry-programmes-with-the-OECD-Minerals-Guidance (September 2022).

audits are often also the result of time constraints and other market pressures that drive practices downwards and risk putting the more robust and thorough auditors out of business.<sup>97</sup>

These problems have been known for decades. A gathering of ETI members back in 2006, for example, raised the poor quality of audits performed to check on the initiative's standards as a major concern. Among the many deficiencies, members noted that audits were still failing to identify breaches of certain aspects of the ETI Base Code, citing as examples discrimination and violation of trade union rights.<sup>98</sup>

### Failing to detect widespread corruption in FSC-certified forests

In 2018, an Earthsight investigation revealed numerous cases of illegal logging, bribery, and corruption involving forests certified by the FSC in Ukraine. Earthsight found that a defective auditing system was at the heart of FSC's failure. The system was incapable of reliably detecting or preventing well-known illegal practices in the country's forestry sector. Auditors overwhelmingly relied on information provided by the state enterprises themselves, even in relation to allegations of corruption involving these very same entities. Earthsight also found that significant illegality risks were generally examined only after an NGO had raised the alarm, and that even in such cases auditors still overwhelmingly relied on documents and assertions from government agencies and state forest enterprises to dismiss the allegations.<sup>99</sup>

### Audit fraud

Audit fraud is prevalent and well documented in the social auditing sector.<sup>100</sup> Suppliers have a strong financial motivation to pass audits, since failing them can jeopardise lucrative business relationships. Many have developed techniques to hide the truth and present an alternative picture to auditors. They may keep false documentation and records, coach workers to give false information to auditors, and prepare the scene in advance (e.g. tidying up, putting on personal protective equipment that is normally not worn, removing under-age workers, etc.). Suppliers also often steer auditors away

97 MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.134, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL\_.pdf (msi-integrity.org) (September 2022).

98 Ethical Trading Initiative, "Getting Smarter at Auditing – Tackling the growing crisis in ethical trade auditing", Report from ETI members' meeting, 16 November 2006, p.7, [DOC] Getting smarter at auditing - Tackling the growing crisis in ethical trade auditing - Business & Human Rights Resource Centre (business-humanrights.org) (September 2022).

99 Earthsight, "Complicit in Corruption – How billion-dollar firms and EU governments are failing Ukraine's forests", July 2018, p.62-64, Earthsight Complicit in Corruption August 2018\_Layout 1 (September 2022).

100 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.73, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022). Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022).

from interviewing the most vulnerable or aggrieved workers.<sup>101</sup> This is facilitated by the fact that inspections are often pre-announced. In extreme cases, suppliers may simply offer bribes to auditors to report favourably on what they found or to omit reporting on breaches.<sup>102</sup>

A study by Transparentem on social auditing of garment factories in India, Malaysia, and Myanmar found that young workers were routinely hidden before auditors arrived. According to this study, at almost every investigated worksite in India and Myanmar, interviewees said that young workers were made to wait during audits in a variety of hiding places.<sup>103</sup> Transparentem's investigations in Malaysia uncovered evidence that recruitment agents charged workers prohibited recruitment fees and then took steps to cover up this practice so that auditors would be deceived. These included coaching workers to minimise the amounts they said they had paid, coercing workers to be videotaped misstating the amounts they had paid, and providing inaccurate receipts with lower amounts than workers had actually paid.<sup>104</sup> Transparentem also found evidence of widespread worker coaching and bribing, document falsification, and record tampering.

While suppliers in these cases undeniably engage in wrongful, often illegal practices, abuses are frequently the result of lead companies' exploitative purchasing practices and audit fraud is driven by suppliers' need to keep a semblance of compliance.<sup>105</sup> Workers also often lie for fear of losing their jobs, which can happen either as retaliation for speaking out, or because buyers decide to cut ties with suppliers who appear to be underperforming.<sup>106</sup>

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- 101 Ethical Trading Initiative, "Getting Smarter at Auditing – Tackling the growing crisis in ethical trade auditing", Report from ETI members' meeting, 16 November 2006, p.8-9, [DOC] Getting smarter at auditing - Tackling the growing crisis in ethical trade auditing - Business & Human Rights Resource Centre (business-humanrights.org) (September 2022). Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, p.8, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022). For anonymised, real-life scenarios involving bribery of auditors, using duplicate or fake documents, keeping fictitious labour accounts or double books, see Transparency International Bangladesh, "Undress Corruption – How to Prevent Corruption in The Readymade Garment Sector: Scenarios from Bangladesh", February 2017, p.17, 19, 25-26, Undress\_Corruption\_for\_web\_13\_02\_2017.pdf (ti-bangladesh.org) (September 2022).
- 102 Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, p.8, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022). Transparency International Bangladesh, "Undress Corruption – How to Prevent Corruption in The Readymade Garment Sector: Scenarios from Bangladesh", February 2017, Undress\_Corruption\_for\_web\_13\_02\_2017.pdf (ti-bangladesh.org) (September 2022).
- 103 Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, p.11, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022).
- 104 Ibid, p.14, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022).
- 105 Transparency International Bangladesh, "Undress Corruption – How to Prevent Corruption in The Readymade Garment Sector: Scenarios from Bangladesh", February 2017, p.24, Undress\_Corruption\_for\_web\_13\_02\_2017.pdf (ti-bangladesh.org) (September 2022).
- 106 Anti-slavery International, "The inadequacies of social auditing: why we need worker-led solutions", February 2022, The inadequacies of social auditing: why we need worker-led solutions (antislavery.org) Ananthalakshmi, A. and Lee, L. "Dyson splits with Malaysia supplier, stoking concern over migrant worker treatment", Reuters, 6 December 2021, Dyson splits with Malaysia supplier, stoking concern over migrant worker treatment | Reuters (September 2022). Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, p.21-22, 24, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022).

## Putting on a show

An investigation by the Thomson Reuters Foundation in 2019 found workers at nine tea plantations certified by Rainforest Alliance – six of which were also certified by Fairtrade – were taking home as little as 26 Sri Lankan rupees (14 US cents) a day after fees, penalties, and other charges were deducted from their wages without their consent. Up to three-quarters of their wages were regularly deducted. Labourers who spoke to investigators explained that their estates only abided by the certifiers' ethical standards during audits, but they were afraid of reprisals if they revealed this to auditors.<sup>107</sup>

Auditors also have strong financial incentives to engage in concealing practices to give false assurances to clients. The case of *Rihan v. Ernst & Young Global Ltd & Others*<sup>108</sup> is a well-known case of auditor cover-up. An internal whistle-blower denounced the cover up of a gold refiner's non-compliance with applicable standards, including the "Good Delivery List" gold trade standard of the Dubai Multi Commodities Centre (DMCC) and the London Bullion Market Association (LBMA). The court found that Ernst & Young, the defendant parent company, had breached its duty of care by ensuring that the negative findings of its subsidiary's audit were obscured in the published report. While corruption among auditors is not unusual, it is unusual that a case reaches this level of visibility, and even more so that a global auditing firm is found legally responsible in court.<sup>109</sup>

## Misleading and Fraudulent Assessments

In September 2012, the company PT Borneo Surya Mining Jaya (PT BSMJ) – a subsidiary of RSPO member First Resources Ltd. – obtained a "New Planting Procedure" (NPP) notification from RSPO. This confirmed adherence to social and environmental standards based on Social and Environmental Impact Assessments and High Conservation Value Assessments conducted by external assessors Bogor Agricultural Institute. In turn, these assessments were verified as RSPO compliant by auditor TUV NORD Indonesia.

A 2015 investigation concluded that the assessments contained a series of false claims and that the assessors knew those claims to be false. The assessments claimed that all local people's land within the concession had been identified and land had been acquired by PT BSMJ through a process of FPIC. The assessments also claimed that PT BSMJ was not yet operational. However, communications with local people revealed that PT BSMJ had begun clearing land at the time the assessments took place and that its customary owners – the community of Muara Tae – had not given their consent. The assessors were aware of this opposition, but instead of reflecting the community's concerns, they left the community out by using what they explained to be a "purposive sampling" methodology.<sup>110</sup>

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107 Fuller, L. "Exclusive: Tea label giants vow probe after Sri Lanka labor abuse expose", Thomson Reuters Foundation, 27 March 2019, Exclusive: Tea label giants vow probe after Sri Lanka labor abuse expose | Reuters (September 2022).

108 *Rihan v. Ernst & Young Global Ltd and Others* [2020] EWHC 901 (QB), High Court Judgment Template (judiciary.uk) (September 2022).

109 Leigh Day, Ernst & Young | Leigh Day (September 2022).

110 Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.8, EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022). Subsequent to the publication of the NPP documents, EIA submitted a complaint to the RSPO. The Complaints Panel commissioned a field review, which confirmed the allegations made by EIA.

## Lack of participation of rightsholders and other local experts

Affected or potentially affected rightsholders are systematically excluded from third-party audits. However, without their views, third-party auditors lack critical information that can allow them to gain and reflect a more accurate picture of real conditions at a factory, field, mine, or other premises.

Rightsholder exclusion is often the result of poor audit design, but it can also be a consequence of practical limitations. In the social auditing field, meaningful engagement with workers is often eroded by time constraints. Pressure to perform short audits, often based on quick checklists, as a result of fierce competition among auditing firms and the need to keep costs down, leaves little room to engage with workers. Otherwise, workers may not participate simply because they do not trust social auditors. Unlike workers' own organisations, social auditors are unable to engender the trust that a permanent on-site presence throughout the year generates.<sup>111</sup>

Even when workers' input is sought, the way in which this is typically done is highly inadequate when it comes to capturing workers' real concerns. Interviews held on-site, often under supervision from factory managers, can hardly be relied on to obtain an honest and accurate picture of working conditions. If workers have not been hand-picked or coached on what answers to give, they will often self-censor for fear of being identified as the source of negative information, which could later cost them their job or put them at risk of violence. These problems, while widely acknowledged, have not led to a significant change in social auditing practices.<sup>112</sup> Off-site interviews by skilled auditors of a wide and diverse cohort of workers over sufficiently long periods of time to build trust and elucidate real working conditions is antithetical to the current profit-driven model of quick, time-bound audits.

In other contexts, such as in the agricultural and mineral sectors, not only the perspective of workers but that of local communities is needed as well. However, many studies of industry schemes, MSIs, and third-party auditing in these areas show that involvement of affected or potentially affected communities is either not sought<sup>113</sup> or, where sought, is undermined by a myriad of barriers that affect meaningful participation.<sup>114</sup> As well as rightsholders, other actors with relevant insights – such as local NGOs, experts, and environmental and human rights defenders – are also typically excluded from audits.<sup>115</sup>

111 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.76-77, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).

112 Ibid, p.77, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).

113 European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, "Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses", 2021, p.18, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022). Grassroots and Environmental Investigation Agency, "Who watches the watchmen? Auditors and the breakdown of oversight in the RSPO", November 2015, p.19, EIA\_Watchmen\_Palm\_Oil\_report\_1115\_EIA\_report\_0208.qxd (eia-international.org) (September 2022).

114 MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.129-131, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL\_.pdf (msi-integrity.org) (September 2022).

115 Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, p.64, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022). Sydow, J. and Reichwein, A. "Governance of Mineral Supply Chains of Electronic Devices", Germanwatch, June 2018, p.37, Governance of Mineral Supply Chains of Electronic Devices (germanwatch.org) (September 2022).



The Commission's Proposal establishes a duty to carry out consultations with potentially affected groups to gather information on actual or potential adverse impacts. However, this provision is undermined by the use of the phrase 'where relevant'.<sup>116</sup> The Proposal does not provide any further guidance as to when this would be 'relevant' or who should make this call. As with many other provisions in the Proposal, the absence of any specification means that this will likely be left to the companies themselves, which is problematic. The Proposal also establishes a duty to consult on the development of a prevention action plan and a corrective action plan, but the decision on whether these plans are needed in the first place is not subject to consultation.<sup>117</sup> Regardless of the specificities and limitations of these provisions, none of them actually refers to, or necessarily impacts on, the way in which auditors carry out their audits.

The Proposal also states that "companies are entitled to make use of appropriate resources, including independent reports" for purposes of identifying impacts.<sup>118</sup> However, it is not clear what type of reports this is referring to. Without any further clarification, and given the Proposal's heavy emphasis on third-party auditing, this can easily be interpreted as referring, once again, to audit reports.

The Proposal's failure to include strong requirements on consultation and engagement with affected or potentially affected rightsholders, environmental and human rights defenders, local civil society organisations, and other experts accentuates the systemic failure of the auditing regime to involve these actors in their audits.

### Cost minimisation as the overriding logic

To keep costs down, companies often demand that audit time should be kept to a minimum. Audit firms, on their part, often offer cheaper audits that take less time, or the absolute minimum number of days required by compliance regimes, to remain competitive. To achieve this, they may sacrifice thoroughness or drop or shorten certain activities, such as off-site interviews.<sup>119</sup> Poor auditing is therefore often the result of companies' unwillingness to pay for more robust, comprehensive, and therefore time-intensive audits. As explained above, this has a direct consequence on the quality of audits. ETI members have recognised that the poor quality of the audits being performed under the ETI initiative was due in part to the limited funds that companies were prepared to devote to auditing and verification. In order to gain an overview of the entire supply base, they concluded that resources were "spread too thinly to allow good quality auditing throughout their supply chain".<sup>120</sup>

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116 Article 6(4) of the Proposal, see footnote 1.

117 Articles 7(2)(a) and 8(3)(b) of the Proposal, see footnote 1.

118 Article 6(4) of the Proposal, see footnote 1.

119 Clean Clothes Campaign, "Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers", 2019, p.78, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022). European Center for Constitutional and Human Rights (ECCHR), Brot für die Welt and MISEREOR, "Human rights fitness of the auditing and certification industry? A cross-sectoral analysis of current challenges and possible responses", 2021, p.44, ECCHR\_BfdW\_MIS\_AUDITS\_EN.pdf (September 2022). See also Garrett Brown, "Fatal Flaws of Foreign Factory Audits – A Spectacular Failure to Improve Conditions", ISHN (Industrial Safety & Hygiene News), 1 February 2013, Fatal flaws of Foreign factory audits | 2013-02-01 | ISHN (September 2022).

120 Ethical Trading Initiative, "Getting Smarter at Auditing – Tackling the growing crisis in ethical trade auditing", Report from ETI members' meeting, 16 November 2006, p.9-10, [DOC] Getting smarter at auditing - Tackling the growing crisis in ethical trade auditing - Business & Human Rights Resource Centre (business-humanrights.org) (September 2022).

Cost minimisation also guides decisions on how much to dig for problems, or how to respond to them when they are found. Some brands may find that bringing non-compliant factories up to standard or finding new suppliers is inconvenient and costly. At the same time, they need to show evidence of compliance, such as certification, to satisfy investors and customers or meet legal requirements. The financial incentive to disguise problems or turn a blind eye to deceptive practices is therefore high. Since most audit reports remain confidential, this is easy to do. If suppliers are made to bear the cost of the measures needed to fix problems, the incentive to conceal problems may simply be shifted to suppliers, which may find that hiding breaches is cheaper than bringing their factories up to standard (see above regarding audit fraud).<sup>121</sup>

### Day-rate audits and failure to capture 'invisible' abuses

In 2019, Human Rights Watch (HRW) denounced a multiplicity of instances of sexual harassment in garment factories in India, Pakistan, Cambodia, and Bangladesh. In its report, HRW described how the social audits global brands relied on for monitoring conditions in factories were failing to capture and address sexual harassment and other forms of gender-based violence at work. Among the reasons, the organisation explained that auditing was not 'victim-friendly' and did not guarantee a safe environment for women, such as off-site interviews with women-only groups. When asked about this, auditors explained that they did not have the freedom to design safer audits because brands or factories paid a very limited amount of money, and conducting interviews off-site needed more money and time. Two brand representatives acknowledged that incorporating off-site interviews was more expensive. None of the 50 audit reports analysed by HRW conducted off-site interviews. Another auditor explained to HRW that, unless companies paid sufficiently for audits, independent auditors from smaller firms could not afford to prioritise in-depth investigations to follow every allegation and corroborate information.<sup>122</sup>

The Commission's Proposal requires that lead companies should bear the cost of independent third-party verification carried out on small- and medium-sized enterprises (SMEs).<sup>123</sup> It also requires companies to make necessary investments, such as into production processes and infrastructures.<sup>124</sup> While these are positive measures that can help prevent cost transfer from brands to smaller suppliers, it can also fuel further cost speculation by lead companies and push them to seek ever cheaper third-party audits to keep their costs down, or simply to hide or overlook problems. In addition, this measure does not deal with the cost-minimisation incentive of larger suppliers.

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121 Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, p.24, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022).

122 Human Rights Watch, "Combating Sexual Harassment in the Garment Industry." 12 February 2019, <https://www.hrw.org/news/2019/02/12/combating-sexual-harassment-garment-industry> (September 2022)

123 Articles 7(4) and 8(5) of the Proposal.

124 Articles 7(2)(c) and 8(3)(d) of the Proposal.

### 3.6 Conclusion

The primacy the Commission affords to industry initiatives and third-party auditing may rest on an assumption that these mechanisms work. However, there is no conclusive evidence that this is the case.<sup>125</sup> In fact, the evidence of challenges detailed above, which is by no means comprehensive, suggests the opposite. While industry initiatives and third-party auditing may be beneficial for aspects of some companies' due diligence processes, given the well-known structural and systemic flaws and weaknesses affecting a large proportion of them, it is imprudent for Member States' enforcement authorities – including courts – to rely on these initiatives to determine whether a company is effectively addressing risks and impacts. Enforcement authorities should concentrate their resources and be laser focused on assessing individual companies' due diligence measures, and whether these measures are effective at addressing risks and adverse impacts in practice – regardless of whether companies participate in an industry initiative or not.

Although well-intentioned industry initiatives do exist and some – especially those that involve workers, unions, communities, and civil society organisations – are more robust and reliable than others, the sector in general is still deeply affected by the flaws and shortcomings highlighted above, many of which are mutually reinforcing. By relying so heavily on these initiatives, the Commission is, at best, turning a blind eye and, at worst, acting irresponsibly.

Legally defined suitability requirements and fitness criteria can help tackle some of the problems, but they cannot tackle them all. This is because many of the challenges described above are inherent to the mechanisms, or because tackling them meaningfully would require interventions that are too complex and unrealistic within the scope and timeframe of the EU Directive. In addition, even if initiatives and audits met strong suitability and fitness requirements, relying solely on these mechanisms for purposes of monitoring and enforcing HREDD obligations would still be undesirable because of the negative repercussions that this would likely entail for the broader corporate accountability architecture, as the next section describes. Finally, assessments of fitness criteria in themselves are by no means infallible. Putting aside the critical questions of who develops these criteria, who performs the alignment assessment, and how these processes are undertaken, these assessments are limited in at least two important ways: they can only attest to the solidity and reliability of an initiative at one moment in time and not in the future; and they can only or predominantly examine quality 'on paper', not in practice.<sup>126</sup>

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125 MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", July 2020, p.193, 195-208, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL.pdf](#) (msi-integrity.org) (September 2022). See also KIT Royal Tropical Institute, "Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?", July 2020, p.8-9 (pointing out that evidence of impact of the 11 Dutch Responsible Business Conduct agreements assessed was so far lacking), [KIT-2020-Evaluation-of-RBC-agreements-FINAL.pdf](#) (August 2022).

126 Additional concerns relate to the role and effect that officially recognised initiatives or 'whitelists' may be given (either in the law or in practice), particularly in the context of determinations of compliance and liability.

## A note on Worker-driven Social Responsibility (WSR) models

Partly as a result of the failure of industry schemes and MSIs to deliver on their promises, other types of private initiatives that are seen by rightsholders and other actors as more reliable, legitimate and promising have begun to emerge.<sup>127</sup> These include Worker-driven Social Responsibility (WSR) models such as the Fair Food Program (2011), the Accord on Fire and Building Safety in Bangladesh (2013), the Milk With Dignity Agreement (2017), and the Gender Justice in Lesotho Apparel agreement (2019).<sup>128</sup> These models are rooted in the worker community. Workers draft the codes of conduct for the programme and play a leading role in shaping and implementing their monitoring, enforcement, and remediation mechanisms. Importantly, these models create legally binding obligations for companies that workers can enforce outside the initiative. Extensive worker education programmes also enable workers to function as partners and implementers, not merely as bystanders of these initiatives. Under the Fair Food Program and Milk With Dignity Program, for example, auditing and grievance resolution both rest with the same independent monitor, which works closely with workers and suppliers to resolve problems as they arise.<sup>129</sup> The difference between these models and industry initiatives is so significant that it is “one of kind, not of degree”.<sup>130</sup> They are credible alternatives to industry initiatives, not an evolution from or variation of them.<sup>131</sup> If the EU Directive is to promote uptake of any private initiative at all, this should be the model it promotes.

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- 127 See, for example, End of visit statement, United States of America (6-16 December 2016) by Maria Grazia Giammarinaro, UN Special Rapporteur in Trafficking in Persons, especially Women and Children, 16 December 2016, End of visit statement, United States of America (6-16 December 2016) by Maria Grazia Giammarinaro, UN Special Rapporteur in Trafficking in Persons, especially Women and Children | OHCHR (October 2022). UN Working Group on Business and Human Rights, UNGPs 10+ A roadmap for the next decade of business and human rights, November 2021, p.31, UNGPs 10+ Roadmap FINAL (ohchr.org) (October 2022).
- 128 MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.46-47, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL.pdf (msi-integrity.org) (September 2022).
- 129 Angelini, A. and Curphey, S. “The Overlooked Advantages of the Independent Monitoring and Complaint Investigation System in the Worker-driven Social Responsibility Model in US Agriculture”, in *Business and Human Rights Journal*, 2022, p.1-6, The Overlooked Advantages of the Independent Monitoring and Complaint Investigation System in the Worker-driven Social Responsibility Model in US Agriculture | *Business and Human Rights Journal* | Cambridge Core; MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.46-47, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL.pdf (msi-integrity.org) (September 2022).
- 130 Angelini, A. and Curphey, S. “The Overlooked Advantages of the Independent Monitoring and Complaint Investigation System in the Worker-driven Social Responsibility Model in US Agriculture”, in *Business and Human Rights Journal*, 2022, p.2, The Overlooked Advantages of the Independent Monitoring and Complaint Investigation System in the Worker-driven Social Responsibility Model in US Agriculture | *Business and Human Rights Journal* | Cambridge Core
- 131 MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.46, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL\_.pdf (msi-integrity.org) (September 2022).

## 4 Why fitness criteria are not enough

### 4.1 Inherent limitations

By definition, conflicts of interest and the potential for bias – whether real or perceived – cannot be effectively and reliably addressed in relation to industry-only initiatives. These initiatives are designed, governed, funded, managed, implemented, and overseen by the very same companies they are meant to regulate. They are, in all practical terms, no more than a collective form of corporate self-regulation.<sup>132</sup> As indicated earlier, it is largely because of the inherent flaws and limitations of corporate self-regulation that the need for public regulation was finally recognised by policy-makers. It is therefore ironic and illogical that public regulation might revert back to industry-only initiatives as a means of implementation.

MSIs are a way of addressing the inherent flaws and limitations of industry schemes. If all other challenges undermining the effectiveness of MSIs were successfully addressed, these initiatives offer some potential. However, MSIs themselves are also affected by certain deep-rooted flaws that cannot be easily addressed.

As far as audits are concerned, suitability and fitness criteria cannot address their inherent limitations as means of verification. Even if third-party auditing met strong fitness criteria, it would still be limited in at least two important ways:

- ❑ it could not provide the comprehensive and ongoing monitoring and verification required by international HREDD standards; and,
- ❑ it could not address the root causes of abuse.<sup>133</sup>

#### Temporal and spatial limitation of third-party auditing

By their very nature, audits can only provide a ‘snapshot’ of a situation in space and time. These ‘snapshots’ tend to be very few and far between. The frequency with which audits are carried out under different industry initiatives varies, but they tend to take place either annually or within even longer periods of up to five years.<sup>134</sup>

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132 After examining a number of prominent industry-led social compliance schemes, Clean Clothes Campaign questions whether improving their quality is possible at all given their inherent flaws, structural limitation and function. Clean Clothes Campaign, “Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers”, 2019, p.79, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).

133 See, for example, Shift, “The EU Commission’s Proposal for a Corporate Sustainability Due Diligence Directive – Shift’s Analysis”, March 2022, p.6 (noting the inability of audit and certification schemes to effectively detect systemic impacts and help address their root causes, even when those schemes are well-resourced), Shift\_Analysis\_EU\_CSDDProposal\_vMarch01.pdf (shiftproject.org) (14 July 2022).

134 A study on voluntary initiatives in the mineral supply chain sector found that audits tended to take place annually, every one to three years, every two years or every three to five years, with only one out of 16 assessed initiatives offering the possibility of mid-cycle audits. Sydow, J. and Reichwein, A. “Governance of Mineral Supply Chains of Electronic Devices”, Germanwatch, June 2018, p.30-33, Governance of Mineral Supply Chains of Electronic Devices (germanwatch.org) (September 2022).

While it is helpful to gain an idea of a situation in a particular place, at a particular moment in time, a spot check or audit will never capture all the information that is needed to understand the full picture and address issues effectively, including hidden abuses, emerging problems, patterns of conflict, exclusion and marginalisation, and root causes. Even on issues that can more easily be grasped in an audit, such as health and safety hazards, audits can at best provide a picture of conditions at a very specific moment in time. There is no guarantee that the situation will change in the near future. If, as described above, market pressures are driving ever shorter audits, these ‘snapshots’ are capturing increasingly more limited and more superficial information.

As the OECD has pointed out, relying heavily on audits is an insufficient means of ensuring that companies are implementing a programme’s requirements. In line with international HREDD standards, monitoring of risks in supply chains must be ongoing, beyond the ‘point in time’ assessment provided by an audit.<sup>135</sup>

### Root causes and purchasing practices

Industry initiatives and third-party auditing typically focus on problems at factory or supplier level and do not tend to look at root causes of abuse.<sup>136</sup> This is because root causes are normally beyond the scope of audits, or because auditors are ill-equipped to examine them.

A critical driver of abuse that audits typically miss is companies’ purchasing practices (e.g. pricing pressures, fast delivery requirements, last-minute order changes or cancellations, absence of secure contracts, etc.).<sup>137</sup> If audits are conducted well, they may find human rights abuses and environmental harm that are a result of these practices, but they are unlikely to examine, highlight, or point the finger at what is happening. However, without looking into lead companies’ business models and purchasing practices, no amount of auditing and verification will fundamentally change patterns of wrongdoing. In fact, suppliers will often try to hide or minimise the existence of human rights or environmental abuses that result from abusive and exploitative purchasing practices to keep clients happy and retain their business. This leads to audit fraud.<sup>138</sup> Indeed, the incentive to keep double books and lie to auditors will continue to exist as long as the demands from buyers conflict with sustainability demands.

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135 OECD, Highlights Alignment Assessment of Industry Programmes with the OECD Minerals Guidance, p.5, Highlights-Assessment-Alignment-of-industry-programmes-with-the-OECD-Minerals-Guidance (September 2022). See also Principle 17(c) of the UN Guiding Principles on Business and Human Rights.

136 See, for example, Shift, “The EU Commission’s Proposal for a Corporate Sustainability Due Diligence Directive – Shift’s Analysis”, March 2022, p.6 (noting the inability of audit and certification schemes to effectively detect systemic impacts and help address their root causes, even when those schemes are well-resourced), Shift\_Analysis\_EU\_CSDDProposal\_vMarch01.pdf (shiftproject.org) (14 September 2022).

137 Vaughan-Whitehead, D. and Pinedo Caro, L. “Purchasing Practices and Working Conditions in Global Supply Chains: Global Survey Results”, Issue Brief No. 10, ILO 2017, INWORK Policy Brief No. 10: Purchasing practices and working conditions in global supply chains: Global Survey results (ilo.org) (September 2022). MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.88, 104-105, MSI\_Not\_Fit\_For\_Purpose\_FORWEBSITE.FINAL.pdf (msi-integrity.org) (September 2022).

138 Ethical Trading Initiative, “Getting Smarter at Auditing – Tackling the growing crisis in ethical trade auditing”, Report from ETI members’ meeting, 16 November 2006, p.11, [DOC] Getting smarter at auditing - Tackling the growing crisis in ethical trade auditing - Business & Human Rights Resource Centre (business-humanrights.org) (September 2022).

In addition to industry schemes and MSIs, the Commission's Proposal makes contractual assurances and contractual cascading – coupled with third-party auditing – a pillar of its HREDD implementation regime. However, it does not attempt to fix many of the abusive and exploitative practices that characterise the relationship between buyers and suppliers and drive many of the abuses at supplier level. The Proposal makes two passing references to corporate procurement and purchasing decisions, but these are not translated into binding requirements in its operative provisions.<sup>139</sup> Once again, the Proposal relies heavily on a system that has proven to be ineffective or insufficient.<sup>140</sup> Worse still, the Proposal's lack of attention to this issue masks the fact that brands and buyers are often a key part of the problem, as they proactively seek or create the conditions for abuse in global supply chains and knowingly benefit from them. This approach risks entrenching rather than preventing corporate practices that lead to human rights abuses and environmental harms and diverting attention from truly transformative solutions.<sup>141</sup>

## 4.2 Unrealistic fixes

Even if it is theoretically possible to imagine the solutions to some of the flaws and limitations of industry schemes, MSIs, and third-party auditing, it is highly unrealistic to expect that these solutions would be in place, at scale, any time soon. Unless the Commission's Proposal sought to put some of these solutions in place through the Directive itself, or parallel efforts in this direction were already underway, these solutions would certainly not be in place by the time the EU Directive comes into force or any time soon after that.

A key example of this is the lack of state regulation, oversight, and accountability of industry initiatives and auditing. Fitness criteria for industry initiatives and sustainability auditing are limited to the policies and internal workings of these mechanisms. Fitness criteria cannot secure the external state-based oversight of, and accountability for, the initiatives that is needed to drive improvements. This depends on changes in laws and regulatory regimes that cannot be obtained through secondary regulation or guidance accompanying the Directive. These changes require time, effort, sustained advocacy and political will, and there is no sign that these exist within the Commission. Its Proposal certainly makes no attempt to regulate these mechanisms or aspects of their activities, except to the extent that some large auditing firms may fall within its scope.<sup>142</sup>

At a more fundamental level, certain structural defects and limitations concerning the design and operating models of MSIs cannot realistically be fixed quickly, if at all. The pervasive lack of meaningful participation of rightsholders in MSIs, whether in their governance structures or

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139 Recitals 28 and 30 of the Proposal, see footnote 1.

140 Shift, "The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive – Shift's Analysis", March 2022, p.2, [Shift\\_Analysis\\_EU\\_CSDDProposal\\_vMarch01.pdf](#) (shiftproject.org) (September 2022).

141 Article 4(8) of the European Parliament's proposed due diligence Directive requires undertakings to "ensure that their purchase policies do not cause or contribute to potential or actual adverse impacts on human rights, the environment or good governance". European Parliament, Annex to the Resolution – Recommendations for Drawing up a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability, Texts adopted - Corporate due diligence and corporate accountability - Wednesday, 10 March 2021 (europa.eu) (September 2022).

142 To the extent that some flaws and limitations can only be addressed by reforming other laws and legal regimes, such as competition law or rules on commercial confidentiality, these fixes also appear highly unfeasible in the short term.

monitoring systems, is one example. Another is the power imbalance that exists between stakeholders within MSIs, which means that corporate interests either tend to prevail or at least are never severely affected. The transformation that would be required to make these initiatives suitable tools for discharging HREDD duties would require a comprehensive overhaul of their culture, governance, standard procedures, and practices that does not appear realistic, at least in the short to medium term, and certainly not at scale.<sup>143</sup>

## 4.2 Broader negative repercussions

The inability of suitability or fitness criteria to address inherent limitations or provide realistic solutions to some of the deep-rooted and systemic defects highlighted above is a sufficient reason to adopt a much more cautious and critical approach to industry schemes, MSIs, and third-party auditing than the Commission does in the Proposal, and to limit their role and effects within a mandatory HREDD regime. However, there are further reasons that mitigate against building a HREDD regime that relies exclusively or primarily on industry schemes, MSIs, and third-party auditing. Doing so would result in a transfer of international human rights and environmental obligations from states to the private sector in practice. It would also shift supply chain responsibilities away from companies that cause, contribute to, or benefit from adverse impacts and promote a top-down approach to compliance. It would also likely stifle innovation and ongoing improvements in corporate due diligence practices. All of this would represent a serious set-back, rather than progress, in global efforts to build a reliable and effective corporate accountability architecture.

### Privatisation of enforcement

In some areas, unaccountable industry schemes and MSIs have already taken on the role of government in monitoring social, human rights, and environmental conditions. Social auditing of labour conditions in factories, for example, has increasingly replaced labour inspections by governments.<sup>144</sup> Private auditing and verification makes life easier for state authorities and certainly reduces the financial burden on limited state budgets. However, this is highly problematic on two counts. On the one hand, governments are abdicating their international human rights and environmental obligations. On the other, the task of monitoring human rights and environmental standards is being increasingly placed on for-profit entities that do not work in the public interest and are only accountable to their for-profit clients.<sup>145</sup> While many non-state actors can and should be made to play a significant role in monitoring, enforcing, and implementing standards, it is the state that must ultimately ensure that standards are adhered to, and those that fail to do so should be held accountable.

143 MSI Integrity, “Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance”, July 2020, p.221-222, [MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](#) (msi-integrity.org) (September 2022).

144 AFL-CIO, “Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Worker Rights”, April 2013, p.16, [CSReport.pdf](#) (aflcio.org) (September 2022).

145 Clean Clothes Campaign, “Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers”, 2019, p.79, [Fig Leaf for Fashion. How social auditing protects brands and fails workers](#) — Clean Clothes Campaign (September 2022).



By giving industry initiatives and third-party auditing such a prominent role in its Proposal, the Commission will be fuelling the ongoing trend towards privatisation of state duties. This approach can also undermine host state enforcement and distract from the efforts and resources that are needed to build the capacity of states to monitor and enforce due diligence standards locally. Commenting on the Commission's Proposal, Unicef pointed out that, "The emphasis on contractual clauses and verification mechanisms might lead to a risk of proliferation of business-led 'private' compliance approaches in countries where their value chains are that might undermine state-based enforcement mechanisms and international cooperation efforts. This would effectively hinder at-scale interventions to prevent child rights abuses by companies, especially when it comes to child labour."<sup>146</sup>

While relying heavily on private mechanisms, the Commission is failing to propose measures to strengthen state monitoring and inspections, law enforcement, and state-based remedy.<sup>147</sup> Some support to third countries is timidly envisaged in the Proposal, which refers to the possibility of action by the Commission to support due diligence in third countries and devise "new measures, including facilitation of joint stakeholder initiatives to help companies fulfil their obligations".<sup>148</sup> This is extremely vague and unambitious, and it might well still be referring to MSIs rather than government action.

### Shifting responsibility to suppliers and other third parties

The Proposal's emphasis on the 'contractual assurance/auditing' formula will have the effect of shifting responsibility for compliance to suppliers and for monitoring and verification to third-party auditors. The Proposal's concomitant reliance on industry schemes and MSIs – both of which also overwhelmingly rely on third-party auditing for monitoring compliance – will only exacerbate this trend.

The 'contractual assurances/auditing' formula has traditionally relied on an assumption that it is suppliers who primarily cause – and are therefore responsible for – abuses. This view transpires in innumerable corporate statements and industry initiatives, even where they purport to work collaboratively with suppliers to tackle issues. For this reason, contractual clauses are typically imposed unilaterally by brands or buyers, without laying out concomitant obligations on them.

### Blaming suppliers: the easy way out

In 2012, the business-led Amfori Business Social Compliance Initiative (BSCI) responded to a situation of worker protest and violent crackdown at Bangladeshi factories Rosita Knitwear and Megatex Knitters by issuing a public communication explaining the steps they were taking to address the situation. The communication stated that the factory management had launched an investigation, with the support of an external consultant; that this resulted in a corrective action

146 Unicef, "An EU Corporate Sustainability Due Diligence Directive that Works for Children UNICEF comments on the European Commission proposal [COM(2022) 71 final]", no date, p.10, An EU Corporate Sustainability Due Diligence Directive that Works for Children: UNICEF comments on the European Commission proposal.pdf (September 2022).

147 Anti-Slavery International and University of Nottingham Rights Lab, "EU law. Global impact. A report considering the potential impact of human rights due diligence laws on labour exploitation and forced labour", June 2021, p.31, ASI\_EUlaw\_GloballImpact\_Report2.pdf (antislavery.org) (September 2022).

148 Article 14(3) of the Proposal, see footnote 1.

plan that management was now following; and that the management of both factories was keen to resolve the current situation.

In addition, the statement explained that, when labour violations were detected in supplying factories, BSCI worked together with all concerned parties “to raise awareness, provide guidance, and build knowledge of these issues and how to tackle them.”<sup>149</sup> The finger decisively pointed to factory owners and managers as the drivers of abuse and those responsible for solutions. While the factory owners and managers in this case were certainly at fault, at no point did BSCI acknowledge the failures of its own BSCI-sanctioned audit to identify widespread worker abuse at the Rosita Knitwear factory a few months before, or to the fact that the auditor itself, SGS, was pointing to defects in the Amfori BSCI inspection protocol to justify these failures.<sup>150</sup> Nor did BSCI suggest that participating companies would or should look at their own purchasing practices to understand the ultimate drivers of the unrest. With workers earning as little as US\$ 37 a month, this should have been the starting point.<sup>151</sup>

The Commission’s Proposal does require companies to “provide targeted and proportionate support for an SME with which the company has an established business relationship”.<sup>152</sup> However, these provisions have many limitations. They do not extend to SMEs that might be in a company’s supply chain but do not fall under the category of ‘established business relationship’. Furthermore, they are again qualified by the use of the phrase ‘where relevant’, which – for all intents and purposes – renders them meaningless. In addition, support is only required when compliance with a code of conduct, the prevention action plan, or corrective action plan “would jeopardise the viability of the SME”. This does not take into account the fact that it is not always the ‘viability’ of the SME that is at stake, but the labour rights of the workers that work for the SME. Companies often remain ‘viable’ on the back of their workers, i.e. by reducing wages and lowering other labour standards. The need for financial support to remain ‘viable’ will not emerge or be apparent in these cases. That aside, ‘viability’ is hardly an ambitious metric for lifting small suppliers and their workforce out of poverty.

In addition, what is meant by ‘support’ is not clear. If this refers to financial assistance, this alone will not ensure a genuine system of shared responsibility between supply chain partners. First, in the absence of any further specification, it will be the brands or buyers themselves that decide how much financial assistance is needed or how much they will offer. Second, even if financial contributions were offered and were sufficient, this alone would likely not be sufficient to tackle deep-rooted challenges, especially in the long term. Other means of close and ongoing engagement and collaboration with suppliers are needed to guarantee a truly sustainable supply chain. This includes ensuring – and contractually reflecting – fair sourcing, purchasing, and pricing terms.

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149 “BSCI participating companies work to tackle labour issues in Bangladesh factories”, 30 May 2012, Amfori (September 2022).

150 Clean Clothes Campaign, “Fig Leaf for Fashion – How Social Auditing Protects Brands and fails Workers”, 2019, p.29, 50, Fig Leaf for Fashion. How social auditing protects brands and fails workers — Clean Clothes Campaign (September 2022).

151 Jim Yardley, “Export Powerhouse Feels Pangs of Labor Strife”, The New York Times, 23 August 2012, As Bangladesh Becomes Export Powerhouse, Labor Strife Erupts - The New York Times (nytimes.com) (September 2022).

152 Articles 7(2)(d) and 8(3)(e) of the Proposal, see footnote 1.

All in all, the Proposal's approach will likely erode rather than enhance companies' sense of individual responsibility for the adverse human rights and environmental impacts of their supply chains.<sup>153</sup> This approach can also have significant legal repercussions. It can influence where regulators, enforcement authorities, and judges place blame, and it can also create liability loopholes by dispersing and diluting responsibility. For example, companies could point the finger at a scheme of which they are member to explain due diligence shortfalls. They could also blame deficient audits to deflect liability or – as is already current practice – point to contractual breaches to blame suppliers for abuses in the supply chains.

### Limited compliance approach stifling innovation

The Proposal's emphasis on contractual assurance and third-party auditing reinforces the status quo by promoting a widespread but failed approach to supply chain due diligence. It promotes a top-down compliance approach, and risks turning the newly created HREDD duties into a mere box-ticking exercise.<sup>154</sup> This approach can also stifle ongoing innovation and development of better HREDD practices.

Many companies are developing and testing methodologies and tools that go beyond auditing. These include: proactively supporting suppliers with funding, as well as know-how and capacity-building; engaging in collaborative efforts with industry peers; actively reaching out to and collaborating with trade unions and civil society organisations; developing mature and effective industrial relations; encouraging workers' self-empowerment via unions; conducting or commissioning participatory or community-led impact assessments; supporting local institutions and law enforcement; seeking the advice of local and international experts; using technological innovations such as those developed to track products or their components; investing in initiatives aimed at addressing root causes of abuse; establishing effective whistleblowing and third-party grievance mechanisms; and examining and changing harmful business models, and commercial practices. Meaningful worker participation and organising that is free from fear of retaliation and effective grievance channels, for example, are a much more effective way of monitoring labour practices in factories, mines, and fields than audits that take place once a year or even less frequently.<sup>155</sup>

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153 Principle 17 of the UN Guiding Principles on Business and Human Rights.

154 OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, 23 May 2022, p.8, OHCHR Feedback on the Proposal for a Directive on Corporate Sustainability Due Diligence (August 2022). Unicef, "An EU Corporate Sustainability Due Diligence Directive that Works for Children UNICEF comments on the European Commission proposal [COM(2022) 71 final]", no date, p.9 (explaining that supplier codes of conduct and auditing have led to a compliance approach to human rights due diligence), An EU Corporate Sustainability Due Diligence Directive that Works for Children: UNICEF comments on the European Commission proposal.pdf (September 2022).

155 Transparentem, "Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform", October 2021, p.30-31, Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform - Transparentem (September 2022).

Of these measures, the Proposal only refers to complaints procedures (albeit in a highly defective manner),<sup>156</sup> collaboration with other entities (mainly to increase leverage),<sup>157</sup> and the collaboration that is entailed by industry initiatives that the Proposal does proactively promote. This list is limited and while other tools, practices, and mechanisms are not banned, as such, the Proposal's over-emphasis on contractual assurance/audit – and, critically, the exonerating effects it seems to afford them – will likely dwarf other measures unless they are legally required. Companies will likely be discouraged from adopting more hands-on measures and continuing to innovate in the way they address risks and impacts in their value chains and might, in time, settle with a simpler, box-ticking approach to supply chain due diligence.<sup>158</sup> Enforcement authorities may also be discouraged from innovating in the way they conduct their monitoring and enforcement activities.<sup>159</sup>

#### 4.4 Limitations of fitness assessments

There are many concerns related to the use of fitness criteria that are beyond the scope of this paper. These include: who is entrusted to develop these criteria and what process is put in place for this task, including questions of transparency; who is involved; and who makes the final call on thorny issues. They also relate to the process through which specific initiatives are assessed against such criteria and, again, questions as to who is responsible for performing this assessment and how this is done. Putting these critical questions aside, there are at least two fundamental limitations in any fitness assessment.

First, assessments as to whether a given initiative (or auditing regime) meets certain fitness criteria can only vouch for the quality and solidity of an initiative at the time when the assessment is performed. They cannot guarantee that the same strong standards and robust performance will be maintained over time. For this, a robust system of ongoing proactive and reactive monitoring would be required, in addition to the regular monitoring of individual companies. However, the Commission's Proposal neither requires nor suggests such a system.

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156 Article 9 of the Proposal requires the establishment of complaints mechanisms, but it makes hardly any reference to the principles and procedural safeguards listed in Principle 31 of the UN Guiding Principles on Business and Human Rights to make these mechanisms legitimate, accessible, predictable, equitable, transparent, and rights-compatible.

157 Primarily in Articles 7(2)(e) and 8(3)(f) of the Proposal.

158 See ECCJ's and Shift's submissions to the EC's consultation on the Proposal, both emphasising this point. ECCJ, "European Commission's proposal for a directive on Corporate Sustainability Due Diligence – A comprehensive analysis", April 2022, p.11-12, [ECCJ-analysis-CSDDD-proposal-2022.pdf \(corporatejustice.org\)](#) (September 2022). Shift, "The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive – Shift's Analysis", March 2022, [Shift\\_Analysis\\_EU\\_CSDDProposal\\_vMarch01.pdf \(shiftproject.org\)](#) (September 2022). See also European Coffee Federation's Position Paper on the European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence, May 2022, p.3 (noting that "requiring mainly contract assurances and audit/verification as due diligence obligations curtails the freedom of companies to choose from a greater variety of tools to comply with their obligations and potentially increases the risk that companies simply shift their obligations upstream"), [Feedback from: European Coffee Federation \(europa.eu\)](#) (September 2022).

159 OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, 23 May 2022, p.8, [OHCHR Feedback on the Proposal for a Directive on Corporate Sustainability Due Diligence \(August 2022\)](#).

Second, fitness assessments only or predominantly examine the solidity of a scheme or initiative on paper.<sup>160</sup> Actual implementation is a very different matter. A robust fitness assessment methodology should include examination of actual practice and impact on the ground. This would include, for example, assessing how a scheme verified that it adhered to standards by member companies in practice, and how it responded, or is responding, to specific risks and impacts identified through, for example, an unsatisfactory audit or an allegation of abuse. It would also include how affected or potentially affected rightsholders or other local actors have perceived, experienced, or judged the outcome of all these activities.<sup>161</sup> Such examinations are useful to draw general conclusions as to how certain initiatives are functioning in practice, but they cannot provide a full guarantee of strong performance in the future, which takes us to the problem addressed above.

While an argument can be made that robust fitness assessments can help to reduce the risk of weak initiatives being used by companies to meet their HREDD duties, these two limitations alone call for a cautious approach. They indicate that, once again, membership in, certification from, or passing an audit under the umbrella of an initiative – even if this initiative has been assessed as meeting certain fitness criteria – should still not be considered, on its own, sufficient proof of due diligence.

### **Fitness criteria can be useful, but never fool proof**

In its “Alignment Assessment” looking at the alignment between the OECD Guidelines for Multinational Enterprises and the OECD Garment and Footwear Guidance, the OECD concluded that the former Dutch Agreement on Sustainable Garments and Textile (AGT) mentioned above had “a robust formal grievance mechanism whose written procedures are largely aligned with the recommendations in the OECD Garment and Footwear Guidance”, and with the effectiveness criteria for operational-level grievance mechanisms established within the OECD Guidelines for Multinational Enterprises.<sup>162</sup> However, as described above, the two cases brought before AGT’s Complaints and Disputes Committee (CDC) demonstrate how practice can be very different from an alignment assessment on paper and that the CDC was anything but robust and effective. The OECD alignment assessment was performed before any case had been submitted and therefore did not include a review of actual implementation.<sup>163</sup> Nevertheless, the many flaws in both procedure and outcome reported by Arisa, SOMO, CCC, and the Myanmar labour rights organisation that used the mechanism show that meeting certain key fitness criteria on paper is hardly a guarantee of positive

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160 For example, the EU methodology for the recognition of due diligence schemes to facilitate implementation of the EU’s 2017 Regulation on supply chain due diligence for importers of tin, tantalum, tungsten, and gold (3TG) does not require schemes applying for recognition to prove that they have adequate tools in place (and that they apply them) in relation to actual implementation of due diligence by their members. See Article 3 of the Delegated Act, COM\_ADL(2019)00009\_EN.pdf (europa.eu) (September 2022). ActionAid et al, “Ensuring the proper implementation of the EU Regulation on the responsible sourcing of minerals from conflict-affected and high-risk areas”, Joint Policy Note, 25 April 2019, Ensuring the proper implementation of the EU Regulation on the responsible sourcing of minerals from conflict-affected and high-risk areas – European Institutions Office (amnesty.eu) (September 2022).

161 OECD, “The role of sustainability initiatives in mandatory due diligence: Note for policy makers”, 2022, p.13, The role of sustainability initiatives in mandatory due diligence (oecd.org) (August 2022).

162 OECD, “The Alignment of Industry and Multi-Stakeholder Programmes with the OECD Garment and Footwear Guidance – Assessment of the Dutch Agreement on Sustainable Garment and Textile”, 2020, p.8, 36-37, The Alignment of Industry and Multi-Stakeholder Programmes with the OECD Garment and Footwear Guidance (September 2022).

163 OECD, “The Alignment of Industry and Multi-Stakeholder Programmes with the OECD Garment and Footwear Guidance – Assessment of the Dutch Agreement on Sustainable Garment and Textile”, 2020, p.11, 34, 55, The Alignment of Industry and Multi-Stakeholder Programmes with the OECD Garment and Footwear Guidance (September 2022).

human rights outcomes.<sup>164</sup> In fact, despite the OECD's high overall score and its conclusion that one of the AGT's strengths was the 'prevention of abuses' – a conclusion that the AGT secretariat highlighted in its public communication<sup>165</sup> – the Dutch government's own evaluation concluded that the AGT had had very little positive impact on many key fields on the ground.<sup>166</sup>

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- 164 Arisa, "Reaction of Arisa to the decision of the Complaints and Disputes Committee of the Agreement on Sustainable Garment and Textiles, concerning a complaint against C&A Nederland C.V.", [Reaction-Arisa-on-ruling-Complaints-Committee-AGT.pdf](#) (September 2022); Pauline Overeem, "Comprehensive reaction to outcome C&A complaints procedure", SOMO, 11 July 2022, [Comprehensive reaction to outcome C&A complaints procedure - SOMO \(11 July 2022\)](#); Clean Clothes Campaign, "Disappointing outcome of complaints procedure against C&A", 7 July 2022, [Disappointing outcome of complaints procedure against C&A — Clean Clothes Campaign](#) (September 2022).
- 165 Dutch Agreement on Sustainable Garments and Textile (AGT), "Dutch Agreement on Sustainable Garments and Textile applies OECD guidelines well", 15 July 2020, [Dutch Agreement applies OECD guidelines well | IRBC Agreements \(imvoconvenanten.nl\)](#) (September 2022).
- 166 KIT Royal Tropical Institute, "Final Evaluation of the Dutch Agreement on Sustainable Garments and Textile", 10 December 2021, p.43, [Final Evaluation of the Dutch Agreement on Sustainable Garments and Textile \(imvoconvenanten.nl\)](#) (September 2022).

## 5 Conclusions and way forward

Not only is the Commission's Proposal promoting mechanisms that have proven to be incapable of detecting risks and preventing abuse effectively and in time, it is also failing to require measures that would help to address some of these mechanisms' shortcomings, such as requiring companies to scrutinise their own sourcing and purchasing practices, and ensuring transparency and publication of audit reports. It must also be noted that a blind and uncritical reliance on these mechanisms – especially third-party auditing – can also increase risks to human rights and the environment. Badly executed third-party audits can provide false assurances of compliance that inhibit deeper investigations, engagement, and interventions that are necessary to unearth and tackle problems. At the worst end of the spectrum, this can lead to the sort of disaster exemplified by the Ali Enterprises, Rana Plaza, and Brumadinho cases highlighted above. The Proposal's entire approach to these issues must be reconsidered.

The above does not mean that certain initiatives and third-party auditing cannot play a role in due diligence. Some schemes, MSIs, and audits can certainly assist companies in implementing aspects of HREDD. Some of these schemes can be more targeted and context specific than generic HREDD standards, and in that way provide a more flexible and tailored platform for members to identify risks, exchange relevant information, drive collective leverage, and facilitate systematic engagement with stakeholders. Robust audits by skilled auditors can also help to unearth critical risks or track the effectiveness of corrective action plans.<sup>167</sup>

However, given the well-known, widespread, and systemic gaps, failures, and limitations of most industry initiatives and traditional social or sustainability auditing, the Commission should adopt a much more cautious and critical approach to these mechanisms than it currently does, even regarding those that seem strong on paper. As explained above, many important limitations and shortcomings cannot be addressed with fitness criteria – either because they are inherent to the system and therefore 'unfixable', or because they are highly unrealistic, at least in the foreseeable future. In addition, as described in the previous section, relying solely or to a significant degree on these mechanisms can also lead to counterproductive shifts in responsibilities and a roll back on innovative and transformative corporate practices. This risks setting us back, rather than forward, in our ongoing collective efforts to secure more robust and effective prevention and accountability mechanisms worldwide. Finally, fitness assessments themselves – even in the best of scenarios – are limited in what they can vouch for, particularly when it comes to actual practice and performance over time.

The EU Directive must therefore be clear that companies within its scope remain individually responsible for HREDD along their supply chains – even where they are members of, or participate

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<sup>167</sup> See OECD, "The role of sustainability initiatives in mandatory due diligence: Note for policy makers", 2022, p.20-22 (listing the ways in which initiatives can support companies across the different due diligence steps), *The role of sustainability initiatives in mandatory due diligence* (oecd.org) (August 2022).

in, industry initiatives.<sup>168</sup> The OECD makes this very clear in its due diligence guidance, by stating that, “Participation in an initiative does not shift responsibility from the enterprise to the initiative for adverse impacts that it causes, contributes to or to which it is directly linked”.<sup>169</sup> It also states that, “Enterprises can collaborate at an industry or multi-industry level as well as with relevant stakeholders throughout the due diligence process, although they always remain responsible for ensuring that their due diligence is carried out effectively”.<sup>170</sup>

Membership in industry initiatives, holding a certification from them, or obtaining a satisfactory audit report, should not be considered a proxy for, or appropriate indicator of, due diligence. They should not shield a company from liability, trigger a lighter or weaker monitoring or enforcement regime, or serve as a basis for establishing a presumption of compliance. The European Parliament’s March 2021 recommendations to the Commission on a corporate due diligence Directive is very clear in this respect, stating that “relying on certified industry schemes does not exclude the possibility of an undertaking being in breach of its due diligence obligations, or of being held liable in accordance with national law”.<sup>171</sup> The European Parliament’s actual proposed Directive similarly states that, “Third-party certification should not constitute grounds for justifying a derogation from the obligations set out in this Directive or affect an undertaking’s potential liability in any way”.<sup>172</sup> The European Parliament goes on to note, “The development of such collective measures should in no way absolve the undertaking of its individual responsibility to perform due diligence or prevent it from being held liable for harm it caused or contributed to in accordance with national law”.<sup>173</sup>

The EU Directive must adequately guide companies within its scope, by making clear that a business partner’s membership in, or certification from, an industry initiative provides no guarantee that this partner is respecting human rights and the environment.<sup>174</sup> As pointed out by the OECD, “individual

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168 OECD, “The role of sustainability initiatives in mandatory due diligence: Note for policy makers”, 2022, p.10, 20-22, *The role of sustainability initiatives in mandatory due diligence (oecd.org)* (August 2022). Some industry associations and schemes recognise this. See, for example, Joint Position Paper on the EU’s Policy and Regulatory Approach to Cocoa Human Rights and Environmental Due Diligence, 18 October 2021 (recognising that “Adherence to a standard by itself, however, is not a substitute for an effective system of due diligence”), <https://www.voicenetwork.eu/wp-content/uploads/2021/10/Joint-position-paper-on-a-mandatory-human-rights-and-environmental-due-diligence-regulation.pdf> (September 2022).

169 OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, p.53, *OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf* (September 2022).

170 OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, p.19, *OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf* (September 2022).

171 European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, paragraph 13, *Texts adopted - Corporate due diligence and corporate accountability - Wednesday, 10 March 2021 (europa.eu)* (September 2022).

172 European Parliament, Recital 35, Annex to the Resolution – Recommendations for Drawing up a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability, *Texts adopted - Corporate due diligence and corporate accountability - Wednesday, 10 March 2021 (europa.eu)* (September 2022). The EU Timber Regulation envisages certification regimes as legitimate elements of an operator’s risk assessment procedures, but are expressly not deemed equivalent to compliance. See Recital 19 and Article 6(1)(b).

173 *Ibid*, Recital 46.

174 OECD, *Highlights Alignment Assessment of Industry Programmes with the OECD Minerals Guidance*, p.6 (concluding that in view of the many gaps and shortcomings in the industry schemes assessed, companies could not simply rely on a supplier’s participation in an industry programme as evidence of effective due diligence by that supplier), *Highlights-Assessment-Alignment-of-industry-programmes-with-the-OECD-Minerals-Guidance* (September 2022).



companies should undertake appropriate due diligence on their suppliers as a programme's alignment with the OECD Guidance does not mean that all companies within that programme are implementing due diligence practices that are aligned with the OECD Guidance".<sup>175</sup> Similarly, a mandatory due diligence bill submitted by six Dutch political parties to the Dutch Parliament in November 2022 would make companies responsible for their own due diligence, even when participating in industry initiatives, and would not allow any sort of safe harbour or lighter enforcement regime just because a company participates in an industry initiative.<sup>176</sup> Instead of focusing so heavily on industry initiatives, the EU Directive should encourage companies to use the full spectrum of available tools and mechanisms, and develop new ones, where necessary, to better enable, assist, monitor, and verify compliance with HREDD requirements in their supply chains.

The above principles also mean that Member State regulators, enforcement authorities, and courts responsible for monitoring and enforcing compliance with the EU's HREDD regime must focus on the substantive quality and effectiveness of companies' due diligence procedures and steps. Whether companies are part of an industry initiative (even an 'approved' one), hold a certification from it, or achieve a positive audit report can only be elements of a broader assessment – neither exhaustive nor decisive in themselves.<sup>177</sup>

This alternative approach to the Commission's Proposal will push companies to fully internalise HREDD and use the full range of tools and approaches necessary to prevent and remediate harm. Indeed, HREDD "should be embedded from the top of the business enterprise through all its functions",<sup>178</sup> and industry schemes, MSIs, audits (and contractual assurances) should be treated as tools within a much broader set of HREDD mechanisms and approaches.<sup>179</sup> This alternative approach will ultimately also help separate out the higher quality, more effective schemes and MSIs from the ineffective ones. If enforcement of HREDD legislation is thorough, effective, and focused on the quality and results of individual companies' due diligence on the ground, companies themselves will naturally flock to the most robust and reliable initiatives.

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175 Ibid.

176 S. van der Graaf, 1 November 2022, "Een einde aan slavernij en uitbuiting", ChristenUnie website, <https://www.christenunie.nl/blog/2022/11/01/Een-einde-aan-slavernij-en-uitbuiting> (Nov 2022); See also Wilde-Ramsing, J. "SOMO welcomes game-changing Dutch bill on mandatory due diligence," SOMO website, 2 November 2022, <https://www.somo.nl/somo-welcomes-game-changing-dutch-bill-on-mandatory-due-diligence/> (November 2022).

177 OECD, "The role of sustainability initiatives in mandatory due diligence: Note for policy makers", 2022, p.12, *The role of sustainability initiatives in mandatory due diligence* (oecd.org) (August 2022).

178 Commentary to Principle 16, UN Guiding Principle on Business and Human Rights.

179 Unicef, "An EU Corporate Sustainability Due Diligence Directive that Works for Children UNICEF comments on the European Commission proposal [COM(2022) 71 final]", no date, p.10, (pointing out that the text of the draft Directive could be significantly strengthened by identifying the broader range of actions that businesses can and should take to prevent and mitigate against negative impacts on human and child rights), *An EU Corporate Sustainability Due Diligence Directive that Works for Children: UNICEF comments on the European Commission proposal.pdf* (September 2022).

Based on the analysis and evidence above, as well as those of many other organisations that have commented on these particular aspects of the Proposal,<sup>180</sup> SOMO recommends that the European Commission, Parliament, and Council should thoroughly review the Proposal's approach to industry schemes, MSIs, and auditing and amend all relevant provisions based on, and expressly articulating, the following key principles:

- ❑ In line with the OECD Due Diligence Guidance for Responsible Business Conduct, companies in scope of the Directive should remain individually responsible for HREDD along their supply chains, whether they are members of an industry scheme or MSI or not.
- ❑ Membership in industry schemes or MSIs (even those judged to meet certain fitness criteria), holding a certification from them, or achieving a positive audit result should not be treated as substitutes for, equivalent to, or even indicators of HREDD.
- ❑ A company's or its business partner's membership in industry schemes or MSIs (even those judged to meet certain fitness criteria), their holding a certification from them, or achieving a positive audit result should not shield a company from liability, trigger a lighter monitoring or enforcement regime, or serve as a basis for establishing a presumption of compliance.
- ❑ Companies in scope of the Directive should be cautioned not to assume that business partners are in compliance with HREDD requirements and expectations simply because they are members of an industry scheme or MSI (even those judged to meet certain fitness criteria), hold a certification from them, or have achieved a positive audit result.
- ❑ Companies in scope of the Directive should be encouraged and expected to use the full range of available tools and mechanisms, and develop new ones where necessary, to better enable, assist, monitor, and verify compliance with HREDD requirements in their supply chains.
- ❑ Enforcement authorities responsible for monitoring and enforcing the EU's HREDD regime should focus on all due diligence measures taken, whether these have occurred within or outside the context of an industry initiative or MSI. They should assess the quality of these measures and whether they appear genuinely capable of meeting the goals of identifying, preventing, minimising, ceasing, or remediating harm. To the maximum extent possible, they should also seek to verify these results on the ground, including through field visits.
- ❑ In their examination of specific complaints or claims, enforcement authorities and courts should be required to focus on the company's actual and potential impacts on human rights and the

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180 For example, Forest Peoples Programmes' Feedback on the European Commission Proposal for a Directive on Corporate Sustainability Due Diligence, Feedback from: Forest Peoples Programmes (europa.eu) (September 2022); Swedwatch, "Europeiska kommissionens förslag till direktiv om tillbörlig aktsamhet för företag i fråga om hållbarhet (Corporate Sustainability Due Diligence)", Feedback from: Swedwatch (europa.eu) (September 2022); Shift, "The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive – Shift's Analysis", March 2022, p.6, Shift\_Analysis\_EU\_CSDDProposal\_vMarch01.pdf (shiftproject.org) (September 2022). Corporate Accountability Lab Comments on the Directive of the European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Feedback from: Corporate Accountability Lab (europa.eu) (September 2022).

environment and the extent to which companies' HREDD measures are effective and genuinely capable of addressing the relevant risks and impacts in practice.

- Member State regulators, enforcement authorities, and courts should not rely on industry schemes or MSIs (even those judged to meet certain fitness criteria), holding a certification from them, or achieving a positive audit result in assessing compliance and liability. At most, these schemes can be considered as elements of a broader assessment of due diligence, neither exhaustive nor decisive in themselves. This should equally apply to companies' business partners' membership in such industry schemes or MSIs, their holding of a certification from them, or having achieved a positive audit result, in relation to companies' HREDD responsibilities concerning them.

## Annex 1

# Suggested changes to specific articles of the proposal

Below are suggestions of how the principles discussed in Section 5 of this briefing could be reflected or articulated in relevant articles of the Proposal, without prejudice to other changes that might be necessary to make the approach to industry initiatives and auditing consistent and coherent throughout the entire text. This is also without prejudice to other changes that might be necessary to the specific articles quoted below to make the HREDD regime stronger and more effective in relation to issues this briefing does not cover.

### Article 7

#### Preventing potential adverse impacts

1. Member States shall ensure that companies take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts [...]
- [...]
2. **These measures may include, but are not be limited to** ~~Companies shall be required to take the following actions, where relevant: [...]~~
- [...]
4. **These and any other measures in place to prevent or mitigate potential adverse human rights and environmental impacts** ~~The contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance, including seeking the views and assessments of affected or potentially affected rightsholders, their representatives, environmental and human rights defenders, and other civil society actors. For the purposes of verifying compliance, the company may refer to suitable industry initiatives or independent third-party verification.~~

### Article 8

#### Bringing actual adverse impacts to an end

1. Member States shall ensure that companies take appropriate measures to bring actual adverse impacts that have been, or should have been, identified pursuant to Article 6 to an end [...]

[...]

3. ~~These measures may include, but are not be limited to~~ Companies shall be required to take the following actions, where relevant: [...]

[...]

5. ~~These and any other measures to bring actual adverse impacts to an end~~ The contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance, including seeking the views and assessments of affected or potentially affected rightsholders, their representatives, environmental and human rights defenders, and other civil society actors. ~~For the purposes of verifying compliance, the company may refer to suitable industry initiatives or independent third-party verification.~~

## Article 14

### Accompanying measures

[...]

4. Companies may rely on ~~best practice tools, mechanisms and initiatives~~ industry schemes and multi-stakeholder initiatives to support the implementation of their obligations referred to in Articles 5 to 11 of this Directive. ~~These may include engaging in transparent and accountable collaborative efforts with industry peers, trade unions, workers and civil society organisations, adhering to Worker-Driven Social Responsibility (WSR) models and other legally binding agreements, and investing in initiatives aimed at addressing root causes of abuse. to the extent that such schemes and initiatives are appropriate to support the fulfilment of those obligations.~~ The Commission and the Member States shall identify such best practice tools, mechanisms and initiatives in consultation with all relevant stakeholders and may facilitate the dissemination of such information. ~~schemes or initiatives and their outcome. The Commission, in collaboration with Member States, may issue guidance for assessing the fitness of industry schemes and multi-stakeholder initiatives.~~

## Article 18

### Powers of supervisory authorities

To add at the end of this article or, failing this, in the relevant Recitals:

[...]

5. In the conduct of their investigative, sanctioning and supervisory responsibilities, supervisory authorities shall focus on human rights and environmental outcomes on the ground, as well as focusing on the extent to which companies' actions under this Directive are effective at actually addressing risks and impacts in practice.

6. Supervisory authorities shall not deem companies that participate in industry schemes or MSIs, hold a certification from them, or have achieved a positive audit result are automatically in compliance with the obligations under this Directive, and neither should they use these facts to presume compliance with the law or apply more lenient supervisory or enforcement action.
7. Supervisory authorities shall not deem companies automatically in compliance with their obligations regarding business partners because these business partners participate in industry schemes or MSIs, hold a certification from them, or have achieved a positive audit result, and neither should they use these facts to presume compliance with the law or apply more lenient supervisory or enforcement action.

## Article 22

### Civil liability

1. Member States shall ensure that companies are liable for damages if: (a) they failed to comply with the obligations laid down in **this Directive** Articles 7 and 8 and; (b) ~~as a result of this failure~~ an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in **this Directive** Articles 7 and 8 occurred and led to damage.  
  
[...]
2. ~~Notwithstanding paragraph 1, Member States shall ensure that where a company has taken the actions referred to in Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5), it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.~~

Companies can collaborate at an industry or multi-stakeholder level to conduct aspects of their due diligence process, but they remain individually responsible for ensuring that their due diligence is carried out effectively along the value chain. Membership in industry schemes or MSIs, holding a certification from them, or achieving a positive audit result does not exclude the possibility of a company being in breach of its due diligence obligations, or of being held liable in accordance with national law. Similarly, the fact that a business partner participates in such industry schemes or MSIs, holds a certification from them, or has achieved a positive audit result does not exclude the possibility of a company being in breach of its obligations.

In the assessment of the existence and extent of liability under this paragraph, due account **may** shall be taken of the company's efforts, ~~insofar as they relate directly to the damage in question,~~ to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, as well as any collaboration with other entities to address adverse impacts in its value chains, **insofar as they relate directly to the damage in question and have effectively provided or contributed to providing remedy.**

