



OPEN LETTER TO EUROPEAN UNION POLICYMAKERS

Brussels, 13 September 2021

Subject: Urgent request to ensure social auditors' liability and effective legislation on human rights and environmental due diligence (HREDD) and corporate accountability

Dear European Commissioners,
Dear Members of the European Parliament,
Dear Council of the European Union representatives,

As we mark the ninth anniversary of the deadly fire in the Ali Enterprises factory in Pakistan we are sending you this letter with regard to the Sustainable Corporate Governance initiative. The letter is based on our collective insights into social auditing and certification practices.

The undersigned and other organisations have amply documented social auditors' and certifiers' failuresⁱ that have resulted in countless human rights violations and loss of life.ⁱⁱ The Ali Enterprises case as well as a few other key examples are presented at the end of this letter. Crucially, these are not isolated incidents but examples of systemic failures of corporate-controlled social auditing that are ever more broadly recognised, including in academic literature.ⁱⁱⁱ Yet, efforts to hold social auditing firms to account have exposed glaring accountability gaps and the lack of effective remedy for the affected workers and communities.

As we will explain in more detail, you now have the opportunity to address these issues with the upcoming HREDD and corporate accountability legislation. We urge you to ensure there is a robust liability regime – including for social auditors and certifiers in their capacity as companies – complemented with an explicit exclusion of audits and certifications as evidence of appropriate diligence.

Social auditor liability is vital to achieve the broader corporate legal accountability goal, and to end impunity where companies cause or contribute to human rights violations and environmental destruction. Furthermore, corporate legal accountability would be undermined if a company was able to defend claims of human rights harm solely through its use of social audits and certifications. There is abundant evidence of how ineffective these mechanisms are in identifying and preventing human rights abuses, and how fundamentally flawed the private audit system is as a whole. The upcoming legislation must confront this reality by ensuring that companies cannot outsource their due diligence duty to social auditors, and that they face legal accountability for human rights violations and environmental destruction.

It is noteworthy that the new U.S. government guidance on Uyghur forced labour states: "In and of themselves, third-party audits are not a sufficient due diligence program."^{iv} Even some auditors themselves have started to publicly acknowledge that "social audits are not designed to capture sensitive labor and human rights violations such as forced labor and harassment".^v

Whereas social auditing and certification regimes are highly diverse, the corporate-controlled audit and certification processes generally display a series of flaws. These include, among others: lack of requisite skills and knowledge for auditors to appropriately check the various areas covered by individual audits in specific geographical and social contexts; short or even no time spent on the audited premises; acceptance of incomplete or falsified documentation; failure to ensure that workers and communities can provide candid information without fear of reprisal; certifying the absence of violations in contexts where these are systemic (e.g. in countries without freedom of association); limited scope so that widespread exploitation and forced labour beyond Tier 1 and/or among homeworkers go undetected; lack of independence from the mandating/lead companies; and the related failure to audit the mandating/lead companies' own purchasing practices that drive many rights violations throughout the value chain.

As a consequence of the fundamental flaws of the social auditing industry as a whole, and of its specific practices, certifications are issued on a daily basis despite severe risks and violations at the audited factories and other locations. Many such cases never become international news, but some do – thanks to investigative reporting, whistleblowers and human rights defenders, or due to deadly disasters such as the factory fire that is the first of our four concrete examples below.

The Sustainable Corporate Governance Initiative is an opportunity to impose on all companies, including social auditing firms, a statutory obligation to continuously identify, prevent, mitigate and account for their adverse impacts, and to be held liable for human rights or environmental harm in their global operations and value chains.

In that context, **we once again call for robust liability regimes to give victims of corporate abuse access to justice and remedy including compensation and guarantees of non-repetition.** This must be accessible in relation to any company's conduct including when victims have sustained harm as a result of negligent and faulty audits. Any provision on the liability of auditing companies should not come at the expense of the liability of the audited companies and its directors.

Furthermore, **it is essential to ensure that the upcoming legislation's provisions explicitly exclude social audits and certification as adequate proof of human rights due diligence** in a court of law or in any other relevant enforcement actions. Beside other flaws outlined above, the time-limited nature of audits does not correspond with the exercising of effective, appropriate and continuous human rights and environmental diligence.

We hope that you will use the opportunity presented by the HREDD and corporate accountability legislation to its full potential. We are available for meetings to discuss this matter and will gladly respond to potential requests for additional information.

Sincerely,

ActionAid
Africa-Europe Faith and Justice Network (AEFJN)
Anti-Slavery International
Austrian Chamber of Labour (AK Europa)
CIDSE
Clean Clothes Campaign (CCC)
European Center for Constitutional and Human Rights (ECCHR)
European Coalition for Corporate Justice (ECCJ)
European Trade Union Confederation (ETUC)
Global Witness
industriAll Europe
International Federation for Human Rights (FIDH)
Platform for International Cooperation on Undocumented Migrants (PICUM)
Sherpa
Women in Informal Employment: Globalizing and Organizing (WIEGO)

Examples of social auditing failures

(1) *Ali Enterprises*

When the Ali Enterprises factory in Pakistan burst into flames on 11 September 2012, most workers were trapped behind barred windows and locked exit doors, without working firefighter equipment or fire alarms, with only one functional fire exit in a building that violated many local and international regulations.^{vi} This left over 250 people dead and 55 seriously injured, many of them teenagers. Nevertheless, only three weeks earlier, the factory was certified under the internationally recognized SA8000 standard by the Italian auditing company RINA Services. This assessment was made by auditors who had reportedly never even visited the building.

Bereaved families fought for over four years to receive some long-term financial compensation from the factory's main buyer, German discount retailer KiK. An attempt to also hold the company legally accountable before a German court failed as did the attempt to hold the auditing company RINA legally accountable in Italy. Most recently, RINA refused to sign the mediation agreement after a lengthy process at the Italian OECD National Contact Point. Nine years after the fire, the affected families are therefore still having to fight for justice, as the president of the Ali Enterprise Factory Fire Affectedes' Association Saeeda Khatoon pointed out in her recent open letter (attached) to Commissioners Reynders and Breton.

(2) *Rana Plaza*

Another recent open letter to the Commissioners came from Kalpona Akter, the executive director of the Bangladesh Center for Workers Solidarity, who vividly recalls the aftermath of the deadliest disaster in the history of the garment industry. Over 1,100 people died in the rubble of the Rana Plaza building and thousands more were injured for life. Again, the facilities had been audited by accredited auditors just months before.

Whereas the auditors had not been tasked with assessing the structural integrity of the building, their report described the construction quality as being good. In that case, TÜV Rheinland was commissioned to undertake the audit by a member of the Business Social Compliance Initiative (now called amfori BSCI). Following a complaint against TÜV Rheinland, representatives from the BSCI conceded that there was a need to clarify issues around the liability of and sanctions for auditing firms.^{vii} In her open letter (attached), Kalpona Akter calls on the Commissioners to introduce strong rules that have accountability at their core and give victims access to justice in European courts.

(3) *Uyghur forced labour*

Auditing companies WRAP and Bureau Veritas conducted audits of the operations of Chinese companies in the Xinjiang Uyghur Autonomous Region, Heitan Taida Apparel Co. and Yili Zhuowan Garment Manufacturing Co., respectively. Allegedly they found no evidence of forced labour, whereas both Chinese companies have been implicated in human rights abuses against Uyghurs by US authorities.

In 2019, the U.S. Customs and Border Protection (CBP) issued a Withhold Release Order on a shipment of the Heitan Taida's, destined for Costco. This was a response to credible evidence that the products had been illegally manufactured, in whole or in part, using modern slavery. In July 2020, the US Department of Commerce's Bureau of Industry and Security (BIS) implicated Heitan Taida, prohibited the company from purchasing American technology and products without a special license. Similarly, in September 2020 CBP blocked imports of products made by Yili Zhuowan after finding indicators of forced labour at the facility. These included restriction of movement, withholding of wages and "abusive

working and living conditions". Both WRAP and Bureau Veritas – along with several other auditing firms -- have by now announced they will no longer conduct audits in the region.^{viii}

(4) **Top Glove**

The world's largest rubber glove company, Malaysia based Top Glove, has been the subject of a Withhold Release Order (WRO) for rubber gloves produced by two of its subsidiaries. The US Customs and Border Protection (CBP) based this measure on reasonable belief that the subsidiaries were using forced labor to produce rubber gloves. The CBP blocked all imports of these rubber gloves into the US, closing the companies' access to the US market.

A 2018 investigation had found that migrant workers producing for Top Glove worked in conditions that meet the ILO's criteria for modern slavery.^{ix} Additional reports on Top Glove's 40 factories include excessive overtime, forced labour, debt bondage, exorbitant recruitment fees, and the systematic confiscation of passports. Yet, Top Glove factories have been issued certificates from auditing companies including Intertek, TÜV SÜD, UL, Bureau Veritas, SGS, and others. Its facilities undergo numerous social auditing inspections on an annual basis, and in 2017 and 2018 alone, 28 social responsibility audits were conducted including SA8000, SMETA, and amfori BSCI, as Top Glove itself stated in a letter to customers and stakeholders.^x

Attachments

- Open letter by Kalpona Akter
- Open letter by Saeeda Khatoon
- Executive summary of the latest Corporate Legal Accountability briefing by Business and Human Rights Resources Centre

Endnotes

- i There are other terms used by different authors for the practices in question, for example: “ethical audits”, “social compliance audits”, “supplier audits”, “corporate social responsibility audits”, “factory audits” and “private audits”. A common characteristic is that they are voluntary processes carried out to evaluate compliance with specified labour and environmental standards.
- ii See, for example: Clean Clothes Campaign. (2019). *Fig leaf for fashion: How social auditing protects brands and fails workers*. At: <https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view>; and various resources available on the Business and Human Rights Resource Center’s *Beyond social auditing* platform (<https://www.business-humanrights.org/en/big-issues/labour-rights/beyond-social-auditing/>) and on the *Social audits and certifications* part of the European Center for Constitutional and Human Rights’ website (<https://www.ecchr.eu/en/topic/social-audits-and-certifications/>)
- iii For example: (1) Anner, M. (2012). *Auditing Rights at Work in a Globalizing Economy: The Limits of Corporate Social Responsibility*. Paper presented at the 16th ILERA World Congress, Philadelphia, USA, 2-5 July 2012. (2) LeBaron, G., J. Lister, & D. Dauvergne. (2017). “Governing Global Supply Chain Sustainability through the Ethical Audit Regime.” *Globalizations* 14:6, 958-975. (3) LeBaron, G. & Lister, J. (2016). *Ethical Audits and the Supply Chains of Global Corporations*. SPERI Global Political Economy Briefs (1). Sheffield Political Economy Research Institute (SPERI), University of Sheffield. (4) Terwindt, C. & Armstrong, A. (2019). ‘Oversight and accountability in the social auditing industry: The role of social compliance initiatives.’ *International Labour Review*. 158. (5) Van Ho, T. & Terwindt, C. (2019). ‘Assessing the Duty of Care for Social Auditors’. *European Review of Private Law*, Issue 2, pp. 379–401.
- iv See *Xinjiang Supply Chain Business Advisory* (July 13, 2021) at: <https://www.state.gov/wp-content/uploads/2021/07/Xinjiang-Business-Advisory-13July2021-1.pdf>
- v The auditing firm ELEVATE in its public response to the 2019 ‘Fig leaf for fashion’ report, see https://media.business-humanrights.org/media/documents/files/documents/ELEVATE_response_to_CCC_report_Fig_Leaf_for_Fashion_20190930.pdf
- vi This was later shown in a forensic architectural analysis of the fire submitted as evidence in a court of law. The video by Forensic Architecture is available at: <https://forensic-architecture.org/investigation/the-ali-enterprises-factory-fire>
- vii European Center for Constitutional and Human Rights. (n.n.). *More for show than safety: Certificates in the textile industry. Complaint on audit report by TÜV Rheinland on Rana Plaza*. At: <https://www.ecchr.eu/en/case/more-for-show-than-safety-certificates-in-the-textile-industry/>
- viii Business and Human Rights Resource Center. (2020). *China: Five audit firms to stop labour-audits in Xinjiang amidst concerns on restricted access*. At: <https://www.business-humanrights.org/fr/demi%C3%A8res-actualit%C3%A9s/china-five-audit-firms-to-stop-labour-audits-in-xinjiang-amidst-concerns-on-restricted-access/>
- ix Freedom United. (2018). *"It's Like Prison" in Malaysian Rubber Glove Factory*. At <https://www.freedomunited.org/news/its-like-prison-in-malaysian-rubber-glove-factory/>
- x Available at <https://finnwatch.org/images/top-glove-letter-to-stakeholders-on-Migrant-Workers- Rights.ex.pdf>