

HUMAN RIGHTS WATCH

Silver Square Offices
Square de Meeûs 35
1000 Brussels
Belgium
Phone: +32 2 737 14 85
E-mail: Belgium@hrw.org
www.hrw.org



HRW.org

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Sub: EU Corporate Sustainability Due Diligence Directive

Dear Ambassadors,

We are writing to urge the Council to firmly reject the proposals presented by Germany in its October 2022 “non-paper” (referred to as paper in this letter) and to ensure that Article 22 is sufficiently robust to serve as a strong deterrent for companies. Germany’s paper recommended reducing civil liability (Article 22) in the draft EU Corporate Sustainability Due Diligence Directive (CSDDD) in several ways.¹

We are also writing to urge the Council to keep the widest possible scope of the directive throughout the value chain, rather than just the “supply chain.”

We would also like to request Council members to provide civil society groups with the latest draft of the EU CSDDD proposal being deliberated in the Council and urgently convene an online meeting with civil society groups *before* the Council’s proposal is finalized on December 1.

Germany proposed that companies only be liable for “intentional or negligent failure” to comply with specific human rights obligations in Articles 7, 8. The Council should reject this and instead ensure the proposed directive provides that companies can be held liable for “a failure to comply with the Directive through its actions or omissions.”

We understand that the Council, at this writing, has not adopted Germany’s proposal to increase the threshold to successfully bring a civil claim to “intent or gross negligence” in cases where the

¹ German Non-paper on Article 22. Germany’s proposal seeks to restrict civil liability for “intentional or negligent failure to comply” with a narrow subset of due diligence obligations “as a result of which death, personal injury, restriction of personal liberty, or damage to or destruction of any item of property was caused.” The proposal seeks to introduce a more onerous threshold of “intent or gross negligence” for civil liability of companies that are a part of “industry or sector initiatives... based on multi-stakeholder approach,” and whose standards are “approved by public authorities.” The same higher threshold of “intent or gross negligence” is also sought to be introduced where companies have obtained a certification from an “independent certifying body” where the certifying body is not “directly or indirectly controlled by the company that mandated the certification” and the certification was obtained in the last five years prior to the death, personal injury, and so on.

company is a member of an “approved” sector or industry initiative.² We hope that this continues to remain the position of the Council and that Germany’s proposals to increase the threshold for civil liability do not find traction in discussions.

The approach proposed by Germany conflates corporate membership in sector or industry initiatives with corporate duty to conduct due diligence. Numerous sector initiatives have collectively [opposed](#) any such approach saying companies are themselves responsible to conduct human rights due diligence and being part of a sector or industry initiative is not a substitute.³

Similarly, being “certified” or doing business with “certified” suppliers is not sufficient proof of due diligence. Yet, Germany’s paper states that certified companies can only be held liable for “intent or gross negligence” where there is a valid certification issued by an “approved” certification body that is “not directly or indirectly controlled by the company that mandated the certification.”⁴

Certification is based on underlying audits. Human Rights Watch’s new report, “[Obsessed with Audit Tools, Missing the Goal’: Why Social Audits Can’t Fix Labor Rights Abuses in Global Supply Chains,](#)” outlines how traditional or standard audit processes are cursory, have little room for the safe participation of workers, are riddled with conflicts of interests even at the audit phase, and the reports are largely non-transparent. The underlying basis for certification—that is the audit report, corrective actions, and the findings were closed or not closed—are not publicly made available. Even the most robust social audit can only better detect rights abuses. Remediating these rights abuses depends on whether brands and suppliers take appropriate action based on these findings in a timely manner.

Germany’s proposal creates civil liability for “death, personal injury, restriction of personal liberty, or damage to or destruction of any item of property... caused,” but leaves out access to justice for other severe adverse impacts including child labour, forced labour, widespread wage theft, environmental destruction, and deforestation. Limiting liability to “damage to or destruction of any item of property” significantly undermines access to justice for Indigenous Peoples adversely impacted by land-based

² Ibid.

³ amfori et al., “Joint Recommendations from an Alliance of Garment Industry Representatives for the EU Corporate Sustainability Due Diligence Directive: Due Diligence: Taking responsibility in value chains,” <https://api.fairwear.org/wp-content/uploads/2022/10/2-CSDDD-Joint-Garment-Industry-Recommendations.pdf> (accessed November 23, 2022). In particular, the sector initiatives state, “In line with the UNGPs, all companies have a responsibility to respect human rights when doing business, and the OECD guidelines state they cannot shift the responsibility of due diligence onto others, such as their suppliers, industry schemes and/or multi-stakeholder initiatives.” See also, Responsible Business Conduct Working Group of the European Parliament and CSR Europe, “Workshop—EU Due Diligence Legislation: Accompanying measures: Report,” May 18, 2021, https://static1.squarespace.com/static/5df776f6866c14507f2df68a/t/6167f9bfc405645ea7d26bbo/1634204097991/CSR+Europe+Report_+Workshop+Inclusive+Due+Diligence.pdf (accessed November 23, 2022).

⁴ German non-paper, proposed article 22, paragraph 3. “3. A company shall also only be liable in cases of intent or gross negligence if it has obtained certification by an independent certifying body that it is regularly in full compliance with the obligations laid down in Article 7 and 8 and (a) the independent certifying body has at the time of the issuance of the certification to the company been approved by a competent public authority⁴ to issue said certifications; (b) the independent certifying body is not directly or indirectly controlled by the company that mandated the certification; and (c) the certification was obtained within the last five years prior to the death, personal injury, restriction of personal liberty, damage to or destruction of any item of property and has not been revoked during this time.”

projects undertaken without free and prior informed consent. Coming on the back of COP27, this would be a blow to holding companies accountable for severe adverse environmental impacts.

Instead of making it difficult for victims—who do not have access to the resources a company has—the directive should merely require victims to make a prima facie case and shift the onus on to companies to prove they conducted human rights and environmental due diligence. Moreover, the directive should not allow companies to plead due diligence defenses for harms that result in deaths, permanent disability, irreparable or intergenerational harm.

In embedding the UN Guiding Principles on Business and Human Rights into legislation, Council members should take care not to water down and lower the bar of what has been achieved through voluntary efforts. Companies have a responsibility under the UN Guiding Principles to remediate actual adverse impacts they themselves cause or contribute to and support the remediation of adverse impacts they are linked with. Where companies fail to discharge these obligations, victims should be allowed to have a civil course of action. Council members should not, for example, exclude companies from being held liable merely because damage was caused by business partners.

If the proposals made by Germany were adopted, they would severely limit access to justice for victims of corporate abuses, serving corporate interests at the cost of human rights and the environment, seriously undermining the effectiveness of the directive.

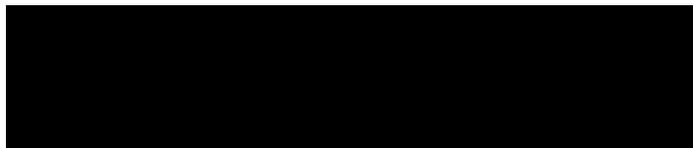
We take this opportunity to remind Council members that the proposed EU CSDDD directive is being finalized around the 10-year mark of several industrial disasters in Pakistan and Bangladesh in 2012 and 2013.⁵ Watering down these proposals and allowing corporations to merely continue their operations without any fear of serious repercussions would be a devastating blow to the families of those who died producing branded products sold in Europe and other global markets. It would also unfairly disadvantage companies that *take* the most robust risk-based due diligence measures or actions as recommended by civil society, going beyond mere certification and merely being part of sector or industry initiatives. In Annex I to this letter, Human Rights Watch describes these problems with additional supporting information.

We hope that Council members will reject the proposal put forward by Germany and meaningfully engage with civil society organizations before the proposal is finalized, and also provide more

⁵ Clean Clothes Campaign, “Tazreen fire: fight for compensation,” <https://cleanclothes.org/campaigns/past/tazreen> (accessed November 23, 2022); Italian National Contact Point, “Final Statement of the Italian National Contact Point for the OECD Guidelines, Specific instance submitted to the Italian NCP on the 11th September 2018 by Ali Enterprises Factory Fire Affectedes Association (AEFFAA); National Trade Union Federation (NTUF); Pakistan Institute for Labour Education and Research (PILER); European Center for Constitutional and Human Rights (ECCHR); Stichting Schone Kleren Kampagne/Clean Clothes Campaign; Campagna Abiti Puliti and Movimento Consumatori (MC) versus RINA Services S.p.A.,” https://pcnitalia.mise.gov.it/attachments/article/2035928/Final%20Statement%20RINA_DEF.pdf (accessed November 23, 2022); European Centre for Constitutional and Human Rights, “Complaint on Audit Report by TUV Rheinland on Rana Plaza Factory,” <https://www.ecchr.eu/en/case/more-for-show-than-safety-certificates-in-the-textile-industry/> (accessed November 23, 2022).

information directly to civil society. Please do not hesitate to contact us if you require any further information.

Best regards,



Philippe Dam
EU Director
Human Rights Watch

Wenzel Michalski
Germany Director
Human Rights Watch

Annex I

Fire and Building Safety

The Council's deliberations are occurring at a somber time. On November 24, it will be 10 years since the Tazreen factory fire in Bangladesh. Since the Rana Plaza building collapse in Bangladesh in 2013, the [International Accord for Health and Safety in the Textile and Garment Industry](#) (formerly the [Bangladesh Accord](#) on Fire and Building Safety) has been the most robust due diligence mechanism on occupational health and safety in the garment and textile industry in Bangladesh.

It is far more robust and does not compare with what social audits or certifications can offer because the Accord combines the following features: a) It is a legally binding agreement between brands and unions, and arbitration cases can be brought against brands for breach of their commitments under the agreement; b) commits brands to continue sourcing from factories, allowing factories a reasonable period for remediation, reducing the ability of companies to cite "zero tolerance" and quietly cut business and leave factories when problems come to light; c) carries escalated warnings to factories delaying remediation, followed by responsible exit as a measure of last resort for consistent failure to remediate on an agreed time-line; d) its Bangladesh partner, the Readymade Garments Sustainability Council, [publishes](#) factory inspections and corrective actions; e) a governance and decision-making structure that includes democratically elected unions and worker rights organizations; f) combining occupational health and safety training programs with workers along with a grievance redress mechanism, to provide ongoing monitoring of factories.

Despite these significant differences, not all companies sourcing garments and textiles from Bangladesh (where the Accord is currently active) are part of the Accord. While many companies participating in sector or industry initiatives are [also part of the Accord](#), others in the same sector or industry initiatives [are yet to join](#). This shows there are huge differences in how companies approach

human rights due diligence on specific risks like occupational health and safety even when they are part of the same sector or industry initiative.

The German government’s proposed pre-conditions for approving industry or sector initiatives are a red herring.⁶ “Approved” industry or sector initiatives cannot absolve companies of their individual obligations to conduct robust human rights due diligence.

Examples of Companies that are Part of Sector or Industry Initiatives, but Not Part of the International Accord

- [Walmart](#), whose branded products were found in the Tazreen factory, is a co-founder of the [Sustainable Apparel Coalition](#) (SAC), a sector initiative. To date, Walmart has yet to publish its [supply chain information](#) and has also yet to join the International Accord. Civil society organizations, including Human Rights Watch, strongly recommend both measures. These measures have been taken by [other competitors](#) of Walmart. Other SAC members, for example, H&M and C&A, are [party](#) to the Accord.
- [Amazon](#), [Auchan](#), [Björn Borg](#), [Desigual](#) are members of amfori, another industry initiative, but are [not yet party to](#) the Accord. amfori administers a social audit program, (amfori BSCI audit) provides a social audit methodology, accredits auditing firms that can be contracted to conduct amfori BSCI audits, and generates social audit reports. But to date, amfori has yet to publish the names and addresses of sites covered under its program, or social audit reports and corrective actions. One of the factories housed in the Rana Plaza building that collapsed in 2013 in Bangladesh had been audited using amfori’s BSCI standard. Subsequently, auditing firms [stated](#) during quasi-legal proceedings that amfori’s BSCI audits are not equipped to detect structural integrity issues.
- Fair Labor Association members like adidas and PUMA are part of the Accord. But others including Levi’s and Gap Inc.—also FLA members—are [not yet part of the Accord](#).

Similarly, SA8000 and Worldwide Responsible Accredited Production (WRAP) are among the two commonly used certification schemes for factories, including garments and textiles. Certification under these schemes is based on social audits. Both [SA8000](#) and [WRAP](#) allow factories to directly pay

⁶ German non-paper, proposed article 22, paragraph 3. “2. A company shall only be liable in cases of intent or gross negligence if it has acceded to an industry or sector initiative and implemented a standard set by this initiative into its normal course of business and (a) the industry or sector initiative is based on a multi-stakeholder approach; (b) the implemented standard was set up and is able to ensure that companies are regularly in full compliance with the obligations laid down in Article 7 and 8; and (c) the implemented standard was approved by a competent public authority³ at the time of the death, personal injury, restriction of personal liberty or damage to or destruction of any item of property.”

for and appoint auditing firms. In Human Rights Watch's [recent](#) report, we have presented testimony from auditors as well as other quantitative data revealing how asking suppliers to pay for and appoint auditing firms heightens the risk of pressures on auditors from suppliers. While Human Rights Watch's report did not specifically investigate SA8000 or WRAP certification, the key challenges described in the report are relevant to all certification schemes, including SA8000 and WRAP. It is pertinent to also note that Ali Enterprises, the factory in Pakistan that burned down in September 2012, killing workers, was [certified](#) using the SA8000 standard.

Despite the significant challenges with certifications, and the ability of companies to simply ignore the most robust due diligence methods even while being part of sector or industry initiatives, the German government's searchable database of standards, [SME Compass](#), lists the SA8000, Fair Labor Association (FLA), and Fair Wear Foundation (FWF), as initiatives that meet the German government's "criteria for credibility." It is unclear how or why this assessment has been made, and why the German government would endorse companies' mere participation in these three initiatives ignoring other more robust due diligence methods like the Accord.