



FASHIONING JUSTICE

A call for mandatory and comprehensive human rights due diligence in the garment industry

January 2021

FASHION
CHECKER 

Clean
Clothes
Campaign 

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Clean Clothes Campaign (CCC) is a global network of labour and human rights organisations, including unions. It campaigns and advocates for the improvement of working conditions in the apparel and sportswear industry.

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INTRODUCTION

Fashion is one of the most labour-intensive industries. Production is powered by the cheap and overworked official workforce complemented by informal or home-based workers who are left out of statistics and labour protection.

Labour rights are further flouted in Export-Processing Zones that have proliferated over the past few decades and contributed to the global race to the bottom on social standards.¹

How big is the global fashion industry?

The global fashion industry represented a 2.5 trillion US dollars (over 2.1 trillion euros)² market with an annual growth rate of 3-5% in 2017.³ The overall apparel industry revenue growth had been slowing down even before the Covid-19 pandemic, but the global revenue of the e-commerce fashion industry alone was predicted to rise to 712.9 billion US dollars (602.8 billion euros) in 2022, compared to 481.2 billion US dollars (406.9 billion euros) in 2018.⁴ (We refer to these market actors as e-tailers, and they should be considered included in any reference to brands and retailers in this paper.)

Where do clothes and profits come from?

Highly decentralized and relying on outsourcing, the garment, textile and footwear industry involves manufacturing facilities across the world, but 60% of the global production still comes from Asia. China, Bangladesh and Vietnam are the top three clothing exporters. In 2019, the European Union sourced one-third (33%) of imported clothes and footwear from China. Other main exporters to the EU were: Bangladesh (16%), Turkey (9%), Vietnam (8%), India (6%), Cambodia (5%), Indonesia, Pakistan and Morocco (3% each) and Myanmar (2%).⁵

By preferring to produce in low-income countries that lack or under-fund social protection systems, fashion brands, retailers and e-tailers have been deriving profits from a system of poverty pay and exploitation of the most vulnerable people whose plight has been further exacerbated by the Covid-19 pandemic.

Why are we publishing this paper?

At the time when we are approaching 10 years since the adoption of United Nations Guiding Principles on Business and Human Rights (UNGPs) and the European Union has set in motion a legislative process geared toward mandatory human rights due diligence (HRDD), fashion brands, retailers and e-tailers have been largely ignoring responsible business conduct principles and the impact the Covid-19 pandemic has had on garment workers.

These factors led us to publish the paper you are now reading. We want to re-confirm our position on HRDD that we presented in 2016⁶ and put forward concrete proposals for binding rules and ensuring companies' responsible business conduct. Our main recommendations – preceded by a brief overview of the current realities – are presented in Part 1 of the paper. Part 2 brings further insights into the current situation.

Our focus on labour issues and human rights in this paper is dictated by our organisation's mission. We have been collaborating with civil society organisations that work to reduce negative environmental impacts, and we support their proposals on mandatory environmental due diligence.

What do we want?

On the part of policy-makers and states, CCC first and foremost calls for a comprehensive approach.⁷ We want to see due diligence required as a matter of regulatory compliance with clear enforcement mechanisms and access to effective remedy; positive incentives for meaningful due diligence practice and adequate sanctions for shortcomings; mandatory transparency; and a range of other complementary measures laid out in this paper. To be comprehensive, HRDD must cover entire value chains, including semi-formal and informal working schemes as well as unofficial subcontracting and home-based work.

Lastly, given the global scale of trade and the patterns of global value chains, we want to emphasize that a move towards mandatory HRDD must not stop at EU institutions. We continue to call for a binding UN treaty that sets a regulatory base for decent work along the entire global value chain and that holds companies accountable for respecting human and labour rights around the world.

BACKGROUND: EXECUTIVE SUMMARY

- The Covid-19 pandemic manifestly exposed and further exacerbated the acute, yet systemic, issues in the buyer-driven apparel value chains. Fashion brands, retailers and e-tailers have cancelled and delayed payment for orders worth billions of euros and have been using pricing strategies that harm the viability of their suppliers' business. As a consequence, millions of workers have not been paid their wages and union-busting has become yet more frequent.
- Garment brands, retailers and e-tailers are directly and indirectly contributing to human rights violations on a mass scale. They facilitate and aggravate abuse by: opting to conduct their business activities where human rights protections are lacking; actively inducing the violations through their trade practices; and not ensuring access to effective non-judicial remedies.
- The various initiatives to widen the uptake of the soft-law human rights due diligence principles have had only limited impact. Making due diligence binding is crucial to ensure that companies can finally be held accountable for their human rights records.

Policy context (see 2.1)

- Over the past decade a number of responsible business initiatives have been launched by multilateral organizations, national governments, NGOs, and other stakeholders.
- In 2011, the United Nations Human Rights Council endorsed the *United Nations Guiding Principles on Business and Human Rights (UNGPs)*. In line with the UNGPs, states have a duty to protect human rights, including by holding companies within their territory and/or jurisdiction accountable for their actions along the global value chains. Companies have a responsibility to respect human and workers' rights in their value chains and should implement meaningful human rights due diligence processes. Access to remedy for victims needs to be guaranteed.
- The Organisation for Economic Co-operation and Development (OECD) published *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*. The Guidance includes recommendations on how to address issues such as forced labour, occupational health and safety, responsible contracting of homeworkers, wages, trade unions and collective bargaining.
- Among other moves at national, EU and international levels towards binding requirements, the European Commission has announced it will submit a legislative proposal on "sustainable corporate governance" including value chain due diligence in 2021.

Corporate practices at the roots of problems (see 2.2.1)

- Many fashion brands, retailers and e-tailers use their market power to impose unfair business deals on their suppliers and fail to perform due diligence with regard to their purchasing practices. As a consequence, the suppliers cut corners on wages, safety, and other compliance-related costs; and they convey the price pressure to lower tiers in the value chain.
- Profit-maximising purchasing practices have the following structural characteristics: unstable relationships between buyers and suppliers; a profit squeeze through falling unit prices; and pressure through lead times and delivery schedules.
- The OECD Due Diligence Guidance on Responsible Supply Chains in the Garment and Footwear Sector recognizes the harmful impact of purchasing practices on workers' rights and recommends a series of measures to address this.
- Most fashion brands, retailers and e-tailers rely on social auditing which contributes to shifting the burden of correcting harms to the suppliers, while ignoring the harm from buyers' purchasing practices and protecting brands' images and reputations.
- At times, reliance on the flawed social auditing system can even be deadly. We have documented cases where private social auditors certified workplaces as safe shortly before preventable losses of workers' lives occurred in those factories.

Widespread human rights violations (see 2.2.2)

- Human rights violations are prevalent throughout garment value chains – to the point that the dominant business model rests on systematic exploitation and abuse. An estimated 80% of garment industry workers are women, and the industry profits from and perpetuates models of gender discrimination.
- In response to brands' purchasing practices, factories pass down costs and risks to their workers. This includes demanding unpaid overtime and subcontracting to homeworkers for half to a third of statutory minimum wages.
- Workers receive poverty wages for their work that frequently takes place in unsafe factories. They are often deprived of maternity leave; prevented from forming or joining trade unions; regularly harassed by male supervisors; and faced with gender-based violence.
- Factory owners say they have no choice but to keep wages low due to the low prices paid by buyers. Governments have kept minimum wages low under pressure from brands, retailers and e-tailers, and in a bid to create or protect jobs.
- Freedom of association and the effective recognition of the right to collective bargaining would be crucial to structurally improve labour rights conditions and change the gender-based power inequality, but they are persistently under attack. Social norms that limit women's voices and participation in society put those rights under additional strain.
- About a decade after the adoption of UNGPs, it is clear that reliance on a voluntary framework, MSIs, and other initiatives to promote corporate respect for human rights has proven insufficient and ineffective for workers and the broader society.



Acute lack of value chain transparency (see 2.2.3)

- The garment industry is characterised by a lack of transparency that makes it challenging or even impossible to identify which factories produce for which brands, and whether a specific supplier is respecting workers' rights and providing safe working conditions.
- The lack of clear value chain information prevents: the broader public from scrutinizing companies' behaviour; companies themselves from understanding the impact of their business operations and reassessing practices after a proper risk evaluation; and most importantly, workers from identifying the buyers of the products they make, thus weakening their options for complaints and remedies.
- To support increased transparency in the garment sector, some corporate and civil society-backed voluntary actions have been developed, such as the Transparency Pledge launched in 2016 by Clean Clothes Campaign (CCC) and eight other civil society organisations, and the EU-funded Fashion Checker launched by the CCC in 2020.
- The European Directive on the disclosure of non-financial and diversity information represented a first step towards increased corporate transparency. The impact of this legislation is limited, however. Fundamentally, it focuses on an obligation to report on human rights due diligence and not on an obligation to do human rights due diligence.

Effective remediation out of reach (see 2.2.4)

- Access to effective remedy is a core component of the UNGPs. Remedy can be provided by judicial, state-based non-judicial and non-state-based grievance mechanisms.
- The OECD Guidelines emphasize the need for enterprises to enable remediation through legitimate, accessible, predictable, equitable and transparent grievance mechanisms.
- Key forms of remediation from a garment worker's point of view include: financial compensation, removal of safety risks, reinstatement of trade union leaders, social security coverage, payment of outstanding wages and severance, cessation of forced and/or unpaid overtime, granting of maternity and sick leave, and dismissal of supervisors who harass workers.
- Workers who seek remedy for human rights violations face many barriers. These include, among others, insufficient financial resources, lack of information and language barriers, jurisdiction hurdles, as well as the requirement to collect and document evidence that puts workers in danger.
- Access to remedy is increasingly understood in a procedural sense rather than in terms of outcomes for the rights-holders: the workers. Grievance procedures tend to result in inadequate remedies or no remediation whatsoever.





PART 1 WAY FORWARD

Mandatory and comprehensive human rights due diligence

RAINBOW
HAPPY

STRENGTHEN THE FABRIC

A company's responsibility to carry out Human Rights Due Diligence (HRDD) is one of the cornerstones of the United Nations Guiding Principles on Business and Human Rights (UNGP). Clean Clothes Campaign (CCC) considers meaningful HRDD a key component of a set of voluntary measures that every company should implement. However, widespread human rights violations (see Part 2) make it abundantly clear that voluntary measures are not sufficient.

Based on over three decades of striving to improve working conditions in the global garment industry, we have a myriad of ideas for how to bring about meaningful positive change. Those that are particularly relevant for the high-risk sector we focus on, in light of ongoing policy processes, are presented in this part of the paper.

The first section (1.1) is addressed at policy-makers in all jurisdictions, as all states have a responsibility to respect, protect and fulfil human rights. The second section (1.2) is focused on the EU, given that it is moving towards mandatory human rights due diligence. Those expectations should not be taken in isolation but as complementary to the first part.

The final section of Part 1 (1.3) challenges the evident resistance by corporations to voluntarily change their own harmful practices. It calls upon brands, retailers and e-tailers to take responsibility in a meaningful way without further delay, and it lays out some specific paths towards meaningful positive change. Again, this is not a stand-alone set of demands. These are selected highlights with complementary specific initiatives having been communicated to fashion brands, retailers and e-tailers over a number of years, and with continued inspiration available on our website: cleanclothes.org.



1.1

Overall recommendations for policy-makers

Every state should fulfil all aspects of the first pillar of the UNGPs that defines the state duty to protect human rights.

- UNGP principles under the first pillar include, among others:
 - effective policies, legislation, regulations and adjudication to prevent, investigate, punish and redress human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises (see Principle 1)
 - enforcing laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights and periodically assessing the adequacy of such laws and addressing any gaps (see Principle 3a)
 - ensuring that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but rather enable business respect for human rights (see Principle 3b)
 - promoting respect for human rights by business enterprises with which they conduct commercial transactions (see Principle 6), for example, through the terms of procurement contracts.

Decision-makers in all jurisdictions should opt for making human rights due diligence mandatory through appropriate legal instruments.

- Pursue ways of establishing mandatory HRDD at national levels through the development of policy and legislative tools.
- Accelerate the introduction of effective mandatory HRDD by supporting the development of comprehensive EU-level legislation.
- Actively engage at the UN level to support the development of an ambitious Binding Treaty on business enterprises with respect to human rights and then ratify the treaty without delay.

When mandating HRDD, global value chains must be understood as global systems of multiple production locations.

- Recognize that the actual production place of a given product is the relevant parameter and not just the formal contractual business link. Semi-formal and informal working schemes as well as unofficial subcontracting and home-based work must be accounted for in all regulatory measures

Ensuring that companies respect human rights requires that states establish a coherent supporting framework and enforcement mechanisms.

- Protect whistleblowers, trade unions and CSOs so they can share information without fear of retaliation and adopt other measures recommended by the UN High Commissioner for Human Rights to combat retaliation.⁸
- Comprehensively promulgate the ILO Labour Inspection Convention (C081) into national legislation and ensure its implementation, including by strengthening the independence of Labour Inspectorates, eg through adequate remuneration of inspectors.
- Ratify ILO Convention No. 190 on Violence and Harassment and eliminating gender-based violence in the world of work as well as all other fundamental, governance and technical conventions and protocols of the ILO, and ensure that all codified rights and processes are thoroughly implemented and enforced.
- Implement support measures to help garment-producing countries and their stakeholders improve their legal and implementation framework, for example, through trade measures, political dialogue and development aid.
- Strengthen cross-border/regional cooperation to identify and mitigate common value chain issues arising in garment-producing countries, including links between migrant sending and receiving countries.
- Ensure enforcement⁹ of mandatory due diligence through an effective combination of measures such as: adequate penalties and criminal sanctions, granting enforcement competences and resources to designated national bodies, encouraging collaboration between enforcement authorities, and enabling third parties to trigger enforcement procedures.
- Use regulation to create positive incentives for businesses to implement human rights due diligence by rewarding compliance (and penalising non-compliance), eg through trade agreements or trade preference programs and when contracting for goods and services through public procurement. At the time of writing, the distribution of EU coronavirus recovery funds presents a clear opportunity to hold businesses accountable for their human rights records.
- Take regulatory measures to ensure that company directors' "duty of care" obligation is interpreted in such a way that directors acting to fulfil their responsibility to respect human rights is considered as acting in line with the directors' fiduciary duties to shareholders.¹⁰

All policy, legislative and corporate human rights due diligence processes must place workers and other rights-holders at the center, and integrate a gender and intersectionality perspective.¹¹

- Actively engage women workers and trade unionists, homeworkers' organisations, gender experts, women's rights organisations, and feminist movements in consultations during the drafting of any legislation.
- Require companies to involve workers, their unions, affected communities and other rights-holders in the development and implementation of due diligence plans at the company level.
- Require companies to conduct gender-responsive due diligence throughout their entire operations and value chains and to also fully take into account intersectional discrimination,¹² for example, on the basis of gender plus ethnicity, religion, age and/or migration status.
- Require meaningful consultation with rights-holders and active engagement with women workers, trade unionists, migrant groups, homeworkers' and women's rights organisations when designing, monitoring, and evaluating grievance mechanisms.
- Ensure that women will benefit equitably from any remedies by taking into account the specific barriers that women face when trying to access justice and remedy, for example, limits on freedom of movement and time-poverty due to unpaid care work as well as the prevalence of intersectional discrimination.

Transparency and access to information are preconditions for credible and effective human rights due diligence policies and processes.

- Ensure that transparency is embedded at all steps of the human rights due diligence process carried out by companies. Companies should be required to disclose information about their due diligence policies, risk assessments, identification of their suppliers, measures taken, tracking of results, use and outcomes of remediation and grievance mechanisms, etc. Such information needs to be regularly updated.
- Ensure that value chain transparency and corporate disclosure are not limited to the closest suppliers or Tier 1 actors but cross the whole value chain. As part of the value chain, homeworkers should be included in the disclosure unless this could endanger their safety and security. In such cases the obligation to publish their information should not apply whereas the obligation to carry out meaningful due diligence and keep the corresponding evidence remains valid.
- Enact mandatory legal requirements on value chain disclosure (production units and processing facilities)¹³ through machine-readable format from companies in high-risk sectors where violations are rife, such as the garment industry.
- Require that information and data relevant to workers' rights – such as the presence of unions or worker committees, employment status, wages paid, gender breakdown of job positions held, migrant workers as share of workforce – is regularly published. Access to such information should be free, unlimited and according to Open Data standards.
- Increase transparency and traceability at product level to empower citizens through, for instance, expanding labeling information to include information on the manufacturing process and its social aspects.
- Set up a central registry at international, EU, or national level, depending on the context, where companies will put out their due diligence strategies and actions, as well as value chain information. Such registry will facilitate access and comparison of information by external stakeholders.

Remediation must be seen as integral to meaningful HRDD with the focus on workers and other rights-holders' right for violations to be remedied.

- Include strong clauses on access to effective remedies for workers and others whose rights have been violated as an integral part of any HRDD legislation.
- Require that sub-suppliers beyond Tier 1 and homeworkers be given written contracts clearly stating the name of the buyer/client brand and referencing the latter's grievance mechanisms.
- Ensure civil and criminal liability for business enterprises that violate, contribute to, or cause human rights violations in their value chains.
- In addition to individual workers, trade unions and organisations representing workers must enjoy locus standi, and worker-friendly civil society organisations domiciled in any jurisdiction should be able to join actions as amicus curia (a friend of the court) to provide evidence.
- Ensure that state institutions play an active role in investigating alleged violations.
- Ensure that business enterprises bear the onus of proof to show they are not responsible for human rights violations.
- Ensure that any limitation periods for bringing legal actions are adequate and take into account the particularities of transnational and human rights litigation.
- The mere existence of due diligence policies and procedures cannot be deemed sufficient to exempt the company from liability. Business enterprises should be deemed liable for (a) failing to undertake proper due diligence that includes meaningful consultation with affected groups of workers, and (b) where harm is identified, or should reasonably have been identified, for failing to take reasonable steps to prevent, mitigate or remedy the harm.
- Strengthen access to judicial mechanisms for rights-holders in garment-producing countries and fulfil other responsibilities arising from Human Rights Conventions and ILO labour standards and specified in UNGPs. Such steps include duties on business enterprises to:
 - Contractually require their suppliers to provide every worker, including homeworkers, with written contracts that include the name of the brand they produce for.
 - Pay for annual supplier and worker education (in all tiers of the chain) in their mother tongue on workers' human rights entitlements and the complaint and grievance mechanisms available to them, and to contractually obligate suppliers to put this information on the walls of the factory.
 - Engage with trade unionists, gender experts, homeworker organisations, migrant groups, women's rights organisations, and feminist movements from the supplier countries to design complaint and grievance mechanisms for workers at all tiers, including subcontracted units and homeworkers, that make it safe for workers to complain without fear of dismissal.
- In all companies' headquarters locations, facilitate access to justice for rights-holders based in third countries, including migrants and undocumented workers, for example, through modified rules on disclosure of evidence and statute of limitations, enabling class actions, lowering financial cost of initiating proceedings, and delinking immigration offenses for labour rights victims to ensure effective remediation for undocumented/migrant workers.

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Remediation must be seen as integral to meaningful HRDD with the focus on workers and other rights-holders' right for violations to be remedied.

- Implement the recommendations of the UN High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms.¹⁴
- Ensure the OECD National Contact Points (NCPs) apply appropriate standards and have adequate professional staff, including persons with sector-specific expertise, and other resources that will improve their accessibility and effectiveness.¹⁵
 - NCPs' threshold for accepting a case should be at reasonable plausibility, taking into account what information a complainant can reasonably be expected to provide in specific circumstances.
 - NCPs should proactively address power imbalances in their proceedings, for example, by seeking missing information, offering different ways to lodge complaints, and accepting victims' legal representation if requested.
 - NCPs should be able to, in exceptional cases, pay for travel if the complainant would otherwise not be able to take part in the proceedings.
 - NCPs should be able to monitor compliance with the outcomes of their mediation and follow through if they are not adhered to.



1.2

What we expect of the EU-level legislation

Having laid out our expectations toward policy-makers in all states, we turn to the EU that is on course to introduce mandatory HRDD in the coming years.

We presented our vision for the principal elements that EU-level legislation on mandatory due diligence should include together with like-minded civil society organisations. In September 2020 we jointly published a briefing that outlines the seven principal elements listed below (1.2.1).¹⁶

Based on our experience in addressing rights violations in the garment sector, we want to additionally emphasize the expectations laid down in 1.2.2 that also touch upon some aspects of supporting measures. Again, all these elements should be considered in conjunction with the overall recommendations contained in section 1.1.

1.2.1 Principal elements

- Business enterprises must have an obligation to respect human rights and the environment in their own operations, in their global value chains, and within their business relationships.¹⁷
- Business enterprises must have an obligation to identify, cease, prevent, mitigate, monitor, and account for potential and actual human rights and environmental adverse impacts through an ongoing due diligence process in accordance with existing international due diligence standards.
- Business enterprises must provide for or cooperate in the remediation of adverse impacts in their global value chains and within their operations and business relationships.
- Business enterprises must be liable for human rights and environmental adverse impacts in their global value chains and within their operations and business relationships.
- Member States must ensure robust enforcement of all the above obligations and ensure the right to an effective remedy.
- The above provisions must apply irrespective of the law otherwise applicable to the resolution of the conflict, as described in Article 16 of Regulation (EC) No 864/2007 (Rome II).
- This legislation must be cross-sectoral, covering all business enterprises including financial institutions.

1.2.2 Additional considerations

- All business enterprises, no matter their size or corporate structure, must be covered by the legislation. This includes corporate foundations, auditing companies, certification structures and others.
- Business enterprises must carry out due diligence processes along their whole value chain and with regards to their subsidiaries and suppliers including all production sites. The focus must be on where the products are made and not on the formal contractual linkages.

1.2.2 <cont>

Additional considerations

- As an organisation with a labour rights focus, we want to draw attention in particular to freedom of association, the right to collective bargaining, the right to a living wage, and the prohibition of discrimination in the world of work.
 - Labour rights, in particular freedom of association and collective bargaining, are central enabling rights for all workers, including migrant workers, short-term contract workers and homeworkers, and should be stipulated as a key aspect for risk identification, mitigation, and remediation.
 - Living wage (or a piece rate that adds up to a living wage) is crucial in ensuring that workers and their families' other human rights are respected, protected and fulfilled, and it must be integrated in HRDD processes. Business enterprises should be required to report on whether workers in their value chain are paid at a living wage level according to a credible and specific benchmark, and they should present specific, time-bound strategies to close the gap between wages or piece rates paid and a living wage if such a gap is identified.
 - Discrimination is rife in the garment industry, and addressing gender discrimination is particularly important as women tend to be paid less, have less employment security, and face gender-based violence at work on a regular basis. These particular risks for each status of employment (full-time permanent employees, fixed-term contract workers, casual workers paid by the piece, migrant workers, and homeworkers) need to be recognized by business enterprises and taken into account in HRDD processes. This entails ensuring enhanced protection and respect for migrant workers' rights, including access to trade unions, improved recruitment practices, and changes to residency and visa systems such as Kafala.
- Business enterprises' purchasing practices must be included in the framework of the HRDD process as they have a direct impact on human rights, and EU legislation should recognize and address this. Critically assessing and modifying purchasing practices would also enable the sharing of compliance costs (such as building safety) along the value chain instead of pushing them to the factories and lower tiers of the chain.
- Transparency and disclosure of information must be a central part of the HRDD legislation. Common disclosure standards focusing on key data points need to be developed to facilitate implementation and comparison. Access to information should be embedded in all steps of the HRDD process (policy, risk identification, actions taken, tracking of results, remediation, etc), and value chain transparency providing detailed and relevant information is crucial. A central registry could be set up at the national or EU level to facilitate sharing and access to this information. Some business enterprises are already disclosing such information on a voluntary basis showing that such openness is not harming their business.
- Transparency should filter down to workers, including homeworkers. They should know which brands, retailers or other companies they are producing for, and they should have access to key reports translated by brands into the vernacular.

1.2.2 <cont>

Additional considerations

- Companies should be obligated to offer training to suppliers on their human rights obligations and to all workers on their labour rights, the due diligence process, and complaint mechanisms.
- Multi-Stakeholder Initiatives can only be a platform for exchanging information, supporting members in implementing HRDD requirements, building collective leverage, and improving access to non-judicial remedy. In order to fulfil these functions, MSIs need the incentivising framework of binding due diligence obligations that specify the requirements to seek collective leverage and provide effective non-judicial remedy. Hence, European-level sectoral dialogues or MSIs should only complement binding legislation once it is enacted and not be considered a stepping stone towards such legislation. Furthermore, membership in MSIs or other collective initiatives must not be allowed to be used as evidence of HRDD or as grounds for an exemption from any requirements of the HRDD legislation. In particular, fulfilment of MSI reporting requirements shall not exonerate business enterprises from any form of civil liability for harm.
- Social auditing should not be encouraged or recognized by the legislation as proof of HRDD as it is deeply flawed and linked to many cases of corporate abuses and redefining the meaning of individual human rights for the purpose of showing compliance even when it is lacking.
- Access to justice in the EU for rights-holders located in third countries should be facilitated through extended statute of limitations and through the application of the jurisprudential principle of equality of arms so business enterprises have an obligation to disclose all evidence in their possession related to the alleged violation.
- Business enterprises must be liable for human rights and environmental adverse impacts in their global value chains and within their operations and business relationships. Liabilities shall be both civil and criminal, and one shall not exclude the other.
- With reference to criminal enforcement, the competent forum shall be where the corporation is registered under the state's law, have their principal place of business under the State's jurisdiction, or have located their central place of administration on the State's territory.
- As complementary regulatory measures to the future HRDD legislation:
 - Review the EU public procurement Directive¹⁸ to ensure that it supports implementation of the law on human rights due diligence.
 - Review the European Directive on Non-Financial Disclosure to:
 - specify clear mandatory requirements for reporting on human rights risks, impacts, and their management,
 - include key performance indicators,
 - require value chain disclosure,
 - expand the reporting requirements significantly beyond the current company threshold,
 - introduce penalties for non-compliance.

1.2.2 <cont>

Additional considerations

- Complementary supporting measures to the future HRDD legislation should:
 - Create positive incentives for businesses to implement HRDD by rewarding compliance (and penalising non-compliance), in particular when public authorities contract goods and services from companies through public procurement. At the time of writing, the distribution of EU coronavirus recovery funds is a clear opportunity to hold businesses accountable for their human rights records.
 - Implement support measures to garment-producing countries and their stakeholders to improve legal frameworks and to improve enforcement of labour laws (such as minimum wage laws or collective agreements) including by improving national inspectorates, areas impacting labour and human rights (for instance, collective bargaining or gender discrimination laws, labour inspections, social security systems, etc). Such support measures could be developed through policy dialogue, trade measures (Generalised Scheme of Preferences) or EU and Member States development aid.
- Support employment-based social protection schemes in supplier countries for all garment workers, irrespective of their formal employment status.



1.3

What we expect of garment brands and retailers

By changing their own practices, brands and retailers can and should take responsibility for the workers without further delay. The specific measures proposed below should be interpreted in light of our position paper on human rights due diligence published in 2016 which contains further guidance on implementing the UNGPs in the garment industry.

1.3.1

Overall expectations

- Garment brands, retailers and all other companies must stop using lack of regulation or lack of enforcement of labour laws and regulations in supplier countries as an excuse for human rights violations in their value chains. They must also stop threatening to move their production to other countries should governments or trade unions signal an intention to increase minimum wages or strengthen labour rights protections, even if these actions may translate to higher production costs.
- Brands and retailers should fill the gaps in human rights protections at state level by concluding value chain Enforceable Brand Agreements on core issues such as wages, gender-based violence, freedom of association, and health and safety, and appoint independent organisations to investigate complaints and determine remedies.
- Certain business models are incompatible with comprehensive human rights due diligence because they put systemic barriers in the way of carrying out human rights due diligence (eg fast fashion that leads to short-term employment schemes). Such business models must be overhauled.
- Brands and retailers must actively engage workers, their unions, affected communities, and other rights-holders in the development and implementation of due diligence plans at the company level. In particular, they must ensure involvement of women workers and trade unionists, gender experts, homeworker organisations, migrant groups, women's rights organisations, and feminist movements from supplier countries.
- Brands and retailers must not limit their human rights due diligence to priority geographical areas. Instead, they must approach it based on issues, and they must tackle these issues in a systemic way across their entire operation, both production in first and second tier factories and production that is outsourced.
- Brands and retailers must conduct gender-responsive due diligence throughout entire operations and value chains, paying attention to discrimination based on other grounds that may intersect with gender-based inequality such as age, race, ethnicity and migration status.
- Within any business enterprise, HRDD should be seen as an ongoing duty that must be anchored across all relevant departments, but especially purchasing. The departments need to be equipped with sufficient human and financial resources as well as be granted executive power to ensure that purchasing practices support the implementation of HRDD.
- Cost-distribution and margins need to be adapted throughout the global value chains – redistribution is a core ingredient for real change.

1.3.1 <cont>

Overall expectations

Additional costs to top-up workers' low wages and piece rate to reach a living wage level need to be absorbed in the price calculation. Hurdles to increasing workers' wages, such as fixed margins along the chain that escalate the costs of the end-price, need to be eliminated.

- The space for human rights to be respected at the factory level must be created by brands and retailers through improved purchasing practices, including long-term relationships with suppliers, giving sufficient lead times, making order sizes commensurate with the supplier's capacity, and offering realistic prices, among others.
- The level of transparency shown by a business enterprise is often directly connected to the level of control they have over their value chain. All brands and retailers should be open and disclose information on their value chain, as well as on all the steps of their HRDD process (policy, identification of risks, actions taken, tracking of outcomes, remediation, etc). Regarding value chain disclosure, brands and retailers should not only disclose relevant information on their manufacturing facilities, such as name, location, products made, employment levels, and ownership but should also strive to go beyond and provide social data (wage costs, presence of unions, etc), economic information (volume of orders, price paid before FOB, purchasing practices), and management reports (auditing reports).
- Brands and retailers must recognize that social auditing cannot be proof of meaningful due diligence as it is deeply flawed and linked to many cases of corporate abuses.
- Membership in MSIs must only be pursued to exchange information, build collective leverage, get support in implementing HRDD, improve access to non-judicial remedy and overall go beyond legal due diligence requirements. Brands and retailers must not try to use membership in MSIs as evidence of HRDD or as grounds to request exemptions from any requirements of HRDD legislation.
- In a multi-buyer and multi-actor setting, brands and retailers must demonstrate the will and openness to work together and lead rather than wait for others to make the first move in prevention, mitigation, and remediation of human rights violations.
- Brands and retailers as well as MSIs and other responsible business initiatives must actively engage with women workers and other rights-holders, trade unionists, women's rights organisations, and homeworker organisations when designing, monitoring, and evaluating grievance mechanisms.
- Brands and retailers must actively engage with migrant worker groups and support migrant worker rights to ensure that better protection and services are extended to migrant workers and there is enhanced respect for their rights. This includes access to trade unions, improved recruitment practices, and changes to local residency and visa systems such as Kafala.
- Brands and retailers must facilitate access to effective remedy by establishing and enhancing non-judicial grievance mechanisms that meet OECD criteria and if a complaint is brought against the business enterprise, immediately and fully engage in procedures brought to non-State-based grievance mechanisms.
- Brands and retailers must monitor and analyse grievances to identify, remedy, and prevent systemic issues.

1.3.1 <cont>

Overall expectations

- Brands and retailers must make available whistleblowing hotlines, at least one of which shall ensure anonymity of the reporting person and should comply with the requirements of the EU Directive on Whistleblower Protection.¹⁹
- Brands and retailers must ensure transparency of non-State grievance mechanisms including on the outcomes of grievance procedures (what remedy was provided, how does it compare to remedy requested, why a process failed if that was the case, etc).
- Brands and retailers, as well as MSIs and other collective initiatives must ensure the independence of the entities that determine the merits of complaints and how violations should be remedied.
- Brands and retailers must ensure that women will benefit equitably from any remedies by taking into account the specific barriers that women face when trying to access justice and remedy, for example, limits on freedom of movement and time-poverty due to unpaid care work.
- Remediation efforts undertaken by brands and retailers should not hinder the work of trade unions nor hinder access to other remediation mechanisms workers may have.
- Brands and retailers must refrain from "cut-and-run" as a response to human rights violations at a supplier factory. They must engage with the management to mitigate and remedy the violations and prevent them in the future. In general, the termination of business relationships should be used only as a last resort.
- In case of termination of a business relationship brands and retailers must adopt a phase-out plan to ensure that workers, irrespective of their formal employment status, receive the wages and benefits they are entitled to and to compensate job losses by prioritising the hiring of workers affected by other suppliers.

SPOTLIGHT 1:

Examples of remedy measures expected of brands and retailers

COMPENSATION: Remediation has to enable the victims and their families to either truly overcome the damage or at least to be adequately compensated for the damage suffered. In practice, remediation will therefore often include financial compensation and non-financial assistance. All too often charity actions are falsely called "compensation". Real compensation must however go beyond a one-time payment and include the long-term perspectives of the affected rights-holders. The Rana Plaza Arrangement and the Tazreen Trust funds demonstrate how such compensation schemes can be implemented.

FACILITATION OF REINSTATEMENT: Often workers are confronted with dismissals because of their trade union activities. Remediation in such circumstances includes the full and swift action of sourcing brands and retailers in order to clarify the allegations together with all involved parties; the facilitation of the reinstatement of workers (if they wish to be reinstated); and full back pay of wages the dismissed workers missed.

RESPONSIBILITY FOR SOCIAL SECURITY: Brands and retailers should ensure that workers receive social security benefits even if the supplier has failed to register them with the national social security program or to keep social security contributions up to date. Brands and retailers should be monitoring on a regular basis whether their suppliers are putting aside funds for severance pay, are registering new workers for social security, including provisions for migrant workers, and are up to date with their employer and worker contributions to the government social security system.

RESPONSIBILITY FOR SEVERANCE PAY: Brands and retailers have the responsibility to provide financial remediation in cases where their supplier fails to pay full severance when factories close down. A situation where workers are left alone without their full wage and severance packages must not occur.

1.3.2 Enforceable Brand Agreements

We call upon brands and retailers as well as all other relevant stakeholders – depending on their position in the system – to support, promote, negotiate, and conclude value chain Enforceable Brand Agreements (EBA) on core issues such as wages, gender-based violence, freedom of association, and health and safety. Key aspects of such agreements include:

- **The agreement is negotiated, implemented and signed by at least one brand or retailer and local trade unions, preferably involving Global Union Federations (GUF) (where trade unions are associated with GUFs).**

What distinguishes EBAs from regular worker-management or collective bargaining agreements is that they are negotiated with brands and retailers that order goods from the involved factory but do not directly employ the workers concerned. As buyers, these brands and retailers have a responsibility for working conditions under which their products are made, and thus for workers' rights along their entire value chains. Employers can be a party to an EBA as well. (For example, in the Freedom of Association Protocol (hereafter: FoAP) in Indonesia, they are party to the agreement, whereas in the Bangladesh Accord on Fire and Building Safety (hereafter: the Bangladesh Accord), they are not.)

Trade union representation is essential to ensure that the needs of workers can be democratically represented, but which level of trade union (eg workplace, sector, national, or global) should represent workers in negotiating, implementing and overseeing the agreement will differ depending on the national context, including possible legal restrictions.

- **The agreement has workplace level application in one or more workplace(s) within the existing supplier base of the signatory brand or retailer to address the root causes of workers' rights violations relevant to the local context.**

What distinguishes these forms of agreements from other agreements (including international framework agreements or IFAs) is that whilst they may include 'frameworks of principle', they articulate a detailed negotiated and time-bound agreement for tackling a particular issue at specific workplaces within the supplier base of the signatory brand(s).

The agreements deal with a 'root-cause' issue that is relevant to the local context. The agreement tries to solve a major existing problem by addressing root causes, rather than dealing with a whole host of different (albeit interrelated) issues. For example, the Bangladesh Accord deals with worker safety and health, and the FoAP in Indonesia with Freedom of Association.

- **The agreement is transparent, enforceable and implementable with mechanisms to ensure that signatories take action.**

The agreements must be enforceable in the sense that they support the ability of local trade unions to move signatory brands more quickly and/or effectively to take action than if the agreement did not exist. There must be clauses that make the agreement a binding contract that gives the possibility for legal redress. Enforcement mechanisms can include monitoring and arbitration within the scope of the agreement or with a neutral third party, or different types of dispute settlement can be outlined including binding arbitration or other forms of legal redress (national or extra-territorial). To be both enforceable and implementable, the agreement must detail the role and responsibilities of signatories.

1.3.2 <cont> Enforceable Brand Agreements

Effective enforcement of the agreement is greatly helped by continued campaigning. Periodic reporting of compliance within the public domain is a pre-condition for effective implementation. High levels of transparency increase the possibility of both workers and the public applying scrutiny and raising complaints where the agreement's provisions are being violated.

- **The agreement empowers workers and their organisations.**

The agreement should promote the empowerment of worker-led organisations. Worker and local trade union ownership over the agreement is necessary for it to be empowering, and both should have a crucial role in implementing and enforcing the agreement. Therefore, the agreement should ideally also contribute to increasing the political space of local trade unions. For this reason, it is vital that EBAs explicitly protect the enabling right of FoA and that trade unionists are provided with the training and support they require to allow them to nurture and develop bargaining skills. In this way they can gain the confidence and capacity to engage effectively in a range of bargaining arenas and effectively utilise FoA.





PART 2 BACKGROUND

Policy context and
garment workers' reality

2.1

Policy context:

States and companies have a defined responsibility

Over the past decade a number of soft-law and other responsible business initiatives have been launched by multilateral organizations, national governments, NGOs, and other stakeholders. This part of the paper summarizes some that are of particular relevance for the garment sector, although their uptake and impact have been too limited to ensure that garment workers' human rights are comprehensively respected, protected, and fulfilled.

2.1.1 The United Nations

In 2011, the United Nations Human Rights Council endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs), which highlight how both states and companies are expected to uphold human rights. Organised in three pillars, the UNGPs can apply to all States and to all business enterprises, and they outline several key concepts.

- States have a duty to protect human rights. In meeting their duty to protect, States should, among other things, enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights. Companies have a responsibility to respect human and workers' rights in their value chains.
- To act on their responsibility, companies should implement meaningful human rights due diligence processes. This would enable companies to identify, prevent, mitigate, account for, and remedy both potential and actual adverse human rights impacts.
- Human rights due diligence has to happen in a comprehensive, ongoing, and transparent manner; has to be centered around the workers and other affected rights-holders; and has to include publicly available accounts of the work done.

As part of their duty to protect, States must ensure through judicial, administrative, legislative, or other appropriate means that victims of abuses have access to remedy.

The UNGPs are recognized as the international reference for international standards on business and human rights and have been used as a standard to follow and replicate in both legislative and non-legislative areas.

In an attempt to further the implementation of the UNGPs, States were called upon to develop National Action Plans (NAPs) laying out the strategies and activities they will develop. While NAPs represented a positive way to raise awareness about the issue within government ministries, push for policy coherence, and increase stakeholder engagement, their lack of focus on regulatory options and access to remedy remain a central weakness.²⁰

2.1.2 The Organisation for Economic Co-operation and Development

The Organisation for Economic Co-operation and Development (OECD) published the *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*. The 2018 Guidance aims to help enterprises in the sector implement the due diligence recommendations contained in the OECD Guidelines for Multinational Enterprises (reviewed in 2011) in order to avoid and address potential negative impacts of their activities and value chains.

The Guidance was developed through a multi-stakeholder process and was approved by the OECD Council. It is aligned with the International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work, relevant ILO Conventions and Recommendations and the ILO Tripartite Declaration. It includes recommendations on how to address issues particularly salient in the garment sector, such as forced labour, occupational health and safety, responsible contracting of homeworkers, wages, trade unions, and collective bargaining.

Through a detailed explanation of the different due diligence steps,²¹ the Guidance also clarifies how to meaningfully engage with stakeholders, including vulnerable or marginalized ones, how to best identify risk factors and potential harms and what adequate grievance and remediation mechanisms should look like.

Whereas it is not perfect, the Guidance could make a big difference in the garment sector – if it were fully implemented. As we show in section 2.2, that is by far not the case, and this Guidance largely remains a set of unfulfilled aspirations.

2.1.3 Multi-stakeholder initiatives

In an attempt to foster dialogue and due diligence implementation, some States have supported the development of multi-stakeholder initiatives (MSI). In the garment sector, initiatives such as the *Partnership for Sustainable Textiles*²² in Germany or the *Agreement on Sustainable Garments and Textiles* (AGT)²³ in the Netherlands (see Spotlight 2) were launched.

SPOTLIGHT 2:

The Dutch Agreement on Sustainable Garments and Textile

The Agreement on Sustainable Garments and Textile (AGT) was launched in 2016 with the Dutch government's backing. It aims to improve working conditions, prevent pollution, and promote animal welfare in production countries in the garment and textile sector.²⁵ Companies are expected to carry out due diligence aligned with the recommendations in the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. The AGT has been fostering exchanges between its corporate members and made progress by introducing aggregated value chain transparency via the Open Apparel Registry. However, a recent evaluation of the members' due diligence reports²⁶ showed that corporate actions and reporting on human rights abuses, mitigation measures, rightsholder engagement, individual value chain transparency, and complaint mechanisms have been quite limited. The ambition that a living wage would be paid throughout companies' production or value chains by 2020 was abandoned in 2019. That is despite a lack of living wages being one of the most salient and widespread risks in the garment sector. This is but one example of voluntary agreements not yielding sufficient results, which supports the argument that we need binding legislation with strong and independent supervision.

Those two initiatives are the only ones, along with FairWear Foundation, that meet our criterion for a genuine MSI: namely, that trade unions, and preferably also other labour rights organisations, have a seat on the Board (rather than be performing a mere advisory function, or none at all, as is the case with other responsible business initiatives in the garment sector).

Even though these platforms allow for experience-sharing, capacity development, and some individual and collective action, they still fall short, by far, of ensuring respect for human rights by businesses.

2.13 <cont> Multi-stakeholder initiatives

General uptake, implementation of due diligence policies, and access to complaint mechanisms remain flawed.²⁴ Also, with mechanisms such as the AGT entailing mere voluntary commitments, brands are free not to commit or to opt out of the agreement without consequences.

2.1.4 Binding requirements

Several initiatives at national, EU and international level have been launched in recent years to introduce binding requirements and fulfil the first pillar of the UNGPs.

Legislation focused on public reporting on value chain due diligence or specific human rights risks – mainly modern slavery – was passed in the European Union, United Kingdom and Australia.²⁷ Italy extends the company's liability to their third parties' violations with extraterritorial coverage through the Italian law decree no. 231/2001 on corporate criminal liability. Companies can be required to put in place specific measures aimed at preventing such crimes committed by them or by their third parties (such as suppliers). If a crime occurred and the company had obtained an advantage or a profit, it shall be criminally responsible even if preventive measures had been followed. While human rights violations are not explicitly included in the law, this model could constitute a precedent on which to base corporate criminal liability.

These initial efforts are now complemented by much more ambitious mandatory human rights due diligence and corporate accountability measures. Several EU countries have developed (eg France) or are moving towards the development of such rules (eg Germany, Netherlands, Finland).

SPOTLIGHT 3:

French duty of vigilance law

After five years of intense mobilisation of French NGOs, trade unions, legal experts, and Members of Parliament, the "Law on the duty of care of parent and subcontracting companies"²⁸ was adopted in March 2017. This groundbreaking law establishes the human rights obligations of companies for their activities worldwide and places the burden of responsibility for preventing human rights violations and environmental degradation on parent and outsourcing companies.

Companies headquartered in France that employ more than 5,000 employees in France or 10,000 worldwide are obligated to set up a vigilance plan. This plan must, among other things, include measures to identify risks and prevent serious human rights or environment-related violations resulting from its activities, whether directly or through its subsidiaries and subcontractors or suppliers. If companies fail to observe this, a progressive infringement procedure can be launched. In the most serious cases it could lead up to holding the company liable for breach of the duty of care. At the time of writing, six formal injunctions against French companies in different sectors have been issued. One case against the oil and gas company Total was brought to court for failure of duty of care.²⁹

The law is not without significant shortcomings. The burden of proof still lies with the victims; the threshold for companies to be covered by the law is too high; and the definition of subcontractors and suppliers is too restrictive.³⁰ Furthermore, there is no public body responsible for the implementation of the law and for verifying the publication and quality of the plans. This is therefore left up to the limited capacities of civil society. An assessment of vigilance plans found a lack of compliance in publishing the annual plan on HRDD. It also found quite heterogeneous reporting that revealed a general lack of stakeholder engagement in the preparation of the plans, patchy risk assessments, imprecise or weak measures to minimize risks, and hardly any reporting on the monitoring of the risks and of the effectiveness of measures. This clearly shows the need for strong monitoring and enforcement mechanisms to be included in any such regulatory measures.

Nevertheless, the law did bring corporate accountability one step closer in France and beyond, as it emboldened the processes for a UN Binding Treaty on Business and Human Rights as well as the future EU legislation on value chain due diligence.

2.1.4 <cont> Binding requirements

The European Commission has announced it will submit a legislative proposal on "sustainable corporate governance" including value chain due diligence in 2021.³³ The EU Council Conclusions on Decent Work in Global Supply Chains recognized as a consensus among EU Member States that voluntary measures and MSIs can play an important role and raise awareness, but "are unlikely to significantly change the way businesses manage their social, environmental and governance impacts and provide an effective remedy to those affected (para 21)". Hence, they called on the European Commission to table a proposal on cross-sector corporate due diligence obligations along global value chains (para. 46).

At the United Nations level, negotiations are ongoing for a UN Treaty on an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. This is something that Clean Clothes Campaign has been calling for,³⁵ as we believe that a strong and binding multilateral instrument would bring the much-needed positive change that voluntary measures have failed to deliver.

Indeed, almost 10 years after the adoption of the UNGPs, human rights violations remain rife. Turning these principles into binding obligations is crucial to ensure that companies can finally be held accountable for their human rights records: through a duty of care and due diligence obligations for companies, and improved access to justice for victims of human rights violations.



2.2

Where we are in practice: Profit-maximising trumps voluntary standards

Factory management dismisses a group of workers who recently tried to form a trade union. Supervisors shout abuse at women who work at the factory and do not allow them to use the toilet. Following a sudden factory closure, workers are left without their meager wages and legally owed severance payment. Part of a building collapses, injuring workers who are told to keep quiet about the incident and some later dismissed for taking sick leave. Workers are forced to work overtime which is not adequately paid.

These summaries correspond with some of the urgent appeals for assistance received by Clean Clothes Campaigns in the course of the last year. They also correspond with many previous cases that demonstrate how – while paying lip service to ‘Corporate Social Responsibility’ – garment companies pursue profit-maximising at the expense of workers’ lives and human rights. The main difference with earlier years is that the Covid-19 pandemic has laid bare the stark power imbalances in the garment industry.

2.2.1 Corporate practices at the roots of problems

Unfair purchasing practices

The Covid-19 crisis made it more obvious than ever that many fashion brands, retailers and e-tailers use their market power to impose unfair business deals on their suppliers and fail to observe due diligence with regard to their purchasing practices. As Worker Rights Consortium pointed out, "A glaring example of the inequities in apparel supply chains and the way they are worsening the present crisis are the terms of payment between buyers and suppliers. It is suppliers that must cover all the up-front cost of apparel production, from buying the fabric to paying workers to sew the garments. Brands don't pay a penny until weeks or months after they receive the finished goods. In effect, suppliers with a tiny fraction of the financial resources their customers possess are required to subsidize their customers' cash flow".³⁶

It is well-documented that fashion brands and retailers canceled and delayed payment of orders worth billions of euros and asked for discounts in response to the pandemic, causing unpaid workers' wages;³⁷ that brands and retailers have been using pricing strategies for orders since the start of the pandemic that harm the viability of their suppliers' business and have further negative consequences for workers;³⁸ and how, as a consequence of this high market pressure, union-busting became more frequent.³⁹ Additional research is showing that as brands and retailers placed new orders with suppliers during the continued COVID-19 pandemic, irresponsible purchasing practices (such as demanding price discounts and longer payment schedules) remain widespread.⁴⁰

The pandemic further exacerbated the acute, yet systemic, issue in the buyer-driven apparel value chains: prices, delivery dates and payment terms are not negotiated between equal partners. Instead, they are largely unilaterally determined by brands and retailers at the buyers' end of the

2.2.1 <cont> Corporate practices at the roots of problems

deal.⁴¹ As a consequence, garment factories – the suppliers – cut corners on wages, safety, social security contributions and other compliance-related costs, and they convey the price pressure to lower tiers in the value chain.⁴²

These profit-maximising purchasing practices have long displayed structural characteristics such as unstable relationships between buyers and suppliers; a profit squeeze through falling unit prices; and pressure through lead times and delivery schedules with ever shorter delivery lead times, rush orders, abrupt order cancellations and fragmentary orders.⁴³

SPOTLIGHT 4:

From small companies to national public procurement: an obligation for all

Smaller companies are not immune to the risk of causing human rights violations in their value chain operations, and the need for responsible corporate practices and due diligence processes applies to companies of all sizes. For instance, many Belgian garment brands are small or medium enterprises (SMEs), yet they were recently accused of being linked to labour rights violations in their value chains.⁴⁴ In two Romanian facilities producing uniforms for the Belgian federal police and the armies of several NATO states, workers testified about low wages, debts they incur to cover basic needs, high work pressure, and extreme heat in the factories during summer. This example of Belgian brands also highlights the importance of improving public procurement requirements to ensure that companies carry out human rights due diligence -- and that public procurement is not tainted by human rights violations. States have a duty to protect human rights and they "should promote respect for human rights by business enterprises with which they conduct commercial transactions".⁴⁵ The EU Directive on public procurement (2014/95/EU) allows contracting authorities to better take social and environmental aspects into account when awarding procurement contracts on the basis of the best price-quality ratio. With 250,000 public authorities in the EU annually spending around 14% of GDP on the purchase of services, works and supplies, public buyers have significant leverage over corporate practices. In Belgium, the 2016 law on public procurement⁴⁶ contains sufficient mechanisms to make procurement more sustainable. However, public contracts, especially at the federal level, are still often awarded to the lowest bidder without sufficient consideration for social issues.

The *OECD Due Diligence Guidance on Responsible Supply Chains in the Garment and Footwear Sector*⁴⁷ recognizes the harmful impact of purchasing practices on workers' rights, including low wages. The numerous product cycles or seasons per year associated with the 'fast fashion' model, late and delayed payments, and price negotiation strategies requiring cost-cutting by suppliers are all singled out for their potential of adverse effects. The OECD Guidance recommends that businesses assess whether their purchasing practices contribute to harm, implement control measures to prevent contributing to harm, and develop management procedures that purchasing departments should follow to mitigate against harm.⁴⁸

2.2.1 <cont> Corporate practices at the roots of problems

Reliance on the flawed social auditing system

The dominant practice of 'corporate social responsibility' fails to account for negative impacts of purchasing practices. In terms of addressing human and labour rights violations in their value chains, most fashion brands, retailers and e-tailers rely on social auditing and its superficial detection of problems at the supplier level. As the ILO put it, "These efforts generally involve attempts by lead firms to monitor their suppliers for compliance with labour standards, but do not address the practices of the lead firms themselves that may undermine supplier compliance".⁴⁹

In other words, this system contributes to shifting the burden of correcting harms to the suppliers while ignoring the harm from the buyers' purchasing practices. At times, the widespread reliance on social auditing can even be deadly. We have documented cases where private social auditors certified workplaces as safe shortly before preventable losses of workers' lives occurred in those factories.⁵⁰

Together with global trade unions we have also long pointed out that value chain codes of practice adopted by voluntary private initiatives "result in 'social audit reports' or even 'certification' that the workers' freedom of association is respected even in countries where the state does not permit or severely restricts this right. This practice has had the effect of redefining the human right for the purpose of showing to the public that there are no violations of human rights."⁵¹

SPOTLIGHT 5:

Social auditing as a fig leaf for fashion

When Ali Enterprises factory in Pakistan burst into flames on 11 September 2012, most workers were trapped behind barred windows and locked exit doors. Some managed to escape from the four-story building by jumping from windows considered too high to require bars. This left over 250 people dead and 55 seriously injured. Ali Enterprises was a clear death trap, without working firefighter equipment or fire alarm, only one functional fire exit and a building that violated many local and international regulations. Nevertheless, only three weeks before the fire, the factory was certified under the internationally recognized SA8000 standard by Italian auditing company RINA. Another tragic example is a boiler explosion at the Multifabs Ltd factory in Bangladesh that killed at least 13 people and injured dozens more. This happened after an amfori BSCI audit by TÜV Rheinland had failed to identify a series of documented and publicly available safety risks. You can find more examples of the failings of corporate social compliance and social auditing systems in our 2019 report *Fig leaf for fashion*.⁵²

2.2.2

Widespread human rights violations

On 23 April 2013, large structural cracks were discovered in the Rana Plaza building in Bangladesh. Lower floors were shut down. Garment factory owners on the upper floors, however, ordered the workers to return the following day. On 24 April, the entire eight-story building came crashing down, killing 1,134 people and leaving thousands more injured.⁵³ Six months earlier, on 24 November 2012, a fire broke out in the Tazreen Fashions garment factory, also located in Bangladesh. Exits to the outside were locked. Over a hundred workers were injured by jumping from the windows on the upper floors – the only way out. At least 112 workers died.⁵⁴

Factories that are unsafe to the point of being death traps are the issue that draws most public attention, especially when lives are lost. This is also the area in which limited but important progress has been achieved following Rana Plaza and other tragedies, for instance through the Bangladesh Accord on Fire and Building Safety. However, human rights violations are still prevalent throughout garment value chains, illustrating that the dominant business model rests on systemic exploitation and abuse.⁵⁵

The Clean Clothes Campaign's urgent appeals (UA) mechanism has helped address hundreds of violations involving some of the world's best known fashion brands that typically present themselves as 'ethical' in one way or another. Freedom of association is at the forefront of those UA cases. Frequently workers start organising over other issues, and then they are fired, harassed and/or threatened as a result. The issues they try to address by organising are typically related to wage, bonus, overtime and/or production targets.

The *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* identifies the following as key areas of sector risks: child labour; forced labour; working time; occupational health and safety; trade unions and collective bargaining; wages; sourcing from homeworkers; sexual harassment; and sexual and gender-based violence in the workplace.

SPOTLIGHT 6:**Human rights abuses in the Uyghur region**

China is one of the two largest cotton producers in the world and the largest producer and exporter of yarn as well as of textiles and apparel. As much as 84% percent of Chinese cotton comes from the Xinjiang Uyghur Autonomous Region (Uyghur Region), which alone accounts for over 20% of global production.⁵⁶

There is growing evidence that the Chinese government is perpetrating human rights abuses on a massive scale in the Uyghur Region, targeting the Uyghur population and other Turkic and Muslim-majority peoples on the basis of their religion and ethnicity. These abuses include arbitrary mass detention of an estimated range of 1 million to 1.8 million people and a programme of re-education and forced labour.⁵⁷

As a result, the yarn, textiles and garments made with Chinese cotton are at extraordinarily high risk of being tainted with forced and prison labour, whether manufactured in China or anywhere else in the world. Moreover, the government policy of using forced labour as a means of social control creates significant risk of the presence of forced labour at virtually any workplace, industrial or agricultural, in the Uyghur Region. Accordingly, operating in the Uyghur Region in accordance with the UNGPs has become a practical impossibility. There are no valid means for companies to verify that any workplace in the Uyghur Region is free of forced labour or to prevent the use of forced labour in these workplaces in line with human rights due diligence.

Given the pervasive scope of the abuses, buyers need to operate on the assumption that all products partially or completely produced in the Uyghur Region are at high risk of being tainted by forced labour. The *Coalition to End Forced Labour in the Uyghur Region*,⁵⁸ including Clean Clothes Campaign, therefore calls on the textile and apparel industry to act on these abuses and ensure that the industry does not benefit from the forced labour of Uyghurs and other Turkic and Muslim-majority peoples.⁵⁹

2.2.2 <cont> Widespread human rights violations

Exploiting and perpetuating gender-based inequality

An industry characterized by human rights violations, that largely produces in countries with high levels of gender inequality⁶⁰ and where an estimated 80% of its workforce consists of women, can only be seen as one that profits from, as well as perpetuates, deeply entrenched gender discrimination.⁶¹

Again, garment brands may declare in their codes of conduct or advertising that they are "pro" gender equality, and perhaps they are selling T-shirts with feminist slogans. But these same pieces of clothing are most likely made by women who receive poverty wages and are: often deprived of maternity leave, child care and safe travel to work; prevented from forming or joining trade unions; forced to work overtime, frequently in unsafe factories; regularly harassed by male supervisors; and faced with gender-based violence.⁶² Women often work under precarious conditions, without contracts or being paid piece rates, and are more likely to do unpaid work that lies outside contractual agreements.⁶³

SPOTLIGHT 7:

Pervasive gender-based violence and harassment

Research in Bangladeshi factories (published in 2020) found that 75% of the interviewed workers regularly experience gender-based violence, and around 75% of these workers regularly become victims of sexual harassment.⁶⁴ Two years earlier, research in H&M's, Gap's and Walmart's Asian garment value chains revealed numerous instances of physical violence, acts that inflicted sexual harm and suffering, verbal abuse, coercion, threats and retaliation, and routine deprivations of liberty including forced overtime. These were found to be a direct result of how brands conduct business.⁶⁵ In Lesotho, nearly two-thirds of the interviewed women workers at Nien Hsing's factories reported experiences of sexual harassment, either their own or of their co-workers. Those who reported abuses typically faced retaliation. Brands' voluntary codes of conduct and monitoring programs let gender-based violence and harassment go on undetected.⁶⁶

Many women working in the garment industry are additionally discriminated against based on their ethnic origin, age, migration status, and/or other factors that give rise to intersectional discrimination. This "takes place on the basis of several personal grounds or characteristics/identities, which operate and interact with each other at the same time in such a way as to be inseparable".⁶⁷

Working hard for a poverty wage

The right to a living wage has been widely recognized (albeit under various terms),⁶⁸ but it is widely ignored in global production value chains. That holds for fast fashion, luxury brands and worker apparel alike.

In 2019, our research revealed that no major clothing brand was able to show that workers making their clothing in Asia, Africa, Central America or Eastern Europe were paid enough to escape the poverty trap.⁶⁹ Wages paid were on average two to five times less than the amount a worker and her family would need to live with dignity. In European countries included in most recent research, wages paid at the factory level were as low as 13% (Romania), 20% (Bulgaria), and only up to 33% (Serbia) of the estimated living wage.⁷⁰

SPOTLIGHT 8:**Checking fashion's wage data**

The official interpretation of the UNGPs makes it clear that the company duty exists "independently of states' ability and/or willingness to fulfil their own human rights obligations. And it exists over and above compliance with national laws and regulations protecting human rights."⁷¹ This means that even if state governments fail to pass minimum wage legislation at a level that protects workers and ensures they are able to live with dignity, brands have a duty to ensure that workers nevertheless receive living wages.

Yet out of the 108 recently surveyed brands within our EU-funded Fashion Checker project, only 28 have published a clear commitment to ensure that a living wage is paid across its supplier network; and only three have published a time-bound, public action plan describing how they will achieve a living wage for workers in their value chains. Field research conducted in parallel found that not a single worker surveyed was earning a living wage, while one in four were paid below regional or national statutory minimum wage level without working overtime. Furthermore, worker interviews point to a significant gender pay gap, but not a single brand surveyed provided evidence or public information on overall gender pay gaps in its value chain. You can read more in our *Out of the shadows* report.⁷² Data on specific brands is available at fashionchecker.org.

Trade unions seek wage increases through collective bargaining with employers at the workplace level, sectoral level and national level. However, given the buyer-driven nature of the garment and sportswear business model, it is brands and retailers that control orders and define the prices they pay for garments and sportswear. Therefore, room for negotiation among social partners in producing countries is limited.

Factory owners say they have no choice but to keep wages low due to the low prices paid by buyers, and workers may find themselves under threat of losing their jobs or risking physical harm if they ask for higher wages. Governments, for their part, have kept minimum wages low under pressure from brands and retailers, and in a bid to create or protect jobs, raise export levels and boost GDP. As a result, where statutory minimum wage exists, it is far from sufficient to provide for workers' and their families' basic needs. Furthermore, the frequently overlooked subcontracted homeworkers typically receive payments below legally mandated minimum wages.

Discussions about wages tend to be linked with productivity. "When it is not possible to keep real wages down, supplier firms can turn to a long-held practice in the sector: increasing work intensity by increasing worker production targets. For example, a worker might be told she needs to perform 90 operations per hour as opposed to the previous requirement of 80."⁷³ In other words, as long as brands fail to pay higher prices to their suppliers – with safeguards to ensure that additional amounts actually reach the workers – there will be pressure for workers to achieve higher production targets every time minimum wages are revised.

All this leaves tens of millions of garment workers and their families trapped in poverty and deprived not only of living in dignity but of a whole range of basic human rights and fundamental freedoms.⁷⁴

2.2.2 <cont>

Widespread human rights violations**Freedom of association under sustained attack**

The right for workers to form or join trade unions is an integral part of the International Bill of Human Rights⁷⁵ and a core enabling right that supports the fulfilment of other rights.⁷⁶ Freedom of Association (ILO Convention 87) and the right to collective bargaining (ILO convention 98) are also recognized as fundamental and universal rights by the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

The protection of freedom of association and the effective recognition of the right to collective bargaining would be crucial to structurally improve labour rights conditions, change the gender-based power inequality, and help address and prevent gender-based violence and harassment.⁷⁷ However, social norms that limit women's voices and participation in society⁷⁸ put these rights under additional strain.

Freedom of association is persistently under attack in the garment industry, which to begin with, largely produces in countries with weak human rights protections.⁷⁹ Indeed, in the latest ITUC Global rights index⁸⁰ a number of preferred sourcing destinations were found to provide no guarantee of workers' rights. They include several South American production countries as well as Cambodia, China, Vietnam and Bangladesh, among others. Bangladesh is listed as one of the world's 10 worst countries for workers' rights. Many other production countries, such as Ethiopia, Myanmar and Pakistan, were found to be characterized by systematic rights violations.

Sector risks identified in the OECD Due Diligence Guidance⁸¹ relating to violations by workers' direct employers include various forms of intimidation and anti-union behaviour; the promotion of employer-dominated structures, weak worker involvement mechanisms and corrupt labour relations practices; the refusal to bargain in good faith; systemic or organised employer opposition and hostility to trade unions; and the negative effect of short-term contracts and other forms of casual contracts and informal employment on the ability of workers to organise.⁸² Migrant workers are subject to especially strong restrictions on their right to organise as well as particularly vulnerable to trafficking and forced labour.

SPOTLIGHT 9:**Increased union busting under the veil of the pandemic**

The Covid-19 pandemic has given garment factories around the world an excuse to dismiss workers en masse and many have used this opportunity to selectively remove union leaders and members from their factories. In Myanmar, the young trade union movement is being threatened as discriminatory layoffs are followed by violent assault on union leaders, harassment and intimidation of members and arrests and imprisonments of workers for joining peaceful strike action.⁸³ Similar approaches to union busting are also occurring in Bangladesh, Sri Lanka, Haiti and Cambodia.⁸⁴ Although the decision to use the Covid-19 crisis to bust a union is taken at the level of the factory, responsibility does not stop there. Garment brands and retailers have immense influence over their value chains and are accountable for how workers are treated in the factories they source from.

Crucially, anti-union violations by factory management may be induced by the workers' indirect employers: the garment brands that buy the products the workers make. Where a supplier believes that anti-union behaviour is necessary in order to meet contractual obligations regarding price or deadlines, or to enter into or continue a business relationship with the buyer, this buyer shares responsibility for the violations.

2.2.3 Acute lack of value chain transparency

Human rights violations summarized in the previous section take place in an industry characterised by a lack of transparency.

The opacity maintained around the complex global value chains and the confidentiality of contractual obligations make it challenging to identify which factories produce for which brands, and whether a specific supplier is respecting workers' rights and providing safe working conditions. The only public source of information on this are brands themselves. Effectively, what happens in the factory, stays in the factory.

To support increased transparency in the garment sector, some corporate⁸⁵ and civil society-backed voluntary actions have been developed, such as the Transparency Pledge (see Spotlight 10). While considerable progress has been made in this area, still well over 60% of brands do not disclose their production locations. Among those that do, the vast majority stops at Tier 1 suppliers.⁸⁶

We can conclude that voluntary actions will never achieve the necessary structural change: there are no strong incentives for companies not to renege on their commitments, and there will always be laggards, so a level playing field is also in the interest of brands that have taken a lead. Lasting and industry-wide change will happen only with the introduction of binding legal requirements.

Refusal to go transparent is short-sighted

The lack of clear value chain information creates a range of negative consequences. One, it impedes scrutiny of companies' behaviour by consumers and the public as well as an understanding of the real impact of a company's chain of operations and, therefore, the consequences of their purchases. It also prevents workers from identifying the buyers of the products they make, thus weakening their possibility for complaints and remedies, as they may not know the company they are producing for. The company concerned cannot effectively understand the impact of its business operations and reassess its practices after a proper risk evaluation. A lack of transparency also limits the capacity of consumer organisations, trade unions, human rights organisations and other stakeholders to verify brands' CSR claims and due diligence activities and hold them accountable for shortcomings.

On the other hand, transparency has many benefits. It can improve the efficiency of due diligence processes, increase operational efficiency, and enhance a company's reputation.⁸⁷ Transparency allows stakeholders such as workers, labour organisations, human rights groups, and others to swiftly alert garment apparel companies to factory-level labour abuses. This gives companies an opportunity to intervene, stop, and rectify rights violations at an early stage. It also improves access to remedy by allowing workers to identify which brands, retailers and e-tailers, multi-stakeholder initiatives or courts of law they can approach. It makes it possible for trade unions to organize along the value chain of specific brands, which allows them to increase their negotiation power. In addition, increased transparency allows states to identify, in case of human rights violations, those that share the responsibility. Finally, it facilitates brand collaboration and collective action in order to stop, prevent, mitigate, and provide remedy for labour abuses in value chains.

SPOTLIGHT 10:**Transparency Pledge and Open Apparel Registry**

Clean Clothes Campaign, together with eight labour and human rights organisations, launched the Transparency Pledge in 2016.⁸⁸ This is a minimum standard for value chain disclosure and improved product traceability, but companies should not hesitate to move beyond and disclose additional data.

By signing the Transparency Pledge, companies commit to bi-annually publish on their website: (i) the full name of all authorised production units and processing facilities; (ii) the production site addresses; (iii) the parent company of the business at the site; (iv) the type of products made (apparel, footwear, home textile, accessories); (v) the number of workers at each site by category: less than 1,000, 1,001 to 5,000, 5,001 to 10,000, more than 10,000. Companies shall publish the above information in a spreadsheet or other searchable format to allow stakeholders to effectively use the data. By December 2019, 41 apparel companies had fully aligned with the Pledge, 19 more were close to aligning and 15 were partially aligned.

The available suppliers' information is also collected by the Open Apparel Registry. Its mission is "to maintain an open-source, neutral and publicly accessible database of every facility in the global apparel and footwear sector, for the purposes of enabling industry collaboration and improved identification of factories."⁸⁹ Each facility is allocated a unique OAR ID. As of 18 December 2020, the OAR contained 51,734 facilities.

A first step: Non-financial information disclosure directive

The European Directive on the disclosure of non-financial and diversity information by certain large undertakings and groups⁹⁰ represented a first step towards increased corporate transparency and access to information for external stakeholders. This 2014 Directive requires a disclosure of policies and risk assessments, reporting on human rights impacts on human rights, and providing Key Performance Indicators and evidence.

The impact of this legislation is limited, however, by its narrow company scope.⁹¹ It leaves out many companies active in the garment sector that should be required to report on their risks and impacts. Furthermore, the Directive does not provide a common reporting framework or clarity on the depth of information to be disclosed, value chain information provided by companies has been minimal so far, and companies have been cherry-picking specific issues to report on.⁹² For instance, only 20% of the 110 apparel and textiles companies analysed explain how their business model and strategy might have adverse impacts on labour issues, only 14% of these companies disclose their supplier lists.⁹³

While the Directive defines categories⁹⁴ companies should disclose information on, these are very broad. In practice, this means that when companies cherry-pick issues they report on, data on freedom of association, working hours, or living wages is virtually absent from non-financial reporting, even though these are vital for understanding the fuller situation of human rights in garment value chains.

The fundamental limitation of this Directive is its focus on an obligation to report on human rights due diligence and not on an obligation to *do* human rights due diligence. The development of dedicated value chain due diligence legislation at the EU level should fill this gap, and there are clear links to be drawn between these two regulatory tools.

2.2.4 Effective remediation out of reach

What is remediation?

Access to effective remedy⁹⁵ for those whose rights have been violated is a core component ("the third pillar") of the UN Guiding Principles on the Business and Human Rights, with duties and responsibilities resting with states as well as corporations.⁹⁶

In UNGPs, remediation and remedy "refer to both the processes of providing remedy for an adverse human rights impact and the substantive outcomes that can counteract, or make good, the adverse impact". Possibilities include apologies, restitution, rehabilitation, financial or non-financial compensation, criminal or administrative punitive sanctions, as well as injunctions or guarantees of non-repetition to prevent further harm.⁹⁷

The OECD Guidelines for Multinational Enterprises also emphasize the need for enterprises to have processes in place to enable remediation. The corresponding grievance mechanisms may take many forms, but they should all meet the core criteria: legitimacy, accessibility, predictability, equitability, and compatibility with the OECD Guidelines and transparency.⁹⁸

Nominally, there are numerous mechanisms available to remedy seekers, including judicial, state-based, non-judicial, and non-State-based grievance mechanisms.⁹⁹ However – as cases encountered by CCC repeatedly demonstrate and other organisations and reports confirm¹⁰⁰ – the mere existence of grievance mechanisms does not guarantee effective remediation for those who have suffered adverse human rights impacts.



2.2.4 <cont> Effective remediation out of reach

Remediation in the garment industry

Given the nature of most common human rights violations in the garment industry, key forms of remediation from a worker's point of view include: financial compensation, removal of safety risks, reinstatement of trade union leaders, social security coverage, payment of outstanding wages and severance, cessation of forced and/or unpaid overtime, granting of maternity and sick leave, or dismissal of supervisors who harass workers.

What remediation would look like may be clear, but garment workers face many barriers when seeking remedy. They range from the lack of information, fear of retaliation, and insufficient financial resources to weak justice systems in remedy seekers' home countries and jurisdiction hurdles in cases involving multinational corporations.¹⁰¹ Those engaged in litigation who were interviewed for a recent EU Fundamental Rights Agency's report¹⁰² highlighted as especially problematic: the rules on burden of proof, the lack of collective redress, the considerable financial risk for claimants, the lack of sufficient information about available remedies, and the lack of equality of arms which is even worse for third-country nationals.

Those broadly recognized barriers are yet aggravated for garment workers who face widespread gender-based discrimination intersecting with the marginalization of migrant workers,¹⁰³ among other prohibited grounds for discrimination. The lack of value chain transparency further worsens the broadly recognized problem of the burden of proof.

SPOTLIGHT 11:

Long and convoluted ways to justice

The cases of the Tazreen fire and Rana Plaza collapse (see section 2.2.2) led to groundbreaking approaches to prevention and remedy. Brands signed on to the binding Accord on Fire and Building Safety in Bangladesh. Those injured and the affected families received compensation through the Tazreen Claims Administration Trust and the Rana Plaza arrangement.¹⁰⁴ However, that happened only after years of relentless international campaigning and thanks to intense public interest and media attention.

After the Ali Enterprises fire in Pakistan,¹⁰⁵ bereaved families fought for over four years to receive some long-term financial compensation from the factory's main buyer, German discount retailer K&M. However, an attempt to also hold the company legally accountable in German court failed, as did an attempt to hold the Italian auditing company RINA accountable in Italian court for having certified the manifestly unsafe factory as safe according to international standards (SA8000) mere weeks before the fire. Most recently, RINA refused to sign the mediation agreement that was the outcome of a lengthy process at the Italian OECD NCP.¹⁰⁶ More than eight years after the fire, the affected families are therefore still having to fight for justice.

The same holds for the 2,000 workers who are owed millions in severance and unpaid wages after the Jaba Garmino factory in Indonesia suddenly went bankrupt in 2015 following the withdrawal of orders by its main buyer, Uniqlo. And the same goes for hundreds and thousands of other fights by predominantly women workers whose rights are systematically violated on a daily basis.

The collection and documentation of evidence is a key barrier workers face. Workers' grievances brought to non-State-based mechanisms are often dismissed due to a lack of (written) evidence. Not being the owners of such evidence, workers rarely have (safe) access to documentation. The demands placed on them to provide evidence put workers in danger while they are trying to obtain information, for example, by taking photos, labels, or documentation from factories. Despite the fact that it is often within their capacity to do so, the same burden is not placed on business enterprises.

2.2.4 <cont> Effective remediation out of reach

When obstacles to accessing a grievance mechanism such as the OECD National Contact Points (NCP) can be overcome, procedures tend to result in remedies that are inadequate, or they do not lead to a remediation at all.¹⁰⁷

Garment factories and brands' practices

The lack of regulation protecting workers rights, weak enforcement,¹⁰⁸ and inadequate access to judicial remedies in many garment producing countries point to the unfulfilled responsibility of states, but garment brands are also heavily implicated in this picture by: opting to conduct their business activities, even predominantly, in those countries because of the lack of human rights protections; actively inducing the violations through their business practices; and depriving workers of access to effective non-judicial remedies.

The latter happens in many ways. When human rights violations in their value chains come to light, many brands opt to cut-and-run instead of using their leverage for sustainable improvements. They hide behind their memberships in various responsible business initiatives which do not really deliver remedy. A recent in-depth analysis of business-led and genuine multi-stakeholder initiatives (MSIs)¹⁰⁹ – showed that almost a third do not have a grievance mechanism, and of those that do, "nearly all of their complaints procedures fail to meet internationally recognized criteria for effective access to remedy".¹¹⁰

When there is a non-judicial grievance mechanism provided via the brand, an MSI or another type of a responsible business initiative, there may be at best an independent investigation followed by a publication of findings – but independently determining adequate remedy and making sure it is also delivered is not built into the process. When grievance proceedings are initiated at mechanisms such as NCPs, brands may refuse to engage, or they draw out the procedures while public campaigning is put on hold.

Last but not least, when adverse human rights impacts are brought to light via grievance mechanisms, brands and business-led responsible business initiatives neglect their duty – also contained in the UNGPs – to follow through with an identification of underlying systemic issues and the development of (collective) strategies for preventing them.

Thus, access to a non-judicial grievance mechanism is conflated with access to actual remedy for the workers whose human rights have been violated. In other words, access to remedy is increasingly understood in a procedural sense rather than in terms of outcomes for the rights-holders: the workers.

2.3

Conclusion:

Voluntary initiatives and non-enforceable commitments have failed to deliver

About a decade after the adoption of UNGPs, it is clear that reliance on a voluntary framework has proven insufficient and ineffective for workers and the broader society. Neither non-judicial grievance mechanisms nor social auditing, certification schemes, or various (other) responsible business initiatives have had the impact touted at their launch.

Systemic patterns of human rights violations in the companies' value chains speak volumes of a lack of systematic and meaningful HRDD practice. Violations of freedom of association, poverty wages, even with extensive overtime, occupational health and safety issues, and gender-based discrimination and violence are frequently documented in numerous brands' and retailers' value chains – despite their public commitments that they would prevent such human and labour rights abuses.

Most strikingly, many brands' actions towards their suppliers during the Covid-19 crisis have shown that HRDD considerations are in any case disregarded once brands' profits seem to be at risk.¹¹¹ With meaningful HRDD practices, considerations aimed at preventing adverse human rights impacts would have compelled brands to purchasing practices that would assure payment of workers' wages during the crisis, at least as far as possible, or brought them to prepare for responsible disengagement strategies in case they decided to end their business with a supplier.¹¹³

Public disclosure on HRDD practices remains weak and patchy as there is no mandatory requirement to actually do human rights due diligence. Hence, it fails to provide evidence of meaningful HRDD and instead points to gaps and shortcomings. Measures reported by brands to address the identified risks often lack adequate coverage of the value chain. This means that even when successful, those measures will reach only a fraction of the workers who produce the brands' garments, or will only marginally address the risks. Public disclosure under the EU Non-Financial Reporting Directive remains selective in terms of human rights risks, measures taken to address these risks, and indicators of how progress on minimizing these risks has been achieved and is continuously assessed.¹¹⁴

Reports produced by companies in the context of their membership in MSIs and other responsible business initiatives also fall short of providing an accurate and complete picture of HRDD practice.¹¹⁵ For example, a 2020 study on public due diligence reporting by 34 companies that signed onto the Dutch Agreement on Sustainable Garments and Textile – an MSI – showed little to no progress regarding themes such as living wages and freedom of association. Few companies even have insight into freedom of association issues at the factory level, whereas they produce in countries where this freedom is known to be under threat. Companies also report no time-bound goals and accompanying steps to achieve living wages in the near future.¹¹⁶

SPOTLIGHT 12:**Failure to launch:
voluntary due diligence
in Germany**

Compelling evidence that companies' HRDD practice misses the mark comes from the government-backed, representative survey on HRDD implementation by German companies with more than 500 employees.¹¹⁷ Remarkably, only 455 of the 2,254 contacted companies even responded to the latest survey.¹¹⁸ This suggests a selection bias towards those companies that are already more familiar with the concept of HRDD. Yet, only 13-17% of the responding companies were found to have implemented HRDD sufficiently. The survey also revealed that risk analysis and measures to address adverse human rights impacts are the two components of HRDD with which companies struggled the most. While drafting human rights policies seems to be practiced somewhat more widely (38-45%), a vast majority of companies fail to put such HRDD commitments into practice. This conclusion is that much more striking for the fact that the evaluation criteria in the survey are far less elaborate than, for instance, the criteria used by the OECD in its due diligence alignment assessments. The survey sought to answer whether at least 50% of the German companies with more than 500 employees implemented HRDD voluntarily in a sufficient manner. With the obvious failure to meet this threshold, the German government coalition agreement stipulates that the government will support mandatory HRDD at national and EU level.¹¹⁹

About a decade after the adoption of UNGPs, it is clear that reliance on a voluntary framework has proven insufficient and ineffective for workers and the broader society. Neither non-judicial grievance mechanisms nor social auditing, certification schemes, or various (other) responsible business initiatives have had the impact touted at their launch.

Therefore it came as no surprise that eight in 10 stakeholders who took part in the study for the European Commission¹²⁰ thought that "the current regulatory landscape on corporate due diligence is neither effective, efficient nor coherent".¹²¹ Voluntary guidelines and reporting requirements were also found to be "the least effective options for protecting people and the planet" (by 68% and 58% of stakeholders, respectively) that may actually "risk denting protection to rights-holders" by the recent study for the European Commission.¹²²

As already mentioned, EU Member States' governments have also recently pointed out that voluntary measures and MSIs alone were unlikely to lead to impactful change and provide remedy to those affected by harmful business practices. Therefore the EU Council Conclusions called for cross-sector corporate due diligence obligations.¹²³

A voluntary process of self-regulation could have led some companies to conduct meaningful HRDD in the context of the Covid-19 pandemic, and this would have led them to identifying the fact that mass order cancellations would indeed cause adverse human rights impacts. If they nevertheless concluded that the orders had to be canceled or postponed, companies would have done this in a responsible way by mitigating the adverse impacts.

The fact that so few companies opted to act responsibly when the pandemic hit, and that they had to compete in the market with those that did not, further points to a clear need for a mandatory framework – so that responsible business conduct is no longer just a matter of choice of a few businesses then disadvantaged through market competition with the laggards. Instead, this has to be a matter of everyone complying with regulatory standards that protect human rights for all.

Endnotes

- Wick, 2020; CCC, 2016a.
- All conversions based on InforEuro, the European Commission's official monthly accounting rates (Dec. 2017).
- McKinsey & Company, 2019.
- Orendorff, 2019.
- The Lab, 2017; International Trade Map (HS codes 61, 62, 64).
- See CCC, 2016a.
- This part draws on De Schutter et al., 2012: 60.
- OHCHR, n.d.
- See Martin-Ortega & O'Brien, 2020 and De Schutter et al., 2012.
- Ibid: 62. The "Sustainable Corporate Governance" initiative of the European Commission includes proposals to ensure companies can focus on long-term sustainable value creation rather than short-term benefits.
- We thank Action Aid (see Groen & Cunha, 2020) for their formulation of gender-oriented recommendations which inspired ours.
- See EIGE, 2020a.
- The Open Apparel Registry is an open-source tool that maps garment facilities worldwide and assigns a unique ID number to each. It compiles data from multiple sources including large datasets from multi-stakeholders' initiatives, brand and retailer supplier lists, facilities and factory groups, service providers, government databases and more. <https://openapparel.org/>
- OHCHR, 2020.
- This part benefited from presentations and discussions at the OECD 2020 Virtual Global Forum on Responsible Business Conduct (Part II – Access to Remedy, 17 June 2020).
- All these elements are detailed out in CCC et al., 2020.
- "All types of business relationships of the enterprise – suppliers, franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants, financial, legal and other advisers, and any other non-State or State entities linked to its business operations, products or services" (OECD, 2018).
- "Directive 2014/24/EU" (2014).
- Directive (EU) 2019/1937.
- ICAR, ECCJ & Dejusticia, 2017.
- i) Embed responsible business conduct in enterprise policy and management systems; ii) Identify actual and potential harms in the enterprise's own operations and in its supply chain; iii) Cease, prevent or mitigate harm in the enterprise's own operations and in its supply chain; iv) Track; v) Communicate; vi) Provide for or cooperate in remediation when appropriate.
- Partnership for Sustainable Textiles, 2020.
- IMVO Convenanten, 2020.
- SKC & SOMO, 2020; OECD, 2020.
- IMVO Convenanten, 2020.
- SKC & SOMO, 2020.
- European Directive 2014/95/UE on the disclosure of non-financial and diversity information by certain large undertakings and groups; Modern Slavery Act 2015 (U.K.); Modern Slavery Act 2018 (Austl).
- Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (I).
- The case was brought by Amis de la Terre and four Ugandese organisations and is backed by three French NGOs, including the CCC member Collectif Ethique sur l'Etiquette, in relation of two oil projects in Uganda and Tanzania (Reed, 2020).
- Subcontractors and suppliers included in the law are those "with whom is maintained an established business relationship".
- Action Aid et al., 2019.
- European Commission, 2020.
- Council of the European Union, 2020.
- See UNHRC, 2020.
- Clean Clothes Campaign, 2016a.
- WRC, 2020.
- See CCC, 2020; CCC, 2020a; Anner, 2020a; Vogt et al., 2020.
- Better Buying Institute, 2020.
- Khambay & Narayanasamy, 2020.
- Anner & WRC, 2020.
- See Anner, 2020; Vogt et al., 2020; Blasi & Blair, 2019.
- In EU legislation, similar problems have already been recognized in the Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food value chain (EU Unfair Trading Practices Directive). However, this Directive applies only to the agricultural and food value chain and does not address the whole range of human rights impacts through a lens of due diligence.
- Merk, 2005. See also Anner, 2020 on "how purchasing practices of lead firms adversely affect working conditions and workers' rights in supplier factories", specifically "a price squeeze and a sourcing squeeze in which lead firms pay increasing lower prices to suppliers while also imposing short lead times and high order volatility".
- Eeckhout et al., 2020.
- OHCHR, 2011: 8.
- Loi du 17 Juin 2016 relative aux marchés publics.
- OECD, 2018a.
- Ibid.: 73-74.
- Blasi & Blair, 2019: 5.
- See Kelly et al., 2019.
- ITUC et al., 2012: 7.
- Kelly et al., 2019.
- For more information see CCC, n.d.-b
- For more information see CCC, n.d.-a
- See <https://cleanclothes.org/fashions-problems-for-an-overview-of-key-issues-that-CCC-works-on>.
- China Daily, 2020.
- Adams et al., 2020; Zenz et al., 2019; Ryan et al., 2018; Human Rights Watch, 2019.
- End Uyghur Forced Labour, 2020.
- End Uyghur Forced Labour, 2020a.
- See, for example, the Gender Inequality Index (UNDP, 2020).
- Read more in Groen & Cunha, 2020.
- See, for example, <https://globallaborjustice.org/publications/for-workers-concrete-experience-and-quotes>.
- Marx, 2020.
- BCWS, 2020.
- GLJ, 2020.
- See WRC, 2019. Follow-up in the form of an Enforceable Brand Agreement (such as we are calling for in this paper; see "Way forward") is summarized in Abimourched et al., 2019, where the above excerpt is from.
- EIGE, 2020.
- See Nelson et al., 2020: 27-33 for a legal analysis of including living wages and living incomes within HRDD frameworks.
- The "Tailored Wages" report covers Adidas, Amazon, C&A, Decathlon, Fast Retailing, Fruit of the Loom, GAP, G-Star RAW, Gucci, H&M, Hugo Boss, Inditex, Levi Strauss & Co., Nike, Primark, Puma, PVH, Tchibo, Under Armour, and Zalando. See Bryher, 2019.
- Musiolek et al., 2020; Ajder et al., 2018.
- OHCHR, 2011: 14.
- Muller, 2020.
- Anner, 2020: 326.
- While there is no universally accepted definition of poverty, the UN Committee on Economic, Social and Political Rights (the body monitoring the implementation of the Covenant) argues for a multidimensional understanding, whereby "poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights". See ECOSOC, 2011.
- The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.
- Freedom of association is specifically included in the Universal Declaration of Human Rights (Article 23); the International Covenant on Civil and Political Rights (Article 22); and the International Covenant on Economic, Social and Cultural Rights (Article 8).
- Abimourched et al., 2019; GLJ, n.d.; ILO Violence and Harassment Convention, 2019 (No. 190): Article 5.
- Groen & Cunha, 2020: 9.
- The roots of these violations lie in an interplay between state and market failures. We published a paper on this together with global unions in 2012. Its findings and recommendations remain relevant today. The three most important causes of adverse impacts on the right to form or join trade unions are: 1) The failure of the state to perform its duty to protect the right; 2) The active violation of this right by employers; and 3) The organisation of economic activity that prevents this right from being realised. See ITUC et al., 2012: 17.
- ITUC, 2019.
- OECD, 2018a: 148-149.
- See Kärnstrand, 2015, for the example of fixed-duration contracts and their impact in Cambodia.
- CCC, 2020b.
- CCC, 2020c.
- The Fair Labor Association now includes in its membership requirements full disclosure in machine-readable format by 2022.
- More in Fashion Revolution, 2020.
- See Robledo & Treibich, 2020. For further analysis of the benefits of transparency for businesses with specific reference to the Transparency Pledge, see ICAR, 2020.
- Other members of the Transparency Pledge coalition are: Human Rights Watch, Worker Rights Consortium, UNI Global Union, Maquila Solidarity Network, International Trade Union Confederation, IndustriALL, International Labor Rights Forum and International Corporate Accountability Roundtable. See <https://transparencypledge.org/>.
- See <https://info.openapparel.org/mission>.
- "Directive 2014/95/EU" (2014).
- The Directive covers only large undertakings which are public-interest entities with more than 500 employees, approximately 6,000 large companies and groups across the EU.
- At the time of writing, the Directive is going under a review process.
- Based on the 2019 assessment on non-financial reports carried out by the Alliance for Corporate Transparency.
- These are i) environment, ii) social and employee issues, iii) human rights, iv) bribery and corruption.
- From a legal perspective, effective remediation entails the possibility for the competent body to order a cessation of ongoing human rights violations, and reparation or compensation for the victims. See eg De Schutter, 2019.
- States are required to take "appropriate steps to prevent, investigate, punish and redress" human rights abuses within their territory and/or jurisdiction (GP 1). Business enterprises that identify that they have caused or contributed to adverse impacts are required to provide for or cooperate in their remediation through legitimate processes" (GP 22). Pillar III of UNGPs is altogether dedicated to access to remedy. It reminds States to "take appropriate steps to ensure" that those affected by business-related human rights abuses "have access to effective remedy" (GP 25).
- OHCHR, 2012: 6.
- OECD, 2011: 29.
- See overview in Marx et al., 2019.
- Eg Daniel et al., 2015; OECD Watch, 2020.
- See Marx et al., 2019:14-17; Skinner et al., 2013: 32-84; FRA, 2020; Essex Business and Human Rights Project, 2017.
- FRA, 2020.
- See also Groen & Cunha, 2020.
- See <http://tazreenclaimstrust.org/> and <https://franaplaza-arrangement.org/>
- CCC, n.d.-c.
- Clean Clothes Campaign, 2020-d.
- See eg Daniel et al., 2015; OECD Watch, 2020.
- For example, most garment producing countries have ratified ILO Convention 81, yet none of the hundreds of workers CCC has interviewed in Europe since 2013 reported having been contacted by labour inspectors regarding their working conditions or having witnessed an in-depth inspection.
- Unlike the MSI Integrity report quoted here, we only consider responsible business initiatives to be genuine MSIs if trade unions, and preferably also other labour rights organisations, have a seat on the Board (rather than being performing a mere advisory function, or none at all). Only three garment sector focused initiatives currently meet this criterion: FairWear Foundation, the Partnership for Sustainable Textiles in Germany and the Agreement on Sustainable Garments and Textiles in the Netherlands.
- The same MSI Integrity report found that "almost a third of MSIs ... do not provide individuals or communities with the ability to seek remedy for rights violations. Most of those MSIs instead require that their members have a grievance mechanism where rights holders can file complaints, but do not set sufficient standards to ensure that those mechanisms are designed or functioning effectively to enable rights holders to seek remedies." (MSI Integrity, 2020:14).
- See for example Anner & WRC, 2020.
- Ajder et al., 2020.
- Vogt et al., 2020.
- ECCJ & CCC, 2019.
- SKC & SOMO, 2020 and OECD, 2020.
- SKC & SOMO, 2020.
- Adelphi et al., 2020.
- Auswärtiges Amt, 2020. The survey has been conducted as part of the National Action Plan on Business and Human Rights.
- CDU et al., 2018: 156.
- Smit et al., 2020.
- Ibid.
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- Council of the European Union, 2020.

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