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The human rights fitness of audits and certifiers

A position paper

THE ROLE OF CERTIFICATION IN MANDATORY HUMAN RIGHTS DUE DILIGENCE

Corporate responsibility is currently on the political agenda of the German government as well as the European Union. The question at stake is: what should mandatory human rights due diligence (mHRDD) legislation look like?

The UN Guiding Principles on Business and Human Rights (UNGPs) define human rights due diligence as a method for business enterprises “to identify, prevent, mitigate and account for how they address their adverse human rights impacts.” This covers adverse human rights impacts that a business may cause or contribute to through its own activities or business relationships, which may be directly linked to its operations, products or services. The UNGPs are the international standard that the German government as well as the EU are following as they are considering mHRDD legislation.

This position paper uses four case studies to discuss the requirements the auditing and certification industries have to meet to review mHRDD. Because when a new legal standard is created, it has to ensure its own implementation. The paper thus poses the question: how can auditing companies’ human rights fitness be guaranteed?

Auditors and certification companies could potentially act as “verifiers” of human rights due diligence reviews. They could assist states and companies in assessing and determining whether a company has done enough to carefully address human rights risks and negative human rights impacts. A mHRDD regulation could create huge

market growth for the audit and certification sector.

An important human rights area in which audit firms are already active is working conditions. Among other instruments, social audits, labor audits, and occupational health and safety audits are used. There are also sector-specific testing and certification systems, e.g. for conflict mineral supply chains, the private security sector, and the agro-industrial sector. These certification systems cover a range of criteria with varying human rights relevance, such as ecological, sustainable, ethical trade and social standards. Some certification companies also offer services that cover general human rights management that is not sector-specific (such as human rights and social compliance).

A variety of providers currently offer human rights-related services, including external audits, certifications and membership in compliance initiatives. These actors range from individual consultants and auditors to NGOs, multi-stakeholder initiatives (MSIs), industry initiatives, technical certifiers, as well as financial auditors, some of whom engage in further activities, from standard development, to auditing auditors, and lobbying to influence governance and regulation.

Over recent years, we have observed the development of norms and regulations that cover the UNGPs' human rights due diligence requirements in whole or in part. Two tendencies in the human rights-related auditing and certification sector have become visible: (1) it is growing, and (2) it is diversifying. There is a potential danger of becoming a confusingly disperse sector that will offer piecemeal and patchy solutions to the challenging task of reviewing human rights due diligence. The problem: if due diligence verification remains unregulated, and due diligence standards unprotected, mHRDD could become an elastic, potentially empty concept, while competition could increase

to the point where the only surviving model is “quick and dirty” checklist solutions.

When certification goes wrong

“Verification” through audits or certificates can go terribly wrong, as a number of tragic events have shown over recent years. Four exemplary case studies were selected to form the basis of this analysis:

(1) The Ali Enterprises factory fire (2012) killed 258 workers: **social audits** in the textile manufacturing industry (certifier RINA, SA 8000, Pakistan).

(2) The Brumadinho dam break (2019) killed 272 people and contaminated a river: **technical audits** in the mining industry (certifier TÜV SÜD, certificate according to national mining regulations, Brazil).

(3) Faulty breast implants produced between 2001 and 2010 caused serious health problems for many thousands of patients: **product safety audits** for medical products (certifier TÜV Rheinland, certificate according to EU regulations, France/Germany).

(4) Local communities have complained for at least the last 10 years of land-grabbing and displacement, pesticide poisoning and violence: **sustainability audits** for palm oil plantations (multiple international and local certifiers, certification under RSPO scheme, Indonesia).

Dealing with human rights risks: A cross-sectoral analysis

The selected cases show that all these certification sectors inherently carry human rights risks that auditors and certifiers must deal with through their own human rights policies and due diligence processes. This is true regardless of whether the issue is building or product safety, social compliance or environmental management, or the auditing and certification activity itself. Auditors and certifiers must identify the risks of their own activity in contributing or being linked to their client companies' human rights violations, and

prevent or mitigate these risks or impacts. If auditors and certifiers cannot be relied upon, this puts into question their possible role as verifiers of human rights due diligence.

The case studies reveal several vulnerabilities of current human rights-relevant auditing and certification systems and practices:

(1) A lack of integration of **human rights due diligence** as a corporate policy and management principle.

This could be improved if auditing and certification companies are covered by a mHRDD law, particularly if they are active in high-risk sectors, such as textile and agricultural production, mining and medical products.

(2) Deficient **quality assurance of auditing and certification activities**, including for standard setting and

monitoring, as well as a lack of human rights competence at the auditing and certification, as well as accreditation and oversight levels.

(3) Deficient **human-rights sensitive methodology** of auditors, certifiers and accreditors. As a result, there is often a lack of transparency, stakeholder engagement and consideration of not only process, but also impact-related criteria.

(4) Absent or insufficient **integrity management**, largely due to the lack of regulation and oversight, which increases vulnerability to corruption and can impair the objectivity of certificates and certifiers.

(5) Finally, **deregulation and a lack of governance and access to legal recourse** opens gaps in states' compliance with its duty to protect.

The table below lists some of the results of our analysis.

CASE STUDY RESULTS	Case 1: Social audit	Case 2: Technica l audit	Case 3: Product safety	Case 4: Environ. certificat e
HUMAN RIGHTS DUE DILIGENCE				
HRDD policy and HRDD process established by the auditor or certifier	No	No	No	No
HRDD policy and process are accreditation criteria	No	No	No	No
Auditors and certifiers are also qualified in human rights	n/a	n/a	n/a	n/a
Whistleblower protection and grievance mechanisms in-line with UNGPs	No	No	No	No
QUALITY ASSURANCE				
State or state authorized accreditation and oversight	No	Partial	Partial	No
Standard setting includes transparency, stakeholder and public participation transparency	No	Partial	Partial	No
METHODICAL QUESTIONS				
Transparency of scope and applied methods	Yes	No	No	No
Human rights sensitive methodology	No	No	No	n/a

Audit includes review of process and impact	n/a	n/a	No	Not suitable
Active involvement of trade unions, civil society and those affected	No	n/a	n/a	No
INTEGRITY MANAGEMENT				
Selection, hiring, supervision or payment by the interested party	Yes	Yes	Yes	Yes
Parallel engagement	n/a	Yes	Yes	Yes
Termination protection and rotation rules	n/a	n/a	No	No
LACK OF GOVERNANCE AND ACCESS TO LEGAL RECOURSE				
State plays an active role through standard-setting, accreditation, regulation, oversight, sanctions, support	No	minimal	Yes	No
Robust liability regime with necessary procedural safeguards	No	No	No	No
Transparency of audit reports and corrective action plans through public registers or disclosure	No	No	No	No

The following proposals are the result of a cross-sectoral analysis, which sought to apply largely already existing solutions, for example from the financial, product safety and environmental auditing sectors.

HUMAN RIGHTS DUE DILIGENCE

The UNGPs' key message to audit companies and certifiers is: all of them are called upon to establish a human rights policy and effective due diligence management process. Human rights due diligence should therefore become mandatory for audit and certification companies, as for all other business enterprises, in particular compliance schemes. It should also become a precondition for accreditation.

Auditors, certifiers and accreditation bodies should be trained in human rights methods. This includes focusing on rights holders, involving interest groups, and assessing violations rather than damages, especially those that are irreparable. Certification

bodies should also provide complaint mechanisms that meet the standards of UNGP 31, in particular that they are accessible, transparent and rights-based. In addition, they should protect whistleblowers.

QUALITY ASSURANCE

The integrity and reliability of audits and certifications should be ensured by governments or government-authorized accreditation and oversight with a legally defined mandate, authority and procedures. Accreditation criteria should include human rights due diligence standards in accordance with the UNGPs and methodological standards.

The processes for setting standards must be legitimate and credible, they should involve stakeholders, be transparent and involve the public. Trade unions in particular should play a central role. Accreditations and standards should be internationally uniform or mutually recognized.

METHODICAL QUESTIONS

Reporting on tests, applied methods and test results must be transparent in order to allow conclusions about the interpretation and reliability of the results, and to enable public oversight. For example, an audit can hardly detect sexual harassment, illegal salary deductions or the suppression of employee organizations if it only works with announced visits, relies on raw data from the clients, or conducts employee surveys directly at the workplace.

Checklist approaches are insufficient. Instead, methods need to be adapted to the specific risks expected or identified in each field and case. This also means auditors need an adequate payment scheme that allows them to be necessarily thorough.

Where appropriate, trade union and employee representatives should be actively involved in reviews, developing remedial measures and assessing impact. They are the ones constantly on site and have access to informal sources of information to which an external auditor would have little access. This can also apply to civil society organizations and (potentially) affected people. All these actors also need special protection against all forms of retaliation.

INTEGRITY MANAGEMENT

Integrity management refers to: conflicts of interest, anti-corruption and avoidance of courtesy certificates.

When clients engage, supervise and pay audit firms, they are exposed to a structural risk of conflicts of interest, which can lead to a lower level of oversight. Alternatives would be contracts brokered by the state or by an independent fund.

At a minimum, however, protection against dismissal and rotation rules should safeguard auditors and certifiers' independence.

The prohibition of parallel commissioning of audit firms and their employees or agents (also hiring them to perform non-audit services) should be standard practice.

GOVERNANCE AND ACCESS TO JUSTICE

Deregulation of state responsibility and its replacement by private services have reduced states' capacity to respond to severe human rights risks. However, states have an obligation to protect human rights against third party interference. This also means states should exercise effective oversight when contracting or legislating the privatization of the delivery of services (UNGP 5). To meet this responsibility, states may use a smart mix of measures. They may assume the role of standard-setter, accreditation body, regulator for mandatory quality and integrity assurance systems, oversight body with the ability to impose sanctions, as well as supporter offering certifiers guidance, incentives and practical implementation assistance.

Liability and access to legal recourse are necessary elements of a robust oversight system. This way, those (potentially) affected, organized civil society and trade unions can be activated to play an important role in ensuring effective oversight over certifiers. Necessary procedural elements are human rights sensitive rules for legal standing, including representative and group actions, those that alleviate the burden of proof (e.g. through access to information and disclosure rights), rebuttable presumptions, and financial assistance to plaintiffs where needed. Site-specific audit reports, corrective action plans, as well as coverage and methodologies, should be disclosed or disclosable to the public or relevant stakeholders.

Legislative proposals for mandatory human rights due diligence, nationally and at EU level, should cover auditors, certifiers and

compliance regimes, independent of their legal form, as long as their activities qualify as economic activities. Auditors and certifiers should be obliged to establish and implement their own human rights due diligence, also covering their subsidiaries and subcontractors, and should be liable in cases where they intentionally or negligently cause or contribute to adverse human rights impacts. For smaller actors, this may apply only in cases where they work in high-risk sectors.

A good practical example of a non-governmental initiative is the Accord on Fire and Building Safety in Bangladesh, a binding sectoral agreement that includes an independent complaint mechanism and the possibility of arbitration, as well as access to audit reports and clear liability rules.

As far as industry-specific questions of quality and integrity assurance in the audit and certification industry are concerned, legislators and regulatory authorities can use models that have already been developed at national and international levels in the fields of auditing, environmental protection and product safety.

Conclusion

States have a duty to protect human rights. When enforcing compliance with human rights standards is outsourced to private certification bodies, the state must at least ensure that private certification effectively fulfils its purpose. This means that states need to implement effective monitoring and liability of auditors and certifiers.

The discussion about auditing and certification in human rights-relevant fields should go hand in hand with the drafting of mHRDD legislation. If a law cannot ensure that it can be implemented and monitored in practice, it will do little to increase legal certainty and will carry a risk of undermining its substance, for example

through allowing “quick and dirty” checklist solutions. An unregulated mHRDD audit and certification market could provoke the rampant growth of multiple, partial audits. Without sufficient regulation, this will provoke a race to the bottom, as we can already see in the field of social auditing for example. Liability through mandatory human rights due diligence is a central element that will increase auditors and certifiers’ accountability, and as a means of general prevention, will also trigger higher certification quality and integrity.

However, several of the deficiencies identified above are not only a matter of applying proper due diligence. In a highly competitive market, which will become even more competitive if HRDD becomes mandatory, states have a duty to ensure that human rights audits and certifications are substantially reliable, and need to make sure that audit and certification performance improves. States must see to it that auditors and certifiers are “fit” to audit human rights.

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