



FINAL STATEMENT
[Courtesy translation of the German original]

**of the German National Contact Point for the
OECD Guidelines for Multinational Enterprises
at the Federal Ministry for Economic Affairs and Energy**

in response to a complaint filed by the

- European Center for Constitutional and Human Rights e.V. (hereinafter: “ECCHR”), Berlin,
- Garment Workers Unity Forum, Dhaka/Bangladesh,
- Comrade Rubel Memorial Center,
- medico international e.V., Frankfurt am Main,
- FEMNET e.V., Bonn and
- Ms Raima Jahan, Mr Mahmudul Hasan Hridoy, Ms Rikta Khatun Joshna, Ms Morjina Begum and Ms Jesmin Akhter (hereinafter collectively referred to as “Bangladeshi Complainants”)

(hereinafter collectively referred to as “Complainants”)

against

- TÜV Rheinland AG, Cologne (hereinafter referred to as “TÜV Rheinland”) and
- TÜV Rheinland India Pvt. Ltd, Bangalore/India (hereinafter referred to as “TÜV India”)

(hereinafter collectively referred to as “Respondents”)

Hereinafter, Complainants and Respondents will be collectively referred to as “the Parties”.

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A. SUMMARY

- 1 On 2 May 2016, Complainants lodged a complaint with the German National Contact Point for the OECD Guidelines for Multinational Enterprises (hereinafter referred to as “NCP”).
- 2 The complaint relates to a social audit conducted by TÜV India in a textiles factory, which, at the time of the audit in June 2012, was based in the factory building of Rana Plaza in Dhaka, Bangladesh. Complainants contend that this social audit fell short of the standards set out in the OECD Guidelines for Multinational Enterprises. They take the view that responsibility for this lies not only with TÜV India, but also with TÜV Rheinland. Respondents disagree with this view.
- 3 Following the Initial Assessment, the NCP accepted parts of the complaint for further examination and therefore offered the Parties the possibility of a mediation procedure. At the same time, the NCP pointed out that the mere fact that the complaint had been accepted for further examination cannot be construed as confirmation that Complainants violated the OECD Guidelines when conducting the social audit. In accepting the complaint, the NCP acknowledged that the matters raised relate to the application of the OECD Guidelines and declared its view that further examination is justified.
- 4 Whilst the Parties spent much time engaging in active and full mediation talks to resolve the matters raised, they were not able to reach agreement. For this reason, the NCP has decided to publish this Final Statement unilaterally.
- 5 In it, the NCP elaborates on the substance of the procedure and the sequence of events. Furthermore and in line with the OECD Procedural Guidance, the NCP sets out its understanding of the main reasons why the Parties have been unable to reach agreement. The NCP makes use of this opportunity to also give recommendations to the Parties as to how they can independently continue to work on the matters raised. The NCP also invites the Parties to each report back to the NCP one year after receiving this Declaration, detailing the steps they have taken in response to the recommendations given by the NCS and explaining the outcomes.

B. SEQUENCE OF EVENTS DURING THE PROCEDURE

- 6 On 2 May 2016, the Federal Ministry for Economic Affairs and Energy received an email containing a letter also dated 2 May and addressed to the NCP, in which Complainants formally lodged a complaint alleging that Respondents had violated the OECD Guidelines for Multilateral Enterprises (hereinafter referred to as “OECD Guidelines”).
- 7 The OECD Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises and set out recommendations for responsible corporate conduct by international enterprises. The governments of the OECD Member States and other participating countries have committed themselves to promote application of the OECD Guidelines through their respective National Contact Points and to have them investigate any potential violations of the OECD Guidelines by multinational enterprises that are based in one of the participating states or operating from the territory of one of these states.
- 8 Whenever the NCP accepts a complaint, it discusses the matters raised in connection with the Guidelines with the Parties and offers its mediation services so as to support the Parties in finding amicable solutions.

I. Substance of the complaint filed by Complainants

- 9 In their complaint (cf. paragraph 6 above), Complainants gave a full account of the substance of their complaint, to which they added numerous written and oral statements submitted in the further course of the complaints procedure. For the purposes of this Final Statement, the NCP would like to present the following summary of Complainants’ submissions:
- 10 The complaint relates to a social audit by TÜV India of Phantom Apparel Ltd. (hereinafter referred to as: “Phantom”) in Dhaka, Bangladesh, in June 2012. Complainants hold that, for the reasons listed in the following, TÜV India failed to comply with recommendations set out in the OECD Guidelines when conducting the social audit:
 - They allege that TÜV India had not thoroughly verified whether Phantom was engaging in human rights abuses such as child labour, forced labour, gender-based discrimination and/or violations of union rights.
 - Furthermore they say that Phantom was one of the textile factories producing in the Rana Plaza factory building when the latter collapsed on 24 April 2013, going

on to point out that at least 1,138 people had died in the collapse, with another 2,500 sustaining injuries. Complainants allege that TÜV India had failed to point out in its social audit that there were risks with regard to the safety of the building. Furthermore, they argue that TÜV India had failed to take into account the scope of the licences issued for the building.

- 11 Complainants declare that they extend their complaint to include TÜV Rheinland, stating the following reasons: They argue that TÜV India is a subsidiary of this company, owned 100% by it. They allege that TÜV Rheinland failed to take the necessary precautions to ensure that its subsidiary would conduct social audits to the necessary standard. Furthermore, they allege that TÜV Rheinland did not respond to statements made in the auditing report, despite these being obviously incorrect, in the eyes of Complainants.
- 12 Complainants held the view that the shortcomings they allege to have found in the auditing report might have prevented customers and/or factory owners from taking the necessary action to protect workers' rights and to ensure that the building was safe.
- 13 Based upon this argument, Complainants say that Respondents' conduct may have abetted human rights abuses. By way of substantiating these allegations, Complainants make reference to the following provisions of the OECD Guidelines:
 - the recommendations set out in Chapter II (General Policies) on how to carry out risk-based due-diligence (no. II.A. 10 to II.A.12);
 - the recommendations set out in Chapter IV on how to protect human rights in line with no. IV.2, IV.3 and IV.5 and
 - the recommendations set out in Chapter V (Employment and Industrial Relations) with regard to the ban on child labour (no. V.1.c).

II. Submissions by Respondents

- 14 Respondents commented on the complaint in a letter to the NCP dated 16 June 2016, followed by various submissions made in writing and orally. For the purposes of this Final Statement, the NCP would like to present the following summary of Respondents' submissions:
- 15 Respondents expressed their dismay at the collapse of the Rana Plaza building and their sympathy with the relatives of the deceased.

- 16 At the same time, Respondents explained that the social audit of Phantom that had been conducted by TÜV India had not extended to a structural analysis of the building. They argued that the points to be investigated as part of an audit of this kind were defined¹ by standard-making bodies, in this case the Business Social Compliance Initiative (BSCI). Respondents stated that they had not been able to deviate from this procedure on their own initiative. They argue that this was all the more true with regard to a structural analysis of the building as called for by Complainants, as the auditors qualified to conduct social audits had not had the necessary technical expertise.
- 17 Respondents go on to argue that social audits are designed to ensure appropriate working conditions in manufacturing companies and compliance with social standards, to render transparent any shortcomings and to indirectly encourage companies – by means of greater transparency – to prevent and address any shortcomings across the value chain. They maintain that the audit of Phantom conducted by TÜV India had met these criteria.
- 18 Respondents hold that social audits, by their very nature, cannot guarantee full adherence at all times to human rights and social standards. They say that social audits are not a means that could prevent manufacturers or suppliers from acting otherwise. However, they declare, social audits can make a positive contribution to greater compliance due to the feedback received by the companies involved.
- 19 On these grounds, Respondents called upon the NCP not to accept the complaint.

III. Initial Assessment

- 20 The NCP conducted an Initial Assessment of the facts to find out whether the matters raised in the complaint would warrant further examination. This Initial Assessment led the NCP to agree with the Federal Ministries represented in the interministerial group for the OECD Guidelines² that some of the points raised by Complainants should be accepted for further examination (cf. 1. below) and to reject others (cf. 2. below).

¹ In the version that applied at the time of the contract award.

² Federal Ministry of Finance, Federal Foreign Office, Federal Ministry of Justice and Consumer Protection, Federal Ministry of Labour and Social Affairs, Federal Ministry of Food and Agriculture, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Federal Ministry for Economic Co-operation and Development; cf. footnote 1 of the procedural guidance for the German NCP: URL: https://www.bmwi.de/Redaktion/DE/Downloads/J-L/leitfaden-zum-beschwerdemanagement.pdf?__blob=publicationFile&v=1

21 The NCP concluded its Initial Assessment on 26 July 2016 and transmitted its answer to the Parties on 1 August 2016. It did so extending an offer to conduct mediation proceedings in which the NCP would discuss the matters accepted for further examination with the Parties and made mediation services available in order to help the Parties jointly resolve these matters.

1. Points accepted for further examination

22 The following points raised in the complaint relating to the social audit were accepted for further examination by the NCP:

- Respondents' potential contribution to child labour, forced labour and gender-based discrimination (Chapter II A. No. 11, Chapter IV No. 2 and Chapter V No. 1 c, d and e OECD Guidelines);
- a potential negative impact on freedom of assembly that may be directly associated with Respondents' business operations (Chapter II A. No. 12, Chapter IV No. 3, Chapter V No. 1 a OECD Guidelines);
- Respondents' due diligence processes with regard to the safety of buildings (Chapter II A. No. 10 OECD Guidelines).

23 The NCP made clear that the fact that the complaint had been accepted for further examination must not be construed as confirmation that Complainants indeed violated the OECD Guidelines when conducting the social audit.

24 Instead, the NCP merely confirmed that the matters raised in the complaint related to the application of the OECD Guidelines and therefore warranted further examination. In essence, the NCP's decision rested on the following reasoning:

25 The NCP argued that the question of whether Phantom had been associated with child labour, forced labour or gender-based discrimination had been within the scope of the social audit. It went on to point out that, whereas TÜV India had not explicitly stated in their auditing report that they had found any such shortcomings, Complainants had answered this question in the affirmative, not least pointing out the country and industry-specific risks and criticising the methods used in the assessment as being insufficient. The NCP found that Complainants' submissions created sufficient grounds for discussions to be held with the Parties to see whether there was scope for improvement with regard to how social audits can be conducted in a way that helps reduce the risk of

child labour, forced labour and discrimination; however, the NCP pointed out that it was well aware that the work of TÜV India was primarily based on existing standards and that an audit cannot amount to a guarantee that such risks do not exist.

- 26 A similar line of argument led the NCP to conclude that it could be of benefit to enter into discussions with the Parties about auditing standards and methods with regard to freedom of association of workers in factories being audited or similar factories.
- 27 Finally, the NCP came to the conclusion that it would make sense to use the mediation process to speak about due diligence design and in particular about the extent to which social audits must extend to matters relating to the safety of buildings, so as to prevent or mitigate health and safety risks for employees.

2. Points not accepted for further examination

- 28 In contrast, the NCP was not satisfied that the allegation that TÜV India had contributed to the collapse of the factory in Rana Plaza and the human rights violations associated with it met the necessary requirements. The NCP stated that the submissions made by Complainants on this matter had not been sufficiently substantiated. In particular, it pointed out the following:
- 29 It said that the NCP had no indications that TÜV India had made a careless statement regarding the safety of the building in which the production site was housed, which could have been seen as contributing to the collapse of the building or as being directly linked to it.
- 30 Furthermore, the NCP argued that Complainants had failed to demonstrate that the danger of a collapse had been so obvious at the time of the audit that the experts from TÜV India could and should have perceived and documented it during the social audit, despite not having any expertise in structural analysis. Moreover, the NCP said that there were no indications that the scope of the social audit should have included comments on the structural safety and the general safety of the entire six-storey factory building, of which Phantom's production site took only up a portion.

3. Acceptance of the offer for mediation by the Parties

- 31 The Parties accepted the NCP's offer of mediation proceedings as stated in No. 21. The notice submitted by Respondents to this effect on 30 September 2016 concluded the preliminary proceedings.

IV. Sequence of events of the mediation procedure

- 32 As part of the mediation procedure, mediation talks were prepared. This required a number of preliminary questions to be answered. As it turned out that the written exchange on the subject was insufficient, the NCP and representatives of the interministerial group for the OECD guidelines held a stakeholder meeting on procedural matters on 12 January 2017. Prior to this meeting, the NCP had held bilateral talks with the Parties.
- 33 The first issue that was discussed at the meeting was who would represent the Parties throughout the mediation procedure. It was agreed that whilst Complainants would be represented primarily by representatives of the ECCHR – with occasional support from a representative of FEMNET e.V. – Respondents would be represented by representatives of TÜV Rheinland. The representatives of the Parties further agreed to sign a confidentiality agreement. They also agreed that the mediation procedure should focus not so much on reviewing past incidents as on improving the implementation of the OECD Guidelines in the future.
- 34 With this having been agreed, the NCP invited the Parties for mediation talks at the Federal Ministry for Economic Affairs and Energy in Berlin. These talks that were held on 16 March 2017 for the duration of one full day and with the involvement of the representatives of the Interministerial Steering Group for the OECD Guidelines. In order to allow the Bangladeshi Complainants to take part in the meeting and give their comments, the NCP had organised video conferencing with Dhaka. However, the Bangladeshi Complainants cancelled their attendance at the meeting at short notice. They justified their decision by saying that they did not wish to bind themselves to the confidentiality agreement mentioned above.
- 35 The intensive discussions that were held during the mediation talks and the different views and interests of the Parties that emerged led the NCP to conclude that an agreement on the matters raised could only be achieved as part of an overall package that would equally reflect the needs of both sides, without losing sight of the Bangladeshi Complainants.
- 36 Picking up on this conclusion, the NCP developed a strategy in the subsequent stages of the procedure which set out three key points to be used in a potential agreement:

- Creating a common understanding between the Parties as to the value and potential of social audits and as to how to successfully conduct and improve these audits;
- Establishing a forward-looking moderated dialogue about the design of social audits within a multi-stakeholder forum such as the Partnership for Sustainable Textiles³ by involving all of the relevant stakeholders;
- A humanitarian gesture by Respondents, which both Parties agree could not be interpreted in any way as an admission of guilt with regard to the collapse of the Rana Plaza factory building.

37 These key points – including in particular the envisaged common understanding as to the social audits – served as a good basis, leading to an intensive discussion being held with and between the Parties throughout a number of bilateral talks and conference calls and in written correspondence. The key points were further fleshed out with the support of the Interministerial Steering Group for the OECD Guidelines, the German Embassy in Dhaka and representatives of GIZ working in Bangladesh.

38 It was in this part of the negotiating process, and despite the differences of opinion that existed between the Parties, that the Parties and the NCP agreed that the representatives of Respondents and the head of the German NCP should write a personal message to the Bangladeshi Complainants, conveying their heart-felt sympathies for the suffering endured. The NCP also used the message to provide information about the state of play of the procedure. The representative of the ECCHR transmitted the messages to Bangladesh.

39 Despite the Parties' intensive dialogue, no common understanding was achieved on the matters raised. Not even the final proposal for compromise presented by the NCP in March 2018 was able to change that. Upon inquiry by the NPC, Respondents declared on 25 April 2018 that all efforts to find an agreement had ultimately failed.

C. ASSESSMENT BY THE NCP

40 As the Parties are not able to agree on the matters raised, the NCP has decided to issue this unilateral Final Statement.

³ URL: <http://www.textilbuendnis.com> [current as of: 21 May 2018].

- 41 First of all, the NCP would like to express its regret that no agreement was reached. From the NCP's point of view, reaching a common understanding on the basis of the key points described above would have been within reach. This could have helped enhance the design of the social audits and therefore would have furthered the effectiveness of the OECD Guidelines.
- 42 On the positive side, the NCP would like to highlight that the Parties spent a considerable amount of time working closely and constructively, coupled with a will to compromise, and – despite their different opinions on the matters raised – did not lose sight of the people involved in Bangladesh and the human side of the procedure.

I. Reasons why no agreement was reached in the procedure

- 43 A key element of the plan that the NCP had presented to the Parties as a basis for discussion was for the Parties to reach a common understanding as to the effectiveness, potential and possibilities to improve the social audits as a way to ensure adequate working and employment conditions in the textile industry, particularly in developing countries where the conditions are often particularly challenging. Addressing this issue is an important part of the international efforts undertaken to create better working and employment conditions in the textile supply chains – efforts that also influence the work of the National Contact Point⁴ and that have long been the subject of a controversial public debate. The system under which social audits are carried out by private-sector companies has been criticised, particularly by trade unions and NGOs, as lacking transparency and as being ineffective in some respects. At the same time, social auditing has become an important field of private-sector activity, with auditing companies trying to ensure that social audits are reliable by continuously updating procedures, but with the contractors and those implementing the standards unable or only partly able to change the framework governing social audits.
- 44 The mediation procedure was strongly characterised by the the Parties' fundamentally different views regarding the exercise of public functions by private-sector stakeholders. It also became clear that any discussion about the substance of social audits is unlikely to be successful unless all relevant stakeholders – including not only civil society and the auditing companies, but also standardisation organisations, clients, and producers – are involved. Whilst – over large parts of the procedure – the Parties worked

⁴ See for example the report published the French NCP after the collapse of the Rana Plaza factory building entitled 'NCP Report on Implementation of the OECD Guidelines in the Textile and Clothing Sector' at <https://www.tresor.economie.gouv.fr/Ressources/file/398811> [as of 4 June 2018].

constructively and in a targeted manner and drew closer together so that there was hope that a joint solution might be within reach, the differences in approach were ultimately too profound and the issues too far-reaching and complex for them to be resolved in a process as limited – both institutionally and on the substance – as the NCP complaints procedure.

- 45 With no agreement having been reached on the common understanding, the Parties were also unable to reach a consensus on the two other points stated in No. 36.

II. Recommendations

- 46 In their Initial Assessment, the NCP concluded that the matters raised by Complainants surrounding social audits that are conducted by private-sector companies play an important role for the future implementation of the OECD Guidelines, and that developing ways of enhancing and improving how social audits are being conducted can help make the OECD Guidelines more effective. The NCP regards the outcome of the mediation procedure as further proof underpinning this assessment as the procedure not only brought to light a number of differences in the Parties' positions, but also helped spark a constructive discussion on how social audits could be conducted and possibly improved.
- 47 As establishing institutions able to effectively monitor compliance of production sites with binding labour and social standards is a tough challenge, particularly for many of the developing countries, social audits organised by private-sector companies will remain an important and widely-used tool for monitoring and auditing global supply chains for a long time to come. The NCP would like to point out that the OECD has stated that audits play an important role in this area in its recently published Due Diligence Guidance for Responsible Business Conduct.
- 48 The NCP is convinced that picking up on the dialogue on how to conduct and enhance the social audits, which was started by the Parties as part of the mediation procedure, would certainly help further the implementation of the OECD Guidelines. This is irrespective of the fact that – during the mediation procedure – the Parties could not be convinced to take part in a joint multi-stakeholder forum to discuss these matters. The NCP therefore recommends that the Parties continue to discuss the matters raised within their respective spheres and continue to involve other relevant stakeholders. This recommendation is based on the assessment – which the NCP was able to build over the course of the mediation procedure – that social audits require continuous en-

hancement and that both civil society stakeholders and private-sector companies have an interest in enhancing them. The NCP also acknowledges that the auditing companies implementing the standards – even though they may be able to supplement individual measures of the audits they conduct (for example by using more female auditors or by working more closely with trade unions both on-site and off-site) – are unable single-handedly to bring about more far-reaching and fundamental changes (such as improving the transparency of auditing reports, auditing procurement officers, conducting audits without giving prior notice, expanding the use of off-site interviews and conducting anonymous interviews); this is only possible by working with those setting the standards, clients, procurement officers, producers, trade unions and civil society.

49 The NCP believes that, in light of the present complaints procedure, Complainants and Respondents could in their discussions on how to enhance social auditing discuss additional points including the following:

- The question as to whether a social audit should be paid for by the company purchasing goods manufactured in the factory that is being audited rather than by the owner of the factory, and how the social audits could thus be enhanced.
- The question as to whether, and if necessary as to how, from a due-diligence angle, the scope of social audits across the value chain should be expanded to include aspects related to structural building analysis and building safety or whether social audits should be supplemented by additional examinations to this effect in order to better protect human rights, particularly workers' rights, at the manufacturing sites that are audited.
- The question as to whether, and if necessary as to how, the social audits could be changed in a way that would allow these instruments to be used to effectively identify shortcomings and thus help improve the working conditions at the factories. Issues that should be looked at in this context could include, for example, due diligence, qualification of the auditors and the time given to these to conduct an audit, and ways in which a faithful account of the situation can be obtained from important interlocutors (such as employees or trade union representatives). In the view of the NCP, there are differences in the auditing standards that are being used here, and also differences in how the auditing is being conducted.
- The question as to whether, and if necessary as to how, the shortcomings that are identified in a particular auditing report i.e. which are to be resolved through

the implementation of a ‘corrective action plan’, can be effectively resolved in practice. The auditing companies cannot resolve the shortcomings found in the companies; this requires the production sites that have been audited and the clients and/or customers to work together constructively and effectively; the duration of the business relationship can also play an important role here. The aspects that could be taken into consideration here include follow-up audits that would be carried out without giving any prior notice, complaints mechanisms for employees and/or employee representation bodies at the company level, and the transparency of the auditing reports.

D. TERMINATION OF THE PROCEDURE AND FOLLOW-UP MEASURES

- 50 This Final Statement published by the NCP concludes the procedure.
- 51 The NCP would ask the Parties to each submit a report to the NCP one year after receiving this Statement, detailing the steps they have taken in response to the recommendations given by the NCP and explaining the outcomes.

Berlin, 26 June 2018

signed Brauns

For the National Contact Point

Detlev Brauns

Federal Ministry for Economic Affairs and Energy