FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

BUSINESS AND HUMAN RIGHTS – ACCESS TO REMEDY

REPORT

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Foreword

Businesses create wealth, making an important contribution to the economy. Their diverse activities affect not just their customers, employees, and contractors along their supply chains, but often entire communities and the environment. This makes it all the more vital that every business, small or large, complies with human rights.

Preventing human rights violations by business is clearly essential. More recently, however, global efforts have focused on developing ways to ensure that victims of such violations have access to effective remedies when harm occurs.

This report looks at the realities victims face when they seek redress for business-related human rights abuses. It presents the findings of fieldwork research on the views of professionals regarding the different ways people can pursue complaints. A previous paper, published in 2019, provided an overview of select examples of business-related human rights abuses.

The scenarios confronted in our research vary widely, and touch on diverse rights – ranging from workers' and consumers' rights, the right to health and environment, the right to privacy, to equality and non-discrimination. Many of the cases pit individuals against large, multinational entities with complex structures and supply chains. The imbalance of power looms large.

Obstacles to achieving justice are often multi-layered. Rules on the burden of proof are a major hurdle, as are stringent requirements relating to accessing documents. Collective redress and representation by statutory human rights bodies and civil society organisations can help counter power imbalances, but are only permitted in limited circumstances. Legal aid, though similarly invaluable, is not always available.

Cross-border cases are especially difficult to resolve. Even preliminary steps like establishing jurisdiction and determining what country's laws apply can be immensely complex, derailing proceedings before they gather steam. Non-judicial mechanisms can be a sensible alternative, but need to be strengthened.

Prevention efforts, too, need to be bolstered. Due diligence obligations and impact assessments that explicitly address human rights issues can help flag problems before they result in harm.

We hope that the challenges, as well as the promising practices, presented in this report will encourage policymakers to embrace measures that promote responsible, rights-compliant business conduct, both within the EU and beyond.

Michael O'Flaherty
Director

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Glossary/abbreviations

ADR	Alternative dispute resolution
AI	Artificial intelligence
CHRB	Corporate Human Rights Benchmark
CJEU	Court of Justice of the European Union
CSO	Civil society organisation
CSR	Corporate social responsibility
ECCHR	European Centre for Constitutional and Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EU	European Union
FRA	European Union Agency for Fundamental Rights
GDPR	General Data Protection Regulation
ICT	Information and communications technology
ILO	International Labour Organization
ISO	International Organization for Standardization
MCO	Municipal Consumers' Ombudsman
NAP	National Action Plan
NCP	OECD National Contact Point
NGO	Non-governmental organisation
NHRI	National human rights institution
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
SLAPP	Strategic Lawsuit Against Public Participation
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights

Key findings and FRA opinions

Business should always be conducted with respect for human rights,[1] and states have a duty to ensure that business conduct does not violate human rights and to provide access to effective remedy for those whose rights are abused.[2] These rights most often include workers' and consumers' rights, the right to health and environment, the right to privacy, and equality and non-discrimination.

Over recent years, global efforts have increased to encourage responsible business conduct that respects human rights and seeks to prevent or, at least, remedy certain negative impacts. In 2011, the United Nations Guiding Principles on Business and Human Rights (UNGPs)[3] advanced the debate, building on the 'Protect, Respect and Remedy' Framework, corresponding to three pillars for action. The first pillar focuses on states' duty to protect against human rights abuses, the second focuses on corporate responsibility to respect human rights and the third focuses on victims' right to access effective remedy. More attention has recently been given to the third pillar. According to the UNGPs (Principle 25), "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."

The 2016 Council of Europe recommendation on human rights and business[4] also focuses on access to remedy. The European Convention on Human Rights (ECHR) provides for the right to effective remedy in Article 13. Moreover, the European Union (EU) Charter of Fundamental Rights enshrines in Article 47 the "right to an effective remedy before a tribunal" and that "[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". The EU Charter of Fundamental Rights also includes other relevant provisions, such as on non-discrimination (Article 21), the rights of the child (Article 24), environmental protection (Article 37) and consumer protection (Article 38), as well as solidarity rights more generally (Title IV).

Since the adoption of the renewed EU strategy for Corporate Social Responsibility in 2011, the EU has adopted legislation enhancing access to effective remedy against corporate abuses. The European Commission also carries out a regular, internal, stocktaking exercise on the progress made in implementing the UNGPs. The Council of the European Union regularly reiterates the EU's commitment to the UNGPs in its conclusions on the Union's priorities in United Nations (UN) forums. The European Parliament issued, in 2016, a resolution on corporate liability for serious human rights abuses in third countries,[5] and requested, in 2019, a study on access to legal remedy for victims of corporate human rights abuses in third countries.

The research of the European Union Agency for Fundamental Rights (FRA) on access to justice shows that, in general, the effectiveness of judicial remedies is often hampered by restrictive rules on legal standing, evidence barriers, high legal costs (combined with restrictive rules on legal aid) and the length of proceedings.[6] The present findings are based on FRA's research collecting evidence on access to remedy in EU Member States on business-related human rights abuses. The research identifies factors that obstruct

or, conversely, facilitate access to justice in regard to human rights abuses by businesses, providing useful evidence for EU action.

The opinions formulated in this report are based on the evidence FRA collected in 2019 and 2020 through interviews with business and human rights experts and practitioners in seven EU Member States (Finland, France, Germany, Italy, the Netherlands, Poland and Sweden). Evidence collected in 2019 in the United Kingdom is included, as the United Kingdom was part of the EU at that time. The fieldwork research builds on FRA's 2017 Opinion on ***Improving access to remedy in the area of business and human rights at the EU level***, which covers judicial and non-judicial remedies, as well as issues related to their effective implementation.

The research finds that most interviewees consider that existing relevant instruments do not take sufficient account of the reality and complexity of disputes involving big corporations. In most cases, these are multinational entities with complex structures and networks of subsidiaries and supply chains.

The UN and Council of Europe instruments point to a need for judicial and non-judicial mechanisms to ensure effective access to remedy for victims of business-related human rights abuse. The findings of the research indicate, however, that non-judicial remedies remain largely unknown or lack sufficient effectiveness, or their potential is not fully used. Courts remain the main avenue for accessing justice in business-related human rights abuses. However, most interviewees point to a lack of specific procedures addressing such abuses. Depending on the nature of the abuse, civil, criminal or administrate proceedings may be available. Interviewees highlight, however, that business-related human rights abuses are often atypical and thus face numerous procedural obstacles. In all countries that the research covers, interviewees pointed to practical, procedural and financial barriers.

Shifting the burden of proof

Depending on the legal system that victims choose to use, various types of proof are required, including, in particular, the requirement to establish a company's liability, as well as various levels of causality and a link to the damage that the company's activity caused to them.

In support of the simplification of relevant procedures, the **2016 Council of Europe recommendation on human rights and business** calls, in paragraph 43, for the revision of "civil procedures where the applicable rules impede access to information in the possession of the defendant or a third party if such information is relevant to substantiating victims' claims of business-related human rights abuses, with due regard for confidentiality considerations".

FRA's research shows that rules on the burden of proof are a major obstacle for those who claim an infringement of their rights by businesses. In most legal systems, to substantiate such a claim, individuals are required to prove that they are directly affected by the actions of a business and to establish the company's liability, including any links between parent companies and subsidiaries or affiliate firms, particularly in cross-border cases. In reality, providing such proof is often practically impossible, especially when the supporting documentation is in the possession of a company accused of the alleged infringement, which increases the imbalance in the judicial equality of arms. The main reason for these requirements is that 'disclosure' – the obligation to release documents and other information by a business entity in a legal dispute – either does not exist in most European legal systems or is available in only a limited way. For example, when courts require that documents for disclosure be explicitly specified, this typically requires

claimants to actually know of their existence and specific content – which is not possible in most cases. Moreover, in the legal systems that FRA's research covers, the burden of proof remains with the claimants, even when there is limited disclosure of documents.

It should be noted that most European legal systems do provide for some degree of reversal in the burden of proof, for instance in cases relating to discrimination or in labour laws. Under EU law, the preamble of Directive 2006/54/EC emphasises that "[t]he adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced [...] provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts." The Racial Equality Directive, the Employment Framework Directive and the recast Gender Equality Directive oblige Member States to introduce a shift in the burden of proof in their domestic non-discrimination regulations. This means that, once a claimant establishes an initial case based on facts, a presumption of discrimination arises, and it is up to the responding party to prove that such discrimination did not occur.

The reversal of the burden of proof is necessary to address and balance the lack of equality between parties, as the information necessary to prove a claim usually lies in the hands of the defendants. However, in cases of communities or individuals affected by corporate activities (e.g. business activities that cause damage to the environment and affect the health or livelihood of local communities), parties are on a very unequal footing.

FRA's research identifies areas where developments are particularly necessary to balance this inequality and enhance claimants' prospects to access an effective remedy.

The experts interviewed suggest that reducing evidentiary obstacles could be achieved by lowering the required level of proof. For instance, specifying a certain level of evidence that would suffice to shift the burden of proof from the victim to the company would be helpful to prove that a parent company has control over a subsidiary or sufficient links to business entities through its supply chain. The experts interviewed indicate that this would facilitate the establishment of a presumption of liability that the company should rebut by providing proof to the contrary.

With regard to access to documents in the possession of a defendant company, interviewees agree that an obligation for companies to disclose all documents that relate to the incident would assist claimants, in particular when they bear the burden of proof. In the area of non-discrimination law, the Court of Justice of the European Union (CJEU) held[7] that a refusal of disclosure by a defendant could prevent the applicant from establishing the initial facts that would allow them to substantiate the case. The domestic court should therefore ensure that any refusal to provide documents does not prevent applicants from establishing their case. In a similar way, in business-related abuses, a lack of access to documents that a defendant company withholds may prevent claimants from establishing causality and liability of the company, or even the initial presumption.

Under the EU Non-financial Reporting Directive (2014/95/EU), companies are required to disclose their human rights risks, impacts and due diligence in their annual reports. To some extent, information provided in these reports might be helpful in cases regarding human rights, yet companies are not bound to disclose all relevant documents. Only public-interest companies with more than 500 employees are required to publish such reports. Moreover, the directive does not specify how companies should report. According to the European Commission guidelines, companies are required to disclose relevant information that is necessary to understand their development, their performance and the impact of their activity, rather than an exhaustive, detailed report. Furthermore, in the case of groups of companies, disclosures may be provided at the group level, rather than by each individual affiliate. The Commission committed, in its ***Communication on the European Green Deal*** of December 2019, to **review the non-financial reporting directive in 2020** as part of its strategy to strengthen sustainable investment. This could be an opportunity to ensure that civil society and other interested parties have access to the information they need, including for the purpose of dispute resolutions and litigation.

FRA OPINION 1

Drawing on existing EU law in regard to shifting the burden of proof, the EU should encourage Member States to consider shifting the burden of proof in cases where the fundamental rights of individuals are infringed by corporate activity. This should apply to causality between the company's conduct and damage, as well as to proving liability for the supply chain. The burden of proof should be shifted once it has been established prima facie that a business has breached a statutory duty. Those found to have violated a legal norm should be required to prove that ensuing damages are not the result of this violation. The same should apply to companies who fail to apply due diligence to their supply chain.

The EU should facilitate the development of clear minimum standards on disclosing information by companies. To ensure the application of the jurisprudential principle of equality of arms, companies should have an obligation, in any dispute against them, to disclose all their documents that relate to the incident, in order to ensure that anyone affected can access information that is necessary to establish a claim.

Improving availability of collective redress or representative action

Most interviewees agree that instruments allowing collective redress or representative actions should be applied more broadly to business and human rights issues, and not only to consumer protection, as is currently the case in many Member States. Extending the options for collective redress would give more people a realistic chance for financial compensation. According to interviewees, an effective instrument should lower the financial risk that individuals incur and allow for an examination of all aspects of the claim, not just the underlying circumstances or legal grounds. In several Member States that the research covers, available collective redress is limited to establishing the wrongdoing, while victims are obliged to subsequently file individual claims for damages, increasing the length and costs of the entire procedure.

In most experts' opinion, the conditions for civil society organisations (CSOs) to be eligible to represent victims

of business and human rights violations are currently too restrictive. FRA's research collected expert testimonies about the difficulties that CSOs face in being recognised as a 'qualified organisation' to file collective redress claims. These testimonies also point to additional difficulties that CSOs face, such as limited resources to deal with and the significant financial costs of prolonged and complex litigation. Experts also stress that it is often not possible for CSOs to have legal standing in the public interest without identifying an individual victim who has sustained damage.

The interviewees consider that available collective redress mechanisms very often do not provide for the possibility to obtain financial compensation through the same proceedings. Complex bureaucratic procedures that are required to merely register potential claimants are cumbersome and hinder access to remedy. Experts suggest, therefore, that a mechanism be introduced that would allow all those affected by a company's actions to be automatically included in a claim unless they specifically choose not to.

Interviewees also note the potentially positive impact of the Commission's Proposal for a Directive on representative actions for the protection of the collective interests of consumers tabled in 2018. They stress, however, that the directive should allow for representative actions to determine the financial claim for individual persons who claim to have been affected.

Supporting civil society organisations

Article 13 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders) enshrines the right to "solicit, receive and utilise resources" to promote and protect human rights. Broadly defined, "resources" include financial assistance, material resources, access to international funds, solidarity, the ability to travel and communicate without undue interference, and the right to benefit from the protection of the state.

Article 11 of the Treaty on the European Union specifies that EU institutions "shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" and "shall maintain an open, transparent and regular dialogue with representative associations and civil society". Access to resources is an integral part of the right to freedom of association, as defined in Article 22 of the International Covenant on Civil and Political Rights and other human rights instruments, including the EU Charter of Fundamental Rights (Article 12). The United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which links environmental rights with human rights, grants the public rights and imposes obligations on parties and public authorities regarding access to information, public participation and access to justice. The EU has been a party to the convention since 2005.

FRA OPINION 2

The EU legislature should continue efforts for the swift adoption of the Directive on representative actions for the protection of the collective interests of consumers.

The EU and Member States should provide for effective collective redress and representative action beyond consumer protection to other cases of business-related human rights abuse.

Member States should ensure that the available collective complaints mechanisms are capable of providing individual claimants with a realistic chance to obtain compensation. To achieve this, such mechanisms should not only determine a wrongdoing, but also examine financial aspects of the claims in one proceeding. Persons affected by the company's actions should be automatically eligible to join a claim unless they specifically choose not to be ('opt-out'), avoiding cumbersome and complex preceding registration procedures.

The EU and Member States should ensure that legislation providing for representative action on behalf of persons affected by the actions of a business allows for legal standing of civil society organisations acting in the public interest, as well as statutory human rights organisations, such as national human rights institutions, Ombuds institutions or equality bodies.

In its report on *Challenges facing civil society organisations working on human rights in the EU* (2018), FRA highlighted the crucial role of CSOs in promoting and protecting fundamental rights. The report highlighted the need to involve civil society in policy making, from the local to the EU level, noting that this is too often not the case today. In addition, the eligibility criteria to be recognised as a legitimate organisation often lack clarity.

This research demonstrates the significant work of civil society actors in supporting victims of business abuse, from providing financial or procedural assistance to raising awareness across the wider public. Moreover, civil society organisations often monitor the compliance of businesses with relevant standards related to the protection of human rights and can cooperate with companies and public authorities in designing and implementing progressive measures.

Interviewees stress that without CSOs' assistance victims would not be able to bring a claim against a business. In this regard, experts in different Member States point to the difficulties facing CSOs in many Member States in being recognised as 'qualified organisations', a status that grants them certain fiscal and procedural privileges, as well as pubic trust, all of which is necessary for them to properly fulfil their role in supporting victims and monitoring business. Some interviewees mention that relevant provisions and criteria are often interpreted incoherently by public administrations and may be challenged in court. This can sometimes result in legal uncertainly for CSOs.

Moreover, as litigation in the field of business-related abuses often entails a high financial cost and a lot of work for CSOs, those experiencing such abuse may not find a CSO capable of representing them.

FRA's evidence shows that CSOs can face pressure or threats when representing victims of big corporations, impeding their action. Interviewees highlight, for example, Strategic Lawsuits Against Public Participation (SLAPPs), which some companies use to intimidate claimants through expensive and frustrating legal proceedings. For CSOs, defending cases against powerful interests in court requires using a considerable proportion of their human resources, which can paralyse their activity, and entails significant financial risks, which can even result in their bankruptcy.

While the Whistle-Blowers Directive[8] sets minimum standards for the protection of persons who report breaches of Union law in the public and private sector, currently there is no anti-SLAPP legislation in force in any EU Member State. In January 2020, 27 CSOs representing journalists, non-governmental organisations (NGOs) and activists sent a letter[9] to the Vice President of the European Commission calling for the EU to take measures against the use of SLAPPs, which are increasingly used to silence individuals and organisations that hold those in positions of power to account. They stress that strong EU anti-SLAPP measures, including legislation and legal funds for victims, will help protect those most vulnerable to legal harassment and send a strong political signal that the EU is ready to stand up for its citizens and protect their fundamental rights. In June 2020, 119 CSOs developed a policy paper[10] calling the EU to end such gag lawsuits, which are a threat to the EU legal order.

FRA OPINION 3

The EU and its Member States are encouraged to ensure adequate funding and legal protection for civil society organisation (CSOs) to enable them to effectively fulfil their role in supporting victims of business-related abuses and monitoring business compliance with human rights standards.

Member States should ensure that the criteria for obtaining qualified status by CSOs in order to be eligible for legal standing or obtain financial help from the state are clearly defined and not excessive.

The EU should introduce strong measures against practices of Strategic Lawsuits Against Public Participation (SLAPPs) in order to protect civil society and activists when they try to support individuals to claim their fundamental rights against business interests. Measures supporting victims of SLAPPs should also be introduced – these should include financial and legal support, as well as training of legal practitioners to recognise and adequately deal with such SLAPPs.

Strengthening non-judicial mechanisms

The UNGPs (Principle 31), as well as the **2016 Council of Europe Recommendation on human rights and business**, call for states to ensure that non-judicial grievance mechanisms (both state based and non-state based) meet certain effectiveness criteria. They also call on states to review the adequacy of their existing measures.

The European Court of Human Rights has stated that a non-judicial body under domestic law may be considered to be a court if it clearly performs judicial functions and offers the procedural guarantees that Article 6 of the ECHR requires, such as impartiality and independence. If it does not, the non-judicial body must be subject to supervision by a judicial body that has full jurisdiction and complies with the requirements of Article 6 (*Zumtobel v. Austria*, No. 12235/86, 21 September 1993, paragraphs 29–32; *Oleksandr Volkov v. Ukraine*, No. 21722/11, 9 January 2013, paragraphs 88–91).

In 2017, FRA in its Opinion on ***Improving access to remedy in the area of business and human rights at EU level*** encouraged the EU to take action, based on the UNGPs, to strengthen the role of non-judicial mechanisms in the business and human rights field.

Non-judicial mechanisms exist in all EU Member States, but their powers and scope vary greatly. Some mechanisms have quasi-judicial powers, while others do not issue binding decisions on cases, but may provide mediation or play a role in guiding or even representing victims before judicial bodies. Non-judicial mechanisms can supplement judicial mechanisms in several ways, as the former can be more accessible and less costly and lengthy than the latter, and they allow for mediation. While their decisions may typically not be enforceable, some interviewees consider their voluntary character to be a strength that facilitates negotiation. Interviewees praised some of the available mechanisms, noting that their full potential is not exploited. This refers in particular to the Organisation for Economic Co-operation and Development (OECD) National Contact Points (NCPs),[11] which the OECD *Guidelines for Multinational Enterprises*[12] require, as well as to national human rights institutions (NHRIs) and Consumers Protection Ombudsmen.

NHRIs, according to the Paris Principles, which the United Nations General Assembly adopted in 1993, must be effective and independent, equipped with sufficient resources and mandated to promote and protect the full spectrum of human rights. FRA has developed a ***Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union***, which outlines how these institutions can be fully compliant with the Paris Principles. In 2010 and 2020, FRA published reports that provided an overview of the status and roles of NHRIs looking at their effectiveness and impact. The most recent report explored the potential contribution of NHRIs in the context of business and human rights, in particular concerning access to justice.[13]

Twenty-four EU Member States and the United Kingdom have established **NCPs for Responsible Business Conduct** mandated to promote the OECD *Guidelines for*

FRA OPINION 4

Member States should consider strengthening the role of non-judicial mechanisms in the business and human rights field. They can achieve this by providing more awareness raising and training of legal professionals, as well as by improving compliance with the decisions of such mechanisms and enforcement in cases of non-compliance.

Member States should also consider strengthening the role of national human rights institutions, Ombuds institutions and consumer protection ombudsmen by empowering them, as appropriate, to file claims to court on behalf of individuals or in the public interest. They can achieve this by providing such institutions with a legal mandate to perform these tasks, as well as with adequate financial and human resources. Their staff should be trained in third-party legal representation.

The EU should support Member States to improve the effectiveness of their OECD National Contact Points, as required by the OECD *Guidelines for Multinational Enterprises*. This could be done by providing financial support and facilitating training and exchange of expertise.

multinational enterprises and related due diligence guidance, and to handle cases (called specific instances) as a non-judicial grievance mechanism. The EU supports the OECD guidelines as an observer. The opinions of interviewees on the effectiveness of NCPs in their country vary greatly depending on factors such as visibility, factual or perceived independence, transparency, trust and human resources.

Interviewees representing NCPs have suggestions for the EU to help improve the effectiveness of this mechanism. They include:

- ★ fostering a network of EU NCPs to promote their activities and facilitate coherence between them;
- ★ using EU development aid (e.g. through the European Investment Bank) to help third countries set up NCP mechanisms, to, inter alia, monitor the conduct of EU companies in third countries;
- ★ involving NCPs in EU policy discussions.

Interviewees also recommend that Ombuds institutions strengthen their competence and role. They provide examples of well-functioning advisory services and bodies with legal standing in courts on behalf of consumers, but also point out that not all Ombuds institutions have such a mandate, and those that do face challenges due to a lack of human and financial resources.

Mitigating financial risk

Article 47 of the EU Charter of Fundamental Rights stipulates that legal aid "shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". EU law provides for specific rules related to legal aid in civil cases. Directive 2003/8/EC[14] harmonises certain aspects of legal aid in cross-border litigation, such as pre-litigation advice in view of a settlement, bringing a case before court, representation in court, and total or partial coverage of or exemption from the costs of proceedings.

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Member States should review rules on legal aid to ensure that they take into account the potential high costs that may be incurred in cases concerning the violation of human rights by companies. In addition, they could consider reviewing procedural rules to allow legal costs to be fully recoverable from a defendant company. Moreover, if a company is found not to have violated human rights, they could consider allowing courts to balance the costs incurred, taking into account the disparity of resources between the parties and the necessity of costs generated by the defendant company, such as hiring several lawyers and experts.

The **2016 Council of Europe recommendation on human rights and business** highlights the need for states to give effect to equality of arms within the meaning of Article 6 of the ECHR, in particular via legal aid schemes, and by ensuring that legal aid is "obtainable in a manner that is practical and effective" for claims concerning business-related abuses (paragraph 41). This is important given the typical disparity of resources between claimants and defendants, particularly when the defendant is a large corporation (paragraph 65).

All interviewees emphasise that the financial cost for private individuals to resort to courts is high.

Most of the experts interviewed consider the legal aid system to be inadequate in light of the overall costs that victims of business-related abuses incur. Legal aid often covers only legal advice costs, not all of the other costs that are involved in bringing a claim. Furthermore, the threshold to be granted legal aid is usually very low, meaning that an individual with an average salary would never be able to bear the costs of litigation against a large corporation.

Experts highlight the multiple costs of litigation beyond court fees, which may not be very high in some countries.

However, they consider the cost of hiring a lawyer, the cost of gaining experts' opinions and the risk of having to cover the costs of the winning party, if the case is lost, to be a major deterrent from taking a case to the court.

All interviewees highlight that the costs of proceedings are enormous whether the victim wins or not, and that most of these costs cannot be recovered even after winning a case.

According to the interviewees, the average individual victim could practically never finance the entire process on their own. In small consumer cases, costs are higher than the actual value of the dispute. In large-scale environmental or human rights cases, the costs of experts can be extremely high. In most of the cases in which the interviewees were involved, financial support was provided by CSOs, by lawyers working pro bono or through crowd funding.

One of the experts suggests that an EU fund for victims of large-scale abuses would help them bring their claims to justice.

Addressing challenges in cross-border cases

The cross-border nature of trade and economic activity in today's globalised economies means that business operations are no longer limited to activities in one particular country. A business that is registered in one Member State may carry out operations within its territory and other Member States of the EU, and may also have subsidiaries or interact with other companies in its supply chain outside the EU. Consequently, the responsibility of EU-based companies for human rights abuses needs to be addressed.

The 2016 UN Human Rights Council resolution underlines "that effective judicial mechanisms are at the core of ensuring access to remedy and that [...] appropriate steps [should be taken] to ensure the effectiveness of such mechanisms when addressing business-related human rights abuses, including in cross-border cases". Moreover, the **2016 Council of Europe Recommendation on human rights and business** states that "Member States should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of business enterprises domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter enterprises" (paragraph 35).

For cross-border cases, the EU harmonised the rules on choice of court ('Brussels regime') to clarify which court has jurisdiction over a certain case. Similarly, the EU harmonised the conflict of law rules ('Rome regime') to determine which country's laws are applicable for non-contractual obligations.

Several interviewees were engaged in cases concerning activities in third countries by an entity linked to EU companies – subsidiaries of companies that have their headquarters in an EU Member State, or activities of their suppliers. Their experience shows that it is very difficult for third-country nationals harmed by a company based in the EU to hold that company responsible. Furthermore, the harm may occur in a country where the judicial system is not functional or independent, has weak enforcement mechanisms or lacks measures to protect victims and witnesses from threat and reprisals. In this context, claimants often seek justice before an EU court.

The attribution and sharing of legal responsibility within a corporation and the responsibility of EU Member States for human rights violations outside their territories are important issues. Establishing jurisdiction in a company's home state can prove difficult because of jurisdiction hurdles. Interviewees highlight difficulties that they have faced in proving the responsibility of companies headquartered in the EU for activities carried out by their local

FRA OPINION 6

The EU should consider reviewing the Rome II Regulation, so that choice of applicable law – either the law where the harm occurred or the law of the country that gave rise to damage – is possible for all types of business-related human rights abuse, not only environmental damage.

The EU and its Member States should require companies to provide both environmental and human rights impact assessments when they plan investments, especially if they apply for funding or loans, in order to identify, assess and address any potentially adverse effects on the human rights of their workers, communities, consumers or other rights holders.

branches or supply chains in third countries, which is necessary to establish European jurisdiction. Several interviewees state that litigation to determine European jurisdiction alone could take up to 10 years, without even touching on the merits of the case.

Another legal obstacle to access remedy concerns the applicable law. According to the EU Rome II Regulation, the applicable law is by default the law of the country where the damage occurs (i.e. the country where the injury was sustained or property was damaged). This regulation includes an exception for environmental damage allowing, in particular situations, the person seeking compensation to choose the law of the country where the damage originated as applicable law, rather than the law of the country where the damage occurred. This is particularly relevant in cases where the damage has occurred in third countries in which the domestic law provides for limited liability or very low level of damages.

Interviewees believe that addressing those issues through EU law would be a positive way forward. This would help companies have more legal certainty, governments to harmonise their laws and claimants to have better protection and easier access to remedy within the EU.

Interviewees recommend amending the Rome II Regulation to allow for some exceptions on choice of law in cases of business-related human rights abuse, as is the case for environmental damages. It would mean that victims of business-related human rights abuse could bring claims for compensation against EU companies before the courts where the company has its 'statutory seat', its 'central administration' or its 'principal place of business'.

Improving horizontal human rights due diligence

Access to remedy is an essential aspect of human rights protection, but prevention of abuse is also important. Prevention forms an integral part of the UNGPs. In fact, the first and second pillars of the UNGPs aim at preventing future harm through the state's duty to protect and the corporate responsibility to respect human rights. The existence of preventive measures also strengthen access to remedy when abuse occurs by ensuring that there are mechanisms to deal with such issues, as well as by facilitating the establishment of a company's liability for its supply chain. For example, documents that a company produces as part of its due diligence obligations could be used by victims as evidence in court proceedings.

The Commentary to the UNGPs notes that "conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[15]

The report of the UN High Commissioner for Human Rights on ***Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability***[16] underlines the links between human rights due diligence and legal liability.

Many of the experts interviewed suggest that a coordinated EU approach in the area of business and human rights is crucial to improve the prevention of potential abuses. For example, EU law could require companies to issue statements on human rights issues in their operations, which would lead them to proactively embrace human rights impact assessments. One expert advocates strengthening regulations that require companies to have policies to evaluate the environmental and human rights impact of their activities – mentioning specifically the **EU Non-financial Reporting Directive**.

Most interviewees consider that companies should be required to undertake mandatory human rights due diligence, as well as human rights impact assessments. They also suggest that all companies need to adopt operational grievance mechanisms. Other proposals include exploring possible links between public procurement, export credit and other public financing of companies, where mandatory human rights due diligence should apply.

The number of Member States with at least some mandatory due diligence is rising, but still this is not an obligation for all sectors and companies. Interviewees recommend an EU regulation defining the due diligence obligations of EU-based companies regarding their foreign activities (horizontal due diligence) and some suggest that such due diligence should also apply to intra-EU activity.

There have been many developments in the area of due diligence and general work on preventing business-related human rights abuses in recent years. Some states have enacted legislation on due diligence measures or are considering such legislation, and CSOs are contributing to raising awareness and providing guidance and monitoring of the corporate sector and governments.

At the EU level, discussions have advanced since the 2016 Council Conclusions[17] and, in February 2020, the European Commission released a **study on due diligence in the supply chain**, which examines different regulatory options for due diligence in the companies' own operations and in their supply chains. The study shows that currently only one in three businesses based in the EU undertake due diligence that takes into account the human rights and environmental impacts of their activities. At the same time, respondents to this study from the business sector and other stakeholders are in favour of an EU regulation with a general due diligence requirement for human rights and environmental impact.

In March 2020, the European Commission published the ***EU Action Plan on Human Rights and Democracy for 2020–2024*** – an outline of the EU's activities in third countries. In regard to the business sector, the action plan aims to,

inter alia, "Support multi-stakeholder processes to develop, implement and strengthen standards on business and human rights and due diligence, and engage with development banks and international financial institutions." The Commission will also strengthen its support for countries' efforts to implement the UNGPs through due diligence legislation and National Action Plans.

In April 2020, the EU Commissioner for Justice announced plans to develop a legislative proposal by 2021 requiring businesses to carry out due diligence in relation to the potential human rights and environmental impacts of their operations and supply chains. He further indicated that the draft law, once developed, is likely to be cross-sectoral and provide for sanctions in the event of non-compliance.

Civil society welcomed this commitment and expressed the expectation that such legislation will incorporate relevant core principles elaborated in international law. In particular, it should ensure that companies will effectively implement such due diligence, that it will cover all sectors, that it will be gender sensitive and that it will be aligned with other regulatory initiatives, including the EU's sustainable finance strategy.

In the EU policy context, sustainable finance is defined as finance that supports economic growth while reducing pressure on the environment concerning climate change and related risks, e.g. natural disasters, while taking into account social and governance aspects. Social considerations may refer to issues of inequality, inclusiveness, labour relations, investment in human capital and communities.

Building on the 2018 Action Plan on financing sustainable growth,[18] the European Commission plans to adopt a Renewed Sustainable Finance Strategy in the second half of 2020. Within the broader context of **the European Green Deal Investment Plan**, this renewed strategy will aim, first, to create a strong basis to enable sustainable investment; second, to increase opportunities for citizens, financial institutions and corporates to have a positive impact on society and the environment; and, third, to fully manage climate, environmental and social risks, integrating them into the financial system. Public consultation on the strategy refers to the need to foster more sustainable corporate governance through an EU framework for supply chain due diligence related to human rights and the environment.

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The EU should ensure that future legislation on mandatory horizontal due diligence covers both environmental and human rights impacts of business operations and includes rules that define due diligence obligations of EU-based companies with regard to their foreign activities, as required by existing international standards, in particular the United National Guiding Principles and the OECD *Guidance for Responsible Business Conduct*. In particular, it should establish consequences for companies not complying with the regulation, and ensure access to remedy for rights holders affected by corporate malpractice. Moreover, such legislation should also be aligned with other regulatory initiatives, including the EU's sustainable finance strategy, which can foster more sustainable corporate governance through integrating environmental and social risks, and their impacts, into the financial system. The obligations of EU companies under human rights due diligence should not be limited to their foreign activity but should also serve the protection of EU citizens.

The EU should ensure that future legislation on due diligence concerning environmental and human rights impacts of business operations includes reference to the participation of civil society.

Endnotes

1 Traditionally, the term 'fundamental rights' is used in a constitutional setting, whereas the term 'human rights' is used in international law. The two terms refer to similar concepts, as can be seen when comparing the content of the EU Charter of Fundamental Rights with that of the European Convention on Human Rights and the European Social Charter.

2 The United Nations Guiding Principles on Business and Human Rights do not include a definition of the term 'abuse'. The United Nations draft of the international ***Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*** includes the following definition in Article 2: "'Human rights violation or abuse' shall mean any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights."

3 Human Rights Council (2011), **Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework**, A/HRC/17/31.

4 Council of Europe, **Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business** (CM/Rec(2016)3) and its accompanying explanatory memorandum.

5 European Parliament, **Resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries** (2015/2315(INI)).

6 FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office of the European Union (Publications Office).

7 CJEU, C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH*, 19 April 2012.

8 **Directive (EU) 2019/1937** of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

9 The letter is available **online**.

10 **Ending Gag Lawsuits in Europe Protecting Democracy and Fundamental Rights**.

11 See the OECD **webpage on NCPs**.

12 OECD (2011), **OECD Guidelines for Multinational Enterprises**, OECD Publishing. See also the OECD **webpage on the guidelines**.

13 FRA (2020), *Strong and effective National Human Rights Institutions: challenges, promising practices and opportunities*, Publications Office, Luxembourg.

14 Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31 January 2003.

15 **UN Guiding Principles on Business and Human Rights**, Principle 17.

16 UN, Human Rights Council (2018), Report of the United Nations High Commissioner for Human Rights, ***Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability***, A/HRC/38/20/Add.2, 1 June 2018.

17 Council of the European Union (2016), ***Council Conclusions on business and human rights***, No. 10254/16, 20 June 2016.

18 European Commission (2018), Communication from the Commission, ***Action Plan: Financing Sustainable Growth***, COM(2018) 97 final.

Introduction

Business activity affects people's enjoyment of their human rights in various ways. Companies can have an impact – positively or negatively – on the rights of their employees and their customers, but also on the rights of workers in their supply chains. Business conduct can also have far-reaching consequences for communities and the environment in the vicinity of the business' operations. That is why we expect companies to comply with human rights standards, in particular labour rights and health and occupational safety standards, as well as the right to privacy, equality and non-discrimination, freedom of expression, the right to health and property rights.

At the international level, the United Nations (UN) has provided guidance for states and enterprises, and the Council of Europe has issued recommendations. Moreover, the Organisation for Economic Co-operation and Development (OECD) has also contributed significantly by establishing instruments and mechanisms related to business and human rights, as have the International Labour Organization (ILO) and the International Organization for Standardization (ISO) (see 'Legal and policy background' section).

A key reference for business and human rights is the **2011 United Nations Guiding Principles on Business and Human Rights** (UNGPs).[1] The European Union (EU) is also increasingly active in the implementation of the UNGPs, namely by adopting strategies, policies, guidance and legislation. EU Member States have obligations related to access to justice under international treaties, which also have implications in the context of business and human rights. The EU has also committed to other instruments, in particular the 2016 Council of Europe Recommendation on human rights and business. Since the adoption of the renewed strategy for Corporate Social Responsibility (CSR) in 2011, the implementation of the UNGPs has been subject to periodic internal stocktaking exercises by the European Commission and the European External Action Service (EEAS).[2] In addition to pursuing its commitments to the UNGPs, the EU has adopted several legislative acts addressing sector-specific instruments, in particular in the context of due diligence. Furthermore, the protection of the environment and of consumers' and workers' rights and personal data are also areas of concern; as areas particularly prone to abuses by business enterprises, these are currently subjects of focus of EU policy and legislative developments.

In June 2016, the Council of the European Union adopted conclusions on business and human rights, which included a request sent to the European Union Agency for Fundamental Rights (FRA) to formulate "an expert opinion on possible avenues to lower barriers for access to remedy at the EU level"[3] – the third of the three pillars of the UNGPs. On the basis of this request, in 2017, the European Commission requested that FRA collect evidence on access to remedy in the EU Member States on business-related human rights abuse to support the identification of the most needed actions by the EU. FRA conducted the research in two phases:[4] the first phase used desktop research in 2018 to identify incidents of business-related human rights abuse, and the second phase involved interview-based fieldwork research in 2019 and 2020 to examine the views of professionals on the availability and effectiveness of the different ways that complaints can be made.

In 2019, FRA published findings from the first phase of the research in the focus paper on business and human rights,[5] which included an overview of selected examples of business-related human rights abuses identified through the desktop research. The findings presented were linked to FRA's previous work in this area, in particular its 2017 Opinion on *Improving access to remedy in the area of business and human rights at the EU level*, which the Council of the European Union had requested.[6]

In this report, FRA presents the findings of its fieldwork research, which provides evidence of obstacles that victims of business-related human rights abuses face when seeking remedies. It also includes promising practices that experts identify and suggestions on measures that can improve access to justice for human rights violations by businesses, at the national and EU levels.

HOW TO READ THIS REPORT

The report consists of four chapters. The first chapter outlines who can be victims of business and human rights abuse – including consumers affected by fraud, workers suffering violations of their right to fair and just working conditions, and local communities affected by environmental damage. It also looks at the crucial role of CSOs in assisting victims seeking a remedy, as well as the risks and obstacles that those organisations face because of their activity. The second chapter provides a general assessment – based on the contributions of interviewees – of available judicial and non-judicial mechanisms and their effectiveness for business-related abuses. The third chapter examines obstacles – identified by interviewees – that victims face when accessing judicial remedies in cases of business-related human rights abuse. Finally, the last chapter focuses on prevention, discussing experts' perspectives on EU action, the role of mandatory human rights due diligence, and legislative and policy developments at national and European levels.

In due course, the report will be accompanied by FRANET country overviews summarising the interviews in the Member States and the United Kingdom, as well as selected detailed case studies, which will be available on FRA's website.

Methodology

The first phase of the research was conducted in 2018. FRA's multidisciplinary research network (FRANET) carried it out. The research covered all 27 EU Member States, the United Kingdom (which was still a Member State when the research was carried out) and North Macedonia and Serbia, both accession countries. In each of these 30 countries, FRANET research teams identified and reported on incidents of business-related human rights abuse. The incidents reported (totalling 155) involved abuses that both occurred within the EU or in third countries and were linked with businesses based in the EU and operating abroad (directly or through supply chains). The findings from this phase are presented in FRA's 2019 paper **Business-related human rights abuse reported in the EU and available remedies**.

The first phase of the research helped to determine some of the factors that play a key role in access to remedy in business-related human rights abuses. It also indicated Member States where relatively more incidents or particular problems relating to access to remedy were identified. On this basis, and given that FRA's resources allowed follow-up fieldwork in only selected countries, the second phase of the research focused on a limited number of countries through interviews – some conducted by FRA staff – with leading experts experienced in accessing remedies in cases of business-related human rights abuse, which are the subject of this report.

The interviews were carried out in 2019 and 2020 with 31 leading experts experienced in accessing remedies in cases of business-related human rights abuse, in seven EU Member States: **Finland**, **France**, **Germany**, **Italy**, **the Netherlands**, **Poland**, **Sweden** and the **United Kingdom**. The results cannot be taken as representative of a given situation in a Member State, but should be read as detailed insights and case studies that shed light on common challenges in accessing remedies in the field of business and human rights.

To obtain a detailed picture of the situation in those countries, despite a limited number of interviews, the research focused on experts with considerable practical experience, going beyond theoretical knowledge, in specific business-related abuses. The interviewees included practising lawyers involved in litigations against big corporations, civil society organisations (CSOs) specialising in strategic litigation and representatives of state consumer protection institutions and OECD National Contact Points (NCPs). The evidence collected by FRA in this report sheds light on the situation in the areas of expertise of the experts interviewed.

FRA's related work

Labour exploitation is a concrete example of the negative impacts that business activity can have on human rights. FRA's research on severe labour exploitation covers it. FRA publications on this topic include:

- **Protecting migrant workers from exploitation in the EU: workers' perspectives** (2019), Luxembourg, Publications Office.
- **Protecting migrant workers from exploitation in the EU: boosting workplace inspections** (2018), Luxembourg, Publications Office.
- **Out of sight: migrant women exploited in domestic work** (2018), Vienna, Publications Office.
- **Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights** (2015), Luxembourg, Publications Office.

The freedom to conduct a business (protected by Article 16 of the EU Charter of Fundamental Rights) is highly relevant to businesses, but is not the focus of this paper. This paper instead focuses on encouraging entrepreneurship and innovation, and on social and economic development. The following FRA report explores how the EU and its Member States conceive and apply this right:

- **Freedom to conduct a business: exploring the dimensions of a fundamental right** (2015), Luxembourg, Publications Office.

FRA has carried out projects relating to strengthening of the role of **national human rights institutions (NHRIs), equality bodies and Ombuds institutions**.

LEGAL AND POLICY BACKGROUND

United Nations

UN Human Rights Office

Already in the 1970s, the UN had set up a commission on transnational corporations and the ILO had adopted a declaration on multinational enterprises and social policy.

In 2011, the UN Human Rights Council adopted a resolution[7] establishing a "Working Group on the issue of human rights and transnational corporations and other business enterprises" (the Working Group on Business and Human Rights). This Working Group is composed of five independent experts from different regions of the world and is mandated "to promote the effective and comprehensive dissemination and implementation of the [UNGPs]".[8] In the most recent resolution renewing the mandate of the Working Group, the UN Human Rights Council stressed the 2030 Agenda for Sustainable Development.[9]

In the same resolution, the UN Human Rights Council established the UN Forum on Business and Human Rights, which has become the world's largest global event on business and human rights.

In 2014, the UN Human Rights Council established "an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights."[10] The 2019 draft instrument that the working group proposed includes access to justice and remedy, the rights of victims, due diligence, legal liability and mutual legal assistance.[11]

Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights (OHCHR) launched, in 2014, its Accountability and Remedy Project designed to contribute to a fairer and more effective system of domestic remedies to address challenges concerning access to remedy that victims face in cases of severe corporate abuse.[12] To date, three phases of the project have been developed, focusing on the effectiveness of state-based judicial[13] and non-judicial mechanisms,[14] and non-state-based grievance mechanisms in business and human rights cases.[15]

International Labour Organization

The ILO has developed a *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (MNE Declaration).[16] The Declaration provides guidance to multinational enterprises, governments and employers' and workers' organisations in areas such as employment, training, conditions

of work and life, and industrial relations,[17] for enhancing the positive effects of the operations and governance of multinational enterprises to realise decent work for all, a goal recognised in the 2030 Agenda for Sustainable Development.[18]

In addition, the ILO Global Commission on the Future of Work published a report in 2019 proposing a "human-centred agenda for the future of work" that places people and their work at the centre of economic and social policy and business practice.[19] The International Labour Conference adopted the ILO *Centenary Declaration for the Future of Work* in June 2019.[20]

Organisation for Economic Co-operation and Development

Like the UN, the OECD has a long history of working with business and human rights. Its guidelines on multinational enterprises stem from 1976, with a dedicated human rights component added in 2011.[21] The updated guidelines establish that enterprises should respect the human rights obligations of every country in which they operate, have due diligence processes in place and participate in the provision of remedies in cases of adverse impacts that they have caused or to which they have contributed.[22] The OECD has also adopted sector-specific and overall due diligence guidance, for instance.[23]

Council of Europe

The Council of Europe's Committee of Ministers adopted, in 2014, a Declaration of support to the UNGPs[24] and, in 2016, a Recommendation on Human Rights and Business, which includes a particular focus on access to remedy.[25] The 2016 Recommendation encourages states to take into account the full spectrum of international human rights standards – civil and political, as well as economic and social – in the implementation process and to give due consideration to the work of their monitoring bodies.[26]

In 2020, the Presidency of the High-Level Conference of the Committee of Ministers on environmental protection and human rights issued a final declaration, highlighting that National Action Plans under the UNGPs could set up suitable structures, mechanisms and processes to ensure responsible business conduct with respect for human rights and the environment.[27]

The Parliamentary Assembly of the Council of Europe (PACE) adopted, in 2019, a follow-up resolution[28] and a follow-up recommendation[29] to the 2016 Committee of Ministers Recommendation. It called on its Member States to support the adoption of a legally binding instrument on business and human rights and to consider revising the 2016 Recommendation to more explicitly cover gender-based human rights abuses and vulnerable population groups. Moreover, PACE adopted a resolution[30] and a recommendation[31] to improve the protection of whistle-blowers, recognising that the protection of whistle-blowers is essential to resolve many of the challenges to our democracies and inviting the Council of Ministers to begin preparations for negotiating a binding legal instrument in the form of a Council of Europe convention, drawing on the EU Whistle-blowers Directive.[32]

European Union

In 2011, the European Commission adopted its renewed strategy for CSR, which combines horizontal and sectoral approaches to promote CSR and implement the UNGPs, as well as the UN 2030 agenda for sustainable development.[33] In 2019, a European Commission Staff Working Document on Business and Human Rights, Corporate Social Rights and Responsible Business Conduct provided an overview of the Commission's and the EEAS' progress implementing CSR and business and human rights across all policy areas.[34] FRA's 2017 Opinion and 2019 focus paper on business and human rights summarise the relevant EU policy developments. Since then, the EU has adopted new legislation

enhancing access to an effective remedy against corporate abuse. The Whistle-blowers Directive reinforces corporate compliance with EU law and sets minimum standards for the protection of persons reporting breaches of Union law in the public and private sectors.

Some areas that Union law covers, such as anti-money laundering, data protection, food and product safety, public health and environmental protection, are also relevant to cases of corporate abuse. The minimum standards ensure accessible and confidential reporting channels for whistle-blowers, protection from retaliation and the reversal of the burden of proof in favour of the whistle-blower. Member States must incorporate this directive into national law by December 2023.

The European Parliament[35] and the European Economic and Social Committee[36] supported the negotiation of the UN legally binding treaty on Business and Human Rights,[37] referred to above. There have been a range of other initiatives on business and human rights, including by the Conference on the agenda for action on Business and Human Rights organised by the Finnish Presidency of the EU,[38] the European Parliament[39] and the Council of the European Union.[40] In addition, entities such as the European Network of National Human Rights Institutions (ENNHRI) have issued recommendations to the EU in the area.[41]

The Council underlined the following in its Conclusions on the ILO's *Centenary Declaration for the Future of Work* of October 2019: "Taking into account the important role of multinational enterprises, encourage and foster responsible management in global supply chains, including through corporate social responsibility, due diligence with respect to human rights, and promotion of decent work and social and labour protection."

The European Commission and the EEAS have also adopted the EU Action Plan on Human Rights and Democracy 2020–2024,[42] with a dedicated chapter on business and human rights. The European Commission commissioned and published, in February 2020, the *Study on due diligence requirements through the supply chain*[43] as part of its consultative and analytical work on fostering more sustainable corporate governance, results of which will feed into the development of a new initiative announced for 2021. This may take the form of a legislative proposal, "addressing human rights, and environmental duty of care and mandatory due diligence across economic value chains"[44] (see Section 4.2).

Rising key issues in the EU – environment, consumers and data protection

In the context of the incidents identified within the EU, next to labour rights and discrimination, the protection of the environment, consumers and personal data[45] is particularly prone to abuses by business enterprises in the EU[46] and increasingly subject to relevant policy initiatives and case law developments.

Environmental protection

Both the European Council's[47] and the Commission's[48] strategic documents for 2019–2024 include a focus on environmental policies.[49] Under the European green deal[50] and following the conclusions of the internal report[51] on the EU implementation of the Aarhus Convention,[52] the Commission will consider revising the Aarhus Regulation[53] to improve access to administrative and judicial review at the EU level and access to judicial review before national courts in all Member States.

The CJEU continues to develop its case law on the enforcement of environmental law,[54] for example in the case *Deutsche Umwelthilfe v. Freistaat Bayern,*[55] in which the Grand Chamber ruled that national courts can enforce clear and precise rules implementing EU environmental secondary law, such as on air quality.

Consumer protection

In May 2013, the EU reinforced non-judicial remedies for consumer protection through an update of the alternative dispute resolution (ADR) Directive for consumer disputes[56] and regulated a new legal instrument for online dispute resolution (ODR).[57] In November 2019, the EU updated existing EU consumer legislation with effective penalties for violations of EU consumer law, tackling dual quality of consumer goods and strengthening consumer rights online.[58] A directive on representative actions for the protection of the collective interests of consumers is currently under negotiation (see Section 3.2).[59] Furthermore, in its 2020 work programme,[60] the Commission announced that under its second priority – "a Europe fit for the digital age" – it would publish a new consumer policy strategy for the period until 2024. The CJEU has developed extensive jurisprudence in this area, covering food safety, unfair commercial practices, mail-order sales, defective goods, insurance contracts, doorstep selling and unfair terms, among others.[61]

Data protection

In 2016, the EU adopted the General Data Protection Regulation (GDPR),[62] updating and enhancing the uniform implementation of this fundamental right enshrined in Article 8 of the EU Charter of Fundamental Rights. In 2018, coinciding with the entry into force of the GDPR, FRA, the Council of Europe and the European Data Protection Supervisor jointly published a *Handbook on European Law relating to Data Protection*.[63]

Some of the latest data protection cases at the CJEU relate to cross-border access to an effective remedy, as many of the service providers are established in third countries whereas their services are virtually available worldwide.[64] In *Google v. CNIL*,[65] the CJEU held that the territorial scope of the 'right to be forgotten' is limited and does not require search engines to remove results outside the EU. However, when tackling the dissemination of illegal content online by service providers, the CJEU recognised in *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*[66] that a judicial injunction could be enforced worldwide within the framework of the relevant international law.

Impact of new technologies on business and human rights – work in progress

New digital technologies, such as artificial intelligence (AI) and facial recognition software, are already part of people's lives, bringing positive social and economic changes, but also new risks and challenges. AI technologies, in particular, may present new safety risks for users when they are embedded in products and services. There is a growing, urgent need to address the potential harm that may occur in relation to the application of digital technologies in the private and public sectors. To mitigate such risks, existing international standards should be used to create coherent guidance for business (in particular technology and digital companies, and anyone using such technologies) and the public sector.

In 2013, the European Commission published the *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*.* This guide, which Shift and the Institute for Human Rights and Business developed, applies the UNGPs to the specific context of the information and communications technology (ICT) sector. It is intended to help ICT companies 'translate' respect for human rights into their own systems and company cultures.

In 2019, OHCHR launched the B-Tech Project, which aimed to develop an "authoritative, legitimate and broadly accepted roadmap" to support the application of UNGPs to the development and use of digital technologies.** The project aims to provide practical guidance and public policy recommendations addressing a rights-based approach to the application and governance of digital technologies.

In February 2020, the European Commission published a white paper on AI.*** The white paper notes that "the specific characteristics of many AI technologies, including opacity, complexity, unpredictability and partially autonomous behaviour, may make it hard to verify compliance with, and may hamper the effective enforcement of, rules of existing EU law meant to protect fundamental rights. […] A common European approach to AI is necessary to reach sufficient scale and avoid the fragmentation of the single market. The introduction of national initiatives risks to endanger legal certainty, to weaken citizens' trust and to prevent the emergence of a dynamic European industry". The white paper presents policy options to enable trustworthy and secure development of AI in Europe, in full respect of fundamental rights.

FRA's project on AI, big data and fundamental rights**** aims to assess the positive and negative impacts of AI and big data when used in public administrations and business, and the impact of technical developments on fundamental rights.

* *European Commission (2014),* **ICT sector guide on implementing the UN Guiding Principles on Business and Human Rights**.

** *UN, OHCHR (2018),* **UN Human Rights Business and Human Rights in Technology Project (B-Tech): Applying the UN Guiding Principles on Business and Human Rights to digital technologies**, *November 2019, pp. 2–3.*

*** *European Commission (2020),* **On artificial intelligence – A European approach to excellence and trust**, *COM(2020) 65 final, Brussels, 19 February 2020.*

**** *For more information, see FRA's webpage on* **AI, big data and fundamental rights**.

Endnotes

1 The UNGPs were endorsed by the UN Human Rights Council in 2011 and they recognise the following aspects: "(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached." The UNGPs thus recognise that preventing and remedying abuses or toleration of abuses by businesses is a joint responsibility of the private sector and public authorities.
2 In relation to the internal market, industry, entrepreneurship and small and medium-sized enterprises, the European Commission has a webpage on **CSR and responsible business conduct**. See also the 'Legal and policy background' section.
3 Council of the European Union (2016), **Council Conclusions on Business and Human Rights**, document 10254/16.
4 For more information, see FRA's webpage on **business and human rights: access to remedy improvements**.
5 FRA (2019), ***Business-related human rights abuse reported in the EU and available remedies***.
6 FRA (2017), ***Improving access to remedy in the area of business and human rights at the EU level***, Opinion 1/2017, Vienna, 10 April 2017.
7 UN, Human Rights Council (2011), Resolution 17/4, ***Human rights and transnational corporations and other business enterprises***, A/HRC/RES/17/4, 6 July 2011, para. 6.
8 *Ibid.*
9 UN, Human Rights Council (2017), Resolution 35/7, ***Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises***, A/HRC/RES/35/7, 14 July 2017, para. 12.
10 UN, Human Rights Council (2014), Resolution 26/9, ***Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights***, 14 July 2014.
11 Open-ended intergovernmental working group (OEIGWG), chairmanship (2019), Revised draft, ***Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises***, 16 July 2019.
12 UN, Human Rights Council (2014), Resolution 26/22, ***Human rights and transnational corporations and other business enterprises***, A/HRC/RES/26/22, 15 July 2014, para. 10.
13 UN, Human Rights Council (2016), Report of the United Nations High Commissioner for Human Rights, ***Improving accountability and access to remedy for victim of business-related human rights abuse***, A/HRC/32/19, 10 May 2016, para. 11.
14 UN, Human Rights Council (2016), Resolution 32/10, ***Business and human rights: improving accountability and access to remedy***, A/HRC/RES/32/10, 15 July 2016, para. 13.
15 UN, Human Rights Council (2018), Resolution 38/13, ***Business and human rights: improving accountability and access to remedy***, A/HRC/RES/38/13, 18 July 2018.
16 International Labour Organization (ILO) (2017), ***Tripartite declaration of principles concerning multinational enterprises and social policy***, ILO publications, Fifth Edition, March 2017 (adopted in 1977 and subsequently revised).
17 ILO (2017), ***Tripartite declaration of principles concerning multinational enterprises and social policy***, ILO publications, Fifth Edition, March 2017 (adopted in 1977 and subsequently revised), p. V.
18 *Ibid.*
19 ILO Global Commission on the Future of Work (2019), ***Work for a brighter future***, ILO publications, 22 January 2019, p. 11.
20 International Labour Conference, **ILO Centenary Declaration for the Future of Work adopted by the conference at its one hundred and eighth session**, GENEVA, 21 JUNE 2019.
21 OECD (2011), ***OECD Guidelines for Multinational Enterprises***, 29 September 2011.
22 *Ibid*, p. 31.
23 For more information, see the OECD's latest documents on **international investment**.
24 Council of Europe, Committee of Ministers (2014), **Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights**, 16 April 2014.
25 Council of Europe, Committee of Ministers (2016), **Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business**, 2 March 2016.
26 *Ibid*, section I(a)(3), as interpreted by the recommendation's **explanatory memorandum**, paras. 14–17.
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1

WHO ARE THE VICTIMS OF BUSINESS AND HUMAN RIGHTS ABUSES AND WHO SUPPORTS THEM?

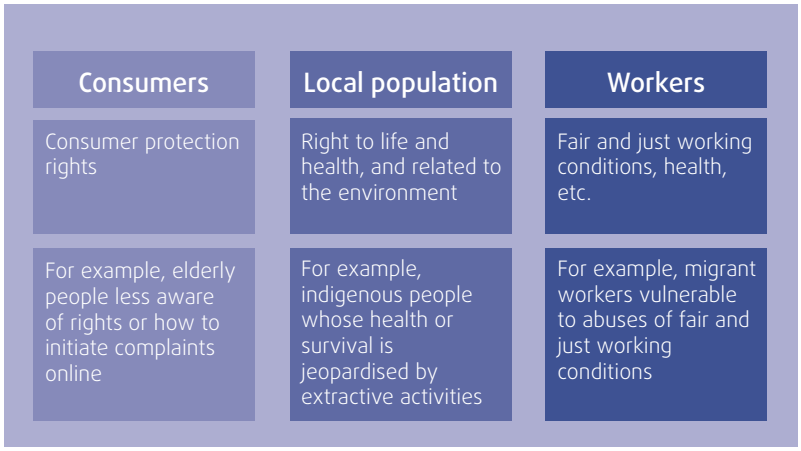
1.1 VICTIMS' PROFILES

The present research shows that the profiles of victims of business and human rights abuses are diverse. Human rights issues range from a company's compliance with labour standards to the displacement of indigenous populations and pollution.

This section provides an overview of who the victims of business-related human rights abuses are, as identified in FRA's research[1] – ranging from consumers affected by fraud, through workers suffering violations of their right to fair and just working conditions, to local communities affected by environmental damage. It outlines some of the issues that experts identify in terms of the types of rights abuses and the paths and obstacles to accessing justice that victims experience, as illustrated by particular cases that expert interviewees knew of (or, in many cases, had been involved in professionally). These cases will touch on many of the issues that will be expanded on in Chapters 2 and 3 of this report.

Three broad categories of victims emerge from FRA's research (see Figure 1): (1) consumers, (2) local populations and (3) workers. This makes it clear that anybody can become a victim of human rights abuse caused by a business.

FIGURE 1: CATEGORIES OF PEOPLE MOST AFFECTED BY BUSINESS AND HUMAN RIGHTS ABUSES



Source: FRA, 2020

Within these three broad groups, particular sub-groups may be more likely to suffer business and human rights abuses. For example, among the consumers, elderly people may be less aware of their rights or may not be familiar with

initiating complaints online, etc.; within the local population, the health or even survival of groups of indigenous people may be jeopardised by the expansion of extractive activities; and, among the workers, migrant workers are more vulnerable to experiencing unfair or exploitative working conditions.

1.1.1 Consumers

Consumers become victims of business-related human rights abuses through consumer fraud and other unfair practices. Consumers can find it difficult in practice to access a remedy following an incident of fraud or another type of abuse, as the case study in Poland shows (see box), which highlights the particular vulnerability of older persons and the challenges they face when pursuing a remedy.

FRA's Fundamental Rights Survey[2] shows that one in four consumers in the EU has fallen victim to fraud in the last five years, but only half of those consumers reported the fraud, for varying reasons. These include finding it "too much trouble to report" (18 %), believing that reporting would not change anything (25 %) and thinking that the incident was not serious enough to report (49 %).

Case study

Misleading customers through unfair market practices

This case concerned a company involved in energy and gas supply that allegedly used unfair market practices to mislead a large number of (mainly older) consumers across **Poland** into signing contracts. The Municipal Consumers' Ombudsman (MCO) was contacted by over 100 people (individually) who had signed contracts for energy supply with the defendant company. Consumers claimed that they were misled into doing so – for example, they claimed that representatives of the defendant had failed to inform them that signing a contract with the defendant would lead to a change of energy supplier.

Consumers were contacted predominantly on landline phones and during working hours, when many people were likely to be at work or attending an education facility – thus targeting senior citizens (who are more likely to be home during those hours). The offer was typically presented during the phone conversation, after which relevant documents were delivered by courier and needed to be signed. This put pressure on consumers to sign the documents without reading them carefully. In many cases, people realised that they had signed contracts with a new energy supplier only when the new bills started to arrive, and they had to choose to either terminate their contract with their existing provider or terminate the new contract – resulting in a fine either way. The fines or payments of about € 120 were substantial for the affected group of elderly people.

Having failed to find an amicable solution, the MCO submitted the case to the court, claiming that the defendant company's actions had violated the Act on the Prevention of Unfair Market Practices and that contracts should be annulled and payments returned. However, relying solely on the Civil Code and Code of Civil Proceedings, while disregarding the Act on the Prevention of Unfair Market Practices, the court of first instance (the Warsaw Regional Court) decided that the case was not a consumer protection case and thus that the MCO had no legal standing. It also decided that the documents submitted, mainly the individual consumers' statements, did not constitute evidence, as people with an interest in the case wrote them. The MCO challenged that ruling.

In its judgment of 16 April 2018, the Court of Appeal in Warsaw repealed the decision of the Warsaw Regional Court, stating that the MCO's legal standing to represent citizens in all types of consumer cases was unquestionable. It also found that the Warsaw Regional Court had failed to investigate the substantive grounds for claims by failing to apply the provisions of the Act on Counteracting Unfair Market Practices and to consider the merits of the MCO's claim for payment of damages and annulment of contracts concluded with the defendant. No final decision had been issued at the time of this research.

Regardless of the outcome, the MCO's support was important for the consumers in this case, as without it most of them would probably not have pursued claims. Following this case, the Office for the Protection of Competition and Consumers has, in a number of cases, imposed fines on entrepreneurs using similar practices to those described in this case.

For further information, see Court of Appeal in Warsaw (2018), ***V ACa 1096/17****, 16 April 2018; Rzeczpospolita (2018), '****Walka o unieważnienie nieuczciwych umów sprzedaży prądu****', 23 September 2018.*

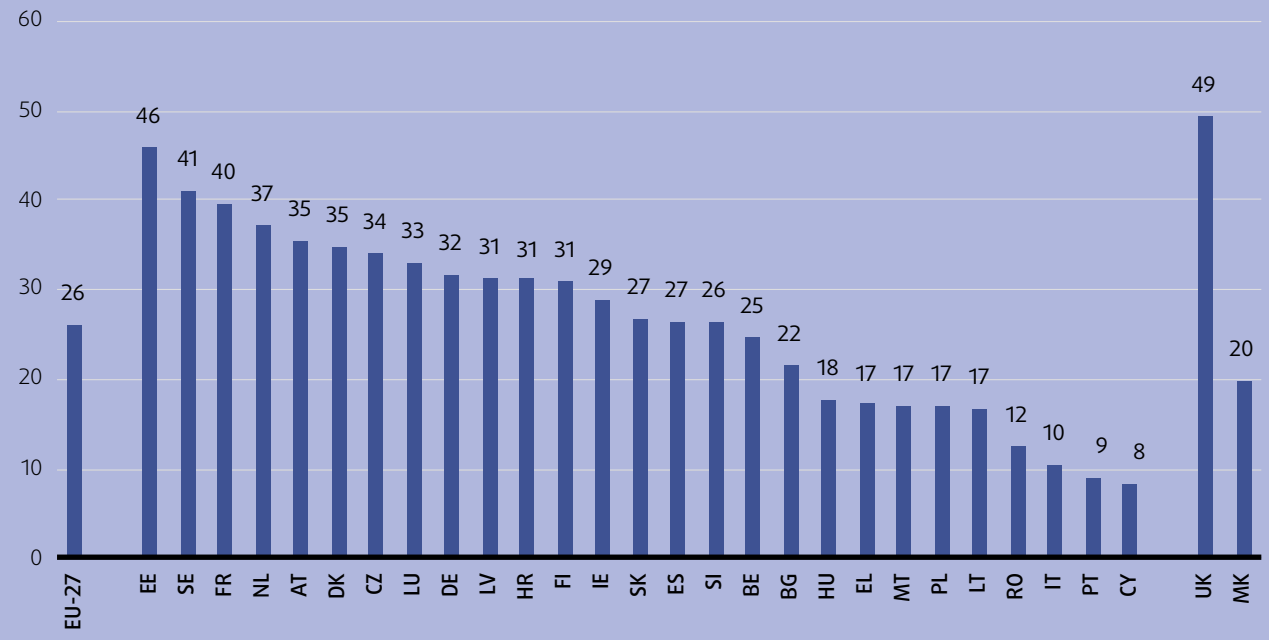
Fundamental Rights Survey findings

In 2019, FRA surveyed a representative sample of the general population in the 27 EU Member States, the United Kingdom (which was an EU Member State at the time of the data collection), and North Macedonia on a range of fundamental rights issues.

Consumer fraud experiences

FRA asked respondents about their experiences of consumer fraud in the last five years and the last 12 months. Across the EU-27, the results show that one in four (26 %) has experienced consumer fraud in the last five years, the majority (61 %) of those being in the last 12 months. While there are no notable gender differences, more young people (aged 16 to 29 years) report experiencing consumer fraud (33 %) than those aged 30 to 54 years (28 %), those aged 54 to 64 years (24 %) and those over 65 years (18 %). More persons with severe or some limitations in their daily activities report encountering consumer fraud in the last six months (36 % and 32 %, respectively) than those with no limitations (23 %).

FIGURE 2: EXPERIENCE OF CONSUMER FRAUD IN THE PAST FIVE YEARS, BY COUNTRY (%)



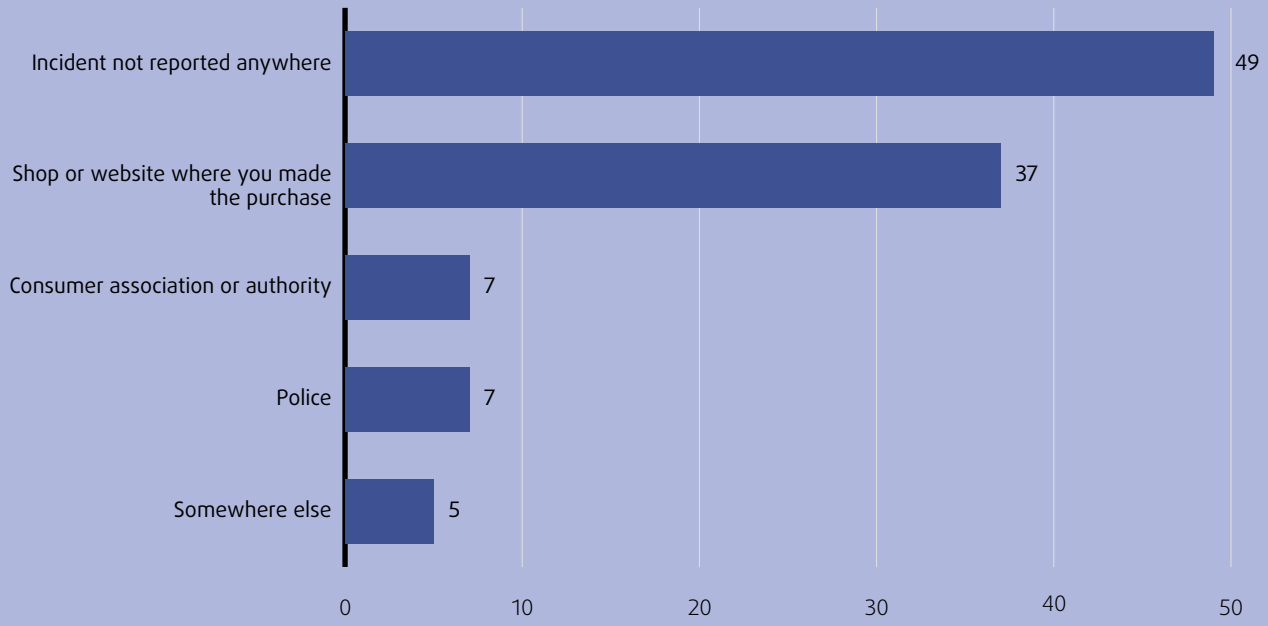
Notes: *All 34,948 respondents in the EU-27, the United Kingdom and North Macedonia were asked to complete the survey section 'Personal security and safety'; weighted results.*

Source: *FRA, Fundamental Rights Survey 2019 [Data collection in cooperation with CBS (NL), CTIE (LU) and Statistics Austria (AT)]*

Across the EU-27, 54 % of the respondents indicate that the last time they experienced consumer fraud was when ordering online, over the internet or by email, while 28 % have experienced consumer fraud in a shop. The results vary significantly among EU countries – for instance, in Denmark, France and Germany, at least two thirds of instances of consumer fraud happen when ordering online, while in Bulgaria and Greece more than 60 % happen when buying something in a shop. These results could reflect differences in online penetration and consumer habits in EU countries, but the research methodology could also influence them, as in 10 Member States respondents were asked to fill out the questionnaire online.

Nearly half (49 %) of the respondents in the EU-27 did not report their latest experience of consumer fraud. Of those who did report it, 37 % reported it directly to the shop or website where they made the purchase, 7 % to a consumer association or authority, 7 % to the police and 5 % elsewhere.

FIGURE 3: REPORTING THE LATEST EXPERIENCE OF CONSUMER FRAUD (%)



Source: FRA, Fundamental Rights Survey 2019 [Data collection in cooperation with CBS (NL), CTIE (LU) and Statistics Austria (AT)]

The respondents who did not report their last experience of consumer fraud gave different reasons for not reporting the incident. Nearly half did not consider the incident serious enough to report (49 %), one in four thought that nothing would happen or change if they reported it (25 %), nearly one in five felt that reporting the incident was inconvenient (18 %), one in five dealt with the situation themselves (18 %) and 9 % of the respondents did not know how or where to make a complaint or report the incident.

Gender differences in reporting rates are insignificant. However, more young people consider the incident not serious enough or consider reporting to be too much trouble (55 % and 21 %, respectively) than older people aged 65 years or more (42 % and 14 %, respectively). Young people more often do not know how to complain and/or where to report (11 %) than older persons (6 %). Fewer persons with severe limitations in daily activities considered the incident as not serious enough to report (34%) than those with some or no limitations (both 50 %).

1.1.2 Local population

It should be recalled that, among the many human rights identified as being adversely affected by businesses in the business-related human rights incidents uncovered in the first phase of FRA's research,[3] 'environmental rights' are mentioned most often (in 44 cases). These incidents primarily affect local people in the areas where businesses (such as those involved in the oil extraction industry) carried out their activities.

Many of the cases referred to by the experts whom FRA interviewed highlight the particular vulnerability of indigenous or rural communities to business breaches of environmental rights, as their land is the source of their livelihood. Environmental rights abuses also affect other fundamental rights, such as the right to health, the right to family life and even the right to life itself.

The cases outlined in this section illustrate the many challenges that local populations affected by business operations face when attempting to pursue a remedy. Such cases often have a cross-country border element nature – for example, involving human rights abuses that happened in third countries linked to businesses that had their headquarters in an EU Member State – which adds extra burdens on victims seeking a remedy.

Case study

Environmental rights – oil spill

One case affecting a local population and involving environmental damage, as well as affecting the right to work, involved a claim originating from two oil spills that took place in Bodo (Nigeria) in late 2008. The oil spills devastated the environment and left many members of the Bodo community unable to earn money by fishing and farming as they used to. The victims in this case were members of the Bodo community, which comprises around 30,000 people, mainly farmers and fishers, living in 35 villages. The community can, as a matter of Nigerian law, pursue claims for damage to its land. The company responsible for the oil spills was Shell Petroleum Development Company of Nigeria – a subsidiary of Shell, namely a British-Dutch **oil** and **gas** company headquartered in the **Netherlands** and incorporated in the **United Kingdom**.

In 2011, Shell and the law firm acting for the claimants reached an agreement whereby Shell formally accepted liability for the oil spills and recognised the jurisdiction of the English courts. A lawsuit was filed in March 2012 in the High Court against Shell. In June 2014, a judge considered that Shell could be held responsible for oil spills provided that there is evidence of a failure from Shell to take reasonable measures to prevent such spills, whether they result from malfunction or theft. In November 2014, evidence produced before the High Court suggested that Shell was aware of a risk prior to the oil spills that affected the Bodo community.

In January 2015, Shell accepted responsibility for the oil spills and agreed to pay GBP 55 million to the Bodo community following an out-of-court settlement. Overall, this was an example of the commencement of a legal action in the United Kingdom leading to the settlement for the claimants of a long-term human rights and environmental issue in another state.

Right to health and life – toxic waste

A second case affecting the rights to health and life, as well as the right to an effective remedy and fair trial, involved nearly 800 people in Chile suing the **Swedish** mining company Boliden for damages after the company exported a pile of toxic waste to Chile in the 1980s. Toxic waste (20,000 tons) from Boliden's smelting factory in Skellefteå (Sweden) was shipped to Arica, a town in northern Chile. Boliden paid the Chilean company Promel SEK 10 million (€ 942,100) for extracting arsenic and gold ore from the waste, which was left open in a pile close to a residential area. For several years, children played on the pile, which contained large amounts of arsenic and lead.

In the 1990s, many people in the affected city developed serious illnesses ranging from chronic coughing and aching joints to cancer. Boliden claimed that it had followed all the laws and rules regulating the field at the time, and that both Chilean and Swedish authorities were aware of the export. The company's standpoint was that the damages should be paid by (1) the Chilean authorities, which had allowed the toxic waste to be placed so close to a residential area, and (2) Promel, the company that had agreed to take care of the waste. The case was dismissed with reference to the period of limitation (reasoning that the case was statute barred, as the export of the toxic waste took place over 10 years before) and the court ruled that the plaintiffs must pay their own and the defendants' costs accumulated during the court processes in the District Court and in the Court of Appeal. In June 2019, the Swedish Supreme Court handed down a judgment in which it ruled that no retrial is necessary, thereby confirming earlier judgments, and ordered the victims to pay the costs of the defendants.

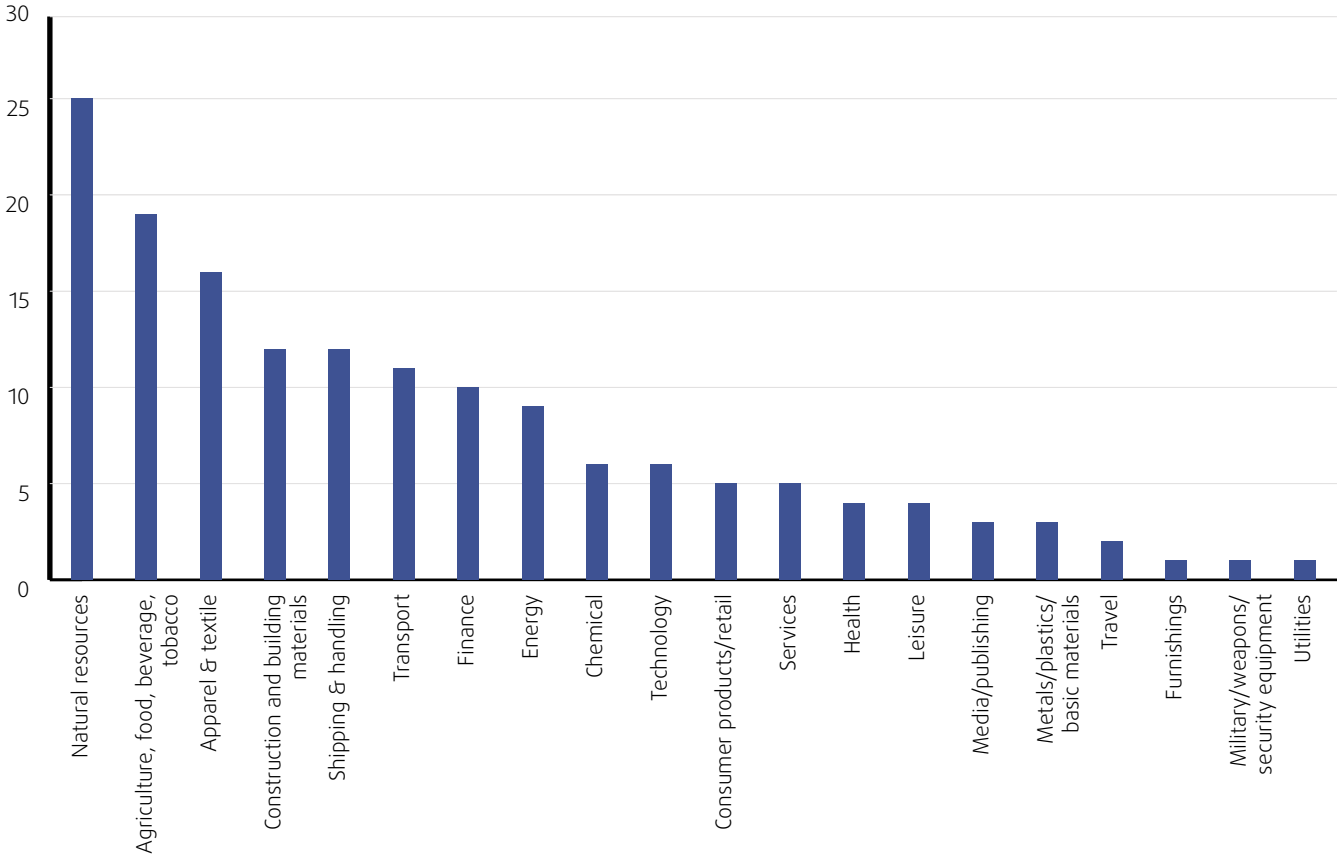
For further information, see European Parliament (2019), ***Access to legal remedies for victims of corporate human rights abuses in third countries***, February 2019; United Kingdom High Court of Justice (2012), ***The Bodo Community, Gokana Local Government Area, Rivers State, Nigeria v. The Shell Petroleum Development Company of Nigeria Ltd (Claim No. HQ11X01280)***, 23 March 2012; SVT (2019), ***'No new negotiation between Boliden and Arica Victims'***, 25 June 2019.

1.1.3 Workers

The third main category of people affected by business and human rights abuses is workers – including direct employees of companies and workers in the supply chains of companies.

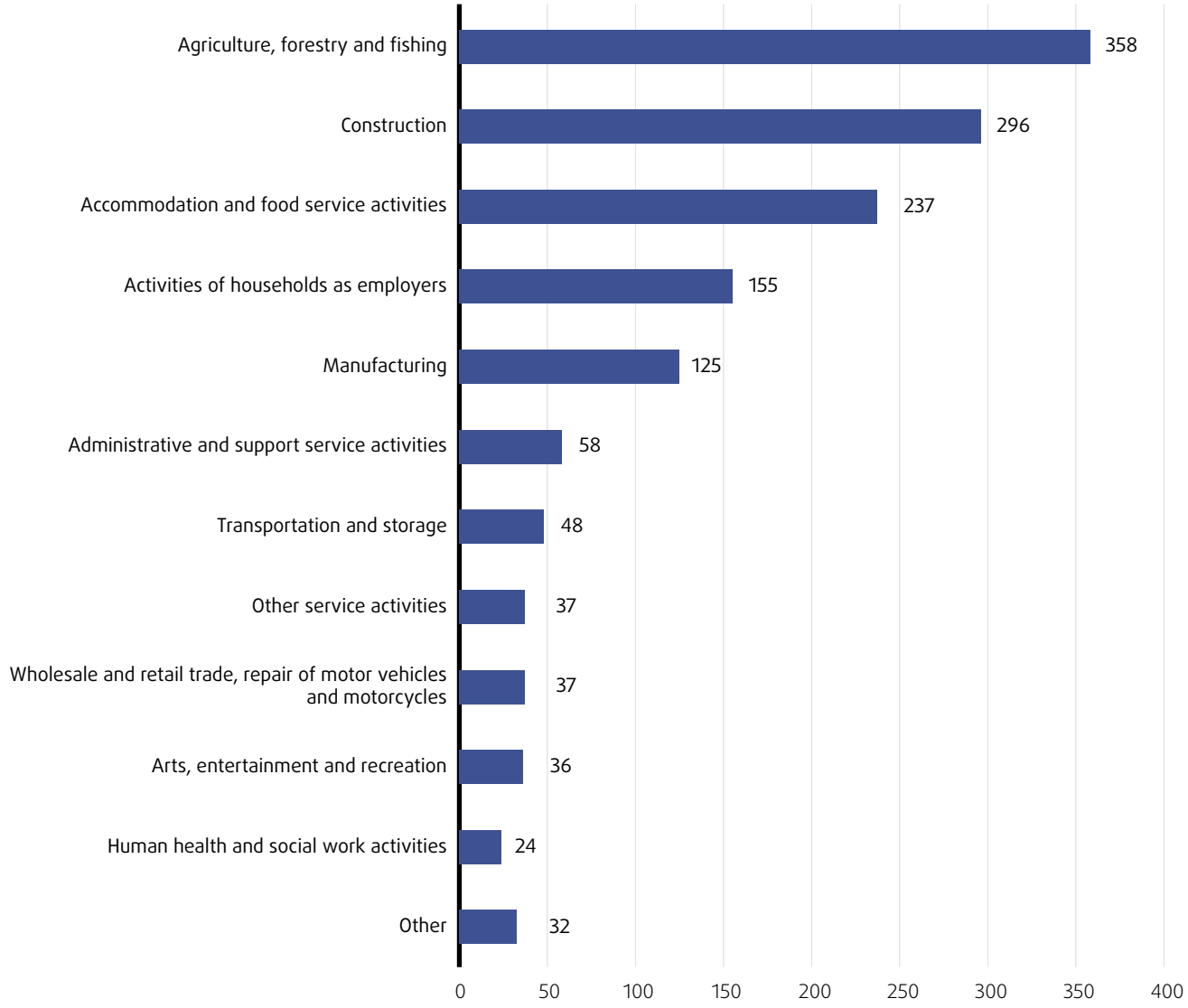
The right to fair and just working conditions is the second fundamental right most frequently adversely affected by business in the incidents identified in the first phase of FRA's research (36 cases), after 'environmental protection'.[4] Abuses involving working conditions often touch on other rights such as health, dignity and even the right to life. FRA's research in the first phase also shows that there is a strong correlation between the main types of industry sectors in which key human rights 'incidents' involving businesses occur and the main industry sectors in which migrant workers are most at risk of experiencing severe labour exploitation (as FRA identified in a 2015 report on severe labour exploitation); this applies, in particular, to immigrants who work in conditions of severe labour exploitation.[5] As Figure 4 and Figure 5 show, in both areas of research (i.e. incidents by industry sector and labour exploitation by industry sector), agriculture, construction, food and beverages, manufacture (including textiles) and transport all feature in the top seven sectors.[6] The overview of sectors cannot be considered as representative of the overall issue in either study,[7] nor can they be directly compared because the methodologies differ. However, the link could be considered a strong indication of the potential for the most serious fundamental rights abuses (such as those infringing the rights to dignity and health, the prohibition of slavery and trafficking in human beings, child labour and the right to fair and just working conditions) involving businesses in these sectors.

FIGURE 4: DISTRIBUTION OF INCIDENTS IDENTIFIED IN THE RESEARCH, BY INDUSTRY SECTOR



Source: FRA, 2019

FIGURE 5: ECONOMIC SECTORS MOST PRONE TO LABOUR EXPLOITATION



Source: FRA, 2015

Notes: Question: "Which are the (up to) three economic sectors where you, in your professional work, have witnessed most often that migrant workers are severely exploited?" N = 551; DK=65 (the graph summarises the answers given by 551 respondents; an additional 65 respondents selected the category 'don't know'). The economic sectors electricity, gas, steam and air conditioning supply; education; mining and quarrying; information and communication; activities of extraterritorial organisations and bodies and others have been included in the category 'other'.

Experts whom FRA interviewed also allude to cases of businesses infringing the right to fair and just working conditions and exploiting workers for their labour. For example, in **Finland**, one interviewee[8] maintains that many business- and human rights-related cases relate to labour rights and are very often found in supply chains – meaning that abuses may happen not necessarily to direct employees of a company, but to workers employed by contractors who are part of a company's supply chain, which poses particular challenges (see case study box). The interviewee identifies the most risky sectors as small ethnic restaurants in particular, the construction sector, berry-picking businesses and the cleaning sector (this correlates with FRA's findings from its 2015 report on severe labour exploitation for Finland, which identified the three most risky business sectors for severe labour exploitation as restaurants, cleaning and construction).[9]

A **Swedish** interviewee [10] mentions a case involving severe labour exploitation with a link to Swedish business. It concerned Swedish importers from six factories in Thailand that exploited migrant workers from Cambodia and Myanmar. There were no legislative remedies involved, according to the interviewee, but the CSO Swedwatch published recommendations on

conducting a risk analysis to ensure working conditions that comply with national legislation.[11] A third interviewee[12] refers to several cases of business and human rights abuses that arose in high-risk environments and concerned labour rights – for example, several instances of companies paying workers low salaries.

Case study

Serious human rights abuses in the supply chain

One case study in **Germany** highlights the particular challenges faced by workers who become victims of serious human rights abuses in the supply chain of a company when trying to access a remedy. This particular case, concerning the German textile retailer KiK Textilien and Non-Food GmbH, represents the first transnational civil claim against a German company for overseas human rights harm in its supply chain. One survivor and three families of the victims claimed compensation from KiK for damages resulting from a factory fire at one of its supplier firms in Pakistan, which killed more than 280 persons. The four plaintiffs were chosen to represent 156 families of the victims, and a law firm from Berlin represented them, with the assistance of the European Centre for Constitutional and Human Rights (ECCHR). The claim was brought against KiK, as it had admitted being the main buyer, sourcing over 70 % of the factory's production over five years.

In the absence of legal precedent on supply chain liability in German courts, the ECCHR and Geulen and Klinger Rechtsanwälte filed the case against KiK to develop this issue through the proceedings.

Although the court in Dortmund accepted jurisdiction and granted legal aid, the Landesgericht Dortmund rejected the claim in 2019 on the grounds of Pakistani law limitation periods. Therefore, the legal question of whether KiK had a duty of care (*Sorgfaltspflicht*) with respect to fire safety in the factory remains open. The total costs that the defence incurred while representing the victims – including legal representation, translations, travel, etc. – were much higher than the amount that the court granted. The case benefited from pro bono support by lawyers, students and translators, as well as funding from CSOs. Although the ultimate rejection of the claim was disappointing for the parties involved, the case is paradigmatic for the supplier relation and succeeded in putting the issue on the agenda in Germany.

For further information, see European Centre for Constitutional and Human Rights (ECCHR) (2019), ***Kik: Paying the price for clothing production in South Asia***; District Court Dortmund (2019), 7 O 95/15 d, Muhammad Jabir and Others v. KiK Textilien und Non-Food GmbH; European Parliament (2019), ***Access to legal remedies for victims of corporate human rights abuses in third countries***, February 2019, pp. 59–66.

1.2 ROLE OF CIVIL SOCIETY ORGANISATIONS

This section outlines the crucial role of CSOs in facilitating, if not enabling, access to justice for victims of business-related human rights abuses. It also explains the risks and hurdles that those organisations face when engaging in strategic litigation or watchdog activities related to business compliance with fundamental rights.

All interviewees, in particular from **France**, **Germany**, **Italy** and the **Netherlands**, have particularly strong opinions on the effective role of organisations in helping victims. Civil society can be helpful in various ways. First and foremost, CSOs are vital for providing support to victims; this support ranges from providing financial

or procedural assistance to raising awareness with the wider public. The involvement of CSOs is particularly relevant when abuse has occurred in a third country, namely when victims lack information regarding their rights and may lack the possibility of effective involvement in the proceedings, and thus have to rely on the CSO to convey their perspectives. Furthermore, CSOs often assist lawyers by undertaking the preparatory work necessary to bring the case to court, and often they actually bring individual or collective cases on behalf of victims or in the public interest.

In almost all cases that interviewees describe, the victims would not be able to bring their cases to the court without the support, both financial and legal, of an organisation.

"It's difficult to envisage victims bringing a case, or foreign victims bringing a case without the help of NGOs."
(France, representative of a NGO specialising in strategic litigation)

For example, interviewees in **Italy** underline that CSOs help victims to access complaint mechanisms, by suggesting lawyers and judicial strategies based on their long-standing experience in the field. An interviewee in **France**[13] and the **Netherlands**[14] stress the important supporting role of CSOs when victims are abroad – to help them understand the local situation and procedures. Finally, several interviewees involved in cross-border cases stress the important role that local CSOs can play in helping to gather supporting evidence about, and helping the lawyers leading the case to understand, the local situation – particularly in third countries and where funding does not allow the lawyer to visit the place where the abuse occurred.

"[W]e are just not in a position to go to [countries]. [...] It's been extremely helpful to have worked with NGOs who are also locally active, to [...] gather supporting evidence for example locally, and to give you more understanding of the local situation. And finally, also, to gain public awareness for the case. Often the NGOs are campaigning around the case and the facts, they are really involved and they seek attention beyond the sole court case and I think that's very important for the case. It's a way to make sure that there is a bigger profit and result than only the result that stems from the case."
(Netherlands, Lawyer)

CSOs are also instrumental in advancing the cause of human rights in the business sector, as one lawyer in Poland sums up.

"The NGOs have an important role to play by ensuring and taking care of the transparency of the process, not least in order to stimulate business to respect and protect human rights, particularly since the European law provisions provided possibility for them to initiate cases."
(Poland, Lawyer)

Initiatives from CSOs also incentivise better business conduct. For example, a lawyer from the **Netherlands** refers to the Fair Wear Foundation, a Dutch organisation that promotes fair practices in the garment sector, in particular in the labour-intensive sewing, cutting and trimming parts of the supply chain.[15] Furthermore, the organisation provides for a non-judicial grievance mechanism for victims. According to the expert, those local mechanisms are actually used and they are exploring the possibility of linking them with local and binding mechanisms to improve access to remedy.

Case study

Measuring business human rights performance

The Corporate Human Rights Benchmark (CHRB) is a multi-stakeholder initiative led by CSOs and investors from the Netherlands, the United Kingdom and Nordic countries, among others, to benchmark corporate human rights performance. Based on public information, the CHRB assesses 200 of the largest publicly traded companies in the world on a set of themes, including (A) governance and policy, (B) respect and due diligence, (C) remedy and grievance mechanisms, (D) company human rights practices, (E) responses to serious allegations and (F) transparency. In 2019, 37 % of the companies assessed were based in Europe.

This yearly benchmark, which was started in 2017, focuses on companies from four industries with significant human rights risks and considerable global economic significance: (1) agricultural products, (2) apparel, (3) extractives and (4) ICT manufacturing.

The 2019 CHRB showed consistently low scores, pointing to weak implementation of the UNGPs. A high number of companies scored zero points on themes A–D, which indicates that companies lack structural commitments and systems to avoid harm to human rights or to provide an effective remedy to victims. In particular, half of all of the companies assessed scored zero points on theme B, human rights due diligence, exposing a key weakness in the corporate approach to manage human rights risks, with wider repercussions for governments and investors.

However, average scores for companies that the CHRB has repeatedly assessed have gone up for 75 % of companies, showing a potentially beneficial influence of continued scrutiny and disclosure of information.

For theme E, responses to serious allegations, an assessment of 150 severe allegations showed that companies provided a satisfactory remedy to victims in merely 3 % of the cases. Finally, despite increasing disclosures of supply chain mapping by business, overall disclosure remains weak, in particular with regard to practices to manage key risks.

For further information, see Corporate Human Rights Benchmark (CHRB) (2019), ***2019 key findings report*** and the ***CRHB website.***

However, one of the most important roles of CSOs, according to interviewees, is to stimulate legal and cultural changes through strategic litigation to improve the protection of human rights, in particular with regard to environmental and consumers' rights, as well as workers' rights.

Several experts note that providing legal standing to CSOs, in particular a possibility for them to lodge representative actions or actions in the public interest, would improve access to remedy for victims of business-related human rights abuses.

In this regard, experts in **Germany**, **Italy** and **Poland** stress that, often, the criteria that organisations have to meet to be eligible for legal standing are very difficult to meet. In **Italy**, only CSOs registered on the list of the National Council of Consumers and Users[16] can start a class action. In **Poland**, only organisations that have been registered for at least 12 months as ecological organisations can be party to administrative proceedings (and can challenge a specific investment in the court). According to one interviewee,[17] this prevents legal standing for ad hoc, grass roots organisations (formed, for example, by members of a local community affected by activities of a business). An additional limitation is the need to prove a factual and legal interest in being a party to proceedings, which excludes claims in the public interest.

The main obstacle for CSOs involved in strategic litigation is the significant risk concerning not only the costs incurred during these, usually very lengthy, procedures, but also the diverse consequences of losing a case, as well as political and legal implications.

An expert in **France** highlights the reluctance of CSOs to bring cases to court in terms of the costs and time involved.

"You know, when you are an NGO you do fundraising for one or two years, at best three years, and you're [part of] judicial proceedings for 10 years, 15 years, and after 10 or 15 years you might just lose [...] it's very tricky to find the financial support for this litigation case. I think there should be some public fund for that."
(France, Representative of an NGO specialising in strategic litigation)

Experts from **Germany** note that, in the case of a negative decision of the court taken within the framework of representative action, the association representing the claimants could be accused of negligent conduct,[18] and persons affected by the decision could claim compensation from the association. In any case, organisations bear the financial risk of proving that a company violated the law or the link to damage suffered by victims. Under German law, certain organisations can mitigate the costs through the financial income that the organisation retrieves from claims against those businesses that do not abide by the requirements of their cease-and-desist declaration. According to an interviewee, in accordance with the national rules in Germany transposing the EU Consumers' Injunction Directive,[19] such litigation can be a source of income for qualified entities representing the collective interests of consumers. The interviewee also points out that this aspect of their work has been controversial, with accusations by some politicians that associations claim money from companies excessively and that their state funding should therefore be reduced.[20] The interviewee furthermore explains that this argument (the allegation of abuse of rights: '*Vorwurf des Rechtsmissbrauchs*') is also used against them in court.

In Germany, organisations that work on public interest issues qualify for charitable status so that donations to them are tax deductible. To receive this status, an organisation has to be engaged in one of the 25 specific activities listed in German law,[21] which does not include activities related to the advancement of human rights and social justice or climate protection. Recently, several German CSOs saw tax offices or administrative tax courts withdraw their charitable status on the ground that some of their activities do not have a charitable purpose and are "too political". Those decisions triggered a discussion in Germany about the role of civil society, and created uncertainty and fear for many organisations active in awareness raising or strategic litigation in the area of human rights and environmental protection. Representatives of CSOs claimed that without such charitable status an organisation not only loses public trust and tax advantages, but is hampered from carrying out other activity, such as advocacy, or may even cease to exist.

Interviewees from **France** and the **Netherlands** refer to strategic lawsuits against public participation (SLAPP) techniques (strategic lawsuit against public participation/prosecution).[22] One interviewee representing an NGO campaigning for stronger French legislation on the liability of parent companies for their subsidiaries abroad gives a specific example. Following a complaint against a multinational company for forced and bounded labour, the company immediately initiated proceedings for defamation and for infringement of the presumption of innocence claiming damages amounting to several hundred thousand euros from employees of the NGO.[23] After 2015, the company initiated a series of SLAPP lawsuits against the NGO. By 2019, the association had dealt with six lawsuits, which the court eventually dismissed. However, the NGO had to bear a high cost to defend itself and did not receive reimbursement for all costs. The aim of those lawsuits was to slow down the main case and exhaust the association's financial and human resources. According to the interviewee, even one lost defamation case could cause an NGO's bankruptcy.

A new SLAPP strategy appears to target not only organisations, but also individuals claiming significant damages, to intimidate not only victims but also staff of NGOs and journalists or whistle-blowers who highlight any harmful business activities. Victims, as well as the CSOs who represent them, face enormous pressure on an everyday basis. In some cases, such pressure can result in witnesses being afraid to give evidence in court. Such intimidation tactics coupled with the difficulties facing organisations in meeting the requirements for legal standing means that only a few are currently able or willing to lodge claims on behalf of victims.

In this regard, the OECD Working Party on Responsible Business Conduct expressed, in March 2020, its deep concern regarding the incidents of alleged undue pressure intended to silence those submitting cases to NCPs for Responsible Business Conduct.[24]

Endnotes

1 This refers mainly to the European context and to the incidents referred to by the experts interviewed in the course of this project, not to all incidents happening globally, which also include violations such as killings of human rights defenders and trade unionists.
2 FRA (2020), ***Your rights matter: security concerns and experiences***, Publications Office, Luxembourg.
3 FRA (2019), ***Business-related human rights abuse reported in the EU and available remedies***, Figures 1 and 2.
4 FRA (2019), ***Business-related human rights abuse reported in the EU and available remedies***, Figures 1 and 2.
5 The following are FRA publications on this topic: ***Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights*** (2015), ***Out of sight: migrant women exploited in domestic work*** (2018), ***Protecting migrant workers from exploitation in the EU: boosting workplace inspections*** (2018), ***Protecting migrant workers from exploitation in the EU: workers' perspectives*** (2019).
6 For more information, see the following: Office of the High Commissioner on Human Rights (OHCHR) (2017), ***Accountability and Remedy Project, Part II: State-based non-judicial mechanisms***, p. 6. That publication identifies four sectors of business activity as posing a high risk of severe human rights impacts: extractives, mining and natural resources; agribusiness and food production; infrastructure and construction; and textiles and manufacture of clothing.
7 FRA (2015), ***Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights***, Section 2.3.
8 Finland, Lawyer and human rights expert.
9 FRA (2015), ***Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights***, p. 47.
10 Sweden, Expert working at an non-governmental organisation (NGO).
11 Swedwatch (2015), '**Trapped in the kitchen of the world**', 25 November 2015.
12 United Kingdom, former counsel for transnational corporations.
13 France, representative of an NGO specialising in strategic litigation.
14 The Netherlands, lawyer experienced in litigation.
15 For more information, see Fair Wear Foundation's webpage '**How we work**'.
16 *Consiglio Nazionale dei Consumatori e degli Utenti*.
17 Poland, senior lawyer at an NGO.
18 This is known as '*fahrlässiges Handeln*' – if the organisation that files the action loses the action based on its own negligent conduct (e.g., in extreme cases, missing deadlines), it can be held liable for that negligence by individual persons who registered with the claim.
19 **Directive 2009/22/EC** of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests. According to Article 2, action for an injunction consists of "[...] proceedings commenced by qualified entities [...] seeking:
"(a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement;
"(b) where appropriate, measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement;
"(c) in so far as the legal system of the Member State concerned so permits, an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions."
20 See, for example, Handelsblatt (2019), '***Kramp-Karrenbauer droht der Umwelthilfe***', 13 January 2019.
21 Federal Law Gazette [*Bundesgesetzblatt*] (2003), **Fiscal Code of Germany in the version promulgated on 1 October 2002**.
22 SLAPP techniques involve a lawsuit that is intended to censor, intimidate and/or silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition.
23 Sherpa (2015), '**Legal action against Vinci in Qatar: Vinci institutes defamation proceedings, claiming exorbitant damages from Sherpa Organisation and its employees**', 16 April 2015.
24 Organisation for Economic Co-operation and Development (OECD) (2020), '**Statement of the Working Party on Responsible Business Conduct**', 13 March 2020.

2

AVAILABLE REMEDIES AND THEIR OUTCOMES

According to UN and Council of Europe instruments, both judicial and non-judicial mechanisms need to ensure that victims of business-related human rights abuses have effective access to remedies.

This chapter provides a general assessment – based on the opinions of the interviewees – of available judicial and non-judicial mechanisms in the selected Member States. Section 2.1 summarises the interviewees' general assessment of available judicial remedies and their effectiveness for business-related abuses (while Chapter 3 focuses on selected major obstacles). Section 2.2 analyses experts' experience of non-judicial mechanisms, in particular the OECD NCPs and relevant ombudsmen. Section 2.3 provides an outline of the possible consequences of a remedy from the point of view of the victim, as the UNGPs highlight (such as the prevention of harm, redress and punitive sanctions for the perpetrator).

In most legal systems in the EU, legal frameworks applicable to potential business-related human rights violations are broad and layered. Most experts agree that access to remedy leading to financial compensation remains largely ineffective for alleged victims of business-related abuses. This is due to the accumulation of practical and procedural obstacles, including high financial risk and costs, rules on the burden of proof and a lack of specialised support, for example in the form of representative actions by CSOs, or a lack of effective collective remedy. Experts' views on non-judicial complaint mechanisms vary depending on the country and the type of mechanism, but, in general, experts describe such mechanisms as ineffective in providing remedy. The OECD complaint mechanism is seen as an alternative access mechanism for third-country nationals and as an opportunity for negotiation; it is considered of little or no relevance to financial compensation.

2.1 JUDICIAL REMEDIES

Effective access to remedy requires judicial assessment. The 2016 UN Human Rights Council resolution underlined that "effective judicial mechanisms are at the core of ensuring access to remedy and that [...] appropriate steps [should be taken] to ensure the effectiveness of such mechanisms when addressing business-related human rights abuses, including in cross-border cases".[1]

According to most interviewees, courts remain the main – and often the only effective – channel to access justice in business-related human rights abuses.[2] However, most interviewees point to a lack of specific procedures for such abuse. Depending on the nature of the abuse, civil, criminal or administrative proceedings may be available. However, interviewees in all countries highlight that business-related human rights abuses are often atypical and those seeking judicial remedy can face a range of practical, procedural and financial barriers.

Several interviewees mention that, while formal judicial structures are in place, they are not always very functional and accessible to victims in view of high court fees, insufficient legal aid, an overwhelmed system and excessively lengthy proceedings.

Available remedies must first of all be tested in court, to assess their efficacy. However, in some countries, there are very few cases relating to business abuses. The majority of interviewees refer to financial risks linked to the high cost of proceedings and legal representation, complex procedures and a lack of expert support as major deterrents from taking a case to court. In some countries, for example **Finland**, there is no tradition of pro bono or human rights strategic litigation, but there is instead a tendency to resolve disputes in out-of-court negotiations. This chimes with the opinions of other interviewees, highlighting the role of CSOs in strategic litigation.

Many interviewees note that civil proceedings are most often used in cases of business-related abuse. In this case, the task of gathering evidence can be considerable, especially when claimants are in a third country and the forum state is in Europe (the next chapter discusses obstacles related to the burden of proof and access to evidence, as well as cross-border issues). This requires identifying possible victims and usually involves considerable language and logistic efforts and very often pleading according to foreign law.

Some interviewees have experience with criminal proceedings. This – in theory – has the advantage of delegating the burden of collecting evidence to the public prosecutor. However, the role of victims in criminal proceedings varies across the EU.[3] In most EU Member States, the public prosecutor leads the criminal proceedings and victims have no control over the course of the case. An interviewee in the **Netherlands** considers this a significant barrier for victims of corporate crime.

An interviewee in **Germany** refers to the independence and commitment of the public prosecution as essential for effective criminal justice.

A **Polish** interviewee[4] also mentions a case in which public authorities tolerated the use of prohibited pesticides because of the powerful business interest involved and influenced the decision of the public prosecutor to drop the criminal investigation.

A similar experience was described by a **French** lawyer[5] working for an NGO specialising in strategic litigation. In a well-known case against a corporation,[6] the CSO reported the case to the French criminal justice system in 2015, using the 'simple complaint' system. The prosecutor dismissed the case in 2018 for lack of identified victims (according to an interviewee, because the victims had been threatened). The interviewee notes that French law allows victims to become a civil party (*partie civile*) in criminal proceedings. This is, according to the interviewee, often the only way to bypass any unwillingness of a prosecutor to institute proceedings and provides claimants with the same rights as prosecutors, namely access to documents and the possibility to demand procedural actions. However, French law requires that a 'simple complaint' be lodged first and, in this particular case, after four years of proceedings, this complaint was dismissed. Only then could a new complaint be lodged, as *partie civile*, and the whole proceeding had to start from scratch in 2019. The case is pending.

"[Y]ou can file a criminal complaint and then from that point on, it's out of your hands. And then of course, you need a very proactive prosecutor to follow up on such a case and the evidence needs to be clear enough for them to do so. So it's a very different starting point. The civil procedure gives us the most flexibility to do it."
(The Netherlands, Lawyer)

"There are cases in which prosecutors must be ready to investigate. But they do not have the staff, the know-how, the resources. It is also a question of will and of resources. [...] [You need prosecutors] who consider it their task to dedicate themselves to such cases. When you have such prosecutors [...], then this system can work. But there is no political will. And in the end, prosecution authorities are political entities."
(Germany, Senior lawyer at a CSO)

Victims can also participate in criminal proceedings through what are known as adhesion, adhesive or ancillary proceedings through which a court can rule on the compensation for the victim of a criminal offence. Rather than pursuing damages in a separate civil action, the victim files a civil claim against the offender as a part of a criminal trial. However, a **German** interviewee considers such adhesion procedures ineffective in criminal proceedings.

Some interviewees note that to initiate administrative proceedings an authority must issue a decision. This limits the scope of its application. In **Poland**, interviewees consider administrative proceedings more accessible, especially in environmental cases, than civil proceedings. However, in administrative proceedings, the main outcome is a decision concerning the operations of a specific company and not compensation or other forms of redress for those affected by these operations. In cases concerning environmental law, the administrative proceedings often offer an opportunity to stop harmful investment, either at the stage of proceedings before administrative bodies or at the spatial planning stage. In cases involving criminal offences, administrative proceedings can also be used in combination with criminal provisions (e.g. concerning corruption regulations). However, the eligibility of organisations to have legal standing in such cases is usually limited (for more details on this, see Section 1.1). Proving a legal interest in the case is an additional challenge. Moreover, there is often political pressure in investment cases involving the interests of large state-owned enterprises, as a **Polish** expert argues.

"Unfortunately in this area, in environmental law and energy investments, when also companies are state enterprises, it's a big issue, because in many cases it's politicised. [...] We can always go to court and it's likely that we will succeed there. But very often the investment will be at such stage that it won't be possible to stop it and take it back."
(Poland, Lawyer representing an NGO)

Interviewees from **Poland** also note that, while administrative courts usually consider such cases with due independence, in practice verdicts and decisions by local authorities are not always implemented. For example, in one case, an investment for a power plant and an open pit mine in the Wielkopolska region of Poland continued, although it had a negative impact on the local water level. Local authorities did not stop the operations of the enterprise, despite the lack of a water permit, a document that is necessary when the investment leads to lowering of a lake's water surface.

Overall, the cases discussed during the interviews reveal certain barriers to effective access to justice for victims that were common to many of the proceedings and countries in this research. The obstacles that seem to be common to all systems that the research covers and cause the biggest barriers to access to justice are discussed in more details in the next chapter. Some interviewees also mention the complexity of procedures (Finland), limited legal aid and the length of court proceedings (France, Italy and Poland). Table 1 summarises these findings.

TABLE 1: BARRIERS AND SUGGESTIONS FOR IMPROVEMENT IN JUDICIAL CASES RELATING TO BUSINESS-RELATED HUMAN RIGHTS ABUSES

Barriers to access to justice in business and human rights cases	What works well/suggestions for improvements
• Rules on burden of proof and limited access to evidence • Limited legal standing for certain specified bodies and/or organisations (such as consumer or Ombuds institutions and CSOs) • High cost of proceedings and uncertainly of the outcome – meaning the claimants also risk having to pay costs of the defendant if they lose the case • Financial risk and fear of reprisals for individuals • Financial and organisational risks for individuals and CSOs in taking up certain cases • Length of proceedings • Extra barriers when bringing a case in an EU Member State when the human rights violation occurred overseas – costs of gathering evidence (travel, translation testimonies and documents) and of effective participation of victims in proceedings, language barriers • Choice of the law and jurisprudence in cases of abuses in third countries • Period of limitation expiring because of applicable law or because the limitation period was not suspended for similar cases	• Reversal of burden of proof, introducing rules on disclosure • Role of CSOs in carrying out strategic litigation – often the only way to bring a case in practice • Key role of CSOs in supporting victims – including covering costs, gathering evidence, expert knowledge • Collective redress/representative actions available in specific areas • Oversight/supervising bodies with powers to investigate facts or fine enterprises (e.g. the consumer protection authorities) • ADR before addressing the court, facilitating solving problems through negations/mediation(but suspending the limitation period would be necessary so that the mediation is not abused to prolong proceedings) • Simplifying court proceedings in low-threshold cases, so an ordinary person could present the case without a lawyer • Introducing special courts or special procedures, which would require mediation but whose decisions would be delivered without undue delay and be final and enforceable

Source: FRA, 2020

2.2 NON-JUDICIAL REMEDIES

Non-judicial mechanisms can be divided into state-based and non-state complaint mechanisms (also referred to as operational-level grievance mechanisms). These can include quasi-judicial bodies, Ombuds institutions and others, such as OECD NCPs.[7]

Non-judicial mechanisms with competence in fundamental rights exist in all EU Member States, but their powers and objectives vary greatly. Some of these may have quasi-judicial powers, while others cannot take binding decisions, but may provide mediation or guide or even represent victims before judicial bodies (for example in Finland, Poland and Sweden – in consumer cases of general interest).

Non-judicial mechanisms can supplement judicial mechanisms in several ways.[8] They can be more accessible, less costly and less lengthy, and allow for mediation. While their decisions may not be enforceable, some of the interviewees consider their voluntary character a strength that facilitates negotiation. According to the UNGPs, as well as the 2016 Council of Europe recommendation and the 2017 FRA Opinion, non-judicial grievance mechanisms should meet certain minimum criteria to ensure independence and effectiveness.[9]

Overall, despite a number of non-judicial, amicable ways of seeking access to remedy, as well as positive experience with the OECD NCP mechanism (see Section 2.2.1) and Consumers' Ombudsman support, court proceedings remain the only effective remedy available to individuals

for business-related human rights abuses, FRA's research shows. However, the length of court proceedings, associated costs and other elements make this route either ineffective or simply too costly for those affected by the adverse business behaviour to make effective use of it.

This section summarises evidence gathered from experts with experience in some types of non-judicial mechanisms – when either representing victims or working for one of the mechanisms – and their evaluation of their effectiveness focusing on the OECD complaint mechanism and Ombuds institutions.

Interviewees outline both the disadvantages and the advantages of non-judicial mechanisms (compared with judicial mechanisms) as appropriate for serious human rights violations (see Table 2).

TABLE 2: ADVANTAGES AND DISADVANTAGES OF NON-JUDICIAL COMPLAINTS MECHANISMS

Disadvantages	Advantages	Recommendations
• Lack of enforceability • Lack of transparency • Lack of awareness	• Lack of publicity • Facilitating mediation and dialogue • Accessibility and low threshold	• Introduce enforcement of ADR decisions • Financial sanctions for non-compliance with ADR decisions • Training among legal professionals, raising awareness

All interviewees confirmed that knowledge about available non-judicial remedies is very low not only among potential victims, but also among legal professionals.

"The problem with amicable dispute resolution is that it is not obligatory and additionally entrepreneurs are not likely to comply with its decisions. Additionally, they often hope that the length and associated cost of going to the court will prevent consumers from claiming their rights."
(Poland, Lawyer from the consumer ombudsman office)

Most interviewees mention the lack of enforceability as a disadvantage. A number of interviewees express doubts about the efficiency of some non-judicial remedies due to their non-binding nature.

Rates of enforced agreements, however, vary greatly depending on the country, type of mechanism and type of sector involved. An interviewee from **Italy**[10] stresses that to protect their public image companies generally comply with arbitrators' decisions. An interviewee from **Finland** states that the compliance rate depends on the sector, varying from 90 % in banking to 50 % in other sectors. An interviewee from **Poland**, representing a consumer ombudsman office, noted that entrepreneurs are not likely to abide by the decisions of ADR mechanisms and, if they engage in them, they do so only to prolong the procedure in the hope that the length and associated cost of the proceedings will dissuade consumers from claiming their rights. Unless judicial proceedings become a real threat, there is little good will to engage in voluntary conflict resolution. A practising lawyer who, in the past, worked for a major ICT company confirms this, as does an interviewee representing the office of a municipal consumer ombudsman. The latter also mentions a case in which only after receiving a subpoena did an entrepreneur become interested in an amicable solution that was offered earlier.

"I think that a general problem with non-judicial mechanisms is that they are held in private. You can understand from the company's point of view that they want to keep everything under wraps for a whole host of reasons, but with these types of issues the need for transparency is going to be important. [...] The idea that those kinds of processes could be used in cases entailing serious human rights violations I think is very dubious and inappropriate."
(United Kingdom, Lawyer)

Overall, interviewees suggest that enforcement of ADR decisions and financial sanctions for non-compliance should be introduced.

Certain interviewees (from **France** and the **United Kingdom**) also mention the lack of transparency and publicity as barriers, as negations are often held in camera, as in the case of NCPs. This does not allow victims to communicate their case – which in strategic cases that CSOs lead is crucial for raising awareness and generating public pressure.

However, other interviewees (from **Italy**[11] and the **Netherlands**[12]) consider the lack of publicity an advantage. While they admit that companies tend to hide behind a 'corporate veil' and not be transparent about their actions and roles, sometimes a lack of publicity may make a company more willing to settle.

Several interviewees point to the aspect of facilitating mediation and providing space for dialogue between parties. According to an interviewee from **Finland**, trying to find common understanding and maintain the dialogue is key but, from a human rights perspective, finding a balance between rights and a commonly acceptable solution can be difficult. This expert provides an example of consultation mechanisms – namely applying **the *Akwe: Kon guidelines***, which are voluntary guidelines prepared by the Secretariat of the Convention on Biological Diversity for impact assessments of development projects potentially affecting indigenous people and local communities. This interviewee also refers to a consultation in the mining sector that the Sámi local community discontinued because they considered that no mining should be carried out in their homeland.

Among other advantages of non-judicial mechanisms, interviewees highlight their accessibility and low cost, as they are usually free and require no legal assistance. The interviewees who specialise in consumer rights also praise the advisory services of consumer protection ombudsmen as good practice.

The following sub-sections focus on two frequently used forms of non-judicial remedy provided by the NCP mechanism and Ombuds and consumer protection bodies.

2.2.1 OECD complaint mechanism

The **OECD *Guidelines for Multinational Enterprises*** require governments adhering to the guidelines to set up an NCP whose main role is to assist enterprises and their stakeholders to take appropriate measures to further the observance of the guidelines, raise awareness of available non-judicial grievance mechanisms and handle enquiries. NCPs provide a mediation and conciliation platform for resolving practical issues that may arise when implementing the guidelines. An individual or organisation can file a complaint with the NCP if they consider that a company has violated the guidelines.[13] The OECD complaint mechanism is non-judicial, as adherence to the guidelines is voluntary for businesses. They can offer a remedy, but decisions of NCPs cannot be enforced in court. Some interviewees consider this lack of enforceability an advantage, as, during mediation, the NCP provides a flexible and neutral forum for discussion. However, other interviewees argue that the success of such mediation is heavily dependent on the good will of businesses.

In **Finland**, one interviewee[14] considers the NCP the only mechanism specifically available for business and human rights. The role of the Finnish NCP is fulfilled by the Committee on Corporate Social Responsibility,[15] which is part of the Ministry of Economic Affairs and Employment.[16] Upon the ministry's request, the Committee may give its opinion on whether or not an enterprise operated according to the guidelines. Since the mechanism has been used in Finland only twice[17] and people do not seem to be aware of it, the interviewee does not consider it an effective remedy.

In **Germany**, the NCP evaluates the admissibility of cases in close cooperation with relevant ministries and the Inter-ministerial Steering Group for the OECD guidelines before any mediation.[18] However, one expert[19] was not aware of any cases in which this procedure provided complainants with any significant solution in terms of remedy. This expert considers that the German NCP, part of the Federal Ministry for Economic Affairs and Energy, is susceptible to political influence and lacks transparency and willingness to initiate proceedings.

PROMISING PRACTICE

Efficient handling of consumer disputes

In **Norway**, a decision of the Consumer Disputes Commission (**Forbrukerklageutvalget**) is enforceable if it is not appealed to an ordinary court within four weeks. The purpose of the Commission is to provide fast, costless and reliable decisions in consumer disputes. It is an administrative tribunal subordinate to the Ministry of Children and Equality. The case handling at the Commission represents the second step of a two-step procedure. The first step consists of obligatory mediation by the local offices of the Consumer Council (*Forbrukerrådet*). The case is passed on to the Commission if mediation is unsuccessful.

However, the interviewee also notes recent positive developments, in particular the improvement of effectiveness and transparency, which the expert links to internal restructuring of the NCP and the recruitment of new staff.

A representative of a **French** NGO involved in strategic litigation emphasises the lack of impartiality, especially in cases involving state enterprises.

"So this is the composition of the NCP and then the secretariat is appointed by the French treasury, which is part of the Ministry of Economy. So directly under the aegis of the Ministry of Economy. And this can be a problem and we have seen that in the case, the complaint which was filed last year against EDF, because EDF is a public electricity company [...] it's the state, the French state has more than 80 % shareholding in the company. And we can see how the shareholding is managed by an entity which falls under the control of the Ministry of Economy. So you can see that in this kind of case with foreign parties, in this case a Mexican organisation, which was the plaintiff, the impartiality of the members can be waived, obviously."
(France, Representative of an NGO involved in strategic litigation)

This interrelation described by the interviewee is an element that has to be balanced on an everyday basis, the Dutch NCP confirms.

"Downside is that we feel the pressure of officials that have to deal with business and trade. Two cases now on Shell as well as many in the past, and it is not easy since it is an influential company. Upside is that we are recognised as an independent mechanism of the government and we have access to a great deal of internal information. E.g. in Denmark they are outside the government but they don't have any cases."
(Netherlands, OECD National Contact Point)

The **Italian** NCP is established under the Ministry of Economic Development.[20] According to one interviewee,[21] the NCP is not independent because the government manages it. Most complaints lodged with this body are rejected. According to another interviewee[22] this is a strategy resulting from the NCP's limited resources. This interviewee also considers that the admissibility criteria of the Italian NCP are too strict and that its priority should be to promote the interests of potential victims.

In the **United Kingdom**, an interviewee's CSO participated in the preparation of a report[23] on the United Kingdom's NCP, which indicates its potential, but also notes that it lacks resources and relevant expertise.

"The UK national contact point for the OECD guidelines has the potential to provide meaningful non-judicial access to justice, alongside the more traditional routes of civil and criminal law. The findings of the NCP also have the potential to feed into judicial cases. In its current form, however, the NCP is largely invisible, and lacks the resources and essential human rights expertise necessary to undertake such a role."
(United Kingdom, Senior lawyer at a consumer rights NGO)

According to an interviewee from **Poland**,[24] the NCP, which in 2017 was transferred to the Ministry of Investment and Economic Development, is largely unknown, having so far dealt with only two cases. However, the impression regarding its efficiency and impartiality is positive. The interviewee highlights that, despite initial concerns, given that the NCP is located in a ministry and its lack of experience, the NCP carried out the procedure efficiently, and showed engagement and good will. One of the cases dealt with by the Polish NCP concerned environmental protection relating to the sale of furnaces on the OLX platform.[25] The Frank Bold Foundation submitted a complaint[26] claiming that the company did not observe the OECD *Guidelines for multinational enterprises* by allowing customers to advertise on its portal the sale of furnaces used to burn processed oil and discarded wooden railway sleepers. The foundation claimed that, although not illegal, the burning of these objects violated environmental protection provisions, as they were considered hazardous waste. The outcome of this case was

positive[27] and the company agreed to change its practice and cooperate with a CSO to implement the decision.

Overall, interviewees describe the complaint mechanism as a good way to enter into discussion with businesses. However, they also express reservations, which the OECD Secretariat seems to acknowledge in its May 2019 progress report on NCPs.[28] Some of the recommendations of the progress report in particular reflect the findings of FRA's research:

- The OECD report recommends that "governments should ensure the provision of financial and human resources commensurate with the scope of the role of NCPs and the heightened complexity of their work. Resources should allow the NCP to adequately handle cases, including access to external expertise where needed, to analyse the circumstances of cases, cooperate with other NCPs, etc. An NCP should be given means to retain the confidence of stakeholders and receive the training and capacity building needed to effectively provide good offices (e.g., training in mediation or resources to engage external mediators)." In this context, an interviewee in the **Netherlands**, working in the NCP office, confirms that the increase in the number of cases requires more human resources, while interviewees from **Germany** and **Italy** mention the lack of willingness to accept new cases.
- The OECD report further advises that "governments should ensure that their NCP enjoys the necessary support and visibility within their government to carry out their functions effectively and promote policy coherence on RCB [Responsible Business Conduct]". Interviewees from **Finland** and **Poland** raise the lack of awareness.
- According to the OECD report, "governments should ensure that the composition of the NCPs is such that they can carry out their functions impartially and without risk of conflicts of interest – or perception thereof." Interviewees from **Germany**, **Italy**, the **Netherlands** and the **United Kingdom** stress the perceived lack of independence as one of the disadvantages of the NCP mechanism.

2.2.2 Role of ombudspersons and consumer protection bodies

The experts interviewed, including representatives of ombudsman and consumer institutions, highlight the important role these bodies play in helping victims of human rights violations to access remedies. The level of support they can provide is significant and includes, in particular, individuals with advice and information. Certain interviewees also highlight the possibility of ombudsman institutions, NHRIs or specialised consumer protection authorities acting in court on behalf of victims, as in **Finland**, **Poland** and **Sweden**.

In **Sweden**, the Swedish Consumer Agency can function as legal counsel in certain cases in its role as Consumer Ombudsman (*Konsumentombudsmannen*). This is, however, rare (approximately one case per year), as the Consumers Ombudsman engages only in cases of interest to all consumers, according to an interviewee.[29] According to the same interviewee, the case must also be of legal interest, for instance a lack of legislation covering the case or an absence of guiding case law.

The District (Municipal) Consumer Ombudsman in **Poland** has soft instruments at its disposal aimed at reaching an amicable resolution of a dispute. However, the ombudsman can also bring a case to court free of charge (the ombudsman is exempted from the court costs). Interviewees in **Poland** highlight that not many consumer ombudsmen in the EU have a similar possibility of legal standing and regret that the limited resources restrict the capacity of the Consumer Ombudsman to make full use of this competence. According to the representative of the Consumer Ombudsman office, the ombudsman tries

PROMISING PRACTICE

EU Ombuds and consumer institutions with a strong role in helping consumers

In **Poland**, the Consumer Ombudsman can provide advice and information to consumers, can assist in lodging claims and even has legal standing before the court on behalf on consumers. According to interviewees, the consumer ombudsman, if provided with sufficient resources, could play a much more important role in protecting consumer rights than it currently does.

In **Sweden**, the National Board for Consumer Disputes has increased the possibility for individual consumers to access justice in consumer cases. The Swedish Consumer Agency acted as the legal counsel for the plaintiffs in a case involving a large number of consumers (approximately 2,000 claimants).

In **Finland**, according to one interviewee, compliance with the Consumer Disputes Board's decisions has reached **75–80 %**. Companies that do not comply are placed on a **blacklist**, published in the **Kuluttaja** (*Consumer*) magazine. *Kuluttajatietoisuuden edistämisyhdistys, Kery*, an association affiliated with the Consumers' Union of Finland working to advance consumer awareness, considered this a positive practice.

to use "other tools aimed to support the consumer, including – in situations when we are convinced that consumer's rights were infringed – supporting him or her in submitting the case to the court" or applies intermediary modes such as a lawyer from the consumer ombudsman office highlights.

"Joining the already ongoing proceedings or presenting an *amicus curiae* to the court, which is often used in situations when the ombudsman notices that the consumer might not do well in the course of the process and decides to write its opinion on the case to the court to present its official interpretation of whether infringement took place or not."
(Poland, Lawyer from the consumer ombudsman office)

However, in **Poland**, not all municipal consumer ombudsmen have the capacity and expertise of the Warsaw municipal consumer ombudsman. Despite the limited number of staff (the Warsaw office employs 16 staff), it engages in a number of cases. In other cities, the tasks of the ombudsman are usually performed by one person, who does not have financial resources even to attend court hearings, as lawyers from the consumer ombudsman office indicate.

"Very often ombudsmen work alone or with the support of one or two employees. [...] Even in a really small district (powiat) one person is usually not able to engage in such far-reaching help as help in court. So very often the ombudsmen either limit themselves to providing help in submitting cases by consumers themselves, or they present views to the court, but they do not engage in submitting cases themselves, because they simply have no such capacity. The tasks of the ombudsman include first of all providing consumers with advice and information."
(Poland, Lawyer from the consumer ombudsman office)

In **Poland**, the District/Municipal Consumer Ombudsman regularly uses administrative proceedings, because they are predictable. For example, if the Ombudsman identifies potential infringement of a group of consumers' interests, it refers the case to the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów* – UOKIK). If the case concerns infringement of the telecommunication law, then the Ombudsman can refer it to the Office of Electronic Communication (*Urząd Komunikacji Elektronicznej* – UKE). These bodies have the power to apply substantial deterrent fines, aiming to reduce negative practices, and the procedure is usually less lengthy than judicial proceedings.

"The reason why the consumer ombudsman's ability of engaging in civil proceedings is limited is mainly due to the limited personnel, unable to engage in the civil court with every single case concerning consumer rights violations [...]."
(Poland, Lawyer from the consumer ombudsman office)

In **Finland**, two consumer rights experts[30] point to the Consumer Disputes Board as an example of a particularly well-functioning and easily accessible (low-threshold) ADR mechanism. The number of complaints filed with this board has increased, according to these experts, although the excessive length of proceedings has been criticised.[31] One interviewee[32] mentions that the non-binding nature of its decisions makes the mechanism less effective, although compliance rates are high. Another expert in **Finland**[33] refers to the **Parliamentary Ombudsman** and the **Chancellor of Justice** as effective mechanisms that are capable of overseeing the legality of actions of public authorities, as well as companies performing public tasks. They have an explicit fundamental rights mandate and can handle complaints, but their decisions are not legally binding. The work of the Parliamentary Ombudsman of Finland in protecting collective consumer interests is also highlighted as a positive and well-functioning practice.

Most interviewees are not aware of the existence of any company-based operational-level grievance mechanisms. Some interviewees provide examples of interesting practices that companies have initiated (see 'Promising practices' box).

One interviewee[34] expresses concern regarding arbitration mechanisms that were originally designed for countries where ordinary courts were not functioning, but now allow companies to avoid local legal obligations. An example of this are claims against Canadian companies operating in Finland that are arbitrated in Switzerland, circumventing the obligation to respect the rights of Sámi people.

2.3 OUTCOME OF REMEDIES

Access to a remedy, as expressed in the UNGPs, includes a range of aspects, from compensation for victims to fines for businesses. The general aim of these remedies is "to counteract or make good any human rights harms that have occurred".[35] However, this does not preclude the wider human rights obligation of a state to provide access to effective remedy to the victim of a human rights abuse. According to the ECtHR, a remedy is considered 'effective' either when it prevents the alleged violation or its continuation or when it provides adequate redress for any violation that has already occurred.[36]

A fine on a business enterprise does not necessarily mean that it will cease abusing human rights, and does not provide victims with effective remedy. A sanction against a business enterprise that does not include reparation for the victim or a clear non-repetition guarantee does not fulfil the international legal obligations of states. A remedy, according to the commentary on the UNGPs, may include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition".[37]

This section outlines the different aims and outcomes that available measures may have and their relevance for the victims of abuses in regard to prevention, sanctions and redress or compensation.

2.3.1 Prevention

An effective remedy includes the prevention of further harm through, for example, injunctions or guarantees of non-repetition.[38] An injunction is a court order requiring a person (including public authorities) to do something or to stop doing something.[39] This type of remedial effect applies for individual cases, while structural prevention is provided through the first and second pillars (see Chapter 4). Relevant tools to enforce the duty to protect include preventive measures, such as injunctions.

Interviewees highlight the accessibility of preventive measures provided by non-judicial remedies, such as the action of administrative authorities and regulators. However, to enhance the accessibility of these interim administrative measures in the context of business and human rights, the EU could provide national-level information about regulators and their powers across different business sectors. This information could be included in the e-Justice portal, which is expected to serve as the one-stop-shop in the area of justice.[40]

PROMISING PRACTICE

Company-level mechanism in cooperation with a consumer ombuds institution

An interviewee from **Poland** reports that a large company decided to create, in cooperation with the consumer ombudsman, internal dedicated units equipped with decision-making powers and responsible for liaison with the consumer ombudsman. The main aim of this cooperation was to handle complaints coming via the ombudsman more efficiently, for example by developing – on the basis of the complaints – special protocols on how to handle similar cases swiftly and in accordance with the law.

Trustworthy local complaint mechanism

A lawyer from the **Netherlands** refers to an interesting practice by an African mining company. The company initiated a complaint mechanism through mobile phones. A third-party CSO was involved in the mechanism, and complainants were informed about the progress/outcome of their complaint. You could send a text message or call the CSO, and then the CSO would examine the claim and, if it felt it was sufficiently serious, the company and the CSO would investigate the complaint. The interviewee states that the practice works well because most people have mobile phones. People also know who is dealing with their complaint and what happens with it. In many systems, that is a big issue for rights holders, as they are not always informed about the process and outcomes of their complaint, which in turn, does not build trust in a mechanism.

PROMISING PRACTICE

Non-judicial complaint mechanisms in the telephone and banking sectors

An expert in **Italy*** reports that some business sectors have developed non-judicial complaint mechanisms that are far more effective than the judicial system. For example, victims of rights abuses by phone companies can address a complaint to the Authority for Communications Guarantees (*Autorità per le Garanzie nelle Comunicazioni* – AGCOM). The authority has developed arbitration and reconciliation mechanisms managed by its regional departments, the Regional Communications Committees (*Comitato regionale per le comunicazioni* – Corecoms). The user/consumer can directly access the Corecoms online for free, with or without the support of an association. There is no need to be supported by a lawyer. Moreover, the Corecoms generally release a decision concerning the complaint within one year from the moment the complaint was filed.

The interviewee also mentions that the banking sector has good practices in non-judicial complaint mechanisms. For example, users/consumers can file online a complaint to the Financial and Banking Arbitrator (*Arbitro bancario finanziario* – ABF) of the Bank of Italy, the independent authority in the banking sector. This online procedure costs, on average, € 20 and provides high-quality technical decisions on complaints within 12–18 months from filing the complaint.

* *Italy, Lawyer at an association for consumer rights.*

Some sectors, such as environmental and consumer protection law, provide for enhanced access to injunctive relief, as follows.

In the area of environmental protection, the Aarhus Convention[41] establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Parties to the Convention are required to make the necessary provisions so that public authorities (at national, regional or local level) will contribute to making these rights effective.[42] When signing and approving this environmental instrument, the EU declared that it intended the Convention "to cover its own institutions alongside national public authorities" and that Member States would be responsible for the performance of the obligations resulting from Article 9(3) of the Convention, unless and until the Community, in the exercise of its powers under the Treaty, adopted provisions of Community law covering the implementation of those obligations.[43] The Aarhus Regulation[44] refers to the environmental competences of EU institutions and bodies. The EU has also adopted directives relating to access to information[45] and to public participation,[46] as provided in Article 9(1) and (2) of the Aarhus Convention. However, besides the Aarhus Regulation, the implementation of Article 9(3) and (4) by EU Member States would require further assessment. These key paragraphs allow members of the public to have access to administrative or judicial procedures, including injunctive relief, to challenge acts and omissions by private persons and public authorities that contravene provisions of their national law relating to the environment.

A **German** interviewee, working as a specialist lawyer in environmental law, criticises the narrow scope of the environmental appeals law,[47] which is applicable only to selected factual situations rather than to all environmental authorisation decisions. He also argues that German law does not impose a binding responsibility on authorities to act in the prevention of environmental damage.

Another area of EU law with enhanced preventive remedies is consumer protection law, which includes the Directive on injunctions for the protection of consumers' interests.[48] A **Finnish** interviewee, a lecturer on consumer law, highlights that consumer protection authorities should be able to issue not only injunctive remedies, but also sanctions, such as fines issued under Norwegian and Swedish consumer law.

A **German** interviewee with expertise in consumer law states that an association can file an action for injunction[49] against a company under civil law to enforce an injunction that will prevent further harm. This interviewee outlines this preventive remedy, listing the following among its advantages:

- naming any persons who claim an infringement of their rights is not required;
- costs can be mitigated by the financial income that the organisation retrieves from claims against those businesses that do not abide by the requirements of their cease-and-desist declaration (however, it is the subject of political controversy and accusations that the association makes use of this tool in an abusive manner).

As regards its disadvantages, the expert mentions the financial risk of proving the illegal conduct of a business.

The EU is currently updating its rules on consumer injunctions through the proposal for a Directive on representative actions against trading practices infringing EU law and harming collective interests of consumers.[50] The proposed rules include the possibility for qualified entities to seek injunction orders stopping the practice or, if the practice has not yet been carried out but is imminent, prohibiting the practice. To prevent abusive litigation, the proposal

also includes provisions relating to the funding of qualified entities. Victims of business abuses can rely on common procedural rules under EU directives in the area of criminal law.[51] However, other than consumer law, there are no common EU civil procedural rules relating to provisional measures.[52] Given the importance of civil injunctions in the prevention of damage, the EU should follow up the legislative initiative that the European Parliament proposed in 2017 to establish common minimum standards on civil procedure, which included rules on provisional and protective measures.[53]

In some cases, criminal injunctive measures can be linked to victim compensation. An interviewee in the **United Kingdom**, a professor of international law and human rights, refers to the *Monterrico* case,[54] in which the claimants, a poor indigenous community, claimed that security forces assaulted, detained and raped them for protesting against a company's mining activities and that the company was aware of and involved in these actions. They commenced their claim in UK courts, as the parent company was incorporated in the United Kingdom. However, before the claimants' lawyer could submit the claim, they found out that the company was being sold to a Chinese company and so they sought an injunction to freeze assets equivalent to their claim, which was successful. The case was eventually settled two years after the injunction.

2.3.2 Sanctions

Judicial and/or administrative sanctions can foster prevention, namely by serving as a deterrent of unlawful or abusive behaviour, and redress, namely by providing public and official recognition of the wrongdoing and conveying the message that justice is done.[55]

Criminal sanctions are used for the most serious corporate abuses. However, criminal law provisions on corporate liability and on the role of victims and public prosecution services in criminal procedures differ significantly among EU Member States. A **Swedish** interviewee[56] highlights that, under the Swedish Penal Code, legal entities such as companies cannot be considered to commit a crime.[57] However, an individual working for a company, such as its CEO or a project manager, may be charged with misconduct or negligence. The interviewee argues that, if it becomes possible to sue companies for crimes, this is likely to lead to an increased willingness and capacity within the Swedish Police to investigate such crimes.

Some interviewees refer to administrative sanctions as an accessible remedy, as they are the result of an investigation by a public authority (such as a market regulator, data protection authorities or a consumer ombudsman) *ex officio* or as a result of the victim's claim. A **Finnish** interviewee[58] argues that the absence of financial sanctions under Finnish consumer law constrains its efficiency, and suggests that the Swedish and Norwegian model of market disruption fees be followed.[59] A **Polish** lawyer sees the ability to impose and enforce deterrent fines as the most effective remedy in cases in which collective consumer interests are at stake. A **Swedish** interviewee[60] working for a consumer authority outlines the advantages of this non-judicial remedy compared with police investigations. In a case of low-value fraud relating to telemarketing, for instance, law enforcement can find it more difficult to sanction abuse, because individual reports to law enforcement are not interlinked and their investigation is not prioritised, whereas the consumer authority can bring these claims to court as a single case under market law. However, the same interviewee recognises that the decisions of the National Board for Consumer Disputes are not the same as court rulings, as the Board cannot impose fines, but can only issue recommendations, which companies can voluntarily follow to avoid a potential court case.

2.3.3 Compensation/reparation

Compensation is a form of reparation to offset damage sustained as a result of an infringement of legal rights.[61] Interviewees consider financial compensation an important part of redress for victims of business-related human rights abuses. However, according to some experts, people expect more from justice than mere financial compensation. Interviewees also refer to the challenges that victims face in getting compensated, including enforcing the payment of compensation. The nature of the rights at stake has implications for the type of remedy that a state is required to provide. According to the Council of Europe, for example, compensation for pecuniary and non-pecuniary damage should in principle be available for violations of Article 2 of the ECHR on the right to life. Pecuniary damage refers to losses that can be precisely calculated.[62] Non-pecuniary losses cannot be precisely calculated, for example pain and suffering. When considering if a remedy offers effective redress, the aggregate of remedies provided under domestic law can be taken into account.[63]

"It is difficult [to obtain compensation for human rights abuses]; consumers [...] have to deal with companies that can operate with the highest impunity [...] there is not the willingness to avoid resorting to a judicial proceeding [...] and the bigger the company, the less willing it will be [to accept resorting to a non-judicial mechanism]; they have plenty of lawyers, they do not care, the only important thing is the profit and to postpone the court's decision as much as they can."
(Italy, Lawyer at an association for consumer rights)

Many factors, outlined in other chapters of this report, can have an impact on the effectiveness of compensation. Some civil law systems, such as the **Italian** tort law, require victims of corporate abuses to bear the burden of proof to establish a causal connection between the damage suffered and the company's action/omission (see more on this issue under **Section 3.1**). An Italian interviewee expressed his concern for the negative effect on victims of these increased costs combined with the length of judicial proceedings and the reluctance of the judiciary to apply the 'loser pays' principle (see more under **Section 3.4**).

Even if compensation is awarded to victims of corporate abuses, the enforcement of favourable decisions is challenging when using some non-judicial remedies (see **Section 2.2**) and in cross-border cases (see **Section 3.3.1**). In addition, in cross-border cases, the calculation of the damages and the monetary compensation can be very different depending on the applicable law (see **Section 3.3.2**).

Some interviewees from the United Kingdom also refer to the symbolic significance of compensation beyond its financial aspects, namely the demonstration that a company is responsible for wrongdoing.

"So I think generally [...] we've felt that communities that have settled with an award, a compensation amount, feel that they have won. Also because of the symbolic meaning of it, even though the companies generally don't accept liability – don't recognise liability – but it is perceived by them and generally [...] it is considered to be a recognition of a level of wrongdoing. So it is experienced by many communities and individual claimants as a win and depending on the amount and on the nature of the compensation package obviously, it could be very considerable and life-changing to some of these people."
(United Kingdom, Legal Advisor at a CSO)

In a similar vein, one interviewee in **Sweden**[64] refers to a case in which he felt that a ruling against a company would have had a symbolically important and redressing effect and would also have established that the company was responsible for the health problems of the plaintiffs. The interviewee states that paying damages to victims is important, not because this would resolve the victims' problems, but because paying damages remains the only available redress mechanism in Swedish courts.

Another interviewee in the United Kingdom points out that, in cross-border cases, it makes a huge difference whether damages are calculated on the basis of the local economic situation in the third country where victims live or on the basis of the economic situation in a company's European headquarters.

In **Germany**, an interviewee[65] refers to access to compensation as one of the main gaps in consumer protection. Several interviewees mention the political pressure in the Dieselgate case for an instrument that can ensure compensation, which resulted in the creation of the sample declaratory action, which was introduced by law in July 2018.[66] Despite this development, according to an interviewee,[67] the barriers for associations to be entitled to file declaratory actions remain high, and the instrument is ineffective, as it only leads to the determination of wrongful conduct. Subsequently, consumers have to claim damages individually, which in practice discourages them.

"Assessing damages according to local levels is undesirable, first because it reduces the deterrent effect on a company and secondly because if its circumstances way heavily on the proportionality rule it makes it more difficult to comply with the proportionality rule."
(United Kingdom, Senior lawyer specialised in bringing cases for abuses of human rights by businesses)

Endnotes

1 UN, Human Rights Council (2016), ***Business and human rights: improving accountability and access to remedy***, A/HRC/32/L.19, 29 June 2016.
2 This is in line with the findings of the first phase of FRA's research: FRA (2019), ***Business-related human rights abuse reported in the EU and available remedies***, December 2019.
3 See, for example, FRA (2019), *Victims' rights as standards of criminal justice*, Luxembourg, Publications Office.
4 Poland, Senior lawyer at an NGO.
5 France, Representative of an NGO specialising in strategic litigation.
6 The complainants accused Vinci, Vinci Construction Grands Projets (VCGP), its Qatari subsidiary Qatari Diar Vinci Construction (QDVC) and their representatives of forced labour and bounded labour, failure to provide medical response and unintentional injuries, as well as concealment of profits arising from violations, before the Public Prosecutor of Nanterre, the headquarters of Vinci Construction.
7 The OECD scheme requires the establishment of NCPs for "promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instance […]".
8 The ECtHR has stated that a non-judicial body under domestic law may be considered to be a court if it quite clearly performs judicial functions and offers the procedural guarantees required by Article 6 of the ECHR, such as impartiality and independence. If it does not, the non-judicial body must be subject to supervision by a judicial body that has full jurisdiction and complies with the requirements of Article 6 (*Zumtobel v. Austria*, No. 12235/86, 21 September 1993, paras. 29–32; *Oleksandr Volkov v. Ukraine*, No. 21722/11, 9 January 2013, paras. 88–91).
9 See FRA's work relating to **NHRIs**.
10 Italy, Lawyer at an association for consumer rights.
11 Italy, Legal expert.
12 The Netherlands, Lawyer.
13 For further information, please see the OECD's webpage on the ***Guidelines for multinational enterprises*** and the OECD's webpage on **NCPs**. The EU supports the guidelines as an observer.
14 Finland, Business and human rights expert and lawyer.
15 For more information, see the Ministry of Economic Affairs and Employment of Finland's webpage on the **Committee on Corporate Social Responsibility**.
16 For more details, please see Section 1 of the **Government Decree on Committee on Corporate Social Responsibility (591/2008)**.
17 For more information, see the Ministry of Economic Affairs and Employment of Finland's webpage on **handling specific instances of the OECD *Guidelines for multinational enterprises***.
18 For further information, see the Federal Ministry for Economic Affairs and Energy's webpage on **the German NCP**.
19 Germany, Senior lawyer at NGO.
20 More information is available on the Ministry of Economic Development's webpage on **the Italian NCP**.
21 Italy, Lawyer.
22 Italy, Lawyer.
23 UK Parliamentary Joint Committee on Human Rights (2017), ***Human rights and business 2017: Promoting responsibility and ensuring accountability***, paras. 201–221.
24 Poland, Senior lawyer at a CSO.
25 The OLX Group is a global online marketplace, founded in 2006 and operating in 45 countries. The OLX marketplace is a platform for buying and selling services and goods such as electronics, fashion items, furniture, household goods, cars and bicycles.
26 For more information, see the OECD's webpage on **Grupa OLX and the Frank Bold Foundation**.
27 Poland National Contact Point (NCP) (2019), **Polish OECD NCP final statement of alleged non-observance of the OECD Guidelines for multinational enterprises**, Warsaw, 13 June 2019.
28 OECD (2019), ***Progress report on national contact points for responsible business conduct***, Meeting of the OECD Council at Ministerial Level, Paris, 22–23 May 2019.
29 Staff of the Swedish Consumer Agency (*Konsumentverket*).
30 Finland, Academic and lawyer at the Consumers' Union of Finland.
31 For more information on the delays, see, for example, the following decision, calling for action to shorten the length of the proceedings: Parliamentary Ombudsman of Finland (2017), **EOAK/4079/2017**, 26 October 2017.
32 Finland, Academic.
33 Finland, Academic.
34 Finland, Academic.
35 UN, OHCHR (2011), ***Guiding principles on business and human rights***, June 2011. See, in particular, the commentary to UNGP 25.
36 ECtHR, *Kudla v. Poland*, No. 30210/96, 26 October 2000, para. 158.
37 UN, OHCHR (2011), ***Guiding principles on business and human rights***, June 2011. See, in particular, the commentary to UNGP 25.
38 *Ibid.* See also FRA (2016), ***Handbook on European law relating to access to justice***, Luxembourg, Publications Office, Chapter 5.2.3, pp. 107–109.
39 *Ibid*, p. 105.
40 More information is available at the website for **the e-Justice portal**.
41 UNECE (1998), **Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters**, 25 June 1998, Article 9(4).
42 For more information, see the European Commission webpage on the **Aarhus Convention**.
43 Declaration by the European Community in accordance with Article 19 of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, annex to 2005/370/EC: Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.
44 **Regulation (EC) No. 1367/2006** of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.
45 **Directive 2003/4/EC** of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.
46 **Directive 2003/35/EC** of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the

drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

47 German Parliament (2018), BGBl. I S. 3290, **Environmental Appeals Act [*Umwelt-Rechtsbehelfsgesetz in der Fassung der Bekanntmachung*]**, 23 August 2017.

48 **Directive 2009/22/EC** of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

49 German Parliament (2001), '***Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz – UKlaG)***', 26 November 2001.

50 European Commission (2018), *Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC*, COM(2018) 184 final, Brussels, 11 April 2018.

51 **Directive 2012/29/EU** of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

52 An overview of the diverse national interim and precautionary measures in civil matters is available in the e-Justice portal **information sheets on national law** prepared by the European Judicial Network in civil and commercial matters.

53 European Parliament (2017), **Resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union** (2015/2084(INL)).

54 High Court of Justice (EWHC) (2009), *Guerrero v. Monterrico Metals plc*, EWHC 247.

55 See FRA (2019), ***Sanctions that do justice***, Luxembourg, Publications Office.

56 Sweden, Lawyer.

57 Sweden Penal Code (1962), ***Brottsbalk* (1962:700)**, 21 December 1962.

58 Finland, Academic.

59 The fine can be issued for businesses or actors on behalf of businesses, such as in relation to "aggressive or deceptive marketing" (see the definition of '**market disruption fees**'). The fine can range from roughly € 500 to € 500,000 and can be a maximum of 10 % of the annual revenue of the business.

60 Sweden, Lawyer at a consumer authority.

61 FRA (2016), ***Handbook on European law relating to access to justice***, Luxembourg, Publications Office, Chapter 5.2.1, pp. 102–106.

62 ECtHR, ***Budayeva and others v. Russia***, Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, para. 191.

63 ECtHR, ***De Souza Ribeiro v. France*** [GC], No. 22689/07, 13 December 2012, para. 79.

64 Sweden, Legal expert.

65 Germany, Senior expert in consumer protection at an NGO.

66 Federal Ministry of Justice and Consumer Protection (2018), *Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage*, 12 July 2018. This declaratory action constitutes a new instrument of collective action in consumer protection. It requires that recognised consumer protection organisations file a civil action against a company to determine the existence or non-existence of the legal and factual requirements giving rise to the claim. Consumers can opt into this claim. For those who do, limitation periods are stayed until the claim has been decided. They can then file individual proceedings on the basis of the claim's findings.

67 Germany, Senior expert at consumer protection at an NGO.

3

MAIN CHALLENGES IN ACCESS TO REMEDY AND WAYS TO OVERCOME THEM

This chapter provides a detailed overview of the obstacles that interviewees identify as key challenges victims face when accessing judicial remedies in cases of business-related human rights abuse. All of the interviewees who are engaged in litigation highlight the problems they find most crucial for effective access to remedy: the rules on burden of proof (Section 3.1), the lack of collective redress (**Section 3.2**), the considerable financial risk for claimants (**Section 3.4**) and the lack of sufficient information about available remedies (**Section 3.5**).

The equality of arms between an individual and a big corporation leaves much to be desired, even in intra-EU disputes, but third-country nationals who have been affected by a violation linked with businesses seated in Europe face additional obstacles caused by factors such as choice of law and jurisdiction, and financial risk, as well as organisational efforts and language barriers. **Section 3.3** deals with this aspect.

3.1 BURDEN OF PROOF

In relation to evidentiary matters, the corporate structure of business enterprises, especially transnational enterprises, is so varied that identifying the correct defendant can sometimes be very difficult.

In all Member States that the research covers, the rules on the burden of proof seem to constitute a major barrier for persons who claim an infringement of their rights. Such a claim in most legal systems requires individuals to prove that a business's action directly affects them and to establish various levels of causality (including links between parent companies with subsidiaries or affiliate firms). Section 3.1.1. recapitulates interviewees' experiences and recommendations in this regard and gives examples of national legislation where the burden of proof can be reversed.

Providing such proof is often almost impossible, especially when the supporting documentation is in the possession of a company accused of the alleged infringement – this aspect is related to the rules on disclosure of documents and will be explored in Section 3.1.2.

3.1.1 Proving the link between damage and business activity/ attribution of liability

Rules on the burden of proof are a major obstacle for persons who claim an infringement of their rights by businesses, FRA's research shows. In most legal systems, such a claim requires individuals to prove that the actions of a business directly affect them and to establish the company's liability, including links between parent companies with subsidiaries or affiliate firms.

In most EU countries, the main rule in civil cases is that the claimant has to bear the burden of proof. Usually, the claimant is required to provide proof of several dimensions of causality – the link between cause and effect – between their claim and the actions of the business in question. Interviewees point to some of those different dimensions of causality that they have had to prove in their experience:

- the existence of a duty of care that the defendant company owes to claimants;
- that the company activity is wrongful or that the duty of care was breached;
- that the wrongdoing of the company violated individual rights (e.g. proof that emissions from specific cars caused the specific claimant's asthma, as in the Dieselgate case, or the link between using a specific herbicide and a farmer's specific health problems, as in the French case against Monsanto (see box));
- the causality between the violation of rights and the damage suffered;
- the extent of the financial consequence of the damage.

This section outlines the difficulties and good practices that interviewees have experienced in this regard.

Often, the hurdles begin at the level of identifying the defendant company – owing to complex corporate structures, for example in the case of multinational companies, it is difficult or even impossible to assign liability to a specific entity. Holding a parent company responsible for the acts or omissions of its subsidiaries requires proof of a specific relationship between them. It is called 'piercing – or lifting – the corporate veil'. The obstacle can sometimes be circumvented by establishing the liability of the parent company on the basis of its own negligence. However, this also requires that the claimants prove corporate structure, which is extremely difficult in practice. These challenges are even greater in relation to other companies in the supply chain of a corporation. They are present, in particular, in cross-border cases, but also in intra-EU litigations, as in the case against Monsanto, France (see box).

Experts from **Germany** also note that, while environmental associations are able to file a claim against authorities without having to prove that individuals are directly affected, in practice individuals are often unable to initiate such proceedings. In most cases, to prove damage and causality, the claimant has to submit expert opinions or specific tests and measurements have to be carried out. However, an expert from Germany, working for an environmental association, points to an important gap in evidential rules – namely that there are no clear rules on how the complex environmental and health-related aspects should be measured. As a result, claimants who order and pay for such tests risk having these tests rejected by the court. Experts' opinions are costly and, if the claimant loses, they will have to bear the costs. Furthermore, very few organisations can provide the types of measurements that would be relevant to establish the environmental/health impact.

Interviewees also provide some good examples of shifting the burden of proof in certain types of cases, as outlined below.

Monsanto case in France – farmer's pesticide poisoning

This case demonstrates the chain of causality that has to be proved in cases. In 2019, the French Court of Appeal acknowledged Monsanto's responsibility for a faulty product, after several years of proceedings: this case began in 2004, with the claimant winning in 2012 and again on appeal in 2015. However, in 2017, the company succeeded before the Court of Cassation in overturning the previous ruling, sending the case back to the court of appeal. The new judgment was delivered in April 2019.

The claimant (a farmer) was a victim of an accident relating to the inhalation of the herbicide 'Lasso'. First, the claimant obtained confirmation that his disease was linked to his occupation and was caused by the specific product in question. Subsequently, the farmer launched a procedure to establish the liability of Monsanto Agriculture France (a subsidiary of a US mother company). In response, the company produced arguments of nearly 100 pages, which had to be individually rebutted. Among others, it claimed that the product was fabricated in Belgium and that, therefore, it could not be considered the producer; however, the court rejected this argument on the second appeal. In the end, the court considered that Monsanto has brought a dangerous product onto the market and had not informed the consumer sufficiently of the dangers relating to it.

Several interviewees mention that warranties for consumer products are covered by the reversed burden of proof following Directive 1999/44/EC.[1] If the product breaks in less than six months, it is for the seller to show that it was not defective, and the same applies during a guarantee period. In addition, in all Member States, in line with the Employment Equality Directive[2], in cases relating to harassment or discrimination, the applicant brings certain elements to support their case prima facie and the employer has to prove the contrary (rebuttable presumption).

In **Finland**, the burden of proving causation is relaxed for the benefit of the victims as regards liability for environmental damage according to the Act on Compensation for Environmental Damage,[3] which requires a probable causal link between the activities and the damage alleged. In consumer cases, the burden of proof is reversed when the protection of collective interests is concerned. In individual disputes, the rule is that the consumer has to be able to prove that the service was defective at the time of delivery.[4]

Interviewees in **Poland** note that, in cases where the interests of a larger number of customers are affected, it is recommended that UOKIK be notified.[5] If it determines that a company infringed the collective interest of consumers, it is then easier for individuals to make use of, for example, the private enforcement procedure. In this procedure, it is not necessary for the individual breach to be proved; instead, it is enough to indicate that there was a collective breach, which leads to the reversal of the burden of proof. The pressure is thus put on the enterprise to provide evidence that the rights of individual were not affected adversely. The Office of Competition and Consumer Protection can also impose fines or start anti-monopoly proceedings that also act as a deterrent. To make group proceedings more effective, but also to minimise the burden of proof, the district/municipal consumers' ombudsman can, in particular cases, make use of the Act on Counteracting Unethical/Unfair Business Practices.[6] It provides for the reversed burden of proof, so it is enough to report that an unfair market practice occurred in relation to the consumer.

In **France**, according to an interviewee,[7] in certain types of cases, it is sufficient to provide "serious, precise and concordant" presumptions, which alleviates the burden of proof for the victims. However, there is no reversal of the burden of proof, except in some rare cases of occupational diseases – in such cases there is a presumption of causality.

3.1.2 Victims' access to evidence

Several of the experts interviewed describe how accessing the evidence needed to prove wrongdoing by a business can be an insurmountable challenge. Interviewees point, in particular, to the disadvantaged position of claimants in accessing a company's relevant internal documents. Once the correct defendant is identified, it is necessary to prove the claim through relevant evidence. This evidence is very often contained in documents – such as letters, reports and emails – that are in the sole possession of the company. Lack of access to such documents often means it is impossible to prove wrongdoing and causality.

An interviewee from the **United Kingdom** points out that, in cases against corporations, documents are usually the only way to support the claim, as obtaining witnesses' testimonies is usually impossible.

"[T]hat is often a difficulty with cases where you need to understand what was going on internally with the company. You often have to get documents, proper disclosure of documents or witnesses and the only witnesses who really were able to shed light on that part were employees, and employees are usually going to be afraid of losing their jobs."
(United Kingdom, Lawyer)

Disclosure – an obligation for a business entity to release documents and other information in a legal dispute – can be a very useful mechanism, as it can ensure equality of arms between a relatively powerless claimant and large corporations. However, in most European legal systems, this is not available or is available only in a very limited way. In all continental systems, courts cannot order the disclosure of documents unless the party explicitly specifies them and – as evidence shows – it is often not possible for the claimant to know what documents the party has. All of the interviewees who are engaged in litigation state that courts require that documents for disclosure be explicitly specified, to the extent that would require claimants to know not only of their existence and name, but also their specific content. In reality, this proves impossible, limiting the potential effects of this measure. As interviewees confirm, it is only in exceptional cases that such disclosure is obtained.

One interviewee from **Germany** explains that, in his experience, requests for documents are never granted, as existing jurisprudence demands that the request be extremely detailed, to the extent that the claimant can succeed only if they already know the content of the file.

"It is possible to win proceedings by not disclosing documents. Companies can simply deny the allegations of the claim to make the claimants have to prove them. If they have committed some unlawful act, they can keep incriminating documents in their archives without any legal risk."
(Germany, Lawyer)

An interviewee from **France** mentions that a court refused to order the disclosure of product labels that were used some years earlier on the product responsible for clients' injuries; these labels would have proved which entity was stated as the producer of that product and so were essential to establish the liability of the company.

An expert in the **Netherlands** elaborates on the same issue, which seemed to be similar to the situation in most EU Member States – the impossibility of obtaining access to key 'internal' evidence.

"[…] in the Netherlands, you're in a position where as a claimant, you need to prove everything that you state and there is no general rule for disclosure of discovery. So it's merely an exception if you get disclosure of documents – you need to apply for that and you need to specifically indicate what documents you need and for what purpose. […] Of course, [certain facts] fall in the sphere of the company and not of the [claimants] who don't have that knowledge. It's all internal knowledge from the company. So, it brought all our claimants in the very difficult position that the company could simply say – you don't even have the beginning of the evidence – and they could simply sit on that evidence and they were not obliged to submit it in the procedure […] So if you don't know about the existence of certain evidence that might be very important, you have no chance of getting it, under Dutch jurisdiction."
(Netherlands, Lawyer)

"I think the question of burden of proof arises around the issue of access to documents and information. One of the most expensive and difficult aspects of cases of this type is disclosure or discovery."
(United Kingdom, Lawyer)

"I think maybe you could do something around disclosure that didn't necessarily make an overall reverse of the burden of proof. That just gives clear access to all of the information [...] I think if businesses were required to be more open on their considerations, on their decision making about a particular situation and what they did in that situation – I think it would make them think more carefully in the first place about what they do. But I also think it would give potential access to information for those that have been aggrieved."
(United Kingdom, Former counsel in a transnational corporation)

Although interviewees from continental legal systems point to the **United Kingdom**'s rules of disclosure as an example of good practice, lawyers from the United Kingdom were more sceptical. The United Kingdom's court procedural rules provide for general and specific disclosure of relevant documents by parties to litigation.[8] However, as the court has discretion in ordering disclosure, there are two potential risks: that the claimants will not ask for relevant documents, as they are unaware that they exist; and that the court may exercise its discretion not to order disclosure. An interviewee from the United Kingdom explained that claimants often have to go through quite difficult court applications and hearings to secure documents.

Some interviewees highlight the role of investigative authorities in acquiring proof in criminal proceedings. However, they also point to a potential challenge arising from a lack of information and training of staff, as well as dependence on the prosecutor's discretion to pursue the investigation. Interviewees note the difference in administrative proceedings against an authority, where the authority has a duty to provide all relevant documents, either directly to claimants or to the court.

This lack of access to company documents is a reason why the process of disclosure of relevant documents in the control of the business can be a very important step for claimants in establishing which company had the requisite control of the particular company that abused human rights.

It adds to the perceived imbalance in the equality of arms in favour of businesses. The experts agree that, to improve the effective access to remedy, either the burden of proof should be reversed, such as in particular types of cases in which it is assumed that the parties are unequal in their ability to prove relevant facts and processes (such as in discrimination cases or cases related to workers' rights), or the duty of disclosure should be introduced.

According to interviewees, an obligation for companies to disclose all their documents that relate to the incident would assist claimants enormously, in particular when they bear the burden of proof. Other proposals, namely for when documents are not forthcoming or adequate disclosure is not possible, include shifting the burden of proof. In this way, the onus of proof would shift to the defendant, to demonstrate, for instance, that a parent company was not in control of the relevant functions. That would then put the obligation on the company to produce the documents to confirm this.

Another similar solution could consist of the rebuttable presumption – under EU law, such a partial shift of burden of proof already exists in areas where one party traditionally faces particularly complex evidence barriers, for example in equality directives. Once a claimant has established an initial case on the facts, a presumption of discrimination arises, and the responding party must prove that discrimination did not occur. The rebuttable presumption could also be triggered once a claimant proves that a company breached its statutory duties (e.g. exceeded the permitted level of emissions or did not provide an environmental assessment of its activity).

Interviewees consider that such solutions would be a fair and just response to this problem.

PROMISING PRACTICE

Facilitating access to documents

In **Italy**, the reformed law on class action lawsuits (Law No. 31 of 12 April 2019*, entry into force in 2020) envisages the possibility for the competent court to impose upon the company concerned the obligation to disclose the relevant documents if the complainants can demonstrate that such documentation is needed to make a decision on the case.

** Italy, Law No. 31 of April 12, 2019, Provisions Concerning Class Actions, Gazzetta Ufficiale, [Official Gazette], Apr. 18, 2019.*

In **Finland,** in the product safety field, concerning consumers' collective interests, the **Finnish Safety and Chemicals Agency** (*Turvallisuus- ja kemikaalivirasto* – Tukes) has the right to make inspections of companies' premises to obtain relevant documents.

3.2 LIMITED AVAILABILITY OF COLLECTIVE REDRESS OR REPRESENTATIVE ACTION

While in many legal systems civil law provides for a possibility to join claims that are similar as regards the subject matter in dispute and that are based on an essentially similar factual and legal cause, such measures usually do not allow one petition to be submitted on behalf of all claimants. Accordingly, such instruments do not provide any substantial reduction in effort, financial burden or risk, either for claimants or for the justice system.

This section summarises the opinions of the interviewees regarding the availability of and need for extended collective redress and/or representative action in the area of business-related abuses.

Across the EU, collective representation is not available in many legal systems or is available in only a very limited way – either to only certain types of claims or only following very complicated procedural rules – FRA's research shows. Existing options are often limited to violations of consumer rights. Experts criticise the lack of provisions in domestic legislation for a collective redress mechanism that offers a realistic avenue to financial compensation.

Legal standing for NGOs is also often limited and experts point to the difficulties for an NGO to be recognised as a 'qualified organisation' with legal standing to file collective redress claims. In some jurisdictions, legal standing for environmental associations in administrative proceedings is considered an effective way of preventing further harm in the field of consumer protection, but experts point to limitations such as being applicable only to selected situations rather than to all administrative decisions relevant for the environment.

Of the 32 cases discussed during interviews in the eight Member States that the research covers, 21 were related to collective damage (where the abuse affected a group of victims), FRA's research shows, but collective remedy was used in only four cases because collective redress or representative actions are limited to very specific types of cases, usually relating to consumer and environmental protection, and, even then, various procedural criteria further limit the scope of the application. There is clearly a need to expand and improve access to justice for collective claims.

In most Member States, beyond consumer protection law (in particular in non-contractual civil law) there are no effective collective redress mechanisms. Experts highlight the need to extend the options for collective redress to allow those mechanisms to have broader outreach and to give individual claimants a realistic chance of receiving financial compensation. In several Member States, specific producers are available in environmental law, although some experts point to a narrow understanding of what falls within this scope (e.g. sometimes, only relevant administrative decisions can be challenged), as well as narrow legal standing for organisations.

In several Member States, consumer protection mechanisms have introduced several ways for associations to prevent further harm through claims under civil law against

individual companies, as well as through initiating administrative proceedings against authorities. However, these mechanisms often remain limited in their applicability and do not provide any financial compensation for persons affected by business actions. This is because such proceedings usually only determine facts and wrongdoing of the company and do not decide individual damages. After a positive ruling, victims usually have to follow up with individual claims for compensation. Although, in principle, the follow-up individual proceedings should be less complex, as the establishment of facts and law can be skipped, victims still need to prove their individual damage and its value. This is the case in Germany and the Netherlands.

The **Dutch** civil code allows a representative action both on behalf of a group of people with similar interests and in the general public interest (for instance, in the interest of the environment or gender equality), where there is no need to identify a particular victim. In this case, associations and foundations can act in a representative capacity, asking for a 'declaration of law', but cannot claim damages for themselves, which is why, subsequently, establishing individual damages is necessary. The Dutch law, however, is not limited to any particular subject matter.

In **France**, class action (*action de groupe*) has been available since 2014. Created for consumer rights, it was subsequently extended to health rights, for example problems with pharmaceuticals, and then to the environment. Victims cannot be compensated until the responsibility of the company involved has been established.

"You will have a case of several years before it leads to an outcome before the Court of Cassation, and only then will each individual victim be able to launch a procedure for an individual remedy. Therefore, there are very few class actions in France."
(France, Lawyer)

On the other hand, collective actions, consisting of compiling a sufficient number of individual actions at the same moment before the same jurisdiction to enable the same judge to hear the cases during the same hearing, are numerous in France. Thus, such actions comprise individual cases, but are engaged collectively.

In **Germany**, the shortcomings of the system in terms of collective redress were at the centre of public attention in Germany in the wake of the Dieselgate scandal. This resulted in the introduction of Sample Declaratory Actions in Civil Proceedings[9] in 2018, which provide registered associations with legal standing to file claims under civil law with the main goal of establishing the wrongdoing of a business. Persons registered with the association's action can claim financial damage after a wrongdoing has been established. This enables recognised consumer protection organisations[10] to file a civil action against a company to determine the existence of legal and factual requirements giving rise to the claims involving mass damages to consumer rights. Consumers can opt into this claim by registering at the Federal Office of Justice.[11] For those who do opt in, limitation periods are stayed until the main action has been decided. They can then file individual claims on the basis of the action's findings to achieve financial compensation. The Sample Declaratory Action is limited in its material scope, as it is applicable only to matters affecting consumers. Despite some advantages of the Sample Declaratory Action as a tool to access remedy, overall, experts believe the instrument to be ineffective in providing compensation for victims.

"[We should] strengthen collective actions. This implies both the rights of associations to institute proceedings as well as collective actions by individual claimants."
(Germany, Attorney-at-law)

In **Poland**, although the procedure for class action (concerning claims of the same type, based on the same or similar facts, pursued by at least 10 individuals) was introduced in 2009,[12] it is very rarely used in practice. Of the four Polish interviewees, only a lawyer from the consumer ombudsman office had first-hand experience with the procedure, which the interviewee describes as very cumbersome. The class action can be applied only in selected types of cases, such as liability for damage caused by dangerous products. The scope of the proceedings is limited solely to determination of the defendant's

liability. The interviewees[13] consider collective redress in consumer rights cases both costly and burdensome for individuals. Even the consumer ombudsman is not able to conduct such proceedings alone, and usually needs assistance from external law firms. For cases concerning environmental law, the Act on the Protection of the Environment was deemed to offer sufficient protection.

In **Finland**, collective redress is also available only in relation to consumer rights violations but has never been used since its introduction in 2007. According to one interviewee, it is possible to file class actions only in mass consumer disputes, and the consumer ombudsman is the only one with the right to take legal action in this regard. However, expenses are high, and the ombudsman cannot afford the risk of losing, with the state then having to pay legal expenses. By contrast, actions in the public interest with legal standing for local environmental organisations in environmental cases (the **Environmental Protection Act**)[14] are considered useful and are often used.

In **Sweden**, the interviewees consider that collective redress is not a tradition within the Swedish legal system. It is regulated in the Group Proceedings Act, but owing to a lack of guiding cases, lawyers consider that taking on a collective redress case would require much more work than a traditional case. Collective redress in consumer law requires each individual involved in the case to have very similar complaints. If they are not sufficiently similar, it will not be possible to engage all claimants in one collective redress.

As several interviewees note, collective action often may not be viable in consumer disputes because of the low value of individual claims. One interviewee refers to the Nokian Tyres case,[15] where the individual losses that misleading advertising caused to customers were estimated to be € 100 per plaintiff/customer. A private law firm started collecting consumer proxies to take the case to the court; however, the firm found that the value of the claim per consumer was too low and the financial risk of taking the case to court was too high. The essential issue, according to the interviewee, would be not for each customer to receive € 100, but rather for the trader to pay for the wrongful act.

Case study

Misleading advertisement

In **Finland**, Nokian Tyres* is a large Finnish company that produces car tyres. It sent tyres to be tested by a car magazine and won the test. After this, the company started using the slogan "test winner" in its marketing and its tyres were more expensive than those of its competitors, giving the consumer the impression that these tyres were of better quality than others. Later, it was found that Nokian had "cheated"; the tyres sent for testing were not the same as those being sold to consumers. The tire manufacturer had allegedly delivered better tires for tire tests in 2005-2014 than for sale.

When this was revealed, Nokian Tyres agreed to stop using the slogan, but refused to pay any compensation to the hundreds of thousands of consumers who had believed that these tyres were of better quality than those of its competitors and therefore paid € 100 more for them.

A private law firm started collecting consumer proxies to take the case to the court. This firm soon found out, however, that court action was not a good idea, because the monetary interest per consumer was about € 100 and the financial risk of taking the case to court was too high. Finally, the firm sent approximately 300 cases to the Consumer Disputes Board. The Consumer Disputes Board found that there was no reason to recommend any remedy because the consumers had failed to show when they got the misleading information and how it had affected their decision making and, for this, the interviewee criticises the Board, stating that it set the burden of proof too high.

* *See the* **Nokian Tyres website**.

In **Italy**, the law on class action lawsuits[16] was reformed and is expected to enter into force in 2020. The law introduces the possibility for victims to share the costs of proceedings: this new provision might turn class action lawsuits into a useful tool in cases of violations of environmental rights, which often affect communities or large groups. Moreover, on the basis of this reform, provisions governing class action lawsuits are now included in the Civil Procedure Code allowing class action across all civil rights.

Overall, the available collective redress mechanisms in the Member States that the research covers have, in principle, many similarities, but their actual use varies in practice depending on factors such as the scope of laws, the complexity of procedures, the awareness of measures and the experience of lawyers. Table 3 outlines the strengths and weaknesses of the available measures, as perceived by the interviewees.

TABLE 3: STRENGTHS AND WEAKNESSES OF EXISTING COLLECTIVE REDRESS MECHANISMS ACCORDING TO EXPERTS INTERVIEWED

Strengths	Weaknesses
- In some Member States, the initial claim is free of charge for the persons who have registered with the association's action. The association filing the claim has financial responsibility - In some Member States, Ombuds institutions or consumer protection bodies do not pay court fees and can represent claimants in court free of charge - Registration of a claim can automatically suspend the limitation period, meaning that persons who have registered will be able to await the court's decision and can then decide whether or not to file their own claim for damages - Persons who claim an infringement of their rights can await the court's decision and have more clarity on their chances of success in claiming compensation without financial risk (and with a suspension of the limitation period) - Some Member States have extended collective redress, initially applicable only in consumer protection, to cover unlimited or very broad types of cases - CSOs are eligible for legal standing on behalf of victims or in the public interest – without the need to identify any individual damage - There is a lack of adequate training of legal professionals, resulting in their low awareness of the measure or reluctance to use it	- In some Member States, the leading case aimed at establishing the responsibility of the company can be costly, complex and longer than traditional filing of numerous individual claims together - In most cases, persons who claim an infringement of their rights will have to make their individual claim for damages after the legal facts and company responsibility have been established - Some measures are restricted to matters linked to consumer protection and therefore encompass only a limited selection of rights that may be relevant in the business-related human rights context - Some measures require cumbersome registration procedures, which may have adverse legal consequences, e.g. in Germany claimants learn if their registration was effective (correctly submitted) only after they file their individual claims, after the main action proceedings are finalised. Therefore, if the authorities consider the registration ineffective, claimants risk their limitation period not being suspended and therefore expiring without their knowledge - The legal standing of CSOs is very narrow, limiting the use of the measure in practice

Ways forward according to experts interviewed

There is consensus among most interviewees that collective redress provisions should be applied broadly to business and human rights issues, and not be limited to consumers' protection, as is the case in several EU Member States. Experts highlight the need to extend the options for collective redress to allow those mechanisms to have broader outreach, as well as to provide individual claimants with a realistic chance of obtaining financial compensation.

Interviewees voice a number of recommendations aimed at strengthening collective redress mechanisms to improve access to remedy for victims of business-related human rights violations.

- A collective redress mechanism should have considerable chances to claim financial compensation. This means that collective redress would not only determine a wrongdoing, but also examine financial aspects of the claims in one proceeding. An effective instrument should allow financial risks to be lowered and should allow all aspects of the claim to be examined, not just the underlying legal grounds.
- The legal standing of NGOs on behalf of persons affected by a businesses' actions should be extended. Experts point to high bars for being recognised as a 'qualified organisation' with legal standing to file collective redress proceedings and to excessive efforts and financial risks for such associations to take up respective litigation. As a consequence, persons affected by a business's actions may have difficulty finding an association to stand up for their cause. Experts recommend enabling NGOs to acquire legal standing for various collective redress or representative action mechanisms, as well as in the public interest, without needing to identify an individual victim and proving individual damage.
- The possibility for an 'opt-out' collective action should be introduced, so that all members of a community affected by the company's actions are automatically included in a claim unless they specifically choose not to be.
- Persons affected by a business's actions should also be able to join and claim their rights together as a group, without the support of an organisation.

3.3 ESTABLISHING CROSS-BORDER LIABILITY OF EU-BASED COMPANIES

When accessing an effective remedy, cross-border incidents present additional challenges for victims of corporate abuses. This could concern, for example, human rights abuse caused by business activity in a third country, with the business having connections to a company in the EU. For cross-border cases, the EU has harmonised the choice of court rules (the 'Brussels regime')[17] clarifying which court has jurisdiction to deal with a case. Similarly, the EU has harmonised conflict of law rules (the 'Rome regime') to determine which country's laws should apply in relation to contractual and non-contractual obligations.[18]

Accessing a remedy in cases of business-related human rights abuse brings greater challenges when the abuse takes place outside EU Member States' jurisdiction. These challenges include a lack of information, increased costs, language and legal knowledge barriers, and evidential issues, among others.[19] This section summarises the evidence gathered from experts with regard to the particular challenges encountered by victims of corporate abuses with a cross-border dimension.

Despite some common standards existing among EU Member States, major challenges to an effective judicial remedy also arise when the responsible business is domiciled outside the EU. The interviews that FRA carried out highlight several complications, relating to the increased cost and length of cross-border litigation, a lack of enforcement and the possibility for companies

to circumvent human rights standards due to different legal standards and out-of-court agreements.

Interviewees in **Germany** and **Poland**[20] point to more lengthy and expensive litigation in cross-border cases, as well as the challenge of enforcing decisions. One interviewee[21] in **Germany** suggests that lengthy and expensive private litigation through civil and commercial jurisdiction could perhaps be avoided by opting to submit claims to public regulators, such as consumer and competition commissioners. Another interviewee in **Sweden**[22] disagrees, because this avenue can incur more costs. Furthermore, recognition and enforcement of the decision in another jurisdiction often requires translating documents and finding legal counsel in the enforcing jurisdiction, which are all obstacles particular to cases with a cross-border link.

"Arbitration versus courts and remedies – the whole architecture should be discussed in Finland, but also in the EU and in global sense, that how is it possible that foreign companies can just circumvent human rights and the local legislation by making agreements?"
(Finland, Academic)

With regard to non-judicial remedies, an interviewee from **Finland** is critical of the option of arbitration, arguing that, while such mechanisms were originally designed for contexts without functioning courts, companies can in practice use them to circumvent the application of business and human rights standards when the abuse occurs in a developed country.

An interviewee in the **Netherlands**[23] refers to *The Hague Rules on Business and Human Rights,*[24] issued in December 2019 by the Center for International Legal Cooperation (CILC), a not-for-profit organisation that the Dutch government funds. These rules aim to improve the implementation of the UNGPs through international arbitration. They are based on the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),[25] updated in 2013 to enhance the transparency on investor–state arbitration initiated pursuant to a treaty.

"The single biggest problem with it, in my view, is that cross-border will be an aspect in 80 % or more of cases and if you don't get hard law that's applied consistently across the globe, you are just going to have people forum shopping to avoid it."
(United Kingdom, Former counsel in a transnational corporation)

Finally, an overarching issue in cases of corporate human rights abuses with a cross-border dimension is the lack of hard law applying evenly across the board, which allows companies to evade responsibilities.

'Forum shopping' is the practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on a determination of which court is likely to provide the most favourable outcome.[26] In a globalised economy, multinational business enterprises operate through value and supply chains across different jurisdictions with different legal standards. Many multinational business enterprises are established in developed countries with high rule of law and human rights standards. However, these corporations can circumvent the strict requirements of their home jurisdiction by operating through subsidiaries, subcontractors and suppliers established in host countries with lower standards of protection for victims.

Judicial co-operation in the EU and the role of Hague Conventions

Most EU Member States are parties to the Hague Conventions on the service abroad of judicial and extrajudicial documents,* and on the taking of evidence in civil and commercial matters.** These multilateral instruments of private international law have been in place for more than half a century. While postal mail is the traditional communication channel between the central authorities of the States parties to the Hague Conventions to send and receive requests, the Special Commission on the practical operation of the Hague Conventions encourages the use of electronic means to facilitate expeditious execution.

The EU is currently updating the regulations on the service in the Member States of judicial and extrajudicial documents and on the taking of evidence in civil or commercial matters to include a mandatory use of methods of electronic transmission between the competent authorities of the Member States, to allow direct electronic means of service such as emails and to promote the use of video conferencing for direct taking of evidence.***

The Hague Conference adopted, in July 2019, a Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.**** However, some legal areas relating to human rights abuses by business enterprises, such as privacy, intellectual property or certain types of marine pollution, are excluded from the scope of this international instrument (see Article 2 of the convention).

* *Hague Conference on Private International Law (HCCH) (1969),* **Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters**.
** *Hague Conference on Private International Law (HCCH) (1972),* **Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters**.
*** *European Commission (2018),* **Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents***), COM(2018) 379 final, Brussels, 31 May 2018; European Commission (2018), Proposal for a regulation of the Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, COM(2018) 378 final, Brussels, 31 May 2018.*
**** *Hague Conference on Private International Law (HCCH) (2019),* **Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters**.

3.3.1 Barriers relating to establishing European jurisdiction

Judicial remedies remain the main avenue for victims to obtain redress.[27] Most of the interviewees refer to transnational tort litigation under private international law rules. The Brussels I (recast) Regulation[28] provides for legal certainty on the definition of jurisdiction for civil matters. However, the Brussels regime does not regulate the international jurisdiction of courts in the Member States concerning defendants domiciled outside the EU,[29] subject to limited exceptions such as claims brought by consumers and employees. In such cases where the uniform rules of the Brussels I (recast) Regulation do not harmonise jurisdiction, jurisdiction is determined through diverse national rules of private international law, as well as by other international instruments, bilateral or multilateral (such as the Lugano Convention)[30]. This fragmented legal landscape results in divergent approaches towards the extension of jurisdiction over the subsidiaries.[31] This section summarises the evidence gathered from experts with regard to the particular challenge of establishing the applicable jurisdiction in cross-border cases. One overarching issue that interviewees bring forward concerns the difficulty for victims to have access to an effective remedy in their local jurisdiction, which is related to several factors, such as inadequate legislation, corruption and the threat of reprisals. In addition, enforcing decisions with a cross-border dimension can be particularly challenging, while multinational corporations have also created intricate legal structures to shift responsibility from the parent company to the local subsidiary.

Case study

River contamination with severe consequences for local community*

On 5 April 2010, an oil pipeline managed by the Nigerian Agip Oil Company (NAOC) – the local affiliate of the Italian multinational corporation Eni – exploded 250 metres away from the river located in the northern part of the territory belonging to the Nigerian Ikebiri community. The contamination and pollution caused by the incident severely threatened the lives of community members, as well as their environmental rights: the community's survival mostly relies on agriculture and fishing.** The intervention of an environmental CSO proved to be crucial. First of all, the CSO – owing to its long-standing experience and expertise in the field – immediately collected the complaints, communicated with the community and negotiated with members of the community the most effective litigation strategy to obtain compensation from the company. In this respect, the CSO suggested resorting to the Italian justice system, and contacting the interviewee. Moreover, the CSO shouldered all of the costs that a lawyer incurred to travel to Nigeria, as well as for evidence-gathering activities. The CSO also covered 100 % of the costs related to the tests necessary to prove that the river was still polluted because of the spillage that had occurred.

According to Italian legislation, a case can be decided on in Italy if one of the parties involved in the dispute is an Italian subject. Neither the community nor NAOC was, but Eni is an Italian corporation. NAOC argued that Italian authorities could not judge it because it was a Nigerian company, and thus rejected the court jurisdiction. However, this problem was tackled by leveraging the 'related-proceedings principle', i.e. the possibility for the court to decide not only on those cases that fall under its jurisdiction, but also on those cases that are linked to such cases. In the case at hand, a complaint was filed against Eni, and the complaint against NAOC was linked to it, so Italian judicial authorities could decide on it.

Once the issue of jurisdiction was resolved, NAOC decided to negotiate with the community, thus avoiding the continuation of judicial proceedings in Italy. The deal the parties entered into involved both financial compensation for the community and a commitment by NAOC to develop certain projects to improve environmental conditions in the area, as well as to reduce the impact of the company's activities. This led to an interruption of judicial proceedings.***

* *Based on information from a Lawyer engaged in strategic litigation.*

** See also *European Parliament (2019),* **Access to legal remedies for victims of corporate human rights abuses in third countries***, Brussels, 1 February 2019: see, in particular, the Eni case study, pp. 56–59.*

*** *Friends of the Earth Europe (2019), '***Ikebiri reach settlement with company, Niger Delta still awaits justice***', 28 May 2019.*

Many interviewees highlight that victims of corporate abuses in third countries often face particular challenges in gaining access to an effective remedy in their local jurisdiction. A **Swedish** interviewee with experience in cross-border litigation says that often, even when it is feasible to seek a remedy in the (third-country) jurisdiction where the harm occurred (*forum loci damni*), this effort is often useless for victims, since local organisations and human rights defenders face many difficulties in accessing an effective remedy in the place where business abuses occur.

"It's twofold. Partly lack of transparency with regard to business activities and especially when it comes to high-risk countries that are corrupt. Where there is inadequate legislation or poor implementation of the existing legislation. That's one thing. You don't have access or won't get information. It can be difficult if you are able to get that far as to request information. On the other hand, we have the whole problem that those who work as human rights defenders receive an increasingly difficult situation year after year."
(Sweden, Researcher with experience in cross-border litigation)

Interviewees in the **United Kingdom** identify similar barriers relating to access to justice in third countries.

The absence of an effective and independent judiciary, as well as the personal risks involved for both the victims and the lawyers and organisations that assist them, seriously hampers the possibility of accessing a remedy in the local jurisdiction. These local obstacles, combined with the link to a company's base in the EU, could allow victims to bring their case to European courts in their search for justice.

Beyond the inaccessibility of effective remedies in host countries, other interviewees highlight the fact that, even if victims get a favourable decision against the parent company in their local jurisdiction, there are few chances to enforce this decision. For example, while describing the *Boliden* case, which included a cross-border dimension between Chile and Sweden, a **Swedish** interviewee[32] argues that, even if a Chilean court had issued a verdict, it would have been disadvantageous for the victim because the company did not have any assets in Chile and the Swedish court would not acknowledge the judgment.

Beyond jurisdictional issues, the majority of experts highlight the difficulties of disentangling the relevant corporate structure of multinational business enterprises to 'pierce the corporate veil'. According to the 'corporate veil' doctrine, multinational business enterprises comprise distinct legal entities with different levels of dependence and connection, each of them having a separate legal existence (and liability) from its owners and managers. Interviewees in **Italy**[33] and **Poland**[34] identify current rules on company law as the main obstacle to victims' ability to pierce the corporate veil, and therefore to establish the liability of the parent company over the action and omissions of its subsidiaries. Furthermore, the Italian interviewee highlights the fact that it is more difficult to extend the responsibility of the parent company under private litigation than in the area of public law.

The EU has certain instruments in place that can help victims to gather relevant information about business enterprises, such as the Directive on disclosure of non-financial information,[35] the interconnection of registers of beneficial owners envisaged under the Anti-Money Laundering Directive,[36] and the interconnection of business registers available in the e-Justice Portal.[37] These tools may foster transparency in the corporate structure of business enterprises. However, we must refer here to the concerns of many interviewees in regard to the difficulties in proving that the abuses of a subsidiary can be attributed to its parent company (see **Section 3.1**).

A number of interviewees refer to the need for binding legislation relating to due diligence standards (see **Chapter 4**), rather than relying on soft law or voluntary regimes.

Finally, a Swedish interviewee[38] states that legislation on companies' responsibility with available sanctions is necessary. As a good practice, she highlights the example of the United Kingdom's Modern Slavery Act, which as she recalls includes sanctions and the possibility of processing both criminal and civil charges, as well as extraterritorial legislation to handle cases concerning high-risk countries.

"In African jurisdictions, but also some Latin American jurisdictions, the communities are suing in the UK. They're doing that either because they have no means of paying for legal representation in their own country, so there is no conditional fee agreement, there's no 'no win no fee' agreement available; or because there is some kind of threat to them and bringing a case in their own jurisdiction would be impossible due to the possibility of reprisals, including against the lawyers involved."
(United Kingdom, Senior lawyer at a consumer rights NGO)

"[I]t is paradoxical that, from a fiscal point of view, holdings are considered as uniform subjects, but when it comes to the judicial responsibility for the actions perpetrated by the companies belonging to the holdings, the society spirit prevails, there is the autonomy and the responsibility of the local branches cannot be extended to the mother-company."
(Italy, Lawyer at a CSO engaging in strategic litigation)

3.3.2 Barriers relating to the applicable law

The relevant applicable EU law on non-contractual obligations in cross-border civil cases is the Rome II Regulation.[39] This regulation provides a uniform rule for EU-domiciled business enterprises, namely that the applicable law of a claim shall be the law of the state where the damage occurred, irrespective of the state where the claim is being brought.[40] There are limited exceptions to this rule.[41] The Rome II Regulation also provides that damages will be assessed in accordance with the law and procedure of the state in which the harm occurred.[42]

Therefore, courts must generally apply the law of the state in which the damage occurred when determining the consequences of a breach of human rights. According to several of the experts whom FRA interviewed, this creates additional barriers for the victims to access an effective and fair remedy. First of all, the claimant's lawyers have to investigate the particular relevant law in another state, which, according to an interviewee from the **Netherlands**, creates additional costs and brings a challenge to obtain legal advice on the applicable legislation in the host country. Second, the application of the host state's laws can be relevant for limitation periods: one of the interviewees in **Germany**[43] refers to the *KiK* case, which German courts ultimately dismissed, as the claim was time-barred according to the short limitation periods that the applicable Pakistani law imposed.[44] Finally, the applicable law can be a decisive factor in determining the level of damage, which may turn out to be disadvantageous for victims when a court decides to award significantly lower damages.

"[The negative] effect of the Rome II Regulation, which means that for harm that occurred after January 2009 you are looking at receiving local damages. So that is going to depress the level of damages and the level of cost that can be recovered still further. Now there are exceptions that can be made there, and the court has the power, the discretion not to strictly apply that rule in certain circumstances but nevertheless that was an important deterring factor. The other one is non-recoverability of success fees."
(United Kingdom, Lawyer)

3.4 FINANCIAL RISKS

All interviewees emphasise that there is a high financial risk for private individuals to resort to courts. While the court fees as such may not be high in many countries, the costs of hiring a lawyer, requesting legal and technical opinions from experts, and having to cover the costs of the winning party if the case is lost, which may be particularly high in the case of a large company, were found to be a major deterrent for victims trying to access a remedy.

Many interviewees mention the cost of legal representation and initiating court proceedings as an important obstacle. In some countries, such as the **United Kingdom**, legal costs are payable by the losing party and there are few financial arrangements to cover the extensive costs related to cases of human rights abuse by business enterprises. Despite the existence of legal aid provisions for claimants in many

of the Member States, in reality they do not cover the full extent of the costs incurred during the process. For example, in **Germany**, experts appreciate the fact that persons affected by a business's actions can access legal aid irrespective of their nationality. Nonetheless, the financial implications and risks of administrative and civil litigation are considered extremely high. Interviewees agree that the costs for a claim under administrative, civil and criminal law usually exceed the amount in dispute.

Other interviewees explain that the costs of the expert opinions needed to establish causality can easily surpass the value of the subject matter.

While in **Germany** legal aid (*Prozesskostenhilfe*) would cover court costs, legal aid will be available only for the less affluent claimants. Interviewees point to financial risk for middle-income households as 'disproportionate'. Confirming this, another interviewee[45]describes an "enormous financial litigation risk" for associations that support third-country nationals in filing a claim under German civil law. The interviewee refers to a case in which the company sued was able to obtain a detailed legal expert opinion, while the association could not afford a similar tool and struggled to find a law firm that would do this pro bono. According to the interviewee, the cost of the expert opinion alone was € 25,000 (the case is not indicated here for reasons of confidentiality).

"Individual consumers won't engage in such costly proceedings. They will make do with settlements. We support some private persons in test cases relating to excess fuel consumption. [...] There is also an evidence problem. They have to conduct driving logs over several months to prove that fuel consumption exceeds the amount stated by the producer. [...] They have to prove this with respect to the individual vehicles they are using."
(Germany, Senior expert in consumer protection at a CSO)

The financial costs of cross-border proceedings are even greater. These include, for example, travel costs for lawyers to visit clients in third countries, costs for legal advice to correctly understand the national legislation of a third country and costs for technical advice concerning the assessment of environmental rights' violations. For this reason, according to several interviewees, European-level CSOs finance most of the proceedings attempted against multinational companies.

Most of the costs must be borne before the start of judicial proceedings, to establish the case, and are thus not covered by free legal aid. Furthermore, as an expert in **Italy** explains, some proceedings involve considerable costs.

"[T]here are some proceedings that are extremely expensive: lodging a complaint before the Court of Cassation requires an initial administrative fee of € 3,000. This is just the initial administrative fee. € 3,000 is a significant cost. Moreover, in some cases courts can decide to double this fee that therefore amounts to € 6,000, plus the lawyer's cost. If the proceeding's outcome is negative, it might be prohibitive."
(Italy, Lawyer and member of a lawyers' association for the protection of human rights)

An interviewee in **France** explains that an individual can hardly finance such costs, even in domestic cases.

"There are several solutions. One is working pro bono, which we do not do or very rarely. We are a law firm specialised in the defence of victims and we are paid for that. Other law firms that defend large companies and do commercial law or real estate law sometimes reserve a small part of their budget to pro bono cases. We have two methods of financing the case. One, we charge a small fee at the beginning of the proceedings and an honorarium depending on the result of the case. Two, which is a bit more unusual and used in cases of industrial pollution, we launch a crowdfunding platform to finance things."
(France, Lawyer experienced in domestic litigation)

With regard to cross-border proceedings, the EU Rome II Regulation could also result in awarding compensation for damages according to local rules and evaluation, whereas victims would incur the significantly higher legal costs elsewhere, as an interviewee from the **United Kingdom** mentions.[46] The application of the law of third countries can also reflect the imbalance of financial resources between multinational corporations and the victims when requesting a legal expert opinion on the foreign provisions applicable to the case. Several interviewees highlight the difference between large companies that can afford to hire numerous lawyers and experts, and can extend the duration of the proceedings, and the limited capacity of the complainants who do not necessarily have these financial means. In this regard, a **Swedish** interviewee refers to the *Boliden* case of Chilean claimants against a Swedish company.

"In the 45 million, which Boliden demand as their legal costs, there are both the enormously high fees of experts, where some of their consultants have billed for totals of 10 million for their expert opinions, but also a million for such a test of a tunnel that they did in Luleå. The court has said that we must pay. It has such consequences for private individuals, even if this is an extreme case, not only because such cases (environmental cases against companies) are unsure in the first place, but when you know that the adversary has [...] [unlimited resources] if you are talking about a big company. If you are talking about smaller companies, there might of course be limits for them too."
(Sweden, Legal expert)

Finally, an important deterrent factor is the fact that the financial risk of pursuing a case is often higher than the value of the claim, even in relatively low-value consumer rights cases. Interviewees from **Finland**, **Germany**, **Italy** and **Poland** point to the lack of affordable court procedures as a weakness in the court-based system of consumer protection.

For many victims, these barriers make them give up their claims.

"The consumer is left alone with the case. And the costs s/he needs to incur to win a case in a court might be higher than the value of the very product concerned. [...] The binding laws do protect the consumer's interests, but to enforce them one has to go to the court, which in case of a product of everyday use, will not always pay off for consumers. Everyone knows perfectly well how our courts function, how big backlog of cases there is. People give up and do not pursue their rights, either sell the items or just throw them away, and that's where unethical traders feed and thrive".
(Poland, Attorney at law with expertise in consumer rights protection)

Ways forward according to experts interviewed

All interviewees agree that the system of legal aid is either inadequate or insufficient compared with the overall costs that victims of business-related abuses incur. While there is no clear-cut solution to this, some suggestions to improve this include:

- making the costs of litigation less than or equal to damages;
- empowering relevant state bodies, such as ombudsmen, to represent or assist claimants in court for free;
- making the legal costs of a claim fully recoverable from the other party in all mechanisms;
- when granting legal aid and costs, reviewing the standard thresholds of claimants' income in the light of the concrete case and actual ability of a person – even those who are well off/middle class – to bear all costs that are entailed in such cases;
- in the case of a case lost against a corporation, setting a threshold for how much the losing party should be obliged to pay back, in particular when the other party hired several lawyers and experts;
- the state providing support for CSOs that offer financial and legal assistance to victims of businesses, and adequately protecting them from abusive counter suits as well as political attacks, to allow them fulfil their important mission (see Section 1.1).

3.5 INADEQUATE ACCESS TO INFORMATION ON VICTIMS' RIGHTS AND COMPLAINT MECHANISMS

A prerequisite for a victim's access to a remedy is having access to information regarding his or her rights and possibilities with regard to issuing a complaint. Nevertheless, there are significant barriers for victims of business human rights abuses when it comes to this issue. FRA's findings shed light on problems such as people's lack of awareness concerning their rights and legal avenues, making it difficult for them to make a complaint; the difficulty in accessing information about available mechanisms to seek justice; and the difficulty in obtaining the evidence needed to prove wrongdoing by the business.

Experts' opinions on whether or not adequate and accessible information exists on the available remedies vary. Consumer rights experts in **Finland**[47] find information on consumer rights-related remedies to be particularly widely and easily available. In contrast, several interviewees in other Member States state that OECD guidelines and mechanisms are not sufficiently promoted and known.

Many interviewees also state that even lawyers, unless specialised in business and human rights or consumer protection litigation, are often not aware of certain judicial and non-judicial mechanisms.

Experts in **Finland**, the **Netherlands**, **Poland** and **Sweden** mention a lack of awareness among the general population regarding their rights and where to turn for further information and support if their rights are compromised – in particular as consumers.

"In terms of specific obstacles for rights holders, I feel the most important one may be that most rights holders are not aware of the dispute resolution or complaint options they have."
(Netherlands, Lawyer)

PROMISING PRACTICE

Raising awareness

An interviewee in **Italy*** reports on awareness-raising activities carried out in the business and human rights field. More specifically, the National Legal Council (*Consiglio Nazionale Forense* – CNF) – the representative body of legal professionals at the Ministry of Justice – set up a specific Human Rights Commission. To improve efforts in this field, the CNF and its local branches are expected to organise training to raise awareness and improve knowledge concerning business and human rights among legal professionals and judicial authorities.

** Italy, Lawyer and member of a lawyers' association for the protection of human rights.*

Experts argue that, on some occasions, the state does not provide enough information to people about the available complaint mechanisms.

In discussing these barriers, several interviewees also highlight the particular vulnerabilities of certain sections of the population – such as older people or migrants – and additional barriers they face. For example, in **Poland**, two experts refer to older people's particular difficulty in pursuing their claims, which often follows from low legal awareness or an inability to lodge complaints online. An expert in **Sweden** refers to the problem of fraudsters strategically pinpointing particular vulnerable groups in Sweden and exploiting their lack of knowledge of their rights, and what to do when their rights have been violated. Finally, an expert in **Finland** identifies migrants as experiencing particular challenges in accessing information about available mechanisms and understanding how the Finnish system works.

The experts interviewed also recommend several solutions to improve victims' access to information about their rights and available complaint mechanisms (judicial and non-judicial), such as introducing legal education for the wider population to increase their awareness, paying legal aid lawyers better and educating businesses about their human rights obligations. In this regard, an interviewee in **Finland**[48] also proposes strengthening human rights-related information provision to (foreign) companies to strengthen their knowledge on human rights relevant to their field of operation, such as the Sámi rights in Finnish Lapland and the possibility of claims related to their rights. This could, in the interviewee's opinion, have a preventive effect on abuses, which would be useful, as taking Sámi rights-related claims to courts requires a lot of expertise, expert support and resources that individual Sámi or Sámi communities do not have.

Ways forward according to experts interviewed

Overall, the interviewees recommend that information about the different mechanisms should be made more easily available and accessible, also in terms of the language used; human rights legal language and terminology are difficult for both the victims and the business sector.

Several experts stress the need for businesses to receive more information about their human rights obligations. An interviewee suggests that providing more information on business and human rights questions to companies could serve as preventive mechanism, in particular in relation to small and medium-sized companies.

According to several interviewees, the state should bear the main responsibility for providing information, through awareness raising, but also through training for legal professionals, which many interviewees deemed insufficient.

Endnotes

1 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171,07/07/1999, p.12–16.
2 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.
3 Finlex (1994), No. 737, **Act on Compensation for Environmental Damage [*Ymäristövahinkolaki*]**, Section 1. This is similarly true under the following: Finlex (1986), No. 585, **Patient Injury Act [*Potilasvahinkolaki*]**, Section 2.
4 Finlex (1978), No. 38, **Consumer Protection Act [*Kuluttajansuojalaki*]**, Chapter 5, Section 16; and Finlex (1990), No. 694, **Product Liability Act [*Tuotevastuulaki*]**, Section 4(a).
5 For more information, see the **official website of UOKIK**.
6 *Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym*, Dz.U. 2007 nr 171 poz. 1206.**http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20071711206**
7 France, Lawyer specialised in litigation.
8 UK, Her Majesty's Government (1998), ***Civil Procedure Rules 1998***, rule 31(12).
9 German Parliament (2018), ***Law on the introduction of a sample declaratory action in civil law* [*Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage*]**, 12 July 2018.
10 Consumer organisations can apply for legal standing for Sample Declaratory Actions at the Federal Office of Justice (BfJ).
11 The Federal Office of Justice is the central service authority of the federal justice system (*Bundesjustiz*) in Germany. It is assigned to the Federal Ministry of Justice and Consumer Protection.
12 **Act of 17 December 2009 on pursuing claims in group proceedings** (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym, Dz.U. 2010 nr 7 poz. 44*).
13 Poland, Attorney at law with expertise in consumers' rights protection and Poland, Lawyer from the consumer ombudsman office.
14 Finlex (2014), No. 527, ***Ympäristönsuojelulaki***, Chapter 18, Section 186(2); and Chapter 19, Section 191(2).
15 Finland, Consumer Disputes Board (*kuluttajariitalautakunta/konsumenttvistenämnden*), Press release, 3 November 2018. A Finnish summary of the case is available on the **website of the Consumer Disputes Board**.
16 *Gazzetta Ufficiale* (2019), Law No. 31, Provisions concerning class actions, 12 April 2019.
17 **Regulation (EU) No. 1215/2012** of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
18 For more information, see more European Commission's webpage on **contractual and non-contractual obligations**.
19 See also FRA (2017), ***Improving access to remedy in the area of business and human rights at the EU level***, Opinion 1/2017, Vienna, 10 April 2017, pp. 24–33; and European Parliament (2019), ***Access to legal remedies for victims of corporate human rights abuses in third countries***, Brussels, February 2019.
20 Germany, two Lawyers. Poland, Attorney at law with expertise in consumers' rights protection and Poland, Lawyer from the consumer ombudsman office.
21 Germany, Senior expert in consumer protection at an NGO.
22 Sweden, Lawyer at a consumer authority.
23 The Netherlands, Lawyer.
24 Center for International Legal Cooperation (CILC) (2019), ***The Hague rules on business and human rights arbitration***, December 2019.
25 UN Commission on International Trade Law (UNCITRAL) (2013), ***Arbitration rules of the United Nations Commission on International Trade Law***, Vienna.
26 See the Merriam-Webster definition of '**forum shopping**' (accessed 13 April 2020).
27 FRA (2019), ***Business-related human rights abuse reported in the EU and available remedies***, Chapter 2.7.
28 **Regulation (EU) No. 1215/2012** of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 4.
29 The domicile of legal persons is defined in **Regulation (EU) No. 1215/2012** of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 63.
30 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, pp. 3–41.
31 See FRA, ***Improving access to remedy in the area of business and human rights at the EU level***, Opinion 1/2017, Vienna, 10 April 2017, p. 32; and European Parliament (2019), ***Access to legal remedies for victims of corporate human rights abuses in third countries***, Brussels, 1 February 2019: see, in particular, the Shell case study, p. 82.
32 Sweden, Legal expert.
33 Italy, Lawyer at a CSO engaging in strategic litigation.
34 Poland, Senior lawyer at an NGO.
35 **Directive 2014/95/EU** of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
36 **Directive (EU) 2015/849** of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Article 30.
37 For more information, see the European Commission's webpage on the **e-Justice portal**. This information is available at the EU and national levels as an implementing measure of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.
38 Sweden, Researcher with experience in cross-border litigation.
39 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199.
40 *Ibid*, Article 4(1).
41 The exceptions include the following: where a claimant and the business share a common 'habitual residence' (Article 4(2)); where the event is manifestly more closely connected with another state (Article 4(3)); and/or where the application of that law would conflict with mandatory laws or public policy of the state in which the claim is brought (Articles 16 and 26). There is also a special exception for environmental damage, where the law will be that of the state where the damage occurred unless the claimant chooses the law of the state where the event giving rise to the damage occurred (Article 7). For further information, see Skinner, G., McCorquodale, R., de

Schutter, O. and Lambe, A. (2013), *The third pillar: Access to judicial remedies for human rights violations by transnational business*. The determination of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality is excluded from the scope of the Rome II Regulation and thus governed by the domestic law of the Member States, subject to the possible application of international instruments containing conflict of law rules. The applicable law to product liability is covered by the Hague Convention of 2 October 1973.

42 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199, Articles 4 and 15.

43 Germany, Senior lawyer at an NGO.

44 See also European Parliament (2019), ***Access to legal remedies for victims of corporate human rights abuses in third countries***, Brussels, 1 February 2019: see, in particular, the Kik case study in Germany, pp. 62–66.

45 Germany, Senior lawyer at an NGO.

46 United Kingdom, Lawyer.

47 Finland, Academic expert and Finland, Lawyer at a consumers' union.

48 Finland, Researcher at a university.

4

PREVENTION OF ABUSE

Access to remedy is of great importance for victims of corporate human rights abuses. However, taking steps to prevent such abuse from occurring is crucial. Prevention forms an integral part of the UNGPs. The first and second pillars of the UNGPs aim to prevent future harm through the state's duty to protect and the corporate responsibility to respect human rights, while the third pillar aims to provide a remedy when such abuses occur (UNGP 25). Preventive measures can also strengthen the access to remedy down the road if abuses do occur, by ensuring that there are structures in place to deal with such issues.

At its core, due diligence prevents human rights abuse. Effective due diligence practices can also help to strengthen access to remedy. For example, documents that a company produces as part of its due diligence obligations could be used by victims as evidence of the company's alleged wrongdoing in court proceedings or to prove liability of a mother company for activities of its subsidiary. Reporting is arguably one of the most important aspects of due diligence that contributes to access to remedy.

This chapter will look at the other core element of business and human rights besides access to remedy: prevention. In particular, this chapter will discuss experts' perspectives on EU action, the role of mandatory human rights due diligence, and legislative and policy developments at national and European levels.

4.1 INTERNATIONAL STANDARD SETTING

The UN has played a key role in setting standards in the area of due diligence, most notably through the work of the UN Working Group on Business and Human Rights, which created the UNGPs. Due diligence is a key component of the UNGPs' second pillar on corporate responsibility to protect human rights. UNGP 17 states that "in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, [business enterprises] should carry out human rights due diligence". This process should cover the potential human rights impact of the business' own activities and the "operations, products or services related to its business relationships" (Principle 17(a)). UNGP principles 15 and 17 also refer to the importance of ensuring that obligations are appropriate for the size and circumstances of business enterprises, which is of particular relevance to small and medium-sized enterprises. The OECD, which has been at the forefront of the promotion of responsible business conduct since 1976, adopted guidance on due diligence for responsible business conduct in 2018,[1] drawing on approaches already contained in sector-specific due diligence guidance, such as guidance related to minerals, garments and footwear, agriculture, child labour in mineral supply chains, extractives and finance.

The draft legally binding instrument on business and human rights, which is being discussed as part of ongoing negotiations within the UN, includes provisions on due diligence, which could facilitate access to remedy. The draft treaty proposes that states lift the statute of limitations for prosecution of the most serious crimes under international law and allow reasonable periods of time for investigation and prosecution of other crimes, especially when the violation occurred in a different state.[2] It also proposes that State Parties introduce domestic legislation that requires businesses to undertake due diligence assessments (Article 5). Importantly, Article 5(3) provides that all persons conducting business activities should report publicly and periodically on financial and non-financial matters, including policies, risks, outcomes and indicators on human rights, as well as on environment and labour standards concerning the conduct of their business activities, including those of their contractual relationships. Furthermore, Article 14 refers to the need for adequate national monitoring mechanisms, while the draft protocol proposes that such mechanisms should be based on the Paris Principles.[3]

In 2019, the Parliamentary Assembly of the Council of Europe adopted a resolution urging states to adopt legislation and policies, paying particular attention to "businesses' responsibilities for their activities having an adverse impact on human rights, in particular through developing human rights due diligence procedures for businesses".[4]

4.2 TOWARDS HORIZONTAL HUMAN RIGHTS DUE DILIGENCE IN THE EU

An important part of the efforts to prevent and mitigate risks of potential business-related human rights abuses concerns the collection and disclosure of information, as it contributes to the continuous monitoring of companies and increases transparency. In FRA's 2017 Opinion on improving access to remedy, FRA stated that "[t]he EU could incentivise Member States to impose due diligence obligations, including for parent companies linked to human rights performance in subsidiaries or supply chains" (opinion 21).[5]

With regard to the mandatory disclosure of information, EU law requires large companies to disclose certain information on their operation and how they manage social and environmental risks. The EU Non-financial Reporting Directive requires public-interest companies with more than 500 employees to publish reports on their policies regarding environmental protection, social responsibility and the treatment of employees, respect for human rights, anti-corruption and bribery, and diversity on company boards.[6] The directive covers approximately 6,000 companies and groups, including listed companies, banks and insurance companies. In December 2019, the Commission committed to reviewing the Non-financial Reporting Directive in 2020 to strengthen sustainable investment.[7]

EU law also provides for due diligence obligations in certain specific areas.

- The EU Timber Regulation, which lays down the obligations of operators that place timber and such products on the market, aims to counter the trade in illegally harvested timber through three obligations, among which is the requirement to exercise due diligence.[8] The operators have to put in place a "due diligence system" that consists of information, risk assessment and risk mitigation.
- Owing to the EU Conflict Minerals Regulation passed in 2017, EU importers of tin, tantalum, tungsten and gold will have to start carrying out due diligence in their supply chains from 1 January 2021 onwards.[9] The application of the new rules follows years of preparatory work and aims

to prevent the funding of armed groups and security forces in conflict areas due to the buying or selling of the minerals concerned.

— Reflecting the EU's commitment to the abolishment of the death penalty, the 2019 EU Anti-torture Regulation stipulates measures to prevent trade in certain goods, namely those that could be used for capital punishment, torture or other inhumane and degrading treatment.[10] The legislation regulates, among other things, trade in pharmaceutical chemicals that could be used in executions using a lethal injection.

— In 2019, the EU regulation on sustainability-related disclosures in the financial services sector was passed.[11] The legislation requires investors and financial advisors to disclose the risks of negative environmental, social and governance impacts and their effect on investment value. There must also be transparency in the consideration of longer term negative impacts in the environmental, social and governance sphere.

The European Parliament has stressed the importance of mandatory human rights due diligence measures. For instance, in 2019, the Parliament's Responsible Business Conduct Working Group adopted a shadow action plan on business and human rights, calling for the adoption of mandatory human rights due diligence legislation.[12] Furthermore, 2019 saw the publication of a study that the European Parliament's Subcommittee of Human Rights had requested on the obstacles that victims of business-related human rights abuses in third countries face in their experiences of accessing justice.[13]

Discussions have advanced since the 2016 Council Conclusions, with a large-scale study[14] finding that many companies would be in favour of an EU regulation with general due diligence requirements for business. The study, which the European Commission requested, presented policy options on due diligence requirements through the supply chain.

This study examined existing regulations and proposals, as well as options for regulating due diligence in companies' own operations and through the supply chain.

In March 2020, the European Commission published the EU Action Plan on Human Rights and Democracy for 2020–2024 – an outline of the EU's activities in third countries. The plan refers to the business sector and aims to, among other things, "Support multi-stakeholder processes to develop, implement and strengthen standards on business and human rights and due diligence, and engage with development banks and international financial institutions".[15] The EU will also strengthen its support for countries'

EU study (2020): one in three EU businesses undertakes human rights due diligence

In February 2020, the European Commission released the results of a **study examining existing regulations and proposals, as well as options for regulating due diligence in companies' own operations and through their supply chains**,* for adverse human rights and environmental impacts, including relating to climate change. The study was launched in 2018 as part of the Commission's **Action Plan on Financing Sustainable Growth** and contributes to the goals of the **European Green Deal**, which intends to entrench sustainability in EU corporate governance rules. The study identifies practices and perspectives concerning the various regulatory options, ranging from no intervention at all to mandatory human rights due diligence.

The study shows that, currently, only one in three businesses based in the EU undertakes due diligence that takes into account the human rights and environmental impact of their activities. Survey respondents from the business sector, as well as from other parts of society, express a favourable attitude towards an EU regulation with a general due diligence requirement for human rights and environmental impacts of businesses. Approximately 70 % of business survey respondents agree that EU-level regulation on a general due diligence requirement for human rights and environmental impacts may provide benefits for business. Within the overall favoured option of mandatory due diligence as a legal standard of care, a general cross-sectoral regulatory measure was preferred. The next steps will be to focus on the discussion of possible future legislation of mandatory human rights due diligence measures.

* *See European Commission (2020), Study on due diligence requirements through the supply chain; EP Report on corporate liability for serious human rights abuses in third countries (2015/2315(INI)).*

efforts to implement the UNGPs through national action plans (NAPs) and relevant due diligence guidelines.

Furthermore, in April 2020, the European Commissioner for Justice announced the Commission's commitment to introduce rules on mandatory corporate environmental and human rights due diligence.[16] The announcement came during a high-level online event that the European Parliament's Responsible Business Conduct Working Group hosted, at which the commissioner presented the results of the aforementioned Commission study.

On 29 April 2020, the European Commissioner for Justice, Didier Reynders, discussed the support that has been canvassed for mandatory rules on sustainable corporate governance, encompassing both directors' duties and a corporate due diligence duty. It would, among other things, require businesses to carry out due diligence in relation to the potential human rights and environmental impacts of their operations and supply chains. He also indicated support for a cross-sectoral approach and for sanctions in the event of non-compliance. A broad range of stakeholders, including civil society and business, has welcomed this information.

In the Communication on the EU Biodiversity Strategy for 2030, the Commission announced a new initiative for 2021 on sustainable corporate governance, which may take the form of a legislative proposal "addressing human rights, and environmental duty of care and mandatory due diligence across economic value chains".[17] Other European Green Deal[18] implementing strategies, such as the Circular Economy Action Plan[19] and the Farm to fork Strategy,[20] also refer to the upcoming initiative and the most recently adopted recovery plan, namely *Europe's moment: Repair and Prepare for the Next Generation*.[21]

Exploring citizens' views on working conditions in the clothing industry

In a recently published Eurobarometer survey on the attitudes of European citizens towards the environment, respondents were asked about topics relating, among other things, to the environmental impact of products, their views on climate change and the role of the EU in standard setting.

When asked if they agreed that brands linked to clothing should be required to ensure good working conditions inside and outside the EU, the vast majority of respondents (92 %) agreed or tended to agree.* In the **Netherlands** and **Sweden**, four out of five respondents "totally agreed".

When asked if they agreed that clothes should be available at the lowest price possible, regardless of the working conditions, responses varied considerably. In **Italy** and **Poland**, the majority of respondents agreed with this statement. Meanwhile, no more than a quarter of respondents in **Finland**, **Germany**, the **Netherlands** and **Sweden** agreed, and over half "totally disagreed" with the statement, with this percentage being largest in **Sweden** (82 %).** This finding highlights the importance that many European consumers place on preventing human rights abuses in the workplace.

* *European Commission (2020),* ***Attitudes of European citizens towards the environment****, Special Eurobarometer Survey, March 2020, p. 91.*

** *Ibid, p. 94.*

4.3 EXPERTS' PERSPECTIVES ON THE NEED FOR STRONGER EU ACTION

FRA's findings indicate that many of the experts interviewed suggest that a coordinated EU approach in the area of business and human rights is crucial to improve the prevention of potential abuses. To this end, the interviewees propose different avenues.

"Audits cannot exempt companies from responsibility. This means that auditing companies must incur in liability for their auditing reports. They must have obligations towards those these audits are intended to protect: the workers or the communities."
(Germany, Senior lawyer at an NGO)

Some interviewees argue in favour of stricter rules on the collection and disclosure of information concerning the human rights and environmental impact of business activities. In this regard, an expert from **Poland**[22] refers in particular to the EU Non-financial Reporting Directive. An expert from the **United Kingdom** [23] argues that the obligations of disclosure should be increased for companies concerning investigations undertaken into specific incidents and the resulting decision-making process. The European Commission could require companies to issue statements on human rights issues in their operations, which would help to normalise such a practice and eventually make companies embrace human rights impact assessments in a proactive way. An expert from **Germany** refers to the proper enforcement of standards as another relevant factor to take into account.

"[M]andatory due diligence on severe human rights violations would be needed. And, at this point, the inversion of the burden of proof would be obtained [...]: the event occurs and [the company] need[s] to demonstrate that you implemented, established and implemented a system to comply with this obligation. In this way, it is not just me being damaged, it is also you demonstrating that it was not your fault"
(Italy, Lawyer involved in litigation against large corporations)

Many experts also spoke in favour of EU legislative action on mandatory human rights due diligence. Such a law, applying across the Member States, would increase legal certainty for companies and victims of corporate human rights abuses, fill existing legal gaps and produce a greater impact than separate national initiatives. According to a **German** expert[24] "[it] would be useful to have [...] a regulation [at the European level] that defines the due diligence obligations of EU-based companies relating to their foreign activities and that applies to all EU [Member States]". The legislation should include the obligations of companies and the legal basis for accessing a remedy in cases in which a company has failed to live up to its obligations, according to an expert from the **United Kingdom**[25] and should explicitly mention the extraterritorial application of the law or at least not preclude that possibility. Mandating legal requirements of due diligence would also benefit the victim's situation regarding collection and burden of proof if an incident should occur.

"If parent companies were made responsible by law, then cases would start to flourish. I do believe that there would be a lot more cases, lawyers would be a lot bolder and less hesitant about taking these cases forward."
(United Kingdom, Legal advisor at a CSO)

Legislation on mandatory human rights due diligence and the establishment of a legal responsibility for parent companies could allow more cases to come to court in the area of business and human rights.

A lawyer from **France** argues, however, for a paradigm change in placing responsibility on producer companies. The obligation of due diligence that weighs on companies should be better defined and non-compliance should be sanctioned more severely. Furthermore, the interviewee criticises the fact that due diligence is limited to the company's activity in third countries.

4.4 NATIONAL HUMAN RIGHTS DUE DILIGENCE MEASURES

The past few years have seen many developments in the area of due diligence and general work on preventing business-related human rights abuses. States have developed NAPs, have enacted legislation on due diligence measures or are considering such legislation, and CSOs are contributing to raising awareness and providing guidance for and monitoring of the corporate sector and governments.

The UNGPs encourage states to pass legislation on due diligence. In past years, several Member States have enacted legislation relating to human rights due diligence measures.

Several of the experts whom FRA interviewed point to the positive developments in Member States' legislation.

In the **Netherlands**, the Senate approved legislation on "Child Labour Due Diligence" in May 2019.[26] The law, seen as a stepping stone towards broader due diligence legislation, requires companies to show how they address the issue of child labour in their supply chains. The law covers companies that sell or supply goods or services to Dutch end-users, thus including companies registered outside the Netherlands. The law also provides for the appointment of a regulator, which publishes the due diligence statements online and engages with victims, consumers and other stakeholders who cannot sue a company based on the law, but have to wait until the company has had the opportunity to deal with their complaint. Subsequently, the stakeholders can contact the regulator.

Furthermore, a company can incur a criminal sanction (fine) for failure to exercise due diligence, namely through failure to produce a statement, to carry out an investigation or to set up an action plan, or if the investigation and action plan are inadequate. The law was published in November 2019 and the date of entry into force is as of yet unknown, but at the latest will be 1 January 2022. The details, which have yet to be specified in general administrative orders, will determine the progressive extent of the legislation; they concern the contents of the corporate statement and what constitutes due diligence, for example. As the law is aimed at protecting the Dutch consumer rather than the victims of child labour, it does not contain any provisions regarding access to remedy for victims as such.

Since 2014, the Dutch government has also begun developing semi-voluntary industry-specific covenants, called "**Agreements on International Responsible Business Conduct**", to which two Dutch experts[27] refer. These agreements are concluded with the government, the sector, trade unions and civil society, and include the banking, gold, and garments and textile sectors. The agreement on sustainable garments and textile includes an independent complaints and disputes committee that can receive complaints from either the secretariat or third parties and has the power to deliver binding decisions. However, according to an interviewee,[28] after approximately two years of the committee's existence, there have not yet been any complaints from third parties.

In the **United Kingdom**, the Modern Slavery Act (passed in 2015) represents a far-reaching piece of legislation, consolidating slavery and trafficking offences and adding new preventive measures and a regulatory body.[29] The Act obliges companies to publish an annual statement if they have sales of more than GBP 36 million and if some or all of their business is based in the United Kingdom. It affects over 12,000 companies. The annual statement must include steps taken to ensure that slavery and human trafficking are absent from the business or it must declare that the company has taken no steps to this end. Furthermore, in March 2017, the UK Parliament's Joint Committee on Human Rights recommended that the government impose a duty on all companies to put in place effective human rights due diligence processes for their subsidiaries and entire supply chain, while also allowing for remedies for victims when abuses occur.[30]

In **Germany**, the government announced in its coalition agreement that it will consider legislation if fewer than half of all major German companies adopt satisfactory human rights due diligence processes by 2020.[31] The government of **Finland** committed to conducting a study with the goal of adopting a mandatory due diligence law that would cover domestic and transnational activities, thereby taking into account the special position of small

PROMISING PRACTICE

Establishing a duty of vigilance for companies

Several experts refer to the pioneering law passed in 2017 in **France**, establishing a 'duty of vigilance' for companies.* The law obliges companies with more than 5,000 employees in France or 10,000 employees worldwide (including the company's subsidiaries) to draw up an annual plan covering due diligence in the parent company, the companies under its control and the suppliers and subcontractors with which the parent company or any of its subsidiaries have established a commercial relationship. The plan should include procedures to identify and analyse the risk of human rights violations or environmental harms connected to the company's operations, procedures to regularly assess risks associated with the supply chain, actions to mitigate identified risks or prevent serious violations, mechanisms to alert the company to risks, and mechanisms to assess measures that have been implemented as part of the vigilance plan and their effectiveness. In particular, an expert from France** mentions the internal alert and complaint mechanism of the law on due diligence, which allows any stakeholder to bring attention to a risk to or a violation of human rights, or to complain about it.

Furthermore, companies are expected to make their annual vigilance plans public. Although the legislation does not shift the burden of proof, it provides for judicial remedies for third parties to demand enforcement of the law. However, three years after entry into force of the legislation, enforcing compliance has proven to be complex, as it is often difficult to assess if a company is bound by the law, many of the plans are brief and there is no official government monitoring body supervising the

implementation of the law. The CSO CCFD-Terre Solidaire took stock of the legislation's impact and stated that the practical application and remedy for victims still lags behind where it should be. Furthermore, in the absence of a clear overview of which companies are bound by the law, CCFD-Terre Solidaire, in cooperation with the CSO Sherpa, created an online platform where the companies subject to the law are listed and where the public can easily access the due diligence statements produced so far.***

* *France (2017), Law on the duty of vigilance (***Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)***), 27 March 2017.*

** *France, Representative of an NGO involved in strategic litigation.*

*** *The online platform is entitled* **Le radar du devoir de vigilance**. *See also extensive resource websites, including codes and statements of individual companies at the websites of the* **Business and Human Rights Resource Centre** *and the* **Database of Business Ethics**.

and medium-sized enterprises.[32] A **Swedish** expert[33] working for a Swedish CSO refers to the obligation for companies to carry out environmental impact assessments as a good model that should be extended to other areas of business and human rights. Although **Sweden** lacks general due diligence legislation, the government commissioned a study in 2017 on Sweden's compliance with the UNGPs and the remaining gaps and challenges.[34] An expert from **Finland**[35] expresses doubts regarding the need for imposing binding human rights obligations on companies, arguing that human rights concern the relationship between individuals and states. However, the interviewee does see the relevance of applying principles such as "polluter pays" and "do no harm" from environmental law to businesses in their extraterritorial human rights responsibilities.

4.5 CASE LAW DEVELOPMENTS

In several Member States, court proceedings concerning corporate responsibility for due diligence measures or the corporate duty of care have taken place in recent years based on existing legislation or newly enacted due diligence laws.

In **France**, the newly enacted legislation on due diligence has provided civil society with the opportunity to resort to judicial proceedings if a company does not comply with its obligations. Several cases are pending. A coalition of 14 local authorities and five NGOs initiated court proceedings in 2020 against the oil company Total for not taking adequate measures to mitigate the implications of its actions on climate change.[36]

Another case that two **French** NGOs and four **Ugandan** NGOs brought against Total concerns the company's conduct in two oil-related projects in Uganda.[37] The applicants held that Total's vigilance plan did not identify the potential negative human rights impact of its projects and did not put into place measures to mitigate the risks. However, in January 2020, the *Tribunal de Grande Instance* in Nanterre, France, ruled that it was not competent to deal with the case, instead referring it to the jurisdiction of a commercial court. The applicants appealed the judgment in March 2020.[38]

Formal notices, which precede the possibility of court proceedings, were also served against other companies. The **French** NGO Sherpa, in cooperation with a federation of trade unions, served a notice to Teleperformance in July 2019, alleging that the company did not make efforts to prevent possible violations of workers' rights in its foreign facilities.[39] Indigenous human rights defenders and two NGOs also served a notice on the electricity and gas company EDF in October 2019 in response to a wind farm project in Mexico, which revolved around the lack of measures to prevent the violation of the rights of indigenous peoples.[40] Finally, in October 2019, several federations of trade unions representing transport workers formally gave notice to XPO Logistics Europe for failing to fulfil the five measures that the due diligence legislation requires.[41]

In the **Netherlands**, the non-profit Foundation Urgenda brought a case against the government for failing to take adequate measures to meet the goals set under the Paris Agreement to limit greenhouse gas emissions. In December 2019, the Supreme Court confirmed the court order delivered by the Hague District Court, which ordered the Dutch state to reduce Dutch greenhouse gas emissions by 25 % by the end of 2020.[42]

In the **United Kingdom**, several cases are ongoing concerning parent company liability and the duty of care. In the case of *Chandler v. Cape*, the court decided that a parent company has a duty of care towards employees of a subsidiary.[43] Corporate liability for a subsidiary's actions is at the heart

of the case of *Lungowe v. Vedanta*, which concerns nearly 2,000 Zambian villagers who are suing Vedanta for the environmental damage that the subsidiary Konkola Copper Mines have caused.[44] The United Kingdom's Supreme Court ruled in 2019 that the applicants had the right to sue Vendata in UK courts, and the proceedings are now under way to judge the merits. The decision of the United Kingdom's Supreme Court in the *Vedanta* case, namely that parent companies have a duty of care towards those affected by actions of their subsidiaries that breach human rights, has generally met widespread approval from civil society and lawyers for companies.[45] This is a significant step towards helping victims gain access to a remedy and reducing the length of proceedings.

The case of *Okpabi v. Shell* is now also pending before the United Kingdom's Supreme Court, where lawyers for 40,000 Nigerian farmers and fishermen from the Niger Delta have appealed the Court of Appeal's judgment that Royal Dutch Shell does not bear responsibility for the environmental damage that its subsidiary Shell Petroleum Development Company of Nigeria committed.[46]

National action plans

The UNGPs encourage states to enact legislation and policies implementing international human rights law, to provide guidance to the business sector and to ensure coherence across state-based institutions. One basic step to achieve this is through NAPs on business and human rights. The UN Working Group on Business and Human Rights provide guidance for states, including the necessary components of a NAP.[a] The Council of Europe has also encouraged states to develop plans for the implementation of the UNGPs in the form of NAPs.[b] The 2016 Council conclusions supported the UNGPs and emphasised in particular the importance of including access to remedy in NAPs.[c] FRA's 2017 opinion on improving access to remedy at the EU level called on the EU to provide further incentives for Member States to develop NAPs and also suggested a common EU action plan, based on key criteria for a NAP, "including indicators to measure achievement and through participatory dialogue with key stakeholders, including civil society organisations".[d]

Since 2013, 15 of the 27 EU Member States have adopted NAPs on business and human rights, namely Belgium, Czechia, Denmark, Finland, France, Germany, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain and Sweden.[e] Other Member States, such as Greece, Latvia and Portugal, are in the process of adopting one or have committed to doing so.[f]

To support work on NAPs, the Council of Europe has developed an online platform, featuring applicable standards and guidance, as well as details on existing NAPs.[g] The Danish Institute for Human Rights has created an online 'one stop shop' regarding NAPs on business and human rights, which can be explored by country, issue and principles in the UNGPs.[h]

The NAPs make reference to a variety of issues, including, but not limited to, judicial and non-judicial grievance mechanisms, supply chains and small and medium-sized enterprises, as well as the environment and climate change. The increasing engagement of states with business and human rights NAPs is promising, but there is considerable variation in the length and details of the plans, as well as in the concreteness of measures, follow-up and monitoring of implementation.

Furthermore, a balanced coverage of all three pillars of the guiding principles – state focused, business focused and access to remedy – is not always ensured, and there is a lack of concrete measures, with the third pillar, on access to remedy, often remaining quite general.[i]

[a] *United Nations Working Group on Business and Human Rights (2014),* **Guidance on national action plans on business and human rights**, *December 2014.*

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[e] *For an up-to-date overview, see the Danish Institute for Human Rights' webpage on* **national action plans on business and human rights**.

[f] *For more information, see OHCHR's webpage on* **state national action plans on business and human rights**.

[g] *For more information, see the Council of Europe's webpage on the* **online platform for human rights and business**.

[h] *See the Danish Institute for Human Rights' webpage on* **national action plans on business and human rights**.

[i] *FRA (2017), Improving access to remedy in the area of business and human rights at the EU level, Opinion 1/2017, Vienna, 10 April 2017, p. 65.*

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7 European Commission (2019), ***The European Green Deal***, COM(2019) 640 final, Brussels, 11 December 2019, Section 2.2.1.
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Conclusions

This report takes stock of the reality that victims of business-related human rights abuses face when seeking a remedy. It shows that, despite several judicial and non-judicial mechanisms being available in principle, these more than often lack effectiveness when dealing with specific cases involving large corporations. Victims face diverse systemic or procedural obstacles, which can encompass cases ranging from gross violations of the right to life, health or dignity – often attracting media attention – to relatively low-value cases affecting individual consumers. However, in most cases, the lack of equality of arms and the imbalance of power between opponents are striking. This imbalance of power, whether regarding financial and legal resources or political influence, manifests itself at various stages of relevant incidents and proceedings – ranging from intimidating victims and their defenders, through access to evidence and experts, to not respecting final agreements. Existing remedies often do not take account of this imbalance, and procedural rules are not adapted to the nature of the cases and reality of corporate structures, FRA's research shows. In cases in which the remedy proves more accessible, it often lacks effectiveness and the ability to provide a meaningful redress to victims.

The report also refers to the prevention of abuses. On this topic, it summarises the views of the experts interviewed alongside current legislative developments at national and EU levels, and provides some suggestions for the content of future measures establishing horizontal human rights due diligence.

The report also contains promising practices and puts forward recommendations for changes to be made at national and EU levels to improve access to an effective remedy for victims of business-related human rights abuses. The suggestions focus on policy and legislative measures that are practical and achievable in the relatively short term, but, at the same time, would hugely improve the position of victims.

The report will be accompanied, in due course, by separate country overviews summarising the interviews in the Member States and the United Kingdom, as well as selected detailed case studies, which will be available through the FRA website.

The findings of the report are addressed to policymakers at national and EU levels, but should also be useful for legal practitioners and civil society actors working in the field of business and human rights and access to remedy.

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FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

Business activity affects not just customers, employees, and contractors along supply chains, but often entire communities and the environment. This makes it vital that every business complies with human rights.

This comparative report looks at the realities victims face when they seek redress for business-related human rights abuses. It presents the findings of fieldwork research on the views of professionals regarding the different ways people can pursue complaints. The findings highlight that obstacles to achieving justice are often multi-layered.

We hope that both the challenges and promising practices presented encourage policymakers to embrace measures that promote responsible, rights-compliant business conduct, both within the EU and beyond.

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