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[B&HR]

Vienna, 10 April 2017

Improving access to remedy in the area of business and human rights at the EU level

Opinion of the European Union Agency for Fundamental Rights

Contents

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),
Bearing in mind the Treaty on European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

Recalling the 2011 United Nations Guiding Principles on Business and Human Rights and the 2016 Council of Europe (Committee of Ministers) Recommendation on human rights and business as well as the 2016 guidance by the United Nations High Commissioner for Human Rights, entitled *Improving accountability and access to remedy for victims of business-related human rights abuse*.

Recalling the general comments and other interpretative documents related to business and human rights by the United Nations' treaty bodies.

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (FRA), in particular Article 2 with the objective of FRA "to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights",

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of FRA to "formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission",

Having regard to previous FRA opinions on related issues, in particular dealing with various aspects of access to justice,[1]

Having regard to the request of the Council of the European Union in its Conclusions on Business and Human Rights of 20 June 2016 to FRA for an expert opinion on "possible avenues to lower barriers for access to remedy [in the context of business-related human rights abuse] at the EU level, taking into account existing EU legal instruments and competences at EU and Member States' levels",

Having regard to consultations conducted in preparation of this opinion with a range of experts, including from the EU funded research projects Human Rights in Business and FRAME (Fostering Human Rights Among European Policies) and practising lawyers as well as, for instance, representatives of the United Nations, the Council of Europe, and the European Network of National Human Rights Institutions,

SUBMITS THE FOLLOWING OPINION:

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[1] See, for example, FRA (2013), Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia - with special attention to the rights of victims of crime, Vienna, 15 October 2017.

Opinions

There is increasing recognition of the impact that businesses have on the enjoyment of human rights. By way of their activities, be it directly through activities or omissions by companies or indirectly through their supply chains, businesses can affect human rights negatively. Rights affected include the entire spectrum of internationally recognised human rights – civil and political rights, as well as economic, social and cultural rights – for example, workers' rights, the right to privacy, equality and non-discrimination, freedom of expression and the right to health. This has led to efforts to increase responsible business conduct, which respects human rights and seeks to prevent or, at least, remedy negative impact.

To elaborate further the responsibility of business to respect human rights, a number of instruments have been developed. This is despite the fact that human rights obligations rest primarily with states. At the international level, the United Nations (UN) human rights monitoring mechanisms have issued interpretative statements and guidance, the Office of the UN High Commissioner for Human Rights (OHCHR) has provided additional guidance and the Council of Europe has issued recommendations. Moreover, the International Labour Organization (ILO), the Organisation for Economic Co-operation and Development (OECD) and the International Organization for Standardization (ISO) have also contributed significantly in establishing instruments and mechanisms related to business and human rights. At the national level, the interlink between businesses and human rights have also received greater attention, with action plans, guidance and legislation aimed at mitigating any negative impact of business on human rights – or even stimulating positive impact.

The European Union (EU) is also increasingly active in the area of business and human rights, by adopting strategies, policies, guidance and legislation. At the outset, the EU Member States have obligations relating to access to justice under international treaties, which have implications also in the context of business and human rights. The EU itself is bound by the provision on access to justice under the UN Convention on the Rights of Persons with Disabilities (CRPD). The EU and its Member States have also committed to a number of other instruments, in particular the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles) and the 2016 Council of Europe Recommendation on human rights and business. Furthermore, the Charter of Fundamental Rights of the EU (the Charter) 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 Charter also includes other relevant provisions such as those on non-discrimination (Article 21), the rights of the child (Article 24), environmental protection (Article 37), consumer protection (Article 38), as well as solidarity rights more generally (Title IV). The European Convention on Human Rights and its provision on the right to an effective remedy (Article 13) is also essential.

In an EU context, two instruments are particularly relevant. The 2011 UN Guiding Principles is the first global framework that exclusively addresses business-related human rights abuses. Although not legally binding, the UN Guiding Principles enjoy wide recognition and serve as a basis for policy approaches towards business and human rights. These principles also form the basis of the 2016 Council of Europe Recommendation on human rights and business, which includes a particular focus on access to remedy. These UN and Council of Europe instruments – as well as the interpretative statements of UN monitoring mechanisms – underscore the importance of access to remedy in cases of business-related human rights abuse. The various monitoring mechanisms, in particular the UN treaty bodies, provide the

normative framework for business and human rights, while the UN Guiding Principles and other guidance documents provide the substantive content to shape this framework.

Besides the UN Guiding Principles, OHCHR issued in 2016 a comprehensive guidance dealing in particular with access to remedy (the OHCHR Accountability and Remedy Project, the 2016 UN Guidance). This guidance, which the UN Human Rights Council welcomed, concretely advises on which tools work well to implement the UN Guiding Principles. Furthermore, in February 2017 the Council of the EU adopted conclusions on the Union's priorities in UN fora for the year 2017, which included a commitment to the UN Guiding Principles and the UN guidance.

This FRA Opinion is placed in this context – the UN and Council of Europe instruments, rooted in the EU Charter of Fundamental Rights.

The Council of the EU requested this FRA Opinion in its Conclusions on business and human rights. The expert opinion sought from FRA was to look at "possible avenues to lower barriers for access to remedy at the EU level" – the third of three pillars of the UN Guiding Principles. The opinion therefore does not look in any detail at the two other pillars, namely the state's duty to protect human rights and the corporate responsibility to respect human rights. The Council Conclusions emphasise the need for further action by the EU on access to remedy in particular. According to the UN and Council of Europe instruments, there is a need for both judicial mechanisms and non-judicial mechanisms to ensure effective access to remedies for victims of business-related human rights abuses. The non-judicial ones should comprise both state-based and non-state-based, including company-level or operational-level (based at or linked to a business) complaints mechanisms.

This FRA Opinion covers the areas of judicial and non-judicial remedies, as well as issues related to their effective implementation. Based on the analysis of these three areas, the following 21 specific opinions are clustered under six headings:

1. Lowering barriers to make judicial remedies more accessible
2. Enhancing the effectiveness of judicial remedies – especially in extraterritorial situations
3. Ensuring effective remedies through criminal justice
4. Ensuring effective non-judicial remedies – state based and non-state based
5. Implementing access to remedy – transparency and data collection
6. Implementing access to remedy – action plans, coordination and due diligence

Lowering barriers to access remedy would help victims of business-related human rights abuse to have their rights realised. Victims should, for instance, more easily be able to get assistance with how and where to bring a case, and should have a more level playing field with business to provide evidence. FRA's findings from research in related areas suggest that more could be done to ensure effective access to remedy for business-related human rights abuse within the EU.

Lowering barriers to make judicial remedies more accessible

A victim of business-related human rights abuse has in theory a range of options as to where to turn for remedy: a court, an ombudsman, or even a company-level complaints mechanism. In severe cases however, the most appropriate mechanism is likely to be a judicial body. However, determining which court is competent to decide in a particular case is one problem at the outset. A victim may also refrain lodging a formal complaint at a court, being afraid of the stigma that a process may provoke. Fear of reprisals for bringing a case to court may be another discouraging factor. Legal advice, as well as court proceedings, may

also come at significant costs and with discouraging legal obstacles, such as rules restricting who may bring a case or how parties can access and use evidence. If a court ruling favourable to the victim is achieved, damages awarded may be too low to compensate for the legal costs and suffering caused.

International human rights law stipulates the right to a fair trial and the right to an effective remedy (such as Article 8 of the Universal Declaration of Human Rights, Article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR), Articles 6 and 13 of the European Convention on Human Rights (ECHR)). Subsequent interpretations, not the least by the UN monitoring mechanisms, have stressed the importance of making remedies accessible to persons in situations of vulnerability (Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) and the General Comments by the monitoring mechanism for the International Covenant on Economic, Social and Cultural Rights (ICESCR)). EU law provides (Article 47 of the Charter) for access to justice, including legal aid to ensure that access is effective, when Member States act within the scope of EU law.

Ensuring minimum standards for needs-based legal aid

Article 47 of the Charter 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". There is notably no limitation as to residence or citizenship in this provision. Within the scope of EU law application, this Charter provision is the benchmark against which Member States' laws and practice should be measured also when it comes to human rights abuses through business activities or omissions. The 2016 Council of Europe Recommendation underlines the availability of a needs-based legal aid. The 2016 UN guidance emphasises the importance of advice on options of litigation funding, such as litigation funds that may be receiving seed money from governments but would raise money also through other means. To set criteria for accessing such funds can ensure that any supported litigation is reasonable and does not encourage malicious or unreasonable litigation.

FRA Opinion 1

The EU should incentivise Member States to raise minimum standards on needs-based legal aid to plaintiffs before courts in the EU in cases of business-related human rights abuse. This should include victims who are not residing in the EU.

The EU could also more forcefully encourage the availability of litigation funds, such as public and/or private funds, as well as crowd-funding, to ensure effective access to remedy. In this regard, the EU should ensure an online overview of available litigation funding and resourcing for potential claimants within and outside of the EU.

Providing for broad legal standing and effect – collective redress and representative organisations

Procedural rules need to allow for collective redress, as well as representative action in business and human rights-related cases. In this way, victims can join forces to overcome obstacles, or organisations may act on behalf of victims. The 2016 Council of Europe Recommendation explicitly emphasises representative action, by calling for "measures that allow entities such as foundations, associations, trade unions and other organisations to bring claims on behalf of alleged victims" (Appendix, Paragraphs 39 and 42). In its Policy objective 15.3, the 2016 UN guidance refines the call for a broad legal standing by noting that effective collective remedies should be based on "criteria [...] clearly expressed and

consistently applied". A uniform approach of criteria applied across the EU Member States would facilitate access to remedy in cases of business-related human rights abuse.

FRA Opinion 2

The EU should provide stronger incentives to Member States to provide for effective collective redress in cases of business-related human rights abuse. Legal standing should include representative action by not-for-profit bodies, organisations or associations, which act in the public interest and whose statutory objectives are to protect and assist victims of business-related human rights abuse. Such organisations should include national, non-national and international, as well as National Human Rights Institutions.

Facilitating the burden of proof

The burden of proof and access to evidence are important aspects influencing access to remedy. In Paragraph 43 of its Appendix, the 2016 Council of Europe Recommendation calls for revisions 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". An assessment of how and when victims can access which evidence from business in the EU Member States would help to identify existing drivers and barriers. The 2016 UN guidance provides a framework for such an assessment (Policy objective 12.5). Reducing evidentiary obstacles could be achieved by lowering the required level of proof. For instance, EU-wide criteria 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. Such a rebuttable presumption would help to ensure victims' effective access to remedy.

FRA Opinion 3

The EU should assess how, what and when evidence can be accessed from business in cases of business-related human rights abuse in the EU Member States. The EU should also facilitate the development of clear minimum standards on how, what and when business should share information with plaintiffs.

The EU could also encourage the Member States to ensure a rebuttable presumption requiring a certain level of evidence. In this case, the burden of proof would be shifted from a victim to a company to prove that a company did not have control over a business entity involved in the human rights abuse.

Bringing clarity on jurisdiction in case of denial of justice

The question of jurisdiction is particularly relevant concerning access to remedy in cases of business-related human rights abuse, in times of increasing globalisation, cross-border activities of businesses and the European single market. Obstacles to remedies may sometimes lead to situations where no effective access is possible within a given jurisdiction. In such cases, legal systems commonly allow for some form of exception to jurisdictional rules to avoid a denial of justice and ensure the required access to justice. This means that cases can be taken up provided that a reasonable link exists between the situation concerned and the forum (the court in question) even if the jurisdictional rules would prescribe another court (typically in another country in this context). The Latin term *forum necessitatis* – jurisdiction by necessity – is the common label to refer to these exceptions.

The 2016 Council of Europe Recommendation also underlines this need; it notes that "domestic courts [must be allowed] to exercise jurisdiction over civil claims [even if the defendant is not domiciled in the jurisdiction] if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the member State concerned" (Paragraph 36). Some EU Member States have an explicit *forum necessitatis*-rule while others have equivalent systems. Ensuring that all EU Member States have operational systems in place to prevent denial of justice, and to clarify what they are and when they apply would be important for victims seeking remedy in cases of business-related human rights abuse in the EU.

FRA Opinion 4

The EU should encourage clarity on how and when* forum necessitatis *(jurisdiction by necessity) applies or equivalent systems are in place in the EU Member States to avoid denial of justice. The EU could also incentivise Member States to ensure a more harmonised application of these rules across the EU.

Accommodating persons in situations of vulnerability

International human rights law instruments and their subsequent interpretation provide guidance on business and human rights for persons in situations of vulnerability, such as women, persons with disabilities, indigenous people and children. In particular, the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the EU is a party, provides in Article 13 that parties to the convention "shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations". The 2016 Council of Europe Recommendation also includes specific sections on addressing additional protection for workers, children and indigenous people.

The UN Treaty Body for the Convention on the Rights of the Child (CRC) – the Committee on the Rights of the Child – has stressed in its 2013 General Comment that, to ensure effective access to a remedy in a business context, states must remove "social, economic and judicial barriers [...] without discrimination of any kind". States must also ensure that information about remedies are provided through appropriate channels to children. The General Comment also stresses children's legal standing, their right to participate fully in the justice process and their right to information, as well as access to legal aid, and that collective complaints should be available (General Comment No. 16, 17 April 2013, Paragraphs 68–69). This comment is based on Article 12 (2) of the UN Convention on the Rights of the Child, to which all EU Member States are parties, requiring children "to be heard in any judicial and administrative proceedings affecting [them], either directly or through a representative or an appropriate body". Article 24 (1) of the Charter of Fundamental Rights also provides for children's right to be heard. Furthermore, the EU treaties include strong obligations on non-discrimination.

FRA Opinion 5

Considering EU Member States' international obligations on non-discrimination and the EU's own similar obligations, particular attention should be given to ensuring effective access to remedy in cases of business-related human rights abuse for persons in situations of heightened vulnerability and marginalisation, such as children, migrants, minority ethnic groups such as Roma and Travellers, indigenous people and persons with disabilities. Particular efforts must be made to assess and ensure remedies in the EU Member States in such contexts. See also Opinion 16 in this regard.

Enhancing the effectiveness of judicial remedies – especially in extraterritorial situations

Accessing remedy in cases of business-related human rights abuse brings particular challenges in a cross-border context and even more so when the abuse takes place outside the EU Member States' national territories. 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 ('Brussels regime') to clarify which court has jurisdiction to deal with a certain case. Similarly, the EU has harmonised the conflict of law rules ('Rome regime') to determine which country's laws should apply relating to contractual and non-contractual obligations, as well as divorce and legal separation cases.

The UN Human Rights Committee – the monitoring mechanism in place for the International Covenant on Civil and Political Rights – has stressed in relation to an EU Member State the need to "strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad." The mechanism for the International Covenant on Economic, Social and Cultural Rights is expected to adopt a General Comment on state obligations in the context of business activities in 2017.

The 2016 Council of Europe Recommendation requires "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). The 2016 UN guidance calls for a legal regime "sufficiently robust to ensure that there is both proper deterrence from and effective remedy in the event of business-related human rights abuses [... with] corporate contributions" (Policy objectives 12 and 13).

Improving access to remedy in extra-territorial cases

The default Brussels regime rule is that courts have jurisdiction in the country where the defendant is domiciled (habitual residence). This also applies to human rights abuse cases within or outside the EU. It means that victims of business-related human rights abuse can bring claims for compensation against EU companies before the courts where the company has its 'statutory seat', 'central administration' or 'principle place of business'. However, the Brussels regime does not provide for jurisdiction in the EU for companies or subsidiaries domiciled outside the EU. This could, nevertheless, be possible based on national law (as opposed to EU law, so-called subsidiary (or residual) jurisdiction), such as providing for jurisdiction based on assets of the defendant being located in an EU Member State.

In its illustrative examples, the 2016 UN guidance calls for regular "reviews whether [...] domestic private law regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and [...] obligations under international human rights treaties, and takes the necessary legislative and/or policy steps to correct any deficiencies in coverage or approach" (Paragraph 12.9). The European Commission High Level Group of national representatives on Corporate Social Responsibility could be given a clear mandate in this regard.

FRA Opinion 6

The EU should mandate a platform for EU Member States to have a dedicated exchange on how best to address extra-territoriality in legislation and through other measures, including subsidiary jurisdiction, to improve access to remedy for victims of business-related human rights abuse across the EU.

Leading on multilateral developments to facilitate access to remedy

Since the scope of jurisdiction has effects elsewhere, such as an enlarged jurisdiction in the EU leading to a diminished one elsewhere, coordination of rules beyond the EU is needed. The Hague Conference on Private International Law has completed essential work in this regard in concluding the Convention of 30 June 2005 on Choice of Court Agreement, which seeks global solutions to jurisdictional issues. The options of victims of business-related human rights abuse need to be at the forefront of developments, with the EU and its Member States taking a stronger stance in this regard.

FRA Opinion 7

To ensure a global and equitable solution for an effective access to remedy, particularly in cases of business-related human rights abuse, the EU and its Member States should lead on multilateral developments facilitating access to remedy through the Hague Conference on Private International Law. This could include a more victims-centred approach, providing for easier access to remedy for victims of business-related human rights abuse.

Guiding application of 'Rome regime' to ensure appropriate level of damage awarded

The default rule in the conflict of law system of EU's 'Rome regime', the Rome II Regulation, is that the law is used where the damage occurs (the human rights abuse in question), unless there is a much closer link to another state. Exceptions are possible based on the public police doctrine, the so-called *ordre public*, including foreign law manifestly contradicting human rights.

FRA Opinion 8

The EU should provide guidance on when and how to make full use of the flexibility available under the* ordre public*-clause of the Rome regime, in particular in extraterritorial settings. This should be done to ensure that, when damage levels in 'host' countries are too low, an EU-wide level of damage, high enough to deter business from further abuse, could be applied.

Learning from designation of applicable law in environmental cases

The Rome regime provides for exceptions on the rules designating the applicable law in cases of environmental damages, allowing for the law of the country where the cause of the damage originated, rather than where the damage occurred. There are many similarities between environmental damage and human rights abuse, including public interest in such matters.

FRA Opinion 9

The EU could analyse consequences of a revision of the Rome regime (the Rome II Regulation), which would allow for exceptions on choice of law, such as already in place for environmental damages, in cases of business-related human rights abuse.

Ensuring effective remedies through criminal justice

Access to remedy can also be achieved through criminal justice. In such a process, possible compensation to victims may be determined in an embedded or parallel civil process rather than a separate civil procedure. This saves time and costs, and makes it easier for the victim by easing the burden of having to collect and provide evidence.

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography includes a requirement (Article 3) to have a sufficiently strong deterrent, such as criminal liability, in cases of engaging children in forced labour. The 2016 UN guidance calls for business and human rights-relevant public law regimes to be "sufficiently detailed and robust to ensure that there is both effective deterrence from and effective remedy in the event of business-related human rights abuses" (Policy objective 1).

Ensuring proper implementation of existing EU criminal law instruments

EU legal instruments with implications for business and human rights, such as the Anti-Trafficking Directive (2011/36/EU)or the Employer Sanctions Directive (2009/52/EC), contribute to ensuring that severe crimes with a strong cross-border element are criminally sanctioned across the EU. The full potential of these instruments concerning investigation and prosecution, for instance, remains insufficiently explored. Research shows that the implementation of such instruments is often inadequate. Data on the application across the EU Member States would increase transparency, improve corporate liability, and thus boost the credibility of EU business – apart from the ultimate purpose of improving access to remedy for victims.

FRA Opinion 10

The EU should make greater efforts to ensure proper implementation in the Member States of the existing EU criminal law instruments that are relevant to business and human rights. This includes collection of data on complaints lodged and compensation paid, which should be made available at EU level to all EU Member States. See also Opinion 16 in this regard.

Encouraging improved investigations of corporate crimes

Research shows that resources and attention given to the investigation of corporate crimes affecting the full respect of human rights are insufficient in many EU Member States. The EU has a unique role in facilitating exchanges and solutions in cross-border investigations. It could enhance its efforts in this area in providing greater support to improve the investigation of corporate crimes in the field of human rights abuses.

FRA Opinion 11

The EU could encourage and facilitate improved investigations of corporate crimes. This could be achieved by providing specialised training to law enforcement and by improving their capacity and resources, particularly in cross-border cases, by involving existing networks and entities.

Facilitating victims' civil claims in criminal procedures

FRA's opinion in its 2015 report on *Severe labour exploitation: workers moving within or into the European Union – States' obligations and victims' rights* underscored the need for victims, such as of severe labour exploitation, to be able to have related civil law claims decided upon as part of the criminal proceedings, rather than being forced to launch a separate suit.

FRA Opinion 12

The EU could provide guidance to and incentives for Member States to facilitate victims' claims for damages in the related criminal process. This could include recommendations on minimum standards, compliance checks against these standards and transparency on the compliance.

Ensuring effective non-judicial remedies – state based and non-state based

Access to remedy in cases of business-related human rights abuse must include non-judicial mechanisms, both state-based and non-state-based. Non-judicial grievance mechanisms can provide a more accessible supplement to judicial remedies, typically at lower cost and less lengthy. Given the non-judicial nature of such grievance mechanisms, minimum standards are essential to ensure independence and effectiveness. The UN Guiding Principles, as well as the 2016 Council of Europe Recommendation, call for states to ensure that non-judicial grievance mechanisms meet certain effectiveness criteria. They also call on states to review the adequacy of existing measures.

Strengthening the role of non-judicial mechanisms

Access to low-threshold supplements to judicial remedies, such as non-judicial remedies, are needed for less severe cases in particular. For such mechanisms to be effective, minimum standards must ensure that they are "legitimate, accessible, predictable, equitable, transparent, rights-compatible, serve as a source of continuous learning, and based on engagement and dialogue," as stipulated in Principle 31 of the UN Guiding Principles and restated in Paragraph 50 of the Annex to the 2016 Council of Europe Recommendation.

Standards allowing for collective redress and representative actions, just as with judicial remedies, would be important. Inspiration can be drawn from existing EU law requirements, such as from the data protection authorities where representative claims are allowed – even if this is an area where the EU has a strong mandate. National Human Rights Institutions (NHRIs), accredited as effective and independent under the so-called Paris Principles, can play an important role as non-judicial bodies having the power to offer remedies if they are competent to accept cases. If they do not have that competence, they could be useful in an advisory capacity.

FRA Opinion 13

The EU should take action to strengthen the role of non-judicial mechanisms in the business and human rights field. This could include minimum standards to improve the efficiency of such remedies. Such minimum standards should also, as with judicial remedies, include collective redress and representative action where mechanisms are competent to accept cases. The possible role of National Human Rights Institutions, accredited as compliant with the so-called Paris Principles, should be considered when ensuring an effective system of non-judicial mechanisms.

Ensuring effective National Contact Points in all EU Member States

National Contact Points, as required by the OECD Guidelines for Multinational Enterprises, have the task to raise awareness among rights holders on available non-judicial grievance mechanisms. They can also serve as a non-judicial body having the power to offer remedy. The 2016 Council of Europe Recommendations underscores their role regarding non-judicial grievance mechanisms. In Paragraph 53 of its Annex, the recommendation requires ensuring the effectiveness of the National Contact Points: "in particular by making available human and financial resources so that they can carry out their responsibilities; ensuring that the National Contact Points are visible, accessible, transparent, accountable and impartial; promoting dialogue-based approaches; considering whether to make public the recommendations of National Contact Points; and ensuring that such recommendations are taken into account by governmental authorities in their decisions on public procurement, export credits or investment guarantees."

Coherence across the EU is another important aspect – both in terms of structure and powers, and modus operandi. This is because several National Contact Points may deal with the same complaint when it involves cross-border situations. A more harmonised approach across the EU would also facilitate awareness among potential victims, regardless in which EU Member State they approach a National Contact Point. Twenty-four EU Member States adhere to the OECD Guidelines and have a National Contact Point.

FRA Opinion 14

The EU could incentivise the EU Member States that do not yet have a National Contact Point to adhere to the OECD Guidelines for Multinational Enterprises and appoint such a contact points. These National Contact Points should advise rights-holders and victims on remedies; they should also serve as non-judicial bodies for business and human rights-related cases themselves.

The EU could encourage the development of stronger minimum standards for the effectiveness of the National Contact Points, including being properly equipped and funded, to be able to, for instance, conduct follow-up meetings and investigations, including translation and travel costs.

Incentivising effective operational-level grievance-mechanism

Non-judicial remedies must also be available at company level, so called operational-level grievance mechanisms. The UN Guiding Principles note that "[s]tates should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms" (Principle 28). The 2016 Council of Europe Recommendation calls on states to encourage businesses "to establish their own grievance mechanisms in line with the effectiveness criteria in Principle 31 of the UN Guiding Principles.

Where such mechanisms are put in place, it should be ensured that they are not used to impede the alleged victim's access to the regular court system or State-based non-judicial mechanisms" (Annex, Paragraph 54). Independence, credibility and effectiveness of such operational-level grievance mechanisms can be enhanced by businesses joining forces with other actors, including state-based non-judicial bodies with a remedial role, to establish multi-stakeholder remedies available at company level.

FRA Opinion 15

The EU could provide stronger incentives for the creation of remedy mechanisms at company level (operational-level grievance mechanisms), including so-called multi-stakeholder initiatives with several businesses joining forces with other actors. For incentives to do so, see also Opinions 16 and 21, dealing with transparency, peer-review and legislation.

Implementing access to remedy – transparency and data collection

In cases of business-related human rights abuse, access to justice provided through judicial or non-judicial means, are required elements under the UN and Council of Europe instruments. Additional measures are, however, needed to render these instruments more operational.

The EU's internal market would be strengthened by establishing a more accessible and uniform system of remedies – providing a level-playing field for businesses and more accessible avenues for victims to access justice. In addition to legislation and various forms of recommendations, transparency and a solid evidence-base on actual operations can incentivise EU Member States to develop a more uniform system.

Providing transparent and comparative overview of remedies

Explicit information on available remedies and their operations in business-related human rights abuse must be available – providing information to victims and other stakeholders but also enabling assessment and 'peer review', as well as boosting the overall credibility of the remedies. Such an overview should include data and information on the National Contact Points (see also Opinion 14) with specific information on the EU Member States.

The 2016 Council of Europe Recommendation calls on states to ensure that victims "have general access to information about the content of the respective human rights and about existing judicial and non-judicial remedies in a language which they can understand" (Annex, Paragraph 57). The European Commissions' Single Digital Gateway and the European e-Justice Portal would be logical places for such information.

How the remedies actually function in terms of cases dealt with and their outcomes also needs to be transparent. An EU approach could take the 2016 Council of Europe Recommendation and the 2016 UN guidance as a basis for a comparative overview. Such an overview could establish a baseline, create momentum for change and greater uniformity, as well as a basis for exchange of promising practices.

FRA Opinion 16

The EU should make available information on existing judicial and non-judicial mechanisms for the benefit of the general public, legal practitioners and victims.

As a second step, the EU should also collect and make available data and information on the functioning of existing remedies in cases of business-related human rights abuse, such as the number of cases brought and their outcome (admissibility, 'success rate' for victims, implemented decisions). EU Member States could provide this type of data and information in a comparative format and disaggregated by factors such as business sector and type of complaint – for judicial as well as non-judicial mechanisms.

As a third step, the EU should consider providing comparative overviews and assessments of key aspects of the 2016 Council of Europe Recommendation and the 2016 UN guidance, including corporate legal liability in the EU Member States. This would ensure a systematic assessment of the most important aspects related to access to remedy.

Collecting and displaying data and information on companies with EU obligations

Greater transparency would lead to greater accountability for companies with obligations under EU law, in particular the Non-financial Reporting Directive (2014/95/EU) and the Shareholders' Rights Directive (2007/36/EC). The Non-financial Reporting Directive requires EU companies with more than 500 employees to "include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters" (Article 19a). The European Commission's obligation under this instrument (Article 2) to provide guidance is an opportunity to provide details on access to remedy. The efficiency of non-financial (including diversity) disclosure obligations would be enhanced by making publically available a list of companies that would have to comply with the disclosure obligations and with which of these they have complied.

FRA Opinion 17

The EU should publish a list of companies which, under EU instruments such as the Non-financial Reporting Directive and Shareholders' Rights Directive, are obliged to provide data and information on the impact of their activities on human rights. This list should also indicate which of these companies comply with these obligations and include the data and information they have provided in a comparative overview.

In this regard, the EU could also provide more specific guidance on what data should be reported on for access to remedy to be effective, such as the existence of operational-level grievance mechanisms, as well as assessments on their actual functioning.

Implementing access to remedy – action plans, coordination and due diligence

A number of steps can be taken through EU-coordinated efforts, peer-review and transparency to ensure that judicial and non-judicial remedies of most relevance in cases of business-related human rights abuse are systematically improved across the EU.

Ensuring effective National Action Plans

The 2016 Council of Europe Recommendation (Annex, Paragraph 10) underlines the need to adopt National Action Plans, and the EU has also strongly encouraged Member States to adopt such plans. While these plans should cover the full range of business and human rights

issues, access to remedy is an important aspect. The relatively few EU Member States (about a fourth) that have so far adopted such plans have been rather general in these plans including few details on access to remedy. For instance, more details on the operation of existing remedies in cases of business-related human rights abuse could be included (see Opinion 17). Indicators to measure performance of the remedies, in line with the effectiveness criteria as outlined by the UN Guiding Principles (Principle 31), could also constitute a useful part of these National Action Plans. Details should also be provided on actions following from the European Commission's 2013 Recommendation on collective redress in relation to business and human rights.

A revitalised transparent peer-review process would incentivise progress, as would an information system on National Action Plans, as called for in the 2016 Council of Europe Recommendation (Paragraph 4). Given that the EU's role and competence on business and human rights is dispersed across a number of policy areas, a dedicated EU-level Action Plan, based on the same criteria as the national ones, could bundle envisaged activities over a certain timespan and render the EU's contribution more visible.

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The EU should provide further incentives to all Member States to adopt, implement and review National Action Plans which implement the UN Guiding Principles, including access to remedy. The inclusion of more specific measures could strengthen these national action plans to facilitate access to remedy, in addition to outlining existing judicial and non-judicial mechanisms, including non-judicial bodies with a remedial role such as National Contact Points. The EU should ensure a regular peer review of EU Member States' National Action Plans and the progress made as to actions, not the least when it comes to access to remedy.

The National Action Plans should include indicators to measure achievement. These plans should be developed, revised and monitored in a process involving civil society, the private sector and other stakeholders. For access to remedy, the 2016 UN guidance and the 2016 Council of Europe Recommendation should be used as a framework in addition to the OECD Guidelines for Multinational Enterprises. The National Action Plans should also include details on how the 2013 European Commission Recommendation on collective redress is applied in the business and human rights field.

The EU could support the Council of Europe's commitment in its 2016 Recommendation to establish an information system on National Action Plans, including promising practices on their development and review.

The EU should consider adopting an action plan, based on the same criteria as outlined in relation to National Action Plans, including indicators to measure achievement and through participatory dialogue with key stakeholders, including civil society organisations.

Supporting Open Method of Coordination on access to remedy

The Open Method of Coordination (OMC), a form of intergovernmental policymaking, encourages joint identification of objectives, exchange of practices and peer evaluation. In an OMC process, the European Commission plays an organising and monitoring role, for example, in benchmarking and comparing countries' performance and exchanging best practices. The development of an OMC in the business and human rights field allows for developing among EU Member States a common understanding of the problems and challenges in implementing the UN Guiding Principles, as well as to build consensus on their practical implementation. There is a need for periodic and transparent peer reviews that

identify the need for updating or fine-tuning of measures and sharing of promising practices in designing and implementing National Action Plans.

The 2016 Council of Europe Recommendation calls for review of "legislation and practice to ensure that they comply with the [relevant] recommendations, principles and further guidance [...], and evaluate the effectiveness of the measures taken at regular intervals" (Paragraph 1).

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The EU should support and facilitate the establishment of an Open Method of Coordination in the area of business and human rights. This could enable a periodic review and update of the National Action Plans as well as continuous development of these, including clarifying in detail the shared and separate competence between the EU and its Member States concerning business and human rights.

Setting up EU networks to provide advice and guidance as well as exchange promising practices

In addition to providing information on available remedies and coordination processes, there is a need for increased awareness and training. The 2016 Council of Europe Recommendation calls on states to provide "sufficient resources and consider developing special guidance and training for judges, prosecutors, inspectors, arbitrators and mediators to deal with business-related human rights abuses, in particular those which have a transnational component" (Annex, Paragraph 56).

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The EU should ensure the existence of a network of contact persons consisting of experts from each of the Member States. This network should provide advice to victims of business-related human rights abuse on available remedies, exchange promising practices, and provide guidance and training to professional groups who contribute to various remedies.

Incentivising due diligence obligations for companies

Implementing access to remedy in business-related human rights abuse cases would also benefit from stronger legislative incentives. A recently adopted law in France could serve as a model for the EU, in addition to existing instruments such as the Non-Financial Reporting Directive. The French legislation (*devoir de vigilance* – 'duty of care') obliges certain companies domiciled in France to conduct and document due diligence for their operations, including through their supply chains. Fines may be imposed for non-compliance. The French Constitutional Council has blocked elements of this legislation, which will require further specifications of these particular provisions before the legislation can come into effect. Due diligence is a key component of the UN Guiding Principles' second pillar on the corporate responsibility to respect human rights. Effective due diligence practices can also help to strengthen access to remedy

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The EU could incentivise Member States to impose due diligence obligations, including for parent companies linked to human rights performance in subsidiaries or supply chains.

Introduction

On 20 June 2016, the Council of the European Union in its 'Conclusions on business and human rights' requested FRA "to issue an expert opinion on possible avenues to lower barriers for access to remedy at the EU level, taking into account existing EU legal instruments and competences at EU and Member States' levels".[2] With the overall theme of the conclusions being business and human rights, the request is under the heading of access to remedy.

The request for an opinion from FRA, the EU's independent fundamental rights body, is for advice on which EU action could be undertaken for the right to a remedy to be improved in cases of business-related human rights abuse. This FRA Opinion draws on EU fundamental rights and international human rights standards, as well as research findings.

The opinion aims to feed into the work of the European Commission in particular, as the Commission develops the *EU Action Plan on Responsible Business Conduct*, as it was labelled in the June 2016 Council Conclusions . It also seeks to contribute to the work of the EU Member States, as they formulate, refine or implement their National Action Plans to implement the UN Guiding Principles. This opinion thus aims to support the EU's work related to business and human rights, by offering advice on how access to justice could be improved in cases of fundamental rights abuse by businesses in – or with significant links to – the EU.

To support the preparation, FRA consulted a range of experts and stakeholders, including from the EU-funded research FRAME (Fostering Human Rights Among European Policies) and Human Rights in Business.[3] FRA carried out additional consultations with practising lawyers with relevant litigation experience as well as, for instance, the United Nations (UN), the Council of Europe and the European Network of National Human Rights Institutions. This was done to ensure that the opinion would be as operational and relevant as possible, by taking into account as much existing research, experience and advice as possible within the given timeframe.

Scope of this opinion

Persons falling victim to abuse by business could have a range of fundamental rights affected. Businesses of all types, large and small, domestic and international, public and private, and across all sectors can affect the respect of human rights. The range of potential rights abuses is wide, including, but not limited to: the right to security of the person, economic and social rights, civil and political rights, the right to non-discrimination, the right to privacy, labour rights, and rights of communities or groups including indigenous peoples, as well as consumer rights and rights related to environmental protection. To claim any of these rights – all of which are part of the EU Charter of Fundamental Rights and international instruments – access to justice is essential.

Access to justice or in particular access to remedy, enables other rights to be realised. The EU Charter of Fundamental Rights provides in Article 47 for a "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 relevance

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[2] Council of the European Union (2016), *Council Conclusions on Business and Human Rights*, Doc. 10254/16, 20 June 2016, para. 14.

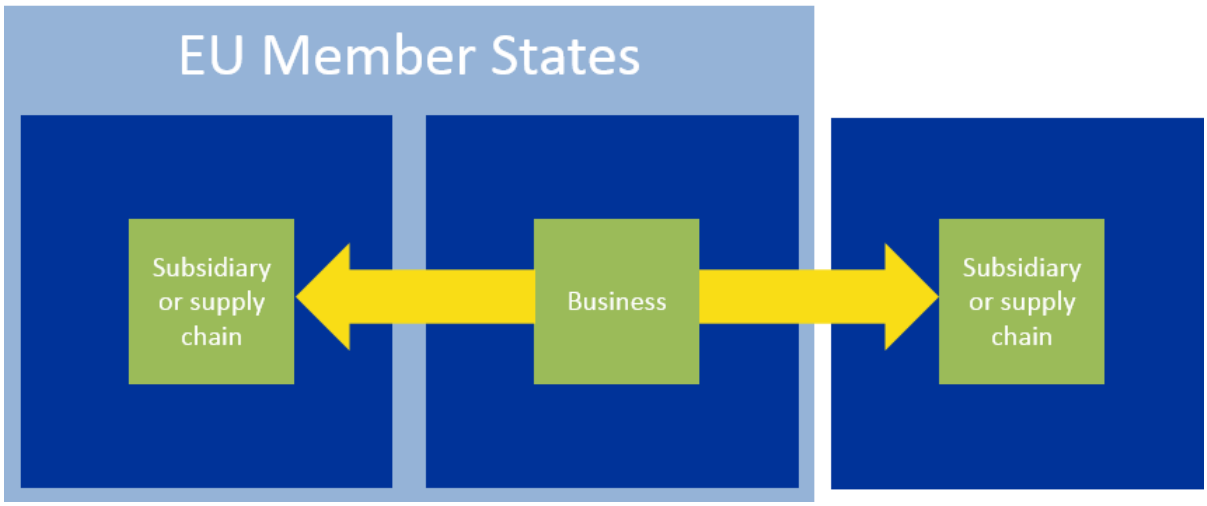
[3] For details, see FRAME website and FRAME (2016), 'International Conference on Business and Human Rights', 20 October 2016 and 'The Implementation of the UN Guiding Principles on Business and Human Rights' and Human Rights in Business' website.

of Article 47 in the context of business and human rights is explored, as are other rights, albeit briefly, including non-discrimination (Article 21), the rights of the child (Article 24), environmental protection (Article 37), consumer protection (Article 38), as well as solidarity rights more generally (Title IV).

This FRA Opinion deals with judicial and non-judicial remedies, in mainly civil and criminal law contexts. It provides advice on EU action aimed at improving access to remedy in the EU.

Business action or omission with adverse impact on fundamental rights may occur in a range of situations. It may relate to a state-owned or private company and its employees. It may be business impact on the surrounding community – through actions or omissions. It may be about the business directly being involved or it may be indirectly through being 'complicit', for example through the actions of a company's subsidiary (whether or not fully owned) or along the supply chain. It may also be actions within an EU Member State with effects within or outside of that state, or actions outside an EU Member State that this state, nevertheless, could influence. Section 1.1 deals in part with the situation of impact outside the EU – in other words, with extraterritorial issues. Since access to remedy is relevant irrespective of the context in which the problem arises – be it within or outside the EU – the other sections focus on EU-internal aspects but also look beyond these situations. Figure 1 seeks to capture this schematically.

Figure 1: Scope of this FRA Opinion – businesses headquartered or otherwise owned/controlled from within the EU with subsidiaries or supply chains within (cross-border or not) or outside the EU



Source: FRA 2017

It is important to underline that business activities may, in the words of a 2014 Council of Europe Committee of Ministers' Declaration, "have an adverse impact on the enjoyment of human rights [but also] contribute to their realisation".[4] The potential impact of businesses on the enjoyment of human rights – both positive and negative – is high. Workers, consumers and people living near a manufacturing industry may feel the consequences, but also people living anywhere else on the globe since business activities can affect various areas of rights enjoyment, in particular data protection, freedom of expression and other aspects related to the digital world.

[4] Council of Europe, Committee of Ministers (2014), Declaration on the UN Guiding Principles on business and human rights, 16 April 2014, p. 8.

The OHCHR describes the situation of remedy in cases of business-related human rights abuse globally as "fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement".[5]

The UN and Council of Europe have adopted instruments that deal with access to remedy in cases of business-related human rights abuse. The Annex to this opinion provides background information on the global and European law and policy developments in the area of business and human rights, particularly on those related to access to remedy.

Key terms

This FRA Opinion uses 'business' as a generic term to capture the meaning of labels such as corporation, company and firm. Where a distinction is needed between a company headquarter and its (wholly or partly owned) subsidiary, 'parent company' (otherwise also referred to as 'lead firm') and 'subsidiary' (a legally separate entity, wholly or partly owned by the parent company) are used. Where one company can influence another company's behaviour due to the existence of contractual links (because the latter is a supplier, a client or a franchisee), 'supply chain' is used, which includes other types of influence down the business 'value chain'.

The victim of business-related human rights abuse, the right holder, is referred to as victim more generally, and claimant or plaintiff where damages are sought in reparation of the harm incurred (whether in civil litigation or as part of a criminal prosecution against the defendant company).

Commitment by the EU and its Member States and need for action

The EU and its Member States have committed to Universal and European standards on business and human rights, and have taken a number of initiatives in this regard. The EU and its Member States have affirmed their commitment to business and human rights specifically by supporting the UN Guiding Principles.[6] Within the context of the Council of Europe, the EU Member States have also contributed to a Recommendation, adopted by Committee of Ministers.[7] This recommendation reaffirms and elaborates on the UN Guiding Principles.

Also the G7 (the Group of 7) – including four EU Member States and the EU – when meeting in Germany in June 2015, stressed the importance of the UN Guiding Principles, as well as of the National Action Plans and the OECD National Contact Points.[8]

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5 OHCHR (2016), *Business and human rights: Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, 10 May 2016, para. 4. This also echoes the problems outlined already in OHCHR (2011), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 26 – commentary, p. 29 (originally issued as a report to the UN Human Rights Council by the Special Representative of the UN Secretary-General, A/HRC/17/31, 21 March 2011.

6 UN, Human Rights Council (2011), *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011,

7 Council of Europe, Committee of Ministers (2016), Recommendation CM/Rec(2016)3 on human rights and business, 2 March 2016,

8 G7 German (2015), Leaders Declaration G7 Summit, 7–8 June 2015.

More generally on access to justice, the EU Member States are all parties to the European Convention on Human Rights (ECHR), which includes provisions on fair trial (including access to courts) in civil and criminal procedures and effective remedy (Articles 6 and 13), issues well-developed by the ECtHR case law. Similarly, the EU Member States are also party to a number of UN conventions, some of which add details to access to remedy and some of which – through the expert body set up to monitor the implementation of the respective treaty – have been explicit on business and human rights. The details of this are laid out in Section 1 in relation to judicial remedies. Furthermore, within the scope of application of EU law, the EU Charter of Fundamental Rights with Article 47 on access to justice is legally binding.

As stated, the Conclusions of the Council of the EU requested FRA to deliver an opinion on *"possible avenues to lower barriers for access to remedy at the EU level."* This emphasises the need for action by the EU to strengthen the third pillar of the 2011 UN Guiding Principles – access to remedy in business-related cases. The rationale for this focus is clear: more needs to be done to improve remedies, which a UN Human Rights Council Resolution of June 2016 evidences at a global level. It raises, in particular, "concern[s] at legal and practical barriers to remedies for victims of business-related human rights abuses, which may leave those aggrieved without opportunity for effective remedy, including through judicial and non-judicial avenues".[9] The resolution continues stating that "as part of their duty to protect against business-related human rights abuses, States should take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses are committed within their territory and/or jurisdiction, those affected have access to effective remedy, as set forth in the [UN] Guiding Principles".

At the EU level specifically, also more needs to be done. The EU Member States stressed their assessment in this regard through the 20 June 2016 Council Conclusions on business and human rights, by highlighting the need for access to effective remedies for victims of business-related human rights abuses.[10] Effective remedy is a main avenue for holding businesses responsible for how their conduct affects the respect of human rights – in terms of providing a remedy for victims but also the need for effective dissuasion.

In sum, commitments to the specific standards exist but there is an identified need for more action by the EU and its Member States in the area of business and human rights, particularly concerning access to remedy.

The EU and the single market hinges greatly on coherence between and consistency across the Member States. This coherence applies to consumers and investors, but also very much for victims seeking a remedy in the EU – be it from the outside of the Union or from within. The EU is a global frontrunner in the area of business and human rights and access to remedy for victims of business-related human rights abuse involving EU companies, subsidiaries or supply chains needs to be reinforced to maintain this position. In addition to EU companies, any business acting within the EU would certainly have to comply with EU standards. The EU has legal competence in some areas which would enable further legislative efforts; a range of other steps, however, could incentivise the Member States to take action in areas where the competence is shared or exclusively at national level.

[9] UN, Human Rights Council (2016), *Business and human rights: improving accountability and access to remedy*, A/HRC/32/L.19, 29 June 2016.

[10] Council of the European Union (2016), *Council Conclusions on Business and Human Rights*, Doc. 10254/16, 20 June 2016.

Corporate Social Responsibility (CSR) and Responsible Business Conduct (RBC) in relation to business and human rights

Business and human rights is the common label for the nexus of states and business in relation to human rights. The UN Guiding Principles on Business and Human Rights provides a widely accepted framework for understanding and implementing measures in this regard, even if the concept is much broader.

Corporate Social Responsibility (CSR) is a specific "concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis [...] over and above their legal obligations."[11] The ISO 26000 refers to "social responsibility" as "the responsibility of an organisation for the impacts of its decisions and activities on society and the environment through transparent and ethical behaviour that contributes to sustainable development, takes into account the expectations of stakeholders, is in compliance with applicable law and consistent with international norms of behaviour, and is integrated throughout the organisation and practised in its relationship"[12].

A third term is the one the OECD champions: Responsible Business Conduct (RBC). RBC is often considered to have integrated procedures in the business supply chains, such as procurement, and non-financial reporting and non-corruption procedures. It may be seen as more 'binding' as opposed to the CSR focus on a regulatory and policy framework which encourages and rewards the adoption of certain voluntary actions by businesses.

Structure of this opinion

This opinion is organised under three main headings, all related to access to remedy for those persons affected by adverse impact on human rights from business activities. The first section looks at judicial remedies while the second zooms in on non-judicial remedies. The third and final section deals with 'implementation' in the sense of supporting 'flanking' measures to improve access to remedy, including National Action Plans and transparency.

The longer sub-sections are organised under three headings:

A. Standards – key norms in the area of business and human rights related to remedy
B. EU action – steps taken at an EU level, in particular legislation and policy measures aimed at business and human rights, with focus on access to remedy
C. Analysis – linking standards with shortcomings and possible action

This is followed by one or more opinions specifying action that is needed to overcome challenges.

Section A on standards takes as a starting point the 2016 Council of Europe Recommendation, the 2011 UN Guiding Principles and the 2016 UN guidance. A table at the beginning of each these sub-section references the three documents and the respective standard. They are used as the main normative guidance for several reasons, the:

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11 European Commission (2011), *Communication, A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final, 25 October 2011.

12 International Organisation for Standardization (2010), *ISO 26000:2010 Guidance on social responsibility*, November 2010.

1. UN Guiding Principles provide the leading global framework for business and human rights – endorsed by the UN, the Council of Europe and the European Union;
2. 2016 Council of Europe Recommendation adds detail and specificity in a European context with explicit reference to the UN Guiding Principles;
3. 2016 UN guidance offers the most detailed advice on how to operationalise key aspects of the UN Guiding Principles.[13]

Additional standards, including those of the OECD and international human rights law provisions, as well as subsequent interpretations, are included in the text following the table, as are EU law standards.

[13] This guidance currently consists of four documents: OHCHR (2016), *Business and human rights: Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, 10 May 2016, accompanied by a note by the Secretariat, A/HRC/32/19/Add.1, 12 May 2016, and illustrative examples, Companion Document to A/HRC/32/19 and A/HRC/32/19/Add.1, 5 July 2016. The UN Human Rights Council welcomed the report in 2016 report on *Business and human rights: improving accountability and access to remedy* (A/HRC/32/L.19).

1. Judicial remedies

Ultimately, a genuine and effective access to remedy must allow for a judicial assessment. The 2016 UN Human Rights Council resolution especially underline "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".[14]

Non-judicial remedies, the subject of section 2, are also important and while such may be able to process more cases, more effectively and at lower cost, the judicial remedy must remain a final option. This may be through a civil, criminal, or administrative procedure. The 2016 Council of Europe Recommendation formulates it so that

> *"Member States should apply / consider such legislative or / and other measures as may be necessary to ensure that*
>
> *[1. For civil justice] human rights abuses caused by business enterprises within their jurisdiction give rise to civil liability under their respective laws.*
>
> *[2. For criminal justice] business enterprises can be held liable under their criminal law or other equivalent law for the commission of [certain types of crime].*
>
> *[3. For administrative justice] decisions of competent authorities such as those granting support, delivering services or granting export licenses to business enterprises [...] are subject to administrative or judicial review". (Appendix paras. 32, 44, and 47, respectively)*

This section includes a first sub-section on civil law generally and extra-territoriality (where access to justice is sought for business abuse of human rights outside of but with links to the EU). The ensuing sub-sections look at civil law obstacles and how to overcome these, criminal law, and finally judicial remedies, as well as international human rights obligations for persons in situations of vulnerability. Remedies in relation to administrative decisions are not explored in detail but a textbox offers some indications of its relevance.

1.1. Civil law – generally and extra-territorially

Remedies in civil justice are a significant part of accessing justice in cases of business-related human rights abuse. For a victim, to bring a civil suit against a business is typically the route in most jurisdictions, as opposed to bringing a criminal charge against a business or pursuing a claim against an administrative entity regulating or otherwise affecting business activity.

Given the cross-border nature of trade and economic activity in today's globalised world, business operations are no longer limited to activities in one particular EU Member State. A business may be registered in a Member State, carry out operations within its own territory and other Member States of the EU, and may also have subsidiaries or interact with other companies in its supply chain outside of the EU. As such, the potential for business-related human rights abuse is global in nature. Access to effective remedy for victims, particularly those in third countries, of alleged business-related human rights abuse by EU-based companies is an issue of increasing importance – for the victims of such abuse most importantly, but also for the sake of the unity and credibility of EU's internal market with investors and other actors.

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[14] UN Human Rights Council (2016), *Business and human rights: improving accountability and access to remedy*, A/HRC/32/L.19, 29 June 2016.

Obstacles to judicial remedies that exist within the EU may be even greater in many other countries. Many impediments may also be exacerbated due to the cross-border nature of business, which are often at stake as well as an economic imbalance between the parties.

A. Standards

Table 1: Standards on access to remedy generally, and in civil cases

2016 Council of Europe Recommendation	Ensuring that "domestic courts have jurisdiction over civil claims concerning business-related human rights abuses against business enterprises domiciled within their jurisdiction." (para. 34)
UN Guiding Principles	
2016 UN guidance	A legal regime "sufficiently robust to ensure that there is both proper deterrence from and effective remedy in the event of business-related human rights abuses [... with] corporate contributions" (Policy objectives 12 and 13) There must be an "effective remedy for the relevant abuse and/or harm." (Policy objective 19)

Table 2: Standards on extraterritorial access to remedy

2016 Council of Europe Recommendation	Allowing for "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) Allowing for "domestic courts to exercise jurisdiction over civil claims [even if not domiciled in the jurisdiction] if no other effective forum guaranteeing a fair trial is available (*forum* necessitatis) and there is a sufficiently close connection to the member State concerned."(para. 36)
UN Guiding Principles	• In the context of states' duties 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." (Principle 25) • "States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis." (Commentary to Principle 2) • In conflict-afflicted areas where transnational corporations are involved, the "home" State has "a role to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse." (Commentary to Principle 7) • Effective access to remedy can be prevented, for instance, when "claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim." (Commentary to Principle 26) • Non-State-based grievance mechanisms such as "adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes" can "offer particular benefits such as [...] transnational reach." (Commentary to Principle 28)
2016 UN guidance	Not applicable

According to Article 1 of the ECHR, states "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Jurisdiction, as defined by the ECtHR, however, is not delimited by state territory but extends to acts of states performed or producing effects outside their territories. Existence of a jurisdictional link between an individual and the state depends on the state's exercise of powers and control, whether directly or indirectly, either over foreign territory or over individuals or situations in foreign territory where such individuals or situations are under effective control of an agent of that state. In this context, the ECtHR has recognised to some extent that the ECHR can apply to victims in attempting to vindicate their rights in domestic proceedings in EU Member State courts, for complaints related to human rights abuses outside that state's territory.

The ECHR does not directly provide for a right of victims complaining of abuses outside a state's territory to bring civil proceedings against EU-based multi-national businesses in an EU Member State. To come under a (human rights) jurisdiction of an EU Member State within the meaning of Article 1 of the ECHR, a victim needs to bring legal proceedings in a national court of that state, which then has the obligation to decide on the jurisdiction in accordance with the state's rules of private international law, having due regard to its obligation under Article 6 of the ECHR to provide access to justice.[15] According to the ECtHR: "*[e]ven though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction ratione loci and ratione personae of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6*".[16]

As stated earlier in this section, the EU Charter of Fundamental Rights is applicable within the scope of EU law. Rights enshrined as in Article 47 on an effective judicial remedy exist for "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated". For businesses and human rights in an extra-territorial setting, with a human rights abuse outside of the EU by a business with links to the EU (such as by a subsidiary of a business headquartered in the EU), the scope of this provision is not settled. In general, however, the scope of the Charter is not limited to the territory of the European Union.[17]

Also, similar to Article 1 of the ECHR, for jurisdiction to be established making the Charter applicable, some form of effective control of the business activity needs to be established. The Charter is binding the EU institutions and the Member States in all their activities; for the Member States, this is the case only where and when they are acting within the scope of EU law. A situation falls within the scope of EU law where, besides the Charter, another provision of EU law is applicable. Certain provisions of the Charter might also be held applicable horizontally, that is vis-à-vis other entities than (Member) States.[18] With regard to Article 47 of the Charter, the CJEU has not yet expressed a view in this regard but there have been cases at national level where national courts granted Article 47 horizontal effect.[19]

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15 Álvarez Rubio, J.J. and Yiannibas, K. (eds), *Human rights in business: Removal of barriers to access to justice in the European Union*, London,Routledge, 2017, Section 1.2.3.

16 ECtHR, *Markovic and Others v. Italy*, No. 1398/03, 14 December 2006, para. 54.

17 CJEU, T-512/12, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro* (*Front Polisario*) *v. Council of the EU*, 10 December 2015.

18 CJEU, C-176/12, *Association de médiation sociale* (AMS), 15 January 2014.

19 United Kingdom, *Benkharbouche v Sudanese Embassy* [2015] EWCA Civ 33 and *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.

International human rights law standards on extraterritoriality

The Human Rights Committee, monitoring the implementation of the International Covenant on Civil and Political Rights, has dealt with business abuse of human rights in relation to extra-territoriality, for instance, in relation to Canada. The Committee has expressed its concern about**:**

> *"companies operating abroad, in particular mining corporations, and about the inaccessibility to remedies by victims of such violations [… and] regrets the absence of an effective independent mechanism with powers to investigate complaints alleging abuses by such corporations that adversely affect the enjoyment of the human rights of victims, and of a legal framework that would facilitate such complaints".*

On this basis, the Committee concluded that the:

> *"party should (a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, […] respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad."*[20]

Similarly in relation to Germany, the Committee has expressed concerns that "remedies may not be sufficient in all cases" and consequently recommended setting out a clear "expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards […] throughout their operations". The Committee also recommended "strengthen[ing] the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad."[21]

The UN Committee on Economic, Social and Cultural rights, has also expressed itself in the area of business and human rights. In a 2000 General Comment, focusing on the right to health, recalled "that "[a]ny person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels."[22] (para. 59) A 2002 General Comment has similar language in relation to the right to water and a 2008 General Comment, in relation to the right to social security.[23]

A 2011 Committee Statement regarding the 'corporate sector' emphasises the importance of "access to effective remedies to victims of corporate abuse of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means." And concludes that steps need to be taken to "prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the

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[20] UN, Human Rights Committee (2015), *Concluding observations on the sixth periodic report of Canada*, 13 August 2015, para. 6. As of 1 November 2016, all EU Member States are parties to the Optional Protocol of 1966 providing for individual complaints under the ICCPR (entry into force 1976), save the United Kingdom, who has not even signed. Details on the status of the Protocol are available on the UN Treaty Collection website.

[21] UN, Human Rights Committee (2012), *Concluding observations on the sixth periodic report of Germany*, CCPR/C/DEU/CO/6, 18 October 2012, para. 16.

[22] UN, Committee on Economic, Social and Cultural Rights (2000), *General comment No. 15*, E/C.12/2000/4, 11 August 2000, para. 59

[23] UN, Committee on Economic, Social and Cultural Rights (2008), *General comment No. 15*, E/C.12/2002/11, 20 January 2003, para. 23; UN, Committee on Economic, Social and Cultural Rights (2008), *General comment No. 19*, E/C.12/GC/19, 4 February 2008, para. 65.

sovereignty or diminishing the obligations of the host States under the Covenant."[24] In October 2016, the Committee also issued a draft General Comment on State Obligations in the Context of Business Activities (see separate textbox).[25]

UN Committee on Economic, Social and Cultural Rights – draft General Comment on State Obligations in the Context of Business Activities

A draft General Comment by the UN Committee on Economic, Social and Cultural Rights states that the domestic application of the Covenant "extends to rights violations in the context of business activities, whether the harm to victims occurs on the territory of the State Party concerned or outside its territory" (Paragraph 41). More specifically on extra-territoriality, the draft states that obligations may arise when a state "exercise[s] control, power or authority over business entities or situations located outside its territory, in a way that could have an impact on the enjoyment of human rights by people affected by such entities' activities or by such situations." The obligation to protect extends to states "pay[ing] close attention to the adverse impacts outside their territories of the activities and operations of business entities that are domiciled under their jurisdiction. States Parties have the obligation to prevent and redress such impacts on the enjoyment of Covenant rights, regardless of where the harm occurs" (Paragraph 35). The Committee underlines that "[t]his obligation extends to any business entities over which States Parties may exercise influence by regulatory means or by the use of incentives, including economic incentives […]." The draft continues by clarifying that states:

> *"may seek to regulate business entities […] having a seat of business, or generating substantial revenues there; entities with substantial business activities in the [state's] territory; entities whose activities in the [state's] territory have nevertheless threatened or may threaten the exercise of economic, social and cultural rights outside the territory; or, more broadly, any entity with a reasonable link to that [state], for instance, due to the nationality of its shareholders or the location of its assets."* (Paragraph 36)

The draft notes, however, that while states "would not normally be held internationally responsible for any violation of economic, social and cultural rights which is caused directly by a private entity's conduct, it would be in breach of its obligations under the Covenant if the violation reveals its failure to take reasonable measures that could have prevented the occurrence of the event. The responsibility of the State can be engaged in such circumstances even if other intervening causes have also played a role in the occurrence of the violation […]." (Paragraph 37)

The draft also underlines the problems involved in proving a causal link between business located in one jurisdiction and human rights abuse in another, as well as consequently transnational litigation at great expense and lengthy process. The Committee calls on the parties to the treaty to mitigate these problems, including clear definition of when trade secrets can be invoked so as not to put at risk the right to a fair trial (Paragraphs 45–46).

The UN Treaty Body for the Convention on the Elimination of All Forms of Racial Discrimination, CERD, has recommended countries like the United Kingdom, in relation to

[24] UN, Committee on Economic, Social and Cultural Rights (2011), *Statement*, E/C.12/2011/1, 12 July 2011, 4 February 2008, para. 5.

[25] UN, Committee on Economic, Social and Cultural Rights (2016), *General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 17 October 2016.

rights of indigenous persons and rights to "land, health, environment and an adequate standard of living" The Committee recommends "appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the State party comply with the provisions of the Convention" including not to introduce obstacles to make access to remedy more difficult and "to sensitize corporations registered in its territory to their social responsibilities in the places where they operate."[26] In more recent Concluding Observations by the Committee, they have advised in relation to the Netherlands, that "companies and transnational corporations registered in the Netherlands involved in economic activities abroad do not endanger the human rights of indigenous peoples [only, but also], minority groups, local communities and the environment in the host countries, taking into account the Guiding Principles on Business and Human Rights"[27] On indigenous peoples, also the 2016 Council of Europe Recommendation provides specific guidance (Part VII, paragraphs 65–68).

The UN Committee on the Rights of the Child has in its 2013 General Comment, held in relation to the particular problem with "businesses' global operations":

> *"There are particular difficulties in obtaining remedy for abuses that occur in the context of businesses' global operations. Subsidiaries or others may lack insurance or have limited liability; the way in which transnational corporations are structured in separate entities can make identification and attribution of legal responsibility to each unit challenging; access to information and evidence located in different countries can be problematic when building and defending a claim; legal aid may be difficult to obtain in foreign jurisdictions and various legal and procedural hurdles can be used to defeat extraterritorial claims."*[28]

All EU Member States are parties to all the conventions referenced here and are thus bound by these. Measures by the EU must consequently work to ensure effective remedies across the EU Member States.

B. EU action

The EU has taken action also in the area of civil justice with implications for access to remedy in cases of business-related human rights abuse. This is in particular in relation to harmonised choice of court and choice of law rules.

EU harmonised law on choice of court

At EU level, several measures have been taken towards addressing issues of jurisdiction and extraterritoriality in the context of access to remedy. The 2015 European Commission's Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights highlights that "the current framework of judicial means for access to remedies is comprehensive and even allows, within certain parameters, extra-territorial access to

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[26] UN, Committee on the Elimination of Racial Discrimination (2011), *Concluding observations on the United Kingdom*, CERD/C/GBR/CO/19-20, 18 October 2012, para. 29. Similar conclusions have also been made in relation to Canada (CERD/C/CAN/CO/18, 25 May 2007, para. 17 and again CERD/C/CAN/CO/19-20, 4 April 2012, para. 14), the United States (CERD/C/USA/CO/6, 8 May 2008, para. 30), and Norway (CERD/C/NOR/CO/19-20, 8 April 2011, para. 17).

[27] UN, Committee on the Elimination of Racial Discrimination (2015), *Concluding observations on the Netherlands*, CERD/C/NLD/CO/19-21, 24 September 2015, para. 38; also similarly in relation the United States (CERD/C/USA/CO/7-9, 25 September 2014, para. 10).

[28] UN, Committee on the Rights of the Child (2013), *General comment No. 16*, 17 April 2013, para. 67.

remedies for victims of corporate-related harm".[29] It also notes the differences in the legal framework between companies seated within the EU and those outside the EU.

The so-called 'Brussels regime', EU's binding rules on which court should be used in cross-border civil or commercial cases, determines the jurisdictional issue of choice of court. The default rule is that courts in the country where the defendant is domiciled (habitual residence) has jurisdiction (Article 4 of Brussels I recast (1215/2012), the so called Brussels I bis (or I A) regulation).[30] The Brussels regulation thus provides for companies domiciled in an EU Member State to be sued before the courts of that state for damages outside of the EU. This means that victims of human rights abuse can bring claims for compensation against EU companies before the courts where the company has its "statutory seat", "central administration" or "principle place of business" (Article 63). The regulation does not provide jurisdiction in the EU for companies or subsidiaries domiciled outside the EU. Still, this could be possible based on national law (as opposed to EU law, so-called subsidiary (or residual) jurisdiction), such as providing jurisdiction based on assets of the defendant being available in an EU Member State. Moreover, this is of course without prejudice of a duty of an EU-based company to exercise due diligence by controlling a subsidiary or a business partner established outside the EU.

EU's collective work through the Hague Conference on Private International Law and the 2005 Choice of Court Agreement, in particular, is an essential component for finding global solutions to jurisdictional issues.[31]

In the 2005 CJEU case of *Andrew Owusu v. N. B. Jackson*,[32] the court removed the forum *non conveniens* possibility in the context of Brussels I, a common law doctrine which allowed a judge to relinquish jurisdiction if a case was deemed 'more conveniently' heard by a court in another country. This has allowed for more cases to be adjudicated by EU courts and thus improved access to remedy.

EU harmonised law on choice of law

The Rome II Regulation (No. 864/2007), EU's binding rules on which law should be used in non-contractual civil and commercial matters (related to tort and damages in particular), determines the conflicts of law.[33] The Rome II Regulation stipulates that applicable law by default is that where the damage occurs (Article 4), unless there is a much closer link to another state, (Article 4 (3)). An exception is provided through (Article 26) an *ordre public* refusal ground, such as foreign law manifestly contradicting human rights.

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29 European Commission (2015), *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play*, SWD(2015) 144 final, 14 July 2015, p. 35.

30 The Brussels regime includes EU Regulation ((EC) No. 44/2001, recast as (EU) No. 1215/2012); the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Lugano Convention ('revised Lugano Convention'), *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, OJ L 339/3, 21 December 2007, ent into force in relation to all states on 1 May 2011, making the regulation also applicable to Iceland, Liechtenstein and Norway, as well as Denmark. A Brussels II *bis* or II a Regulation ((EC) No. 2201/2003) concerns the choice of courts in matters related to matrimonial issues (e.g. divorce) and parental responsibility (e.g. custody and access rights).

31 The EU approved the instrument on 11 June 2015, https://www.hcch.net/en/news-archive/details/?varevent=412.

32 CJEU, C-281/02, *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [GC], 1 March 2005.

33 Rome I deals with contractual obligations and Rome III specifically with divorce cases.

Through the CJEU jurisprudence, EU competition law obliges parent companies with the responsibility for subsidiaries and even joint-venture partners unless these independently act on the market (even the burden of proof is reversed)[34] – while tort law uses the doctrine of separate legal personalities, competition law uses the economic entity doctrine. The CJEU jurisprudence, moreover, also enables the European Commission to use fines based on the total turnover of the corporate group, and not only of a subsidiary. This enhanced capacity of the European Commission should be kept in mind, for instance, in relation to dissuasion (deterrence) through damages in a business and human rights context.

Extraterritorial specific action

Much of the choice of court and law issues are also applicable, or in particular, in extra-territorial settings. The European Commission probed a range of changes to the Brussels Regulation leading up to the adoption in 2012 of its recast. Some of the proposals that were not adopted related to extra-territoriality. The Commission noted:

> *"The good functioning of an internal market and the [Union's] commercial policy both on the internal and on the international level require that equal access to justice on the basis of clear and precise rules on international jurisdiction is ensured not only for defendants but also for claimants domiciled in the [Union]. The jurisdictional needs of persons in the [Union] in their relations with third States' parties are similar. The reply to these needs should not vary from one Member State to another, taking into account, in particular, that subsidiary jurisdiction rules do not exist in all the Member States. A common approach would strengthen the legal protection of Union citizens and economic operators and guarantee the application of mandatory Union legislation."*[35]

The 2009 Green paper asked for reflections on extending the scope to non-EU defendants, for instance, to establish jurisdiction also for subsidiaries to EU-headquartered companies. The Green paper suggested adding explicit jurisdiction based on particular activities and significant assets in an EU Member State provided that the dispute would relate to these activities or assets. A uniform *forum necessitatis* to ensure access to justice where this would otherwise be denied was also 'scoped'. These proposals were pursued in a proposal for a recast of Brussels I.[36] They were, however, not included in the adopted version. This was partly due to such jurisdictional issues to be clear an effective needs to be in place globally and thus would rather be resolved under the Hague Convention. Another reason was the legal basis where it was argued that with the purpose being mutual recognition within the EU, extending the scope beyond the EU would go too far.[37]

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34 CJEU, C-97/08 P, *Akzo Nobel NV and Others v Commission of the European Communities*, 10 September 2009; C-172/12 P, *EI du Pont de Nemours and Company v European Commission*, 26 September 2013; C-179/12 P, *The Dow Chemical Company v European Commission*, 26 September 2013.

35 European Commission (2009), Green paper on the review of Regulation 44/2001, COM(2009) 175 final, 21 April 2009, second heading, "The operation of the Regulation in the international legal order".

36 European Commission (2010), Proposal for a regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final, 14 December 2010, Articles 25 and 26.

37 Augenstein, A. and Jägers, N. 'Judicial remedies – the issue of jurisdiction, in Álvarez Rubio, J. J. and Yiannibas, K. (eds.), Human rights in business: removal of barriers to access to justice in the European Union, Routledge, 2017, Section 1.3.2.3.

C. Analysis

EU's legislation on the choice of court and law ensures a certain degree of harmonisation across the Member States. Still, problems exist in terms of effective access to remedy in the EU Member States.

Since EU Member States have different approaches regarding both the conditions under which the corporate veil may be lifted (allowing the parent company to be held liable for the acts of the subsidiary) and due diligence obligations of the parent company (to control acts of the subsidiary), coherence criteria could be agreed at an EU level. This would guide the determination of when a connection between a company based in an EU Member State and a subsidiary outside of the EU is sufficiently strong to make it possible for a case to be brought before courts in EU Member States rather than in a host state. This is not only important for coherence of the single market, but also in order to ensure better predictability of outcomes of cases and to be able to have both the headquarter company and the subsidiary sued before the same court (to reduce litigation costs and to reduce problems when it is unclear which of the two is responsible).

The Court of Justice of the EU case on the right to be forgotten and links between business entities

In the well-known CJEU case on 'the right to be forgotten' (C-131/12, *Google*, 13 May 2014), the court held that "processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable" (Paragraph 55).

Part of the problem is the diversity of systems beyond the harmonised area. Having a uniform system of remedies for business-related human rights abuse, or at least clarity and transparency on which procedures and mechanisms are in place in each of the EU Member States, would be important to ensure effective access to justice. Inspiration could be drawn from the European e-Justice Portal and its online tool for fundamental rights complaints.[38] Since companies have business activities in more than one EU Member State at times, this would also be a reason why a uniform system does make sense. More uniformity and stronger minimum standards would also avoid negative 'forum shopping' where companies may prefer incorporation in an EU Member State where remedies for abuse are less accessible.

The regime on choice of law, the Rome II Regulation, includes choice of law to determine the level of damages (Article 15 I). With the basic principle being the law the damage occurs, this can lead to significant problems – this is apparent in cases where the companies are large multinationals operating in countries with low levels of damages and cases being brought before courts in countries with high legal costs.[39] Article 7 provides for a special provision in relation to environmental damages (see below on the special relationship of the EU with environmental law and access to justice), where the plaintiff can choose "the law of the country in which the event giving rise to the damage occurred." The Rome II Regulation also provides, in relation to environmental damage (in Article 7), the possibility

[38] See the European e-Justice Portal online and in particular "where to turn for help"; the latter was developed by FRA, see the website of the tool.

[39] See for example The Joint Committee [of Lords and House of Commons in the UK] on Human Rights, Oral Evidence, HC 443, 19 October 2016; and related written evidence, such as from Leigh Day.

for a claimant to use the law "of the country in which the event giving rise to the damage occurred," instead of choosing the law of the country where the damage occurred (as per Article 4 (1)). A parallel approach to human rights could be considered.

In line with the Aarhus Convention, the EU has legislated requirements in particular when it comes to access for the public to environmental information and review ("before a court of law or another independent and impartial body established by law" (Article 9)) if such access is not provided.[40] The rationale for this strong 'involvement' is "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being" (Article 1). The Regulation the EU adopted in 2006 on the application of the Convention, corresponding to the EU's acceptance of the treaty, provides for the possibility of non-governmental organisations (qualified in Article 11) to request a review by the EU institutions or body that have acted or failed to act in relation to the environment (Article 10).[41] This process could also be brought before the CJEU (Article 12). A 2003 directive (amended in 2011) similarly requires EU Member States to provide for access to justice, ensuring efficiency and genuine accessibility, and that information about the available procedures is publically available.[42]

The EU Charter of Fundamental Rights includes environmental protection (Article 37) but also consumer protection (Article 38). Consumers within the EU, have a legitimate claim to know that companies based in or operating from the EU are held accountable for human rights abuses. This is not only of relevance to companies on which services they may rely or by which actions they may be directly affected, but also to 'EU companies' as a whole guaranteeing that EU businesses are credible – while more importantly providing for access to justice. Arguably, there are parallels between the public interest in the environment and in human rights performance of businesses. Just as the environment has effects on the "health and well-being" of people, so can businesses in relation to human rights.

The same logic as for environmental damage under Rome II could be applied to business-related human rights abuse. This would hinge on managerial failure to ensure due diligence at headquarters and could be used to apply the law of the land of the seat of the business to determine levels of damages. This would also provide incentives for law firms in countries with higher legal fees to take up such cases. Moreover, the 2016 UN guidance provides examples on how corporate liability needs to be checked against due diligence requirements.[43]

Opinions 5 to 9 are relevant to this sub-section.

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40 Of 1998 (entry into force 2001), all EU Member States as well as the EU are parties. For details on the status of the treaty, see the UN Treaty Collection website.

41 European Parliament, Council of the European Union (2006), Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 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, OJ L 264/13.

42 European Parliament, Council of the European Union (2003), Directive 2003/35 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, OJ L 156/17; amended by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance, OJ L 26/1.

43 OHCHR (2016), *Business and human rights: Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, 10 May 2016, Policy objective 3.

1.2. Civil law – overcoming additional obstacles (legal standing, evidence and costs)

In addition to the choice of court and law issues, there are specific aspects of judicial procedures that can affect effective access to remedy in cases of business-related human rights abuse. This sub-section focuses on three major such aspects:

- legal standing – who can bring a case;
- disclosure rules related to access to evidence;
- cost of bringing a case.

A. Standards

Table 3: Standards on civil remedy – measures to overcome obstacles

2016 Council of Europe Recommendation	• Revisions 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." (Appendix, para. 43) • Adoption of "measures that allow entities such as foundations, associations, trade unions and other organisations to bring claims on behalf of alleged victims". (Appendix, paras. 39 and 42)
UN Guiding Principles	"appropriate steps to ensure the effectiveness of domestic judicial mechanisms [...], including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy." (Principle 26)
2016 UN guidance	• "Possibilities for civil enforcement of legal standards by regulators can be created; through amendments to rules on standing to provide for enforcement by regulators, associations, consumer bodies, groups of citizens of 'collective rights' (e.g. with respect to consumer rights, unfair business practices, environmental rights); by providing for the possibility of representative actions by regulators on behalf of people who have suffered losses, which can result in enforceable compensatory orders for affected persons." (Illustrative examples 16.7) • Claimants must "have access to diversified sources of litigation funding." (Policy objective 15) • "Costs associated with bringing private law claims [...] (e.g. lawyer's fees and court fees) are reduced". (Policy objective 16) • Claimants can get legal assistance both in the 'home' and 'host' states "for the purpose of gathering evidence from foreign individual, corporate and regulatory sources for use in judicial proceedings." (Policy objective 17) • States shall actively "improve access to information for claimants and their legal representatives in cross-border cases". (Policy objective 18) • Effective collective remedies should be based on "criteria [...] clearly expressed and consistently applied." (Policy objective 15.3)

The UN Guiding Principles highlight in the Commentary to Principle 26 the often "inadequate options for aggregating claims or enabling representative proceedings [such as collective redress], and this prevents effective remedy for individual claimants".[44] Similarly, the United Nations Working Group on Business and Human Rights' 2015 *Guidance on National Action Plans on Business and Human Rights* recommends that states should introduce or strengthen options for "aggregating claims and representative proceedings such as class actions, multi-party litigation or other collective action procedures."[45]

The 2016 Council of Europe Recommendation stresses that victims bringing cases against businesses should be ensured "legal systems [which] sufficiently guarantee an equality of arms within the meaning of Article 6 of the European Convention on Human Rights. In particular, they should provide in their legal systems for legal aid schemes regarding claims concerning such abuses. Such legal aid should be obtainable in a manner that is practical and effective."[46]

According to the ECtHR, legal systems may establish selection procedures for determining whether legal aid will be granted in civil cases, but these may not function in an arbitrary or disproportionate manner, or impinge on the essence of the right to access court.[47] Legal aid is generally subject to a financial means and merits test. States can decide whether it is in the interest of justice to provide legal aid, taking into account: the importance of the case to the individual; the complexity of the case; and the individual's capacity to represent themselves. Also, under Council of Europe law, the European Agreement on the Transmission of Applications for Legal Aid allows people who habitually reside in one State Party to apply for legal aid in civil, commercial or administrative matters in another State Party to the agreement.[48]

The OHCHR Secretariat note, elaborating on the 2016 UN Guidance, provides that prioritisation should be given to claimants in financial need. Such prioritisation should "ensure that such funding is available on transparent and non-discriminatory terms, taking into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization" (Objective 15.1). The note also encourages pro bono legal services, private funding, 'success fee' funding, and litigation insurance as well as collective redress (Objectives 15.2 through 5).[49]

There is also a need to ensure that "[p]otential claimants have access to well-publicized and reliable sources of advice on their options with respect to litigation funding and resourcing, in languages and formats that are both accessible and understandable."[50]

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44 UN (2011), *Guiding Principles on Business and Human Rights*.

45 UN Working Group on Business and Human Rights (2015), *Guidance on National Action Plans on Business and Human Rights*, p. 30.

46 Council of Europe, Committee of Ministers (2016), Recommendation CM/Rec(2016)3 on human rights and business, 2 March 2016, Appendix, para. 41.

47 ECtHR, *Aerts v. Belgium*, No. 25357/94, 30 July 1998.

48 Council of Europe, European Agreement on the Transmission of Applications for Legal Aid, CETS No. 92, 1977. 22 of the EU Member States are parties to the convention, see the website of the Council of Europe's Treaty Office, with Germany in addition having signed. Croatia, Hungary, Malta, Slovakia, and Slovenia have so far not signed.

49 OHCHR (2016), Note by the Secretariat, A/HRC/32/19/Add.1, 12 May 2016.

50 OHCHR (2016), *The OHCHR Accountability and Remedy Project – Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse*, 5 July 2016, Policy objective 15.6.

B. EU action

The EU has sought to improve and harmonise legal standing through the Brussels I *bis* Regulation and jurisdiction, as described in the previous sub-section. The EU has also pushed for collective redress. In order to facilitate access to justice in case of violations of rights granted under EU law in general, the European Commission recommended in 2013 for the EU Member States to have collective redress mechanisms in place by 26 July 2015 for individuals to be able to more easily enforce the rights granted to them under EU law.[51] The recommendation contains a series of common principles for collective redress mechanisms, which could be also used in addressing claims against the human rights abuse by business.

The EU has adopted an instrument on taking of evidence in civil or commercial matters.[52] The EU has also in other areas than business and human rights concerned itself with evidentiary matters, such as the burden of proof where particularly complex barriers exist – i.e. in the area of non-discrimination.

As for legal costs, the EU has, in addition to Article 47 (3) of the Charter of Fundamental Rights, specific legislation in place related to legal aid in criminal[53] and civil cases.[54] As for costs, the mentioned 2013 European Commission Recommendation focused on collective redress includes references to reimbursement of legal costs (Paragraph 13) and funding (Paragraphs 14–16), but is rather seeking to avoid abuse of the system and conflicts of interest.

C. Analysis

Legal standing

For civil justice in particular, legal standing is an essential issue. Legal standing (standing to sue or *locus standi*) is the gateway for accessing justice. In ordinary court cases, rules for standing restrict the ability to pursue a particular claim for the individuals who have suffered the harm in question or their direct representatives (for instance, where an individual is deceased).[55] The limitations are in place to ensure predictability and legitimate claims, but also to ensure that someone without interest in a matter does not abuse the system of legal standing. Legal standing relates closely to collective redress and representative action – where a group of claimants can come together or where, for example, a representative organisation can bring a claim.

Wider legal standing rules, which allow claims related to the same dispute to be handled in one single proceeding, avoid many different individual proceedings. It is a useful tool to facilitate access to remedy, especially in those areas in which individuals face particular difficulties of procedural rules and other nature when seeking to obtain justice. Such broadened rules lead to procedural economy with beneficial results in terms of costs and

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51 European Commission (2013), *Recommendation 2013/396 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, OJ 2013 L 201, 26 July 2013, p. 60, Article 38.

52 Regulation 1206/2001, 28 May 2001, OJ L 174/1, 27 June 2001

53 In criminal law Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297/1, 4 November 2016 and an accompanying Recommendation on legal aid, C(2013) 8179, 27 November 2013.

54 Directive 2003/8, 27 January 2003, OJ L 26/41, 31 January 2003. There are also two Commission Decisions, 2004.844 and 2005/630 related to the Directive, setting out a form for application and transmission of legal aid.

55 FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office, p. 39.

time not only for claimants and defendants but also for the court system and therefore for public resources in general.[56] Collective redress enables victims to pool resources, mitigate risk and to balance the equality of arms. The EU has adopted binding secondary law with a view to relaxing the rigid legal standing rules in order to facilitate access to justice in other areas.[57]

The 2013 European Commission recommendation prescribes a review. The European Commission will have to, within two years of the 2015 deadline, "assess the implementation of the Recommendation on the basis of practical experience [...,] in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust. The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed" (Article 41). This assessment is an ideal opportunity to consider stronger incentives for compliance, including the development of a binding instrument. A revised instrument could also be clearer on collective and representative redress in relation to business and human rights. The assessment underpinning reform should be facilitated by the national registries of collective redress actions prescribed under Part VI of the recommendation, not the least since Member States, supported by the European Commission, "should endeavour to ensure coherence of the information gathered in the registries and their interoperability" (Article 37).

Representative standing is important and similar in its advantages to collective redress. The EU has used this option in the area of non-discrimination law with the Racial Equality Directive (Article 7), the Employment Equality Directive (Article 9), the Gender Equality Directive (recast) (Article 12), and the Gender Equality Directive on Goods and Services (Article 8)[58] as well as the Seasonal Workers Directive (Article 25).[59] These all oblige Member States to ensure, which associations, organisations or other legal entities may engage in judicial or administrative proceedings on behalf of or in support of victims, with the victim's permission. Such associations may include NGOs, trade unions or equality bodies.

Another example of rules that open up a legal standing can be found in the area of data protection. Pursuant to the currently valid Data Protection Directive, a representative or association may lodge a complaint to a data protection authority on behalf of a data subject, or represent the rights or interests of data subjects.[60] The new General Data Protection Regulation (GDPR; to be applied as of 25 May 2018) further clarifies these principles. Provided there is a mandate from a data subject, a not-for-profit body, organisation or association whose statutory objectives are in the public interest and which is active in the field of the protection of data subjects' rights and freedoms may lodge a complaint to a Data Protection Authority on behalf of that data subject or exercise the right to judicial remedy and the right to seek compensation on behalf of data subjects. The GDPR also provides for

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56 *Ibid.*, p. 39. See also FRA (2012), *Fundamental rights: challenges and achievements in 2011*, Luxembourg, Publications Office, p. 205 and further.

57 Some of these elements are highlighted in FRA (2014), *Access to data protection remedies in EU Member States*, Luxembourg, Publications Office.

58 Directives 2000/43, 29 June 2000, OJ 2000 L 180, 19 July 2000; 2006/54, 5 July 2006, OJ 2006 L 204, 26 July 2006; 2010/41, 7 July 2010, OJ L 180, 15 July 2010; and 2004/113, 13 December 2004, OJ L 373, 21 December 2004.

59 Directive 2014/36, 26 February 2014, OJ L 94/375, 28 March 2014.

60 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, Art. 28 (4).

Member States to mandate a body to lodge complaints on behalf of data subjects, without being mandated by those data subjects.[61]

A third example relates to EU rules in the area of environment. EU secondary law reflecting the Aarhus Convention requires national courts to recognise claims brought by NGOs affected or likely to be affected by, or having an interest in, the environmental decision making procedures.[62] A fourth and final example is the complaints mechanism under the Council of Europe body, the European Committee of Social Rights. This quasi-judicial body, which makes assessments on the compliance of states with the European Social Charter, allows that national and international organisations, such as trade unions as well as international NGOs, submit collective complaints.[63] As of 10 February 2017, 14 of the 28 EU Member States are parties to the Optional Protocol providing for the complaints mechanism, and an additional four EU Member States have signed so far.[64] Sub-section 1.4 provides an example of EU criminal law (Employer Sanctions Directive) allowing for representative standing on behalf of victims.

In the context of representative redress, attention should also be had to the important role civil society can play. The 2016 UN Resolution underscores "the positive and valuable role played by civil society, including non-governmental organizations, in [...] the context of corporate activity and when seeking accountability and assisting victims in their access to effective remedies in cases of business-related human rights abuses".[65] This can be by way of support but could also be as organisations brining cases on behalf of victims. National Human Rights Institutions in the EU Member States can similarly play important roles.[66]

Disclosure

Apart from obstacles in relation to legal standing, there are important elements related to evidentiary matters that affect access to remedy. This is in particular the case with how to prove involvement of businesses in human rights abuse and how to link parent companies with subsidiaries or affiliate firms. In civil and commercial cases gathering information that can be used as evidence is complex in a company structure and there is a large divergence between Member States how this is done. Disclosure – how information can be forced to be released by a business entity in a legal dispute – is important. Disclosure is a powerful tool in that it can ensure equality of arms between the relatively powerless claimant and large business.

The United Kingdom has a general duty under the Civil Procedure Rules[67] requiring businesses to disclose the existence of (or that it has existed) a document (any type of information, such as minutes of meetings, travel logs, commissioning of experts for advice

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61 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119, Art. 80.

62 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ 2010 L 334.

63 See 'Collective complaints procedure' on the Council of Europe website. See also FRA (2012), *Bringing rights to life: The fundamental rights landscape of the European Union*, p. 20.

64 For details on the status of the protocol, see 'Chart of signatures and ratifications of Treaty 158' on the Council of Europe Treaty Office website.

65 UN, Human Rights Council (2016), *Business and human rights: improving accountability and access to remedy*, A/HRC/32/L.19, 29 June 2016.

66 UN, Human Rights Council (2016), *Business and human rights: improving accountability and access to remedy*, A/HRC/32/L.19, 29 June 2016.

67 United Kingdom, Rule 31 of the Civil Procedures Rules (1988, No. 3132).

and audits). The disclosure requirements extend to information proportionate to what is to be proven. In Italy, for instance, courts cannot order disclosure of documents unless the kind of document needed is explicitly detailed and the claimant has to pay for the cost of making the document available so in reality the potential effects are very limited.[68] A similar general duty across the EU would enhance victims' possibilities to effective remedy and a harmonised approach would ensure better predictability and a more uniform single market. A feasible step in the short term may be for the EU to facilitate establishment of clear minimum standards on how, what and when business must share information with plaintiffs.

An additional step in terms of overcoming problems related to evidence may be the reversal of proof in terms of control by a parent company over an affiliate. Here there would likely be a risk that business is configured in a way that makes such a presumption more unlikely. Common law allows in extraordinary cases for a reversal of proof when the evidence speaks overwhelmingly in favour of the claimant (*res ipsa loquitur* – the facts speak for themselves). A more feasible form than reversal of proof may be a rebuttable presumption, where certain criteria only would have to be established for the need to prove control, similar to *res ipsa loquitur*. The EU could elaborate similar detailed rules.

Under EU law, such shift in the burden of proof already exists in areas where one party traditionally faces particularly complex evidence barriers. It is, for example, embedded in the EU non-discrimination legislation, such as the Racial Equality Directive (Article 8) and the Gender Equality Directive (Article 18).[69] 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.

Costs – legal aid and litigation funding

For victims, legal aid and the level of legal costs are often essential factors whether access to remedy is effective or not. In addition to legal aid as provided under the EU Directive – to citizen domiciled or with habitual residence or third-country nationals habitually and lawfully reside in the EU – Article 47 of the Charter of Fundamental Rights opens for a wider reading were at least there is no obligation to be lawfully resident in an EU Member State. A plaintiff bringing a legitimate claim before a court in an EU Member State against a company would seem to be entitled to needs-based legal aid even if not residing in the EU – so irrespective of nationality and residence. The EU could, apart from legislating accordingly, also incentivize Member States to ensure minimum standards on legal aid in cases of business-related human rights abuse so as to guarantee an effective access to remedy.

As for costs there are also other forms to cover legal costs as well as compensation for damages. Funds can be set up in support of victims' compensation or litigation, be it private, public or blended, for example with governmental seed money, advertisement and incentives for investors or donors to contribute. Litigation supporting funds are in operation in relation to children and in relation to the environment with success in some countries.[70] Contributions can also be achieved through portions of damages or fines awarded being required to go towards such funds. Crowd-funding is another approach that could be further

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68 Italy, Article 210 of the Code of Civil Procedures.

69 See also Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Art. 9; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Art. 10.

70 See for example Children's Investment Fund Foundation, Client Earth and the Human Rights Fund of the Government of the Netherlands.

encouraged and supported at an EU level.[71] With greater funding opportunities available, lawyers will also be encouraged to take on the case, and gain needed experience.

To improve predictability and thus access to remedy across the EU, clear and transparent rules presented in a comparative and accessible way for all EU Member States, on who pays for costs (winner or loser), in what types of cases there would be 'cost-shifting' to the benefit of claimants, and the availability of litigation funding – in relevant languages.

For legal aid more specifically, the EU could also seek to harmonize rules across the Union on how legal aid could be made available also to claimants not residing in the territory. This process should seek to "strike an appropriate balance between considerations of access to remedy and fairness to all parties."[72]

Opinions 1 through 4 are relevant in the context of this sub-section.

1.3. Criminal law

Access to remedy in cases of business-related human rights abuse is also achieved through criminal law. Criminal law and criminal justice are indispensable means of human rights protection against severe human rights violations, as highlighted by the European Court of Human Rights (ECtHR) in the case of *M.C. v. Bulgaria*.[73]

A. Standards

Table 4: Standards on remedies in criminal justice

2016 Council of Europe Recommendation	• Consider ensuring that business "can be held liable under their criminal law or other equivalent law for the commission of [... for instance] offences established in accordance with treaties [... or] other offences constituting serious human rights abuses involving business enterprises." It should also be possible for businesses to "be held liable for participation in the commission of such crimes." (Appendix, para. 44)[74] • It should be possible, irrespective of the possibility of holding businesses responsible, for representatives of businesses to be held criminally liable under such crimes. (Appendix, para. 45) • Investigations into such crimes must meet the effectiveness criteria laid down under the ECHR, i.e. "adequate, thorough, impartial and independent, prompt, and contain an element of public scrutiny, including the effective participation of victims in the investigation." The

71 See for example CrowdJustice.

72 OHCHR (2016), *Business and human rights: Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, 10 May 2016, policy objective 12.5.

73 ECtHR, *M.C. v. Bulgaria*, No. 39272/98, Judgement of 4 December 2003; the ECtHR summarised its case law in *M.C. and A.C. v. Romania*, No. 12060/12, judgment of 12 April 2016, paras. 107–112.

74 Treaties exemplified include Council of Europe conventions such as that on cybercrime ('Budapest'), human trafficking, and violence against women ('Istanbul'), as well as UN instruments such as the Palermo convention on organized crime and the optional protocol to the CRC on child prostitution etc. All 28 EU Member States have at least signed all eight instruments included in the list and almost all are also parties. The European Union itself is party to the Palermo convention and the UN Convention against Corruption, and the European Commission has stated its commitment to also become party to the 'Istanbul convention. In relation to the Palermo convention, see Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127/39, 29 April 2014; FRA has also issued an opinion on a draft version of this directive, FRA (2016), *Opinion 03/2012, Confiscation of proceeds of crime*, 4 December 2012.

	duty to prosecute is coupled with an obligation to give a sufficiently reasoned decision if a prosecution is not pursued. (Appendix, para. 6)[75]
UN Guiding Principles	
2016 UN guidance	There is a need to assess corporate criminal liability for severe impacts on human rights and while the there is no accepted definition of severe in this regard, a set of categories that "many jurisdictions include is provided: • participation in acts amounting to international crimes, • murder; • kidnapping; • severe physical assault; • use of forced labour; slavery like practices (e.g. human trafficking); • use of child labour; • serious breaches of workplace health and safety laws; • serious breaches of consumer safety standards; and • serious and/or large scale environmental damage." (Illustrative examples 1.2)

According to the ECtHR case law, the most serious forms of abuses committed by non-state actors may give rise to criminal responsibility. The ECtHR recognises that states may have a duty to protect individuals from other individuals' actions where such actions threaten rights under the ECHR. In the case of serious abuses, effective dissuasion may require the establishment of criminal offences.[76] For example, states are under a positive obligation to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person and that these provisions must be backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. The ECtHR has also introduced in its case law standards relating to the individual criminal responsibility of company representatives (which must however be distinguished from the criminal responsibility of companies themselves).[77]

The UN Treaty Body for the Convention on the Rights of the Child, the Committee on the Rights of the Child, stressed in its 2013 General Comment in relation to forced labour, that states must consider criminal legal liability or other such deterrent for legal entities such as businesses. This they state on the basis of the *Optional Protocol on the sale of children, child prostitution and child pornography* of 2000 (entry into force 2002), which requires in Article 3 that criminal legislation must be in place that also applies to legal entities. All EU Member States have signed the protocol and all, save Ireland, are also parties.[78]

Also, the 2016 UN guidance states that "implementation of international treaties (e.g. treaties relating to the rights of children, worst forms of child labour, forced labour, and human trafficking) have led to the creation of new criminal offences which may be extended to corporate entities as well as individual offenders."[79] OHCHR also underscores the need for

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75 On the need to remove barriers for such investigations, this was also stressed by the European Parliament (2016), Resolution on corporate liability for serious human rights abuses in third countries, 2015/2315(INI), Strasbourg, 25 October 2016, para. 35.

76 See e.g. ECtHR, *X and Y v. the Netherlands*, judgement of 26 March 1986 or ECtHR, *M.C. v. Bulgaria*, judgment of 4 December 2003, para.150.

77 E.g. ECtHR, *Perrin v. the United Kingdom*, 18 October 2005 or ECtHR, *Van Anraat v. the Netherlands*, 6 July 2010.

78 Details on the status of the protocol are available on the UN Treaty Collection website.

79 OHCHR (2016), Illustrative examples, Companion Document to A/HRC/32/19 and A/HRC/32/19/Add.1, 5 July 2016, Illustrative examples 1.2.

a regular review of the coverage of national law to align it with obligations under international human rights treaties.[80]

B. EU action

The EU has legislated corporate criminal liability with relevance for human rights. EU instruments in this regards include the Framework Decision on Racism and Xenophobia,[81] the Employer Sanctions Directive,[82] and the Anti-Trafficking Directive.[83]

Specific issues of criminal liability may become relevant also, for example, in the framework of cross-border transport, due to the scope of the EU legislation in the field of combating facilitation of irregular migration. Council framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence extends the scope of the EU facilitation Directive[84] by compelling Member States to provide criminal penalties also for legal persons who facilitate irregular migration. Although the EU legal framework allows Member States to refrain from punishing persons or organisations who facilitate entry or transit for humanitarian reasons, FRA research shows that a number of Member States do not exempt non-profit acts from criminalisation.[85] Transport companies and their employees who may find themselves encountering potential refugees, are therefore incentivised not to offer assistance even to persons who are in clear need of protection.

C. Analysis

The potential of already existing EU legislation in the area of criminal law is not used at its intended capacity. To date, FRA has conducted research into areas of crime involving activities of legal persons mainly in the context of online hate crime and severe forms of labour exploitation. To draw on this research, online service providers can participate as accomplices in offences criminalised under the EU Framework Decision on Racism and Xenophobia, if they become aware of contents published on their websites that qualifies as hate crime and do not act on their obligations to eliminate these contents. In the case of *Delfi A.S. v. Estonia*, the ECtHR clarified the pertinent legal obligations incumbent on the owners of internet news portals in this regard.[86] Recent research, conducted by FRA into professionals' perceptions of hate crime victimisation reveals that many professionals working in the area of countering hate crime, experience cyber hate as a growing problem and a great concern.[87] FRA's research complements the assessment of the implementation of the Council Framework Decision, in which the Commission highlights that the crucially important jurisdictional provisions of Article 9 of the Framework Decision have not received

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80 OHCHR (2016), Illustrative examples, Companion Document to A/HRC/32/19 and A/HRC/32/19/Add.1, 5 July 2016, Illustrative examples 1.9.

81 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328.

82 Directive 2009/52/EC on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals of 18 June 2009, OJ L 168/24.

83 Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2022/629/JHA, OJ L101.

84 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328.

85 FRA (2016), *Criminalisation of migrants in an irregular situation and of persons engaging with them*, Luxembourg, Publications Office.

86 Application no. 64569/09, Grand Chamber judgment of 16 June 2015.

87 FRA (2016), Ensuring justice for hate crime victims: professional perspectives. Luxembourg, Publications Office of the European Union 2016, p. 21.

appropriate attention from Member States.[88] Ensuring jurisdiction under this provision would include conduct committed "for the benefit of a legal person that has its head office in the territory of that Member State" and would provide for a criminal law remedy.

For the Employer Sanctions Directive, the FRA 2015 report on *Severe labour exploitation: workers moving within or into the European Union* presents findings and recommendations emanating from comprehensive research into forms of labour exploitation criminalised under secondary EU legislation – including prominently the Employer Sanctions Directive – or according to international human rights standards, for example, regarding slavery and forced labour. While the main objective of the Employer Sanctions Directive is to curb the employment of third-country nationals in an irregular situation of residence, Article 9 of the directive obliges EU Member States to criminalise particular severe forms of labour exploitation, including:

- employing a foreign worker under particularly exploitative working conditions (Article 9 (1) l);
- employing a person who the employer knows to have been trafficked (Article 9 (1) (d));
- the employment of a minor.

Criminal law provisions enacted under Article 9 of the directive protect fundamental rights of individuals, including in particular Article 31 (right to decent working conditions), Article 5 (the right to be protected against trafficking) and Article 32 (the right of children to be protected against economic exploitation) of the EU Charter of Fundamental Rights.

The Employer Sanctions Directive includes provisions apt to support victims in having access to justice, including Article 13 on "[f]acilitation of complaints". This provision also obliges Member States to allow third parties to intervene in proceedings in support or on behalf of victims. While the employer of a foreign worker may often be a legal person, the application of criminal law provisions created in accordance with Article 9 of the directive in such cases is highly relevant. Article 11 of the directive on the liability of legal persons obliges Member States to ensure that legal persons can be held liable for offences criminalised according to Article 9 of the directive. In addition, under the directive, EU Member States must also ensure that a legal person can be held liable where the lack of supervision or control made the severe exploitation possible, if a person under the authority and for the benefit of the legal person committed the offence.

Liability of a legal person under these terms does not exclude liability of natural persons as perpetrators, inciters or accessories in the offence.

- The FRA research, conducted between 2013 and 2015, reveals that in cases of severe labour exploitation of workers, offenders face a low risk of being held to account in a criminal court or having to compensate exploited workers who have moved within or into the EU.[89]
- Besides a lack of cases reaching the prosecution phase, other aspects that negatively affect redress include the following: lengthy and complex proceedings (sometimes victims must pursue compensation separately through civil courts, even where involved in criminal proceedings); businesses declaring bankruptcy and workers not

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88 Report from the Commission to the European parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM 2014/27 final, 27 January 2014, p. 9.

89 FRA (2015), *Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights*, Luxembourg, Publications Office, p. 81.

receiving back pay and compensation because of this; as well as employers simply refusing to pay compensation, even where awarded by a court.

- FRA findings also show that effective access to redress in the area of severe labour exploitation hinges on issues such as the level of information about rights received by the exploited worker, the quality of the investigation by the authorities, adequate characterisation of the offences, the worker's residence status, and support from lawyers and other third parties, such as trade unions.
- On compensation specifically, experts interviewed by FRA emphasised that a realistic avenue to attaining back pay owed and compensation for violations of rights is one of the most important things for victims of severe labour exploitation. However, many national compensation schemes do not directly benefit those who have experienced severe labour exploitation. With regard to victims of trafficking in human beings specifically, the Anti-Trafficking Directive obliges Member States to ensure that such victims have access to existing state compensation schemes. Experts claim that a genuine chance of attaining back pay and compensation is key towards encouraging more victims to report to the police and seek access to justice.
- Another clear finding from FRA's research into severe labour exploitation is that foreign workers who wish to lodge complaints against exploitative employers face a lack of possibilities to do so. This includes a lack of authorities that could be easily addressed and be responsive to workers' rights and needs (and due to their vulnerable situation, victims of labour exploitation rarely file complaints on their own). Research by Eurofound points to some promising practices in this regard – for example, some trade unions (in Cyprus, Italy, the Netherlands and Slovenia) have established systems for handling complaints (particularly from migrant workers) and/or for monitoring abusive behaviour of employers in high-risk sectors.[90]

According to Article 12 of the Employer Sanctions Directive, EU Member States must ensure that a legal person held liable for an offence under Article 9 of the Directive is punishable by effective, proportionate and dissuasive penalties. In addition to punishment, criminal courts can order back payments to be made, as well as a variety of other sanctions that are appropriate to add to the effectivity of the punishment.

Research conducted by FRA into the effectivity of these provisions reveal a bleak picture. The consensus of over 600 experts interviewed across 21 Member States was that penalties for legal persons held liable for employing third country nationals in an irregular situation under particularly exploitative working conditions (required by the Employer Sanctions Directive) are not sufficiently dissuasive.

In many cases, the legal basis at a national level necessary to apply such measures is not in place. Where it is, there are often no indications as to the effective implementation of these provisions. For example, the important possible sanction of publishing a list of employers who have been found liable of severely exploiting workers (Article 12, Paragraph 2) is implemented only in a small fraction of Member States. A similar situation was found concerning the sanction of temporary or permanent closure of an establishment used for the severe exploitation of foreign workers (Article 7 (1) (d)). In these respects, FRA's findings

[90] Eurofound (2016), Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour, Luxembourg, Publications Office, p. 37.

confirm the Commission's assessment of the implementation of the Employer Sanctions Directive.[91]

The 2016 UN guidance provides detailed illustrative examples on how law regimes must be clear on business direct role as well as in terms of complicity to third parties. These examples constitute a solid framework for a needed EU-wide assessment.[92]

Overall, what shows is a lack of commitment to holding legal persons to account for severe labour exploitation, although it can be assumed that the full implementation of the Employer Sanctions Directive would considerably add to dissuading exploitative practices. While ensuring criminal sanctions, attention must also be kept on compensation to victims.[93] The 2012 Victims' Rights Directive emphasises that victims must be allowed to participate in criminal proceedings (Article 1) and in the context of criminal proceedings against legal persons, of particular significance will often be the right of victims under Article 16, to obtain, within reasonable time, a decision of the criminal court on compensation by the offender. In addition, Member States are required to "encourage offenders to provide adequate compensation to victims".[94]

The number of victims actually compensated in relation to the Employer Sanctions Directive is very low while data collection in the area is also poor.[95] Another example of relatively low application of an EU instrument is the Anti-Trafficking Directive, where prosecution of legal persons (required under Article 5 of the directive) has been undertaken only in a few EU Member States.[96]

New principles on corporate crimes

A group of legal experts, supported by Amnesty International and the International Corporate Accountability Roundtable (ICAR), adopted in October 2016 a set of 10 Corporate Crime Principles. Involvement of victims and strengthening of their rights are stressed under the ninth principle, on effective remedies.

For further information, see: http://www.commercecrimehumanrights.org/

Part of improving the implementation in EU Member States of EU criminal law obligations that can improve the effectiveness of access to remedy in cases of business-related human rights abuse – in addition to legislation – is better capacity to monitor and investigate. This hinges greatly on capacity, resources, training and incentives – even more accentuated in

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91 Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM 2014/186 final, 22 May 2014, pp. 5-6.

92 OHCHR (2016), Illustrative examples, Companion Document to A/HRC/32/19 and A/HRC/32/19/Add.1, 5 July 2016, Policy Objectives 1, 2 and 3.

93 Required by EU law for violent intentional crimes under Article 1 of Directive 2004/80, 29 April 2004, OJ L 261/15, 6 August 2004 on compensation to crime victims.

94 Victims' Rights Directive, 2012/29, OJ L 315/57, 14 November 2012; See FRA – European Union Agency for Fundamental Rights (2015), *Severe labour exploitation: workers moving within or into the European Union – States' obligations and victims' rights*, Luxembourg, Publications Office; see also {FRA – European Union Agency for Fundamental Rights 2014 #189}

95 Kadri Soova, Lilana Keith and Michele LeVoy, 'Employers' Sanctions: Impacts on Undocumented Migrant Workers' Rights in Four EU Countries' (2015) http://picum.org/picum.org/uploads/publication/EmployerSanctions_Final.pdf, p. 11.

96 European Commission (2016), Report on the progress made in the fight against trafficking in human beings, COM(2016) 267 final, 19 May 2016, p. 11.

cross-border settings with its particular complexities. EU's resources, such as facilitation of cross-border justice provided by Eurojust, monitoring by the European Commission, peer review by Member States, and sharing of best practices should be made greater use of in this regard.

The OHCHR's guidance package includes examples of components of a investigations related to:

- a clear mandate and support;
- transparency and accountability in the use discretion to enforce rules;
- sufficient resources, training and expertise;
- ensuring safety of victims and other affected persons and sensitive to persons in situations of vulnerability;
- independent decisions without political influence;
- effective and specific cross-border cooperation mechanisms in place.

In a useful manner, this could be applied to map the EU's strengths and weaknesses.[97]

Opinions 10 to 12 are relevant in the context of this sub-section.

1.4. Generally and persons in situations of vulnerability

On fair trial and access to an effective remedy in general there are a number of standards and jurisprudence of relevance – from the UN and the Council of Europe in particular. How they are relevant and applicable in the context of business and human rights is the focus of this sub-section.

A. Standards

Table 5: Standards on judicial remedies generally

2016 Council of Europe Recommendation	Part IV, Paragraphs 31–48: "to grant to everyone access to a court in the determination of their civil rights, as well as to everyone whose rights have been violated under these instruments an effective remedy before a national authority, including where such violation arises from business activity" (para. 31)
UN Guiding Principles	Principle 26: "appropriate steps to ensure the effectiveness of domestic judicial mechanisms [...], including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."
2016 UN guidance	*In its entirety (dealing with accountability and remedy)*

Under international human rights law, access to remedy is provided for in the 1948 Universal Declaration on Human Rights (UDHR), where Article 8 stipulates that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The International Covenant on Civil and Political Rights (ICCPR), restates this in Article 2 (3) adding details on guarantees and enforcement of this right. The International Convention on the Elimination of All forms

[97] OHCHR (2016), Illustrative examples, Companion Document to A/HRC/32/19 and A/HRC/32/19/Add.1, 5 July 2016, Policy objectives 4–9 in particular.

of Racial Discrimination, requires "effective protection and remedies" through courts or other state institutions as well as reparations for damage (Article 6). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, similarly obliges redress and compensation to victims (Article14).

For the Council of Europe instruments, the European Convention on Human Rights (ECHR) stipulates the "[r]ight to an effective remedy" in Article 13, for all rights and freedoms of the convention. In other words, Article 13 permits individuals to claim a remedy before a national authority for arguable claims that one or more of their rights set out in the ECHR have been violated. Article 13 of the ECHR does not require any particular form of remedy to be offered – it could be judicial but not necessarily. The primary requirement is that the remedy is "effective in practice as well as in law". This provision should also be read together with Article 6 of the ECHR, requiring a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Indeed, where a remedy is sought for a violation of an ECHR right that also constitutes a civil (or criminal) right under Article 6, the wider and stricter safeguards of Article 6 (1) apply. For example, where the ECHR right asserted by the individual is a civil right recognised under domestic law – such as the right of property – the safeguards of Article 6 (1), implying the full panoply of a judicial procedure, are stricter than, and are considered to absorb, those of Article 13. Effective remedies, however, must also be available to a victim of a violation of Article 6 of the ECHR.[98] In addition, the ECtHR has also read specific procedural obligations into substantive articles of ECHR, such as Articles 2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery and forced labour) or 8 (right to respect for private and family life) of the ECHR.[99] Such procedural obligations call for the organisation of domestic procedures to ensure better protection of persons, those that ultimately require the provision of sufficient remedies for violation of the rights.

Access to justice in this regard relates to cases within the jurisdiction of a state, typically linked to the territory but with extra-territorial elements included when there is a sufficiently strong link through power and control of a state over a situation in another state. Sub-section 1.3 explores the extra-territorial aspects, including as elaborated by the UN human rights treaty bodies. The UN treaty bodies, monitoring the UN human rights conventions, have also pronounced themselves on the right to a remedy more generally but not explicitly on extra-territoriality. For instance, the Human Rights Committee (monitoring the ICCPR) has noted in a General Comment, that obligations must include protection from actions by private persons or entities, and they must provide for a remedy.[100]

The EU Charter of Fundamental Rights, applicable within the scope of EU law, provides in Article 47 for the "[r]ight to an effective remedy". This right exists for "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated". In the context of business and human rights in an extra-territorial setting, this is explored further in Sub-section 1.3. Access to remedy is an essential component. It allows individuals to seek redress for violations of their rights. According to well-established case law, any remedy provided to an individual must meet the criteria of availability, adequacy and effectiveness. It is not

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98 ECtHR, *Kudła v. Poland*, App. no. 30210/96, 26 October 2000, para. 146.

99 *Mosendz v. Ukraine*, App. No. 52013/08, 17 January 2013; *Virabyan v. Armenia*, App. No. 40094/05, 2 October 2012; *Rantsev v. Cyprus and Russia*, App. No. 25965/04, judgment of 7 January 2010 and *M.C. v. Bulgaria*, App. No. 39272/98, judgment of 4 December 2003.

100 UN, Human Rights Committee (2004), *General Comment No. 31*, CCPR/C/21/Rev.1/Add.1326, 26 May 2004, para. 8.

sufficient that a remedy may only be available in theory under the law. It must also be effective in practice.[101]

Under some UN treaties not directly concerned with human rights there are obligations in relation to the private sector. The 2003 (entry into force 2005) UN Convention against Corruption obliges parties to the treaty to take measures "to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures." The provision also calls for "transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities".[102] All EU Member States as well as the EU itself are parties to this convention.

The international human rights law standards and their subsequent interpretation by the UN treaty bodies and the ECtHR underscores the obligation to provide effective access to justice where there is jurisdiction and that human rights protection extends to providing access to remedy for actions by private persons. Additional implications of international human rights law on persons in situations of vulnerability is dealt with later in this sub-section and, as for extra-territoriality, in Sub-section 1.3.

Persons in situations of vulnerability

International human rights law instruments and their subsequent interpretation provide more detailed guidance on business and human rights in relation to persons in situations of vulnerability, such as persons with disabilities, indigenous peoples and children. All EU Member States are parties to all the UN conventions, and the EU itself is party to the Convention on the Rights of Persons with Disabilities (CRPD).[103] The UN CRPD, provides in Article 13, entitled "access to justice", that parties to the convention "shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations".[104] The 2016 Council of Europe Recommendation on human rights and business also includes specific sections on addressing additional protection for workers, children, and respect for the rights of indigenous peoples.

The UN Treaty Body for the Convention on the Rights of the Child, the Committee on the Rights of the Child, has been the most explicit on remedial action in relation to businesses' abuse of human rights. The Committee highlights forced labour and the requirement of having a sufficiently strong deterrent, such as criminal liability. This is provided for (Article 3) in a 2000 optional protocol dealing with issues like forced labour.[105]

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101 FRA (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office, chapter 5.

102 Article 12. The status of the UN Convention against Corruption is available at the UN Treaty Collection.

103 Ireland had only signed the CPRD; ratification is reported to be imminent at the time of writing.

104 As of 1 December 2016, all EU Member States, save Ireland (signed in 2007), as well as the EU are parties to the CRPD. The Optional Protocol to the CRPD, also of 2006 (entry into force in 2008) has as of 1 December 2016 22 of the EU Member States as parties with an additional 3 having signed (Ireland, the Netherlands, and Poland have not yet signed. Details on the status of the protocol are available at the UN Treaty Collection website.

105 All EU Member States are party to the protocol save Ireland who so far only has signed.

In its 2013 General Comment, the Committee formulates the problem of remedy and children to be that

> *"[c]hildren often find it difficult to access the justice system to seek effective remedies for abuse or violations of their rights when business enterprises are involved. Children may lack legal standing, which prevents them from pursuing a claim; children and their families often lack knowledge about their rights and the mechanisms and procedures available to them to seek redress or may lack confidence in the justice system."*[106]

The Committee, in that General Comment, also underscored that to ensure effective access to a remedy, states must remove "social, economic and judicial barriers [...] without discrimination of any kind" and to ensure that information about remedies are provided through appropriate channels to children. The General Comment also stress children's legal standing, right to participate fully in the justice process and right to information, as well as access to legal aid and that collective complaints should be available.[107]

The need of greater protection for persons with disabilities and children, for instance, is expressed in international human rights law, also in terms of accessing justice.[108] Ensuring that mechanisms providing a remedy are adapted to such persons is essential and that strong action is taken to provide remedy for forced child labour. The 2016 Council of Europe Recommendation also stresses the additional protection needed for children (Part VI, Paragraphs 61–64); it includes "measures to remove social, economic and juridical barriers so that children can have access to effective judicial and State-based non-judicial mechanisms without discrimination of any kind, in accordance with the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice".[109] Article 12 (2) of the UN Convention on the Rights of the Child, to which all EU Member States are parties, requires children "to be heard in any judicial and administrative proceedings affecting [them], either directly, or through a representative or an appropriate body". This is also reflected in Article 24 (1) of the EU Charter of Fundamental Rights.

B. EU action

On access to remedy in general, and specifically for persons in situations of vulnerability, the EU has taken action with relevance also to business and human rights.[110] A few examples of what the EU has done of relevance:

- made the Charter of Fundamental Rights with its Article 47 on access to justice part of EU primary law and thus legally binding;
- legislated in the area of criminal justice to ensure minimum fundamental rights standards;

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106 UN, Committee on the Rights of the Child (2013), *General comment No. 16*, 17 April 2013, para. 66. The General Comment is also referenced in the 2016 Council of Europe Recommendation, requiring "due consideration".

107 UN, Committee on the Rights of the Child (2013), *General comment No. 16*, 17 April 2013, paras. 68–69.

108 FRA (2017) *Child-friendly justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*, Luxembourg, Publications Office; FRA (2015), *Child-friendly justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*, Luxembourg, Publications Office; FRA (2013), *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, Luxembourg, Publications Office.

109 Para. 64 (b).

110 For an comprehensive overview, see European Commission (2015), *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play*, SWD(2015) 144 final, 14 July 2015, p. 25.

- adopted data protection legislation requiring independent institutions ('data protection authorities') to "hear claims" (Article 28);
- adopted equality legislation requiring independent institutions ('equality bodies') to provide victims with assistance to pursue complaints;
- legislated and taken other action in relation to asylum and migration;
- legislated on access to justice in relation to environmental law;
- become party to the UN CRPD with its more detailed language on access to remedy.

The EU has taken such actions on the basis of a clear mandate set out in the EU treaties – which are explicit on issues such as equality and data protection.

The EU has also legislated on a number of issues related to migration, with relevance for business and human rights, for example: the Long-term Residence Directive (2003/109/EC),[111] the Seasonal Workers Directive (2014/36/EU),[112] the Students and Researchers Directive (2016/801/EU),[113] the Blue Card Directive (2009/50/EC; on entry and residence of third-country nationals),[114] the Single Permit Directive (2011/98/EU),[115] and the Intra-corporate Transfer Directive (2014/66/EU).[116]

These legal instruments represent the pillar of EU policy aimed at facilitating legal migration for work-related purposes. They provide protection by granting basic rights. The single permit and seasonal workers directives, for example, guarantee the right to equal treatment with EU nationals in terms of working conditions, access to education and vocational training, and certain rights in the field of social security. In addition, by offering legal pathways to the EU, they are seen as an important element of preventing irregular migration. The European Agenda on Migration, adopted in 2015,[117] mentions the recast of the students and researchers directive and the review of the Blue Card directive among the key initiatives in this field, in order to attract new talents to the EU.

111 Directive (EU) 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L016/44, 23 January 2004.

112 Directive (EU) 2014/36 of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L94/375, 28 March 2014.

113 Directive (EU) 2016/81 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132/21, 21 May 2016.

114 Directive (EU) 2009/50 of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18 June 2009.

115 Directive (EU) 2011/98 of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343/1, 23 December 2011.

116 Directive (EU) 2014/66 of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157/1, 27 May 2014.

117 European Commission (2015), A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.

Judicial review of administrative actions

Just as in the areas of civil and criminal law there has to be access to remedies also in relation to administrative action. The 2016 Council of Europe Recommendation specifies that "that decisions of competent authorities such as those granting support, delivering services or granting export licenses to business enterprises [...] take into account human rights risks, for example, on the basis of a human rights impact assessment" and that such decisions "are subject to administrative or judicial review" with "appropriate measures to address credible allegations of human rights abuses in connection with the business activities that form the basis of [such] decisions" (Appendix, Paragraphs 47–48).

Examples at an EU level of the need for a remedy in the context of business and human rights include competition law, state aid, European Structural and Investment Funds, and EU lending,[118] as well as in a range of development cooperation and external relations contexts. Other areas could be related to asylum and migration, taxation, data retention and environmental law. For remedy in relation to business action in these areas, administrative law decisions triggering this action needs to provide for a judicial review and an effective "measure" to ensure that allegations of business abuse can be heard.

C. Analysis

FRA's research in the area of access to justice in general shows that the effectiveness of a remedy provided by courts is often hampered in practice for reasons related to, in particular, restrictive rules on legal standing, evidence barriers, high legal costs (combined with restrictive rules on legal aid) and length of proceedings.[119] Moreover, victims of human rights violations often find existing redress avenues too complex – be it judicial or non-judicial mechanisms. They also often lack awareness of their substantive and procedural rights, in particular those rights guaranteed in EU and/or international law, and therefore do not seek justice.[120] FRA research concerning victims (of crime) also confirms that victims are hesitant to report crimes directly to the police or other criminal justice authorities and prefer instead approaching NGOs or other support organisations.[121] Persons in situations of vulnerability in particular, are often more likely to pursue complaints through some form of collective redress and/or a representative organisation. While these aspects highlight barriers to access to justice in general, they are also relevant in the context of business-related human rights abuses, and could even be exacerbated in a cross-border setting. Issues related to, for instance, legal standing and reducing obstacles to access justice are dealt with in more detail in relation to civil law in the next sub-section.

At a level of 'values', Article 2 of the Treaty on European Union (TEU) includes human rights and Article 10 of the Treaty on the Functioning of the European Union (TFEU), requires that the EU "shall aim to combat discrimination based on" various grounds. Article 3 of the TEU links the values to the internal market.

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118 For example, the UN Guiding Principles are part of the European Investment Banks standards on investment, European Investment Bank (2013), *Environmental and Social Handbook*, pp. 55, 70 *et seq*, 96 *et seq*.

119 FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office, p. 38.

120 *Ibid*.

121 FRA (2015), *Victims of crime in the EU: the extent and nature of support for victims*, Luxembourg, Publications Office.

As regards legal basis for legislation, the largely shared competence between the EU and its Member States in this area provides some ground for EU action. The 2015 European Commission Staff Working Document on the UN Guiding Principles concludes that for the third pillar of the UN Guiding Principles the EU has some competence, while most of the competence lies with the Member States.[122] The part within EU competence is that under Articles 81 and 82 of the TFEU – judicial cooperation in civil and criminal matters respectively.

Additionally, in whatever area the EU legislates to regulate business, EU law or implementing national legislation,[123] has to ensure access to remedy, for example in relation to consumer or environmental protection.

While most work needed to ensure greater access to remedy rests with the EU Member States, there are also other legal bases of relevance for the EU.

Article 26 of the TFEU, in turn, concerns the internal market, specifying that it "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured". Article 114 of the TFEU allows for approximation of "law, regulation or administrative action in Member States which have as their objective the establishment and functioning of the internal market". Article 114 (3) provides for "a high level of protection" for approximation "concerning health, safety, environmental protection and consumer protection" (with Articles 115–117 elaborating on details). These provisions, read together with Article 50 (2) (g) of the TFEU, on freedom of establishment of companies in the EU Member States,[124] could be explored as basis for contributing to an approximation of legal instruments on access to remedies to ensure a proper functioning of EU's internal market. Article 352 of the TFEU, provides for a legal basis to take action where such is otherwise not explicitly foreseen but where action is needed to achieve an objective of the Treaties.

A more uniform system rooted in the core values, consumers, shareholders, creditors and other stakeholders – and certainly businesses – would have a more level playing field, across the entire single market; a more uniform system could thus encourage investments and entrepreneurship. Article 16 of the Charter of Fundamental Rights of the European Union, freedom to conduct a business, adds to this by providing for 'enhanced' protection for businesses, by not being limited to EU citizens and not hinging on a cross-border situation.[125] The need for a coherent application of the UN Guiding Principles is emphasised in the 2016 Council of Europe Recommendation, which states that "[i]n their implementation of the UN Guiding Principles on Business and Human Rights, member States should take into account the full spectrum of international human rights standards and ensure consistency

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122 European Commission (2015), *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play*, SWD(2015) 144 final, 14 July 2015, p. 23.

123 See in this context Article 19 (1) TEU: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

124 "Coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms […] with a view to making such safeguards equivalent throughout the Union."

125 FRA – European Union Agency for Fundamental Rights (2015), *Freedom to conduct a business: Exploring the dimensions of a fundamental right*, Freedoms, Luxembourg, Publications Office of the European Union, pp. 11–12.

and coherence at all levels of government".[126] Consistency and coherence is also important across the EU.

While EU legislation is an approach, other measures must also be considered. In order to reinforce minimum standards for remedies, a comparative study on what works in practice and is suitable and needed in the EU in this regards should be commissioned. This is also what is recommended in the UN 2016 guidance package, which calls for "a review of the coverage and effectiveness of [...] law regimes that regulate the respect by business enterprises of human rights" so as to ensure a legal system that effectively "take into account the particular challenges arising from complex global supply chains". The recommendation also notes more generally that this should be done in order to improve the effectiveness of "judicial mechanisms as a means of delivering corporate accountability and remedy in cases of business-related human rights abuse".[127]

Such a study should set the baseline and targeted minimum level, and suggest how to move from a baseline to target, including regular reporting, peer review, technical assistance and incentives. The process should include annual data submissions by Member States on complaints (including state-based and non-state-based, judicial and non-judicial),[128] admissibility, successful cases, and implemented decisions, disaggregated by business sector, type of complaint, etc.

The OHCHR's 2016 guidance package on business and human rights is a good basis for mapping the systems in place across the EU. For instance, principles for assessment of corporate liability, including how acts may be attributed to a company or how standards of expected management is communicated.[129]

In this process, the EU could also collect best practices (as called for by the 2016 Council of Europe Recommendation (Paragraph 3) on remedies, such as NCPs and judicial mechanisms, and cross-border cooperation as well as, for instance, legal aid.

The strong commitment at EU and Member State levels to improve access to remedy for business-related human rights abuse are underscored by international law obligations under UN and Council of Europe instruments – in particular in relation to particular groups such as children. While the EU has taken a number of measures to follow up on the commitments and obligations, more needs to be done for access to remedy to be genuine and effective as evidenced by the Council of the EU's call for action in this regard through the 2016 business and human rights conclusions.

Opinion 5 is relevant in the context of this sub-section.

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126 Para. 3 of the Annex.

127 OHCHR (2016), *Business and human rights: Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, 10 May 2016, para 31.

128 UN working group underscores the need for this: United Nations General Assembly, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises.' (A/70/216, 30 July 2015), para. 88, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/216,

129 OHCHR (2016), *Business and human rights: Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, 10 May 2016, policy objectives 1.4, 1.5 and 1.6.

2. Non-judicial remedies

In addition to judicial remedies, non-judicial mechanisms are required to ensure effective access to justice. It is not only the State's duty to protect human rights of all citizens and to ensure access to remedy through judicial and non-judicial mechanisms, but it is also a corporate responsibility to prevent and remediate any infringement of human rights that businesses may contribute to.

Non-judicial remedies provide a more accessible and simpler supplement to judicial remedies, often at a lower cost to the claimant and quicker than through judicial remedies such as courts. Furthermore, non-judicial procedures are usually seen as complementary to other legal remedies and are generally subject to judicial supervision.

Non-judicial bodies can include national human rights institutions, equality bodies, data protection authorities, ombudsperson institutions, labour inspectorates, specialised tribunals, government-run complaints offices and others.[130] Alternative dispute resolution procedures, such as mediation and arbitration, also provide alternatives to accessing justice. Furthermore, there are also possibilities for companies to develop operational-level grievance mechanisms, which can be linked to due diligence procedures that aim to prevent business-related human rights abuse. The UN Guiding Principles refer to operational-level grievance mechanisms as an effective means of enabling remediation, especially when they meet certain criteria defined in the UN Guiding Principles, and can be an important part of a wider system of remedy.

The UN Guiding Principles provide for effectiveness criteria for non-judicial grievance mechanisms, which should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, serve as a source of continuous learning, and be based on engagement and dialogue. These criteria were developed to provide guidance on setting up effective non-judicial grievance mechanisms, and are widely endorsed by businesses, states and other stakeholders.

This section deals with this in two sub-sections: the first covers non-judicial mechanisms such as statutory quasi-judicial bodies and others; the second covers specifically OECD National Contact Points. Under non-judicial mechanisms, both state-based and non-state grievance mechanisms (also referred to as operational level grievance mechanisms) are covered.

2.1. State-based and non-state-based remedies

A. Standards

Table 6: Standards on non-judicial remedies

2016 Council of Europe Recommendation	• "Member States should provide for State-based non-judicial grievance mechanisms that meet the effectiveness criteria listed in Principle 31 of the UN Guiding Principles [...] and facilitate the implementation of their decisions. They should ensure that non-State based non-judicial grievance mechanisms also meet these effectiveness criteria." (Appendix, para. 50) • Bodies such as labour inspectorates, National Human Rights Institutions, and equality bodies, should be evaluated as to the "adequacy and availability" in general and the remedies they afford. "This could include

[130] FRA (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office.

	extending the mandate of existing State-based non-judicial bodies or creating new ones with the capacity to receive and adjudicate complaints of business-related human rights abuses and afford reparation to the victims." (Appendix, para. 51) • Business shall "establish their own grievance mechanisms in line with [...] effectiveness criteria" (established by the UN Guiding Principles) while these mechanisms should not preclude access to judicial or other non-judicial grievance mechanisms. (Appendix, para. 54)
UN Guiding Principles	• States shall "consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms." (Principle 28) • "[B]usiness enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted." (Principle 29) • "Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available." (Principle 30) • Eight points stressed for both state-based and non-state based mechanisms, including legitimacy, accessibility, predictability, equity and transparency. (Principle 31)
2016 UN guidance	• Not applicable; a forthcoming phase of the OHCHR-project on accountability and remedy will look at state-based non-judicial mechanisms – a paper of 17 February 2017 sets out the scope and provides an overview of practices and challenges (https://business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf)

The ILO Tripartite Declaration of Principles concerning multinational enterprises and social policy (revised version of 2014) includes an explicit section on examination of grievances. Under Article 58, it stipulates that "multinational as well as national enterprises should respect the right of the workers whom they employ to have all their grievances processed in a manner consistent with the following provision: any worker who, acting individually or jointly with other workers, considers that he has grounds for a grievance should have the right to submit such grievance without suffering any prejudice whatsoever as a result, and to have such grievance examined pursuant to an appropriate procedure".[131] The ISO 26000 also includes a section on resolving grievances, recommending that organisations establish mechanisms for remedy which are legitimate, accessible, predictable, equitable, rights-compatible, clear and transparent, and based on dialogue and mediation."[132]

B. EU action

The EU requires the appointment or establishment of non-judicial bodies in the EU Member States on issues related to human rights and is supportive of the OECD National Contact Points – the focus of next sub-section.

Non-judicial mechanisms with a remit related to fundamental rights exist in all EU Member States, but their powers, goals and operations vary greatly. Some of these may have quasi-judicial powers, while others have no power to decide cases themselves – but may fill

[131] ILO (2014), *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, ILO publications, p.10.

[132] ISO (2010), *International Standard ISO 26000: Guidance on Social Responsibility*.

important roles in advising judicial bodies or guiding victims. They are often established or designated as requirements under EU instruments, such as equality bodies, related to non-discrimination directives (as described in Sub-section 1.3), or the UN treaties, such as under the Convention on the Rights of Persons with Disabilities. At the EU level, "the Racial Equality Directive, Gender Goods and Services Directive, Gender Equality Directive and Employment Equality Directive allow the Member States to provide a remedy for breach of non-discrimination law not only through the courts, but also through conciliation or mediation."[133] The role of equality bodies differs with regard to mediation, with some being directly involved in reaching settlements approved by the equality body to ensure that victim's interests are protected, and in other cases equality bodies may simply refer cases to a third party mediator. Some Member States also have National Human Rights Institutions that cover fundamental rights more generally, and these can be mandated with some of the tasks under EU and UN instruments, such as also being equality bodies or serving as the designated monitoring body under the UN Convention on the Rights of Persons with Disabilities.[134]

C. Analysis

Non-judicial mechanisms can supplement the judicial ones in several ways. For instance, delays in obtaining and executing judgments constitute one of the most frequent procedural barrier to accessing justice via courts. Over a fifth of all violations found by the European Court of Human Rights in EU Member States typically concern excessive length of proceedings.[135] Excessive delays undermine access to justice and may violate human rights, and lengthy proceedings are often more 'costly' for the victim than for the business. Non-judicial mechanisms often also afford victims lower cost, lower procedural threshold, less stigmatising and generally more accessible remedies. In some cases, such as criminal, judicial remedies are the only appropriate option,[136] but in many other situations, non-judicial offers clear advantage.

FRA's research in the area of access to justice, such as on the effectiveness of remedies outside courts (e.g. equality bodies) underscores advantages,[137] but it also highlights problems such as the relatively low reporting of, for example, instances of discrimination and low awareness of these bodies.[138] FRA's research also shows that victims of severe labour exploitation are reluctant to come forward and report to monitoring bodies.[139] FRA's research on violence against women also shows that incidents of violence are very rarely reported to the police and few are aware of support services or organisations for victims.[140] A FRA report on the views of trade unions and employers also includes findings on the low number of complaints and low rates of reporting in cases of ethnic discrimination, as well as

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133 FRA (2012), *Access to justice in cases of discrimination in the EU – Steps to further equality*, Luxembourg, Publications Office.

134 FRA (2012), *Handbook on the establishment and accreditation of National Human Rights Institutions in Europe*, Luxembourg, Publications Office.

135 See Number of ECtHR judgments finding a violation on FRA website.

136 For instance, Article 48 of the Istanbul Convention "prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope" of the treaty.

137 FRA (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office.

138 FRA (2009), *European Union Minorities and Discrimination Survey Main Results Report,* Luxembourg, Publications Office, and FRA (2016), *Second European Union Minorities and Discrimination Survey: Roma – Selected findings*, Luxembourg, Publications Office.

139 FRA (2015), *Severe labour exploitation: workers moving within or into the European Union: States' obligations and victims' rights*, Luxembourg, Publications Office.

140 FRA (2014), *Violence against women: an EU-wide survey - Main Results,* Luxembourg, Publications Office.

burdensome complaints procedures in Equality bodies, and fear of retribution among victims if they do complain.[141] For this reason, collective complaints and involvement of civil society organisations to facilitate complaints, as explored in relation to judicial mechanisms, should also be considered in relation to non-judicial mechanisms.

In a business and human rights context, the involvement of non-judicial mechanisms could be enhanced and made more explicit. This is the case in particular for National Human Rights Institutions (which may simultaneously be Ombuds institutions as well as equality bodies, for instance) accredited through a global system as independent and effective (and granted so called A-status as per compliance with the 'Paris Principles'). There are currently 15 of the 28 EU Member States with such bodies and accreditation. Their roles typically include interaction with international human rights monitoring mechanisms, and powers to recommend legislative and other changes at national level. They may also be involved in guiding or supporting claimants, or even process cases where this is within their mandate. A more systematic role could be developed in relation to monitoring the adequacy of existing remedies for business-related human rights abuse and to provide and facilitate victims' access to remedy.

As for non-state grievance mechanisms, inspiration could also here be sought from other areas. While issues such as labour rights may be where non-state mechanisms are the most needed, an example from EU's data protection framework can be useful. EU law provides 'data subjects' with the right to ask a company (a company based grievance mechanism of sorts) who is a 'data controller' to remedy grievances. If the complainant does not receive an adequate answer from the data controller, the data subject can file a complaint to the relevant national Data Protection Authorities (a state-based non-judicial body required in each EU Member State). Accordingly, companies who are data controllers are obliged by law to have an internal system in place to deal with such complaints. Neither the current Data Protection Directive nor the new General Data Protection Regulation (effective as of 25 May 2018) introduces any effectiveness criteria (such as being accessible and transparent) of such mechanism.[142] However, the new GDPR imposes an explicit obligation on data controllers to give effect to the rights of data subjects.[143]

The new General Data Protection Regulation also reinforces the overall accountability of data controllers. Data controllers must implement a number of security measures, including the requirement in certain cases to notify personal data breaches.[144] Companies that perform certain risky data processing must designate a data protection officer to ensure compliance with the rules.[145] Where a type of processing is likely to result in a high risk for the rights and freedoms of individuals the competent authorities must carry out an assessment of the

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141 FRA (2010), *The Impact of the Racial Equality Directive – Views of trade unions and employers in the European Union,* Luxembourg, Publications Office.

142 Court of Justice of the European Union (CJEU), *Commission* v. *Germany* (C-518/07), 9 March 2010 and *Commission* v. *Austria* (C-614/10), 16 October 2012.

143 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, Art. 12 (2).

144 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, Art. 34.

145 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, Art. 37.

potential impact of a certain processing, in particular when using new technology.[146] Although this may not improve access to remedy directly, such accountability mechanisms can promote the implementation of human rights due diligence which, in turn, can help to tackle some of the access to remedy barriers and address underlying causes of human rights abuse.

EU's data protection framework could also inspire in other ways. With the new General Data Protection Regulation, possible to complain before Data Protection Authorities "in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement", not only the one where a company is based.[147]

While the role of data protection in the EU and consequently the legal basis for EU action is quite different from business and human rights, the area shows what has been found required for effectiveness and what has been put in place.

Non-judicial grievance mechanisms can be based on multi-stakeholder initiatives, where a range of actors come together to establish, support or rely on a remedy. This can provide needed peer review, transparency and credibility for a remedy to be effective. Still, the knowledge of operational-level grievance mechanisms is limited and more could be done at an EU level to ensure that this information is gathered. As the UN Working Group on the issue of human rights and transnational corporations and other business enterprises stressed in a 2015 report to the UN General Assembly: "Research in the field of business and human rights lacks comprehensive data on the number and nature of complaints against companies for their adverse impacts and the effectiveness of the bodies tasked with investigating and remediating those impacts".[148]

Opinion 13 is relevant in the context of this sub-section.

2.2. OECD National Contact Points

The OECD Guidelines for Multinational Enterprises requires adhering countries to set up National Contact Points (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 […]" (Implementing Procedures, I (1)).[149] Although the NCP mechanism has been an element under the guidelines since 1984, it has received greater attention from 2000, after a revision of the OECD Guidelines, where NCP's competency was enlarged and when human rights were first included in the (Chapter IV).

146 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, Art. 35.

147 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016, Art. 77 (1).

148 UN General Assembly (2015), 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/70/216, 30 July 2015, para. 88.

149 OECD (2011), *OECD Guidelines for Multinational Enterprises*, Part. II, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Implementing Procedures, I (1).

Table 7: Standards on National Contact Points

2016 Council of Europe Recommendation	• Calls on states to adhere to and implement the *OECD Guidelines for Multinational Enterprises (*Appendix, para. 52) • States "which have implemented the OECD Guidelines should ensure the effectiveness of their National Contact Points (NCPs) established under these guidelines, in particular by making human and financial resources available so that they can carry out their responsibilities; ensuring that the NCPs are visible, accessible, transparent, accountable and impartial; promoting dialogue-based approaches; considering whether to make public the recommendations of NCPs; and ensuring that such recommendations are taken into account by governmental authorities in their decisions on public procurement, export credits or investment guarantees."(Appendix, para. 53.)
UN Guiding Principles	
2016 UN guidance	

As noted in the introduction, the June 2016 Council Conclusions encouraged improved effectiveness of EU Member States' National Contact Points and calls on the European Commission to include in its forthcoming proposal, EU legislative efforts and guidance to the Member States aimed at improving access to remedy.[150]

While the NCPs may function as a complementary non-judicial remedy,[151] only 22 of the EU Member States are among the 35 OECD countries adhering to the OECD Guidelines and an additional two EU Member States (Lithuania and Romania) have also signed up to the Guidelines.[152] Consequently, not all EU Member states are bound by the OECD Guidelines and, as a result, Bulgaria, Croatia, Cyprus and Malta are not under an obligation to establish an NCP. Among the 24 EU Member states that are so obliged, 17 are developing or have developed a National Action Plan (see further under Sub-section 3.1) to promote policy coherence and action in the area of human rights and businesses. Of these 17, only Lithuania did not include its NCP in the plan.[153]

As of 20 December 2016, NCPs in the EU Member States had revised a total number of 363 cases, the majority over employment and industrial relations (55 %) and alleged human rights abuses (26 %).[154] However, OECD Watch, an NGO, found that, out of the 250 cases it reviewed for the period 2001–2015, only 20 led to an acknowledgement of wrongdoing (by the NCP or the company), an additional 20 to a change in policy and 3 others to improvement

150 Council of the European Union (2016), *Council Conclusions on Business and Human Rights*, Doc. 10254/16, 20 June 2016, para. 13.

151 OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing.

152 Bulgaria, Croatia, Cyprus, Malta do not adhere to the OECD guidelines. For detailed information, see 'About the OECD Guidelines for Multinational Enterprises' on the OECD website.

153 OECD (2016), *Rapport annuel sur les principes directeurs de l'OCDE a l'intention des entreprises multinationales 2015*, OECD Publishing, p. 26.

154 OECD NCP Complaints Database.

on the ground.[155] For the period 2012–2015, during which only 105 complaints led to 4 acknowledgements of wrongdoing, 6 additionally to policy changes and 1 complaint to change on the ground.[156] None of these cases led to compensation for the victims.

While NCPs have the potential to influence enterprises' conduct and lead to better compliance with the guidelines, the system is yet to fully deliver at the required level. Problems of visibility, accessibility, transparency and independence account for some of these shortcomings. For instance, in spite of a promotional role of NCP, few organise awareness-raising activities. Of the 24 EU NCPs, only 14 organised any such actions during 2014 and 2015.[157]

Admissibility of complaints is under the scrutiny of NCP. According to the guidelines, NCPs must take into account "whether [an] issue is material and substantiated" before offering their good offices.[158] Many NCPs apply a rather high threshold.[159] Furthermore, NCPs sometimes use additional admissibility criteria than those six provided for in the Guidelines.[160] Submitting a claim can therefore be a challenge. Between 2001 and 2015, 43 % of the complaints brought to NCPs were deemed inadmissible, and this rose to 52 % between 2012 and 2015.[161] Financial barriers also prevent accessibility. Many NCPs cannot bear translation and travel costs necessary for an effective process. Such costs are shifted to the complainants.

Transparency is also often compromised. While confidentiality should be limited to sensitive business information,[162] it often surrounds the whole process, especially during the mediation phase. Parties might be asked not to communicate about the mediation process or the lodging of a complaint. Besides the impact on the overall visibility of NCPs, this also prevents complainants from gaining the needed public attention.[163]

Besides a certain lack of transparency, the trust in the independence of NCPs can also be compromised by the very structure of an NCP, where they are too closely related to government. This has an impact on the number of complaints submitted and on the outcome of these complaints.

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155 Daniel, C. *et al* (2015), *Remedy remains rare*, OECD Watch, p. 18. The critical assessment was confirmed in terms of resources dedicated to the operations of the NCPs by a study by the organisation itself : OECD (2015), OECD report to G7 Leaders on Responsible Business Conduct, p. 6.

156 *Ibid.*

157 OECD (2016), *Rapport annuel sur les principes directeurs de l'OCDE a l'intention des entreprises multinationales 2015*, OECD Publishing, Annex III.

158 OECD (2011), *OECD Guidelines for Multinational Enterprises*, Part. II, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Art. 25.

159 For instance, in a case against Shell in Sakhalin, the NCP in the Netherlands rejected the complaint on the basis that there was no previous court ruling finding non-compliance; see Daniel, C. *et al* (2015), *Remedy remains rare*, OECD Watch, p. 25.

160 "The identity of the party concerned and its interest in the matter; whether the issue is material and substantiated; whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance; the relevance of applicable law and procedures, including court rulings; how similar issues have been, or are being, treated in other domestic or international proceedings; and whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines." OECD (2011), *OECD Guidelines for Multinational Enterprises*, Part. II, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Art. 25.

161 Daniel, C. *et al* (2015), *Remedy remains rare*, OECD Watch, p. 13.

162 OECD (2011), *OECD Guidelines for Multinational Enterprises*, Part. II, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Art. 32.

163 Daniel, C. *et al* (2015), *Remedy remains rare*, OECD Watch.

The relatively poor performance is also underscored by the Council Conclusions on business and human rights of 20 June 2016, requesting FRA to adopt this opinion, which called for "further enhance[ment of] the effectiveness of their National Contact Points (NCPs): The Council encourages these Member States to promote peer reviews and learning on the functioning and performance of NCPs. The Council calls on the Commission and Member States to actively participate in the OECD's efforts to strengthen the capacity of NCPs within the EU and in the EU's partner countries."[164]

In addition to an overall strengthening of NCPs and availability in all EU Member States – and possibly one for the EU itself (similarly to its monitoring mechanism under the UN CRPD) – the EU could set up a one-stop webpage or contribute to an existing one, accessible at least in all EU languages, and advertise the existence of this overview in appropriate fora. Moreover, the website could offer comparative overviews on the respective NCPs, as well as generally the role of NCPs and of the OECD guidelines.

Opinions 14 and 15 are relevant in the context of this sub-section.

[164] Council of the European Union (2016), *Council Conclusions on Business and Human Rights*, Doc. 10254/16, 20 June 2016, para 17.

3. Implementation

Effective implementation of the various judicial and non-judicial grievance mechanisms, both state and non-state based, is crucial to ensuring access to remedy for victims of business-related human rights abuses. Implementation of the UN Guiding Principles in the EU with respect to the third pillar can be strengthened and achieved through:

- the development and adoption of National Action Plans (NAPs);
- the establishment of an Open Method of Coordination mechanism on business and human rights;
- further awareness raising activities and transparency on access to remedy.

In order for the EU to achieve results in an area where the division of competence of the EU vis-à-vis its Member States is complex, NAPs and the Open Method of Coordination can be key. While distinct tools, they share potential elements, such as collaboration and peer review.

3.1. National Action Plans

National Action Plans (NAPs) are strategic policy documents, either stand-alone or integrated into other government strategies, which outline ways in which States can protect against business-related human rights abuses and serve as an instrument to implement the UN Guiding Principles. NAPs take as a starting point the UNGPs and other standards, such as those set by the OECD Guidelines on Multinational Enterprises, and ideally cover the full range of aspects related to business and human rights, including the third pillar on access to remedy. The specific thematic priorities of the NAPs developed to date vary, depending largely on the country context. For example, Italy's NAP addresses irregular working conditions and labour exploitation in the agricultural sector.

Table 8: Standards on National Action Plans

2016 Council of Europe Recommendation	• The need to "share plans on the national implementation of the UN Guiding Principles on Business and Human Rights ("National Action Plans"), including revised National Action Plans and best practice concerning the development and review of National Action Plans". • These would even be available "in a shared information system, to be established and maintained by the Council of Europe, which is to be accessible to the public, including through reference to existing information systems". (Appendix, para. 4) • Member States should adopt such plans and that they should cover all three pillars of the UN Guiding Principles, including access to remedy (Appendix, para. 10) • Consultations in the development of plans should take place, explicitly with National Human Rights Institutions, trade unions and NGOs, for instance. (Appendix, para. 11) • In cooperation with stakeholders, Member States should ensure continuous monitoring of the plans. (Appendix, para. 12)[165]

[165] This is explained further in para. 19 of the Explanatory Memorandum to the Recommendations, CM(2016)18-addfinal, 2 March 2016, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1a7f.

UN Guiding Principles	
2016 UN guidance	Member States should "[d]evelop a comprehensive strategy for implementation of the guidance [...] for instance, as part of national action plans on business and human rights, and/or as part of strategies to improve access to justice generally". (Report, para. 31)

The United Nations Working Group on Business and Human Rights has encouraged all States to "develop, enact and update a [NAPs] as part of the State responsibility to disseminate and implement the UN Guiding Principles on Business and Human Rights."[166] In 2014, it released an updated version of its guidance on the development of NAPs, which highlights among many areas the need for both states and businesses to consider how access to remedy through both judicial and non-judicial mechanisms can be built into the strategies.[167]

At the EU level, the 2016 Council Recommendation also stresses the importance of ensuring access to remedy through the NAPs, as also referred to in the introduction. "The Council recalls that access to effective remedies for victims of business-related human rights abuses is of crucial importance and should be addressed in [NAPs]."[168] In February 2017, the Council of the EU adopted conclusions on EU priorities in UN fora for the year 2017. These included a commitment to the UN Guiding Principles and the UN guidance (the OHCHR's Accountability and Remedy Project) that the EU would continue to work on implementing these principles and encourage more of its Member States to adopt NAPs.

Although the NAPs are a global response to the UN Guiding Principles, the European Commission invited EU Member States to develop NAPs in the 2011 CSR Communication, formulated as "their own plans or national lists of priority actions to promote CSR in support of the Europe 2020 strategy, with reference to internationally recognised CSR principles and guidelines". This should be developed, according to that document, "in cooperation with enterprises and other stakeholders".[169]

FRA's Fundamental Rights Forum recommends EU Member States to adopt action plans

The Chair Statement of FRA's 2016 Fundamental Rights Forum underlined the importance of National Action Plans for business and human rights in EU Member States (Point No. 57).

See: http://fra.europa.eu/sites/default/files/fra_uploads/frf-2016-chairs-statement-1_en.pdf

Also the Draft CESCR General Comment on business and human rights recalls the obligation (Article 2.1) under the Covenant to take all appropriate steps to implement the Covenant and links this to National Action Plans. The draft General Comment suggests the procedure for adoption of such plans to take the form of a "process through which relevant actors, including civil society, the private sector and international organizations, will be

166 http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx

167 https://business-humanrights.org/en/un-working-group-releases-guidance-on-natl-action-plans; there are also other initiatives, such as The Danish Institute for Human Rights and the International Corporate Accountability Roundtable (2014), *National Action Plans on Business and Human Rights – A toolkit for the development, implementation and review of state commitments to business and human rights frameworks*

168 Council of the European Union (2016), *Council Conclusions on Business and Human Rights*, Doc. 10254/16, 20 June 2016, para. 12.

169 European Commission (2011), *Communication, A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final, 25 October 2011, p. 13.

involved in its design and implementation; and the responsibilities of national mechanisms for implementation and monitoring."[170] Emphasis is also given to measuring progress, with the draft General Comment stating that:

> *"[i]n developing and implementing their national strategies and plans of actions, as well as indicators and benchmarks in this context, States Parties should incorporate human rights principles, including effective and meaningful participation, non-discrimination and gender equality, and accountability and transparency. States Parties should also ensure that monitoring mechanisms are in place to give effect to the national strategies and plans of action. The Committee recalls in this regard the fundamental role that national human rights institutions and civil society organizations can and should play in achieving the full realization of the Covenant rights in the context of business activities."*[171]

Several of the EU Member States have by now adopted NAPs, either as freestanding strategies or as part of a more overarching CSR plan.[172] Eight EU Member States have so far produced a NAP: Denmark, Finland, Germany, Italy, Lithuania, the Netherlands, Sweden, and the United Kingdom. NAPs are also in progress in at least Belgium, the Czech Republic, France, Greece, Ireland, Latvia, Poland, Portugal, Scotland, Slovenia and Spain.

The completed NAPs generally include a chapter on the third pillar, mostly outlining existing measures for judicial and non-judicial remedy, such as access to tribunals and courts, national Ombudsman, National Human Rights Institutions, employment tribunals, and development and existence of the NCPs as called for by the OECD Guidelines. The NAPs also commonly highlight the existence of trade unions and NGOs who have supported consultations and settlement proceedings. Most existing NAPs include a short overview of how to access judicial remedy, as well as underlining possibilities for legal aid and other grievance mechanisms for victims of business-related human rights abuses.

Some Member States have also outlined additional concrete measures to facilitate better access to remedy. In Denmark, a mediation and complaints-handling institution was established by law in 2012 with the purpose to investigate cases involving Danish companies with respect to international CSR guidelines, the OECD Guidelines and the UN Guiding Principles.[173] Similarly, in the Netherlands, the ACCESS Facility was set up in 2012 to improve access to effective dispute settlements between companies and communities at local level.[174] The government of the United Kingdom, including through its Trade and Investment (UKTI) teams, has also committed to encouraging UK companies to establish or participate in grievance mechanisms and to extend such grievance mechanisms to their

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170 UN, Committee on Economic, Social and Cultural Rights (2016), draft *General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 17 October 2016, para 52. The draft also makes reference, in para. 33, to the academic expert initiative, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 28 September 2011.

171 UN, Committee on Economic, Social and Cultural Rights (2016), draft *General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 17 October 2016, para 53.

172 For a list of such plans, see http://ec.europa.eu/growth/industry/corporate-social-responsibility/in-practice_en; for a more visual overview, see https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans. On 21 December 2016, also Germany adopted an action plan.

173 More information available at: http://businessconduct.dk/

174 Ministry of Foreign Affairs, the Netherlands (2014), *National Action Plan on Business and Human Rights*.

overseas operations.[175] Lithuania has adopted or put forward various legislative amendments to improve conditions for collective redress and establish more effective procedures for extrajudicial dispute resolutions.[176]

However, the existing NAPs are still quite general with regard to implementing measures in the area of access to remedy. They could be further strengthened through more concrete steps to provide increased access to information and awareness raising, further operational activities to lower barriers to access to remedy, strengthening the scope and activities of the NCPs, support to various grievance mechanisms and other actions from governments, businesses and civil society. Specialised working groups or inter-ministerial committees, as is foreseen, for example, in the Italian NAP could undertake further reviews of legal mechanisms, identification of gaps in access to judicial remedy with respect to extraterritorial violations, and additional measures to strengthen access to remedy in civil, criminal and administrative justice.[177] Trainings for judges, lawyers and other relevant stakeholders would also be logical elements.

The 2016 Council of Europe Recommendation calls for allocation of "sufficient resources and [to] consider developing special guidance and training for judges, prosecutors, inspectors, arbitrators and mediators to deal with business-related human rights abuses, in particular those which have a transnational component."[178] The Recommendation also refers to the need for "more efforts to support each other through technical co-operation and the exchange of experience."[179]

The EU has the potential to support EU Member States in ensuring an annual follow up on their action plans, indicating what has been achieved and what needs to be done when it comes to remedies. In particular, support could include guidance on how to better integrate the UN Guiding Principles into new and existing strategies, beyond listing existing measures already undertaken by Member States. The process could include peer review and should be forward looking, not only reflective. The development of NAPs should involve the wide range of stakeholders and these should also be part of the monitoring of progress. The NAPs should also include indicators and benchmarking. The European Commission has set up a High-Level Group on Corporate Social Responsibility where issues such as NAPs can be discussed.[180] The Commission has also run a series of peer reviews with the Member States.[181]

As described, also the EU itself has adopted consecutive plans in this regard although not explicit 'action plans'. Periodic updates and monitoring of such actions have not yet taken place, although there is potential for further development in this area, given the central role of NAPs as elaborated here – not the least to improve access to remedy, and how these

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175 HM Government, UK (2013), *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*.

176 Permanent Mission of the Republic of Lithuania to the United Nations Office and other International Organisations in Geneva (2015), *Lithuania's Action Plan on the Implementation of the United Nations Guiding Principles on Business and Human Rights*.

177 Italian National Action Plan on Business and Human Rights, 2016–2021.

178 Council of Europe, Committee of Ministers (2016), Recommendation CM/Rec(2016)3 on human rights and business, 2 March 2016, Appendix, para 56.

179 Council of Europe, Committee of Ministers (2016), Recommendation CM/Rec(2016)3 on human rights and business, 2 March 2016, Appendix, para 51.

180 Letter from the European Commission in response to national parliament green card motion, 15 December 2016, p. 4.

181 See the website of the European Commission, Employment, Social Affairs & Inclusion.

should be developed and monitored, and in order "to exercise leadership to build genuine commitment and capacity to achieve tangible progress in standards, business behaviour and change for rights-holders."[182]

Developments towards a treaty on business and human rights

The UN Human Rights Council established an inter-governmental working group on business and human rights, which is tasked to develop an international human rights law treaty.[183] The working group will meet for the third time in October 2017. The treaty may bring, in due course, obligations under international law. What these obligations will be is far from certain but they could include issues such as reporting, jurisdiction and minimum standards for remedies, or obligations to adopt National Action Plans (NAPs) on business and human rights and to report on these through a peer review process. Steps should be taken in anticipation of this treaty, including improvements in accessing remedy in business-related human rights abuse cases, to maintain EU leadership on these issues.

All EU Member States should develop comprehensive NAPs in line with the UN Guiding Principles and the OECD Guidelines as to NCPs and on the basis of stakeholder consultation, including concrete measures targeted towards improving access to remedy. The EU could encourage faster adoption, greater harmonisation, better comparison between the plans, and stronger peer review on the plans themselves and on the action to which they are committed. Additionally, the EU could encourage Member States with existing NAPs and particularly those currently developing NAPs to include measures for undergoing independent and peer reviews as well as stakeholder consultation on remedy, as has been included in the recent NAP of the United States of America.[184]

Opinion 18 is relevant in the context of this sub-section.

3.2. Open Method of Cooperation

The Open Method of Coordination (OMC) is a form of intergovernmental policy-making that originated in the 1990s as part of employment policy, and has provided "a new framework for cooperation between the EU countries, whose national policies can thus be directed towards certain common objectives."[185] Under the OMC, EU Member States jointly identify objectives, exchange practices in the way they design policies and funding schemes, evaluate one another and jointly establish measuring instruments such as statistics, indicators and guidelines. The European Commission plays an organising and monitoring role, for example, in benchmarking and comparing countries' performance and exchanging best practices, as well as hosting most of the meetings and conducting research and studies. Until now, the OMC has been applied in the policy areas of employment, education, social protection, youth and vocational training.

The Open Method of Coordination offers a possibility to use the power of peers to make progress on access to remedy in the area of business and human rights. The development of an OMC in the area of business and human rights allows for potential to create among EU

182 Statement by leading business associations at the UN Annual Forum on Business and Human Rights (2016), 'Statement on national action plans on business and human rights', 16 November 2016, para 2.

183 See the dedicated section of the OHCHR website.

184 United States State Department (2016), *Responsible Business Conduct: First National Action Plan for the United States of America*.

185 On the Open Method of Coordination, see http://eur-lex.europa.eu/summary/glossary/open_method_coordination.html

Member States a common understanding of the problems and challenges in implementing the UN Guiding Principles, as well as to build consensus on their practical implementation. Given the shared competence between the EU and the Member States in many of the areas that relates to business and human rights, and with various obligations at international and EU levels through the UN Guiding Principles, ILO and OECD Guidelines, in addition to initiatives in the broader field of CSR, the OMC mechanism would be suitable to establish common approaches between different processes at various levels of governance. From the EU perspective, the OMC could also provide a way to monitor how EU law in the area of business and human rights is implemented and identify areas of potential future action.

Inspiration for the methodology could be sought from other areas where the OMC is applied, such as in relation to employment, social policy and social inclusion, and also recently in the area of culture.[186]

The methodology could in particular be used in relation to access to effective remedies, as suggested by the recent Resolution by the European Parliament, which invited "the Commission to undertake a thorough examination, in consultation with all stakeholders, including civil society and corporations, of existing barriers to justice in cases brought before the courts of Member States for alleged human rights abuses committed by EU-based enterprises abroad".[187]

Opinion 19 is relevant in the context of this sub-section.

3.2. Awareness and transparency

For access to remedy to be effective, a number of actions need to be considered more generally – such aspects as highlighted in relation to the NCPs, including increased transparency for the sake of accessibility and awareness raising, as well as an improved evidence-base for assessment.

Table 9: Standards related to awareness and transparency

2016 Council of Europe Recommendation	• "Member States should assist in raising awareness of and in facilitating access to non-judicial grievance mechanisms, and contribute to knowledge sharing of the available non-judicial grievance mechanisms." (Appendix, para. 49) • There should be "general access to information about the content of the respective human rights and about existing judicial and non-judicial remedies in a language which [claimants in business related human rights abuses] can understand". (Appendix, para 57)
UN Guiding Principles	
2016 UN guidance	• The need for states to actively "improve access to information for claimants and their legal representatives in cross-border cases (Policy objective 18)

[186] European Commission (2009), *Reinforcing the Open Method of Coordination for social protection and social inclusion*. See also: http://ec.europa.eu/social/main.jsp?catId=1063&langId=en. See also: http://europa.eu/rapid/press-release_MEMO-11-216_en.htm

[187] European Parliament (2016), Resolution on corporate liability for serious human rights abuses in third countries, 2015/2315(INI), Strasbourg, 25 October 2016, para. 24.

Remedies, both state-based and non-state-based, must offer, at a very minimum, a certain level of transparency to the general public as to their existence and their general operations. The UN Guiding Principles suggest that access to remedy requires also that states "facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so."[188] Awareness on existing mechanisms starts with solid outreach work. FRA research shows that enabling access to justice requires also practical support to victims, including awareness raising on their rights.[189] Additionally, as to complainants, specific process updates on the complaint in question are needed. Minimum standards for a remedy must also ensure that the mechanisms have enough 'teeth' to ensure change and remedial action. Transparency on the process will contribute to needed incentives for impact in this regard. Resource allocation can also pose a barrier to effective grievance mechanisms and in terms of practically promoting awareness on their existence and transparency.

In line with the effectiveness criteria for grievance mechanisms outlined in the UN Guiding Principles, access to remedies must also be continuously assessed with a view to improvements, drawing on lessons learned to both improve existing mechanisms and to prevent future harm. As stated, and also supported by FRA research in the area of access to justice, victims of human rights violations often find existing redress mechanisms too complex. They also often lack awareness of their substantive and procedural rights, in particular those rights guaranteed in EU and/or international law, and therefore do not seek justice through the courts. These issues pose particular challenges in situations involving cross-border litigation.

Several tools exist at the EU level that help to overcome these obstacles to access to remedy. For example, the European Commission set up the European e-Justice Portal to increase awareness of rights under EU law, as well as to help with cross-border legal issues and boost mutual understanding of different legal systems. Currently, the information and resources provided in the Portal are available in all EU official languages, ranging from information on legal aid, judicial training, European small claims and videoconferencing to links to legal databases, online insolvency and land registers. It also includes user-friendly forms for various judicial proceedings, such as the European order for payment and it includes a section on which non-judicial bodies one can turn in cases of violation of fundamental rights.[190] The European e-Justice portal is based on cooperation where EU Member States feed the European Commission with specific national-level information that concern their respective legal systems.

The European e-Justice Portal is conceived as the electronic one-stop-shop in the area of justice. However, the tool has further potential to be extended to include concrete information, including through an interactive way, on the rights as well as redress avenues at national as well as EU level, targeting specifically victims of cross-border business-related human rights abuse. Relevant national and EU rules on private international law (Rome and Brussels regimes), and their application in EU Member States is also not yet reflected in the information. An additional place for such information would be the future European

188 UN (2011), *Guiding Principles on Business and Human Rights*, Commentary to Foundational Principle 25. 25.

189 FRA-European Court of Human Rights (ECtHR) (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office.

190 As for the non-judicial part of this section, it will be based on the Clarity tool developed and launched by the FRA in 2015.

Commission Single Digital Gateway, intended to provide "easy online access to Single Market information, procedures, assistance and advice for citizens and businesses."[191]

One additional mechanism that is still lacking at EU level is a repository for EU companies that have obligations under EU instruments, such as the mentioned Non-financial Reporting Directive and the Shareholders' Rights Directive, with details on their delivery on these obligations, including access to remedy – procedures and practice, for instance operational level grievance mechanisms.

A network of contact persons in each EU Member State, which can advise and assist in cases of business-related human rights abuse, as well as exchange promising practices is also not yet fully developed in the EU.

Opinions 16 and 17, as well as 20 and 21, are relevant in the context of this sub-section.

[191] See the Public Consultation, deadline 28 November 2016, available at: http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8896

Annex

Business and human rights

Although human rights stem from the relationship between states and people, where the national government of a state is the duty bearer of rights enjoyed by the rights holders, the people, the nature of rights has evolved. With the increased role, influence, and capacity of corporations in society and the resulting risks of negative impact with operations abusing rights, a responsibility for business to 'respect' human rights has been recognised.

The European Court of Human Rights has recognised in several cases the so-called 'horizontal application' of the Convention. The concept derived from the doctrinal theory called '*drittwirkung*' (third party effect). It suggests that the ECHR applies also in the relations between private parties (horizontal effect), as opposed to 'vertical effect' of human rights between states as duty bearers and individuals as rights holders. In short, this means that states, as a parties to the ECHR, have an obligation to prevent human rights abuses by third parties (for example in relations between labour unions and employers). This case law, while useful for human rights in a business context, does not solve all the issues related to business and human rights, and in particular not in the area of access to justice. It is partly for this reason, that the need to develop principles for business and human rights has arisen.

The United Nations Human Rights Council endorsed in 2011 the three pillar-framework of the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) formulated by the UN Secretary General's Special representative on business and human rights (formally 'on the issue of human rights and transnational corporations and other business enterprises'):

1. the state duty to protect human rights;
2. the corporate responsibility to respect;
3. the need for access to remedy for victims – judicial and non-judicial.

The UN Guiding Principles "clarify and elaborate on the implications of relevant provisions of existing international human rights standards, some of which are legally binding on States, and provide guidance on how to put them into operation. The UN Guiding Principles refer to and derive from States' existing obligations under international law."[192] The UN Guiding Principles are the first universally accepted global framework which addresses business-related human rights abuses, and although they are not legally binding, they are widely recognised and supported, and serve the basis for policy approaches towards business and human rights internationally.

The first pillar is the traditional understanding of human rights obligations on states. The "corporate responsibility to respect human rights", the second pillar requires "act[ing] with due diligence to avoid infringing on the human rights of others" and addressing this "requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation" to "adverse human rights impacts with which they are involved."[193]

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192 OHCHR (2014), Frequently asked questions about the guiding principles on business and human rights, New York and Geneva: United Nations publication.

193 UN, Human Rights Council (2011), *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business*

The third pillar, on which this opinion focuses, contains one 'foundational principle', Principle 25. It holds that "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."[194] An additional six 'operational principles' complete the third pillar, dealing with:

- "state-based judicial mechanisms" (Principle 26)
- "state-based non-judicial grievance mechanisms" (Principle 27)
- "non-state-based grievance mechanisms" (Principles 28, 29 and 30)
- "effectiveness criteria for non-judicial grievance mechanisms" (Principle 31)

A remedy, according to the Commentary on the UN Guiding Principles,[195] can be "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." Also, at the procedural level, the "remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome."

The UN Guiding Principles detail that remedies can be provided by "courts (for both criminal and civil actions), labour tribunals, National Human Rights Institutions, National Contact Points under the Guidelines for Multinational Enterprises of the [Organisation for Economic Co-operation and Development, OECD], many ombudsperson offices, and Government-run complaints offices." Moreover, for the remedies to be effective, the principles require states to "facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so."

Legal and policy framework – business and human rights generally, at international and European levels

The area of business and human rights has received increasing attention over the last decades. Figure 2 offers a schematic overview of actions by main actors: the United Nations, the Council of Europe and the EU specifically on business and human rights. The ensuing text elaborates on the actions by the UN and the Council of Europe in addition to those by the OECD and ILO, as well as ISO standards. The next sub-section provides an overview of the EU initiatives.

and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 21 March 2011, Principle II A 11. This was endorsed by UN, Human Rights Council (2011), *Human rights and transnational corporations and other business enterprises*, 6 July 2011; and OHCHR (2012), *The corporate responsibility to respect human rights: An interpretative guide*, Geneva, Publishing Service of the UN.

194 UN (2011), *Guiding Principles on Business and Human Rights*, foundational principle 25.

195 *Ibid.*, Commentary to foundational Principle 25.

Figure 2: Overview of key legal and policy framework for business and human rights of relevance to the EU

United Nations	Global Compact 2000 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, 21 March 2011 Committee on the Rights of the Child, General Comment No. 16 on state obligations regarding the impact of the business sector on children's rights (2013) OHCHR Guidance – Business and Human Rights: Improving accountability and access to remedy for victims of business-related human rights abuse, A/HRC/32/19, 10 May 2016 (and related documents) Committee on Economic, Social and Cultural Rights, General Comment on State Obligations in the Context of Business Activities, forthcoming (2017)
ILO	Tripartite declaration of principles concerning multinational enterprises and social policy, 1977 (2014 4th edition)
ISO	ISO 26000:2010 – Guidance on social responsibility (2010)
OECD	OECD Guidelines for Multinational Enterprises, 1976/2000 (2011 with a dedicated human rights chapter) OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017)
Council of Europe	Parliamentary Assembly (PACE) Resolution 1757 (2010) on Human rights and business & Recommendation 1936 (2010) on Human rights and business, 6 October 2010 Committee of Ministers Recommendation CM/Rec(2016)3 on human rights and business, 2 March 2016.
EU	European Commission, Green Paper – Promoting a European Framework for Corporate Social Responsibility (2001) European Commission, Communication on a renewed EU strategy 2011-2014 for Corporate Social Responsibility (2011) European Commission, Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights, SWD(2015) 144 final, 14 July 2015 Council Conclusions on Business and Human Rights, 10254/16, 20 June 2016

Source: FRA 2017

The United Nations sought to address the issue of transnational corporations and their influence on societies already in the 1970s.[196] In the late 1990s, the then UN Sub-Commission for the promotion and protection of human rights, set up under the Commission

[196] A Commission on Transnational Corporations and the United Nations Centre on Transnational Corporations (UNCTC) was established in 1974.

on Human Rights (what is now the Human Rights Council) established a working group on transnational corporations. The working group developed a set of norms on human rights obligations of companies that were adopted by the Sub-Commission.[197] However, the Commission on Human Rights, when having the opportunity in 2004, did not approve the text.

In 2000, the UN Secretary-General initiated the Global Compact and five years later appointed a Special Representative on business and human rights. The Global Compact commits businesses, on a voluntary basis, to more sustainable and socially responsible actions. Currently, the close to 10,000 'active' businesses and related actors that have signed up globally, include some 4,000 from the EU 28.[198]

The Special Representative of the UN Secretary-General, Professor John Ruggie, led the work of developing the UN Guiding Principles, adopted in 2011. Following the adoption, the UN Human Rights Council established a working group on "human rights and transnational corporations and other business enterprises", tasked with promotion, exchange of promising practices and engagement with stakeholders, among other things.[199] The working group also guides the annual Forum on Business and Human Rights, taking place in Geneva since 2014.

In 2014, the UN Human Rights Council also established an inter-governmental working group on business and human rights, with a view to elaborate a legally binding instrument on business and human rights.[200]

In 2016, the Office of the United Nations High Commissioner for Human Rights (OHCHR) issued a comprehensive guidance based on multi-stakeholder consultations dealing in particular with access to remedy (and accountability), providing concrete advice on what tools work well in order to implement the UN Guiding Principles – guidance welcomed by the UN Human Rights Council.[201] The guidance consists of four elements that are used extensively in this opinion:

1. A report of the UN High Commissioner for Human Rights to the Human Rights Council (10 May 2016)
2. An annex to the report with the guidance, formulated as 19 'policy objectives'
3. A note by the Secretariat (OHCHR) in the form of an addendum to the report by the High Commissioner (12 May 2016), providing explanations and context to the policy objectives
4. Illustrative examples, accompanying the policy objectives and explanations, with details on concrete possible models (5 July 2016)

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197 UN (2003), Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003

198 Calculation based on data available on the United Nations Global Compact website.

199 See the dedicated section of the OHCHR website.

200 See the dedicated section of the OHCHR website.

201 OHCHR (2016), *Business and human rights: Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19, 10 May 2016, accompanied by a Note by the Secretariat, A/HRC/32/19/Add.1, 12 May 2016, and Illustrative examples, Companion Document to A/HRC/32/19 and A/HRC/32/19/Add.1, 5 July 2016. The report was welcomed by the UN Human Rights Council in UN, Human Rights Council (2016), *Business and human rights: improving accountability and access to remedy*, A/HRC/32/L.19, 29 June 2016.

The UN has also sought stakeholder comments on a draft paper specifically on state-based non-judicial mechanisms.[202]

The Council of Europe, working in parallel, started with the Parliamentary Assembly adopting a resolution[203] accompanied by a recommendation[204] to the Committee of Ministers to take action, including clear guidance and a possible legally binding instrument on business and human rights. This in turn was followed by a Committee of Ministers-decision tasking the Steering Committee for Human Rights (CDDH) to develop standards for a Recommendation. After the CDDH finalized its drafting process in December 2015, the Committee of Ministers of the Council of Europe adopted Recommendation (2016)3 to member States on human rights and business in March 2016.[205]

Council of Europe Guide to human rights for internet users: effective remedies and redress

Building on the various instruments of the Council of Europe, in particular the European Convention on Human Rights (ECHR), the guide on human rights for internet users provides specifics under seven headings, such as non-discrimination and freedom of expression. The last heading deals with effective remedies and redress, and states: "To obtain a remedy, you should not necessarily have to pursue legal action straight away. The avenues for seeking remedies should be available, known, accessible, affordable and capable of providing appropriate redress. Effective remedies can be obtained directly from Internet service providers, public authorities and/or national human rights institutions. Effective remedies can – depending on the violation in question – include inquiry, explanation, reply, correction, apology, reinstatement, reconnection and compensation."

The guide also notes which practical implications this will have, including: "**Your Internet service provider, providers of access to online content and services, or other company and/or public authority should inform you about your rights, freedoms and possible remedies** and how to obtain them. This includes easily accessible information on how to report and complain about interferences with your rights and how to seek redress. **Additional information and guidance should be made available** from public authorities, national human rights institutions (such as ombudspersons), data protection authorities, citizens' advice offices, human rights or digital rights associations or consumer organisations." (Emphasis as in original)

For further information, see the dedicated website of the Council of Europe

202 See the dedicated section of the Business &Human Rights Resource Centre's website.

203 Council of Europe, Parliamentary Assembly (PACE) (2010), Resolution 1757 (2010) on Human rights and business, 6 October 2010.

204 Council of Europe, PACE (2010), Recommendation 1936 (2010) on Human rights and business, 6 October 2010.

205 Council of Europe, Committee of Ministers (2016), Recommendation CM/Rec(2016)3 on human rights and business, 2 March 2016. See also the Explanatory Memorandum, CM(2016)18-addfinal, 2 March 2016.

In the 1970s, the OECD (Guidelines for Multinational Enterprises)[206] and ILO (Tripartite declaration of principles concerning multinational enterprises and social policy)[207] instruments were initiated, which continue to play important roles in ensuring businesses' compliance with human rights today. The OECD scheme requires the establishment of National Contact Points (which is explored in Sub-section 2.2). The OECD has also, for example, issued guidance on stakeholder engagement in the extractive sector, including reference to due diligence and access to remedy as important aspects of business conduct, not only in terms of obligations to respect human rights, but also as making good business sense.[208] The ILO can set up Commissions of Inquiry when a state is consistently and seriously violating commitments made – nonetheless this measure is rarely taken.[209] In later years, there is also a standard developed for business and human rights (ISO 26000:2010), which includes complaints and dispute resolution standards in consumer-related issues (Sub-clause 6.7.6).[210]

EU main initiatives on business and human rights

There are a number of significant steps taken by the European Union in the area of business and human rights, including access to remedy. The European Commission issued in 2001 a Green Paper on Corporate Social responsibility (CSR),[211] and committed in the Europe 2020 strategy to a CSR policy document in 2010 "as a key element in ensuring long term employee and consumer trust".[212] This commitment materialised in the form of an Action Plan for 2011–2014.[213] This EU CSR strategy made the link to human rights more explicit, stating that there is a "need to give greater attention to human rights, which have become a significantly more prominent aspect of CSR." (p. 5) It also moved from earlier language of voluntary contributions by business to society to a "responsibility". (p. 6) The strategy also renewed the commitment of the EU to the UN Guiding Principles, stressing that "European policy to promote CSR should be made fully consistent with this framework." (p. 7)

As part of this commitment, implementation of the UN Guiding Principles was foreseen with several actions. The European Commission announced the creation of "a peer review mechanism for national CSR policies" in 2012 (p. 12), to develop sectoral-specific human rights guidance (p. 12), and invited Member States to have in place updated National Action Plans on the implementation of the UN Guiding Principles by the end of that year. (p. 14) Also, the strategy noted that any process should "include an effective accountability

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206 OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing; and on the webpage of the OECD Guidelines for multinational enterprises.

207 International Labour Organisation (ILO) (2006), Tripartite declaration of principles concerning multinational enterprises and social policy, Geneva, International Labour Office. A 5th edition is expected to be adopted in 2017.

208 OECD (2017), *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, OECD Publishing.

209 For more information, see 'Complaints' on the International Labour Organisation website.

210 For more information, see 'ISO 26000 – Social responsibility' on the ISO website.

211 European Commission (2001), *Green paper – Promoting a European Framework for corporate social responsibility*, COM(2001) 366 final, 18 July 2001.

212 European Commission (2010), *Communication, Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, 3 March 2010, p. 17.

213 European Commission (2011), *Communication, A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final, 25 October 2011.

mechanism for dealing with complaints regarding non-compliance [with "self- and co-regulated]" CSR processes, such as codes of conduct. (p. 10)

Following up on the EU Strategy, in 2013 the European Commission issued three Sectoral guides, concerning employment and recruitment agencies; information and communication; as well as oil and gas – all with a "Remediation and Operational-Level Grievance Mechanisms"-section.[214] These sections outline aspects for business to consider in terms of 'external' (such as the OECD National Contact Points or National Human Rights Institutions) as well as 'operational-level' (company-based) complaints mechanisms.

In 2015, the European Commission issued a Staff Working Document on the implementation of the UN Guiding Principles, reinforcing its commitment to the UN Guiding Principles.[215] This commitment is also stressed in the EU Action Plan on Human Rights and Democracy 2015–2019, issued by the Council of the European Union. The list of action points includes (Number 18) details on efforts in support of implementing the UN Guiding Principles.[216] The European Instrument for Democracy and Human Rights has also been equipped with a dedicated budget line to support civil society in cases concerning business and human rights.[217]

In 2016 the European Parliament debated an own-initiative report on "corporate liability for serious human rights abuses in third countries".[218] The ensuing resolution, adopted on 25 October 2016, "[c]alls on the Commission and Member States to guarantee policy coherence on business and human rights at all levels: within different EU institutions, between the institutions, and between the EU and its Member States, and in particular in relation to the Union's trade policy".[219] The resolution also encourages a set of actions aimed at improving access to a remedy, some of which are noted in the respective sections of this opinion.

Human rights due diligence is another angle through which the EU approaches business and human rights. Although not explicitly related to access to remedy, the EU legislated in 2010 to prevent illegally logged timber and timber products to enter the single market (a due diligence obligation through the supply chain to ensure that the timber can be traced to its source).[220] The EU legislators have also agreed on enhanced requirements for larger EU companies, through revisions of the Shareholders' Rights Directive (2007/36/EC) to achieve greater transparency and engagement with shareholders.[221] Furthermore, in March 2017 the European Parliament approved a draft EU regulation on a European Union "system for supply chain due diligence self-certification of responsible importers of [rare minerals] and gold". According to Article 1 of this EU regulation, it would "curtail opportunities for armed groups and security forces [...] to trade in [rare minerals] and gold [... and would] provide transparency and certainty as regards the supply practices of importers, smelters

214 For more information, see 'Corporate social responsibility in practice' on the Commission website.

215 European Commission (2015), *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play*, SWD(2015) 144 final, 14 July 2015, p. 23.

216 Council of the European Union (2015), EU Action Plan on Human Rights and Democracy, p. 29.

217 Mentioned in the Statement on behalf of the EU, 27 October 2016, at the UN Human Rights Council's Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. See also 'Small grants' on the European Commission website.

218 European parliament, Committee on Foreign Affairs (2016), *Draft report on corporate liability for serious human rights abuses in third countries*, 2015/2315(INI), Brussels, 18 March 2016.

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

220 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance, OJ 295/23, 12 November 2010.

221 European Parliament (2017), *Shareholders' Rights Directive Q&A*, 14 March 2017.

and refiners sourcing from conflict-affected and high-risk areas."[222] Similarly, to monitor EU business the EU adopted legislation in 2014 requiring non-financial and diversity information reporting for larger businesses (with due diligence obligations for the supply chain).[223] The same year, EU legislation on procedures for public procurement was adopted (including obligations in relation to non-discrimination).[224] The European Commission has also proposed due diligence to be reinforced in relation to, for instance, export of dual use items (civil and military), through a revised regulation.[225] EU's anti-tax-avoidance measures for companies are also of relevance in the context, for instance transparency requirements for multinationals operating in the EU.[226] Such obligations – more general on human rights aspects such as diversity, or more thematic and narrow such as in relation to particular goods – contribute to holding businesses responsible (by way of due diligence and fines, for instance) and by raising awareness.

The EU is also involved in due diligence development in the OECD, with guidelines on garment and footwear, for example.[227] In 2016, the European Commission committed to stepping up efforts on responsible business conduct in relation to the UN Sustainable Development Goals (SDGs). Regarding Goal No. 16, for example, the Commission notes on the rule of law, that "[e]ffective justice systems play a crucial role for upholding the rule of law and the Union's fundamental values [systems that are] a prerequisite for an investment and business friendly environment. The EU is encouraging Member States to improve the effectiveness of their national justice systems in the context of the European Semester, the EU's annual cycle of economic policy coordination".[228]

Due diligence developments in European states

Legislation in France was recently adopted (on *devoir de vigilance – 'duty of care'*) which obliges certain large companies (estimated to 100–150) domiciled in France or presenting links to France to conduct and document due diligence, fines may be imposed on companies which do not comply.[229] Germany proposed a similar scheme, including also access to documents for victims as well an oversight mechanism .[230] A Swiss initiative (Switzerland

222 Proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, COM 2014/111 final, 15 March 2014. The European Parliament approved the draft regulation on 16 March 2017.

223 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 Text with EEA relevance, OJ 330/1, 15 November 2014.

224 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, OJ 94/65, 28 March 2014.

225 European Commission (2016), Proposal for a regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), COM(2016) 616 final, 28 September 2016.

226 See generally the overview by the European Commission.

227 See details at: https://mneguidelines.oecd.org/guidelines/: Since 1960 the EU is an 'active observer' of the OECD, represented by the European Commission, see details at the website of the OECD.

228 European Commission (2016), Communication on next steps for a sustainable future, COM(2016) 739 final, 22 November 2016,Section 2.2.

229 Adopted legislation no. 924, 21 February 2017 ; http://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_entreprises_donneuses_ordre.asp, introduced 11 February 2015. For the estimate on the number of companies affected, see the FAQ of the European Coalition for Corporate Justice.

230 Klinger, R. *et al.* (2016), *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht*, Amnesty International *et al.*

albeit not an EU Member State, but still part of the EU single market) is advocating similar measures.[231] The Italian Nation Action Plan on business and human rights commits to an evaluation of due diligence legislative reform as well as analysis of obstacles to access to remedy.[232] The parliament of the Netherlands adopted in February 2017 a bill on due diligence in relation to child labour.[233] The banking sector in the Netherlands adopted in 2016 an agreement on business and human rights with reference to the UN Guiding Principles and providing detailed actions on steps that will be taken to provide for, encourage and support effective remedy.[234] The Modern Slavery Act in the United Kingdom provides for a 'comply/explain' transparency requirement.[235]

Against the backdrop of these European Commission initiatives, the Council of the EU and the European Parliament were coupled by the mentioned Council Conclusions of June 2016, requesting FRA to become active. The request was embedded in the Council Conclusions on Business and Human Rights, stressing the importance of implementing the UN Guiding Principles. Under four headings of implementation, corporate responsibility to respect human rights, access to remedy and external policy, the Conclusions lists aspects of what has been done and what needs to be done.

Five of the 19 operational paragraphs relate to access to remedy, where the Council reminds Member States that the National Action Plans, which they have committed to adopt, should include access to remedy (Paragraph 12).[236] The Conclusions also underscored the importance of the guidance of the Council of Europe and the United Nations, in particular the 2016 recommendation by the Committee of Ministers of the Council of Europe and the accountability and remedy project of OHCHR. This guidance should be implemented and considered in National Action Plans (Paragraphs 15 and 16), as noted by the Council Conclusions. The guidance and the Council of Europe recommendations are, therefore, used as starting point for the sections of this opinion.

Moreover, under the access to remedy headline, the Council encouraged greater effectiveness of EU Member States' National Contact Points, as part of the implementation measures under the OECD Guidelines for Multinational Enterprises. Finally, the Conclusions also stated that more needs to be done in this area and called on the European Commission to include in its forthcoming "EU Action Plan on Responsible Business Conduct", proposals for EU legislative efforts and guidance to the Member States aimed at improving access to remedy (Paragraph 13).

In February 2017, the Council of the EU adopted conclusions on EU priorities in UN fora for the year 2017, which included a commitment to the UN Guiding Principles and the UN guidance (the OHCHR's Accountability and Remedy Project):

"The EU will continue to work with partners on the implementation of the UN Guiding Principles on Business and Human Rights, including the encouragement of more states to

231 See the website.

232 See the Italian Action Plan.

233 Initiative 34506, numbers 1–3, introduced 24 June 2016; adopted on 7 February 2017.

234 In 2016, Social and Economic Council of the Netherlands (2016), Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, 28 October 2016.

235 United Kingdom (2015), Modern Slavery act.

236 "Develop and implement National Action Plans (NAPs) on the implementation of the UN Guiding principles or integrate the UN Guiding Principles in national CSR Strategies; share experience and best practices in the development of NAPs," in Council of the European Union (2015), *Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019*, 20 July 2015, action 18(c).

adopt national action plans, and will engage in the work streams of the UN Working Group as well as OHCHR, including its Accountability and Remedy Project. While further legal developments are being discussed, the EU believes that much remains to be done to implement existing obligations to prevent abuses, and ensure access to remedy when abuses occur."[237]

[237] Council of the European Union (2017), Council Conclusions on EU Priorities at UN Human Rights For a in 2017, 5689/17, 27 February 2017, para. 27.

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