

# Business-related human rights abuse reported in the EU and available remedies

## FRA Focus

*Growing global efforts to encourage responsible business conduct that respects human rights include steps to ensure access to effective remedies when breaches occur. In 2017, the European Commission asked the EU Agency for Fundamental Rights (FRA) to collect evidence on such access in the EU Member States, with the ultimate goal of identifying the EU actions most needed in this field. FRA's resulting research involved two phases: desk research on different incidents of abuse; and interview-based fieldwork on professionals' views on the availability and effectiveness of different complaint avenues.*

*This focus paper presents preliminary findings from the first phase of the research. It gives an overview of select examples of business-related human rights abuse identified through the desk research. A separate report, to be published in 2020, will elaborate on these findings.*

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## Introduction

There is growing recognition of the impact that businesses have on the enjoyment of human rights, be it directly through companies' activities or omissions, or indirectly through their supply chains. Rights affected include the entire spectrum of internationally recognised human rights<sup>1</sup> – civil and political rights, as well as economic, social and cultural rights. These include workers' rights, the right to privacy, equality and non-discrimination, freedom of expression and the right to health. Other relevant rights, such as those explicitly mentioned in the Charter of Fundamental rights of the EU, relate to consumers and the environment.

For the past 45 years there have been increased global efforts to encourage responsible business conduct that respects human rights and seeks to prevent or, at least, remedy certain negative impact. While preventing business-related human rights abuse is vital, access to effective legal remedy in case of breaches is also crucial. Access to justice is therefore essential for victims of business-related human rights abuse. In 2017, the European Commission requested FRA to collect evidence on access to remedy in the EU Member States on business-related human rights abuse to support the identification of the most needed actions by the EU. FRA

conducted research in two phases: the first was done through desk research to identify the different ways victims can pursue complaints about human rights abuses; the second involved interview-based fieldwork research to examine the views of professionals on the availability and effectiveness of the different ways complaints can be made. In the context of this project, FRA has cooperated with the European Law Institute (ELI) – an independent organisation with the aim of improving European law.<sup>2</sup>

This focus paper presents preliminary findings from the first phase of the research, which will be elaborated further in 2020. It gives an overview of select examples of business-related human rights abuse identified through the desk research, referring to the types of industry sectors involved and complaints mechanisms used. The findings presented are linked to FRA's previous work in this area, in particular its 2017 Opinion on *Improving access to remedy in the area of business and human rights at the EU level*, which had been requested by the Council of the EU.<sup>3</sup> The findings from the second phase of FRA's research will be presented in 2020 in a separate report, which will be combined with results from the first phase.

### Key concepts relating to business and human rights

Business and human rights is the concept commonly used by the United Nations\* as well as the Council of Europe.\*\* Other organisations use similar notions, but with somewhat different meaning and scope. For the purpose of this focus paper, the key concepts related to business and human rights are defined as follows:

- **Corporate Social Responsibility (CSR)** refers to holding companies responsible for their impact on society, "whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".\*\*\* The development of CSR efforts should be led by companies, but "public authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation [...]".\*\*\*\*
- **Responsible Business Conduct (RBC)** is an alternative standard set by the OECD through its Guidelines for Multinational Enterprises.\*\*\*\*\* It is defined as "making a positive contribution to economic, environmental and social progress with a view to achieving sustainable development and avoiding and addressing adverse impacts related to an enterprise's direct and indirect operations, products or services". RBC "means above all complying with laws, such as those on respecting human rights, environmental protection, labour relations and financial accountability, [...]". It also involves responding to societal expectations communicated by channels other than the law [...]. Private voluntary initiatives addressing this latter aspect of RBC are often referred to as corporate social responsibility (CSR).\*\*\*\*\*
- **Business and Human Rights (BHR)** is the common label for the nexus of states and business in relation to human rights, defining what companies and governments should do so businesses do not have a negative impact on human rights, which are an increasingly important aspect of CSR/RBC. The [2011 United Nations Guiding Principles on Business and Human Rights \(UNGPR\)](#) provide a widely accepted framework for understanding and implementing measures in this regard. The concept of business and human rights importantly also places emphasis on the rights-based aspect, that victims of business-related human rights abuse should have effective access to remedy and be able to claim this.



■ **Human rights due diligence** is the process through which business enterprises should identify, prevent, mitigate and account for their potential and actual human rights impacts. Due diligence can support access to remedy by bringing clarity to relationships and responsibilities between corporate entities, and detail efforts made to prevent abuse. Within the framework of the UNGPs, it is the core requirement of business in meeting its responsibility to respect human rights. Human rights due diligence is recognized in various international and EU instruments, and established principles and standards have been complemented with additional, sector-specific due diligence frameworks.

\* See the *United Nations Guiding Principles on Business and Human Rights*.

\*\* Council of Europe's *Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business*.

\*\*\* European Commission, *Green paper - Promoting a European framework for corporate social responsibility, COM/2001/0366 final*.

\*\*\*\* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A renewed EU strategy 2011-14 for Corporate Social Responsibility (COM/2011/0681 final)*; see also *ISO Standard 26000:2010 for Guidance on social responsibility*.

\*\*\*\*\* See *OECD Guidelines for Multinational Enterprises*.

\*\*\*\*\* See *OECD policy framework for investment user's toolkit, Ch. 7: Promoting Responsible Business Conduct*.

# 1. Legal and policy context

Business activity affects people's enjoyment of their human rights in various ways. Companies can affect – positively or negatively – the rights of their employees, their customers, but also the rights of workers in their supply chains.<sup>4</sup> Business conduct may have far-reaching consequences for communities in the vicinity of companies' operations.

## Interlinking business and human rights: positive examples

At national level, the interlink between business and human rights has 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.

Examples of positive impact on human rights can be found in the banking sector. In October 2015, banking and investment members of the UN Environment Finance Initiative (the Finance Initiative) released the [Positive Impact Manifesto](#). As part of its implementation, a dedicated set of '[Principles for Positive Impact Finance](#)' was developed to guide financiers and investors in their efforts to increase their positive impact on the economy, society and the environment.

In September 2019, at the annual United Nations General Assembly, 130 banks from 49 countries launched '[the Principles for Responsible Banking](#)', which provide the framework for a sustainable banking system helping this industry demonstrate how it makes a positive contribution to society.

ABN AMRO, an enterprising bank, in its [Human Rights Report 2018](#), makes specific reference to human rights in their general risk management framework and actively seeks to finance social enterprises that have human rights at the core of their business. For example, they have set up an impact banking programme for agricommodity clients, which improves access to finance for small-holder farmers, helping them to escape poverty.\*

\* See ABN AMRO Group N.V. [Human Rights Report 2018](#).

The 'Business and Human Rights' response has developed in recent years. This section presents the most important international and regional instruments setting out standards in the area of business and human rights.

Since the 1970s, the International Labour Organization (ILO) and the Organisation for Economic Cooperation and Development (OECD) have contributed significantly to the establishment of instruments and mechanisms related to business and human rights: the OECD (Guidelines for Multinational Enterprises)<sup>5</sup>

and ILO (Tripartite declaration of principles concerning multinational enterprises and social policy)<sup>6</sup> instruments continue to play important roles in ensuring businesses' compliance with human rights today. The OECD scheme requires the establishment of 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 [...]".<sup>7</sup> Furthermore, the International Organization for Standardization developed the ISO 26000:2010,<sup>8</sup> which provides guidance on how businesses and organisations can operate in a socially responsible way, and includes complaints and dispute resolution standards in consumer-related issues.

The [2011 United Nations Guiding Principles on Business and Human Rights \(UNGPs\)](#)<sup>9</sup> provide the first global framework that exclusively addresses business-related human rights abuses. Adopted following the 2008 UN Framework on Business and Human Rights, they have had considerable influence on a number of instruments relating to business conduct and accountability for related infringements of human rights. The UNGPs are built on the 'Protect, Respect and Remedy' Framework and introduce three pillars in which action needs to be taken:

- I. States' duty to protect against human rights abuses
- II. Businesses' responsibility to respect human rights
- III. Victims' right to access an effective remedy when their human rights are breached.

### Defining human rights 'abuse'

The UNGPs do not include a definition of the term 'abuse'. The [UN draft of international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises](#) includes the following definition in Article 1.2:

"Human rights violation or abuse' shall mean any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights."

Although not legally binding, the UNGPs enjoy wide recognition and serve as a basis for policy approaches towards business and human rights. These principles also underpin the 2016 Council



of Europe Recommendation on human rights and business,<sup>10</sup> which includes a particular focus on access to remedy. According to 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. Furthermore, the Council of Europe published a [Handbook on Business and Human Rights for legal practitioners](#) (2018) and developed a course on its e-learning platform [HELP](#). The EU has committed itself to promoting and implementing the UNGPs' standards in various EU strategies and legislation.<sup>11</sup> In support of the UNGPs, the European Commission adopted in October 2011 a Communication on a renewed EU strategy for Corporate Social Responsibility (2011 CSR Strategy). The Commission carries out a regular internal stocktaking exercise on the progress that has been made since the 2011 CSR Strategy.<sup>12</sup> In February 2019, the Council of the European Union adopted conclusions on the Union's priorities in UN fora for the year 2019, reiterating the EU's commitment to the UNGPs, as expressed regularly in previous years. The Council affirmed that "the EU will continue to promote the issue of implementation of the UN Guiding Principles on Business and Human Rights both in its external action and internal policies, including through initiatives on human rights due diligence, access to remedy for victims of corporate abuses, and support to environmental and indigenous human rights defenders".<sup>13</sup>

In addition to pursuing its commitments to the UNGPs, the EU has adopted several legislative acts addressing sector-specific instruments in particular in the context of due diligence. These can support access to remedy by bringing clarity to relationships and responsibilities between corporate entities, alongside detailed efforts made to prevent abuse. Such obligations – from more general ones on human rights aspects such as diversity, to narrow thematic ones in relation to particular goods – contribute to holding businesses responsible – by way of due diligence and fines, for instance, and by raising awareness.<sup>14</sup>

The European Commission's [Notice on access to justice in environmental matters](#) (2017/C 275/01) provides for an overview of EU law in this area. Additionally, the [e-Justice Portal's webpage](#) on access to justice in environmental rights provides easily accessible rules on starting a review procedure before an independent court of law or an administrative body in every EU Member State, in line with Pillar III of the UNGPs.

In the context of the right to an effective remedy against corporate abuses, the European Commission adopted in April 2018 the New Deal for Consumers package<sup>15</sup> composed of two proposals for Directives

and a Communication, with the aim of empowering qualified entities to launch representative actions on behalf of consumers, introduce stronger sanctioning powers for Member States' consumer authorities, as well as extend consumers' protection online. The proposals reflect recommendations made by FRA in its 2017 Opinion.<sup>16</sup> It specified that:

*"The EU should 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."*

*FRA, Opinion 1/2017, 10 April 2017, opinion 2*

The Rome II Regulation<sup>17</sup> provides the EU's binding rules on which law should be used in non-contractual civil and commercial matters (related to tort and damages in particular) and determines the conflicts of law.

Another relevant initiative that facilitates access to justice is the Whistleblower Protection Directive proposed in April 2018.<sup>18</sup> It will enhance the protection of persons reporting on breaches of Union law, disclosing relevant evidence on human rights abuses that otherwise would not be accessible to victims or public authorities.

The European Parliament (EP) has also been concerned about business-related human rights abuse. After the 2016 EP resolution on corporate liability for serious human rights abuses in third countries,<sup>19</sup> the EP's Sub-Committee on Human Rights requested a study on access to legal remedies for victims of corporate human rights abuses in third countries, which was published in February 2019.<sup>20</sup> Meanwhile, in October 2018, the European Parliament adopted a resolution supporting the negotiation of a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights.<sup>21</sup>

It should be noted that the EU and its Member States were among the lead actors in the negotiations of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.<sup>22</sup> This private international law instrument, adopted in July 2019, aims to facilitate effective access to justice for victims of human rights abuses in cross-border cases.

The findings of the present research confirm the importance of the issues highlighted in FRA's Opinion of 2017.

## FRA's 2017 Opinion on improving access to remedy

In June 2016, the Council of the European Union adopted conclusions on business and human rights, which included a request to FRA to formulate "an expert opinion on possible avenues to lower barriers for access to remedy at the EU level"<sup>23</sup> – the third of three pillars of the UNGP.

On the basis of this request, in 2017 FRA issued the Opinion on *Improving access to remedy in the area of business and human rights at the EU level*. It covers judicial and non-judicial remedies, as well as issues related to their effective implementation. Based on the analysis of these three areas, the 21 specific opinions are clustered under six headings:

1. Lowering barriers to make judicial remedies more accessible (opinions 1-5)
2. Enhancing the effectiveness of judicial remedies – especially in extraterritorial situations (opinions 6-9)
3. Ensuring effective remedies through criminal justice (opinions 10-12)
4. Ensuring effective non-judicial remedies – state based and non-state based (opinions 13-15)
5. Implementing access to remedy – transparency and data collection (opinions 16-17)
6. Implementing access to remedy – action plans, coordination and due diligence (opinions 18-21)

See FRA (2017), *Improving access to remedy in the area of business and human rights at the EU level, Opinion 1/2017*, 10 April 2017.



## 2. Incidents of business-related human rights abuse in EU Member States

This section provides an overview of fundamental-rights infringements in selected incidents, involving different types of industry; and explores complaints mechanisms used, linking some of the findings with relevant FRA opinions.

Relevant human rights issues covered in the reported incidents range from compliance within a company with labour standards to displacement of indigenous populations and pollution. Consequently, the profiles of victims or persons affected by the operations of the business are very diverse.

The identified incidents cover complaint-mechanisms ranging from judicial remedies to complaints before national human rights institutions, equality bodies, ombuds institutions, OECD National Contact Points, and company-level grievance mechanisms. Some of the incidents reveal a lack of adequate remedies.

### 2.1. Methodology

The first phase of the research was conducted in 2018. It was carried out by FRA's multidisciplinary research network (FRANET). The research covered all 28 EU Member States, as well as North Macedonia and Serbia, both accession countries. In each of these 30 countries, FRANET research teams identified and reported on incidents of business-related human rights abuse.

FRANET used two sources to identify key human rights 'incidents' involving businesses: the global database 'Business & Human Rights Resource Centre',<sup>24</sup> and reports from a leading national quality newspaper in each country. These quality newspapers were selected based on their circulation and readership in the country, with a dedicated business or economics and finance section. 'Key' incidents refers to those incidents that received the greatest media attention (by number of references or other such objective criteria) during the reference period, irrespective of which Charter provision related to the incident. While media attention is not necessarily an ideal criterion for objective selection, this method of identifying and selecting relevant incidents did provide for a comparative reference frame. In addition, the FRANET network was asked to identify possible information hubs (such as websites at national level established by or funded by the state, providing details on access to remedy) for victims of business-related human

rights abuses, as well as promising practices. A second phase focused on a limited number of countries through interviews with leading experts experienced in accessing remedies in cases of business-related human rights abuse, which will be the subject of FRA's report in 2020.

The research covered a seven-year time period: from the adoption of the UNGPs by the Human Rights Council on 16 June 2011, to 16 June 2018. The incidents chosen indicated some attempt by the victims (even if unsuccessful) to have access to some form of redress (access to justice).

The reported incidents involve abuses that both occurred within the EU and in third countries, and that are linked with businesses based in the EU and operating abroad (directly or through supply chains).

#### Identifying incidents in the 30 countries covered

Each FRANET partner was asked to identify up to six incidents. The methodology asked for the same number of incidents for each State, irrespective of population size, number of and dominant types of companies. For some, typically smaller countries, it was challenging to identify six incidents. For nine states, only two to five incidents were included (Serbia: 5; Latvia, Luxembourg, Malta, North Macedonia, Slovenia: 3; Belgium, Czech Republic, Lithuania: 2). For two countries, more than six incidents were included (Bulgaria: 8; and Austria: 7). In total, 155 incidents were covered.

### 2.2. Rights involved

The incidents entail a range of human rights abuses.<sup>25</sup> In many incidents, more than one fundamental right was at stake. Thus, the total number of rights affected is higher than the total number of incidents.

As shown in Figure 1, the fundamental right to non-discrimination (Article 21 of the Charter) is third in the ranking of incidents. More than half of these discrimination cases related to equal treatment in employment and occupation based on gender, ethnicity, age or disability.<sup>26</sup> This high rate of incidents could be explained by the existence of EU rules introducing remedies for discrimination in the context of employment.<sup>27</sup>



Overall, the incidents reported mostly affected environmental rights (Article 37 of the Charter) and working conditions (Article 31), followed by cases of discrimination (Article 21), and incidents where human life (Article 2) and the right to an effective remedy (Article 47) were at stake. Figure 1 gives an overview of the rights most frequently involved in the reported incidents (with the corresponding provision of the EU Charter of Fundamental Rights).

The 2007 Rome II Regulation includes a specific regime for environmental damage<sup>28</sup> allowing, in particular situations, the person seeking compensation to choose the law of the country where the damage originated as applicable law, rather than the law of the country where the damage occurred. This is particularly relevant in cases where the damage has occurred in third countries in which the domestic law provides for limited liability or very low level of damages. FRA’s Opinion 1/2017 encouraged the EU to revise the Rome II Regulation to allow for

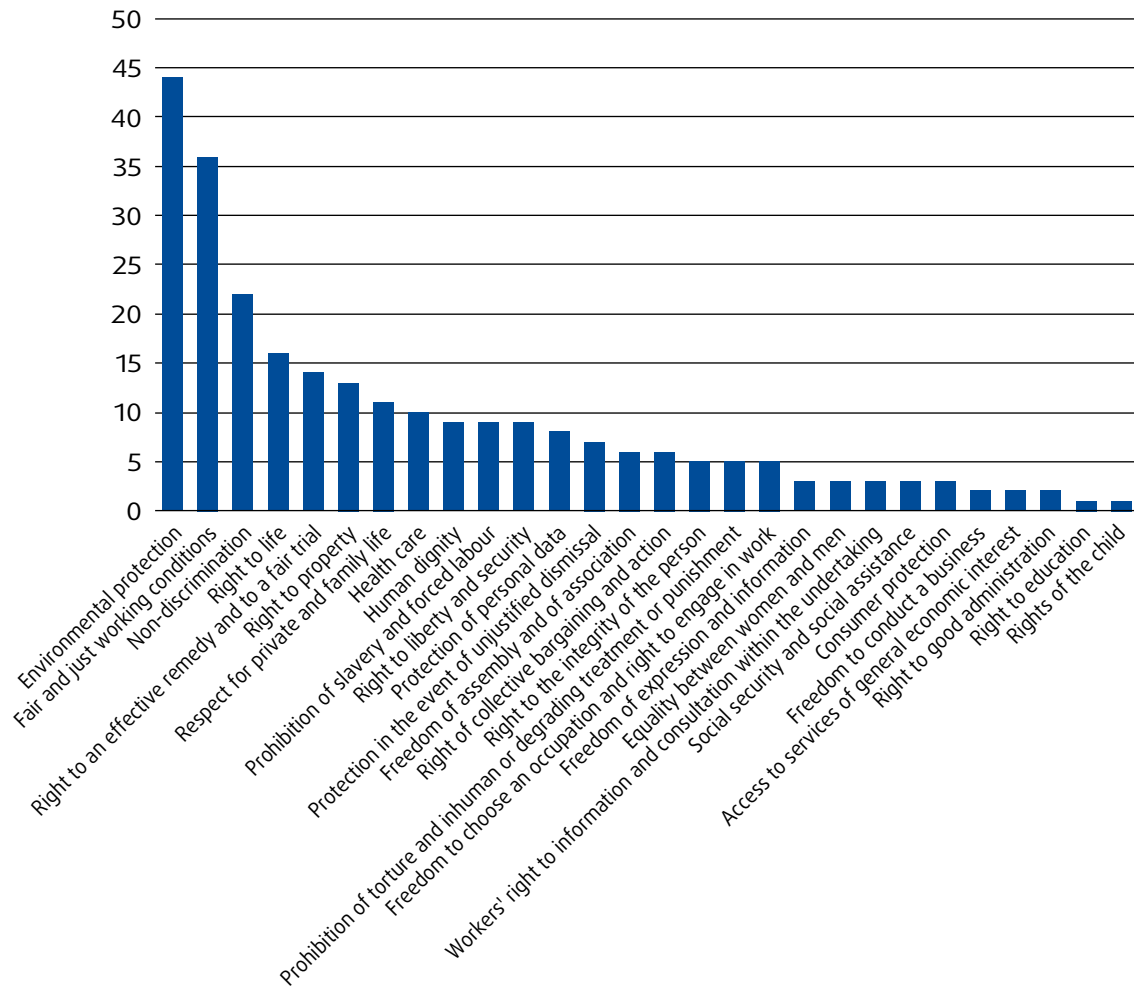
exceptions on the choice of law also in cases of business-related human rights abuses beyond environmental damage (FRA opinion 9).

Often, business abuses of environmental and labour rights have an impact on other fundamental rights.<sup>29</sup>

For example, the construction of a hydropower plant in Laos<sup>30</sup> allegedly contributed to severe environmental damage (Article 37 of the Charter), as well as to the displacement of local communities, affecting their right to family life (Article 7 of the Charter). Numerous NGOs lodged a complaint with the Austrian OECD National Contact Point Enterprises against an Austrian supplier of hydropower-turbines, who participated in the construction and operation of the plant.

Another incident involved the right to life (Article 2 of the Charter), the prohibition of slavery and forced labour (Article 5 of the Charter), and the right to fair and just working conditions (Article 31 of the

**Figure 1: Total number of incidents identified in the research, by Charter article**



Source: FRA, 2019





Charter).<sup>31</sup> It implicated a Chinese company based in Italy. Seven Chinese workers (four of them being undocumented immigrants) died in a fire in a garment workshop warehouse. The workers, who slept inside the warehouse, were subjected to labour exploitation and exposed to very poor health and safety conditions. Following criminal proceedings, the company's owners were convicted of manslaughter.

Some of the reported incidents involved the rights to respect for private and family life (Article 7 of the Charter), protection of personal data (Article 8) and consumer protection (Article 38), as in the case of a water park in Cyprus that used photos of random clients in a promotional campaign without their knowledge. A father and his two minor children discovered the ads with their photo in magazines, newspapers, on the internet, in printed leaflets, on tickets, on buses, on giant advertisement boards and in several other busy locations. The court held that the image of the complainant and his children (who were not public figures) playing in their bathing costumes involved a private activity and that capturing such an image was not of general interest to society. The complainants had been photographed in a private space, even if this was accessible to the public. The court ordered the water park to withdraw the advertisement and to pay compensation.

Other collected incidents concerned, among others, discrimination in employment, noise and smell nuisance coming from a nearby night club and restaurant, and the protection of personal data by social media.

### 2.3. Types of industry sectors involved

The reported incidents mainly involved the extractive (natural resources), agriculture and textile sectors (see Figure 2).

An incident involving the oil extraction industry concerned a group of Nigerian citizens and inhabitants of the areas around the Niger Delta. They suffered serious and ongoing pollution and environmental damage resulting from leaks from oil pipelines controlled by a Nigerian petrol company, a subsidiary of oil and gas company Royal Dutch Shell Ltd. – its headquarters are in the Netherlands and its registered office is in the United Kingdom. The victims sought remedy before civil courts in the Netherlands (claim brought in 2008, the case is pending in second instance since 2013); and in the United Kingdom (cases brought between 2015 and 2017, and still pending).<sup>32</sup>

In another incident, an EU manufacturer of shoe soles in Cyprus was found responsible for systematic emissions of a potentially cancerous substance, from 1976 until 2009. The death toll ultimately reached 44 residents and employees, who died of various forms of cancer relating to the factory's emissions. The court ruled that the statistically significant increase in new cancer cases in a 500-meter radius around the factory could only mean that the factory was responsible.<sup>33</sup>

FRA highlighted in its 2017 Opinion that greater transparency would lead to greater accountability for companies with obligations under EU law. It pointed out:

*“The EU should publish a list of companies which, under EU instruments such as the Nonfinancial 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.”*

*FRA, Opinion 1/2017, 10 April 2017, opinion 17, first paragraph*

The Non-financial Reporting Directive (2014/95/EU) requires EU companies with more than 500 employees to “include in the management report a nonfinancial 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, anticorruption and bribery matters” (Article 19a). The European Commission's obligation under this instrument (Article 2) to provide guidance is an opportunity to raise awareness and provide specific guidance on forms of access to remedy available at national and EU level.

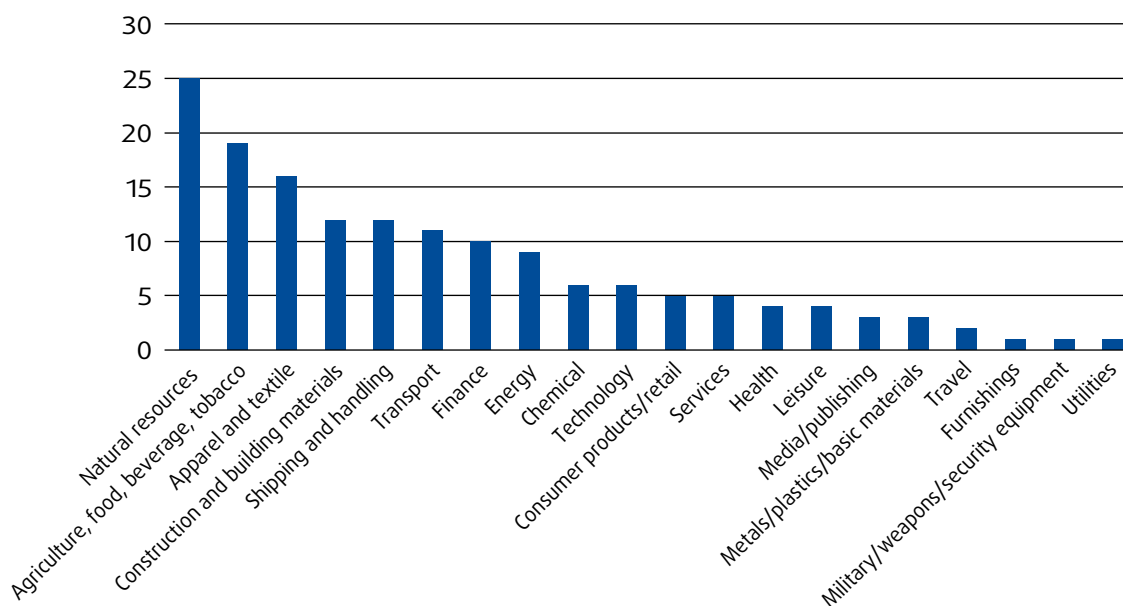
*“In this regard, the EU could also provide more specific guidance on what data should be reported on for access to remedy to be effective, such as the existence of operational-level grievance mechanisms, as well as assessments on their actual functioning.”*

*FRA, Opinion 1/2017, 10 April 2017, opinion 17, second paragraph*

### 2.4. Profile of the victims

The profile of victims<sup>34</sup> of business abuses vary, including consumers, workers,<sup>35</sup> persons with disabilities suffering from discrimination, and groups of indigenous people whose health or survival is jeopardized by the expansion of extractive activities.

Figure 2: Distribution of incidents identified in the research, by industry sector



For example, in France, an epilepsy medication was allegedly responsible for causing severe malformations in 2,150 to 4,100 children. The victims were pregnant women who took the medication during their pregnancies between 2007 and 2014, and children born to these women.

Nomadic tribes in Northern Kenya were affected by the operation of a major consortium, including a Danish wind energy company, accused of illegal land grabbing and exploitation. The case was still pending at the time of data collection in 2018.

In another case, several Lithuanian nationals – who worked on chicken farms that supply eggs to leading United Kingdom supermarkets – were found to have been victims of trafficking and severe labour exploitation. The claimants alleged that they had been threatened and intimidated with fighting dogs, housed in appalling conditions, and denied sleep and toilet breaks. The company agreed to pay over £ 1 million in compensation after a high court found in 2016 that they had failed to pay the national minimum wage, had made unlawful deductions from wages, and had failed to provide their staff adequate facilities to wash, rest, eat and drink.

A Mexican indigenous community in the Isthmus of Tehuantepec region in Oaxaca state was affected by the operation of the ‘Gunaá Sicarú’ wind-park project by a French electric utility company, EDF, which encroached on their territory. The project has allegedly been progressing without the affected community ever being informed or consulted. The

complaint with the OECD National Contact Point (NCP) at the French Ministry of Economic Affairs was still pending in 2018.

FRA Opinion 1/2017 highlighted that:

*“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.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 5

## 2.5. Victims’ representation

In about half of the incidents identified in this research, victims themselves (individually or in groups) sought redress. In the other half, representative organisations (such as NGOs and labour unions) and state entities (such as environmental agencies, law enforcement or regulators) sought justice.

Overall, almost a third of the identified incidents (46) were initiated by representative organisations, i.e., a representative organisation that can bring a claim

in the public interest. This confirms the relevance of legal standing in representative actions by non-profit bodies, such as labour unions and environmental NGOs.<sup>36</sup>

Representative organisations were mostly active in incidents relating to environmental rights (16 out of 46) and labour rights (15 out of 46). These findings may be linked to the existence of legal rules allowing for legal standing in these areas.

In its 2017 Opinion, FRA emphasised:

*“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.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 2, second sentence

Moreover, it stated that:

*“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.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 20

For example, in court proceedings in Gdansk (Poland) concerning construction permits for a new coal power plant, local residents and three non-governmental organisations had opposed the plant. NGOs could file a complaint and be party to the proceedings because they showed legal interest in challenging the construction permit.

In its 2017 Opinion, FRA also emphasised:

*“[Procedural rules need to allow for] collective redress in cases of business-related human rights abuse.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 2, first sentence

Collective redress encompasses mechanisms granting standing, to a member of the affected group or to a representative entity, to bring an action on behalf of the specific victims in order to obtain either compensatory relief, injunctive relief, or both.<sup>37</sup> In this way, victims can join forces to overcome obstacles, or organisations may act on behalf of victims. While the findings show that almost a third of reported cases were pursued by more than just one victim, the evidence available from the desk research does not provide sufficient information to confirm whether or not collective redress had

been used, including because many cases were still pending.

## 2.6. Preventing abuse – due diligence requirement

In areas such as the environment, employment and data protection, there are sound due diligence obligations and mandatory compliance regimes for business. In addition, there is a duty to protect for States, which is reflected in the action taken by regulators, law enforcement and public administrations to prevent and deter human right abuses. Due diligence is a key component of the UNGPs’ second pillar on the corporate responsibility to respect human rights. Effective due diligence practices can also help to strengthen access to remedy.<sup>38</sup>

One of the reported incidents concerns operations of a copper mine owned by the Zambian subsidiary of a business incorporated in the United Kingdom.<sup>39</sup> The waste discharge from the mine polluted waterways affecting 1,826 Zambian villagers. The pollution of a water source resulted in health and environmental damage, as well as loss of income. This case concerned procedural issues of jurisdiction. The Court of Appeal found that it was arguable that the UK-based parent company owed a duty of care to the claimants, citing a number of reasons relating to the financial and operational support it gave to its subsidiary. However, substantive issues were not considered and therefore damages were not awarded.

*“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.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 21

Several reported cases, involving companies from different EU Member States, concerned the collapse of the Rana Plaza factory in Dhaka, Bangladesh in 2013, killing 1,138 people and injuring more than 2,000. The building hosted five garment factories that produced clothing for several international garment brand industries. It gave rise to proceedings involving different companies. Even though the building was not owned by the garment industries concerned, workers in the Rana Plaza factory – working on behalf of these industries – were exploited to produce low-cost clothing, without minimum safety measures.

Clean Clothes Campaign Denmark and *Aktive Forbrugere* (Active Consumers) submitted a complaint against New Wave Style, the textile manufacturer

and supplier of PWT Group located in the factory, to the Mediation and Complaints-Handling Institution for Responsible Business Conduct. The institution found that PWT Group did not apply processes for due diligence that meet the OECD Guidelines in relation to its supplier. In particular, the institution found that PWT Group failed to make demands that New Wave Style ensures its employees' basic human and labour rights, including taking adequate steps to ensure occupational health and safety in their operations. However, in the institution's view, it had not been documented that an inspection would have identified the risks present in the building. Accordingly, PWT Group could not be held accountable for the collapse of the building.<sup>40</sup>

Also in relation to the Rana Plaza incident, the Italian Benetton Group was targeted by civil society and NGOs, in particular the campaigning website Avaaz, which collected more than one million signatures in less than a fortnight, and by the Clean Clothes Campaign, which gathers both NGOs and trade unions working in the garment sector. In particular, the Benetton Group was harshly criticised for a lack of transparency in its conduct relating to the Rana Plaza incident. The company board first denied having had any kind of businesses with Rana Plaza, but after the release of pictures of the collapsed building showing some items of clothing with Benetton tags, the company declared that they had placed some orders there, but only after an audit company certified that the factory observed the required safety standards. On this matter, NGOs (in particular the Italian section of the Clean Clothes Campaign, "Campagna Abiti Puliti") accused Benetton of consciously hiring an audit company known to be unreliable. Despite all public accusation from NGOs, no court case was brought against the Benetton Group.

In 2014, the ILO set up the Rana Plaza Donors Trust Fund, which collected donations from global brands, civil society, trade unions and the Bangladeshi government. The NGO's accusations against the Benetton group triggered indignation amongst civil society, ultimately also prompting the company's management board to participate in the economic compensation scheme for victims within the abovementioned dedicated ILO Fund. In 2015, the Benetton Group agreed to give USD 1.1 million to the fund.

A Polish garment company, LLP, also produced clothing in the Rana Plaza factory. After the collapse, LLP issued a statement indicating that it placed its production in different parts of the world via agents, and that supervision of the working conditions in Bangladesh was "very difficult". Nonetheless, although no case was brought against the company, LLP paid voluntary compensation to victims and introduced substantial changes to its CSR policies.<sup>41</sup>

These incidents relate, among others, to FRA opinion 15. It provides:

*"The EU could provide stronger incentives for the creation of remedy mechanisms at company level (operational-level grievance mechanisms), including so-called multistakeholder initiatives with several businesses joining forces with other actors."*

FRA, Opinion 1/2017, 10 April 2017, opinion 15

The incidents also show that the burden of proof and access to evidence are important aspects influencing access to remedy. As FRA has noted:

*"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."*

FRA, Opinion 1/2017, 10 April 2017, opinion 3

## 2.7. Type of complaint mechanisms used

In its 2017 Opinion (see opinion 13), FRA encouraged the EU, based on the UNGPs, to 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".

Figure 3 shows that, of the 142 reported incidents where some form of complaint mechanism was used, 105 involved courts. Non-judicial remedies were used in only one out of every four incidents.

In some cases, non-judicial remedies were tried to no avail, so victims ultimately had to turn to judicial remedies. One of the cases concerned the Irish Data Protection Commissioner's refusal to investigate a complaint by Austrian lawyer and activist Max Schrems regarding Facebook Ireland Ltd transferring personal data of its users to the USA.<sup>42</sup>

He claimed that, in view of the revelations made in 2013 concerning the activities of the U.S. intelligence services, the law and practice of the U.S. do not offer sufficient protection against surveillance by the public authorities of the data transferred to that country. The Irish authority rejected the complaint on the ground, in particular, that in 2000 the Commission considered that, under the 'safe harbour' scheme,<sup>43</sup> the U.S. ensures an adequate level of protection of the personal data transferred (the Safe Harbour Decision<sup>44</sup>). Mr. Schrems brought an action before the High Court of Ireland, challenging the Irish commissioner's refusal. The High Court referred to the CJEU for a preliminary ruling, asking whether the Commission's decision prevented a national supervisory authority from investigating a complaint alleging that the third country does not ensure an adequate level of protection and, where appropriate, from suspending the contested transfer of data. In October 2015, the CJEU declared the Safe Harbour Decision invalid and supported the claimant's position, finding, among others, that the Irish supervisory authority was required to examine Mr. Schrems' complaint with all due diligence.<sup>45</sup>

In another incident, an HIV-positive employee working in a clothing store submitted a complaint to the Labour Inspectorate, protesting his dismissal on grounds of his chronic disease. The Labour Inspectorate informed the Greek Ombudsman, who participated in the discussion of the labour dispute and subsequently carried out his own investigation. The employee claimed that, after his illness was disclosed, he was transferred to a warehouse, and eventually dismissed. The employer claimed that they were not aware of the employee's condition. However, the Ombudsman's investigation led to a finding of a violation of anti-discrimination law. The Ombudsman forwarded the report to the Labour Inspectorate, recommending the imposition of administrative sanctions, which were eventually paid. The company offered to reinstate the employee, but he refused and brought the case to a court, demanding compensation and recognition of discrimination from the employer. The case is still pending (status as of September 2019).

The assistance of National Human Rights Institutions seems to be beneficial in settling certain types of individual cases. For example, in Latvia, following an individual claim, the Ombudsman concluded that a sawmill operated illegally because the company did not comply with the requirements regarding avoiding environmental pollution. Following the Ombudsman's recommendation, the State Environment Service in 2017 decided to suspend those operations that did not comply with the regulation, and the company was ordered to address the shortcomings.

The OECD Guidelines for Multinational Enterprises require OECD National Contact Points (NCPs) to raise awareness on available non-judicial grievance mechanisms. They can also serve as a non-judicial body, having the power to offer remedy.<sup>46</sup> Twenty-four EU Member States adhere to the OECD Guidelines and have a National Contact Point. However, out of 155 incidents identified through FRA research, only 8 were addressed to NCPs.

As emphasised by FRA in its 2017 Opinion:

*"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 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."*

FRA, Opinion 1/2017, 10 April 2017, opinion 14

## 2.8. Ensuring effective remedies through criminal justice

Several incidents involved criminal liability of the companies. In this context, FRA emphasised in its 2017 Opinion that access to remedy can also be achieved through criminal justice. Consequently:

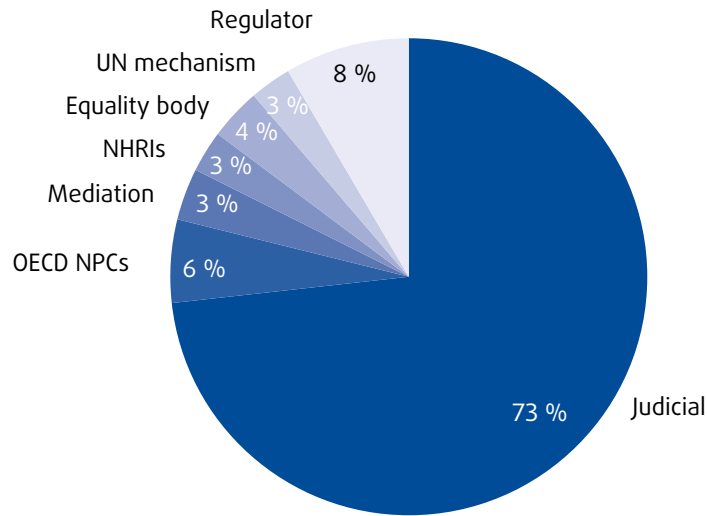
*"The EU should make greater efforts to ensure proper implementation in the Member States of the existing EU criminal law instruments that are relevant to business and human rights. This includes collection of data on complaints lodged and compensation paid, which should be made available at EU level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

FRA, Opinion 1/2017, 10 April 2017, opinion 10

One of the incidents concerned the first time a European shipping company was held criminally liable for having sold vessels for scrap to substandard shipbreaking yards in India and Bangladesh. A shipping company was sentenced by the Rotterdam District Court for the illegal export of vessels sent for scrapping on the beaches of South Asia.<sup>47</sup> The court based its ruling on the on EU Waste Shipment Regulation.<sup>48</sup> The prosecution stated that the ship dismantling methods endangered the lives and health of workers and polluted the environment. The



**Figure 3: Distribution of incidents identified in the research, by type of complaint mechanism used**



Source: FRA, 2019

company was heavily fined, and two of its executives were banned for one year from exercising the profession as director, commissioner, advisor or employee of a shipping company.

In its 2017 Opinion, FRA stressed that:

*“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.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 12

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.

In the case of several workers’ deaths in a Chinese company warehouse in Italy, the Chinese and Italian owners of the company were charged with manslaughter and sentenced to between 4 to 8 years’ imprisonment. Moreover, the owners of the warehouse were ordered to pay a financial remedy to the only survivor of the fire, the victims’ relatives, as well as the municipality and the trade union, who joined the civil lawsuit as plaintiffs. Compensation amounts ranged between € 5,000 and € 50,000.<sup>49</sup>

## 2.9. Specificities of incidents with a cross-border nature

Multinational enterprises, by nature, conduct business across borders. The consequences of their actions and inactions can adversely affect the human rights of victims residing in another country, inside or outside the EU, where these businesses are not established or represented. Therefore, cross-border situations can make access to justice particularly difficult.

*“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.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 6

Accessing remedy cross-border in cases of business-related human rights abuse brings even more challenges when the abuse takes place outside the EU Member States’ jurisdiction. Apart from a lack of information, other issues come into play when a cross-border dimension is involved. These include increased costs, language and legal knowledge challenges, and evidential issues, among others.<sup>50</sup>

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, which also relate to divorce and legal separation cases.

FRA emphasised in its 2017 Opinion that obstacles to remedies 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.

*"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."*

FRA, Opinion 1/2017, 10 April 2017, opinion 4

*"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."*

FRA, Opinion 1/2017, 10 April 2017, opinion 9

Overall, more than half (88) of the incidents collected involved one country. Approximately 22 involved an intra-EU cross-border element, while the remaining 45 concerned a situation that typically involved abuse outside of the EU with an EU-headquartered company having a significant role (directly or through supply chains), but also abuse by non-EU headquartered businesses active in the EU. The types of industries mainly involved in the reported incidents, as identified in Figure 2, have higher cross-border impact than others. For example, more than half of the incidents (13 out of 25) relate to extractive industries like mining or oil companies that are operating in countries outside the EU.

While the differences are not big, there is a rather clear indication that the cross-border element adds difficulties for the victim to be able to get the case heard, and even more so if the case relates to a cross-border situation outside the EU.

In its 2017 Opinion, FRA also stressed that 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.

*"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."*

FRA, Opinion 1/2017, 10 April 2017, opinion 11

However, 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. An example identified relates to the German textile retailer Kik.<sup>51</sup> This case constituted the first transnational civil claim against a German company for overseas human rights harm in its supply chain. One survivor and three families of the victims claimed compensation from Kik for damages resulting from a factory fire at one of its supplier firms in Pakistan, which killed more than 280 persons. The four plaintiffs were chosen to represent 156 families of the victims. They were represented by the law firm Geulen & Klinger from Berlin, with the assistance of the European Center for Constitutional and Human Rights (ECCHR) in Berlin. While the court in Dortmund accepted jurisdiction and granted legal aid, the claim was rejected by the *Landesgericht* Dortmund in 2019 on the grounds of Pakistani law limitation periods.<sup>52</sup> The total costs incurred by the defense while representing the victims – including legal representation, translations, travel, etc. – were much higher than the amount granted by the court. The case benefited from pro bono support by lawyers, students, translators, as well as funding from NGOs.

This shows that a very common obstacle to accessing justice is the lack of adequate funding of legal representation and other costs related to court proceedings, particularly in cross-border cases involving third-country victims. The 2016 Council of Europe Recommendation underlines the availability of needs-based legal aid and the 2016 UN guidance emphasises the importance of advice on options of litigation funding. FRA's 2017 Opinion reiterates this standard:



*“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.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 1

## 2.10. Information hubs

In addition to identifying incidents, the research teams in the Member States were asked to identify possible information hubs for victims on where to turn to access remedies in this specific context. FRA called for such information hubs in its 2017 Opinion, including data collection and assessment based on key guidance:

*“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.”*

FRA, Opinion 1/2017, 10 April 2017, opinion 16

The research shows, however, that in none of the 30 countries covered by this report was there government-provided, publically available online guidance for how to access remedy in cases of business and human rights violations. Half of the countries (16 of 30) had no information available. In the other half (14 of 30), some information was available, but not explicitly related to business and human rights; it did not cover judicial and non-judicial mechanisms; and did not provide details on the actual usage of the mechanisms.

An example of a useful document in this regard was found in Belgium, where establishment of an information hub providing details on access to remedy in cases of business-related human rights abuse was provided in the National Action Plan for Business and Human Rights from 2017.<sup>53</sup> Following the plan’s recommendation, the Federal Institute for Sustainable Development published the brochure ‘Access to Remedy in Belgium’ in June 2018.<sup>54</sup> It provides extensive information on the different remedy mechanisms available in Belgium, including information on the procedural aspects and the conditions for accessing these remedies. The brochure includes information on possible judicial procedures, judicial and non-judicial administrative remedies and preliminary alternative dispute resolution mechanisms. It is available on paper and online in Dutch, French, German and English.<sup>55</sup>

## 2.11. Promising practices

The research also included identifying possible ‘role models’ in areas other than business and human rights where access to remedy has been enhanced. This was again related to FRA’s 2017 Opinion (see opinion 13, cited above). The background text to opinion 13 provided further details as to where EU law itself constitutes good practice.<sup>56</sup> FRA’s Opinion thus dealt with legal standing and noted that collective redress and representative action (where certain organisations can bring claims) “lead to procedural economy with beneficial results in terms of costs and time not only for claimants and defendants but also for the court system and therefore for public resources in general”. FRA thus supported its position in reference to its earlier research on access to justice.<sup>57</sup> The Opinion further noted that, for equality bodies and data protection authorities, EU law requires EU Member States to allow for representative action. This is explicit in the Racial Equality Directive,<sup>58</sup> the Employment Equality Directive,<sup>59</sup> the Gender Equality Directive,<sup>60</sup> the Gender Equality Directive on Goods and Services,<sup>61</sup> and the Seasonal Workers Directive.<sup>62</sup>

The EU legal framework on data protection enhances access to an effective remedy in an area that is particularly prone to abuses by businesses. Compliance with these rules shall be subject to control by an independent authority. This is a key safeguard provided by Article 8 (3) of the Charter. In addition to institutional oversight by data protection supervisors, EU secondary law on data protection enhances access to justice through representative actions. Article 80 (1) of the General Data Protection Regulation (GDPR)<sup>63</sup> provides for the right of data subjects to mandate a qualified not-for-profit body, organisation or association to lodge a complaint on his or her behalf with

a supervisory authority or with a judicial authority. Furthermore, Article 80 (2) of the GDPR also allows Member States to provide in their national legislation the extension of these representative actions independently of a data subject's mandate.<sup>64</sup> The CJEU has emphasised in the case Fashion ID that national legislation providing the possibility for a consumer-protection association to commence legal proceedings for an infringement of personal data protecting laws in no way undermines the objectives of that protection and, in fact, contributes to the realisation of those objectives.<sup>65</sup> Besides, the court clarified that providing this possibility to consumer-protection associations does not appear to undermine the independence with which the supervisory authorities must perform the functions entrusted to them, since that possibility affects neither those authorities' freedom to take decisions nor their freedom to act.<sup>66</sup>

A similar system also exists under EU law for environmental cases<sup>67</sup> as well in relation to EU criminal law and the Employer Sanctions Directive.<sup>68</sup>

### 3. Summary and next steps

The overview of incidents of business-related human rights abuse identified in the research points to certain recurrent issues as regards access to remedy in this area, such as types of rights affected or the sector of business involved in rights abuse. For example, this overview suggests that victims of incidents involving multinational companies and cross-border liability seem to encounter far more obstacles when trying to access a relevant remedy. The prospect of a favourable outcome seems lower in such cases – particularly when the case relates to a cross-border situation reaching outside the EU. Another observation stemming from the research is that victims rarely pursue a remedy individually – in many cases they are assisted by NGOs, through collective redress or representative action, and various forms of advisory or non-judicial mechanisms.

Importantly, the first phase of the research helped to determine some of the factors that either create obstacles for or, conversely, play a key role in facilitating access to justice in relation to human rights abuses by business. These include:

- the role of due diligence by companies for victims to be more willing and able to bring cases;
- how the availability of collective redress in some areas and/or the possibility for representative organisations to bring cases on behalf of victims could provide incentives to bring cases or facilitate access to a remedy (cost sharing/reduction, reduced stigma, etc.);
- how rules of evidence have an impact on effective access to remedy;
- the role of non-judicial mechanisms, such as National Human Rights Institutions or Ombud institutions, that can support victims – not only in accepting cases but also in providing support and advice, and possibly taking cases before judicial mechanisms;
- how cross-border liability, both intra-EU and involving a third-country component, affects access to a remedy.

To further explore these and other factors, and as part of the second phase of its research, FRA has been conducting a number of qualitative interviews with experts who have extensive practical experience with litigation involving cases of business-related human rights abuses – in Finland, France, Germany, Italy, the Netherlands, Poland, Sweden and the United Kingdom.

On the basis of the findings of the second phase of the research, a comparative report will be published in 2020, which will draw on insights from these professionals, who have been involved in business and human rights related litigation. It intends to provide clear guidance to the European Union on measures that are most needed to improve access to justice. The professionals' experiences, collected through the second phase, will help assess available remedies – based on the analysis of FRA's desk research findings and the experience of the interviewees – taking into account elements such as: accessibility, efficiency, costs, access to information, procedural length and complexity, and burden of proof for victims of business-related abuses. The issue of collective redress as well as the role of NGOs and similar entities in supporting victims of business-related abuses will also be looked at.

On this basis, the comparative report will identify major obstacles for victims seeking justice in relation to business-related human rights abuses, and will try to formulate proposals on how to overcome those obstacles. It will present examples of good practices, including policy or legislative developments in this area, as well as practices in other fields that could be drawn on to inspire improvements. As far as feasible, the report will also look at action plans, guidance and legislation aimed at mitigating negative impacts of business on human rights, or even stimulating positive impact.



# Endnotes

- 1 Traditionally, the term ‘fundamental rights’ is used in a constitutional setting, whereas the term ‘human rights’ is used in international law. The two terms refer to similar substance, as can be seen when comparing the content of the EU Charter of Fundamental Rights with that of the European Convention on Human Rights and the European Social Charter.
- 2 The cooperation consisted of a research team being formed with meetings funded by the ELI, and detailed discussions on research focus and methodology.
- 3 FRA (2017), *Improving access to remedy in the area of business and human rights at the EU level*, Opinion 1/2017, 10 April 2017.
- 4 See, for example, ‘The positive and negative human rights impacts of non-state actors’ (2014), a report within the framework of FRAME, a research project funded under the EU’s Seventh Framework Programme (FP7).
- 5 OECD (1976, updated in 2011), *OECD Guidelines for Multinational Enterprises*.
- 6 International Labour Organization (ILO), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 5th edition (2017) (adopted in 1977 and subsequently revised).
- 7 *OECD Guidelines for Multinational Enterprises, Implementing Procedures*, I (1).
- 8 For more information, see ‘ISO 26000 – Social responsibility’ on the ISO website.
- 9 The UN Human Rights Council endorsed the Guiding Principles in its *resolution 17/4 of 16 June 2011*.
- 10 Council of Europe, *Recommendation of the Committee of Ministers to member states on human rights and business* (CM/Rec(2016)3) and its accompanying explanatory memorandum.
- 11 The Annex to *FRA Opinion 1/2017* includes a chapter about the EU main initiatives on business and human rights.
- 12 European Commission, *Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play*, SWD(2015) 144 final and *Staff Working Document on Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress*, SWD(2019) 143 final; Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play, SWD(2019) 143 final.
- 13 Council of the European Union, *Conclusions on EU Priorities in UN Human Rights Fora in 2019*, Brussels, 18 February 2019.
- 14 For example, in 2013, the European Commission published *guidelines for three sectors* (Information and Communications Technology, Oil and Gas, Employment and Recruitment Agencies) as well as Small and Medium-sized Enterprises (SMEs). A detailed description of the relevant legal and policy framework until 2017 is set out in detail in the *FRA 2017 Opinion*.
- 15 European Commission, *Communication to the European parliament, the council and the European economic and social committee: A New Deal for Consumers*, COM/2018/0183 final.
- 16 FRA (2017), *Improving access to remedy in the area of business and human rights at the EU level*, Opinion 1/2017, 10 April 2017, Opinion 2.
- 17 *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations* (Rome II).
- 18 European Commission, *Proposal for a Directive of the European parliament and of the council on the protection of persons reporting on breaches of Union law*, COM/2018/218 final.
- 19 European Parliament, *Resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries* (2015/2315(INI)).
- 20 Study ‘Access to legal remedies for victims of corporate human rights abuses in third countries’, February 2019, European Parliament, Policy Department for External Relations.
- 21 European Parliament, *Resolution of 4 October 2018 on the EU’s input to a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights* (2018/2763(RSP)), paras. 13 and 19. See also the *zero draft* (16 July 2018) and the *revised draft* (16 July 2019) for this new UN binding instrument.
- 22 Hague Convention of 2 July 2019 on the *Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*. See FRA, *Improving access to remedy in the area of business and human rights at the EU level*, Opinion 1/2017, 10 April 2017, Opinion 7, which called for EU’ and Member State’s leadership on multilateral developments facilitating access to remedy through the Hague Conference on Private Law.
- 23 Council of the European Union, *Council Conclusions on Business and Human Rights*, document 10254/16.
- 24 The database is available [online](#). The Business & Human Rights Resource Centre is an international NGO that tracks human rights impacts (both positive and negative) in over 180 countries. The information is available in eight languages. The centre’s board is composed of activists, academics, ex-business people, and other specialists.
- 25 For each of the incidents identified, researchers in each country were asked to select the Charter rights affected.
- 26 Thirteen out of 22 reported incidents related to discrimination in the context of employment.
- 27 For an overview of the EU legislation on non-discrimination, see *FRA’s Handbook on European non-discrimination law* (2018), pp. 20-23.
- 28 *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations* (Rome II), Article 7. The Rome II Regulation provides for the EU’s binding rules on which law should be used in non-contractual civil and commercial matters (related to tort and damages in particular) and determines conflicts of law. It includes choice of law to determine the level of damages (Article 15 I). 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 an *ordre public* refusal ground (Article 26), such as foreign law manifestly contradicting human rights. Article 7 provides for a special provision in relation to environmental damages, 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 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)).
- 29 Compare the ECtHR’s *factsheet on environment and the ECHR* (June 2019).
- 30 Austria, case nr.1. After several rounds of mediation meetings, the company acknowledged its human rights and environmental protection obligations and has committed to developing policies and procedures in relation to the implementation of human rights and environmental standards in accordance with internationally recognised principles, including a direct referral to, and commitment to apply, the OECD Guidelines for Multinational Enterprises.
- 31 Italy, case nr. 3. See also Section 2.6.
- 32 UK case nr. 6. See also the *study on access to legal remedies for victims of corporate human rights abuses in third countries* published by the Directorate-general for external policies of the European Parliament (2019), pp. 78-81; and Amnesty International et al., ‘*Seeking justice, the rising tide of court cases against Shell*’, May 2018.

- 33 Cyprus, case nr.2.
- 34 The UNGPs do not include a definition of the term ‘victim’. The UN draft of international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises includes the following definition in Article 2: “‘victims’ shall mean any persons or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse as defined in Article 1 paragraph 2 below. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependents of the direct victim.”
- 35 In particular, immigrants who work in conditions of severe labour exploitation. Compare FRA publications on this topic: *Severe labour exploitation – Workers moving within or into the European Union. States’ obligations and victims’ rights* (2015), *Out of sight – Migrant women exploited in domestic work* (2018), *Protecting migrant workers from exploitation in the EU – Boosting workplace inspections* (2018), *Protecting migrant workers from exploitation in the EU: workers’ perspectives* (2019).
- 36 See also Section 2.11 on promising practices.
- 37 Definition included in the study on collective redress in the member states of the EU, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the Committee on Legal Affairs of the European Parliament (2018).
- 38 See Chapter 2 for examples of EU legal developments in this area.
- 39 UK case nr.2. See also the study on access to legal remedies for victims of corporate human rights abuses in third countries published by the Directorate-general for external policies of the European Parliament (2019), pp. 91-95.
- 40 Denmark, *Final Statement by the Mediation and Complaints-Handling Institution for Responsible Business Conduct* (The Danish OECD National Contact Point (NCP) to the OECD) from 17 October 2016, p. 8.
- 41 Miazga, A. (2018), *‘Globalne wyzwania dla praw człowieka’, w Rzeczpospolita*, 27 February 2018.
- 42 The complaint was filed with the Irish Data Protection Commissioner, given that Facebook has its European Headquarters in Ireland.
- 43 The ‘safe harbour scheme’ includes a series of principles concerning the protection of personal data to which U.S. undertakings may subscribe voluntarily.
- 44 Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000 L 215, p. 7).
- 45 CJEU, C-362/14, *Maximillian Schrems v. Data Protection Commissioner*, 6 October 2015.
- 46 Further information on OECD NCPs can be found in *FRA Opinion 1/2017* on business and human rights, Chapter 2, Section 2.
- 47 The Netherlands, case nr. 4.
- 48 *Regulation (EC) No 1013/2006* of the European Parliament and of the Council of 14 June 2006 on shipments of waste.
- 49 Italy, case nr. 3.
- 50 See also *FRA Opinion 1/2017*, pp. 24-33, and the study “Access to legal remedies for victims of corporate human rights abuses in third countries”, February 2019, European Parliament, Policy Department for External Relations.
- 51 Germany, case nr.3. See also the study on access to legal remedies for victims of corporate human rights abuses in third countries published by the Directorate-general for external policies of the European Parliament (2019), pp. 56-59.
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- 53 Belgium, FPS Chancellery of the Prime Minister of Belgium, National Action Plan for Business and Human Rights (*Nationaal Actieplan Ondernemingen en Mensenrechten/ Plan d’Action National Entreprises et Droits de l’Homme*), Press release, 20 July 2017; Interdepartmental Commission for Sustainable Development (*Interdepartementale Commissie voor Duurzame Ontwikkeling/ Commission Interdépartementale pour le Développement Durable*) (2017).
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- 57 FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office, p. 39; and FRA (2012), *Fundamental rights: challenges and achievements in 2011*, Luxembourg, Publications Office, p. 205 et seq.
- 58 *Council Directive 2000/43/EC* of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Art. 7.
- 59 *Council Directive 2000/78/EC* of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Art. 9.
- 60 *Directive 2006/54/EC* of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Art. 12.
- 61 *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. 8.
- 62 *Directive 2014/36/EU* of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, Art. 25.
- 63 *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.
- 64 *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, Art. 80 (2).
- 65 CJEU, C-40/17, *Fashion ID GmbH & Co. KG v. Verbraucherzentrale NRW eV*, 29 July 2019, para. 51.
- 66 *Ibid.*, para. 60.
- 67 *Directive 2010/75/EU* of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).
- 68 *Directive 2009/52/EC* of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Art. 13.









## Related publications:

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

- *Protecting migrant workers from exploitation in the EU: workers' perspectives (2019)*, <https://fra.europa.eu/en/publication/2019/victims-severe-labour-exploitation>
- *Protecting migrant workers from exploitation in the EU – Boosting workplace inspections (2018)*, <https://fra.europa.eu/en/publication/2018/protecting-migrant-workers-exploitation-eu>
- *Out of sight – Migrant women exploited in domestic work (2018)*, <https://fra.europa.eu/en/publication/2018/exploited-domestic-workers>
- *Severe labour exploitation – Workers moving within or into the European Union. States' obligations and victims' rights (2015)*, <https://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union>

The freedom to conduct a business (protected by Article 16 of the EU Charter of Fundamental Rights) is highly relevant for business, but not the focus of this paper. It is about encouraging entrepreneurship and innovation, and about social and economic development. A FRA report explores how this right is conceived and applied by the EU and its Member States:

- *Freedom to conduct a business: exploring the dimensions of a fundamental right (2015)*, <https://fra.europa.eu/en/publication/2015/freedom-conduct-business-exploring-dimensions-fundamental-right>



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