Business and human rights – access to remedy

Italy - Country report

2019

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1. Introduction

The fieldwork was carried out between 8 April 2019 and 28 May 2019. The sample included four experts with a long-standing practical experience in the provision of legal support to victims of fundamental rights violations in the business field. All interviews were conducted face to face in Italian since this was the language the interviewees felt most comfortable with.
The specific features of the experts involved in the fieldwork are described here below:

- one legal expert (IT_1) working for an association aimed at protecting consumers' rights against the abuses perpetrated by companies;
- one legal expert (IT_2) working for a private law firm, and member of a civil society organisation engaging in strategic litigation, and representing individuals who have suffered human rights violations, before national and international (state-based and non-state-based) courts and bodies, as well as before judicial and non-judicial mechanisms, such as the National Contact Points (NCPs) of the Organisation for Economic Co-operation and Development (OECD);
- one legal expert (IT_3) working for a private law firm, who has been involved in a case of blatant fundamental rights violation perpetrated by an Italian company; and
- one legal expert (IT_4) working for a private law firm, member of the Bar Association for the Protection of Human Rights and involved in the strategic litigation case against a big corporation.

As for the difficulties encountered in conducting the fieldwork, all the experts who decided to take part in it were extremely helpful in providing information, as well as in reporting their direct and indirect experiences, opinions, and suggestions concerning the issues considered in this project.

2. General assessment of remedies in business-related human rights abuses

As for the remedies actually available to victims of human rights abuses related to business, two main areas need to be considered: judicial and non-judicial remedies.

Judicial remedies

All the four experts involved in the fieldwork expressed an overall negative opinion about Italy's judicial redress mechanisms. The Italian judicial system is described as excessively slow and expensive for victims (IT_1).

As for the costs of judicial redress mechanisms, these include both the administrative and bureaucratic costs to initiate proceedings, and the legal costs, namely the lawyer's fee. For instance, IT_1 reported that, in order to start administrative judicial proceedings, the complainant is required to pay an initial bureaucratic fee of €600 (this sum has been recently increased to €650). Another interviewee (IT_3) reported that – as far as business and human rights cases are concerned – he often works for free due to the high costs incurred during such proceedings; such costs include by way of example: travel expenses shouldered by lawyers to meet with their clients in third countries; costs incurred due to legal/technical advice needed to correctly understand the national legislation of the third country, which applies in case of non-contractual obligations (as was the case with the litigation reported by the interviewee); and costs related to technical advice concerning the assessment of environmental rights violations. This is the reason why – according to IT_3 – the majority of cases brought against multinational companies in Italy are financed by European non-governmental organisations (NGOs).

High costs may not be affordable to low-income victims, especially considering the shortcomings affecting the legal aid system. As a matter of fact, legal aid is a viable option for victims: according to the applicable legislation,[1] whoever lives on a low income (on average, the threshold is €11,000 per year) is entitled to legal aid at any stage of judicial proceedings, and for all types of violations/abuses. In the framework of this system, lawyers are paid by the state (and not by their low-income clients); from their part, when appointing a lawyer, clients are required to choose from a specific list compiled by judicial authorities. It is important to remark that such legal aid system does not apply to non-judicial mechanisms, and that the relevant financial resources have been cut significantly over the years (IT_4).[2] Moreover, lawyers who decide to provide legal assistance in the framework of the legal aid system generally come to this decision for two reasons: either based on humanitarian motivations (this is the case of lawyers, such as the ones working in the immigration law field, who are committed to the protection of disadvantaged social groups), or because they are young professionals with little

[1] Decree of the President of the Republic No. 115 of 30 May 2002, Consolidated text of legislative and regulatory provisions concerning legal expenses (*Decreto del Presidente della Repubblica 30 maggio 2002, n. 115, Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia*), available at: www.altalex.com/documents/news/2014/09/10/patrocinio-a-spese-dello-stato.

[2] IT_4 also reported on the functioning of the legal aid system in relation to the European Court of Human Rights (ECtHR): according to him, it is very difficult to benefit from such system when a plurality of complainants are concerned. Moreover, ECtHR provides legal aid only to those victims whose complaints have passed the admissibility test, and have been communicated to the national government: therefore, the initial costs to prepare and file the complaint shall be borne by the victims themselves.

experience (and legal aid thus represents a way to start working and gaining experience). Moreover, another factor discouraging a high number of lawyers from providing their services under the legal aid system is the significant delay with which the state usually settle payments. It is also worth stressing that third-country citizens might find it difficult to have access to legal aid because of the impossibility/extreme difficulty of obtaining the official income certificate from the consular authorities of some states: they sometimes do not issue such certificate, or issue it after a very long time, when it is already too late for the interested party to file a complaint with the competent judicial authorities. Some courts have autonomously ruled that, in case of delay or omission by consular authorities, the complainant who can prove that the request has been submitted to such authorities is allowed to provide a self-declaration about the income earned abroad.

The excessive length of judicial proceedings in Italy is also mentioned by the four interviewees when assessing the effectiveness of judicial complaint mechanisms.

As for the information provided and made accessible to victims, one of the interviewees (IT_1) considered that it is easy for them to have access to basic information concerning legal aid or the functioning of the system, also thanks to the promotional activities carried out by several organisations. In her opinion, the problem emerges as to where to obtain high-quality technical information, inasmuch as the information made available to victims is very often fragmented and inconsistent.

As for the role played by NGOs and civil society organisations, these are not entitled by the applicable legislation to participate as parties in judicial proceedings of this kind before Italian civil courts. This is an element that differentiates the Italian judicial system from the systems in place in other EU Member States: one of the interviewees (IT_2) reported having noticed, when studying the legislative provisions in force in other EU Member States, that NGOs are entitled to participate as parties in such proceedings; in some cases, they have even brought legal action against important international holdings (i.e. Shell in the Netherlands). However, the possibility of allowing these organisations to participate as parties in proceedings initiated against companies and holdings would be crucial in view of the central role such organisations play in supporting victims of human rights violations in the business field: according to IT_4, these organisations can provide information to victims, and raise general awareness about fundamental rights. They can also contribute to raising victims' awareness about a violation, thus helping them support each other when accessing complaint mechanisms. Moreover, based on their long-standing experience in the field, such organisations can recommend lawyers and judicial strategies.

Non-judicial remedies

Alternative dispute resolution (ADR) mechanisms were mentioned by some of the interviewees as an alternative to ordinary judicial proceedings.

Besides the sector-specific ADR mechanism reported in Section 4, mediation and arbitration are the most widespread ADR mechanisms in Italy. They generally act as a filter aimed at decreasing the number of judicial procedures before Italian courts, thus reducing the latter's judicial backlog. Civil mediation can be tabled by one of the parties as a way to avoid starting judicial proceedings. According to one

of the interviewees (IT_4), this mechanism could potentially represent an effective tool for victims of rights violations thanks to its structural features (e.g. the fact that it protects the privacy of the involved parties, and that it takes place in the premises of an association or in the office of a law firm, and not in the courthouse). In this respect, he considered mediation to be particularly effective in combating discrimination: for instance, if an employee is discriminated against and fired because of their sexual orientation, and wants to have their rights restored, it might be more comfortable for them to obtain compensation through mediation than through legal action before a court, inasmuch as, in the former case, their sexual orientation will not be disclosed during a public judicial hearing. However, some hurdles prevent mediation from becoming a viable and effective redress mechanism for victims. First of all, a cultural reason (IT_4): Italian people are generally inclined to engage in litigations, and want an authority to decide who is right, in this case a proper judicial authority. Secondly, lawyers have lobbied against the introduction of compulsory mediation, fearing they could be replaced by mediators, thus losing their power and professional status. Thirdly, companies often refuse mediation, and prefer facing traditional complaint mechanisms also considering the length of Italian judicial proceedings. Fourthly, mediation is expensive for the parties: according to the official fees for mediation professionals, such costs can range – for each of the parties involved in the mediation – from EUR 65 to EUR 9,200 depending on the financial value of the controversy. Moreover, parties are required to pay also administrative costs to start the mediation procedure: such costs can range from EUR 40 to EUR 80.[3] Finally, civil mediation is mandatory in relation to litigations concerning specific sectors (such as building management issues), and this might result – in case the mediation itself is unsuccessful – in a delay in the access to the judicial system.

Arbitration was mentioned by IT_4. According to the interviewee, this mechanism is too expensive, and the arbitrators are far from being neutral and independent inasmuch as each company appoints its own arbitrator. Arbitration is an ADR instrument that is used when the parties of the controversy decide to appoint a private body (the arbitration board – *collegio arbitrale*) to decide the case. This instrument is generally envisaged in the initial contract between the parties; however, they can decide to resort to arbitration even when the problem/controversy occurs. It is generally used in the commercial field for controversies worth relevant financial amounts. It is governed by art. 806 of the Italian Civil Code. Since, it is an ADR instrument that parties agree on, it can be performed in many different ways, its outcome can be an enforceable decision or a mere negotiation. The procedure's outcome is previously decided by the parties themselves.

One of the interviewees (IT_2) also mentioned the Italian National Contact Point (NCP), an institution established under the Ministry of Economic Development, Directorate-General for Industrial Policy, Competitiveness, and SMEs, Sixth Division, whose main role is to further the effectiveness of the OECD Guidelines for Multinational Enterprises.[4] The number of complaints lodged with this institution is risible, and most of them are rejected. According to IT_2, this does not mean that Italian companies fully respect human rights; it should instead be remarked that this organism – far from being independent – is managed by the

[3] Official fees are available at: www.miolegale.it/utilita/tariffe-mediazione-civile/.
[4] More information is available on the Italian NCP's website: https://pcnitalia.mise.gov.it/index.php/en/ncp-burger/about-us1.

Italian government through the Ministry of Economic Development, and that the person in charge of filing complaints is a governmental official (and definitely not an independent expert, a professor, or someone with long-standing experience in the field of human rights protection). This situation is extremely critical, and gives rise to a conflict of interests whenever companies partially or totally controlled by the state are involved (this is the case of ENI and ENEL, among other companies). The Italian NCP was considered also by another interviewee, IT_3: in his opinion, most of the cases that have been brought before this organism have been righteously deemed inadmissible. However, he also reported that the organism should change its approach to these issues: when mediating between companies and victims of rights violations, this body – whose aim is to provide a non-binding mediation – should be primarily focused on protecting the interests of potential victims instead of adopting a neutral approach to the cases. On the other hand, the interviewee has the impression that the organism under analysis is acting in the same way as Italian judicial authorities often do, i.e. trying to find inadmissibility reasons in order to avoid considering too many cases. If the organism's priority were to promote the interests of potential victims, there would be no need to adopt strict admissibility criteria: only those cases that are glaringly groundless would be rejected. Moreover, the organism under analysis can rely on limited financial resources, and is generally reluctant to report violations of the OECD guidelines, which is instead crucial.

Finally, Italy, unlike other EU Member States, and in spite of its international commitments, has not established a human rights authority. Such authority is expected to be impartial and independent from public authorities, and is supposed to have reporting, recommendation, and inspection powers. The authority could also be entitled to propose legislative reforms. Although victims of violations would anyway have to resort to judicial authorities to obtain compensation, the role of such an authority would be crucial to providing common guidelines and interpretation of the applicable legislation protecting fundamental rights, and to supporting victims of potential violations (IT_2).

3. Major obstacles for victims of related human rights abuses

Most of the information contained in this section has already been reported in Section 2, since the issues covered by these two sections of the report are closely intertwined.

First, victims have to cope with the excessive length of Italian judicial proceedings. As stressed by one of the interviewees (IT_1), the slowness of proceedings is often reflected in the uncertainty of the outcome, which might discourage the victim from relying on, and resorting to the Italian judicial system. In fact, from the initiation of the case until the date of the final decision, the legal framework, relevant case law, and the social context may change significantly; as a consequence, the final decision can be very different compared to the expected outcome envisaged at the time when the case was initiated.

Secondly, the interviewees mentioned the high costs incurred when initiating judicial proceedings in Italy; moreover, courts have wide discretionary power in deciding whether legal expenses – also of the party the court has found in favour of – shall be paid by the unsuccessful party in a litigation. According to one of the interviewees (IT_1), this is a risk that potential victims consider before resorting to a judicial complaint mechanism: regardless of the outcome, legal expenses shall

be shouldered in full by the complainant at least at the beginning of the judicial procedure. In this regard, as reported by IT_1, courts more and more often rule that each party shall bear their own costs: this trend can further discourage victims from initiating judicial proceedings.

One of the interviewees (IT_1) mentioned the specific case of the access to justice/remedies by consumers. Large companies – which can afford to pay several legal assistants – are not interested in avoiding judicial proceedings: they would instead try to postpone the court's decision as much as possible, thus benefitting from the extreme slowness of the Italian legal system. According to the interviewee, the only effective remedy in the field of consumer rights is provided by those mechanisms that can easily and quickly lead to the adoption of a decision on a case, such as the Financial and Bank Arbiter (*Arbitro Bancario Finanziario*, ABF) and the Regional Communications Committees (*Comitati regionali per le comunicazioni*, Corecom) (see Section 4).

4. Good practices

The interviewees mentioned a very limited number of good practices. Only one of them (IT_1) reported that some business sectors have been concerned by the development of non-judicial complaint mechanisms that are far more effective than the judicial system. This is the case, for instance, of the telephony market. In this sector, victims of rights abuses perpetrated by phone companies can file a complaint with the Authority for Communications Guarantees (*Autorità per le Garanzie nelle Comunicazioni*, AGCOM). AGCOM developed arbitration and reconciliation mechanisms managed by its regional branches, Corecom. Such branches can be resorted to online for free, directly by the user/consumer (with or without the support of an association; there is no need to be assisted by a lawyer). Moreover, Corecom generally issue a decision on the complaint within one year from the moment when the complaint was filed. Another business sector mentioned by the interviewee in this respect is the banking one: users/consumers can file a complaint with ABF, an organism operated by the Bank of Italy (the independent authority of the banking sector). In this case as well, the complaint can be filed directly by the individual through an online form; fees amount to an average of €20. Thanks to this non-judicial complaint mechanism, users/consumers can obtain a high-quality technical decision concerning their complaint within 12-18 months from the moment when the complaint was filed. The interviewer pointed out that, unlike judicial rulings, the decisions adopted by such mechanisms are not enforceable; from her part, the interviewee stressed that – in order to protect their public image – companies generally comply with the arbitrators' decisions.

5. Burden of proof

Issues concerning the burden of proof are deemed of utmost relevance by all the stakeholders involved in the fieldwork. These issues concern both judicial and non-judicial proceedings, as well as both national judicial proceedings and transnational cases (IT_3).

The relevance of the shortcomings affecting the burden-of-proof system emerges especially when an EU comparative approach is adopted. Judicial authorities of other EU Member States (such as the Netherlands and the United Kingdom) boast far wider order-to-show-cause powers compared to Italian judicial authorities

(IT_2). In those judicial systems, it is much easier for victims to receive adequate protection of their rights. In fact, in other countries, judicial authorities can oblige companies to collect and submit all documents and evidence that are necessary for the court to make a decision on the case. In the Italian system, instead, courts have much weaker order-to-show-cause powers: therefore, companies have the possibility of carefully selecting which documents to deliver to the court, and which to conceal from the court with a view to hiding from their responsibility.

The evidence collection system in Italian judicial proceedings is based on the discovery approach. This issue specifically concerns the business and human rights field. According to one of the interviewees (IT_3), some documents that are crucial as evidence in this type of litigations should be publicly available, inasmuch as, otherwise, it would be very difficult for victims to access them. This is the case of the so-called 'organisational and management scheme', as per Legislative Decree No. 231 of 8 June 2001, Provisions on the administrative liability of legal persons, companies, and associations (including those without legal personality), pursuant to Article 11 of Law No. 300 of 28 September 2000:[5] this scheme shall be implemented by companies, and include the risks connected to their activities and the measures/actions to be undertaken to reduce such risks and to avoid committing a criminal offence. The scheme is divided into two parts: a) a general part, which is more or less the same for all companies, aimed at reporting the actions implemented by the company in order to comply with the applicable legislation; and b) a specific part, which is different for each company, aimed at reporting the actions that the company shall implement in order to avoid a list of potential criminal offences. Moreover, since the entry into force of Legislative Decree No. 254 of 30 December 2016, Implementation of Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, modifying Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups,[6] the non-financial reporting approach was introduced in Italy: pursuant to the decree, all companies exceeding a threshold in terms of number of employees must complement the annual budget with a description of the organisational and management scheme. However, transparency cannot be achieved through a mere description of the scheme. This shall be publicly available, and it shall be possible to use it as evidence against companies in judicial proceedings, should they not comply with the measures envisaged in the organisational and management scheme to avoid perpetrating a criminal offence, such as, for instance, environmental rights violations. This is particularly the case whenever such measures are implemented by the mother company but not by its local affiliates, since the scheme under analysis – when multinational companies are concerned – apply to the whole corporation. The public availability of the organisational and management scheme would also contribute to formally establishing a connection between the mother company and its local affiliates. It might be accessed by victims by filing a formal request with the court, which can oblige the company to disclose it. However, this system

[5] *Decreto legislativo 8 giugno 2001, n. 231, Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300*, available at: www.gazzettaufficiale.it/eli/id/2001/06/19/001G0293/sg.

[6] *Decreto legislativo 30 dicembre 2016, n. 254, Attuazione della direttiva 2014/95/UE del Parlamento europeo e del Consiglio del 22 ottobre 2014, recante modifica alla direttiva 2013/34/UE per quanto riguarda la comunicazione di informazioni di carattere non finanziario e di informazioni sulla diversità da parte di talune imprese e di taluni gruppi di grandi dimensioni*, available at: www.gazzettaufficiale.it/eli/id/2017/01/10/17G00002/sg.

features two crucial shortcomings: on the one hand, the victim must pay a fee to access the document they need as evidence in the relevant proceedings; on the other hand, the victim must clearly specify which document they want to access. Nevertheless, in most cases, victims do not know which document they need to prove the company's actions or omissions. The interviewee also stressed that, if judicial authorities were fully aware of the case during the whole duration of the proceedings (and not just at the end), they would be in a position to ask the company to provide all the documents (including emails, recordings of phone calls, etc.) they need to make a decision.

Moreover, victims (and their legal assistants/lawyers) can find it extremely difficult, expensive, and time consuming to collect all the documents they need in order to support their arguments before a court of law. In this regard, IT_2 – when reporting on the case described in the annex to this report – stressed several shortcomings, in particular: how difficult and time consuming it was to travel between Italy and Nigeria to collect witness accounts and documents; how expensive it was to test the chemicals polluting the river; and how much information he had to glean in order to demonstrate the glaring connection between the mother company and its local affiliate. As to this latter aspect, the interviewee also stressed that, in order to initiate a case before Italian judicial authorities, he had to demonstrate the legitimacy of involving the mother company in the proceedings, together with its Nigerian branch. To this aim, he leveraged the 'duty of care' principle, i.e. the obligation for companies to be consistent with the standards, ethic principles, and guidelines they adopt, strictly monitoring and assessing not only the activities they directly implement, but also those carried out by the companies they, more or less directly, control. This principle was to be applied to the considered case also because the connections in terms of human resources between the mother company and its local affiliate made it even more evident that they were acting as one. All these crucial pieces of information had to be collected by the victims themselves, i.e. the Nigerian local community in the case at hand, and submitted to the court by their lawyer. The interviewee deemed this burden of proof to be excessive, also considering that victims in Italy also have to cope with the limited order-to-show-cause powers granted to judicial authorities.

Moreover, the burden of proof for victims is even heavier due to the features of the Italian civil law system: unlike the criminal law system, which has been gradually harmonised at EU level (where the right to a fair trial is included in the acquis communautaire), civil law is still characterised by a mostly state-based approach (IT_3). In this regard, it is worth stressing that, pursuant to applicable legislation, the parties involved in a trial cannot act as witnesses. They can provide statements and official declarations both personally and with the mediation of their lawyers, but they are never allowed to act as witnesses. In this respect, their statements cannot be used as proofs on which the court can base its decision. This is a principle founding the entire Italian Civil Law. For instance, if a person has an accident in the hospital – because the floor was slippery and this person broke his/her arm – in order to receive a compensation for the damage, the person needs to prove the damage with medical official documents, that the accident occurred because the floor was wet, that the hospital did not adopt adequate measures to avoid the incident. It is not enough to provide a statement about the incident.

In the interviewee's opinion, most of civil trials concern facts occurred between two people: if they cannot act as witnesses of what actually happened, it is extremely difficult to prove it otherwise. All the subjects involved in the trial – or that might be informed about it – should be granted the right to act as witnesses: it is the responsibility of judicial authorities to assess the reliability of their accounts.

Another issue to be considered (IT_1) is the possibility for victims to demonstrate that they have complied with the applicable procedure when communicating with the company concerned (i.e. they have used the official forms, the deadlines have been met as to the filing of the complaint, etc.). For instance, in the case of car insurance companies, clients must promptly and formally report an accident to the relevant company, and, before formally filing a complaint against it, they must be able to demonstrate they have complied with the formal reporting procedure. In most cases, however, consumers rely on informal communication channels (such as call centres and helplines), which turn out to be more easily accessible and user-friendly. However, this approach might compromise their right to resort to complaint mechanisms and to obtain compensation (IT_3).

In general terms, it can be concluded that the main obstacle faced by victims is the necessity to successfully prove the causal connection between the damage they suffered, on the one hand, and the behaviour of the concerned companies, on the other. Italian courts very often adopt an extremely strict interpretation of the causal connection, and this approach can seriously compromise the right of victims to have the violations they have suffered restored and compensated. Moreover, it can be very difficult for victims to prove a direct violation of their fundamental rights, as well as their entitlement to lodge a complaint against a company.

6. Collective redress

When asked about the issues covered by this section, the interviewees referred both to collective redress mechanisms and to class action lawsuits.
As a general remark, class action is initiated by a complainant – being it an individual or an association/NGO – in order to protect the interests of a specific category of subjects. For instance, this is the case of an association/individual starting a class action against a phone company in order to obtain that its overpricing policy is deemed illegitimate. If the action is officially recognised as a class action, all the consumers that had to cope with this policy have the possibility to join the action and obtain a compensation. This is called the opt-in approach. On the opposite, in the USA the class-action is on the opposite ruled by the opt-out principle: an individual can be automatically included in a class-action, unless s/he decides to opt out and abandon the action.
Collective redress mechanisms (*ricorso collettivo*) is a judicial proceeding initiated by more than one person who share a common purpose or who were subject to the same rights' violation. They entrust the case to the same lawyer. The main difference between the two procedures is the following one: the class action is initiated and carried out by one complainant (an individual subject or an association/NGO) and other subjects who opt-in are beneficiaries of the action; in the collective redress mechanism, all the subjects are parties in the proceeding.

Collective redress mechanisms were mentioned only by IT_4. He had direct experience with them in the framework of the trial against a well-known Italian steel company. He had also initiated collective redress actions before the ECtHR and national courts in other relevant judicial cases that did not involve private companies: by way of example, he was involved in a trial initiated before national courts against the Ministry of Public Health during the well-known contaminated blood scandal in the 1970s-1990s.[7] In this case, the interviewee decided to adopt two different strategies: as for the national context, he decided not to file a complaint against Italian pharmaceutical companies, but to bring an action against the Ministry of Public Health for failing to check and assess the quality of available blood products; as concerns the USA, he decided to start a class action lawsuit – involving the same complainants – against pharmaceutical companies based there. This difference in the strategy adopted was due to the argumentation that the class action system works effectively in the USA, where the opt-out clause is available; in the Italian legal framework, instead, it was easier for victims to leverage the liability of the ministerial authorities.

As to class action lawsuits, IT_1 was the only expert who was directly involved – in her role as legal expert of a consumers' association – in a class action lawsuit initiated in Italy against a well-known multinational company. The interviewee provided a negative assessment of this experience, stating that the possibility of resorting to the class action mechanism is extremely difficult for Italian consumers.
The first barrier is the territorial competence: consumers' organisations are supposed to initiate the class action in the area of judicial competence where the company is based.
The second barrier concerns the fact that consumers are not interested in class action lawsuits: whereas NGOs and associations are interested in them inasmuch as this tool is likely to change companies' business culture and to orient case law in the field of consumer rights protection, an individual consumer can expect to obtain the same compensation through an individual complaint filed in the framework of the ordinary procedure. In other words, there is no additional benefit for those consumers who decide to resort to collective redress mechanisms or class action lawsuits, all the more so considering that, pursuant to applicable legislation, the related costs shall be borne by the proponent, whether an individual or an organisation. In fact – according to the Italian class-action system – the proponent bears all the procedure's costs since it is the only party officially taking part to the controversy. The other people involved in the case are beneficiaries of the action. This is the reason why class action in Italy has never worked so far: people are not encouraged to bear the costs of an expensive procedure – such as the class action – so that other people can benefit from it; they rather prefer to initiate an individual proceeding that is far less expensive.

Thirdly, only the organisations/NGOs that are included in the list compiled by the National Council of Consumers and Users (*Consiglio Nazionale dei Consumatori e degli Utenti*, CNCU)[8] are entitled to initiate a class action lawsuit. The individual consumer, too, can start it but – as already mentioned – they are not incentivised

[7] Wikipedia, 'Scandalo del sangue infetto', available at: https://it.wikipedia.org/wiki/Scandalo_del_sangue_infetto (English version not available).
[8] Italy, Ministry for Economic Development (*Ministero dello sviluppo economico*) (2019), 'Il Consiglio Nazionale dei Consumatori e degli Utenti – CNCU', available at: www.mise.gov.it/index.php/it/mercato-e-consumatori/associazioni-dei-consumatori/cncu.

to do so. The fact that only enlisted organisations can initiate a class action lawsuit is not rational: if an individual can, there is no reason why any association whatsoever cannot. According to IT_1, this could mean that the Italian law makers are willing to make class action lawsuits available only to those associations they can indirectly control through CNCU.
It is worth reporting that Law No. 31 of 12 April 2019, Provisions concerning class action lawsuits,[9] has recently reformed the applicable legislation (the new legal framework will enter into force in 2020). The reform does not introduce any incentives with a view to encouraging consumers/users to resort to class action (IT_1). However, once in force, it will envisage the possibility for the competent court to impose upon the company concerned the obligation to disclose the relevant documents if the complainants can demonstrate that such documentation is needed to make a decision on the case: this provision, however, is not very useful if the complainants do not know for sure which documents should be requested (see Section 5). Another positive element of the new legislative framework concerns the possibility for victims to share the costs of proceedings: this new provision might turn class action lawsuits into a useful tool in cases of violations of environmental rights, which often affect communities or large groups (IT_3). Finally, thanks to the reform, the provisions governing class action lawsuits are now included in the Civil Procedure Code, which thus provides for the possibility of protecting not only consumers' rights but also all groups of people whose rights have been homogenously violated (IT_4). In this way thanks to the reform, the class action will be applicable to all spectrum of civil rights whereas it is currently limited to consumers' rights.
This new set of rules has not been applied yet. Therefore, if a plurality of victims are concerned, the best option they have is to lodge a collective complaint. It is worth stressing, however, that companies are much more hostile when it comes to collective complaints, compared to individual ones, since collective complaints are more likely to gain media and public opinion's attention compared to individual proceedings and it can relevantly damage the companies' public image (IT_4).

7. Cross-border liability

Not all the involved experts had experience with (non-)judicial proceedings initiated against companies based or operating in other EU Member States or in third countries. Those who did, reported some relevant issues concerning liability and the possibility for victims to be compensated for the damages suffered because of business activities.
For instance, IT_2 stressed that, in case human rights violations are perpetrated by Italian companies abroad, there are often issues concerning translation of documents, as well as in terms of compatibility between the Italian legal system and the legal system of the country where the violations occurred. For instance, this is the case of an indigenous community of Nigeria, which constitutes a legal entity pursuant to the Nigerian legislative framework but is not considered as such by the Italian law system. Consequently, it is necessary to somehow adapt legal patterns in order to include cases, subjects, and categories that still do not exist in the Italian law system. However, this can be done only if judicial authorities are willing to interpret legislative provisions in a dynamic and flexible manner so as to

[9] *Legge 12 aprile 2019, n. 31, Disposizioni in materia di azione di classe*, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2019-04-12;31.

grant adequate protection to victims, even in those cases that have never been dealt with before by Italian courts. On the other hand, if judicial authorities are not willing to update the interpretation of legal patterns, and are not sensitive to victims' requests, they might rigidly interpret those categories so as to exclude, in certain cases, the possibility for victims to challenge the companies' behaviour.
The same interviewee also stressed that Italian courts have jurisdiction over a case only when one of the two parties is an Italian subject. In the case study considered during this interview (which is the one reported in the annex), the complainant was not an Italian subject, but the mother company was. According to international private law, the proceeding can be held before the judicial system of one of the parties involved in the dispute. However, in case holdings are concerned, the local branch of the corporation – based in the third country – might challenge the jurisdiction of the Italian court, stating that it is subject to Nigerian legislation. This is the reason why it is important to clearly identify the responsibility of mother companies, otherwise the mother company remains exempted from the responsibility burden and only the local branch of the corporation is included in the controversy. In this case, it would be impossible to apply the Italian jurisdiction: the local jurisdiction of the affiliate would apply. Making the mother-company accountable for fundamental rights' violations perpetrated abroad by its local branches is important both to provide additional instruments to the victims to have their rights protected and restored, widening their possibilities to have access to justice; and to stop the practice according to which corporations try to hide their crimes, confounding potential complainants with an opaque responsibility organisation between mother companies and local affiliates.
IT_3 stressed this very same point: according to him, a possible solution to this jurisdiction problem could be the attempt to involve both the mother company and the local affiliate in the proceedings. However, Italian judicial authorities may not accept such solution, as no case law has emerged in this regard so far. In the interviewee's opinion, if Italian judicial authorities decided to exclude the local company from the proceedings, and to focus merely on the mother company, the allegation would be much weaker since, pursuant to applicable legislation, mother companies are not to be held accountable for their local affiliates' deeds: the Italian legislation concerning the business and human rights field is based on the principle of differentiation of liability between the various companies belonging to the holding. However, from an ethical point of view, mother companies shall meet their commitments and be accountable for their activities, even if these are carried out by their local branches. Many companies have adopted in recent years ethical standards, due diligence tools, and social responsibility charters, and shall be deemed responsible for their actual implementation and application in any place the holding operates. For this reason, IT_2 suggested the following approach: at an initial stage, the mother company is deemed to be accountable for the activities carried out by the holding, as well as for the rights violations it perpetrates all over the world. If the deterrent impact of this initial stage is not enough, legal action can be initiated: in this case, however, pursuant to applicable legislation, the liability of the mother company will have to be proved (as stressed in other sections of this report).
If EU companies are involved in the litigation, the scenario changes significantly because of the common system ruling cross-border liability based on judicial cooperation, the existence of the Court of Justice of the European Union and the mutual recognition of the jurisdictions of EU Member States (IT_1 and IT_2): the existence of a standard procedure makes it easier for consumers to understand

the functioning of the procedure itself, in addition to forcing legal professionals to conform to an easier and more concise way of dealing with complaints, which is far different from the Italian one. Moreover, the notification system, too, is far smoother, since all communications concerning the proceedings are shared with the parties by the competent chancellor's office. However, it is worth stressing that the EU non-judicial complaint system can only be applied to compensation cases not exceeding the €2,000 threshold (so-called 'European small claims procedure', ESCP). For this reason, according to IT_1, ESCP should be extended to all types of proceedings involving EU companies, also in compliance with the principle of non-discrimination among users/consumers.

8. Conclusions and ways forward

Some notes about the experts and the interviews are reported as preliminary remarks.

The experience of the four interviewees were varied in nature: on the one hand, this aspect had an impact on the possibility of comparing the results emerging from the interviews; on the other hand, it provided a more comprehensive perspective on the issues covered by this project. More specifically, IT_2 had direct experience with human rights violations perpetrated in third countries by Italian multinational companies. He has never dealt with cases of violations perpetrated by Italian companies in the EU territory. The most relevant element was that the case study the interviewee reported on (see annex) has been the first case of judicial proceedings held in Italy in the framework of which the local branch – based in a third country – of an Italian holding was deemed to be accountable for the fundamental rights violations perpetrated outside the Italian territory. IT_3 was the only interviewee who had direct experience with the Italian NCP; moreover, while proposing suggestions to improve the existing system, the interviewee referred to the relevant opinion issued by the FRA in 2017,[10] since he was involved in its development as legal expert in the field.

Some issues were common to the four interviews:

- the excessive length of Italian judicial proceedings was mentioned as one of the main barriers victims face when trying to obtain compensation for the abuses suffered;
- legal expenses and the shortcomings of the legal aid system;
- the necessity to strongly emphasise the liability of mother companies for the actions and activities implemented by the affiliates operating in third countries;
- the necessity to improve ADR mechanisms and to reduce the judicial backlog;
- the excessive burden of proof victims face when resorting to Italian courts, as well as the possibility that victims' position could be radically reversed during the trial; and
- the lack of harmonisation of legal patterns, which might represent a barrier for victims when attempting to resort to the Italian judicial system.

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

All the experts participating in the fieldwork provided interesting suggestions to improve the system described so far, as well as to foster the access of victims of violations to justice and redress mechanisms. These suggestions concern both the national and the EU level.

The national level

- The legal procedures should be simplified through the introduction of standard procedures that are more accessible to users/consumers and to individuals in general. Moreover, ESCP could be applied to national civil litigations, as well; this change might have a positive impact also on the excessive length of judicial proceedings in Italy (IT_1).
- The simplification of judicial proceedings might include also the possibility of adapting them depending on the size of the damage suffered by the victim. More specifically, IT_1 suggested that, in case of disputes worth less than €10,000, the requirement for victims to be assisted by a lawyer should be eliminated in order to reduce legal expenses.
- More financial and human resources should be earmarked for the judicial system. Moreover, the staff involved should be trained, and adequate turnover ensured, so as to make it possible to hire more young people, who generally boast stronger knowledge of new technologies and of the working methods that have been introduced in recent years (as a matter of fact, the average age of the staff working for Italian courts is worryingly high). (IT_3; IT_4)
- As for class action lawsuits, specific legislative provisions should be introduced to incentivise victims to resort to this mechanism (IT_1).
- Victims of environmental disasters and human rights violations should be automatically granted the right to legal aid even in case they are not residing legally in Italy, or do not fall under any of the existing legal patterns, such as in the case of the Nigerian community (IT_2).
- The necessity to reverse the burden-of-proof principle (IT_2): considering the excessive burden of proof borne by victims, a different approach should be adopted by the national legislation. Mother companies should be automatically considered to be accountable for the deeds of the companies they control. If it were so, in case of judicial proceedings for rights violations perpetrated by the controlled companies, it would not be up to victims to demonstrate the (in)direct liability of mother companies, or the level of awareness of such companies about the activities of their local branches. It would be the responsibility of mother companies to demonstrate – in order to prove their innocence – that any possible measures have been adopted to prevent the violation perpetrated by the controlled company. This improvement would support both the victims themselves and the NGOs representing them, in accessing the judicial system, and contribute to increasing victims' chances of having their rights adequately protected. A less drastic alternative was suggested by IT_3: the introduction of mandatory due diligence for all companies and corporations that covers the most serious human rights violations. If due diligence were mandatory, the burden of proof would be automatically reversed since companies would be required to demonstrate that all the necessary measures/actions have been adopted to comply with this obligation. This type of due diligence should be public and accessible to all stakeholders.
- The applicable legislation should be complemented with the possibility for NGOs and associations supporting victims to be empowered to start and

participate in judicial proceedings involving companies that have allegedly violated fundamental and environmental rights (IT_2; IT_3; IT_4).

- ADR procedures and mechanisms should undergo stronger standardisation. ADR bodies should be compelled to make a final decision on each case they cope with. In this way, judicial authorities would have to deal with only those severe offences that cannot be tackled through non-judicial mechanisms. Even though ADR bodies' decisions are not enforceable, they have an impact on companies' public image: if such bodies were able to quickly come to a decision on each case, companies would be more inclined to comply with those decisions, with a view to restoring their public image. On the other hand, if ADR bodies do not deliver decisions promptly, companies will tend to ignore these mechanisms and to wait for judicial authorities to tackle the case, trying to postpone the latter's decisions as much as possible (according to the strategy described in the previous sections of this report). (IT_1)
- Mediation should be reformed in order for it to fully express its potential: mediators – including the Italian NCP – should be given the possibility of issuing a decision (albeit non-binding in nature) on the considered case. Moreover, this decision, as well as the consideration of the efforts made by the parties to come to mediation, should be adequately considered in the judicial proceedings stemming from a failed mediation process: if one of the parties refused to the take part in mediation, this should be taken into due consideration by the competent judicial authorities. (IT_3)

<u>The EU level</u>

According to the interviewees (IT_1 in particular), EU institutions might play a crucial role in reducing the barriers victims face in accessing complaint mechanisms. More specifically, IT_1 tabled some proposals.

First, EU legislation should rule ADR mechanisms in greater detail, thus reducing EU Member States' discretional power in this regard.

Secondly, the EU should foster harmonisation and communication between national legislative frameworks in order to codify the official steps that need to be taken to access the judicial system, as was the case with cross-border business activities. This means introducing standard patterns/forms that can be used by all victims in every EU Member State. The adoption of this approach would also contribute to the respect of the non-discrimination principle, eliminating any differences in terms of tools available to victims of violations perpetrated by national companies, as against those perpetrated by cross-border companies.

Thirdly, the EU legislation could also establish that the hearing before judicial authorities is not always necessary: some cases can be decided on by the competent judicial or non-judicial authorities without such authorities having to formally meet and hear the parties, unless the latter expressly ask to be heard.

Finally, the EU should introduce binding legislation on class action lawsuits aimed at making this system as homogenous as possible across EU Member States, thus offering a more effective instrument to the victims of rights' violations perpetrated by European companies or companies based in any other EU member state different from the one of residence.