MINUTES[1]

ROUNDTABLE

"Business and Human Rights: from Italy's Action Plan on Business and Human Rights to the EU Fundamental Rights Agency's Legal Opinion"

Rome, Ministry of Foreign Affairs and International Cooperation

November 20, 2017

After the 1st formal meeting between the institutional Working Group on Business and Human Rights (in Italian GLIDU) taking place earlier in the morning, the Roundtable *"Business and Human Rights: from Italy's Action Plan to Fundamental Rights Agency's legal opinion"* – organized by the Inter-ministerial Committee for Human Rights (in Italian CIDU) with the support of the EU Agency for Fundamental Rights (FRA) – was held.

The event was chaired and moderated by **Fabrizio Petri** (President of CIDU), that briefly introduced the previous meeting organized this year by the CIDU and the EU Agency for Fundamental Rights about communication rights and the main objectives of the Roundtable. The discussion was thus opened by **Jonas Grimheden** (Freedoms and Justice Department - FRA), who recalled the 21 opinions[2] released by the Agency in April 2017 regarding access to justice and remedies in the field of Business and Human Rights and including information about what have been done, what could be done, the short and medium-term objectives to be achieved, always in the framework of the EU competencies. «We tried to stress the context and the human rights framework, focusing on the sake of customers and investors. We particularly

[1] This work has been drafted by Marta Bordignon and Irene Salvi, members of the Human Rights International Corner (HRIC). An Italian translation is also available at HRIC website.
[2] Full document available at http://fra.europa.eu/en/opinion/2017/business-human-rights.

solicited a broader legal standard, a stronger representation of victims in actions of complaint - often we have very weak victims facing very strong companies - and an extension of non-judicial mechanisms» stated Mr. Grimheden (who also recalled the existence in Italy of a non-judicial mechanism, namely the OECD National Contact Point). «We have to compete by reputation» concluded «and this requests political will, too». During his speech, he focused on seven out of the 21 opinions, namely: i) ensuring minimum standards for needs-bases legal aid and encouraging the availability of litigation funds; ii) providing collective redress and representative organizations; iii) facilitating the burden of proof; iv) ensuring appropriate level of damage awarded; v) effective judicial and non-judicial mechanisms; vi) the establishment of a EU platform to address extraterritoriality in legislation; vii) supporting the Open Method of Coordination (OMC) on access to remedy by EU Member States. Finally, he pointed out some overall missing points - such as the existing lack of guarantee of access to remedy in the Business and Human Rights field, the needed reform of some domestic legal system in a dynamic way – and he called for a renewed political will at EU level that could work as a leading example worldwide.

The following speech, *"Corporate-related transnational human rights violations: the Italian civil and criminal jurisdiction"*, given by **Angelica Bonfanti** (University of Milan), focused on extraterritorial and jurisdictional issues. As regards civil jurisdiction, Italy applies EU Regulation n. 1215/12 of 12 December 2012 (Brussels 1 bis), which establishes the jurisdiction of the courts of the place where the defendant is domiciled, and the corporate defendant has its statutory seat, central administration or principal place of business. On the basis of this title of jurisdiction Italian courts are competent to adjudicate disputes concerning corporate transnational violations of human rights only if plaintiffs can prove that the corporate veil must be pierced, and the foreign subsidiaries' activities are controlled by the Italian parent company. Given the complexity of such a demonstration, she suggested to integrate in the Italian legal system some flexible and residual titles of jurisdiction, such as the *forum necessitatis*, suitable to avoid denials of justice. As far as the criminal jurisdiction is concerned, Italian Legislative Decree 231/2001 – addressing the administrative liability of companies for criminal offences - can still be considered a useful normative tool. However, some updates are requested in order to strengthen its effectiveness nowadays - especially with regard to corporate transnational crimes - for instance by clarifying the extent of Italian criminal jurisdiction over corporate crimes occurred abroad and by considering the opportunity to provide for the mandatory

(instead than voluntary) adoption of organizational management models covering also the activities of the foreign subsidiaries.

Afterward, **Giacomo Maria Cremonesi** (Human Rights International Corner) presented his speech on *"The implementation of the Italian Action Plan: regulatory and judiciary solutions"*, by proposing a cross-cut analysis between some opinions contained in the FRA Legal Opinion and the relevant provisions of the Italian National Action Plan, in particular regarding free legal aid, representative organizations, and access to evidence. About the first aspect, he highlighted the need to make access to remedies - including free legal aid - more approachable also for non-UE citizens who are victims of corporate-related human rights violations, for example through simplified bureaucratic requirements (e.g. personal self-statement). As far as the second aspect is concerned, Cremonesi pointed out the relevance of representative actions allowing associations, foundations and other NGOs or CSOs – with the main objective of protecting and assisting victims of corporate-related human rights violations – to bring claims on behalf of alleged victims, as already provided for environmental and anti-discriminatory cases. Furthermore, regarding the access to evidence in the possession of the enterprise, according to the FRA Legal Opinion and recalling the Italian implementing decree of the EU Directive on Non-Financial Reporting he outlined the necessity to much broaden the disclosure of the so-called '231 Model' – provided by the Law Decree 231/2001 on the administrative and criminal corporate liability – even for human rights abuses. Finally, about the last point he drew the attention on the need to conduct a comprehensive study of the Legislative Decree 231/2001 – as recalled by the Italian National Action Plan – in terms of broadening the objectives and the scope of application of the Decree and bringing civil actions aimed at scrutinizing corporate liability.

Maria Benedetta Francesconi (OECD National Contact Point) took word on *"The mechanism of specific instances under the OECD Guidelines"*, mentioning the relevant normative gaps existing within the EU Member States. Regarding the recent activity carried out by the Italian OECD Contact Point, it is worth mentioning the first *peer review* released in September 2017, along with the establishment of a first working group that involves trade unions and represents a renewed attention to the matter, although stronger tools and a better communication strategy are still needed.

Marco Fasciglione (IRISS – National Research Council - CNR) speech, titled "*Access to remedies and the State duty to protect*", focused on the role of States' action in the implementation of the

Third Pillar of the UN Guiding Principles on Business and Human Rights. This Pillar, indeed, has increasingly been referred to as the "forgotten pillar" since, despite the unanimous endorsement of the UNGPs by the Human Rights Council in 2011, little meaningful action has been taken to date by Governments, International Organizations and other State Actors to guarantee effective remedy to victims of corporate human rights abuses. The speech highlighted also some methodological avenues to be adopted for an effective and fair implementation by States of the access to remedy duty (e.g. the necessity for a victim-oriented approach), as well as the preventative and proactive function of remedial mechanisms, compelling States to adjust their own legal systems by enacting, and/or amending and/or repealing laws.

It was then the turn for **Chiara Macchi** (School of Advanced Studies "Sant'Anna", Pisa) to talk about *"Parent company's duty of care and access to remedies: reflections on the opportunity of a regulatory intervention"*. In her words, a regulatory intervention affirming the principle of the parent company's duty of care could help improve access to remedy, provided it is coupled with a system of civil liability (i) allowing the victims of extraterritorial harm to seek redress in the parent company's home state, and (ii) shifting the burden of proof from the victim to the company. This, as she underlined, would be in line with the FRA Legal Opinion and would respond to the call put forward in 2017 by representatives of 9 EU Member States' parliaments (including Italy) for the adoption of EU-level legislation related to a mandatory Human Rights Due Diligence.

Giacomo Barbieri (Italian Trade Union, CGIL) in his speech *"Workers and employees as leaders in implementing human rights in economic activities"* stressed that it is compelling to affirm the central importance of workers as rights-holders in order to overtake power disparities. **Maria Beatrice Deli** (ICC) thus presented a speech on *"Access to non-judicial remedies: instruments, models and features",* reminding that non-judicial remedies are considered more advisable - even by the Italian National Action Plan on Business and Human Rights - due to their features of rapidity and lower costs. Deli even stated the necessity to intensify access and transparency mechanisms, quoting as good example the IDLO Investment Support Program (established in 2016 with the task to support local companies in 47 emerging countries).

Finally, **Anton Giulio Lana** (Italian Lawyers Association for Human Rights) talked about *"Access to remedies within the European Convention on Human Rights: the right to an effective complaint and the ECHR's jurisprudence"*. Recalling several judgements of the European Court

of Human Rights, Lana underlined that it appears urgent to provide more effectiveness to remedies - both on the procedural and substantial level - established for human rights violations. In his opinion, it would be very useful to enlarge the chance for NGOs and CSOs to participate as third-party interveners in cases related to human rights violations against multinational corporations, to overcome the lack of power that often leads single claimants to give up the challenge.

In conclusion, **Fabrizio Petri** recalled the CIDU's commitment to promote the Business and Human Rights Agenda for next year - especially in the light of the NAP's mid-term review planned by 2018 – and to keep open a multi-stakeholder dialogue, in particular with CSOs and corporations.