



REMARKS ON THE ITALIAN ACTION PLAN ON BUSINESS AND HUMAN RIGHTS

2016-2021¹

May 2017

1. PROCEDURAL ASPECTS: STAKEHOLDERS ENGAGEMENT

The Italian National Action Plan (NAP) - launched by the Inter-ministerial Committee for Human Rights (in Italian CIDU) on December 15th, 2016 - is the result of a consultation and drafting process that lasted more than one year and half (from January 2015 to July 2016), and led to the release of a first draft, open for a public consultation by September 10th, 2016.

The drafting process of the NAP has been coordinated by the Inter-ministerial Committee for Human Rights, that has been appointed as the Italian leading authority in the field of Business and Human Rights. CIDU - an inter-ministerial body within the Ministry of Foreign Affairs and International Cooperation (in Italian MAECI) - was established with the aim to comply with the international obligations of the Italian Government arising from its membership of the international Human Rights treaties. Among the main activities carried out by this institution, it is worth mentioning the support to the adoption of new instruments aimed at achieving the full compliance of Italy with some international legislations, such as the Communication of the EU Commission on a Renewed Strategy on Corporate Social Responsibility(CSR) 2011-2014, that calls for the publication of Action Plans by the EU Member States for implementing the UN Guiding Principles on Business and Human Rights (UNGPs).

The Italian Action Plan has been finalized thanks to a common effort of an institutional Working Group – composed of all the Ministries involved – and a non-institutional one – composed of representatives of academia, enterprises, trade unions, business associations, Civil Society Organizations (CSOs) and legal experts. Both Working Groups have worked in parallel at the beginning, and have then shared their outputs during some joint meetings. Furthermore, the first draft released in July 2016, and thus available for an open consultation, has received many

¹ This work – drafted by Marta Bordignon, Maria Francesca Cucchiara and Giacomo Maria Cremonesi - will focus on the final version of the Italian NAP, officially released in December 2016 and thus revised in accordance with the comments and contributions submitted to the CIDU during the public consultation.

contributions and inputs from CSOs, Non-Governmental Organizations (NGOs), as well as business associations, trade unions and companies².

On March 13th, 2017 the first Implementation Workshop of the NAP was held in Rome, and it was coordinated by CIDU in collaboration with AsVis (Italian Alliance for Sustainable Development). However, the event did not clarify neither the timeline for the implementation of the measures contained in the NAP, nor the role played by the Working Group on Business and Human Rights (in Italian GLIDU) - provided by the NAP as a monitoring body - and the non-institutional Group, not established yet. It is still lacking, indeed, a successful participation process that involves all the relevant stakeholders, especially those representing the most affected and engaged groups, in order to promote an effective implementation of the NAP's content.

2. NAP'S CONTENT: SOME GENERAL REMARKS

First of all, as far as the **State commitment** is concerned (pag. 5, Part I - NAP English version), the implementation of the measures contained in the NAP in line with the Sustainable Development Goals (SDGs) and the UN Agenda 2030 reveals a multidisciplinary and wider approach of the Italian Government, also in relation to the National Strategy on Sustainable Development recently adopted by the Ministry of Environment. Among the National Strategic Objectives, the document recalls the promotion of CSR and of a sustainable management of natural resources. Moreover, the multi-stakeholder approach aforementioned - both among the State commitment and in regard to the monitoring mechanism - follows the related suggestions and provisions existing at international level.

As already mentioned in the joint contribution released by HRIC in September 2016, the clear reference among the six **National Priorities** (pag. 7, Part II C – NAP English version) to the support of a Human Rights Due Diligence (HRDD) process is favourably welcomed, especially in the light of the recent adoption of the French Law providing a mandatory HRDD (*devoir de vigilance*) for multinational corporations. The reference contained in the Italian NAP, however, is limited to a mere 'promotion' of this kind of initiatives and does not imply the adoption of a legal instrument that provides an obligation for enterprises to annually publish a *plan de vigilance*, as in the French case³.

At the same time, it is worth mentioning the inclusion of some measures for tackling *caporalato* and any form of exploitation, forced labour, children labour, slavery, and irregular work, with a particular reference to migrants and modern slaves, following the recently adopted legislation⁴ and that could hopefully restate a renewed commitment of the Italian Government in this field.

² The contribution to the Italian NAP co-signed by HRIC, ECCJ, FIDH and Mani Tese is available at: <http://www.humanrightsic.com/single-post/2016/09/15/HRIC-ECCJ-Mani-Tese-and-FIDH-contribution-to-the-Italian-NAP-on-Business-and-Human-Rights>

³ The law adopted by the French Parliament does not provide criminal penalties in case of non-compliance, according to the decision of the French Constitutional Council.

⁴ Please refer to Law 199 of October 29th, 2016, that amended art. 603 bis Criminal Code by widening the scope of the application of the crimes of illegal intermediation and labour exploitation in order to ensure greater efficiency of criminal action against this phenomenon.

Regarding the above-mentioned initiatives related to discrimination and equal opportunities, it is interesting the concept of *diversity management* applied at corporate level and based on the content of Law 76/2016. Finally, regarding environmental sustainability, the Paris Agreement on Climate Change (COP21) – ratified by Italy in October 2016 and entered into force on November 4th, 2016 – provides some effective instruments of environmental protection and promotion of legislative initiatives (such as the environmental crime).

For what concerns the **Government expectations towards business** (pag. 9, Part III – NAP English version), HRIC welcomes the transposition by the Italian Government of the EU Directive on Non-Financial Reporting with the decree 254/2016 (entered into force on January 25th, 2017) that provides the obligation for enterprises (with more than 500 employees, or more than 20.000.000 € of turnover or more than 40.000.000 € of net revenues) to annually publish a Non-Financial Report.

The **current activities** related to some aspects of the UNGPs are also relevant, as well as the **future commitments** clearly pointed out by the NAP (pag. 10 and following, Part IV – NAP English version).

Besides the already-mentioned necessity to promote due diligence process for Small and Medium Enterprises - that represent the majority of Italian enterprises - the text also highlights that need for companies operating in «*weak governance zones*» to apply HRDD throughout their supply chains, in light of the EU Regulation on conflict minerals approved on March 2017 (pag 23, Part IV B - NAP English version).

Furthermore, a number of measures tackling irregular work and *caporalato*, especially in the agricultural sector, are listed (pag. 15-16, Part IV B – NAP English version). Nevertheless, these are mainly aimed at preventing and repressing these phenomena, whilst the victims are less safeguarded and protected, in particular irregular migrants.

Finally, regarding the provision of training activities on Human Rights through *e-learning* schemes and *ad hoc* seminars – directed to diplomatic and consular network, competent Government and public officials, judges and lawyers – one more time HRIC expresses its availability to take care and carry on this kind of initiatives, thanks to the multidisciplinary expertise of its members.

3. THE POTENTIALITIES OF DECREE 231/2001

Moreover, among the planned measures there is the commitment to conducting a «***comprehensive study***» of the Decree No. 231/2001 on administrative liability for offences committed by legal entities, in order to assess the scope of its implications in relation to the UNGPs (pag. 15, Part IV B – NAP English version). The Decree provides the adoption of compliance programs, called ‘models of organization, management and control’, and has thus raised awareness among companies about the idea of preventing eventual offences, in accordance with the objectives of HRDD. By providing such “administrative” (but substantially criminal) liability – to be ascertained by a penal judge – the Decree should guarantee access to judicial remedies for victims of the alleged offences listed in its Art. 24 and following.

In order to avoid incurring in liability, the company shall demonstrate that it has efficiently adopted a 'model of organization, management and control' able to prevent the crime occurred and that has established an internal body entrusted with monitoring and supervising the compliance with the model. Otherwise, both fines (including confiscation of the crime profits) and the interruption of business activity are provided.

The list of crimes has been extended over the time and it currently includes specific Human Rights violations, such as the practice of mutilation of female genitalia, child prostitution and pornography, human trafficking and slavery. In 2015, some environmental crimes have been included (environmental disaster, environmental pollution, failure to decontaminate, etc.).

In this regard, it should be underlined that corporate liability under the Decree 231/2001 could be invoked also in relation to Human Rights abuses committed by Italian enterprises operating abroad, especially if part of the violation occurred in Italy. Unfortunately, the NAP refers only to a limited number of cases falling under art. 4 of the Decree and art.7, 8, 9 and 10 of Criminal Code (cfr. pag. 26, Part IV B – NAP English version), namely crimes entirely committed overseas.

In relation to multinational corporations, it will be thus possible to take a judicial action in Italy against the Italian parent company, if the involvement of a corporate representative in committing the crime partially abroad will be demonstrated. On the other hand, if the involvement of the corporate representative occurred entirely abroad, the requirements listed in Art. 4 of the Decree 231/2001 are needed⁵.

4. ACCESS TO JUSTICE

The planned measures related to access to an effective judicial remedy provided by the NAP represent a step forward towards greater access to justice for victims of corporate abuse.

According to the NAP, the Working Group on Business and Human (in Italian GLIDU) should focus on the **following priorities**:

- 1) Conduct a review of the responsibility of companies in respect of human rights, of the legal mechanisms and develop a practical and comprehensive toolkit of the remedies available in domestic law;
- 2) Identify eventual gaps and/or existing barriers jeopardising access to judicial remedy for victims of business-related human rights abuses especially with regard to extraterritorial violations also basing on the relation between parent company and subsidiary;
- 3) Evaluate the introduction of relevant additional legislative measures to strengthen access to effective remedy both in civil, criminal and administrative law.

The identification of «eventual gaps and/or existing barriers jeopardising access to judicial remedy for victims of business-related human rights abuses especially with regard to

⁵ This provision refers to a more limited number of cases. In particular, Art. 4 of the Decree 231 states that in cases falling under Art. 7 of Criminal Code, the enterprise – if having its headquarter in the State territory – is held accountable also in relation to crimes committed entirely abroad, if the State where the offence occurred did not yet proceed against it. (cfr. pag. 26, Part IV B – NAP English version).

extraterritorial violations also basing on the relation between parent company and subsidiary» and the related need to introduce « *relevant additional legislative measures* » (pag. 26, Part IV B – NAP English version) are important for guaranteeing an effective access to justice for victims of corporate-related Human Rights violations, especially for the violations committed outside Italy and the EU by corporations domiciled in Italy also through subsidiaries and business partners.

HRIC observes that right now the NAP does not identify a precise timeline for these tasks to be carried out by GLIDU and that it is unclear to what extent civil society will be allowed to participate in this process.

In any case we underline that GLIDU should base its analysis on the base of the recommendations of the recently adopted Opinion of the *European Union Agency for Fundamental Rights*⁶.

Within the framework of the on-going parliamentary activity of reform of judicial system, the NAP is committed to **raise the awareness on the following priorities**: i) remedies against the excessive length of civil proceedings; ii) measures to strengthen special courts for enterprises by extending their competence to consumer protection-related claims, misleading advertising and unfair competition; iii) special court sections for human rights (especially children rights) and family issues; iv) introduction of criminal provisions against economic crimes, also committed abroad; v) verification of the possibility of introduction of the class action.

The timeline and to what extent this awareness raising role will be implemented are still unclear. HRIC believes that to improve access to remedy the priority should be given to the identified remedies against the excessive length of civil proceedings, without prejudice for victim's rights, and to the possibility to introduce a class action for victims of corporate related human rights abuse, even if committed outside Italy and Europe.

The Plan provides also the following **planned measures**: i) the activation of training courses - also through the collaboration with the Ordine Forense - for judges and lawyers on Business and Human Rights; ii) the maintenance of an adequate level of funding for legal aid in order to ensure its access also to non-national and non-resident claimants, in particular irregular migrants.

HRIC believes that maintaining an adequate level of resources also for non-national claimants is an important and ambitious objective to be pursued, which could facilitate access to justice for economically disadvantaged people who are often victims of crimes.

Indeed, HRIC believes that GLIDU and the Italian Government should carefully consider that in civil judgment the **burden of proof** for victims of corporate human rights violations is **excessive** and it **should be lowered**. A shift in the burden of proof and/or more extensive disclosure rules should be introduced in line with the recommendations of the recently adopted

⁶ Documento disponibile: <http://fra.europa.eu/en/opinion/2017/business-human-rights>

Opinion of the *European Union Agency for Fundamental Rights* or of the the 2016 Council of Europe Recommendation on human rights and business⁷.

5. CONCLUSIONS AND RECOMMENDATIONS FOR THE MONITORING PHASE

In conclusion, the NAP contains a clear and specific framework of the actions already implemented by the Italian Government in the field of Business and Human Rights, without identifying an effective timeline for the implementation of the identified measures and monitoring the objectives achieved. After all, during the consultation and drafting phases, the process of selection of the stakeholders involved, as well as the timeline and the organization of the two above-mentioned Working Groups, have never been disclosed. However, it is worth mentioning the commitment expressed– even if it is not clear and well-defined - in the NAP by the Government to include a reference to the adoption of a legislation regarding Due Diligence and Duty of Care.

Finally, as far as the update, monitoring and dissemination of the NAP content are concerned, the establishment of the GLIDU - founded on March 13th, 2017 in parallel with the 1st Implementation Workshop - represents an useful tool, although its functioning and role have not been defined yet, as for the already mentioned non-institutional Working Group. The planned mid-term review – expected in 2018 – is fundamental for filling the existing legal gaps, and thus for informing all the involved stakeholders about the results achieved, if conducted in accordance with the transparency principle. However, in order to conduct an effective «*mid-term review*» some fundamental information should be provided, such as: i) a list of the institutions responsible for implementing the single planned measures; ii) to have access to a kind of roster containing all the implementation data, aimed at facilitating an ongoing dialogue with CIDU and with the other institutions involved.