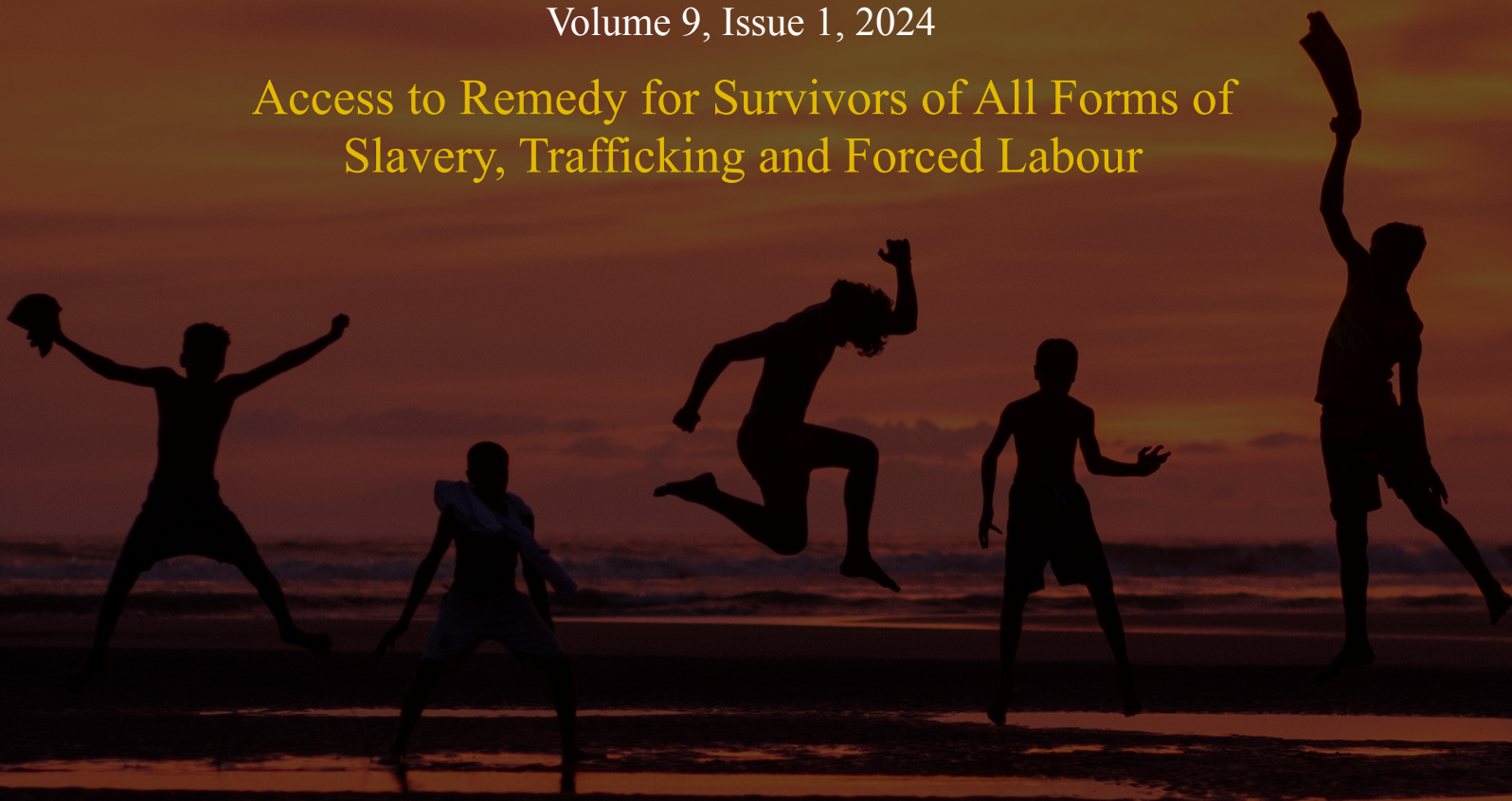


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**Access to Remedy for Survivors of All Forms of
Slavery, Trafficking and Forced Labour**



Access to Effective Remedy and Grievance Mechanisms: a Brief Review of the Situation for Exploited Migrant Workers in Finland and Norway

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Abstract

This article examines access to effective remedy and grievance mechanisms for exploited migrant workers in Finland and Norway. It reviews the countries' National Action Plans on Business and Human Rights to understand their uptake of Pillar III of the United Nations Guiding Principles on Business and Human Rights in a national context. It then analyses state-based judicial mechanisms and disclosed company-based grievance mechanisms and remediation processes to identify their accessibility and effectiveness in providing remedy for exploited migrant workers at home. Finally, it exposes gaps in policy and practice that makes it difficult for this cohort to access remedy in the two countries. Despite recent legal improvements to protect human rights, there is a need for stronger focus on outcomes from states and business in line with their commitments and responsibilities. Access to effective remedy can only become a reality for rightsholders when it is based on a participatory approach that is equally grounded in business ethics.

Keywords: Finland - Norway - Migrant workers - Labour exploitation - Remedy - Grievance Mechanisms - Business and Human Rights - UNGPs - NAPs

1. Introduction

Access to remedy is at the core of the business and human rights frameworks.¹ The UN Guiding Principles on Business and Human Rights (UNGPs) has three key pillars of which pillar III calls for States and companies to ensure access to effective judicial and non-judicial remedy

¹ Ramasastry, Anita. "Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability." *Journal of Human Rights* 14, no. 2 (2015): 237-259. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705675.

for victims.² However, access to remedy has been described as the “forgotten pillar” of the UNGPs, and one neglected area concerns access to remedy for migrant workers.³ This article focuses on grievance mechanisms and access to remedy for exploited migrant workers in Finland and Norway.

We begin this article by examining the principles set out in the UNGPs to guide States and business enterprises on access to effective remedy, and then provide context to labour migration in Finland and Norway.

To situate our analysis of grievance mechanisms and remediation processes within judicial and private sector perspectives in the two Nordic countries, we first examine Finland and Norway’s National Action Plans on Business and Human Rights (NAPs) and their uptake on pillar III of the UNGPs in national contexts. We then analyse judicial state-based mechanisms, and disclosed company based grievance mechanisms and remediation processes to identify their accessibility and effectiveness in providing remedy for the cohort of exploited migrant workers in Finland and Norway. Finally, we set out to identify possible gaps in policy and practice that may hinder the substantive and procedural aspects that are needed to provide access to effective remedy.⁴

2. Methodology

Examining substantive and procedural aspects of remedy in Finland and Norway is important, because it will give a clearer picture of how policy and practise together function in providing access to effective remedy for exploited migrant workers. To do so, this article employs qualitative methodologies to evaluate the NAPs, the judicial mechanisms, and the public corporate statements to understand possible underlying causes for access to effective remedy or lack thereof.⁵ Firstly, we have employed secondary data collection and analysis of scholarly articles, grey literature, government documents, international normative frameworks, statistics and media reports to gain insight into the nexus between migrant worker exploitation, NAPs, judicial and private sector grievance mechanisms and remedy, and to investigate our research questions.⁶ Secondly, we employ thematic analysis, a method used to identify and analyse patterns in qualitative data that is also suitable for smaller data sets⁷ such as the one we

² UN Working Group on Business and Human Rights. “The UN Guiding Principles on Business and Human Rights: An Introduction,” OHCHR, Accessed October 26th, 2023. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.

³ Anti-Slavery International. “Migrant workers’ access to remedy. A briefing paper for business.” 2021. Accessed: December 1, 2023 https://www.antislavery.org/wp-content/uploads/2022/02/ASI_AccessToRemedy_Report.pdf

⁴ UN General Assembly, Report of the Working Group on the Issue of Human Rights and transnational Corporations and Other Business Enterprises, A/72/162. 2017.

⁵ Sandelowski, Margarete. Focus on research methods: Whatever happened to qualitative description? *Research in Nursing and Health*, 11, No. 4. (2000): 334-335. <https://pubmed.ncbi.nlm.nih.gov/10940958/>

⁶ Heaton, Janet. Secondary analysis of qualitative data: An overview. *Historical Social Research*, 33, No. 3 (2008): 33-34. <https://www.jstor.org/stable/20762299>

⁷ Clarke, Victoria and Virginia Braun. Teaching thematic analysis. *Psychologist*, 26, No. 2 (2013): 120-123. https://www.researchgate.net/publication/269928387_Teaching_thematic_analysis_Overcoming_challenges_and_developing_strategies_for_effective_learning.

use in this article to analyse the corporate statements under the EU Non-Financial Reporting Directive (NFRD) for the Finnish companies and the human rights due diligence (HRDD) Transparency Act for the Norwegian companies.

The article seeks to answer the following questions:

How is exploitation of migrant workers addressed in the Finnish and Norwegian National Action Plans (NAPs) on Business and Human Rights?

What state-based judicial mechanisms exist in Finland and Norway, and how effective are they in providing remedy for exploited migrant workers?

What grievance mechanisms do Finnish and Norwegian companies have, and do they provide remedy?

3. Grievance mechanisms and access to remedy for migrant workers

To understand appropriate grievance mechanisms and access to effective remedy for exploited migrant workers at a national level, we first need to explore the principles set out to guide states and business enterprises to prevent and address violations. Rights and remedies are closely linked, and when breaches take place, the right holders should be able to seek remedy. Without this ability, rights mean very little in practice, and that is why the right to effective remedy is a core principle of human rights law and a key component of the UNGPs.⁸

States have an obligation to prevent and protect individuals from human rights violations, and to provide justice and remedy in situations of grievance under international law and the UNGPs. This is the foundational principle of remedy.

States may also address grievances if business enterprises fail to do so, and are the sole provider of justice when a crime has been committed, for instance in cases of forced labour.⁹ Grievance mechanisms provide a channel for rights holders and others to identify concerns, and are defined as “any routinised state-based or non-state-based or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought”.¹⁰ In order to allow for early intervention of grievances in line with the UNGPs, companies should establish effective operational-level grievance mechanisms for individuals or communities who may be adversely affected, so that the situation can be remediated. And as the foundational principle of access to remedy asserts, states must “take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that affected people

⁸ UN General Assembly, Report of the Working Group on the Issue of Human Rights and transnational Corporations and Other Business Enterprises, A/72/162. 2017.

⁹ M. Law. Government Approach to Remedy for Workers. What Can Companies Learn? A Discussion Paper. Cerno. 2017. Accessed on February 20th, 2024. https://www.ethicaltrade.org/sites/default/files/shared_resources/cerno_government_remedy_paper.pdf.

¹⁰OHCHR. “Guiding Principles on Business and Human Rights.” 2011. <https://documents.un.org/doc/undoc/gen/n17/218/65/pdf/n1721865.pdf?token=VaMiPUA5ael2UxMQCP&fe=true>.

within their territory or jurisdiction have access to effective remedy”.¹¹ This also includes acting as a watch-dog on businesses.¹²

Although there are existing state-based remedial mechanisms and non-state based remedial systems in place, they are perceived as difficult to use.¹³ Access to remedy for grievances is hindered by both structural and situational factors, such as difficulty to access the mechanisms; lack of awareness about existing mechanisms; and lack of trust in the mechanisms by workers. Other hindrances can be language barriers, fear of retaliation or termination of contract, costs, and lack of access to expert or legal support.¹⁴

3.1 Labour Migration in Finland and Norway

Migrant workers play an important part in the global economy. Of the more than 281 million international migrants in the world today,¹⁵ 169 million are migrant workers who are employed in different countries to where they are nationals.¹⁶ Migrant workers also provide much needed labour to sectors in the Nordic countries.¹⁷

As EU and EEA member states, both Finland and Norway have experienced an increase in migration into the countries since the expansions in 2004 and 2007.¹⁸ In Finland, labour migration has steadily grown, with 15 012 applications in 2021 and 20 960 in 2022.¹⁹ In 2022, the most common nationalities from outside the EU were Russian, Indian, Ukrainian, Filipino and Chinese. And the largest cohorts from EU countries were Estonians, Germans and Latvians.

¹¹ OHCHR. “Guiding Principles on Business and Human Rights.” 2011.

¹² Law. Government Approach to Remedy for Workers. What Can Companies Learn? A Discussion Paper. 2017.

¹³ Wintermayer, Irene and Amy Weatherburn. “Access to protection and remedy for victims of human trafficking for the purpose of labour exploitation in Belgium and the Netherlands.” (2021). https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_783811.pdf.

¹⁴ Brunovski, A. and A.M. Ødegård. Menneskehandel i arbeidslivet. 2019. Fafo. Accessed on February 20th, 2024. <https://www.faf.no/images/pub/2019/20732.pdf>; Brunovskis, Anette. "Special rights within universal welfare: Assistance to trafficking victims in Norway." *Journal of Comparative Social Work* 11, no. 1 (2016): 5-37. <https://journals.uis.no/index.php/JCSW/article/view/134/118>; Anti-Slavery International. “Migrants’ Workers Access to Remedy. A briefing paper for business.” 2021. https://www.antislavery.org/wp-content/uploads/2022/02/ASI_AccessToRemedy_Report.pdf; Davis, Tina. Recruitment of Migrant Workers, a study from Norwegian food production. 2023. https://kinginstituttet.no/wp-content/uploads/sites/4/2023/08/Rapport_A4_digital.pdf.

¹⁵ IOM. “World Migration Report.” 2022. <https://worldmigrationreport.iom.int/wmr-2022-interactive/>

¹⁶ ILO. “ILO Global Estimates on International Migrant Workers. Results and Methodology.” Third Edition. 2021. https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_808935.pdf

¹⁷ Schoultz, Isabel, Marlene Spanger, Anniina Jokinen, Synnøve Økland Jahnsen, Heraclitos Muhire, and Anna-Greta Pekkarinen. "Constructions of migrant victims of labor exploitation in Nordic court cases." *International Review of Victimology* (2023): 02697580231174912.

¹⁸ Davis, T. “Rekruttering av migrantarbeidere: En studie fra norsk matproduksjon” 2023. King Institute: Oslo.

¹⁹ The number of applications for persons outside the EU and EEA applying for a residence permit to Finland for the first time, based on work.

The sectors where migrant workers are most sought after include cleaning, healthcare, restaurant, and agriculture.²⁰

The largest groups of migrant workers in Norway come from Poland, Lithuania and Romania, and Ukraine and India for persons from third countries outside of the EU/EEC.²¹ In 2022, around 170 000 temporary migrants came to Norway to work.²² The country has relatively high wages compared to most countries in Europe and has therefore been an attractive country for migrants to seek work.²³

There has been a general shift in the labour market towards work that is more temporary, flexible and insecure, a change that is particularly evident in low skilled and low wage sectors.²⁴ This has led to employment becoming more precarious in these sectors.²⁵ Migrant workers can be vulnerable to exploitation and forced labour in risk sectors such as agriculture, fishing, construction, hospitality, cleaning and car wash, and exploitation occurs on a continuum with decent labour at one end and forced labour at the other, with different degrees of human rights and labour rights violations in between.²⁶ Research on Finland and Norway show that migrant workers in lower skilled sectors in the Nordics are vulnerable to exploitation, and in some cases also human trafficking for forced labour.²⁷

3.2 National Action Plans as Governance Tools to Facilitate Change

Since the adoption of the UNGPs in 2011, both Finland and Norway have made policy and legislative developments to implement the guiding principles at the national level and improve the landscape for corporate responsibility.

²⁰ "Maahanmuuton vuosi 2022: Venäjän hyökkäys Ukrainaan vaikutti laajasti maahanmuuttoon," Finnish Immigration Service, accessed December 19, 2023, <https://migri.fi/-/maahanmuuton-vuosi-2022-venajan-hyokkays-ukrainaan-vaikutti-laajasti-maahanmuuttoon>.

²¹ Statistisk Sentralbyrå. "Innvandringen tilbake på samme nivå som før pandemien." 2022.

²² Arbeidstilsynet. "Arbeidstilsynets risikobilde." Sammendrag. 2024. P. 14. <https://www.arbeidstilsynet.no/globalassets/rapportar/risikobilde/risikobilde-sammendrag.pdf>

²³ P.A.Dyste. "Markedsanalyse for innkvartering av sesongarbeidere i Norge." 2016. Norges miljø-og biovitenskapelige universitet.

²⁴ Doellgast and Poulignano. *Reconstructing Solidarity: Labour Unions, Precarious Work, and the Politics of Institutional Change in Europe*. 2018. Oxford: Oxford University Press ; Schoultz, Isabel, Marlene Spanger, Anniina Jokinen, Synnøve Økland Jahnsen, Heraclitos Muhire, and Anna-Greta Pekkarinen. "Constructions of migrant victims of labor exploitation in Nordic court cases." *International Review of Victimology* (2023): 02697580231174912.

²⁵ Davis, Tina. "Exploitation and forced labour practices of working holiday-makers in the Australian fresh food supply chain: a structural approach." PhD diss., 2016. : <https://ses.library.usyd.edu.au/handle/2123/17850>.

²⁶ Davis, 2016; Ollus, Natalia. "From forced flexibility to forced labour: The exploitation of migrant workers in Finland." PhD diss., University of Turku, 2016.

²⁷ Jokinen, Anniina, Natalia Ollus, and Anna-Greta Pekkarinen. *Review of actions against labour trafficking in Finland*. Helsinki European Institute for Crime Prevention and Control, 2023. <https://heuni.fi/-/report-series-99b#:~:text=Finland%20has%20been%20able%20to,the%20enforcement%20of%20criminal%20liability.>; Brunovskis and Ødegård, 2022; Davis, 2023.

Finland's National Action Plan for Business and Human Rights (NAP) was introduced in 2014. Linked to UNGPs pillar III on remedy, the NAP emphasizes that the Finnish constitution provides strong protection of human rights from a legal perspective; that tribunals are autonomous; that legal expenses are low; and that legal aid is accessible for persons with insufficient financial means. The NAP recognizes the need for victims of business related abuse to be aware of their rights, and acknowledges the vital role labour market organizations and NGOs play in disseminating information to workers about their rights and providing counselling in situations where it is needed.²⁸

The Finnish NAP further highlights the need to support employees in vulnerable positions. The NAP mentions “preventative measures such as early stage consultation and settlement proceedings”²⁹ as a way for business enterprises to prevent further harm related to their activities, and encourages companies to use non-binding complaint mechanisms, and to collaborate with NGOs. The NAP recognizes the OECD National Contact Point's (NCP) statements as legally non-binding in terms of companies implementing the resolutions.

The NAP has an attachment, a background memorandum, which gives further information on specific human rights and related legislations that are relevant for businesses. The memorandum recognizes that exploitation of migrant workers and immigrants in Finnish households, restaurant, construction, cleaning, metal, transport, gardening and berry picking sectors, may meet the criteria of human trafficking for forced labour.³⁰

The NAP gives an overview of the Finnish judicial and non-judicial structures, and correctly identifies that rights holders need to be aware of their rights and that labour market organizations and NGOs have been given the task to support vulnerable workers. As such, the NAP is relevant to cases of labour exploitation and other labour law violations taking place in Finland. However, it does not address the barriers that vulnerable workers may experience in practice, such as the majority not being members of trade unions, or the practical and procedural barriers in the judicial system, such as long processes and high evidence threshold. Furthermore, the NAP does not elaborate on any steps Finland should take to ensure access to effective remedy

²⁸ The Ministry of Employment and the Economy. National Action Plan for the Implementation of the Guiding Principles on Business and Human Rights. 2014. Accessed November 20, 2023. <https://tem.fi/documents/1410877/3084000/National+action+plan+for+the+implementation+of+the+UN+guiding+principles+on+business+and+human+rights/1bc35feb-d35a-438f-af56-aec16adfcbae/National+action+plan+for+the+implementation+of+the+UN+guiding+principles+on+business+and+human+rights.pdf>

²⁹ The Ministry of Employment and the Economy. National Action Plan for the Implementation of the Guiding Principles on Business and Human Rights. P. 30.

³⁰The Ministry of Employment and the Economy. “YK:n yrityksiä ja ihmisoikeuksia koskeva toimeenpanosuunnitelma, liite 1 Taustamuistio”. 2014. p. 50, Accessed November 20, 2023. <https://tem.fi/documents/1410877/3084000/National+action+plan+for+the+implementation+of+the+UN+guiding+principles+on+business+and+human+rights/1bc35feb-d35a-438f-af56-aec16adfcbae/National+action+plan+for+the+implementation+of+the+UN+guiding+principles+on+business+and+human+rights.pdf>

for business-related abuse in its territory and jurisdiction, through judicial, administrative, legislative or other appropriate means, as the UNGP 25 states.³¹

In 2015, Norway introduced a NAP to follow up on the UNGPs as a way to make it easier for business enterprises to actualise their human rights obligations. The NAP was informed by a mapping and gap analysis by Mark Taylor, a consultant from Fafo Research Foundation, who states that “Norwegian policy and legislation rests on the fundamental assumption that where business activities cause harm, the state will intervene with various forms of legislation”³² Further, Taylor identifies several national risks, including “violations of workers’ rights through the undermining of wages and working conditions, or through discrimination and social dumping”.³³ However, the NAP has been critiqued for focusing heavily on international matters, such as promoting CSR and protecting human rights abroad, and in doing so, it does not “adequately address the full scope of the State’s jurisdiction as it is heavily skewed towards external concerns”.³⁴ Studies on migrant workers and labour exploitation in Norway reveal several types of violations that occur on a continuum of exploitation, such as irregular contracts; wage theft; extreme work hours; bad living conditions; exaggerated costs; and recruitment fees; dependent employment relationships; abuse of power; and, forced labour.³⁵ This aligns with Taylor’s findings, although the reality of low skilled migrant workers in Norway being at risk of exploitation is not mentioned in the NAP.³⁶

In response to the 26th principle of the UNGPs on judicial grievance mechanisms, the NAP states that Norway has comprehensive human rights laws as well as relevant laws for responsible business in some areas.³⁷ The plan also points out that Norway has an efficient judicial system, and that Norwegian compensation law can lead to economic redress or compensation if the criteria are met.³⁸

On the topic of state based grievance mechanisms outside of the court system, the NAP states that Norway has well-functioning institutions, such as its Labour Inspectorate, Children’s Ombudsman, Consumer Authority, Equality and Discrimination Ombudsman, Environmental Authority, and the Civil Ombudsman as well as several grievance mechanisms linked to

³¹ UN Working Group on Business and Human Rights. “The UN Guiding Principles on Business and Human Rights: An Introduction.” OHCHR. Accessed October 26, 2023. https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf

³² Taylor, M.B. A Mapping and Gap Analysis. The State’s Duty to Protect. 2013. Fafo. Accessed January 12, 2024. <https://globalnaps.org/wp-content/uploads/2018/08/norway-gap-analysis.pdf>.

³³ Taylor, M.B. “Mapping and Gap Analysis.” 2013. The concept of social dumping is explained on page 11.

³⁴ ICAR, ECCJ and Dejusticia. Assessment of the National Action Plan (NAP) on Business and Human Rights of Colombia. 2017. P. 166. https://icar.ngo/wp-content/uploads/2021/04/ICAR_DejusticiaColombianNAPAssessment.pdf

³⁵ Davis. 2023. P 69.

³⁶ Taylor, M.B. A Mapping and Gap Analysis. The State’s Duty to Protect. 2013

³⁷ Norwegian Ministry of Foreign Affairs. “Business and Human Rights. National Action Plan for the implementation of the UN Guiding Principles.” 2015. Accessed January 12, 2024. https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/mr/business_hr_b.pdf.

³⁸ Norwegian Ministry of Foreign Affairs. “BHR NAP.”

employees, children's, women's and men's rights, such as the OECD National Contact Point, whose mandate it is to process cases independently of the government.³⁹

The plan further sets out directions and criteria for non-state-based grievance mechanisms at the company level in line with the UNGPs effectiveness criteria.⁴⁰

Although the drafting process of the NAP was coordinated by the Ministry of Foreign Affairs, each relevant Ministry is meant to be responsible for monitoring and assessing the need for legislative amendments and other measures within its area of expertise.⁴¹ However, a general concern for NAPs that has been set up under single agencies is how the policy is mainstreamed without the establishment of cross-governmental groups that allow for a continuous dialogue on matters related to the NAP beyond the drafting.⁴² Experience has shown that high-level political buy-in and leadership across government is essential for effective implementation of NAPs.⁴³

Rather than anchoring human rights violations related to business activities at home more clearly in the NAP, such as exploitation of migrant workers and mainstreaming this through all relevant Ministries for stronger policy and operational alignment, labour exploitation and forced labour practices are today primarily operationalised through separate government policy agendas under different Ministries. And these agencies' work does not include a focus on business enterprises' responsibilities and role on human rights violations as laid out in the NAP. This raises a general concern related to NAPs, which is that if the plan is placed under a lead agency, such as the Ministry of Foreign Affairs, then it is questionable if it has the needed authority to mainstream the policy across all government agencies. Another pertinent question is what authority the agency has to secure the full achievement of the NAPs goal.⁴⁴

The key stakeholders involved in tackling labour exploitation nationally are primarily different authorities, such as the police, labour inspectorate, tax authorities together with trade unions and some non-governmental organisations.⁴⁵ The siloed approach between the business and human rights (BHR) agenda reflected in the NAP that sits under the Ministry of Foreign Affairs on the one hand, and the National Action Plan against Social Dumping and Work Life

³⁹ Norwegian Ministry of Foreign Affairs. "BHR NAP". Although the state-based mechanisms referenced in the NAP are appropriate to provide access to effective remedy on paper, it is hard to assess to what extent they are substantive in their operational delivery of access to effective remedy without undertaking empirical research to examine their effectiveness.

⁴⁰ Norwegian Ministry of Foreign Affairs. "BHR NAP." The criterias include being legitimate, fair, accessible, predictable, reasonable, based on dialogue with and transparency for the involved parties, and that the results and remedies are in accordance with internationally recognized human rights.

⁴¹ Norwegian Ministry of Foreign Affairs. "BHR NAP." <https://globalnaps.org/country/norway/>. The National Action Plan on Social Dumping and Work Life Crime is under the Ministry of Employment, and the National Action Plan Against Human Trafficking is under the Ministry of justice.

⁴² O'BRIEN, Claire METHVEN, Amol Mehra, Sara Blackwell, and Cathrine Bloch Poulsen-Hansen. "National action plans: Current status and future prospects for a new business and human rights governance tool." *Business and Human Rights Journal* 1, no. 1 (2016): 117-126.

⁴³ Scottish Human Rights Commission. 2019. P. 9.

⁴⁴ Methven O'Brien et al. 2015.

⁴⁵ Brunovskis and Ødegård. "Menneskehandel i arbeidslivet." 2019. Accessed January 12, 2024. <https://www.faf.no/images/pub/2019/20732.pdf>.

Crime and the National Action Plan against Human Trafficking that primarily falls under separate Ministries reveal a siloed approach towards effectively tackling labour exploitation at home.⁴⁶ This fragmentation has until now prevented the different stakeholders from speaking the same language when talking about business-related human rights violations affecting migrant workers. Further, it is a missed opportunity to sufficiently engage with business enterprises in several high-risk sectors in Norway where their responsibilities are clearly set out in the UNGPs and NAP, and where they may have direct leverage to influence effective operational change.

Although a state's introduction of a NAP indicates a political commitment to bring laws, policies and practices into alignment with the core norms of the UNGPs,⁴⁷ the Norwegian NAP does not fully live up to this promise when it comes to internal labour exploitation. Further, the lack of mainstreaming of the policy across governmental departments exemplifies the United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' statement that 'the lack of policy coherence between governmental departments and agencies that shape business practice and the human rights obligations of the State is a significant gap'.⁴⁸

At an operational level, the current system does not provide a sufficiently strong multi-stakeholder approach that captures the maximum responsibilities business enterprises have as well as their power to influence change in their national operations and supply chains in line with the responsibilities set out for companies in the NAP. This reflects a concern that NAPs have not done enough thus far to ensure better protection in key policy areas, including in access to remedy.⁴⁹

The Finnish and the Norwegian governments have introduced the NAPs, an important governance tool to prevent and address human rights abuses linked to business. However, without political will and a stated commitment to measure and evaluate the NAPs impact based on transparency, the NAPs will remain weak in their implementation of Pillar III of the UNGPs, which will see obtaining effective remedy as an exception rather than the rule.⁵⁰ It is also notable that the Finnish NAP acknowledges more explicitly that business related exploitation occurs in Finland, and that migrant workers are a vulnerable group nationally. The Norwegian NAP on the other hand, has a stronger focus on human rights risks and violations that occur internationally.

⁴⁶ The National Plan against Social Dumping and Work Life Crime sits under the Ministry of Employment, and the National Action Plan against Human trafficking sits under the Ministry of Justice.

⁴⁷ Methven O'Brien et al. 2015.

⁴⁸ General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/73/163 (16 July 2018), para 84(a)

⁴⁹ Rivera, Humberto Cantú. "National action plans on business and human rights: Progress or mirage?." *Business and Human Rights Journal* 4, no. 2 (2019): 213-237. <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/national-action-plans-current-status-and-future-prospects-for-a-new-business-and-human-rights-governance-tool/51687C20A72589C0D9A34B13F1790C15>; San Antonio, Silvia Avellaneda. "Role of Human Rights Indicators in National Action Plans on Business and Human Rights: Comparative analysis of Finland and Spain." *The Age of Human Rights Journal* 20 (2023): e7500-e7500. <https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/7500>; ICAR, ECCJ and Dejusticia. 2017.

⁵⁰ UN General Assembly, Report of the Working Group on the Issue of Human Rights and transnational Corporations and Other Business Enterprises, A/72/162. 2017

As a result, there is a disconnect between business related exploitation of migrant workers at home and the national response structures in Norway.

3.3. Do the state-based judicial mechanisms provide remedy for migrant workers?

Access to justice is a vital part of states' duty to protect human rights. Exploitation and forced labour are serious crimes, where victims are entitled to remedy.

Recent research from Finland states that policy measures to tackle labour trafficking and exploitation have been more successful there compared to other Nordic countries.⁵¹ Finland has the largest number of indictments and convictions for trafficking for forced labour in the Nordics.⁵² Human trafficking for forced labour was added to the Finnish penal code in 2004, at the same time as the extortionate work discrimination law was introduced, which can be applied in cases where an employee is put to an inferior position by exploiting their dependent position.

The first court case of trafficking for forced labour in Finland was in 2007. Since 2005, the labour inspectorate has had specialized inspectors focusing on monitoring the use of migrant workers.⁵³ Research has been conducted on labour exploitation in Finland, and the independent role of the National Rapporteur on Trafficking in Human Beings has been a driver for developments at policy and practice levels.⁵⁴ Research has also found that forced labour is widely understood in the Finnish court system, which is reflected by for instance the courts having referred to the ILO's forced labour indicators in many of the convictions.⁵⁵ Despite some of the positive developments, the threshold for sentencing trafficking for forced labour remains high,⁵⁶ which is the case across the Nordic countries.⁵⁷

In addition to the criminal court, remedy for labour exploitation can be sought in a civil process, especially concerning different labour law violations, such as unpaid wages. The civil process however includes a high cost risk for the plaintiff, especially if they are not a trade union member. Free legal aid by the state is provided only if a person has insufficient funds, based on a calculation on their income, expenses and wealth.⁵⁸ In the civil process, costs for litigation and a

⁵¹ Jokinen, Ollus and Pekkarinen. "Review of actions."

⁵² In Finland there have been 25 indictments and 9 convictions for trafficking for forced labour between 2000-2020. In Schoultz et al., "Constructions". P. 7 .

⁵³ Jokinen, Ollus and Pekkarinen. "Review of actions." P. 31.

⁵⁴ Jokinen, Ollus and Pekkarinen, Review of actions, 60. Finland is the only country in the Nordics that have a National Rapporteur on Trafficking in Human Beings.

⁵⁵ Jokinen, Ollus and Pekkarinen, Review of actions, 60.

⁵⁶ Kimpimäki, Minna. "Ulkomaisten työntekijöiden hyväksikäyttö: ihmiskauppaa, kiskonnantapaista työ syrjintää vai alipalkkausta?" 2021. Lakimies 119, no. 5 (2021): 785-811.

⁵⁷ Schoultz et al., "Constructions".

⁵⁸ "Mitä oikeusapu maksaa," Oikeus.fi. Accessed March 7, 2024 <https://oikeus.fi/oikeusapu/fi/index/hakeminen/mitaoikeusapumaksaa.html#>.

private lawyer can become high, and the plaintiff is responsible for all the expenses, compared to a criminal process where it is the prosecutor who brings the case to court.⁵⁹

The state judicial mechanisms related to labour exploitation in Norway have until recently, primarily been the criminal code for human trafficking for forced labour, which was introduced in 2003, and updated in 2015.⁶⁰

The legal threshold for sentencing for forced labour differs slightly in the Nordic countries as mentioned above.⁶¹ The number of legal cases of trafficking for forced labour is highest in Finland with 25 cases processed by the courts. Norway is second with nine court cases. Experts do, however, find the overall threshold for cases to be high.⁶²

The discussion on exploitation in Norway has in recent years been focused around social dumping and work life crime, two policy agendas that have been introduced by separate governments.⁶³ This focus is also reflected in a new national action plan for social dumping and work life crime introduced for the first time in 2022.⁶⁴ According to the government, social dumping concerns migrant workers getting significantly worse wages and working conditions than Norwegian employees, which can include excessive work hours and poor living conditions. Work life crime refers to different forms of profit motivated crime in the labour market that happens at the expense of employees working conditions and rights, but also affect the welfare state as a whole.⁶⁵ In the discussions about severe labour exploitation, the focus on criminal employers has been much stronger than on the remediation of the victims.⁶⁶ In 2021, Norway was for the first time downgraded to Tier 2 in the yearly Trafficking in Persons (TIP) Report by the US Department of State due to not having met the minimum standards for eliminating trafficking, including prosecuting zero trafficking cases; not providing sufficient funding for victims assistance; charging traffickers for non-trafficking crimes; and not securing trafficking free supply chains in selected sectors.⁶⁷

A new law against wage theft became effective in Norway in January 2022, which is punishable by up to six years in severe cases. This law could potentially bridge a judicial gap

⁵⁹ Kristiina Vainio ja Maija Mustaniemi-Laakso. "Business and human rights - access to remedy. Finland country report", 2019. Accessed November 15, 2023 https://fra.europa.eu/sites/default/files/fra_uploads/fi_country_report.pdf.

⁶⁰ Law section §257 and §258 on human trafficking: Brunovskis and Ødegård. "Menneskehandel i arbeidslivet." P. 28.

⁶¹ Jokinen, Ollus and Pekkarinen. "Reviews of actions". P 53.

⁶² Jokinen, Ollus and Pekkarinen, Review of actions, 54.

⁶³ Jokinen, Ollus and Pekkarinen. "Review of Actions"; Davis and Pedersen."Migrantarbeidere i Norske Verdikjeder." P. 13.

⁶⁴ There is also a national action plan on human trafficking from 2016 that has no expiry date and lacks alignment with the NAP on Business and Human Rights, which does not mention forced labour in a supply chain context.

⁶⁵ Regjeringen. "Handlingsplan mot sosial dumping og arbeidslivskriminalitet." 2022. Accessed on February 23rd, 2024. <https://www.regjeringen.no/no/dokumenter/test/id2928944/?ch=1>.

⁶⁶ Brunovskis, A. and Ødegård, A.M. "Gråsoner".

⁶⁷ DEPARTMENT OF STATE WASHINGTON DC. "Trafficking in persons report." (2021). Norway was still put on Tier 2 in the 2023 TIP Report.

between prosecutions for trafficking for forced labour, which has a very high threshold, and labour law breaches, to address this particular form of labour exploitation more effectively. The first and only conviction for wage theft under the law was given in October 2023.⁶⁸ Wage theft may be one of the more common forms of labour violations in Norway and represents a direct threat to migrant workers' livelihood and wellbeing.⁶⁹ Norway does not have national statistics on forced labour, with its principal purpose to inform measures to prevent and eliminate severe exploitation, as well as inform measures to protect persons, and provide access to appropriate and effective remedy.⁷⁰ This has been criticised by GRETA in their 2017 and 2021 country report, and by the TIP Report.⁷¹

Similarly, there is no data on the prevalence of wage theft although it is expected to be quite widespread.⁷² A recent study based on interviews with migrant workers show that 14 out of 19 workers had experienced wage theft.⁷³ Employers use different methods, such as delaying payments until temporary migrant workers can not afford staying in Norway any longer and return home without pay, declare themselves bankrupt, or demand paybacks from workers after having paid the correct wages so that it looks legitimate on paper.⁷⁴ A key problem since the wage theft law was introduced is that police drop 90% of the cases, primarily because the evidence threshold is very high.⁷⁵ The burden of proof is on the violated worker, who in most cases will struggle to document how many hours they have worked in a way that satisfies the threshold for sending a case to court.⁷⁶ Another problem is that exploited workers do not have

⁶⁸ Ognedal, O. "Pubeier etter historisk dom: - Aldri mer." 2023. NRK. Accessed January 12, 2024. <https://www.nrk.no/ostfold/eier-av-spisested-i-askim-er-den-forste-som-er-domt-for-lonnstyveri-1.16593207>.

⁶⁹ Ekendahl-Dreyer, A.S. De sårbare arbeiderne. 2020. Dagsavisen. Accessed January 12, 2024. <https://www.dagsavisen.no/debatt/2020/06/18/de-sarbare-arbeidstakerne/>.

⁷⁰ ILO. "Guidelines concerning the measurement of forced labour." ICLS/20/2018/Guidelines. 2018. Norway has been criticised by GRETA in their 2017 and 2021 country report for not having a comprehensive system for collecting and analysing data on measures to protect and promote the rights of victims of trafficking

⁷¹ GRETA. "Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Norway." 2017. <https://rm.coe.int/greta-2017-18-fgr-nor-en/1680782abc>; GRETA. "Evaluation Report Norway. Access to justice and effective remedies for victims of trafficking in human beings". 2022. <https://rm.coe.int/greta-third-evaluation-report-on-norway/1680a6ce66>. US Department of State. "2023 Trafficking in Persons Report: Norway. <https://www.state.gov/reports/2023-trafficking-in-persons-report/norway/>.

⁷² Günther, J.H et al. "Ber staten hjelpe ofre for lønnsstyveri: - Må slå neven i bordet." NRK. Accessed on March 1st, 2024. <https://www.nrk.no/ostfold/hoyre-ber-staten-om-a-hjelpe-ofre-for-lonnstyveri-i-norge-1.16766823#:~:text=NRK%20forklarer&text=Lønnstyveri%20er%20å%20bevisst%20betale,gi%20inntil%206%20års%20fengsel..>

⁷³ Davis. Rekruttering av migrantarbeidere. P. 74

⁷⁴ Aanstad, H. "Flere må straffes for lønnsstyveri." 2023. FriFagbevegelse. Accessed January 12, 2024. <https://frifagbevegelse.no/debatt/flere-ma-straffes-for-lonnstyveri-6.490.1007910.ab96b737b5#:~:text=Det%20markerer%20et%20betydelig%20fremskritt,sluppet%20una%20i%20stor%20skala.>

⁷⁵ Günther et al. "Ber staten hjelpe ofre for lønnsstyveri: - Må slå neven i bordet."

⁷⁶ We are currently doing interviews for a larger research project on access to remedy, and this is an early finding that several experts bring up.

access to any free legal aid in cases concerning underpayment or wage theft.⁷⁷ Beyond the impact wage theft has on the workers and their families lives, it also creates an uneven playing field for business enterprises who operate responsibly.

Although migrant workers who have been underpaid can seek remedy in the form of recovering wages through the civil courts as mentioned in the NAP, they rely heavily on specialised support, such as civil society organisations, trade unions and pro bono lawyers, to do so.⁷⁸ There are still significant practical barriers, including access to information about the civil remediation avenue; not getting access to free legal aid; having to pay a fee to put forward a complaint; the near impossible scenario of filing a complaint if you do not have support from an NGO, a pro bono lawyer or a trade union;⁷⁹ and, that it can take around two years before a case is settled.⁸⁰ The responsibility for collecting money owed to them from exploiting employers currently falls on the employees who have been underpaid or receive no pay. Once a complaint is filed through the first stages of civil court, a conciliation council, full remediation in terms of repayment of all lost wages is not a given, in which case there has to be an appeal that requires further legal aid and more costs.

In October 2023, the labour inspectorate performed 1800 inspections thus far that year with a particular focus on wage theft and indecent working conditions, and they discovered violations at 630 of the inspected companies.⁸¹ However, even if the labour inspectorate sanctions a company for wage theft or underpayment with a fine, the money goes to the state and not to the violated workers. For temporary migrants who are in the country on time bound seasonal visas or for EU workers who have not been paid, it can be hard to seek redress for wage theft or other forms of exploitation for several reasons, including visa expiry; lack of free legal aid; no money to stay; and long court procedures. And if they leave the country, they may drop out of the system altogether and give up on seeking remedy.⁸²

It has been pointed out that Norway could benefit from introducing a law similar to the Finnish extortionate work discrimination law where exploited migrant workers can seek remedy for labour exploitation that doesn't meet the high threshold of the human trafficking criminal

⁷⁷ Brunovskis, A. and A.M. Ødegård. 'Grovt utnyttning av utenlandske arbeidstakere. Gråsonen mellom det regulære arbeidslivet og menneskehandel.' Fafo. P. 77. 2022. Accessed on February 23rd, 2024. <https://www.faf.no/images/pub/2022/20817.pdf>.

⁷⁸ Weatherburn, Amy, and Irene Wintermayr. "Access to protection and remedy for victims of human trafficking for the purpose of labour exploitation in Belgium and the Netherlands." (2021). Accessed on March 5th, 2024. https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_783811.pdf.

⁷⁹ The probability of filing complaints without support is low due to for instance language barriers, costs and lack of income. You only have rights to legal support if you are a member of a trade union, and membership is generally low amongst temporary migrant workers in the Nordic countries. The Norwegian Confederation of Trade Unions (LO) offers limited legal aid in a limited number of cases as part of a collaboration with frontline NGOs. LO. "LO-advokatene samarbeider med Caritas, Kirkens Bymisjon, Juss buss m.fl." 2019. Accessed on February 29th, 2024. https://www.lo.no/hva-vi-mener/lo-advokatene/nyheter-fra-lo-advokatene/lo_advokatene_bistar_de_mest_sarbare/.

⁸⁰ Brunovskis and Ødegård. "Menneskehandel i arbeidslivet."

⁸¹ Ognedal, O. "Pubeier etter historisk dom: - Aldri mer". 2023. NRK

⁸² Schoultz et al. "Constructions".

code.⁸³ Overall, it is not an easy path to seek redress through criminal cases for labour exploitation in the Nordic countries,⁸⁴ even though Finland has a better track record than Norway.⁸⁵ The situation seems to illustrate McDonald's statement that "There is a large population of exploited migrant workers whose cases never come to court, and the cases that do reach court thus represent the tip of the iceberg".⁸⁶ Although States are the primary duty bearer for providing remedy according to international law, non-state based grievance mechanisms by business enterprises have the potential to bridge a current accountability gap. It allows rightsholders an alternative route to seek remedy where judicial recourse may present too many obstacles or may not be a viable option.

4. What grievance mechanisms do Finnish and Norwegian business enterprises have, and do they provide access to remedy?

Under Pillar II of the UNGPs, all companies have a duty to respect human rights regardless of size, sector and country of operation, and it is expected that they have processes in place to remediate any harm they have caused directly or indirectly.⁸⁷ When it becomes mandatory by law to conduct human rights due diligence processes, companies who have been laggards in responding to Pillar II of the UNGPs have to put proper processes in place to ensure that specific criteria are met with the end goal to prevent human rights violations or activate early interventions to stop and remediate harm. For the purpose of this article, we reviewed human rights due diligence and sustainability statements from a small sample of Finnish and Norwegian companies to assess what the entities disclose about grievance mechanisms and remediation processes in response to Pillar III of the UNGPs. We reviewed six Finnish and six Norwegian company statements based on the required Non-Financial Reporting Directive (NFRD) that Finnish businesses have reported under, and the mandatory HRDD statements Norwegian companies have published under the Transparency Act.⁸⁸ We selected companies from the construction sector and food industry as these are known to be high risk sectors for migrant workers. We analysed what the business enterprises disclose on potential and actual risks related to migrant workers in their national operations and supply chains, as well as their operational grievance mechanism structures and remedy strategies and actual cases to better understand if remedy is provided. Although the companies may have reported on human rights in several

⁸³ Brunovskis and ødegård. 2022. As mentioned earlier, the chances of trying and winning human trafficking cases in court has proven to be slim, especially in recent years.

⁸⁴ Both Norway and Finland are signatories to the 2014 ILO protocol, which states that "Each Member shall take effective measures to prevent and eliminate its use, to provide to victims protection and access to appropriate and effective remedy, such as compensation, and to sanction the perpetrators of forced or compulsory labour".

⁸⁵ Brunovskis and Ødegård. *Menneskehandel i arbeidslivet*. P. 43

⁸⁶ Schoultz et al. 2023; McDonald, William F. "Explaining the under-performance of the anti-human-trafficking campaign: experience from the United States and Europe." *Crime, Law and Social Change* 61 (2014): 125-138.

⁸⁷ Deva, S. 2023.

⁸⁸ We only focus on the NFRD and Transparency Act disclosures although the companies assessed may also report under other regulations, i.e the EU Taxonomy.

different places, we have focused on reviewing reporting in their annual reports and sustainability reports from 2023.⁸⁹

Overview of companies assessed from Finland and Norway

Company	Sector	No. of employees	Report type	Disclosure on grievance mechanisms	Disclosure on labour exploitation risks for migrant workers	Disclosure on cases of remediation
S Group	Retail, food and other	Ca. 40000	Sustainability report	Yes	Yes	2 cases
Kesko	Retail, food and other	ca. 39000	Sustainability report	Yes	No	No
Valio	Food production	4457	Sustainability report	Yes	Yes	No
Fazer	Food production	6235	Sustainability report	Yes	Yes	No
YIT	Construction	Ca. 5000	Sustainability report	Yes	Yes	No
SRV	Construction	Ca. 1000	Sustainability report	Yes	Yes	No
Coop Norge AS	Retail, food	Ca. 26000	Transparency Act statement	Yes	No	2 cases
NorgesGruppen	Retail, food	44139	Transparency Act statement	No	Yes	1 case
Lerøy Seafood Group ASA	Food production	5972	Transparency Act statement	Yes	No	No

⁸⁹ All the HRDD statements by Norwegian companies under the Transparency Act have been analysed from their annual reports for consistency.

Gartnerhallen SA	Food production	Coop of 1000 suppliers	Transparency Act statement	Yes	No	No
Betonmast (part of AF Gruppen)	Construction	600	Transparency Act statement	Yes	Yes	1 case
Skanska Norway	Construction	Ca. 3800	Transparency Act statement	Yes	Yes	No

4.1 Reporting frameworks in Finland and Norway

The Finnish companies have to report under the Non-Financial Reporting Directive (NFRD), which does not set out specific reporting criteria or guidance on grievance mechanisms and remedy.⁹⁰ In 2020, the European Commission decided to review the effectiveness of the NFRD through a public consultation, which revealed the directive’s implementation shortcomings linked to reliability, comparability and relevance of the information provided.⁹¹ A new regulation was introduced in 2023 on companies’ disclosure on sustainability information that includes human rights, the Corporate Sustainability Reporting Directive (CSRD), which will replace the NFRD.⁹² The new directive, based on the UNGPs,⁹³ will strengthen the sustainability reporting requirements in accordance with the European Sustainability Reporting Standards (ESRS) for large and listed companies in Europe, and the first reports will be published in 2025 for the reporting year 2024.⁹⁴ The CSRD will be mandatory for larger Finnish companies; it stipulates the due diligence procedures corporations will have to perform and sets out specific guidelines for how to report on remedy.⁹⁵

The UNGPs have proven to be influential in shaping policies and laws in the BHR field, and HRDD have become a leading area of development and discourse around how business

⁹⁰ The NFRD requires companies to publish a non-financial report on their ESG performance in their annual report.

⁹¹ European Parliament. Briefing. Non-financial Reporting Directive. 2021. Accessed on February 29th. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI\(2021\)654213_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf).

⁹² Corporate Sustainability Reporting Directive (CSRD): [Corporate sustainability reporting - European Commission \(europa.eu\)](https://european-council.europa.eu/media/en/press-room/pages/press-room-item.aspx?id=13182)

⁹³ Platform on Sustainable Finance. Final Report on Minimum Safeguards. 2022. P. 15. Accessed on March 1st, 2024. https://finance.ec.europa.eu/system/files/2022-10/221011-sustainable-finance-platform-finance-report-minimum-safeguards_en.pdf.

⁹⁴ European Sustainability Reporting Standards (ESRS) have been developed by EFRAG, independent multi-stakeholder body. The ESRS were adopted by the EU commission in July 2023 to be used by companies under the CSRD.

⁹⁵ The Norwegian Government held a hearing in October 2023 as to whether the CSRD should be included in Norwegian law to replace the Non_Financial Reporting Directive, and the decision is still pending.

respect human rights, including HRDD laws at national and European level.⁹⁶ HRDD is a process by which corporations can identify, prevent, mitigate and account for their actual and potential adverse human rights impacts.⁹⁷ The legal test with the HRDD laws is not whether a human rights violation occurs in an enterprise's operations or supply chains, but what actions companies take to identify risks and breaches, assess its seriousness, and what steps they take to respond.⁹⁸ Norway introduced the Transparency Act in 2021, a HRDD law that also includes a focus on decent working conditions and access to information.⁹⁹ The law requires companies to conduct due diligence assessments of their own business, supply chains and business partnerships, and publish an account of their assessment. Companies also have a duty to provide information upon request, and take steps towards all workers getting a living wage. The law applies directly to around 9000 companies..¹⁰⁰

The Transparency Act is enforced by the Norwegian Consumer Authority, who can give warnings and economic sanctions if companies do not fulfill the requirements under the law. It also provides guidelines for what needs to be included in a statement. The statements have to meet three criteria: 1) a general description of the business enterprise that includes information about how the company is organised, what products or services it offers, what markets it operates in, how human rights and decent working conditions have been anchored in internal guidelines and routines, and information about grievance mechanisms; 2) the statement needs to include information about actual negative consequences and significant risks that have been identified through the due diligence assessment, and the guidelines highlight the importance for companies to describe what their findings have been and not just state that they have had findings,¹⁰¹ and 3) the statement has to include information about initiatives and results. As a minimum, companies

⁹⁶ Deva, Surya. "Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?." *Leiden Journal of International Law* 36, no. 2 (2023): 389-414. <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/A826E647F5996B9D9EA331D0258129BB/S0922156522000802a.pdf/mandatory-human-rights-due-diligence-laws-in-europe-a-mirage-for-rightsholders.pdf>. HRDD

⁹⁷ McCorquodale, Robert, and Justine Nolan. "The effectiveness of human rights due diligence for preventing business human rights abuses." *Netherlands International Law Review* (2021): 1-24. <https://link.springer.com/article/10.1007/s40802-021-00201-x>.

⁹⁸ Johnstone, O. and Hesketh, O. "Effectiveness of mandatory human rights and environmental due diligence laws." *Modern Slavery Evidence & Policy Centre. Policy Brief. P. 7. 2022. Accessed March 1st, 2024. https://modernslaverypec.org/assets/downloads/mHREDD_briefing_FINAL.pdf.*

⁹⁹ The HRDD requirement in the Norwegian law is listed in: Krajewski, Markus, Kristel Tonstad, and Franziska Wohltmann. "Mandatory human rights due diligence in Germany and Norway: Stepping, or striding, in the same direction?." *Business and Human Rights Journal* 6, no. 3 (2021): 550-558.

¹⁰⁰ Forbrukertilsynet. "The Transparency Act." 2024. Accessed on March 1st, 2024. <https://www.forbrukertilsynet.no/vi-jobber-med/apenhetsloven/the-transparency-act>. The duty to provide information covers requests for general information and information about a specific product or service. The due diligence assessment must be carried out based on the OECD Guidelines for Multinational Enterprises.

¹⁰¹ The Consumer Authority may have updated information on their website about reporting duties and guidelines after they have assessed the first round of statements published by companies in 2023.

have to communicate what they have done or plan to do, and expected and actual results of these initiatives in reducing risks or remediate actual negative consequences the company has found.¹⁰²

4.2 Company disclosure and acknowledgement of risk

The selected Finnish companies are not under legal obligation to conduct a HRDD under the NFRD, although some of them disclose in their statements that they have done so, while the Norwegian companies are legally bound to do so under the Transparency Act. Reporting based on the UNGPs is a tool for investors, authorities and other stakeholders to assess companies' understanding and management of human rights risks.¹⁰³ The purpose of using HRDD as a risk assessment tool is for business enterprises to consider risk to people rather than risk to the corporation, in other words to ensure that the risk assessment goes beyond identifying and managing risk to the company itself. It is however argued that in practice, HRDD as a risk management tool is more profit-driven than rights-driven.¹⁰⁴ This can be said to defeat the purpose of the UNGPs as a framework for companies to 'know and show' that they respect human rights.¹⁰⁵

The company statements we assessed vary in terms of if and how they mention the risk of migrant worker exploitation linked to their supply chains and operations in Finland and Norway. Of the Finnish company statements, five of six business enterprises show awareness of the potential risk of exploitation that migrant workers are vulnerable to in a national context. However, the depth of disclosure varies. One company mentions human trafficking for forced labour. Two of the companies list internal measures they have implemented, such as having internal guidelines to prevent and identify exploitation, and internal training on prevention and identification of labour exploitation risks in Finland. Four of the companies disclose external measures they have initiated, including partnerships with a local university, hiring survivors of human trafficking, and organising regular anti-grey economy days on construction sites to inform about and tackle socially harmful phenomena, including exploitation.

Of the Norwegian company statements, only three companies mention the potential risk of exploitation for migrant workers at home. One company in the food industry mentions concrete actions they have made to address migrant worker risks, and also disclose about a new supplier dialogue system, which functions as a support to the company's risk assessments. The construction companies overall elaborate more on the risk of migrant worker exploitation within their sector, and give a more in depth account of where in their operations and supply chains this may pose a threat. In doing so, they show a greater awareness of risk to this specific group.

Further, these companies refer to challenges related to human rights, including basic labour rights and work life crime. One company mentions examples linked to informal work and

¹⁰² Forbrukertilsynet. Redegjørelse. 2024. Accessed on March 1st, 2024. <https://www.forbrukertilsynet.no/vi-jobber-med/apenhetsloven/redegjorelsesplikt#etterpa>

¹⁰³ Shift. "UN Guiding Principles Reporting Framework." 2023. Accessed on March 1st, 2024. <https://www.ungpreporting.org>.

¹⁰⁴ Deva . "Mandatory Human Rights Due Diligence Laws in Europe". P. 400.

¹⁰⁵ Shift. UN Guiding Principles Framework.

migrant workers who are coerced into slavely working conditions, and discloses that the greatest inherent risk of violations of human rights and decent working conditions are potential situations at their building sites. The other construction company views suppliers of services to their construction sites as partly high risk when it comes to the risk of breaches of human rights and decent working conditions, and highlights how the construction industry in general is known for having high demand for cheap labour and an extensive use of migrant workers within some procurement categories. Further, the company identifies the following procurement categories as high risk areas: painting, bricklaying, cleaning and labour hire companies. Both companies in the construction sector mention measures they have implemented, such as partnering with the industry alliance, EBA for overall risk assessments and Fair Play Bygg.¹⁰⁶

One company operating in the food industry disclose that they consider the risk for human rights violations in Norway to be low due to strict labour law regulation, while another company in the same industry disclose that they consider exploitation of migrant workers to be the greatest risk in their supply chains. The latter has entered into a partnership with the Coretta and Martin Luther King Institute for Peace (King Institute) to strengthen migrant workers' rights in Norwegian food supply chains by initiating a project that focuses on improving recruitment processes among their suppliers. Overall, only three of the six Norwegian companies mention measures they have taken to address risks in Norway beyond their own internal systems, which include engaging in industry alliances and collaborating with external civil society partners. The Finnish companies disclose a greater awareness about the potential risk of exploitation for migrant workers in their reporting under the NFRD than the Norwegian companies do in their reporting under the HRDD Transparency Act

4.3 What grievance mechanisms do the companies have?

Grievance mechanisms are an essential way for rights holders and others to identify concerns and raise grievances, and seek remedy in cases where companies have caused harm. A business enterprises' operational level grievance mechanisms should meet the criteria set out in the UNGPs and the NAPs to ensure that they are "legitimate, fair, accessible, predictable, reasonable, based on dialogue with and transparency for the involved parties, and that the results and remedies are in accordance with internationally recognized human rights".¹⁰⁷ The grievance mechanisms should also be used as a source of learning for companies. In order to create effective operational level grievance mechanisms that have integrity, companies need to build a systematic approach to remedy that allows affected rights holders to address adverse impacts in a timely way.

¹⁰⁶ Fair Play Bygg is established as a collaboration between trade unions and business enterprises. The initiative operates a third party whistleblower channel, and investigates concrete cases of exploitation and work life crime that they report to the authorities.

¹⁰⁷ OHCHR. "Guiding Principles on Business and Human Rights." 2011; Norwegian Ministry of Foreign Affairs. "BHR NAP."

However, there are several hindrances in getting access to remedy, and one of them is based on how well the operational level grievance mechanisms are set up.¹⁰⁸ Known weaknesses can be a lack of trust in the mechanism by the rights holders, language barriers, fear of reprisals, and lack of ownership of the mechanism.¹⁰⁹ Kimotho and Ogot argue that for a grievance mechanism to meet an effective human rights based approach, it needs to seek to reduce power imbalances between a company and the affected rights holder.¹¹⁰ According to the 2023 Corporate Human Rights Benchmark, only 5% of companies disclose evidence of how they ensure the rights holders trust, while only 10% show evidence of how they engage with affected stakeholders for them to feel a sense of ownership by involving them in the development, performance and improvement of the grievance mechanisms.¹¹¹ Without meaningful engagement with potentially affected rights holders, it will be difficult to ensure that the grievance mechanisms meet the criteria outlined in the UNGPs, such as being predictable, fair, and transparent. Another major barrier that often prevents exploited migrant workers from seeking remedy in the first place is the lack of awareness about the existing grievance mechanism. If a company does not communicate about the grievance mechanisms to the potentially affected groups, the grievance mechanisms have not been made accessible to the rights holders.¹¹²

Our statement analysis revealed that all the Finnish companies disclose information about their grievance mechanisms, while only four of the six Norwegian companies do so. However, the level of information provided differs. The main grievance mechanism established by the Finnish business enterprises are whistleblower channels that are open to both internal and external complaints that can be used anonymously. All but one of the companies disclose the number of reports of possible misconducts they received in the reporting year, and some specify how many of the complaints came through the whistleblower channel.

One company lists other possible channels to put forward grievances, which include amfori¹¹³ and the Board of Trading Practices in Finland while another company disclosed that reports about possible misconducts can also come through their shop stewards. None of the companies disclose about receiving complaints relating to human rights violations in their supply chains through the whistleblower channel. One company disclosed that they have carried out an annual survey for external migrant workers that focuses on terms, wellbeing, and awareness of

¹⁰⁸ World Benchmark Alliance. "Access to grievance mechanisms without trust and ownership hinders just remedies". 2023. Accessed on March 4, 2023. <https://www.worldbenchmarkingalliance.org/publication/chrb/findings/access-to-grievance-mechanisms-without-trust-and-ownership-hinders-just-remedies/>.

¹⁰⁹ World Benchmark Alliance. "Corporate Human Rights Benchmark 2023."

¹¹⁰ Kimotho, Wangui, and Daniel Ogot. "Exploring the drivers of gendered grievance mechanisms: examples from the agribusiness, extractive and wind power sectors in Kenya." *Impact Assessment and Project Appraisal* 39, no. 3 (2021): 240-250. <https://www.tandfonline.com/doi/pdf/10.1080/14615517.2021.1906020>.

¹¹¹ World Benchmark Alliance. "Corporate Human Rights Benchmark 2023."

¹¹² OHCHR. OHCHR Accountability and Remedy Project: Meeting the UNGP's Effectiveness Criteria". Summary of APR III Guidance. 2021. <https://www.ohchr.org/sites/default/files/2022-01/arp-note-meeting-effectiveness-criteria.pdf>.

¹¹³ amfori is a global business association that promotes sustainable trade, supply chains and business.

their rights. They also disclosed about putting up posters about labour exploitation at their sites as a preventative measure to help people identify signs and seek assistance.

The six Norwegian companies that we assessed had to report for the first time under the Transparency Act for the year 2022 in 2023.¹¹⁴ Of the six companies, two of them do not disclose any information about grievance mechanisms in their Transparency Act statement in their annual reports, although it is likely that they have grievance mechanisms in place.¹¹⁵ The other four business enterprises have established whistleblower channels that are open to external and internal reporting apart from one company that only has a channel for internal reporting by and for their own staff. One company disclosed that they have a policy for whistleblowing, a whistleblowing channel for internal and external complaints, and a notification committee that reports on complaints every quarter, while their subsidiaries report through a ‘compliance’ certificate, which includes reporting regularly on human rights and decent working conditions and whistleblowing. Another company outline their grievance mechanisms and the process in detail by describing multiple levels within the leadership hierarchy where a complaint can be filed; they disclose contact details of where grievances can be reported, how the complainant is kept informed during the process, and that the company also has a whistle-blowing committee with names of the members listed in the statement. The company also states that they have routines in place to ensure a consistent treatment and protection against reprisals. Another company has established a whistleblower channel in the form of a hotline that is operated by a third party, which is open to internal and external complaints. The Norwegian companies’ have also established separate email addresses specifically for questions and complaints linked to the Transparency Act.

Although most of the companies disclose information about their grievance mechanisms, the degree of information differs, and the information seems to overall be more superficial than substantive in nature. The grievance mechanisms are primarily whistleblower channels that cover a broad range of grievances, and none have been specifically designed in a way that is sensitive towards labour exploitation cases. None of the companies who share information about their grievance mechanisms disclose how they communicate about the mechanism to the potentially affected group of migrant workers for it to become accessible, or whether they have engaged with this particular at-risk group in designing and assessing the mechanisms for them to feel a sense of ownership, and view it as a legitimate, fair and transparent channel and process.¹¹⁶ Conducting internal training of staff on human rights risks, including for migrant workers is important, however, the fact that companies receive a very low number of complaints related to possible human rights violations does not necessarily reflect whether exploitation occurs that needs to be remediated. The lack of reported cases can simply be because affected groups do not know about the channel’s existence and how they can put forward a grievance in a way that

¹¹⁴ The Consumer Authority. “Transparency Act.” 2023. Accessed January 12, 2024. <https://www.forbrukertilsynet.no/vi-jobber-med/apenhetsloven/the-transparency-act>

¹¹⁵ As mentioned earlier, piecemeal reporting on human rights in different places by companies, including publishing different versions of Transparency Act statements makes it harder to accurately assess the work they disclose doing in this area.

¹¹⁶ The need for solid stakeholder consultation in the development and implementation of remedies is emphasised in the UNGPs.

seems accessible, predictable and trustworthy. Overall, the disclosed information about the company grievance mechanisms can be deemed superficial in nature, and the focus seems to be more on internal processes rather than implementing effective grievance mechanisms for migrant workers who experience harm.¹¹⁷

4.4 Do the companies provide remedy?

Although we have only assessed a small sample of company statements from Finland and Norway, we specifically selected corporate reports from two industries that represent high risk. Furthermore, we reviewed statements of larger business enterprises that are bound to report under the NFRD and the Norwegian Transparency Act.

Overall, both the Finnish and the Norwegian companies disclose very little information about concrete remediation cases and access to remedy in general. Only one of the Finnish companies disclose about a specific case of remediation. A Finnish study on corporate human rights performance found that only a small portion of Finnish companies are publicly committed to remediating adverse impacts that they had caused or contributed to, and that the companies do not have a clear approach to remedy in general.¹¹⁸ This may improve with the CSDR coming into effect in 2023, which has stricter reporting guidelines for larger Finnish companies on ESG.¹¹⁹ Furthermore, when the EU Corporate Sustainability Due Diligence Directive (CSDDD) proposed by the EU Commission will be passed, it will become mandatory for the largest Finnish companies to conduct due diligence and report on the findings.

The Norwegian companies we assessed are all legally bound to conduct due diligence in line with the OECD Guidelines for Multinational Enterprises, which follows the six steps model of the OECD Due Diligence Guidance for Responsible Business Conduct.¹²⁰ Out of six companies, three reported about specific cases of negative consequences they identified in their supply chains in 2022. Two of the companies have a near identical disclosure of a case concerning berry suppliers. Both companies only write about the case in a couple of sentences although it is disclosed as a case of severe violation of labour and human rights. They do not report about the geographic location, the circumstances and nature of the case, how many people were involved, and what concrete steps the companies' have taken to remediate the situation. One of the companies also disclose about a second case that was flagged in their supply chains, which turned out not to be an actual case of negative consequence. A third company reports

¹¹⁷ Effective worker voice includes workers being informed of their rights, protection from retaliation if they are to speak up, and access to effective mechanisms to file grievances. US Department of Labor Affairs. Worker Voice. 2023.

¹¹⁸ Tran-Nguyen, Elina, Suvi Halttula, Jaana Vormisto, Lotta Aho, Nikodemus Solitander, Sirpa Rautio, and Susan Villa. "Status of Human Rights Performance of Finnish Companies (SIHTI) Project: Report on the status of human rights performance in Finnish companies." (2021).

¹¹⁹ ESG stands for Environmental, Social and Governance.

¹²⁰ Krajewski, M. et al. "Mandatory Human Rights Due Diligence in Germany and Norway," Accessed on March 7th, 2024. <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/mandatory-human-rights-due-diligence-in-germany-and-norway-stepping-or-striding-in-the-same-direction/85815FE5F1D1F64208B0068B7FBBECF8>.

about a serious case at one of their building sites where they terminated a contract of a sub-contractor for not having paid the wages that a group of migrant workers were due. The company remediated the situation by immediately paying the workers the wages they were owed, and offered them direct employment. Another company only writes about what actual remedy actions it has taken in one sentence.

The Norwegian companies we assessed have to conduct mandatory HRDD. And although they have to provide annual HRDD statements under the Transparency Act, the statements we assessed did not differ noticeably in quality from the statements that the Finnish business enterprises disclosed. One Finnish company reported about a suspected case of human trafficking in Finland of berry pickers from Thailand, which concerned their supply chain. However, the statement provided noticeably more detailed information about the berry case than the Norwegian companies shared in their disclosures. The level of transparency of the actual remediation cases are arguably quite poor.¹²¹

Although Norway is ahead of Finland in having a HRDD law, the Transparency Act does not insist on business achieving outcomes. Instead, it focuses more on making the HRDD process mandatory.¹²² Although introducing the Transparency Act is a big step in the right direction for business enterprises to respect human rights, it is important to note that there is a crucial distinction between HRDD as a process to identify human rights violations by business and the outcome it strives to achieve by preventing and mitigating such harm. In order to secure stronger impact for the rights holders, future HRDD laws will benefit from having clearer expectations of outcomes and access to remedy.¹²³ As such, the HRDD laws should be viewed as a vital part of a smart-mix of regulations to tackle business related human rights abuse rather than an end cure in itself.¹²⁴

Although ten out of the twelve companies assessed in this article disclose about their grievance mechanisms, which primarily are whistleblower channels, the focus seems to be more on internal processes than on ensuring effective implementation and delivery of remediation. For a grievance mechanism to provide sufficient outcomes, it needs to be responsive to the vulnerabilities of rightsholders.¹²⁵ As none of the business enterprises reveal if and how they have engaged with and communicated about the mechanisms to the group at risk of exploitation, it is difficult to say if and how the mechanisms are providing remedy. However, from the actual

¹²¹ The disclosures on remediation are a contrast to for instance Tesco's previous reporting on a remediation case. Tesco. Modern Slavery Statement 2020/21. 2021. P. 9. Accessed March 8th, 2024. https://www.tescoplc.com/media/757633/tesco-modern-slavery-statement_2021.pdf.

¹²² Deva. "Mandatory Human Rights Due Diligence Laws in Europe". P. 394.

¹²³ The Norwegian Transparency Act will be evaluated after some time to assess its effect and to possibly broaden its scope to include environmental responsibility and Small and Medium-Sized Enterprises(SMEs). A Member of Parliament who at the time was the Minister that put forward the HRDD law suggestion to Parliament, Kjell Ingolf Ropstad, has already submitted a written question in Parliament to the current Minister whose portfolio the law fall under, Kjersti Toppe to ask if she will set a date for the evaluation in 2024. In her response, she does not say no to this, but simply says that a date has not yet been set. It may be too early to evaluate the effectiveness of the law after only one round of company statements.

¹²⁴ Deva. "Mandatory Human Rights Due Diligence Laws in Europe". P. 397.

¹²⁵ Deva. "Mandatory Human Rights Due Diligence Laws in Europe". P. 393.

information disclosed in the statements, there is little evidence that suggests access to effective remedy for affected migrant workers is high up on the priority list of the assessed companies in Finland and Norway.

5. Conclusion

Since the introduction of the UNGPs in 2011, significant improvements have been made in response to Pillar I and Pillar II by states and business enterprises. However, a general criticism has been that the uptake of Pillar III, access to effective remedy, has overall been too slow.

This paper has reviewed grievance mechanisms and access to remedy for exploited migrant workers in Finland and Norway by assessing state-based judicial and business level grievance mechanisms to understand how they align with the criteria in the UNGPs and the NAPs. And it has identified structural and situational factors that can hinder access to remedy for migrant workers, as well as identified possible gaps between policy and practice.

Although Finland's and Norway's introduction of the NAPs show political commitment to embed the core norms of the UNGPs into national laws, policies and practice, neither of the countries' NAPs fully live up to their promise on access to remedy when reviewed against judicial grievance mechanisms and company level grievance mechanisms. Neither of the NAPs sufficiently focus on migrant workers as a potential group at risk of exploitation at home although research findings show otherwise. Further, not mainstreaming the NAP across all relevant governmental agencies for policy coherence creates a gap between policy and practice concerning effective access to remedy for migrant workers who experience business related human rights abuse. Neither Finland nor Norway have expressed expiring deadlines for their NAPs or an intention to update them. Without putting in place a system for monitoring and evaluation, for overseeing implementation, and a clear timeframe, the NAPs will remain a policy tool without much influence beyond an initial step towards a more effective approach to tackle human rights violations.

Both Finland and Norway's NAPs promise effective state-based judicial mechanisms on paper. However, the NAPs does not reflect the actual challenge of accessibility for migrant workers who seek redress through the judicial systems. The threshold for sentencing trafficking for forced labour is very high in both countries. Structural barriers, such as low identification, lack of free legal aid, costs, and a long processing time for cases hinders effective access to remedy through judicial grievance mechanisms for victims of labour exploitation in both countries. This illustrates the limitations of the judicial system in providing access to effective remedy for rightsholders who have experienced business related human rights abuse.

Larger companies are bound to report under the NFRD in Finland, and to conduct HRDD and report under the Transparency Act in Norway. The Transparency Act is an important legal tool to protect human rights, and with a mandatory requirement for larger companies to conduct HRDD, it has created a significant step forward for business enterprises to respect human rights. In our review of a small sample of statements from companies in the construction industry and the food industry, we found that there was not a significant substantive difference between the statements under the less stringent NFRD regime and the mandatory HRDD Transparency Act.

Five out of six Finnish companies show awareness in their statements of migrant workers being a group at risk of exploitation in their sectors, while only three of the six Norwegian companies disclose a similar awareness.

All Finnish companies disclose information about their grievance mechanisms, while only four of the Norwegian companies do so. None of the companies share information about if their grievance mechanisms have been designed in a way that is sensitive towards labour exploitation cases, if they engaged with this group of rights holders in the design process, and how the mechanisms are made accessible to migrant workers. Without a participatory approach, the power imbalances between businesses and affected migrant workers will further exacerbate their vulnerabilities. Although there is a low number of cases related to human rights breaches in operations and supply chains disclosed amongst the companies, it does not necessarily reflect the prevalence of exploitation if information about the grievance mechanisms are not communicated to potentially vulnerable migrant workers in a way that is accessible, predictable, and trustworthy. Otherwise, companies can not really claim that they have a grievance system that provides access to effective remedy. Further, only a few of the companies reported on actual cases of remediation, with minimal information about the cases and the process. Out of one company in Finland and two companies in Norway who have discovered serious human rights cases linked to berries in their supply chains, only the Finnish company goes as far as to disclose about the nature of the case, which concerns human trafficking in Finland.

The berry case shows that adverse human rights impacts by companies that affect migrant workers also occur at home in Nordic countries. Our assessment of the NAPs, the state-based judicial mechanisms, and a small sample of company disclosure on grievance mechanisms and remediation cases do not give a reassuring picture of the situation for exploited migrant workers whose right it is to access effective remedy in the two countries. Clearly, in order to make access to effective remedy a reality for this at-risk group, a much tighter alignment between policy and practice is needed to bridge current gaps. There also needs to be a shift from process oriented implementation of HRDD to a stronger focus on outcomes, and a greater level of transparency in the disclosure of remediation cases by companies. Information about existing grievance mechanisms also needs to reach this at-risk group to make them accessible. This shift requires a more proactive approach from States as duty bearers and regulators of policy commitments to ensure that human rights are equally protected and fulfilled in line with Pillar I and II of the UNGPs.

Although it is important to acknowledge the recent positive improvements in the BHR space, such as the Norwegian Transparency Act and other similar national legislations, and the agreements of the European Commission's Corporate Sustainability Due Diligence Directive and the Forced Labour Import Ban that will further strengthen a smart mix of regulation, it does not in itself ensure access to effective remedy. A legalistic approach alone will not do the job. What is needed is a worker-centred approach to remedy. Access to meaningful information and participation are equally important components as stand-alone grievance mechanisms. Without these, the current power imbalances between corporates and rightsholders will continue to be a barrier for access to effective remedy and remediation of abuse. These components need to be part of a system that empowers and enables workers to seek restoration of their rights. For this to become a reality, companies need to shift from mere compliance with law to a participatory

approach that is equally grounded in business ethics. Only then will Pillar III of the UNGPs turn from a paper promise into a reality for rights holders.

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