

Monitoring of the status of implementation of the human rights due diligence obligations of enterprises set out in the National Action Plan for Business and Human Rights 2016-2020.

Final Report



Preamble

The Federal Foreign Office commissioned the audit firm Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft (EY), in cooperation with its consortium partners adelphi consult GmbH, Systain Consulting GmbH and focusright GmbH, to conduct the survey to monitor the status of implementation of the human rights due diligence obligations of enterprises (monitoring) set out in the National Action Plan for Business and Human Rights 2016-2020 (NAP).

This Final Report has been compiled with the following goals in mind, as defined in the performance specification:

- analysis and evaluation of the overall results (2018-2020)
- presentation and discussion of the methodological approach
- discussion of the extent to which the NAP monitoring process has proved to be worthwhile and whether it would be effective and efficient to continue it in connection with additional NAPs or legal requirements, where appropriate.

The draft of the Final Report was submitted to the Interministerial Committee for comment on 29 September 2020. The report was adopted by the Interministerial Committee on 8 October 2020.

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1 Introduction

1.1 Background

The National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016 – 2020 (NAP) was adopted by the Federal Cabinet on 21 December 2016. In it, the Federal Government formulates its expectations of enterprises with regard to the implementation of human rights due diligence and respect for human rights throughout corporate supply and value chains. The definition of human rights due diligence is based on the United Nations' Guiding Principles on Business and Human Rights (UN Guiding Principles), which in turn are based on internationally recognised human rights. They thus constitute a universally recognised frame of reference for the human rights obligations of states and for the responsibility of companies to respect human rights.

In Chapter III of the NAP, the Federal Government expresses its expectation that enterprises will introduce the process of due diligence described in the Action Plan in a manner commensurate with their size, sector, and position in supply and value chains. This process comprises five core elements of due diligence in the field of human rights:

1. a human-rights policy statement
2. a procedure for the identification of actual and potential adverse impacts on human rights
3. measures to ward off adverse impacts and review of the effectiveness of these measures
4. reporting
5. a grievance mechanism

1.2 Project goal and overview

To assess the status of implementation of the five core elements in enterprises, the Federal Foreign Office launched a monitoring process in 2018 which has now been concluded with the final survey phase in 2020, thereby implementing a measure envisaged by the NAP. The Interministerial Committee, chaired by the Federal Foreign Office, was intensively involved throughout the entire monitoring process. The activities of the Interministerial Committee were closely flanked by the Business and Human Rights Working Group of the National CSR Forum, which includes representatives of the social partners, business and civil society. The aim of the monitoring, formulated in the NAP, was to establish whether at least 50 percent of enterprises based in Germany with more than 500 employees had incorporated the core elements of human rights due diligence described in the NAP into their corporate processes by 2020. In addition to ascertaining the status of implementation of human rights due diligence, the aim was to make quality assessments with regard to the extent of implementation, the challenges and the compliance costs for enterprises.

If the core elements have not been implemented adequately, the NAP stipulates that the Federal Government will consider further action, which may culminate in legislative measures (NAP, p. 10). The current coalition agreement¹ states the following: "If an effective and comprehensive review of the NAP in 2020 finds that companies' voluntary commitment is insufficient, we will introduce appropriate legislation at the national level and advocate an EU-wide regulation."

¹ cf. coalition agreement between the CDU/CSU and the SPD (Berlin, 12 March 2018): A new awakening for Europe - A new momentum for Germany - A new level of solidarity for our country, available online at: <https://www.bundesregierung.de/resource/blob/975226/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1>, retrieved 31 July 2020. (in German)

The performance specification² for the monitoring process envisaged three survey phases in total, one each in 2018 (exploratory survey phase), 2019 (first representative survey phase) and 2020 (second representative survey phase).³ The structure of the evaluation system described in the Inception Report (published on 4 September 2018) underwent critical review and further development within the context of the exploratory phase in 2018.⁴ To this end, interviews were conducted with 30 enterprises and nine stakeholder representatives selected by the Business and Human Rights Working Group in order to generate qualitative findings on the implementation of human rights due diligence. The Interim Report on the exploratory phase in 2018, published on 5 July 2019⁵, presented the findings of the exploratory phase and outlined plans for the next stage of the process and the further development of the methodological approach for the subsequent representative survey phases.⁶

During the representative monitoring phases in 2019 and 2020, quantitative results were generated with regard to the status of implementation of the core elements. To this end, statistically representative random samples were taken. Each enterprise included in the samples was asked to participate in an online survey in which they were questioned on the status of their implementation of the NAP requirements for each core element. With the help of the “comply or explain” mechanism stipulated in the NAP, the enterprises also had the option of providing an explanation for each question in cases where their state of implementation was not in line with the requirements formulated by the Interministerial Committee. The information provided by the enterprises was then verified by the consortium in accordance with a specified procedure. The Interim Reports in 2019⁷ and 2020⁸ explained the findings from each survey and described the methodological approach of the representative survey phases in 2019 and 2020. To answer the key question of the monitoring process – whether at least 50 percent of enterprises based in Germany with more than 500 employees have incorporated the elements of human rights due diligence described in the NAP into their business processes in 2020 – the relevant results are those of the representative survey in 2020, in accordance with the goal formulated in the NAP.

² “Monitoring NAP” tender of 29 December 2017, notification reference number: VV-118-2017-0201 by the Federal Foreign Office

³ For further information, see Figure 1.

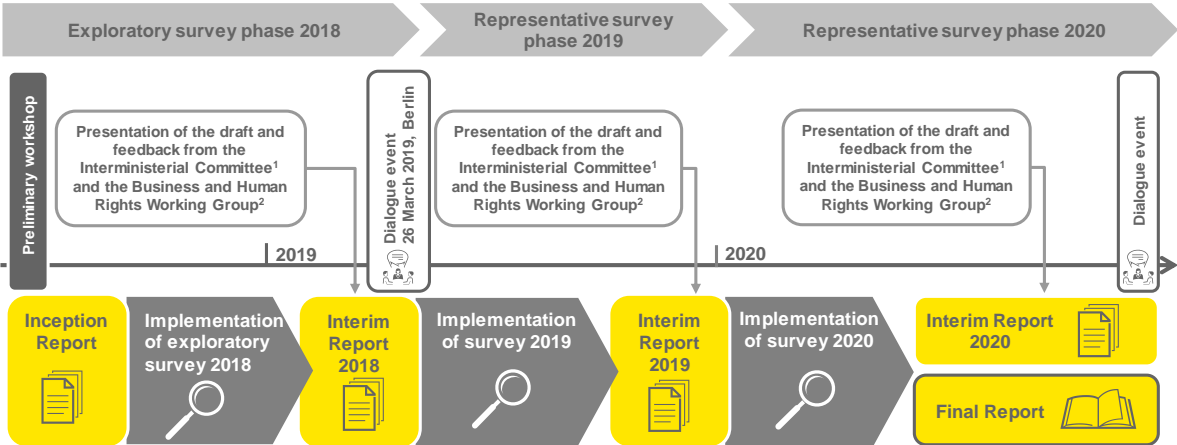
⁴ The overall schedule for the monitoring project was described in detail in the Inception Report of 4 September 2018. The Inception Report is available here: <https://www.auswaertiges-amt.de/blob/2232456/8d910dd921d773bdafccfb106dff46f2/inception-report-data.pdf>, retrieved 26 June 2020. (in German)

⁵ The Interim Report on the exploratory survey phase in 2018 is available here: <https://www.auswaertiges-amt.de/blob/2232418/1531aad304f1dec719954f7292ddbc05/190710-nap-zwischenbericht-data.pdf>, retrieved 26 June 2020. (in German)

⁶ See Interim Report 2018, footnote 6 for more information.

⁷ The Interim Report on the exploratory survey phase in 2019 is available here: <https://www.auswaertiges-amt.de/blob/2314274/3a52de7f2c6103831ba0c24697b7739c/20200304-nap-2-zwischenbericht-data.pdf>, retrieved 23 September 2020. (in German)

⁸ The Interim Report on the exploratory survey phase in 2020 is available here: <https://www.auswaertiges-amt.de/blob/2384126/f793a1412234e5c281abc876f05e6974/200915-nap-3-bericht-data.pdf>, retrieved 23 September 2020. (in German)



1) Interministerial Committee under the lead responsibility of the Federal Foreign Office
 2) Business and Human Rights Working Group of the National CSR Forum

Figure 1: Overview of project schedule

The Federal Government commissioned a consortium comprising Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft (EY), adelphi consult GmbH (adelphi), Systain Consulting GmbH (Systain) and focusright GmbH (focusright) to carry out the monitoring. Responsibility for overall project management lies with EY. The Inception Report contains detailed information about the consortium.

2 Analysis and evaluation of the overall results

This chapter will sum up the most important results from the three survey phases from 2018 to 2020. It will also spotlight findings from more in-depth analysis of the data gleaned in the 2019 and 2020 surveys.

2.1 Summary of the results of the survey phases 2018-2020

The three surveys conducted within the context of the NAP monitoring process are mutually independent. That means that the results of the individual survey phases do not permit any conclusions to be drawn regarding the progress of the enterprises’ implementation of the NAP requirements over that period. All survey results depict only one specific point in time during the respective survey period. Whereas the enterprises from the exploratory survey in 2018 were targeted specifically, those featured in the representative survey phases in 2019 and 2020 were chosen by means of random samples.

To answer the key question of the monitoring process – whether at least 50 percent of enterprises based in Germany with more than 500 employees have incorporated the core elements of human rights due diligence described in the NAP into their business processes – the relevant results are those of the representative survey in 2020, in accordance with the goal formulated in the NAP. Based on the evaluation and the statistical weighting procedures applied⁹, 13 to 17 percent of the enterprises are deemed to be “compliers”, 83 to 87 percent of the enterprises are deemed to be “non-compliers” and fewer than 1 percent are “enterprises with implementation plans”. Within the group of “non-compliers”, 10 to 12 percent of the pool of enterprises are “on the right track” towards fulfilling the NAP requirements.¹⁰

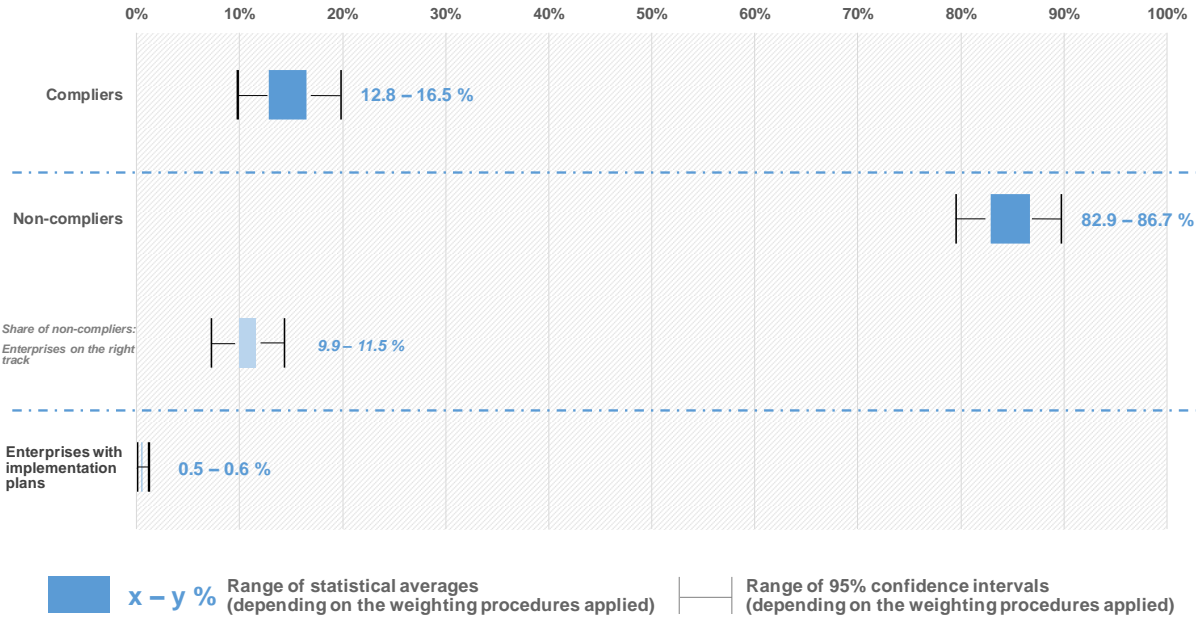


Figure 2: Results of the representative survey in 2020

⁹ In order to ensure a representative result and to compensate for selection based on observables, four different weighting factors were calculated. From a statistical perspective, the application of each of the calculated weighting factors can be justified. The results from the compliance categories were therefore presented as the range of these four weighting factors.

¹⁰ See Interim Report 2020, p. 18 f.

The results of the representative survey in 2019 are on a similar scale to those in 2020. It shows that 17 to 19 percent of enterprises are “compliers” and 78 to 81 percent are “non-compliers”. “Enterprises with implementation plans” make up 2 to 3 percent. As a proportion of the non-compliers, the “companies on the right track” comprise 9 to 12 percent.¹¹

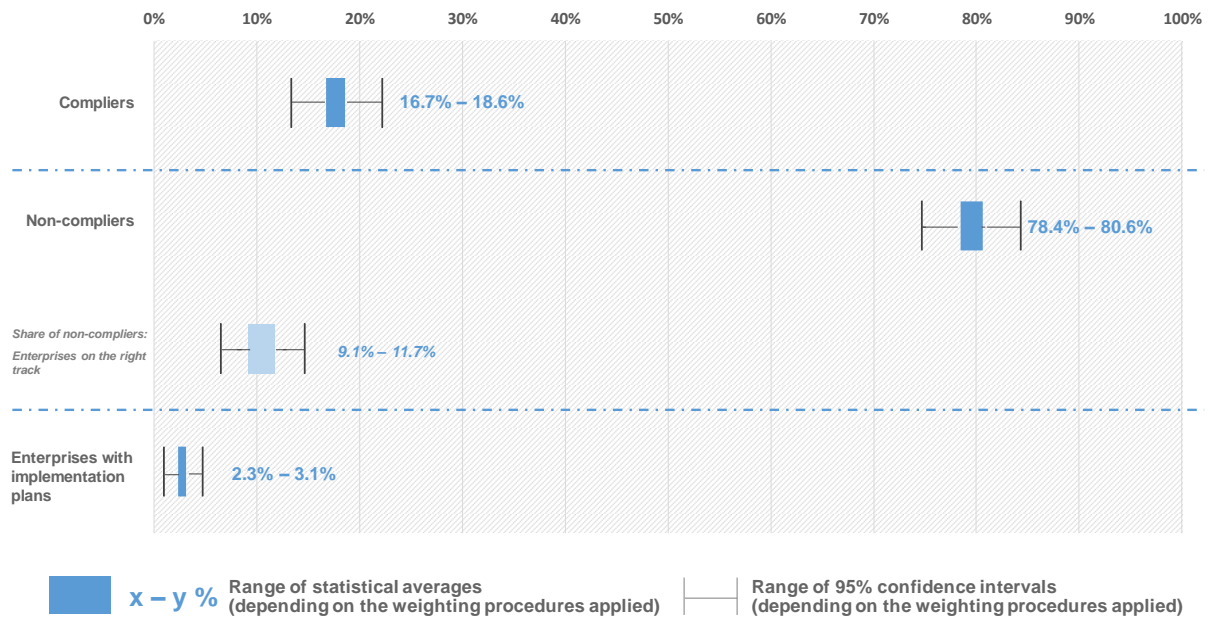


Figure 3: Results of the representative survey in 2019

As the methodological approach for the surveys in 2019 and 2020 basically remained the same, the results can feasibly be compared. The quality and reliability of the survey results are reflected in the overlap in the ranges of 95 percent confidence intervals¹². This applies not only to the level of compliance as a whole, but also to the degree of compliance with regard to the individual core elements.

¹¹ See Interim Report 2019, p. 18 f.

¹² A confidence interval is the range within which the true value of the arithmetic average of the statistical survey lies, based on the pool of enterprises with a defined probability (confidence level; here 95 percent).

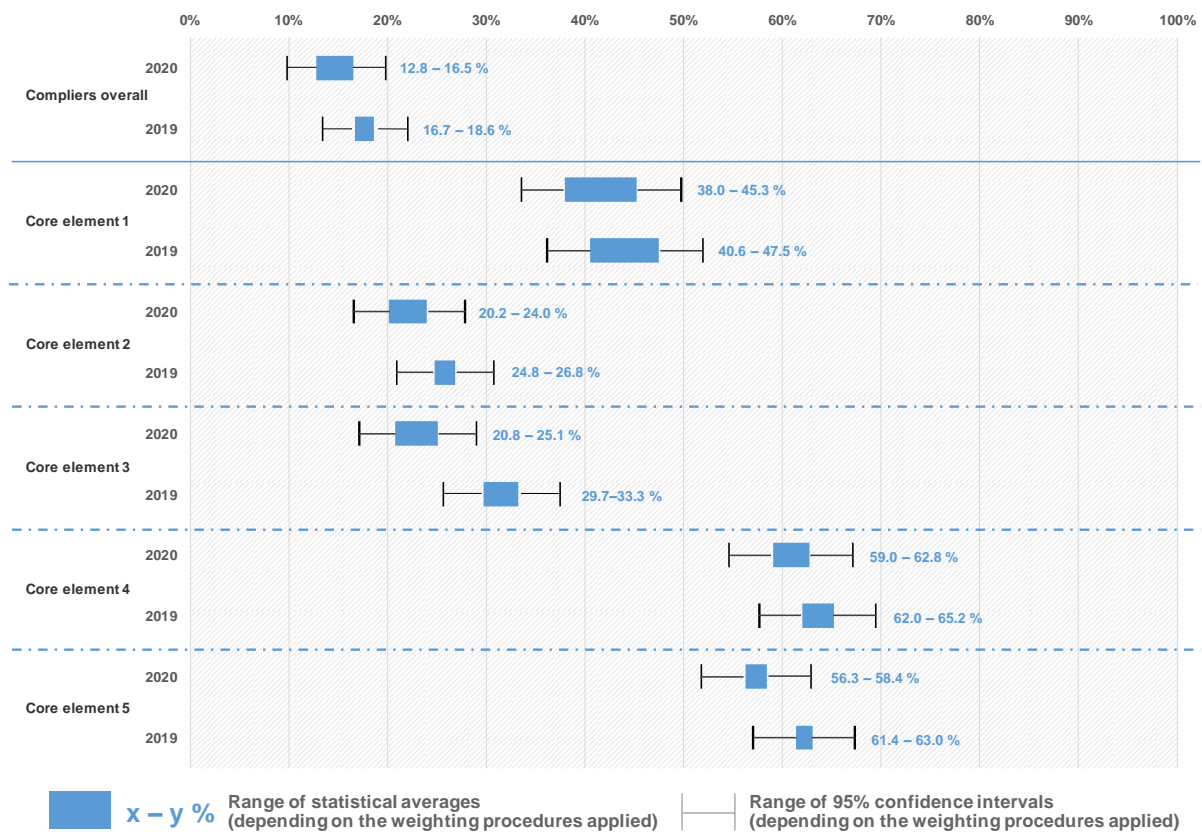


Figure 4: Results of the representative surveys in 2019 in 2020 in comparison

It is striking that the degrees of compliance in 2020 have moved slightly to the left compared to 2019. That is due to the fact that the weighting factors applied have a greater influence on the 2020 results than was the case in 2019, rather than to an actual drop in the rate of compliance. That in turn is due to an improved data basis in the gross sample in 2020 compared with 2019.¹³ The improved data basis meant that in 2020, it was possible to take better account in the weighting of distortions as a result of observables. Furthermore, it is not possible, with one exception, to see whether the slight adjustment of the questionnaire between the representative surveys influenced the results. Only the comparatively much lower level of compliance with core element 3 can be attributed to a change in the response options in the opening question on the core element. Further detailed information on the comparative analysis can be found in Chapter 3.3 of the Interim Report for 2020.

In the two representative surveys, the enterprises also had the opportunity in the online questionnaire to describe the challenges they face and their wishes with regard to the implementation of the NAP requirements in the area of the core elements by means of a free text option. Here, too, the responses from the 2019 and 2020 surveys are very similar. By far the most frequently mentioned challenge is the complexity of the value chain, which hampers the identification and reduction of human rights risks. Challenges posed by differing international framework conditions – with regard to both the regulatory environment and cultural aspects – were also frequently cited. The wishes expressed included greater support from the Federal Government and from associations, for example in the form of guidelines on human rights due diligence or the introduction of uniform standards. Furthermore, several enterprises expressed a desire for regulation

¹³ For the enterprises in the extended random sample in 2019, no internet research concerning the existence of a policy statement was undertaken, which means that this information was missing. In contrast, research was conducted for all enterprises in the sample in 2020.

at international level in order to create uniform requirements and framework conditions for the systematic implementation of the issue across national borders.¹⁴

2.2 Focus on risk analysis and measures

In the context of the evaluation, detailed analysis of the individual core elements was undertaken in both representative surveys in order to ascertain which aspects of enterprises' implementation of human rights due diligence decisively influenced the results. As in the case of the core results, these factors were largely similar in both surveys. The greatest challenges for enterprises were in the area of human rights risk analysis and in establishing a procedure for identifying any adverse impact on human rights as well as in implementing commensurate and risk-based measures. Around half of the enterprises do not have any such risk analysis in place, while in some cases the analysis does not cover all relevant components of the value chain.¹⁵ This also corresponds to the results of the 2018 exploratory survey. In the interviews, the enterprises emphasised methodological challenges such as the clear definition of human rights issues, the estimation of risk materiality and inadequate knowledge and resources for conducting a risk analysis.¹⁶

The appropriate scope of the risk analysis – i.e. the commensurate inclusion of all relevant stages of the value chain – is a central requirement of the NAP. Closer analysis of the data from the representative surveys shows that appropriate scope of the risk analysis is linked to a more comprehensive risk profile. Hence, there is a positive significant correlation between the degree of compliance for Question 2.2.1¹⁷ and the risk profile variables (Questions 2.3.1 to 2.3.4)¹⁸ for almost all of these variables. That means that enterprises where the scope of the risk analysis is adequate are more likely to identify risks in the individual stages of the value chain, to identify higher risks in this context and to list more human rights issues and potentially affected groups. In contrast, there is a negative significant correlation between the degree of compliance in Question 2.2.1 and the response to Question 2.3.1 that no risks were identified. That means that only a very small number of enterprises where the scope of the risk analysis is adequate have not identified any human rights risks.

Steps were also taken to examine whether enterprises that incorporate specific stages of the value chain into their risk analysis also tend overall to be “compliers”. This correlation is positively significant for the direct supply chain, the indirect supply chain and products and services. This means that enterprises which excluded those three levels from their risk analysis tended overall to be “non-compliers”. To sum up, it can be said that in this context it is not just a particular stage of the value chain that has led to many enterprises being non-compliers, but that non-compliance stems from the fact that it was particularly common for all the stages of the value chain that generally go beyond the enterprise itself to be excluded from the risk analysis.

Another major challenge seems to be the implementation of commensurate measures to prevent human rights risks. According to the NAP, these should be determined on the basis of the results of

¹⁴ See Interim Report 2020, p. 31 and Interim Report 2019, p. 28.

¹⁵ See Interim Report 2020, p. 22.

¹⁶ See Interim Report 2018, p. 36.

¹⁷ Question 2.2.1: What stages of the value chain do you analyse with regard to human rights risks?

¹⁸ Question 2.3.1: At which stages of the value chain have you identified potential negative impacts on human rights?

Question 2.3.2: At which stages of the value chain have you identified particularly high potential negative impacts on human rights?

Question 2.3.3: What human rights issues have you identified as a result of your risk analysis?

Question 2.3.4: What potentially affected groups have you identified as a result of your risk analysis?

the risk analysis. The two core elements are therefore closely intertwined, which probably also explains why their degree of compliance is similar (ly low) throughout both representative surveys. As the human rights risk analysis is either non-existent or insufficient with regard to the NAP requirements in the majority of the enterprises, no adequate or commensurate measures can be determined on the basis of such a (non-existent or insufficient) risk analysis. That is also illustrated by the fact that in both representative surveys, only around a third of enterprises stated that they had identified measures on the basis of the human rights risk analysis.¹⁹ The enterprises from the exploratory survey in 2018 stated that the main challenges were related to their lack of influence on the high-risk parts of the value chain and the differing legal and cultural framework conditions worldwide.²⁰ The participants in the exploratory survey were predominantly enterprises that had already immersed themselves in the subject of human rights due diligence.²¹ The findings from the exploratory survey correspond to the supplementary responses provided by the enterprises at the end of the questionnaire in the two representative survey phases.²² To sum up, it can be stated that the challenges with regard to human rights due diligence measures are found on two levels: there are challenges in actually identifying appropriate measures to reduce human rights risks, and enterprises often find it difficult to successfully implement the necessary measures they have identified into their operations and to assess their effectiveness.

In the context of the survey, the free text responses by enterprises on the human-rights measures for the relevant stages of the value chain were also evaluated in order to obtain an overview of possible approaches to reduce human rights risks:

Stage of the value chain	Frequently cited human-rights-related measures
Own enterprise	<ul style="list-style-type: none"> • Training • Code of conduct or policy statement • Complaints mechanism or reporting hotline • Integration in management systems (e.g. occupational safety or personnel) • Integration in compliance processes
Affiliated companies	<ul style="list-style-type: none"> • Training • Code of conduct or policy statement • Complaints mechanism or reporting hotline • Integration in compliance processes • Internal audits/revision
Direct supply chain	<ul style="list-style-type: none"> • Supplier obligations (e.g. code of conduct for suppliers) • Performance of audits • Supplier reviews • Training
Indirect supply chain	<ul style="list-style-type: none"> • Performance of audits • Participation in sector-wide initiatives • Plans for corrective measures • Promotion of supply chain transparency • Integration in management systems (e.g. purchasing)

¹⁹ See Interim Report 2020, Annex 4 and Interim Report 2019, Annex 4.

²⁰ See Interim Report 2018, p. 38 f.

²¹ See Interim Report 2018, p. 31 f.

²² See Interim Report 2020, p. 31 and Interim Report 2019, p. 28.

Products/services/projects	<ul style="list-style-type: none"> • Quality management • Participation in sector-wide initiatives • Certification
Investment	<ul style="list-style-type: none"> • Monitoring of compliance with the standards defined by the enterprise • Compliance with external standards (e.g. PRI – Principles for Responsible Investment)

Table 1: Human rights measures in the value chain

2.3 Detailed analysis of the survey data in 2019 and 2020

To compile this Final Report, detailed analysis of the data from the representative surveys in 2019 and 2020 was conducted. To this end, the net samples for 2019 and 2020 were combined. A detailed explanation of the methodology of the analyses can be found in the Annex. **As only defined parts of the net samples for 2019 and 2020 were observed, the following analysis results are not representative of the pool of enterprises. This chapter, therefore, can only present comparative qualitative trends.** Moreover, it cannot be ruled out that individual manifestations are the result of self-selection of the enterprises for participation in the monitoring process. However, the trends provide insights into the degree of compliance in individual categories, sectors and stages of the value chain compared to the degree of compliance of the enterprises as a whole.

To determine the gross sample, the enterprises were divided into six categories. They included the three size-based categories 501 to 1000 employees, 1001 to 2000 employees and more than 2000 employees, as well as two branches: manufacturing, and trade and services. The information is taken from the Bisnode database. Examination of these categories shows a slightly above-average²³ degree of compliance across all sizes of enterprise in the field of trade and services. In the manufacturing sector, the degree of compliance for enterprises with more than 2000 employees is similar. In contrast, the rate of compliance in the manufacturing sector falls with the size of the enterprises. In the case of manufacturing enterprises with 501 to 1000 employees, it is well below average.

In addition, the degree of compliance was also evaluated according to sectors. At the beginning of the online questionnaire, the enterprises were able to assign themselves to up to 3 out of a total of 30 sectors. These 30 industries were put into clusters of 10 in order to obtain enough data points to carry out an evaluation (see Annex). The industry cluster of food, wood products, textiles and leather reveals a well above average degree of compliance, the financial services, transport and logistics, and chemicals, pharmaceuticals, plastics and mining clusters have an average level of compliance, and the automotive and vehicles cluster is slightly below average. All other clusters – engineering and metallurgy, electronics, telecommunications and digital, services (not the same as the category “trade and services”, see above), construction and buildings, and energy, supply and waste disposal – have a degree of compliance that is well below average.

At the same time, at the start of the online questionnaire the enterprises were able to assign themselves to one or more of seven stages of the value chain in which they are active. The analysis confirms the picture described above. Enterprises in sales/trade have an above-average degree of compliance, whereas enterprises in the area of lending/financing/insurance are average. The value

²³ The average corresponds to the 95 percent confidence interval of “compliers” on the basis of the weighted data from the combined net samples (see Annex).

chain stages “manufacture of components/intermediate products”, “manufacture of end products” and “services” reveal a below-average level of compliance. Not enough data points are available to make a statement on the value chain stages “raw material extraction” and “waste treatment/recycling”.

The detailed analysis shows a connection between participation in sector-wide initiatives and compliance with the NAP. The group of enterprises that stated that they were participating in a sectoral initiative in order to tackle actual and potential adverse impacts on human rights is above average in the categories “compliers” and “companies on the right track”. Their compliance with the core elements is also greater than the net sample values. This advantage could be observed in both representative phases. However, the evaluation shows that even in this group, the proportion of compliers is less than 50 percent. It is also important to point out that the results do not show any causal relationships but only reveal correlations. Joining a sectoral initiative can both serve as the trigger for an enterprise to examine its human rights due diligence and be the result of that examination.

As early as the exploratory phase in 2018, the enterprises and stakeholders expressed the view that participation in sectoral initiatives was an important factor in implementing human rights due diligence but was not necessarily sufficient to fulfil all the requirements of the NAP. Standards and sectoral initiatives were described as helpful for obtaining information and fostering exchange among members. They also provided assistance with initial steps towards managing suppliers – even beyond the direct supply chain – and with selecting, monitoring and training business partners by setting standards and providing verification services. However, one criticism was that there were too many different standards and initiatives which did not adequately do justice to the complexity of an enterprise or which only took account of a limited section of human rights issues.²⁴

²⁴ See Interim Report 2028, p. 32 f.

3 Reflection on the monitoring as a whole

The requirements that the monitoring had to fulfil were stipulated in the performance specification²⁵ for the monitoring tendering procedure. The consortium formulated the basic concept, outlined the methodological details and finally presented the results in regular reports. The Interministerial Committee adopted each report by consensus. The NAP monitoring methodology was designed to be a learning system. It was continuously developed on the basis of the findings from each of the three monitoring phases.

3.1 Reflection on the monitoring process

Chapter III of the NAP and the performance specification formed the basis of the monitoring process. The goals of the monitoring mentioned in Chapter 1.2 are described in the NAP, while the methodological approach, including the three survey phases, the four-stage procedure, the “comply or explain” mechanism and representativeness, is outlined in the performance specification. These guidelines dictated the approach of the consortium throughout the entire monitoring process. The results from the representative survey in 2020 and their presentation in the 2020 interim report were used to ascertain the extent to which enterprises in Germany with more than 500 employees have implemented the NAP requirements. The relevant standards governing academic work were taken into account in this context, so the results gleaned are objective and sound. The goal of obtaining additional quantitative and qualitative information on the extent to which the elements of human rights due diligence have been implemented and the associated challenges over and above the level of implementation of the NAP was also achieved.

The consortium, under the lead responsibility of EY, was responsible for preparing the reports. The drafts were first discussed with the Federal Foreign Office in its role as contractor. The results of the discussion were then submitted to the Interministerial Committee and the Business and Human Rights Working Group for their comments. During committee meetings the consortium also gave an oral presentation of all reporting drafts, with accompanying slides, to the Interministerial Committee and the Working Group, and answered questions. The consortium recorded the written comments on each report in a comments grid and added remarks where appropriate. The comments grid and the reports, which had been adapted on the basis of the comments, were again released to the Interministerial Committee and the Business and Human Rights Working Group, in consultation with the Federal Foreign Office.²⁶ Several rounds of comments were sometimes required, depending on the complexity and content of the reports. Where necessary, individual details were subsequently discussed with the Interministerial Committee. The requirement framework for the representative surveys was only discussed in the Interministerial Committee and was not presented to the Business and Human Rights Working Group so as not to encourage any systematic distortion of the responses by revealing the requirement framework. The requirement framework was published as an annex to the 2020 Interim Report after the monitoring process had been completed. All the reports, the requirement framework and the performance specification were released by the Federal Foreign Office following the consent of all ministries represented on the Interministerial Committee.

²⁵ “Monitoring NAP” tender of 29 December 2017, notification reference number: VV-118-2017-0201 by the Federal Foreign Office

²⁶ This approach was not adopted for the 2019 Interim Report, as no consensus was reached in the Interministerial Committee in advance on the Federal Foreign Office’s proposal to submit a draft to the Working Group for comment prior to the Interministerial Committee’s final decision to release the report.

The Inception Report described the methodology for the exploratory survey in 2018 and thereby provided an important basis for the preparation of the representative survey phases. The Inception Report also contained a theoretical description of the evaluation system envisaged for the representative surveys. As described in Chapters 3.2 and 3.3, the evaluation system was substantially revised in the course of the 2018 Interim Report. It therefore transpires that it would have been advisable for the Inception Report to focus on the approach in the exploratory survey phase and on the development of the questionnaire.

The 2018 Interim Report on the results of the exploratory survey contained the core methodological components of the monitoring process – the questionnaire and the detailed evaluation system. The challenge was to adopt a methodological approach that was as detailed as possible and that could serve as a basis for the Interministerial Council’s decision-making. As the monitoring was the first of its kind worldwide, no significant experience was available for the consortium to take into account. At the same time, the various perspectives of the ministries represented on the Interministerial Committee had to be taken into account, particularly in the evaluation system. The required consensus in the Interministerial Committee on the 2018 Interim Report and thus on the methodology could not be reached within the original timescale. The start of the 2019 survey was therefore delayed by approximately three months, which accordingly compressed the entire timetable, right up to the presentation of the results of the 2020 survey in summer 2020 as originally planned. Consequently, it was not possible to involve external stakeholders, for example, by enabling the Business and Human Rights Working Group to submit comments on the 2019 Interim Report, to the extent planned.

The results of the two representative surveys in 2019 and 2020 were recorded in the respective Interim Reports. As described in Chapter 2.1, the results were on a similar scale. The content of the Interim Reports therefore also overlaps to a large extent. However, that was necessary as each Interim Report was based on a separate, independent survey, meaning that each Interim Report should make sense to external readers without the need for many references. The survey period in 2020 was extended by one month due to the impact of the COVID-19 pandemic. Correspondingly, the presentation and adoption of the 2020 Interim Report was also postponed. Preliminary information on the results of the representative survey in 2020 was shared with the Federal Foreign Office in advance on 14 July 2020 as a basis for decisions on the subsequent political process.

As well as the overall results, the Interim Reports contained details on the individual core elements and on the impact of the respective methodological components: the “comply or explain” mechanism, free text options and contradictions on the result. That provides a high level of transparency for the ministries and stakeholders involved.

Overall, all reports compiled during the monitoring process fulfilled the function envisaged in the performance specification. The schedule was ultimately met despite the extension of the discussion and survey phases for political reasons and due to the pandemic, with the result that the Federal Government was able to launch the discussion on follow-up measures as planned in summer 2020.

Contact procedures in the representative survey phases

In the original planning for the representative surveys of the monitoring process, the idea was to contact the persons responsible in the enterprises featured in the sample. The plan was to use official contacts such as the publicised points of contact in the purchasing or sustainability departments of the enterprises as well as points of contact known to the consortium for this. That proved not to be possible for data protection reasons. Instead, contact had to be made via general, publicly accessible email addresses and by writing to the management. The procedure for this

approach was improved in the third monitoring phase on the basis of experiences from the previous phase.

The enterprises involved in the 2019 sample were first contacted via email using addresses that were generally available. Only later was the management contacted by post, which resulted in higher levels of participation. For the 2020 survey, therefore, the management was contacted by post directly at the start parallel to the email campaign. That approach led to an adequate level of participation despite the generally difficult circumstances caused by the COVID-19 pandemic.

3.2 Reflection on the survey methodology

Following the awarding of the contract, an initial methodology for the survey was drafted on the basis of the concept set out in the tender. The performance specification from the tender documents for the NAP monitoring served as a basis for the methodological approach. The Interministerial Committee adopted the methodology by consensus, with its approval of the Inception Report and the subsequent Interim Reports for 2018 and 2020.

In the exploratory phase, the questionnaire and requirement framework were then developed and discussed with the Interministerial Committee and the stakeholders from the Business and Human Rights Working Group. The insights from this phase were channelled into preparing the 2019 survey. The methodology of the latter was so robust that only minor adjustments were necessary for the 2020 survey.

The main principles remained valid for the entire duration of the project, as did the decision in favour of a form of implementation that is sufficiently informative while ensuring that the workload is reasonable for all participants. Critical aspects of the methodology are listed below.

3.2.1 Definition of the pool of enterprises

In the performance specification for the monitoring tender, the pool of enterprises was defined as the body of the results tables from the statistical enterprise category “Enterprises according to sectors with 500 and more employees subject to compulsory social security contributions”, based on the date of adoption of the respective Interim Report. As the raw data from the Federal Statistical Office was made available neither to the consortium nor to the contractor due to statistical confidentiality, a commercial company database had to be used to define the pool of enterprises. The Amadeus database, which the consortium initially considered in the Inception Report, proved to be unsuitable, as it did not provide a full picture of the enterprises covered by the NAP, particularly those from the financial sector. Both representative surveys therefore used the company database Bisnode, which fulfilled all the requirements.

The number of employees in an enterprise was determined pursuant to Section 267 (5) of the Commercial Code for all survey phases. The number of employees in each case applies to the individual legal entity or, in the case of concerns based in Germany, the worldwide (consolidated) number of employees.

In Germany there is no legal definition and no other standard definition for the institution “enterprise”. For monitoring purposes, the survey team formulated the following definition of the term “enterprise” in the spirit of the NAP: “Enterprises comprising the pool of enterprises for the NAP monitoring are defined as for-profit enterprises.” In order to apply a filter to define the pool of enterprises, in a first step the legal form was taken as an indication of the for-profit principle, and in

a second step a manual assessment of specific enterprises was undertaken. This made it possible to filter out purely charitable enterprises.²⁷

3.2.2 Assessment categories

The original plan to divide enterprises into two categories (“compliers” and “non-compliers”) proved to be too general in the exploratory phase. It became clear that various stakeholders wanted a definition of results that allowed a distinction to be made between enterprises that had made more progress with implementation and those which had implemented very few or no measures. With the adoption of the 2018 Interim Report by the Interministerial Committee, the group of non-compliers was therefore defined more specifically and supplemented by the sub-group of “companies on the right track”. Given the rather vague stipulation in the NAP that implementation should take place “by 2020”, a new results category was created: “enterprises with implementation plans”. This adjustment made it possible to show in the Interim Reports for 2019 and 2020 that the overall result – fewer than 50 percent of the enterprises concerned fulfil the NAP requirements – did not change if the enterprises that had not fully implemented the NAP requirements at the time of the survey but which had a viable plan for implementation by the end of 2020 or were “on the right track” with regard to implementation were listed separately. In view of the very small size of the group entitled “enterprises with implementation plans”, which had no impact on the result, the contractor decided that separate post-validation of the “enterprises with implementation plans” mentioned in the third Interim Report for early 2021 was excessive.

3.2.3 Questionnaires and response options

In the Inception Report the idea was that each response option would represent a specific level of implementation, ranging from “0 – non-existent” to “5 – in full”, for each question/criterion. Based on the results from the exploratory phase, this idea proved to be unsuitable and was abandoned when the questionnaire was compiled. Thus, for some questions, fewer than five response options were defined, including purely binary options such as “Yes, in place” and “No, not in place”. This provided a more suitable basis for assessment in some areas than the original five-category system. For other questions, several equal response options were defined. This proved necessary to reflect different ways of fulfilling the requirements. These changes proved to be a sensible way of giving enterprises a clearly comprehensible, appropriate and adequate response option. The use of free text options also helped to do justice to company-specific aspects while allowing targeted evaluation of whether implementation was adequate.

The 2019 and 2020 surveys were predominantly based on the questionnaire and requirement framework developed in the exploratory phase. The basic framework has proved to be functional, very practicable and informative. Only minimal adjustments designed to improve comprehensibility were made to the questionnaire between the 2019 and 2020 surveys. The methodology of the two surveys, however, is largely identical.

²⁷ See Interim Report 2028, Chapter 6.2.1.

3.2.4 Requirement framework

Prior to the start of the monitoring phases, the planned methodology involved identifying various pre-defined compliance patterns based on the development of a systematic requirement framework. These patterns were to be based on objective company characteristics (e.g. size, sector, etc.) and be combined in requirement profiles with a specific implementation level for each core element (“evaluation clusters”). Due to the very diverse combination of company characteristics and their specific qualities with regard to potential human rights impacts, this approach was refined on the basis of the results of the exploratory phase.

An initial refinement was the definition of the risk disposition of the individual enterprises as a central element of the enterprise’s human rights due diligence. Thus, the evaluation system was revised to incorporate the results of the risk analysis (risk disposition) from core element 2 of the NAP. The results of the risk analysis of the responding enterprise consequently determine the subsequent development of human rights due diligence with regard to the measures and the monitoring of their effectiveness.

In addition, for many questions, the different ways in which enterprises went about implementation were taken into account. Various response options leading to compliance therefore reflected the broad range of company implementation methods.

Another change to the methodology presented in the Inception Report was that for some questions, the requirements were defined identically for all enterprises, as dependency on varying company characteristics such as size or sector cannot be considered relevant to compliance. In core element 1, for instance, the existence of a policy statement is a requirement that applies to all enterprises. For other questions, the requirements differ depending on the concrete risk disposition of the enterprise concerned – i.e. the existence and the level of specific human rights risks or specific affected groups.

This requirement framework, which uses enterprises’ individual risk disposition as a basis for evaluation and thereby takes into account the fact that the concrete form of an evaluation of human rights due diligence always has to be tailored to the specific enterprise, proved its value during the first representative survey and was also applied in the second survey.

3.2.5 Four-stage procedure

The Inception Report outlined a four-stage procedure for evaluating the information provided by the enterprises. This proved to be reliable and was applied in both representative phases.

In stage 1, the online survey was completed and supplemented by a media analysis and research into human rights issues typical of the industry in order to check the plausibility of the information provided. In stage 2, the information provided was examined for discrepancies. Such discrepancies could arise, for example, from deviations between different responses in the information provided by the enterprises or between these responses and publicly accessible information. In the case of discrepancies and in the event that the enterprises in question provided contact information, they were contacted in stage 3 in order to clarify this. The intention was for any remaining discrepancies to be clarified conclusively in stage 4 by interviewing further stakeholders. As it was possible to subsequently resolve all discrepancies relevant to the evaluation in stage 3 in discussions with the enterprises, stage 4 was not applied.

3.2.6 Evaluation of the “comply or explain” and free text responses

The “comply or explain” mechanism was defined in the performance specification. It was designed to allow enterprises to justify why they had not implemented particular procedures formulated in the NAP or had implemented them in a different form. The questionnaire also featured several free text options so that enterprises could provide further information in addition to the provided response options. For each individual question relevant to the evaluation, enterprises were asked also to explain their response if the pre-formulated response option selected did not correspond to the requirement framework.

In the exploratory phase, five evaluation principles were defined for responses under “comply or explain” and for free text options: completeness and relevance (formal evaluation principles) as well as preciseness, functional equivalence and context (content-based evaluation principles). These were used as guiding principles in order to simplify and standardise the evaluation of “comply or explain” and free text responses. The formal and content-based dimensions of all “comply or explain” and free text responses were assessed and evaluated separately. For “explain” responses from enterprises for which the evaluation could not be extrapolated directly from the requirement framework, an estimate was defined within the relevant assessment team and then discussed in the consortium. The results of these discussions were channelled into internal evaluation guidelines. These evaluations also applied the principle of commensurateness when taking account of context-based factors. They examined the extent to which information on sector, size and position in the supply and value chain could be used to evaluate whether the requirements had been implemented commensurately. For example, enterprises without significant investment activity do not have to take into account the prospect of investment in the risk analysis in order to meet the requirements.

This procedure proved its worth in both surveys. In both representative surveys, a large proportion of enterprises made use of the option of entering information under “comply or explain” and free text; while the procedure for evaluating form and content, involving the use and further development of the evaluation guidelines, guaranteed that the evaluation process was unbiased and standardised.

3.3 Reflection on the NAP requirements and the requirement framework

One central aspect of the survey and the accompanying evaluation is the requirement framework. The requirement framework determines which responses in the questionnaire should ultimately be considered to be commensurate implementation of human rights due diligence. The aim here was to allow a sound compromise to be found between efficient evaluation and more intensive observation of individual and enterprise-specific circumstances.

Given the aim of the monitoring, the tight timetable and the wish not to deter enterprises from voluntary participation by overcomplicating the questionnaire, while doing justice to specific enterprise constellations and contexts, the methodological combination of a quick-to-complete online questionnaire with pre-defined responses on the one hand and individual evaluation through the use of free text and “comply or explain” options (see Chapter 3.2.6) on the other was appropriate. Examination of the responses provided by the enterprises clearly showed that purely automatic evaluation without qualitative individual evaluation does not work. In addition, the evaluation was individualised still further through incorporation of the specific risk disposition of the enterprise into the requirement framework.

During compilation of the questionnaire and the requirement framework, it was already striking that Chapter III of the current NAP contains fewer specific orientation points and guidelines for enterprises than the more comprehensive UN Guiding Principles. Likewise, the content of the NAP

requirements and the UN Guiding Principles is not always identical. For example, the NAP requirements regarding the policy statement are comparatively detailed, whereas in other places, such as the sections on reporting or on the grievance mechanism, the requirements are much less specific. This was a central challenge in developing the requirement framework. The design of the requirement framework adopted by the Interministerial Committee was dictated solely by the NAP requirements. It must therefore be emphasised that compliance with the NAP requirement framework is not necessarily a statement on the degree of implementation of the UN Guiding Principles.

Enterprises' responses also indicate (see Chapter 2.1) that translating generally formulated requirements into specific guidelines for action and criteria for the broad spectrum of corporate practice can be difficult. There is uncertainty about expectations with regard to the precise scope of human rights due diligence. For example, most enterprises are not sufficiently aware that the NAP states that all levels of an enterprise's value chain that are relevant to business activities should be included in the human rights risk analysis in order to make it possible to use the result to identify risk-based measures to reduce negative human rights impacts. Here there are particular problems with interpreting the NAP criteria for what is commensurate, i.e. size, sector and position in the enterprise's value chain. The NAP makes a general reference to them without providing more detail. This aspect particularly concerns the limits of responsibility and influence in global and complex value chains. This is exacerbated by the fact that the NAP hardly discusses the graduated concepts of "cause", "contribute" and "directly linked" that are central to the UN Guiding Principles, and even deviates from the UN Guiding Principles in its references ("indirectly linked"). In this area, the requirement framework therefore gave enterprises considerable scope to describe their individual approach to risk analysis and measures and to justify this approach through the "comply or explain" mechanism and free text options. This allowed the evaluation to take account of the extent to which enterprises had reflected on the specified criteria of commensurateness in their approach to human rights due diligence and the prioritisation of their measures.

The design of the requirement framework played a central role in the monitoring methodology, as the framework determined the compliance status of individual enterprises and therefore the rate of compliance for all participating enterprises. All in all, the process to define the requirement framework was shaped by the divergent stances of the stakeholders involved. As the NAP itself does not prescribe any differentiated categorisation of requirements, it was methodologically advisable to adhere closely to the formulations in Chapter 3 of the NAP in defining the requirement framework. It was thus possible to develop a commensurate evaluation basis approved by the Interministerial Committee which the stakeholders involved continued to view critically but which was nonetheless justified due to its wording being closely aligned with that of the NAP. For questions on which the NAP did not offer sufficient guidance to provide a solid requirement framework for responses, it was only logical to dispense with the definition of a requirement. Responses to these questions were therefore not relevant to compliance and served to provide qualitative additional information.

3.4 Limitations of the methodology

Various aspects proved to be challenging, particularly ensuring sufficient participation and obtaining a net sample that was representative of the pool of enterprises. Responding to the questions was voluntary for enterprises, and the contact management team had to adhere rigorously to data protection regulations. Another factor was the need to preserve enterprises' anonymity to the Federal Government and the public due the voluntary nature of the surveys, as well as the risk that there would be even greater self-selection in the participation process if the enterprises involved and

the evaluation of their compliance levels had not been treated anonymously. Letters therefore had to be sent to a large number of enterprises and time-consuming contact efforts undertaken to obtain a sufficient net sample in each representative survey phase. This almost inevitably led to the self-selection of the participating enterprises. The resulting distortion of the results could be ironed out with regard to observables but not with regard to non-observables.

The main focus of the monitoring process was the question: Is the enterprise a complier or not? The aim to maximise the efficiency of the survey by using the form of an online questionnaire has the advantage of rapid generation of survey results. However, it also means that survey results produce less in-depth information than direct interviews, for example. The form of survey where enterprises themselves supply information allows a statistically valid and effective survey for the purposes of NAP monitoring but is less effective for generating detailed and fully verified information.

Quality control to check the plausibility of the information provided took place exclusively through consultation of public sources and the identification of logical errors within the responses. The monitoring methodology did not include a final review and validation of enterprises' due diligence processes, as this would have made extended validation or even onsite evaluations necessary and considerably increased the amount of time and resources needed.

Another challenge was the limited scope for contacting enterprises to conduct this plausibility check. For data protection reasons, the online questionnaire asked participants for their permission for the survey team to contact them if they had any questions. A certain number of enterprises refused to grant this permission. In the case of these enterprises, it was not possible to resolve contradictions.

In the case of impersonal or anonymous surveys it is also possible that the information provided by an individual enterprise depends on who has filled in the questionnaire. Expertise, the availability of internal corporate information and subjective stances can all influence the responses. To mitigate these effects, participating enterprises were explicitly advised to involve different stakeholders in responding to the questionnaire.

In conclusion, it can be stated that in spite of the challenges mentioned, the monitoring process was able to show accurately and reliably that fewer than 50 percent of German enterprises with more than 500 employees have implemented the NAP requirements. The monitoring was therefore a comprehensive, rigorous and effective evaluation of the implementation of Chapter III of the NAP and in an aggregated form was also able to reveal particular weaknesses with regard to compliance with individual core elements. This notwithstanding, it must be noted that the NAP monitoring is less clear on the question of why these weaknesses exist. The challenges faced by the individual enterprises can only be outlined, as the methodology of the NAP monitoring is not designed to conduct a final individual compliance evaluation for individual enterprises on the requirements of the UN Guiding Principles or the possible legal regulation of human rights due diligence. To achieve this, it would have to be developed further into a qualitative evaluation of individual cases with additional survey instruments such as interviews and more document verification.

Findings of the Federal Government's NAP Help Desk

Within the context of the two NAP monitoring representative surveys in 2019 and 2020, the Federal Government's NAP Help Desk was the official point of contact for enterprises with questions on the NAP monitoring content and the questionnaire. Enterprise representatives were able to consult Help Desk advisors via phone or email.

For each of the two survey phases in 2019 and 2020, around 140 to 145 enterprises made use of the advice services offered by the NAP Help Desk. For the 2020 survey, despite the challenges posed by the COVID-19 pandemic, there was a slight increase in the number of requests in comparison with 2019 (around 200 requests compared to 180). The findings from the activities of the NAP Help Desk in the context of the monitoring process will be published in a separate brief Help Desk report.

This will be available on the [website](#) of the Agency for Business and Economic Development from 19 October 2020.

The Federal Government's NAP Help Desk is a free support service for enterprises, based in the Agency for Business and Economic Development and financed by the Federal Ministry for Economic Cooperation and Development. The Help Desk works independently of the NAP monitoring consortium and in compliance with data protection regulations.