

Section 1: Need and objectives for EU intervention on sustainable corporate governance

Q1: Due regard for stakeholder interests', such as the interests of employees, customers, etc., is expected of companies. In recent years, interests have expanded to include issues such as human rights violations, environmental pollution and climate change. Do you think companies and their directors should take account of these interests in corporate decisions alongside financial interests of shareholders, beyond what is currently required by EU law?

Selected answer:

- Yes, a more holistic approach should favour the maximisation of social, environmental, as well as economic/financial performance.

Answers not selected:

- Yes, as these issues are relevant to the financial performance of the company in the long term.
- No, companies and their directors should not take account of these sorts of interests.
- Do not know.

Explanation:

Over the past 20 years, the Social and Economic Council of the Netherlands (SER) has been promoting responsible business conduct through multiple advisory reports and the facilitation of international RBC sector agreements since 2014, following a unanimous advisory council report¹ at the request of the Dutch government. The SER takes a holistic approach to sustainability and therefore considers issues such as human rights violations, environmental pollution and climate changes as an integral part of sustainability. The RBC agreements are based on the OECD guidelines and UNGP's and are part of a wider array of Dutch policy measures to work towards improved conditions in global supply chains. International RBC agreements offer companies the opportunity to work jointly at the sector level with the government, unions and CSOs to address specific complex problems in a structured and solution-oriented manner and thereby increase leverage.

In recent years, a great deal of experience has been gained with the implementation of the guidelines, including in the form of RBC agreements. This has given us a better idea of what companies encounter in practice when they genuinely embark on the due diligence process. This leads to additional insights for future policy, which are also reflected in various evaluations.

In the SER's most recent advisory report 'Together towards sustainable supply chain impact', challenges have been identified which companies encounter when implementing the OECD guidelines and UNGP's. One of these challenges is to fully integrate the UNGP's and OECD guidelines within companies, as this requires commitment from their directors. Doing business internationally with respect for people and the environment requires integration throughout the enterprise. There is a frequent tension between commercial and sustainability objectives. Commitment on the part of top management is crucial in order to involve all departments and ensure that RBC risks are taken into account in corporate decision making.

See also:

- SER-advisory report 'Together towards sustainable supply chain impact' *link*
- Website of the Dutch RBC agreements *link*

Q2: Human rights, social and environmental due diligence requires companies to put in place continuous processes to identify risks and adverse impacts on human rights, health and safety and environment and prevent, mitigate and account for such risks and impacts in their operations and through their value

¹ See: <https://www.ser.nl/-/media/ser/downloads/engels/2014/international-responsible-business-conduct.pdf>. The SER advises the Dutch government and parliament on social and economic policy and consists of representatives of employers, workers and independent experts. See <https://www.ser.nl/en/SER/About-the-SER> for more information.

chain. In the survey conducted in the context of the study on due diligence requirements through the supply chain, a broad range of respondents expressed their preference for a policy change, with an overall preference for establishing a mandatory duty at EU level. Do you think that an EU legal framework for supply chain due diligence to address adverse impacts on human rights and environmental issues should be developed?

Selected Answer:

- Yes, an EU legal framework is needed.

Answers not selected:

- No, it should be enough to focus on asking companies to follow existing guidelines and standards.
- No action is necessary.
- Do not know.

Explanation

According to the SER, a combination of comprehensive due diligence legislation and multi stakeholder sectoral cooperation, preferable at the European level, leads to the greatest impact within the supply chain to prevent and address risks to people and the environment. Legislation and cooperation reinforce one another and the combination of both instruments is a prerequisite for sustainable impact in supply chains. Because of the level of scale required to achieve impact, the SER finds that an ambitious European policy mix offers the best opportunities for achieving sustainable supply chains.

Given that many enterprises in Europe and elsewhere do not yet implement the guidelines, or only to a limited extent, and the market does not price the negative external effects within the supply chain, there is an uneven playing field. Consumers, customers, and government do not sufficiently reward investment in improving production conditions. Consequently, there are few consistent external incentives to prioritise such investment, and much depends on intrinsic motivation. A broad legal obligation at the European level is therefore required to ensure better adherence with the UNGP's and OECD guidelines.

According to the SER, the overarching principle for developing an Initiative for Sustainable Corporate Governance should be the extent to which the initiative, through the implementation of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) by companies, can be expected to prevent negative impact and maximise positive impact within international supply chains.. In its latest advisory report the SER included a list of requirements for future RBC policy, you can find an abstract below:

"What does this require for [an Initiative on Sustainable Corporate Governance and] the broader European policy mix?

- The widest possible deployment of mutually reinforcing policy instruments;
- Coherent policy, synergy between policy instruments, and use of the same standards;
- Contribution to a level playing field on the widest possible scale, and embedding of instruments at the European level;
- Promoting the involvement of stakeholders and rights-holders in producing countries, including producers;
- Improving access to remedy;
- Increasing insight into the supply chain and the possibilities for the various nodes within it to contribute to international RBC;
- Encouraging cooperation so as to increase influence;
- Contribution to dialogue and trust;
- Attention to the learning agenda and to making the impact quantifiable, including the positive and negative side-effects of the policy."

Q3: If you think that an EU legal framework should be developed, please indicate which among the following possible benefits of an EU due diligence duty is

important for you (tick the box/multiple choice)?**Selected answers:**

- Ensuring that the company is aware of its adverse human rights, social and environmental impacts and risks related to human rights violations other social issues and the environment and that it is in a better position to mitigate these risks and impacts
- Contribute effectively to a more sustainable development, including in non-EU countries
- Levelling the playing field, avoiding that some companies freeride on the efforts of others
- Increasing legal certainty about how companies should tackle their impacts, including in their value chain
- A non-negotiable standard would help companies increase their leverage in the value chain
- Harmonisation to avoid fragmentation in the EU, as emerging national laws are different
- Other:

Not selected answers:

- SMEs would have better chances to be part of EU supply chains

Global supply chains are complex and individual parties in EU countries mostly have limited leverage when it comes to improving human rights and environmental standards in these supply chains. Implementing the UNGPs and the OECD Guidelines requires government, business and civil society to work together all along the supply chain. A European framework enables parties to increase their leverage, join forces and work collectively towards more international collaboration which is necessary.

In addition, a European framework should contribute to the broad understanding and predictability of what proper due diligence includes. Businesses raise concerns regarding the lack of alignment on disclosure requirements across stakeholders including governments, multistakeholder and industry-led initiatives as well as investors. They refer to the administrative burden of using different tools for the assessment of and reporting on due diligence implementation, and to the diversion of capacities away from the implementation of concrete measures, especially measures aimed at impact. Moreover, fragmentation of legislative initiatives in member states increases administrative costs and procedural burden, which can be mitigated by a harmonized European legal framework. Finally, producers in non EU-countries have pointed to the discordance in auditing standards and certification for years. An encompassing EU Framework can help to address these concerns.

A harmonised European due diligence duty could therefore:

- Increase predictability and clarify expectations of companies vis-à-vis due diligence and the reduction of the reporting and administrative burden on companies;
- Contribute to consistent requirements by European companies towards their suppliers and producers all along the supply chain;
- Provide consistent information for policy makers and civil society in order to review, benchmark and monitor company performance;
- Free resources within all stakeholders (EU businesses and non-EU producers, civil societies, labour unions, investors and governments) that can be redirected towards actual impact-oriented actions

See also the note on *Alignment between initiatives at the European level* by the Partnership for Sustainable Textiles, the Dutch Agreement on Sustainable Garments and Textile and the Sustainable Apparel Coalition <https://mneguidelines.oecd.org/OECD-Garment-Forum-2020-Session-Note-Alignment-between-Initiatives.pdf>

Q3b: Please indicate which among the following possible risks/drawbacks linked to the introduction of an EU due diligence duty are more important for you (tick the box/multiple choice)?

Selected answers:

- Competitive disadvantage vis-à-vis third country companies not subject to a similar duty
- Disengagement from risky markets, which might be detrimental for local Economies

Answers not selected:

- Increased administrative costs and procedural burden
- Penalisation of smaller companies with fewer resources
- Responsibility for damages that the EU company cannot control
- Difficulty for buyers to find suitable suppliers which may cause lock-in effects (e.g. exclusivity period/no shop clause) and have also negative impact on business performance of suppliers

The advantages of an ambitious due diligence legislation at the European level outweighs any disadvantages.

Section 2: Directors' duty of care – stakeholders' interests

Er is geen Q4

Q5 Which of the following interests do you see as relevant for the longterm success and resilience of the company?

	Relevant	Not relevant	I do not know/I do not take position
the interests of shareholders	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees in the company's supply chain	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of customers	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the operations of the company	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the company's supply chain	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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the interests of local and global natural environment, including climate	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the likely consequences of any decision in the long term (beyond 3-5 years)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of society, please specify	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
other interests, please specify	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Throughout its advisory reports, the SER has put emphasis on the role of companies within society. Society provides companies a license to operate when a company proficiently satisfies the expectation society has of the social responsibilities of companies. This is why the effects companies have on society are part of the core business of companies. For this reason, the SER considers the interests of society as relevant for the long term success and resilience of a company.

Q6 Do you consider that corporate directors should be required by law to (1) identify the company's stakeholders and their interests, (2) to manage the risks for the company in relation to stakeholders and their interests, including on the long run (3) and to identify the opportunities arising from promoting stakeholders' interests?

No opinion

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Q7 Do you believe that corporate directors should be required by law to set up adequate procedures and where relevant, measurable (science –based) targets to ensure that possible risks and adverse impacts on stakeholders, ie. human rights, social, health and environmental impacts are identified, prevented and addressed?

No opinion

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Q8 Do you believe that corporate directors should balance the interests of all stakeholders, instead of focusing on the short-term financial interests of shareholders, and that this should be clarified in legislation as part of directors' duty of care?

No opinion

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Q9 Which risks do you see, if any, should the directors' duty of care be spelled out in law as described in question 8?

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

How could these possible risks be mitigated? Please explain.

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Where directors widely integrate stakeholder interest into their decisions already today, did this gather support from shareholders as well? Please explain.

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Q10 As companies often do not have a strategic orientation on sustainability risks, impacts and opportunities, as referred to in question 6 and 7, do you believe that such considerations should be integrated into the company's strategy, decisions and oversight within the company?

The SER agrees with the given statement because it is in line with the spirit of the OECD guidelines and UNGPs. The Netherlands has adopted the Corporate Governance code, requiring corporate management to take long term value creation for stakeholders into account. The board has to report on the implementation of long term value creation on an annual basis.

Regarding oversight, the SER acknowledges an important role for workers representatives in adopting and implementing RBC policy. Involving the workers representatives in drafting the RBC policy can help broaden the support of the policy within the organization and creates checks and balances. As the establishment and functioning of a workers representative body

is part of the directors duty, this element should be included. Note that the freedom of workers to choose their own representatives has to be guaranteed with that.

Q11 Are you aware of cases where certain stakeholders or groups (such as shareholders representing a certain percentage of voting rights, employees, civil society organisations or others) acted to enforce the directors' duty of care on behalf of the company? How many cases? In which Member States? Which stakeholders? What was the outcome?

Please describe examples:

The SER does not have any specific cases relating to the duty of care. The financial sector international RBC Agreements however require shareholders to utilize their voting power to engage with companies and influence companies to take long term value creation and (international) RBC into account. Many financial companies publish the votes and outcomes on an annual basis.

Q12 What was the effect of such enforcement rights/actions? Did it give rise to case law/ was it followed by other cases? If not, why?

Please describe:

Please see our answer under question 11.

Q13 Do you consider that stakeholders, such as for example employees, the environment or people affected by the operations of the company as represented by civil society organisations should be given a role in the enforcement of directors' duty of care?

Agree

Following the OECD Guidelines and the UNGP's, workers representatives and civil society organizations should be consulted and thus play a role in RBC policymaking as well as in the implementation of RBC policy and the creation of support for this in the company. Experience shows that the workers representatives can on the one hand help bring the RBC policy established by the board of the company to the workplace through its own communication channels and networks. On the other hand the workers representatives can also open up new ideas and potential bottlenecks for the management of the company and thus fulfil a catalytic role.

Q13a In case you consider that stakeholders should be involved in the enforcement of the duty of care, please explain which stakeholders should play a role in your view and how.

Please see our answer under question 13.

Section 3: Due diligence duty

Q 14 "For the purposes of this consultation, "due diligence duty" refers to a legal requirement for companies to establish and implement adequate processes with a view to prevent, mitigate and account for human rights (including labour rights and working conditions), health and environmental impacts, including relating to climate change, both in the company's own operations and in the company's the supply chain. "Supply chain" is understood within the broad definition of a company's "business relationships" and includes subsidiaries as well as suppliers and subcontractors. The company is expected to make reasonable efforts for example with respect to identifying suppliers and subcontractors. Furthermore, due diligence is inherently risk-based, proportionate and context specific. This implies that the extent of implementing actions should depend on the risks of adverse impacts the company is possibly causing, contributing to or should foresee." Please explain whether you agree with this definition and provide reasons for your answer.–

The SER is in favour of comprehensive due diligence legislation, which is based on the OECD-guidelines and UNGPs. As the given definition corresponds with definitions given in the OECD-guidelines and UNGPs, the SER agrees with this definition. The UNGPs form a coherent framework and must be interpreted in the light of their purpose, namely to improve business and human rights standards and practices in order to deliver real results for stakeholders and communities, thereby also contributing to socially sustainable globalisation. This can be achieved by including Shift's 'Guardrails for Human Rights Due Diligence: Assessing the Quality of a Company's HRDD Efforts' in the development of future due diligence legislation. The Guardrails can be found here: <https://shiftproject.org/>

Moreover, when implementing the OECD Guidelines and applying due diligence in practice, companies encounter a number of difficulties. These are linked to the various steps in the due diligence process. Addressing these difficulties effectively, requires the widest possible deployment of mutually reinforcing policy instruments at the European level, including credible and effective platforms for multi-stakeholder collaboration that demonstrate putting the UNGPs and OECD Guidelines into practice. It also requires long term investment by business, government, trade unions and civil society.

The SER also advises within the due diligence duty, to give specific attention to the enabling right Freedom of Association and Collective Bargaining. They are needed while working on repelling child labour, forced labour and establishing a living wage. They should be in the heart of due diligence policy.

Finally, the OECD has carried out an alignment assessment on the extent to which the working method of the Dutch Agreement on Sustainable Clothing and Textile (AGT) corresponds to its guidelines for the garment and footwear sector. The assessment shows that it is possible to make the guidelines operational and practical for SME's. According to the OECD "One of the strengths of the AGT is that it continuously strives to determine how small and medium-sized enterprises can carry out due diligence in a way that is appropriate to their size and circumstances". The full report can be found here: <https://mneguidelines.oecd.org/alignment-assessment-garment-footwear.htm>

Q15 Please indicate your preference as regards the content of such possible corporate due diligence duty (tick the box, only one answer possible). Please note that all approaches are meant to rely on existing due diligence standards, such as the OECD guidance on due diligence or the UNGPs. Please note that Option 1, 2 and 3 are horizontal i. e. cross-sectorial and cross thematic, covering human rights, social and environmental matters. They are mutually exclusive. Option 4 and 5 are not horizontal, but theme or sector-specific approaches. Such theme specific or sectorial approaches can be combined with a horizontal approach (see question 15a). If you are in favour of a combination of a horizontal approach with a theme or sector specific approach, you are requested to choose one horizontal approach (Option 1, 2 or 3) in this question.

Selected answer:

- Option 1. "Principles-based approach": A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU level general or sector specific guidance or rules, where necessary

Not selected answers:

- Option 2. "Minimum process and definitions approach": The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.
- Option 3. "Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues". This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.
- Option 4 "Sector-specific approach": The EU should continue focusing on adopting due diligence requirements for key sectors only.
- Option 5 "Thematic approach": The EU should focus on certain key themes only, such as for example slavery or child labour.
- None of the above, please specify

Explanation

Regarding the content of a possible corporate due diligence approach, the SER stresses the importance of selecting an approach that includes and monitors all steps in the due diligence process. This includes impact on the ground and possible remediation. The SER stresses the importance of coherence between the OECD Guidelines and UNGPs and any new form of legislation. This legislation should be horizontal and therefore cross-sectoral and cross thematic to ensure it is in line with the spirit of the OECD-Guidelines and UNGPs. The SER advises to apply the approach to the largest possible categories of businesses. This does, however require the inclusion of the principle of proportionality to ensure a supervising authority can distinguish between the (administrative and operational) capabilities of SMEs and multinationals.

The primary focus of the SER in its advise on the possible corporate due diligence approach is to generate the largest possible incentive for companies to generate impact on the ground and ensure the approach does not result into a ticking the box exercise and to inspire cooperation between companies, governments, trade unions and CSOs. The application of the OECD-guidelines requires a space for companies to collectively learn and innovate new methods and systems to create impact on the ground by, for instance, making use of best practices. This can be achieved through a principle based approach. On the other hand, the SER finds it of great importance to ensure companies have certainty of law and predictability when it comes to possible regulation and sanctions. This can be achieved via rule based regulation.

Finally, the SER adds the importance of "future proof" adoptive regulation and legislation. The SER therefore opts for a mixture between a (primarily) principle based approach and (where possible and efficient) rule based approach to ensure 1) the primary focus of the approach is impact on the ground, 2) there is room for innovation, 3) there is room for proportionality and reasonableness and fairness for SMEs and 4) whilst providing companies the maximum amount of legal certainty and predictability.

Q15a If you have chosen option 1, 2 or 3 in Question 15 and you are in favour of combining a horizontal approach with a theme or sector specific approach, please explain which horizontal approach should be combined with regulation of which theme or sector?

Regarding the horizontal approach the SER stresses the importance of including all due diligence steps and applying the approach to the entire business community. The SER recognizes the importance of identifying high risk sectors (by, for instance repeating the KNPG sector risk analysis, as conducted on behalf on the Dutch government in 2014) to map high risk sectors and prioritize risks. By making use of recognized sector based schemes through which companies can collaborate to address these risks companies can gain better understanding and guidance to implement due diligence. The SER sees regulations for high risk sectors, such as the conflict mineral regulation as a welcome addition to legislation based on the horizontal approach.

15b Please provide explanations as regards your preferred option, including whether it would bring the necessary legal certainty and whether complementary guidance would also be necessary.

As described above, the SER finds it of great importance to ensure companies have certainty of law and predictability when it comes to possible regulation and sanctions. This can be achieved via rule based regulation where fitting. Additional guidance would be required for the principle based approach, which should include sharing best practices and the adaptation of Shift's fundamental Guardrails. Shift's fundamental Guardrails can function as a check for companies to assess the steps they must take for implementation of the guidelines. By creating an overview of best practices, a list of voluntary requirements for due diligence steps and recognized schemes, companies gain insight into accepted approaches and can deduct possible alternative approaches that are better fitting for the companies own business model. By including these examples in a complementary guidance for the regulating authority, business community and stakeholders, all stakeholders can work towards a shared understanding of the implantation of possible legislation.

15c-g

n.a.

Q 16 How could companies'- in particular smaller ones'- burden be reduced with respect to due diligence? Please indicate the most effective options (tick the box, multiple choice possible) This question is being asked in addition to question 48 of the Consultation on the Renewed Sustainable Finance Strategy, the answers to which the Commission is currently analysing.

Selected answers:

- SMEs should be subject to lighter requirements ("principles-based" or "minimum process and definitions" approaches as indicated in Question 15)
- Capacity building support, including funding
- Detailed non-binding guidelines catering for the needs of SMEs in particular
- Toolbox/dedicated national helpdesk for companies to translate due diligence criteria into business practices
- Other option, please specify

Answers not selected:

- All SMEs should be excluded
- SMEs should be excluded with some exceptions (e.g. most risky sectors or other)
- Micro and small sized enterprises (less than 50 people employed) should be excluded
- Micro-enterprises (less than 10 people employed) should be excluded
- SMEs should have lighter reporting requirements
- None of these options should be pursued

Explanation

The OECD guidelines and UNGPs apply to companies of all sizes in all sectors and thus future legislation should do so as well. However, proportionality for SME's is required as you cannot expect the same from a large company as from an SME, see also question 15. This also

applies to how a possible regulator acts. Platforms for multi-stakeholder collaboration can also further support SMEs: by identifying the risks as a sector, it also becomes easier for smaller companies to reduce negative consequences. Experience with the Dutch RBC agreements shows that it is possible for SMEs to do this with the right support. Challenges for SMEs, such as effectively addressing risks in their supply chain, promoting access to remediation and effectively consulting stakeholders and right-holders throughout the different steps of the due diligence cycle can be done collectively. Enabling smaller companies to do this, requires support from and collaboration with organisations with local experience and networks, such as local/sectoral employer's departments, labour unions and CSO's. Investing in capacity building on implementing human rights due diligence and dialogue skills should be part of the support for such platforms. Moreover, smart tools for principled prioritisation and increasing leverage will further help implementation. Finally, extending the financial incentives (both governmental and from investors) for companies can ensure that international RBC pays off more.

See for example the results from and developed tools in the first collective project of the Dutch agreement on Sustainable Garments and Textiles:

<https://www.imvoconvenanten.nl/en/garments-textile/news/combats-child-labour>

Q 17 In your view, should the due diligence rules apply also to certain thirdcountry companies which are not established in the EU but carry out (certain) activities in the EU?:

Don't know

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Q 17A/17B

n.a.

Q 18 Should the EU due diligence duty be accompanied by other measures to foster more level playing field between EU and third country companies?:

The practical implementation of the OECD Guidelines and UNGPs in recent years has consistently shown how crucial the local context in producing countries is. It is only with consistent behaviour by a substantial part of the market – with employees and civil society organisations daring to address issues locally and with governments jointly putting sustainable supply chains on the map – that producers within the supply chain have sufficient incentives and opportunities for structurally improving conditions and for carrying out production with respect for people and the environment. This calls for extra efforts on international RBC on the part of the business community. What is equally important is government commitment to other policy instruments for sustainable globalization, such as development aid and trade measures, and the coherence and synergy between the various policy instruments.

Therefore additional measures are also required regarding European policy instruments for sustainable globalisation:

- In addition to the efforts for international RBC, also intensify efforts regarding other routes to sustainable globalisation.
- Monitor the impact of the COVID-19 crisis on international RBC and parties in the supply chain, and learn lessons to create robust, crisis-proof and sustainable supply chains in which people and the environment are central.
- Seek cooperation with governments in key producing countries, focusing on ratifying ILO core conventions, better enforcement of their own legislation and regulations and the creation of platforms for social and multi-stakeholder dialogue and cooperation.
- Ensure consistency in the various areas of flanking policy, such as trade policy, development policy, competition policy and the internal market, procurement policy, and financial sector policy.

- Create a learning agenda, with scope to experiment and a firm commitment to research, monitoring, and evaluation.
- Invest in comprehensive information and awareness about the international RBC framework and the relationship with the SDGs among European public officials – such as procurement managers, embassy staff, and local government staff – and among companies and consumers.

Q19a If a mandatory due diligence duty is to be introduced, it should be accompanied by an enforcement mechanism to make it effective. In your view, which of the following mechanisms would be the most appropriate one(s) to enforce the possible obligation (tick the box, multiple choice)?:

Selected answers:

- Other

Answers not selected

- Judicial enforcement with liability and compensation in case of harm caused by not fulfilling the due diligence obligations
- Supervision by competent national authorities based on complaints (and/or reporting, where relevant) about non-compliance with setting up and implementing due diligence measures, etc. with effective sanctions (such as for example fines)
- Supervision by competent national authorities (option 2) with a mechanism of EU cooperation/coordination to ensure consistency throughout the EU

There are no joint statements on the organization of the enforcement mechanism, however the SER wishes to share the following points of attention regarding supervision:

The design of supervision, enforcement and the possibilities for remedy are an important determinant for impact in the supply chain. A precondition for access to remedy is that it has been demonstrated that a company has not complied with its legal obligations and that someone has suffered damage as a result. This means that companies must first be given fair time to comply with the legal obligations. Also, a possible regulator should apply proportionality for SME's, as you cannot expect the same results from a large company as from an SME.

Moreover, it is conceivable that the supervisory authority will draw on the experience of sectoral partnerships to formulate minimum standards (dynamic supervision), thus encouraging partnerships to learn from one another's experience. It is important for there to also be scope for bottom-up initiatives, which the supervisory authority may not be immediately aware of in the first instance.

Regarding the enforcement, additional measures, such as under the EU conflict minerals regulation, are needed to ensure that implementation of the OECD-guidelines and UNGP's settle into the capillaries of the sectors. In order to support enterprises effectively in complying with possible legislation, some degree of integration in the enforcement scheme with sectoral cooperation is necessary. In this way, enterprises can learn from one another how legislation can be implemented and risks can be addressed jointly. A balance will need to be struck between, on the one hand, responsibility and liability on the part of individual enterprises and, on the other, the incentives for enterprises to cooperate on a sectoral basis. Participation in sectoral cooperation could, for example, lead to a company being given more time to comply with its obligations before the supervisory authority initiates sanctions and the like (after all, the company is showing that it is taking the matter seriously).

One more far-reaching option is for the arrangements and monitoring mechanisms regarding sectoral cooperation and certification systems to be validated by the supervisory authority as a recognised scheme, which imposes equivalent requirements to the legislation. Supervision of the party implementing the recognised scheme will then be made more stringent. The question, however, is whether this does justice to the individual responsibility of enterprises, and whether it does not place too much responsibility on the sectoral partnerships. Reciprocal reinforcement of legislation and sectoral cooperation is conditional on the latter meeting

certain quality criteria. For example, recognised forms of sectoral cooperation could play a role in supervision. Recognition should depend on the extent to which sectoral cooperation promotes the OECD Guidelines (as analysed in the OECD Alignment Assessments). The Sustainable Garments and Textile Agreement may be taken as an example. It is relevant here to add that the OECD assessed the approach adopted in the textile agreement as being international best practice.

It is also important for the supervisory authority to have a clear understanding of the incentives in the various nodes in the supply chain so that it can determine where increasing influence will be most effective. In order to identify these points, it is necessary to analyse how the supply chain is structured. Sectoral cooperation can play an important role in performing and utilising such an analysis with a view to addressing the risks of negative impacts on people and the environment in the supply chain. Given the overarching principle of achieving maximum impact in the supply chains, it is important for the supervisory authority to deploy the available resources where the maximum impact can be achieved. When assessing compliance with the guidelines one must also weigh up what can be expected of an enterprise on the basis of its position within the supply chain.

Q19b In case you have experience with cases or Court proceedings in which the liability of a European company was at stake with respect to human rights or environmental harm caused by its subsidiary or supply chain partner located in a third country, did you encounter or do you have information about difficulties to get access to remedy that have arisen?:

Answer:

Yes

Access to remedy is a vital part of the due diligence cycle, and thus to the SER RBC Agreements. When assessing the obligation to provide access to remedy the SER uses the requirements of the OECD Guidelines and not the legal requirements of tort law. The SER therefore has no experience in cases or proceedings in which liability was at stake. The SER does have experience accessing the obligation to provide remedy the sense of the OECD Guidelines, the answer should be read in that context.

In this regard, the Dutch Agreement for Sustainable Garments and Textiles pioneers with an Independent Complaints and Grievances committee with binding rulings to all parties involved in the procedure. Working towards effective grievance mechanisms remains a process where a lot is to be learned, especially regarding accessibility and reliability for those who are directly affected. In the continuation of the textile agreement, we are looking again at how this can be further improved.

The page of the Complaints and Grievance committee of the Agreement for Sustainable Garments and Textiles and their rulings can be found here:

- <https://www.imvoconvenanten.nl/en/garments-textile/agreement/complaints>
- *Ruling in the case of Arise –C&A Nederland – December 2020* and the reaction of Arisa to the decision of the Complaints and Disputes committee
- *Ruling in the case of Corn. van Dijk – May 2019*
- *Ruling in the case of Manderley Fashion – May 2019*

In addition, parties within the Dutch Banking Sector Agreement published a paper on enabling remediation. The paper explores the role and responsibility of banks with regard to remedy, when connected to human rights impacts through client relationships. It summarizes the most important points of conversation, consensus and broadly shared insights and diverging perspectives where parties were unable to reach consensus.

For the report, see: *Discussion paper on enabling remediation*

See also the Access to Remedy page of the RBC agreements:

- <https://www.imvoconvenanten.nl/en/featured-themes>

Section 4: other elements of sustainable corporate governance

Q20a Do you believe that the EU should require directors to establish and apply mechanisms or, where they already exist for employees for example, use existing information and consultation channels for engaging with stakeholders in this area?

strongly agree

Dialogue with employee representatives and other relevant stakeholders is important at every step of the due diligence process. After all, given the diverse aspects relating to international supply chains and given their complexity, a meaningful stakeholder dialogue provides the best opportunity to effectively carry out due diligence. As directors have the final responsibility for the effectiveness of their companies' due diligence, they also have the responsibility to establish and apply mechanisms or use existing information and consultation channels for engaging with stakeholders.

20b If you agree, which stakeholders should be represented? Please explain.,

The SER follows the definition of the OECD-guidelines and UNGP's regarding who companies' stakeholders are. Stakeholders include, amongst others, directly or indirectly and potentially and actually affected rights-holders. They include workers and independent trade unions as their representatives, local communities, and non-governmental organisations (NGOs) active in the fields of human rights, development cooperation, the environment, and consumer protection.

Companies should conduct meaningful stakeholder dialogues (direct consultation with potentially negatively affected stakeholders), however in practice it is still challenging for companies to identify the most important stakeholders. Shift's fundamental "guardrails" for HRDD should be considered in this regard.

Q 20c What are best practices for such mechanisms today? Which mechanisms should in your view be promoted at EU level? (tick the box, multiple choice)

	Is best practice	Should be promoted at EU level
Advisory body	<input type="radio"/>	<input type="radio"/>

Stakeholder general meeting	<input type="radio"/>	<input type="radio"/>
Complaint mechanism as part of due diligence	<input type="radio"/>	<input checked="" type="radio"/>
Other, please specify	<input type="radio"/>	<input checked="" type="radio"/>

Other, please specify:

For the effectivity of stakeholder consultation it is far more important to identify the right stakeholders, to have real dialogue with them and taking their interests into account in decision making processes, than the form of such a mechanism. Shift's fundamental "guardrails" for HRDD should also be considered regarding the effectivity of stakeholder engagement, which remains challenging in practice.

Q21 Remuneration of directors

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Q22 Enhancing sustainability expertise in the board

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Q23 Share buybacks

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.

Q24 Do you consider that any other measure should be taken at EU level to foster more sustainable corporate governance? other measures

In the view of the SER, an ambitious European policy mix is needed, which requires the widest possible use of mutually reinforcing policy instruments. Crucial for positive impact in the supply chain are platforms for multi-stakeholder collaboration and learning and exchange should be part of the smart policy mix of both individual member states and the EU. These platforms need to involve actors from all along the supply chains (including in production countries) in order to be effective. Where possible, sector-wide multi-stakeholder cooperation should be established directly at European level. Moreover, smart tools for principled objective prioritisation and increasing leverage will further help implementation.

In addition, the EU should provide policy coherence and incentives for pre-competitive collaboration on improving human rights, including within EU competition law. Competition law may prohibit companies from sharing and publishing specific information collectively because it is assumed to negatively affect the functioning of the market or consumers. More discussion is needed on avenues for pre-competitive cooperation within competition policy, leading towards a European policy framework that takes both social and environmental concerns into account.

Another important aspect of policy coherence is sustainable procurement. In its own operations, governments should apply international RBC criteria, thereby rewarding early adopters and ensuring a level playing field. There should be focus in international tenders on including international RBC criteria, and governments should encourage innovation and experimentation in tendering procedures.

The SER has, in its previous advises, identified several issues which in practice form an obstacle for businesses when constructing and implementing an RBC policy.

- *Governmental Financial incentives:* in order to ensure RBC can become more of a priority for companies it is important to ensure there are enough financial incentives for companies. Governments can play an important role in providing such incentives by including RBC requirements into every Public Procurement. States are bound by the UNGP's as well as the OECD Guidelines and therefore have a duty to promote human rights and respect for the environment through its own purchasing practice. The SER has identified two pathways through which this can be implemented on an EU level:
 - o **The EU Green Public Procurement** standards should be expanded to include RBC requirements and be made mandatory for governments;
 - o Include RBC standards in the selection criteria, as stated in **Directive 2014/24/EU on public procurement** or alternatively in the technical specifications.
- *Financial Incentives from the financial sector:* The SER has identified the financial sector as an important lever to accelerate economic and social transition. The EU has adopted the **Taxonomy regulation** to redirect financial flows towards more sustainable projects. Given the holistic view the SER has on sustainability the SER advises the EU to include RBC objectives in the Taxonomy regulation to ensure equal importance to social issues in addition to environmental issues.

- *Cooperation between companies*: RBC requires cooperation between companies within one sector and within the same supply chain. To provide more room for cooperation in **Competition law** by no longer requiring initiatives in sustainability to demonstrate the consumers enjoy a fair share of the resulting benefit, but rather allowing companies to balance the furthering RBC as a benefit in itself, not only for the consumer but for society as a whole. The same can be said for the **Vertical Block exemption regulation** and the **Vertical guidelines**; the Commission proposes to adopt a more lenient approach towards agreements implementing the EU Green Deal. The SER advises the Commission to include RBC regulations in this revision.
- *Ensure consistency in policy*: policy coherence in terms of new and existing **trade policy and trade agreements** are of importance on a national and EU level to ensure governmental policy and trade agreements to not incentivize or contribute to potential adverse impacts. Trade policy and trade agreements can increase pressure on developing countries to keep production costs low, whilst RBC policy aims toward a true cost price. This true price enables production locations to implement sustainable practices. What is equally important is government commitment to other policy instruments for sustainable globalization, such as development aid and trade measures, and the coherence and synergy between the various policy instruments. Trade agreements can be used as a tool by governments to create this synergy as they allow an opening to incentivize and further strengthen the RBC and sustainable development agenda. This makes it important to ensure coherence and synergy between both instruments and increase the efforts made in terms of RBC policy.

Section 5: impacts of possible measures

Our answers are based on SER advisory reports and where there are no joint statements, we do not provide any input.