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# Key messages on Corporate Sustainability Due Diligence Directive ahead of European Parliament JURI Committee vote

## 1 The Directive requirements should recognise that it is not necessary or possible for insurers to conduct due diligence on all of the potentially millions of business partners within their value chains. The scope of coverage of insurers' value chains under the Corporate Sustainability Due Diligence Directive (CSDDD) must be improved to appropriately reflect the insurance sector's specific characteristics.

The insurance industry welcomes the fact that recital 19 of the European Commission directive proposal states that SMEs, individuals and households receiving insurance are not considered to be part of the value chain for the CSDDD. However, this is not reflected in the articles of the proposed Directive.

Insurers should only be required to carry out due diligence assessments on their direct business partners. No look-through to the business partners of an insurer's business partners should be required.

An insurer should not be expected or required to deny provision of a legally required insurance policy because of a due diligence assessment (see point 3 below).

### Recommendation

Insurers recommend adapting the CSDDD scope of coverage of the value chain in Article 3(g) for financial services to:

- explicitly remove SMEs, households and natural persons;
- limit it to direct business partners; and,
- exclude customers of (re)insurance mandated by law of a member state.

## 2 Due diligence requirements should follow a risk-based approach to ensure effectiveness, proportionality and feasibility for companies. For adverse impacts in their downstream value chains (ie, to underwriting customers and to investments), in line with the approach proposed in the ECON Committee opinion for institutional investors and asset managers, insurers should be recognised as only linked to potential adverse impacts (as opposed to causing or contributing to adverse impacts).

Introducing a risk-based approach for insurers along the lines of the proposal in article 42a of the ECON opinion is essential. An appropriate risk-based approach will ensure proportionality, allow companies to target and prioritise the material adverse impacts and improve the due diligence measures' effectiveness and efficiency.

The CSDDD should define different levels of a company's involvement in adverse impacts in their value chain: causing, contributing or only being linked. These can then be used in the determination of the appropriate measures/actions needed by a company to carry out sufficient due diligence and to respond to identifying an adverse impact in its covered value chain.

Insurers should be defined as only linked to (potential) adverse impacts in their downstream value chains given their specific characteristics and relationship with customers and investments. This is in line with the approach for institutional investors and asset managers in the proposed recital 42a of ECON's opinion.

### Recommendation

**Incorporate a risk-based approach** into the CSDDD based on the concept of causing, contributing or being linked to adverse impacts. **Insurers should be defined as only linked to (potential) adverse impacts in their downstream value chains** given their specific characteristics and relationship with customers and investments.

## 3 Insurers should not be expected, or required, to deny provision of a legally required insurance policy because of a due diligence assessment.

An insurer should not be expected or required to deny provision of a legally required insurance policy because of a due diligence assessment. Where there is a statutory requirement to have insurance (eg, liability and life/health products), the beneficiaries (eg, employees, local residents) are usually different from the insurer's business partners. Therefore, refusing to provide insurance to a company for due diligence reasons can negatively impact other stakeholders and jeopardise the social role of insurance, and should not be an unintended consequence of the proposal.

### Recommendation

**Article 3(g) should be amended** to define that the value chain of regulated financial entities does not include customers of (re) insurance mandated by the law of a member state.

**Articles 6, 7 and 8 should be amended** to clarify that insurers should not be expected or required to deny provision of a legally required insurance policy because of a due diligence assessment or terminate the relationship if it can be reasonably expected to cause substantial prejudice to whomever that service is provided or to other stakeholders (staff, citizens, local economy, etc.).

## 4 Civil liability rules should not be included in the Directive. If Article 22 is retained, it is essential that civil liability provisions are clear and due diligence requirements are appropriate, proportionate and achievable.

Article 22 on civil liability would run the risk of unduly interfering with the established principles of national civil law, undermining its consistency. Experience with the General Data Protection Regulation (GDPR) shows how important it is to take care to avoid conflicts between EU and national regulation. While the GDPR is applicable since May 2018, many essential questions on civil liability under Art. 82 of the GDPR remain unresolved as the Court of Justice of the EU has to deal with many requests for preliminary rulings concerning Art. 82 GDPR.

Article 22, with its reference to multiple due diligence obligations, is much more complex than Article 82 of the GDPR, potentially leading to legal uncertainty and litigation on how to interpret it. Therefore, civil liability rules should not be included in the Directive. The powers granted to the supervisory authorities without civil liability are sufficient for the effective enforcement of the Directive and injured persons could bring forward claims in accordance with the established principles and rules of international civil law.

If Article 22 is retained, it is vital to achieve legal clarity to avoid creating unmanageable litigation risks. To achieve this, all of the following are required:

1. Set out a clear definition of damage as well as
   - how people affected by a damage are paid;
   - how the damage is divided between the victims and between the companies in the value chain; and,
   - objective criteria to establish the amount of damages to be paid.

2. Establish:
   - a cause and effect; and,
   - the interaction with non-EEA countries and their legislation.

3. Clarify that the primary responsibility to pay damages rests with the party causing the damage.

4. Clarify that the burden of proof rests with the claiming party.

### Recommendation

Ideally, Article 22 of the proposed Directive should be deleted. If Article 22 is retained, full legal clarity is crucial. Therefore, **civil liability provisions must be clarified, and due diligence requirements be appropriate, clear, proportionate and achievable**.

To achieve this, **the approach proposed by the Council of the EU in its General Approach is recommended, ie, defining clear criteria for holding a company liable**:

- Damage caused to a natural or legal person's legal interests protected under national law
- Breach of duty (abused or violated right, prohibition or obligation listed in Annex I of CSDDD when they aim to protect the natural or legal person), ie, a company is not held liable for a derivative (indirectly caused) damage.
- Causal link between the damage and the breach of duty
- Fault, either by intention or negligence

**Article 22 should also clarify that** a company should not be liable for the damage that would have occurred to the same extent, regardless of whether the company had taken action in accordance with this Directive, as proposed by the Council.

## 5 Insurers should not be defined as "high risk"

The concept of "high-risk" sectors should apply to sectors that have a high risk of contributing to material adverse impacts on the environmental or human rights. Insurers are highly unlikely to have a significant direct impact on the environment or human rights and therefore should not be defined as high risk.

Furthermore, there is no reason to specifically mention insurance special purpose vehicles and insurance holding companies in Article 3 of the EC proposal — there is no such mention for banks, for example.

### Recommendation

**Insurers, due to their specific characteristics, should not be part of the high-risk sectors**, in line with recital 22 of the EC proposal as well as the approach taken in the Corporate Sustainability Reporting Directive (CSRD).

Definitions of insurance special purpose vehicles and insurance holding companies in Article 3 of the EC proposal should be removed.

## 6 Groups should be allowed to apply due diligence requirements at consolidated level.

The Directive, as proposed by the EC, applies at company level. For groups, due diligence policies and processes will usually be decided at group level and then cascaded to subsidiaries. The Directive requires "companies" to disclose their due diligence practices and to have transition plans. To avoid unnecessary and excessive costs, while still ensuring full accountability for groups on their due diligence and transition planning, it is important to include text which allows group level application of CSDDD requirements and an exemption for companies where group application has been applied. This is consistent with the approach taken for the Corporate Sustainability Reporting Directive and the Non-Financial Reporting Directive before it.

### Recommendation

The insurance industry supports the proposals by the Council (new Article 4A) and the ENVI Committee (Article 4(2a)) **to allow parent companies to fulfil the obligations on behalf of their subsidiaries**.