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Response to EC CSDD Directive proposal

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Key messages

As Europe's largest institutional investor, the insurance sector is committed to the EU's sustainability objectives.

European insurers also strongly agree that economic activities must avoid causing or contributing to adverse impacts on human rights and the environment, and welcome corporate decisions that duly take account of a broad spectrum of considerations relevant to both the companies' impact on people and the planet, as well as on long-term financial performance.

The European Commission's (EC) proposal for a Corporate Sustainability Due Diligence (CSDD) Directive is intended to accelerate and deepen the corporate sustainability actions and transition planning already being undertaken by many companies, and the insurance industry supports this objective.

It is, however, important that in creating legal obligations and penalties (civil liabilities/ fines) for non-compliance, the requirements are appropriate, clear, proportionate and consistent with existing requirements.

In this respect, the insurance sector welcomes the fact that:

- The Directive sets out a harmonised framework on corporate due diligence requirements. This will ensure a regulatory level playing field and prevent divergences between member states.
- The value of industry cooperation, industry schemes and multi-stakeholder initiatives to support the implementation of due diligence is recognised.
- Both EU and non-EU companies are covered to ensure a level playing field.

The insurance sector would, however, like to bring to the attention of legislators the following key elements:

1) Consistency and alignment with other EU legislations is essential to avoid a fragmented framework regarding due diligence which could lead to real difficulties in the practical implementation of the Directive. It must be made explicit in the Directive that specific sectoral obligations should prevail.
2) Due diligence requirements should apply at consolidated level only.
3) The definition of value chain needs to be reviewed to fully reflect the insurance sector's specificities and limited to established direct business partners.

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4) Civil liability rules should not be included in the Directive. If Article 22 is retained, it is essential that due diligence requirements are appropriate, clear, proportionate, achievable.
5) Further clarity is needed in terms of supervision.
6) The 500+ headcount criterion of the proposed directive is too low and should be better aligned with national legislation.
7) Other concerns related to risks for SMEs and generally the need for clarity in Level 1 rather than reliance on guidelines.

Further details on key messages

1) Consistency and alignment with other EU legislations is essential to avoid a fragmented framework regarding due diligence which could lead to real difficulties in the practical implementation of the Directive. It must be made explicit that specific sectoral obligations should prevail.

There is a real **need for consistency and better alignment with other EU legislations**. It is unclear at this stage how the proposal will fit with other legal requirements as set out by other sustainability regulations applicable to the insurance sector. Policymakers should ensure that sustainability due diligence sectoral financial rules do not duplicate or contradict the existing rules for the financial sector. Insurers' sectoral regulations often impose identical, if not stricter, obligations to the proposed Directive. It must be made explicit (as it is on pages 7-8 of the draft proposal) that such **specific sectoral obligations should prevail**. To avoid any form of confusion, overlap or duplication, Insurance Europe recommends that the **CSDD Directive is cross referenced in regard to these existing obligations**:

- The Solvency II Implementing Regulation 2015/35, as amended in 2021/1256, already requires insurers to identify sustainability risks and incorporate them into prudential policies.
- The Corporate Sustainability Reporting Directive (CSRD) proposal sets out reporting requirements with regards to, inter alia, the undertaking's actual and potential adverse impacts, measures taken to prevent or bring to an end such impacts and transition plans. The Sustainable Finance Disclosures Regulation (SFDR) also already includes disclosure requirements for large financial market participants, notably regarding the integration of sustainability risks in their remuneration policy and the principal adverse sustainability impacts of their investment and advisory activities on the environment and the society, based on a list of mandatory and voluntary indicators. The CSDD Directive proposal should support the CSRD and SFDR disclosure requirements in the sense that companies will meet the CSRD/SFDR disclosure requirements by reporting on compliance with the CSDD requirements (and/or sector-specific requirements). As undertakings subject to CSRD/SFDR will report on CSDD substantive requirements, consistency and alignment between CSRD/SFDR and CSDD is essential.
- Renumeration policies are a matter between the owners and managers of an undertaking. The possibilities of shareholders to influence a company's renumeration policy has already recently been imposed by Article 275 Delegated Regulation 2015/35, EIOPA's opinion BoS-20-040 on the supervision of remuneration principles in the insurance sector, and recently increased through Directive 2017/828 relating to long-term shareholder engagement. Insurance Europe therefore considers the inclusion of the issue of renumeration in this Directive unnecessary for the insurance sector.
- Under already existing legislation (Solvency II), the directors and boards of directors of companies are required to plan, implement and monitor issues that are material to the undertaking. Insurance Europe, therefore, finds it unnecessary to define the role of directors in setting up and overseeing due diligence in this Directive and sector-specific requirements should prevail: eg Solvency II for the insurance sector. It should also be noted that the assessment of potential and actual adverse impacts is driven by operative risk management, rather than corporate strategy.
- The complaints procedure should allow for the use of existing complaints procedures, such as those established under Directive 2019/1937 and the National Contact Points for Responsible Business Conduct under the OECD Guidelines for Multinational Enterprises. It is also not in line with the United Nations Guiding Principles on Business and Human Rights that the company itself should establish the complaints procedure, and it will create a heavy administrative burden for the companies. Furthermore,

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the complaint´s procedure goes beyond the well-established client's complaint procedure and could be misused as a coercive tool for some profit driven groups, possibly plaintiffs in collective redress mechanisms. The draft CSDD should, therefore, introduce safeguards and procedural delimitations for this procedure.

2) Due diligence requirements should apply at consolidated level only

At this stage, the Directive does not allow for consolidation. Yet, due diligence plans and codes of conduct are usually decided at group level and then applied by subsidiaries. **A consolidation mechanism should be foreseen in the Directive**.

3) The definition of value chain needs to be reviewed to fully reflect the insurance sector's specificities and limited to established direct business partners.

The insurance industry welcomes the fact that SMEs, individual stakeholders and households are excluded from the value chain. This is stated in recital 19, but it should also be added to Article 3(g). Nonetheless, further clarification of the value chain would be needed to take into account the insurance sector's specificities:

- An entity has influence over a business partner only if it has the power to give orders. However, in the contractual relationship with policyholders, (re)insurers have very limited leverage on policyholders' behaviours. Furthermore, (re)insurance companies do not have discretionary power in the provision of statutory insurance (eg motor or pension insurance) which entails an obligation to contract. In that case, mandatory due diligence would not add value as the provision of such services could not be denied based on the due diligence assessment. Insurance Europe, therefore, proposes to add in Article 3(g) and recital 19 that the value chain of regulated financial entities does not include customers of (re)insurance mandated by law of a member state.
- For some insurance products (eg liability and life/health products), policyholders may be different than beneficiaries of the insurance policy. In this case, if an insurer were to refuse to provide insurance to a company because of sustainability reasons, other stakeholders (eg third parties in liability contracts or employees of the company in a health scheme) might be harmfully impacted. This would jeopardise the social role of insurance and go against the objectives of the proposal.
- (Re)insurance contracts are already subject to a wide variety of requirements (eg those related to the fight against terrorism and organised crime) and are highly regulated by national law. There should be a coherent junction between new obligations and pre-existing ones.

Furthermore, the definition of value chain for regulated financial undertakings (Article 3(g)) includes a reference to the provision of specific services including "other financial services" which remains open-ended. Clarification is needed on whether investments are included and on the implications for intermediary and advisory services within the existing distribution forms.

In general, a progressive approach is needed. Taking appropriate measures to identify and act against principal adverse impacts across insurers' whole value chain, including all the operations and the ones of subsidiaries, seems hardly feasible and unrealistic. **The Directive should set obligations only for established direct business partners,** which would already create a spill-over effect. The potential need to extend the value chain can be reassessed at a later stage during the review by the EC.

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

Given the inclusion of enforcement measures, it is crucial that the requirements resulting from the Directive are appropriate, clear, proportionate and achievable to ensure its successful implementation and avoid unintended consequences.

Enforcement measures

Insurance Europe strongly objects to requiring member states to incorporate civil liability rules for the violation of certain due diligence obligations. Article 22 on civil liability would run the risk of unduly interfering with the established principles of national civil law, undermining its consistency. In addition:

- It would risk the insurability of legal risks of companies.
- The Directive does *not*:
  - Set out a clear definition of damage, or sufficient due diligence measures.
  - Establish a cause and effect between the incurred damage and the failure to meet due diligence requirements.
  - Lay out how people affected by a damage are paid.
  - Set out how the damages are divided between the companies in the value chain of the company that caused the actual damage or between the victims.
  - Provide for objective criteria to establish the amount of damages to paid.
  - Includes provisions regarding the interaction with non-EEA countries and their legislation. This relates, for instance, to a situation in which administrative, management or supervisory body (AMSB) members of EU countries, bound with EU legislation, are part of AMSB entities in third countries which do not allow for the implementation of certain sanctions or legislations.
- The United Nations Guiding Principles on Business and Human Rights (UNGPs) that specifically state that a company is not required to remediate for adverse impacts it has not caused or contributed to, even if they are directly linked to its operations.
- There is no centralised body to coordinate multiple payment of damages by various companies to the same affected group.

As a result, the provisions in Article 22 would expose the companies concerned and their liability insurers to unaccountable and unpredictable legal risks. Given the vague description of the requirements to prevent adverse impacts and to bring actual adverse impacts to an end, many potential claimants would be encouraged to file civil actions against the companies. Irrespective of these unintended consequences, Insurance Europe points out that injured persons could bring forward claims in accordance with the established principles and rules of international civil law. Hence, it is not clear that there is an existing lack of remedy that needs to be addressed by the Directive. Insurance Europe takes the view that the powers granted to the supervisory authorities without civil liability would be sufficient for the effective enforcement of the Directive.

If civil liability rules are retained in the Directive, due diligence requirements should be refined so that they are appropriate, clear, proportionate, and achievable. Furthermore, Article 22 should be amended to clarify that:

- The primary responsibility to pay damages rests with the party actually causing the damage, and any damages paid based on the failure to meet due diligence obligations is secondary to it.
- The burden of demonstrating that a company has not complied with its due diligence obligations rests on the claiming party. The onus should not be on the company itself to demonstrate its innocence.

Similar to Article 22, the concerns listed above also apply to Article 8. The obligation to pay damages to affected groups (Article 8.3(a)) does not meet the requirement of adequate predictability and should be removed. The obligation is not based on any objective criteria, in particular the significance and scale of the damage.

Due diligence requirements

- **Measures for preventing, mitigating and bringing adverse impacts to an end**:
  - Impacts cannot be prevented or mitigated before they have been identified. It is, therefore, unreasonable to require prevention or mitigation measures to impacts that should have been identified (Article 7(1)).
  - Clarification is needed on the type of measures deemed "appropriate" from a financial services perspective for an entity to prevent or bring to an end the adverse impacts. In fact, in the contractual relationship with policyholders, insurers do not act as "instructing partners" and have thus very limited room for action to influence their behaviours. This is also true for reinsurers which have no direct relationship with the ultimate policyholders or beneficiaries who are potentially or actually causing the damages to the environment or human rights. In this

regard, Insurance Europe welcomes the derogation granted to financial services regarding the obligation to terminate the business relationship in case of potential severe impact (Articles 7(6) and 8(7)). The proposal should not jeopardise the current insurance contract law which already regulated the conditions for contracts' termination and should consider that sectoral regulation provides for a legal obligation to contract with the client in some cases (MTPL and other compulsory insurance for example).

- **Directors' duty of care**: A clear distinction should be made between duties of executive directors (the management of the company) and company administrators (members of the administrative/surveillance board). It should also be noted that the content of Article 25 goes beyond the Directive's core substance on due diligence and does not define sustainability matters clearly.
- **Level playing field**: The proposal provides many obligations towards companies established in the EU. It should also have sufficient arrangements to ensure a level playing field with companies outside the EU. The current proposal remains unclear on whether subsidiaries of European groups which are based outside the EU are in the scope of the proposed Directive. If it is the case, the Directive should allow for a proportionate and risk-based approach to ensure efforts are focused where really needed and the benefits justify the costs. Such subsidiaries may be competing against local counterparts with less or no due diligence requirements.
- **Practical feasibility of stakeholders' consultation**: The definition of the stakeholders (Article 3(n)) to be consulted in accordance with requirements of Articles 6(4), 7(2a) and 8(3b) is very wide. It includes internal stakeholders (such as employees) and external parties (such as communities or entities whose rights or interests are or could be affected by the products or services of the company). There should be a differentiated treatment according to the category of stakeholders. If all stakeholders should be regularly consulted, only internal stakeholders (such as employees, trade unions) seem qualified to really evaluate sustainability risks and, therefore, detect a potential/real negative incident with regard to the directive requirements.

5) Further clarity is needed in terms of supervision.

The added value of establishing a new European Network of Supervisory Authorities is unclear. The creation of a new body is not appropriate and risks bringing an additional layer of complexity and significant cost into the existing supervisory environment. It also seems to overlap with existing structures which could fulfil the tasks of facilitating and ensuring the coordination and alignment of practices of the designated national supervisory authorities, as set out in Article 21.

In terms of supervision, the Directive should also:

- Define what obligations fall under the control of national authorities and specify the control to be performed.
- Make a clear reference to the CSRD requirement to disclose transition plans (Article 19a.2(a.iii)). Consequently, the control of transition plans should follow the rationale under the CSRD.
- Clarify the interplay with the CSRD: companies subject to the CSRD are not required to report on the matters covered by the proposed Directive. Yet, their reporting is ultimately subject to the control of the European Securities and Markets Authority (ESMA). As a result, the articulation between ESMA and designated national supervisory authorities should be clarified.
- Consider cases of conflict of interest among competent authorities: specific provisions should be included to clarify the prevalent directive in the case of conflicts of interests, for example, if the compliance with the proposed Directive conflicts with, for instance, the interest of policyholders or beneficiaries of insurance contracts.
- Clarify the proposed delegated powers of the EC to ensure that it cannot lay down additional obligations for companies. Article 14(3) should clearly indicate that such measures shall not impose new obligations for companies.

6) ***The 500+ headcount criterion of the draft directive is too low and should be better aligned with national legislation.***

Regarding the scope, the EC's proposal aims to avoid additional undue financial and administrative burdens on smaller insurers. **The proposed 500+ headcount criterion is, however, too low** as sufficient staff is needed to meet the demanding requirements set out in the Directive, notably the development of prevention and mitigation plans on an extensive part of the value chain and the need to largely consult affected stakeholders.

Furthermore, the inclusion of EU companies with 500+ employees significantly exceeds the scope of corresponding national requirements of some member states. For instance, the German Supply Chain Duty of Care Act ("Lieferkettensorgfaltspflichtengesetz") covers companies with 3,000 employees (1,000 employees as from 2024) or more, and the French "Loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre" (2017-399) addresses only undertakings with at least 5,000 employees at a domestic level or 10,000 worldwide.

7) ***Other concerns related to risks for SMEs and generally the need for clarity in Level 1 rather than reliance on guidelines.***

- **The viability of doing business with SMEs might be jeopardised**. The requirements for companies to provide targeted and proportionate support to affected SMEs creates a risk that it becomes commercially unviable to involve SMEs in their value chain.
- There should be **sufficient clarity in the Level 1 text**: it is not appropriate to rely significantly on guidelines as indicated by Article 13.

Insurance Europe is the European insurance and reinsurance federation. Through its 36 member bodies — the national insurance associations — it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers pay out over €1 000bn annually — or €2.8bn a day — in claims, directly employ more than 920 000 people and invest over €10.6trn in the economy.