insurance europe

July 2022

Key messages on EC proposal for a Corporate Sustainability Due Diligence Directive

As Europe's largest institutional investor, with over €10 trillion of assets under management, the insurance sector is committed to the EU's sustainability objectives. Insurance Europe[1] supports the European Commission's (EC) aim for a Corporate Sustainability Due Diligence (CSDD) Directive, which aims to:

- Help ensure that corporate decisions take account of a broad spectrum of considerations relevant to both companies' impact on people and the planet, as well as on its long-term financial performance.
- Deepen the corporate sustainability actions and transition planning already being undertaken by many companies. This will, in turn, stimulate the supply and availability of sustainable investments.

The insurance sector welcomes the fact that the Directive sets out a harmonised framework on corporate due diligence requirements to avoid divergences between member states, and covers both EU and non-EU companies to ensure a level playing field. The sector also welcomes the fact that transition planning requirements should cover the company's own activities and not its value-chain.

However, the following key elements where improvements are needed:

1 Groups should be allowed to apply due diligence requirements at consolidated level

The Directive, as proposed, applies at a company level, and for groups potentially applies to every subsidiary. Yet, due diligence plans and codes of conduct are usually decided at group level and then cascaded to subsidiaries. Group level reporting must be allowed to avoid unnecessary and excessive costs, while still ensuring full accountability for groups on their impact and transition planning. Therefore, an exemption should be included for companies that are part of a group, where the group is applying the Due Diligence Directive, similar to the approach taken for the Non-Financial Reporting Directive (NFRD).

2 The definition of value chain for the financial industry must be further clarified to fully reflect the insurance sector's specificities and limited to established direct business partners

The definition of value chain for financial undertakings needs some modifications and clarifications to work for insurers:

- The need to exclude individuals, SMEs and households from the definition of value chain for financial undertakings is recognised in recital 19 but needs to be also included in Article 3(g)
- It should be made clear that only direct business partners (eg. direct clients) are required to be assessed, and not the business partners of an insurer's business partners. The potential need to extend the value chain can be reassessed at a later stage during the review by the EC.
- Article 3(g), and/or other articles should be amended to ensure that the value chain and business relationships of regulated financial entities for the purpose of the directive do not include customers of (re)insurers mandated by law of a member state. 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 buy insurance (eg liability and life/health products) the beneficiaries (eg employees, local residents) are often different from the insurer's business partners. Therefore, refusing to provide insurance to a company because of sustainability reasons can negatively impact other stakeholders and jeopardise the social role of insurance, and should not be an unintended consequence of the proposal.
- Article 6(3) and/or other articles should be amended to ensure that the identification of actual and potential adverse impacts does not lead to an obligation to deny an insurance coverage.

1 Insurance Europe's response to the EC Better Regulation consultation on CSDD can be found here.

3 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 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. Furthermore, although the EC's stated aim is to create legal certainty for businesses and stakeholders as regards expected behaviour and liability; there is a lack of clarity about the proposed liability provisions and they would generate legal uncertainty and risk the insurability of legal risks of companies.

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, the provision to allow companies to use contractual cascading and assurance is vital. There are, however, remaining concerns that both civil liability provisions and due diligence requirements are not sufficiently clear, proportionate, and achievable to avoid creating unmanageable litigation risks. For example there is a need to:

- Set out a clear definition of damage.
- Establish a cause and effect, how people affected by a damage are paid, how the damage is divided between the victims and between the companies in the value chain, objective criteria to establish the amount of damages to be paid, the interaction with non-EEA countries and their legislation.
- Clarify that the primary responsibility to pay damages rests with the party actually causing the damage, that civil liability is fault-based and that the burden of proof rests on the claiming party.

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.

4 The 500+ headcount criterion of the proposed directive is too low and should be increased significantly

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 operational capacity 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. For example, the German Supply Chain Duty of Care Act ("Lieferkettensorgfaltspflichtengesetz") covers companies with over 3,000 employees (1,000 employees as from 2024), and the French "Loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre" covers undertakings with over 5,000 employees at a domestic level or 10,000 worldwide.

5 Creation of a new supervisor body is not appropriate and further clarity is needed in terms of supervision

The insurance industry welcomes that the decision over the body that is designated to oversee/supervise the requirements set by the CSDD Directive is taken at national level. At European level, the added value of establishing a supervisory authority 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. Furthermore, clarifications in terms of supervision are needed in the Directive in relation to:

- Which obligations fall under the control of national authorities and how the control is to be performed.
- The interplay with the Corporate Sustainability Reporting Directive (CSRD): the control of transition plans should follow the rationale under the CSRD, and the articulation between designated national supervisory authorities and the European Securities and Markets Authority, which ultimately controls the reporting of CSRD companies, should be clarified.
- Cases of conflict of interest among competent authorities: if compliance with the proposed Directive conflicts with, for instance, the interest of policyholders or beneficiaries of insurance contracts.
- Article 14(3) which should clearly indicate that the EC, in its delegated powers, shall not impose new obligations for companies.

6 Other concerns

- 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.
- There is a need for consistency and better alignment of the CSDD Directive with other EU legislation to avoid a fragmented due diligence framework which could lead to real difficulties in the application of the Directive. Policymakers should ensure that sustainability due diligence sectoral financial rules support the CSRD and Sustainable Finance Disclosures Regulation disclosure requirements and do not duplicate or contradict the existing sectoral rules for the financial sector (eg Solvency II). To avoid any form of confusion, overlap or duplication, Insurance Europe recommends that the CSDD Directive is cross referenced regarding these existing obligations.