# Response to call for feedback on EU Platform on Sustainable Finance draft report on minimum safeguards

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**Q1.** *The Report proposes two sets of criteria for the establishment of non-compliance with MS: one related to adequate due diligence processes implemented in companies (ie relying on corporate reporting and disclosure) and the other related to the actual outcome of these processes or the company's performance (ie relying on external checks on companies).*

*Do you agree with this two-pronged approach?*
*Yes – No - Don't know/ no opinion/ not applicable*

- Yes

**Q2.** *The advice of the report is that companies covered in the future by the EU due diligence law (the proposed CSDD Directive) which are acting in compliance with the law would be considered aligned with the human rights part of the minimum safeguards as the demands of these two legislations overlap (provided that the final scope and the requirements of CSDDD will indeed be aligned with the standards and norms of Taxonomy Regulation Article 18).*

*Do you agree with this advice of the report?*
*Yes – No - Don't know/ no opinion/ not applicable*

- No

*[If "no" to question 2] Please explain why you do not agree with this advice of the report (5000 characters)*

Insurance Europe supports the overall approach to consider compliance with the upcoming Corporate Sustainability Due Diligence Directive (CSDDD) as alignment with the human rights part of the minimum safeguards (MS), with Corporate Sustainability Reporting Directive (CSRD) compliance providing fit-for-purpose

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information. To this extent, insurers caution against setting overly prescriptive requirements for the short transition period which will likely last just two years, as they may impose significant burden on companies and create undue complexity.

However, while the observation made in the report on the difference between the Taxonomy Regulation (TR) and the proposed CSDDD (monitoring of compliance with minimum standards on a continuous basis vs at the inception of the contract) is relevant, insurers disagree with the conclusion that because of such difference (if it remains in the final CSDDD), compliance with CSDDD should not be considered as fulfilling the MS. On the contrary, the CSDDD should always be regarded as being compliant with TR Article 18, as otherwise the requirement to comply with the MS only at the inception of a contract would be largely irrelevant. Should the EU establish in law what constitutes sufficient due diligence in human rights, it should not undermine such legal framework by establishing that the CSDDD level of due diligence is not sufficient to meet the minimum level established in the Taxonomy for sustainable activities.

Furthermore, Insurance Europe encourages the PSF to be more precise on the amendments needed in the ESRS to ensure complete compliance with the MS (eg via the inclusion of a table matching MS requirements and CSRD disclosures requirements). To ensure equal data availability across CSRD companies (with or without taxonomy-eligible activities) and to avoid fragmentation of reporting requirement (for preparers) and data sources/reporting channels (for users), integrating minimum safeguards in the EU Sustainability Reporting Standards (ESRS) is essential. That way, the CSRD can ensure reporting on minimum safeguards and, therefore, an investor in a CSRD company knows whether the latter is compliant with the minimum safeguards.

**Q3.** *The UNGPs require that due diligence processes implemented in a company result in human rights abuses being effectively prevented and mitigated. To check whether processes implemented in a company fulfil this requirement, the report suggests applying external checks based on a company:*

*A. having had a final conviction at court*
*B. or not responding to complaints at OECD national contact points or allegations via Business and Human Rights Resource Centre.*

*Do you agree with this approach?*
*Yes – No - Don't know/ no opinion/ not applicable*

- No

*Please explain your answer to question 3 (5000 characters).*

European insurers generally agree with the approach set out in the report to assess the outcomes and effectiveness of due diligence procedures. However, Insurance Europe would like to raise the following concerns:

- The PSF should thoroughly rethink the criterion A on final conviction in light of the following:
  - It is not clear whether any conviction under labour law, tax law or competition law would constitute non-compliance. There may be types of convictions that should not automatically lead to non-compliance. For instance, there are thousands of lawsuits in the tax-area: in some cases they fall in the companies' favour, in others they fall in the tax authorities' favour.
  - While it makes sense to have additional checks in addition to policies, and the proposed indicators appear to be relatively straightforward, the report does not provide for a clear framework nor a timeframe according to which a company can be deemed compliant with MS again after a violation. The report only states that "status of non-compliance should be held until the company has proved that its processes have been improved in a way that a repetition of breaches is unlikely". The PSF should illustrate how such evidence should be provided by companies (eg the publication of a revised due diligence plan, code of conduct etc). In addition, given that court cases can take years to be completed and might, therefore, not indicate the current performance of the company (eg if the company implemented changes after the breach has occurred but before a final conviction is issued,

as this can occur only some years later), there should be the possibility for a company to demonstrate right after a final conviction that it improved its performance. This could be the case eg. if the company immediately carries out relevant management changes and improve the general governance. A more nuanced classification / waterfall logic would allow for these issues to be taken into perspective. In any case, relevant thresholds in relation to the reporting year need to be stipulated (eg time of violation, time of final conviction).
    - Generally, the approach to consider final court cases would miss severe allegations against companies. Issuers may strategically decide to settle cases through compensation to avoid a final decision from a court, while the practices can continue.
- Regarding criterion B, unresponsiveness to OECD contact points and the Business and Human Rights Resource Centre (BHRRC) are more common indicators of company performance. However, while the BHRRC's work is impressive and probably one of the best publicly available databases for these issues, it is questionable whether EU legislation should give such power and status to an independent organisation with no legal basis for its mandate or guarantee of its continuance to provide such a database.
- The suggested approach is not suitable to work with current data availability and reliability. The United Nations Guiding Principles (UNGP) Reporting Framework is a voluntary framework, used by only 80 companies (according to their website), and the upcoming CSRD does not require to disclose convictions (to the PSF own admission). Although there might be other sources to obtain such information, there will not be enough reliable data available. While the PSF provides links to benchmarks, the universe covered for instance for the Corporate Human Rights Benchmark consists of only 230 companies, which is not nearly enough to cover an insurer's portfolio. Therefore, insurers cannot support an approach in which the relevant information for most issuers will not be available and/ or reliable enough.
- The approach might lead to unintended bias. Indeed, the assessment of non-EU companies, non-listed and non-Multinational Entities, will likely be not only difficult and burdensome when verifying MS compliance, but will also leave room for subjective interpretations. For respective disclosure requirements (to reflect on those two criteria) to be designed in an adequate way, it is essential that there is neither judgment needed for the preparer when compiling the information (eg the requirements must be clear and standardised as no company would itself disclose that its due diligence processes are not adequate) nor for the user/data provider/investor when assessing the information. There should be clear guidance on "adequacy" to ensure that the assessment is conducted consistently.

**Q3.1** *Which type of court cases should be selected as criterion for non-compliance with minimum safeguards? (5000 characters)*

A thorough cross-country analysis, including non-EU jurisdictions, is indispensable and should be carried out.

Where national laws related to due diligence exist, court cases related to breaches of such laws should be selected as criteria for non-compliance with minimum safeguards. In the same way, when the CSDDD is adopted and implemented, court cases related to breaches of this new legislation should be selected as criteria for non-compliance. Criminal court cases relating to breaches of human rights, corruption, tax law and competition law (identified themes) could be also selected.

In any case, not all convictions for human rights abuse should be considered as relevant court cases (eg. in case of slight negligence). This approach would be comparable to the materiality concept of the CSRD. In particular, the PSF could refine a classification system based on the severity of the violation (for which no classification system has been provided yet), and at which hierarchy level within the company structure the violation occurred, and whether it was structural or even politically motivated. Whether a response (and if so, what type of response) was triggered in the company could also be taken into account (eg new due diligence, policies, programmes, etc). Furthermore, a clear timeframe according to which a company can be deemed compliant again with the minimum safeguards after a violation is required to avoid different interpretations. European insurers recommend that the PSF defines a realistic timeframe with a specified period of time (eg two years)

after which the judgment is no longer relevant for determining non-compliance with the minimum safeguards. Otherwise, at least concrete examples should be given to show how such re-determination should be performed.

Insurance Europe takes the view that additional checks for non-compliance should be limited to the supervisory process (administrative or judicial: eg fines and settlements) laid down by the legislation in place for the four identified topics (human rights, corruption, taxation, and fair competition). No other external checks should be needed.

**Q3.2** *Are there other types of external checks you would suggest (data for these checks should be publicly available and lead to the same result for a company)?*

*Yes – No - Don't know/ no opinion/ not applicable*

- No

**Q4** *The advice given in the Report on corruption, taxation and fair competition is comparable to the advice on human rights in that it requires that a company has implemented processes to avoid and address negative impacts and that the company has not been finally convicted for violations in these fields.*

*Do you agree with this approach?*
*Yes – No - Don't know/ no opinion/ not applicable*

- Yes

*Please explain your answer to question 4 (5000 characters)*

The advice given in the report on corruption, taxation and fair competition should not result in:

- A broader definition of compliance with regard to corruption, taxation and fair competition for MS purposes than what is provided for in current or draft regulation and guidelines on said issues, even if there is no direct reference to such regulation in the report.
- The development of a new set of reporting requirements that would be transitional and/or overlap with current or proposed reporting requirements (under consideration by other bodies).
- In any case, it should be limited to cases of a certain severity. This approach would be comparable to the CSRD's materiality concept. In particular for taxation rules, which are mostly complex, not all convictions should be relevant and adequate thresholds should be applied. Furthermore, European insurers recommend that the PSF define a realistic timeframe with a specified period of time (eg two years) after which the judgment is no longer relevant for determining non-compliance with the minimum safeguards. Otherwise, concrete examples should be given as to how such re-determination should be performed.

Finally, as highlighted in Insurance Europe's response to Question 3, the PSF's suggested approach:

- Is not suitable given the current availability and reliability of data.
- Might lead to unintended bias as the assessment of non-EU companies, non-listed and non-MNEs will likely leave room for subjective interpretations.
- Disregards any potential improvement and change implemented after a breach has occurred and the final conviction is issued only years later.
- Considers final court cases but would miss severe allegations against companies.

**Q4.1** *Which type of court cases should be selected as criterion for non-compliance with minimum safeguards? (5000 characters)*

A thorough cross-country analysis, including non-EU jurisdictions, is indispensable and should be carried out.

Where national laws related to corruption, taxation and fair competition exist, court cases related to breaches of such laws should be selected as criteria for non-compliance with minimum safeguards. Criminal court cases relating to breaches of human rights, corruption, tax law and competition law (identified themes) could be also selected. The PSF should consider, where relevant, the work of other bodies on the same topics.

In any case, not all convictions for corruption, taxation or fair competition violations should be considered as relevant court cases. As detailed in the response to Question 3.1, the PSF could refine a classification system based on the severity of the violation. In addition, a clear framework and timeframe according to which a company can be deemed compliant again with the minimum safeguards is required to avoid different interpretations (see Question 3.1).

Insurance Europe takes the view that additional checks for non-compliance should be limited to the supervisory process (administrative or judicial: eg fines and settlements) laid down by the legislation in place for the four identified topics (human rights, corruption, taxation, and fair competition). No other external checks should be needed.

**Q4.2** *Are there other types of external checks you would suggest (data for these checks should be publicly available and lead to the same result for a company)?*

*Yes – No - Don't know/ no opinion/ not applicable*

- No

**Q5** *A suggestion given in the Report on MS is to consider the human rights due diligence processes companies have implemented and do checks on their performance, rather than rely on controversy checks based on media coverage (as is done by some ESG rating agencies).*

***Q5.1*** *What do you think these changes imply for companies? (5000 characters)*

The insurance sector is committed to the EU's sustainability objectives and, therefore, supports robust due diligence processes to ensure that corporate decisions take account of a broad spectrum of considerations relevant to both companies' impact on people and the planet. In that perspective, Insurance Europe welcomes the proposal for a CSDDD setting out a harmonised framework at EU level with due diligence requirements for companies including financial undertakings.

However, the insurance industry cautions against the PSF's suggestion to consider the policyholder-insurer relationship as equivalent to other business relationships. The relationship between an insurer and its policyholders is highly regulated through insurance contract law. Refusing to provide insurance to a company because of MS can:

- Contravene existing rules on compulsory insurance coverage.
- Negatively impact other stakeholders and jeopardise the social role of insurance, especially for insurance products for which the policyholder is different than the actual beneficial owner of the contract (ie third party liability and provident insurance products). In this case, if an insurer were to refuse to provide insurance to a company, other stakeholders (ie third parties in liability contracts or employees of the company in group benefit schemes) could suffer the consequences. This should not be an unintended consequence of the MS.

To this extent, the insurer-policyholder relationship should not be deemed equivalent to other business relationships. Nevertheless, insurers could still comply with minimum safeguards as required by due diligence law (national or European) by having their clients adhere to their code of conduct or any other measure, decided by the insurer, aimed at verifying the respect of human rights by a client.

Furthermore, from a company perspective and especially for groups, it may be operationally challenging to assess compliance to minimum safeguards of all subsidiaries when calculating Taxonomy KPIs. Since due diligence processes are usually established at group level:

- Criterion 1 should be deemed to be met for all subsidiaries if the group has set up robust due diligence processes.
- If a subsidiary is in breach of criterion 2, the taxonomy-aligned Capex/ Opex/ turnover should be removed from the overall group aggregated KPI. Yet, the group can still be deemed compliant with MS.

Also, the fact that companies cannot rely on controversy checks would potentially limit the eligibility of ESG rating agencies they can mandate if the agencies do not change their process.

Finally, it remains generally unclear how to measure the performance of the processes, and which performance is sufficient to comply with article 18.

***Q5.2** What do you think these changes imply for investors? (5000 characters)*

The insurance sector fully supports the ambition to provide guidance on how compliance with minimum safeguards should be assessed, and would like to raise the following points:

- As stated by the report, for companies subject to Taxonomy regulation, the external verification of MS compliance should rest with the auditor. Investors should not be required to perform supplementary diligence to assess MS compliance of a company.
- For companies not covered by the EU Taxonomy Regulation, eg non-EU companies, it may be a very difficult, time consuming and burdensome process for investors to verify MS compliance, especially if those companies are outside the scope of rating agencies work. This will render the publication of a voluntary KPI according to Article 7(7) of the Disclosures (Article 8) Delegated Act extremely challenging as MS assessment requires significant time and legal expertise. Recognising voluntary statements of third-party companies should be considered. In a similar vein, the process put forward by the report to assess MS compliance will also be overly burdensome and challenging for non-listed and non-large companies.
- These changes would also limit the eligibility of useable ESG ratings if the agencies do not change their process

It remains unclear how to measure the performance of the processes and which performance is sufficient to comply with Article 18.

**Q6** *The OECD guidelines for multinational enterprises highlight the importance of good corporate governance. The Report takes this up by developing criteria for bribery/corruption, taxation and fair competition.*

*Do you agree with this approach?*
*Yes – No - Don't know/ no opinion/ not applicable*

- No

*[If "no" to question 6] Which other aspects of good corporate governance matters do you believe the advice should cover or refer to would you like to add? (5000 characters)*

Insurance Europe generally agrees with the approach to take up these governance issues from the OECD guidelines. However, further alignment is required on the definition of good governance within the sustainable finance framework (SFDR, CSRD, EU Taxonomy etc). Better alignment should be considered to avoid unnecessary administrative burden and cost to the financial industry, as well as confusion to the retail investors.

In addition, there is an issue in terms of data availability. While data will be available for large EU companies via the upcoming CSRD disclosure requirements, this will not be the case for taxation purposes nor for third-country companies.

**Q7** *Do you have further suggestions or comments on the Report? (5000 characters)*

- It is unclear what the status of the report will be, as it will not be a part of the legislative framework but rather a voluntary guide. At this draft stage, the report is very detailed in its guidance, but some issues are still on an early draft stage.
- The main goal of the report is to advise the European Commission on the application of Article 18 of the Taxonomy Regulation related to minimum safeguards. In that perspective, it should not create additional obligations, but rather fully consider existing laws regarding human rights, corruption, taxation, and fair competition to avoid any inefficient regulatory overlapping.
- European insurers welcome the fact that the report clearly takes into account upcoming legislations such as CSDDD and CSRD, but caution against setting overly prescriptive requirements for the short transition period – which will likely last only two years, as they may impose significant burden on companies and create undue complexity. Where due diligence processes rely on reporting tools that have yet to be built, the compliance burden of companies in scope should not be increased by short-term transitional processes. It is also worth noting that any new due diligence process that entails IT development requires sufficient time (18 to 36 months on average) for a comprehensive implementation once the companies involved have a good understanding of the process prior to its implementation.
- Criteria which (as of today) rest on ESG rating agencies' collection of information from international agencies, national authorities, media, company reports etc, should be developed because there will remain many instances where data supporting the two-pronged approach is not available, at least in the foreseeable future. As a result, many companies (including non-EU companies) may be non-compliant with the MS solely because sufficient data (eg on tax policies) is not available. This will significantly reduce the incentive to use the taxonomy-reporting in a constructive way throughout the EU.
- External checks of non-compliance should be limited to supervisory processes (administrative or judicial) laid by legislation. Other third-parties should not substitute nor supplement any administrative or judicial decisions. Nevertheless, if other external checks were to be developed, they should not require new data collection, analysis and reporting that could lead to duplicating present or ongoing processes.
- SME standards should indeed not be allowed to be used by special purpose vehicles (SPVs) in sensitive geographies and sectors. However, the report should also acknowledge that project financing takes place in other settings as well. Insurers suggest using the Equator Principles to allow the use of the SME standards in project finance. Also, in some cases it might not make sense to create separate due diligence policies for the SPV if that is done only to meet the MS criteria. For instance, in Finland major projects are usually in the energy sector, eg the construction of wind farms, where the SPV typically does not have a majority owner or personnel. If all the owners have relevant due diligence policies in place, it should be sufficient to meet the MS criteria for the SPV.
- It is appreciated that the report considers MS criteria for sovereign and sub-sovereigns, as guidance on assessing sovereign alignment is currently missing. As stated in the report, all countries have human rights issues to be resolved. Using the Global Alliance of National Human Rights Institutions (GANHRI) rating would seem simple, but it is questionable whether it adds any value as nearly all countries are already accredited with "A" status.
- The term "large non-CSRD companies" is only used once in the report and creates confusion as to what it refers.

- "Exposure to controversial weapons" should be clearly defined in scope to avoid misinterpretations that would leave parts of "taxonomy-aligned activities" without the possibility to be counted. If "exposure" means direct selling or manufacturing, this would be reasonable. However, if "exposure" includes other activities such as manufacture of parts that can be used for controversial weapons and other products, or aircrafts that can carry controversial weapons, this could lead to unintended consequences (eg excluding 100% of wind power turbines from shipping companies). In the final SFDR regulatory technical standards, the Principal Adverse Impact (PAI) indicator is limited to the "share of investments in investee companies involved in the manufacture or selling of controversial weapons".
- While Insurance Europe understands that minimum safeguards are screened at a company level, this would go against the "activity-based" principle of the EU Taxonomy.
- The only two guiding documents are the UNGP and OECD Guidelines, and none of these make reference to "controversial weapons", "military", "cluster munitions" or "firearms" within their texts.