insurance europe

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Key messages on the Corporate Sustainability Due Diligence Directive (CSDDD) proposal for interinstitutional negotiations

1 Insurers' due diligence obligations should not cover their downstream value chains. If they are included, provisions must be improved to appropriately reflect the insurance sector's specific characteristics

The Directive's 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. Furthermore, the complexity brought by the nature of insurance activities, where the contract beneficiary is often different from the insurance client (company pensions schemes for example) makes the inclusion of insurers' downstream value chain extremely challenging.

If an exclusion of the downstream value chain is not possible, 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.

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. This should be reflected also in the articles of the proposed Directive, as proposed by both the Council's General Approach and the European Parliament's report.

Furthermore, **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. In this regard, Insurance Europe welcomes the derogation granted to financial services regarding the obligation to terminate the business relationship if it causes substantial prejudice to the entity to whom that service is being provided (Articles 7(6) and 8(7) in the EC proposal). While the Parliament's amendment recognises that there should be no termination of service if it would cause bankruptcy, this provision should at least be extended to mandatory insurance. Rather, insurers support the Council's General Approach not to require termination/suspension of contracts for financial undertakings and to introduce an explicit recognition in Recitals 41 and 41b of cases in which the parties are obliged by law to enter into them, such as mandatory insurance.

Recommendation

Insurers recommend excluding insurers' downstream value chains. If not possible, they recommend adapting the CSDDD scope of coverage of the value chain in Article 3(g) for financial services to:

- limit it to direct business partners;
- explicitly remove SMEs, households and natural persons;
- exclude customers of (re)insurance mandated by law of a member state and company pension schemes; and,
- exclude insurance that also benefits injured third parties, such as business liability, motor liability and accident insurance, as it would otherwise affect the very victims the CSDDD aims to protect.

Articles 6, 7 and 8 should also be amended to clarify that insurers should not be expected or required to deny or terminate the provision of financial services, in particular legally required insurance policies, because of a due diligence assessment, in line with the Council's General Approach (Articles 7(6) and 8(7) and Recitals 41 and 41b).

2 Risk-based approach: 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), if those are included in the scope of the CSDDD, insurers should be recognised as only linked to potential adverse impacts (as opposed to causing or contributing to adverse impacts), in line with the approach proposed by the Parliament.

Introducing an appropriate risk-based approach, including via the possibility to prioritise adverse impacts as proposed by the Council (Article 6a) and the Parliament (Article 8b) is essential to ensure proportionality, allow companies to target and prioritise the material adverse impacts and improve the due diligence measures' effectiveness and efficiency.

The CSDDD should also define different levels of a company's involvement in adverse impacts in their value chain, along the lines of the proposal in Article 7(1a) and 8(2a) of the Parliament report: causing, contributing to or only being linked to. 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.

I**nsurers should be defined as only potentially linked to adverse impacts in their downstream value chains** given their specific characteristics and relationship with customers and investee companies, in line with the proposed amendments by the Parliament in Article 7(1b) and 8(2b). As highlighted by the OECD Guidelines for Multinational Enterprises, in the context of investments, the nature and extent of due diligence requirements should depend on the nature of an investment entity, the size and nature of its investment portfolio and relationship to specific investments (eg. the ownership share in the company, tenure of investment, access to relevant information and the likelihood that meaningful influence may be exercised). In any case, as company management and boards must act on behalf of all shareholders, a minority shareholder cannot direct the company to take specific actions.

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, in line with the approach of the European Parliament in Article 7 (1b) and 8(2b).

3 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 has been applicable since May 2018, many essential questions on civil liability under Article 82 of the GDPR remain unresolved, as the Court of Justice of the EU has to deal with many requests for preliminary rulings concerning Article 82 of the 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 over 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 and severe obstacles to providing liability insurance to policyholders under the CSDDD, thereby impeding the capacity for covering injured persons/ third parties. 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.

In addition, the articulation between Article 22 and requirements to compensate or remedy affected stakeholders (as proposed by the EC in Article 8(3a), the Council in Article 8(3g) or the Parliament in Article 8c) is unclear as they both regulate civil liability. Liability for damages and due diligence obligations should be distinguished as they are different categories in civil law. The purpose of due diligence requirements is to prevent adverse impacts.

Recommendation

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 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.

In any case, provisions requiring the compensation or remediation of affected stakeholders (as proposed by the EC in Article 8(3a), the Council in Article 8(3g) or the Parliament in Article 8c) should be removed as they are not due diligence obligations.

4 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 for their due diligence and transition planning, it is important to include text that 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) to **allow parent companies to fulfil the obligations on behalf of their subsidiaries**.

5 The Directive should not go beyond its core substance on due diligence and interfere with sector-specific requirements and national corporate governance systems

The content of Article 25 and 26 goes beyond the Directive's core substance on due diligence. Insurance Europe finds it unnecessary to define the role of directors in setting up and overseeing due diligence in this Directive. Sector-specific requirements should prevail: eg, Solvency II for the insurance sector. The Directive should not interfere with different corporate governance systems within the EU reflecting different member

states' views about the roles of companies and their bodies in determining the remuneration of directors, as underlined by the Council in its General Approach.

Furthermore, insurers are already, under Article 275 of Delegated Regulation 2015/35, required to amend their remuneration policies to include how sustainability risks are included in the risk management system. EIOPA's opinion BoS-20-040 on the supervision of remuneration principles in the insurance sector says that this should include environmental, social and governance criteria. Insurance Europe therefore considers the inclusion of the issue of remuneration in this Directive unnecessary, especially for the insurance sector.

Recommendation

Remove Articles 15(3), 25 and 26 in line with the General Approach of the Council.

6 Other concerns

- **The viability of doing business with SMEs might be jeopardised**. Requirements in Article 7(2d) for companies to provide targeted and proportionate support to affected SMEs creates a risk that it becomes commercially disadvantageous (if not unviable) to involve SMEs in large companies' value chains, in particular given the risk of potential liabilities in the case of adverse impacts. This requirement, if maintained, would damage and not help SMEs.
- **The notion of "meaningful engagement" with stakeholders under Article 8d** of the European Parliament proposal should be clarified or deleted.
- It should be clarified in article 15 itself, in line with the contents of Recital 15, that **companies have an obligation of means** for developing transition plans under Article 15, **not an obligation of result**.

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