

# Position of the German Insurance Association (GDV) on the Corporate Sustainability Due Diligence

Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937

**Executive summary** The GDV supports the efforts to establish a coherent and harmonized framework for sustainability-related due diligence requirements. The draft proposal is a good starting point to achieving this goal. However, the German insurers request the co-legislators to consider the following comments:

- **Due diligence requirements for (re-) insurers should be limited to their own operations.** Treating customers/clients as part of a value chain is not suitable for (re-) insurance and may inflict unintended consequences for residents and employees whom the CSDD seeks to protect, and other stakeholders not targeted by the CSDD.
- The **scope of obliged entities** should be narrowed by the due diligence regulations at Member State-level.
- It should be possible to comply with CSDD-requirements on a **consolidated level**.
- The establishment of a targeted and vaguely regulated **civil liability regime** should be abandoned as it would expose obliged entities to incalculable legal risk and impair the availability of liability insurance coverage.
- The CSDD should not incorporate **general sustainability requirements** which are not or only distinctly related to its primary objectives.

## 1 General Comments

The German insurers are unconditionally committed to the Sustainable Development Agenda of the United Nations and the goals of the Paris Agreement. Protecting human rights and preserving the environment are essential to achieving sustainable development. The Proposal for a Directive on Corporate Sustainability Due Diligence constitutes a major step in the right direction by complementing the transition efforts of the German insurance industry already underway and aiming to create a harmonized legal framework that supports undertakings to monitor, detect, mitigate, and eliminate adverse impacts on human rights and the environment in the relevant aspects of their business operations.

The draft Directive will unfold its positive potential most effectively if the range and content of due diligence requirements as well as underlying enforcement and compliance mechanisms are clear, manageable, suitable to the specificities of companies in scope, and -most notably- proportionate. Those conditions are yet not entirely met for insurers, as an important sector within the scope of this Directive. Therefore, the GDV would appreciate if the following comments and suggestions are taken into consideration.

## 2 Detailed Comments

### 2.1 Definition of the value chain

Insurance companies are not part of the real economy and are not equally exposed to environmental and human rights risks in their value chains as the latter. The definition of the value chain for regulated financial undertakings (Art. 3 lit. g second sentence) reflects this by including only the activities of clients (e.g., corporate/industrial policyholders) receiving their specific services (e.g., insurance coverage) into the value chain, thus departing from the concept of capturing all upstream and downstream established business relationships.

**However, the GDV believes that there are compelling reasons to restrict obligations for insurers to their own operations and to the operations of their subsidiaries.** Applying due diligence rules to policyholders would only have if any, marginal impact on their conduct and treatment of human rights or environmental issues. Imposing these requirements to companies is only appropriate if they can exert effective influence. We fail to see how adverse impacts on human rights and the environment should arise from insurance activities. Therefore, insurers do not have a real leverage to prevent (Art. 7), let alone to bring actual adverse impacts to an end (Art. 8) except by denying insurance coverage.

Denying insurance coverage to policyholders may inflict unintended consequences on the beneficiaries of contracts (e.g., employees regarding pension schemes) or third parties (e.g., injured persons regarding liability insurance). The draft directive reflects this by limiting the obligation to terminate financial service contracts to special circumstances, considering if the termination could cause substantial prejudice to the entity to whom the service is being provided (Art. 7 para. 6; Art. 8 para. 7).

Furthermore, Art. 7 para. 5 and 8 para. 6 may require obliged entities to refrain from entering into new or extending existing relations, and temporarily suspend or terminate business relationships. It should be noted that certain kinds of insurance coverage might be mandatory according to Member State laws and/or aims to protect beneficiaries such as for instance, injured persons or employees. Denying insurance coverage would therefore hurt stakeholders not targeted by the CSDD.

Moreover, individuals/households and SMEs are appropriately excluded from the value chain of financial undertakings (Recital 19), which is explicitly welcomed. Therefore, only corporate/industrial policyholders would be subject to due diligence. These entities are most likely targeted by the scope of the CSDD themselves, thus capturing insurers as part of their upstream value chain. Therefore, the dual application of due diligence measures would be redundant and result in unnecessary operational burdens.

In addition, it should be borne in mind that insurers are subject to extensive sustainability regulation. Most notably, the Solvency II Implementing Regulation 2015/35, as amended in Regulation 2021/1256, already requires insurers to identify sustainability risks and incorporate them into prudential policies. This includes the careful consideration of whether to accept policyholders with questionable records on human rights or environmental issues.

If the inclusion of policyholders is maintained, the definition of value chain needs some modification/clarifications to work for insurers, such as:

- The exemption of individuals/households needs to be incorporated into the wording of Art. 3 lit. (g) third sentence.
- The extension of the value chain to *“other companies belonging to the same group whose activities are linked to the contract in question”* should be deleted. Due diligence requirements should only be applied to direct contract parties.
- If policyholders maintain to be part of the value chain of insurers, the due diligence requirements need to be adjusted to avoid unintended consequences regarding Art. 7 para. 5 and 8 para. 6 (see above).

## 2.2 Scope

The scope would already include companies with more than 500 employees and a rather low annual turnover of 150 **million** EUR. While we see and acknowledge the objective not to expose SMEs to financial and administrative burdens, **it should be kept in mind that existing corporate due diligence legislation in the Member States (e.g., France and Germany) calibrates the employee-related threshold much higher.** This is based on the reasonable assumption that only companies with at least a four-digit workforce are exposed to the considerable risk of meeting potential adverse impacts on human rights or the environment in their value chains and have the resources required to integrate the due diligence process in their governance structure.

## 2.3 Groups

We strongly suggest allowing for compliance with CSDD requirements at the group level. This would also be consistent with the recent Triologue agreement on the proposal for a Corporate Sustainability Reporting Directive (CSRD).

## 2.4 Civil liability

The GDV **objects to introducing a targeted civil liability regime** for non-compliance with due diligence requirements. No loophole needs to be addressed as claimants can file suits by the rules and principles of (international) civil law. These rules and principles should not be undermined. Insurers included in the scope of the CSDD would not only be exposed to unpredictable legal risks due to the opaque conditions for being held liable for damages. It would also create severe obstacles to providing liability insurance to policyholders subject to the CSDD, thus impeding the capacity for giving coverage to injured persons/third parties.

In addition, important questions remain unanswered, e.g., what qualifies as damage, how damage is valued, and whether obliged companies should also be liable regardless of negligence or fault. It is also unclear how the civil liability under Art. 22 interacts with the requirement to neutralize an adverse impact or minimize its extent by the payment of damages to the affected persons (Art. 8 para. 3 lit. (a)). We therefore strongly recommend to state in the CSDD that the civil liability system and the rules on damages are left to national law.

## 2.5 General sustainability requirements

The CSDD should **be strictly limited to companies' obligations regarding actual and potential adverse human rights and environmental impacts** in their operations and value chains. However, the proposal includes provisions that exceed the objectives of the Directive and raise several questions:

Art. 15 of the proposal sets obligations for companies to have in place the plan ensuring that the business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. Contrary to the explanatory memorandum of the EU Commission, the GDV does not consider this provision as a mere complement to the recent proposal for a Corporate Sustainability Reporting Directive (CSRD). Governance and reporting are different pillars of regulation.

In addition, Art. 25 extends directors' general duty of care for the company, e.g., requiring directors to consider the consequences of their decisions for sustainability matters in a broad sense. According to Recital 63, this provision should ensure that the duty of care is understood and applied in a manner that is coherent and consistent with the due diligence obligations introduced by the CSDD. The GDV fails to see the necessity of this provision, as Art. 26 already imposes a direct responsibility of directors for setting up and overseeing due diligence, including a mandatory consideration of relevant input from stakeholders and civil rights organizations. Due to the unclear meaning of "sustainability matters", directors will be exposed to an increased liability risk for alleged breaches of director's

duties. It could also impair the capacities of insurers to provide D&O liability insurance coverage for directors.

## 2.6 Due diligence requirements

- Art. 5 para. 1 requires obliged entities to integrate due diligence into *all* their corporate policies. We do not consider this necessary and proportionate as obliged entities should be required to maintain a (general) due diligence policy anyway. At least, the integration requirement should be limited to *relevant* corporate policies.
  
- Art. 7 para. 2 lit. (b) requires obliged companies to seek contractual assurances from a (direct) business partner that it will ensure compliance with the company's code of conduct and, if necessary, a prevention action plan. The mandatory reference to the companies' policies and prevention measures may impede the agreement on contractual assurances, particularly regarding dominant or business partners not subject to the CSDD. Therefore, alternative methods, such as the acceptance of equivalent codes of conduct of trading partners, should be considered.
  
- Art. 7 para. 2 lit. (d) requires obliged companies to provide targeted and proportionate support for an SME, where compliance with the code of conduct or the prevention action plan would jeopardize the viability of the SME. Furthermore, obliged companies shall bear the cost of the independent third-party verification of compliance with contractual assurances for SMEs (Art. 7 para. 4). The GDV considers these obligations inappropriate. Furthermore, it is not clear how the financial burden is shared if an SME operates business relationships with multiple obliged companies.



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