GDV Gesamtverband der Versicherer

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# German Insurance Association (GDV)'s comments for the Trialogue negotiations

## Corporate Sustainability Due Diligence Directive (CSDDD)

While corporate sustainability due diligence requirements will contribute to human and environmental rights, there is a need of **proportionality**, **feasibility**, and **legal certainty**. Therefore, the Directive should consider the role of insurance companies and not impose unreasonable due diligence requirements nor expose obliged undertakings to incalculable liability risks.

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**Scope (Article 2(1)(a)) –** We recommend sticking to the **EC's and Council's proposal** regarding the thresholds for the scope, i.e., only insurance companies with more than 500 employees and with a turnover above 150 Mio. EUR should be included.

→ Only companies with **business activities on a scale that can affect customers and suppliers**, and with sufficient resources to implement the complex requirements of the CSDDD should be included in the scope.

**Value chain / chain of activity (Article 3 lit. g)** – If clients are included, the value chain should be **limited to clients (excluding SMEs and households) directly receiving the benefits of insurance coverage**, i.e., the policyholders themselves, and should not include their value chain.

→ We welcome that individuals, **households, and SMEs should not be included** according to all co-legislators. This should be made explicitly clear in Art. 3 lit. g.

→ Furthermore, **the business partners of the policyholder are generally not known to the insurer** and their risks are outside the sphere of the insurance companies. If the customer's value chain were to be included, this would mean that insurers would have to survey the entire value chain of the insured policyholders, i.e., ultimately the insured industrial companies, and subject them to a risk analysis. It is unclear how this would be feasible in practice.

→ **Insurance in the context of occupational pension schemes should be excluded**. They are used to secure the retirement provision of the employees of the insured employers (i.e., the client) and are not linked to possible CSDD risks of the employer. However, the inclusion could raise difficult questions of consideration as to whether employees in certain industries can still receive a company pension at all.

→ Insurance that also benefits injured third parties, such as business liability, motor liability and accident insurance, should be excluded from the scope of the CSDDD, as **it would affect the very victims the CSDDD aims to protect**.

**Investments should be out of scope (Article 8a EP's position)** – We recommend sticking with **the Council's position** not to add due diligence requirements for investments.

- → Due diligence requirements for institutional investors, as provided by Art. 8a in Parliament's position are **redundant**. For shareholders of listed companies, audit and engagement obligations are already explicitly regulated in the **Shareholders' Rights Directive EU 2017/828**. To the extent that amendments to the shareholder duties are requested, they should be made under the relevant Shareholders Rights Directive and a patchwork of individual regulations should be avoided.
- → Furthermore, where investors invest in financial securities e.g., bonds issued by EU Member States or companies on a regulated market (stock exchange), **no "*individual business relationship*" arises between the investor and the EU Member State** / company. Debt securities should therefore generally be excluded from the scope of the CSDDD.
- → Regarding **securities publicly listed on a stock exchange in the fast-moving exchange trading**, no investor can assess potential violations of human rights or environmental standards on the part of the issuer, the seller or the stock exchange operator before buying/selling securities.
- → Insofar **as the EU aims to improve the financing of the European real economy by deepening and broadening the EU capital markets within the Capital Markets Union** (CMU), the inclusion of investment activities in the Corporate Sustainability Due Diligence Directive would create additional complexity for investments in listed companies and financial securities and thus rather achieve the opposite.

**A risk-based approach with clarification is essential** – We recommend sticking to a risk-based approach **as proposed by the European Parliament** and to clarify it furthermore for legal certainty. If this approach is maintained, insurance companies can – at most – only be considered as **linked** to an adverse impact (Art. 7(1b), 8(2b)).

- → Key elements need to be clarified as **the criteria and the legal consequences of the due diligence requirements remain vague**.
- → In general, insurance companies can only be considered as linked to an adverse impact. Insurance protects against risks, damages or losses that may be beyond the financial means of the individual. Accident and liability insurances for example aim to compensate damages of employees and others (such as residents) that are caused by companies. In this respect, there may be a "link" between the business activity of the company and its insurer, but **the insurer is clearly not part of the supply chain/real economy**. There is **no evidence that denying insurance coverage would prevent a potential adverse impact**, but it is certain that it would result in a lack of compensation for the victims or the company's employees.
- → There should be no obligation to suspend or terminate insurance contracts. **Denying insurance coverage would have far-reaching consequences** for the policyholder and third parties. Therefore, the exception in Art. 7(6) and 8(7) of the Council's compromise is to be welcomed.

**Director's duties should be deleted (Article 25, 26)** – We recommend sticking with the **Council's position** and deleting the special director's duties.

- We agree with the Council's approach considering that the proposal to regulate directors' duty of care (Article 25) is an "*inappropriate interference with national provisions regarding directors' duty of care, and potentially undermining directors' duty to act in the best interest of the company*". In addition, that would create **new and hardly assessable liability risks for directors**, particularly regarding the unclear meaning and scope of the obligation to take "sustainability matters" into account. It would therefore have a negative impact on the possibility of providing D&O insurance for directors affected by the CSDDD.
- Article 26 of the EC's proposal is closely linked to the due diligence process and does **not consider the diversity of corporate governance systems and the freedom of companies to regulate their internal affairs**. We therefore welcome that both the Council and the Parliament do not adhere to this proposal.

**Civil liability (Article 22, Article 8c EP's position)** – If civil liability provisions are maintained, the rules must be **clear, legally certain, and foreseeable**.

- Legal certainty is needed to avoid creating **unmanageable litigation risks and serious obstacles to providing liability insurance to policyholders** under the CSDDD, and thus to the ability to cover injured persons/ third parties and environmental damage. Essential clarifications are needed: **Liability should only be considered in the case of own fault**, clear definition of damage, reliable rules on liability exemptions - "safe harbor".
- Article 22 on civil liability would run the risk of unduly interfering with the established principles of national civil law, undermining its consistency. It would therefore be very helpful to expressly provide that **the legal interests to be protected and the assessment of the damage are to be determined by national law** (Art. 22(1)(b) and (2) Council position).
- **Liability for adverse impacts caused by third parties should be excluded**, at least if there is no sufficient own contribution to the impact. In this respect, the EP's presumption that there is no such close link between insurance (financial institutions) and adverse impacts caused by third parties is to be welcomed (Art. 7 (1b), 8 (2b) EP's position). However, it needs to be clarified that this presumption also applies to Article 22.
- Furthermore, **due diligence requirements and liability should not be mixed up**. Due diligence requirements are obligations to take precautions to protect life, health, environment, and other legal interests. They therefore relate to a point in time when a damage can still be prevented – opposed to civil liability provisions which relate to a damage that has already occurred. "Due diligence" requirements to remedy adverse impacts (Art. 8(3a) proposed by the EC, Art. 8 (3g) and Art. 3 t) proposed by the Council, Art. 8c proposed by the Parliament) are therefore actually not "due diligence" but civil liability provisions. As such, they contradict Article 22 and should be deleted.

**Gesamtverband der**
**Deutschen Versicherungswirtschaft e. V.**

**German Insurance Association**
Wilhelmstraße 43 / 43 G, 10117 Berlin
Postfach 08 02 64, 10002 Berlin
Phone: +49 30 2020-5000 · Fax: +49 30 2020-6000
www.gdv.de, brussels@gdv.de

**European Office**
Rue du Champ de Mars 23
B-1050 Brussels
Tel.: +32 2 28247-30 · Fax: +49 30 2020-6140
www.gdv.de/en, brussels@gdv.de

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