



# D&O MESSAGE 2021

RISK AND INSURANCE



**A newsletter outlining developments in  
Directors' and Officers' Liability (D&O).**

**A SECURE FUTURE.**

It's been 1½ years since the COVID-19 pandemic started to affect large parts of our lives and the world of work. A number of industries are under a huge amount of pressure. If companies fail or don't achieve the desired results, decisions made by the responsible directors and officers are scrutinized. Bankruptcy is still the biggest risk here, as insolvency administrators and creditors try to claim their losses directly from decision makers. Balance sheet submissions and social security contribution payments are particular focal points when it comes to D&O claims. In reality, however, bankruptcies decreased by about 6.6% in 2020 compared to the previous year. This is surprising, but also shows that state support measures are working. The question still remains: how much longer is this going to last?

## CASE STUDIES FROM THE MEDIA – LIABILITY UNDER CORPORATE LAW

### SWISSAIR

29 former bodies of the then Swissair companies reached a settlement with creditors' committees. In doing so, the creditors are foregoing bringing new liability lawsuits. Together, the former directors and officers are paying an amount of CHF 2.75 million to the estate companies without recognizing any legal obligation and without prejudice. For the directors, this chapter is coming to an end exactly 20 years after the grounding, which is a long period of time.

D&O insurer in court about the payment of the incurred defense costs. So far, the insurer has refused to pay, arguing that this was an intentional breach of duty. However, this generally requires a final judgment, so the D&O insurer can be expected to make advance payment of the defense costs until criminal conduct is found. Only after the judgment has been pronounced do the persons responsible have a repayment obligation. The court's final decision in this cover process is pending.

### VOLKSWAGEN DIESELGATE

The VW Group has reached an out-of-court settlement with the D&O insurers and the former directors and officers in the Dieselgate case. The panel of D&O insurers paid out 270 million euros, which is Germany's biggest D&O payout to date, according to press reports. This will not help to ease the market.

### WIRECARD

We can only take a guess at the total damage to Wirecard, but claims of over 12 billion euros were reported at the creditors' meeting. Long-standing CEO Markus Braun resigned on June 19, 2020 and is now in custody. The former CEO is now arguing with the

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## CURRENT AND FUTURE CHANGES IN LEGISLATION

### VVG

Changes to the Insurance Contract Act (ICA) will come into effect on January 1, 2022. Important for companies to note is the introduction of the “professional policyholder” figure. The absolutely and relatively mandatory provisions of the contract do not apply to this. This means that the parties are free to determine the content of the contract.

One significant change for directors and officers is that an injured third party will have a direct right to claim against the liability insurer of the injuring party, as in traffic law. The injured party can now submit a claim directly to the insurer.

The injured party can thus initiate a liability dispute and possibly also a cover dispute against the insurer. Practice will show whether and how this will work in D&O configurations if the suing party is the actual company that has taken out D&O insurance.

### DSG

Switzerland’s revised Data Protection Act (FADP) was passed by parliament back in September 2020. It is likely to come into force next year, although a specific date has not yet been set. The FADP sets out various principles that must be observed when transmitting, storing or erasing personal data. When it comes to cybersecurity, data security is of central importance. Insufficient cybersecurity exposes companies to financial and legal risks. The board of directors is particularly exposed to a certain level of risk. This is because, according to Article 716a of the Swiss Code of Obligations, it has the irrevocable and non-transferable task of ultimately managing the company and thus designing appropriate risk management, which also includes cybersecurity.

### EVENT-DRIVEN LITIGATION / ESG

Sustainability is a topic that the company has been engaged with for some time. But more recently, it’s not just been a topic of discussion – it’s something that’s been heavily weighted. The keyword “ESG” – short for “Environment, Social and Governance” – also falls under the sustainability criteria. Cases from Facebook (diversity lawsuit), Shell (CO<sub>2</sub> sustainability lawsuit) and the wildfires in California, which resulted in a lawsuit against PG&E and a conviction for causing a natural disaster, show that ESG issues are becoming more explosive.

The Swiss response to this can be seen in the corporate responsibility initiative. This was rejected at the ballot box, but parliament’s indirect counter-proposal is now being discussed. The change in the law provides for new obligations for companies that the board of directors are required to implement. On the one hand, large Swiss companies are legally obliged to report the risks of their business activities in the areas of the environment, social issues, employee issues, human rights and anti-corruption, as well as the countermeasures taken. On the other hand, companies with risks in the sensitive areas of child labor and “conflict minerals” must meet special and extensive due diligence obligations.

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## MARKET DEVELOPMENT D&O INSURANCE

### RATE CHANGE / HARD MARKET

The D&O insurance market has been a hard market for over two years now. This has resulted in reduced sums insured, increased premiums and an increase in risk information required by insurers for financial figures and COVID-19. In our opinion, the Swiss D&O portfolio is still profitable for the insurance industry. Most of the corrections that have now been made can be traced back to the global loss assessment. The pandemic is also making this tough market even tougher. Although the economic effects of it are not yet clear, they have already been priced into D&O premiums.

### PROGRAM STRUCTURE

The question of whether there are alternative risk transfer solutions to the insurance market is something that is becoming more important. Big corporations with their own captive insurance can check whether they have D&O cover under this insurance. The focus is on cover elements that affect the company and not on protecting private assets that belong to executive bodies. Newer approaches, such as passing on the entire D&O risk to an especially established protected cell company (PCC), have not yet been attempted by many – either in a legal or operational way.

### BENCHMARK FOR LIMITS OF LIABILITY

Average sums insured by our customers as of May 2021.



In all three segments, the average values are slightly lower than the previous year. The analysis shows that most companies did not change their sum insured. Some companies reduced the limits, and there were virtually no increases. The reasons for a reduction included lower market capacities or an unwillingness to pay the surcharge for the same limit.

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