



D&O Message 2024

RISK AND INSURANCE



A newsletter on developments relating to the personal responsibility of members of Boards of Directors and Executive Committees (Directors' & Officers' Liability, D&O).

A SECURE FUTURE.

Managers and members of Boards of Directors continue to face significant challenges and pressure, due to the likes of changes to the law, the influence of social media, the geopolitical situation and the impact of monetary policy. The situation with regard to the latter has stabilized somewhat, and Switzerland is in a better position than other European countries. Average inflation in the Eurozone has fallen to 2.8%, and Switzerland has even managed to beat that with a figure of 1.3%. The Swiss National Bank's slightly surprising move to cut interest rates is another sign of stability. The reduction in the base rate to 1.5% (from an already low level of 1.75%) sends a strong signal to the other central banks with their base rates of 4.5% (ECB) and 5.25% (FED).

Case studies from the press

Liability under company law

CLIMATE CHANGE: CLIENTEARTH TAKES SHELL TO COURT

ClientEarth filed the world's first ever D&O lawsuit relating to climate change against Shell in the UK. It criticized the company's Board of Directors for being inadequately prepared for the financial risks of climate change and for not doing enough to achieve the net-zero targets of the Paris Agreement. The High Court (and subsequently the Court of Appeal) rejected the case, because no evidence could be presented to show that the measures were not in Shell's interest. Although the prospects of similar lawsuits succeeding currently seem low, governing bodies should pursue active climate strategies to avoid future action. NGOs and society could redouble their efforts in this area.

SIGNA INSOLVENCY

The Signa Group filed for insolvency in November 2023. This also affects a large number of Swiss creditors, such as the private bank Julius Bär, which reported losses in excess of CHF 600 million on loans to the collapsed firm and ousted its CEO Philipp Rickenbacher. Various different criminal complaints have been filed against Signa's founder René Benko due to suspected fraud. According to reports in the Süddeutsche Zeitung, there is a D&O limit of EUR 100 million that is borne by a number of established insurers. The potential exhaustion of this limit could have a negative impact on the European D&O insurance market.

CREDIT SUISSE

UBS merged with Credit Suisse (CS) in March 2023, leaving Switzerland with only one global systemically important bank. The government stipulated conditions for the merger that included writing off AT1 bonds, resulting in total losses for thousands of investors. Of the 1,300 bondholders, 120 filed complaints with the Federal Administrative Court in an attempt to claw back

their investments. The court granted access to the write-off order. The dispute relates to the lawfulness of the write-off and the appropriateness of the measure. A decision is being reached in a pilot judgment procedure. Law firms in Asia are considering filing lawsuits with international courts of arbitration, and a group of investors in Switzerland wants to file a suit in the US due to expropriation. US class action lawsuits have been brought against CS and the relevant decision-makers, including a suit brought by AT1 bondholders in the US.

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Changes to legislation Current and future

AI ACT

As the world's first comprehensive legal framework for artificial intelligence (AI), the EU's AI Act marks an important step towards promoting trustworthy AI in Europe. The goal is to introduce new regulations to protect fundamental rights, security and ethical principles, and to address the risks posed by powerful AI models. The act introduces three categories of AI: prohibited AI, high-risk AI, and AI with limited risks. Like with the GDPR, penalties of up to EUR 35 million or 7% of total worldwide annual turnover should be anticipated. Switzerland is planning to develop compatible regulations by the end of 2024. The AI insurance market promises enormous opportunities for growth, with an anticipated volume of 407 billion by 2027 and a contribution to US GDP of 21% by the year 2030. This growth calls for careful consideration on the part of companies that use or develop AI of the risks in relation to data protection, privacy, ethics and human rights.

IOA/CAPACITY OF LLOYD'S OF LONDON TO BE SUED

The revision of the Insurance Oversight Act has cleared up the ambiguity surrounding Lloyd's of London's legal capacity. As a legal entity under UK law, Lloyd's of London is deemed to be fundamentally capable of being a party to legal proceedings, and therefore of holding rights. The Association of Lloyd's Members, on the other hand, is not capable of holding rights and therefore of being a party to legal proceedings.

The capacity to be sued is key in this respect, because it defines who can act as a defendant in court proceedings. In this case, the question is whether Lloyd's of London as an organization or only certain members (the underwriters) can be involved in a legal dispute. The introduction of a special provision concerning Lloyd's of London's capacity to be sued is a response to this complexity. The provision is based on EU law, and enables Lloyd's of London to act as a defendant in court proceedings while still taking the legal responsibility of individual Lloyd's underwriters into consideration. This creates legal certainty and clarity regarding Lloyd's of London's position in the context of the Insurance Oversight Act.

LLOYD'S

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Good to know

INSURING AGAINST FINES

In March 2023, SIX Exchange Regulation AG (SER) opened an investigation into Orell Füssli AG. At SER's request, the Sanction Commission of SIX Group AG imposed a fine on Orell Füssli AG in November 2023 due to multiple negligent violations and one grossly negligent violation of ad hoc publication regulations. Orell Füssli AG did not seek legal recourse and the Sanction Commission's ruling became legally valid.

Most Swiss D&O policies exclude fines, but the wordings vary. Such exclusions are often not just included in lists, but also in the definition of financial losses. This also includes compensation of a punitive nature to cover American contractual penalties. Even if fines were not excluded, there are questions surrounding whether the

definition of a loss under liability law would be met, or whether the assumption of a fine under civil law would defeat its purpose as a punishment. Many countries prohibit insurance against punitive compensation because this would defeat the purpose of the penalty.

Although it is not possible to insure against fines, in this case the D&O insurer could have considered assuming any legal defense costs incurred by the governing bodies. Any additional cover provided for in a D&O policy could also have applied. The reimbursement of the governing bodies' investigation expenses would have been conceivable in this regard.

Market development and current issues

D&O insurance

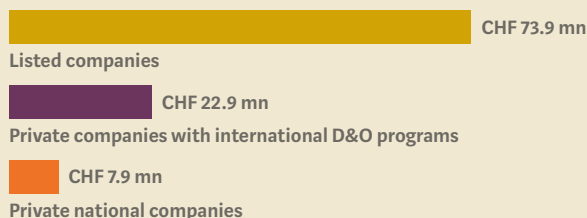
EMERGENCY POWERS/SANCTIONS

The Federal Council made use of emergency powers in connection with UBS's takeover of Credit Suisse to preserve financial stability. The restriction of shareholders' rights and potential expropriation prompted criticism. There is some doubt regarding the legitimacy of the emergency directive. The lawsuits relating to the write-off of the AT1 bonds are still pending and could set a precedent – for the D&O insurance market as well. However, a general initiative to contest the emergency powers failed due to a lack of signatures. At the same time, sanctions and corresponding clauses in our insurance contracts are becoming increasingly important.

Careful consultations and negotiations are crucial because sanctions are a complex and politically charged process – both nationally and internationally. The choice of sanctions depends on a range of different factors, which is why the clauses must be carefully checked, and rejected if necessary to avoid cover objections.

BENCHMARK FOR LIMITS OF LIABILITY

Average sums insured by our customers as at April 2024



The D&O insurance market clearly turned a corner in 2023. The competition was intense on account of the large number of insurance providers, and most insurers massively increased their risk appetite. The premiums for many of our customers were back near their pre-hard

market levels. In many cases, some of the capacity that was dispensed with when the market was hard was bought back. This is reflected to a similar extent in the benchmark for all categories. The benchmark also shows that more and more customers are starting to set up international programs due to international expansion and local compliance challenges. Year-on-year growth stood at just under 10%. In addition to savings on premiums, improved conditions also became possible and multi-year contracts regained their popularity.

Since almost all listed companies buy in an international program, we decided to only include private companies with international D&O programs in the benchmark.

ABOUT KESSLER

Kessler is the leading Swiss enterprise specializing in comprehensive risk, insurance and pension benefits consulting. We advise over 1,500 medium-sized and large Swiss companies from the service, trading and manufacturing industries, as well as the public sector. Thanks to our expertise in each of these economic sectors, our highly qualified staff and our leading market position, we contribute significantly to the long-term success of our clients. As a reliable partner, we inspire our clients and open up new perspectives through the safe and successful management of risks. Founded in 1915, Kessler has 350 employees working at its head-

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