

D&O MESSAGE

RISK AND INSURANCE 2018

DEVELOPMENTS IN DIRECTORS' AND OFFICERS' LIABILITY (D&O) CLAIMS

RAIFFEISEN

According to FINMA, Raiffeisen Switzerland, the central bank of the Raiffeisen Group, seriously violated regulatory law under CEO Pierin Vincenz. Criticism has primarily been levelled at the board of directors, who in the opinion of FINMA neglected to supervise the activities of the CEO and failed to enforce internal regulations. The assembly of delegates refused to approve the acts of the board of directors and management. As a result, the bank can hold the former leadership liable for any loss or damage suffered by Raiffeisen. It remains to be seen if FINMA will impose sanctions on individual members of the board of directors.

POSTAUTO SCHWEIZ AG

In February 2018, it was announced that PostAuto Schweiz AG had collected subsidies totaling CHF 78 million over a number of years through illegal transfers. The Federal Office of Transport (FOT) brought charges against all relevant directors of Swiss Post and PostAuto Schweiz AG. The Federal Office of Police (fedpol) is currently determining whether the violations are criminal. The entire management of PostAuto Schweiz AG has been dismissed. According to Urs Schwaller, chairman of the board of directors, claims for damages are also being considered. The Federal Council gave only limited approval to the acts of the Swiss Post board of directors and may hold its members legally accountable.

SWISSAIR

Liability proceedings were recently brought against Swissair concerning concealed profit distributions and whether or not these constituted violations of duty. The Zurich commercial court cleared all 14 accused members of the board of directors and managers and ordered the plaintiffs to pay legal costs of CHF 4.5 million. Swissair creditors have referred the verdict to the Federal Supreme Court.

THE RISK OF CYBER INCIDENTS TO A BOARD OF DIRECTORS

Lacking or inadequate cyber risk management may, in some cases, qualify as a breach of the duty of care or loyalty and result in liability for directors or officers. The risk of liability under Swiss Code of Obligations (CO) 754 can be reduced if corporate management takes appropriate account of cyber risks. D&O insurers anticipate an increase in D&O claims due to cyber incidents. This is already the case in the USA, where Altaba (formerly Yahoo) reached a USD 80 million settlement with shareholders this year after management failed to report a data loss promptly. Liability proceedings brought against Wendy's and 19 of its directors were also settled, following accusations that the company had not taken sufficient precautions against malware. In the settlement, Wendy's undertook to set up a committee on the board of directors to monitor IT and cyber security.

CAUSES OF D&O INSURANCE CLAIMS

Kessler examined the causes of D&O claims by its clients (medium and large Swiss companies) between 2013 and 2018. The chart shows which interest group made the first claim (only one entry per case).

Compared to the first study in 2013, cases of business partners, clients and third parties have risen 6% to 38%. A new category are the social security agencies.



IMPORTANT LEGISLATIVE AMENDMENTS

AMENDMENT TO THE SWISS DATA PROTECTION ACT (DPA)

The draft Data Protection Act (DPA) includes criminal provisions with fines of up to CHF 250,000 for violations of specific obligations to cooperate with the Federal Data Protection and Information Commissioner, to provide information, to report on foreign disclosure and subprocessing, and data security requirements. These fines can be imposed on individuals with responsibility and decision-making authority if they acted with intent. Currently, it should be assumed that the fines are not covered by a D&O policy, although defense against unjustified accusations can be insured. A definitive assessment must be made after entry into force of the DPA at the end of 2019/beginning of 2020.

TRENDS IN D&O INSURANCE

BENCHMARK LIMITS OF INDEMNITY

Our clients are taking out D&O insurance policies with the following average limits of indemnity (July 2018):

– Listed companies	CHF 91 million
– Privately held companies	CHF 16 million
– Companies operating nationwide	CHF 14 million
– Companies with subsidiaries outside Switzerland	CHF 39 million
– Companies with an international D&O program	CHF 67 million

The figures for listed companies declined slightly compared with 2017 in connection with several major M&A transactions. Demand for very low indemnity limits in the smallest enterprise segment rose significantly, which is why the figure for companies operating nationwide has also decreased slightly.

MARKET DEVELOPMENTS

In the first quarter of 2018, the US insurance market showed slight increases in premiums of between 1.0% and 2.5% for the first time since 2014. We suspect the reasons are the increased requirements for those in positions of responsibility in companies as well as the major mergers of insurers that have taken place or are pending. Accordingly, we expect that the capacities offered will decline slightly or that insurers will increasingly protect themselves with re-insurance capacity. The same trends are apparent in Australia and Germany in particular. Are these signs of an impending hardening of the market?

ABOUT KESSLER

Kessler is the leading Swiss enterprise specializing in risk, insurance and pension fund consulting. Due to the know-how and experience of our staff, the innovative strength as well as due to our market position, we create added value in a sustainable manner for our clients from all parts of industry (i.e. service, trading and manufacturing companies as well as public sector). Our excellent reputation combined with our financial success form the foundation of our long-term future as an independent family enterprise. Founded in 1915, Kessler has 275 employees working at the headquarters in Zurich as well as at further sites in Aarau, Basle, Berne,

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