



# D&O MESSAGE 2022

RISK AND INSURANCE



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

A SECURE FUTURE.

The Ukraine war has drastically changed the situation in Europe. The crisis is also affecting the insurance market. Many major insurers, reinsurers and brokers have suspended business activities in the affected areas. Most D&O insurance policies do not include specific exclusions for war or warlike events. Insurers are now drafting new clauses to clarify coverage for war events. These range from sanctions clauses based on EU and US requirements through to cover exclusion if such sanctions rules are breached. In some cases, these clauses go as far as excluding whole territories, causes and any claims that are related to the crisis either directly or indirectly.

## CASE STUDY FROM THE PRESS LIABILITY UNDER COMPANY LAW

### BOEING

In one of the largest settlements ever made in a derivative claim suit, the parties agreed on a payment of USD 237.5 million to be borne by the D&O insurance provider. This related to two Boeing 737 MAX crashes. The consolidated lawsuit alleges that the company's board of directors breached its supervisory obligations. It failed to set up safety oversight mechanisms before the first crash. In addition, warnings about safety problems were ignored after the first crash and before the second crash. The plaintiffs succeeded in producing sufficient arguments for the parties to reach a mediation agreement to settle the dispute despite the fact that, based on current legal practice, it is extremely difficult to prove supervisory duty breaches by a board of directors.

### RAIFFEISEN

On November 3, 2020, the Zurich III public prosecutor's office filed an indictment in the Pierin Vincenz case. The former Raiffeisen boss and former Aduno boss Beat Stocker were both charged with commercial fraud, document forgery, passive bribery and embezzlement. In its judgment of April 11, 2022, the Zurich District Court sentenced Vincenz and Stocker to three years and nine months and four years in prison, respectively, in addition to conditional fines. The district court referred most of the claims for damages by the bank and credit card company Aduno to civil proceedings – these claims were in the tens of millions. The defense lawyers for all persons convicted intend to appeal. The case is expected to be heard before the Zurich Supreme Court in about a year's time. If criminal proceedings are initiated against a governing body, D&O policies provide cover for advance payment of defense costs under certain

conditions. If it is established by the court that the breaches of duty were knowingly committed, these costs generally have to be reimbursed.

### WIRECARD

In March 2022, the Munich 1 public prosecutor's office filed charges against several individuals in the case of insolvent payment service provider Wirecard – including charges against former Group CEO Markus Braun. Among other things, there are allegations of professional fraud, disloyalty, market manipulation, and the intentional breach of accounting obligations. Michael Jaffé, Wirecard's insolvency administrator, also filed a D&O lawsuit at the same time. When granting loans totaling EUR 140 million, those in charge are said to have failed to fulfill their obligations. Pressure is also mounting for Wirecard's former auditor EY. Almost 1,000 lawsuits are already pending in Munich. Courts are now considering whether affected investors are allowed to pursue claims against EY. D&O insurance already has to pay for defense costs. There are also PR costs of up to EUR 100,000 to protect against reputational damage that could jeopardize careers.

## CURRENT AND FUTURE CHANGES IN LEGISLATION

### ICA

The revised Insurance Contract Act (ICA) came into force on January 1, 2022. It applies to contracts entered into on or after this date. Formal requirements and the right of termination only apply to contracts entered into before this date. The aim of the revision to the law is to provide better protection for non-professional policyholders. Whether or not a policyholder is considered to be “professional” is something that has to be reviewed on a case-by-case basis. Mandatory and semi-mandatory provisions may be amended for professional policyholders. This raises the question of whether all articles of the revised ICA can be amended. Is it therefore legal to waive the right to make a direct claim in the insurance terms and conditions for professional policyholders? The provisions of the revised ICA raise many questions. No practical experience has yet been gained.

### FADP

The complete revision of the Federal Act on Data Protection (FADP) is intended in particular to improve the transparency of data processing and improve the level of self-determination that data subjects have over their data. The revised FADP is likely to enter into force in September 2023. As it does not include a transition period, companies will have to meet the requirements of the new law by the time it comes into force.

While the current FADP only provides for a penalty system with fines of up to CHF 10,000, the revised FADP allows fines of up to CHF 250,000. The main difference is that, under the revised FADP, fines are targeted at data controllers.

### CPC

If a large number of people suffer the same or similar damage, under the current law in Switzerland, each person is required to assert their legal claims individually. The instruments of Swiss civil procedure law do not allow for effective collective legal enforcement in these mass or scattered cases. As a result, affected parties often refrain from asserting their rights if they have only suffered minor losses. In December 2021, the Federal Council presented new proposals for collective legal protection.

In accordance with Article 89 of the Swiss Civil Procedure Code (CPC), group action is to be expanded and made available to assert claims related to all legal infringements. As before, the group action will, in principle, be directed at refraining from or eliminating an infringement or determining an infringement's unlawfulness. In addition, a separate new group action is to be introduced. The intention here is to allow claims for damages or disgorgement of profits, particularly in the event of mass or scattered losses. This new group action procedure will also be supplemented by arrangements for collective settlements.

A key point here is that the Federal Council does not intend for group or collective actions to be launched as class actions. Such representative actions result in individual claims being bundled together, with a group plaintiff bringing a suit for other persons who themselves are not formally involved in the proceedings but participate in the outcome (in both a positive and negative sense), as a legally binding decision is also made about their claims.

---

## MARKET DEVELOPMENT D&O INSURANCE

### CURRENT ISSUES

Companies are under increasing pressure to set sustainable environmental, social and governance (ESG) targets. Things can become tricky if their ESG strategy is not up to date. This is illustrated by the case of Royal Dutch Shell in Holland. In May 2021, a court ruled that the company was required to reduce its carbon dioxide emissions by 45 percent by 2030 compared to 2019. Royal Dutch Shell has appealed.

Event-driven litigation by US investors against boards of directors of non-US-domiciled companies is increasingly taking place in the US. Examples of this include the derived shareholder actions against the Bayer, Credit Suisse and UBS boards of directors. However, the Bayer and UBS cases have been dismissed by the New York Supreme Court.

It has been possible to list and trade SPACs (special purpose acquisition companies) on the SIX Swiss Stock Exchange since December 6, 2021. Such “backdoor” IPOs are under fire. Breaches of duty may happen in IPOs, acquisition target searches and de-SPAC transactions. There have been lawsuits in the US. SIX has therefore developed a new listing standard. The aim is to “safeguard an adequate level of investor protection.”

### MARKET DEVELOPMENT

Insolvencies are one of the main causes of D&O claims. These have not significantly increased as a result of the COVID-19 pandemic. However, recent studies are now predicting an increase in insolvencies of up to 10 percent due to the discontinuation of government measures, the current level of inflation, the Ukraine war, higher oil prices and disrupted supply chains.

Insurers will therefore focus on financially robust customers. Companies with an advantageous risk profile benefit from more competitive conditions. We are observing a market stabilization. Insurers are rightly offering more and more unchanged conditions and are no longer restricting cover. This does not include exclusions relating to war.

Many new providers are also entering the market. In the excess market, we are seeing a clearly growing interest in underwriting more risks. As a counter-trend, one leading insurer is withdrawing entirely from the commercial D&O market in Germany and Austria.

### BENCHMARK FOR LIMITS OF LIABILITY

Average sums insured by our customers, as of May 2022.



In all three segments, the average values are lower than the previous year. The analysis shows that most companies did not change the sum insured. In particular, sums insured in excess of CHF 100 million were significantly reduced in some cases. As was the case last year, this is due to the reduced capacity in the insurance market and an unwillingness to pay the surcharge the same limit. In addition, an increasing number of SMEs are purchasing D&O policies with a sum insured of between CHF 1 million and CHF 3 million.

### ABOUT KESSLER

Kessler is the leading Swiss enterprise specializing in comprehensive risk, insurance and pension benefits consulting. We advise over 1,000 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 300 employees working at its headquarters in Zurich and its other

sites in Basel, Bern, Geneva, Lausanne, Lucerne, Neuchâtel, St. Gallen and Vaduz. As the Swiss partner of Marsh since 1998, we are part of a network with specialists in all areas of risk management and great experience in handling global insurance programs. Marsh, the world’s leading insurance broker and risk advisor, operates in more than 130 countries and is part of Marsh McLennan (NYSE: MMC).

Further information can be found at [www.kessler.ch](http://www.kessler.ch), [www.marsh.com](http://www.marsh.com), [www.mmc.com](http://www.mmc.com).

#### KESSLER & CO Inc.

Forchstrasse 95  
P.O. Box  
CH-8032 Zurich  
T +41 44 387 87 11  
[www.kessler.ch](http://www.kessler.ch)