



# D&O Message 2023

Risk and Insurance



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

A SECURE FUTURE.

Energy prices remain high: the International Energy Agency (IEA) estimates that the level of gas imported by the EU in 2022 tripled compared to 2021. The Russia-Ukraine conflict remains a threat, while the United States's debt is growing. In an attempt to reduce this debt, the US has introduced major tax increases. Rising interest rates and inflation have made financial markets volatile.

For many companies, these additional burdens have proven too much and resulted in them filing for bankruptcy. In France and the UK, bankruptcies increased by more than 45% in 2022. At 22%, the situation in Switzerland is significantly better and more stable. However, the country is still being affected by these problems – as illustrated by the example of Credit Suisse. Hence, the situation continues to be a challenge for the members of the Board of Directors and the management.

## Case studies from the press

### Liability under company law

#### ACSMS PENSION FUND

Through a series of risky investments, an asset manager caused the pension fund held by the medical and social services of the Saane district (ACSMS) to lose CHF 57 million, as a consequence of which it had to be liquidated. In September 2022, 12 members of the Board of Trustees, the external auditor and the pension expert were accused in a court ruling of failing to properly exercise their supervisory duties towards the asset manager. As a result, they were ordered to pay damages of CHF 20 million. The convicted parties are expected to appeal against the verdict before the Swiss Federal Supreme Court.

#### WIRECARD

In December 2022, the main hearing began in the criminal case against former Wirecard CEO Markus Braun and two co-defendants. Key testimonies came from chief witness Bellenhaus and were vehemently rejected by Braun. Meanwhile, there have been more frequent reports about Chubb's expended insurance

cover. In 2021, the insurer was ordered by the court to pay the defendants' legal costs. This was because until any ruling determining that they acted with willful intent, the defendants remain covered. So far, EUR 13.5 million of the EUR 15 million insured by Chubb has already been spent on legal advice. Additional costs are to be borne by the excess insurers, from which an insured sum of EUR 150 million was purchased.

#### KARSTADT

Hamm Higher Regional Court ordered six members of the supervisory board of Karstadt parent company Arcandor, which had been insolvent since 2009, to pay damages of EUR 53.6 million to the company's insolvency administrator. The court explained that its ruling was based on the fact that the supervisory board members' duties included supervision of the members of the management board. In 2006, they had allowed claims for damages against former board members to lapse, thus neglecting their supervisory duties. This case sets a precedent and serves as a reminder to supervisory boards to always take immediate action against board members.

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## CREDIT SUISSE

In 2023, investors filed several US class-action lawsuits against Credit Suisse Group AG (CSG) and some of its directors. This is because CSG's shares are listed on the New York Stock Exchange as American Depositary Shares (ADS). They are traded in USD in the form of American Depositary Receipts (ADRs) and are regulated by local stock exchange laws. Observers predict that we are also going to be faced with lawsuits from well-capitalized, major shareholders or owners of subordinated AT1 bonds. However, the comments made by Chairman Axel Lehmann about cash outflows

having "basically stopped" did not lead to the Swiss financial supervisory authority FINMA initiating any supervisory proceedings.

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## Current and future changes in legislation

### CORPORATE LAW

New rules for publicly traded companies have been in force since the beginning of 2023. The fact that the regulations regarding annual general meetings and additional options for structuring capital have been updated are significant achievements. For decision-makers, it is important that minority shareholders have been given more rights, not least relating to requesting information, inspecting business accounts and jointly determining the agenda of an AGM. Hurdles regarding "special investigations" (previously "special audits") have also been removed.

We are watching with interest to see whether the new Article 756 (2) CO will be applied in practice; this provision allows an AGM, on behalf of the company, to initiate legal action against its executive officers. The meeting may entrust the Board of Directors or a representative with conducting such proceedings. Companies must adapt their Articles of Association to the new legislation by January 1, 2025.

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### ESG (ENVIRONMENTAL, SOCIAL AND GOVERNANCE) REPORTING

Public-interest entities are required to file a report on non-financial matters for the first time for the 2023 financial year. On climate issues, the Swiss Federal Council is going even further and has adopted the implementing ordinance on climate reporting. This enters into force on January 1, 2024, and follows the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). It revolves around the risk that a company enters into as a result of climate-related business operations and the impact of its business operations on the climate.

### FADP FINES

Switzerland will amend its data protection regulations in September 2023. Like the European GDPR, the new Federal Act on Data Protection (nFADP) improves protection of the data of natural persons – but not of legal persons. Unlike in the EU, the penalty for violating the provisions of the FADP is directed against natural persons as opposed to companies. In the event of intentional violations of the law, they are liable for a fine of up to CHF 250,000. This does not focus on the person responsible for the action, but on the person responsible for the organization. Fines are not insurable, nor can a company pay the fine for the person responsible.

## Market development

### D&O insurance

#### ARTIFICIAL INTELLIGENCE

The launch of ChatGPT represents just the latest of several language processing tools based on artificial intelligence (AI) and machine learning now available. Big-tech companies have made it clear that they are using these technologies. Managers are faced with the difficult task of assessing the risk – or at best the benefits – of using these young technologies. This is because there is a risk of adopting incorrect information from AI systems or passing trade secrets on to third parties. This could lead to claims being made against the management or company. It is therefore important to ensure awareness of this issue among employees.

#### RISK NOW ALSO HIGHER IN SWITZERLAND

Companies that went bankrupt after the federal government's coronavirus support scheme ended were mostly small to medium-sized businesses. We therefore anticipate an increasing number of legal disputes. The takeover of CS by UBS represents a stiff test for the management. The way all of this will impact the development of D&O losses remains to be seen.

#### MARKET TURNAROUND DESPITE CHALLENGES

Four years ago, the global financial lines market hardened considerably. The main drivers were payments amounting to millions for D&O cases abroad and the associated losses for insurers. Well-known and highly costly cases for insurers were Daimler, VW, Wirecard,

Boeing and others. To date, there have been no major D&O claims in Switzerland. After analyzing the D&O customer portfolio, we assume that D&O is generally a profitable type of insurance for Swiss insurers. New providers are also offering capacities for D&O on the market, a fact reflected in falling premiums.

#### BENCHMARK FOR LIMITS OF LIABILITY

Average sums insured by our customers as at May 2023.



The limits of listed companies have decreased slightly. The analysis shows that most companies did not change their sum insured, while others introduced slight reductions due to cost considerations. A number of other companies, on the other hand, have been moving towards increasing the sum insured. This is down to the availability of capacity and the higher competition in the surplus market. There is also a willingness to use premium savings for purchasing higher sums insured.

#### ABOUT KESSLER

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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).

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