

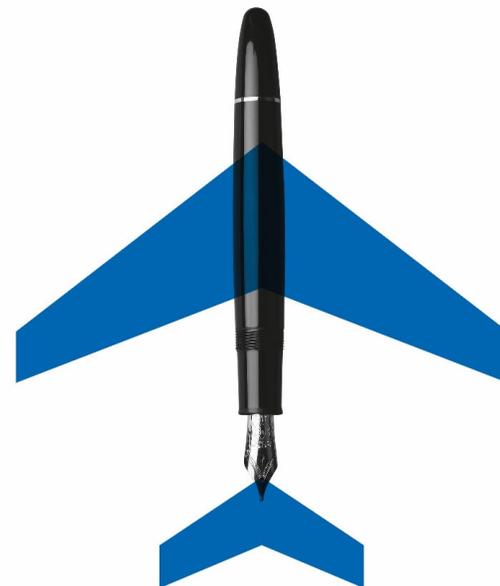
## **Civil Liability of Board Members**

### **Responsibilities and how to mitigate the risks**

**25 January, 2023**

Agris Bitāns

*Managing Partner*



## **General Overview**

Whether liability is real?

## Whether Liability is Real?

In Latvia



1

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Enter the event code in the top banner

Event code  
**FZRMLK**

## Maximum Amount Awarded by the Court In Latvia

**Bijušajiem «Krājbankas» valdes locekļiem būs jāatmaksā 15 miljoni eiro - AT atsaka kasācijas tiesvedību**

REI Panorāma

Dalīties:

28. aprīlis, 2020, 12:23 | Latvijā

Autori: Zane Mače (Latvijas Radio raidījuma "Atvērtie faili" žurnāliste), Girts Zvirbulis (LTV Ziņu dienesta korespondents), LSM.lv Ziņu redakcija

Saeimas deputātam Mārtiņam Bondaram ("Attīstībai/Par!") un vēl sešiem bijušajiem "Latvijas krājbankas" bankas valdes locekļiem būs solidāri jāmaksā 15 miljoni eiro, kurus no tiem vēlas piedzīt bankas maksātnespējas administrators "KPMG". Tā nolēma Augstākā tiesa (AT), atsakoties ierosināt kasācijas tiesvedību un atzīstot, ka "Latvijas krājbankas" valdes locekļi nav rīkojušies kā krietni un rūpīgi saimnieki.

**Tiesa apmierina «Reap» prasību pret Karginu un Krasovicki par 81 miljona eiro piedziņu**

Dalīties:



Bijušie "Parex bankas" akcionāri - Valērijs Kargins un Viktors Krasovickis

Foto: Ieva Čika/LETA

17. augusts, 2022, 14:19 | Latvijā |

# 85,9 M EUR

## General Overview

### Main duties



- The **fiduciary duty** requires each individual member to seize business opportunities for the company and not to exploit them for personal gain
- The **duty of loyalty** obliges to act in the best interest of the company
- The prohibition of competition between the board member and the corporation
- The duty of confidentiality

## General Overview

### General statutory and non-statutory duties of the board members

- to make use of all opportunities, overall to **increase the company's profit** in the long-term perspective and to prevent the company from being harmed
- the **overall management** of the company and the issuing all necessary directives
- **determination** of the company's organisation
- the **duty of legality**
- the duty to ensure the required **accounts are kept**
- the organisation of the **financial control and financial planning** systems as required for management of the company
- compilation of the **annual report** and ensure the timely filling thereof at the applicable authority
- the **appointment and dismissal** of persons entrusted with managing and representing the company

## General Overview

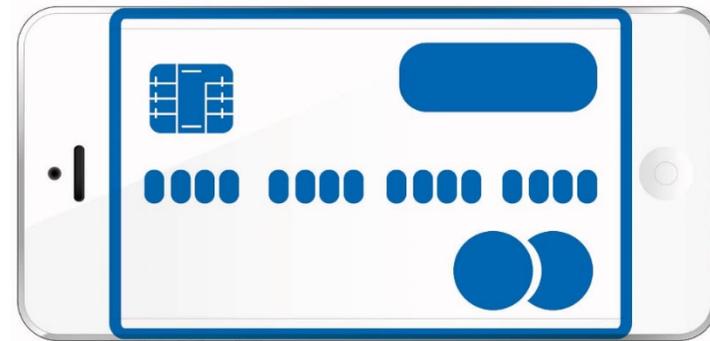
### General statutory and non-statutory duties of the board members

- **overall supervision** of the persons entrusted with managing the company in particular with regard to compliance with the law, articles of association, operational regulations and directives
- the duty to prepare and execute the **general meeting**
- the duty to **report** to the supervisory board
- **implementation** of resolutions of the general meeting
- ensuring the approval of the **dividend payments** of the company
- ensuring of the **payment of taxes** and **social securities** for employee
- ensuring the timely filing of **tax return**
- **notification** of the court (general meeting) in the event that the company is overindebted
- **and** further duties which can be deduced from general principles in accordance with good practice

## General Overview

### Other duties of the board members

- Environmental
- Health and safety
- Competition law
- Record keeping and accounting
- Data privacy
- Bribery
- Compliance and sanctions
- ESG
- etc.



## Preconditions of Liability

- General liability – under Art 169 of the Commercial Law
  - the behaviour of the board member;
  - the actual loss (damage) and
  - a causal link between the behaviour of the board member and the damage suffered

Members of the board and of the council shall perform their obligations as an honest and careful manager.

A member of the board and of the council shall not be liable **if they prove** that they have acted as an honest and careful manager.

**Reverse burden of prove.**

## Preconditions of Liability

Unlawful behavior

Liability is

- for unlawful acts
- for lawful acts if the company suffers damage as a result from the relevant actions

Practical examples

- money withdrawn from the bank's account
- money transfer without justified ground
- lack of assets
- economically detrimental transaction

Breach of **standard of duty of care**



## Preconditions of Liability

### Standard of duty of care

- Objective standard – all members should possess *minimum abilities* and knowledge
- Factors that could influence the standard of care (liability)
  - the object of the enterprise (a bank v a brewery)
  - the size of the company
  - the nature and importance of the specific action to be taken
  - the standard practices in the field of business
  - the general economic environment
  - the personal experience
  - a lawyer as board member
- The company's purpose cannot be achieved without taking certain risks
- The *Business Judgment Rule*

## Preconditions of Liability

### The *Business Judgment Rule*

- The decision must be taken:
  - in *good faith* (in rational belief that it is the best interest of the company) and
  - based on an *informed and disinterested judgment* (with all appropriate information for such a decision and without a relevant conflict of interest).
- If the member of the board acted in good faith in a reasonable way, based on an informed and disinterested judgment, the duty of care is deemed not to be violated



## Preconditions of Liability

- Joint and Several Liability
  - Members of the board and of the council are joint and several (solidarily) liable for losses that they have caused to the company
  - Liability of individual board members for disadvantageous transactions authorized by the majority in a board meeting
  - Nonparticipation in business activities or board meetings is not release from civil liability
- Calculation of damage
  - Direct and indirect losses
  - Diminishing of assets
  - Increasing of debts
- How to prove

## Procedure

- Who can sue or initiate?
  - Shareholders
  - Minority shareholders
  - Third persons – creditors
  - Insolvency administrator
  - State revenue service
- Procedure (Art 172)



## Limitation of Liability

### Prescription period

- Prescription time period and when it starts

Claims against a member of the board and of the council shall expire within **five years** from the day of causing losses (Part 5 Art 168).

When prescription period starts? When the company became aware or should become aware about – three preconditions of civil liability

**Knowledge of a member of the board or even whole board is not a knowledge of the company**

## Limitation of Liability

### — Release from liability

- A member of the board and of the council shall not be liable for losses caused to the company if he or she has acted in good faith within the framework of a lawful decision of the meeting of shareholders.
- The fact that the council has approved the actions of the board shall not release the members of the board from liability to the company (Part 4 Art 169).
- The company (the shareholders meeting) can (Art 173):
  1. release a member of the board from liability;
  2. withdraw its action;
  3. make a settlement.

General release from civil liability is not sufficient.

Release, withdrawn or settlement is **not applicable to third person's** (creditor's) or minority shareholder's claim.

## How to mitigate risks

- Act as reasonable businessmen (standard of duty of care)
  - vote «against» if not sure
  - keep records and information
  - create good corporate governance with regular monitoring system
  - proactively communicate with supervisory council or shareholders in order to limit or release from liability
- D&O Insurance
- Understanding fiduciary duties and statutory obligations

# Eversheds Sutherland Bitāns is launching The Board Member's pocket guidebook

Eversheds Sutherland Bitāns | 27 January 2023 |





# D&O Insurance view

Liability risk for Board members

Thomas Marcadet, Head of FINPRO CEE  
January 2023

A business of Marsh McLennan



1. How the risk looks like in practice?
2. Quantifying D&O risk – playing hard to get
3. How to avoid being claimed?
4. What to do if you are claimed?

# Agenda

**How the risk looks  
like?**



## Intrinsic risk factors



### HIGHER RISK

- Litigious legal environment (US, UK, Germany).
- Listed equity.
- Sectorial exposure (Banking, Pharma, retail, state-owned, sports federations, Tech, startups).
- Poor governance, no training of D&Os.
- Active regulator.
- Negative claims history of D&Os.
- Brutal management style, frequent changes in Board.
- Change in control.
- IPO.



### LOWER RISK

- Limited litigation experience in country.
- Private owned / family owned.
- Non-profit, manufacturing, insurance.
- Collegial governance, checks and balances, trainings, procedures, transparency.
- Passive regulator, limited resources.
- No claims in the past.
- Appeased and open management, stable Board.
- Stability in control.

## New risk factors

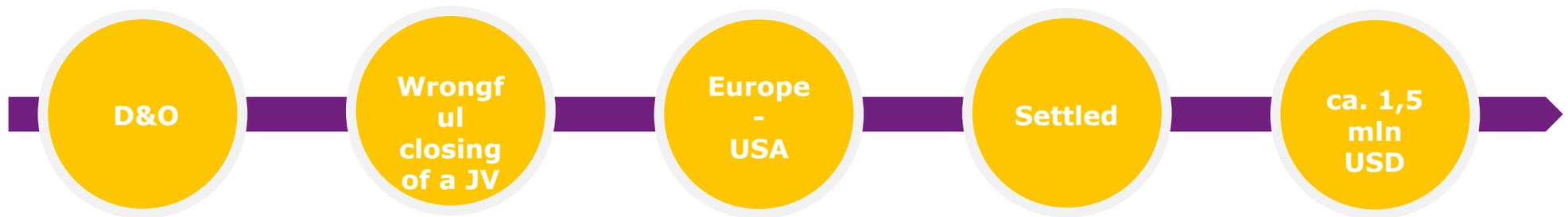
### ONGOING FACTORS DRIVING RISKS FOR DIRECTORS

-  Bankruptcy exposure.
-  Increased regulatory scrutiny and accountability.
-  More aggressive pursuit of directors by stakeholders.
-  Rise in securities class action litigation.
-  Rising defence and settlement costs.
-  Growth in “event-driven” litigation.

### RECENT FACTORS DRIVING RISK

-  Inflation, Change in rate environment, increased bankruptcy risk.
-  Supply Chain Disruptions.
-  Increased Regulatory and Criminal Enforcement Activity.
-  EU Collective Redress Directive.
-  ESG.
-  Cyber.
-  #MeToo.

## Claims examples



### FACTS

- **D&O** claim for a large European firm alleging the wrongful closing of a JV.
- Claim **against directors** of the company initially > 100 mln USD.
- **Process:**
  - Analysis of the claim and frequent communication with US lawyers as well as with local, European and US claims managers at the insurer.
  - Information of the client of required items and update on the legal proceedings towards insurers.



### FINANCIAL CONSEQUENCES

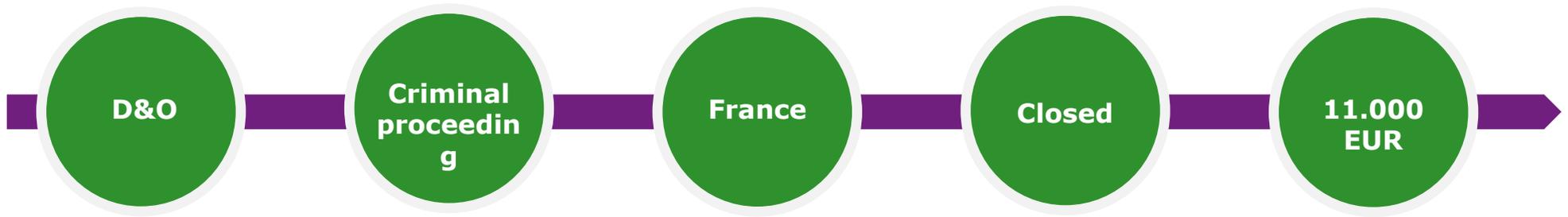
- Claim against directors of the company initially > 100 mln USD.
- Outcome: **settlement for 1,5 mln USD.**



### KEY SUCCESS FACTORS

- **Escalation** to improve communication with the insurer.
- **Communication** on a regular basis.
- **Managing expectations** on both sides to come to a settlement offer allowing the client to negotiate with the plaintiff.

## Claims examples



### FACTS

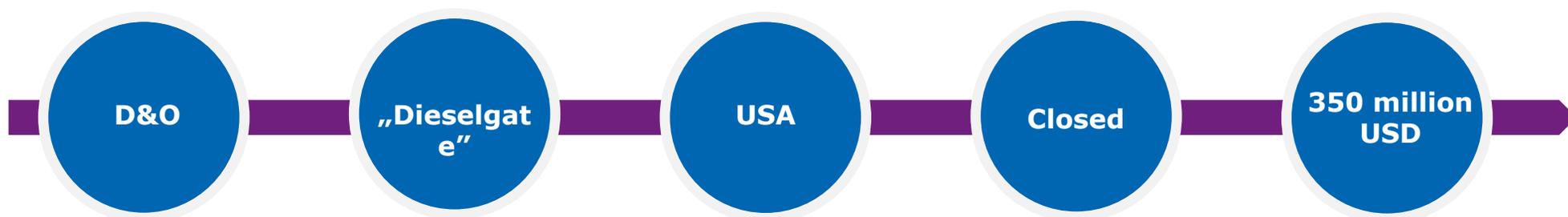
- Non-compliance with safety rules on the premises of the company, which led to the death of a worker.
- Director implicated.



### FINANCIAL CONSEQUENCES

- Defence costs (lawyers employed) during the proceeding.

## Claims examples



### FACTS

- Diesel emission-cheating scandal – it was revealed that in September 2015 that Volkswagen was equipping its 2.0-liter and 3.0-liter diesel vehicles with devices that would allow the cars to pass government-mandated emission tests, then emit more pollution once they hit the roads.
- Securities Class Action – settled in 2018 for 48 million USD.
- In 2021 the company's Supervisory Board voted to assert claims for damages against the individual directors. According to the press release the report concluded that „negligent breaches of duty had occurred“.
- Individuals were said to breach duties by failing to “to comprehensively and promptly clarify the circumstances” behind the use of the emissions test defeating software in diesel engines sold in the North American market between 2009 and 2015; and by failing to “ensure that the questions asked by the U.S. authorities in this context were answered truthfully, completely and without delay”.



### FINANCIAL CONSEQUENCES

- The settlement was announced in June 2021.
- The settlement, worth in the aggregate approximately \$351 million in U.S. dollar terms, includes substantial payments both by the individual executives and by the company's D&O insurers.



**Regulator proceeding** – the investigation was launched against the directors of the publicly listed company, who did not fulfill the obligation about notifying the shareholders on time about the significant agreement with a bank.



**Company's claim** – based on the derivative transactions concluded by one of the directors, the company suffered millions of euro of losses. As it turned out the transactions were not properly secured, the company decided to sue the responsible director for the losses it suffered.



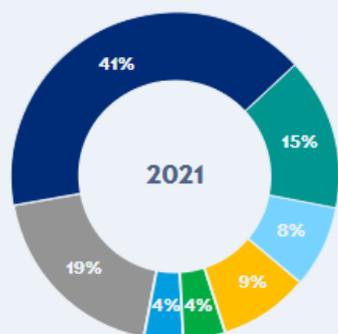
**Shareholder's claim** – the minority shareholder of the company brought a claim on its behalf against the members of management and supervisory boards for the losses which in claimant's opinion the company has suffered as a result of concluding the unfavorable contract.



# Top D&O types of claim and causes of loss (UK & Cont. Europe resp.)

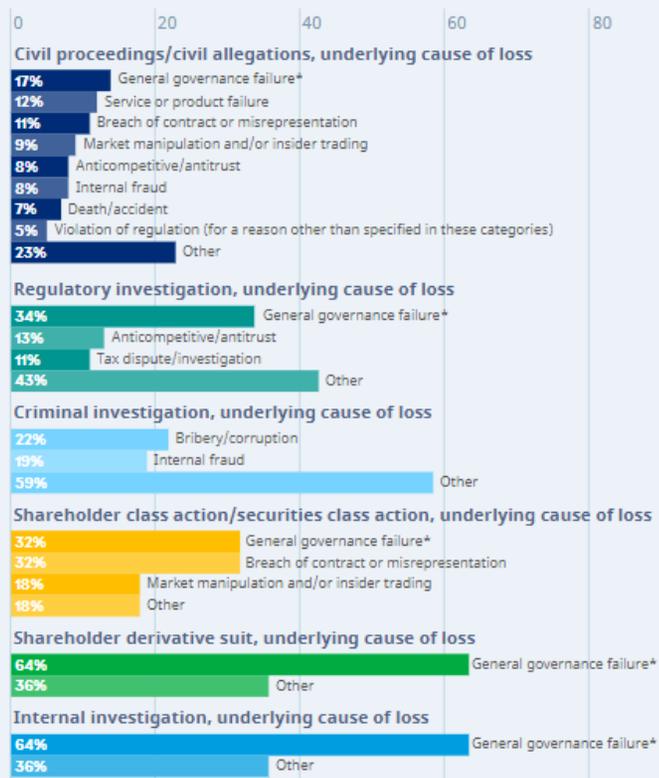
## 10| D&O Type of claim and cause of loss

Governance failure is the most common D&O cause of loss.

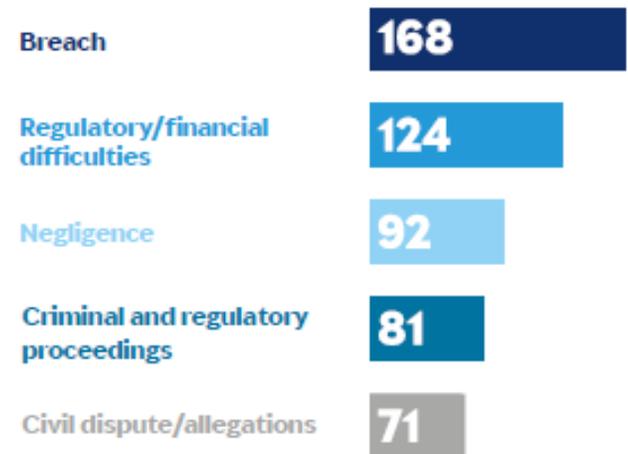


- Civil proceedings/civil allegations
- Regulatory investigation
- Criminal investigation
- Shareholder class action/securities class action
- Shareholder derivative suit
- Internal investigation
- Other

\* Including breach of fiduciary duty, inadequate control of procedure, and failure to supervise.



## 05| Frequency of D&O claims allegations



# Quantifying D&O risk

– playing hard to get



## Can liability be quantified?

### Various approaches



**Risk assessment  
like Property?**

- Defense costs per hour
- Limitations of liability
- Size of liability, company, risk factors



**Statistics like  
Motor insurance?**

- Difficult to compare
- Unavailability of public data
- Available for US Securities class actions

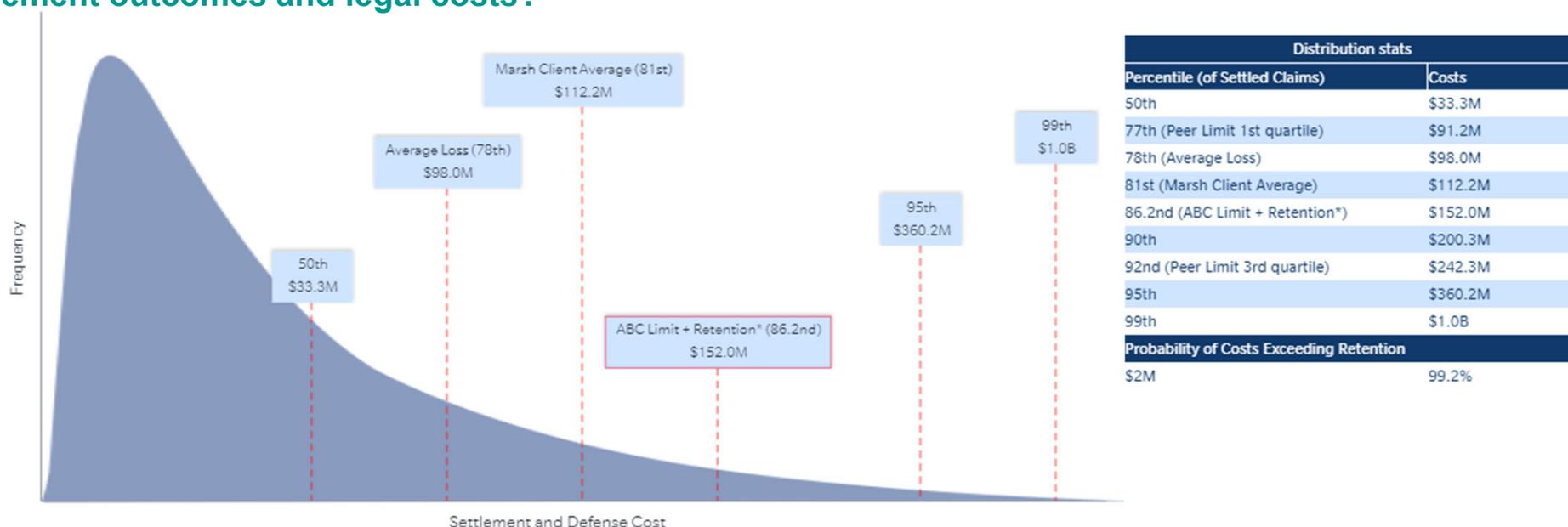


**Benchmarks?**

- Yes
- Reflect past and peers

# Data – D&O US Exposure modelling

Based on historical settlements and independent variables, what is the statistically likely range of settlement outcomes and legal costs?

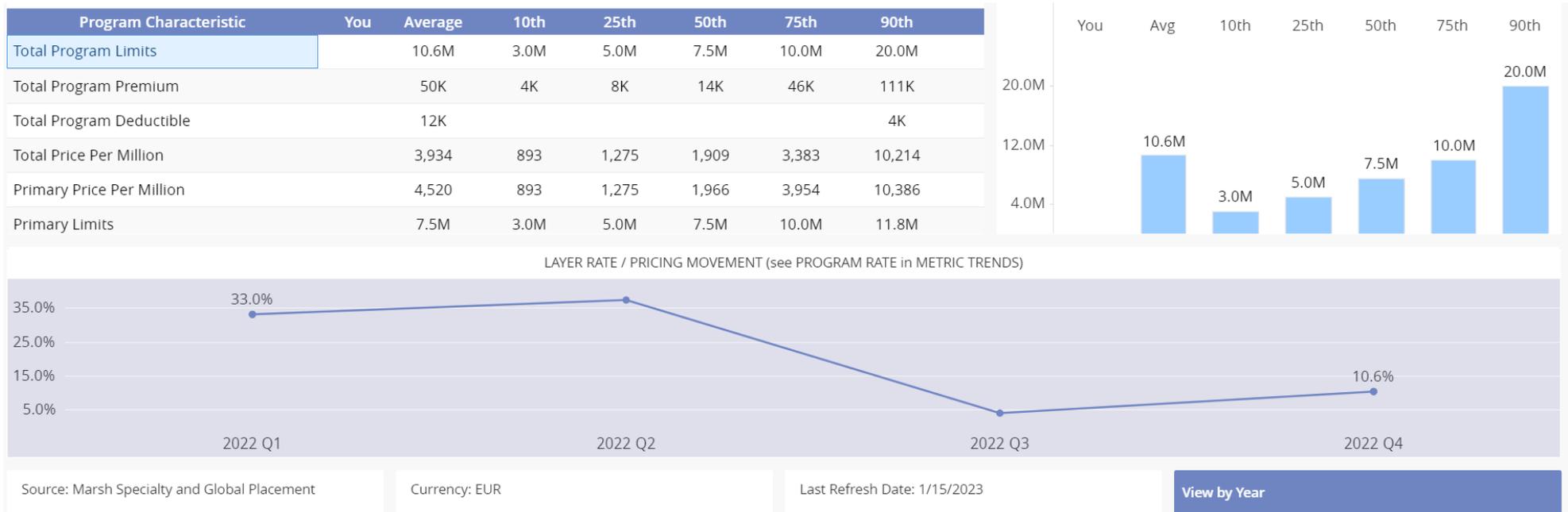


## Observations

- Based on the current Side ABC Limit + Retention limit purchased by XXXXXX, it is projected that 86.2% of the time, the total cost of a securities claim that reaches settlement will fall within the \$150M of Side ABC limit (+\$2M Retention) currently purchased.
- Marsh clients purchase D&O Insurance covering their own unique range of settlement outcomes from the 1st quartile (77%) to the 3rd Quartile (92%). The average Marsh client purchases limits that cover 81% of the range of settlement outcomes.
- For XXXXXX, the 81st percentile is \$112.2M.

# Benchmark example

## Illustration Non-listed EU companies with turnover of 25 to 100M USD



**How to avoid being  
claimed?**

**3**

# Corporate Governance

Public Company Preparedness: Best Practices from D&O Insurer's Perspective  
 Helpful Resource: [NYSE IPO Guide](#)

1	<b>Building out your Board</b>	<ul style="list-style-type: none"> <li>• Board is diverse by Gender, Race, Ethnicity and experience.</li> <li>• Public company experience.</li> <li>• Board composition (is CEO / Chairman role split or combined? / Majority independents).</li> <li>• Ongoing disclosure between Board members, senior management and all other shareholders.</li> </ul>	<p>A good risk will meet many of the criteria identified in the middle column:</p> <ul style="list-style-type: none"> <li>• Significant focus on Board diversity.</li> <li>• Public Company D&amp;O experience is considered important from a D&amp;O Underwriters perspective.</li> <li>• Adherence to state requirements e.g. CA.</li> <li>• Independence, D&amp;O Underwriters prefer CEO and Chairman to be split positions.</li> </ul>
2	<b>Executive Compensation</b>	Compensation practices (salaries, equity and non-equity).	A good D&O risk will be able to reference that the company is engaging with a compensation consultant to assist with analyze compensation practices, including equity and non-equity incentives for a public company.
3	<b>Framework for establishing Board reporting to ensure best in class Board oversight</b>	Framework established on Board Reporting.	A good D&O risk will have an identified framework established for Board Reporting and be able to speak to plans to build out Enterprise Risk Management structure.
4	<b>Establishing various committee functions</b>	<ul style="list-style-type: none"> <li>• Audit.</li> <li>• Compensation.</li> <li>• Nominating/Corporate Governance.</li> </ul>	A good D&O risk will be able to present that that committees have been established and members appointed including "lead" prior to the IPO.
5	<b>Increasing maturity in Finance, Legal, Compliance and Security Functions</b>	Build out senior management team as necessary to operate as a public company and address heightened regulatory exposures.	A good D&O risk will be able to highlight key hires in each of the areas with relevant public company experience.

## Corporate Governance

### Public Company Preparedness: Best Practices from D&O Insurer's Perspective

6	<b>Implementation of Accounting Standards and Internal Audit Function</b>	<ul style="list-style-type: none"> <li>Accounting Standards for Public Companies.</li> <li>SOX Compliant.</li> <li>Internal Audit.</li> </ul>	<p>A good D&amp;O risk will address:</p> <ul style="list-style-type: none"> <li>Accounting standard transition for public companies.</li> <li>A timeline identified to become SOX compliant, including key milestones. Furthermore, important to highlight engagement with an outside accounting consultancy firm if assisting with the process.</li> <li>Internal Audit function established prior to the IPO.</li> </ul>
7	<b>Auditors</b>	External Auditor.	A good D&O risk will ensure the audit firm is properly independent from the company under PCAOB and SEC rules.
8	<b>Guidance Philosophy</b>	<ul style="list-style-type: none"> <li>Establish a guidance philosophy.</li> <li>Determine frequency of guidance (quarterly vs annual).</li> <li>Identify metrics.</li> </ul>	There is no one-size-fits-all answer here. Some businesses are stable and predictable. A good D&O risk for an IPO will have an established guidance policy addressing frequency and metrics.
9	<b>Ongoing Disclosure Practices / Policies</b>	<ul style="list-style-type: none"> <li>SEC Accounting / Disclosures.</li> <li>Public Communications.</li> </ul>	<p>A good D&amp;O risk will be able to demonstrate:</p> <ul style="list-style-type: none"> <li>Established public communication protocol.</li> <li>Evidence that company is consulting with with outside counsel regarding mandatory and voluntary disclosures.</li> </ul>
10	<b>Single or Dual Class Share Structure</b>	Dual-Class Share Structure. Differential Voting Rights.	Companies with dual-class share structures have made the headlines in recent years and often face more governance challenges. The only recourse for shareholders in this scenario if they are unhappy is to file a derivative lawsuit. As such being able to explain why the company is implementing a dual-class structure will be important for D&O Underwriters to understand.

# Corporate Governance

## Public Company Preparedness: Best Practices from D&O Insurer's Perspective

#	Governance Category	Criteria / Questions	Considerations for D&O Risk
11	<b>Legal &amp; Compliance</b>	<p>Examples of Key Legal &amp; Compliance Policies / Procedures:</p> <ul style="list-style-type: none"> <li>• Regulations.</li> <li>• Contracts.</li> <li>• Litigation.</li> <li>• Sanctions Policies /Procedures.</li> <li>• Ethics.</li> <li>• Anti-Bribery &amp; Corruption.</li> <li>• Insider Trading.</li> </ul> <p><b>By-laws / Charter</b> Exclusive venue in by-laws.</p>	<p>Many of the policies identified in the middle column are expected for a public company. Specifically calling out a couple of these, a good D&amp;O risk will include:</p> <p><b>Anti-Bribery &amp; Corruption:</b></p> <ul style="list-style-type: none"> <li>• Anti-Bribery &amp; Corruption Policies established.</li> <li>• Internal controls established.</li> <li>• Confirmation training is completed.</li> <li>• If there are overseas operations, is the training being conducted in local language to avoid miscommunication.</li> <li>• Is there the appropriate skill set within the organization to conduct the training.</li> </ul> <p><b>Ethics Policy:</b></p> <ul style="list-style-type: none"> <li>• Code of Conduct.</li> <li>• Confirmation training is completed.</li> <li>• If there are overseas operations, is the training being conducted in local language to avoid miscommunication.</li> <li>• Hotline.</li> </ul> <p><b>Exclusive venue in by-laws:</b> D&amp;O Underwriters will view Federal Forum Provision in Charter Provision favorably.</p>

## Corporate Governance

### Public Company Preparedness: Best Practices from D&O Insurer's Perspective

#	Governance Category	Criteria / Questions	Considerations for D&O Risk
12	<b>ESG Policies</b>	<p><b>Environmental:</b></p> <ul style="list-style-type: none"> <li>• Climate changes – Carbon footprint.</li> <li>• Sustainability.</li> </ul> <p><b>Social:</b></p> <ul style="list-style-type: none"> <li>• Diversity, Equity and Inclusion.</li> <li>• Employee Relations – types of employee wellness initiatives.</li> <li>• Health and Safety &amp; working conditions.</li> <li>• Customer Relations.</li> <li>• Vendor / Suppliers – high risk labor conditions.</li> <li>• Community impact.</li> </ul> <p><b>Governance:</b> Addressed in other sections of this table.</p> <p><b>Questions:</b></p> <ul style="list-style-type: none"> <li>• How has the company set sustainability targets and goals that appeal to the marketplace?</li> <li>• What story is the company telling the street?</li> <li>• What accountabilities has the company set for ESG-related performance?</li> </ul>	<p>A good D&amp;O Risk will be able address the efforts that are underway within the company with regards to various ESG policies / initiatives. D&amp;O underwriters will want to know that the company is seeking external advice from outside counsel / external audit regarding disclosures, especially voluntary disclosures to ensure they are reliable. Furthermore, D&amp;O Underwriters will want to know how the Board is engaged and overseeing these efforts.</p> <p>By way of an example, specifically in relation to Diversity, Equity an Inclusion:</p> <ul style="list-style-type: none"> <li>• Identifying gender pay gaps and actions being taken.</li> <li>• What efforts are underway to recruit a more diverse (gender, race, diversity) workforce.</li> </ul>

## Corporate Governance

### Public Company Preparedness: Best Practices from D&O Insurer's Perspective

#	Governance Category	Criteria / Questions	Considerations for D&O Risk
13	<b>Data Security (IT Systems / Cyber Security / Privacy)</b>	<ul style="list-style-type: none"> <li>• Regular Board engagement on the subject of cyber risk. Is there any cyber expertise on the Board? Is there a party that acts as a conduit in engaging the group in an accessible fashion?</li> <li>• Does the Company have a formalized process for determining when a cyber event would be “material” for disclosure?</li> <li>• Does the Company have a cyber incident response plan? Is there a contingency plan to provide immediate response to mitigate damage? How often is that plan get tested against disruptive efforts from both internal and external sources?</li> <li>• Please talk through how management addresses risk associated with third-party vendors that have access to the Company's data?</li> <li>• What is the company doing to teach employees about the most common cyber risks and how to report them?</li> <li>• What levels of cyber insurance does the Company purchase?</li> <li>• Please comment on the company's compliance with relevant data privacy laws (e.g. GDPR, CCPA etc).</li> </ul>	<p>A good D&amp;O risk will be able to demonstrate that board is engaged in the oversight of cybersecurity risk and understanding the answers to the following questions is important for the D&amp;O Underwriter.</p>

**What to do if you  
are claimed?**

**4**

## **D&O Insurance**

**Different names, but...**

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**D&O**

**Directors and  
Officers**

**Management  
Liability**

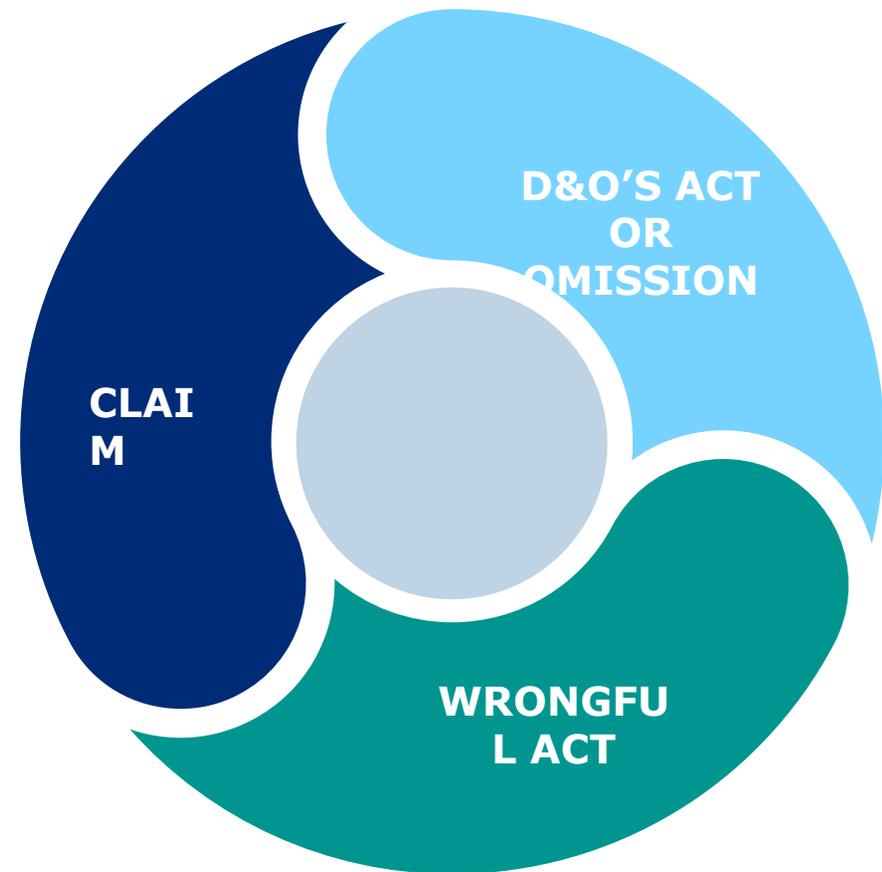
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## D&O Insurance

... but the same meaning

### In simple words:

Directors and officers liability insurance is insurance coverage intended to protect individuals from personal losses if they are sued as a result of acting as a director or an officer in a company.



# D&O Insurance

## Sources of D&O liability



### Why a director can be held liable?

- **General law regulations**
- **Contractual agreement**
- **Internal company regulations**

### Liability of managers

- Companies Act – local law regulations – cite here.
- Personal and unlimited liability of overall private assets.
- Negligence suffices as a degree of fault.
- Reversal of the burden of proof: Manager must prove that he has acted in accordance with his duties.
- Joint and several responsibility for collegial bodies, despite allocation of departments within the internal relationship.
- Liability also for misconduct of employees.

### Liability of the supervisory board

- Companies Act – local law regulations – cite here.
- Obligation in case of claim: in the event of recognized misconduct, the Supervisory Board is obliged to assert claims; otherwise it may itself become liable for damages.

# D&O Insurance

## Who can raise a claim and why?

### Government / Authority bodies

- Anti-trust
- Dishonesty / fraud / bribe
- Misstatement

### Market attendees

- Anti-trust/ unfair competition
- Contract dispute
- Fraud

### Employees

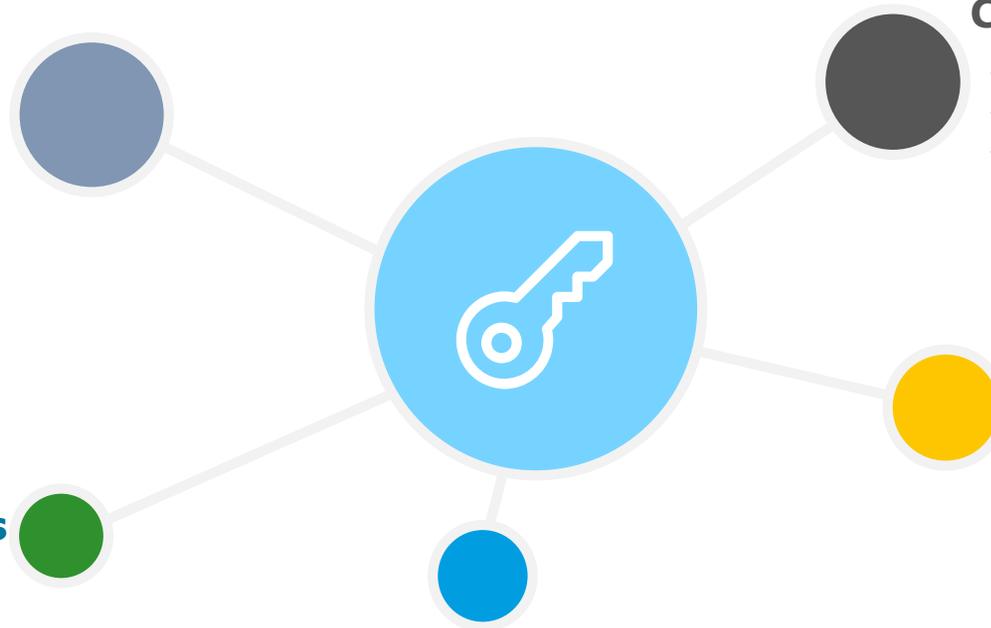
- Discrimination
- Harassment
- Failure to hire or promote
- Unfair termination

### Company

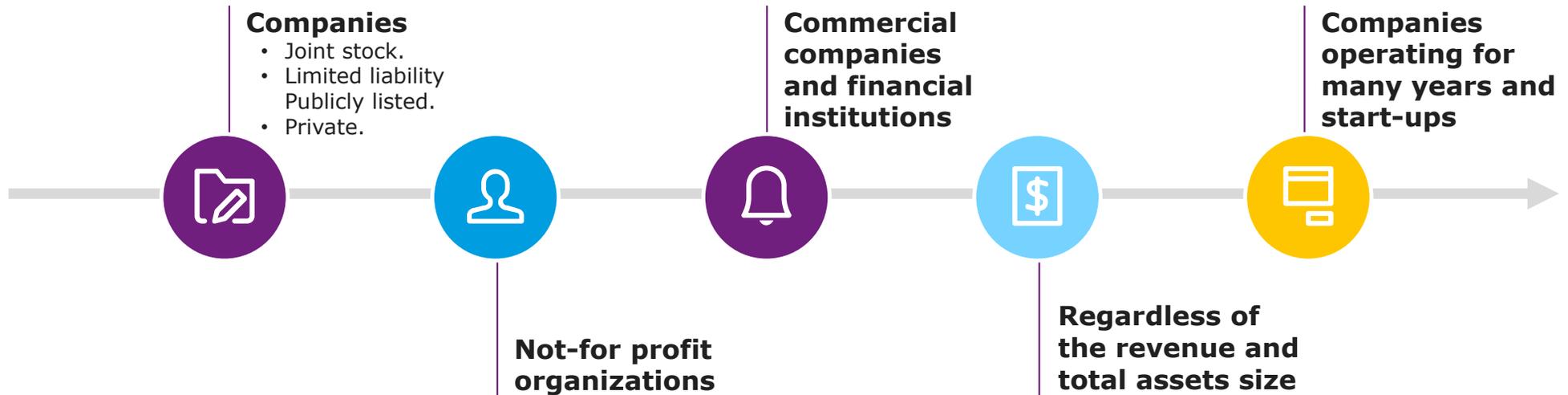
- Company
- Other directors
- New board of directors

### Investors/ shareholders

- Misstatement
- Not achieving the forecasted results



## Who is buying D&O policies?



# D&O Insurance Product

## What is covered under the insurance?

- What is meant by the term “claim”?
- When must a claim be made?
- When must an act or omission giving rise to the claim have occurred?



## Who is insured?



# D&O Insurance Product



Insureds – Directors & Officers

Personal Assets

D&O Insurance

**Insuring Agreement A:**  
Natural Person Insured

PERSONAL ASSETS PROTECTION

Insureds – Corporate Balance Sheet

Corporate Assets

D&O Insurance

**Insuring Agreement B:**  
Corporate Reimbursement  
– Natural Person Insured

CORPORATE RISK TRANSFER



Insureds – Corporate Entity  
as a Defendant in SEC Claims only

Corporate Assets

D&O Insurance

**Insuring Agreement C:**  
Corporate Entity Coverage for SEC Claims

SIGNIFICANT DEFENDANT ALLOCATION COVERAGE

## D&O Insurance Product

### Typical exclusions



Intentional acts



Criminal fines and charges



Unlawful personal gains



IvI (or CvI) in the USA



Taxes



Environmental liability/ pollution costs



Prior known claims and circumstances



Other possible exclusions depending on territory (Russia / Ukraine), activities type or specific situation of the company



## D&O Insurance Product

### Typical extensions

-  New subsidiaries
-  Discovery period
-  Run off cover
-  Court attendance costs
-  Retired directors cover
-  Assets & Liberty expenses
-  Reputation protection/  
public relation expenses
-  Loss mitigation expenses
-  Emergency expenses
-  Pre investigation costs
-  Civil fines and penalties
-  Tax liability
-  Future public offering cover
-  ... **and many more**

**In case a claim  
happens...**

## Claims TO DO List

Attention points when faced with a claim or a circumstance potentially leading to a claim



### CLAIM

- Inform broker and notify claim to your insurer
- Collect facts
- Do not admit any liability
- Review coverage and discuss next steps
- Cooperate with insurer
- Agreement on choice of lawyers and defence costs



### CIRCUMSTANCES

- Notify circumstances to your insurer
- Discuss potential legal advice or loss mitigation costs possibilities with the insurer

**CONCLUSION: should  
you insure D&O?**

## CONCLUSION

### CONS

- Cost
- Complexity
- Work

### PROS

- Negligible vs. loss amounts
- We handle the complexity
- We work for you 😊 on placement and in case of a claim

# Appendix

## D&O Insurance

**D&O insurance was introduced** to the US by Lloyds in the 1930s after the Black Friday in October 1929, when economies were running badly, worldwide stock markets dropped to a historical low and, in consequence, D&Os were facing many shareholder claims. Since the 80s the demand for D&O insurance has been booming outside the US too, especially due to the globalization of the world's economies and the introduction of corporate governance rules and various consumer and shareholder protection laws.

In its early years in Europe and Asia, D&O insurance coverage was rather narrow. Claims under these policies were rare, and profit margins were attractive. In recent years, however, markets have changed significantly owing to fierce competition amongst insurance players, innovative wider policy wordings and premium decreases. In addition, public and regulatory awareness of managers' behaviour and liabilities has steadily resulted in far higher exposures towards claims.

Source: A contribution to "Directors and Officers (D&O) Liability" by Deakin; Koziol; Riss (Eds.) ISBN: 978-3-11-048971-2

E. Spann (Head of Financial Lines facultative, Munich Re) Directors' and Officers' Liability from an Insurance Perspective.



## D&O Insurance Product

### Typical extensions

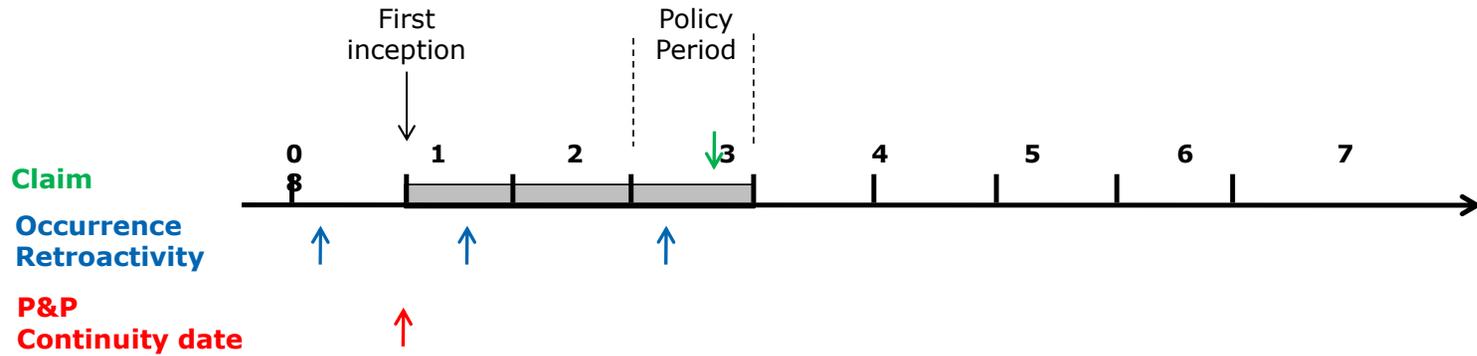
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-  Loss mitigation expenses
-  Emergency expenses
-  Pre investigation costs
-  Civil fines and penalties
-  Tax liability
-  Future public offering cover
-  ... **and many more**

# D&O Insurance Product

## A claims made contract – claim, occurrence, retroactivity & continuity

When must a claim be made and when must an act or omission giving rise to a claim have occurred?

### CLAIMS MADE DURING THE POLICY PERIOD

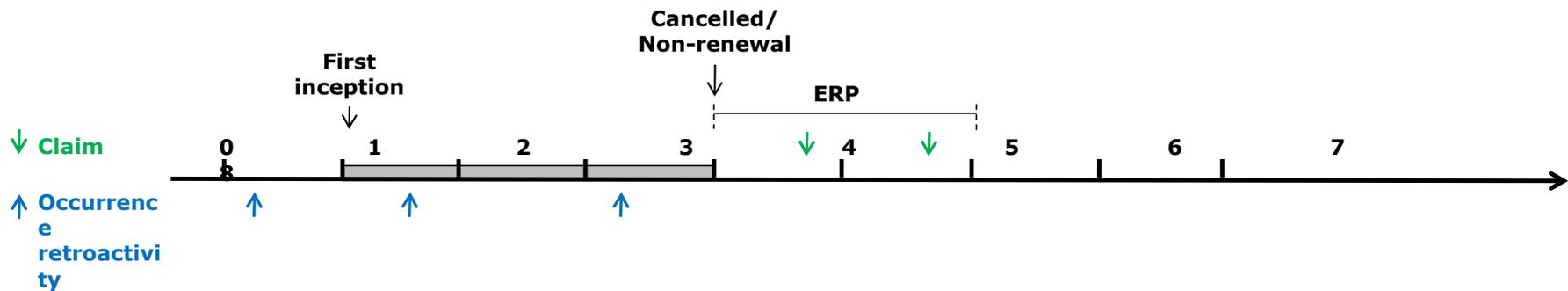


# D&O Insurance Product

A claims made contract – extended reporting period

When must a claim be made and when must an act or omission giving rise to a claim have occurred?

## CLAIMS MADE AFTER THE EXPIRING OF THE POLICY PERIOD



# Market Developments

## D&O market conditions

### European market - Cautious Optimism

#### Favorable Market

From 2002 to 2017 – declining D&O pricing, ample capacity, broadening coverage, and robust competition.

#### 2017-2021 Volatile D&O Market

- COVID-19 infected stressed D&O market.
- Limits management, hard push for rate & higher retentions.

Year	CLIENT	Private Large Europe	Listed Europe
2019	%	71%	82%
2020	%	135%	186%
2021	%	58%	72%

#### 2021-22 Capacity

- New capacity.
- Cautious insurers continue to remediate their book / to push rate given claims. deterioration of the book and economic uncertainty.
- Insurers in growth mode (already remediation process / less affected by legacy claims / feel market now priced adequately).

#### 2021-22 Market

- After 3 years of hard market now heading into the direction of a more stabilizing market.
- For companies who have seen significant premium increases

the last 3 years the impact becomes less (subject to risk profile). More orderly pricing



D&O claims are on the rise across the globe. Heightened risks of insolvencies, the increasing reporting obligations on directors, together with the developing area of shareholder activism will ensure claims continue to increase. In addition, with investors and companies being ever more concerned with climate change and their carbon footprint, we anticipate seeing this as an area of growth for D&O claims.

#### Initial Rate Push

Single digit D&O rate increases (primary more than excess).

#### 2019 Challenging D&O Market

- Shrinking capacity / lack of competition.
- Escalating rate increases – as high as +50% (excess more than the primary).

In the Netherlands, a new regime in respect of class actions was introduced in 2020, under the Dutch law of Redress of Mass Damages in a Class Action (WAMCA). It is still very early in its inception, but there are fears it will also turn into the US class action system. Only one lead plaintiff is permitted and, a subject can opt out after the appointment of the lead plaintiff or after a settlement has been reached.

Samuel Casey December 15, 2021

The relaxation of government economic support measures globally – and the potential for resulting insolvencies – is set to remain a key concern for D&O underwriters in 2022, according to Allianz Global Corporate & Specialty (AGCS).

#### D&O Liability Looking Forward

- COVID-19 uncertainty and economic concerns.
- Noteworthy D&O claim backlog.
- Continued Event-driven litigation risks.
- Claim uncertainty from surge in SPAC IPOs.

# FINPRO Claims Experience

## Technical aspects of FINPRO claims

### What constitutes a claim or a circumstance, criticality of a correct notification, duty of disclosure requirements and its implications

#### Recognising a Circumstance

- Do you know about any situation or fact; and
- Based upon your knowledge and experience or that which a similar person in your situation would have; and
- Would a reasonable person in your situation realise:

**That such situation or fact could lead to claim against you at some time in the future?**

#### Reasons for a Notice of Circumstance

- Future Claim(s) arising from the circumstances described in the notice will relate back to the policy year in which notice was given.
- Insurer can make the judgement call as to whether or not the matter requires their immediate involvement.
- Satisfy your duty of disclosure.

#### Duty of Disclosure

- Obligation to act at all times with the utmost good faith towards your insurer.
- Certain policies contain a clause stating that changes in circumstances during the policy period need to be advised to the insurer.
- Failing to satisfy the duty of disclosure, can result in: **cancellation of the policy** and treat is as it had never existed, **denial of claims payments, revision of premiums** and compulsory excesses, or affect the **extent of cover**.
- Even failing to report minor matters can result in proving an **history of**

# FINPRO Claims Experience

## Technical aspects of FINPRO claims

### False and late declarations, missing information and their implications on cover

#### Timing of the declarations

- As soon as possible, the insured's Risk Management or the insured person should notify the existence of a claim or of circumstances which may reasonably be expected to give rise to a claim or an inquiry (see definition of "claim" in the policy), to the Marsh servicing office.
- In order to avoid missing required information, it's preferable to use specific Marsh Claims Notification Forms, for the notification of any circumstance or claim.
- When submitting these, all necessary and useful documents and information should be attached as well.

See example: **Claims Notification Form – Crime Insurance**

- All notices, summons, writs as well as all documents regarding legal proceedings sent to or served on the insured or their offices, must be communicated **promptly** to the insurer through Marsh.

#### NOC Wording in the Current Primary Policy

- The level of specificity required by the carrier in the NOC (and presumably have accepted it) is described in the NOC wording of the primary policy.
- Given your client's particular NOC language, is it possible for your client to draft a NOC that is specific enough such that the carriers will accept it? Did the client **first become** aware of the issue that could give rise to a future Claim during the Policy Period?
- The conversation should also involve not only your client's 'risk manager, but also legal resources. Best practice – your client's counsel (inside and outside) is part of the conversation.



#### Implications

Failing to comply with the (potential) claim notice provision in the policy can result in a court denying entitlement to any reimbursement from the insurer.

## Insurance

### Feedback Survey

- 1 Go to [wooclap.com](https://wooclap.com)
- 2 Enter the event code in the top banner

**FZRMLK**



# Questions?



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