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## Insurance Supervision Act – Overview of the Ongoing Revision

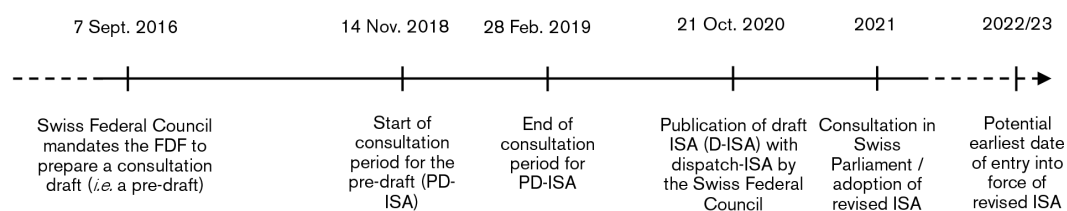
Reference: CapLaw-2021-01

On 21 October 2020, the Swiss Federal Council published the draft of the revised Insurance Supervision Act together with a dispatch to Swiss Parliament. The revised act is expected to enter into force by 2022 at the earliest. This article provides an overview and discusses selected key topics of the revision.

By Peter Ch. Hsu\*

### 1) Introduction

The Insurance Supervision Act of 17 December 2004 (ISA) has been in force since 1 January 2006. It codifies the regulation of Swiss (re)insurance undertakings and insurance intermediaries in one single Federal act and replaced the insurance supervisory law that previously was implemented in various Federal acts. Since ISA's entry into force, there have been minor amendments to its text only, mainly to align it with changes to other Swiss laws (e.g. enactment of the Financial Market Supervisory Act (FINMASA)). In 2016, the Swiss Federal Council entrusted the Federal Department of Finance (FDF) with a project to elaborate a draft for a partial revision of ISA. The FDF subsequently published a pre-draft of a partial revision of ISA (PD-ISA) for public consultation on 14 November 2018. Two years later, on 21 October 2020, the Swiss Federal Council published the draft ISA (D-ISA; BBl 2020 9061) together with a dispatch (*Botschaft*) to Swiss Parliament (dispatch-ISA; BBl 2020 8967), a report on the consultation process (consultation report) and a report on a comparison with developments on an international level and a regulatory impact assessment. Currently, the Economic Affairs and Taxation Committees (EATC) of the National Council (*Kommission für Wirtschaft und Abgaben des Nationalrates; WAK-N*) is in the course of deliberations on the D-ISA and expected to conclude them by 12/13 April 2021 and publish its proposal in its comments (*Fahne*). Subsequently, D-ISA will be debated in the special session (*Sondersession*) of the National Council on 3–6 May 2021 (see <<https://www.parlament.ch/press-releases/Pages/mm-wak-n-2020-02-02.aspx>>) and might enter into force by 2022 at the earliest. However, in view of the legislative process, 2023 appears to be more realistic.



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This abstract discusses selected key topics of the new provisions of D-ISA. The partial revision pursues the following three key goals of the Swiss Federal Council's financial market strategy by various pinpoint amendments (dispatch-ISA, p. 5 *et seqq.*):

Goals of the Swiss Federal Council for financial market strategy	Proposals for amendment in D-ISA
<b>1. Enhancement of the competitiveness</b> of the market participants and improvement of high-quality products / services for clients	<ul style="list-style-type: none"> <li>– <b>Less stringent rules for insurance undertakings if</b> and to the extent they contract with professional insured only <i>i.e.</i>, a result of a client protection-oriented approach of regulation and supervision</li> <li>– <b>Less stringent rules for captives</b></li> <li>– <b>Potential exemption by FINMA</b> from license requirement for <b>small insurance businesses</b></li> <li>– <b>Exemption for ancillary insurance</b> (<i>Annexversicherung</i>)</li> <li>– <b>No introduction of new license requirement for Swiss pure reinsurance branch offices of foreign insurers:</b> the initial proposal of the PD-ISA has been dropped in D-ISA. D-ISA only provides for a delegation by the legislator to the Swiss Federal Council of the competence to implement a license requirement in the future depending on future developments at an international level.</li> </ul>
<b>2. Foster stability of the financial system</b>	<ul style="list-style-type: none"> <li>– <b>Additional regulation on supervision of insurance groups and conglomerates</b></li> <li>– <b>Requirement for stabilization plan</b></li> </ul>
<b>3. Integrity of the financial marketplace</b> and appropriate <b>customer protection</b>	<ul style="list-style-type: none"> <li>– <b>Restructuring procedure for insurance undertakings/ material group companies</b> to improve customer protection (without impairing competitiveness)</li> <li>– <b>Rules of conduct for insurance intermediaries</b></li> <li>– <b>Regulation of qualified life insurance products</b></li> <li>– <b>Ombudsman's office: Affiliation requirement for insurance undertakings and insurance intermediaries</b></li> </ul>

The above table is simplified, and it should also be noted that some of the goals and measures are interdependent and some of the measures serve multiple goals.

Further, D-ISA aims to address new developments in the insurance industry as well as the financial sector (*e.g.* innovative business models/insurtech) of the recent past. In addition, D-ISA implements certain provisions in the act that to date have been regulated in the Insurance Supervision Ordinance (ISO) to ensure a sound legal basis (*e.g.* certain provisions on the Swiss Solvency Test (SST)).

## 2) Key topics of the amendments by D-ISA

### a) Introduction of a Restructuring Framework (Article 52a–52m D-ISA)

Currently, **ISA lacks specific provisions on the restructuring** of a (re)insurance undertaking, in contrast e.g. to the banking regulation. ISA only mentions restructuring as a potential measure by stating that an insurance undertaking may only enter bankruptcy proceedings in the absence of a prospect of a restructuring (article 53 ISA). Further, ISA explicitly excludes the application of the restructuring provisions in the Debt Collection and Bankruptcy Act (DEBA) (article 53 para. 2 ISA).

Because of the absence of any restructuring rules in ISA, FINMA can only decree "**safeguarding measures**" if an insurance undertaking, e.g., is challenged by financial difficulties and the interests of the insured are endangered (article 51 ISA). FINMA, e.g., may decree the measure of a transfer of the insurance portfolio to another insurance undertaking with the consent of the latter (article 51 para. 2 lit. d ISA). However, **ISA does not include any capital measures or the possibility of intervening in the rights of third parties** to carry out a restructuring.

As a result, under current law, **FINMA is *de facto* forced to open bankruptcy proceedings**, even if a successful restructuring of the insurance undertaking were possible.

The new provisions of D-ISA aims to offer the possibility to **restructure an insurance undertaking rather than to liquidate it**. This may safeguard the interests of the insured because the insured are typically more interested to continue their insurance contract than to terminate it due to the bankruptcy of the insurance undertaking. In particular, in the area of supplemental medical insurance and life insurance, it is often difficult to find similar alternative coverage (e.g., because of preexisting illness, old age or higher premiums). The new provisions enable various restructuring measures, inspired by the banking regulation, but taking into consideration the specifics of the insurance business (see articles 52a–52m).

See for a more detailed discussion MONICA MÄCHLER, New Regulatory Regime for Financially Distressed Insurance Companies, CapLaw 1/2021, p. 15 *et seqq.* (see below) and PETER CH. HSU, Insurance Supervision Act – Overview of the Ongoing Revision, Bär & Karrer Publication (available at <<https://www.baerkarrer.ch/en/publications>>).

### b) Reliefs and Exemptions from Insurance Regulation/Supervision

#### i. Insurance for Professional Insured (Articles 30a–30c D-ISA)

The supervisory regime under ISA is based on the principle that all insured **require the same level of protection** and does not differentiate between the different levels of protection required by the various categories of insured (e.g., private individuals, small

and medium-sized enterprises, large customers, direct insurers). The only exception to this rule is the lighter supervisory regime for reinsurance undertakings (article 35 ISA).

Under D-ISA, a lighter regulatory regime continues to apply to pure reinsurance undertakings and mixed direct and reinsurance undertakings with regard to their reinsurance business (article 35 para. 2 D-ISA). In addition, D-ISA further takes into account the different protection requirements of insured by providing supervisory relief to insurance undertakings that only have professional clients (or insurance undertakings that service both professional and other clients with regards to their business with professional clients). Upon request, FINMA grants those insurance undertakings (in general or for their business with professional clients) an exemption from the following obligations and requirements (article 30a para. 1 D-ISA) (subject to certain limitations under article 30a para. 4 D-ISA):

- Obligation to hold an organizational fund (article 10 ISA).
- Tied asset requirement (articles 17–20 ISA; article 54a<sup>bis</sup> D-ISA).
- Different adjustment of various categories of insurance agreements in the restructuring procedure (article 52e para. 2 D-ISA).
- Obligation to affiliate with an ombudsman's office (articles 82–82i D-ISA).

If an insurance undertaking benefits from the exemptions for professional insured, it must **inform** the professional insured of the status and comply with further information obligations (articles 30b and 30c D-ISA).

The following entities are deemed professional insured i) financial intermediaries in the meaning of the Federal Banking Act (BankA) and the Federal Act on Collective Investment Schemes; ii) insurance undertakings in the meaning of ISA; iii) foreign insured subject to prudential supervision equivalent to that of the persons referred to in i) and ii); iv) public law corporations, public law institutions and public law foundations with professional risk management; and v) companies with professional risk management (article 30a para. 2 D-ISA with reference to article 98a lit. b–f of the amended Federal Insurance Contract Act that into force on 1 January 2022 (Amended ICA)). In contrast, pension funds and large companies in the meaning of article 98a para. 2 lit. a and g Amended ICA do not qualify as professional insured.

If an insurance undertaking provides its services to both professional and non-professional insured, the relief shall only apply to the business with professional insured (article 30a para. 3 D-ISA).

### *ii. Captives (Article 30d D-ISA)*

Furthermore, D-ISA provides for exemptions for **intra-group direct insurance and reinsurance (captives)** from the following provisions (article 30d para. 1 D-ISA):

- Obligation to hold an organizational fund (article 10 ISA; article 15 para. 1 lit. d D-ISA).
- Obligation to join the National Insurance Office and the National Guarantee Fund (article 13 ISA).
- Tied asset requirement (articles 17–20 ISA; article 54a<sup>bis</sup> D-ISA).
- Application of various specific provisions for individual insurance classes (articles 32–34 and 36–39 ISA).
- Different adjustment of various categories of insurance agreements in the restructuring procedure (article 52e para. 2 D-ISA).
- Additional safeguarding measures for foreign insurance undertakings (articles 57–59 ISA).
- Obligation to affiliate with an ombudsman's office (articles 82–82i D-ISA).
- Provision on the transfer of an insurance portfolio under article 62 ISA.

Under the new rules, a captive may also provide insurance services to third parties. However, the exemptions do not apply to this part of the business (article 30d para. 3 D-ISA).

### *iii. Small Insurance Business / Insurtech*

Under current law, FINMA may exempt from supervision an insurance undertaking whose insurance activities are of minor economic importance or cover only a small group of insured persons (article 2 para. 3 ISA). **In practice, this exemption has been very narrowly interpreted and hardly ever applied.** PD-ISA also included the proposal that FINMA shall have the ability to exempt small insurance undertakings, in particular those with innovative business models, from insurance supervision (article 2 para. 3 PD-ISA). In the consultation procedure, the introduction of the exemption as such was generally much welcomed. However, the generic wording of the requirements for the exemption was heavily criticized and the concern has been raised that FINMA might, therefore, be reluctant to grant the exemption in practice.

**Under D-ISA, the Swiss Federal Council has the competence to exempt small insurance undertakings from supervision** (article 2 para. 5 lit. b D-ISA), *e.g.*, by way of introducing a regulation in the ordinance (*e.g.*, in ISO). Pursuant to the wording of the



draft provision, the exemption shall serve the purpose to safeguard the future viability of the Swiss financial center. The Swiss Federal Council may introduce conditions to the granting of exemptions, such as domicile in Switzerland, guarantees (e.g., also in the form of reinsurance), adequate information of clients, organizational requirements, etc. When adopting a regulation of the exemption the Swiss Federal Council shall in particular take into account the business model, the economic importance and the risks of the insurance product for the insured concerned, the volume of business and the group of insured persons.

#### **iv. Further Exemptions from Insurance Supervision**

**SERV/ECA:** While the **Swiss Export Risk Insurance** (SERV) is exempted from the scope of application of ISA (article 2 para. 2 lit. b ISA), there is currently no such exemption for **foreign Export Credit Agencies** (ECA) that insure Swiss exporters in relation of trade activities and Swiss banks in relation to trade financing. D-ISA now provides for an express exemption for foreign state-owned or state-guaranteed export risk insurance undertakings (article 2 para. 2 lit. b<sup>bis</sup> D-ISA).

**Associations (Vereine), organizations (Verbände), cooperatives (Genossenschaften) and foundations:** Associations, organizations, cooperatives and foundations that offer and enter into security arrangements, including, e.g., sureties and guarantees with their members, are exempt from insurance supervision if i) their local area of activity is limited to the territory of Switzerland, and ii) any profit generated by such contracts will be allocated in full to the contract partners (article 2 para. 2 lit. e D-ISA).

**Annex insurance:** When selling goods and services, there may be a demand on the part of the customer for insurance coverage that complements the product or service and is tied to it (annex insurance) (e.g., display damage insurance when purchasing a cell phone). D-ISA expressly excludes insurance intermediaries of annex insurance of minor importance from its scope of application (article 2 para. 2 lit. f D-ISA). The Swiss Federal Council will define the criteria by ordinance (article 2 para. 4 lit. c D-ISA). This exclusion from the scope of application (as it is well known under the Insurance Distribution Directive (IDD) in the EU/EEA regulation 2016/97) is sensible.

#### **c) New Rules regarding the Sale of Insurance Products with Investment Character (Qualified Life Insurance Products)**

In its debates on the Federal Act on Financial Services (FinSA), the Swiss Parliament decided that the rules of conduct of financial service providers should not apply to the insurance sector. Instead, D-ISA shall introduce such regulation and adapt it to the specific needs of the insured. The regulation in D-ISA aims to create a *level playing field* for investment products. It contains provisions on qualified life insurance products that have the character of investment products and that shall be subject to the corresponding regulations for the protection of the investor (see the definition of qualified life insurance products in article 39a D-ISA), including, e.g.:

- An insurance undertaking offering qualified life insurance products must prepare a **key information document** (KID) in advance (article 39b para. 1 D-ISA, see further article 39c–39h D-ISA) (see the similar regulation for financial intermediaries in article 58 *et seqq.* FinSA). The Swiss Federal Council may issue supplementary provisions (article 39f D-ISA).
- **Advertising** for qualified life insurance products must be clearly recognizable as such. The advertising must refer to the KID for the respective qualified life insurance and to the reference agency (*Bezugsstelle*) (article 39i D-ISA) (see regulation to financial service providers in article 68 FinSA)
- Before recommending a qualified life insurance policy, an insurance undertaking or an insurance intermediary must examine whether the product is **appropriate** for the insured and what knowledge and experience the insured has (article 39j D-ISA; *cf.* appropriateness assessment in article 11 FinSA).
- An insurance undertaking and insurance intermediary must, *e.g.*, document what qualified life insurance contract has been concluded, which knowledge and experience of the insured has been gathered, that no appropriateness assessment has been carried out based on article 39j para. 3 or 4 (*e.g.*, because the information received from the insured is insufficient for an appropriateness assessment), or that the insured was advised against purchasing a qualified life insurance product. Insurance undertakings and insurance intermediaries shall provide a copy of such documentation to the insured persons upon request or make it available to them in another appropriate manner (article 39k D-ISA; *cf.* article 15 and 16 FinSA).
- Further, an insurance intermediary will be subject to a **duty to provide certain basic information** to their clients in advance in relation to all insurance products (article 45 D-ISA, see current regulation in article 45 ISA).
- The **regulation of compensation** of insurance undertakings and third parties for non-tied insurance intermediaries (article 45b D-ISA; *cf.* article 26 FinSA; see below).

See for a more detailed discussion BERTRAND SCHOTT/SIMON BÜHLER, Insurance Supervision Act: Proposed New Rules regarding Distribution of Insurance Products (Point of Sale) and Insurance Intermediaries, CapLaw 6/2020, p. 10 *et seqq.*

### d) New Rules for Insurance Intermediaries

D-ISA continues to distinguish between tied and non-tied insurance intermediaries that have currently been defined in ISO only (see article 43 para. 1 ISA for tied and article 183 ISO for non-tied insurance intermediaries). **Under D-ISA the definitions will be implemented into the law in article 40 para. 2 and 3 D-ISA.** Under D-ISA, an insurance intermediary cannot be simultaneously engaged in business as a tied



and non-tied insurance intermediary (article 44 para. 1 lit. b D-ISA) taking into account that a non-tied insurance intermediary stands in a fiduciary relationship to the insured (article 40 para. 2 D-ISA).

**Non-tied insurance intermediaries must register with the register of insurance intermediaries** (article 41 para. 1 D-ISA). Tied insurance intermediaries need not to register in the register of insurance intermediaries. In contrast to current law, **tied insurance intermediaries cannot generally voluntarily register** but may only register in the register of insurance intermediaries if they prove that they intend to take up a business activity abroad in a jurisdiction that requires a registration in the register in Switzerland (article 42 para. 1 and 4 D-ISA). This applies in particular to insurance intermediaries that are or intend to engage in business in the Principality of Liechtenstein. **Tied insurance intermediaries** have an identifiable fiduciary relationship with their employers, typically insurance undertakings. FINMA can indirectly and effectively supervise tied insurance intermediaries via the insurance undertakings – **a registration in the register is not necessary for this purpose** (dispatch-ISA, p. 9008).

Newly included are the requirements of good reputation and the guarantee of fulfillment of the obligations under D-ISA (article 41 para. 2 lit. b D-ISA; cf. article 11 FinIA). Furthermore, the **requirement of a domicile, residence or branch office in Switzerland** is included, which is considered as important for the effective supervision of FINMA (article 41 para. 2 lit. a D-ISA). Consequently, in contrast to current regulation non-tied insurance intermediaries will, in principle, no longer be able to operate without a physical presence in Switzerland. In justified cases, FINMA, however, may grant exceptions (article 41 para. 5 D-ISA).

D-ISA introduces **new rules regarding the disclosure of compensation** and waiver requirements for **non-tied insurance intermediaries** (article 45b D-ISA). A distinction is made between two types of arrangements: i) If a non-tied insurance intermediary receives compensation from an insurance undertaking or a third party only (e.g., a commission, rebate or similar financial benefits), the insurance intermediary may accept it if and to the extent it informed the insured expressly (article 45b para. 1 D-ISA); ii) if the non-tied insurance intermediary receives remuneration from the insured, then the insurance intermediary may only accept compensation from an insurance undertaking or a third party if a) the insured has been expressly informed about the compensation and the insured expressly waives the compensation or b) if the non-tied insurance intermediary passes the compensation on to the insured (article 45b para. 2 D-ISA). The latter is similar to the general rule on inducements/retrocessions for financial service providers (article 26 para. 1 FinSA). The disclosure of the compensation must indicate the type and the amount of the compensation and take place prior to the provision of the service or entering into an agreement. If the amount cannot be determined in advance, the policyholder must be informed the calculation parameters and the range amounts of the compensation (article 45b para. 3 D-ISA). This, in principle, reflects

the case law of the Supreme Court on retrocessions in the asset management in the financial services business. It goes, however, further as in the current wording of the provision an express waiver (as opposed to, *e.g.*, as well a silent waiver) is required (see also article 26 para. 2 FinSA).

These rules on disclosure and waiver do not apply to the **compensation of tied insurance intermediaries** (*cf.* dispatch-ISA, p. 9006).

Tied and non-tied insurance intermediaries must provide for the necessary skills and knowledge for their activities (article 43 D-ISA; *cf.* article 6 FinSA). As under current law, insurance intermediaries will be subject to a duty to provide certain basic information to their clients in advance in relation to all insurance products (article 45 D-ISA). Furthermore, tied and non-tied insurance intermediaries must avoid conflicts of interest (article 45a D-ISA and see also article 14a D-ISA). Non-tied insurance intermediaries are required to register with an ombudsman's office (article 82c para. 1 D-ISA).

#### **e) Introduction of an Obligation to Affiliate with an Ombudsman's Office (Articles 82–83c D-ISA)**

Currently, there is already an ombudsman's office in the field of private and health insurance. Since 1 January 2021, financial service providers have also been subject to the obligation to affiliate themselves with an ombudsman's office (article 77 FinSA). Under D-ISA, in principle, all insurance undertakings and non-tied insurance intermediaries must affiliate with an ombudsman's office (article 82c para. 1 D-ISA). Reinsurance undertakings and captives are exempted from the affiliation requirement (articles 35 and 30d D-ISA) and insurance undertakings that are exclusively engaged in the business of insurance of professional insured may be exempted from such requirement upon request to FINMA (article 30a D-ISA). However, more recently, the EATC of National Council has proposed removing the affiliation requirement with the ombudsman's office from the D-ISA (<https://www.parlament.ch/press-releases/Pages/mm-wak-n-2020-02-02.aspx>).

#### **f) Proposed Amendments of Penal Provisions (Articles 86 and 87 D-ISA)**

D-ISA shifts the enforcement model away from penal provisions and the threat of monetary fines towards supervisory review and enforcement (*cf.* articles 89–92 FinSA). It maintains only those penal provisions that protect crucial elements of the supervisory framework and lowers the maximum level of fines. In particular, lit. a (violation of the duty to join the National Insurance Office and the National Guarantee Fund according to article 13 ISA), c (late submission of the annual report; article 25 ISA), d (not forming the prescribed technical provisions) and f (violation of the proper execution of claims settlement in motor vehicle liability insurance) of article 86 para. 1 ISA will be abolished and the maximum fine (*Busse*) for contraventions (*Übertretungen*) shall be reduced from CHF 500,000 to CHF 100,000 (in case of intent) and from CHF 150,000 to

CHF 50,000 (in case of negligence) (article 86 D-ISA) (misdemeanours (*Vergehen*) can still be punished by imprisonment up to 3 years or monetary penalty (*Geldstrafe*) (in case of intent) or fines up to CHF 250,000 (in case of negligence)). Also, the criminal liability for failure to submit or late submission of changes to the business plan shall no longer apply (*cf.* article 87 para. 1 lit. b ISA). These reliefs are remarkable. The concept of focusing on supervisory review and enforcement is in our view sensible.

### g) Proposed Amendments regarding Group and Conglomerate Supervision

Systemic risks do typically not arise from the traditional insurance of customer risks but tend to be incurred rather in other activities and by affiliates of insurance undertakings. Therefore, the revision also aims to strengthen group supervision, which should contribute to system stability, see *e.g.*: FINMA approval requirement for business plan changes regarding changes in the board of directors and senior management, control etc. at group or conglomerate level (article 71<sup>bis</sup> para. 1 and article 79<sup>bis</sup> para. 1 D-ISA), reporting obligation for all undertakings of the group pursuant to article 29 FINMASA (article 71 D-ISA), formal legal basis for solvency requirements in article 69 and 77 D-ISA, obligation to prepare stabilization plans (article 67 para. 4 and article 75 para. 4 D-ISA), etc.

Swiss domiciled material group and conglomerate companies (without supervision by FINMA on an individual level) are subject to FINMA's jurisdiction for bankruptcy (articles 71<sup>bis</sup> and 79<sup>bis</sup> ISA with reference to articles 53–54e ISA). Such jurisdiction will be extended to Swiss domiciled material group and conglomerate companies irrespective of the existence of group or conglomerate supervision and to Swiss domiciled parent companies of an insurance group or conglomerate (article 2a para. 1 lit. a and b D-ISA). Furthermore, such jurisdiction will be extended to protective measures, measures in the event of a risk of insolvency, restructuring and liquidation (article 2a para. 1 D-ISA with reference to articles 51–54i D-ISA).

### 3) Further proposed amendments

In PD-ISA it was proposed that **foreign reinsurance undertakings with a branch in Switzerland are to be made subject to an insurance supervision** requirement in Switzerland (article 2 para. 1 lit. b no. 2 PD-ISA). This was heavily criticized in the consultation process because the liberal Swiss regime for reinsurance branches has proven to be very successful to encourage foreign insurers to establish a Swiss reinsurance branch instead of transacting on a pure cross-border basis from abroad into Switzerland. So far, no significant incidents have occurred that would have called for such extension of the scope of ISA license requirements. D-ISA no longer provides for such license requirement. However, under D-ISA the Swiss Federal Council has the competence to introduce such license requirement (by way of an amendment of the ordinance) to address development in international standards (article 2 para. 5 lit. a D-ISA).

The **SST** is the risk-based solvency regime. The regulation on SST has been based on article 9 ISA but most of the regulation has been implemented in ISO. The new provisions on SST in D-ISA shall provide for a formal legal basis in the law (articles 9–9b D-ISA). Further, they adjust certain terminology to the SST. The provisions, however, do not aim for a change of the calibration of the SST. Furthermore, under D-ISA the Swiss Federal Council has the authority to introduce additional capital requirement systems for insurance undertakings with international activities, insurance groups and conglomerates, in addition to the solvency regulations, in order to meet international capital standards (article 9c D-ISA).

Under D-ISA, FINMA may require economically significant Swiss insurance undertakings to prepare a **stabilization plan** (article 22a para. 1 D-ISA) (*cf.* similar requirement for systemically important banks under article 7 *et seqq.* BankA). In this plan, the insurance undertaking will describe the intended measures to stabilize itself in an event of a crisis to continue its business activities without government support (article 22a D-ISA).

As under ISA, insurance undertakings in addition to their insurance business may only engage in other business activities if such **other business activities** have an immediate nexus to the insurance activities (article 11 para. 1 ISA, see article 11 para. 1 lit. b D-ISA). Further, under ISA FINMA *may* authorize other business (that do not have an immediate nexus to the insurance activities) if such business activities do not jeopardize the interests of the insured. The new provision shall make it clearer that FINMA has to grant such authorization if the requirements are met (article 11 para. 1 lit. b D-ISA). The Swiss Federal Council shall specify the conditions and details in the ordinance (article 11 para. 2 D-ISA). In view of the new developments in the insurance industry, including, *e.g.*, the new distribution channels (electronic platforms), specialized consultancy and service provision and parametric (re-)insurance, a more liberal regime would be helpful being understood that the equivalency requirements on the international level sets certain limits (consultation report, p. 22 *et seq.*).

Furthermore, to eliminate uncertainties regarding the legal capacity of **Lloyd's as a party in a civil or supervisory procedure** (see the decision of the Swiss Federal Supreme Court 4A\_116/2015, 4A\_118/2015, consideration 3.1 and 3.4), a specific provision for Lloyd's in view of its nature as a unique insurance market has been included in D-ISA (article 15a D-ISA).

One further change that is noteworthy is the following: Under ISA, a person who intends to directly or indirectly participate in a Swiss domiciled insurance undertaking must notify FINMA if the participation reaches or exceeds the thresholds of 10, 20, 33 or 50% of the capital or voting rights of the insurance undertaking (article 21 para. 2 ISA). However, based on the wording of ISA only a reduction of a *direct* participation (but not of any indirect participation) in a Swiss domiciled insurance undertaking below the relevant thresholds (and the change of the direct participation

so that the insurance undertaking no longer qualifies as a subsidiary) have to be notified to FINMA (article 21 para. 3 ISA). **Under D-ISA the reduction as well of an indirect participation in a Swiss domiciled insurance undertaking below the thresholds must be notified to FINMA** (article 21 para. 3 D-ISA).

Finally, it was proposed in PD-ISA that changes to the regulatory **business plan** relating to i) a change of directors of the board of directors, senior management and control (article 4 para. 2 lit. g ISA and article 5 para. 1 PD-ISA) and ii) a material change in the outsourcing of functions (article 4 para. 2 lit. j ISA and article 5 para. 1 PD-ISA) should require prior submission for approval to FINMA. Usually, as a practical matter an insurance undertaking is well advised to submit such changes to the regulatory business plan in advance to FINMA to avoid any surprises and be required to unwind a transaction. However, it is sensible that the timing requirement of a *prior* submission of changes of business plan forms g and forms j for approval by FINMA has been dropped in D-ISA so that the current rules remain in force.

#### 4) Outlook

D-ISA proposes various amendments to ISA and includes also some relief measures and exemptions from regulation (e.g., for insurance undertakings with only professional insured, small insurance business and captives). This is rather unusual for a project of new regulation as we have become used to the principle that new regulation introduces additional regulatory burden on the regulated entities rather than to bring relief. This is a positive development. The deliberations of the Swiss Parliament scheduled for this spring will certainly be followed with great interest.

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## New Regulatory Regime for Financially Distressed Insurance Companies

Reference: CapLaw-2021-02

One of the key goals of the proposed revision of the Swiss Insurance Supervision Act is to insert provisions on restructuring into the Swiss insurance regulations that so far do not exist. Together with some related amendments, these provisions are designed to form a regulatory regime for financially distressed insurance undertakings.

*By Monica Mächler*

On 21 October 2020, the Federal Council approved for the attention of Parliament the **Dispatch on the Amendment of the Swiss Insurance Supervision Act** (ISA, SR 961.01) (the Dispatch) along with a draft ISA (D-ISA; Federal Gazette (Switzerland),