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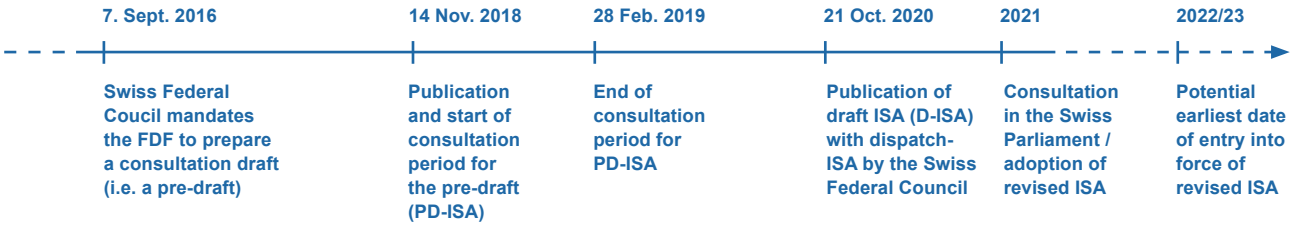
Overview of the Ongoing Revision Insurance Supervision Act

On 21 October 2020, the Swiss Federal Council published the draft of the revised Insurance Supervision Act together with a dispatch to the 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 covered by the revision (see also Peter Ch. Hsu, Insurance Supervision Act – Overview of the Ongoing Revision, CapLaw 1/2021, p. 2 *et seqq.*).

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. On 14 November 2018, the FDF subsequently published a pre-draft of a partial revision of ISA (PD-ISA) for public consultation. 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 the Swiss Parliament (dispatch-ISA; BBl 2020 8967), a report on the consultation process (consultation report), a report on a comparison with developments at an international level and a regulatory impact assessment. Currently, the Economic Affairs and Taxation Committee (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 expects to conclude them by 12/13 April 2021 and publish its proposals and 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 (including time for debate in parliament, a referendum period of 100 days and expected substantial revision of ISO), then 2023 appears to be more realistic.



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 targeted amendments (dispatch-ISA, p. 5 *et seqq.*):

Goals of the Swiss Federal Council for financial market strategy	Proposals for amendment in D-ISA
1. **Enhancement of competitiveness** of market participants and improvement in high-quality products / services for clients	– **Less stringent rules for insurance undertakings if** and to the extent **they contract with professional insured only** – *i.e.*, a result of a client protection-oriented approach of regulation and supervision – **Less stringent rules for captives** – **Potential exemption by FINMA** from licence requirement for **small insurance businesses** – **Exemption for ancillary insurance** (*Annexversicherung*) – **No introduction of new licence requirement for Swiss pure reinsurance branch offices of foreign insurers:** 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 licence requirement in the future depending on future developments at an international level.
2. **Foster stability of the financial system**	– **Additional regulation on supervision of insurance groups and conglomerates** – **Requirement for stabilization plan**
3. **Integrity of the financial marketplace** and **appropriate customer protection**	– **Restructuring procedure for insurance undertakings/ significant group companies** to improve customer protection (without impairing competitiveness) – **Rules of conduct for insurance intermediaries** – **Regulation of qualified life insurance products** – **Ombudsman's office: Affiliation requirement for insurance undertakings and insurance intermediaries**

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.

Furthermore, 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 under the Insurance Supervision Ordinance (ISO) to ensure a sound legal basis (e.g. certain provisions on the Swiss Solvency Test (SST)).

Key topics of the amendments by D-ISA

Introduction of a Restructuring Framework (Art. 52*a*–52*m* D-ISA)

Currently, **ISA lacks specific provisions on the restructuring** of a (re)insurance undertaking, in

contrast with the regulatory regime for banking. ISA only mentions restructuring as a potential measure by stating that an insurance undertaking may only enter bankruptcy proceedings in situations where there is no prospect of a restructuring (art. 53 ISA). ISA also explicitly excludes the application of the restructuring provisions in the Debt Collection and Bankruptcy Act (DEBA) (art. 53 para. 2 ISA).

Given the absence of any restructuring rules in ISA, FINMA can only decree "**safeguarding measures**" if an insurance undertaking is challenged by financial difficulties and the interests of the insured are endangered (art. 51 ISA). FINMA may in particular set out the scale and extent of a transfer of the insurance portfolio to another insurance undertaking with the consent of the latter (art. 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 aim to offer the possibility of **restructuring an insurance undertaking rather than liquidating it**. This may safeguard the interests of the insured because the insured are typically more interested in continuing their insurance contract than terminating 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 cover (for example, because of pre-existing illness, old age or higher premiums). The new provisions enable various restructuring measures, inspired by the banking regulation, but take into consideration the specifics of the insurance business. They include in particular the following:

– Transfer of a (re)insurance portfolio to another (re) insurer or rescue company (art. 52*b* para. 1 lit. a and art. 52*c* D-ISA).

– Continuation of holding the insurance portfolio in the insurance carrier with the possibility to intervene in the rights of the creditors.

– Reduction and subsequent increase of the share capital (art. 52*b* para. 1 lit. b and art. 52*d* D-ISA).

– Conversion of specific debt into equity rights (so-called bail-in; in particular the *no-creditor-worse-off-than-in-liquidation-principle* must be observed) (art. 52*b* para. 1 lit. b and art. 52*d* D-ISA).

– Reduction of receivables (art. 52*b* para. 1 lit. b and art. 52*d* D-ISA).

– Material adjustment of insurance contracts, namely the limitation of the rights of the insured under the insurance contract or the exclusion of such rights (art. 52*b* para. 1 lit. c and art. 52*e* D-ISA).

– Suspension of the termination of agreements (art. 52*g*) and of reinsurance agreements (art. 52*h* D-ISA).

Under D-ISA, **specific debt positions may be converted into equity rights (bail-in)** under certain conditions subject to limitations and exclusions in a restructuring procedure. The conversion of debt into equity represents a massive intervention in the financial rights of a creditor. Since the creditors are, in principle, to be treated preferentially compared to the owners of the insurance undertaking as bearers of the entrepreneurial risk, the existing equity capital must be completely reduced prior to the conversion so that the owners lose their rights (art. 52*d* para. 3 lit. a D-ISA). In addition, any so-called risk-absorbing capital instruments (the spectrum of these instruments ranges from non-convertible hybrid capital to convertible bonds) (*cf.* art. 22*a* ISO) must be converted or completely reduced before any debt capital is converted into equity rights (art. 52*d* para. 3 lit. b D-ISA).

Excluded from conversion or claim reduction are: i) secured claims or claims that may be set off (art. 52*d* para. 2 lit. a D-ISA), ii) certain debt incurred by the insurance undertaking with the approval of FINMA during a period of safeguarding measures (art. 52*d* para. 2 lit. b D-ISA) and iii) claims based on insurance contracts for which the tied asset requirement within the meaning of art. 17 ISA if the tied assets are sufficient to cover the claims (art. 52d para. 2 lit. c D-ISA; it is different if the tied assets are insufficient).

The following **waterfall** applies to the conversion of debt into equity, in line with the order that applies in a bankruptcy of an insurance undertaking (art. 52*d* para. 4 D-ISA):

Converted first	**1**	Subordinated claims (art. 52*d* para. 4 lit. a D-ISA)
	2	Class 3 claims within the meaning of art. 219 para. 4 DEBA (art. 52*d* para. 4 lit. b D-ISA)
	3	Claims based on insurance contracts for which no tied asset requirement within the meaning of art. 17 ISA applies (art. 52*d* para. 4 lit. c D-ISA)
	4	Class 2 claims within the meaning of art. 219 para. 4 DEBA (art. 52*d* para. 4 lit. d D-ISA)
	5	Class 1 claims within the meaning of art. 219 para. 4 DEBA (art. 52*d* para. 4 lit. e D-ISA)
Converted last	**6**	Claims based on insurance contracts for which the tied asset requirement within the meaning of art. 17 ISA applies but only if the tied assets are insufficient to cover the claims – up to the full amount of the required tied assets (art. 52*d* para. 4 lit. f D-ISA)

Interestingly, the **claims of employees** (see 5 above) are converted prior to the claims based on insurance contracts for which the tied asset requirement within the meaning of art. 17 ISA applies but only if the tied assets are insufficient to cover the claims (see above 6). Such priority for the protection of the insured over the interests of the employees is unexpected and appears to be a novelty (in contrast to the restructuring of banks, where employee claims may not be converted at all; *cf.* art. 49 lit. a of the FINMA Banking Insolvency Ordinance).

FINMA may initiate **restructuring proceedings** if there is a reasoned prospect of restructuring the insurance undertaking or of continuing to provide individual insurance services (art. 52*a* para. 1 D-ISA). In doing so, it may appoint a person to draw up and implement a restructuring plan (restructuring officer) (art. 52*a* para. 3 D-ISA). The restructuring plan describes how the risk of insolvency of the insurance undertaking will be eliminated and which measures will be ordered for such a purpose (art. 52*b* para. 1 D-ISA). **The restructuring plan requires an approval by FINMA** (art. 52*j* para. 1 D-ISA). A key criterion for FINMA to approve a restructuring plan is the principle that no creditor may be placed in a worse position than in the event of an immediate bankruptcy. All measures envisaged in the context of a restructuring must comply with the **no-creditor-worse-off-than-in-liquidation-principle** (art. 52*j* para. 1 lit. c D-ISA; dispatch-ISA, p. 9029). We would expect that making such a comparative assessment may be challenging in practice and FINMA will have a relatively broad discretion in its decision.

The consent to the restructuring plan of the owners of the insurance undertaking is not required (art. 52*j* para. 2 D-ISA). However, **the consent of the creditors (not only the insured) is required if the restructuring plan affects their rights** (art. 52*k* para. 1 D-ISA). If at least half of the known creditors reject the restructuring plan (whether voting rights are determined by individual votes (*Kopfstimmrecht*) or by the amount of capital is unclear; in the scope of application of the DEBA, the voting right in the creditors' meeting (Art. 235 DEBA) is determined by individual voting), FINMA orders bankruptcy (art. 52*k* para. 2 D-ISA).

Reliefs and Exemptions from Insurance Regulation/Supervision

Insurance for Professional Insured (Art. 30*a*–30*c* 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 (art. 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 (art. 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 cli-ents). Upon request, FINMA grants those insurance undertakings (in general or for their business with professional clients) an exemption from the following obligations and requirements (art. 30*a* para. 1 D-ISA) (subject to certain limitations under art. 30*a* para. 4 D-ISA):

– Obligation to hold a so called organizational fund (*Organisationfonds*) (art. 10 ISA).

– Tied asset requirement (art. 17–20 ISA; art. 54*a*^{bis} D-ISA).

– Different adjustment of various categories of insurance agreements in the restructuring procedure (art. 52*e* para. 2 D-ISA).

– Obligation to affiliate with an ombudsman's office (art. 82–82*i* D-ISA).

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

The following entities are deemed to be professional insured: i) financial intermediaries within the meaning of the Federal Banking Act (BankA) and the Federal Act on Collective Investment Schemes; ii) insurance undertakings within 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 (art. 30*a* para. 2 D-ISA with reference to art. 98*a* lit. b–f of the amended Federal Insurance Contract Act that comes into force on 1 January 2022 (Amended ICA)). In contrast, pension funds and large companies within the meaning of art. 98*a* 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 (art. 30*a* para. 3 D-ISA).

Captives (art. 30*d* D-ISA)

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

– Obligation to hold an organizational fund (art. 10 ISA; art. 15 para. 1 lit. d D-ISA).

– Obligation to join the National Insurance Office and the National Guarantee Fund (art. 13 ISA).

– Tied asset requirement (art. 17–20 ISA; art. 54*a*^{bis} D-ISA).

– Application of various specific provisions for individual insurance classes (art. 32–34 and 36–39 ISA).

– Different adjustment of various categories of insurance agreements in the restructuring procedure (art. 52*e* para. 2 D-ISA).

– Additional safeguarding measures for foreign insurance undertakings (art. 57–59 ISA).

– Obligation to affiliate with an ombudsman's office (art. 82–82*i* D-ISA).

– Provision on the transfer of an insurance portfolio under art. 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 their business (art. 30*d* para. 3 D-ISA).

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 (art. 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 (art. 2 para. 3 PD-ISA). In the consultation procedure, the introduction of this exemption was generally well received. However, the generic wording of the requirements for the exemption was heavily criticised 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 (art. 2 para. 5 lit. b D-ISA), by way of introducing a regulation in the ordinance (in ISO). Pursuant to the wording of the draft provision, the exemption shall serve the purpose of safeguarding the future viability of the Swiss financial centre. The Swiss Federal Council may introduce conditions for the granting of exemptions, such as domicile in Switzerland, guarantees (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.

Further Exemptions from Insurance Supervision

SERV/ECA: While the **Swiss Export Risk Insurance** (SERV) is exempted from the scope of application of ISA (art. 2 para. 2 lit. b ISA), there is currently no such exemption for **foreign Export Credit Agencies** (ECA) that insure Swiss exporters in relation to 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 (art. 2 para. 2 lit. b^{bis} D-ISA).

Associations (*Vereine*), organisations (*Verbände*), cooperatives (*Genossenschaften*) and foundations: Associations, organisations, cooperatives and foundations that offer and enter into security arrangements, including 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 (art. 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 mobile phone). D-ISA expressly excludes insurance intermediaries providing annex insurance of minor importance from its scope of application (art. 2 para. 2 lit. f D-ISA). The Swiss Federal Council will define the criteria by ordinance (art. 2 para. 4 lit. c D-ISA). This exclusion from the scope of application (that is well known under the Insurance Distribu-tion Directive (IDD) in the EU/EEA regulation 2016/97 is sensible.

New Rules regarding the Sale of Insurance Products with Investment Characteristics (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 characteristics 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 art. 39*a* D-ISA), including, *e.g.*:

– An insurance undertaking offering qualified life insurance products must prepare a **key information document** (KID) in advance (art. 39*b* para. 1 D-ISA, see further Art. 39*c*–39*h* D-ISA) (see the similar regulation for financial intermediaries in art. 58 et seqq. FinSA). The Swiss Federal Council may issue supplementary provisions (art. 39*f* 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*) (art. 39*i* D-ISA) (see regulation to financial service providers in art. 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 (art. 39*j* D-ISA; cf. appropriateness assessment in art. 11 FinSA).

– An insurance undertaking and insurance intermediary must document what qualified life insurance contract has been concluded, what knowledge and background infor-mation about the insured has been gathered, that no appropriateness assessment has been carried out based on art. 39*j* 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 (art. 39*k* D-ISA; cf. art. 15 and 16 FinSA).

– Furthermore, 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 (art. 45 D-ISA, see current regulation in art. 45 ISA).

– The **regulation of compensation** of insurance undertakings and third parties for non-tied insurance intermediaries (art. 45*b* D-ISA; cf. art. 26 FinSA; see below).

For a more detailed discussion, see 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*.

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 art. 43 para. 1 ISA for tied and art. 183 ISO for non-tied insurance intermediaries). **Under D-ISA the definitions will be implemented into the law in art. 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 (art. 44 para. 1 lit. b D-ISA) taking into account that a non-tied in-surance intermediary stands in a fiduciary relationship to the insured (art. 40 para. 2 D-ISA).

Non-tied insurance intermediaries must register with the register of insurance intermediaries (art. 41 para. 1 D-ISA). Tied insurance intermediaries do not need to provide their details to 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 reg-ister in Switzerland (art. 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 (art. 41 para. 2 lit. b D-ISA; cf. art. 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 (art. 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 specific cases, however, FINMA may grant exceptions (Art. 41 para. 5 D-ISA).

D-ISA introduces **new rules regarding the disclosure of compensation** and waiver requirements for **non-tied insurance intermediaries** (art. 45*b* D-ISA). A distinction is made between two types of arrangements: i) If a non-tied insurance intermediary re-ceives 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 (art. 45*b* 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 (art. 45*b* para. 2 D-ISA). The latter is similar to the general rule on inducements/ retrocessions for financial service providers (art. 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 policy-holder must be informed of the calculation parameters and the range amounts of the compensation (art. 45*b* para. 3 D-ISA). This, in principle, reflects the case law of the Supreme Court on retrocessions covering asset management in the financial services business. However, it goes further as in the current wording of the provision an express waiver (as opposed to, *e.g.*, a silent waiver) is required (see also art. 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** (art. 43 D-ISA; *cf.* art. 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 (art. 45 D-ISA). Further-more, tied and non-tied insurance intermediaries must avoid conflicts of interest (Art. 45*a* D-ISA and see also art. 14*a* D-ISA). Non-tied insurance intermediaries are required to register with an ombudsman's office (art. 82*c* para. 1 D-ISA).

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

Currently, there is already an ombudsman's office in the field of private and health insurance. From 1 January 2021, financial service providers have also been subject to the obligation to affiliate themselves with an ombudsman's office (art. 77 FinSA). Under D-ISA, in principle, all insurance undertakings and non-tied insurance intermediaries must affiliate with an ombudsman's office (art. 82*c* para. 1 D-ISA). Reinsurance undertakings and captives are exempt from the affiliation requirement (art. 35 and 30*d* 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 (art. 30*a* D-ISA). However, more recently, the EATC of the 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>).

Proposed Amendments of Penal Provisions (art. 86 and 87 D-ISA)

D-ISA shifts the enforcement model away from penal provisions and the threat of mone-tary fines towards supervisory review and enforcement (*cf.* art. 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 Insur-

ance Office and the National Guarantee Fund according to art. 13 ISA), c (late submission of the annual report; art. 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 art. 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) (art. 86 D ISA) (misdemeanours (*Vergehen*) can still be punished by imprisonment of up to three 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.* art. 87 para. 1 lit. b ISA). These reliefs are indeed remarkable and the principle of focusing on supervisory review and enforcement is in our view sensible.

Proposed Amendments regarding Group and Conglomerate Supervision

Systemic risks do not typically arise from the traditional insurance of customer risks but tend to be incurred 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 FINMA approval requirement for business plan amendments regarding changes in the board of directors and senior management, control etc. at group or conglomerate level (art. 71bis para. 1 and art. 79bis para. 1 D-ISA), reporting obligation for all undertakings of the group pursuant to art. 29 FINMASA (art. 71 D-ISA), formal legal basis for solvency requirements in art. 69 and 77 D-ISA, obligation to prepare sta-bilization plans (art. 67 para. 4 and art. 75 para. 4 D-ISA), etc.

Swiss domiciled significant group and conglomerate companies (*wesentliche Gruppen- und Konglomeratsgesellschaften*) (without supervision by FINMA on an individual level) are subject to FINMA's jurisdiction for bankruptcy (art. 71bis and 79bis ISA with reference to art. 53–54*e* ISA). Such jurisdiction will be extended to Swiss domiciled significant 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 (art. 2*a* 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 (art. 2*a* para. 1 D-ISA with reference to art. 51–54*i* D-ISA).

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 (art. 2 para. 1 lit. b no. 2 PD-ISA). This was heavily criticised in the consultation process because the liberal Swiss regime for reinsurance branches has been highly successful in encouraging 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 licence requirements. D-ISA no longer provides for such a licence requirement. However, under D-ISA the Swiss Federal Council has the competence to introduce such a licence requirement (by way of an amendment of the ordinance) to address developments in international standards (art. 2 para. 5 lit. a D-ISA).

The **SST** is the risk-based solvency regime. The regulation on SST has been based on art. 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 (art. 9–9*b* D-ISA). Furthermore, they adjust certain terminology used by 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 (art. 9*c* D-ISA).

Under D-ISA, FINMA may require economically significant Swiss insurance undertakings to prepare a **stabilization plan** (art. 22*a* para. 1 D-ISA) (*cf.* similar requirement for systemically important banks under art. 7 *et seqq.* BankA). In this plan, the insurance undertaking should set out the intended measures to stabilise itself in the event of a crisis to be able to continue its business activities without government support (art. 22*a* 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 link to the insurance activities (art. 11 para. 1 ISA, see art. 11 para. 1 lit. b D-ISA). Further, under ISA FINMA may authorise other business (that do not have an immediate connection to the insurance activities) if such business activities do not jeopardise the interests of the insured. The new provision shall make it clearer that FINMA has to grant such authorization if the requirements are met (art. 11 para. 1 lit. b D-ISA). The Swiss Federal Council shall specify the conditions and details in the ordinance (art. 11 para. 2 D-ISA). In view of the new developments in the insurance industry, including, e.g., the new distribution channels (electronic platforms), specialist consultancy and service provi-sion and parametric (re-)insurance, a more liberal regime would be helpful being under-stood that the equivalency requirements on the international level set 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 (art. 15*a* 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 (art. 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) has to be notified to FINMA (art. 21 para. 3 ISA). **Under D-ISA the reduction as well as an indirect participation in a Swiss domiciled insurance undertaking below the thresholds must be notified to FINMA** (art. 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 (art. 4 para. 2 lit. g ISA and art. 5 para. 1 PD-ISA) and ii) a material change in the outsourcing of functions (art. 4 para. 2 lit. j ISA and art. 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 their regulatory business plan in advance to FINMA to avoid any surprises and to reduce the risk of being 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.

Outlook

D-ISA proposes various amendments to ISA and also includes 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 burdens on the regulated entities rather than bringing 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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