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Allianz Global Corporate & Specialty

# Directors and officers (D&O) insurance insights 2023

The top five risk trends boards of management need to guard against in 2023, according to Allianz Global Corporate & Specialty (AGCS) financial lines experts

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Our customers are as diverse as business can be, ranging from Fortune Global 500 companies to small businesses. Among them are not only the world's largest consumer brands, financial institutions, tech companies, and the global aviation and shipping industry, but also floating windfarms or Hollywood film productions. They all look to AGCS for smart solutions to, and global programs for, their largest and most complex risks in a dynamic, multinational business environment and trust us to deliver an outstanding claims experience.

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# 1. Economic and recession risks

## Inflation, the energy crisis and supply chain issues to bring insolvency-related D&O claims.

**10.7%**

Inflation rate in the euro area in October 2022

At the start of 2022 post-pandemic supply chain bottlenecks, higher energy and transportation costs, and shortages of labor were already contributing to higher inflation. When the war in Ukraine started in February this further fueled global inflationary and supply chain pressures, causing price shocks for a wide range of commodities, including energy, food and construction materials. In June 2022, inflation in the euro area hit its highest annual level since the creation of the euro currency in 1999, jumping to a record 8.6% before hitting 10.7%[1] in October 2022. In the US, consumer price inflation reached 9.1% – a 40-year high[2], while in the UK in May it was also at 9.1%, again a 40-year high, before rising even further to 10.1% in September.[3]

Inflation, the energy crisis and supply chain issues are areas of risk that D&O insurers are monitoring closely, says **David Van den Berghe, Global Head Financial Institutions at AGCS**. One of the most pressing questions is which firms will be able to offset higher wage bills, energy costs and borrowing costs with productivity enhancement. According to Allianz Research, the sectors most at risk of a liquidity and profitability squeeze are construction, transportation, telecoms, machinery and equipment, retail, household equipment, electronics, automotive, and textiles.[4] Overall, insolvencies are expected to increase by +19% in 2023.[5]

The likelihood that a public company will be sued in a securities class action increases when financial performance is poor and a company's share price drops. In such a scenario investors might argue that the company failed to disclose the challenges it was facing to maintain its earnings guidance. "We expect our underwriters to review the capital adequacy, earnings and liquidity of companies diligently," says Van den Berghe. In addition to this potential increase in insolvency-related D&O claims, increasing inflation is likely to influence future D&O claims through larger settlements and higher pre-judgement interest rates. It could also further drive up defense costs, with higher salaries and hourly rates," says **Angela Sivilli, Co-Head of Global Practice Group for Commercial D&O and Financial Institutions Claims at AGCS**. Attorney fees continue to rise with some partners' fees as high as $1,800 per hour, compared with $1,000 just five years ago.[6]

## Growth outlook 2023

Allianz Research expects global growth to slip into negative territory in Q4 of 2022 (-0.1% q/q), followed by a slow recovery at +1.5% in 2023. Eurozone growth is likely to plunge to -0.8% in 2023 due to soaring energy prices and negative confidence effects creating a shock on real disposable incomes and corporate margins. The US will register a -0.7% fall in GDP, mainly due to rapidly tightening monetary and financial conditions, which will significantly cool the housing market.[7]

Macroeconomic scenarios have been adjusted repeatedly over the past months. An important consideration for 2023 is the impact state interventions will have on government budgets and whether credit ratings of government debt will remain stable, concludes **Van den Berghe**. The possibility of sovereign debt rating downgrades looms over firms carrying these assets on their balance sheets. This is another area of concern for underwriters in addition to the volatility on the stock markets which we forecast will remain high in 2023.

## Insolvency indices by region, contribution to yearly change in global insolvency index

*Source: Allianz Research*

# 2. Cyber security struggles

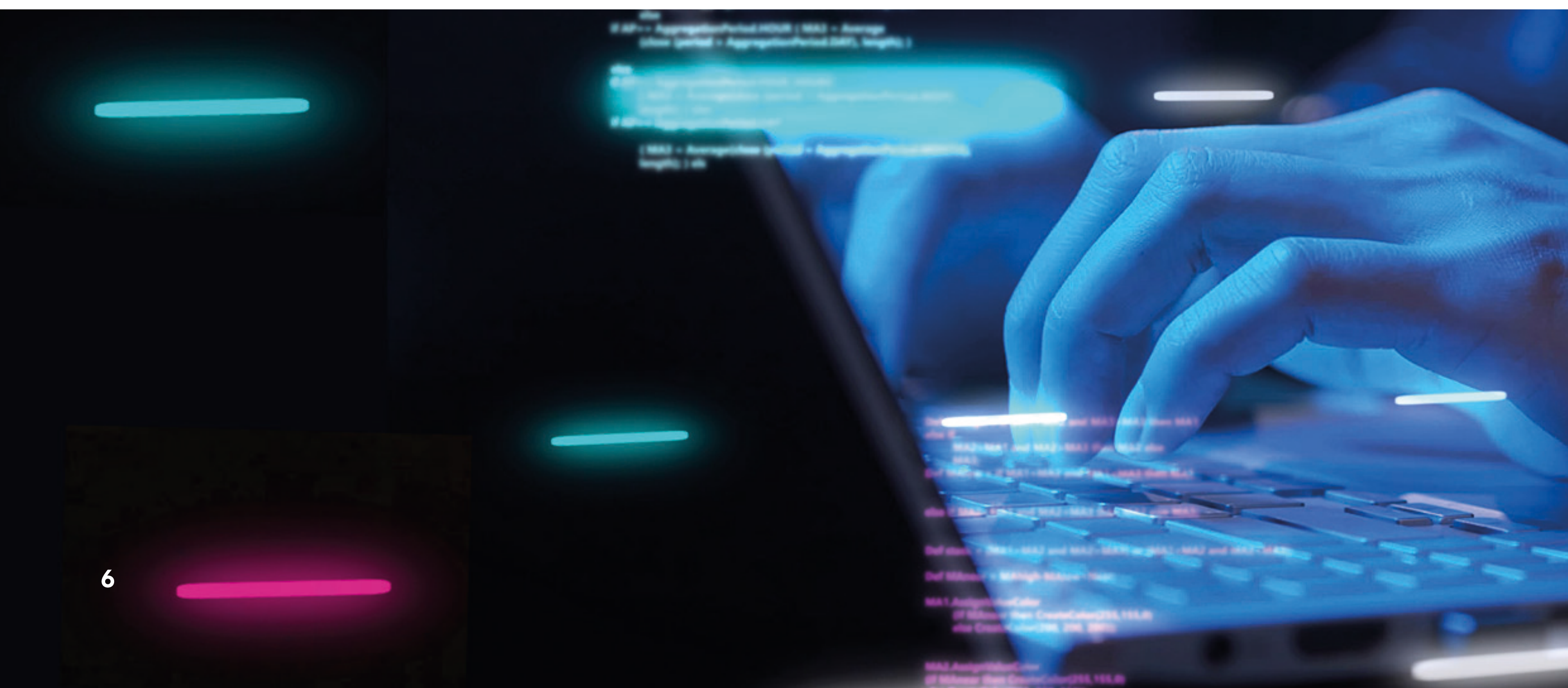
## Increasing scrutiny on what the C-suite is doing is impacting D&Os.

Whether it is a ransomware, supply chain or data breach incident, companies face an evolving landscape of cyber security threats in today's booming digital economy, ensuring the days of cyber risk being regarded as just an issue for IT are firmly in the past.

Today, issues such as data security and information protection are key C-suite concerns, with cyber security resilience increasingly seen as a vital element of any business, given the potential costs and consequences of dealing with a cyber incident together with the expansion of tougher data breach and privacy regulations around the world *(see box)*.

Recent years have seen a dramatic increase in the number of incidents, with the aftermath of events such as data breaches being devastating for the companies affected, including fines, costly breach notification procedures, business interruption and intensely negative publicity.

It is little wonder that investors increasingly view cyber security risk management as a critical component of a company board's risk oversight responsibilities and, being fiduciaries, board members are therefore expected to develop and maintain accountabilities for cyber security before, during, and after any cyber incident. Any activities they undertake can expect to be examined and if they do not ensure that proper cyber and information security, incident escalation, and reporting measures are in place, they may be seen to have failed to fulfil their duties. Around the world, directors have already been called to account, including in derivative and direct litigation, due to their alleged failures to institute appropriate corporate governance to protect against cyber security risk. Moreover, major breaches experienced by publicly traded firms have damaged investor confidence, causing rapid share price drops, and, thereby, becoming "events" which can give rise to costly class action securities litigation.



"Today, board-level executives are not only expected to know what the top cyber security risks to their company are – both in the present and in the future – they are also expected to understand how theft, loss, corruption, or inaccessibility of data and systems can materially impact their business and be the driving force behind addressing and defending against these threats, rather than just responding to them," says **Rishi Baviskar, Global Cyber Experts Leader, Risk Consulting, AGCS**.

## What can be done?

With investors and shareholders ever more interested in taking a closer look at what has been done to limit, as well as reduce, the harm to the organization from the top level, directors and officers must keep on top of cyber security risk exposures and expected trends impacting all relevant stakeholders.

"Cyber security is an enterprise-wide risk management issue and boards need to initiate and implement a cyber risk management structure that covers the entire organization from the top down to third-party vendors, ensuring there is sufficient budget and staff resources to establish such a framework," says **Baviskar**.

It is critical that the board has regular access to cyber security expertise that can help them to better understand the legal (and other) implications of any cyber risks and offer solutions specific to the organization. Having cyber expertise with direct reporting lines to the board is fast becoming essential for many companies while, increasingly, others are also deploying a dedicated executive committee or appointing a board member with a cyber security background.

"Ultimately, strong cyber security is down to the culture of the company and its people," says **Baviskar**. "Directors and executives need to lead by example and ensure that good cyber hygiene such as data privacy and information security trainings are regularly carried out and the company's cyber security processes and policies are understood by staff and all relevant third parties."

### Data regulations to cover 70% of global GDP next year

From the General Data Protection Regulation (GDPR) in Europe to the US Health Insurance Portability and Accountability Act (HIPAA) to critical infrastructure protection, regulations around the world designed to protect against cyber threats, data breach and privacy regulations continue to expand. Through 2023, government regulations requiring organizations to provide consumer privacy rights will cover five billion people worldwide, representing more than 70% of global GDP, up on around three billion people in 2021, according to Gartner.[8]

# 3. ESG disclosures and exposures

## Increasing compliance requirements and the prospect of regulatory or legal action resulting from a range of issues are impacting directors and their insurance policies.

In October 2022, the EU Banking Authority (EBA) published a report on how to incorporate environmental, social, and governance (ESG) risks in the supervision of investment firms[9] – recommendations include setting out foundations for integrating ESG risk-related considerations in the supervisory process.

Identification of ESG factors and risks that could affect the risk profile of a company is a key step – it includes the business model, size, internal organization and the nature, scale and complexity of its services and activities, as well as the materiality of its exposure to ESG risks. While there are current limitations related to data and methodologies in the assessment of ESG risks, the recognition of ESG risks in strategies, governance arrangements and internal processes and incorporating them in assessments of risks to capital and liquidity are now key priorities for institutions today.

The EBA's communication follows that of the US Securities and Exchange Commission (SEC), which, in May 2022[10], proposed new disclosure rules for funds and advisers around ESG information. The proposed amendments seek to categorize certain types of ESG strategies broadly and require funds and advisers to provide more specific disclosures in fund prospectuses, annual reports, and adviser brochures based on the ESG strategies they pursue.

Funds focused on the consideration of environmental factors generally will be required to disclose the greenhouse gas emissions associated with their portfolio investments. Funds claiming to achieve a specific ESG impact will be required to describe this impact and summarize their progress towards it. Funds that use proxy voting or other engagement with issuers as a significant means of implementing their ESG strategy will be required to disclose information regarding their voting of proxies on particular ESG-related voting matters and information concerning their ESG engagement meetings.

## Climate change litigation grows

Globally, the cumulative number of climate change-related litigation cases has more than doubled since 2015. Just over 800 cases were filed between 1986 and 2014, and more than 1,200 cases have been filed in the last eight years.[12] Nearly three quarters were filed before courts in the US but 2021 saw the highest annual number of recorded cases outside the US, with cases identified for the first time in Italy, Denmark and Papua New Guinea, for example.

## Implications and areas of concern for D&Os

"Regulatory action due to ESG-related issues is a major concern for directors – a breach in regulations can trigger a D&O policy, subject to its terms and conditions," explains **Lydia Miller, Global Underwriting and Product Analyst, Financial Lines at AGCS**. "Although criminal fines and penalties are not covered, a policy can cover defense costs until such conduct has been established. Government oversight can pressure boards to ensure businesses are complying with legislation."

In addition to new laws and regulations around the world, companies and their D&Os also face the prospect of increasing litigation from environmental groups, activist investors and even disgruntled employees.

For example, companies which do not comply with international agreements such as the Paris Agreement[11] – a legally-binding international treaty on climate change – may fall foul of activist and investor action *(see box)*. Failure of directors to assess and mitigate the impact of climate change in their business can lead to claims that they have breached their duty of care to the company.

In a similar vein – listed companies misrepresenting ESG credentials or failing to take actions in accordance with climate goals – so-called greenwashing – can also become vulnerable to shareholder suits, potentially resulting in long-term reputational damage for the company, in addition to the cost of regulatory action and litigation.

Finally, a rise in social, diversity and inclusion issues is also being observed. Employees who feel they have been discriminated against or constructively dismissed, particularly during the Covid-19 pandemic, may pursue directors, as well as the company, for damages. Similarly, D&Os who are perceived to have not taken enough action to stamp out discrimination, or are regarded as enabling such a culture to develop, may also find themselves exposed to litigation.

"ESG-related liabilities can potentially become significant exposures for D&O insurance," **Miller** concludes. "The setting of sustainability targets and action carried out to oversee progress towards achieving these goals, steps taken to ensure ESG-related disclosures, recognition of current ESG risks – and the management of them – are increasingly key checkpoints for insurers when it comes to the risk assessment of a company. Companies with strong ESG frameworks and governance will likely find insurers more willing to offer capacity."

## Litigation risk landscape for non-US domiciled companies

Recent years have seen shareholders increasingly seek to avail themselves of US courts to bring derivative actions on behalf of non-US domiciled corporations, potentially pointing to heightened US litigation risk for directors and officers of non-domiciled US companies. The number of core federal filings against non-U.S. issuers in the first half of 2022 (18) is on track to be significantly less than half of 2020's record high of 74.[13] However, this continues to be a highly exposed area, according to **Hannah Tindal, Head of D&O, UK and Nordics at AGCS**.

"Derivative litigation did see some favorable outcomes for non-US domiciled companies in 2021, with the dismissal of two derivative lawsuits filed in New York courts, including one against a large pharmaceutical company," **Tindal** explains. "While these outcomes could alleviate concerns about derivative lawsuits for non-US companies, there are several similar cases still pending and a recent meaningful settlement (of at least $300mn in a derivative lawsuit involving the software company Renren)[14], so the threat of this type of litigation continues."



# 4. US class action securities litigation

### Trends around SPACs, pace of filings, large cases, merger objections, crypto and Covid are evolving.

The number of new filings during the first months of 2022 suggested that this would be a banner year for securities class actions against so-called Special Purpose Acquisition Companies (SPACS). These have enjoyed a surge in popularity in recent years as they represent a faster track to public markets but, at the same time, have also come under increasing regulatory scrutiny. However, new filings significantly dropped by mid-year, with only two filings in Q3 and one in October at the time of writing.

As of the beginning of November, there have been 23 SPAC-related class action filings in 2022, compared with 32 for all of 2021. The reasons for this shift remain unclear. "Given the number of recently-completed SPAC mergers with private companies and the number of SPACS still in search of target companies for acquisition, we may yet see a large number of related class actions ahead," says **David Ackerman, Co-Head of Global Practice Group for Commercial D&O and Financial Institutions Claims at AGCS**. "At the same time, rules recently proposed by the US Securities Exchange Commission around SPAC Initial Public Offering (IPO) disclosures and disclosures in connection with de-SPAC transactions may significantly reduce the future attractiveness of SPACs as a going public model in comparison to traditional IPOs."[15]

Meanwhile, the pace of new US securities class action filings overall slowed during H2 2022 after projections had suggested 2022 might break the run of year-on-year declining rates of new filings begun in 2019. With two months remaining in the year, it appeared that 2022 would continue the downward trend in new filings.[16] The likelihood of a company listed on either the NYSE or NASDAQ stock exchanges being targeted in a securities class action also continues to decrease, projected at approximately 3.3% in 2022 as compared to 4.2% in 2021, 6.3% in 2022, and 8.9% in 2019. This is due not only to the overall decline in new class action filings since 2019 but because of the significant increase in the number of US-listed companies over recent years.[17]

## Large cases dominate losses and merger objection suits persist

While the frequency of new filings may be in decline, the aggregate quantum of damages potentially at issue has skyrocketed. That is not to say that there has been a rise in alleged investor loss valuation for all cases across the board. This year, very large cases have represented a disproportionately higher share of aggregate alleged shareholder losses than the historical averages over the past 20 years. By at least one measure, lawsuits filed against only three communications industry companies account for as much alleged investor loss as the aggregate of all securities class action lawsuits filed in 2021.[18]

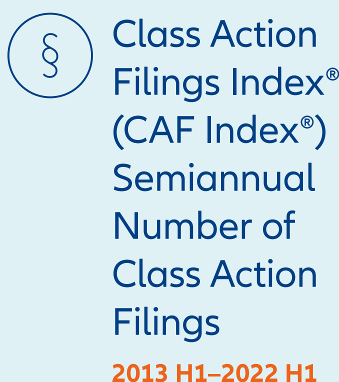
Corporate directors and their insurers will find little comfort seeing that new filings of merger-objection class action litigation have continued the dramatic decline begun three years ago.

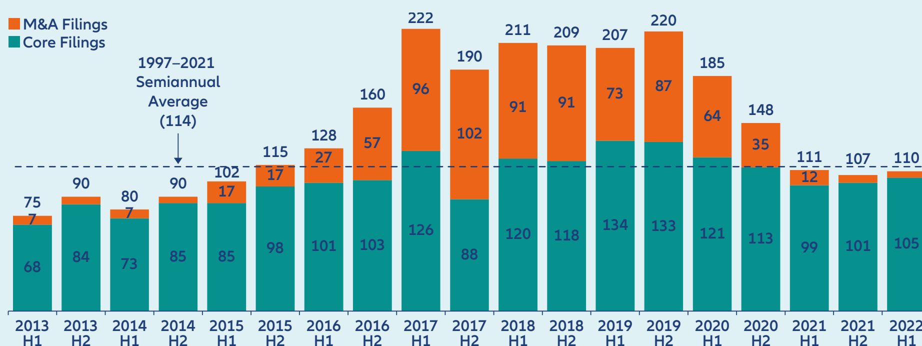
Merger-objection suits persist, now commonly brought as single investor state court actions to avoid scrutiny of federal court judges who have become increasingly resistant to approving terms of settlement, including plaintiffs' attorneys' fees or mootness fees, where plaintiffs themselves have received little if any benefit. Plaintiffs' attorneys filed only one merger-objection suit as a putative class action in federal court this year through June, but new filings on behalf of discrete litigants during the same period raised objections to nearly 90 transactions.[19]

## Watch cryptocurrency and Covid-19 activity

Other trends of note include the increased targeting of cryptocurrency companies (10 suits filed in the first half of 2022 as compared to 11 for all of 2021, 13 in 2020 and four in 2019). This may not be surprising given the recent roiling fluctuations in the valuation of digital currencies, which continued in November 2022 with the sudden collapse of the world's second largest cryptocurrency exchange, FTX – authorities around the world are investigating for potential breaches of securities laws – and the fact that regulatory oversight has increased. From 2016 to 2019, only 8% of cryptocurrency-related cases included allegations concerning cryptocurrency exchanges. Since then 44% of such cases have had these allegations.[20]

In addition, Covid-19 continues to be an incubator for new securities class actions on pace with 2021 (eight suits through H1 2022, compared with 17 new suits in all of 2021).




*Cornerstone Research. 2022. Securities Class Action Filings-2022 Midyear Assessment.*

# 5. Antitrust and competition risks

## Increased enforcement could see more D&O claims.

On July 9, 2021, US President Joe Biden signed an executive order titled "Promoting Competition in the American Economy". This order established the policy of more aggressively enforcing existing antitrust laws to combat excessive concentration in industry.[21] In his speech that day, the President singled out the pharma, tech and agriculture industries. He noted that 40 years ago, the government had pulled back on enforcing antitrust laws, and concluded that this "experiment" had resulted in less growth, weakened investments and fewer small businesses.[22] Shortly afterwards, experienced antitrust lawyer, Jonathan Kanter, was appointed as Assistant Attorney General for the Antitrust Division at the Department of Justice (DOJ).[23]

Since that announcement, the Food and Drug Administration (FDA) has approved the sale of over-the-counter hearing aids, while the Federal Trade Commission (FTC) has pushed companies to make it easier to fix their own products. In line with this new policy, the DOJ recently won a civil antitrust lawsuit, seeking to stop publisher Penguin Random House's proposed $2.2bn acquisition of rival Simon & Schuster.[24]

The DOJ has also brought, and won, criminal cases under the Sherman Antitrust Act for monopolizing, or attempting to monopolize, markets,[25] such as one which saw a construction company president pleading guilty to proposing dividing up highway repairs by region with a competitor. It also forced the resignation of directors from the boards of five companies due to alleged violations of Section 8 of the Clayton Act (which prohibits interlocking directorates – when competing corporations are represented on each other's boards).[26]

This aggressive enforcement is expected to continue. In a September 2022 speech Kanter said: "We will litigate more merger trials this year than in any fiscal year on record… We have indicated 20 criminal cases since November (2021), more than any time since the 1980s. We ended FY 2021 with 146 pending grand jury investigations, the most in 30 years."[27]

### 'Follow on' claims and potential D&O liability

"This new aggressiveness by the DOJ may lead to an increasing number of D&O claims," says **Angela Sivilli, Co-Head of Global Practice Group for Commercial D&O and Financial Institutions Claims at AGCS**. "Firstly, antitrust enforcement actions can lead to 'follow on' civil D&O claims, both against companies and against individual directors and officers." For example, in the initial *Lina Arslanian v Allergan PLC*[28] securities lawsuit, which followed antitrust authorities investigating a number of companies in the drug industry for suspected price collusion, plaintiffs alleged that "Defendants made false or misleading statements and/or failed to disclose that: (1) Allergan and Actavis *(a predecessor company)* were engaging and/or had engaged in conduct that would result in an antitrust investigation by the US DOJ; (2) the DOJ investigation and the underlying conduct could cause US prosecutors to file criminal charges against Allergan and Actavis by the end of 2016 for suspected price collusion; (3) in turn, Allergan and Actavis lacked effective internal controls; and (4) as a result, Allergan PLC's and Actavis PLC's public statements were materially false and misleading at all relevant times."

FY 2021 ended with 146 pending grand jury investigations, the most in 30 years

"While antitrust enforcement actions would not typically trigger entity coverage under a D&O insurance policy, as they are not securities claims, such a 'follow on' action may well trigger coverage in the absence of an antitrust exclusion," **Sivilli** explains.

In addition, individual directors and officers may be liable under the antitrust laws, corporate law or federal securities laws. There is both criminal and civil liability under the antitrust laws for any individual who "formulated, negotiated, authorized, directed, or executed policies or agreements that constituted steps in an antitrust violation."[29] General corporate law will impose liability for individuals who were either "aware of the violations or who failed to make good faith efforts to oversee material risks and compliance with applicable laws."[30] Finally, of course, individual directors and officers may be liable for any misrepresentations or omissions relating to the risk of antitrust enforcement activity.

"In the absence of an antitrust exclusion, D&O policies may be triggered to defend claims against the individual directors and officers. While most policies have criminal conduct exclusions, those exclusions do not typically go into effect in the absence of a final adjudication, and of course will not apply to civil claims arising out of antitrust enforcement actions," **Sivilli** concludes.

# Market dynamics the state of the D&O insurance sector

Billions of dollars of premiums are collected annually for D&O insurance, but the profitability of the sector has suffered in recent years, which has led to hard market conditions driven by higher premiums, tighter terms and selective deployment of capacity for both primary and excess layers. Global insurance pricing for D&O recorded double-digit increases in all key markets in 2021, according to third party data, but has begun to stabilize in 2022 with rate softening and declining premiums during a year of continued market improvement.

The reduced number of filed securities class actions, coupled with an influx of new market entrants in this space, has created a favorable market environment for public and private D&O buyers. Buyers are seeing more competitive conditions fueled by significant capacity in excess layers and a slowdown in IPO and M&A activity creating a lack of new business opportunities.

## Market risk factors

However, there is still a lot of risk facing insurers as macroeconomic issues and a potential economic slowdown loom, conditions which typically lead to an uptick in D&O claims. In addition, several other trends continue to affect the market outlook, such as social inflation, global supply chain disruptions, rising interest rates, "event-driven" securities class action litigation, as well as C-suite accountability for environmental, social, and governance (ESG) and cyber exposures. Increasing inflation is also likely to influence future D&O claims through larger settlements.

Softening conditions are prompting more discussions around these trends *(see box)* as the insurance market looks to anticipate the impact of any potential increase in loss activity.

"More than ever, carriers will look to differentiate themselves from the competition by adding value through consistent messaging and appetite, superior products, market visibility with key trading partners and best-in-class underwriting talent," says **Katie Fioretti, Global Head of Management Liability Commercial, AGCS.**

### Three to watch

**Economic uncertainty:** Global supply chain disruptions, rising interest rates, the war in Ukraine, rising labor costs, trade conflicts, the Covid-19 pandemic and growing consumer/energy prices have all resulted in soaring inflation with rates running at or around 10% in many countries around the world. Combined, these increase the likelihood of a global recession, which has D&O carriers concerned about potential insolvencies and litigation costs.

**ESG:** Companies continue to see pressure around ESG issues as regulations are implemented around the world. Failure to disclose and lack of implementation could potentially lead to increased litigation for carriers as organizations navigate company policies to lessen their environmental impact surrounding greenhouse emissions and exposures.

**Supply chain disruptions:** Businesses are faced with labor shortages and supply chain interruptions as they try and recover from the impact of Covid-19, again raising the prospect of potential insolvencies. With Chapter 11 (company reorganization) filings in the US on the rise, insurers are closely monitoring if this trend will continue in 2023 as these factors and inflation continue to impact profitability.

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