Start-up governance in Switzerland: practical guidelines for founders and board members

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SWISS INSTITUTE OF DIRECTORS

STARTUP Board Academy

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Steering a start-up is like driving a racecar. Legally speaking, the board of directors is in the driver's seat. With the right crew as board members and management team, working together smoothly, you will significantly increase your chances of crossing the finish line. Enjoy the ride!

The "Board of Directors"- a term that conjures up the image of a group of middle-aged men (still, unfortunately, mostly men) gathered in a glass-paneled boardroom discussing dividend distributions of a listed company. However, the vast majority of boards of directors are in charge of small and medium-sized enterprises (SME), which represent 99% of the companies in Switzerland (90% have fewer than 10 employees). More than 100'000 companies in Switzerland are limited companies (AG, SA) and hence have a board of directors (later board), even if composed only of a single director. About 5'000 new limited companies are created each year, with the same number of boards that need to be set-up. Among these new companies, we will focus on start-ups in this article (more than 300 new start-ups are founded in Switzerland per year). We define start-ups as technology or science-based companies with a focus on innovation and with a scalable business model targeting an international market. While many of the principles below are fully applicable to other SMEs, start-up companies face specific challenges regarding governance (see Box 2).

A vast and untapped opportunity

The potential of the board to help a start-up increase its chance of success and minimize its risk of failure is often overlooked and untapped. The board is a powerful tool, so powerful that it can make or break a start-up. A well-functioning and robust board can attract investors, add financial and strategic value, save time and money, facilitate decision processes, help avoid common pitfalls and identify risks early on, and bring a new or holistic view to the company. On the other hand, the destructive potential of a malfunctioning board is common knowledge (see Uber, Theranos, SoFi, or Zenefits). Board members, therefore, may add a lot of value to a start-up (or do a lot of harm) and thus have a great responsibility. For start-up founders, the main challenge is to assemble the right board at the right time.

Trickier than it seems

Some directors-to-be think that joining the board of a start-up will be a smooth ride where they can gather experience before joining a larger board; they should think twice. The same laws apply to start-ups as they do for much larger companies, from day one of incorporation. There is no special treatment of start-ups, which means the same legal expectations, complexities, and liabilities apply. In Switzerland, the board is responsible for nothing less than the overall direction and control of the company ("Oberleitung", "Haute direction") if not properly delegated (see below). Directors are therefore more in charge than they may think. Moreover, one could see a start-up as a miniature and accelerated version of a larger company: it is like driving a Formula 1 racecar while a larger company is like a family van. If you are thinking of gaining your first experience in a start-up, consider whether you would learn to drive on an F1. Director in a start-up is a complex, technical, formal, and hands-on duty; one should not be ensnared by the "hype" and "coolness" of the ecosystem.

As an entrepreneur, you may want to think carefully about whom you wish to have on your board as you cannot afford to have a dysfunctional board, given the many challenges you have to overcome. Hence, you are well-advised to carefully select potential candidates and have an open dialogue to align expectations.

Box 1: The ten commandments of start-up governance

1. Select a board adapted to the phase and goals of your start-up
2. Pick the right individuals
3. Pick the right mix of individuals
4. Educate even "experienced" board members in start-up governance
5. Agree on the role of the board of directors
6. Avoid, mitigate, and manage conflicts of interest
7. Formalize the delegation to management and the governance principles
8. Build the team spirit during a peaceful time
9. Run effective and efficient board meetings
10. Manage and mitigate your liabilities

Objectives of these guidelines

We are offering guidance to ensure that boards are optimized so that they can realize their potential to fully benefit the start-up. In no way do we want to frighten founders or future board members. Rather, we aim to avoid misconceptions and false expectations, and to increase awareness of the challenges, so that everyone can fulfil their mandate successfully and to enjoy the experience. In the first part, we will address how founders can recruit the most suitable board and board members. Then, we will describe how the board (among which will often be one or more of the founders) can best operate. The article is summarized in ten rules of effective startup governance (see Box 1).

Box 2: Specificities and challenges of start-ups

While start-ups have to follow the same rules as any other larger companies, they evolve in a specific environment and face additional challenges that impact governance:

People wear many hats: there are many stakeholders in a start-up, and they often have many roles at the same time, such as founder, inventor, shareholder, part of the management team, and member of the board. This may lead to all sorts of conflicts of interest and requires very clear organizational rules. This can also represent a mental burden, notably for the founders for whom it may be challenging to switch hats constantly.

Emotions are involved: stakeholders are usually heavily involved emotionally in the start-up because it is their baby/idea, they have invested time and energy (often without being paid), they have taken risks (e.g. quit their jobs) or invested their own money or their employer's money. This will impact decision making and relationships.

Changes happen at high-speed, and crises are frequent: the environment and situation of the start-up evolve very quickly: decisions have to be taken frequently and quickly, with a high impact on the company. Major events with significant consequences to current strategy are frequent and unpredictable (e.g. funding, R&D results, partnerships). A team that can react quickly and is prepared and works well under pressure is essential.

Independence of the board is difficult to achieve: founders and early investors are very influential at the beginning and constitute the majority or the totality of the board. Depending on their experience and their agenda, they can have a positive or negative influence (be it intentional or not) on the company. Investor "representatives" may be forced to make decisions that are good for the company but less so for their employer, putting them in a tricky situation.

Start-ups operate with very few people, which means that a single person can make a big difference if they do not work well or leave. There is an important HR role of the board to mitigate the pressure on the CEO: setting and controlling KPIs and incentives of the CEO and planning for the potential succession of key management positions.

Many are first-timers: founders usually have, because of lack of experience, a poor understanding of governance, and of the role and impact of a good board of directors (start-up is even often their first professional experience). Some board members could have limited expertise and experience in governance or the ecosystem as well, which tends to happen in brand new technical areas (new biotech fields, new technical fields like AI or blockchain).

Guidelines for founders

1. Select a board adapted to the phase and goals of your start-up

The role of the board is to steer your company in the right direction. But which direction? This has to be clearly defined by the shareholders of the company - usually the founders - from the very beginning. Everyone needs to be aligned with the purpose of the company. Initial shareholders should clarify their "why," their reason for the start-up. What is their personal motivation? Is it money, fame, freedom, changing or saving the world, gathering new experience, love for the technology, securing a job? What should the future look like: an exit, trade sales, a sustainable friends and family business, a non-profit venture? Alignment among founders needs to be particularly strong because investors for whom the money comes first will soon challenge it. Founders can formally document goals and objectives in an owner strategy document ("Eigentümerstrategie", "stratégie du propriétaire"), which may be useful particularly once external shareholders join. If not documented formally (which is often the case), founders should at least discuss these issues. Board members need to be aware of the owner's strategy in order to best fulfil their mandates. Indeed, it will drive the choice of board members: you will not recruit the same people if you are looking for a rapid exit or if you want to save the world.

2. Pick the right individuals

There is, of course, no straightforward definition of what constitutes a "good" (often described as "experienced") board member. We favor the following: the right person at the right moment. Hiring a board member should be a structured process, just like any job recruitment. Think twice before offering a board seat to someone in your immediate network without careful consideration. On the other side, potential board members should also perform careful due diligence before joining your start-up (see Box 3).

You should expect the following from a future board member:

- An appropriate level of engagement: neither too hands-off nor wanting to be too deeply involved in the day-to-day business. The board member should take the mandate seriously without being domineering.
- Sufficient time available: while what is sufficient greatly varies depending on the start-up, the circumstances (crisis versus good weather), and the qualifications of the board members, availability of approximately 20% of the time per board mandate would be reasonable.
- Social skills: the board member should be able to work well with others and have their ego in check.
- Professionalism associated with pragmatism: the board is a serious and complex mandate that requires a high level of

formality, which should, however, not become an end in itself. A healthy dose of pragmatism is key.

– Experience in boards of directors with a successful track record, in particular regarding start-up boards: note that having been on 20 boards may provide experience but not necessarily expertise (a mandate itself says nothing about performance).
– Avoid board members with mandates in too many boards at the same time. This can prove to be a significant challenge, in particular in times of crisis like the recent coronavirus crisis.
– Good knowledge of the local rules: while general principles are usually the same, some important governance rules are country-specific and cannot merely be copy-pasted from other countries.
– As independent as possible with limited (or manageable) conflicts of interest: the more independent a board member (even if not formally "independent" as defined below), the easier it will be for them to make the best decisions for the company.
– Relevant network: note that while a board member can and should open doors, this is a nice-to-have rather than their primary role, which is to direct and control the company. There are other ways to have people open doors, e.g. by contracting well-connected individuals as business development consultants.
– Ready to step down when no longer adding significant value. This requires self-awareness and humility. The appointment should be finite in duration with processes for review, re-appointment, and recruitment well defined. Remember that once someone is on the board, it may be delicate to have them leave. For board members that you do not get to select yourself (e.g. investor representatives), education is key (see below).
– Good personal match: founders and potential board members should have coffee together, more than once. And the founders should ask themselves: are we willing to take their advice?

3. Pick the right mix of individuals

As it is the case for any team, a well-performing board is the result of both individual and team performance, which depends on the right mix and collaboration. The right mix is a good balance of expertise, experience, interests, level of seniority, diversity, and independence. Drafting a matrix (see Table 1) will give you an overview and help you identify the gaps to recruit accordingly.

The ideal number of board members is not cast in stone. You do not want so many that someone can shirk their duty, but enough to have all the necessary expertise available. Usually, this means three people before the first round(s) of financing, then around five. Whereas decisions are usually taken unanimously without a formal vote in a well-functioning board, an uneven number may help avoid any blockage in a sticky situation. In case of an even number, the chairperson could be given a casting vote, but it is usually not ideal to have different voting rights because of the dynamic it can cause. Note that if you have to count votes in a board regularly, it may be a sign of dysfunction, and you may consider making some changes.

The minimal expertise to be represented includes technological knowledge (often by the founders), sector knowledge, sales and marketing, finance (There is no need for a CFO in the early phase, but you need someone with solid knowledge. All board members need to have fundamental financial knowledge, however.), and governance expertise (in particular regarding start-ups). Other areas of expertise that will be needed in the long run would also be helpful, providing an early sensitivity for topics such as communication, legal, human resources, compliance, audit and control, M&A, or exit strategies. Obviously, not all competencies can or must be represented in the board at all times, and timing is the determining factor. Missing expertise can be found elsewhere, in the advisory board, management, through an advisor to the board, or through contracted third parties, etc. Often this is the preferred path. In summary, you do not have to onboard a new member every time you need new expertise (e.g. regulatory, legal), but you may need to for critical steps for the company (e.g. preparing the exit). Therefore, it is very important that boards review the composition, skills, and expertise of all governing bodies (board, management, advisory boards, etc.) to ensure that they are appropriate for the stage of development.

Table 1: Competence and diversity matrix

This is an oversimplified example: categories should be adapted to the start-up and the field of activity.

	Key expertise				Governance		Diversity	
	Technical	Sectorial	Financial	Leadership	Experience as a board member	Training in governance	Man/Woman	Age
Board member 1	X						W	45
Board member 2	X		X				M	52
Board member 3		X			X		W	35
Board member n			X	X	X	X	M	62

4. Educate even "experienced" board members in start-up governance

Serving in a start-up board is a specific task that is positively influenced by expertise and experience. Like any other specific role, it has to be learned. While previous roles in larger companies can bring a lot of similar and transferable knowledge, most board members will benefit from some formal training. Awareness of "blind spots" and the humility to address them is a key asset in future board members. In training focused on start-up governance, "experienced" board members are educated on the (local) specificities of start-up governance (including legal duties) while founders are trained on governance fundamentals.

Box 3: Do I really want to become a board member of this start-up?

When you are about to make a major purchase (car, house), you probably do your homework and some kind of due diligence. Why abstain from proper due diligence when asked to join a board – a decision that could impact both your finances and reputation? Review documents and spend time interviewing people. First, discuss with the CEO to make sure they have understood the role of the board and are ready to use this resource and listen to the board to make better strategic decisions (and they do not just see it as a formal body to please investors). Talk to external advisors as well to get their view on the company and ecosystem and to identify whether there may be any significant issues.

You can and must ask questions before you join (you may have to sign an NDA). See how easy it is to obtain information and documents and how the founders react to advice you give; it will show you what it may be like as a board member in the future.

Minimal due diligence

– Review key documents: all shareholder agreements, organizational rules, articles of association
– Review minutes of the previous board and AGM
– Obtain vital financial documents (last financial statements)
– Meet key management team members
– Meet key customers (when applicable)
– Get familiarized with the product (and production facilities when applicable)
– Get to know your future fellow board members
– Clarify who owns the company and what the owner strategy is
– Finally, think about your situation: do I have the expected competence and time, is this mandate compatible with my personal, professional, or academic reputation?

Guidelines for board members

5. Agree on the role of the board of directors

The main task of the board is nothing less than the overall direction and control of the company (unless duly delegated, see below). It is thus nothing like the old-fashioned image of a group of elderly corporate executives having the red carpet rolled out for them, with the board seat as an honorific title. The formal duties of the board are described in Art. 716 CO (see Box 4). If management is properly delegated, the board should focus, in theory, on providing the strategic direction while the management team is responsible for the business strategy and all operational aspects. In real life, the difference between strategic and operational matters is not always clear in a start-up, and the board often has to adopt a hands-on attitude. It is not so much what is or what is not a board matter; it is about the impact that a given topic has on the survival and the direction of the company. To give an exaggerated example, the Christmas party is typically not a board matter at all. But what if the management team were to organize a Christmas party for 50 K while the cash in the bank is 100K?

Fig.1: Roles and interactions of start-up stakeholders

The shareholders

- Set the company purpose
- Elect and remove directors and auditors
- Decide about increases in capital and (usually) the entry of new investors
- Approve fundamental structural or financial changes to the company such as a merger or liquidation

Elect the board members ⇩⇧ Reports to the shareholders

The board of directors

- Provides strategic directions
- Controls the company
- Ensures that financials are in line with the strategy
- Protects the company's interests

Hires and fires the CEO
Delegates management ⇩⇧ Reports to the board

The top management team

- Develops business strategy in line with the strategic directions provided by the board
- Executes the company's strategy
- Informs the board pro-actively of any critical risk and opportunity
- Hires the staff

Board members have a unique role in that they need to place themselves at a distance, and the board is not a problem-solving resource for issues that should be dealt with by management. Being a start-up CEO can be a quite lonely job and they might be tempted to get some "operational back-up" from the board, raising issues that a board is not required to decide upon, causing meaningless debates. On the other hand, the board should refrain from micro-management. The management should not get the signal that they are micro-managed, babysat and that they do not need to take or own decisions, or that they have a safety net. The board should therefore find the right balance between relying too heavily on management and being overbearing or micromanaging.

Box 4: The duties of the board of directors

In accordance with the law, the board of directors has seven non-transferable, inalienable duties (Article 716 of the Swiss Code of Obligations):

- The board of directors is the company's senior management body which issues the necessary directives
- The board of directors determines the organization of the company
- The board of directors is responsible for the organization of the accounts, financial audits and financial planning
- The board of directors is responsible for appointing and dismissing the management and drafting representation reports
- The board of directors supervises the management of the company in compliance with the laws, articles of association, regulations and directives
- The board of directors is responsible for the drafting of management reports, the preparation of the general meeting and the application of its decisions
- In the event of over-indebtedness or insolvency of the company, the board of directors will refer the matter to the courts.

Source: kmu.admin.ch

6. Avoid, mitigate, and manage conflicts of interest

The responsibility of board members is to do what is best for the company, not for themselves or for the company they represent. Conflicts of interest are almost inevitable in a start-up board, mainly because of its composition, with founders (who are often shareholders as well) and, in many cases, investor representatives. Even independent board members may have some conflicts of interest because of their activities in the field, their investments, or their involvement in other companies. Conflicts of interest do not have negative consequences per se, but they need to be balanced and declared. Management and board members should openly address their conflicts of interest and step out of discussions and avoid influencing decisions when needed. The chairperson could ask, at the start of all board meetings, if there are any material changes to conflicts of interest or any specific conflict of interest related to the agenda.

7. Formalize the delegation to management & the governance principles

As outlined above, the board of directors is responsible for the overall direction of the company but is allowed to delegate the day-to-day management. Delegation is standard practice, but strictly speaking, should only be done once management is in place and fully reliable. There are three cumulative conditions for management to be formally delegated:

- Delegation must be possible according to articles of association
- Delegation must be formalized in organizational rules
- Delegation must be documented as a board decision

It is important to formalize the processes and document all discussions and decisions. Organize your board and board meetings professionally from the start. Yes, this may take some time and effort at the beginning – and you may think it is not fully adapted to a company just starting – but it is a worthwhile investment in the future. And you are here to stay, aren't you?

While processes need to be professional, they have to remain pragmatic and adapted to the phase of the start-up (large company governance principles and documents may not be applicable 1:1 to a start-up). The minimal processes and documents to be formalized include:

- Articles of association
- Organizational rules
- Shareholder agreement
- Minutes of the board and annual general meetings
- Optionally: ownership strategy, founders' agreement, etc.

You may also want to make all documents available to all appropriate stakeholders using a data room.

8. Build the team spirit during a peaceful time

Running a start-up is a difficult and sometimes highly emotional endeavor with many ups and downs: crises will likely happen within the board as well as between the board, management, and shareholders. You, therefore, have to prepare, and it is much easier to prepare when things are calm than in stormy weather. Ensure fluid communication between the board, the management team, and shareholders and document it. This will prevent inadequate and unnecessary finger-pointing when pressure rises. Get to know each other; you do not have to organize team-building activities such as river rafting, but you can start by having coffee with other board members or organizing field visits of the boards (e.g. to the company, the production facilities, or one key customer). Get to know the CEO and the management team as well: being CEO is a lonely job, and it will be invaluable to have a board that knows the challenges of the CEO and is able to ask "how are you doing?" with genuine care over a cup of coffee.

9. Run effective and efficient board meetings

Efficiency and effectiveness in board meetings are not only positive for the outcome of the meetings themselves but also to keep board members engaged. Keep in mind three principles to maximize the board meetings: preparation, focus, and off-line discussions.

Prepare for the meeting

For this, the chairperson should be aligned with the CEO and send an agenda and pre-reads at least a week before the meeting. The pre-reads should be focused on what is needed to be able to discuss and decide on the topics on the agenda, i.e. detailed enough but not overwhelming (think short decks and crisply presented financials). Board members should take the time to read (and not just browse through) the pre-reads and process the materials. This will prevent questions and discussions during board meetings, which would have been solved by more thorough preparation. The frequency of meetings will depend on the company's pace and challenges to be solved (e.g. in a crisis). A start-up board will often meet once every 1-2 months, but you have to be well organized to have time to take action based on the received minutes before the next pre-reads reach your inbox.

Focus on the agenda

You only have to discuss what is on the agenda. If other topics come up, you may decide to discuss them, but you have the right to ask to discuss them in another session. If possible, start with what matters (important decision) rather than starting with "update slides" that will always take more time than planned. Better to take one well-considered critical decision than to rush through the agenda.

In your board meetings, you should regularly review the key performance indicators (KPI) of the company and the management. These are not generic and should be discussed between the board and the CEO to arrive at the most meaningful KPIs tailored to the current state of the company. All meetings will contain a detailed financial update (balance sheet and cash flow status), comparing current actual numbers with forecasted numbers, with a clear focus on sales. The cash flow statement has to be reviewed monthly, with a rolling forecast based on the worst-case scenario. All board members should have the cash burn rate prominently in mind. If the company is currently raising funds, discuss the status of the round and the time left to close it. Speak about risks, both previously and newly identified (using a regularly updated risk matrix). Do not forget about human resources. Keep abreast of organization charts and succession plans, salaries, and incentives. Employees leaving may alert you to issues within the company. Of course, you need to understand how the company is reaching their milestones in projects, technology, product development. Pay particular attention to the advancement of strategic projects, alignment of resource allocation and strategy, as well as industry trends and competition. Align on the exit strategy, even if it is farther down the line. And last but not least, make sure to always check the status of actions taken based on the decisions of the last board meeting. Note that many company topics could be discussed, but not everything is the best use of the board of directors' time. If a member seems to want to discuss a topic at length (because they

> ### Box 5: the different roles in the board
>
> **The chairperson**
>
> They are usually elected by the board, from among the board members. Should be the "boss of the board," by no means just an honorific position. Key interface between the board, the management, and the shareholders. Key role in managing conflicts of interest. Responsible for preparing and leading the board meetings and general meetings. Ideally, both experienced and independent.
>
> **The independent**
>
> A board member is considered independent when they do not have a management position in the company (nor had one in the past) and have no (or only minor) business relations with the company. Should be the chairperson. Number of independents and their qualifications should evolve with the stage of the company. Should have great negotiation and diplomatic skills, and be calm and rational.
>
> **The founder**
>
> Usually member(s) of the executive team (see below). No passive founders (i.e. founders not part of the management team), passive founders can be given seats in the advisory board.
>
> **The executive team**
>
> Usually, the CEO, in particular, if the CEO is one of the founders. However, the CEO does not have to be a member of the board; they can be a regular guest. In general, avoid having more than one member of the management team in the board unless this is of critical importance (e.g. two "equal" founders need to be part of the board).
>
> **The investor representative**
>
> Part of the negotiation and reflected in the shareholder agreement. Should be able to put the company's interest before the investor's interests. Beware of them pushing for nonessential reporting for internal purposes in the investor firm.
>
> **The secretary**
>
> Supports the chairperson in the organization of the meetings and writes the minutes. Very important because minutes become a legal document. Writing board minutes requires expertise and experience; board meetings are unlike other meetings. Should not be someone outside the board (maybe an external lawyer at a later stage), and not the administrative assistant of the chairperson. Avoid rotating this function.
>
> **The observer**
>
> May attend the board meetings, but does not participate in the discussions and has no voting rights. Usually "imposed" by investors. While not ideal to have (too many) observers as they enlarge the group without being fully part of it, it can be a way to "avoid" having an additional board member when negotiating with investors who want representation in the board.

are passionate about it or want to show off the extent of their knowledge), one can politely propose to deepen the discussion of this topic in a one-to-one meeting after the meeting and to go back to the agenda.

Make use of the power of off-line interactions

Board meetings are not (only) updates on what the company has done since the last board meeting. They are strategic meetings. To avoid spending too much time "updating" the members during the board meeting, you can organize, between formal board meetings, general update calls (i.e. not a formal board meeting) or more specific updates (technology, legal, etc.) with specific members attending, who will then shortly report to the board. In this way, updates will be shared in a condensed way and formalized in the minutes without taking too much time. If a decision is needed based on the discussions in these informal calls, they can be reached by circular or can be taken at the next formal board meeting. Informal meetings can also take place between individual board members and management to discuss general or specific topics. Note, however, that a *meeting with a board member* is not a *board meeting*! These are discussions, not formal decisions.

10. Manage and mitigate your liabilities

Being a board member is a legal mandate: you need integrity, expertise and time to fulfil your duties. The members of the board are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties (Art. 754 CO). There are three areas in which liability of board members will almost always be enforced:

- The board not informing the judge in case of over-indebtedness (Art. 725 CO)
- The company not paying social insurance costs
- The company not paying VAT

Other actions of the board of directors can be legally challenged. Still, the plaintiff must be able to demonstrate that you violated one of the following obligations: duty of care, loyalty, or good faith. If you make a business decision on an informed basis, in good faith, and the honest belief that the action taken is in the best interest of the company, you should not be challenged whatever the impact of that decision ("business judgment rule"). To mitigate the risk to be challenged on board decisions, establish solid decision processes, and document them consistently (e.g. discussions and decisions documented in the minutes of the board meetings). Obtain all relevant information from the company to make informed decisions, avoid conflicts of interest, and seek appropriate counsel (financial, legal, etc.). As an individual, remain well informed about the company (e.g. board pre-reads, speak with employees or customers, brush up your financial literacy) and about the ecosystem, and refer to the key documents of the company when needed.

Box 6 : Q&A regarding liabilities of board members

I represent an investor: does this mean that my potential liabilities are limited?

No, and this is usually grossly underestimated. Responsibility is personal. Your employer may cover some financial costs, but they cannot cover individual criminal law liability. Personal responsibility remains after leaving the employer.

How to address capital loss?

Capital loss means that your cumulated operational losses are greater than half of your share capital and reserve. If the last annual balance sheet shows a capital loss, the board of directors must call a shareholders' meeting without delay and propose a financial reorganization (art. 725 CO). Possible reorganization measures are balance sheet restructuring (e.g. revaluation of assets), operative measures (e.g. termination of employees), or an increase of capital. It is best to contact a legal counsel as soon as this situation is approaching.

How to address over-indebtedness?

In case of a substantial concern that the net loss is higher than the equity (so-called over-indebtedness), an interim balance sheet must be prepared (art. 725 para. 2 CO). If the interim balance sheet shows over-indebtedness, the board must notify the judge, unless some creditors agree to subordinate their claims to those of all other creditors. While actions regarding capital loss will often not be prosecuted, board member carries personal responsibility if they do not act promptly and diligently in case of over-indebtedness.

Do I need D&O insurance?

A Directors and Officers Insurance (D&O) is insurance for board members and top management of a company for defense costs in the event of a legal action brought for alleged wrongful acts. Intentional illegal acts, however, are typically not covered under D&O policies. It will often be difficult for start-up boards to receive D&O coverage at an early stage because insurance companies will not offer this to small companies or because the fees would be too high. Note that the risk for legal actions against the board increases with the number of parties involved (e.g. investors), hiring of personnel (social security, contracts, labor law), selling products (e.g. VAT), or high-risk activities (e.g. clinical trials).

Should I get off the boat when things are getting hot?

There may be a temptation to resign in a crisis. It would usually be too late, however. Also, the resignation may constitute a violation of the duty of care and loyalty for which the board member may become liable.

Authors' note

Start-up governance in Switzerland: practical guidelines for founders and board members was written by Roch Ogier (University of Zurich) with the expert support of Michael Hilb (Swiss Institute of Directors, University of Fribourg) and Virginie Verdon (Start-up Board Academy). Special thanks are due to

Saskia Karg for review and comments on the manuscript. As the prevailing wisdom and legislation around governing start-ups remain subject to change, we regard these guidelines as a living document. As such, we are keen to hear feedback from readers and will incorporate this as much as possible into further editions. If you would like to comment on these guidelines, please contact us at: roch.ogier@uzh.ch.