COVID-19: Duties of the board of directors

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In light of the rapid evolving and dynamic situation causing unprecedented challenges for almost all enterprises, members of board of directors of Swiss companies need to respond and assess whether the actions they are taking are sufficient to fulfill their personal fiduciary duties and responsibilities.

On 16 March 2020 the Swiss Federal Council declared an "extraordinary situation" under the Epidemics Act and adopted extensive measures to protect the public causing a near shut down of the public life (COVID-19 Ordinance).

The new measures introduced by the Swiss Federal Council entered into force on 17 March 2020 and include, among others, a ban to hold public and private events as well as a temporary closure of various businesses such as for example restaurants, bars, concert halls and theatres or sports centres.

The newly enacted measures impose considerable restrictions on each individual and may have serious economic consequences for businesses. Hence, the boards of directors of affected companies must now consider various practical and legal issues.

COVID-19 causes need to act for matters falling into the board of directors' unalienable duties – no action may lead to personal liability

The members of the board of directors are responsible for all matters of a company, which are not assigned to others (officers or individual board members). In other words, this joint responsibility of the members of the board of directors may be reduced by way of delegation, e.g., if the delegation is done properly on the basis of organizational by-laws or regulations.

However, under mandatory Swiss corporate law, there are certain exclusive responsibilities of the board that may not be delegated, for example:

- The ultimate management of the company as well as issuing the required directives in order to develop, and if necessary (due to a crisis) to amend, the business strategy and to determine and oversee appropriate means to pursue it

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- To establish and oversee the organisation of the company, i.e., to decide, implement, and if necessary (due to a crisis), to amend the basic guidelines for an (in light of the business, its complexity and risks of a particular company) appropriate corporate governance, risk management and assessment as well as the internal control system
- To establish and oversee the accounting, financial and risk control as well as financial planning systems as required for the management of the company and to monitor the liquidity of the company
- To supervise the persons to which management responsibilities are delegated, in particular with regard to compliance with strategy, the law, regulations and directives, meaning that the board is responsible that a (in light of the business, its complexity and risks of a particular company) adequate and timely reporting allows the board to be informed to be in a position to step in and take adequate measures
- To prepare the annual report and financial statements, and for (larger) companies with an ordinary audit, also cash flow statements and a management report to provide information on the conduct of a risk assessment and extraordinary events and should also include a statement about future prospects (Lagebericht)
- To prepare the annual general meeting as well as the implementation of its resolutions
- To notify the court in the event that the company is over-indebted

These responsibilities cannot be delegated with responsibility reducing effect and must be carried out by each board member personally with due care and in order to safeguard the interests of the company. Otherwise, there is a risk that board members become personally liable for breach of their fiduciary duties.

What this means for board members:

As some further insights below show, the coronavirus pandemic (COVID-19) is likely to significantly challenge personal, non-assignable, duties and responsibilities of board members in almost all enterprises. For the benefit of the company and its employees and other stakeholders, but also to prevent risks of personal liability of board members, the board needs to proactively act and document:

- **an ongoing assessment of implications and, if necessary or appropriate, decision taking, in particular, to**
- **check, amend and update risk assessment, guidelines, contingency plans and, if required, strategy,**
- **take responsibility in the ultimate management and oversight of the company, in particular**
- **to ensure the well-being of employees and management to allow ongoing operations,**
- **to give the necessary directives to monitor and assure compliance with applicable laws and directives issued by the authorities as a reaction to COVID-19; and**
- **to provide for and ensure ongoing financial planning and control, which includes, in particular, to monitor and ensure sufficient liquidity.**

Board Meetings: Need to lead and decide in times of challenges and social distancing

With almost no businesses left unaffected by the challenges caused by the COVID-19 outbreak, the board of directors is under a duty to proactively assess and to put its implications for the company on the agenda for the next board meeting - or to even call for extraordinary meetings, as necessary in the current situation.

There is need to inform, analyze, discuss and resolve on critical matters. Not only within the board, in particular also in cooperation with the executive management team, there is need to exchange intensively. For many companies, this involves a substantial number of crucial individuals which cannot or should not meet in person given the current (and every day changing) legal and social restrictions including travel bans and persons working from remote locations.

Despite these hurdles, the fiduciary duty of board members still requires to convene such meetings to take the above and below described actions. Unless the articles of association or the organizational regulations would provide otherwise, under Swiss law, it is allowed that board meetings are held electronically (e.g. by video conference or similar audiovisual

communication means) or via telephone conference and board resolutions may be passed also via written circular resolution.

To demonstrate the board's compliance with fiduciary duties in the wake of a crisis, it is important and imperative that records are taken that show a thorough assessment and decision-making process conducted within the board and the management. Therefore, board meetings, involving management, should be held via telephone or videoconference, with minutes duly taken. A decision-making process via written circulars is unlikely to demonstrate sufficient care in view of the complexity of the situation that most companies face in view of the COVID-19 challenges.

Map the risks

The board has the ultimate responsibility to ensure that an adequate risk management and system of internal control is established and maintained, with the execution of the risk management process being the responsibility of the executive management. As a basic pre-requirement to perform such duty, a thorough risk assessment is required.

While risks are usually assessed (semi-)annually, the unprecedented and constantly changing COVID-19 situation will require most companies to immediately reassess risks and respective processes and controls, as well as to update the assessment on an ongoing basis or certainly more regularly than just annually.

Similar, the board should immediately assess if contingency plans are still accurate and whether monitoring and reporting protocols are in place to gather and provide the board with relevant and current information as to all impacted areas including: employee and customer health and safety, human resources, IT, cybersecurity, liquidity, credit capacity, customer outlooks, supply chains and performance issues under key contracts and such other areas that may be applicable to a particular business and industry. Any identified deficiencies in such reporting protocols should be addressed immediately.

Readiness and ability to act and operate

The chairman and/or secretary of the board should make sure updated calendars and contact information of all board members are available and remain updated in order to be in a position to call extraordinary telephone meetings or video conference (allowing a quorum) on short notice.

In times of challenge, the sequence of (ordinary) meetings should be increased. Regular telephone calls should be arranged in advance in order to make sure a quorum for conducting meetings and passing resolutions is met. The board should also assess relevant applicable quorums required for a decision and the current composition of critical committees (such as the audit and risk committee) in order to take contingencies if certain members should be unable to perform their duties.

To perform its legal duties the board is dependent on information and reports by the management. However, the Board needs to assess whether detailed written reports are necessary or whether management’s time should be spent directly addressing the current

operational and other challenges. To find an efficient way to obtain the information necessary for putting the board in a position to take decisions by avoiding disturbances to management is key.

Existing, crucial committees may need further support by management, other board members or external advisors. For example, the audit committee is often also to lead risk oversight, but these days, many audit committees will also have additional urgent responsibilities for oversight of the company's audit and financial controls and liquidity as well as, for listed companies, public reporting and disclosure obligations associated with the financial reporting.

However, it is crucial to note that even if such tasks are handled by committees or others, still, in the areas of non-assignable board duties, each board member remains personally responsible and all board members should request to be continually updated and to review and assess relevant analysis and course of action.

To address the extraordinary situation, special committees on the board level and special task forces on the management level could be established. The current situation changes almost daily and there are new rules and bans affecting almost any enterprise which must be monitored by management and, if necessary, escalated to the board. The board of directors is responsible for the company's compliance with applicable laws including mandatory ordinances of the Swiss Federal Council, as for example, the COVID-19 Ordinance. For example, see our update on new employer duties towards employees, which fall into a risk category (see our Legal Update from 17 March 2020 here).

Also, depending on the sector, the board of directors must ultimately ensure that the business is closed (if applicable), that the company does not carry out any public and private events, and that it generally complies with the rules on social distancing. The strict measures of the COVID-19 Ordinance as to the closure of businesses or the prohibition of private and public events is in force until 19 April 2020. Deliberate non-compliance with these rules may lead to a criminal conviction.

How to organize the annual general meeting

For companies whose financial year ended on 31 December 2019, the annual general meeting must be held by 30 June 2020, in particular in order to approve the 2019 annual report and financials. The current restrictions for the public life may also slow down necessary work for audit and the preparation of the annual report. The board of directors must actively follow any delays and take appropriate measures. In particular for companies with an ordinary audit, for many companies the effects of the COVID-19 situation will already have an effect on the notes to the financials and the statement of the future prospects (Lagebericht) etc.

Also, the current ban to hold public meetings in Switzerland also extends to annual general meetings of companies. However, with the COVID-19 Ordinance the Swiss Federal Council enacted a special legal basis that allows the board to still convene a shareholder meeting (see our Legal Update from 18 March 2020). In essence, these rules now allow a "virtual" shareholder meeting without the need for shareholders to be physically present. One alternative this new law offers, and which in most circumstances is the easiest to implement on a short term, is to allow the board to organize the meeting in a way such that only the chairman

(usually the chairman of the board or his deputy), the secretary and an independent proxy (and, if mandatorily required, a representative of the auditor or a notary) are physically present. All shareholders may receive information electronically and may provide written or electronic instructions to the appointed independent proxy.

Financial responsibility

Last, but in practice most relevant, when it comes to fiduciary duty and personal liability risks of board members, is the financial responsibility of the board of directors. The board of directors is obliged to continuously monitor the financial situation of the company. Very simplified, the following applies:

In times of challenges, to provide for and monitor liquidity in order to allow the company to meet its obligations as they fall due is of particular importance. Also, if the board of directors has reasons to believe that the company is over-indebted (balance sheet test with assets no longer covering the liabilities), it must draw up an interim balance sheet and submit it to the auditors for examination. If the interim balance sheet shows that the liabilities are not covered (at going concern values as well as at liquidation values), the board of directors must notify the court, which may then declare bankruptcy.

Failure to comply with its financial responsibility may result in personal liability for any damages caused in the delay of bankruptcy. The board of directors, however, can avoid notifying the court of an over-indebtedness if there is a sufficient subordination of claims (e.g. under existing loans) and good prospects of a financial restructuring of the company in due course or if there are concrete reasons to believe that the company may be financially restructured within in a short time period.

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No legal or tax advice

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