The Board's View

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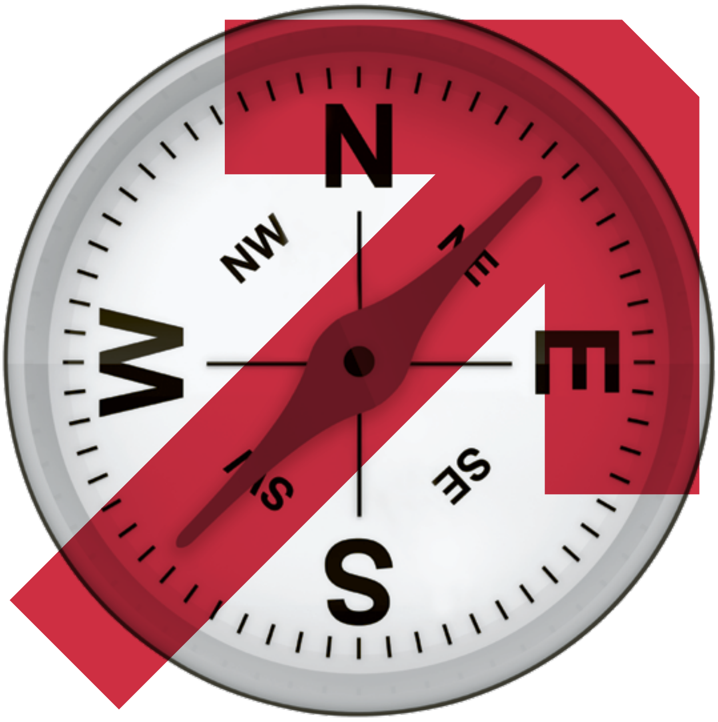


# Leading through the crisis

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**Key Take-aways**

**1.**
The dislocation in the economy triggered by Covid-19 and lockdown measures, which may occur in waves, require comprehensive strategic planning.

**2.**
Public companies face additional challenges as they need to carefully monitor their public disclosure, trading restrictions and dividend policy.

**3.**
If liquidity collapses, the board of directors needs to consider state aid programs and the scope of its duties as they shift to the protection of creditors.

In these unprecedented times, boards face many critical challenges. Below is a checklist to support boardrooms in their strategic planning and overall management to steer through the crisis.

## 1 Crisis management as a core responsibility of the board

- The board is entrusted with overall responsibility for the management of the company (*Oberleitung / haute direction*) and financial planning.
- As management is fully engaged in the day-to-day handling of the crisis, the board should focus on the bigger picture and review available information, provide challenging input, give critical insight and oversee the actions of management.
- The board should ensure that the decisions taken by management are in line with the board's overall strategic and financial planning, both in the short and long term, and the core values of the organization.
- Crisis management requires frequent board meetings. Given that the board's actions will be evaluated with the benefit of hindsight, it is crucial to keep timely and appropriately detailed minutes.

## 2 Safety of the workforce and other operational considerations

- The board should regularly review health and safety measures in light of evolving government regulation and industry practice, including for the safe return of employees as lockdown measures are gradually eased.
- As work from home or alternative work environments are implemented, the board and management should review the critical impact of extensive remote IT access on cybersecurity and the safety of data.
- In business sectors that rely on global supply chains and cross-border transactions, boards should obtain regular updates on potential material disruptions to the company's supply chains.
- Boards should request management to review and report on the company's most significant contracts whose performance may be affected by force majeure (please see our newsflash "Is your contract affected by the coronavirus outbreak?" of March 3, 2020).

## 3 Protection of the liquidity position of the company

- The board should obtain regular flash numbers on sales and cashflow as well as updated projections. It should request from management, and oversee, appropriate cost control systems.
- The board and management should regularly review compliance with covenants under the company's debt documentation, consider drawing available debt financing (in the light of the signal this may send), review the impact of any credit rating downgrades and consider securing new or even alternative forms of financing (such as private equity or debt capital).
- The board and management should consider the company's eligibility to and impact of any available state aid program (see "State aid programs" below), including in light of the ethical trap and public backlash this has created for a number of companies around the world.
- The board should reevaluate the company's dividend policy and buy-back program (especially for "dividend stock"). Regulators and institutional investors are weighing in on the allocation and return of capital. State aid loans, if obtained, would preclude distributions to shareholders.
- If liquidity collapses, the board must consider filing an application seeking the opening of restructuring proceedings or applying for a Covid-19 moratorium in order to avoid bankruptcy.
- The board may decide to sell assets in order to free up cash. In doing so, the board must ensure that its decision is well-informed, that assets are sold pursuant to a process reasonably designed to achieve market value in the circumstances, and that no shareholder approval is required (divestitures should not amount to a de *facto* liquidation).

## 4 Public disclosure and trading restrictions

- Boards of companies with securities listed on the SIX or "public" capital market debt must closely monitor their reporting obligations.
- As of yet, there is no Covid-19-specific ad hoc disclosure guidance in Switzerland. The US, EU, UK, French and German regulators, among others, have issued guidelines that boards and management of Swiss companies would be well advised to consider. [1]
- Boards and management will need to evaluate the continued validity of any profit forecast previously published, its withdrawal and the merits of new or no guidance.
- The board should consider instituting a blackout period. Where Covid-19 has affected the company in a way that would be material to investors, corporate insiders who are aware of these matters are prohibited from trading in the company's securities until such information is disclosed to the public.

## 5 Governance issues

- Boards should consider the concerns of large institutional shareholders who are weighing in on the social impacts of the pandemic (while still keeping their focus on longer term ESG considerations). For example, the UN Principles for Responsible Investment urge investors to engage with companies that are failing to protect employees' safety or their financial security.
- Boards should also review and analyze proxy advisors' recommendations. ISS has published policy guidance on April 8, 2020. ISS guidelines deal with such issues as general meeting format and postponement, treatment of shareholder rights, change in executive compensation metrics or targets, capital structure and payouts.
- In-person general meetings are banned until May 10, 2020. General meetings happening before the expiration of the ban or that have been called before such expiration can be held under an alternative format. Covid-19 related health precautionary measures will continue to apply even after the expiration of the ban. For further information, please see our analysis "Annual general meetings – how to proceed in the face of Covid-19" of March 20, 2020.

## 6 Strategy and M&A considerations

- The board should review the impact of the crisis on its strategy.
- In this context, the board should explore potential reorganizations, divestitures of assets and acquisition opportunities as distressed businesses come up for sale.
- In a cross-border context, the board should consider any foreign investment regime – many countries are bolstering their regime or considering state stakebuilding.
- The board should review the company's exposure to unsolicited bids or shareholder activism. Please see our analysis "Grasping the nettle of shareholder activism" of February 18, 2020.

## 7 State aid programs

- Many sectors face reduced or zero revenues. The Swiss government and other countries across the world have instituted emergency relief.
- Employers can maintain jobs by reducing working time and paying employees an amount (capped) equal to 80% of the wages attributable to lost working hours. Employers receive an indemnity if certain conditions are met. Reducing working time requires the approval of the competent cantonal authority. Also, the employees must consent to the reduction in working time.
- If the company had gross turnover of less than CHF 500 million in 2019, it can also consider emergency loans of up to CHF 20 million backed by the government. The ability to incur such emergency loans must be analyzed under the terms of the company's existing debt. Key areas of focus include the impact of the emergency loan on dividends, cash pooling arrangements and international operations.

[1] The ESMA and member state's guidelines will apply to those Swiss companies that have securities listed on a regulated exchange or traded on a multi-lateral trading facility in the European Union (and are as such subject to the market abuse regulation). See https://www.esma.europa.eu/about-esma/covid-19.

The Division of Corporate Finance of the U.S. Securities and Exchange Commission has published a helpful list of potential risks that any publicly traded company can look to as guidance. See https://www.sec.gov/corpfin/coronavirus-covid-19.

- Boards must ensure the payment of all social security and pension contributions at all times. Missed payments may result in liability and even criminal prosecution for board members. Companies hit by the crisis can however temporarily defer (without interest) the payment of social contributions. They can also adjust the amount of prepayments in case of significant reduction in the workforce.
- Boards should analyze any further measures taken by the government, including the payment deadline to pay missed rents on commercial leases, tax-related measures and industry specific financial aid. Please see our newsflash "Corona pandemic and its impact on taxpayers in Switzerland" of April 17, 2020.

## 8 Dealing with over-indebtedness

- If the business faces acute financial difficulties, the board should obtain clarity about its duties in a distressed situation. The board should also consider tightening communication processes (to control and centralize all external and internal communications).
- As part of its review of the financial condition of the company, the board should investigate the financial health of important counterparties with which the company contracts.
- Ordinarily, if the company is over-indebted both on a going concern basis and at liquidation values, the board is required to advise the judge (unless creditors accept to subordinate their claims). The Swiss government however has modified this regime until October 20, 2020: among other things, the board has no duty to advise the judge if the company was not over-indebted as at December 31, 2019, and the board believes that the over-indebtedness can be remedied by December 31, 2020.
- The duties of the board in circumstances where the annual financial statements reflect that equity is less than half the registered capital plus legal reserves remain unchanged. If that situation arises, the board is required to call a general meeting and to propose restructuring measures (including capital reduction, fresh capital or debt-equity swap).
- Amendments to the existing debt-restructuring procedure and a special Covid-19 moratorium have also been adopted. For further information, see our newsflash "Covid 19 - New temporary insolvency regime for businesses" of April 17, 2020.
- No relief is however afforded in respect of Swiss accounting rules. Companies are required to hold their books as usual. Accordingly, if the board concludes that it is intended or probably inevitable that all or some activities will cease in the next twelve months from the balance sheet date, then the relevant portion of the financial statements must be prepared on the basis of liquidation values.
- For those companies that have not yet closed their annual financial statements, the auditors must opine as to whether the company is a going concern in their audit opinion. The audit process will be subject to heightened review. Scenario analysis linked to the length of lockdown measures is likely to be critical.

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