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ADVISORY BOARDS IN GERMAN START-UPS

ROLE / DUTIES AND LIABILITY /
BEST PRACTICES

**OLNS
BOARD STUDY
2024/2025**

Survey of
2,900+ German
Start-ups


orrick

VC & TECH BRIEFINGS GERMANY

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ORRICK LEGAL NINJA SERIES



About the Orrick Legal Ninja Series – OLNS

In substantially all of the major world markets, we have dedicated technology lawyers who support young German technology companies on their growth trajectory through all stages. As one of the top tech law firms in the world, we are particularly committed to bringing the American and German entrepreneurship ecosystems closer together.

For this purpose, we launched the Orrick Legal Ninja Series ("OLNS") back in 2019. With this series, we provide overviews on current legal trends and take deeper dives on certain legal topics particularly relevant for German start-ups and their investors.

OLNS editions are co-authored by a multidisciplinary team of lawyers from our national and international offices. It is our goal to tap into the rich reservoir of the venture capital, corporate venture capital and technology know-how of our international platform and make it available to the exciting German entrepreneurship and innovation scene.

Why "Ninja Series?" This title might simply reflect the fact that some of us watched a little too much TV in the 1990s. But, seriously, "Ninja" has come to signify "a person who excels in a particular skill or activity." That's what the Orrick team strives for when it comes to providing tailored advice to growing tech companies and their investors. We hope that OLNS also empowers you to be a Ninja entrepreneur.

If you'd like to discuss this further, please contact us. We would love to learn about your experiences with the topics discussed in this publication, so please share them with us. We constantly strive to evolve and grow to best serve our clients.

We hope you enjoy this twelfth edition of OLNS.

On behalf of the Orrick Team,


Sven Greulich

Orrick – Technology Companies Group Germany

A. Advisory Boards in German Start-ups

Preface and Terminology Used in This Guide

A stage in darkness, nothing can be seen in the hall, only a voice can be heard:



"You don't see me; you never actually see me. All you can see is my impact, without knowing that I am working in the background. You see the results and successes without knowing my contributions. I am a member of the advisory board of the greatest start-ups and work for and with the best founders and investors. You don't see me, I'm always in the background. You never hear me; you may not even know I exist."

Maybe this is a bit too much drama and it is also not entirely accurate (some advisory boards certainly are in the media spotlight). But now we have your attention for the topic. Let's talk about advisory boards in German start-ups: what they are, how to use them effectively and what to avoid. Oh, and then we have a few data points for you after working our way through a few thousand articles of association (we love drama).

In Germany, most start-ups are organized as a GmbH or UG (*haftungsbeschränkt*). Two corporate bodies are mandatory for these.

While the shareholders' meeting is the supreme decision-making body, the management runs the company's business and represents the company externally. In doing so, it is bound by the instructions of the shareholders' meeting. However, if the start-up has venture capital investors on board, a third body is usually set up voluntarily: The advisory board (sometimes called a "shareholders' committee" and very rarely "administrative committee"). The advisory board has a couple of start-up specific tasks that develop over time when the company matures.

While supervisory boards in established companies are primarily concerned with controlling, compliance and corporate governance, the advisory board in the early stages of a start-up is much more focused on the development of the company, helping with technology and product development, customer and employee acquisition and support with fundraising. In addition, a good advisory board can also help the founders grow into their roles as company leaders and develop along the start-up's growth path or work towards making room for more suitable external managers in the future.

In practice, such advisory boards come in various forms. The advisory board can be a purely advisory (expert) body, but it can also be modelled closer to a supervisory body that has control over certain measures taken by the management board (i.e., usually the founders). Finally, the advisory board can also be granted its own decision-making powers so that it acts as a decision-making body for certain topics, notably the appointment and removal of managing directors. Numerous constellations are also conceivable for the composition of the advisory board. Often, the advisory board will initially only consist of founder and investor representatives; independent members with special expertise are often added at a later stage.

Following a brief introduction into the topic (Chapter I.), this Guide explains the role of the advisory board in the corporate governance system of a start-up from a legal perspective (Chapter II.), highlights duties and liability risks (Chapters III. and IV.), and seeks to provide practical guidance regarding the appropriate composition and best practices for the operation of advisory boards (Chapters V. and VI.). In Chapter VII., we present the results of an empirical study on the size and composition of advisory boards in German start-ups in the various financing stages of the start-up. As far as we can tell, this is the most comprehensive study of its kind in the German market.

This Guide is not intended to be a stand-alone document. Instead, this Guide augments and is augmented by other editions of our OLNS, notably the OLNS editions² that deal with employment law matters, the establishment of employee participation programs, U.S. / German holding structures, early-stage financings and spin-offs. This Guide cannot cover all relevant topics and it only presents our humble views. Every company and every investor is different, and this Guide is not a substitute for proper legal advice on a case-by-case basis. Honestly, talk to your lawyers, it will make them happy.

"Please don't do anything stupid or kill yourself, it would make us both quite unhappy. Consult a doctor, lawyer and common-sense specialist before doing anything in this book."

Tim Ferriss, Tools of Titans



2. You can find all editions of the OLNS here: <https://www.orrick.com/en/Practices/Orrick-Legal-Ninja-Series-OLNS>.

I. Introduction

1. THE CORPORATE GOVERNANCE OF A GMBH – BRIEF OVERVIEW

Usually, German start-ups are organized as a limited liability company (*Gesellschaft mit beschränkter Haftung* – "**GmbH**"). Primarily for financial reasons, founders might also start with an entrepreneurial company with limited liability (a so-called UG (*haftungsbeschränkt*)) which one can think of as a "GmbH light." However, once institutional investors come on board (that is usually the point in time when advisory boards get established), the share capital of the UG (*haftungsbeschränkt*) will be increased to at least EUR 25,000, *i.e.*, the minimum capital of a "real" GmbH and the UG (*haftungsbeschränkt*) becomes a GmbH by operation of law. That is why hereinafter we will focus on GmbHs.

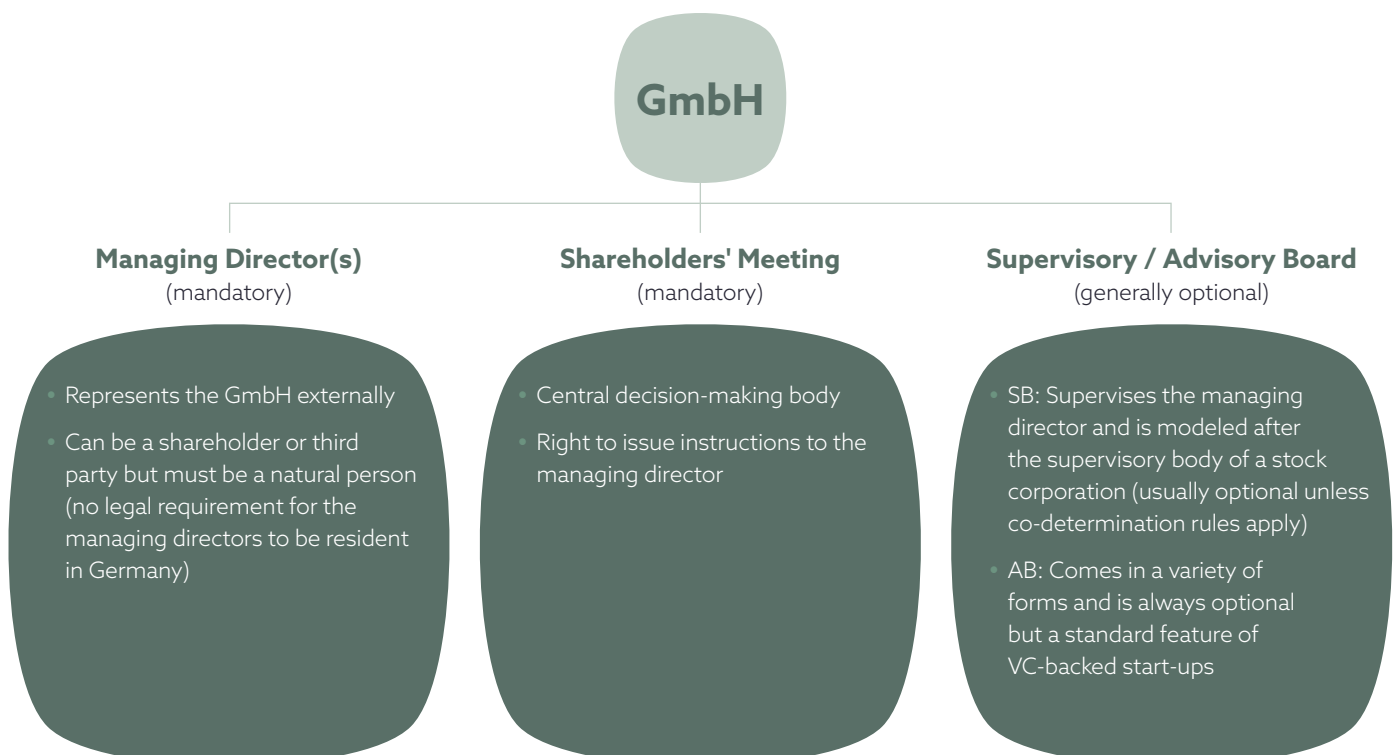
The GmbH is a corporation with a personalistic character and limited liability: This means that in principle, the company's creditors only have recourse to the company's assets and neither the shareholders nor the managing directors or advisory board members can be held personally liable. However, shareholders, managing directors and advisory board members must "play by the rules" to avoid liability risks (more on that later).

Unlike the rigid German stock corporation (*Aktiengesellschaft*), the GmbH offers a maximum degree of flexibility on how to organize the relationship amongst the shareholders in their relationship *inter se* by having broad statutory freedom.

The managing directors must follow lawful instructions from the shareholders (or a strong advisory board).

Generally, a GmbH only has two mandatory corporate bodies, *i.e.*, the shareholders' meeting (*Gesellschafterversammlung*) and the management board (*Geschäftsführung*). The management board represents the company and is responsible for the day-to-day operations while the shareholders' meeting is, *inter alia*, responsible to appoint and remove the members of the management board (though, that power can be delegated to the advisory board as we will see), adopt the financial statements of the company, and to resolve certain fundamental matters such as the issuance of new shares in the company or its liquidation.

However, many German start-ups – at least those beyond the very early stages – opt to implement an advisory board (*Beirat*) as a (voluntary) third corporate body as further described herein. The advisory board is then often composed of founders, investor representatives and, at least in later stages, outside / independent board members. The objective is to have a more flexible corporate body to advise the management board and assume certain control responsibilities.



This German-style advisory board must be distinguished from advisory boards that some private companies and start-ups in the United States have established. Advisory boards of the U.S.-kind are flexible, informal bodies created by the board of directors to provide the company's management team with non-binding strategic advice. They do not have the authority to vote on matters brought to the board of directors. Such advisory boards are created by a resolution of the board of directors and the company will need to have the members sign an advisory board agreement, which is essentially a consulting agreement. The key provisions of the advisory board agreement are confidentiality and invention assignment. In Germany, such informal bodies also exist and are known as "expert committees," "scientific advisory boards" or similar. The German-market advisory board that this publication focuses on, is, however, a formal corporate body with more competences and sits on the spectrum somewhere between a U.S.-style advisory board and a U.S.-style board of directors.

In the following, we'll unravel the legal mumbo jumbo, typical makeup, and key responsibilities of the German advisory board. We'll also sprinkle in some real-world examples and best practices to show how an effective advisory board can be the secret sauce to a GmbH's success. So, sit back, relax, and get ready to discover how this unsung hero of corporate governance can help a German start-up navigate the choppy waters of business with style and finesse (too much drama again?).

2. ADVISORY BOARD VS. SUPERVISORY BOARD

But first things first: The advisory board is not to be confused with the legally defined supervisory board (*Aufsichtsrat*). Although supervisory boards are the rare exception in German start-ups that are organized as a GmbH (that is at least until the start-up has hired a relevant number of employees), it is important to understand the difference between an advisory board and a supervisory board and keep them apart.

The supervisory board is mandatory for German stock corporations (*Aktiengesellschaften*) pursuant to the German Stock Corporation Act ("**AktG**"). It is a corporate body that has a control / supervisory function and obligation. It monitors the management of the company and can and must intervene in the management of the company in certain cases.

As a rule, a supervisory board is not mandatory for a typical GmbH. Rather, a mandatory supervisory board must be set up by a GmbH only in certain cases in accordance with German co-determination regulations. Companies with generally more than 500 employees must set up a supervisory board in accordance with the

One-Third Participation Act (*Drittelbeteiligungsgesetz*), one third of which must consist of employee representatives. If the company has more than 2,000 employees, the supervisory board must be made up of an equal number of shareholder and employee representatives in accordance with the Co-Determination Act (*Mitbestimmungsgesetz*). In the event of a voting stalemate, the chairperson of the supervisory board, who always comes from the shareholders' side, has a casting vote. An elaborate set of rules exist to determine when the aforesaid thresholds of employees are met.

Even though the German Limited Liability Companies Act ("**GmbHG**") allows for a voluntary establishment of a supervisory board for which the (strict) rules under the AktG would apply, such voluntary supervisory boards are the rare exception in German start-ups organized as a GmbH. The reason for this is straightforward. If, according to the articles of association of the company, an optional supervisory board is to be established, certain provisions of the AktG relating to the supervisory board are to be applied in accordance with sec. 52 para. 1 GmbHG. This includes, among other things, the strict provisions of the AktG regarding the liability of its members for a violation of their duties. Investors and founders alike seek to avoid this strict liability regime and do not consider the supervisory board, with its rigid formalities, to be appropriate for the needs of a start-up. Rather, they usually prefer the more flexible and – as we will see – less risky advisory board to advise the management of the start-up and exercise some level of control over the actions of the management.

Side Note: It is good practice for the company's articles of association to clearly state that the voluntarily established advisory board is not a supervisory board and that the rules stipulated in the AktG and the GmbHG for supervisory boards do not apply to such advisory board. In addition, using the terms such as "monitoring" or "supervising" should be avoided when describing the role of the advisory board in the company's articles of association, shareholders' agreement and other corporate documents as this might blur the distinction between the two corporate bodies. We are aware of cases where a company filed for insolvency and the insolvency administrators brought liability claims against the members of the advisory board claiming that despite the labelling of "advisory board," that body actually supervised the management board and consequently, the strict liability rules for supervisory board members must apply.

Even if the distinction described above should not be blurred, the following should be noted. If, in the early phase of the start-up, the focus is on the advisory activities and control of the use of funds by the investor representatives on the advisory board, independent advisory board members are regularly added as the start-up grows and matures. The advisory board is then often conceptually increasingly similar to a supervisory board, although unlike a supervisory board, the members of the advisory board can still be instructed by the shareholders' meeting.

3. THE LEGAL BASIS

The advisory board discussed in this publication, which is the most common in German start-up land, is a genuine corporate body and can make binding decisions within the company within the scope of its responsibilities. Due to its corporate function, the advisory board requires authorization in the start-up's articles of association. It is necessary that the articles of association either themselves provide for the formation of an advisory board or at least authorize the shareholders' meeting to form one by means of a (simple) shareholders' resolution. This can either be included in the articles of association from the outset or by means of a subsequent amendment. With regard to the amendment of the articles of association, it should be noted that in the event that special rights are to be established in favor of individual shareholders to a seat on the advisory board or to the appointment of an advisory board member, not only the majority required to amend the articles of association pursuant to sec. 53 GmbHG is required, but also the consent of all shareholders who are not to receive such a special right.

It is common practice for the articles of association to regulate the composition, rights and obligations of the advisory board, the selection of its members and the manner in which they are appointed and dismissed. Regarding the internal organization and the specifics of the powers of the advisory board, the reference to the provisions of stock corporation law provided for in sec. 52 para. 1 GmbHG is regularly excluded in practice in the articles of association. Instead, the provisions of the articles of association and, in particular, the shareholders' agreement and the rules of procedure for the advisory board regularly issued by the shareholders' meeting apply. As a consequence, procedural issues such as the frequency and location of meetings, as well as the modalities of convening, passing resolutions and keeping minutes are not to be found in the articles of association but in the shareholders' agreement and / or in the rules of procedure for the advisory board (although these can theoretically also be issued by the advisory board itself, in practice, however, adoption by the shareholders' meeting as part of a financing round prevails). Changes to the internal governance structure of a start-up, in particular with respect to alterations of the advisory board's size, competences and composition (appointment rights) are usually qualified as so-called reserved matters that would in addition to the majority required to amend the articles of association pursuant to sec. 53 GmbHG also need the approval of certain shareholders or shareholder groups (e.g., representing a certain quorum of preferred shares).

II. The Role of the Advisory Board

Irrespective of the distinction between "strong" and "weak" advisory boards as described below, any advisory board has at its core, an advisory function. It supports and advises the management board in strategic and operational matters.

In addition to this advisory role, the advisory board is often equipped with further tasks and powers. The articles of association or shareholders' agreement of a company usually define the exact tasks and powers of the advisory board, which can differ from company to company.

Customary additional tasks and powers of advisory boards in VC-backed start-ups are:

- approving certain actions and measures of the management board (this is a standard feature in both "weak" and "strong" advisory boards); and
- (only) in case of a "strong" advisory board (see below), the appointment and removal of members of the management board.

Benefits of an Advisory Board

ADVISE

Experience and Expertise

- Product / Market Fit
- Building a Scalable Organization
- Go-to-Market and Scaling
- Preparation for Exit / IPO

Strategic Counseling

CONTROL

Control of the Management

- Approval of Certain Management Actions
- As the case may be, Appointment and Dismissal of Managing Directors

DEVELOPMENT (EXTERNAL RESOURCES)

Access to External Networks

- Employees
- Investors
- Customers and Suppliers

Transfer of Credibility Through Expert Board Members

DEVELOPMENT (INTERNAL RESOURCES)

Assistance with Crisis Management

- Founder Departure
- Compliance Issues
- RIFs
- Communication and PR Strategies

Moderator Between Investors and Founders

Development of Founders

1. ADVISORY ROLE

Steve Blank, American entrepreneur and investor once remarked: "A start-up is not a smaller version of a large company. A start-up is a temporary organization in search of a scalable, repeatable, profitable business model."

It is this journey of discovery, learning, adjusting and then expansion that the advisory board is meant to support. In sticking to the theatre theme running through this publication (we bet you haven't noticed), the advisory board in a GmbH is the optional sidekick that every superhero founder team dreams of. It's there to provide expert advice, enhance decision-making, and ensure that the company doesn't accidentally steer into an iceberg. Think of it as the Yoda to the GmbH's Luke Skywalker, guiding the company with sage advice and the occasional cryptic riddle. This role will obviously change dramatically over the lifetime of a start-up and requires a constant renewal as well as re-skilling and upskilling of the advisory board's members.

It is a truism, that as a founder team, you should actively ask for advice and approach your advisory board at an early stage if problems arise. Even if everything runs smoothly, your board can help as a devil's advocate or as (beware, lawyers' humor ahead...) sounding board to critically question your own position and pressure test your own decision-making. The mere presence of often unexperienced managers (read: the founders) amplifies the advisory board's role in steering strategic decisions.

However, the potential experience of the advisory board is in quite a few cases not fully utilized because the founders either think they know better anyway or the necessary trust element is missing. And then there are those founders whom a strong investor representative on the advisory board could (or should) have helped on a personal level to mature into a great leader (or at least to get the worst excesses of their own hubris under control).

When in a 2023 podcast Bloomberg's Emily Chang discussed with investor legend Bill Gurley the importance of finding and backing the right founders and the role that an engaged and powerful board (they were talking about U.S.-style board of directors) can play in this context, Gurley remarked: "To get it to a really big outcome requires someone to be a great CEO [...]. The founder must want to learn to be a great CEO and that part is hard. [...] Why in the world would a 22-year-old be good at managing 10,000 people?" When then asked about the now (in-)famous saga about Uber's CEO-founder Travis Kalanik's ousting in 2017, Gurley telescoped out and summarized his experiences as follows: "I won't name any names, but there are plenty of entrepreneurs from previous generations that are not perfect humans and matured along the way, right? And became different people and different leaders and you would like to make that happen [...]."

While with its representation of different shareholder groups an advisory board will often be far from 100 % objective, one of its key values lies nevertheless in its external perspective (especially when independent board members augment an advisory board's ranks). By not being directly involved in the start-up's daily operations, the advisory board can provide a more unbiased and dispassionate view of challenges and opportunities. This advisory function is beneficial to the start-up for a variety of reasons:

- **Avoid Internal Bias:** Advisory board members (other than the founders, of course) are not involved in the daily operations and team dynamics play a lesser role, allowing for a clearer view of the situation.
- **Innovation:** The outside perspective and the investor representatives pushing for results can inspire new ideas and creative approaches that internal teams might overlook due to their immersion in the daily operation.
- **Stimulates Healthy Questioning and Unrest:** Advisory board members can ask critical and challenging questions that lead to deeper reflection and more informed decision-making.
- **Validate Strategies and Approaches:** The approval and feedback of external experts can validate and strengthen the start-up's strategies, increasing confidence in the decisions made.
- **More Rapid Adjustment:** The external perspective helps the start-up adapt more quickly to changes in the market, technology and trends.
- **Balancing the Interests of Stakeholders:** An advisory board that enjoys the trust of all (or at least most) shareholders can mediate and arbitrate by virtue of its authority.

Although the advisory board can play a key role in the success of the start-up, at the end of the day its role remains limited and the founding team and the company's extended management team are responsible for the success of the start-up and no advisory board can take the key strategic and tactical decisions away from them. The advisory board's point of view is one data point, an important one for sure but ultimately it is not the advisory board that runs the company. The loyal reader of OLNS will have noticed that in all OLNS editions, a quote from Mark Twain can be found (we still stubbornly believe it makes us come across as smarter than we actually are), so here we go: "We should be careful to get out of an experience only the wisdom that is in it and stop there lest we be like the cat that sits down on a hot stove lid. She will never sit down on a hot stove lid again and that is well but also she will never sit down on a cold one anymore." What the great master wanted us normal human beings to understand is that experience needs to be put in context and not every critical experience of your advisory board members is relevant for your start-up.



A conversation with
Jasper Masemann,
partner, and
Moritz Nathusius,
general counsel at
Cherry Ventures



BUILDING BLOCKS OF SUCCESS

Sven: Hi Jasper and Moritz, thanks for taking the time. Jasper, Moritz and I have known each other for years, but I wanted to meet you for quite some time.

Jasper: Yes, why is that?

Sven: I heard stories about your desk at home and your Lego collection and I wanted to show you this.... [Sven turns off the blur filter on his camera and an office appears that seems to scream "The Legal Empire Strikes Back". While Jasper and Sven are grinning, Moritz starts to wonder...]

Sven: But we wanted to talk about your lessons learned when it comes to advisory boards. You have a wealth of international experience. What have you learned over the years?

Jasper: Well, I led investments in more than 20 companies across Europe, the U.S. and Israel in the last 9 years and saw a few things. Good and bad.

Moritz: What would you say are the main objectives of an advisory board?

Jasper: It is important to understand the difference between an advisory board and a supervisory board. The latter is all about corporate governance, controls and checks and balances. That is very, very different for an advisory board in a start-up, at least in the early stages. Here, our focus is on supercharging the founders and their thinking. We want to offer our perspective and especially our experience from the portfolio companies. The goal is to support better decision-making for crucial topics.

Moritz: Anything else?

Jasper: Yes. A second important objective is to professionalize matters. What do I mean by that? If only the founders and we as early backers are on the cap table, you don't need an advisory board.

However, once the cap table grows, an advisory board makes a lot of sense. Having regular board meetings helps founders to professionalize the company's internal processes and structures. The preparatory work that goes into a good advisory board meeting and the necessary follow-ups and follow-throughs might seem boring, but they are really important and quite hard to establish quickly.

Sven: Let me ask a provocative question. When you draw on your experience, do you think that the right people sit on advisory boards?

Jasper: Well, it depends. I sometimes have the feeling that more experienced operators on the advisory boards of German start-ups would highly benefit them.

Sven: Can you please explain?

Jasper: I understand that every investor with a sizable investment wants to be represented on the company's advisory board. However, especially in the early stages of a start-up the founders will simply benefit the most from investors who have operational experience to go deep with their portfolio companies. At Cherry we believe that also having experienced a similar journey as the founders and knowing how great looks like does foster much more meaningful conversations. Christian and Filip scaled Zalando, Sophia Spotify, Dinika Uber Eats and I was a solo founder. We never force ourselves upon founders, but what we share is our view of the company and its potential trajectory to help founders. I think that the overall ecosystem in Germany would benefit from more "operator investors".

Moritz: What do you think about observers on an advisory board?

Jasper: They can have their role, but an advisory board can quickly get too crowded. While having too many passive board members who don't participate in the debate is not helpful, having too many folks sharing their perspective can also be counterproductive. When I chair advisory boards, I adhere to strict time management and giving every opinion an opportunity to be heard.

Moritz: And what about independent members?

Jasper: I had independent members on my boards and made good experiences. However, this is likely something for companies in the later stages once there is a capital market exit on the horizon or a chairperson is needed to align interests of different shareholder groups. If an early-stage start-up requires special know-how that goes beyond what the investors can bring to the table, it generally suffices to hire an outside topic expert for a limited period of time.

Sven: Any further practical guidance on how the work of the advisory board can become more effective?

Jasper: I don't like virtual board meetings. Sometimes they can't be avoided but nothing trumps direct interaction. In the early stages one meeting per quarter should be enough but it is important to be in constant dialogue between the board meetings. For example, we speak with our portfolio companies at least every second week and are 24/7 available on messengers and the phone.

Sven: Moritz and Jasper, thanks so much for sharing your perspective and Jasper, may the bricks be with you.

“I sometimes have the feeling that more experienced operators on the advisory boards of German start-ups would highly benefit them.”

Jasper Masemann
Partner, Cherry Ventures

2. APPROVAL REQUIREMENTS

Investors in German start-ups require a certain degree of control over the use of the funds they have invested in the start-up and the general direction of the company. When it comes to investor's veto rights, we often see a distinction between (i) more "fundamental" measures that get assigned to the shareholders' meeting and require, among others, approval of a certain preferred majority (these matters are usually set forth in the company's articles of association and sometimes also in parallel in the shareholders' meeting) and (ii) more operational matters for which the company's management board requires the approval of the advisory board and that are often set forth in the shareholders' agreement or the rules of procedure for the management board. We will focus on this latter group of matters.

For time-sensitive matters, through the work of the advisory board, the flow of information to relevant investors (groups) and a certain degree of control over the use of the investment capital can be presented much more efficiently than through the relatively sedate shareholders' meeting. A reservation of consent allows investors and independent advisory board members to enter a dialog with the management board before the measure is implemented. In this way, the pros and cons of a measure of a certain significance can be discussed and different points of view can be heard. Again, the wise founder should not see these catalogues as shackles but as a necessary evil allowing well-founded business decisions. And (spoiler) if things don't go according to plan, the prior approval of the advisory board can also justify the desired release of management from potential personal liability.

Of course, such veto rights are always caught between the investors' desire for control and influence on the one hand and the need to preserve the key assets of a start-up on the other, *i.e.*, speed and the strong leadership and execution power of the founding team. Even if the gap has certainly become smaller in recent years, the approval catalogs in German start-ups are often more comprehensive and granular than those in their American counterparts. We advise a sense of proportion here. If the founders regularly have to request approval for measures several times a month, something is not right. Of course, there is nothing wrong with (and even a lot to be said for) a strategic exchange with the advisory board every (second) month but granting approval for business transactions should certainly not make up the majority of the advisory board's activities. Important measures with long-term consequences, such as the recruitment of key employees, the structure of suitable employee participation programs, major cooperation agreements, major investments, entry into international markets, the acquisition of shareholdings and related party transactions, *etc.*, should be discussed in the advisory board and require the approval of the investor representatives. However, making day-to-day business measures subject to approval certainly sends the wrong signal.





BEWARE THE ANTITRUST LAW(YER)

The early anarcho-capitalist Isabel Paterson once remarked "As freak legislation, the antitrust laws stand alone. Nobody knows what it is they forbid." If Isabel hadn't died in 1961, we'd tell her to relax and that we're here to help, but we digress. What we want to say is that when agreeing on the rights and competencies of an advisory board, one should also keep in mind the boundaries set forth by German antitrust rules. These can come into play in two ways:

An investor can acquire negative control over the affairs of a start-up, which might then trigger merger clearance requirements. Such negative control concerns may arise if an individual investor gets too much influence over the company's affairs which in turn can become relevant when agreeing on the veto rights of such investor, including through its representative on the start-up's advisory board. For example, if an investor-appointed board member can veto the appointment of a managing director or the approval of a business plan all by himself, that is cause for concern. Ultimately, this question will however require an assessment of all relevant facts on a case-by-case basis to determine whether the veto rights when seen together rise to the level of negative control within the meaning of applicable antitrust laws.

Another point of peculiar interest is the exchange of competitively sensitive information ("CSI"). In a nutshell: CSI is information that will enable a (potential) competitor as recipient to change its strategic behavior on the market. Typically, information about current or future prices, capacities, customers, technologies, innovation are most sensitive. Investor-appointed members of the advisory board may also be board members of such (potential) competitors at the same time or in case of a corporate venture capital investor the investor itself may compete with the start-up. In case such advisory board members are dealing with or have influence on the daily business of such other company or the CVC investor, you need to think about limitations of information for them as a member of your advisory board. Solutions can be to exclude them from (parts of) meetings or provide them with redacted information only, for example.⁷

3. THE "STRONG" ADVISORY BOARD

In German corporate practices, a distinction is made between "strong" and "weak" (or "simple") advisory boards. This distinction relates to the scope of powers and competencies conferred by the shareholders' meeting on an advisory board.

If the advisory board is conferred with the authority to appoint and remove the managing directors of the company, then it is usually referred to as a "strong" advisory board (*starker Beirat*). Such power will need to be stipulated in the company's articles of association. Findings of our OLNS Board Study 2024/2025 indicate that such strong advisory boards are fairly common in the late-stage financings and amongst German scale-ups (for details see Chapter A.VII.5.).

Some authors use the term "strong advisory board" more broadly, i.e., they refer to an advisory board as "strong" – in contrast to a purely contractual advisory board – already whenever the articles of association of the start-up provide for the advisory board as a separate corporate body and the advisory board already performs any corporate governance tasks in addition to its purely advisory function. In this publication, we will stick to the narrower understanding presented, according to which a strong advisory board differs from a weak advisory board in that it decides on the appointment and removal of managing directors, as this criterion corresponds to market practice in our view.

In case of a strong advisory board, the commercial register (*Handelsregister*) of the company will need to be able to verify the effectiveness of resolutions on the appointment and removal of managing directors. To enable the commercial register to make its assessment, German law requires that companies disclose members of a strong advisory board to the commercial register by filing and keeping an updated list of the advisory board's members with the commercial register. Maintaining an updated list of the advisory board members with the company's commercial register falls into the responsibility of the management board of the company; for practical purposes, the lists are submitted to the commercial register electronically via a notary.

7. For more details on the success factors and specific challenges of corporate venture capital, see our Guide OLNS#4: "Corporate Venture Capital." The Guide can be downloaded for free here: <https://media.orrick.com/Media%20Library/public/files/insights/olns-04-corporate-venture-capital.pdf>.

4. TRANSFER OF FURTHER COMPETENCIES FROM THE SHAREHOLDERS' MEETING

In addition, it may be appropriate to transfer further powers assigned to the shareholders' meeting to the advisory board. These include, for example, exempting the management from the restrictions of sec. 181 German Civil Code, adopting the annual financial statements, passing resolutions on the appropriation of profits and on changes to the existing accounting principles as well as even the right to issue instructions to the management of the company. Here, the GmbH law offers scope for transferring competencies of the shareholders' meeting to the advisory board, provided that these are not the few areas of responsibility that must necessarily remain with the shareholders' meeting. These include, among other things, amendments to the articles of association (this applies particularly to the issuance of new shares and the creation of authorized capital), decisions on mergers or conversions, etc.

And always remember, no matter how strong the advisory board might be, it is like an actor in a play where the shareholders' meeting holds the script, the stage directions and even the keys to the theater. If the shareholders decide they want to rewrite the scene, the advisory board can do little more than bow politely and exit stage left.



III. Duties of the Advisory Board Members

1. OVERVIEW

One of our favorite quotes, which we also use time and again to convince clients of the need to deal with emerging issues at an early stage (yawn...) comes from Ralph Waldo Emerson: "We learn geology the morning after the earthquake." With this in mind, we would like to take a brief look (well, as brief as possible for a lawyer who perceives petty as a compliment) at the duties of advisory board members and the resulting liability risks.

For the advisory board that is set up as a separate corporate body, the legal status of its members is determined by law and the articles of association. The members of the advisory board are subject to fiduciary duties and are liable to the company for any damage caused by a breach of duty. The legal literature derives the applicable standard of care and the basis for the company's claim for damages from an overall analogy from sects. 43 and 52 GmbHG in conjunction with sects. 116 and 93 AktG as well as sects. 34 and 41 German Cooperative Act (*Genossenschaftsgesetz*). Each member therefore owes the care of a prudent and conscientious member of the advisory board, whereby the more extensive the powers of the advisory board itself, the stricter the range of duties. This holds true even if the board members represent the group interests of one or more investors or other shareholders.

The duties of the advisory board members can be categorized into three main areas:

- the duty of loyalty (*Treuepflicht*);
- the duty to act within the law (*Legalitätspflicht*); and
- the duty of care (*Sorgfaltspflicht im engeren Sinne*).

We will present them in some more detail further below.

Essentially, the advisory board's responsibilities are primarily directed towards the company. Generally, an advisory board member is free to represent and pursue the interests of the shareholder or group of shareholders which appointed him or her.

However, in certain cases, there may also be duties towards shareholders. For example, the advisory board can be assigned the role of serving as a neutral mediator in disputes between shareholders. The duty of the advisory board towards the shareholders is to effectively resolve conflicts and to promote a constructive cooperation within the company.

Typically, an advisory board does not have direct legal duties towards outside third parties. As described above, the advisory board is a consulting body that supports and oversees the management but does not supervise or monitor it. Its main responsibility lies with the company itself and indirectly with the shareholders.

2. THE DUTY OF LOYALTY

Drawn with a broad brush, the duty of loyalty requires the advisory board members in particular to adhere to the following:

- Must consider the company's best interests.
- Cannot claim company resources for personal use.
- Must maintain confidentiality of business secrets.
- Prohibited from pursuing special advantages.

Sounds straight forward, but it might be a bit more complicated in individual cases, particularly when it comes to potential conflicts of interests. An advisory board member active in competing companies does not inherently pose a fundamental conflict of interest, but transparency is key. Shareholders must be informed of potential conflicts of interests. A permanent conflict of interest affecting his or her entire activity and the essential core area of the enterprise, however, would result in the advisory board member having to resign from his or her mandate.

The duty of loyalty also provides the company with protection against inaction or violations by the advisory board, especially when it has been entrusted with key responsibilities such as approving the company's annual financial statements and approving the decisions regarding the distribution of profits.

3. THE DUTY OF LEGALITY

The duty of legality has an internal and an external aspect and in general requires the advisory board members to adhere to the following:

- Advisory board members must follow legal obligations, especially within their official roles (internal duty).
- Advisory Board members must work towards ensuring that the management acts in a lawful manner (external duty).

The latter in turn includes the following aspects, insofar as the advisory board is able to exert influence within the scope of its mandate (i.e., consultation, consent rights and, in the case of a strong advisory board, by dismissing managing directors):

- ensure legal integrity of managing directors;
- prevent specific managerial crimes; and
- oversee company-wide legal compliance, possibly including standard compliance programs.

As the company grows and its business activities scale, the duty of legality might lead to the obligation to work towards implementing customary compliance programs that further institutionalize such compliance-related measures, reporting standards, training programs, etc.

4. THE DUTY OF CARE

The duty of care requires the advisory board members to adhere to the following:

- Promote the company's purpose.
- Observe due diligence, protect company interests and avert damages to the company.

To put it into legalese: Advisory board members have in any case the obligation to act with the duty of care of a diligent and conscientious board member (*Sorgfalt eines ordentlichen und gewissenhaften Kontrollleurs und Beraters*). Specific conduct requirements are shaped by the company's internal task assignment and are context dependent. Those board members with special knowledge must live up to a higher standard of care for matters within their area of expertise.



IV. Liability Risks of the Advisory Board Members

1. APPLICABLE LIABILITY STANDARD

Members of the advisory board do not serve as absolute overseers of the management, given their lack of direct authority over the executive team. While under German law, any form of negligence might suffice to establish the liability of an advisory board member in case of a breach of his or her duties, in German start-ups, such liability risks are usually sought to be mitigated by specific provisions in the company's articles of association, e.g., by using the following language:

"In the exercise of their office, each member of the advisory board shall be entitled to reasonably consider the interests of the shareholder or shareholders who appointed them to the extent there is no conflict to the interests of the company. A possible liability of the advisory board members towards the company due to a lack of consideration of the interests of the company in the exercise of the competences of the advisory board shall be excluded to the fullest extent permitted by law. The liability of the advisory board members shall, in any case, be limited to intentional misconduct and gross negligence."

2. LIABILITY RISKS

In case of grossly negligent or intentional breaches of duty, advisory board members can generally be held liable by the company or the shareholders. The advisory board members can for example bear responsibility if they approve transactions in violation of their aforesaid duties and such transactions then cause harm to the company. However, the shareholders' meeting may waive the company's right to claim damages without being bound by the three-year waiting period applicable to German stock corporations (*Aktiengesellschaften*). The routine discharge of the advisory board by the shareholders' meeting can imply such a waiver. Liability towards third parties would normally only be considered if the actions or inactions of an advisory board member directly lead to damages to third parties, which is rather unusual in practice. Such situations could arise, for example, if advisory board members knowingly support or facilitate unlawful actions by the management board.

And in the U.S.?

In Delaware corporations, unlike their German counterparts, the board of directors assumes a more pivotal and direct role within the company. Delaware law allows for the inclusion of provisions in the corporation's charter that absolve directors from personal liability for monetary damages arising from breaches of their duty of care (but not for breaches of the duty of loyalty). This kind of exculpation clause often results in the dismissal of many lawsuits that allege duty breaches by the board of directors.

3. THE BUSINESS JUDGMENT RULE

Although the advisory board of a GmbH ultimately does not make business decisions, members should use the Business Judgment Rule as their guiding standard of conduct. The Business Judgment Rule states that business decisions based on appropriate information and made in the best interest of the company are generally not subject to liability. Liability does not arise if the board member has no personal legal interest in the decision that was made, has adequately prepared for the decision, and acted credibly in the best interest of the company. It's like having a get-out-of-jail-free card, but only if you play by the rules of wisdom, care and honesty.

4. D&O INSURANCE AND INDEMNIFICATION AGREEMENTS

Obtaining Directors and Officers (D&O) liability insurance is recommended as a prudent measure to protect the personal assets of the advisory board members.

As these insurance policies are often tailored to supervisory board members of stock corporations, it is important to ensure that the activities of an advisory board member in a GmbH or a partnership are included in the insurance cover. Here are a few additional considerations though we advise to seek guidance from an experienced broker on a case-by-case basis:

- **Coverage Scope:** Ensure the policy covers all potential liabilities that board members might face, including legal costs, settlements, and judgments arising from their decisions and actions.
- **Policy Limits:** Assess the appropriate coverage limits (even in early stages the general limit should not be less than EUR 1 to 2 million). This depends on the size of the company, the industry, and the specific risks involved. Higher limits provide more protection but come at a higher premium.
- **Exclusions:** Understand what the policy does not cover. Common exclusions might include willful misconduct, criminal acts, and certain regulatory fines. Make sure these exclusions are clearly defined.

Note that some policies in the German market will have exclusions or lower limits for certain U.S. matters, which can become relevant when the start-up has strong connections with or relevant operations in the U.S.

Consider also whether the policy covers regulatory investigations, which can be a risk for start-ups, particularly in regulated sectors.

- **Claims-Made Basis:** D&O policies are typically written on a claims-made basis, meaning they cover claims made during the policy period. Ensure that there is coverage for past acts (retroactive date) and consider a tail coverage for claims made after the policy expires.
- **Defense Costs:** Check if the policy covers defense costs and whether these costs are within the policy limits or in addition to them. Defense costs can be substantial.
- **Other Aspects:** Understand the deductibles or retentions applicable to the advisory board members, as these will impact out-of-pocket expenses in the event of a claim. If the start-up is sold, merged, or goes public, ensure that the policy provides run-off coverage to protect former directors and officers against claims arising after they leave their positions.

U.S.-style indemnification agreements (such as the standard document promulgated by the NVCA⁹) are rare in Germany and it is unclear if they would be enforceable, notably in case of the company's insolvency. However, as described above, the liability risks of an advisory board member in a GmbH are usually significantly lower than the ones of a director in the United States and the other measures described herein are often considered to provide adequate protection for the members of the advisory board.

9. For details see our Guide OLNS#11: "Bridging the Pond – U.S. Venture Capital Deals from a German Market Perspective." The Guide can be downloaded here: <https://media.orrick.com/Media%20Library/public/files/insights/2023/olns11-bridging-the-pond.pdf>.

V. Size and Composition of the Advisory Board

1. AN IMPOSSIBLE QUESTION

We are asked time and again whether we have some generally applicable advice on the right size and, more importantly, composition of an advisory board. If there are too few members or the wrong members, you do not get a broad range of perspective and advice. However, if you have too many members or the wrong members, this can make the advisory board unwieldy and unproductive. At the risk of losing half of our readership here, unfortunately no, and to use the standard answer of our profession: it depends. We tend to agree with Jeff Stump and Shannon Barbour from venture capital investor A16Z who summarized their experiences with U.S. boards of directors in a 2022 blog post as follows: "We have consistently found that the best founders and start-ups build their boards forward from product-market fit – instead of backward from IPO – and approach it like building a presidential cabinet. The composition of a board will evolve alongside a company, and there is no one-size-fits-all approach to building a board. There isn't a set number of board seats or a particular balance of personas that solves every business problem."

So, as the right size and composition of an advisory board depends on a variety of criteria and is always case-specific, we can only briefly outline the most relevant criteria from our point of view here. The following statements are also of a more normative nature, *i.e.*, they are guided by "how it should be." Of course, the power of the factual also exists here and perhaps especially here in start-up land. In some start-ups, the founders have such a powerful position that the advisory board – even if the investor representatives wanted to and were not just happy to be allowed to invest in this hot start-up in the first place – cannot fulfill its task.

2. THE RIGHT SIZE

Many investors and advisors tend to approach the question of size from the negative side and advise "not too many and never an even number."

2.1 Never an Even Number, Right?

Let's start with the latter argument because it sounds so obvious. A composition that enables stalemate situations, *i.e.*, an even number of advisory board members, cannot be right, at least not without giving one advisory board member a casting vote or tiebreaker. Advisory boards should resolve conflicts and facilitate decisions, not block or delay them.

However, reality offers a more nuanced picture. For example, over 80 % of German unicorns for which information is available from public registers have or had an advisory board (or supervisory board) with an even number of members in the past at some point, and the results of the OLNS Board Study 2024/2025 also show that advisory boards with an even number of members are not that rare (for details, see Chapter A.VII.). There are also a number of reasons for this; in particular, the possibility of majority voting on the advisory board should not be overestimated, especially in the early phases of a start-up.

On the one hand, even if the lead investor accepts a majority of founder representatives on the advisory board (such a composition has its merits, at least in the early stages), the investor will still insist on a veto right. If the catalog of legal transactions requiring approval is correspondingly broad, the investor need not fear "majorization."

In our opinion, however, what is even more important is that majority decisions in the early stages often indicate very significant problems in the start-up. Founders and investors are, in these cases, often well advised to discuss the matter until either all representatives support a decision (with more or less enthusiasm) or not to put the measure in question to a vote to avoid potentially causing long-term friction amongst the various stakeholder groups.

Let us illustrate how much context matters and give you an anecdote from our practice. A story why we sometimes wonder why the "sign"-button on DocuSign is not followed by an "are you sure and have you consulted your grandmother or at least your attorney?"-button. A start-up had received a term sheet from an investor for its first priced round. At the time, the start-up was still organized as a GmbH. The term sheet provided for an innocent-looking advisory board with three members. One member was to be appointed by the founders, one by the investor and a third member jointly by the first two. In addition to the usual advisory role, the advisory board was to vote on a catalog of transactions for which the management required prior approval by the advisory board. During the due diligence and negotiation phase, the investor and founders then decided on a "flip," *i.e.*, the transfer of the operating German GmbH to a newly founded U.S. holding company (a Delaware Inc.), shortly before the closing of the financing round. Investors and founders would henceforth have a stake in the U.S. holding company and the operating GmbH would become a wholly-owned subsidiary of the U.S. holding. Among other things, the investor and founders hoped that this would give them better long-term access to the deeper funding ecosystem in the United States.¹² Without further ado, the founders and investor took the term sheet and replaced "GmbH" with "Inc. (yet to be incorporated)" and "Advisory Board" with "Board of Directors." All good, right? If that sounds like a trick question, trust your instincts. In an Inc., the board of directors has a much more relevant position than an advisory board has in a GmbH. In particular, the board of directors appoints and nominates the officers of the company. In the revised term sheet, the founders had unsuspectingly *de facto* already relinquished control of their start-up with the first round of financing.

2.2 The Advisory Board can Scale With its Start-up

In practice, it is important to find the right balance between the relevant expertise and the representation of the relevant stakeholder groups on the one hand and the need for flexible and efficient task completion while maintaining legitimate confidentiality interests on the other.

Depending on where the start-up is on its development path, sizes of three to five members in the early stages and, later, up to seven members are usually recommended by many consultants, while occasionally we see advisory boards with up to nine members.

However, in our view, the question should be less about "how many" and more about bringing together the right people for that particular stage with the necessary flexibility and consistency.

3. THE RIGHT MEMBERS FOR THE RIGHT STAGE

Just as the number of advisory board members changes over time and as the challenges faced by the start-up change, so do the demands placed on the members of the advisory board. Continuity on the advisory board is important in order to develop a deep knowledge of the start-up and its particular challenges and to build up the necessary relationship of trust with the founders. At the same time, a start-up looking for product-market fit naturally requires different skills and expertise from its advisory board than a start-up in the international expansion phase or shortly before an IPO.

"Experience may be overrated by some, but it is hard to find a substitute for it."

Frank Sloodman, former CEO of Snowflake in his 2022 bestseller "Amp it up"

12. For a detailed introduction into the pros and cons of a flip and how to implement it, see our Guide OLNS#7: "Flip it Right." The Guide can be downloaded here: <https://media.orricks.com/Media%20Library/public/files/insights/olns-7-flip-it-right.pdf>.

3.1 General Considerations

Venture capital investors expend an enormous amount of time, energy and intellectual firepower finding entrepreneurs and businesses that offer an extremely rare combination of innovation, a compelling business model, an impressive team of entrepreneurs, and great potential for rapid growth (and if the timing is right, even a certain football team from Hamburg town may finally find its way back into the Bundesliga... only if...). To improve chances of success, good VCs add one further ingredient: an advisory board optimally composed, structured and incentivized for each stage of a fast-moving development cycle to ensure ongoing, meaningful, and desired support for their portfolio companies. The collective expertise and experience of diverse board members not only enriches decision-making but also provides a multifaceted view of the situation at hand. This diversity stems from various industry backgrounds, functional expertise, and cultural perspectives, enabling a more comprehensive analysis. It's the amalgamation of these distinct viewpoints that can identify and mitigate risks, uncover hidden opportunities and, ultimately, drive innovation and growth within a portfolio.

Establishing and maintaining an effective advisory board requires skill and tact under even the most favorable circumstances. In the fast-forward world of venture capital, the issues the advisory board is asked to address are greatly magnified by rapidly changing competitive markets for portfolio companies, explosive growth rates, succeeding rounds of investment and potentially conflicting exit timing and strategy among the investor base.

So, if diversity is important, then don't bring in a bunch of board members who all look and think like the founders. The same applies to investor representatives on advisory boards whose main differences seem to be the logos on their hoodies. Rather, the board must be diversified by experience as well. As we have seen, the tasks of the advisory board can be plentiful and may include having to (further) develop technology, product, sales and personnel strategies, advise the founders and help them develop into leaders, establish contacts, mitigate or resolve conflicts and avoid costly operational mistakes.

However, the selection of advisory board members does not take place in a vacuum. Rather, the articles of association or shareholders' agreement of the start-up usually stipulates that certain shareholders or groups of shareholders are entitled to appointment rights. These appointment rights can be assigned to specific shareholders, e.g., individual founders or investors, or it can be stipulated that the appointment is to be made by a majority of the votes of a certain share class (for details, see below in the discussions of founder members and investor members). In later phases of the company's development (often Series B or later), independent advisory board members can be added. We will come back to the question of how these independent members get proposed and appointed in practice.

However, investors that come in on subsequent rounds at higher valuation points want to have their interests vigorously represented, which could possibly conflict with the aim of having the right mix of expertise on the board and a board that is aligned strategically. Not all Investors are alike, especially when they have liquidation preferences at various levels of the proceeds waterfall and an underwhelming exit becomes a realistic option, these basic tensions can flare up. Further, there can be difficult sensitivities to manage with a founder who has chosen unqualified yet personally close members on the advisory board (often recruited from the ranks of the early business angel investors). Incoming investors must then balance the desire to upgrade the board with the potential for conflict in forcing the issue prior to or just after investing.

Idea in Brief...

For those of our readers who like it short and crisp, here are some of the main considerations when setting up an advisory board boiled down to a few bullet points:

- Founders need to be aware that they have skill gaps and need good mentors to help them grow their company and grow themselves into their leadership roles.
- A good advisory board is not just a nuisance ("Do I need to get their consent?" vs. "Is this something it makes sense to sound with my advisory board and get their insights?").
- The advisory board must be sufficiently experienced and diverse to allow critical thinking and real dialogue. Domain expertise and competencies in sales and scaling are critical.
- Check a potential board member's commitment and make sure a candidate is willing to contribute the necessary time to your start-up.
- The board composition should be sufficiently flexible. It takes a different board to launch a start-up then to prepare it for a successful exit – good board members know when their time has come.
- When considering an even number of board members, build in a deadlock resolution mechanism (tie breaker and casting votes) – though be aware that in reality, non-unanimous voting patterns can be a sign of trouble.
- Not every shareholder needs to be represented on the advisory board, since advisory boards should be lean and agile. It is often advisable to have independent board members that are sufficiently incentivized.
- Be aware of confidentiality and competition issues.

3.2 Founder Members

Let's start with a question that may come across as a bit surprising: If the advisory board is to advise the management board (these are at least in the early stages of the start-up almost always the founders) and also help the founders develop into leaders, should the founders be allowed to appoint members to the advisory board at all, and if so, shouldn't these founder-appointed members at least be different people from the founders?

So where is the problem, you might ask yourself. To revisit our theater theme one last time: Allowing the founder, who is also the managing director of the start-up, to be part of the advisory board might seem like letting the star actor be the director at the same time and run the lighting and sound too (Wait, didn't Ben Affleck win an Oscar with *Argo* for doing exactly that?). But let's face it, who knows the script better than the person who wrote it? The founder has been there from the first rehearsal, knows every line, every cue, and every dramatic twist. Of course, to keep things fair, in order for the advisory board to be able to play the role of the critical audience, ready to throw tomatoes if the founder's ego gets too big, there need to be mechanisms in place to ensure that the founder's dual role doesn't turn into a one-person show, maintaining a balance between creative genius and practical decision-making.

But let's take this step by step: Two questions need to be distinguished here. The question of what is legally permissible and the question of what makes practical sense.



Are Founders Allowed to Become Advisory Board Members?

A few voices in the legal literature argue against (indirect) shareholders who also hold the office of a managing director being appointed to the advisory board if it is up to the advisory board to decide on individual management measures. We are not convinced by this view, and it has so far mostly remained isolated. The German law on limited liability company lacks regulations on the incompatibility of management and control, while the German law on stock corporations knows such rules for the supervisory board (see sec. 100 para. 2 sentence 1 no. 1-3, sec. 105 AktG). In our opinion, there are also no interests worthy of protection on the part of the public involved that associate an advisory board anchored in the articles of association with independent monitoring of the management. The advisory board is the outflow of the comprehensive internal organizational competence of the shareholders and is not meant to protect the general public. This is also supported by a control consideration: If there is no advisory board, the powers remain with the shareholders' meeting. Here, the founders will often hold (indirectly through their holding entities) the majority of voting rights in the early phases. The German law on limited liability companies only provides for voting prohibitions to a very limited extent, and the shareholders, who are also members of the management board, are permitted to grant themselves discharge or issue-binding instructions.

Should Founders Become Advisory Board Members?

So, if active founders are legally allowed to be a member of the advisory board, the question arises as to whether they should be on the advisory board. Caution, spoiler alert: Yes, they should.

However, if you look at the cohort of German unicorns, for example (see also Chapter A.VII.7. for more details), it is noticeable that there were regulations sometimes as well that allowed the founders to delegate advisory board members, but a managing director (therefore often a founder) was not allowed to be an advisory board member. Examples of this are currently OneFootball and Volocopter, while Contentful in Series B (2016) and Staffbase in Series A (2015) provided for such incompatibility clauses at certain times in the past.

However, such incompatibility provisions are rare and the findings of our OLNS Board Study 2024/2025 indicate that in particular start-ups that were launched in recent years rarely feature such clauses. In our opinion, the founders themselves should also be represented on the advisory board, at least the founders who play an active role in the company. On the one hand, the advisory board takes over the tasks of the shareholders' meeting for reasons of efficiency and the founders would also be represented there.

On the other hand, the advisory board serves to balance the interests of the relevant shareholder groups.

Founders on the advisory board promote the necessary exchange of ideas and points of view. Founders have a deep understanding of the business, its vision, and its operational nuances. They are usually the most committed to the success of the start-up and can provide valuable insights and motivation. Their presence on the advisory board can also help with continuity and alignment between the board's strategic guidance and the company's operational execution. That being said, we obviously are aware that founders' commitment is often also partially just another word for their personal biases that could conflict with what is supposed to be an objective advisory role of the board. Their close involvement with the company might affect their ability to provide and, more often than not, accept impartial advice. Founders may resist advice that contradicts their vision or existing strategies, potentially stifling innovation and adaptability.

However, the investors' need for protection and control of the management board is only taken into account if the appointment of the founding managing directors to the advisory board does not result in the founders (usually being the managing directors of the start-up) being able to decide on the relevant management measures without the consent of the investors. Some scholars argue for a prohibition on voting by the founders sitting on the advisory board in cases where the matter at hand concerns measures for which the management board requires the approval of the advisory board. This is therefore not a question of whether founding managing directors may sit on the advisory board at all, as described above, but whether they are subject to a voting ban as advisory board members for a certain (albeit, of course, very important) group of measures. In our view, however, such a general voting ban goes too far. This is because if the advisory board (which is in the organizational sovereignty of the shareholders) did not exist, the shareholders' meeting would be responsible for the respective decisions. In that case, only the comparatively narrow voting prohibitions of sec. 47 para. 4 GmbHG would apply. A general ban on voting for founding managing directors in advisory board decisions regarding the management of the company that goes beyond these narrow limits would therefore appear to be too far-reaching. In practice, there is also no need to protect investor representatives on the advisory board. As a rule, a qualified majority is required for decisions of the advisory board.

What About the Founder who Leaves the Company?

And what if the founder is no longer an active founder, maybe he has even become a leaver during his or her vesting period?

Now, should this former star still be allowed backstage as part of the advisory board or should he or she just be told to sit in the audience and enjoy the film, *i.e.*, just be an ordinary shareholder (we know, but we can't help it)?

Even when former founders decide to no longer be in the spotlight, their experience and insights can still be incredibly useful. They've seen the company through its first act and can provide a historical perspective. Their knowledge of past triumphs and disasters can help guide current decisions, ensuring the company doesn't repeat old mistakes. Of course, there's the potential for some backstage drama. The advisory board needs to ensure that this former star doesn't try to rewrite the script to suit their own interests. It's crucial to have clear boundaries and a strong director (aka the still active co-founders and / or the chair of the advisory board) to keep the production on track.

So, in the case where the founder has taken a step back on good terms, allowing them to be part of the advisory board can still be a winning move for the company. However, as professional pessimists (yeah, we have seen too much...), we would recommend to always prepare "for the worst" in the shareholders' agreement, and provide for an automatic forfeiture of any appointment rights of a leaving founder, unless the investor majority agrees otherwise, leaving room for amicable settlements in the individual case (*i.e.*, when everyone feels comfortable having a retired Broadway legend being around a bit longer to offer tips to the new cast – okay, this really was the last act).

3.3 Investor Members

With every new financing round, the discussion around the composition of the advisory board starts all over again. Who shall stay on the advisory board, who becomes an observer and who will drop out?

First, it's important to recognize that investors are far from being a monolithic group and come with different backgrounds, goals, and equity stories.

Early-stage investors might have a deep emotional and financial commitment to the company, having been there from the start (and hoping that this company is the home run that can return their fund eventually). Later-stage investors, on the other hand, might be more focused on scaling and quick returns. This diversity in investment horizons and price points can lead to differing and potentially conflicting priorities.

The new lead investor will usually get at least an observer seat and often even a board seat and quite often both. Many investors request a board seat and an additional board observer spot. This might make sense if the investor is very active and, for instance, a junior colleague joins the board meetings as observer to support the management with operational or strategic tasks on a regular basis. From the investor's perspective, the additional observer seat serves to train young talent.



The lead investors of the prior rounds will want to stick to their advisory board seats. Remember, investors might have different visions and exit time horizons, and interests can diverge especially when the investors have invested at very different price points. If the advisory board is also intended to serve as an unbureaucratic exchange with the most important shareholder groups, it is also true that the importance of some investors can change over the course of financing rounds. Not every investor needs to be represented on the advisory board (this ultimately also applies to the observer seat on the advisory board that is often offered as a compromise). Founders and the relevant investor groups should resist the urge to make the advisory board too large or to fill it with the wrong people.

However, when deciding which investors should be represented on the advisory board, where possible, you may want to give weight to a few other factors:

- **Strategic Value:** Investors who bring more than just capital to the table, such as industry expertise, valuable networks, or strategic partnerships, can be very beneficial.
- **Experience and Commitment:** If an investor is willing to assign one of its general partners with a proven track record of guiding start-ups to success and mentoring successful founders, that should carry a lot of weight.
- **Diversity:** Having a diverse advisory board can lead to more well-rounded decision-making. For example, although that investor might not have signed the largest check, some founders we interviewed for this publication confirmed that they considered the advice from U.S. early-stage investors to be particularly helpful when it comes to scaling an organization across several countries.
- **Alignment of Interests:** Do the investors' goals and vision for the company align with those of the founders and other board members? Again, investors may differ, and, for example, the interests of a corporate venture capital investor with a strategic focus might not be the same as those of an institutional venture capitalist.

Remember, the advisory board should point to the future. This means recruiting individuals who will not only help now but will move the start-up to the next level or even beyond. Notably, the advisory board should offer a melting pot of relevant views and skills and, in particular, have way more relevant experience than the founders.

THE FIVE MOST USELESS BOARD MEMBERS (WHO ARE ACTUALLY ONLY TWO)



In episode #385 of the Doppelgänger Tech Talk podcast from September 4, 2024, the two hosts Philipp Glöckler and Philipp Klöckner apparently decided on the spur of the moment to talk about "The Top 5: Today – Our Most Useless Board Members". In fact, only two were discussed, but even these two we found entertaining and helpful and therefore wanted to share them (we took the liberty of straightening out the "podcast grammar" a bit for better readability and translated the revised transcript into English...).

#1 The guy or girl on the board who is always saying, "At company XY – which just happens to be their most successful investment – we do it this way." It's like having a hammer and every problem becomes a nail. Let's say you're on the board of Airbnb and you say, "At Uber, we did it this way." Or, "At Facebook back in the day, we did it this way." This person simply applies the same strategy to every company because they see every problem as completely equal. This is extremely toxic.

#2 The second type of board member is the one who thinks it is their job to constantly ask ad hoc questions in board meetings. It is of course important that the chairman maintains discipline to prevent everyone from being unprepared and seeing the slides for the first time. However, that is the worst case. In a professional board, that should not happen. But if everyone sees the slides for the first time, then every slide is scrutinized because people think, "My job is to sit here now and I should probably be a bit critical so that I also appear to be a critical thinker, to be doing my job as supervisor. So, I'll ask a difficult question and just question the whole concept of the company again or ask whether we should be in this market at all." That way, you take a discussion that you would normally have in an offside and just move it into any board meeting.

"Some of the board members are just too young. They've never lived through it. They don't know. They were trained in the last ten years. They've only seen up. Some of them are naïve, which means they haven't studied economics and finance to the extent that they should. I might point them to one of my favorite blog posts: "The Keys to the 10X Revenue Club," because Silicon Valley mostly lives on price to revenue multiples. It is the conversation du jour in Silicon Valley, and it's one of the most naïve ways you could value a financial asset in the world, and so people just need to sharpen their pencils [...]."

Bill Gurley, BG2Pod, episode #1 of 25 January 2024

3.4. Independent Members

3.4.1 Overview

Independent members are rare in early-stage start-ups. However, these members gain importance in later phases (or at least they should). They have little or no connection to the founders or investors and usually do not have a relevant stake in the start-up (although it may be worth offering them a slice of the pie under the start-up's virtual or equity-based participation program, as really good independent members often know their value – see below).

Such an independent member who might be an industry expert with deep subject-matter expertise can share strategic insight and help the founders navigate industry-specific nuances. Well-known names reflect positively on the company's reputation and indicate the start-up's legitimacy to investors and other stakeholders. When the relationship between founders and investors is not free of tension, independent members can also get the dialog going again.

Relevant areas of expertise and knowledge may include the ones listed below. As the company's needs will likely change over time, it is advisable to critically review the need for independent members and their selection from time to time.

Market and Strategy

- **Industry Experts:** People with deep knowledge of the industry in which the start-up operates.
- **Business Developers:** People with special skills in business strategy.
- **Successful Entrepreneurs:** People who have been successful in launching and growing their own start-ups can provide practical knowledge and advice based on their experience.

Functional Skills

- **Marketing and Sales Experts:** Individuals with experience in marketing, branding and sales strategies who can help the start-up to market its products or services effectively.
- **Financial Experts:** People who know how to build a finance function and an adequate risk management for the start-up.
- **Technologists:** People with experience in technological development and industry trends who can help develop the start-up's tech stack.
- **Talent Managers:** People who know how to build, scale, train and retain the start-up's workforce across multiple locations.

Credibility Transfer and the Elder Statespersons

- **Industry Leaders:** Prominent and respected figures in the field whose presence on the advisory board can increase the start-up's credibility and network of contacts.
- **Moderator and Diplomats:** Often more senior leaders with a proven track record that can reconcile the interests of the major shareholder groups and help founders grow into their new roles or help them transition into different roles or exit the start-up.

A conversation with
Jakob Freund, CEO
and Co-founder at
Camunda



CAMUNDA

THE BENEFIT OF INDEPENDENT BOARD MEMBERS WITH EXCEPTIONAL OPERATIVE EXPERTISE

Sven: Jakob, great to have you here. In one sentence, what does Camunda do?


Jakob: Camunda provides a workflow and decision automation platform that offers process orchestration capabilities to organizations of any size. Our customers include some of the most demanding organizations around the world across virtually all types of industries, including financial services, insurance, telecom, retail, manufacturing, tech, and the public sector. We are fortunate to be supported by a vibrant global community of more than 100,000 developers.

Sven: Is this your first start-up? Which stage are you in?

Jakob: Yes, this is my first company. After Highland Europe led our Series A, we raised a Series B from Insight Partners in 2021, and we have just crossed the threshold of USD 100 million in ARR.

Sven: Wow, congratulations, what an achievement and great investors indeed. You always had an advisory board at Camunda, is that correct? What do you think were the most important benefits for you?

Jakob: Highland Europe has been very supportive for many years, both within our five regular board meetings each year and during our frequent interactions outside of those meetings. Insight then added the perspective of an international growth investor and helps us focus on the next stage of our journey. Together, we envisioned a company that would create value for our shareholders and employees, and then planned it backward from there.



Sven: Any lessons you learned when it comes to "board competencies"?

Jakob: There is little benefit in having me present slides with data about our recent performance when everyone can study these materials ahead of the meeting. I believe in efficient time management, and we want to have as much time as possible for robust discussions. There should be no surprises and no drama in the boardroom. We have never had a situation where our advisory board had to adopt a majority decision, everything so far was unanimous. Important matters need preparation, sounding, and pre-discussions ahead of the meeting.

Sven: Couldn't agree more. Taking a bit of a turn here. You will now make changes to your advisory board, right?

Jakob: When raising our last financing round, we already agreed with our investors to expand our advisory board by adding an independent member.

Sven: What were the reasons? Was it about checks and balances?

Jakob: No, we wanted to augment our skill set and add expertise for our next growth phase. We work very closely with our existing investors, and Camunda has developed immensely over the last few years. We are on an amazing journey, but we know that we will need to adjust and build a larger organization with a design that can scale very efficiently. So, we were looking for a board member who can help us on that journey.

Sven: And now you have found the right candidate? What were you looking for exactly?

Jakob: I think we have found the right candidate and hope to close that hire soon. Look, we have great expertise on our advisory board, but we are aware that the founders on the board are in the midst of daily operations and might not always have sufficient distance. Our other advisory board members have backgrounds in investments and finance. Together, we were looking for an "operative" board member, someone who has scaled an organization from a few hundred to several thousand employees in an international arena. We want someone who can challenge our thinking about organizational designs, ways to collaborate, and expansion plans, and help us make better-informed decisions.

Sven: Jakob, thank you so much, I am absolutely certain that we will hear great news from Camunda soon.

“We work very closely with our existing investors, and Camunda has developed immensely over the last few years.”

Jakob Freund

CEO and Co-founder at Camunda

3.4.2 How Independent Board Members Get Elected

In practice, there are a variety of ways in which independent members can be elected to the advisory board. According to our experience and the analyses for the OLS Board Study 2024/2025, the following approaches are particularly common:

Election by the Other Members of the Advisory Board:

Here, the other members of the advisory board elect the independent member, whereby there are a number of variants that give different shareholder groups more or less influence via their representation on the advisory board:

- In the case of straightforward majority decision, the other advisory board members elect the independent member by a simple or qualified majority, whereby no advisory board member has a veto (e.g., currently in the Grover Group's articles of association).
- At the other end of the spectrum is the election by unanimous resolution of the other members of the advisory board, which, in particular, gives founder representatives on the advisory board a veto right (see, for example, the Series D articles of association of Taxfix GmbH prior to its conversion into a German stock corporation (2022)).
- Between these two ends of the spectrum are approaches in which the advisory board decides by majority vote, but the candidates are proposed by the founders or their representatives on the advisory board. For example, the articles of association of Trade Republic from its Series C (2021) provided that two independent members are elected by a majority of the advisory board votes, but their nomination for election required the approval of the founders' representatives in addition to the majority of the advisory board. Regulations in which an advisory board member may be appointed by a founder but must be acceptable to the investors (representatives) also fall into a comparable category (see for example the current at Choco Communications (Series B2) or in the past at Contentful (Series C, 2017)).

Election by the Shareholders' Meeting: The election of independent advisory board members by the shareholders' meeting is somewhat less common.

- Here, approval by both the ordinary majority and the preferred majority is often required (see, for example, the current articles of association of Helsing (Series B, here, two members are appointed by three investors together with the founder majority)), but sometimes a simple majority is sufficient (e.g., at Volocopter from its Series E (2022) onwards).
- Sometimes (especially in later phases) a simple majority of the share capital is sufficient. However, we also come across regulations according to which the shareholders' meeting can only choose between candidates proposed by the founders. For example, the articles of association of the Grover Group in Series B (2021) stipulated that the shareholders' meeting should appoint an advisory board member by a majority of investors, who should be selected from a shortlist of at least three candidates to be drawn up by the founder.



3.4.3 The Chairperson

We think that appointing a chairperson of the advisory board is very useful. We see the chairperson primarily in an administrative role and think that the question of whether the role of a chairperson should be created needs to be separated from the question of whether that chairperson necessarily needs to have a casting vote in case of a tie.

The Administrative Aspect: The chairperson is responsible for organizing the advisory board and keeping things on track, e.g., organizing and holding board meetings, preparing and circulating the board minutes and communicating with the start-up's management board. In fact, the chairperson should be the primary contact for the management board and the other board members. Against this background, founders are not the best candidates for this role.

The Mediation Aspect: As we will see when discussing the findings of our OLNS Board Study 2024/2025 and comparing it with the situation in U.S. start-ups, in the U.S., boards of directors usually transition over several financing rounds from a founder-controlled initial phase to an investor-controlled stage. Part of this shift of power is often a phase of what can best be described as "shared control" when boards are composed of an equal number of investor and founder directors and at least one independent board member (often with a tiebreaking vote). Research in U.S. managerial and law literature showed that while independent directors could be invited to provide advice and access to resources, this alone cannot explain why these directors frequently hold substantial voting power. Rather, it needs to be acknowledged that independent directors take on a "mediation" role. The presumption is that the independent board member can take an unbiased role when investors and founders as the two largest fractions with roughly equal power disagree on major decisions (in U.S. start-ups, these would often be the replacement of the CEO or the sale of the company). Even if the advisory board in Germany often has far less authority, comparable questions arise here as well and an independent advisory board chairman can help to keep everyone on the same page and, if push comes to shove, resolve deadlocks.



A conversation with
Andreas Haug,
Founding Partner at
Headline



Headline

EVERY BOARD SHOULD DO A 360° ASSESSMENT FROM TIME TO TIME

Sven: Andreas, great to have you and thanks for taking the time.

Andreas: No problem. The topic of a good advisory board is very dear to me.

Sven: Why is that?

Andreas: It is through our work on the company's advisory boards that we deliver on our promise to the founders to create value and help the company. Good work on the advisory board not only results in better decisions, but it helps the founders to professionalize and internalize a corporate governance that can scale with the company. Effective boards can help the founders to mature and develop into leaders. Think about it – many founders haven't had a boss for many years, or never had one at all. Who will give them feedback, both positive and negative? But getting feedback in a structured and well-intended way from people the founders can trust is really important.

Sven: I hear it, you are a board believer?

Andreas: Well, I had to come down the learning curve myself. When I was a founder, I did not

appreciate my boards. To me, they sometimes felt like a nuisance that kept me from getting real work done. With the benefit of hindsight and some grey hair, I must say that I did not capitalize on the opportunities that my board had offered me and I didn't treat them the way I should have.

Sven: As an investor-appointed board member, you are wearing two hats...

Andreas: Yes and no. Obviously, I represent Headline as an investor. However, as a member of the advisory board, I act in the interest of the company, and in this capacity, the company's interests will take precedent.

Sven: Can you think of an example?

Andreas: If the company is in choppy waters and a pay-to-play round is in its interest, I will support such a structured financing on the company's board, but that doesn't mean that we as Headline will participate in that financing.

Sven: Got it. Let's talk about the actual board meetings. Do you have some tips in this respect?

Andreas: Sure, let's start with what board meetings should not be, or at least not predominantly. These meetings shouldn't be a rear-view mirror exercise. It makes no sense to waste people's time with reviewing past numbers. Board members need to come prepared to discuss what will come next. I talk to the company, usually the CEO and CFO, before the meeting to learn what is front and center for them. I think it makes sense to focus a board meeting on a very limited number of key strategic topics, ideally only one or two, but then to go deep.

Sven: I see. When investors get board seats, how should they be filled?

Andreas: If done seriously, filling the role of an advisory board member is a lot of work and requires experience and perspective. This is a partner-level job. The lead investors often also get observer rights and they can be filled with next-generation partners to help them gain experience.

Sven: That training on the job is important?

Andreas: Absolutely. Let me zoom out here for a second. I think that we need a richer group of board talent in Germany, not only within VC investors. Compared to other entrepreneurial hotbeds in the world, this class is underdeveloped in Germany, and frankly, also underappreciated.

Sven: Do you have any suggestions on how an advisory board can become more effective over time?

Andreas: The board needs to consistently assess its role, and that includes to ask whether the right people are still on the board. Arguably, this is more for companies in the later stages, but I think it is beneficial to bring in an outsider as chairperson and then do regular 360° or self-assessments. We do this for the management, so why shouldn't we critically ask advisory board members from time to time whether they still deliver value? For me, the board is there to help the company and not to represent the interests of shareholder groups. I like to compare the work of a venture capitalist with the role of a record label. For their most promising artists, the label will do everything to stage them, promote them and develop them from great to worldclass artists.

Sven: I like the idea of the board's mission to develop alongside the founders and start-ups. Let me double-click on the outside chairperson. Should he or she get paid, and if yes, in what form?

Andreas: Yes, absolutely. Good outside board members are rare, great chairpersons even rarer. These people know their value, and in my experience, if they get paid, they tend to be more engaged and work harder. It is simple psychology. When you ask me how they should be compensated, then I would go for a mix of options and some cash compensation. What is even better is if your outside board member has real skin in the game by investing some money in the company, maybe upon preferred terms.

Sven: Anything else on the outside board members?

Andreas: This might sound surprising, but I had good experiences with board members that came from big corporates. This can be a real win-win situation. These board members know how to build a large organization and offer an extremely valuable perspective on how to bring a scale-up to the next level. At the same time, they get exposed to new ways of working and doing business.

Sven: Andreas, thanks so much for sharing your valuable insights.

Andreas: It's always a pleasure, Sven.

VI. Best Practices for a Functioning Board

Advisory board work differs considerably depending on the phase of the company's development and can be pretty time-consuming, not only in times of crises but also in phases of strong growth and the period before an (capital market) exit. For the board members, the personal preparation for attending meetings, attending the meeting itself, follow-up work, availability in the periods between meetings and communication with fellow board members, ongoing updating and expansion of one's own knowledge and extraordinary meetings in crisis situations can altogether become quite a burden. Some founders find the effort involved in preparing advisory board meetings and the occasional lack of detailed knowledge of the advisory board members, in combination with unsolicited advice, to be at least time-consuming and often rather unproductive to say the least. However, the mere fact that the status of the start-up usually must be prepared and presented at least two to four times a year does have its advantages. But a successful advisory board relationship also requires continuous and active cooperation between the two sides. In this chapter, we have therefore compiled some practical tips drawing not only on our own experience but also on learnings from interviews with founders and their investors.

1. MEETINGS OF THE ADVISORY BOARD

Formal advisory board meetings should take place regularly, in addition to the informal exchange between meetings. In our experience, the meeting calendars of many start-ups provide for one meeting of the advisory board per quarter and sometimes a further planning meeting in the fourth quarter to discuss and approve the business plan for the following year. In the case of other start-ups, investors want an ordinary advisory board meeting every two months; a more frequent cadence is, however, rare. Effective advisory board work requires these meetings to be well prepared and conducted. This includes a meaningful agenda, adequate information for the advisory board members in advance and then a constructive meeting itself with clear minutes and, where appropriate, follow-up and follow-through.

1.1 Preparation of Advisory Board Meetings

Meetings of the advisory board can be held physically or virtually (the rules of procedure of the advisory board will regularly also permit a combination as well as subsequent voting by email, etc.). Experienced investors frequently recommend that at least half of the ordinary advisory board meetings per year should be held physically. Experience has shown that the mere fact that it is necessary to travel leads to committee members taking the matter more seriously. Direct interaction allows for a more focused and better discussion in terms of content but also for sufficient social interactions, which is essential for a relationship of trust. This is why the regular advisory board meetings, which take place four to six times a year, should be scheduled well in advance (ideally at the beginning of the year or at least half a year).

Neither risk-averse lawyers nor investors like surprises, at least not negative ones. Therefore, at least one week before an advisory board meeting, the advisory board members should receive all the necessary information and documents for the meeting. This gives them sufficient opportunity to ask questions and request additions to the information package.

Many start-ups prepare so-called "board decks" for the advisory board meetings, which often become more extensive and formal as the start-up matures. In our experience, PPT presentations predominate, even if some advisory boards prefer formulated texts, taking inspiration from the famous "Amazon memos." What belongs in the board deck depends on the specific individual case; some investors provide practical assistance here.¹⁴ Anu Hariharan, former partner at A16Z and the Y-Combinator, shared these lessons from her role as a board observer of HR-tech scale-up Gusto: "What really allows Gusto to pull off their strategic focus within their board meeting, however, happens outside the board meeting: (1) They do a lot of prep work on the areas where they're seeking input. Ideally this is a topic you're already discussing with your executive team so the materials can be leveraged for multiple discussions; and (2) they send out a pre-read version of their board deck at least a week in advance, collecting questions from each board member in a *Google Doc* three days before the meeting. The Gusto team then answers all those questions in the *Google Doc* by the morning of the board meeting, so the subsequent discussion inside the board meeting can focus on the two most strategic topics."

"Board meetings shouldn't be for the benefit of the board. They should be for the benefit of the CEO and the senior team."

Fred Wilson

14. We find, for example, the following post from VC investor Sequoia very useful: <https://articles.sequoiacap.com/preparing-a-board-deck>.

It is also of little help in the cooperation with the advisory board, which is necessarily based on trust, if the founders paint a false, overly positive picture of the start-up in the board deck (there is no pitching here). The same holds true for negative news. An advisory board meeting is a lousy forum for surprises and a terrible stage for drama (did we mention that one of our authors played theater while in high school?). But seriously, if founders do not believe that they can talk about challenges and problems transparently with the advisory board, there is at least one communication problem. Sometimes one of the two sides is wrongly staffed, and this can escalate at some point.

1.2 Conduct of the Advisory Board Meeting

As mentioned, the board deck should be sent out several days before the advisory board meeting. If the advisory board members are unable (or unwilling) to prepare, too much time will be wasted during the meeting reciting the past instead of engaging in serious discussion. Some founders may not mind spending a large part of the meeting on reporting, as this supposedly conveys a detailed knowledge of the matter. This is often not helpful, and investor representatives should communicate this politely but clearly and support the founders in learning "board competencies."

"People who enjoy meetings should not be in charge of anything."

Thomas Sowell, U.S. economist

It is also important to manage towards a timeline so that your meetings do not run far beyond the allotted time. Assigning estimated discussion times next to each agenda item as part of the board deck can be a helpful tool to help guide expectations regarding anticipated discussion times and to help ensure that you are able to reach each topic on your agenda.

1.3 After the Advisory Board Meeting

Minutes should be taken of the advisory board meeting, showing the dates of the advisory board meeting, the advisory board members participating in the resolution and observers present, as well as any resolutions passed. The minutes should be prepared promptly after the advisory board meeting and sent to all members by the chairperson for review and, if necessary, comment. Whether the minutes are then formally adopted at the next advisory board meeting is ultimately a matter of taste (but since we lawyers are convinced that compliance should become an Olympic sport, we are sympathetic to such a decision). In our opinion, however, it is even more important that the advisory board minutes also record any tasks identified in the advisory board meeting for the management or individual advisory board members outside of resolutions, with a clear responsibility and a fixed completion date. An account of their completion must then be given at the next advisory board meeting at the latest.

If necessary, the management of the start-up must also be informed about the resolutions of the advisory board. Here, too, communication should be carried out by the advisory board chairperson as the central communication channel between the advisory board and management.

2. ONGOING REPORTING OBLIGATIONS

In the early phase, the start-up's shareholder agreement usually provides for monthly KPI reporting to the shareholders and / or regular investor briefings. Thus, at this stage, there is usually no separate reporting to the advisory board. However, in later phases with a larger group of shareholders, and especially if the advisory board also has independent members, there is often a reorientation. The advisory board often becomes the addressee of the short-term reporting (monthly and quarterly as well as *ad hoc* in the event of unexpected events).

A conversation with
Ksenia Kokareva,
Operating Partner at
Blossom Capital



FOUNDERS' TIME IS VALUABLE – LET'S MAKE THE BEST OUT OF IT

Sven: Hi Ksenia, thanks for taking the time to speak with me. You are the operating partner at Blossom Capital. Briefly: what does Blossom do and what is your USP?


Ksenia: Our goal is to find the most ambitious and talented founders in Europe early and be their preferred Series A partner. We invest with high conviction in only 5-6 companies each year so that we can focus and deliver the support that the founders want. We have a partner-led approach to value creation over the initial 12-18 months after our investment and get our companies in the best position to raise a successful Series B and keep accelerating on their growth trajectory.

Sven: I would like to focus on the 12-18 months that you mentioned. Every investor claims to create value. So, what is Blossom's approach.

Ksenia: Over this initial period, we follow a very structured high-touch value creation program, which includes monthly in person meetings with the founders at their headquarters.

Sven: Wait a second. So, you are travelling to your portfolio companies every month?

Ksenia (laughing): Yes, of course, founders' time is more valuable than ours. We think that our value-creation meetings should be face to face wherever possible. And yes, we go to the founders and are respectful of their time.



Sven: Coming back to the monthly workshops. What happens at these meetings.

Ksenia: Let's start with what will not happen. The founders will not be asked to present polished slides on a monthly basis the way they do at the board meetings... We want to work with the same raw data that the founders look at and then go deep. We want a lively agenda that is set by both the founders and ourselves in a collaborative way. We discuss strategic matters, including founder mindshare, go-to-market, growth, expansion, people topics, monthly KPIs on a very granular level. Ultimately, it is always the founders running the show, but we have a lot of experience with scaling the best European companies during this critical period from Series A to Series B, have a very detailed playbook and can challenge assumptions and help find better solutions. In addition, we can have 1:1s with the founders / key execs on a weekly basis as well as Portfolio WhatsApp groups for all *ad hoc* topics where our team is available literally 24/7.

Sven: Your fund strategy is to get a meaningful ownership percentage and therefore you typically lead the Series A. Do you ask for a seat on the company's board, in particular on the advisory boards of your German portfolio company?

Ksenia: We will ask for the right to a board seat but will initially usually not fill that seat.

Sven: Why is that?

Ksenia: It is not that we think formal board meetings etc. are not important. They have their role but typically their value for the founders will come at a later stage. We believe that we at Blossom can create more value at Series A with our approach of monthly deep dives which enable us to anticipate any issues and proactively help the founders resolve them rather than to react to the presentations delivered at the quarterly board meetings. At Series B, we might then fill our board seat if that makes sense for the company and us.

Sven: Ksenia, thanks so much. We will keep our fingers crossed that many German start-ups will make it into your portfolio of Europe's best Series A start-ups.

“We want a lively agenda that is set by both the founders and ourselves in a collaborative way.”

Ksenia Kokareva

Operating Partner at Blossom Capital

3. CONFIDENTIALITY CONSIDERATIONS

Principle: In the cases of interest here, the advisory board is a corporate body of the company. Its voting members are board members and as such are already subject to a statutory duty of confidentiality. The scope of this obligation as well as the way it is to be handled can be defined by the shareholders (for the advisory board as a corporate body) in a confidentiality agreement. This duty of confidentiality does not apply to observers on the advisory board. In practice, they often conclude a separate confidentiality agreement with the start-up.

Scope: Notwithstanding the confidentiality obligation, the advisory board member may also pass on the information that comes to his or her knowledge during his or her advisory board activities to the shareholders or shareholder groups appointing him or her. Only that way can the advisory board member (the same applies to an observer) fulfill his or her mandate as a representative of the interests of individual shareholders or shareholder groups.

Special Situations: There may be situations in which the remaining advisory board members or the shareholders and shareholder groups behind them have an interest worthy of protection in which individual advisory board members are excluded from advisory board deliberations or information to the advisory board to an appropriate extent. This may be the case with strategically motivated CVC investors, e.g., regarding to certain technical trade secrets, or if an advisory board member is appointed by an investor who is also invested in a competitor of the start-up and is concerned with issues relating to corporate strategy, etc. This may also be the case in an ongoing exit process. In an ongoing exit process, one of the shareholders may also belong to the group of prospective buyers, so that the other shareholders have a legitimate interest in ensuring that the representative of the prospective buyer on the advisory board does not obtain confidential information through the advisory board.

In such cases, the advisory board member in question is well advised to disclose a potential conflict of interest to the advisory board or the advisory board chairperson and to withdraw from the relevant deliberations. In addition, a clause should be included in the rules of procedure of the advisory board or the shareholders' agreement to the effect that the advisory board (if necessary, at the proposal of the chairperson of the advisory board and with a qualified majority) can exclude an advisory board member from certain consultations and, in this respect, from the general flow of information. In order to prevent abuse, U.S. documents sometimes include provisions requiring the company's external legal advisor to confirm that a conflict of interest cannot be ruled out before a resolution on the exclusion is passed.

4. COMPENSATION ASPECTS

Founders and the general partners or other employees of the investors who serve on the advisory board do not receive any separate remuneration for this activity, but they can be reimbursed for expenses.

In the first few years, when the start-up has not yet generated any significant revenue, the independent experts on the advisory board are often "only" entitled to a moderate "expense allowance," which is undoubtedly worthwhile for high-quality advisors. It is advisable, at least for somewhat more established start-ups or as soon as a financing round has been concluded, to pay at least a so-called attendance fee (e.g., EUR 500 to EUR 1,000 per advisory board meeting per person) as an expense allowance to the advisory board members.

While we are not aware of comprehensive empirical data for the German market, we can get some insights from our experience with working with countless UK start-ups over the years that might inform the discussions for German advisory boards. A typical scale for an independent board member in early-stage UK start-ups often looks as follows (though this will obviously depend on the specific circumstances such as sector, expected workload, quality and reputation of both the start-up and the prospective board member, etc.):

- Pre-Seed: 0.1 % – 0.25 %;
- Seed: 0.05 % – 0.1 %; and
- Series A: 0.01 % – 0.05 %.

In later stages, there is usually a more prevalent cash component in the compensation of the independent board members. Here, we see daily rates of EUR 2,500 to EUR 4,000 (or around EUR 15,000 to EUR 25,000 per year) for high-caliber advisory board members. An advisory board with a purely advisory role tends to receive less than an advisory board with more extensive competencies. In addition, a potentially higher workload of the chairperson of the advisory board can correspond to a slightly higher remuneration. However, if there are several independent board members, the differences in compensation should be kept within a relatively small range. Inequities in compensation can create an unofficial rank structure amongst independent advisory board members, which might not be helpful.

5. THE USE OF ARTIFICIAL INTELLIGENCE IN ADVISORY BOARDS

If you ask ChatGPT or other models "how can Artificial Intelligence support and enhance the work of boards?", it will usually respond with "how much time do you have?". Then one might wonder why a recent survey by ARMID (Aufsichtsräte Mittelstand in Deutschland e.V.)¹⁵, an association of supervisory boards in German SMEs, indicated that the vast majority of their members currently do not sufficiently understand and exploit the benefits of Artificial Intelligence ("AI") for their work. One might assume that start-up advisory boards might be more tech enthusiastic, but we would go out on a limb here and predict that at the moment, AI is only slowly finding its way into the daily work of German start-ups' advisory boards. However, the future potential is beyond doubt. Below are just some of the areas where AI can support and enhance the work of an advisory board.

However, the road ahead won't be easy. The AI landscape is rapidly evolving, and no one knows which solution will be best suited in a year from now, which might often result in an attitude of "Oh, that is interesting, let's wait and observe where this is going." The need for board members to understand AI technologies and their implications will often require additional training and education. Integrating AI tools with existing IT infrastructure and workflows can also be complex and require significant technical expertise. It will also be interesting to see if AI tools will be able to bring some of their strengths to bear in start-up land given that these models require vast amounts of data as well as high-quality data – data that might be hard to come by in a rapidly changing environment of great uncertainty.

5.1 Internal Processes and Efficiency Gains

AI-Assisted Meeting Preparation: AI can assist in preparing for board meetings by gathering and summarizing relevant information, highlighting key issues and suggesting agenda items based on current business challenges.

Efficiency in Decision-Making: AI tools can automate routine tasks, allowing the board to focus on more strategic issues. For example, AI can help in agenda setting, meeting scheduling and minute-taking.

5.2 Advisory Function

Data Analysis and Insights: AI can process vast amounts of data to provide insights that inform strategic deliberations and decisions. This includes financial analysis, market trends, risk assessments and much more. For example, AI can assist in the development of business strategies by simulating different scenarios and their potential outcomes or support a skill gap analysis of the current team based on the growth trajectory of the company as well as the selection of suitable candidates.

Performance Monitoring: AI offers insights into the start-up's performance metrics, customer feedback and operational efficiency. Here, AI can also support the advisory board's role on innovation by providing data-driven insights for product innovation and by helping to identify new market opportunities.

Predictive Analytics: AI can support forecasting future trends and outcomes, helping the board to make proactive decisions.

5.3 Corporate Governance Function

Risk Management: AI can identify potential risks by analyzing patterns and anomalies in data, helping the board to mitigate them before they become significant issues.

Enhanced Governance: AI can support systems designed to ensure compliance with regulatory requirements by monitoring changes in laws and regulations and providing timely updates.

Policy Enforcement: AI can help enforce corporate policies by monitoring activities and flagging any deviations from established guidelines.

Audit and Reporting: AI tools can assist in conducting internal audits and generating accurate reports, ensuring transparency and accountability. It can also monitor key performance indicators (KPIs) and other metrics, providing frequent updates on the start-up's performance.

15. See Klaus F. Jaenecke, Der Einsatz künstlicher Intelligenz in den Aufsichtsgremien mittelständischer Unternehmen, Der Aufsichtsrat 2024, p. 2 et seq.

VII. The OLNS Board Study 2024/2025

Enough theatre, let's bring the data.

1. THE IDEA

In this Chapter, we will share first findings of our "OLNS Board Study 2024/2025", a comprehensive empirical study of advisory boards in German start-ups. The goal of our analysis was to empirically examine anecdotal evidence and practical knowledge on the composition and role of advisory boards in the various financing stages of a start-up. Amongst others, we seek to test the following hypotheses:

- Advisory boards are set up in the early financing phases and usually have three to five members at the beginning. In later financing phases, the number of advisory board members increases.
- The majority of advisory boards include founder representatives. However, the voting weight of the founders on the advisory board decreases over the course of the financing rounds.
- As the start-up develops, the approval density generally decreases, *i.e.*, fewer business transactions require the approval of the advisory board. In the later phases, the advisory function of the advisory board becomes even more important. This should also be reflected in the composition of the advisory board, *i.e.*, we would expect more industry and other expertise that is important for the further success of the company and fewer pure shareholder representatives.
- In practice, the weak advisory board, which leaves the authority to appoint and remove managing directors to the shareholders' meeting, continues to dominate. Strong advisory boards, which are more similar to the American-style board of directors, are more common in later company phases and are found more frequently in companies with Anglo-American investors.

2. THE STUDY DESIGN

2.1 The Data Set

To analyze the current lay of the land and identify trends in German market advisory boards, in a first step, we have used data from the service provider PitchBook to create a set of start-ups headquartered in Germany. We applied the following search criteria: (i) all VC stages from Angel & Pre/Accelerator/Incubator, Seed, Series A, Series B, Series C, Series D and Series E, (ii) in the region of Germany and (iii) for the period from January 1, 2018, to July 8, 2024. We then limited the search to the deal status "completed."

The resulting cohort included 5,711 hits, it being understood that companies that have raised multiple rounds of financing will be included several times in that set.

We then eliminated all start-ups that were at the relevant point of time not organized as a GmbH or UG, or that had been sold, merged or liquidated. For the remaining data set of companies, we obtained copies of their current and prior articles of association from the electronic commercial register at www.handelsregister.de, in total a set of 14,687 articles of association for a total of more than 2,900 companies. This represents one of the largest samples ever analyzed for the German market in terms of both the set of start-ups and sample period.

2.2 Analysis Methods and Assumptions

Relevant data was extracted from PDF and TIF(F) files using document processing techniques and, in some cases, manual data collection. We then used an AI-enabled software solution to answer specific questions and fine-tuned prompts in various iterations to improve the accuracy scores.

To collect and interpret relevant data points, we made a couple of assumptions, including the following:

- Where appointment rights are assigned to the holders of the majority of common shares, we have considered these advisory board members to be founder members, as experience has shown that it is the founders who hold common shares. Similarly, where the majority of a class of preferred shares has appointment rights, we have considered these advisory board members to be investor members. Since the articles of association often only name the shareholders with a right of appointment, we based the classification of an advisory board member as either an investor or a founder on the following assumptions: Known VC investors were categorized as investors. Holdings and ventures were classified as either founders or investors based on experience. UGs and natural persons were generally classified as founders.

- When appointment rights were assigned to founders or investors, the respective group appointed a member to the advisory board that stems from or at least has strong affiliations with the respective shareholder group. We acknowledge that an investor who has an appointment right might have also appointed an outside expert rather than one of its general partners or employees and that, accordingly, the number of "independent" advisory board members is very likely higher than the results of our survey indicate.
- If founders and investors or the other members of the advisory board have to agree (unanimously or by majority vote) on advisory board members, we have qualified the respective advisory board members as independent, even if the articles of association did not stipulate any criteria such as "independent," "neutral industry expert" or similar. Members were also classified as independent if they were appointed by the managing directors or the shareholders' meeting.
- The PitchBook data set contains a certain number of start-ups that have not raised money from "traditional" venture capital investors and might thus not have established advisory boards (e.g., where the start-up is a corporate spin-out or company builder project with the corporate or the company builder being the dominant shareholder and thus might not consider an advisory board to be required).
- The electronic commercial register itself has weaknesses. During our work, we repeatedly came across cases where articles of association were incorrectly sorted, incompletely scanned or missing altogether.
- From the reviewed articles of association, the financing stage was sometimes not apparent. We then relied on the classification by PitchBook, but one should be aware that a misclassification cannot be excluded.
- We have endeavored to increase the hit rate of our AI solution used for the qualification of advisory board members as founder or investor representatives or as independent members through various iterations of the prompts, but we cannot rule out the possibility of errors in individual cases. As described above, investors might also exercise their right of appointment in favor of external experts, especially in later financing phases, so that the number of independent members in the OLNS Board Study 2024/2025 tends to be too low.
- We also acknowledge that relying primarily on companies' articles of association might provide a partially incomplete picture. While we think that over the recent years the leading venture capital law firms in Germany have converged on market practices for what needs to be stated in the articles of association, in particular for articles of association that date back to the period prior to 2020, articles of association occasionally lacked detailed provisions around advisory boards.

2.3 Limitations and Potential Causes for Mistakes

While we sought to provide a comprehensive and accurate assessment of the situation of advisory boards in Germany in the various financing rounds, we are well aware that both the underlying data set as well as our approach in assessing it are far from perfect and leave plenty of room for further future research.

Below we list what we believe are the most important limitations to be aware of when interpreting our results.

Limitations of the Underlying Data Set: Although the reviewed data set is sizable, it has some limitations:

- Our analysis is limited to the start-ups recorded in the PitchBook database. Even though we believe that the quality of this and similar databases for the situation in Germany has improved in recent years, the overall coverage level for Germany does not yet match the quantity and quality of the situation in the USA. There are a number of reasons for this, including a reluctance in some areas to make their own investments public, the relatively late entry of international database providers into the German market and the low level of standardization of investment documentation in Germany compared to the USA (NVCA documentation) and the UK (BVCA documentation), which makes it difficult to systematically record and evaluate financing rounds.

Limitations of our Approach: The OLNS Board Study 2024/2025 has also limited itself to certain analyses, which we will explain in more detail later. We will certainly expand our analyses in the future in order to achieve even more granular results.

- Our analysis is generally limited to start-ups that have received external funding. As PitchBook and other service providers do not claim to cover all start-ups in a country, one should be cautious to extrapolate our findings to the broader (non-investor focused) start-up ecosystem in Germany.

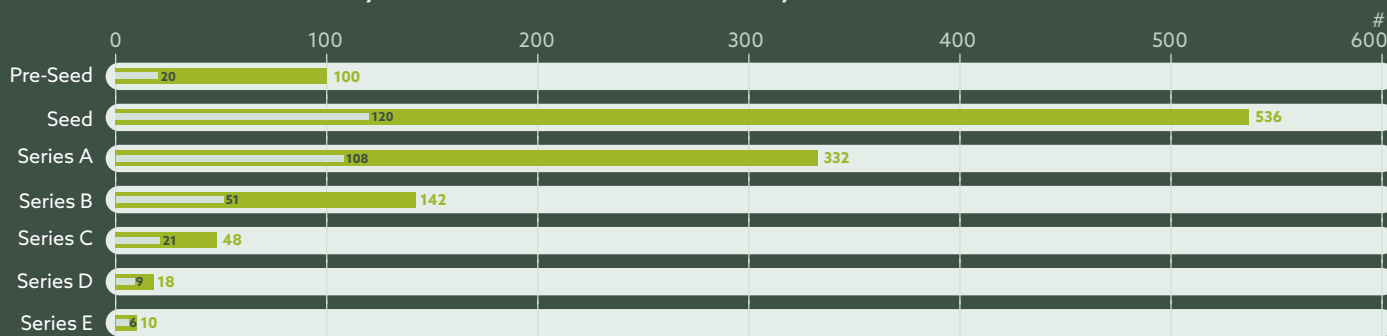
- Our analysis only covers those advisory boards that have the quality of a corporate body, not those that are established purely on the basis of the law of obligations (for a distinction, see Chapter A.I.3. above). However, in typical VC-financed start-ups, advisory boards that are set up as corporate bodies are predominant.
- We have limited our analysis to the publicly accessible articles of association. In some cases, however, the articles of association only stipulate that the company has an advisory board with a certain number of members and that the shareholders' meeting decides on the appointment of the advisory board members. We were unable to include these articles of association in the evaluation of the composition of the advisory boards or their development over financing rounds, as the actual appointment rights of individual shareholder groups in these cases can usually be found only in nonpublic shareholder agreements (where they establish a voting commitment of the shareholders to appoint such designed members in the shareholders' meeting).
- Because revised articles of association are usually only filed with the company's commercial register in the context of a financing round, we observe board composition at the time of new financings but cannot, for example, analyze changes in the periods between the filing of revised articles, e.g., when founders voluntarily relinquish one of their board seats to make room for an outside expert or an investor who granted the start-up a bridge financing by means of a convertible loan.



Advisory Boards Analysis

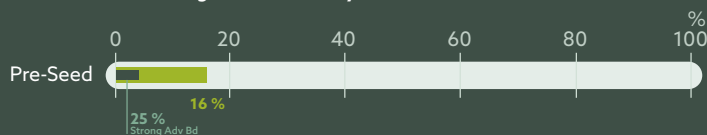
Advisory Board

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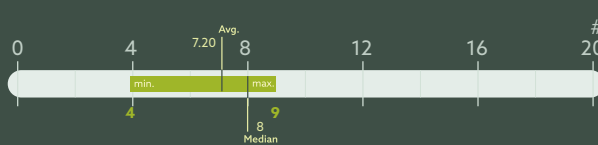
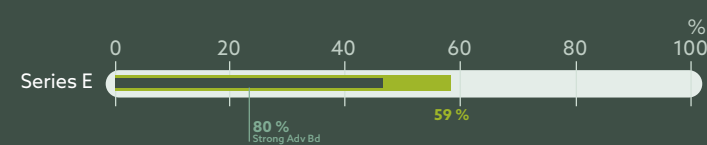
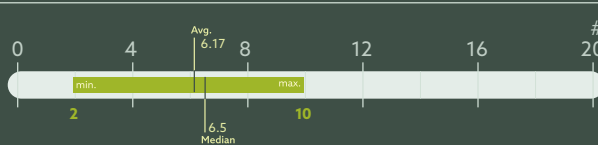
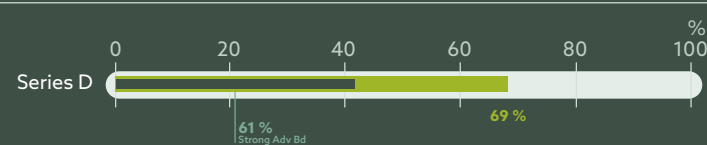
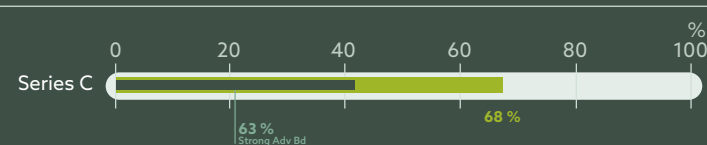
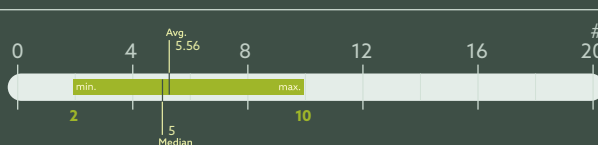
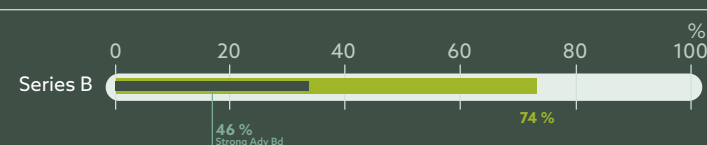
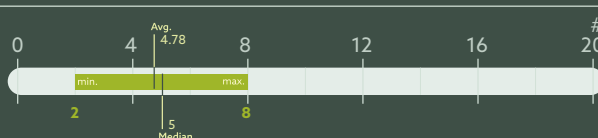
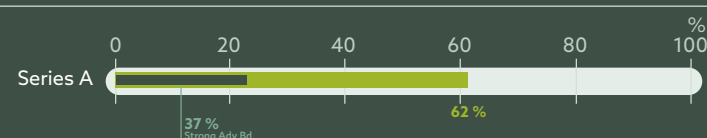
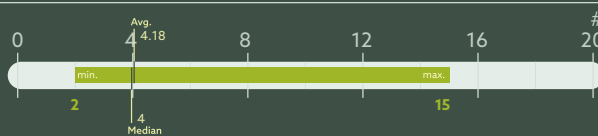
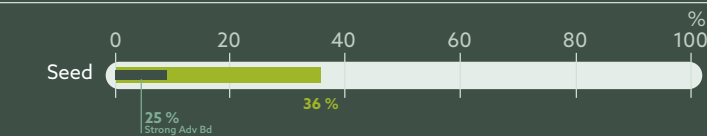
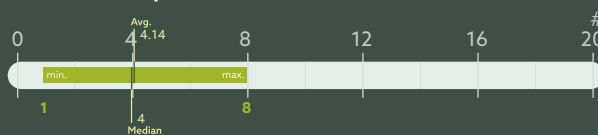


Advisory Board

Percentage with Advisory Board



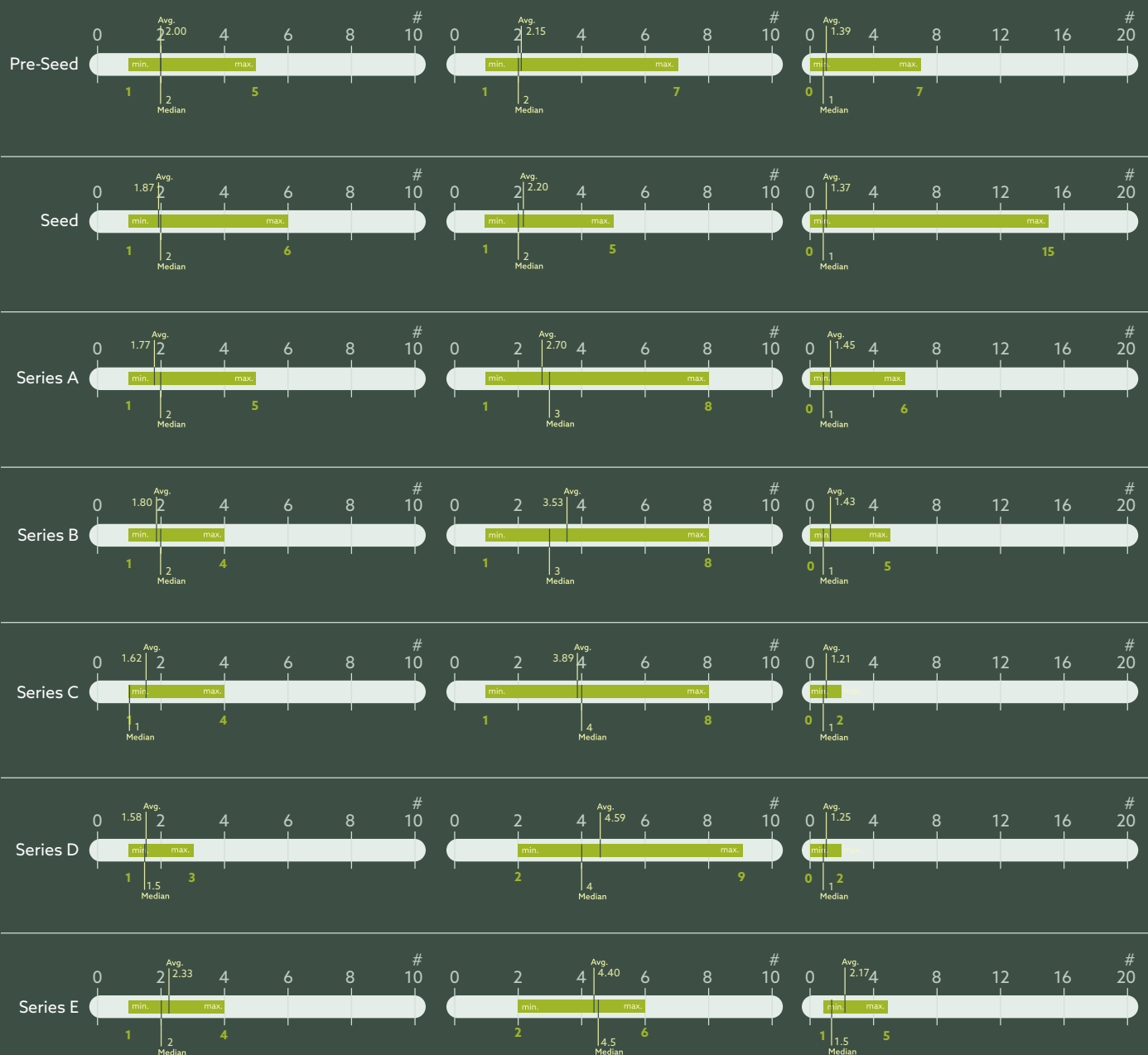
Size of Advisory Board



Founders

Investors

Independent



3. FINDINGS REGARDING THE SIZE OF ADVISORY BOARDS

The following lists our main findings regarding the size of advisory boards (average and median number of members as well as the minimum and maximum numbers) broken down per financing stage. As will become clear, the size of the advisory board grows through the financing stages. Main reasons might be a more complex cap table of the start-up with various investor (groups) that request board representation as well as the increasing complexity of the business and the need for diverse and specialized expertise.

Pre-Seed: For the start-ups in the data set that had established an advisory board and whose last financing round was classified as Series Pre-Seed (in total, these were 100 companies), the average size of the advisory board was 4.14 members. The median was 4 members. In this group, the smallest advisory board had 1 member and the largest advisory board had 8 members. In 20 % of all cases, the advisory board had an even number of members and in 80 % an uneven number.

Seed: For the start-ups in the data set that had established an advisory board and whose last financing round was classified as Series Seed (in total, these were 536 companies), the average size of the advisory board was 4.18 members. The median was 4 members. In this group, the smallest advisory board had 2 members and the largest advisory board had 15 members. In 22.39 % of all cases, the advisory board had an even number of members and in 77.61 % an uneven number.

Series A: For the start-ups in the data set that had established an advisory board and whose last financing round was classified as Series A (in total, these were 332 companies), the average size of the advisory board was 4.78 members. The median was 5 members. In this group, the smallest advisory board had 2 members and the largest advisory board had 8 members. In 32.53 % of all cases, the advisory board had an even number of members and in 67.47 % an uneven number.

Series B: For the start-ups in the data set that had established an advisory board and whose last financing round was classified as Series B (in total, these were 142 companies), the average size of the advisory board was 5.56 members. The median was 5 members. In this group, the smallest advisory board had 2 members and the largest advisory board had 10 members. In 35.92 % of all cases, the advisory board had an even number of members and in 64.08 % an uneven number.

Series C: For the start-ups in the data set that had established an advisory board and whose last financing round was classified as Series C (in total, these were 48 companies), the average size of the advisory board was 5.69 members. The median was 5.5 members. In this group, the smallest advisory board had 3 members and the largest advisory board had 10 members. In 43.75 % of all cases, the advisory board had an even number of members and in 56.25 % an uneven number.

Series D: For the start-ups in the data set that had established an advisory board and whose last financing round was classified as Series D (in total, these were 18 companies), the average size of the advisory board was 6.17 members. The median was 6.5 members. In this group, the smallest advisory board had 2 members and the largest advisory board had 10 members. In 50 % of all cases, the advisory board had an even number of members and in 50 % an uneven number.

Series E: For the start-ups in the data set that had established an advisory board and whose last financing round was classified as Series E (in total, these were 10 companies), the average size of the advisory board was 7.2 members. The median was 8 members. In this group, the smallest advisory board had 4 members and the largest advisory board had 9 members. In 60 % of all cases, the advisory board had an even number of members and in 40 % an uneven number.

4. FINDINGS REGARDING THE COMPOSITION OF ADVISORY BOARDS

The number of founder members in advisory boards decreases over the financing rounds from an average of 2.0 founder members in the Series Pre-Seed to 1.58 founder members in the Series D, while at the same time the average size of the advisory board increases from 4.14 to 6.17 members, as shown above. In Series E, the number of founder members increases again to 2.33 with an average size of 7.2 members, although the results should be interpreted with caution due to the small number of data points in this financing phase.

The number of investor members on advisory boards increases over the financing rounds from an average of 2.15 investor members in the Series Pre-Seed to 4.59 investor members in the Series D, which corresponds to approx. 52 % of the average size of an advisory board in Series Pre-Seed and approx. 74 % in Series D.

The number of independent members remains constant at a relatively low level across the financing phases, averaging 1.39 in the Series Pre-Seed to an average of 1.25 in the Series D, and thus decreases in relative terms. While an average of around 34 % of all advisory board members are independent members in Series Pre-Seed, this figure drops to just 20 % in Series D.

Here are the details on how the advisory board's composition develops over time.

Pre-Seed: The advisory boards of the start-ups where the last financing round was the Series Pre-Seed had an average of 2 founder members, with the median number of founder members being 2 as well. The lowest number of founder members was 1 and the highest was 5. For investor members, the average was 2.15 with a median of 2. The lowest number of investor members in this financing phase was 1 and the highest was 7. The average number of independent members was 1.39 with a median of 1. The lowest number of independent members was 0 and the highest was 7.

Seed: The advisory boards of the start-ups where the last financing round was the Series Seed had an average of 1.87 founder members, with the median number of founder members being 2. The lowest number of founder members was 1 and the highest was 6. For investor members, the average was 2.2 with a median of 2. The lowest number of investor members in this financing phase was 1 and the highest was 5. The average number of independent members was 1.37 with a median of 1. The lowest number of independent members was 0 and the highest was 15.

Series A: The advisory boards of the start-ups where the last financing round was the Series A had an average of 1.77 founder members, with the median number of founder members being 2. The lowest number of founder members was 1 and the highest was 5. For investor members, the average was 2.7 with a median of 3. The lowest number of investor members in this financing phase was 1 and the highest was 8. The average number of independent members was 1.45 with a median of 1. The lowest number of independent members was 0 and the highest was 6.

Series B: The advisory boards of the start-ups where the last financing round was the Series B had an average of 1.8 founder members, with the median number of founder members being 2. The lowest number of founder members was 1 and the highest was 4. For investor members, the average was 3.53 with a median of 3. The lowest number of investor members in this financing phase was 1 and the highest was 8. The average number of independent members was 1.43 with a median of 1. The lowest number of independent members was 0 and the highest was 5.

Series C: The advisory boards of the start-ups where the last financing round was the Series C had an average of 1.62 founder members, with the median number of founder members being 1. The lowest number of founder members was 1 and the highest was 4. For investor members, the average was 3.89 with a median of 4. The lowest number of investor members in this financing phase was 1 and the highest was 8. The average number of independent members was 1.21 with a median of 1. The lowest number of independent members was 0 and the highest was 2.

Series D: The advisory boards of the start-ups where the last financing round was the Series D had an average of 1.58 founder members, with the median number of founder members being 1.5. The lowest number of founder members was 1 and the highest was 3. For investor members, the average was 4.59 with a median of 4. The lowest number of investor members in this financing phase was 2 and the highest was 9. The average number of independent members was 1.25 with a median of 1. The lowest number of independent members was 0 and the highest was 2.

Series E: The advisory boards of the start-ups where the last financing round was the Series E had an average of 2.33 founder members, with the median number of founder members being 2. The lowest number of founder members was 1 and the highest was 4. For investor members, the average was 4.4 with a median of 4.5. The lowest number of investor members in this financing phase was 2 and the highest was 6. The average number of independent members was 2.17 with a median of 1.5. The lowest number of independent members was 1 and the highest was 5.

5. FINDINGS REGARDING STRONG ADVISORY BOARDS IN GERMANY

Strong advisory boards, *i.e.*, advisory boards that have the authority to appoint and dismiss the managing directors of the start-up, are rather rare in the early stages (25 % of all start-ups with advisory boards in the Series Pre-Seed and Seed, 37 % in the Series A). However, their prevalence increases over the financing rounds and is over 60 % from Series C onwards.

The rarity of strong advisory boards in the early stages of start-ups can be attributed to the founders' desire for control and investor trust as well as the central role and importance of the founders at this point of a company's trajectory. As start-ups progress through financing stages and grow in complexity, the prevalence of strong advisory boards increases due to the need for robust governance, investor requirements, professionalization, risk mitigation and a better alignment of interests when the competence to appoint the members of the company's executive body is allocated to a body with a stronger monitoring role.

Here are the details:

Pre-Seed: Start-ups with an advisory board whose last financing round was classified as Series Pre-Seed (a total of 100 companies) had a strong advisory board in 25 % of cases.

Seed: Start-ups with an advisory board whose last financing round was classified as Series Seed (a total of 536 companies) had a strong advisory board in 25 % of cases.

Series A: Start-ups with an advisory board whose last financing round was classified as Series A (a total of 332 companies) had a strong advisory board in 37 % of cases.

Series B: Start-ups with an advisory board whose last financing round was classified as Series B (a total of 142 companies) had a strong advisory board in 46 % of cases.

Series C: Start-ups with an advisory board whose last financing round was classified as Series C (a total of 48 companies) had a strong advisory board in 63 % of cases.

Series D: Start-ups with an advisory board whose last financing round was classified as Series D (a total of 18 companies) had a strong advisory board in 61 % of cases.

Series E: Start-ups with an advisory board whose last financing round was classified as Series E (a total of 10 companies) had a strong advisory board in 80 % of cases.

6. HYPOTHESIS VERIFICATION

6.1 Early Financing Phases and Advisory Board Size

Hypothesis: Advisory boards are set up in the early financing phases and usually have three to five members at the beginning. In later financing phases, the number of advisory board members increases.

Verification: This hypothesis is verified by the data presented. The study shows that in the Pre-Seed phase, advisory boards have an average size of 4.14 members, which aligns with the expectation of three to five members. As the start-ups progress through the financing stages, the size of the advisory boards increases, reflecting the growing complexity and need for diverse expertise. By the Series E, the average size of advisory boards reaches 7.2 members. This trend indicates that as start-ups secure more funding and expand their operations, they also expand their advisory boards to include more members who can provide specialized knowledge and support.

6.2 Founder Representatives and Voting Weight

Hypothesis: The majority of advisory boards include founder representatives. However, the voting weight of the founders on the advisory board decreases over the course of the financing rounds.

Verification: The data supports this hypothesis. In the early stages, such as the Pre-Seed phase, advisory boards have an average of 1.87 founder members. As the start-ups move through subsequent financing rounds, the number of founder members decreases, reaching an average of 1.58 in Series D. Concurrently, the number of investor members increases significantly, from an average of 2.15 in the Pre-Seed phase to 4.59 in Series D. This shift indicates that while founders remain represented on advisory boards, their relative voting power diminishes as more investors join the board and exert greater influence over decision-making processes.

6.3 Approval Density and Advisory Function

Hypothesis: As the start-up develops, the approval density generally decreases, and the advisory function becomes more important, which should be reflected in the composition of the advisory board with more industry experts and fewer shareholder representatives.

Verification: This hypothesis is partially verified. The study reveals that the number of independent members on advisory boards remains relatively constant across financing stages, averaging around 1.39 in the Pre-Seed phase and 1.25 in Series D. However, the proportion of independent members decreases as the total size of the advisory board grows. Meanwhile, the number of investor members increases significantly, suggesting that the advisory boards become more investor-dominated rather than incorporating more industry experts. This trend indicates that while the advisory function may become more critical, the composition does not necessarily shift towards industry expertise but rather towards increased investor control.

6.4 Weak vs. Strong Advisory Boards

Hypothesis: Weak advisory boards, which leave the authority to appoint and remove managing directors to the shareholders' meeting, dominate early stages. Strong advisory boards, similar to American-style boards, are more common in later company phases and in companies with Anglo-American investors.

Verification: The data confirms this hypothesis. In the early stages, such as the Pre-Seed phase, only 25 % of start-ups have strong advisory boards. This percentage gradually increases through the financing stages, reaching over 60 % from Series C onwards. The prevalence of strong advisory boards in later stages indicates a shift towards more robust governance structures as start-ups grow and require more formal oversight. Additionally, the study notes that 4 out of 8 unicorns that transitioned to strong advisory boards did so during financing rounds led by Anglo-American investors, suggesting a correlation between the presence of these investors and the adoption of stronger advisory board structures. However, the study does not establish a direct causal relationship.

7. DEEP DIVE ON GERMAN UNICORNS

7.1 The Data Set

So how do the findings for the overall data set compare to the German unicorns, *i.e.*, privately held companies with a valuation of at least USD 1 billion?

There is no definitive list of which German start-ups have currently actual unicorn status as in some instances the last external funding round occurred a few years ago in a different funding environment. We used a list published by Deutsche Startups in early 2023 and augmented it by a few other online publications to come up with our list. We are aware that our data set might miss some German scale-ups that should have unicorn status or might include some companies that would no longer have unicorn status when doing a fundraising now.

Fun fact, according to PitchBook the number of VC-backed unicorns worldwide exceeded 1,000 for the first time in early 2022 and currently the most popular databases count more than 1,400 of these magical creatures. Even though the "real" numbers are probably lower after the valuation bubble around 2021 got deflated in recent years, it is definitely far more than the rarest horse breed in the world, arguably the Galiceño, a Mexican horse breed with a current estimated number of less than 100 (we know, what an interesting piece of information, you are welcome).

But let's get back to the German unicorns and their advisory boards. First, we have to acknowledge that not all German unicorns are organized in the legal form of a GmbH (anymore). Some started out as a GmbH but then reorganized as an SE at some point or did a flip, *i.e.*, a reorganization where the German scale-up becomes the subsidiary of a new holding entity domiciled abroad. We included these start-ups. Where such reorganization or flip occurred only recently and a meaningful "corporate history" was available, we included these companies in our review up until the time they ceased to be a GmbH or got a new holding entity, respectively.

Against this background, we included the following German unicorns in our survey: Choco Communications, Clark, Contentful, commercetools, FlixBus, Forto, Grover, Helsing, Mambu, N26, OneFootball, Personio, Raisin, Razor Group, SellerX, Sennder Technologies, Staffbase, Taxfix, Tier Mobility, Trade Republic Bank and Volocopter.

The following unicorns were excluded:

- Companies that have a topco domiciled outside of Germany and where there is no meaningful "advisory board history" on the level of the German operating entity, as the case may be (Enpal, GetYourGuide, Omio, Roboyo, Sumup, Vivid Money and WeFox).
- Companies that have never been a GmbH (Solaris), organized as an AG or SE already several years ago (Agile Robots and Celonis), or where the articles of association for the period prior to the SE-reorganization do not provide for meaningful information about the company's advisory boards (DeepL and Flink).
- Companies where the articles of association only state that there can be an advisory board but no details about the board composition (Berlin Brands Group, Chrono24 and Scalable) or did not contain any references to an advisory board at all (CHECK24).

7.2 Summary of the Key Findings

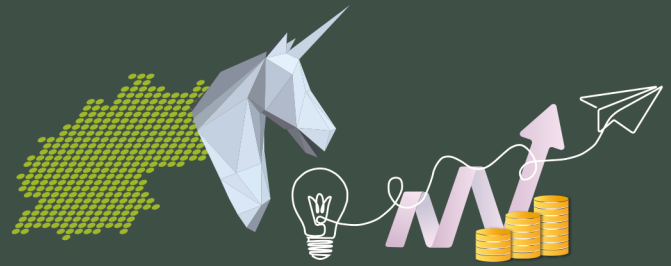
So, what did we learn?

- A total of 15 unicorns in the analyzed data set had most recently implemented a strong advisory board (71 %) while a total of 6 had a weak one (29 %). Out of these 15 unicorns equipped with a strong advisory board, 7 started with a strong advisory board right from the beginning of its implementation in the seed phase. We note that 4 out of the 8 unicorns that later moved to a strong advisory board structure did so in the course of a financing round that saw lead investors from the United States or the United Kingdom. While there is at least a correlation, our analysis does not allow us to confirm a causal relationship between Anglo-Saxon lead investors and a predominance of strong advisory boards.
- The average size of the most recent advisory board was 7.43 with a median of 8. The smallest board had 5 members and the largest had 10 members.
- The average number of founder members on the most recent advisory boards was 1.52 with a median of 2. The lowest number of founder members was 0 and the highest was 4.
- The average number of investor members on the most recent advisory boards was 4.81 with a median of 5. The lowest number of investor members was 2 and the highest was 7.
- The average number of independent members on the most recent advisory boards was 1.09 with a median of 1. The lowest number of independent members was 0 and the highest was 3.



UNICORNS (GmbH)

21 German unicorns are still organized as a GmbH or were so until recently. We looked at their current Advisory Boards.



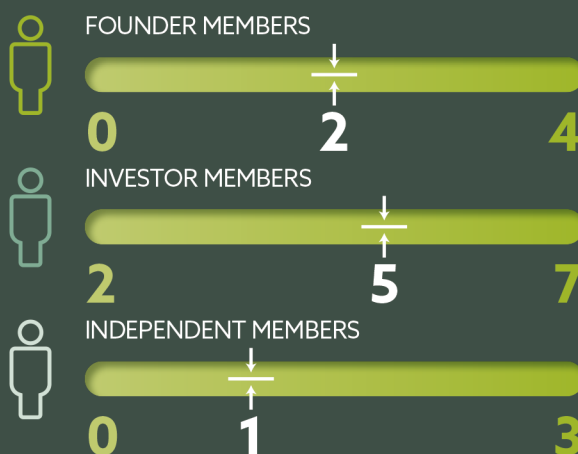
* i.e., the Advisory Board can appoint and remove managing directors



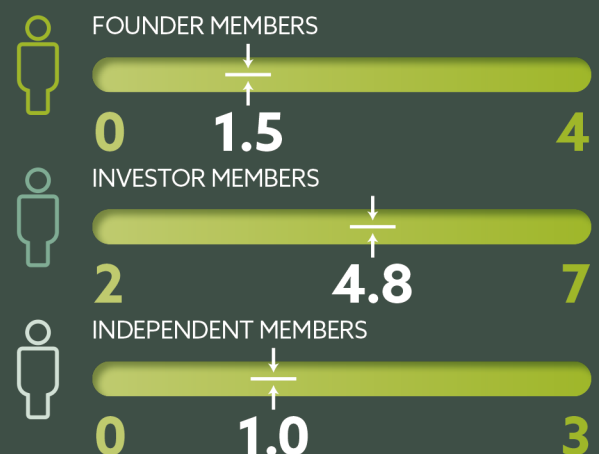
in the course of a financing round with U.S. / UK lead investors



COMPOSITION MEDIAN





















COMPOSITION AVERAGE



Brief disclaimer (we are lawyers after all and that is our language): While we looked at the German unicorns in more detail and relied on a manual assessment of the articles of association rather than an AI-supported software analysis, our review and findings are generally subject to the same assumptions and limitations as described above.

7.3 Detailed Analysis

CHOCO COMMUNICATIONS NAME Choco Communications GmbH REGISTERED SEAT Berlin INCORPORATED 2018 LEGAL FORM(S) GmbH (since incorporation)	Series B 2021 – 2022 		Independent member to be appointed by one of the founders but must not be affiliated with the founders and needs to be mutually acceptable to the investors' majority.
	Series A2 2020 		
	Series A 2019 		
	Series Seed 2018 		Managing directors cannot become advisory board members.
CLARK NAME Clark Holding SE REGISTERED SEAT Berlin INCORPORATED 2015 LEGAL FORM(S) SE (incorporated as a GmbH, then reorganization as an AG and finally as an SE in 2021)	Series C 2021 		One member to be mutually agreed between the preferred majority and the management board. This advisory board member has been qualified as an independent member.
	Series B1 2019 		
	Series Seed 2018 		
COMMERCE TOOLS NAME commercetools GmbH REGISTERED SEAT Munich INCORPORATED 2005 LEGAL FORM(S) GmbH (since incorporation)	Series C 2021 – 2022 		
	Series B 2021 		The articles do not specify how the advisory board members are appointed.
	Series A 2013 		
	Series Seed 2011 – 2012 		






KEY
 Founder Member
 Investor Member
 Independent Member
 Not Specified
 Strong Advisory Board











CONTENTFUL NAME Contentful GmbH REGISTERED SEAT Berlin INCORPORATED 2014 LEGAL FORM(S) GmbH (in 2022, Contentful GmbH was flipped into a U.S.-holding structure and subsequent financings occurred on the level of the holding entity and are thus not reflected herein)	Series E 2020			Independent member to be appointed by the unanimous vote of all other advisory board members.
	Series D 2018			
	Series C 2017			Each founder can appoint one member alone and one member is appointed by the founders together, but other members of advisory board have the right to object.
				Independent member to be appointed by the unanimous vote of all other advisory board members. If consent cannot be reached: by a vote to be passed with simple majority by all other advisory board members.
	Series B 2016			Managing directors and employees of company/subsidiaries cannot become advisory board members.
				Independent member to be appointed by the unanimous vote of all other advisory board members. If consent cannot be reached: by a vote to be passed with simple majority by all other advisory board members
	Series A 2013			Two independent members to be appointed by the shareholders' meeting.
	Series Seed 2012			


FLIXMOBILITY NAME FlixBus SE REGISTERED SEAT Munich INCORPORATED 2012 LEGAL FORM(S) SE (incorporated as a GmbH, then reorganization as an AG and finally as an SE in 2021)	Series G 2021			Managing directors cannot become advisory board members.
	Series F 2019			
	Series E 2017			
	Series D 2015			
	Series C 2014			
	Prior to Series B 2014			









FORTO NAME Forto SE REGISTERED SEAT Berlin INCORPORATED 2016 (as Deep Blue Ocean Internet GmbH) LEGAL FORM(S) SE (corporate reorganization into an SE & Co. KG in 2021, followed by a reorganization into an AG in 2022 and finally an SE in 2023)	Series D 2022	       		Two independent members to be appointed jointly by certain holders of preferred shares, subject to the approval of the simple majority of the board members. One advisory board member to be appointed by the company. These members have been qualified as independent members.
	Series C 2021	       		
	Series B 1 2020	      		One advisory board member to be appointed by the company. This advisory board member has been qualified as an independent member.
	Series B 2020	        		
	Series B 2019	       		
	Series A 2017	      		One advisory board member to be appointed by the company's management board. One advisory board member shall be an independent industry expert delegated by the majority of votes in the shareholders' meeting. Both of these advisory board members have been qualified as independent members.
	Series Seed 2016	   		
	Pre-Seed 2016	    		One of the founders appoints one member, which is chairman of the advisory board. Same founder can pick further advisory board members out of the group of the other shareholders.







GROVER GROUP NAME Grover Group GmbH REGISTERED SEAT Berlin INCORPORATED 2015 LEGAL FORM(S) GmbH (before: UG (haftungsbeschränkt))	Series C 2024  	One advisory board member to be appointed by a majority vote of the advisory board members.
	Series C1+C2 2023  	
	Series C1+C2 2022  	Four members to be appointed by the advisory board by a majority vote of the advisory board members.
	Series B 2021  	One advisory board member to be appointed by the shareholders' meeting with the approval of the investor majority under the proviso that such appointment shall be made on the basis of a short list of at least three objectively suitable candidates provided by a founder. This member has been qualified as an independent member.
	Series A 2018  	One advisory board member to be appointed by the shareholders' meeting with the approval of two investors and one founder shareholder. This member has been qualified as an independent member.
	Series Seed 3 2015 – 2017 	






































HELSING NAME Helsing GmbH REGISTERED SEAT Munich INCORPORATED 2021 LEGAL FORM(S) GmbH (since incorporation)	Series B 2023  	Two advisory board members to be appointed by certain investors together with a founder majority. These members have been qualified as independent members.
	Series A+ 2022 	One advisory board member to be jointly appointed by investors and founders. This member has been qualified as an independent member.
	Series A 2021  	





















































MAMBU NAME Mambu GmbH REGISTERED SEAT Berlin INCORPORATED 2010 LEGAL FORM(S) GmbH (in 2021, the company flipped into a Dutch holding structure and Mambu B.V. became its sole shareholder)	Series D 2020  	One member, which shall be an independent industry expert, to be appointed by the other board members.
	Series C1 2020  	
	Series C 2019  	
	Series B 2015  	
	Series A 2013 – 2014  	Articles of association only state that there can be an advisory board. Every holder of series A shares and common shares would be allowed to appoint one member; would be weak.

N26 NAME N26 AG REGISTERED SEAT Berlin INCORPORATED 2013 LEGAL FORM(S) AG (incorporated as a GmbH, which changed its legal form to an AG in 2022)	Series E 2021  	One member to be appointed by Investor (...) and Investor (...) jointly together with the Company, whereby such member shall be designated by a majority of the other voting members of the advisory board, shall be independent of the shareholders (...) (both investors that can appoint) and shall have appropriate industry experience. This member has been qualified as an independent member.
	Series D 2019 – 2020  	
	Series C 2018  	
	Series B 2016  	Both founders can appoint one member each and one member to be appointed unanimously by the two founders.
	Series A 2016  	One advisory board member to be appointed unanimously by the other members of the advisory board. This member has been qualified as an independent member.
	Series Seed 2015  	One advisory board member to be appointed by holders of common shares holding in aggregate 2/3 of those common shares, that are not held by (...) [two of the founder holdings]. This member has been qualified as independent member.





ONEFOOTBALL NAME OneFootball GmbH REGISTERED SEAT Berlin INCORPORATED 2012 LEGAL FORM(S) GmbH (since incorporation)	Series D3 2021 – 2022  	Managing directors cannot be members of the advisory board.
	Series C 2017 – 2021  	
	Series B-5 2013 – 2016  	
	Series A 2013  	

PERSONIO NAME Personio Group SE REGISTERED SEAT Munich INCORPORATED 2014 LEGAL FORM(S) SE (incorporated as an UG (haftungsbeschränkt), turned into a GmbH which was contributed into a GmbH & Co. KG in 2022 which was then transformed into an AG in 2022 and finally into an SE in 2022)	Series E 2021 – 2022 	Two advisory board members shall be independent industry experts and be appointed by one of the founders.
	Series D 2020 	
	Series C 2019 	One advisory board member shall be a independent industry expert and be appointed by a founder. One advisory board member shall be an independent industry expert and be appointed by a majority vote of the other advisory board members.
	Series B 2019 	Two advisory board members shall be independent industry experts and be appointed by a majority vote of the other advisory board members.
	Series A 2017 	Up to two advisory board members, which shall be independent industry experts, shall be elected by a shareholders' resolution through a majority vote of all shares.
	Series Seed 2016 	One independent advisory board member to be appointed by the other advisory board members.

RAISIN NAME Raisin GmbH REGISTERED SEAT Berlin INCORPORATED 2012 LEGAL FORM(S) GmbH (since incorporation)	Series C 2023	         		One member to be appointed by all other advisory board members together by simple majority. This advisory board member has been qualified as an independent member.
	Merger with Deposit Solutions 2021	         		
	Series D 2019	         		
	Series C 2017	         		
	Series B 2015 – 2016	         		Articles state that there can be an advisory board with five members of which one would be a founder member and four would be investor members.
	Series A Until 2014			Articles of association only state that there can be an advisory board.











RAZOR GROUP NAME Razor Group GmbH REGISTERED SEAT Berlin INCORPORATED 2019 LEGAL FORM(S) GmbH (since incorporation)	Series D-2 2024	         		
	Series Acquisition 2022 – 2023	         		
	Series B 2021	         		
	Series A 2020 – 2021	         		
	Series Seed 2020	         		

MXP PRIME PLATFORM (D.B.A. SELLERX) NAME MXP Prime Platform GmbH REGISTERED SEAT Berlin INCORPORATED 2020 LEGAL FORM(S) GmbH (since incorporation)	Series C 2023 (Structured Round)			One advisory board member to be appointed by mutual decision of the following two groups: majority of the members of the advisory board appointed by certain investors, as well as majority of the members of the advisory board appointed by certain investor and both founders. This advisory board member has been qualified as an independent member.
	Series B1 2021			
	Series B 2021			
	Series A 2021			
	Series Seed 2020			

SENNER TECHNOLOGIES NAME Sennder Technologies GmbH REGISTERED SEAT Berlin INCORPORATED 2015 LEGAL FORM(S) GmbH (since incorporation)	Series D 2023			Two advisory board members to be appointed jointly by two founders and one investor. These advisory board members have been qualified as independent members.
	Series D 2021			
	Series C 2019			
	Series B 2019			Two advisory board members to be appointed jointly by two founders and one investor. One advisory board member to be appointed jointly by the shareholders entitled to (individual or joint) delegation. These three members have been qualified as independent members.
	Series A 2018			
	Series Seed 2017			The articles do not specify how the advisory board members are appointed.

STAFFBASE NAME Staffbase AG REGISTERED SEAT Chemnitz INCORPORATED 2014 LEGAL FORM(S) AG (incorporated as a GmbH and changed form to an AG in 2024)	Series E 2024 		Two advisory board members (who do not directly or indirectly work for, advise or otherwise receive consideration from or are otherwise related to, any of the shareholders or any of their affiliated companies) to be appointed by the founders together with the consent of shareholders of the company representing a qualified majority.
	Series E 2023 		Two advisory board members to be appointed by three founders collectively, with the consent of the investors' majority. Both advisory board members have been qualified as independent members.
	Series E 2022 		
	Series D 2021 		
	Series C 2019 		
	Series B 2018 		One advisory board member to be appointed by the shareholders' meeting with the consent of the investors' majority. This advisory member has been qualified as an independent member.
	Series A 2016 		Managing directors or employees cannot become members of the advisory board.
	Series Seed 2014 		

TAXFIX NAME Taxfix SE REGISTERED SEAT Berlin INCORPORATED 2016 LEGAL FORM(S) SE (incorporated as a GmbH, then reorganization as an AG and finally as an SE in 2022 and 2023, respectively)	Series D 2022 		One advisory board member who needs to be an independent expert to be appointed unanimously by all members of the advisory board. One advisory board member to be appointed by the other members of the advisory board by simple majority of votes. A prerequisite for a delegation is that the member to be appointed has been appointed CEO of the company by the shareholders' meeting. Both advisory board members have been qualified as independent members.
	Series C 2020 		
	Series B 2019 		One advisory board member who needs to be an independent expert to be appointed unanimously by the members of the advisory board.
	Series A 2018 		
	Series Seed 2017 		

TIER MOBILITY NAME Tier Mobility SE REGISTERED SEAT Berlin INCORPORATED 2018 (according to NorthData) LEGAL FORM(S) SE (incorporated as a GmbH, then reorganization as an AG and finally as an SE in 2021)	Series C 2020 		One advisory board member is appointed by the managing directors of the company. This advisory board member has been qualified as an independent member.
	Series B2 2019 		
	Series B1 2019 		
	Series A2 2019 		
	Series A1 2018 		

TRADE REPUBLIC BANK NAME Trade Republic Bank GmbH REGISTERED SEAT Berlin INCORPORATED 2016 LEGAL FORM(S) GmbH (since incorporation)	Series C 2021 		Two advisory board members to be nominated by founders and appointed upon approval by advisory board (incl. founding member) with simple majority of the vote cast. In the articles of association from 2022 and thereafter, no advisory board is mentioned anymore.
	Series B 2020 		One advisory board member to be nominated by founders and appointed upon approval by advisory board (incl. founding member) with simple majority of the vote cast. This advisory board member has been qualified as an independent member.
	Series A 2019 		One independent member to be appointed by the other advisory board members. This advisory board member has been qualified as an independent member.
	Series Seed 2017 – 2019 		The articles do not specify how the advisory board members are appointed.

VOLOCOPTER NAME Volocopter GmbH REGISTERED SEAT Berlin INCORPORATED 2007 LEGAL FORM(S) GmbH (since incorporation)	Series E 2022 		Managing directors cannot become advisory board members. Three members, of which at least two shall have no relationships with shareholders, to be appointed by the affirmative vote of a simple majority of all shares. These three members have been qualified as independent members.
	Series D 2021 		Managing directors cannot become advisory board members. Two advisory board members to be appointed by the affirmative vote of at least three of the advisory board members appointed by founders and investors and with consent of the simple majority of all shares. These two members have been qualified as independent members.
	Series C 2019 		Two advisory board members to be appointed unanimously by one founder together with two other shareholders (not holders of common shares). These two members have been qualified as independent members.
	Series B 2017 		The articles of association only state the advisory board members are appointed by the shareholders' meeting.
	Series A Up until 2016 		

8. THE SITUATION IN THE U.S.

How do the findings for Germany relate to what we know about board dynamics in VC-backed U.S. start-ups? Luckily, there are some recent U.S. studies that we can draw upon. However, one must keep in mind that any comparison is ultimately limited by the different roles and functions of the advisory board and the board of directors.

As we have mentioned before, German advisory boards are different from U.S. boards of directors. In U.S. start-ups, analyzing whether investors or entrepreneurs have the majority of board seats, *i.e.*, have control over the board, is essential to understanding the balance of power in the firm. This is because in the U.S., the board of directors is ultimately responsible for all major decisions: hiring and firing the executives, approving large budget items and initiating fundamental transactions, such as the sale of the company, raising equity, IPO and liquidation. VC investor Mahendra Ramsinghani summarizes this succinctly: "The boardroom is where the venture capitalist wields the greatest influence on a company's future growth." While voting rights and protective provisions may enable investors to block unfavorable transactions, they do not give them the power to initiate these transactions unless they control the board of directors.

Drawing, amongst others, on Form D filings from SEC's EDGAR database, Michael Ewens from Colombia University and Nadya Malenko from Boston College reviewed a data set covering more than 7,700 U.S. start-ups. The authors showed, amongst others, the following:¹⁷

- The average board size across a start-up's life is 4.5, with approximately 2 seats held by VC investors, 1.7 by founders / executives and 0.8 by independent directors.
- The dynamics of board composition reveal the shift of control over the life cycle. At first financing, the average (median) board has 3.6 (3) members, and board control is most frequently allocated to the founders / executives. As the start-up grows and raises capital, it adds both VC directors and independent directors, and at later stages of the life cycle, board control is most typically allocated to the investors.

- Independent directors are widespread: they are present in about half of all firm-year observations (firm-years being years in which the company has raised an equity financing).
- The findings indicate that independent directors play an important role in the evolution of board control over the life cycle: As the board transitions from founder to investor control, it typically goes through the stage that the authors of the study call "shared control", and companies showed a median of two founder directors, two VC investor directors and one independent. At this stage, neither the VCs nor the entrepreneurs hold the majority of seats on the board, so whenever these two parties disagree, independent directors have a tiebreaking vote. Such shared control is particularly common after the company raised its second priced round.

One needs to note that the sample Michael Ewens and Nadya Malenko analyze ends in 2017 (though the authors sought to confirm their overall findings by analyzing alternative data sources for the post-2017 periods). We expect that during the boom years starting in 2020 and ending in early 2022, founders will often have retained more control for longer over "their" boards, though that trend might have then partially reversed in the tighter financing environments over the last couple of quarters.

17. Ewens, Michael & Malenko, Nadya, Board Dynamics over the Startup Life Cycle, National Bureau of Economic Research (NBER), Working Paper 27769, Issue Date September 2020, Revised January 13, 2022, May 9, 2024, DOI 10.3386/w27769 (can be downloaded at: <https://www.nber.org/papers/w27769>, last visited: 2024/08/01).

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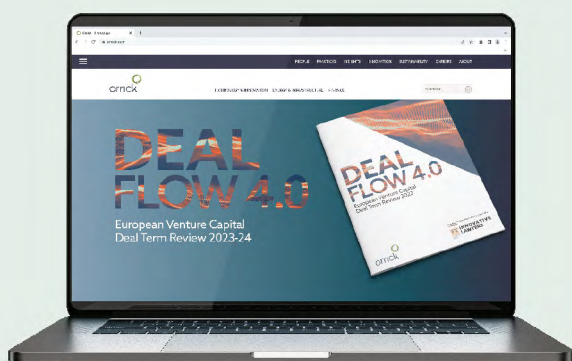
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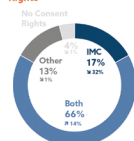
Deal Flow 4.0 with our analysis of the 2023 deal terms is available at orrick.com.

1 DEAL TERM REVIEW 2023-24 VENTURE FINANCINGS

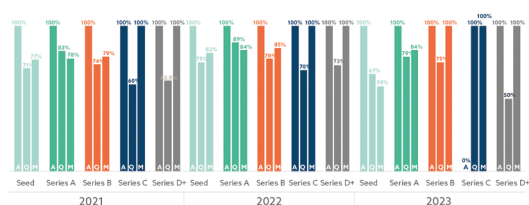
Rights

- Overall, **95%** of deals included **consent rights**: investor majority consent (IMC) only (17%)/investor director consent (IDC) only (0%)/both (66%)/other (13%)/no consent rights (4%). Increasingly, later-stage deals transitioned to a blended IMC regime, avoiding stacked or tiered consents.
- Similarly, we saw a **shift in later-stages** to having a **simple majority threshold (50% plus one) for drag-along**, i.e., not requiring "stacked consents" from junior preference classes, with an **even greater** number of deals at all stages (and specifically later stages) including a drag-along threshold greater than 50%.
- The vast majority of our deals have **drag-along rights**, with founder veto prevalent in earlier stages and continuing well into the later stages. Compared to 2022, in 2023 we saw an **increase in the number of earlier-stage deals which included a founder veto**.

Rights



Information Rights % of total deals in each round



- All deals include Information Rights (delivery of information and preparation of reports) on an annual basis. In addition, the majority of deals also feature Information Rights on a quarterly and monthly basis.

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“

Orrick is reimagining how to use
data in the delivery of legal services.

Reena Sengupta,
RSG Consulting

”

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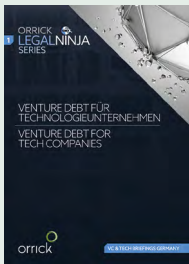
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Other Issues in this Series

www.orrick.com/en/Practices/Orrick-Legal-Ninja-Series-OLNS

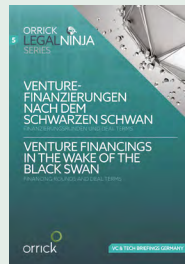


OLNS #1 – Venture Debt for Tech Companies

May 2019

Venture Debt is a potentially attractive complement to equity financings for business start-ups that already have strong investors on board.

This is a highly flexible instrument with very little dilutive effect for founders and existing investors.



OLNS #5 – Venture Financings in the Wake of the Black Swan

April 2020

In the current environment, all market participants, and especially entrepreneurs, need to be prepared for a softening in venture financing and make plans to weather the storm. In this guide, we share some of our observations on the most recent developments and give practical guidance for fundraising in (historically) uncertain times. We will first provide a brief overview of the current fundraising environment, and then highlight likely changes in deal terms and structural elements of financings that both entrepreneurs and (existing) investors will have to get their heads around.



OLNS #2 – Convertible Loans for Tech Companies

August 2019

Due to their flexibility and reduced complexity compared to fully-fledged equity financings, convertible loans are an important part of a start-up's financing tool box. In a nutshell: a convertible loan is generally not meant to be repaid, but to be converted into an equity participation in the start-up at a later stage.



OLNS #6 – Leading Tech Companies Through a Downturn

May 2020

Steering a young technology company through a downturn market is a challenging task but if done effectively, the start-up can be well positioned to benefit once the markets come back. While OLNS#5 focused on raising venture financing during a downturn, in this guide, we want to give a comprehensive overview of the legal aspects of some of the most relevant operational matters that founders may now need to deal with, including monitoring obligations and corresponding liabilities of both managing directors and the advisory board, workforce cost reduction measures, IP/IT and data privacy challenges in a remote working environment, effective contract management and loan restructuring.



OLNS #3 – Employment Law for Tech Companies

January 2023 - updated and expanded edition replacing the 2019 edition

Young technology companies are focused on developing their products and bringing VC investors on board. Every euro in the budget counts, personnel is often limited, and legal advice can be expensive. For these reasons, legal issues are not always top of mind. But trial and error with employment law can quickly become expensive for founders and young companies.



OLNS #4 – Corporate Venture Capital

March 2020

Corporates are under massive pressure to innovate to compete with new disruptive technologies and a successful CVC program offers more than capital – access to company resources and commercial opportunities are key features that justify CVC's prominence. This guide serves to share best practices for corporates and start-ups participating in the CVC ecosystem and also to ask important questions that will shape future direction.



OLNS #7 – Flip it Right: Two-Tier U.S. Holding Structures for German Start-ups

July 2024 - updated and expanded edition replacing the 2021 edition

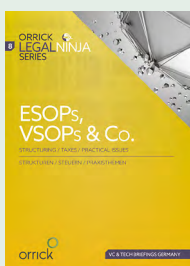
Operating a German technology company in a two-tier structure with a U.S. holding company can have great advantages, most notably with respect to fundraising in early rounds and increased exit options and valuations. However, getting into a two-tier structure (be it through a "flip" or a set-up from scratch) requires careful planning and execution. This guide shows you what to consider and how to navigate legal and tax pitfalls.



OLNS #10 – University Entrepreneurship & Spin-offs in Germany – Set-up / IP / Financing and Much More

November 2022

German universities are increasingly becoming entrepreneurial hotbeds, but university spin-offs face some unique challenges, some of which could – with the right support systems and policies in place – be considerably less stressful. OLNS#10 helps founders by providing them with an overview of how to get a university-based start-up off the ground. We will discuss founder team composition and equity-splits, the composition of the first cap table, important considerations for the initial legal set-up (founder HoldCos and U.S. holding structures) as well as financing considerations. We will also return again and again to the specifics of IP-based spin-offs, especially when it comes to how a start-up can access the university's IP in an efficient manner.



OLNS #8 – ESOPs, VSOPs & Co.: Structuring / Taxes / Practical Issues

June 2021

OLNS#8 provides a comprehensive overview of equity-based and Employee-ownership programs (or in short "ESOPs") play a critical role in attracting and retaining top talent to fledgling young companies. Stock options reward employees for taking the risk of joining a young, unproven business. This risk is offset by the opportunity to participate in the future success of the company. Stock options are one of the main levers that start-ups use to recruit the talent they need; these companies simply can't afford to pay the higher wages of more established businesses. With OLNS#8, we want to help start-ups and investors alike to better understand what employee ownership is, structure them in a way that is congruent with incentives, and implement them cleanly.



OLNS#11: Bridging the Pond – U.S. Venture Capital Deals from a German Market Perspective

August 2023

Venture financings and deal terms in the U.S. and in Germany have many similarities but there are also some differences. To help navigate these challenges, we have put together OLNS#11. OLNS#11 is a guide that offers founders and investors with a "German market" background an introduction to U.S. deals and helps them understand where U.S. deals differ from a typical German financing. OLNS#11 also augments and builds on OLNS#7 that explains how German founder teams can get into a U.S./German holding structure (the famous flip).



OLNS #9 – Venture Capital Deals in Germany: Pitfalls, Key Terms and Success Factors Founders Need to Know

October 2021

Founding and scaling a tech company is a daunting challenge. OLNS#9 summarizes our learnings from working with countless start-ups and scale-ups around the world. We will give hands-on practical advice on how to set up a company, how (not) to compose your cap table, founder team dynamics and equity splits, available financing options, funding process, most important deal terms and much more.

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