



cutting through complexity

Founder Institute

Startup Legal 101

Stefan Kimmel, Thomas Skowronek, Lukas Kawka,

Tina von Riedesel

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Founding

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Employees

3

Investment Agreements – to be continued

4

Selected Tax Topics – to be continued

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Accounting – to be continued



1. Founding

The business idea of **STARTUP COMPANY** has moved into a legally existing company

- Choosing the legal form that is suited best
- Considering the set-up from an employment side (own staff/ subcontracts/ leased workers)
- Choosing the right type of employment contract
- Setting up a tax efficient corporate structure (i.e. regarding a future exit)
- Tax optimized contribution of existing assets (e.g. IP) in the startup company



2. Development

STARTUP COMPANY has gained higher market share and needs to expand its personnel to cope with the growth

- Search for investors
- Negotiate investment agreements
- Working Time restrictions
- Handling disputes with employees
- Implementation of employee participation programs
- Employees vs. freelancer
- Internationalization of the business model (tax aspects)
- Tax compliance



3. Exit

The business idea of **STARTUP COMPANY** has moved into a legally existing company



1

Legal aspects

What do I have to do to secure my investment from a legal perspective?

What does an investment agreement mean for my life?

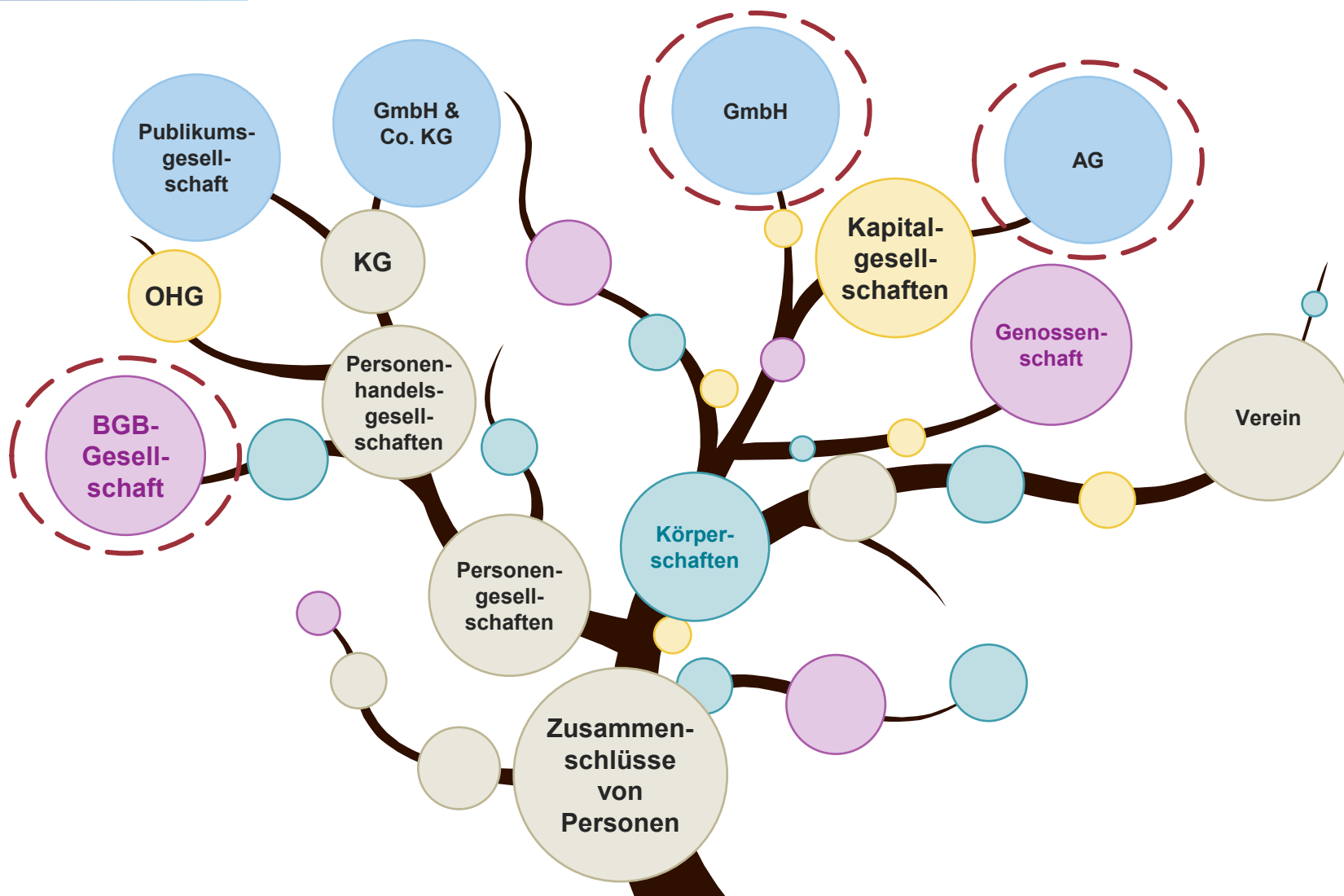
How to form a company?

How to avoid common legal mistakes (e.g. data/consumer protection)?

What do I have to consider to adequately protect my Intellectual Property?

When should I involve legal advisors?





	Minimum Share Capital	Liability of the Shareholders	Formal Requirements for the Foundation	(Management) Bodies	Transfer of Shares
GbR	None	Unlimited	None	None	Consent of the other shareholders required
GmbH	€ 25,000	Limited to the company's assets	Notarization required (costs approx. € 500.00)	Management, shareholder's meeting, voluntarily: Supervisory board	In general no consent of the other shareholders required, notarization mandatory
UG (haftungsbeschränkt)	€ 1.00	Limited to the company's assets	Notarization required (costs approx. € 500.00)	Management, shareholder's meeting	In general no consent of the other shareholders required, notarization mandatory
AG	€ 50,000	Limited to the company's assets	Notarization required (costs approx. € 700.00)	Management, general meeting, supervisory board	In general no consent of the other shareholders required, no formal requirements

Partnership under the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) Gesellschaft bürgerlichen Rechts – „GbR“ (also „BGB-Gesellschaft“)

- ▶ Minimum of two shareholders
- ▶ Shareholders need to pursue an economic or ideal purpose
- ▶ No formal foundation necessary (i.e. no written articles of association)
- ▶ Therefore: In case two or more persons act together for an economic or ideal reason, in most cases this is already considered a GbR (e.g. when the business plan is prepared)
- ▶ Unlimited personal liability of the shareholders
- ▶ In general all shareholders together are authorized to conduct the GbR's business and to represent the GbR

	Limited Liability Company (GmbH/UG) (haftungsbeschränkt))	Stock Company (AG)
Articles of Association	<ul style="list-style-type: none"> ■ In many areas, flexible provisions and provisions that deviate from legal regulations can be laid down in the articles of association 	<ul style="list-style-type: none"> ■ Principle of formal strictness of the articles: Provisions that deviate from legal regulations are only possible in the case of explicit legal admissibility ■ Thereby transparency with regard to applicable provisions on principles about corporate governance, liability of corporate bodies, protection of minority shareholders etc.
Organization	<ul style="list-style-type: none"> ■ Two- or threefold structure: <ul style="list-style-type: none"> – Managing directors and shareholder meeting – (in general) voluntarily: supervisory board/ council ■ In general supervision of managing directors by the shareholder meeting, delegation of competences to supervisory board/council and other bodies possible 	<ul style="list-style-type: none"> ■ Threefold structure: Management board, supervisory board and general meeting ■ Supervision of the management board by the supervisory board

	GmbH/ UG (haftungsbeschränkt)	AG
Management	The managing directors manage the business activities and represent the company in dealings with third parties	The management board manages the business activities and represents the company in dealings with third parties
Supervisory Board	<ul style="list-style-type: none"> ■ Implementation of supervisory board only on a facultative basis ■ Exception: Supervisory board is mandatory due to co-determination of employees (if more than 500 employees) 	<ul style="list-style-type: none"> ■ Supervisory board is mandatory ■ Supervisory board supervises and controls the activities of the management board
Organization of the shareholders	<ul style="list-style-type: none"> ■ Shareholder meeting ■ Convocation by registered mail ■ 1 vote per € 1,- of a share ■ Shareholders have the authority to issue instructions to the managing directors by shareholder resolution 	<ul style="list-style-type: none"> ■ General meeting ■ Convocation by public announcement or registered mail ■ Voting right in accordance with the number of shares respectively the par value of the shares ■ No authority to issue instructions with regard to management matters by the general meeting or the supervisory board

	GmbH/UG (haftungsbeschränkt)	AG
Information rights of the shareholders	<ul style="list-style-type: none"> ■ Each shareholder is entitled to request information from the managing directors regarding the company affairs and to request access to the company's books principally at any time ■ Information has to be provided "without undue delay" by managing directors 	<ul style="list-style-type: none"> ■ At the general meeting, shareholders can request information from the management board regarding company affairs insofar as they are required to appropriately judge the object of the agenda ■ No right of information regarding individual items
Share Capital	<ul style="list-style-type: none"> ■ GmbH: Minimum share capital: € 25,000; contribution in kind is permitted. ■ UG (haftungsbeschränkt): <ul style="list-style-type: none"> – Minimum share capital € 1.00 – Obligation to form a statutory reserve (gesetzliche Rücklage), 25% of the yearly profits minus the losses need to be paid into such statutory reserve until the company increases its share capital to a minimum of € 25,000 – No contribution in kind permitted 	<ul style="list-style-type: none"> ■ Minimum share capital: € 50,000

	GmbH/UG (haftungsbeschränkt)	AG
Duties	<ul style="list-style-type: none"> ■ Full representation of the company in dealings with third parties ■ If there are several managing directors, they represent the company jointly, sole power of representation may be granted ■ Pursuit of the company's objects by determination of how to use the resources of the company ■ But: Margin of discretion towards shareholders in case of management measures is smaller (limited application of the business judgment rule) ■ Legal obligations like keeping of books, preparation of annual accounts etc. 	<ul style="list-style-type: none"> ■ Full representation of the company by the management board in dealings with third parties ■ If there are several members of the management board, they represent the company jointly, sole power of representation may be granted ■ The management board is required to manage the company under "its own responsibility", this includes management and guidance (so-called business judgment rule) ■ The management boards' obligations comprise its own legal compliance and its enforcement at lower levels, this includes organizational obligations and preventive control

	GmbH/UG (haftungsbeschränkt)	AG
Membership	<ul style="list-style-type: none"> ■ Managing directors may be appointed by the shareholder meeting, the articles of association may provide for the appointment by the supervisory board ■ Appointment for an indefinite period of time possible ■ Further rights and obligations can be established in the management service agreement ■ Revocation is possible at any time by shareholder resolution (or as the case may be resolution of supervisory board or council in case of an according determination in the articles of association) ■ Revocation is also possible without an important reason 	<ul style="list-style-type: none"> ■ Management board members are appointed by the supervisory board ■ Appointment for a maximum period of five years ■ A repeated appointment or extension of the period in office is possible for a maximum period of five years (contractual commitments of a longer appointment or repeated appointment are ineffective according to the prevailing view in law literature and jurisdiction) ■ Revocation by the supervisory board only for good cause, e.g. serious violation of duties, incapacity to carry out management duties or withdrawal of confidence by the general meeting
– Management service agreement –	<ul style="list-style-type: none"> ■ Management service agreements of managing directors and members of the management board may determine further rights and obligations, in particular as to the period of appointment and the remuneration, management service agreements have to be terminated separately from the revocation 	

	GmbH/UG (haftungsbeschränkt)	AG
Management competences	<ul style="list-style-type: none"> ■ Shareholders are entitled to give instructions by shareholder resolution to the managing directors also in day-to-day business ■ Extensive catalogue of reserved matters that require the consent of the shareholder meeting, supervisory board, council or additional bodies can be laid down, also in the area of day-to-day business 	<ul style="list-style-type: none"> ■ Principally, shareholders have no influence regarding the management since the management board is acting free of instructions; the management board is not subject to any instructions from the supervisory board ■ Catalogue of reserved matters that require the consent of the supervisory board is admissible, but only in case of significant business transactions of a certain type, reserved matters in the area of day-to-day business are not permitted ■ Reserved matters that require the consent of the general meeting are not permitted ■ The supervisory board may adopt rules of procedure for the management board (in case of several members)

	GmbH/UG (haftungsbeschränkt)	AG
Liability	<ul style="list-style-type: none"> ■ Formal discharge of the managing directors results in the waiver of claims towards the respective managing director regarding such facts, which the shareholders already know or should have known due to reports made by the managing directors or arising from documents submitted by them ■ No liability towards the company in case of acting on the basis of an effective instruction by the shareholder meeting, unless creditor-protecting provisions are contradictory or the instruction is illegitimate ■ In case a D&O insurance is contracted, the managing directors are not legally obliged to agree on an excess 	<ul style="list-style-type: none"> ■ Formal discharge of Management Board and Supervisory Board does not represent a waiver of damage claims ■ No liability in case of transactions undertaken due to a legitimate resolution by the General Shareholders' Meeting, for which the Management Board can exceptionally ask the General Shareholders' Meeting (exception: infringement of creditor-protecting provisions) ■ Incorrect statements regarding the state of the company in the General Shareholders' Meeting are penalized, § 400 AktG ■ In case a D&O insurance is contracted, the management board is obliged to agree on an excess in the amount of 10% of the claim up to at least 150% of the fixed annual remuneration

	GmbH/UG (haftungsbeschränkt)	AG
Duties	<ul style="list-style-type: none"> ■ Comprehensive rights of control and instruction of the shareholder meeting towards the managing directors ■ Competences may be delegated to council/supervisory board, so that these bodies then fulfil duties of the shareholder meeting 	<ul style="list-style-type: none"> ■ The general meeting is the decision-making body for the shareholders and has the competences described by law ■ Rights of co-determination are limited to participation in the general meeting, rights of information and voting in the general meeting ■ No right of instruction towards management board or supervisory board ■ In charge of resolutions regarding periodical measures (allocation of profit or loss etc.), structural measures (capital increase) and special cases (compensation claims against the members of corporate bodies etc.)

	GmbH/UG (haftungsbeschränkt)	AG
Resolutions	<ul style="list-style-type: none"> ■ Shareholders' resolutions are principally to be recorded in written form ■ Resolutions by written procedure (circulation procedure) are principally allowed provided that no shareholder rises any objections ■ Resolutions amending the articles of association require notarization ■ Only resolutions amending the articles of association have to be submitted to the commercial register 	<ul style="list-style-type: none"> ■ Minutes of the protocol of the general meeting ■ Circular resolutions of the general meeting are not permitted, but casting of a vote per postal vote or electronic participation (Online-General Meeting) ■ Notarization is required in case of a non-listed company, if a three-quarter majority or a larger majority is legally required (e.g. alteration of the articles of association, fundamental resolutions, capital increase) ■ Apart from that non-notarial minutes, which have to be signed by the chairperson of the supervisory board ■ All minutes have to be submitted to the commercial register

	GmbH/UG (haftungsbeschränkt)	AG
Meeting	<ul style="list-style-type: none"> ■ Convocation of the shareholder meeting with a notice of (at least) one week by registered mail ■ Significant defaults in the convocation (invitation, which is not directed to all shareholders, by unauthorized persons, by regular mail etc.) are resulting in nullity, slighter defaults (inadmissible place or time, shorter notice period) result in the voidability of the resolutions 	<ul style="list-style-type: none"> ■ Convocation of the general meeting with a notice of at least 30 days by registered mail or announcement in the company's designated publications (at least EBAnz) ■ Defaults in the convocation result in the nullity of resolutions
Protection of minority shareholders	<ul style="list-style-type: none"> ■ The shareholder meeting has to be convened if so required by a minority representing 10% of the registered share capital ■ Minority shareholders may effect the convocation themselves in some cases ■ The amendment of the agenda can be requested by a minority of 10% 	<ul style="list-style-type: none"> ■ The general meeting has to be convened upon request of a minority representing 5% of the registered share capital ■ Minority shareholders may effect the convocation by themselves after authorization by court ■ The amendment of the agenda can be requested by a minority of 5% or a minority of € 500.000

	GmbH/UG (haftungsbeschränkt)	AG
Information rights	<ul style="list-style-type: none"> ■ Each shareholder is entitled to request information on company affairs and access to the books of the company in principal at any time ■ Information has to be provided „without undue delay“ by the managing directors ■ The information rights are limited by a „considerable need of information“ (not each of the shareholders can arbitrarily „browse“ the company’s files) ■ The principle of proportionality has to be respected ■ Information and access to books may be refused in case of concerns that the information obtained might be used for non-company purposes 	<ul style="list-style-type: none"> ■ In the general meeting, shareholders may request information on company affairs from the management board, insofar as this information is required to appropriately judge the object of the agenda ■ Information individual items is not allowed in the general meeting ■ Information may be refused only under certain conditions established in Sec. 131 para. 3 AktG (in case of concerns on disadvantageous transactions)

	GmbH/UG (haftungsbeschränkt)	AG
Shares	<ul style="list-style-type: none"> ■ Purchase agreement and transfer of shares need to be notarized ■ Shares are freely transferable, if there is no restriction on transferability ■ Differentiated constitution of memberships' rights possible (participation in profits, voting rights) 	<ul style="list-style-type: none"> ■ Shares may be transferred without observing any formal requirements ■ Shares are freely transferable, if there is no restriction on transferability ■ Setting-up of different types and classes of shares is possible (par value or non-par value shares, ordinary or preference shares) ■ Obligation to keep a shareholder's register (in case of registered shares with restricted transferability)
– Restriction on transferability –	<p>The restriction on transferability has to be provided for in the articles of association, but may be limited in accordance with the specific requirements, such as that transfers of certain shareholders or for specific reasons do not require prior approval</p>	

	GmbH/UG (haftungsbeschränkt)	AG
Liability	<ul style="list-style-type: none"> ■ Liability is principally limited to the payment of the registered share capital (not an issue in case of transformation) ■ In general no liability in regard to company's debts ■ Direct liability of the shareholders possible in case of undercapitalization, intermixture of assets, dependent relationships and economically destructive intervention or other cases of intentional damage of creditors contrary to public policy ■ Each shareholder is obliged to file for insolvency if the company lacks management, unless the reasons for filing for insolvency or the lack of management are unknown 	<ul style="list-style-type: none"> ■ Liability is principally limited to the payment of the registered share capital (not an issue in case of transformation) ■ In general no liability in regard to company's debts ■ In practice the direct liability of shareholders is hardly seen, theoretically possible in case of undercapitalization (in case of capital investment of a certain amount), intermixture of assets, dependent relationships and economically destructive intervention

	GmbH/UG (haftungsbeschränkt)	AG
Structure	<ul style="list-style-type: none"> ■ Optional establishment of supervisory board/ council ■ Respective provision is required in the articles of association ■ Provisions of German Stock Companies Act are largely dispositive, therefore possibility of flexible provisions about competences, meetings etc. 	<ul style="list-style-type: none"> ■ The supervisory board has to be composed of at least 3 members (or a number of members divisible by 3) according to mandatory law ■ The supervisory board has to supervise the company's management by the management board and should have the required expertise ■ Regulations regarding the supervisory board (§§ 95 – 116 AktG) are largely mandatory
Duties	<ul style="list-style-type: none"> ■ Control of the management board, articles of association can provide for the extent of such control and further duties 	<ul style="list-style-type: none"> ■ Control of the management board, no right to issue instructions, exercising influence possible through catalogue of reserved matters requiring approval (see below)

	GmbH/UG (haftungsbeschränkt)	AG
Membership	<ul style="list-style-type: none"> ■ Members of the supervisory board may be elected by shareholder resolution or seconded by certain (groups of) members ■ The period of appointment or secondment as well as the revocation may be stipulated in the articles of association ■ Members of the supervisory board may be represented by third parties 	<ul style="list-style-type: none"> ■ Members of the supervisory board may be elected by the general meeting or seconded by certain shareholders according to a respective provision in the articles of association ■ Appointment for a period of maximum 5 years with the possibility of reappointment ■ Members who are seconded may be revoked and replaced at any time ■ Elected members may be revoked with a three-quarters majority (dispositive) ■ Representation by third parties is only possible in case of a respective provision in the articles of association and without an own speaking and petition right of the third party („messenger“)

	GmbH/UG (haftungsbeschränkt)	AG
Liability of Supervisory Board Members	<ul style="list-style-type: none"> ■ Members of an optional supervisory board are liable towards the company due to general provisions, the liability may be reduced by the articles of association ■ In exceptional cases, third parties may claim damages directly from the members of the supervisory board in accordance with general provisions of civil law ■ Release from liability by shareholders' resolution is possible 	<ul style="list-style-type: none"> ■ Members of the supervisory board shall execute their duties with the diligence of a prudent and diligent member of a supervisory board, they are responsible for non-compliance towards the company and third parties according to §§ 116, 93 AktG ■ Incorrect statements of the supervisory board in the general meeting regarding the state of the company are penalized, § 400 AktG ■ Each member of the supervisory board is obliged to file for insolvency if the company lacks management, unless the reasons for filing for insolvency or the lack of management are unknown

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2

Tax aspects



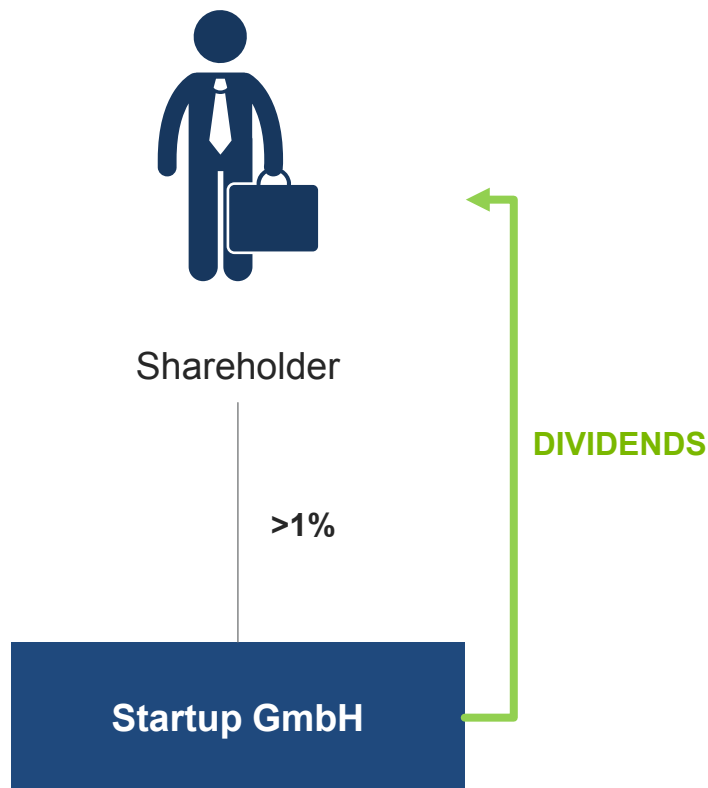
Shareholder

>1%

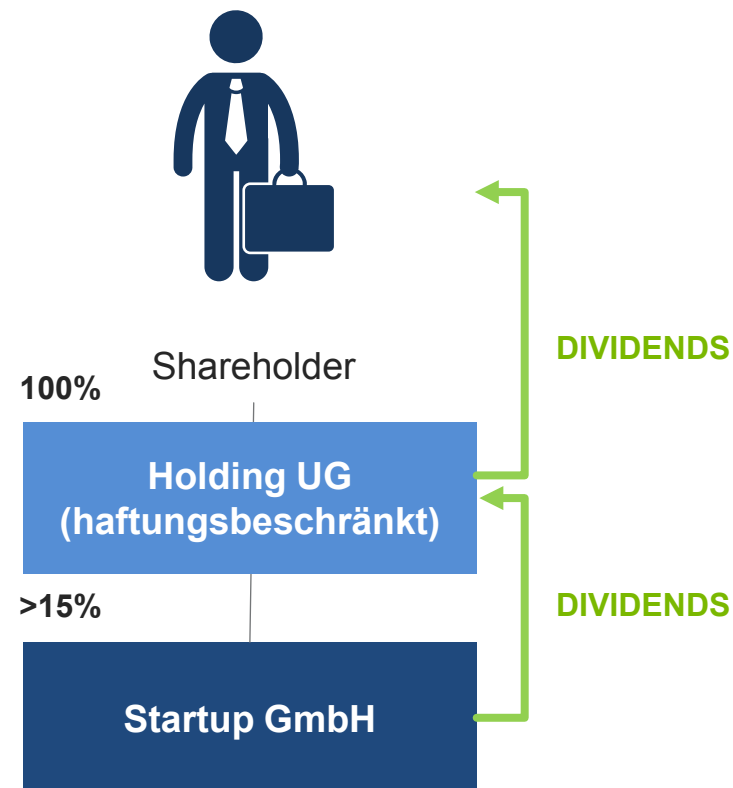
Startup GmbH

TAXATION AT THE LEVEL OF STARTUP GMBH

- Corporate income tax (Körperschaftsteuer) plus solidarity surcharge (Solidaritätszuschlag): 15.825%
- Trade tax (Gewerbesteuer), trade tax rate depends on the respective municipality:
 - Berlin: 14.35%
 - Schönefeld: 7%
- (Total) **tax rate** (Berlin): **30.175%**

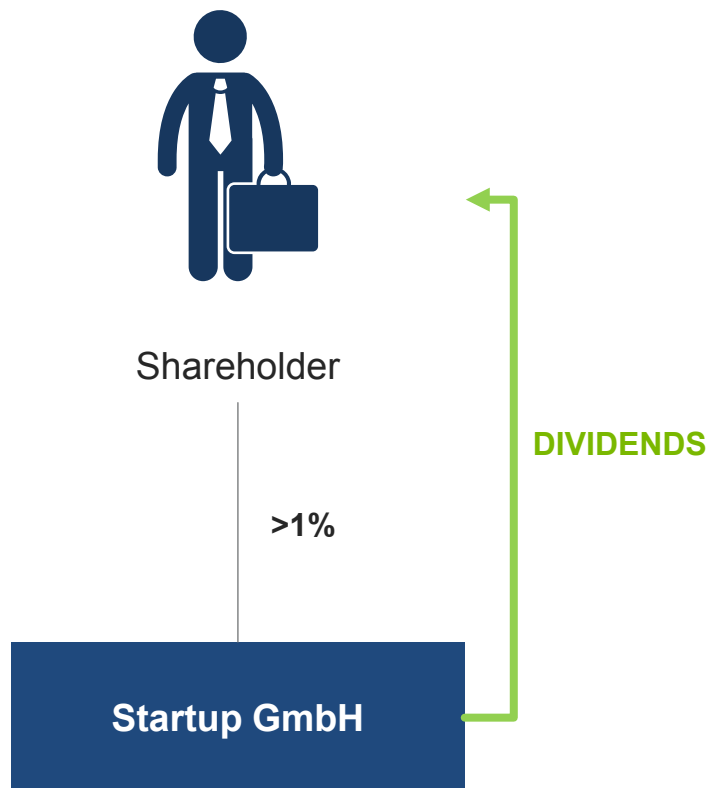


- Dividends: **100**
- Dividends after WHT approx.: **72**

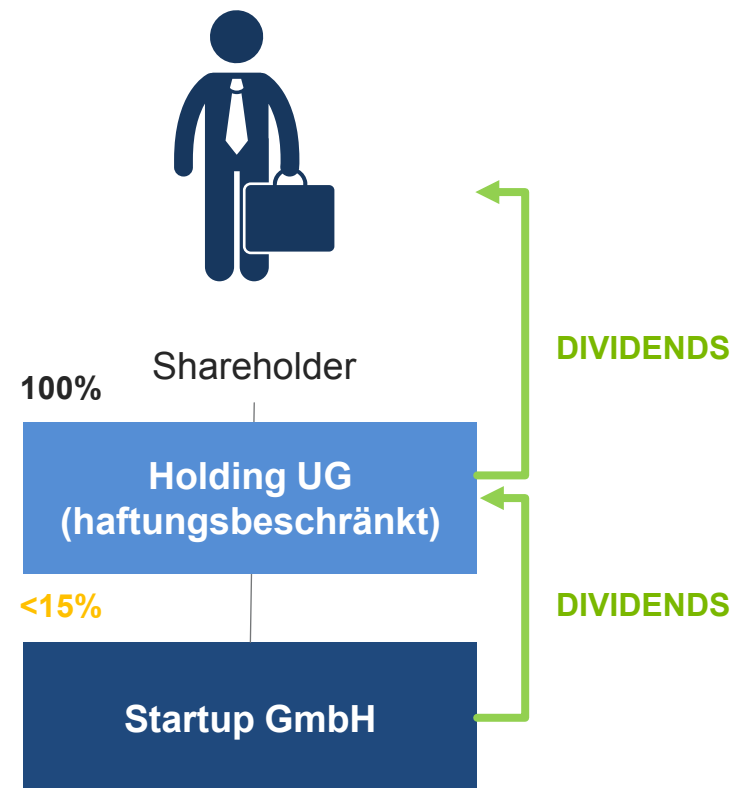


- Dividends: **100**
- Dividends after tax approx.: **98**
- Dividends after WHT approx.: **71**

Rough calculation on the basis of the partial income method and the top income tax rate – for discussion purposes only



- Dividends: **100**
- Dividends after WHT approx.: **72**

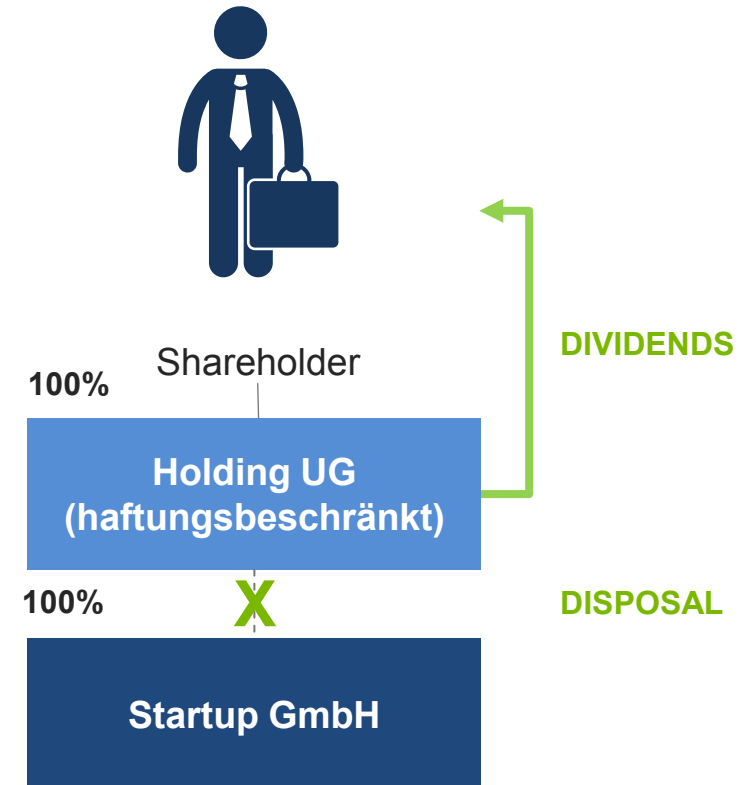


- Dividends: **100**
- Dividends after tax approx.: **70**
- Dividends after WHT approx.: **52**

Rough calculation on the basis of the partial income method and the top income tax rate – for discussion purposes only



- Capital gains: **100**
- Capital gains after tax approx.: **72**



- Capital gains: **100**
- Capital gains after tax approx.: **98**
- Dividends after WHT approx.: **71**

Rough calculation on the basis of the partial income method and the top income tax rate – for discussion purposes only



Shareholder

100%

X DISPOSAL

Startup GmbH

- Capital gains: **100**
- Capital gains after tax approx.: **72**



Shareholder

100%

Holding UG
(haftungsbeschränkt)

5%

X

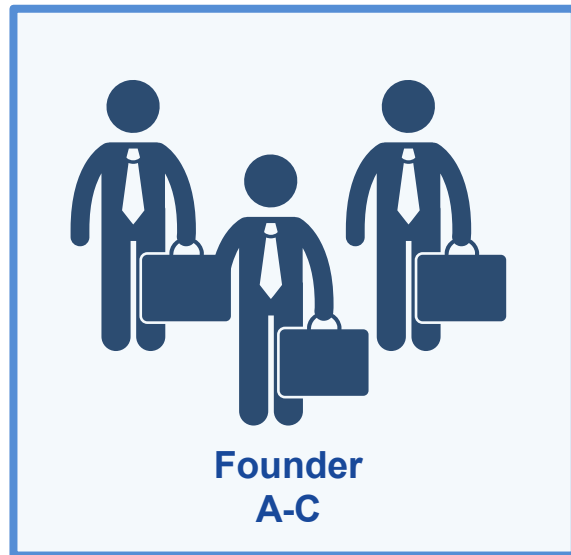
Startup GmbH

DIVIDENDS

DISPOSAL

- Capital gains: **100**
- Capital gains after tax approx.: **98**
- Dividends after WHT approx.: **71**

Rough calculation on the basis of the partial income method and the top income tax rate – for discussion purposes only



= partnership (e.g. GbR)

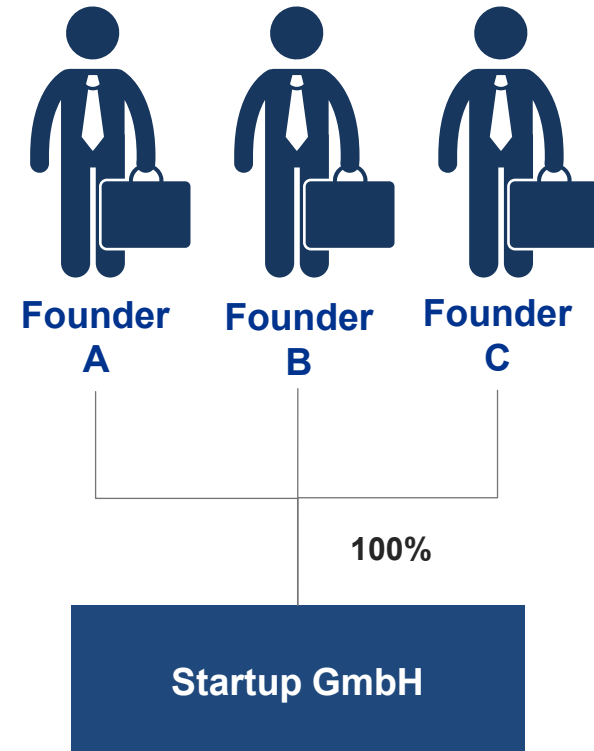
Developed:
IP (e.g. Software, etc.)

= business assets

1. Taxation of the IP value
(at fair market price)!
2. Tax neutral transfer
possible under certain
formal conditions



1. Founders incorporate
Startup GmbH
2. Startup GmbH "uses" IP



A large blue geometric shape, resembling a parallelogram, is positioned on the left side of the slide. It has a dark blue outer border and a lighter blue inner section.

3

Employees

Freelancer or Employee?

Clarification necessary

Classification as Employee?

- Formal approach is not possible
- Consideration of all circumstances of each individual case
- Decisive: Actual execution of the employment relationship

Indicators

- Bound by instructions and operationally integrated in organization
- Business risk
- Primarily and permanently active for one principal
- Activities that are typically performed by employees

Measures to obtain legal certainty

- Application for a binding ruling regarding the social security status for statutory pension scheme (*Sozialversicherungsrechtliches Statusfeststellungsverfahren der Rentenversicherung*)
- Application for a binding ruling for wage tax purposes

Possible Consequences for Mistaking an Employee for a Freelancer

Timeframe	<ul style="list-style-type: none"> ■ Claim for restitution over a number of years
Wage Tax	<ul style="list-style-type: none"> ■ Salary is subject to wage tax, possibly withholding category VI ■ Responsibility to properly pay wage taxes
Social Security	<ul style="list-style-type: none"> ■ Social insurance contributions are subsequently due (both employer's and employee's contribution), recourse to the employee usually not possible
VAT	<ul style="list-style-type: none"> ■ VAT wrongfully invoiced – disguised employment (<i>Scheinselbstständiger</i>) ■ Input VAT must be refunded (recourse to the employee usually not possible)
Labor Law	<ul style="list-style-type: none"> ■ “<i>Scheinselbstständiger</i>” will become employee with protection against unfair dismissal, right to paid vacation and continued payment of wages in case of illness
Commission of an Offense	<ul style="list-style-type: none"> ■ Possible punishability for withholding social security contributions and wage tax evasion ■ Fines are possible – even detention in severe cases

DRAFT OF EMPLOYMENT CONTRACTS

- German law on General Terms and Conditions has many pitfalls; any unclarity will be interpreted in favor of the employee.
- Certain rights of the employer, e.g., the option to ensure that possible inventions of the employee remain with the company, need to be ensured.
- In certain instances, it might make sense to agree on post-contractual non-compete obligations – this is, however, rather expensive. The employer needs to pay half of the total compensation of the employee during the period in which the employee is not allowed to compete.
- It may be relevant to have fixed term or project-limited contracts
- It is essential that the contract reflects the actual status of the employee as employee or freelancer and that the employment relationship is executed in line with the contract.

WORKING TIME

- In Germany, working time is restricted to a daily general maximum of 8 hours. However, it may be prolonged to 10 hours if – in a period of 24 weeks – the average is not more than 8 hours. Since the law assumes a 6-day-working week, it is generally possible to work up to 10 hours at 4 days a week and 8 hours on day 5. **Please note that the threshold of 10 hours may not be exceeded.** An exception is only possible in very rare circumstances.

DISPUTE WITH EMPLOYEES

- Disputes can occur in many instances – employees may ask for better employment conditions, fall ill (too often), would like to go on holiday at a time that is inconvenient for the company, violate their employment obligations etc.
- In a small company, the employer can terminate the employment „at will“, he only has to observe the applicable notice period and notice must be given in writing. If the company has a work council, the work council must be heard (caution: the hearing of the works council is a pitfall)
- Once the company employs more than 10 employees, the employees enjoy termination protection. This means that the employer must not dismiss employees who he considers to be, e.g., low performing. Rather, the employer is restricted to three legally recognized reasons that he must prove in the event of a dispute.
- The legally recognized reasons are:
 - Violation of obligations. Please note that most violations are not per se qualified as a reason to terminate the contract, but the employee needs to receive a formal warning and only repeated offenses may suffice to terminate the contract. An exception are serious and grave violations like stealing.
 - Personal incapacity to perform the obligations under the contract; e.g., if the employee is ill for more than 42 days each year over a period of three years and it may be expected that he will not get better.
 - Redundancies. Please note that in the event of redundancies, the employer may not freely choose, which employee he dismisses, but must keep the employees who are the socially weakest. In order to determine, who is socially strong or weak, the marital status, the number of children, the age, and the seniority of the employee are generally taken into account

KPMG@Factory
Follow us to the factory showroom
Brunnenstraße 142, 10115 Berlin



Tina von Riedesel
Rechtsanwältin

Tel. +49 30 530199-152
Mobile +49 151 54379856
triedesel@kpmg-law.com

KPMG Rechtsanwaltsgesellschaft mbH



Stefan Kimmel
Rechtsanwalt

Tel. +49 30 530199-139
Mobile +49 174 3025389
skimmel@kpmg-law.com

KPMG Rechtsanwaltsgesellschaft mbH



Thomas Skowronek
Manager
Audit Corporate

Tel. +49 30 2068-4633
Mobile +49 174 3006538
tskowronek@kpmg.com

KPMG AG Wirtschaftsprüfungsgesellschaft,
a subsidiary of KPMG Europe LLP



Lukas Kawka
Senior Associate
Corporate Tax Services

Tel. +49 30 2068-1153
Mobile +49 151 72726236
lkawka@kpmg.com

KPMG AG Wirtschaftsprüfungsgesellschaft,
a subsidiary of KPMG Europe LLP



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