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Rechtsanwälte

DIGITAL VENTURES

- Company Founding in Switzerland –

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Seminar «Digital Ventures: Leadership & Foundation»

Sessions zum Seminar auf [uzh.innovation](https://www.instagram.com/uzh.innovation/) Instagram-Kanal

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Agenda

- Protecting your idea
- Setting up your company
- Raising finance
- Taking on staff
- Taxes
- Exit
- Q&A

Protecting your idea – intellectual property law matters

Why important?

Your unique business idea and its protection is likely to be one of - if not - the most valuable asset of your business – make sure you can commercially use it and that you are the only one to use it.

Remember the following 4 rules!

Protecting your idea – intellectual property law matters

First rule: be aware of your intellectual property assets and document them.

These could be protectable by:

- a patent;
- a design;
- a trademark;
- copyright.

Protecting your idea – intellectual property law matters

Second rule: Make sure to secure registrations in time.

Registrations of patents, designs and trademarks generally work on a first-to-file basis.

Protecting your idea – intellectual property law matters

Third rule: Make sure you fully own your intellectual property assets.

- Make sure that all intellectual property rights developed by employees and third parties (consultants, etc.), which are crucial to the business are correctly transferred to your company. Have such agreements in written form.

Protecting your idea – intellectual property law matters

Fourth rule: Don't forget the «fringe» areas.

- Domains.
- Social Media Accounts.
- Social Media Vanity URLs.

Setting up your company – corporate law matters

Why important?

Operating your business through a legal entity not only enhances your perception in the market but also limits your liability exposure. Be sure to choose the right legal entity and know what comes along with it.

- **Stock Corporation (AG) vs. Limited Liability Company (GmbH)**

Setting up your company – corporate law matters

	Stock Corporation	Limited Liability Company
Incorporation	<ul style="list-style-type: none"> - public deed - at least 1 corporate or individual founder - entry in the commercial register is constitutive 	<ul style="list-style-type: none"> - public deed - at least 1 corporate or individual founder - entry in the commercial register is constitutive
Share Capital	<ul style="list-style-type: none"> - minimum: CHF 100'000.- - maximum: no limits 	<ul style="list-style-type: none"> - minimum: CHF 20'000.- - maximum: no limits
Capital Structure	<ul style="list-style-type: none"> - bearer shares and/or - registered shares and/or - participation certificates (non-voting shares with nominal value) - minimal nominal value: CHF 0.01 	<ul style="list-style-type: none"> - at least one share per shareholder - minimal value of shares: CHF 100 (except in restructuring)
Minimum Contribution (in cash or in kind)	<ul style="list-style-type: none"> - bearer shares: 100% of the share capital - registered shares: 20%, but at least CHF 50'000.- 	<ul style="list-style-type: none"> - 100 % of the share capital
Duties of Shareholders	<ul style="list-style-type: none"> - only financial (obligation to deposit a fixed amount per shares) - Further obligations in SHA 	<ul style="list-style-type: none"> - financial (obligation to deposit entire issue price of shares) - personal (such as duty of loyalty and prohibition of competition)

Setting up your company – corporate law matters

Transfer of Shareholder Rights	<ul style="list-style-type: none"> - bearer shares: disposal of shares at one's discretion - registered shares: may be restricted by the articles of association - participation certificates: disposal of certificates at one's discretion or - restricted by the articles of association 	<ul style="list-style-type: none"> - consent of $\frac{2}{3}$ shareholders present at meeting and $\frac{1}{2}$ of the entire capital - obligation of assignment in written form; possibly amendment of the articles of association - contract of assignment must name statutory rights and duties - withdrawal for valid reasons - registration at the commercial register
Organisation	<ul style="list-style-type: none"> - general meeting of shareholders - board of directors - auditors (opting out if all shareholders agree and less than 10 full-time employees in a year on average) 	<ul style="list-style-type: none"> - shareholders' meeting - management - (auditors: opting out like stock corporation)

Setting up your company – corporate law matters

Management	<ul style="list-style-type: none"> - board of directors; - managing officers (optional) 	<ul style="list-style-type: none"> - all shareholders, or - one individual shareholder (optional); - managing officers (optional)
Residence Requirements	<ul style="list-style-type: none"> - at least one person, with sole signature power for the company (or two with joint signature power) must be a Swiss resident 	<ul style="list-style-type: none"> - at least one person, with sole signature power for the company (or two with signature power) must be a Swiss resident
Liability	<ul style="list-style-type: none"> - only the business assets 	<ul style="list-style-type: none"> - only the business assets, unless the articles of association explicitly provide for additional contributions of shareholders
Further Financing	<p>More flexibility:</p> <ul style="list-style-type: none"> - ordinary capital increase - authorized capital increase (tranches, Gobble-up) - condition capital increase (ESOP, Convertible Loans) 	<p>Limited flexibility:</p> <ul style="list-style-type: none"> - ordinary capital increase

Setting up your company – corporate law matters

Also think about:

- ✓ Fiduciary Duties & Liability as member of the board of directors or the management.
- ✓ Keep the corporate records in order (minutes of shareholders' and board meetings, financial statements, share register, etc.).
- ✓ In many cases the founders of a company are the owners of intellectual property rights which they have been developing. **When transferring such rights into a newly incorporated company** you should seek assistance from an expert (Legal & Tax). Mistakes at this point in time can be costly to fix and be a real barrier to a successful exit.

Setting up your company – corporate law matters

Also think about:

- ✓ Employee Shares/ESOP/PSOP to be dealt with as early as possible in the process.
- ✓ Taxes are key.

Raising Finance

Why important?

Be clear on how you want to raise finance for your company – your choice will have different impacts on the timeline of your financing round, the complexity of the agreements and the overall transaction costs.

How?

- Equity Financing
- Debt Financing
- Alternative Financing (ICO, token)

Raising Finance – The Big (Financing) Picture

Who finances ?



Raising Finance – ICO / TGE vs. traditional financing (Life cycles)

ICO / TGE	Traditional financing
Product- / business idea, formulation in White Paper	Product- / business idea
Pre-Funding through FFF / Business Angels (limited), company formation	Early phase from the idea to know-how / patent / prototype etc.
ICO: money against token, based on White Paper	Company formation, financing through founder and Business Angels
Project development and realization, failure possible	Financing through outside parties (VC), mostly various rounds, documentation!
Token trading (secondary market, Crypto-Exchanges)	IPO with a prospectus

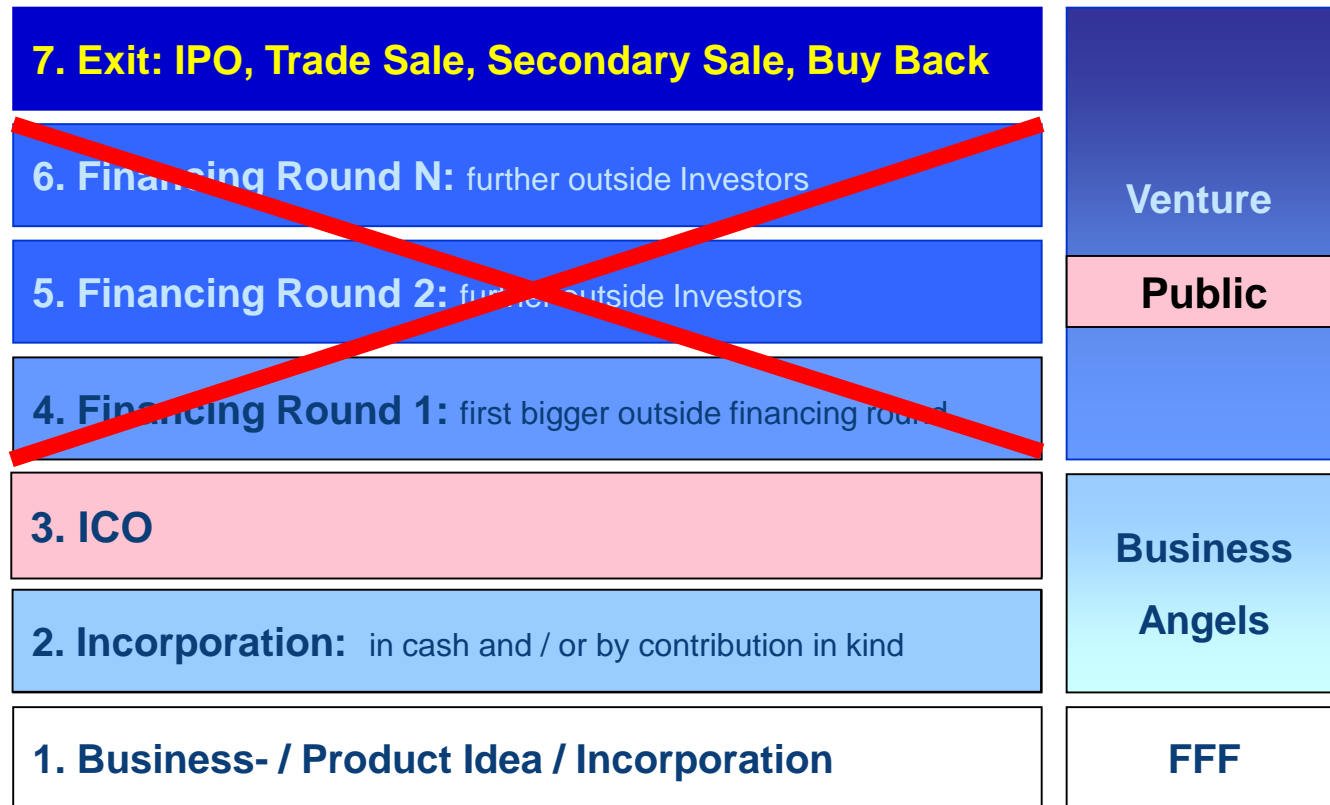
Raising Finance – ICO / TGE vs. traditional financing

ICO / TGE	Traditional financing
<p>No legally defined content requirements of the White Paper</p> <ul style="list-style-type: none">• No repeated financing rounds• Cheap listing on crypto currency exchanges	<p>Expensive documentation of all stages</p> <ul style="list-style-type: none">• Financing rounds• Prospectus for the IPO
<p>Hardly any involvement of banks / consultants</p>	<p>Involvement of banks / consultants / auditors / etc.</p>
<p>Normally no participation of Token holders</p>	<p>Participation of the investors who become co-shareholders or members of corporate bodies</p>

Raising Finance – The Big (financing) Picture

Small

Who finances ?



Taking on staff – employment law matters

Why important?

Employment agreements for Start-ups differ from the usual. Thoroughly think about and prepare tailor-made employment agreements from the beginning – Swiss employment law provides for many provisions which (i) apply automatically, or (ii) do not apply, if no explicit agreement is made

How?

- Written agreements to be drafted or at least checked by an attorney!

Taking on staff – employment law matters

Selection of important covenants that need to be made **in writing** to be applicable or to be excluded:

- **Non-Compete and non-solicitation:** (i) employee to have knowledge of clientele or commercial secrets, (ii) exploitation of information has potential to cause employer substantial harm, and (iii) restriction of non-compete in time, place and scope. **Do not forget to include a liquidated damages clause and an effective enforcement (Realdurchsetzung) clause!**
- **Right to inventions and designs:** **Employer should reserve the right to acquire inventions and designs produced by the employee** in the course of his work for the employer but not in performance of his contractual obligations.

Taking on staff – employment law matters

Selection of important covenants that need to be made **in writing** to be applicable or to be excluded:

- **Overtime:** Any overtime not compensated for by time off must be paid by the employer with a supplement of at least 25 per cent of the applicable wage, unless there is an agreement to the contrary in writing.
- **Provision regarding side-line work:** In general, sideline work is permissible as long as it is not competing activity. You can however exclude any sideline activity in the employment agreement.

Taking on staff – employment law matters

Also think about:

- Risks associated with ESOP and other participation programs:
 - **Might be considered as part of the employees' wage.** Thus, upon termination of the employment agreement there might be claims. Careful drafting advised.
 - When considered wage: **social security contributions** accrue and must be paid.
 - **Tax issues**

Tax

Special tax issue for Start-Ups

- Valuation of Start-ups for personal wealth tax
 - Taxation on the basis of values at financing round may lead to high wealth taxes for the founders
 - Current practice in Zürich:

Years since Founding	Valuation Basis
1. - 3. (1.-5.)*	Net asset value (Substance)
4. (6.)*	2/3 net asset value + 1/3 value of financing round
5. (7.)*	1/3 net asset value + 2/3 value of financing round
6. (8.)*	Value of financing round

*Extended timeframe for Medtech- and Biotech-Start-ups

Exit – what to consider (General)

Learnings from recent Exits:

- **Beware of Right of First Refusal:** A ROFR has its advantages but may have a negative impact at exit since **potential acquirers may shy away (deal uncertainty)** or process is delayed (advance waiver of beneficiaries).
- **Avoid tax issues:** Overall aim at exit shall be to (i) **preserve tax-free capital gain for Swiss resident sellers** and (ii) avoid unforeseen tax and social security consequences.
- **Consider drag along provision carefully:** Obligation to co-sell shares at the **same terms and conditions as the majority shareholders** can be cumbersome to minority shareholders (reps&warranties, liability, non-compete, tax).

Exit – what to consider (General)

Learnings from recent Exits:

- **SHA should be flexible:** Start-up might require urgent further funding. **A SHA that can only be amended with unanimous consent might hinder urgent funding to happen.** Thus, it needs to be made sure that SHA can be amended with a certain majority of shareholder votes.
- **No physical issuance of shares:** Can be a deal killer if shares or certificates are lost and potential acquirer is not willing to buy prior to the end of a «Kraftloserklärungsverfahren».

Exit – How to avoid pitfalls

- SHA: «Gouverner, c'est prévoir» (ROFR, Drag along, Tax,...)
- SHA: Dynamic drafting regarding adaptations
- SHA: No issuance of shares
- Good Corporate Governance
- Comply with the (tax) Law (still enough leeway with creative lawyers ...)
- Make an excellent first impression (DD, records, etc.)
- Don't sign agreements when being under pressure
- Don't sign agreements if you don't know the benchmark

Q&A – ask your VC lawyer

Questions?

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