

# Startup Guide

# From Incorporation to Exit

*A Comprehensive Legal and Financial Framework*

May 1<sup>st</sup>, 2024

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# *Our Startup Desk*



## OUR STARTUP DESK

We are one of the first Swiss large corporate law firms to establish a legal advisory unit dedicated to the needs of startups and venture investors. **The Kellerhals Carrard Startup Desk is counting more than 40 active members now.**



We combine experience and tradition...



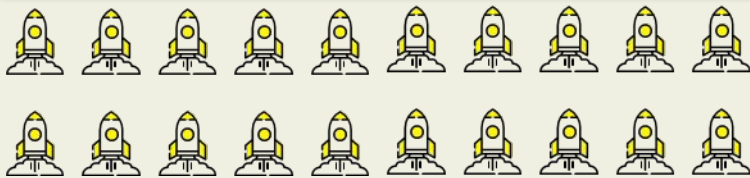
...with innovation and entrepreneurial minds.




In 2023 we advised on

**> 140**

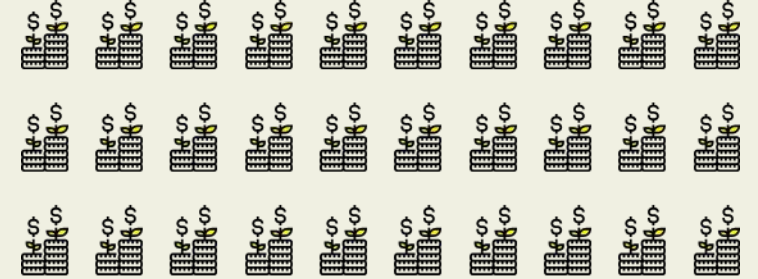
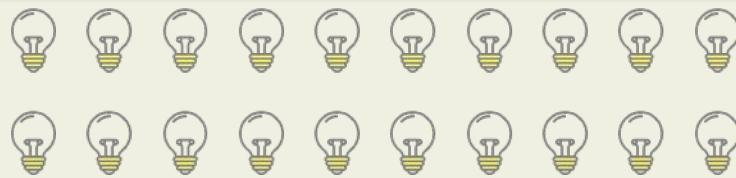
**Financing Rounds - 69 of these were also listed in the Swiss Venture Capital Report 2023**



**Top 100 Startups**

**30** 

**/ Top 100 Startups rank among our clients**



**ETH / EPFL-Spin-Offs**

**35%**

**of all ETH / EPFL-Spin-Offs (since 2016) among our clients**





# *Startup Guide*



# Startup

## from Incorporation to Exit

Simple guide on selected topics

## Startup Guide: From Incorporation to Exit

### Table of Content

1. Project and Business Plan
- 2. Foundation: choice of legal form, process and associated documents**
- 3. Relations between shareholders**
4. Relations with employees
5. Relations with third parties
6. Data protection
- 7. Financing of the startup**
8. Exit



SCAN ME

***Incorporation : Choice  
Of Legal Form,  
Process and Associated  
Documents***

***Incorporation Process –  
AG/GmbH***

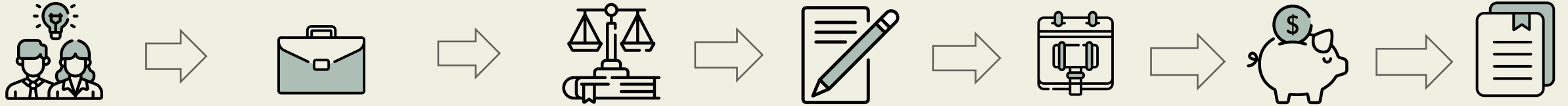






# FOUNDATION: CHOICE OF LEGAL FORM, PROCESS AND ASSOCIATED DOCUMENTS

## *Incorporation Process – AG/GmbH*



**Business idea and team of founders**

**Involve professionals (lawyers, notaries)**

**Think about legal form (Sàrl vs. SA)**

**Notary Appointment**

**Drafting of notarial documents (including articles of association)**

**Minimum capital**

**Crucial: Shareholders' Agreement**

	Sàrl	SA
<b>FORMATION</b>	Entry commercial register	Entry commercial register
<b>MINIMUM CAPITAL</b>	CHF 20'000 fully paid-in	CHF 100'000 50% paid-in
<b>ANONYMITY</b>	No anonymity, shareholders entered in commercial register	Anonymity
<b>LIABILITY</b>	No personal liability	No personal liability (except for the not fully paid-in amount)
<b>SHARE TRANSFER</b>	Transfer cumbersome (entry in commercial register)	Simple transfer (assignment), anonymity
<b>NAME AND FIRM PROTECTION</b>	Freely assignable, protection in the whole of Switzerland	
<b>TAX</b>	Salary is taxable income (plus subject to social security charges)	
<b>INCENTIVE PROGRAMMES</b>	Stock option plan, share participation plan, phantom stock plan (easier to implement in an AG, though)	

**Duration:** ideally 10 days but the bottleneck is usually the shareholders' agreement. **Realistic: 3-4 weeks**

**Technically, EVERY GmbH is converted into an SA as part of its first seed round because investors don't want to be invested in a Sàrl. Such conversion requires more admin.**



# *Relations Between Shareholders Shareholders' Agreement (SHA)*



## RELATIONS BETWEEN SHAREHOLDERS *Shareholders' Agreement (SHA)*

- Basic provision of Swiss company law □ **Art. 680 CO**

*"A shareholder may not be required, even under the articles of association, to contribute more than the amount fixed for subscription of a share on issue".*

- The Articles of Association cannot impose rights and obligations to the shareholders other than paying the shares issue price.
- You will need an **agreement** among the shareholders that governs their mutual rights and obligations with respect to the company.
- Shareholders' Agreement aim to **contractually** govern shareholders' rights and obligation to an extend not allowed by the Articles of Association.



### **All shareholders**

The shareholders' agreement typically contains provisions relating to the governance of the company, limits on the transfer of shares, financial provisions and other provisions



# Governance

## Board of Directors

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- Responsible for the overall strategy and guidance of the company. The following board matter aspects are typically governed in the SHA:
  - Size
  - **Composition**
  - Majority requirements

## Management

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- Under Swiss law, it is technically the board that runs the company.
- The delegation, if done properly, will result in a substantially reduced liability exposure.
- Oftentimes consists of a CEO and a CTO and possibly other C-level officers

## Shareholders' Meeting

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- The shareholders' meeting has certain mandatory competences under Swiss law such as decisions on:
  - capital structure (e.g. capital increases)
  - the name
  - seat and business purpose of the company
  - the dissolution or merger of the company

## Auditor

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- A Swiss startup usually starts without appointing a formal auditor



# Transfer Restrictions on Shares

## Right of First Refusal (ROFR)

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- Standard clause in SHAs and should **always be included**.
- It provides that a shareholder who wishes to transfer shares to an outsider or another shareholder, must first offer the shares to all other shareholders at the same price as the proposed acquirer.

## Tag-Along Right

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- Standard clause in an SHA. It protects primarily minority shareholders
- The protection is based on the right to co-sell shares when other shareholders have a possibility to sell their shares to an acquirer.

## Drag-Along Right

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- Considered a crucial clause for every SHA because it allows a majority of shareholders to force the minority to sell their shares in an exit scenario.
- A drag-along right should be included **already at incorporation stage** even though it is unlikely that it will ever be used prior to the first funding round.

## Purchase Right

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- Purchase rights are also a standard feature of SHA of Swiss startups.
- They kick in only in certain pre-defined circumstances such as **death** or insolvency of a shareholder, a material breach by a shareholder or the termination of an employment agreement, etc.



## Other Topics

### Non-Compete/Non-Solicitation

- A founder leaving the startup for whatever reason is not restricted from engaging in a competitive activity unless you subject him or her to a non-compete covenant in the SHA
- Frequently included in an SHA.
- If non-active shareholders are involved (e.g. professors, advisors), the non-compete needs to be looked at carefully. Universities and investors (especially VCs) will generally not agree to be subject to such undertakings.

### Liquidated Damages

- The SHA is contract  decisions taken in breach its provisions **are valid** under Swiss company law
- The most common provision relating to the breach of the SHA is the obligation for the breaching shareholder to pay liquidated damages (i.e. a contractual penalty) to the startup and/or the non-breaching shareholders.
- What is the correct amount of the liquidated damages? There is, unfortunately, no easy answer to this. We often see penalties in the range of CHF 50 to 150k.

# *Financing of the Startup*

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# Financing Instruments

## FINANCING OF THE STARTUP

### 1) **Financing round and share capital increase**

- a) The equity-raising process
- b) Contractual documentation

### 2) **Convertible loans**

- c) Type of agreement and standard contractual clauses
- d) Practical advantages of convertible loans for a startup





# Equity Rounds

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## **Equity Rounds** (Minority Stake)

### **Definition**

**Cash financing** against share issuance:

- in furtherance of agreed upon business plan of company;
- in various rounds (seed, series A, series B, series C etc.).



## How:

What Forms of  
Financings are  
available in  
Practice?

# Equity Financings – Strategic Considerations



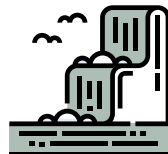
**Dilutive** financing



More **complex** and therefore, more **costly**



Benchmark in terms of **valuation**



Liquidation preferences create **path dependencies** for future financing rounds



# Financing

## Process and Stages

### Preparation

- Financing need / financial plan
- Group of investors/ participation model
- Cap table
- Pitch documents
- Preparing Due Diligence
- Preparing Term Sheet

**1 – 2 months**

### Negotiation

- (NDA)
- Term Sheet
- Due Diligence
- Draft / review of the documents

**1 – 6 months**

### Implementation

- Signing, Investment Agreement, Shareholders' Agreement and other related agreements
- Capital increase
- Entry in commercial register

**2 weeks – 2 months**

# Convertible Loans

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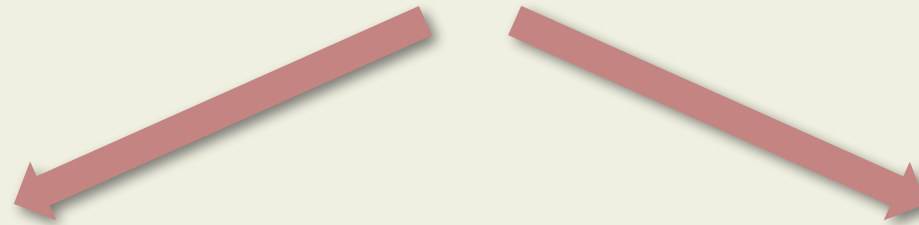


# Convertible Loan

## Definition & Main Use Cases

A (typically subordinated) **unsecured loan**

- from one or several existing or new investors to the startup
- that **aims at being converted** upon the next (qualified) financing round
- at a **discounted share price**



Pre-seed or Seed-stage  
financings

Bridge loans  
ahead of equity round

I How - What forms of financings are available in practice?

# Convertible Loans

## Strategic Considerations

- **Easy** to set up;
- **Cheaper** than an equity financing round;
- Allows to postpone the discussion about the **valuation** of the company.
- Immediate **cash** with no subsequent cash out until a possible repayment;
- **No dilutive effect** until conversion (Will increase the number of **preferred shares**).



I How - What forms of financings are available in practice?

# Convertible Loans

## Concept

- (Straight) **loan from investors** to the startup (debt liability on the balance sheet);
- Usually **interest-bearing** (accruing), often ranging between 5 and 8%;
- **Fixed term** (usually until the next financing round with a cushion, i.e. 6 – 18 months, in rare cases more).
- **Conversion** (usually mandatory) of loans together with accrued interest  **into shares** of the startup on the occasion of the next (qualified) equity financing round; prior to the loan's maturity date
- Conversion usually with a **discount on the share price** ranging from 0 – 30%;
- Depending on local jurisdiction: **Subordination**.





# Let's keep in touch!



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