

Beteiligungsverträge

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Überblick über wesentliche Bestandteile eines Beteiligungsvertrages:

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Vertragsstruktur:

- Beteiligungsvertrag (***Investment Agreement***): enthält Regelungen für Einstieg eines Investors
- Gesellschaftervereinbarung (***Shareholders´ Agreement***): enthält Regelungen für Dauer der Beteiligung des Investors
- beides oft in einem Vertragswerk (***Investment and Shareholders´ Agreement***)

- Notarielle Beurkundung (wenn GmbH)
- häufig auf englisch
- wird für jede Finanzierungsrunde neu verhandelt und neu formuliert, wobei neuer Investor immer „tonangebend“ ist

- separate „Ausführungsverträge“ (Kapitalerhöhungsbeschluss, Geschäftsführer-Anstellungsvertrag, Darlehensvertrag etc.), die Anlagen zum Vertrag werden
- damit Umfang oft 50 bis 100 Seiten

Beteiligungsstruktur:

- **Kapitalerhöhung (*Primary*):**
 - Erhöhung des Stammkapitals + Einzahlung Nennwert
 - Aufgeld (kann auch in Medienleistung bestehen)
 - Verhältnis Kapitalerhöhung + Aufgeld je nach vereinbartem Unternehmenswert
 - ggf. Einzahlung Aufgeld nach Erreichung von Meilensteinen
- **ggf. zusätzlich Anteilsübertragungen (*Secondary*):**
 - zB um Gründern teilweisen cash out zu ermöglichen
 - oder Anteile inaktiver Gründer zu reduzieren
- **neuer Gesellschaftsvertrag:**
 - tritt sofort in Kraft
 - enthält Schutzrechte zugunsten des Investors (zB Veto-Rechte)

Garantien der Gründer ggü den Investoren:

- **Garantie-Katalog**
 - Umfangreich
 - Verschuldensunabhängig
 - Unabhängig von Kenntnis
- **Inhalt der Garantien (Auszug):**
 - Ordnungsmäßigkeit des gesellschaftsrechtlichen Status Quo (Gründung, Kapitalerhöhungen, Anteilsübertragungen, Kapitaleinzahlung und –erhaltung)
 - Korrektheit der Jahresabschlüsse
 - Vorhandensein des IP (Technik, Patente, Domains etc.) bzw. Gültigkeit von Lizenzen
 - Vorhandensein aller erforderlichen Genehmigungen
 - Keine Verletzung Rechte Dritter
- **Reichweite der Garantien:**
 - Richtigkeit der erteilten Informationen
 - Vollständigkeit !
- **Haftung bei Garantieverletzung:**
 - Garantierten Zustand herstellen, sonst Geldersatz
 - Gründer haften gesamtschulderisch
 - Haftung auf eigene Beteiligung begrenzt

Erlösvorzug:

- Investor bekommt Erlös vorrangig vor Gründern (***Proceeds Preference*** oder ***LiqPref***)
- Gilt bei jeder Form von „***Exit***“ (Unternehmensverkauf, Liquidation, Börsengang)
- Bei mehreren Investoren gilt ***Kaskadenprinzip (Waterfall)***

- Typische Regelungen:
 - Investor B bekommt Investment (Nennwert plus Aufgeld) vor allen anderen Gesellschaftern (***einfach bis maximal zweifach***)
 - danach bekommt Investor A sein Investment (***einfach bis maximal zweifach***)
 - danach alle Gesellschafter gemäß Anteilen (***hier sehr wichtige Unterscheidung: Anrechnung bei Investoren oder nicht, d.h. Investoren bekommen auf späteren Stufen das angerechnet, was sie vorher bevorzugt bekommen haben***)

Erlösvorzug - Beispiel für Klausel

22. Allocation of Exit Proceeds

22.1 In case of (i) a Trade Sale (including after exercising the Drag Along Right), (ii) an Asset Deal or (iii) a distribution of profits or (iv) in the event of the liquidation of the Company (collectively the "Exit Event"), the Shareholders hereby agree to the following allocation of the purchase price, the dividends, liquidation proceeds or comparable proceeds (collectively the "Exit Proceeds"), as the case may be:

22.1.1 First level allocation:

The holders of Seed Shares shall receive in preference to the remaining Shareholders an amount equal to their Total Investment (as defined in section 22.1.3 below) (the "Seed Liquidation Amount"). If and as far as the Exit Proceeds are less than the Seed Liquidation Amount, the Exit Proceeds shall be distributed between the holders of Seed Shares pro rata to their Total Investments with respect to the Seed Shares held.

22.1.2 Second level allocation:

To the extent that the Exit Proceeds exceed the Seed Liquidation Amount the remaining Exit Proceeds shall be distributed to all Shareholders (including the Seed Investors) who participated in or supported the Exit Event pro rata to the Shares sold by them, with the proviso that, with respect to the Seed Investors, the Seed Liquidation Amount shall be offset against the amount the Seed Investors may receive as a result from their Seed Shares pursuant to this section 22.1.2.

22.1.3 "Total Investment" means the sum of all contributions (i.e. contributions in cash and in kind, namely the conversion of shareholders' loans and respective interest accrued thereon) by a Shareholder to the Company.

22.2 To ensure the allocation of the Exit Proceeds set forth herein, the Shareholders undertake to procure that the respective buyer will transfer any Exit Proceeds to an escrow account from which an escrow agent to be appointed by the Advisory Board shall distribute the respective amounts according to the provisions hereof.

22.3 In case of a swap, contribution or merger within the meaning of the German Trans-formation Act (Umwandlungsgesetz - UmwG), any consideration shall be distributed in accordance with this section 22. To the extent that the consideration consists of shares in companies listed at a stock exchange, the share price fixed at the stock exchange at the time and date that the respective Exit Event takes effect (i.e. after any waiting period, lock up period or expiry of similar restrictions) is decisive; in other cases, to the extent that the value of the shares received is decisive, such value shall be determined with binding effect on all Shareholders by the Company's auditor for the purpose of the appropriate application of this section 22. The provisions as set forth in this section 22.3 sentence 1 and sentence 2 shall not apply if after such swap, contribution and/or merger the Shareholders hold more than 50% of the receiving company (aufnehmende Gesellschaft i.S.d. UmwG) and the rights of the Shareholders as set forth in this Agreement and the Articles of Association remain in full force upon such transaction; if this is not the case, any Exit Proceeds shall be allocated as set forth herein.

22.4 For the avoidance of doubt it is understood that in the event of a liquidation of the Company or distribution of dividends resulting from an Asset Deal the allocation of Exit Proceeds as set forth herein shall apply accordingly. To the extent that this is not reflected in the Articles of Association, the Shareholders hereby expressly agree to instruct the liquidator and/or the Company to deviate from the respective provisions of the Articles of Association and to distribute the liquidation proceeds and/or dividends in accordance with this section 22; taking this into account, the relevant Shareholder herewith assigns (abtreten) the relevant payment claim with respect to and resulting from such allocation of Exit Proceeds as set forth herein.

22.5 It is understood by the Shareholders that the preferred allocation of the Exit Proceeds as outlined in sections 22.1 and/or 22.4 shall only be applicable until the Seed Investors have received the Seed Liquidation Amount (e.g. for the case of subsequent distributions of profits).

Beispielsrechnung für Erlösvorzug

Erlös = 10 Mio.:

	Investment	Quote	LiqPref	Erlösverteilung mit Anrechnung	Erlösverteilung ohne Anrechnung
Investor B	2 m	15%	LiqPref 2-fach	4 m + 0 = 4 m	4 m + 0,75 m = 4,75 m
Investor A	1 m	25%	LiqPref 1-fach	1 m + 1,47 m = 2,47 m	1 m + 1,25 m = 2,25 m
Gründer 1	12,5 k	30%		1,765 m	1,5 m
Gründer 2	12,5 k	30%		1,765 m	1,5 m

Vesting:

- Gründer müssen sich eigene Anteile „erdienen“ = wenn sie das Unternehmen vorzeitig verlassen, Anteile abgeben
- **Vesting Period** (Gesamtdauer) bis 3 Jahre
- **Vesting Cliff** 6 Monate (vorher alle Anteile weg)
- Unterscheidung zwischen **Bad Leaver** und **Good Leaver**:
 - Bad Leaver: Eigenkündigung oder Kündigung durch Gesellschafterversammlung mit wichtigem Grund
=> alle Anteile herausgeben
 - Good Leaver: Kündigung durch Gesellschafterversammlung ohne wichtigen Grund oder unverschuldete Arbeitsunfähigkeit
=> Anteile zeitanteilig behalten/herausgeben
- Übertragung zu Anschaffungskosten (meistens Nennwert)
- Übertragung auf Gesellschaft selbst oder auf Investoren

Vesting – Beispiel für Klausel:

16. Vesting of Shares

16.1 The Parties agree that 75% (in words: seventy five percent) of the Common Shares as explicitly described in Exhibit 16.1 (the "Vesting Scheme") held by the Founders (each a "Vesting Transferor" and such relevant Shares the "Vesting Shares") shall be subject to a transfer obligation subject to the terms and conditions as set forth herein (the "Reverse Vesting"). The Parties also agree that in case of (i) a Bad Leaver Event as defined in section 16.3.1 the number of Unvested Shares as defined in section 16.2 shall be subject to the Reverse Vesting and (ii) a Good Leaver Event as defined in section 16.3.2 all Vesting Shares of the respective Vesting Transferor shall be deemed vested.

16.2 The Reverse Vesting shall have a term of three (3) years as of the first day of the month following the Seed Closing, and shall be calculated on a monthly basis (i. e. 1/36 of the Vesting Shares shall vest per month). The details of the vesting scheme including (i) the serial numbers of Vesting Shares, (ii) the relevant number of such Shares subject to the transfer obligation hereunder (the "Unvested Shares") and (iii) the name of the person relevant for the respective Vesting Transferor (the "Key Per-son") are also reflected in the Vesting Scheme.

16.3 For the purposes of the Reverse Vesting the respective "Leaver Events" are defined as follows:

16.3.1 "Bad Leaver Event": The service agreement (Geschäftsführerdienst- oder Anstellungsvertrag) of the relevant Key Person with the Company has been terminated by the Company for cause (Kündigung aus wichtigem Grund gemäß § 626 BGB) and/or the Key Person has been withdrawn from his position as managing director (Geschäftsführer) or employee (Angestellter) of the Company for cause (wichtiger Grund im Sinne von § 38 Abs. 2 GmbHG); or the Key Person resigns as managing director or employee of the Company and/or the Key Person terminates his service agreement (Geschäftsführerdienst- oder Anstellungsvertrag).

16.3.2 "Good Leaver Event": The service agreement (Geschäftsführerdienst- oder Anstellungsvertrag) of the relevant Key Person lapses or is being terminated or ends otherwise for any reason other than those set forth hereinabove in section 16.3.1 (e.g. the Company terminates the service agreement in the absence of good cause or because the Beneficiary has become permanently disabled to work (dauerhafte Berufsunfähigkeit) and/or the Key Person has been withdrawn from his position as managing director (Geschäftsführer) or employee (Angestellter) of the Company without cause (ohne wichtigen Grund im Sinne von § 38 Abs. 2 GmbHG) or the Beneficiary's death).

16.3.3 For purposes of determining the occurrence of the respective Leaver Event the following shall apply: in the event of a termination or withdrawal as mentioned before the decisive moment (maßgeblicher Zeitpunkt) shall be the receipt (Zugang) of the termination or withdrawal notice.

16.4 The Company is obliged to inform the Shareholders (except the respective Vesting Transferor) (the "Participating Shareholders") without undue delay (unverzüglich) in writing upon its knowledge about the occurrence of a Bad Leaver Event. If a Bad Leaver Event occurs the Company has the right to purchase all remaining Unvested Shares as of the date on which the Bad Leaver Event has occurred (the "Company's Purchase Option"). For this purpose, each Vesting Transferor (individually not jointly) hereby offers to sell (verkaufen) and transfer (abtreten) to the Company its Unvested Shares at their nominal value (Nominalwert) as of the date on which the Bad Leaver Event occurs. The Company is not entitled to the Company's Purchase Option if the purchase and acquisition of the Unvested Shares due to the Company's Purchase Option does not meet the requirements of section 33 para. 2 sentence 1 German Limited Liability Companies Act (GmbHG) (the "Exclusion Event"). The Company's Purchase Option can only be exercised by the Company through notarial notice within a period of two (2) weeks following the Company's knowledge of the Bad Leaver Event (the "Company Purchase Period").

Vesting – Beispiel für Klausel:

16.5 Upon the expiry of the Company Purchase Period the Company shall promptly inform the Participating Shareholders whether it has exercised the Company's Purchase Option (the "Company's Notice"). If the Company has not exercised Company's Purchase Option within the Company Purchase Period or in the event of an Exclusion Event each Participating Shareholder (individually not jointly) has the right to purchase the Unvested Shares (the "Shareholder Purchase Option") according to the following provisions:

16.5.1 Each Participating Shareholder is entitled to the Shareholder Purchase Option pro rata to the Participating Shareholder's shareholding in the Company in relation to the aggregate shareholding of all Participating Shareholders at the time when the Bad Leaver Event has occurred.

16.5.2 To effect the Shareholder Purchase Option the respective Participating Shareholder shall submit a written notice to the Company (the "Purchase Exercise Notice"). The Company shall inform the Vesting Transferor accordingly without undue delay. The Purchase Exercise Notice has to be submitted to the Company within 10 (ten) Business Days after receipt of the Leaver Event Notice otherwise the respective Purchase Option ceases.

16.5.3 If a Participating Shareholder does not (for whatever reason) exercise its Shareholder Purchase Option in time, the remaining Participating Shareholders are entitled to acquire the respective Unvested Shares according to section 16.5.1.

16.5.4 In the event a Shareholder Purchase Option has been exercised validly the Vesting Transferor hereby sells (verkauft) and transfers (tritt ab) to the respective Participating Shareholders, who duly issued a Purchase Exercise Notice (each an "Exercising Beneficiary") the following Unvested Shares at their nominal value (Nominalwert): The Unvested Shares, starting with the lowest serial number (upwards), shall be allocated to the Exercising Beneficiaries in the order of the amount of their shareholdings in the Company (downwards) beginning with the Exercising Beneficiary holding the largest participation. Each of the Exercising Beneficiaries herewith already accepts (annehmen) the conditional sale and transfer of the respective Unvested Shares under this section 16.5.4.

16.6 In the event of a purchase of Unvested Shares pursuant to sections 16.4 or 16.5 above, the consideration to be paid by the Exercising Beneficiary or the Company (as the case may be) shall correspond to the lower of (i) the nominal value or (ii) the subscription price of the relevant Unvested Shares transferred hereunder. The relevant payment set forth in this section 16.6 shall be made within 10 (ten) days after the transfer has become effective.

16.7 All Shareholders shall be obliged to adopt a Shareholders' resolution consenting to the transfers of the Unvested Shares. All Shareholders hereby hold under waiver of all formal requirements a Shareholders' meeting and unanimously agree to the transfer of the Unvested Shares. Furthermore – for the avoidance of doubt – it is understood, that each Shareholder hereby waives any Right of First Refusal, Tag Along Rights or similar rights which might result from the aforementioned transactions.

16.8 In case any further acts, declarations or measures by any Party should be necessary or appropriate in order to implement the transactions set forth in this section 16, then all Parties shall be obliged and herewith undertake vis-à-vis each other to take any such act or measure and make any such declaration without undue delay. In particular, upon request by the Company or any Exercising Beneficiary, each Vesting Transferor shall be obliged to enter into a separate share sale and transfer agreement with the Company or with the relevant Exercising Beneficiary/Beneficiaries regarding the sale and transfer of the Unvested Shares on the same economic terms and conditions as set forth herein.

Verwässerungsschutz für Investoren:

- Investor erhält zusätzliche Anteile, wenn spätere Finanzierungsrunde zu niedrigerer Bewertung (**Down-Round**) stattfindet.
- Zusätzliche Anteile sind durch Kapitalerhöhung zu gewähren, bei der (nur) Investor zum Nennwert Anteile übernehmen darf.
- Zwei gängige Varianten:
 - **Weighted Average**-Methode: Bewertungsbasis, die ursprünglich für Investor galt, und Bewertungsbasis für Down-Round werden gemittelt und nach Volumen der jeweiligen Finanzierungsrunden gewichtet (komplizierte Formel). Das Ergebnis ist maßgeblich für die Anzahl der weiteren Anteile, die Investor bekommt.
 - **Full Ratchet**: Investor bekommt so viele weitere Anteile, dass er insgesamt so gestellt ist, wie wenn er alle Anteile zu Bewertung der Down-Round bekommen hätte.

Verfügungen über Anteile (Restriktionen und Zwangsverkäufe):

- Grundsatz: jede Veräußerung bedarf eines Gesellschafterbeschlusses (dadurch Vermeidung unerlaubter Veräußerungen)
- Vorerwerbsrecht (**Right of First Refusal**): oft vorrangig zugunsten Investoren
- Mitverkaufsrecht (**Tag-Along**): jeder Gesellschafter hat das Recht, seine Anteile mitzuverkaufen, wenn ein anderer für seine Anteile einen Käufer hat (**Schutz der Gründer !**)
- Mitverkaufspflicht (**Drag-Along**): Gesellschafter müssen bei bestimmten Konstellationen ihre Anteile mitverkaufen:
 - zB wenn bestimmter Preis für das gesamte Unternehmen geboten wird;
 - zB nach Ablauf von 4-5 Jahren, egal zu welchem Preis (um Investor den Exit zu ermöglichen);
 - Möglichkeiten für Gründer:
 - Konditionen verhandeln und abmildern
 - Recht einfordern, Anteile zu übernehmen oder Drittinvestor zu finden
 - Regelungen zur Missbrauchsverhinderung (auslösende Angebote müssen von unabhängigem Investor kommen/ Einschaltung M&A-Berater/ transparentes Bieterverfahren)

Verfügungen über Anteile – Beispiel für Drag-Along-Klausel:

21. Drag Along Right
- 21.1 In the event a third party (i) intends to purchase (including by way of a share swap, contribution or merger) the majority of the Shares in the Company (i.e. covering at least more than 50% of the Shares in the Company) (the "Trade Sale") or (ii) intends to enter into an Asset Deal with regard to more than 50% of all of the Company's assets (the "Asset Deal") or (iii) any measure pursuant to the German Transformation Act (Umwandlungsgesetz - UmwG) (the "Transformation"), (the Trade Sale, the Asset Deal and the Transformation collectively the "Exit-Transaction"), upon request of one Seed Investor all remaining Shareholders shall be obliged to sell and transfer on a pro rata basis and on the same economical terms their Shares to the buyer (the "Drag Along Right") and to take up all other measures required to effect such Exit-Transaction.
- 21.2 The Drag Along Right shall only be exercisable
- 21.2.1 upon request of Investor, if the Company is in receipt of an offer to execute an Exit-Transaction on the basis of an enterprise value of the Company of EUR 15,000,000.00 or more; or
- 21.2.2 if the majority of the Seed Investors is willing to sell their Shares, and
- 21.2.3 if the majority of the holders of Common Shares is willing to sell their Shares (such requirement ceasing upon December 31, 2018), and
- 21.2.4 if the underlying transaction is not effected in favor of a company affiliated with one of the Shareholders or their relatives pursuant to section 15 German Fiscal Code (Abgabenordnung - AO), and
- 21.2.5 if the acquirer is willing to effect the transfer of all shares offered on the same legal and economic terms applicable (pro rata) to all Shareholders.
- 21.3 In order to exercise the Drag Along Right the respective Seed Investor shall send a Transfer Notice to the remaining Shareholders. Each of the remaining Shareholders shall thereafter be obliged to execute and facilitate the transfer according to such Transfer Notice and the provisions of this section 21 without undue delay.
- 21.4 A person to be authorized to negotiate the conditions of the Exit-Transaction with the third party (the "Negotiator") may be determined by the Majority of Seed Investors. In this case the Negotiator shall be authorized (beauftragt) by all Shareholders to negotiate all terms and conditions with the prospective buyer. The Negotiator shall in particular ensure that the Shareholders' interest in achieving a high price as consideration for the Exit-Transaction will duly be considered. The Negotiator shall as soon as possible submit a draft of the relevant agreement for the Exit-Transaction to the Shareholders. The Seed Investors shall only be obliged to participate in an Exit-Transaction if only representations and warranties related to his title to the underlying Shares (whereby the Seed Investors' liability must be limited to the respective purchase price received by it, respectively under the relevant transaction) need to be given by him. The Negotiator shall be entitled to demand that all Shareholders submit to the Negotiator the respective powers of attorney by way of separate deed.
- 21.5 For the avoidance of doubt the Shareholders undertake that in the event of a Trade Sale pursuant to this provision the Right of First Refusal shall not apply. All Parties shall be obliged to immediately consent in a shareholders' meeting to the relevant transfer of Shares after exercise of the Drag Along Right.

Vergleich unterschiedlicher Investoreninteressen:

Business Angel	Corporate VC / Strategischer Investor	Klassischer VC (Finanzinvestor)
nur Frühphase	Frühphase (ggf. auch später)	Eher spätere Finanzierungsrunden, frühestens Seedphase
Geschäftsmodell noch nicht am Markt erprobt bzw. Technik noch nicht fertig entwickelt	Geschäftsmodell oder Technik müssen erfolgversprechend sein	Geschäftsmodell muss Marktfähigkeit erkennen lassen (Technik spielt eher untergeordnete Rolle)
Schwerpunkt nicht bei Investition, eher strategische Beratung	Schwerpunkt bei R&D und/oder Investition, auch strategische Beratung	Schwerpunkt bei Investition, auch strategische Beratung
eher flexibel im Hinblick auf Exit	will Übernahme aller Anteile sichern	will Verkauf aller Anteile sichern (Exit oder IPO)



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SCHWERPUNKTE

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