Start-up law in Denmark

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4 Denmark

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4.1 Introduction

Before we start to describe and analyse the legal and economic background for start-up formation, we would like to briefly introduce you to the Kingdom of Denmark and provide you with some basic information and business and cultural context.

The Kingdom of Denmark (Denmark) is a Scandinavian country in Northern Europe bordering the Baltic and North Seas. The country consists of a large peninsula and more than 100 islands referred to as the Danish Archipelago, including the territories of Greenland and the Faroe Islands, and the capital is Copenhagen. Other large cities include Aarhus, Odense, Aalborg and Esbjerg. Denmark has great business relationships with its neighbours, Germany, Sweden and Norway. The population of Denmark is above 5.8 million (July 2018 estimate) and lives on a total area of 43,096 square kilometres. The official language is Danish. Other minority languages in Denmark are Faroese, German and Greenlandic. Additionally, there is a great English language competency in Denmark and the majority of the population speaks English. It is important to emphasize that it is possible to communicate with public officers in English and many official documents are in English, which represents a great advantage for businesses and entrepreneurs from all over the world.

Since 1849, the government system is a constitutional monarchy with the Queen as the chief of state and the prime minister as the head of government. Queen Margrethe II became monarch thanks to the change

in the law in 1953 which allowed a woman to ascend to the throne.[1] She succeeded her father, King Frederick IX, in 1972. The chief executive body appointed by the Queen is the cabinet (*Regering*). There are approximately 25 members of the Cabinet, known also as Ministers, heading diverse government ministries. The legislative branch consists of the unicameral People's Assembly (*Folketing*) that has 179 seats, including two representing Greenland and two the Faroe Islands. The highest court is the Supreme Court (*Højesteret*) with a court president and 18 judges. Denmark has been a member of the European Union (EU) since 1973 and a member of NATO since its founding in 1949.

Denmark boasts a highly competitive, service-based, modern market economy with high employment levels and a generous social security system. Denmark belongs to the OECD high-income countries. Denmark's gross domestic product (GDP) per capita is USD 54,337.[2] The leading industries in Denmark are pharmaceuticals, maritime shipping, renewable energy, high-tech agricultural sector as well as tech sector. Denmark is also known for its modern design, fashion and creative Nordic cuisine.

Denmark's small open economy is highly dependent on foreign trade, and the government strongly supports trade liberalization. Denmark is a net exporter of oil, food and gas, but depends on imports of raw materials for its manufacturing sector. Since the financial crisis in 2007 and 2008, Denmark has been experiencing a modest economic expansion. The economy grew by 2.0 per cent in 2016 and 2.1 per cent in 2017 and 2.37 per cent in 2018.[3] Unemployment stood at 5.5 per cent in 2017, based on the national labour survey. The labour market was tight in 2017 and 2018, with corporations experiencing some difficulty finding appropriately skilled workers to fill the positions, which provides a good opportunity for international skilled labour.

Although a member of the EU, Denmark is not a member of the Eurozone. Its national currency is the Danish crown (*dansk krone*). Despite previously meeting the criteria to join the European Economic

[1] The Act of Succession ('*Tronfølgeloven*'), No. 170 of 27 March 1953.

[2] 'Denmark' (*OECD*) https://data.oecd.org/denmark.htm accessed 19 November 2018.

[3] 'Real GDP Forecast' (*OECD*) https://data.oecd.org/gdp/real-gdp-forecast.htm accessed 19 November 2018.

and Monetary Union, Denmark has negotiated an opt-out with the EU and is not required to adopt the euro.

Aside of supportive welfare, Denmark is also known for its high tax burden. Denmark has a progressive tax system, which is accepted by the population and perceived generally as fair. The tax funds are used to pay for different expenses that benefit the entire society, including free healthcare, welfare benefits, state pension and child benefits. Businesses in Denmark also are subject to a variety of taxes, but also benefits. We will simplify the overview further in this chapter.

Ultimately, when reading this chapter, one should remember that Denmark was ranked third in the Doing Business 2019, after New Zealand and Singapore, which suggests that the conditions for starting a new business venture might be extremely beneficial. In the following sections, we will reflect on the diverse legal aspects of starting a start-up in Denmark.

4.2 Establishing a company

Establishing a company in Denmark is relatively easy and many steps can be carried out digitally either directly on appropriate online platforms or via online agents who offer their services of establishing a company or a holding company for a set amount of money (DKK 5,000–10,000) that would include all the registration fees. Even though the majority of the information in regard to company formation is provided in English, in case of particularities in the structure, ownership or division or rights and obligations between the shareholders or partners, it would be recommended to always consult a lawyer. Nonetheless, the below sections offer a comprehensive overview of the existing business forms and the key procedural aspects that are connected to formal establishment of a company.

4.2.1 Forms of business entities

There are several forms of business entities in Denmark. The principal laws governing corporations and their formations are the Danish

Companies Act (DCA)[4] and the Act on Certain Commercial Enterprises.[5] The DCA offers three types of companies, where shareholders' liability is limited to the funds paid for the shares:

- the private limited company (*anpartsselskab*) (ApS);
- the public limited company (*aktieselskab*) (A/S);
- the limited partnership company (*partnerselskab*) (P/S).

The characteristics of these companies are to a great extent similar to their equivalents in other jurisdictions, but we will describe them briefly in the below sections. In addition to the above three types, there are other possible business forms in which a business can operate. These include sole proprietorship, the European company and different types of partnerships.[6] The sole proprietorship (*enkeltmandsvirksomhed*) is usually the first form one selects for his or her business venture. This is due to the fact that it is extremely easy to register and operate the sole proprietorship. Given that this book focuses on start-ups, which represent a common pursuit of more than one entrepreneur and/or where the entrepreneur aims to limit his or her personal liability, we will not focus on the sole proprietorship. The European company (also known as *Societas Europea*, SE) is a type of public limited liability company regulated directly by EU law.[7] The SE generally offers a simpler way to run a business if the business is simultaneously present in more than one EU Member State. Those start-ups that are active in several EU Member States can organize their activities under a single European label, which is recognized across the EU and which provides a greater mobility in the integrated EU market.[8]

In Denmark, the most commonly used forms are the private limited company (hereinafter 'ApS') and the public limited company (hereinafter 'A/S'). In recent years, we have also observed more entrepreneurial companies (hereinafter 'IVS') being formed. However, the Danish Parliament

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[4] Danish Companies Act ('*Selskabsloven*'), No. 763 of 23 July /2019 www.retsinformation.dk/Forms/R0710.aspx?id=209846 accessed 7 December 2019 (DCA).

[5] Act on Certain Business Companies ('*Lov om visse erhervsdrivende virksomheder*'), No. 599 of 19 May 2010.

[6] Such as general partnerships (I/S) and limited partnerships (K/S).

[7] Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294/1 and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22.

[8] See the national rules that are available in individual EU Member States, http://ec.europa.eu/internal_market/company/societas-europaea/countries/legislation/index_en.htm accessed 19 January 2019.

has repealed the entrepreneurial company form in April 2019 based on an analysis prepared by the Danish Business Authority.[9] This decision has been criticized both by academics as well as by practitioners.[10] Given the current status of IVS, we will not elaborate on the IVS form in this chapter.

When considering the above forms of business entities, they all have shareholders and issue shares. The shareholders may decide that the company will issue share certificates, but it is not necessary. The rules of the DCA applicable to the public limited company (A/S) apply in the same way to the limited partnership company (P/S) with several exemptions.

ApS

The ApS was intended as the most common corporate entity in Denmark to achieve limited shareholder liability for small enterprises. Therefore, it might be also the most suitable for a start-up, providing that the founders have sufficient initial capital – DKK 40,000 (prior to 2019, it was DKK 50,000). An owner of an ApS is not personally liable for the debts and obligations of the company. The risk is limited to the value of the equity capital for which a shareholder acquires shares. The ApS is often used to establish a holding company, which might be important for those start-ups that need to divide the business operations within one entity and keep for example the intellectual property (IP) rights within another. The statutory company law requirements applicable to the ApS are not strict and permit a high degree of flexibility in the drafting of the by-laws.

A/S

The A/S is the other important corporate entity offering limited shareholder liability in Denmark, governed by the DCA. The advantage of the A/S is that it has access to capital markets and therefore greater scope for raising funds to finance its business activities. However, as this

[9] Analysis of the Entrepreneurship Company ('*Analyse af iværksætterselskaber*') of September 2018, available in Danish online: https://erhvervsstyrelsen.dk/sites/default/files/media/analyse_af_ivaerksaetterselskaber.pdf accessed 27 August 2019.

[10] See Alexandra Andhov, 'Abolishing Entrepreneurial Company (IVS) in Denmark: How Substantiated Are the Reasons and What Are the Negative Effects on Entrepreneurship?' [2019] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3370620 accessed 27 February 2020.

could result in a large number of shareholders, its governance structure is stricter than that of the ApS. Moreover, the capital requirement is set higher, to DKK 400,000. The DCA regulates issuance, payment and transfer of shares; however, it is often the Articles of Association that would contain much more specific information on the rights attached to the shares. These choices will affect the measures to be taken by shareholders in order to protect their rights against third parties and possible investors and will also determine whether or not share certificates must be issued. This form of corporation is generally advised to those start-ups that are interested in either a substantial investment or are ready to enter capital markets.

P/S

The limited partnership company is a combination between a limited partnership and limited liability company. The DCA provisions governing public limited companies also apply to limited partnership companies with the necessary changes, in which the limited partners have contributed a certain amount of capital, which is divided into shares. It is a requirement that the general partner has managerial and financial powers in the limited partnership company. Similarly to the three above companies, the limited liability partnership is incorporated by filing with the Danish Business Authority (*Erhervsstyrelsen*) (DBA). An important factor that might be worth considering for start-ups is that the P/S is a tax-transparent entity, which means that only the partners are taxed for their parts of the profits of the limited partnership.

4.2.2 Work permits, CPR and NemID

Before establishing any type of business venture, a non-Danish citizen is subject to visa requirements, both to enter and remain in Denmark. EU/European Economic Area (EEA) citizens are not subject to any visa requirement. Citizens from the Nordic countries, EU/EEA and Switzerland are entitled to live and work in Denmark.[11] However, if the intention is to reside in Denmark for more than three months, they all must apply for a registration certificate at the International Citizen

[11] More information available at: www.statsforvaltningen.dk/site.aspx?p=6394 accessed 19 January 2019.

Service or at the State Administration upon their arrival.[12] Citizens from other countries must apply for work and residence permit before entering Denmark, conventionally at a Danish diplomatic mission.

As mentioned previously, Denmark is a highly digitized country, where many of the official documentation submissions can be done electronically. However, before one can become an active member of this digitized community, one has to obtain a CPR number and also a NemID. The CPR number is a personal identification number. Even opening a bank account in Denmark is subject to holding a CPR number. The CPR number is a unique personal number and is used in Denmark as an ID number. Anyone who intends to stay in Denmark for more than three months is obliged to obtain a CPR number. Almost all public authorities use the CPR registry system, to avoid duplicate registration, limit errors in submissions and simplify access to public authorities for natural persons. One obtains a CPR number when registering with the Danish Civil Registration System at Citizens' Services in the Municipality.[13]

Another tool that one needs to use when carrying out any official activities on the Internet in Denmark is a NemID. NemID means literally Easy ID and is a common secure login on the Internet, which is necessary for online banking, reviewing electronic post from the municipality or tax office or engaging with one of the many businesses that use NemID. In addition to the personal NemID that is connected to one's CPR number, businesses can also have a NemID. There are two types of NemID for businesses. The first is the NemID employee certificate, which will allow an employee of the company to act on behalf of the company. The second is NemID business for banking. With a specific CPR number and NemID, one can initiate his/her entrepreneurial endeavours and establish a business operation.

[12] More information available at: https://um.dk/en/travel-and-residence/how-to-apply-for-a-visa/ accessed 19 January 2019.

[13] See 'CPR Number' (*City of Copenhagen*) https://international.kk.dk/artikel/how-do-i-get-cpr-number accessed 19 January 2019.

4.2.3 Formal requirements and registration

The DBA (*Erhervsstyrelsen)* is the key organization responsible for registration of the companies. The DBA operates the Danish Central Business Register and is the authority enforcing compliance with the DCA.

There are three different ways of establishing a company in Denmark. Firstly, there is an online registration, where a new company can be incorporated and ready to operate within a few hours by using the online registration provided by the DBA. The second form is a classic paper registration, where it will take up to five weeks for the DBA to establish a company. The third form is to acquire a shelf company from a law firm or a company that offers such services and within several hours have an active legal entity. In the following subsections, we will focus on the first option and provide you with a basic overview of the necessary steps.

In order to create a business (sole entrepreneur, a company or a partnership), one needs to visit www.indberet.virk.dk (Virk website) and find '*start virksomhed*'. On the website one has to fill in personal information, what kind of business one wants to initiate, if one has employees, what activities does the company carry out, and other information. Once all of the documentation is ready, one can register the new company. However, only those who have their NemID can log into the system.

According to the DBA, before establishing a company, an online application needs to include:

- Memorandum/Articles of Association (*Stiftelsesdokument*);
- Statutes (*Vedtægter*);
- evidence of initial capital deposit (*Dokumentation for kapitalens indbetaling*).[14]

Necessary information and different examples can be found on the Virk website.[15]

[14] The capital can be approved by a lawyer or a registered state authorized public accountant or by a financial institution.

[15] Virk https://indberet.virk.dk accessed 19 January 2019.

4.2.4 Memorandum/Articles of Association

When incorporating a company governed by the DCA, shareholders must adopt the Memorandum or the Articles of Association, which must be subsequently filed with the DBA. The DCA lays down a number of formal and material requirements in sections 26 and 27.[16] However, these represent only basic provisions given that Danish company law is largely based on a principle of freedom of contract, which allows shareholders to organize their company as they deem appropriate. Shareholders are therefore able to insert provisions relating to other issues that are provided in the DCA, subject to compliance with the DCA and other obligatory provisions of diverse laws, namely accounting regulation, financial and banking as well as anti-money laundering requirements.

Given that Articles of Association need to be submitted to the DBA, they are part of public record. Therefore, it is a common practice to only adopt very general Articles of Association and provide for detailed provisions governing the relationships between shareholders in by-laws, statutes or in founders' agreements, which do not need to be disclosed publicly.

4.2.5 Initial capital

According to the DCA, the Danish limited liability companies must have a share capital in either Danish crowns or euros. The following initial and minimum share capital is required in the three basic types of companies:

- ApS must have a minimum of DKK 40,000 (EUR 5,360) in initial equity capital.
- A/S must have a minimum equity capital corresponding to DKK 400,000 (EUR 53,600). However, when establishing an A/S, only an amount equal to 25 per cent of the equity capital, but not less than DKK 50,000 (EUR 6,700) must be paid up at all times. Payment must be made on each individual share. However, where the share capital is

[16] These reflect on (1) the company's name; (2) the address of the registered office in Denmark; (3) the purpose of the company; (4) the amount of the equity capital; (5) the shareholders' voting rights; (6) the management of the company; (7) the accounting fiscal year of the company; and (8) the appointment of the auditors. Furthermore, the Articles of Association shall include information reflecting the (a) names and addresses of the shareholders, the members of the management board and the auditor of the company; (b) the allotment of shares to the individual shareholders; (c) the shares issue price; and (d) the company formation costs which the company is to discharge.

paid in non-cash contribution, the entire share must be paid up.
- P/S does not have an obligatory initial capital for a general partner, given that the general partner has unlimited joint and several personal liability. Only the limited partner is obliged to pay the minimum initial capital of DKK 1 (EUR 0.14).

4.2.6 Founders' agreement

A founders' agreement is a new phenomenon that we observe in the start-up industry. A founders' agreement is not a Memorandum of Association or Articles of Association or by-laws;[17] it is an agreement that is often signed by founders even before creating an entity. From a legal perspective it is a form of contract where the founders stipulate their rights and responsibilities in their company or in regard to their idea or project that they have been working on. A founders' agreement governs the business relationship of founders. This contract relies to a great extent on the general contractual freedom theory, which in Denmark has a long-standing tradition and is also often referred to in jurisprudence.

A founders' agreement should reflect individuals' contributions, visions and aspirations for a start-up and provide a route for dealing with issues and disagreements within the company's decision-making. Based on the authors' experience, as a rule of thumb, a founders' agreement can contain the following provisions:

- ownership structure;
- conditions and limitations to the ownership transfer;
- responsibilities of individual founders;
- time, knowledge and material contributions of the founders;
- vesting schedule;
- decision-making processes;
- dispute resolution and possible involvement of mediators;
- future employees' interest;
- ownership of IP;
- confidentiality;
- non-compete and non-solicitation;
- choice of law;
- annotations;
- representations and warranties.

[17] Some may know it under the name 'Collaboration agreement'.

Depending on the timing of drafting of a founders' agreement, the founders may decide to include all of the above provisions in their Memorandum of Association or by-laws.

Shareholders' agreements, including founders' agreements, usually have no binding effect on the company or on resolutions passed by the shareholders in a general meeting and, consequently, shareholders who are parties to such agreements should consider carefully how to ensure that the agreement can be implemented with the full effect intended.

4.2.7 Types of shares and rights associated with them

All shares carry equal rights, unless the Articles of Association provide otherwise and establish diverse classes.[18] In such case, the Articles of Association must also stipulate the different characteristics and size of each class. Similarly, all shares carry voting rights, unless provided otherwise by the Articles of Associations.[19] Non-voting shares only carry a right of representation if so provided by the Articles of Association.[20] Hence, the DCA provides a general framework for all corporations to operate, however shareholders dispose with a great discretion.

A company may issue par value shares or non-par value or any combination of them.[21] Non-par value shares have no nominal value. Each non-par value share represents an equal amount of the share capital.[22] The amount of the share capital represented by par value shares is based on the proportion between the par value and the share capital, and the amount represented by non-par value shares is based on the number of shares issued.[23] All shares are freely transferable and non-redeemable, unless otherwise provided by the statute.[24] Shares may be registered in the names of the holders only, as bearer shares are no longer possible since July 2015.[25] Furthermore, no purchaser of a registered share may exercise the rights conferred on that purchaser as a shareholder unless

[18] DCA sec. 45.
[19] DCA sec. 46(1).
[20] DCA sec. 46(2).
[21] DCA sec. 47(1).
[22] DCA sec 47(2).
[23] DCA sec. 47(3).
[24] DCA sec. 48(1).
[25] DCA sec. 48(2).

and until the purchase has been registered in the register of shareholders or the shareholder has given notice of his acquisition of the shares to the company and established good title to them.[26]

After the company is formed the central governing body of the company must as soon as possible set up a register of shareholders.[27] The register of shareholders must be kept available for inspection by public authorities. The Articles of Association must specify the place where the register of shareholders is to be kept if it is not kept at the company's registered office. The register of shareholders must be kept within the EU/EEA.[28]

Under the DCA, the rights of shareholder remain within the power of a shareholder regardless of whether his/her shares are fully paid up.[29] If a shareholder has failed to duly comply with the central governing body's request for payment of the amount outstanding on a share, the shareholder may not exercise the voting rights attached to any of his/her shares and the shares will be considered unrepresented at the general meeting.[30]

4.3 Protection of minority shareholders

The DCA acknowledges different groups of shareholders and provides them with diverse rights and obligations.[31] Shareholders with less than 10 per cent of equity capital and voting rights are considered minority shareholders. Minority shareholders are protected to a different extent in different jurisdictions across the EU despite the fact that basic legal protection has been introduced by the EU. In Denmark, most of the rights and protection are to be found in the DCA, and usually refer to ApS and A/S companies. A stricter set of regulation applies to publicly traded companies, which are also subject to the securities regulation.

[26] DCA sec. 49(1).

[27] DCA sec. 50(1).

[28] DCA sec. 51(1).

[29] It is the Articles of Association that specify the time limits for subscribing and paying for the shares: DCA sec. 26.

[30] DCA sec. 34.

[31] The threshold is above 50 per cent, 25 per cent, 10 per cent, 5 per cent or 1 share.

The existing protection for minority shareholders provides the following tools and mechanisms:

- each shareholder is entitled to attend and speak at general meetings;[32]
- each shareholder is entitled to have a specific matter included on the agenda of the annual general meeting;[33]
- each shareholder is entitled to attend general meetings by proxy, which needs to be in writing and dated;[34]
- a proposed resolution to change the equality principle of company's shares (shares carry equal rights), or increase shareholder obligations to the company, requires a unanimous agreement of all shareholders;[35]
- in A/S companies, shareholders that hold 5 per cent of the share capital can request an extraordinary general meeting. The board of directors must send the notice convening the meeting no later than two weeks after the request;[36]
- in ApS companies, any shareholder can request that an extraordinary general meeting is summoned to deal with a specific issue;[37]
- a proposed resolution to increase the share capital at a price below market value in favour of certain existing shareholders requires a unanimous agreement of all shareholders;
- a proposed resolution to decrease the share capital at a price above market value in favour of certain shareholders requires the unanimous agreement of all shareholders;
- a proposed resolution to decrease the share capital directed at certain shareholders requires the agreement of the shareholders in question;
- a minority shareholder may require redemption if more than 90 per cent of share capital and voting rights are owned by one shareholder. If the redemption price cannot be agreed upon, the redemption price must be determined by an independent expert appointed by the local court.

[32] DCA sec. 78.

[33] In A/S companies, such a request must be received no later than six weeks before the annual general meeting. If the request is received later, the discretion lies in the hands of the board of directors.

[34] DCA sec. 80(1)(2).

[35] DCA sec. 107(1). According to DCA sec. 46(1)(2), all shares carry voting rights. However, the Articles of Association of a limited liability company may provide that certain shares carry no voting rights, and that the voting power of certain shares differs from that of the other shares.

[36] DCA sec. 89(3).

[37] DCA sec. 89(2).

4.3.1 Management structure and corporate governance considerations

Under the DCA, public and private limited companies may choose between the following governance structures:

- the traditional Danish governance structure with an **executive board** performing the day-to-day management of the company **and** a **board of directors** (of at least three members for public limited companies) exercises overall and strategic management functions and supervisory functions (the so-called 'one-and-a-half-tier' governance structure); or
- two-tier (German-inspired) governance structure, where all management functions lie with an **executive board**, **and** a **supervisory board** (of at least three members for public limited companies) performs only supervisory functions;[38]
- one-tier (Anglo-Saxon-inspired) governance structure, where a private limited company is managed only by an **executive board**. If a public limited company adopts a one-tier governance structure, it would create a board of management that entails several executive directors and a majority of non-executive directors.

The text of the DCA in numerous places refers to a 'central governing body'.[39] Depending on the governance structure, the central governing body means:

- the board of directors of companies having a board of directors;
- the executive board of companies having only an executive board; and
- the executive board of companies having both an executive board and a supervisory board.[40]

Subsequently, the term 'supreme governing body' refers to:

- the board of directors where the one-and-a-half tier governance structure is used;
- the executive board where the one-tier governance structure is used, or
- the supervisory board where the two-tier governance structure is used.[41]

[38] This structure entails an extended registration time for some registration with the DBA.

[39] See e.g. DCA secs 9(2), 33(2) 42(1).

[40] DCA sec. 5(4).

[41] DCA sec. 5(5).

The majority of Danish private limited companies choose a simple one-tier structure, and only in cases of public limited companies the governance of a company is carried out by a two-tier structure with an executive board and a board of directors. The board of directors is responsible for strategic management and a proper organization of the company's activities. The board is also responsible for overseeing the bookkeeping and financial reporting. Adequate risk management and internal control procedures also falls under the board's discretionary powers. The executive board performs its duties pursuant to the directions of the board of directors. The executive board may not decide on major strategic issues. It is advisable, when establishing the two-tier governance model, to specifically stipulate either in Articles of Association or Statute which decisions are taken by the executive board and which by the board of directors. Moreover, in public limited companies, the chairman or vice-chairman of the board of directors or the supervisory board shall not be involved in everyday management tasks and the combined position of chairman and chief executive (as known in the UK) is in Denmark not plausible. In public limited companies, the majority of the directors or supervisory board members must be elected by the general meeting.

4.3.2 Vesting

Vesting is a mechanism by which founders or employees of a company earn their ownership over time.[42] Vesting can be extremely beneficial for early start-ups that have insufficient capital. The main purpose of vesting is over a period of time the exchange of shares in the company for the employee's loyalty, longevity and continued high performance – attributes that are extremely important for start-ups.

Each start-up's vesting schedule is unique and establishes a different methodology according to which employees or founders will become also shareholders. There are three basic types of vesting schedules:

- Immediate vesting – when a person is entitled to the benefits of ownership immediately upon receiving the plan even if he/she no longer works at the company. This type of vesting is usually not used by start-ups;[43]

[42] Vesting was originally used in the context of retirement plan benefits, where employees would receive employer-provided benefits or assets over a period of time. The purpose of the vesting was to incentivize the employees to perform well and remain with the company for a long period of time, which would save the company not only capital, but also time and retain talent.

[43] This type of vesting is present for employees' health benefits or insurance, not shares or share options.

- Cliff vesting – when an employee becomes a shareholder on a given date as long as she or he remains with the company. This is the most used vesting schedule by start-up companies, as it allows them to keep the valuable employees while allowing the start-up to vet the employees before fully committing them into the company. It shows an interest and value of the company to its employees. It can give an employee an incentive to become part of the company.

Box 4.1 Example

Cliff vesting means that instead of receiving the shares (or any other assets) immediately, an employee gets them over a period of time. This can be 2, 3 or 4 years or even more. As an example, Pernille could receive 4 per cent of the ownership in the company over four years, whereas her 'cliff' would be two years. The 'cliff' describes the date on which Pernille becomes fully vested. A four-year vesting schedule with a one- or two-year cliff is very common. Each year Pernille would receive 1 per cent, but if Pernille leaves before the 2nd year cliff, she is not entitled to any of the ownership.

- Graded vesting – the ownership in a start-up is provided over a certain period, often through equal portions.

Each start-up will have a different starting position, different key personnel and also a different financial situation. All these factors contribute as to how the start-up will define its vesting schedule and which trigger mechanisms will be the most important: whether the ownership will be triggered by a time, which is the most common, or by a future event. Furthermore, a start-up can design different vesting schemes for different people involved in the business. There might be different vesting scheme for employees for consultants, directors, advisers or founders.

4.3.3 Future debt/equity considerations

The executive board must ensure that the company's bookkeeping procedures comply with current law, and that its assets are properly managed. The executive board must further ensure that the financial resources of the company are adequate at all times, and that the company has sufficient liquidity to meet its current and future liabilities as they become due. The executive board is therefore required at all times to assess the company's financial position and ensure that the available capital resources are adequate.

Table 4.1 summarizes the difference between ApS and A/S.

Table 4.1 Summary comparison of Danish business structures: ApS and A/S

Forms of business entities	ApS	A/S
Formal requirements	• Articles of Association • Statutes Evidence of initial capital deposit	• Articles of Association • Statutes Evidence of initial capital deposit
Minimum initial equity capital (DKK)	40,000	400,000
Maximum equity capital (DKK)	unlimited	unlimited
Requirement to transfer 25% of the yearly profit to the equity capital (reserve obligation)	No	No
Shares can be publicly traded	No	Yes
Requirements for payments of dividends	No requirements	No requirements
Procedural aspects	Electronic with necessary documentation and NemID	Electronic with necessary documentation and NemID
Articles of Association	necessary	necessary

4.4 Running a business: some legal considerations

This section aims to briefly introduce numerous legal issues that a start-up needs to keep track of, once it formalizes its establishment and forms a company. Firstly, we address a number of issues of corporate governance, including managers' liability and fiduciary duties as well as issues connected to employment law.

4.4.1 Corporate governance

During the life of the company it is the DCA that governs the majority of the day-to-day life of a company together with the company's Articles of Associations and other corporate documents, stock exchange regulation (in case a start-up is considering becoming a publicly limited company), codes and recommendations containing generally accepted best practices and other relevant regulations.

The DCA lays down the fundamental rules under which both public and private companies operate. In addition, the Danish Financial Statements Act[44] also includes certain provisions regarding corporate governance together with the Danish Act on Approved Auditors and Audit Firms.[45] The DBA oversees the compliance with both of the mentioned acts. In addition, the Danish Financial Supervisory Authority (FSA) carries out supervision under the Financial Statements Act with respect to listed companies that are financial institutions.[46] In addition, listed companies are subject to the Danish Capital Markets Act[47] and the EU Market Abuse Regulation.[48] Publicly traded companies listed on Nasdaq Copenhagen A/S must adhere also to the terms and conditions set out in the Nasdaq Copenhagen A/S Rules for issuers of shares.[49]

The Committee on Corporate Governance has also adopted Danish Recommendations on Corporate Governance.[50] The first issue was

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[44] Danish Financial Statement Act ('*Årsregnskabsloven*'), No. 1253 of 1 November 2013.

[45] Act on Approved Auditors and Audit Firms ('*Godkendte revisorer og revisionsvisksomhender (revisorloven)*'), No. 1167 of 9 September 2016.

[46] Danish Financial Statement Act ('*Årsregnskabsloven*'), No. 1253 of 1 November 2013.

[47] Which entered into force on 3 January 2018 and replaced the Securities Trading Act. It also transplants Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II) into Danish law and includes provisions related to the Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012 (MiFIR).

[48] Council Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directive 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1.

[49] 'Rules for Issuers of Shares' (*Nasdaq Copenhagen*) https://www.nasdaq.com/docs/2020/01/07/Nasdaq%20Copenhagen%20Rules%20for%20Issuers%20of%20Shares%20%20-%2015022020%20(Clean).pdf accessed 2 March 2020.

[50] 'Corporate Governance Recommendations' (*Committee on Corporate Governance*), https://corporategovernance.dk/recommendations-corporate-governance accessed 2 March 2020.

adopted in May 2013; currently applicable is the revised version of November 2017. All listed companies must either comply with the recommendations or explain why they do not. Even though the recommendations are considered 'soft law', they are generally complied with and followed as a common practice.

4.4.2 Management body and management

As mentioned in Section 4.3.1, Danish companies can opt for a two-tier corporate governance structure with a board of directors and executive board. The board of directors is responsible for the strategic management, whereas the executive board handles the day-to-day management of the company. Alternatively, but rarely used in Denmark, an executive board may be appointed by a supervisory board, which in that case monitors the management board.[51]

The DCA governs the rules on remuneration of the members of the board of directors or the executive board. It states that the members of the board can receive remuneration, both in the form of base pay and performance-related bonuses.[52] The amount shall not exceed what is considered ordinary in the specific industry, given the nature and length of the position, as well as what is considered financially reasonable and sound in light of the company's financial standing.[53]

4.4.3 Boards' duties and liabilities

A company with a two-tier structure is managed on a daily basis by the executive board, while being supervised by the board of directors. The executive board shall follow the law, the corporate documents and the recommendations of the board of directors. The day-to-day business operations do not include transactions which, considering the scope and nature of the company's activities, are of an unusual nature or effect on the company. These decisions can only be made with the approval of the board of directors, unless it is a time-sensitive issue. Hence, it is the task of

[51] 'Denmark: Corporate Governance 2019' (*ICLG*) https://iclg.com/practice-areas/corporate-governance-laws-and-regulations/denmark accessed 5 February 2019.

[52] If the company aims to introduce the incentive-based remuneration for the board members, the shareholders must adopt general guidelines for such remuneration at a general meeting. These guidelines should also stipulate, in case of equity programmes, the vesting periods and severance payments.

[53] DCA sec. 138(1).

the board of directors to determine the company's policies in relation to business strategy, organization, accounting and finance, and their timely enforcement.

In general, the basis in Danish law for management liability is negligence. Board members and executive officers must exercise their duties loyally and always with due care and attention (similar to the US concept of duty of care and duty of loyalty). There are several examples where a possible management liability can arise:

- neglect of specific, clearly defined duties imposed by the DCA, the Financial Statements Act, the company's Articles of Association, or fundamental legal principles (e.g. granting of shareholders' loans, which are illegal);
- the pursuit by management of their own interests, or interests not related to those of the company (e.g. family transactions, family appointments);
- failure to perform properly the duties (e.g. when management has failed to monitor the cash flow and financial status of the company).

Danish courts have been reluctant to impose management liability unless clear specific duties have been neglected. The board of directors and the executive officers must perform overall management and strategic management duties and ensure proper organization of the company's business, including:

- ensuring that the bookkeeping and financial reporting procedures are satisfactory;
- undertaking adequate risk management and establishing internal control procedures;
- staying informed about the financial position of the company;
- maintaining adequate financial resources of the company, and maintaining sufficient liquidity to meet its current and future liabilities as they become due; and
- in public limited companies, the supervisory board must adopt specific rules of procedure relating to the exercise of its powers. These will typically include the frequency of board meetings, voting procedures and its constitution.

The executive board must, in addition to performing day-to-day management:

- follow the directions issued by the board of directors;
- ensure that the company's bookkeeping complies with the applicable statutory rules;
- ensure that the assets of the company are properly managed; and
- ensure that the financial resources of the company are adequate at all times, and that the company has sufficient liquidity to meet its current and future liabilities as they become due.

In accordance with the general principle of collective and joint responsibility, the entire board as a whole, not only its individual members, is responsible for transparency and disclosure of information. However, it is the practice in Denmark that the chairman of the board of directors in cooperation with the CEO is submitting all necessary documentation, official statements and press releases.

If a company uses the one-tier or two-tier governance structure described above the responsibilities of the executive board change accordingly. Naturally, the members of the boards should consider the D&O liability insurance.

4.4.4 Foreign citizens as managers

Foreign companies that have Danish subsidiaries often appoint foreign personnel to the supreme governing body of the Danish subsidiary. In some cases, day-to-day management is entrusted to foreign personnel posted in Denmark. In case of start-ups, the same rules apply as for foreign subsidiaries. Board members and executive officers of start-ups must be registered with the DBA.

Similarly to other jurisdictions, there have recently been several corporate governance failures,[54] which increases the discussion in regard to managers' liability. Even though a start-up usually has a limited reach to other businesses or consumers, the same rules apply and the managers should be aware of the existing duties imposed by law and seek proper advice.

[54] Starting with the 2008 Financial Crisis up to the scandal around Danske Bank and Nordea in 2018 and 2019.

Given the increasing willingness of creditors and shareholders to hold management liable for failures, it is more important than ever to be aware of the extent of this liability.

4.5 Employee matters

Start-ups often focus their time and energy on financing the business and developing and marketing their core products or services. However, as their business grows, they hire more employees or consultants, and complying with the panoply of employment laws and rules might not necessarily be their primary concern, as they attend to their business operations. Non-compliance with these laws and rules might pose substantial risks for the growth of the start-up or its later sale. Determining who will oversee employment and human resources-related issues should therefore be among the main concerns for start-ups.

The principle of freedom of contract is largely recognized in Denmark and as such is only restricted by several labour law acts and collective bargaining agreements (CBAs). Where there are no statutory or contractual rules governing a labour dispute, the courts tend to decide the matter in the light of customs and practice applicable to a specific industry.

Most Danish employment laws, regardless of employees' nationality, are applicable to employees who work a majority of their worktime in Denmark or if the employer has its closest connection to Denmark, be it its seat, offices or primary place of business. Those employees who have been posted in Denmark for a specific period of time are subject to specific minimum regulations regardless of any choice of law clause in the employment contract.

The key sources of law are:

- the Danish Holiday Act, Consolidated Act No. 1177 of 9 October 2014;
- the Salaried Employees Act, Consolidated Act No. 81 of 3 February 2009, which address salaried employees and includes protection in relation to notice periods, severance pay, compensation or termination;
- Act on Employment Clauses, Act No. 1565 of 15 December 2015;

- Working Environment Act, which addresses issues of safety instruction for the working environment; and
- Act on Prohibition of Discrimination in the Labour Market.[55]

Danish law distinguishes between various categories of employees:

- salaried employees – employed at least eight hours a week on average;
- workers – employed in manufacturing industries and usually members of trade unions;
- chief executive officer (CEO) – is registered with the DBA and are not subject to the Salaried Employees Act;
- employee shareholders – an employee might not be considered an employee under law, depending on the amount and type of shares that the employee shareholder owns in the company; and
- self-employed workers – independent contractors who are characterized by their independence and the fact that they work on their own account.

Start-ups at their early stage might prefer either self-employed workers or in case of co-founders they would be perceived as employee shareholders instead of salaried employees. The main risk of misclassification of an employee as self-employed or an employee shareholder is that salaried employee and workers are subject to the protection of statutory law and contractual clauses may not limit this protection.

For salaried employees and workers, Danish law provides statutory protection across several fields including:

- forms of employment contract;
- working hours;
- part-time work;
- maternity leave;[56]
- holiday entitlement;[57]

[55] The Law on Prohibition of Discrimination in the Labour Market ('*Lov om forbud mod forskelsbehandling på arbejdsmarkedet*'), No. 1349 of 16 December 2008 with later amendments.

[56] The Act on the Entitlement to Leave and Benefits in the Event of Childbirth, No. 822 of 20 June 2018 governs the right to leave and the right to receive child benefit from municipality. There is no general statutory entitlement for employees in regard to childbirth, but according to the Salaried Employees Act female salaried employees are entitled to receive 50 per cent of their salary during maternity leave.

[57] Under the Danish Holiday Act, employees are only entitled to paid holidays if they have accrued them in the previous calendar year or in a previously set time frame. Employees are entitled to five weeks'

- non-discrimination;[58]
- termination;[59] and
- post-employment restrictive covenants.[60]

4.5.1 Hiring new employees vs. consultants

Due to high costs of employing an employee in Denmark and a complex regulatory environment, start-ups often attempt to contract an independent consultant (a contractor) instead of an employee. Under Danish law, there are differences between the employee and an independent consultant. Firstly, a worker who has an employment contract is considered an employee. There are three essential elements creating an employment contract:

- personal work;
- remuneration; and
- 'relationship of authority'.

The third element is the most significant. An independent consultant is a person (or a company) performing professional activities in respect of which she or he is not bound by an employment contract. This means that she or he does not work under the authority of an employer – a start-up. Consequently, it is the lack of direct subordination which distinguishes an independent consultant from an employee.

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statutory holiday per year, corresponding to 25 working days. The holiday year runs from 1 May to 30 April.

[58] Denmark adopted specific laws that protect from discrimination in workplace: the Act on Equal Treatment of Men and Women in Relation to Employment, No. 645 of 8 June 2011 and the Act on the Prohibition against Discrimination on the Labour Market, No. 1001 of 24 August 2017. These prohibit direct or indirect discrimination due to (1) gender; (2) race or colour; (3) religion, belief or political opinion; (4) sexual orientation; (5) age; (6) disability; or (7) national, social or ethnic origin.

[59] Salaried employees are entitled to a notice period of between one to six months, depending on their seniority and on their respective CBA. Other types of employees are entitled to a reasonable notice, taking into consideration the duration of their employment and the type of work. In case of an employee's resignation, he or she must provide the employer with one month's notice.

[60] See Section 4.5.3.

If a Danish court is required to decide whether a person is an employee or an independent contractor, the court will consider:

- if the person carrying out work is in a subordinate position and takes instructions from any other employee in the start-up;
- who is responsible for the result of the work performed;
- if the person must personally perform the work or if she or he can delegate the work to another person;
- if the person runs a personal financial risk when carrying out work for the start-up;
- if the person has established his/her own independent business registered with the DBA;
- if the person carries out work for only one start-up or if she or he has other customers or companies she or he works with; and
- whether the person fulfils the work regularly and using the same methods of work as ordinary employees employed by the start-up, giving considerations to working hours, use of start-ups' software, and participation in social activities of the start-up together with other start-up employees.

One major consideration for a start-up are its resources and if a start-up has a contract with an independent consultant, the start-up is obliged to pay the agreed fees directly to the independent consultant without deducting any tax and without adding the (value-added tax) VAT on the consultant's fees. Hence, it is the independent consultant who is personally responsible for the payment of taxes and VAT to the Danish government. In case of the employment contract, it is the start-up that is obliged to withhold tax at source. Furthermore, the independent consultant must file her or his annual tax account to the Danish tax authorities, while the employee will only file a summary tax return form as the employer will report all important information related to the remuneration earned with the employee. This brings additional administrative burden to the start-up. Independent consultants are furthermore not entitled to specific benefits; they only receive the fees agreed between the parties with the addition of VAT (25 per cent). They cannot be remunerated in other form. Apart from the agreed salary and benefits, employees are entitled by law to the payment of either holiday pay or salary during five weeks' holiday per holiday year, and salary or state sickness benefits during periods of sickness, which the independent consultants are not entitled to.

The level of income tax for independent consultant and employees is very similar and as such is progressive – the higher the income, the higher the tax level, ending in a maximum tax level of approximately 60 per cent, but the independent consultant may benefit from certain tax advantages, such as the ability to deduct business related costs, which might be also beneficial for the start-up, which ultimately would benefit both parties.

4.5.2 Employee equity compensation

For start-ups, it is often the case that in order to keep loyal and key employees, an employee equity compensation scheme might be agreed upon.

In November 2017, the Danish government adopted several initiatives in the entrepreneurial area. The initiatives aim to make it more encouraging for employers to use employee equity-based compensation schemes and easier to understand the rules on employee equity plans, while also introducing more freedom of contract in this field.[61] The purpose of this initiative was to create better conditions for employers by making it easier for companies to pay their employees in equity. This could especially benefit new, smaller companies with limited financial resources.

From an employment law perspective, employee equity is regulated by three different sets of rules, the Stock Option Act (SOA), the Salaried Employees Act (SEA) and the Contracts Act. The type of employee equity compensation scheme determines which act is applicable. In terms of employee equity compensation covered by the SOA, an employee cannot be forced to forfeit options or warrants which the employee has already exercised at the effective date of the termination of the employment. However, only 'good leavers' are entitled to options and warrants, which have been granted, but have not yet been exercised at the time of the termination. 'Bad leavers' do not have this right, unless the incentive plan provides for these rights.

[61] For more, see the amendment to the Danish Stock Option Act of 3 October 2018, which entered into force on 1 January 2019.

4.5.3 Employees' inventions and non-compete

All employees are subject to a duty of loyalty and duty of confidentiality during their employment. The duty of loyalty prevents the employee for commencing employment in a competing company or initiating a competing business venture. Naturally, one must consider what would constitute a 'competing company' or a 'competing business venture'. Nonetheless, in case one plans to create a business that could be considered as competing, one should consider leaving the position before any major activities or materializing steps.

Furthermore, the employment contract may include restrictive covenants, including non-solicitation of customers, non-competing or a combination of the two. These restrictive covenants are governed by the Act on Employment Clauses, Act No. 1565 of 15 December 2015. The non-solicitation provision may only be enforced in relation to customers with whom the employee has had a direct contact within the past 12 months and may last a maximum of 12 months from the effective date of employment termination. The same time limitation is applicable for the non-competing clauses, which are only enforceable for the maximum period of 12 months from the effective date of termination. In addition, in order for the restrictive covenants to be enforceable, an employer must pay a monthly compensation of minimum 40 per cent[62] or 60 per cent[63] of the monthly salary[64] to the employee during the term of the clause.

For a combined non-solicitation and non-competition clause, the clause is enforceable only for a maximum of six months from the effective day of employment termination and a payment of a monthly compensation of 60 per cent of the employee's monthly salary is required.

4.5.4 Other considerations: position of unions and employee representation

The Danish labour market is substantially unionized. CBAs usually are adopted in the form of a framework agreement between the Danish Confederation of Trade Unions (*Landsorganisationen i Danmark*) and

[62] In cases where the duration of the clause is up to six months.

[63] In cases where the duration of the clause is between six and twelve months.

[64] The decisive amount is the salary at the time of the termination of employment.

the Danish Employers' Confederation (*Dansk Arbejdsgiverforening*). A company may become subject to a CBA via membership in an employer organization or if it consents to a CBA via membership directly or by reference. Many salaried employees and workers are additionally protected by CBAs. These will provide an additional layer of protection or entitlement in relation to salary, working hours, parental leave or pensions. Where employees are not subject to a CBA, the employment is regulated predominantly by the employment contract. CEOs, self-employed and employee shareholders are usually not subject to these additional protections.

The right to elect a trade union representative in the workplace is triggered where there are more than five employees in the workplace. Usually there will be one trade union representative for every 50 employees. It is also common to have several unions in a single workplace and in larger workforces. In those cases the employees would elect joint trade union representatives. In addition to trade union representatives, employees can establish cooperation committees or work councils. Employees in both public limited companies (A/S) and limited companies (ApS) with 35 or more employees have a right to elect a number of representatives to the board of directors. Speaking generally, this employee representation is up to one-third of the members of the board of directors.

4.6 Start-up funding

Raising capital is vital to the survival and long-term success of start-ups. Some start-ups need funding from the very beginning, while others rely on their founders' personal savings or family support during the first years of their operations. Others aim to capture their market presence and therefore attract a lot of funding before they create a profitable business. Hence, the needs and the ways to achieve financial support will differ from start-up to start-up. Moreover, the funding opportunities and processes are also changing and the fundraising metrics today are substantially different from those seven or eight years ago. There continues to be more start-ups, more eager investors, new forms of financing, but also greater scrutiny from professional investors. We will highlight some of the changes and the requirements, depending on the type of the investment.

All companies raising capital must decide which form and instrument to use and who to choose to partner with. It is often forgotten that the investors will substantially influence the life of the further growth of a start-up. Furthermore, the type of financing will also depend greatly on the company's stage of development. When advising a start-up on its financial options, an adviser should be familiar with a typical start-up's life cycle that includes the following stages:

- **Idea**: all start-ups need to have an idea that they are able to present either by drawing sketches, mock-ups or rough prototypes;
- **Proof of concept**: as a next step, the start-up builds a basic version of their product – often called a minimum viable product (MVP) that is able to show the product and test it with a small group of possible customers. During this period, the start-up should also have the team ready and presentable;
- **Development**: if the concept is validated by the market and the start-up raises sufficient capital, it is able to hire additional employees and build a more substantial version of the product;
- **Go-to-market**: once a product is developed, the start-up is ready to enter the market;
- **Scaling and expansion**: once the product is on the market, the start-up can focus on expanding its customer base to capture a larger portion of the product's addressable market;
- **Maturity and exit**: as the company grows (hopefully not a start-up anymore), it turns its focus from maximizing revenue to achieving profitability. It is often the case that the company is sold even prior to its profitability. Even companies that complete successful initial public offerings (IPOs) are often not profitable at the time they go public.[65]

4.6.1 Business plan

Before expanding on the types of funding that are available and most used in Denmark, it is important to realize that the idea or a possible prototype

[65] According to Professor Jay Ritter from the University of Florida, 83 per cent of US-listed IPOs that took place during the first three-quarters of 2018 were not profitable and 'lost money in the 12 months leading up to their debut'. The Wall Street Journal goes on to state that the previous record was 81 per cent, when the 'stock-market debutantes' were unprofitable. Corrie Driebusch and Maureen Farrell, 'IPO Market Has Never Been This Forgiving to Money-Losing Firms' *Wall Street Journal* (New York, 1 October 2018) www.wsj.com/articles/red-ink-floods-ipo-market-1538388000 accessed 2 March 2020.

is not everything. To attract the first investment, the start-up needs to calculate all the necessary investments, risks and potential profit – create a **business plan**.

A good business plan should never be underestimated in Denmark. The start-up needs to envision the company's objectives, forecasts and routes, and a plan should provide clarity on how the group behind the start-up intends to change the idea to profit and expand a business in Denmark. A well-structured business plan can often be the difference between success and failure. There are numerous sources one can turn to when drafting the business plan,[66] but ultimately, any business plan should be able to answer three questions: What are the essentials of your business? How are you going to achieve them? When are you going to achieve it by?

4.6.2 Alternatives

In Denmark, there are numerous alternatives for funding that might not be available in other jurisdictions, while some forms of funding are still in their development phase. In this section, we offer a brief overview of the existing funding opportunities, and briefly reflect on their advantages and disadvantages. In-depth analysis of the financing is not feasible in this publication, but we refer to further reading in the footnotes. At the same time, it is important to remember that start-ups do not only raise the necessary capital once, but they go through numerous rounds of financing. This is extremely important when planning the equity financing, as at almost every round the founders are trading the equity in their start-up for capital that they use for growing, unless the founders use debt financing or soft money, where no equity is exchanged.

When reading the following sections, please keep in mind the speed of developments in start-up environment and continue to update yourself about new funding opportunities. The following figure shows the main types of financing and their timing, depending on the stage of the

[66] See e.g. Richard C Freed, Joseph D Romano and Shervin Freed, *Writing Winning Business Proposals* (3rd edn, McGraw-Hill Education 2010); Noam Wasserman, *The Founder's Dilemmas: Anticipating and Avoiding the Pitfalls that Can Sink a Startup* (Princeton University Press 2013); Hal Shelton, *The Secrets to Writing a Successful Business Plan: A Pro Shares a Step-By-Step Guide to Creating a Plan that Gets Results* (Summit Valley Press 2014); Robert J Hamper and L Sue Baugh, *Handbook for Writing Proposals* (McGraw Hill Education 1995).

start-up's development. However, it might be often the case that some funding opportunities are viable in several stages of a company's progress (see also Figure 4.1).

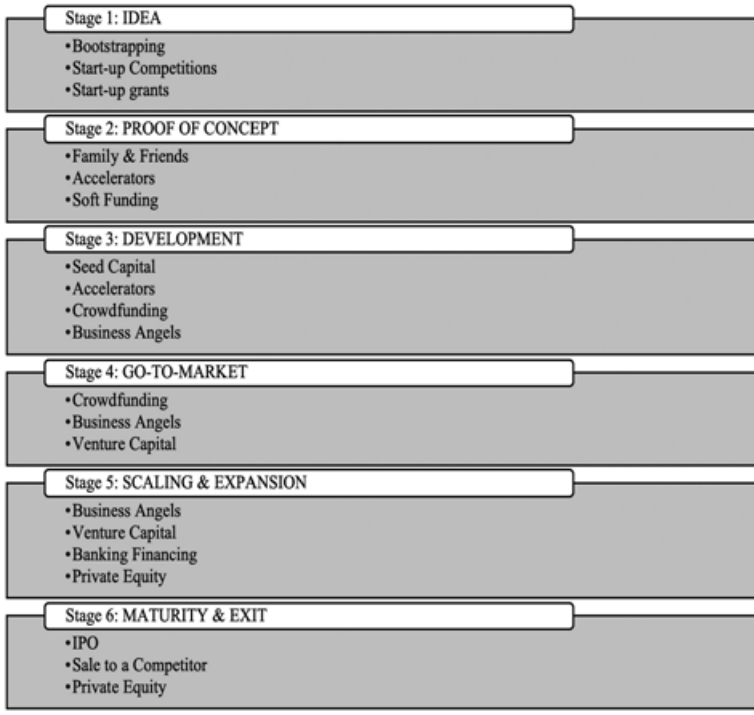

Figure 4.1 *Financing possibilities in the light of the start-up development*

4.6.3 Bootstrapping

At the beginning of the typical start-up's life cycle, founders fund their ideas and start-ups with their own capital. They are usually still employed and work on their idea during evenings and weekends and they are usually 'bootstrapping' their start-up. Bootstrapping means that the founders spend their own money, which entails using their personal resources, savings, credit cards or personal loans. Even though bootstrapping might

not seem very appealing, before founders can persuade someone else to invest money in their idea, they should show that they have. This will show their own commitment and trust in their idea. In Denmark, given the financial support of the state during one's unemployment (*A-kasse*), founders might have a possibility to work on their idea even if they decide to quit their jobs and work on the start-up full time for some period.

4.6.4 Start-up grants (public innovation centres)

The Danish government undertakes an active role in supporting entrepreneurship and innovation. The government decided to run public innovation centres, which operate and think almost like venture funds, but invest much earlier and the amounts invested substantially differ. The usual initial investment round is around DKK 3 to 4 million. Until 2014 there were six centres spread across Denmark that were supposed to focus on regional growth, however currently there are only two active:

- Syddansk Teknologisk Innovation (Odense, Taastrup); and
- Borean Innovation (Aalborg, Herning).

In addition to these two centres, there are several other opportunities with other foundations that offer soft money, including:

- Innovation fund (*Innovationsfonden*); and
- Industrial fund (*Industriendsfonden*).

4.6.5 Family, friends and professional contacts

The personal and professional networks can be extremely important for founders during their early stage. Founders can ask for funding from close friends, family or professional acquaintances. However, borrowing from family and friends can be tricky and might affect one's future relationships. Therefore, if a founder decides to borrow money from a close person, it is still advisable to agree on the main terms of such agreement, specifying the interest, term of loan, prepayments, events of default[67] and whether there is any collateral involved.[68] At the same time, professional

[67] Events of default is a set of predefined circumstances that allow a lender to demand full repayment of an outstanding loan before it is due. These could include a non-payment of any amount of the loan, financial covenant breach, material misrepresentation, insolvency or others.

[68] Collateral are the assets used to secure a loan (debt). It can be both movable and immovable property.

contacts can be beneficial not only for the purposes of financing, but can serve as a useful source of advice and relationships.

4.6.6 Accelerators

A start-up accelerator is not only a space where founders can find funding, but it usually offers additional support, mentoring and networking. Participation in an accelerator programme may be extremely beneficial for start-ups' growth, exposure and future fundraising by business angels or venture capital funds. There has been an explosion in the number of active accelerators in Denmark, but the three leading accelerators in Denmark are:

- Accelerace;
- Startup Bootcamp; and
- Go Grow.

4.6.7 Crowdfunding

Crowdfunding has become a common source for founders to gain finances both in Denmark and across the world. There is a plethora of diverse crowdfunding platforms that start-ups use to present their idea or product. Crowdfunding uses the crowd to replace traditional fund providers. There are diverse types of crowdfunding, including donation-based platforms, pre-purchase or reward-based (e.g. Kickstarter or IndieGoGo), debt and equity crowdfunding.[69] Naturally, the regulation of each form of crowdfunding will be different.

Donation-based crowdfunding is regulated on the same terms as other types of public fundraising campaigns. Start-up companies must notify the Danish Fundraising Board of their campaign and comply with the conditions set by the board. Furthermore, donations received through public fundraising are subject to tax and the Danish Customs and Tax Administration must also be notified. Similarly, pre-purchase-based crowdfunding is allowed, but there are numerous tax considerations. Start-ups using reward-based crowdfunding must post the earnings from these sales in their annual accounts with their production costs for the

[69] See Alexandra Andhov, 'Crowdfunding: Business and Regulatory Perspective' in Douglas Cumming and Sofia A Johan (eds), *The Oxford Handbook of IPOs* (OUP 2018).

purpose of corporate taxation and VAT. Furthermore, if the amount is considerably larger than the value of the product or service, the surplus value is regarded as a donation and the tax must be paid in accordance with the tax rules applicable for gifts or donations.[70]

Equity crowdfunding is not widespread in Denmark, due to numerous legislative obstacles. One is the prohibition of ApS from issuing equity to the public. It is only permitted for A/S companies to do so, where the initial capital and governance requirements are substantially stricter.[71]

4.6.8 Business angels

Many business angels prefer to invest together in consortia. Denmark is no exception and there are four regional business angels networks which entrepreneurs can contact and pitch:

- DanBan – Danish Business Angels;
- Switzr Midt/Nordjylland;
- BAN InVest Østjylland; and
- BA-Syddanmark.

Many business angels are not a member of any of the above formal networks, in many cases because they already have large personal networks and therefore do not need the exposure/deals arising from the business angels networks. Finding these business angels is a bit trickier, but some may be found via the Danish Venture Capital Association (DVCA). This is a non-governmental organization (NGO) organizing both Danish venture funds and Danish business angels. On this member list one will find a lot of angels who are not active in the formal business angels networks.

However, there are also many angels who are not even members of the DVCA. These include many successful IT entrepreneurs who are now investing in new start-ups.[72] The best way to find these is to review the

[70] Ministry of Business and Growth, Denmark, 'Crowdfunding in Denmark' (2015).

[71] DCA, sec. 1(3).

[72] Among these are Morten Lund (Skype), Jesper Buch (Just Eat), Martin Thorborg (Amino, Jubii etc.), Morten Wagner (Freeway), Tommy Ahlers (Podio), Janus Friis (Skype), Ditlev Bredahl (UK2), Morten Strunge (Onfone), Thomas Madsen-Mygdal (Podio), Mads Peter

specific industry in which a start-up aims to operate through news articles and company databases.

4.6.9 Venture capital

Venture capital (VC) funds are investment funds that seek equity investment in start-ups and small- to medium-sized enterprises (SMEs) with high growth potential. VC investments are made in a wide range of sectors. In Denmark, predominantly fintech, biotechnology, energy and industrial products have attracted VC in recent years.

The managers of the VC funds are governed by the Alternative Investment Fund Managers Directive (AIFMD).[73] The AIFMD imposes a wide range of restrictions on VC fund managers based in or promoting funds into the EEA and also creates a regulatory passporting regime to dispense with the requirement to obtain authorization in each EEA jurisdiction in which the fund manager is active. The Directive was transposed into Danish law in 2014.

VC funds are typically looking to invest money raised in a three- to five-year investment period and then realize the investments made before the end of the life of the fund, which is normally around 10 years.[74] While the specific objectives of the fund are set out in the investment objectives and criteria, most funds seek to generate a three times multiple on money invested. It is therefore important for the start-ups to reflect on the type of a VC fund and whether their objectives are compatible. Due to the risk associated with investments of this nature (only around 20 per cent of investments will be successful) there is significant pressure on fund managers to generate exceptional returns from the successful investments to compensate for those investments that have failed. Some of the VC funds are more open if investing with other funds through the creation of syndicates.

Veiby (M1), Thor Angelo (LanguageWire), Kaare Danielsen (Jobindex), Moonis Kamil (Onfone), Niels Henrik Rasmussen (Secunia), Lars Torpe (Mach), Klaus Nyengaard (JustEat) and others.

[73] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) No. 1095/2010 [2011] OJ L174/1.

[74] Among the well-known VC funds are SEED Capital, Sunstone Capital, Northcap, VF Venture, NorthZone, Novo Ventures or Lundbeckfond Ventures.

4.6.10 Banking financing (debt financing)

Banks in general continue to be conservative when lending money to start-ups with an unproven business model. It is no different in Denmark, where new and growing businesses find it challenging to obtain funding from banks without providing collateral (security). However, the Danish Growth Fund (*Vækstfonden*) provides debt funding as well as bank securities to businesses that meet their criteria.

4.6.11 IPO

The abbreviation IPO refers to Initial Public Offering, which refers to the first sale of company's shares on a public market. IPOs represents a great source of capital and can benefit the growth of the company as well as its reputation. However, publicly traded companies are regulated to a much greater extent than privately held companies. Among other compliance obligations, they face an array of reporting obligations to diverse regulatory agencies as well as their shareholders. The costs and regulatory burdens for publicly traded companies are substantial. Nevertheless, an IPO might represent an important step in a start-up's life and should be considered at the right moment.

Compared to other jurisdictions described in this book, Denmark faces challenges in making start-up companies grow. The usual scenario is that either a start-up is financed by a VC fund, which is later bought back by the founders or more commonly the VC fund will be bought out by another competitor or business partner. IPOs are only seen with larger companies rather than with start-up companies.

Stock market listing in Denmark takes place on Nasdaq OMX and DK First North. The larger listings take place on Nasdaq and the SMEs go public on DK First North. The general legal framework of IPOs is set out in the Danish Capital Market Act, which regulates the prospectus requirements, based on the EU regime. The majority of capital market law and hence the process for listings and IPOs has been harmonized across the EU. The regulatory process for launching a prospectus is based on the guidelines issued by the FSA. All start-ups considering a small IPO shall first consult the FSA and lawyers in regard to their eligibility.

4.6.12 Rounds of financing: dilution

One of the most common forms of raising capital is through the sale of start-ups' shares or the issuance of new shares. In this section, we do not discuss the legal requirements and the process for the issuance of new shares. The focus of this section is to emphasize the importance of planning the financing rounds and realizing the unescapable dilution of one's ownership.

First and foremost it needs to be emphasized that public limited liability companies (ApS) are not allowed to sell their shares to the public (including crowdfunding). Only A/S companies under strict scrutiny from the Danish FSA and subject to specific regulatory requirements may sell their shares to the public. However, they can sell their existing shares to specific investors. Start-ups conducting diverse rounds of financing typically use one or more of the following instruments to raise capital:

- convertible loan notes;
- common stock; or
- Simple Agreements for Future Equity (SAFE).

Convertible loan notes and common stock are the two most common financing instruments used for financing start-ups. Convertible loan or promissory notes are debt securities. The purpose of the convertible notes is to convert them into common or preferred stocks once a conversion event takes place. Depending on the start-up there are different conversion events, including the next equity financing conversion or a specific corporate transaction (if the company is sold while the notes are still outstanding) or by a specific date (maturity conversion).[75]

Common stock is the simplest form of equity investment. Investors who purchase shares of common stock typically receive the same security that the start-up's founders hold. However, it might not include any special rights, preferences or privileges that a VC firm is looking for. Moreover, the ApS and A/S can also issue different types of shares, subject to the DCA.[76]

[75] For more on convertible notes and conversion price see Brad Feld and Jason Mendelson, *Venture Deals* (John Wiley & Sons, Inc. 2015) ch 8.

[76] DCA, secs 45–9.

A completely new contractual form of investing is the Simple Agreement for Future Equity (SAFE). SAFE was developed by the seed accelerator Y-Combinator in Silicon Valley. In its essence SAFE is a convertible equity financing instrument, which in many aspects was designed to replicate the economics of a convertible note. However, the difference between SAFE and a convertible note is that SAFE is not a debt instrument. Therefore, it never matures as a convertible note. By using SAFE, an investor contributes an amount of money to the start-up without buying convertible debt and without immediately buying shares. The general concept is that investors buy what could be described as an unpriced warrant in the start-up, which is converted into shares after the occurrence of a number of events listed and described in the SAFE document.[77] In Denmark, an alternative to SAFE is being used – HATCH.[78] However, one of the challenging issues is uncertain tax treatment of SAFE and similar financing instruments.

All the above instruments should always be considered in case of start-up financing. All of them will in a different way affect the ownership of the original founders. Nonetheless, at one point or another dilution is the reality that each start-up will face. However, this does not mean that one should not consider attracting investment through sale of equity. At the beginning, the founders of the start-up usually hold 100 per cent of the start-up's equity. In the following scenario, we will show how the ownership of a start-up dilutes after two rounds of financing (see also Table 4.2).

The 1st round is usually the angel investor round. Once an angel investor enters with the necessary initial capital, founders need to share their equity. This share can vary, but for the purposes of this exercise, an angel invests an amount equal to 20 per cent of the value of the start-up. The start-up would then sell 20 per cent of its shares to the angel, which would leave the original founder with 80 per cent of shares.

The 2nd round would take place already when there is a product or a model of VC firm would step in, which would invest an amount equal to half of the value of the company, which itself has also increased in

[77] For more details on SAFE, see Carolynn Levy, 'SAFE Financing Documents' (*Y-Combinator*, September 2018), www.ycombinator.com/documents accessed 2 March 2020.

[78] A differently named, yet similar instrument is called Keep it Simple Security (KISS), created by 500 Startups, or the convertible security proposed by a partner at Wilson Sonsini Goodrich & Rosati.

Table 4.2 Equity dilution table

Rounds	Founder 1	Angel	VC 1
Before 1st round	100% 100/100 shares	–	–
1st round	80% 80/100 shares	20% 20/100 shares	–
2nd round	40% 40/100 shares	10% 10/100 shares	50% 50/100 shares

the meantime. To buy a 50 per cent share in a start-up might be a risky decision and it might be that the VC firm would pair with a few other investors in order to acquire such shares. Moreover, the VC firm may decide to acquire a substantially smaller share, anywhere from 10 per cent up. Yet, in the above scenario, the founder already, after two rounds, owns 40 per cent of the start-up.

Many start-ups will go through more than just two rounds, which will continue to dilute the start-up. Furthermore, the above example might be naturally more complex, having at the beginning different founders with different ownership or more rounds of financing, offering options instead of equity themselves, plus having employees options or shares, as mentioned in Section 4.5.2. Nonetheless, all of the start-ups will at some point need investors and they should prepare for ownership dilution, more demanding decision-making processes and additional pressure, as the investors will desire to materialize their investment and see profits.

4.7 Tax

When starting a start-up, aside from business law and liability considerations, tax is an important determinant to consider. Given the complexity of the tax system in Denmark, one should consider the different treatment for a person or a private or public limited company. In this section, we try to help to navigate this decision-making.

4.7.1 Business activity

As a point of departure all income earned by a person is taxable in Denmark. Hence it does not – for income tax purposes – make any difference whether the income is generated by a business run by the person or a salary from employment. It is when we look at deductions, deficits and other matters that the qualification of the income generating activity really becomes relevant.

The definition of a '**business activity**' is not regulated in the tax legislation in Denmark but has instead been developed over the years in administrative and court practice.

Box 4.2

Business activity occurs when business is carried out at one's own expense and risk, and thus with the purpose of achieving an economic profit.

The business must be carried out fairly regularly and not just in a short period of time and the business must not be of a subordinate nature.

The following criteria are used by the tax authorities when determining whether an activity is a business activity:

- whether there is any prospect, now or later, that the business will generate profits (be profitable);
- whether any deficits are passing, for example problems related to starting up, or whether the business is dependent on the person having stable income from other sources in order to neutralize the deficits;
- whether the prospects of profitability have been investigated before starting the business, including whether budgets have been prepared;
- whether the business has the necessary intensity and seriousness;
- whether the person has the necessary prerequisites to run the business, and whether the business has a natural link to the person's possible other income generating activity;
- whether there are other purposes with the business;
- whether the person has been prevented from using the business's assets for private purposes;

- whether the extent/duration of the business is of a certain size;
- whether the way in which the business is carried out is usual for businesses of that particular nature;
- whether the business meets the commercial standard which applies for the particular business in question; and
- whether the business, in any case, could be sold to a third party, that is to say whether the business, irrespective of previous deficit, in the eyes of a third party would be considered to have a potential value related to earnings, or instead the business cannot be detached from the property, person or the context it has so far been run in or by.

None of these criteria are – in themselves – determinative of whether the activity constitutes a business activity. However the question of profitability has been important in many cases. Importantly, the registration of the undertaking for VAT purposes has no impact on the evaluation of whether the undertaking should be considered a business activity.

If the activity is not considered a 'business activity' it will instead be considered a hobby, or what in Denmark is defined as a fee-based business. In these cases the person is allowed to deduct his or her expenses in the income generated but cannot carry any further losses over to other income or to income generated in a new tax year. If, on the other hand, the undertaking is considered as business activity, the person will be allowed deductions for business expenses, depreciations, to offset a deficit in other types of income and carry a deficit forward.

The business income will be taxed with the 'personal income tax' which – at its marginal level – amounts to 56.5 per cent. The threshold for reaching the marginal tax level is income over DKK 531,000 or EUR 68,801.92 in 2020. There are different taxes which all amount to the percentage mentioned before. The tax is – at the marginal level – calculated as shown below:

$$0{,}08 + (1 - 0{,}08) \times (0{,}2493 + 0{,}0068 + 0{,}1213 + 0{,}14994^{*}) = 0{,}565 \text{ or } 56{,}50 \text{ per cent}$$

If the person incurs expenses for having paid interest to, for example, a bank, this cannot be deducted in the business income taxed as 'personal income taxation'. Instead interest expenses are treated as 'capital income tax', and the tax-value of such a deduction is only 25.6 per cent.

It is thus – from a tax perspective – an unfavourable position to have expenses in the form of interest, as it cannot be offset 100 per cent in the business income. For this reason many people choose either to run their business in a limited company or use a special tax solution called '*virksomhedsskatteordningen*', or in English the sole-trader-scheme (STS). The STS does not have a separate legal personality.

4.7.2 The sole-trader-scheme (STS)

If a person runs a start-up as the STS, he or she will firstly be taxed at the same level as limited companies, which in 2020 is 22 per cent. Furthermore, the STS provides full tax-value for interest expenses, as the interest expenses are deducted in the same taxable income as the business income. The STS is a flat tax.

The STS allows the person running the start-up to save up money in the business by only paying 22 per cent in tax. This money can then be used in any given year for business expenses, investments and so on. The person may at any time take out money for his or her own private purposes, which will incur an additional taxation equivalent to income earned outside the STS but with a deduction for the tax already paid in the STS.

The STS model is, however, a complicated scheme which requires knowledge of the rules and maintenance of accounts. Therefore, a tax-adviser and an auditor might be a good solution.

4.7.3 Limited liability company

Limited liability companies are taxed with a flat tax of 22 per cent. Dividends to shareholders are – when they are natural persons – taxed at 27 per cent for dividends not exceeding DKK 54,000 or EUR 7,236.66 in 2020. Any dividends exceeding that amount are taxed at 42 per cent.

If the shareholder is another limited company the taxation depends on the ownership share:

- '*Koncernselskabsaktier*', which implies that the shareholder has control of the company, are not subject to tax on dividends; and gains and losses on said shares are not taxable either;
- '*Datterselskabsaktier*', which means subsidiary-shares. These are shares where the shareholder owns at least 10 per cent of the shares.

The shareholder is not subject to tax on dividends; and gains and losses on said shares are not taxable either;
- '*Porteføljeaktier*', which means portfolio shares. These are shares where the shareholder owns less than 10 per cent in the company and the company is not listed on an exchange. Dividends are taxed and so are gains and losses on the said shares.

A person who has carried out a business activity in his or her own capacity can convert this to a limited liability company. This can be done without incurring any taxes pursuant to '*virksomhedsomdannelsesloven*', which means the conversion-of-business law. This is done by reducing the acquisition sum of the shares in the limited company with the profit which otherwise would have been taxed as a result of the conversion.

4.7.4 VAT

The VAT rate in Denmark is 25 per cent. There is not a varied VAT rate on specific goods or services.

If a start-up has a VAT-liable turnover of more than DKK 50,000 or EUR 6,700.61 in 12 months it has to register itself for VAT purposes. If the start-up fails to do that before exceeding the DKK 50,000 threshold the business will be liable for VAT on all the income, including the first DKK 50,000, until its proper registration. The business will not be able to claim the VAT it has paid to the Danish state from its customers before its registration. This will thus be detrimental for the business and it should be carefully observed not to postpone a VAT registration for too long.

Some business areas are not required to register for VAT purposes. Instead, they shall become '*lønsumsafgift*'-registered if they are in the health, personal transport, finance and association category.

There are a number of services which are exempt from VAT, for example hospital treatment and medical services, including chiropractic, physiotherapy, other actual healthcare and dental services, and sale of real property including buildings, plots and windmills (except the sale of recently constructed buildings and building plots). Generally speaking, renting out real property for residential property is also exempt from VAT.

The Danish VAT rules are based on EU legislative acts. The Danish tax authorities and courts are bound to adhere to the interpretation of these

by the Court of Justice of the EU. The VAT position on international trade firstly depends on whether the state is a member of the EU or instead a country outside the EU (third country).

If a start-up *sells* goods and services beyond the borders of Denmark, **yet still within the EU**, the VAT rules depend on whether the start-up trades in goods or services and whether the start-up trades with businesses or private individuals. If a Danish start-up sells its services to businesses in other EU countries, the business usually does not have to charge Danish VAT. The buyer is responsible for calculating and paying VAT in the EU country where his or her business is registered.

If a Danish start-up is selling its goods or services to a non-EU country, the start-up must report the value of its international trade when it files its VAT-return in 'E-tax for businesses (*TastSelv Erhverv*)'.

If a start-up provides telecommunications services, electronic services or radio and TV broadcast services VAT must be paid in the country where its customers reside or generally stay. The business has to be able to document where its customers stay, even if it believe all its customers are Danish.

VAT has to be declared in each VAT period. A business starts with having quarterly VAT periods, being 1 June, 1 September, 1 December and 1 March.

4.7.5 Research and development reliefs

Expenses for experimental and research activities are often of such a nature that they should either be treated as establishment expenses that cannot be deducted or expenses that lack the necessary and natural connection to the income acquisition. This applies to the costs of the research used in general and the cost of basic research in particular. For this reason, Danish tax law has a special provision, *Ligningslovens* section 8 B, which specifically allows for deduction or depreciations for expenses for experimental and research activities, even when the business has not yet started.

Expenses on experimental and research activities, including basic research, can be deducted for the full amount in the year of the expend-

iture or alternatively depreciated with equally large amount in the year of the expenditure and the following four years. The start-up can choose which method to use. It is the opinion of the tax authority that a combination of the two methods can also be chosen by the start-up, so that the part of the year's expenses that are not fully deducted in the income year is depreciated over a five-year period.

If the taxpayer has incurred expenses related to experimental and research activities before the business enterprise has started, the person concerned can, as a general rule, first deduct the expenses in the year in which the start-up has started, or alternatively write off the expenses as of that tax year. However, the taxpayer can deduct these expenses already in the year in which they are incurred, in the case of the taxpayer being a limited liability company, or if the Tax Administration has allowed the expenses to be deducted or, alternatively, depreciated before the company has started.

Expenses related to basic research can only be deducted if it is a business which is already up and running, and thus not yet by a start-up.

4.7.6 Other tax matters

It is important to be aware that pursuant to Danish tax law, expenses incurred in connection with establishing a business, and which by their nature are one-time expenses, are considered 'establishment expenses', and as such are not deductible.[79] On the other hand, in several cases, the courts have allowed deductions for ordinary, ongoing operating expenses incurred during the initial phase. To sum up, it can be said that expenses that are typical of regular operating expenses, and which are incurred in the time immediately preceding the start of the business, are deductible.

If a planned start-up ends up not being launched, there are still deductions for usual current operating expenses such as rent, wages, electricity, heat and the like, which naturally had to be incurred for a shorter period before the planned and now abandoned start of the business. The deduction or depreciation right for other, more extraordinary business expenses, is contingent on an ongoing, income generating business activity. Therefore, these unsuccessful expenses are treated as non-deductible establishment costs when related to establishment of a business.

[79] The State Tax Act ('*Statsskattelovens*'), No. 149 of 10 April 1922, § 6, 2.

The reason for not allowing deductions for expenses related to establishment is that an expense – according to Danish tax law – has to have a connection to the acquisition of the taxable income. This 'operating cost concept' (*driftomkostningsbegreb*) entails, in particular, difficulties with regard to construction and establishment costs, which do not relate to income, but rather to the income base (*indkomstgrundlaget*).

Expenses aimed at providing a new income base, either in the form of starting a new business or expanding an ongoing business beyond its previous framework, have the character of establishment costs that cannot be deducted.

This is a point of attention when starting a business in Denmark, as the founders may thus incur costs for advisers, market research and analysts which they cannot deduct.

There are, however, a few special tax rules which deviate from the above, for example on research and development pursuant to *ligningslovens* section 8 B, as discussed in the previous section.

4.8 Protecting an idea or a product

The following sections will provide a brief introduction to intellectual property rights (IPR) from a Danish perspective. Given the high degree of internationalization and EU harmonization in many areas of IPR, the Danish perspective is rather European, and many points are generally applicable throughout the EU.

This section will first provide a general introduction to the rationales of IPR, why it is important for start-ups and some general outlines of the legal and institutional landscape for IPRs in Denmark. Secondly, a brief introduction will be provided to the most common forms of IPR protection and how they are regulated and governed in Denmark and in some cases at EU level. Thirdly, some general thoughts concerning agreements about IPR will be presented, particularly licensing and employment contracts. Finally, some remarks on the enforcement of IPRs in Denmark will be provided.

4.8.1 Introduction to IPR

The general idea of intellectual property protection is to address the fact that it is often **easy to copy but hard to develop** something original, leaving originators at a disadvantage from copyists that may 'freeride' on their innovative efforts. Another important function of IPR is to avoid confusion on the part of the consumers on what they are buying or with whom they are dealing. This is particularly relevant for trade marks and design protection. This ensures that there is an incentive for businesses as well as individuals to invest time and resources in development of new technologies, original work, trade marks and designs. All of these are important pieces in the puzzle that add up to efficient and transparent markets and fair competition. Today a substantial part of a business's value comes from intellectual or 'immaterial' goods such as trade marks, invention, designs, artistic expressions or software. Knowledge about how these assets are protected and the rights they entail are important to a start-up: Your start-up is very likely to be the owner of many different kinds of IPR that form important parts of your business assets, and you will want to know how to avoid conflicts with other people's IPR.

4.8.2 IPR awareness

Awareness of IPR is crucial for a start-up for several reasons. First of all, you do not want to spend your time, energy and money dealing with allegations of infringing on other people's IP. Therefore, you need to ensure that you have the right to use text, pictures, technologies and software in your business. Besides being a risk, IPR may also create significant opportunities for your business. Investors may be interested in your IP portfolio as a part of their assessment whether to invest in your start-up. IPR may enable you to charge a premium on your products or services compared to your competitors. In the global market place recognizability is pivotal. IPR may enable or diversify your business model with licensing revenues from IPR. IPR awareness is therefore important both from a **risk** and an **opportunity** perspective and may be turned into a **strength** for your start-up as well as becoming a **weakness** if not taken into consideration in due time.

4.8.3 IPR in Denmark

Historically, the scope of IPRs was limited to the national territory, which constituted the limits of the sovereign power and thus the possi-

bility to enforce the rights. However, today IPRs are subject to multiple international treaties and agreements that ensure minimum levels of protection (e.g. the Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement from 1994) and mutual recognition of IPR and equal treatment (e.g. the Paris and Berne conventions from 1884 and 1886). In Europe the national processing of IPR applications and in some areas the enforcement of IPR (the principle of territoriality) has been supplemented by regional institutions that may grant IPR protection in multiple jurisdictions with only one application. Given that many businesses will grow beyond national borders, the Danish legislation and institutional setup for the grant of IPRs should be seen in this **integrated European context**. For design and trade mark protection both a national and a European registration is possible via regulations and thus these areas have been subject to significant harmonization through EU laws as well as by rulings from the Court of Justice of the European Union (CJEU). Recently, an EU directive on the protection of trade secrets has been passed and thus took a step towards increased European harmonization in this increasingly important domain. The following sections provide a brief overview of the most common forms of IPR, what they protect and how the legal and institutional framework looks in Denmark.

4.8.4 Patents

If you have an invention which is of a technical character,[80] patent protection may be an option you should consider. Patent protection applies to a broad cohort of things, e.g. computer code (algorithms), biology, animals and plants. A patent gives you the right to exclude others from using your invention commercially. You get a patent by submitting a patent application to a patent office. Besides the formal requirements the patent application has to meet (e.g. language, list of inventors and claims), the application must demonstrate that your invention is novel, sufficiently inventive compared to existing inventions and the current state of knowledge (has an 'inventive step') and has industrial applicability. Furthermore, the application must make a disclosure of the invention that is sufficiently precise to enable a person skilled in the art to practice the invention. If the patent is granted you get up to 20 years of protection of your patented invention in the geographical domains, you have

[80] 'Technical Character of the Invention' (*European Patent Office*) www.epo.org/law-practice/legal-texts/html/caselaw/2016/e/clr_i_d_9_1_1.htm accessed 2 March 2020.

applied in. This means that if you are granted a patent in Denmark, you may exclude others from using your invention in Denmark, but not in Germany. However, there are well-established routes for obtaining patent protection in more than one jurisdiction. You may submit a patent to the European Patent Organization (EPO).

EPO is established by the European Patent Convention (EPC) and governs the grant of patents via this international agreement. You can designate as many of the 38 member states[81] as you like[82] and if your application is successful get a 'bundle' of national patent rights via one application. Similarly, the Patent Corporation Treaty (PCT) provides an international route streamlining the process for applying for patents in a multiple of the 152 member states[83] to this treaty (including the EPO member states). These two routes centralize the grant of patents. You do not have to decide whether to apply in one or more jurisdictions from the beginning. A Danish patent application may be used as the basis for applying for a patent in other jurisdictions within 12 months (some within 31 months) via the EPO or the PCT system, and still refer to the date where you filed the first patent application as the priority date. An early priority date is important for the assessment of the patentability requirements. The novelty and inventive step of your invention is assessed relative to what had been made available to the public at the priority date. Therefore, an early priority date may be extremely important in areas where the technological development is rapid, because the threshold for novelty and inventive step is continuously being raised by the publication of new inventions and scientific insights.

When navigating a start-up where patent protection could be a feasible scenario you should be particularly aware of disclosure of the invention or parts of it. The patentability requirement of novelty means that the same invention must not have been made available to the public anywhere in the world before the patent application is handed in to the patent office and a priority date for your invention is established. Likewise, the assess-

[81] 'Member States of the European Patent Organisation' (*European Patent Office*) www.epo.org/about-us/foundation/member-states.html accessed 7 August 2019.

[82] You should be aware that the fee for applying increases with the number of Member States you designate.

[83] World Intellectual Property Organization www.wipo.int/pct/en/pct_contracting_states.html accessed 7 August 2019.

ment of the patentability requirement of inventive step takes into account all knowledge that has been made available to the public prior to the priority date, including your own disclosures of the invention or parts of it. Therefore, it is extremely important not to disclose an invention or parts of it to the public before you apply for a patent because this may destroy the option to have a patent or make it significantly more difficult to get it. However, you will of course have to show people what you are working on in your start-up, such as investors, employees and co-developers. The practical way to avoid disclosure when showing the invention to others is to have them sign a **non-disclosure agreement** (NDA) before you show them anything. A non-disclosure clause should also be integrated in employment contracts. Disclosure could also be a display of the invention or a product containing it at a business fair or offering the product for sale. Such actions may constitute disclosure even when the invention is not visible as such. Therefore it is generally not advisable to place a product on the market before you have handed in your patent application if you want to obtain a patent protection at some point.

When you apply for a patent, the patent application is made publicly available after the patent office has conducted a first assessment of the invention and the application and provided you with a search report. This is done within 18 months from the application date. In this report you will get a list of what the patent office considers to be prior art that should provide the basis for assessment of the inventive step for your invention. It may turn out that something turns up that makes it likely that you will not be granted the patent. In that case it may be an idea to choose to withdraw your application before publication of your patent application. In that way, your invention remains a secret or at least unpublished by the patent office, and you may still protect your invention as a trade secret. Another strategy would be to limit the scope of claims in the application and exclude the features of the invention that do not meet the patentability criteria, for example limiting your claim from 'a filter to extracts *particles* from the exhaust of *vehicles*' to the narrower claim of 'a filter to extract *carbon particles* from the exhaust of *busses*'.

Patents can be applied for at the Danish Patent and Trademark office or directly at the EPO. It costs approximately DKK 20,000 or EUR 2,800 to file a patent application if it is a straightforward application. However, on top of the basic fees, most applicants will need to consult a patent agent in order to get a feasible application put together and assess the best filing

and claim strategy. This may add significant costs and the slightest complications will easily triple the costs. On top of that comes the annual fees for renewal. Furthermore, it is often stated that you should not apply for a patent you cannot afford to litigate. The truth in that is, that the costs of getting a patent may be diminutive compared to the cost of protecting and enforcing the patent in litigation. There does not (yet) exist a common European patent court, which means that litigation regarding infringement of a patent right has to be done in the individual courts of each country in which the alleged infringement has taken place. This obviously adds substantial costs to litigating a patent dispute. On the other hand, patents are well-established legal instruments that are considered to be an imperative feature for business models in many technology intensive areas. Patents may thus also be important signifiers of commercial viability for investors and a token of the knowledge embedded in your start-up.

4.8.5 Utility models

Applying for a patent may be a time-consuming and expensive process with significant uncertainties and no guarantees that you will actually get a patent in the end. However, if you have a good invention, the patent system provides the most robust line of protection and exclusivity for it. There are alternatives to patent protection, which may provide cheaper and more expedient routes for protection of useful inventions, though the protection is often shorter or less robust.

An alternative to patent protection offered in Denmark and Germany is utility model protection (in Danish '*brugsmodeller*'), also often referred to as 'petty patents' and in England 'utility models'. The reason for introducing this sort of protection is to provide an easy and cheap way to protect small inventions, such as useful tools, which may be valuable but not to the extent where the costs of getting a patent could be justified or the patentability criteria would be difficult to fulfil. The central difference from patent protection is that an application for utility model protection is only controlled for its adherence to formal and not the material requirements of novelty, inventive step and industrial applicability. This means that the cost for applying for utility model protection is significantly lower. Another benefit is that a utility model application may establish a priority date for a subsequent patent application if within 12 months

you choose to apply for a patent for the same invention[84] in Denmark or a European patent via the EPO. Also, if a patent application is rejected due to lack of inventive step, the application may be 'transformed' into a utility model application with the same priority date as the patent application. This must be done within two months of the rejection of the patent application. Thus, utility model protection may be a good option if you have a relatively simple but useful invention in your hands or you want to establish a priority date and get 12 months to look further into the potential of your invention and see whether it should be upgraded to a patent application. However, it should be kept in mind that some inventions such as processes and computer programs are not subject to utility model protection.

4.8.6 Trade secrets

To protect an invention as a trade secret it must not be generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question. Secondly, it must have commercial value. And thirdly, you must have taken reasonable steps to keep it secret.[85] This could include using NDAs and to have safety measures such as entranced control to facilities. The directive has been implemented in Denmark via a new law on trade secrets.[86] Before the implementation of the EU directive trade secrets were protected in the Danish Marketing Act (*Markedsføringsloven*),[87] which may still be useful in some cases of unfair commercial practices such as the protection of trade dress. However, trade secret protection does not protect you from someone reverse engineering your product or developing it with their own efforts. If your product is easy to copy, trade secret protection is not an option you should put too much faith in. Thus, the benefit of trade secret protection is that it is cheap and you do not have to apply for it. The downside is that it only works with products that can be kept secret.

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[84] Danish Patent Act, No. 90 of 29 January 2019, § 6 www.retsinformation.dk/Forms/R0710.aspx?id=206465 accessed 7 August 2019.

[85] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Art. 2.

[86] Danish Trade Secret Act, No. 309 of 25 April 2018 www.retsinformation.dk/Forms/R0710.aspx?id=200512 accessed 7 August 2019.

[87] Danish Marketing Act, No. 1387 of 23 December 2012 www.retsinformation.dk/Forms/R0710.aspx?id=188880 accessed 7 August 2019.

Trade secrets are often considered an alternative to patent protection. However, the definition of a trade secret is much broader than inventions, and the recent EU directive has brought about an unprecedented level of harmonization in the area, which seems to have heightened the interest in this approach to protecting a great variety of business assets. Trade secret protection may thus also apply to client lists, sales strategies and innumerable other things as long as they are not generally known, are valuable and are kept secret.

4.8.7 Trade marks

Trade marks are more important than ever as a means for consumers to find your services or products in an increasingly global marketplace. A trademark should add distinctiveness to your business and products, which also aids consumers in establishing traceability of products.

4.8.7.1 Distinctiveness

The principle criteria for getting trademark protection is that it must have 'distinctiveness'. This means that a trademark may not, for example, consist exclusively of signs that are purely of a descriptive character, signs that are customary in the current language or a shape that is there to perform a technical function.[88] Furthermore, a trade mark must also be different from other trade marks used for the same category of products. This is the so-called relative grounds for refusal.[89] A trade mark may be a name or a word, but can in principle consist of anything that is capable of distinguishing and can be represented in the trade mark registry.[90] Thus, trade mark protection has been granted for sounds, colours and shapes that were found capable of signifying a certain origin of a product or service. The core function of a trade mark is to signify an origin, and that distinctiveness may be acquired over time if consumers begin to associate a common term with a specific origin. The opposite may also become the case if a trade mark becomes part of the common language as has been the case with, for example, 'Gramophone' and 'Vaseline'.

[88] For an extensive list of these so-called absolute grounds for refusal, see Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark [2017] OJ L154/1 (Trade Mark Directive), Art. 7.

[89] ibid Art. 8.

[90] ibid Art. 4.

4.8.7.2 Scope of protection

The scope of protection for a trade mark is not unlimited: firstly, it is only the commercial use of the trade mark to indicate the origin of goods or services that is protected. Secondly, the protection only extends to the use of identical or similar signs, used for identical or similar products where there is a likelihood of confusion on the part of the consumer. If both sign and product are identical, likelihood of confusion is taken for granted, as is the case with pirated copies of goods. However, if either the goods or the marks are only similar you must establish that there is a likelihood of confusion 'in the mind of the average consumer'. An important extension of the scope of protection for trade marks occurs with reputation for well-known trade marks such as Coca-Cola, Google or Disney. When you apply for a trade mark you do not get protection from all uses of it, but only from other commercial use of similar/identical marks for similar/identical products. However, if a trade mark is well known the protection also extends to use of similar marks for different products or services.[91] The similarity of products are based on the product classes you register your product for when applying, also known as the 'NICE Classification system'.[92] It is thus important to remember that the classes of goods/services you choose to register your mark in is an important element in shaping the scope of protection provided by your trade mark. So, you should think ahead for your business or your client and allocate time to make yourself familiar with the classifications, pick a good strategy to get a suitable scope of protection and seek some advice from a trade mark lawyer.

4.8.8 Routes to trade mark protection in Denmark

In Denmark, there are four routes to get protection for your trade mark. Firstly, you may apply for the registration of a national trade mark covering Denmark at the Danish Patent and Trade Office (PTO). Secondly, you may apply for an EU trade mark covering all EU Member States. Thirdly, the Madrid system provides a route for international trade mark registration of existing national or EU trade mark registrations. Finally, Denmark

[91] ibid Art. 9(2)(c).

[92] 'Nice Classification' (*World Intellectual Property Organization*) www.wipo.int/classifications/nice/en accessed 7 August 2019.

also protects unregistered trade marks, where the act establishing the right is use of the trade mark on the market in Denmark.[93]

National trade mark law has been harmonized via EU directives. At the same time the EU trade mark regulation establishes an independent EU-wide trade mark protection that exists in parallel with national trade mark protection. Thus, the general requirements for getting a trade mark are the same for an EU and a Danish trade mark. There is, however, one significant caveat. If you apply for an EU trade mark, the trade mark must have 'unitary character'.[94] This means that it must be suitable for trade mark protection in all Member States. This means that if the mark has already been registered as an EU trade mark or is protected in just one EU country, this forecloses the possibility to get the same or a similar mark registered as an EU trade mark, but you may still apply for national registrations in individual Member States. Also a sign which is descriptive in one EU language (e.g. Danish or English) cannot be registered as an EU trade mark.

Trade marks and other features that serve to distinguish business or products may also be protected by provisions in the Danish Marketing Act (DMA). The general clause in DMA section 3 states that you must observe 'good commercial practices'; this clause is often cited along with more specialized provisions in an infringement case. Misleading acts and omissions that are likely to materially distort the behaviour of consumers are regulated in sections 5 and 6.[95] Misleading advertising that may mislead other traders and may lead to unfair consequences for them are prohibited in section 20,[96] and section 21 establishes the conditions for comparative advertising. Finally, section 22 prohibits the use of other businesses' distinguishing marks, such as business identifiers or trade dresses and use of your own marks in a way that is likely to mislead others.

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[93] Danish Trademark Act, No. 88 of 29 January 2019, § 3, No. 3 www.retsinformation.dk/Forms/R0710.aspx?id=206405 accessed 7 August 2019.

[94] Trademark Directive, Art. 1(2).

[95] See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22.

[96] See Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21, Art. 3.

While the specialized regulation for the protection of trade marks have increased, the use of this provision as a basis for protection has decreased, and it serves to fill the gaps that may occur between the more specialized legislation, such as for unregistered business signs of mere local importance and usually quoted together with the general clause in section 3. Thus, the DMA provides a bouquet of general provisions that may serve to supplement the protections in specialized legislation, particularly if the use is misleading consumers, or otherwise makes unfair use of distinctive business features for example in comparisons with other products.

4.8.9 Domain names

Finally, a small cohort of specialized legislation may provide relevant protection for various aspects that are distinctive for your business. Regulation of domain names may be of great importance and the domain name is typically the first sign any company registers. Importantly the registration of a name in one system (as a domain name or trade mark) does not by itself give rights in another system. Therefore one needs to observe the conditions in all the acts and register a domain name *and* a trade mark. A domain name consists of a generic part ('.dk') and a second order name ('ku.dk'). While there may be many different domains registered with the ending '.dk', only one domain may be registered with the combination 'ku.dk'. You may of course register your own trade mark as a domain name. However, the problem may be that somebody else has already registered it. This may lead to different scenarios where either the trade mark regulation, the DMA or the domain name act are relevant. If you have a registered trade mark, then you may prohibit others from using it for commercial communication. This means that if the person having registered your trade mark as a domain name is using the domain for commercial purposes, this should be assessed in accordance with the protection provided by the trade mark act. However, it will also be relevant who registered first. Registration of domain names for the purpose of selling them is explicitly prohibited in the Danish Domain Name Act section 25, which also includes a general clause calling for 'good domain name practice' (in Danish: '*god domænenavns skik*'). However, it is not per se illegal to sell a domain name for more than you have bought it for. Finally, the DMA may provide useful provisions, such as the general clause in section 3, for the myriad of situations in between that may occur at the intersection of domain names and trade marks. Disputes regarding

.dk domain names are referred to the dispute board for domain names,[97] which provides a cheap and expedient route for resolving most issues related to domain names.

4.8.10 Other legislation with trade mark relevance

The Trademark Act, the Marketing Act and the Domain Name Act are the most important laws in Denmark when protecting your distinctive business features. However, the DCA contains rules regarding company names: for example, when establishing a limited liability company (ApS or A/S),[98] the name must be distinctive and not create confusion. Use of personal names in the line of business are governed by the Names Act (*Navneloven*), which may be useful if you use your own names for your company. Furthermore, Danish and EU rules may apply for so-called EU-collective marks and certification marks that are used to signify quality, guarantee or associations of traders and for geographical indications and designation of origin.[99]

4.8.11 Design

The vast majority of goods we encounter in our everyday life has been produced on an industrial scale. A significant amount of thought goes into the exact shape, functionality and appearance of goods, from bathroom utilities to consumer electronics, kitchen gear, cars and bicycles. In consumer society these details may be decisive for consumer preferences. It matters how your mobile phone looks and how it feels to hold in your hand. Therefore, protection of the design of a product may be a valuable asset to your business. The legal instruments available may vary between jurisdictions outside EU. In the US there is no *sui generis* protection for designs and you would have to look elsewhere, such as copyright or patent law, for protection of a design depending on the aesthetic and technical characteristics of the design. In EU the design directive[100] provides

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[97] In Danish: '*Klagenævnet for domæne navne*', Disputeboard for Domain Names in DK www.domaeneklager.dk/en accessed 7 August 2019.

[98] Danish Companies Act ('*Selskabsloven*'), No. 763 of 23 July 2019, § 2 www.retsinformation.dk/Forms/R0710.aspx?id=209846 accessed 7 August 2019.

[99] Trade Mark Directive, Arts 75(2) and 83(1); see also 'Certification and Collective Marks' (EUIPO) https://euipo.europa.eu/ohimportal/en/certification-and-collective-marks accessed 7 August 2019.

[100] See Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs [1998] OJ L289/28 (Design Regulation).

national harmonization of design protection while the design regulation[101] provides for an EU-anchored and EU-wide design protection.

With a design is meant 'the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation'.[102] Design protection may be designated to the appearance or composition of an article as well as preliminary drawings or models.

You can obtain a design protection covering Denmark via four different routes:[103]

1. Registered Danish design protection, governed by the Danish Design Act;
2. Unregistered EU design, governed by the EU design regulation;
3. Registered EU design, governed by the EU design regulation;
4. International design registration, governed by the Geneva Act of the Hague Agreement.

It costs from EUR 350 to register an EU design,[104] which provides protection in all EU Member States while it costs from approximately EUR 160 to register a design in Denmark.[105] From an economic perspective it seems attractive to apply for an EU design rather than a national design. This seems to be the general trend, where applications for Danish design protection have been decreasing while applications for EU design protection have been steadily increasing over the last decade. Just as with case trade marks, a caveat of applying for EU design protection is the requirement of 'unitary character' embedded in Article 1(3) of the design regulation. Unitary character means that a design can only be registered as an EU design if there are no hindrances for its registration in any of the EU

[101] See Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs [2002] OJ L003.

[102] Design Regulation, Art. 1(a). This formulation has been translated into the Danish implementation of the directive in the Danish Design Act, No. 89 of 29 January 2019 www.retsinformation.dk/Forms/R0710.aspx?id=206407 accessed 7 August 2019.

[103] Jens Schovsbo and Niels Holm Svendsen, *Designret – Designloven med kommentarer* (DJØF forlag 2013) p. 29.

[104] 'Fees and Payments' (EUIPO) https://euipo.europa.eu/ohimportal/en/rcd-fees-and-payments accessed 7 August 2019.

[105] See DKPTO's list of fees for Patent, trade marks, utility models and design registrations http://iprights.dkpto.org/patent--utility-model/prices-and-payment.aspx/ accessed 7 August 2019.

Member States. The unitary character requirement also means that if an EU design is invalidated in one Member State it is invalid in all Member States. While this requirement of unitary character can provide some reservation for the registration of an EU right in relation to trade marks, this seems less of a problem for designs.

Besides falling within the scope of the design definition, a design must be *new* and have *individual character*.[106] A design is considered new if no identical design has been made publicly available anywhere in the world before the day the application was submitted (priority day). Individual character means that the design must be sufficiently different from previous designs taking into consideration the freedom of the designer and the overall impression of the informed user.[107] These requirements for protection apply regardless of whether you choose to protect your design with a design registration or as an unregistered design right. You establish a priority date for a design when applying for registration. If on the other hand you want to settle with the protection as an unregistered design it is still important to be able to prove when you conceived the idea. For that purpose, the Danish PTO offers an online service where you can send in documentation of your design and you receive a certificate documenting the date and time of submission, thus establishing a 'priority date' for the unregistered design. This service is available for DKK 625 (approximately EUR 85).[108] You may register your design in Desdoc and subsequently apply for a design registration within 12 months from the publication without your registration being novelty destructive for the subsequent application for registration. However, you should be aware that different rules regarding novelty may apply in jurisdictions outside EU.

Finally, it is important to keep in mind that designs may also contain features that could get protection from other forms of IPR. Technical features may be protected by patent or utility model protection and some technical features are explicitly excluded from design protection. This is the case if the design concerns features that are determined by

[106] Danish Design Act § 3 and Regulation (EC) No. 6/2002, Art. 4(1).

[107] For more guidance on this intricate evaluation, see 'Design Rights and the Assessment of Individual Character' ('*Novagraaf*') www.lexology.com/library/detail.aspx?g=1eb84e67-5872-405a-bd5b-4572f0d44f0e accessed 7 August 2019.

[108] Desdoc https://desdoc.dkpto.dk accessed 7 August 2019.

the technical function of the product.[109] Such features should instead be protected via a patent or utility model protection. However, designs with original aesthetic features may also be subject to copyright protection.[110] Copyright protection does not foreclose design protection and the two may thus overlap. Finally, a design feature that gives a product distinctiveness could also be registered as a trade mark. While the time span of design protection has a maximum of 25 years, trade mark protection does not have an expiry date. Thus, trade mark protection may be an attractive supplement or alternative in some cases.

4.8.12 Copyright

Copyright protection is provided for a multitude of things. You are probably already using software programs to make pitches and presentations for your start-up, writing text to your website and maybe you have made illustrations to spice up your press kit. You may also be selling beautiful vases, knitted sweaters or other products that are subject to copyright protection. This means that you and your start-up are already soaked in copyrights. Just like the other fields of IPR we have looked at in this chapter, copyright protection is subject to significant efforts of internationalization. Particularly in the last two decades, the EU has been the front runner in adapting the copyright system to the technologies of the twenty-first century. However, the three basic principles governing the copyright domain date back to the Berne Convention from 1886. The *principle of automatic protection* means that copyright protection is not conditional on compliance with formal requirements. In other words, if you have made an original, aesthetic work, you have a copyright in it. You do not have to file an application or observe other formal requirements to get the copyright. The *principle of territoriality* is the golden standard in international law and means that Danish copyright law applies to infringements that have happened on Danish territory. If a Danish artist's work is infringed upon in Germany it is German copyright law that applies. Finally, the *principle of national treatment* means that countries must provide at least the same protection to foreign authors as is provided for Danish authors. If a US artist's work is infringed upon on Danish territory, we must provide at least the same protection for the

[109] The so-called 'Must-fit' rule, see Danish Design Act § 8, sec. 1(1) and Regulation (EC) No. 6/2002, Art. 8.

[110] See section 4.8.12.

work as we would if it had been a work made by a Danish artist. These basic principles have subsequently been reiterated in revisions of the Berne Convention, and in 1994 in the TRIPS Agreement, and are still important basic principles governing copyright protection. For the last two decades several EU directives have also been issued in the copyright domain. An important purpose of this body of legislation is to adapt the legal framework to the challenges emerging from the all-encompassing digital world and the implications this has for the protection and use of copyright protection. The intersection of the digital world and copyright are providing continuous challenges, including for artists trying to ensure the protection and fair remuneration for their works and Internet service providers facing liability issues for providing their services. Denmark is a member of the Berne Convention and TRIPS, and has implemented the many EU directives.

Copyright covers original aesthetic creations such as literary works, paintings and music but also software programs, blueprints and architecture. If you have made use of another person's copyrighted work and made a performance of it you get an IP right of your own in your performance or recording. These are the so-called 'neighbouring rights'. The broad scope of objects covered by copyright and neighbouring rights along with the automatic emergence of the right mean that it is impossible to avoid dealing with copyright in what we do, either because we *produce* things that are copyrighted or because we *use* things that are copyrighted. Therefore, licences and agreements are extremely important in this domain either to ensure that you are not infringing upon someone else's copyright or as part of your own business model. The starting point of a copyright is always the maker of the work. However, many copyrights are transferred to other parties either entirely or partially. If you have an employee or a consultant or hire an artist to make a visualization of your business plan, write text for your webpage or compose music for your next documentary, it is important that you ensure that you also get the appropriate rights to use these works for your purposes. If your employee creates copyright-protected work as part of her job, it follows from Danish case law that you as the employer get some rights to use the work if the work is necessary for the conduct of your usual business and the work is within the job description of the employee. This of course leaves open the questions what is '*necessary*' and '*usual business*' and '*within the job description*'. The practical way to eliminate the uncertainty is by having an employment contract that provides clarity on these points.

Likewise, if you have external parties such as consultants or freelancers working for you, it is important that you ensure that the rights to these works are transferred to you, not only in relation to the immediate use of the works but also the future uses that could be relevant. The reason this can be tricky is that contracts on the transfer of copyrights are traditionally interpreted narrowly and in favour of the creator. If a designer creates an illustration for you to use in your Power Point slide deck, you cannot assume that you can subsequently use the illustration in a video presentation on YouTube. If you do, you risk that the designer can charge you for the use of the illustration again in this new context. Therefore, you will usually try to formulate very broad agreements for the transfer of rights to copyrighted material, since you never know what or how you may want to use the material in the future, and it would be impractical and potentially expensive to have to negotiate a new agreement and fee every time you come up with a new use. Finally, collecting societies such as KODA and Gramex collect payments for the use of copyrighted works, and distribute the income amongst the right holders. For instance, if you want to play music in your café, you pay a fee for the music to a collecting society rather than paying each artist individually.

These features of the copyright regime may of course also be a stepping stone for your own business model where you can sell licences for specific uses of your copyrighted products, thus ensuring your perpetual business by limiting the licence in time, geography, format and purpose.

It can be breath-taking to start considering the amount of copyrights you potentially need to clear in order to make a Power Point presentation using some illustrations, pictures and models found in a Google search. These rights should not be ignored. Different mechanisms have been developed to make it easier to navigate this landscape of rights without having to go through negotiations every time. Several payment platforms offer easy access to content. Other platforms offer free access and use of content based on standardized licensing regimes such as Creative Commons (CC). However, you should still be aware of the limitations that are still embedded in the use; for example, CC-licences may come in a form that prohibits commercial use of the material or licences may contain a 'share alike clause' known from open source software. This entails that you may use the copyrighted material but also agree to share your own further developments of the copyrighted material. This is important to keep in mind if you have licensing fees at the centre of your

business model. If you have some open source software code in a program you have written, this may oblige you to make your own code available on open source terms. It is your responsibility to check which licence terms apply if you use copyrighted material. There are various services that offer to scan your source code for open source software.[111]

4.8.13 Protection of compilations of data (databases, etc.)

Collecting data on consumers may inform your business decisions and enable you to target marketing activities and optimize your business. Data has therefore become an extremely valuable asset in the current economic environment, and it is relevant to consider which legal remedies are available to protect such assets from the perspective of the start-up, that is as a business asset.

There are three primary ways to protect your datasets available within the EU and Denmark. Firstly, copyright protection may apply if the collection of data can be said to be original. This can be a tricky evaluation since each bit of data is not necessarily original. The question is whether the structure or selection comprising the aggregation of the data can be said to constitute an intellectual effort. In that case, copyright protection may be provided for the database as an original work.[112]

The EU database directive provides a *sui generis* right targeted at providing legal protection for databases where a substantial quantitative or qualitative investment has been made. This rule is implemented in the Danish Copyright Act Article 71(1) and (2). If you have compiled a significant amount of information or have made significant investments in such compilation of information, you have an exclusive right to copy the database or substantial parts of it and make it available to the public. The database protection also provides exclusivity for insignificant parts of the content if the use is systematic, contrary to normal exploitation and the interests of the database owner.[113]

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[111] See e.g. Black Duck Software https://blackducksoftware.com accessed 15 September 2019.

[112] See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20, Arts 1–6.

[113] For more information see 'Protection of Databases' (European Commission 2018) https://ec.europa.eu/digital-single-market/en/protection-databases accessed 15 September 2019.

Furthermore, a database may be kept secret and qualify as confidential commercial information for which protection should be provided according to the Paris Convention and TRIPS. However, it should be kept in mind that neither database protection nor trade secret protection hinder the independent creation of a similar database by others.

Finally, data exclusivity has been implemented in the life science domain to protect the data submitted to authorities in order to obtain marketing approval for new pharmaceuticals.[114]

4.8.14 Complaints and enforcement

The grant of IPRs has to a significant degree been embedded in pan-European systems governed by the EU Intellectual Property Office (EUIPO) and EPO. These systems exist in parallel and collaborate with the national systems and institutions. Complaints regarding the grant of patents, trade marks, designs and utility models made by the Danish PTO can be brought to the Appeal Board for Patents and Trademarks,[115] a dispute resolution body established by law.[116] Likewise, decisions regarding the grant of design and trade marks made by the EUIPO may be appealed within the EUIPO system[117] and decisions regarding patent applications filed at the EPO through the EPO system.[118]

The enforcement side of IPR is still primarily the prerogative of national courts. In Denmark it will often be the Danish Maritime and Commercial Court that is designated for IPR cases. As mentioned in the section on domain names there also exist dispute resolution boards that provide cheap and expedient methods for settling disputes. However, also in this area, the CJEU has attained a significant influence in the legal devel-

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[114] EU Directive 2001/83 introduces the so-called 8+2+1 system providing up to 12 years of data protection for clinical trial data. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311, Art. 8.

[115] In Danish '*Ankenævn for Patenter og Varemærker*', https://naevneneshus.dk/start-din-klage/ankenaevnet-for-patenter-og-varemaerker/ accessed 7August 2019.

[116] Danish Patent and Trademark Appeal Board Act, No. 892 of 21 September 2009 www.retsinformation.dk/Forms/R0710.aspx?id=125551 accessed 7 August 2019.

[117] 'Appeal' (EUIPO) https://euipo.europa.eu/ohimportal/en/appeal accessed 7 August 2019.

[118] 'Euro-PCT Guide: PCT Procedure at the EPO' (*European Patent Office*) www.epo.org/applying/international/guide-for-applicants.html accessed 2 March 2020.

opment where it has the final say in the interpretation of EU directives and regulations including in the domains of copyright, design and trade mark protection. Enforcement of patents is primarily a domain of national courts while the Unified Patent Court (UPC) for Europe has yet to become a reality. Only in the biotechnological domain does the CJEU have some influence via the biotech directive,[119] which means that some cases in this area may be referred to the CJEU by national courts.

4.8.15 Concluding remarks on IPR

The importance of IPR has been increasing steadily over the last several decades. At the same time the strategic use of IPR has also become much more nuanced. IPR awareness is also extremely important for start-ups both for long-term and short-term value capture as well as to avoid risks and ensure freedom to operate. Furthermore, for the many start-ups that are not engaged in primary production of tangible assets, IPR is often the most important business asset generated.

Denmark is generally well integrated in the European IPR systems and has implemented EU directives and international treaties in the national legislative framework. The court system works well and civil servants generally have a high level of proficiency in English which eases communication. Furthermore, there are several dispute resolution bodies that provide for sound, expedient and not too costly resolution of disputes.

4.8.16 Protection of personal data – GDPR

In Denmark the governance of the protection of personal data is undertaken by the Danish Data Protection Agency.[120] The agency processes complaints about unlawful processing of personal data, receives reports on data breaches from data controllers and conducts control visits. To get an overview of what you should be aware of regarding personal data in your start-up, start by identifying all the personal data that your start-up uses – data on employees, clients, customers or users – and get a grasp on how you handle these data and what the foundation for you to handle these data is. The following will briefly outline some of the basic principles

[119] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L213/13.

[120] Danish Data Protection Agency www.datatilsynet.dk/english accessed 7 August 2019.

necessary to get an idea of the structure, distinctions and most important obligations introduced by the General Data Protection Regulation (GDPR).

4.8.16.1 Basic principles

The basic principles governing all processing of personal data is found in Article 5 of the GDPR. Generally, personal data must be processed in a lawful, fair and transparent manner for specified purposes and you may not collect more data than necessary to pursue these purposes. You must keep the data updated and not keep it for longer than necessary and have appropriate security measures in place to protect the data from unlawful processing, loss, damage or destruction. Article 6 states the grounds for lawful processing of data. Processing on the basis of consent of the data subject or to effectuate the performance of the contract are two of the common grounds for data processing found in Article 6(1)(a) and (b).

4.8.16.2 Definition of personal data

Personal data is any piece of information that can be traced back to a specific person. Since May 2018, the protection of personal data has been governed by the GDPR. The regulation distinguishes between three classes of personal information:

1. Ordinary data, GDPR Article 4(1);
2. Special categories of data, GDPR Article 9;
3. Data related to criminal conviction and offences, GDPR Article 10.

Different restrictions and requirements apply to the processing of these different categories, which you must be aware of.

4.8.16.3 Data controller and data processor

The GDPR distinguishes between the data controller and the data processor. The data controller is the natural or legal person that decides the means and purpose of the processing of the data.[121] The processor is the

[121] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1, Art. 4(7).

natural or legal person processing the data on behalf of the controller.[122] The processor and the controller have different sets of obligations related to the personal data. For example, it is the controller that must be able to document that the processing of personal data is lawful for example by providing adequate documentation of the consent of the data subject for the processing.

4.8.16.4 Consent

When you visit websites, sign up for newsletters, order goods or services or just browse around on the Internet, you leave a trail of data behind. The processing of this data that is more or less knowingly littered around the online environment by users may tell us a lot about their future possible decisions and preferences, and therefore be extremely useful to inform your start-up's business decisions, product development or target sales efforts. The most common basis for processing this rich collection of personal data is the consent of the data subject. There are no specific formal requirements to the format of a consent. It can be written, oral, given by ticking a box or signing a document. However, as data controller you must be able to document the consent.[123] This makes oral consent somewhat impractical. Another issue is that the consent must be crafted in a way so the person giving consent actually knows (or at least has a fair chance of knowing) what he or she is consenting to. A consent in the meaning of the GDPR thus means 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'.[124]

When addressing the issue of personal data in your start-up it is a good idea to be aware of the procedures and routines for handling personal data from the beginning and ensure the implementation of good practices from the very beginning. If the correct procedures and processes are in place for storage and documentation the requirements of the GDPR do not have to be overly burdensome or inhibitive. There is a rich offering of courses, guides and services that may help you implement the practicalities of the GDPR. One place to start is with the extensive materials

[122] ibid Art. 4(8).

[123] ibid Art. 7(1).

[124] ibid Art. 4 (11).

and guidelines provided by the EU Commission to help companies and individuals become compliant with GDPR rules.[125] Furthermore, national data protection agencies can answer specific questions and are the point of reference if you face issues of breach of data security or the GDPR rules.[126]

4.9 Operational liabilities

A running start-up faces a range of potential legal liabilities related to various aspects of its operations. Depending on the industry and area within which the start-up operates, it will face diverse risks. However, many of the industries within which start-ups operate have adopted rules and laws that specify companies' obligations, including fintech, pharmaceuticals, medical devices or physical products for customers. All other non-specific areas will be covered with the general tort law (*Erstatningsret*).[127] Moreover, if it is a highly sophisticated industry, most of the start-ups will need to receive some form of a licence or an authorization in order to start offering their services and products. Therefore, it is always advisable to become acquainted with all of the existing and possibly pending laws and guidelines.

4.10 Dissolving a company

When a company is in financial difficulty and is unable to pay its creditors at maturity, the board and management of the company are obliged to take into consideration the best interests of all stakeholders in the company, including the company's shareholders and its creditors. Sections 108 and 127 of the DCA explicitly stipulate that shareholders voting at a general meeting and members of the board of directors and management may not act in a way that is clearly likely to grant certain shareholders or others an undue advantage at the expense of other shareholders or the company. Under Section 119 of the DCA, the board of directors and management

[125] GDPR.EU https://gdpr.eu accessed 7 August 2019.

[126] Danish Data Protection Agency www.datatilsynet.dk/english accessed 7 August 2019.

[127] Law on Liability ('*Bekendtgørelse af lov om erstatnigsansvar*'), No. 1070 of 24 August 2018.

must ensure that a general meeting is held no later than six months after it has been ascertained that the equity of the company falls below half of the company's financial position and, if deemed necessary, submit proposals for necessary actions, including potentially dissolving the company.

As a starting point, a decision to wind up an insolvent company must be adopted at a general meeting by a majority of at least two-thirds of the votes cast and the capital represented. A simple majority will suffice if the dissolution is prescribed by statute, by a company's Articles of Association or by the DBA under the DCA.

One or more bankruptcy trustees can be elected by a simple majority, but shareholders representing at least 25 per cent of a company's share capital may appoint an additional trustee to manage the bankruptcy together with the trustees appointed at the general meeting. The general meeting can resolve to impose on the management that an insolvency petition be filed. However, the management is entitled to, and under certain circumstances obliged to, file for insolvency proceedings regardless of whether the general meeting concurs.

After a bankruptcy order is issued, the trustee assumes control of the company, which also suspends the powers of the shareholders. The trustee takes over control of the company's estate and the company/debtor loses control over its assets. The trustee will sell the assets and distribute the dividend in accordance with the Bankruptcy Act.[128] The trustee can ask for the mail to be intercepted at the address of the bankrupt and have this forwarded to his office. Any employee will be terminated by the trustee if he or she is not transferred to another company as part of a transfer agreement.

If all shareholders agree, once a company has paid all creditors, it may be dissolved by the company's shareholders making a declaration to the Danish Commerce and Companies Agency that all debts, whether due or not, have been paid and that it has been resolved to dissolve the company. Otherwise, a resolution on voluntary dissolution by liquidation must be passed by the general meeting by at least two-thirds of the votes cast as well as at least two-thirds of the share capital represented at the general meeting.

[128] Bankruptcy Act ('*Konkursloven*'), No. 11 of 6 January 2014.

In the case of a start-up, it is important to protect predominantly its intellectual property from possible bankruptcy, so that it would not become a part of the bankruptcy estate in case a start-up would become insolvent. This is usually done by separating the operation of a company and the IP. Ideally, one would establish the operation company (OC) and an independent second entity that would own the IP and would licence the IP to the OC. Such structure is not 100 per cent bulletproof, but usually can provide the start-up with a second chance. The second option would be to create a security over the IP by way of a mortgage, where the lender would be the founders, who would lend the start-up (borrower) the IP. To perfect the mortgage, the lender (creditor) must register the mortgage in the Personal Registry. The registration must be renewed every 10 years. Registration is subject to a registration fee of 1.5 per cent of the secured amount and a filing fee of DKK 1,400.

4.11 Start-up environment

The start-up environment in Nordic countries is extremely developed and undoubtedly offers a legal and business framework that is supportive of new business ideas and ventures, both for Scandinavians as well as internationals. To provide you with some data, the start-up scene grew substantially between 2011 and 2019. Seed investments doubled from EUR 0.35 million to EUR 0.7 million from 2017 to 2018, series A tripled from EUR 3.3 to EUR 9 million, and series B rounds increased from EUR 8 to EUR 11 million within a year.[129]

There are a great number of start-up events, meetups and hubs across all Scandinavian countries. New accelerator and incubator programmes are being established together with business angel networks and VC firms. Furthermore, universities are active participants in the market. They have their own start-up or digitalization centres offering space and support for their graduates, while being open to cooperation with corporations. An industrial PhD is also a possibility. Denmark also offers outstanding industry clusters regarding life science, ICT, design, clean tech and sustainable energy. Denmark has a large network of public and private entre-

[129] Irena Chloe Angelov, 'Copenhagen's Start-up Ecosystem at a Glance' (*EU-Startups*, 27 June 2019) www.eu-startups.com/2019/06/copenhagens-startup-ecosystem-at-a-glance accessed 21 July 2019.

preneur supporters, accelerators and incubators. Start-ups have access to pitch competitions, investment funds, collaborative research centres and much more to unleash the potential of your start-up.

Despite higher taxes than many other European countries, Denmark offers not only healthcare and social care, but also leading digital public infrastructure and thus simple interaction with the public system. Bureaucracy in business, government and the daily lives of Danes is very limited, and Denmark's business regulation is known for its low level of red tape. Moreover, almost everyone speaks English and therefore communication ought to be uncomplicated.

The key industries, according to the Ministry of Foreign Affairs of Denmark are:[130]

- Cleantech
  - Wind power
  - Bioenergy
  - Energy Storage and Smart Grid
  - Green Transportation
- Data Centres
- Tech
  - Robotics
  - Sound Technology
  - Wireless and Mobile Technology
  - Software Development
- Life Sciences
  - Pharma and Biotech
  - MedTech
  - eHealth
- Food
  - Food Ingredients
  - Food Technology
- Maritime
- Design and Innovation.

[130] 'Set up Business in Denmark' (Ministry of Foreign Affairs of Denmark) https://investindk.com/set-up-a-business accessed 22 July 2019.