

VC Investments of Strategic Investors – Objectives and Expectations, Specific Deal Terms and related Legal Challenges

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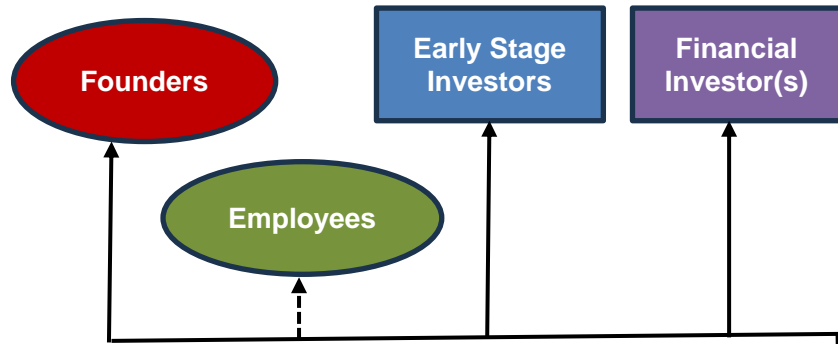
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THE CVC INVESTMENT SETTING AND THE ROLE OF THE STRATEGIC INVESTOR

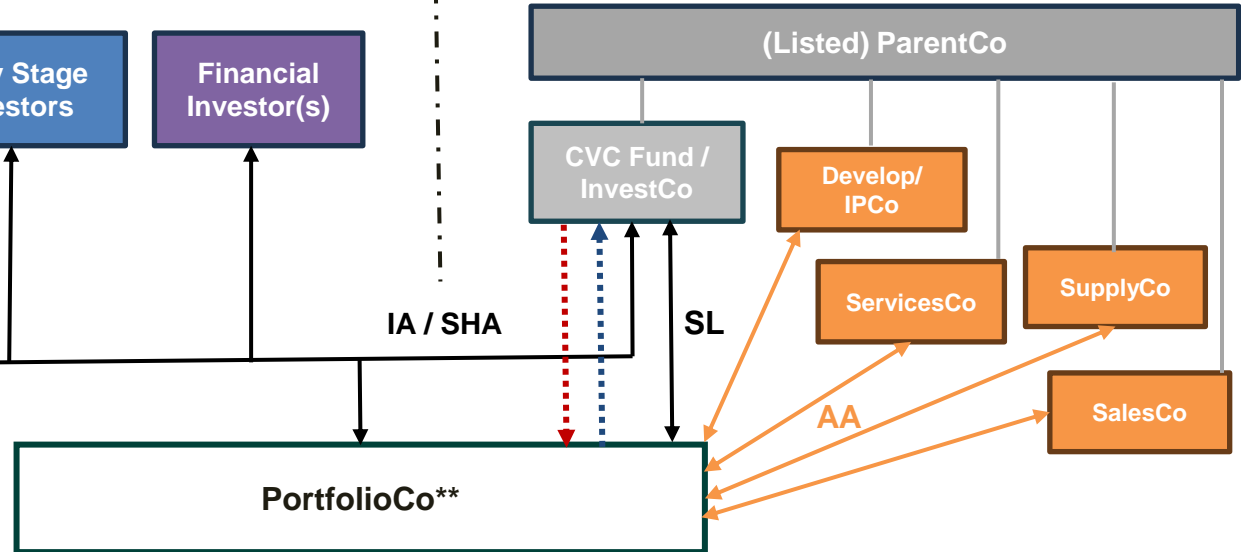
The CVC Investment Setting

To set the stage, who are the parties involved in a CVC transaction?

Existing Shareholders / Investors



New Strategic Investor / Partner



Investment Documents

IA = Investment agreement
SHA = Shareholders agreement
SL = Side letter

** Start-up / scale-up in form of Swiss stock company (*Aktiengesellschaft*)

Flow of funds
→ (red dotted arrow)
Consideration
(e.g. pref shares)
← (blue dotted arrow)

Partnering Documents

AA = Ancillary agreements
(R&D / co-development, collaboration, licensing, services, supply and distribution, etc.)

Characteristics, Objectives and Expectations

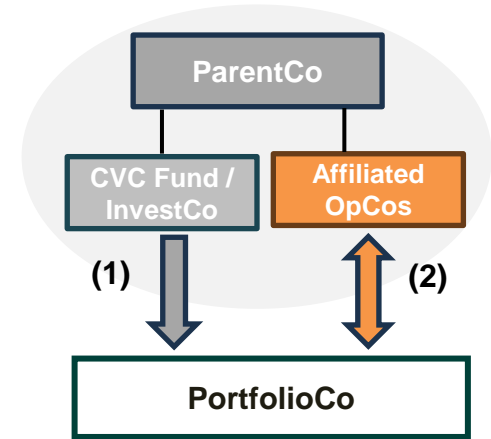
What do Strategic Investors as industry experts aim to achieve and what do they expect?

Characteristics of Strategic Investors / Investments

- Seasoned industry experts
 - Business development / innovation units of large corporates
 - Specialized corporate VC funds (CVC)
- Corporate VC: (1) investment and (2) partnering

Objectives and Expectations

- Investment activities to pursue financial and strategic goals
- Long-term benefits of collaborating with PortfolioCo
- Business opportunities
 - Access to innovative technologies
 - Joint development of products, solutions or services
 - Access to new markets
 - Potential acquisition of PortfolioCo
- Commitment from Founders



Contributions from Strategic Investors

What are Strategic Investors as industry experts and partners able to contribute?

Financial Contributions

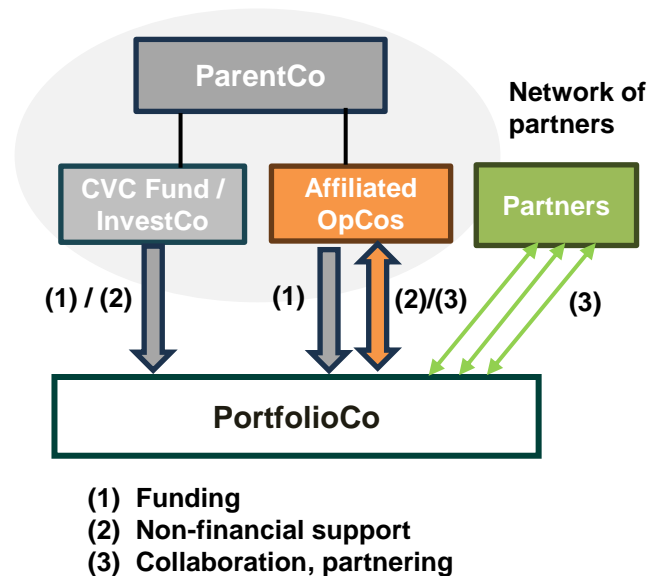
- (Equity) funding
- Payments under ancillary agreements (e.g. like royalties)

Non-financial Support

- Industry expertise
- Management expertise (legal, finance, tax, etc.)
- Resources, use of platform

Business Partnering / Collaboration Opportunities

- Cooperation
- Provision of services
- Access to network



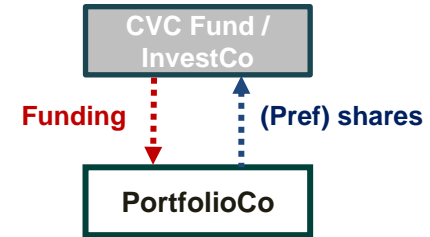
THE INVESTMENT BY THE STRATEGIC INVESTOR

The Investment by the Strategic Investor

Strategic Investors provide equity funding and aim to manage their investment

Structure of Investment

- Direct equity investment into PortfolioCo
- New series of (preferred) shares
- Funding in cash or other form (e.g. contribution in kind)
- Single investor round or co-investment setting

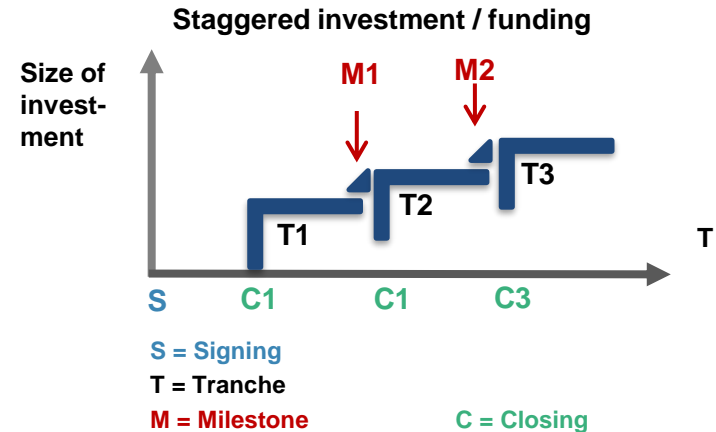


(Financial) Preferences for Strategic Investor

Milestone Funding Approach

- Purpose and mechanics
- Milestones
 - Objective measurable criteria
 - Decision on achievement
 - Dispute resolution mechanism / expert
- Staggered legal implementation

Incentives for Founders; Capital Pool for ESOP



The Investment by the Strategic Investor

Strategic Investors expect a sound process and a suitable documentation

Other Key Investment Terms

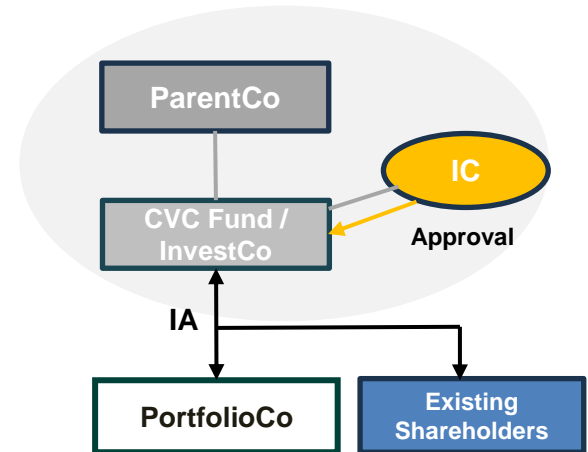
- Satisfactory due diligence (expert teams, timing)
- Capital structure of PortfolioCo (pre-closing)
- Conditions precedent
- Representations / warranties, remedies
- Other customary VC deal terms

Approval from Investment Committee (IC)

- Affiliation with ParentCo
- Different stakeholders

Documentation

- Investment agreement (IA) >> all parties
- Key deliverables at closing
 - (revised) articles of incorporation of PortfolioCo
 - Capital increase documentation
 - Shareholders agreement (SHA) >> all parties
 - Ancillary agreements



THE PARTNERING AND COLLABORATION

General Undertakings and Business Conduct

Strategic Investors expect high standards of business conduct and monitor compliance

General Undertakings

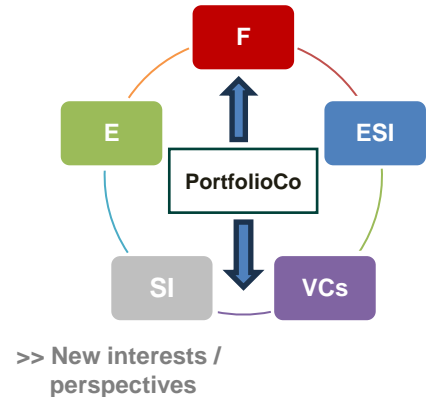
- Different interests of stakeholders >> Founders (F), Employee Shareholders (E), Early-stage Investors (ESI), VCs, Strategic Investor (SI)
- General undertakings vs. tailor-made undertakings
- Business plan / use of funds

Company Policies and Specific Covenants

- Standards of corporate governance
- Compliance with laws
- Business conduct covenants (e.g. international standards; ESG/SDG focus)
- Reporting obligations

Documentation

- Shareholders agreement (SHA) >> all parties
- Side letter to SHA >> bilateral agreement Strategic Investor - PortfolioCo



Ancillary Agreements for Business Partnering

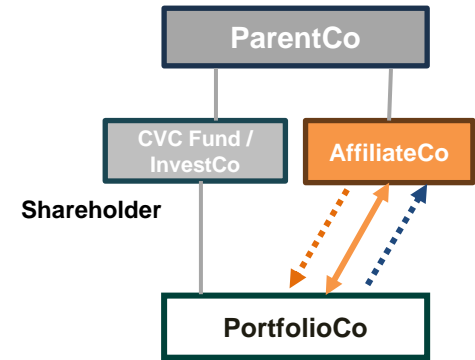
Strategic Investors look for partnering and collaboration opportunities

Structure and Typical Areas

- Collaboration of PortfolioCo with Strategic Investor
- Typical partnering fields / examples of ancillary agreements (AA)
 - R&D and co-development agreements
 - In- / out-licensing agreements
 - Use of platform (e.g. labs) and provision of services
 - Supply / distribution agreements
- Interplay with VC framework: free-standing contract vs. need for alignment

Legal Framework and Challenges

- Interests of PortfolioCo / fiduciary duties of directors
- Dealing at arm's length / transfer pricing
- Capital protection due to affiliation with CVC Fund / InvestCo
- Protection of IP / know-how
- Confidentiality / non-solicitation
- Term and termination
- Independent contractors / no simple partnership



Example:
Supply of **goods / services**
against **compensation**

Corporate Governance, Information and Control

Strategic Investors are a partner and expect to have a seat on the table

Board Composition / Investor Director

- Nomination right of Strategic Investor
- Investor Director often represents a class of shares
- Board observer

Role and Duties of Investor Director

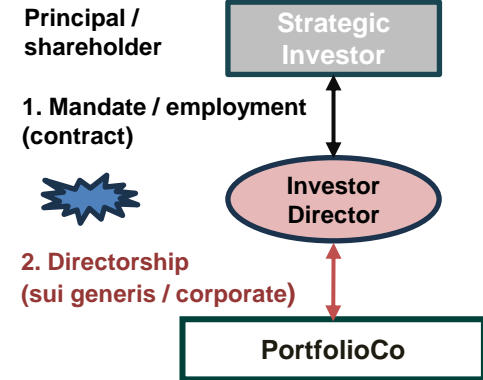
- Fiduciary duties of care and loyalty
- Safeguarding interests of PortfolioCo
- Double nexus of duties >> priority for interests of PortfolioCo
- Right to information, duty of confidentiality
- Non-compete / non-solicitation

(Potential) Conflicts of Interest (Col)

- (Investor) Director's obligations
- Measures >> depending on nature / magnitude of Col



Corporate Opportunities



Examples for Measures

1. Allow director to participate, but exclude from vote
2. Submit matter to shareholders meeting
3. Delegation of matter to third party expert
4. Obtain fairness opinion on matter in question
5. Exclude conflicted director from deliberation and vote (simple recusal)
6. Exclude conflicted director from deliberation, vote and access to materials, no invitation (foreclosure)

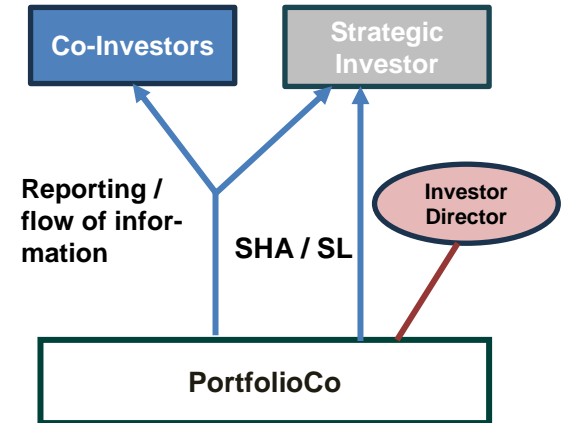
Corporate Governance, Information and Control

Strategic Investors need information and seek for sound checks and balances

Information Rights of Strategic Investor

- Information for monitoring investment, reporting
- Statutory rights as shareholder
 - Right to information
 - Right to inspect
 - Requirements and limits
- Contractual rights
 - Regular reporting / ongoing reporting (extraordinary)
 - As a corollary: need for confidentiality obligations
 - Equal treatment of shareholders
- No duty of loyalty >> contractual obligations regarding non-use of confidential / proprietary information

Auditor, (international) Accounting Standards



Corporate Governance, Information and Control

Strategic Investors expect to be involved and to have a say on important matters

Important Board Matters

- Board composition
- Quorum of attendance
- Qualified quorum for important matters
- Rules for dealing with deadlock situations

Important Shareholder Matters

- Key topics for Strategic Investor
- Corporate approvals vs. contractual consents
- De facto veto rights and their limits

Documents to address Governance, Information and Control Issues

- Shareholders agreement (SHA)
- Side letter to SHA?
- Articles of incorporation
- Board regulations
- Director agreement

SECA Model VC SHA (large) (for illustration)

*"Each of the Shareholders acknowledges and agrees with the other Shareholders: (a) not to cast an affirmative vote in respect of any of the important shareholder matters specified in Part A of Annex 6 ("**Important Shareholder Matters**"), unless any such Important Shareholder Matter will be approved by at least: (i) [66 2/3%] of shareholder votes [and the absolute majority of the share capital of the Company] [represented at the relevant General Meeting of Shareholders]/[issued by the Company] and (ii) [66 2/3%] of shareholder votes of the holders of Preferred Shares [represented at the relevant General Meeting of Shareholders]/[issued by the Company], whereby each Share shall entitle its holder to one vote irrespective of the class to which it belongs; [...]"*

EXIT CONSIDERATIONS

Selected Exit Topics and Special Deal Terms

Strategic Investors seek for a return on investment and strive for a successful partnering

Interests and Particularities

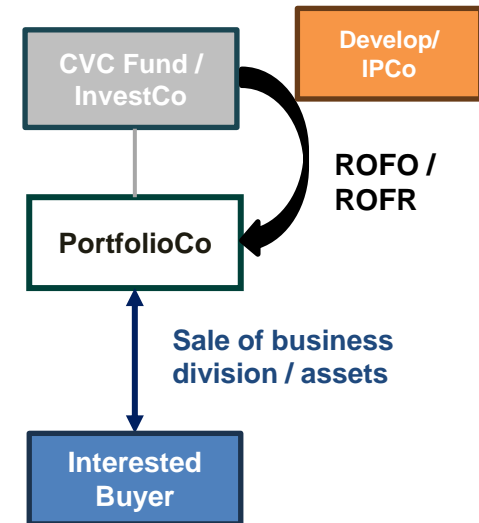
- Long-term (business) perspective of Strategic Investor
- Flexibility with respect to exit scenarios
- Avoid hold-out risks

Special Exit Terms / Rights of Strategic Investor

- Structuring of right of first refusal (ROFR) / drag-along right
- Investor right of first offer (ROFO) / ROFR / right to match with respect to business related transactions (e.g. sale of assets, licensing)
- Call and put arrangements (e.g. if collaboration shall enable buyout / full integration over time)
- Put option
- Alignment of ancillary agreements (AA) with exit scenarios

Documentation

- Shareholders Agreement (SHA) >> all parties
- Side letter to SHA?



KEY TAKEAWAYS, DISCUSSION / Q&A

Key Takeaways

Strategic Investments combine VC deal terms and business partnering terms

In brief

- **Strategic Investors** are **industry experts** pursuing financial and strategic goals
- **Strategic Investors** look for (1) **investment** and (2) **partnering opportunities**
- Strategic Investments **combine typical VC terms** with specific **business partnering terms**
- The **CVC transaction documentation** usually consists of:
 - (1) a typical VC deal documentation (IA, SHA, corporate documents); and
 - (2) tailor-made ancillary agreements for business partnering
- Comparable to **joint ventures**, the following requires close attention in CVC deals:
 - Corporate governance, information and control mechanisms
 - Business partnering arrangements (dealing at arm's length)
 - Exit terms and special rights for Strategic Investor
 - Interplay of VC investment documents with ancillary agreements

[>> Discussion / Q&A >>](#)

Thank you for your attention

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