



Impact Investing – How SDG and ESG Goals Impact VC Transactions and Translate into Investment Deal Terms

A brief overview and legal snapshot - Switzerland

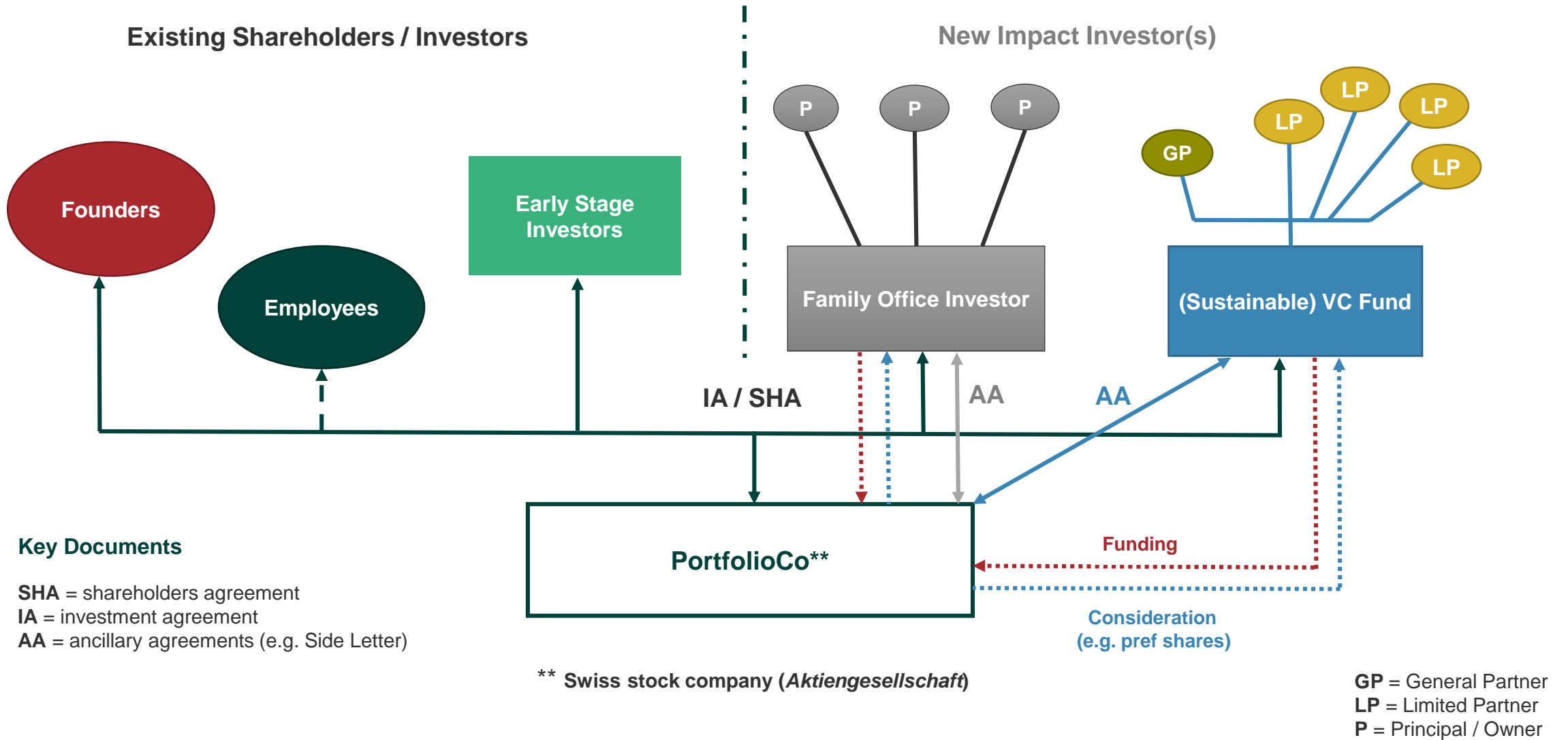
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- **Financing of VC-backed companies**
- **Direct equity investments**
- **Sustainable investment related terminology**
 - "ESG" refers to Environment, Social and Governance criteria
 - Socially responsible investing
 - Green investing
 - Impact investing
 - Sustainable investing
- **Types of impact investors**
- **Key corporate considerations**
 - Interests of the company; fiduciary duties of directors
 - Stakeholder Value vs. Shareholder Value

Overview on an Impact Investment Setting



ESG Investment Framework – From Soft Law to Hard Law?

Examples for illustration

International Standards

- UN Global Compact
- UN Guiding Principles (UNGPs) on Business and Human Rights
- 17 Sustainable Development Goals (SDG)



Investment Principles

- 6 UN Principles of Responsible Investment (PRI)



Governance Principles

- Swiss Code of Best Practice for Corporate Governance (SCBP) (2023)

ESG Regulations / Initiatives

EU

- European Green Deal, e.g. EU Taxonomy, Sustainable Finance Disclosure Regulations (SFDR)
- Corporate Sustainability Reporting Directive (CSRD), Non-Financial Reporting Directive (NFRD), etc.

Switzerland

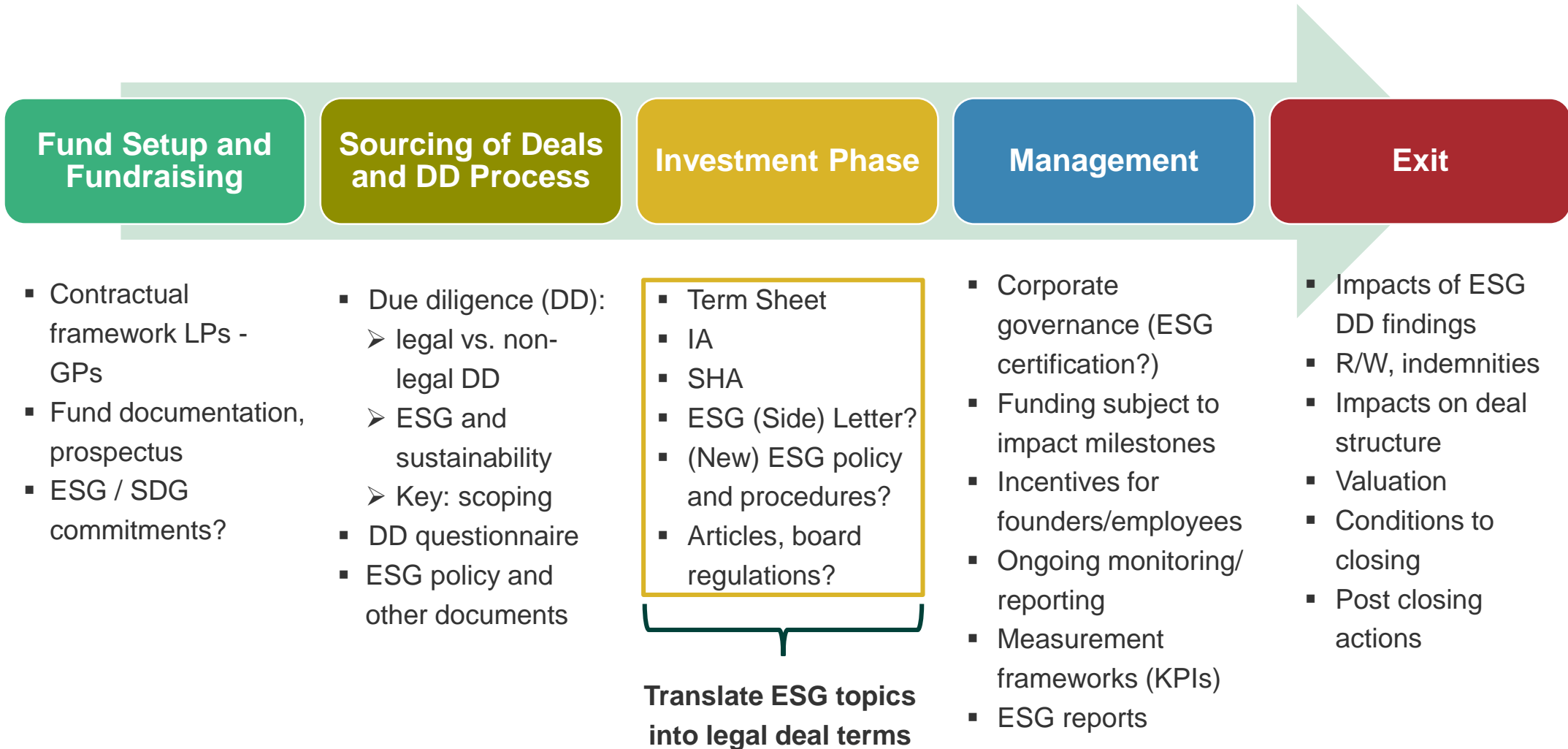
- Different regulations for ESG disclosures, reporting on non-financial matters
- Initiatives by Financial Market Supervisory Authority (FINMA)
- Climate-related legislation, etc.

Ongoing development from Soft Law to Hard Law

The Sustainable Investment Cycle – Impact of ESG / SDG Topics

Examples for illustration

Key Legal Topics



Translation of ESG / Sustainability Aspects into Legal Deal Terms

Examples for illustration – TS and IA



(Non-binding) Term Sheet (TS)

- **Outline of ESG / impact aspects and expectations**
- **Actions before signing**

Investment (and Subscription) Agreement (IA)

- **Staggered funding approach**
 - ESG / impact milestones
 - Funding subject to achievement of milestones
- **Specific ESG related representations / warranties (R&W) by Founders (and Company?)**
- **Conditions to closing**

Corporate documents of PortfolioCo

- **Articles of incorporation (e.g. purpose?)**
- **Organizational regulations, policies and directives?**

Translation of ESG / Sustainability Aspects into Legal Deal Terms

Examples for illustration – SHA



Shareholders Agreement (SHA)

- **Standards of corporate governance**
- **Business plan**
- **Company policies and specific covenants**
 - ESG policy or commitment to establish such policy
 - Business conduct covenants (e.g. international standards / legislation with ESG/SDG focus)
 - Reporting obligations (e.g. periodic ESG report) and information for Impact Investors
- **Important shareholder matters** (e.g. change purpose of PortfolioCo)
- **Important board matters** (e.g. change of ESG and other policies/regulations, incentives schemes)
- **Remedies**
 - Purchase option (e.g. material breach of SHA)
 - Put option for Impact Investors

(ESG) Side Letter for Impact Investors


- **Ancillary arrangement to IA and SHA:** Special rights and privileges for certain (important) investors or investors subject to special government regulations
- **Content**
 - Additional **information rights**
 - Obligation to adhere to certain **compliance** processes (incl. ESG measures / performance reporting)
 - Specific **covenants**, also with respect to subsidiaries (e.g. ESG principles, ESG targets)
 - **Put options** for exit (e.g. in case of imminent reputational damage)
 - More advantageous **exit terms** (e.g. only cash compensation, limited R&Ws, etc.)
 - No application of **non-compete clauses**, etc. to Impact Investor
 - Rights for Impact Investor to pursue further **similar investments**

Challenges with Side Letters:

- **Parties:** Often only PortfolioCo and Investor parties to Side Letter
- Possibility of **enforcement** (e.g. put option, limitations)?
- Problem with **confidentiality**?
- **Conflicts** with IA/SHA: Entire Agreement Clause

Entire Agreement Clause (e.g. SHA):

*With the exception of the Investment Agreement, this [Shareholders] Agreement including its Annexes constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes any agreement or understanding with respect to the subject matter hereof that may have been concluded between any of the Parties prior to the date of this Agreement. *The Parties confirm that in addition to this Agreement, there are no side agreements relating to the subject matter hereof between any of them that have not been disclosed to the other Parties and the terms of which may affect any of the rights granted to any of the Parties hereunder.**

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- Integration of topics of Side Letter into SHA / IA, whenever possible
 - Side Letter as Annex to SHA
 - Care with "Entire Agreement Clause"

In Brief

- Sustainability and SDG / ESG aspects are key topics
- Impact investing is not only a trend
- Professional (impact) investors have clear expectations
- Sustainability and ESG is a cross-sectional area and constantly evolving
- Impacts on transaction practice
 - Cooperation between different advisors (e.g. DD process)
 - Incorporation of ESG terms in legal documentation
 - Enforcement of ESG terms during investment cycle

Outlook: Trends and recent developments

>> Discussion / Q&A >>

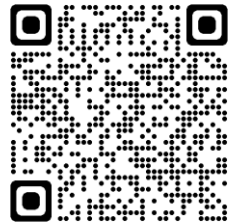
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