Shareholder’s Agreement
Executive Summary
Executive Summary of a Shareholder’s Agreement

Relating to

Cross-border Syndicated Investments in an Early Stage Initiative

The purpose of this Executive Summary of the Shareholders’ Agreement is to cover and summarize the main terms and conditions to be defined and agreed by the parties involved in a cross-border syndicated investment in an early stage initiative (hereinafter referred to as the Initiative or the Company) as regards among others the (i) terms of the investment, (ii) relations between the parties, (iii) governance of Company and (iv) exit conditions.

The Shareholders’ Agreement shall constitute valid and binding obligation of all the parties – investors, managers and founders (hereinafter referred to as the Parties) – as regards the investment in the Initiative, and shall contain all relevant and material agreements of the Parties in connection thereto.

Due to the particular risks associated with the cross border nature of the investment allied to the risks inherent to the financing of seed initiatives, the Shareholders’ Agreement governs, in particular, issues arising from the multi-jurisdictional character of the investments, with particular emphasis being given to the reporting duties, access to information, responsibility of lead investor and jurisdiction.

The Shareholders’ Agreement shall therefore constitute the agreement of the Parties on at least some of the following issues which we briefly describe below, notwithstanding the fact that they may have to be amended, accrued or reduced vis a vis the factual situation at stake:

1. **Definitions of all main contractual terms**

In order to avoid any misinterpretations arising from potential different underlying concepts of the words used in the different jurisdictions of the Parties, it is important to have a Section fixing the exact contents and understanding of the Parties as regards the expressions used in their agreements.

2. **Objectives and scope of the agreement**

It is also essential to define the objectives and scope of the Shareholders’ Agreement. This agreement aims at ruling the relations between the shareholders, in their capacity of shareholders of the Initiative, but having in mind that groups of shareholders may have different interests, rights and obligations, depending on the quality they are participating in the Initiative - angel investors, lead investor, and founders.

3. **Terms of investment**

The Shareholders’ Agreement reflects the acceptance by a group of Investors to invest in a certain business. The decision to invest was taken upon analysis of the relevant business plans, of the investment risk and of the founders’ credibility; upon the signature of the Confidentiality Letter/Agreement and upon a due diligence, and any other action, as the case may be, that was required to backs up the decision to invest.

The Shareholders’ Agreement shall therefore reflect the result of the analysis of the documents above mentioned and of the negotiations held: it is the document and moment to clearly define to all Parties involved the terms and conditions that are accepted by all of them as essential for the development of the Initiative.

In this regard, the Parties shall agree on the time frame of the investment; the distribution of the set up costs among the Company and their respective cap; the details of the costs and expenses properly incurred by the Company in connection with its management (bookkeeping,
auditing, external counselling, organization of meetings, development and marketing of the business, insurances, definition of the funding of costs etc); anti-dilution provisions. They shall also agree to sign up to a Code of Conduct, which shall contain the guidelines ruling the relations between the Parties.

4. Responsibility of the lead investor towards the other investors possibly located in another country

The lead investor shall provide the other investors, in a timely manner, information of the Company’s details and activity, including by ensuring that each investor receives (i) quarterly balance sheets, (ii) profit and loss and cash flow statements, (iii) analysis of the market trends and of the competitive scenario, (iv) analysis of the main strengths and weaknesses of the Initiative. The lead investor shall also be responsible to recommend other investors and possible exit alternatives and strategies, and in general, monitor the Initiative’s activity and any other material information.

5. Representations and warranties of the Company and the Managers

In order to strengthen investors’ confidence both the Company and its Managers shall provide to all investors with their representations and warranties regarding several corporate, regulatory, tax matters.

6. Rights of investors and founders

In addition to the information rights, the Shareholders’ Agreement shall rule also the distributions to the investors and include general rules as for the allocation of results, contingent liabilities, insolvency.

It is also common to agree on the terms and conditions for the assignment of participations in the Initiative and pre-emption rights in connection thereto, usually detailed in sections concerning the transfer of participations.

7. Governance of the Company

The Shareholders’ Agreement shall have as attachment the Articles of Association of the Company as are currently in force, their expected amendments if any and the terms and conditions to be followed for the approval of any amendments thereof. It shall also include details of the management structure of the Company, respective powers, appointment and removal; form to bind the Company, as well as the definition of the composition, functions, appointment and removal of an advisory committee and or a remuneration committee, if applicable. Many of these committees do not correspond to corporate bodies as ruled under applicable law and therefore the right document to describe them is the Shareholders’ Agreement.

8. Management of the Company

In addition to the definition of the corporate bodies, functioning, appointment and removal, the Shareholders’ Agreement shall also establish rules for the management of the company, such as policies of the Initiative, policies and restrictions concerning the company management.

9. Information duties/ Financial information

Venture capital investment requires a strong set of up dated financial information of the Initiatives. When the investments are made by investors of different origins and in addition the Initiative is headquartered in another jurisdiction, such duties are even of greater substance. It is therefore important that, at the Shareholders’ Agreement level, the Parties agree on the general terms and conditions related with the preparation, maintenance and timing of disclosure of the financial information of the Initiative, describing the type and contents of the information to be provided, its timing and entity in charge of the disclosure of such information.
10. Reporting methodology and guidelines

The Shareholders’ Agreement shall also define the general terms and conditions of the information to be provided both by the Company and by the lead investor.

11. Exit Strategy

Another issue to be dealt with at the Shareholders’ Agreement is how investors shall exit the Initiative, either if the exit follows a planned schedule or if it has to be anticipated. Several alternatives are possible such as the listing of the Company, sale of the shares to founders, managers or new shareholders.

12. Exclusivity, Non-competition and non-solicitation

It is also common to foresee exclusivity clauses, at least for the founders and the Company in such a way as to warrant to investors that founder and Company are fully committed to the development of the activity that is being financed.

In addition, this exclusivity usually supersedes termination of employment or consultancy agreements entered into by the parties being strictly linked to non competition and non solicitation clauses. Therefore, clauses forbidding or restricting competing activities, solicitation of the Company’s employees and imposing confidentiality (see below) to ensure that none of them will use the information and knowledge obtained to start, promote or help third parties to start and promote the same or identical business purpose shall also make an integral part of a Shareholders’ Agreement of this nature.

13. Confidentiality

It is important that the Parties define information that is deemed as confidential and should therefore have a special treatment and to obtain the commitment of all of them that such information will not be disclosed.

14. Penalties and breaches of agreement

It is also important to establish at the Shareholders’ Agreement level penalty clauses for breach of what was agreed by the parties. Such clauses are intended to work not only in case of an effective breach, but also to prevent future breaches. The parties should graduate the seriousness of different breaches that may occur. Most common clauses concern: (i) breach of lead investor’s duties towards the other investors as regards information duties; (ii) breaches by the investors to fulfil their obligations to finance the company (and this may even lead to their forced exit of the company), (iii) breach of the agreed business plan by the Company.

15. Applicable law

Due to the cross border nature of the investment, the definition of the law governing the relations of the Parties shall also be a matter carefully treated. It is important to choose a law acceptable to all Parties involved. It is however in most of the situations compulsory or strongly advisable to submit the shareholders agreement to the law applicable to the Initiative.

16. Conflict resolution

For the same reasons of indent 15 above, the most suitable alternative will be to submit the resolution of conflicts to arbitration proceedings. The conflict resolution clause shall establish, among others, the procedural rules that will apply to the composition of the panel of arbitration, the venue of the arbitration and respective language.

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