

Early-stage investments in the UK: Updated BVCA model documents

March 7, 2023 | Client Update | 6-minute read

Following a review involving its legal and accounting committee and experts from the legal and investor community, the British Private Equity and Venture Capital Association has recently published updated model documentation for early-stage investments in the UK.

The British Private Equity and Venture Capital Association (BVCA) model documents for early-stage investments are widely used for post-seed early-stage investments in the UK including, in particular, Series A funding rounds. The purpose of these documents is to promote industry-standard legal documentation for such investments, thus allowing investors and entrepreneurs to focus on deal-specific matters.

The [updated model documents](#), published in February 2023, comprise forms of subscription agreement (together with disclosure letter), shareholders' agreement and articles of association. The model documents were last revised in 2017. The BVCA has recorded a [webinar](#) providing an overview of the updated documents and has announced that an updated model term sheet and ancillary documents will be published in due course.

The principal changes made to the 2017 model documents are summarised below. Most of these changes are mechanical in nature, but changes have also been made to update the documents in light of market practice and ESG and tax considerations.

Subscription agreement

- *Structure* – The updated model subscription agreement is now separate from the shareholders' agreement and is to be entered into by the company and investors only. Previously, the subscription agreement and the shareholders' agreement were combined in one document to be entered into by the company and all of its shareholders.
- *Convertibles and SAFEs* – The updated model subscription agreement now includes optional drafting (mechanical in nature) for the issue of shares to holders of convertible notes, simple agreements for future equity (SAFE) and other similar instruments which would be triggered by the early stage investment.
- *Warrantors* – Under the 2017 model subscription agreement, both the company and founders would provide warranties to investors. The updated model subscription agreement adopts the founder-friendly position that only the company (and not the founders) would provide warranties, but where a warranty is qualified to be subject to the company's actual awareness, the scope of the company's knowledge would include the actual and implied knowledge of each executive director and founder.
- *Warranties* – The scope of the warranties provided to investors have been expanded in some respects (for example, through the addition of ESG, sanctions, Enterprise Investment Scheme (EIS), Venture Capital Trusts (VCT) and national security legislation warranties) and reduced in others (for example the removal of the 'no material undisclosed liability' and 'accuracy of disclosure letter information' warranties). The accompanying drafting note states that the warranties have been drafted on the basis that there will be a detailed disclosure process, with no general disclosure of any data room or due diligence document under the disclosure letter.

- *Company liability limitation provisions* – The limitation period has been simplified and reduced to 18 months (albeit in square brackets) for all warranty claims. The de minimis and aggregate claims hurdles have been removed.

Shareholders' agreement

- *Undertakings* – Additional undertakings from the company and founders (for example in relation to EIS and VCT treatment, data protection and US tax) have been included in the updated model shareholders' agreement. Specifically, the updated model shareholders' agreement now provides that the company must prepare and adopt:
 - a **code of conduct governing appropriate workplace behaviour**, a diversity policy and an anti-harassment and discrimination policy prohibiting discrimination and harassment at the company, in each case in a form to be agreed with the investors;
 - a **climate policy** in a form approved by an investor majority measuring the company's emissions footprint and setting clear actions and steps to achieve climate neutral operations by a specific deadline;
 - a **diversity and inclusion policy** in a form approved by an investor majority to ensure that the company is inclusive across gender, ethnicity, age, sexual orientation, disabilities, socio-economic background and national origins; and
 - a **sustainability impact plan** detailing how to define, measure and report on the sustainability impact of the company's technology in a form approved by an investor majority.
- *Sale or IPO* – The updated model shareholders' agreement has removed the following provisions with respect to a sale or IPO of the company:
 - the provision exempting investors from giving warranties or indemnities upon a sale or IPO of the company; and
 - the provision allowing an investor majority to require the company to appoint a professional advisor if a sale or IPO of the company is not achieved within five years.

Articles of association

- *Liquidation preference* – The Series A preference shares liquidation preference has been modified in the updated model articles so that each holder thereof will now receive a fixed preference amount per Series A share or if greater, the amount that would be received if they had converted their Series A shares into ordinary shares immediately prior to the distribution. Under the 2017 model articles, Series A shareholders would not benefit from the greater amount unless they actually exercised their conversion rights.
- *Anti-dilution* – The updated model articles designate the broad-based weighted average ratchet formula as the default formula to calculate the number of Series A shares to be issued to investors for a down round. Under the 2017 model articles this formula, together with the full ratchet and narrow-based weighted average ratchet formulae, was suggested as a possible option for an anti-dilution calculation. The full ratchet and narrow based weighted average ratchet formulae are now referenced as alternative formulae in an appendix to the updated model articles.
- *Pre-emption rights on a new issuance* – The updated model articles have limited pre-emption rights on the issue of new shares by the company to investors (and not ordinary shareholders) and lowered the threshold for disapplying pre-emption rights (from requiring a special resolution to an investor majority consent). The updated model articles include accompanying drafting notes explaining that these changes will facilitate raising financing from outside investors and reflects commercial reality that allocations in future rounds are decided by the board and the investor majority.
- *Drag-along* – The drag-along provisions have been expanded and now contemplate that the sale agreement (that dragged shareholders are required to sign with the drag buyer) may contain more extensive terms than before. For example, part of the consideration paid or payable pursuant to the sale agreement to the dragged shareholders may be subject to escrow or other arrangements with respect to (among other things) liabilities of the dragged shareholders and any price adjustment mechanism.
- *IPO* – The updated model articles now include in relation to an IPO, lock-up provisions on the transfer of shares for a maximum of 180 days, commencing on the date the final offering document is published and specific provisions to facilitate a pre-IPO reorganisation (for example, the interposition of a new holding company).
- *EIS/VCT* – The updated model articles contain optional drafting to facilitate EIS/VCT analysis for investors (for example, 50% EIS/VCT caps on corporate shareholders in relation to return of capital, dividends and voting rights).

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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