

BVCA updates its model documents for early-stage investments

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Following a review involving its legal committee and experts from the venture capital and legal community, the British Private Equity and Venture Capital Association has recently updated its model documents for early-stage investments in the UK, largely clarifying the changes that were made to these documents two years ago.

Background

The British Private Equity and Venture Capital Association (BVCA) model documents, comprising forms of subscription agreement (together with disclosure letter), shareholders' agreement and articles of association are widely used to cater for early-stage UK-based investments, specifically Series A funding rounds. The last revisions to the model documents were in February 2023 and were covered in our previous [client update](#).

The key changes to the 2023 model documents are highlighted below. The BVCA focused primarily on clarifying certain operative provisions and have added substantive wording for developments in artificial intelligence and sanctions. The BVCA has also added a term sheet (summary of terms document) to the suite of model documents. The updated model documents can be downloaded from the [BVCA website](#).

Subscription agreement

- Regulatory investigations – Optional language has been included for investors to require assistance from the company and founders if the funding round becomes the subject of any regulatory investigation (including under the UK National Security and Investment Act 2021).
- Warranties and confirmations – With the exponential growth in artificial intelligence (AI) start-ups, the model subscription agreement has been updated with a suite of AI warranties to investors. Significant updates to the intellectual property warranties have also been made. In addition, the updated subscription agreement now includes a confirmation from investors on the financial promotion exemptions they can rely upon for their investment.
- Completion – The updated model subscription agreement provides alternative simplified completion mechanics for the situation where the company will receive all subscription monies prior to completion of the share issuance. These mechanics offer less protection for the company as compared to the default completion provisions. For example, under the alternative provisions, the board does not have the discretion to effect a variation of the subscription agreement to remove all references to an investor if it fails to pay its subscription monies before a longstop date. These provisions should therefore be used with caution.

Shareholders' agreement

- Disclosure of company’s information to investors – the updated model shareholders’ agreement provides boards with discretion to withhold from or redact information provided to investor-appointed directors and observers where such information relates to a conflict of interest between the investor and the company’s interests, is privileged or commercially sensitive, or where disclosure would result in a breach of confidentiality obligations that is detrimental to the company’s interests. This discretion is particularly helpful for start-ups that receive investment from strategic investors in the same industry they are trying to disrupt or otherwise compete.
- Director indemnification – Optional language has been added requiring the company to enter into indemnification agreements with the investors’ directors or to indemnify directors directly in the shareholders’ agreement itself. This looks to be driven by US investors as it is customary for US early-stage investments to have such provisions in their constitutional documents.
- VC investors – The model shareholders’ agreement now includes acknowledgements from the company that its venture capital investors may have investments that compete with the company but nothing in the shareholders’ agreement prohibits these investors from holding or making such investments or making such investments so long as they do not disclose confidential information relating to the company in relation to such investments. In addition, investors do not have to share investment opportunities with the company (subject to the investor’s directors’ fiduciary duties). This is a helpful addition as it is customary for VC investors to include similar language in shareholders’ agreements.
- Company undertakings – Company undertakings relating to anti-money laundering, tax evasion and sanctions have been added to the model shareholders’ agreement.

Articles of association

- Liquidation preference – In relation to the Series A shares liquidation preference, the updated model articles clarify that in assessing whether the holder will receive a fixed preference amount per Series A share or the amount that would be distributed if such Series A share had been converted into ordinary shares, Series A shares having the same preference amount per share will be assessed collectively and Series A shares having a different preference amount per share will be assessed severally. The articles also clarify that in working out the distributions under the liquidation waterfall, the board may determine (with investor consent) the exchange rate that would apply to any amounts designated in different currencies.
- Anti-dilution – The updated model articles include drafting to clarify that the investor majority may waive the anti-dilution rights of the holders of the Series A shares in whole or in part. Specifically, the BVCA noted that such rights may be waived absolutely such that no such rights apply to a qualifying issuance (a down round) e.g. in relation to a loan convertible into shares at a discount or in part, with regards to such discount only such that the shares issued following conversion are deemed issued at the non-discounted price. In addition, the articles clarify that the anti-dilution calculations are to be undertaken separately in respect of all Series A shares with different starting prices.
- Variation of shares – Drafting has been added to the model articles (and the model shareholders’ agreement) providing that the exercise of any rights under these documents in respect of any reclassification, conversion, redesignation or denomination of preference shares or employee/founder shares or the variation of voting or economic rights of employee/founder shares in accordance with the provisions of these documents will not constitute a variation of the relevant shares or require any additional class consents. This addition is a response to the Court of Appeal judgment in DnaNudge Limited v Ventura Capital GP Limited [2023] EWCA Civ 1142 that the exercise of a right to convert preference shares into ordinary shares in a company’s articles of association constituted a variation of class rights and therefore required class consent.
- Sanctions – The updated model articles include additional sanctions wording to ensure that shares are not issued or transferred to sanctioned individuals. The articles also provide the board with broader discretion to request for more information to identify sanctioned individuals. Directors who become sanctioned individuals will have to vacate their office.
- EIS / VCT – The optional drafting for the liquidation waterfall to facilitate EIS/VCT analysis for investors has been substantially re-drafted; however, the practical implications of the liquidation preference are meant to remain the same.

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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