

IRISH VENTURE CAPITAL ASSOCIATION

**IVCA STANDARDIZED TERMS
FOR SHAREHOLDERS AGREEMENTS**

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A subcommittee of the Irish Venture Capital Association has agreed specimen clauses covering the following issues frequently encountered in venture capital agreements.

1. Vetoes in VC investment documents.
2. Limitations on liability.
3. Tag Along for Shareholders Agreement.
4. Drag Along for Articles
5. Drag Along for Shareholders Agreement.
6. Allotment of new shares.
7. Transfer of shares.
8. Anti Dilute.

These are set out in correspondingly numbered sections below. Where relevant a section contains an introductory note.

Capitalised terms have been made consistent throughout each of the 8 sections. The investee company is referred to as “the Company”, the venture capital fund referred to as “the Investor” etc. The general definitions are contained in the vetoes (Section 1). Definitions specific to particular clauses and which are capable of being defined generally are contained in that section.

These clauses are specimen only and will need to be tailored to the circumstances. No responsibility is accepted by the Irish Venture Capital Association or any member or the board or any sub-committee thereof for the contents of the clauses or for any loss alleged to be sustained by reason of the use of these clauses.

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SECTION 1.0 - VETOES IN VC INVESTMENT DOCUMENTS

1.1 Introduction

- 1.1.1 Notwithstanding that venture capital investments are generally characterised by a high degree of risk, investors seek to maintain substantial levels of control over the portfolio company by requiring that their consent be obtained before the Company undertakes certain significant actions. Generally the “reserve matters” and the veto right associated with them are set out in a shareholders agreement rather than the articles of association.
- 1.1.2 The sample language below provides that before certain matters are undertaken by the portfolio company (or as the case may be any of its subsidiaries) the prior consent in writing of the investor is required. It also reserves a number of matters for the Board. Obviously the balance as to whether a particular matter should be included as an investor reserve matter or a board reserve matter depends on, amongst other things, the number of independent directors on the Board.

1.2 Definitions

(General definitions for other sections included).

- 1.2.1 “**Accounts**”, the audited [consolidated] accounts of the Company for the period of 12 months ended [];
- 1.2.2 “**Articles**”, the articles of association of the Company adopted [];
- 1.2.3 “**Board**”, the board of directors of the Company and (where another Group Company is referred to) any other Group Company as constituted from time to time;
- 1.2.4 “**Borrowings**”, borrowings of any nature whatsoever including without limitation all sums outstanding under hire purchase, credit sale or leasing agreements or similar obligations;
- 1.2.5 “**Business**”, [];

- 1.2.6 “**Business Day**”, a day on which banks in Dublin are open for business
[];
- 1.2.7 “**Completion**”, completion of the subscription pursuant to clause
[];
- 1.2.8 “**Connected Person**”, a person connected to a Covenantor or any
shareholder of the Company within the meaning of Section 10 of the TCA;
- 1.2.9 “**Disclosure Letter**”, a letter of disclosure of [date] addressed by the
Warrantors to the Investor;
- 1.2.10 “**Encumbrance**”, any mortgage, charge, pledge, lien, option, restriction,
right of first refusal, right of pre-emption, third party right or interest, any
other encumbrance or security interest of any kind and any other type of
preferential arrangement (including, without limitation, title, transfer and
retention arrangements) having similar effect;
- 1.2.11 “**Group**”, the Group Companies;
- 1.2.12 “**Group Company**”, any one of the Group Companies;
- 1.2.13 “**Group Companies**”, the Company and the Subsidiaries;
- 1.2.14 “**Investor**”, [];
- 1.2.15 “**Investor Group**”, in relation to the Investor, [];
- 1.2.16 “**Investor Majority**”, [[]
- 1.2.17 “**Listing**”:
- (a) the admission of any of the shares of any Group Company to the
Official List of the Irish Stock Exchange Limited and/or the
London Stock Exchange Limited; or
 - (b) the admission to trading of such shares on the Irish Enterprise
Exchange of the Irish Stock Exchange (or any other market
regulated by the Irish Stock Exchange Limited) or on the

Alternative Investment Market of the London Stock Exchange Limited (or any other market regulated by the London Stock Exchange Limited); or

- (c) the listing or quotation of any such shares (or in the case of the New York Stock Exchange the listing or quotation of depository receipts representing such shares) on any other stock exchange or regulated securities market (including the New York Stock Exchange or NASDAQ); [or
- (d) the offering to the public in any jurisdiction of any such shares for sale or subscription];

1.2.18 “**Management Accounts**”, the [consolidated] management accounts of the Company for the period commencing [] and ending on [];

1.2.19 “**Permitted Transferee**”, in relation to any Investor, any member of its Investor Group;

1.2.20 “**Service Agreement(s)**”, the contracts of employment to be entered into between the [Company] and [], [] and [] on Completion in the form set out in [Annex/Schedule] [];

1.2.21 “**Share Option Scheme**”, the Share Option Scheme dated [] of the Company a copy of the rules of which is set out in [Annex []] (as amended with the consent of the [Investor Majority] from time to time);

1.2.22 “**Shares**”, shares in the capital of the Company in issue from time to time and “**Share**” means any one of them;

1.2.23 “**Subsidiaries**”, any subsidiary of the Company from time to time as defined by section 155 Companies Act 1963;

1.2.24 “**Tax Warranties**”, the warranties contained in Section/Schedule [] paragraph [] of [this Agreement];

1.2.25 “**TCA**”, the Taxes Consolidation Act 1997;

1.2.26 “**Warranties**”, the warranties contained in Section/Schedule [] of [this Agreement];

1.2.27 “**Warrantors**”, [];

1.2.28 “**Warranty Claim**”, a claim for breach of one or more of the Warranties.

1.3 Restricted Transactions¹

1.3.1 The parties hereto hereby covenant with and undertake to the Investor that for so long as the Investor and/or any Permitted Transferee(s) of the Investor holds Shares in the capital of the Company, the Company shall not (and shall procure that each Group Company shall not) without the prior consent in writing of an Investor Majority:

- (a) carry on any business other than the Business or make any material change in the scope or nature of the business;
- (b) other than pursuant to the Share Option Scheme create or issue or agree to create or issue any share or loan capital or instrument carrying rights of conversion into any share or loan capital or give or agree to give any option in respect of any share or loan capital or redeem, purchase, re-issue or convert or agree to redeem, purchase, re-issue or convert any of its share or loan capital save in accordance with the terms of this Agreement;
- (c) consolidate, divide, sub-divide or alter in any respect any of the rights attaching to any of its shares or reduce its share capital or capital reserve account or repay any amount standing to the credit of any share premium account or redemption reserve or otherwise re-organise its share capital in any way or create any new class of shares;
- (d) pass any resolution amending or altering its memorandum or articles of association or changing its name;

¹ These exclude prohibitions on the transfer of shares which are usually dealt with specifically in the context of offer round in the articles of association.

- (e) transfer, sell, assign, licence or otherwise dispose of or part with possession or control of the whole or any part of its business, property undertaking or assets including any intellectual property or enter into any contract to do so whether or not for valuable consideration other than in the ordinary course of its business;
- (f) acquire or dispose of any share or loan capital or other interest in any company or enter into any partnership, joint venture or profit sharing agreement or arrangement with any person or incorporate or promote any company;
- (g) introduce any executive or employee stock or share option or profit sharing scheme or bonus or commission or incentive scheme of any nature whatsoever other than the Share Option Scheme;
- (h) enter into any scheme or arrangement or composition with its creditors or any class thereof or propose or pass any resolution for the winding up of or the presentation of a petition for the appointment of an examiner to any of the Group Companies;
- (i) approve or appoint any additional directors to the Board;
- (j) appoint or remove or alter the terms of employment of any executive, director or other employee or consultant whose remuneration is in excess of €[] per annum;
- (k) apply for or undertake a Listing;
- (l) declare or pay any dividend or make any other distribution;
- (m) transfer, assign, license or otherwise dispose of or grant any Encumbrance over any intellectual property rights (otherwise than in the ordinary course of business) or agree to do any of the foregoing or make any change to any existing agreements entered into by any Group Company relating to intellectual property rights (otherwise than in the ordinary course of business).

- (n) incur any item of capital expenditure which exceeds €[] or incur any capital expenditure which would result in the aggregate capital expenditure of the Group exceeding €[] in any one financial year of the Company;
- (o) enter into any contract, transaction or arrangement otherwise than in the ordinary course of its business and upon an arms length and commercial basis or enter into any contract, transaction, or arrangement with a Connected Person or any director or shareholder of any of the Group Companies;
- (p) enter into any substantial, long term or onerous contract, arrangement or understanding or any contract materially affecting its business or assets;
- (q) amend or alter the terms of any material contract or commitment to which it is a party other;
- (r) appoint or remove any chairman of the Company;
- (s) rescind, terminate or make any changes to the terms of the Service Agreement(s);
- (t) pay or agree to pay any royalty (including patent royalties) or similar such payment to any person;
- (u) permit the aggregate Borrowings of the Group Companies to exceed an amount equal to €[];
- (v) otherwise than for the purpose of securing any Borrowings permitted by clause [] of this Agreement create or permit to subsist any mortgage or charge whether floating or specific on the whole or part of its undertaking, property or assets or give any guarantee or indemnity or enter into any arrangement guaranteeing or securing the obligations of any person or become surety for any person or enter into any similar arrangement;

- (w) approve an annual budget or business plan or amend or deviate in any material respect from any annual budget or business plan approved by the Investor.

1.3.2 The parties hereto hereby covenant with and undertake to the Investor that for so long as the Investor and/or any Permitted Transferees of the Investor hold Shares in the capital of the Company, the Company shall not (and shall procure that each Group Company shall not) without the prior approval of the Board:

- (a) establish or announce to any person any proposal to establish any retirement, death or disability benefit scheme of or in respect of any of its officers or employees or former officers or former employees (or any dependant(s) of any such person) or grant or create or make or announce to any person any proposal to grant create make or agree any additional retirement, death or disability benefit or any changes to any existing benefits;
- (b) change its auditors or the date of the end of its financial year;
- (c) enter into any contract transaction or arrangement whereby it would receive less than a fair commercial price for any of its goods or services or would pay more than a fair commercial price for any goods or services supplied to it (less customary trade discounts and allowances in each case);
- (d) save in the ordinary course of business, enter into any hire purchase or lease or instalment purchase agreement or arrangement or other agreement or arrangement for payment on deferred terms;
- (e) make any loan or provide any credit (other than normal trade credit given in the ordinary course of business) or make payments out of or drawings on its bank accounts other than routine payments in the ordinary and usual course of business;
- (f) alter the accounting policies and principles of the Company or the Group;

- (g) terminate or notify an intention to terminate any material contract or commitment to which it is a party other than in the ordinary course of business;
- (h) grant any pension or make any payment to any ex-director or ex-employee;
- (i) change the bankers to the Company;
- (j) except for debt collection in the ordinary course of business in an amount not exceeding €[] and claims against any Group Company which are covered by insurance, commence, settle or defend any action or proceedings brought by or against the Company or take any other material step in the conduct or defence of any such material litigation involving any Group Company;
- (k) factor or assign any book debts;
- (l) prepay any loan made to any Group Company; or
- (m) enter into any tenancy, lease or licence agreement or an arrangement in respect of any real property.

SECTION 2.0 - LIMITATIONS ON LIABILITY

2.1 Introduction

The following is a standard set of warranty limitations that are likely to be acceptable to an Investor and an investee company in a normal venture capital investment transaction. It may need to be amended to reflect the particular circumstances of a transaction or any particular concerns of the parties.

2.2 Definitions (See Section 1.2)

2.2.1 “**Accounts**”, the audited [consolidated] accounts of the Company for the period of 12 months ended [];

2.2.2 “**Management Accounts**”, the [consolidate] management accounts of the Company for the period commencing [] and ending on [];

2.2.3 “**Tax Warranties**”, the warranties contained in Section/Schedule [] paragraph [] of [this Agreement];

2.2.4 “**Taxation**”, []

2.2.5 “**Warranties**”, the warranties contained in Section/Schedule [] of [this Agreement];

2.2.6 “**Warrantors**”, [].

2.3 Limits To Liability For Claims

No claim shall be brought against the Warrantors nor shall the Warrantors be liable to the Investor for any breach of the Warranties:

2.3.1 Expiry

Unless notice in writing is given by the Investor to the Warrantors of the claim, on or before in the case of the Tax Warranties the fifth anniversary of the date of this Agreement and, in case of all Warranties other than Tax Warranties, the [] anniversary of the date of this Agreement provided

that any claim made before such relevant date shall, if it has not previously been satisfied, settled or withdrawn, be deemed to have been withdrawn and be barred and be unenforceable on the expiry of a period of 6 months from the date on which notice was given under this paragraph, unless proceedings in respect thereof shall have been commenced by issue and service of such proceedings on the Warrantors;

2.3.2 Individual de minimis

Unless the aggregate amount of any claim exceeds [] (a “Relevant Claim”);

2.3.3 Claims Threshold

Unless and until the aggregate amount of all Relevant Claims exceeds [] in which event the Investor shall be entitled, subject to the other provisions of this Agreement, to make a claim for the whole amount of such claim(s) and not just the excess;

2.3.4 Cap on Claims

To the extent that the aggregate amount of the liability of the Warrantors for all claims made under this Agreement, exceeds [].

2.3.5 Contingencies

To the extent that it is based upon a liability which is contingent only unless and until such contingent liability becomes an actual liability within the time periods set out in Clause [2.3.1].

2.3.6 Change in Law

To the extent that any such breach or claim occurs or the amount recoverable in respect thereof is increased as a result of any legislation or other governmental regulation or alteration of the interpretation of any existing enactment or governmental regulation not in force at the date hereof which takes effect retrospectively or occurs or is increased as a result of any

increase in the rates of Taxation after the date of this Agreement or change of published Revenue practice;

2.3.7 Accounts

To the extent that the subject matter thereof is specifically provided for in the Accounts or in the Management Accounts;

2.3.8 Other Recovery

To the extent that:

- (a) the Company actually recovers compensation for the loss or damage suffered by it arising out of such claim under the terms of any insurance policy for the time being in force or from any third party;
- (b) the Company or the Investor receives any credit or benefit or makes recovery of an amount as a result of the circumstances giving rise to the claim;
- (c) any Taxation for which the Company is liable to be assessed is extinguished as a result of the circumstances giving rise to such claim;

2.3.9 Disclosure Letter

To the extent that the subject matter of such claim has been fairly and accurately disclosed to the Investor in the Disclosure Letter.

2.4 Recovery & Loss

The Investor shall not be entitled to recover the same loss in respect of any claim for breach of any of the Warranties or otherwise obtain reimbursement or restitution more than once in respect of any cause or action giving rise to any breach of the Warranties.

2.5 Duty to Mitigate

Nothing herein or in the Warranties shall or shall be deemed to relieve the Investor of any common law duty to mitigate any loss or damage incurred by it.

2.6 Fraud by the Warrantors

The limitations contained in Clause [2.3 - refer to clause entitled “Limits to Liability for Claims”] shall not apply to any breach of any of the Warranties in respect of any Warrantor which, or the delay in the disclosing of which, is wholly or partly in consequence of fraud by that Warrantor.

2.7 Remedies for breach of Warranties

The Investor’s rights in respect of any matter which amounts to a breach of Warranties shall be limited to damages. Payment of any claim shall to the extent of such payment satisfy any other claim which is capable of being made in respect of the same loss or damage.

2.8 No claim formulated

The Investor confirms to the Warrantors that it has not formulated nor is it in the process of formulating any claim under this Agreement.

2.9 Knowledge

Each statement, representation or warranty comprised in the Warranties which is qualified by the expression “to the best of the knowledge, information and belief of the Warrantors” or any similar expression shall be deemed to include a warranty that such statement, representation or warranty has been made after due and careful enquiry and any information known, or which after due and careful enquiry would have been known, by any of the directors or senior management of the Company shall be deemed to be known by each of the Warrantors.

SECTION 3.0 - TAG ALONG FOR SHAREHOLDERS AGREEMENT

3.1 Introduction

This clause applies in the event of a sale of shares by other shareholders (including promoter shareholders where they are not otherwise restricted from selling pursuant to other clauses in the Subscription and Shareholders Agreement) and permits the Investor to participate in the sale. It is provided that the tag along right is subject to any rights of pre-emption and therefore pre-emption must be exhausted first before tag along comes into play.

3.2 Definitions (See Section 1.2)

3.2.1 “**Articles**”, the articles of association of the Company adopted [];

3.2.2 “**Business Day**”, a day on which banks in Dublin are open for business [];

3.2.3 “**Company**”, [];

3.2.4 “**Investor**”, [].

3.3 Tag Along

3.3.1 In the event of a proposed sale by a member (other than the Investor)(in this Clause referred to as a “Proposed Seller”) of all or a proportion of his shares in the Company the provisions of [PRE-EMPTION ARTICLE IN ARTICLES OF ASSOCIATION]² shall apply but shall be subject to the provisions of clause [3.3.2] below.

3.3.2 Upon a Proposed Seller:

- (a) receiving any offer (or an invitation being made to him as the case may be) for the purchase of all or a proportion of his shares; and

² The pre-emption articles should include a statement to the effect that pre-emption rights are subject to the obligation to afford the tag along right to the Investor.

- (b) wishing to accept such offer (or invitation as the case may be) then, following application of the provisions of [ARTICLES [*] – [*] of the [Articles] (rights of pre-emption on transfer) the Proposed Seller shall procure (and it shall be an express pre-condition of any such agreement for the sale and purchase of the Proposed Seller's shares), that the Investor shall have the option, for a period of not less than 30 Business Days after receiving written notice of such offer, of selling to the purchaser the same proportion of his entire holding of shares as are being sold by the Proposed Seller (or all of them if the Proposed Seller wishes to sell all his shares) at the same time and on conditions no less favourable than those offered to the Proposed Seller [including as to price] [save that the consideration due for all shares being transferred pursuant to this Clause [3.3.2] including the shares held by the Investor shall be allocated in accordance with [Article [*] of the [Articles]³ .

³

This refers to the article dealing with priority on exit rights.

SECTION 4.0 - DRAG ALONG FOR ARTICLES

4.1 Introduction

This Article is intended to apply where an offer has been made which is acceptable to holders of a stated percentage of shareholders including the Investor, and provides that in such circumstances the Investor may require all other shareholders who are party to the shareholders agreement to transfer their holdings in the context of the sale. A drag along clause in a shareholders agreement will only bind those shareholders who are party to it and therefore a drag along clause should be considered for inclusion in the articles of association also.

4.2 Definitions (See Section 1.2)

4.2.1 “Company”, [];

4.2.2 “Investor”, [].

4.3 Drag along

4.3.1 If the holders of not less than [X]% of the entire issued share capital of the Company including the Investor wishes to transfer its shares in the Company pursuant to a bona fide arms’ length offer (the “Offer”) by any person (the “Purchaser”) then the Investor may require all other holders of shares to transfer such shares as are held by them to the Purchaser or as the Purchaser directs, by giving notice (the “Come Along Notice”) to that effect to all such holders (each a “Called Shareholder” and together the “Called Shareholders”) specifying:

- (a) that the Called Shareholders are required to transfer such shares pursuant to this Article [*];
- (b) the date by which they shall have delivered duly executed the documentation referred to in Article [*] below (which date shall be not later than [21 days] following the date of the Come Along Notice (the “Called Shareholders Completion Date”));

(c) the consideration due to them in respect of the sale of their shares. Each Called Shareholder shall deliver duly executed the documentation referred to in Article [*] below by the Called Shareholders Completion Date.

- 4.3.2 If a Called Shareholder makes default in complying with the foregoing provisions of this Article [*] by the Called Shareholders Completion Date, the Investor or failing him one of the directors of the Company appointed by the Investor or some other person as the Investor may nominate (the “Attorney”), shall forthwith be deemed to be the duly appointed attorney of the Called Shareholder with full power to execute complete and deliver in the name and on behalf of the Called Shareholder all such documentation as is required to transfer the relevant shares (including any agreements required to be entered into by all shareholders in relation to the Offer by the Purchaser) to the Purchaser and the Attorney may receive and give a good discharge to the Purchaser for the consideration due to the Called Shareholder and (subject to the transfer being duly stamped) enter the name of the Purchaser in the register of members as the holder or holders by transfer of the shares so purchased by him or it. The Attorney shall procure that the consideration due to the Called Shareholder is deposited into a separate bank account in the Company’s name which the Company shall hold on trust (but without interest) for the Called Shareholder until he shall deliver up his certificate or certificates for his shares, as the case may be.
- 4.3.3 The pre-emption rights contained in Article [*] shall not apply to any transfers made pursuant to this Article [*].

SECTION 5.0 - DRAG ALONG FOR SHAREHOLDERS AGREEMENT

5.1 Introduction

This clause permits an Investor to act to sell the Company, and require all other shareholders to sell their shares and is intended to be included in the Shareholders Agreement itself. The offer only needs to be acceptable to the Investor for him to be able to rely on the drag right below.

5.2 Definitions (See Section 1.2)

“**Articles**”, the articles of association of the Company adopted [];

“**Company**”, [];

“**Investor**”, []

5.3 Drag along

Where a bona fide third party offer (an “Offer”) or invitation (the “Invitation”) is made by any person (the “Purchaser”) to any party to this Agreement (the “Recipients”) to acquire not less than a majority of the issued share capital of the Company.

5.3.1 The Recipients shall immediately notify the Investor and the Company of such Offer or Invitation.

5.3.2 [If such Offer or Invitation is in terms acceptable to the Investor, he shall have the option to require all other shareholders who are party to this Agreement (“Called Shareholders and each a “Called Shareholder”) to transfer all of their shares in the capital of the Company to the Purchaser, or as the Purchaser directs, at the same time and on the same terms as the shares are being transferred by the Investor but on the basis that the aggregate consideration for all such shares shall be allocated as between all shareholders in accordance with the provisions of [Article [*] of the Articles, by giving notice in writing to that effect to such Shareholders.

- 5.3.3 If a Called Shareholder makes default in transferring any shares pursuant to this Clause [*], the Investor or failing him one of the directors of the Company appointed by the Investor or such other person as the Investor may nominate (the “Attorney”), shall forthwith be deemed to be the duly appointed attorney of the Called Shareholder with full power to execute complete and deliver in the name and on behalf of the Called Shareholder all such documentation as is required to transfer the relevant shares (including any agreements required to be entered into by all shareholders by the Purchaser) to the Purchaser and the Attorney may receive and give a good discharge to the Purchaser for the consideration due to the Called Shareholder and (subject to the transfer being duly stamped) enter the name of the Purchaser in the register of members as the holder or holders by transfer of the shares so purchased by him or it. The Attorney shall procure that the consideration due to the Called Shareholder is deposited into a separate bank account in the Company’s name which the Company shall hold on trust (but without interest) for the Called Shareholder until he shall deliver up his certificate or certificates for his shares, as the case may be.
- 5.3.4 The pre-emption rights contained in Article [*] of the Articles shall not apply to any transfers made pursuant to this Clause [*]. In the event of any conflict between the provisions of this Clause [*] and [DRAG CLAUSE IN ARTICLES] the provisions of this Clause [*] shall prevail.

SECTION 6.0 - ALLOTMENT OF NEW SHARES

6.1 Introduction

This is a standard provision for inclusion in Articles dealing with the allotment of new shares on a pre-emptive basis.

6.2 Definitions (See Section 1.2)

“**1983 Act**”, the Companies (Amendment) Act 1983;

“**Acts**”, the Companies Acts 1963 – [2006];

“**Board**”, the board of directors of the Company and (where another Group Company is referred to) any other Group Company as constituted from time to time;

“**Equity Shares**”, equity share capital as defined in Section 155 Companies Act 1963 [note this could include shares with unusual features so consider carefully by reference to circumstances];

“**Investor**”, [];

“**Member of the Same Group**”, a company, its holding company and subsidiaries of its holding company;

“**Subscription Agreement**”, a subscription agreement dated [] made between [];

“**Table A**”, Table A of the Companies Act 1963;

“**Warranty Claim**”, a claim for breach of one or more of the Warranties.

6.3 Allotment of Shares

6.3.1 Directors' Authority to Allot Shares

Subject to the provisions of these Articles relating to new shares the shares shall be at the disposal of the directors and that they may (subject to the provisions of the Acts) allot, grant options over or otherwise dispose of

them to such persons, on such terms and conditions and at such times as they may consider to be in the best interests of the company and its shareholders. The directors are generally and unconditionally authorised to exercise all powers of the Company to allot relevant securities (as defined for the purposes of section 20 of the 1983 Act) up to an amount equal to the authorised but as yet unissued share capital of the Company as at the date of adoption of these Articles, and such authority will expire five years from the date of adoption of these Articles save that the Company may before such expiry make an offer or agreement which would or might require relevant securities to be allotted after such expiry and the directors may allot relevant securities in pursuance of such offer or agreement as if the authority conferred hereby had not expired.

6.3.2 Disapplication of statutory pre-emption rights

Section 23(1) of the 1983 Act shall not apply to any allotments by the Company of equity securities as defined for the purposes of that section.

6.3.3 Pre-Emption on Allotment

Save as provided in Regulation 130 and 131 of Part 1 of Table A relating to bonus issues and subject to Article [6.3.3(h)] no share (which term for the purposes of this Article [] includes any security convertible into a share in the capital of the Company) may be allotted except as follows:

- (a) the shares to be offered for subscription shall be first offered to the holders of the Equity Shares in proportion to the total number of Equity Shares then held by them respectively for cash and in all respects on the same terms per share;
- (b) such offers shall be made by notice to each holder of the Equity Shares stating the total number of shares so offered, the number thereof offered to that member, the price per share and the date (but not less than 28 days after the date upon which notice is given) by which the offer, if not accepted, will be deemed to have been rejected;

- (c) any shares in respect of which such an offer to such a member is accepted shall be allotted on the basis of such offer and the member will be obliged to subscribe accordingly;
- (d) any shares so offered which are still not taken up may be allotted to any third party, at the discretion of the Board, on the same terms as they were offered to members pursuant to this Article [];
- (e) the benefit of an offer to allot shares or of the contract arising out of the acceptance thereof cannot be assigned or transferred by the offeree except in the case of a member who is a body corporate to a Member of the Same Group as such member;
- (f) it shall (if so required by the Investor) be a condition of any allotment of shares that the allottee, if not itself already a party to it enter into a deed of adherence in a form to be agreed by the Board to any shareholders agreement between the Company and members;
- (g) no share having rights attaching thereto which would be preferential to the rights attaching to the shares held by the Investor may be allotted unless the rights attaching to the shares held by the Investor (unless otherwise approved by the Investor) are varied or modified to include such preferential rights so that the shares held by the Investor shall rank pari passu in all respects with such new class of shares;
- (h) the provisions of this Article [] may be disapplied in respect of any particular allotment or allotments with the consent in writing of:
 - (i) the Investor; and
 - (ii) the holders of a [majority] of [the Ordinary Shares];

- (i) the provisions of this Article shall not apply to:
 - (i) any allotment of shares pursuant to the Share Option Scheme;
 - (ii) any allotment of shares to the Investor in satisfaction of a Warranty Claim under the Subscription Agreement; and/or
 - (iii) [any allotment of Shares to the Investor pursuant to the anti-dilution clause].

SECTION 7.0 - TRANSFER OF SHARES

7.1 Introduction

This is a standard form of article dealing with the transfer of shares on a pre-emptive basis.

7.2 Definitions (See Section 1.2)

“**Equity Shares**”, equity share capital as defined in Section 155 Companies Act 1963 [note this could include shares with unusual features so consider carefully by reference to circumstances];

“**Investor**”, [];

“**Member of the Same Group**”, a company, its holding company and subsidiaries of its holding company;

“**Shares**”, shares in the capital of the Company in issue from time to time and “**Share**” means any one of them;

“**Subscription Agreement**”, a subscription agreement dated [] made between [];

“**Table A**”, Table A of the Companies Act 1963;

“**Transfer Notice**”, the notice referred to in Article [7.3.3(b)];

“**Warrantor**”, [];

“**Warranty Claim**”, a claim for breach of one or more of the Warranties.

7.3 Transfer of Shares

7.3.1 The instrument of transfer of a fully paid up share need not be signed by or on behalf of the transferee and regulation 22 of Part I of Table A will be modified accordingly.

7.3.2 Permitted Transfers

- (a) Any member of the Company which is a body corporate may transfer any of the Shares held by it to a Member of the Same Group as such member.
- (b) [A Warrantor] may transfer any number of Ordinary Shares to the Investor in satisfaction of liability under a Warranty Claim (as defined in the Subscription Agreement).

7.3.3 Pre-Emption Rights On Transfer Of Shares

- (a) Save as provided in Article [7.3.2] (Permitted Transfers), no member or person entitled by transmission shall transfer or dispose of or agree to transfer or dispose of or grant any interest or right in any Shares to any person (a Transferee) without first offering the same for transfer to the holders for the time being of Equity Shares (other than the proposing transferor). Such offer may be in respect of all or part only of the Shares held by the proposing transferor and shall be made by the proposing transferor by the giving in writing of a Transfer Notice.
- (b) Each Transfer Notice shall specify the Shares offered (the “Sale Shares”) and the price at which they are offered (the “Specified Price”) and (unless the Transfer Notice is required or deemed to be given under Article [bad leaver clause]) the identity(ies) of the proposed transferee(s) (if known and it shall constitute the Company as the agent of the proposing transferor for the sale of the Sale Shares to the holders of Equity Shares (other than the proposing transferor) at a price not less than the Specified Price.
- (c) Upon receipt by the Company of the Transfer Notice the Board shall forthwith give written notice to the holders of Equity Shares (other than the proposing transferor) of the number and description of the Sale Shares and the Specified Price and (unless the Transfer Notice is or required to be given under Article [bad leaver clause])

the identity(ies) of the proposed transferee(s) (if known), inviting each of such members to state by notice in writing to the Company within 21 days whether he is willing to purchase any and, if so, what maximum number of the Sale Shares (“Maximum”) he is willing to purchase and shall forthwith give a copy of such notice to the proposing transferor. A person, who pursuant to such a notice, expresses a willingness to purchase any Sale Shares is referred to below as a Purchaser.

- (d) Within ten days of the expiration of the said period of 21 days the Board shall, subject to Article [7.3.3(e)] allocate the Sale Shares to or amongst the Purchasers and such allocation shall in the case of competition be made pro rata to the number of Shares held by them but individual allocations shall not exceed the Maximum which the relevant holder shall have expressed a willingness to purchase.
- (e) If the Transfer Notice shall state that the intending transferor is not willing to transfer part only of the Sale Shares, no allocation shall be made unless all the Sale Shares are allocated.
- (f) Forthwith upon such allocation being made, the Purchasers to or amongst whom such allocation has been made shall be bound to pay to the Company (as agent of the proposing transferor) the Specified Price for, and to accept a transfer of the Sale Shares so allocated to them respectively and the proposing transferor shall be bound forthwith upon payment of the Specified Price as aforesaid to deliver to the Company (as agent of the Purchasers) such documents as are required to transfer such Sale Shares to the respective Purchasers.
- (g) If in any case the proposing transferor after having become bound to transfer Sale Shares as aforesaid makes default in so doing the Company may receive the Specified Price and the Board may appoint some person to execute instruments of transfer of such Sale Shares in favour of the Purchasers and shall thereupon subject to

such transfers being properly stamped cause the name of each of the Purchasers to be entered in the register of members of the Company as the holder of those Sale Shares allocated to him as aforesaid and shall hold the Specified Price in trust for the proposing transferor. The Company may give a good receipt for the purchase price of such Shares and may register the Purchaser or Purchasers as the holders thereof and issue to them certificates for the same whereupon the Purchaser or Purchasers shall become indefeasibly entitled thereto.

- (h) If within the period of ten days referred to in Article [7.3.3(d)] above, any of the Sale Shares have not been allocated in accordance with the foregoing provisions of this Article, then the Directors may within the following 20 days allocate the Specified Shares or the balance thereof (as the case may be) to any other person or persons nominated by or acceptable to the Directors who is willing to purchase the Specified Shares at the Sale Price provided such person, if so required by the Directors enters into a binding and legal commitment with the Company whereby such person or persons agree(s) to be bound by any shareholders agreement as it applies to the Transferor.

- (i) If, at the expiration of the period of 20 days referred to in Article [7.3.3(h)] above, any of the Sale Shares have not been allocated in accordance with the provisions of this Article [7.3.3], then[, subject to Article [any other provision limiting ability to transfer]] the proposing transferor may at any time within a period of 60 days after the expiration of the said period of 20 days transfer the Sale Shares not so sold to the proposed transferee(s) specified in the Transfer Notice (if any), or to any other person at any price not being less than the Specified Price PROVIDED THAT:
 - (i) if the Transfer Notice shall contain the statement referred to in Article [7.3.3(e)] he shall not be entitled hereunder to

transfer any of such Sale Shares unless in aggregate all of such Sale Shares are so transferred;

- (ii) the Board may require to be satisfied on reasonable grounds that such Sale Shares are being transferred in pursuance of a bona fide sale for the consideration stated in the transfer without any deduction, rebate or allowance whatsoever to the transferee and if not so satisfied may refuse to register the instrument of transfer; and
 - (iii) [if required by the Directors/the Investor], the transferee enters into a binding and legal commitment with the Company whereby he agrees to be bound by the terms of any shareholders agreement as it applies to the transferor.
- (j) Any or all of the provisions of this Article [7.3.3] may, at any time, be waived or suspended in respect of any particular transfer, or class of transfers, of shares with the consent in writing of the Investor and [the holders of [a majority] of the Ordinary Shares].

SECTION 8.0 - ANTI-DILUTE

8.1 Introduction

The specimen clause set out below is a specimen anti-dilute clause for possible use in venture capital agreements. The clause can be used in either a shareholders agreement or in articles (it is drafted on the basis that it is for inclusion in articles), but will require some conforming depending on its location.

The following are the key issues which need to be considered in the context of anti-dilute clauses including the specimen clause:

8.1.1 Whether the anti-dilute provision is by way of an adjustment to a conversion rate or by way of an immediate fresh issue of shares

Many anti-dilute formulae work is by way of an adjustment to a conversion rate. However a fresh issue of shares may be better from the point of view of the subscriber as they determine the number of shares they get at the time of the fresh issue and the matter is dealt with there and then. This also provides greater certainty for other investors and it has been decided to go this route in the specimen. The specimen clause provides for the venture capitalist to get more of the same type of share it has, whereas conversion adjustment usually gets more of the “convert share”(i.e. the new issue type of share).

8.1.2 Nominal value

Problems can arise if the nominal value of shares held post the anti-dilute event (including the anti-dilute shares) is greater than the amount originally subscribed for the shares. An anti-dilute clause needs to legislate for how to deal with this. It is usually possible to deal with this problem by way of a bonus issue out of a share premium account if there is one (but note that it is not possible to issue redeemable bonus shares). If there is not, the beneficiary of the anti-dilute may need to subscribe for fresh shares at par. This is not usually problematic provided that the amount required is relatively low. The specimen clause gives the beneficiary the option to

subscribe more shares in this event, with a fairly tight window to exercise that option.

8.1.3 Possible carve outs from the anti-dilute

It is standard that certain issues of shares in the future be carved out from the anti-dilute. The specimen clause so provides. These carve outs include:

- (a) Issues of shares arising from technical conversions of other types of shares.
- (b) Shares forming part of Share Option Scheme.
- (c) Shares which are part of a pre-existing option arrangement.
- (d) Sometime there is an exception for shares in connection with bank financing strategic alliances etc. This sometimes covers only non-cash issues. It may be desired that the venture capital appointed director approves such an issue.

Fundraisings of a very small amount and issues where there is an investor majority waiver of anti-dilute (an alternative to this is “pay to play” where an investor only gets anti-dilute if they are participating fully in the round) are also sometimes carved out, but this is not done in the specimen.

8.1.4 Formula

A key issue in anti-dilute is the formula that is used to achieve the desired result. The easiest formula by far is the simple A (being the amount subscribed) over B (being the new issue price) (often referred to as “full ratchet”). This is however seen as being harsh for promoters. It has been decided (while including the full ratchet drafting) to use in the specimen a formula based on weighted average which compares the new issue and the old issue. There are other formulae which can be used. The key difference is whether comparison is made in a formula with the Preferred Shares only (this seems to be market practice and is the approach adopted in the specimen) or the entire issued equity share base. Some literature on the issue

suggests a possible comparison with the fully diluted share base. Two examples are attached which show the effect of the “weighted average” clause in two different scenarios.

8.1.5 Auditors

It is probably sensible to have a clause in an anti-dilute clause saying that if there is doubt the auditors will deal with the matter. An issue which may arise on this is that auditors in the current climate may be unwilling to do anything which involves certification or judgements. A drafting precaution might involve allowing the auditors to refer the matter on to a nominee of theirs.

8.1.6 Non cash fresh issue

Some formulae address the issue where the price received for the new shares is not in cash. This is done in the proposal.

8.2 Definitions (See Section 1.2)

If using this clause will need to define:

8.2.1 “**Auditors**”, the auditors for the time being of the Company;

8.2.2 “**Convertible Securities**”, securities which are convertible into shares in the Company;

8.2.3 “**Investor**”, [];

8.2.4 “**Options**”, options to acquire shares in the Company;

8.2.5 “**Original Issue Price**”, [];

8.2.6 “**Sale Price**”, [].

8.3 Anti-dilute adjustment

8.3.1 In order to prevent dilution of the rights of the [Preferred]⁴ Shares, the number of shares held by the Investor shall also be subject to adjustment from time to time pursuant to this Article []. This adjustment will where practicable be by way of bonus issue (with all other shareholders being deemed to have waived their rights to participate in such bonus issue) or if not practicable or only partly practicable, the Investor will have the option (with no pre-emption for any other shareholder) exercisable within [one month] of the issue or sale giving rise to this right to subscribe such additional shares (or portion thereof where partly practicable) at par:

- (a) If the Company issues or sells (or is deemed to have issued or sold) any Shares or Options [or Convertible Securities] (other than or pursuant to:
 - (i) the conversion of the [Convertible Shares] into Ordinary Shares;
 - (ii) an issuance of Shares in connection with acquisitions, bank financings, equipment leasing arrangements, strategic alliances or other analogous events approved by the Board [(such approval to include the Director(s) appointed in accordance with Clause [clause giving Investor rights to appoint directors] of the Shareholders Agreement)];
 - (iii) Ordinary Shares which form part of the Share Option Scheme; or
 - (iv) the issue of up to [] Shares pursuant to an option entered into [on the date of adoption of these Articles of Association].)⁵

⁴ Please insert title of Shares which have anti-dilute protection.

⁵ These exceptions facilitate certain issues which do not trigger anti-dilute. It is standard to except the grant of share option to employees and their exercise (per (iii)). It is also common to except conversion of

for a consideration (in the case of Options on an as-exercised basis, and in the case of Convertible Securities on an as-converted basis) per Share less than the [Sale Price/Original Issue Price] (adjusted appropriately⁶ to reflect any previous anti-dilution adjustment pursuant to this Article), then forthwith upon such issue or sale, the number of [Preferred] Shares shall be adjusted so as to increase⁷ the number of [Preferred] Shares in issue to be such number as is derived from the formula (ignoring any fraction resulting from application of the formula):

[Full Ratchet Formula

$$\frac{A}{B} - C$$

Where A is the aggregate Original Issue Price paid for all of the [Preferred] Shares;

B is the price per-unit at which the new Shares, Options [or Convertible Securities] are to be issued (or exercised or converted as the case may be); and

C is the number of [Preferred] Shares] in issue prior to the event]]

Weighted Average

$$\frac{X \times Z}{Y} - Z$$

where:

X = the Sale Price/Original Issue Price, adjusted appropriately to reflect any previous anti-dilute adjustments made pursuant to the Article;

Y = the weighted average price of (a) in relation to the [Preferred] Shares, the [Sale Price/Original Issue Price], adjusted appropriately to reflect any previous anti-dilute adjustment made pursuant to this Article and (b) in relation to the Ordinary Shares or Options or Convertible Securities to be issued by the Company (the

existing shares (per (i)). This clause also facilitates the exception of strategic issues (ii) and of specific options (iv).

⁶ These rights need further elaboration.

⁷ Please note this formula determines the increase in number of shares. It is not the entire holding to result from conversion.

number thereof being “V”), the price (in the case of Options on an as-exercised basis, and in the case of Convertible Securities on an as-converted basis) at which such Ordinary Shares, Options or Convertible Securities are to be issued by the Company (“W”), and for this purpose “weighted average price” shall mean:

$$Y = \frac{(X \times Z) + (W \times V)}{Z + V}$$

Z = the number of [Preferred] Shares held (or deemed held) by the holders of [Preferred] Shares prior to the relevant issue;

- (b) If there is any doubt or dispute arising in respect of the adjustment to be made pursuant to this Article [] the matter will be referred to the Auditors who, acting as experts and not as arbitrators, will certify the appropriate adjustment (or if they consider themselves unable to do so, appoint an appropriate party so to do) and the certificate of the Auditors (or other appointed party) shall (in the absence of manifest error) be conclusive and binding on all concerned.

[Example:

Original issue price for 500,000 Preferred Shares (“Z”) was €2 per share (“X”).

There are now 2,000,000 shares in issue.

It is proposed to issue 1,000,000 shares (“V”) at €1.25 per share (“W”).

Additional Shares on conversion are

$$\frac{2 \times 500,000}{Y (1.5)} - 500,000$$

$$\frac{Y = (2 \times 500,000) + (1.25 \times 1,000,000)}{500,000 + 1,000,000} = 1.5$$

Additional Shares = 166,666

So 500,000 Preferred Shares now increased to 666,666 Preferred Shares.

If no. of additional shares were 500,000 at €1.99 each:

$$\frac{2 \times 500,000}{Y (1.995)} - 500,000$$

$$\frac{Y = (2 \times 500,000) + (1.995 \times 1,500,000)}{500,000 + 500,000} = 1.995$$

So additional shares are 1,253

So 500,000 Preferred Shares increased to 501,253.

8.3.2 Determination of Consideration

For purposes of this Article [8.3], the consideration received by the Company for the issue of any Shares, Options or Convertible Securities (“Additional Shares”) shall be computed as follows:

- (a) Cash and Property: Such consideration shall:
 - (i) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Company, excluding amounts paid or payable for accrued interest;
 - (ii) insofar as it consists of property other than cash, be computed at the fair market value thereof at the time of such issue, as determined in good faith by the Board, and
 - (iii) if Additional Shares are issued together with other shares or securities or other assets of the Company for consideration, which covers both, be the proportion of such consideration so received, computed as provided in clauses [(i) and (ii)] above, as determined in good faith by the Board.
- (b) Options and Convertible Securities: The consideration per share received by the Company for Additional Shares which are in the form of Options and Convertible Securities, shall be determined by dividing:

- (i) the total amount, if any, received or receivable by the Company as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Company upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities, by

- (ii) the maximum number of Ordinary Shares (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

APPENDIX

IVCA Committee re Drafting of Precedent Clauses

Debbie Rennick, Act Venture Capital

Joe Concannon, Bank of Scotland

Gerry Jones, EVP

Orla Tarbett, Enterprise Ireland

Michael Murphy, NCB

Feargal Brennan, BCM Hanby Wallace

Eithne Fitzgerald (substitute for John Olden) A & L Goodbody

Brendan Heneghan, William Fry

Stephen Keogh, William Fry

John Olden, A & L Goodbody

Colm Rafferty, Maples and Calder

Sub-Committees were

Vetoes

Colm Rafferty

Gerry Jones

Limitations of Liability

Stephen Keogh

Orla Tarbett

Tag Along

Feargal Brennan

Joe Concannon

Drag Along

Feargal Brennan

Joe Concannon

Allotment of New Shares

John Olden/Eithne Fitzgerald

Michael Murphy

Transfer of Shares

John Olden/Eithne Fitzgerald
Michael Murphy

Anti-dilute

Brendan Heneghan
Debbie Rennick

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