

Drafting a share purchase agreement: split exchange and completion: checklist

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Checklists | **Maintained** | England, Wales

A checklist of additional matters for the buyer's solicitors to consider when drafting a share purchase agreement (SPA) for the acquisition of the entire issued share capital of a private company, where the transaction involves a split exchange and completion.

About this checklist

This document is a checklist of additional matters for the buyer's solicitors to consider when drafting a share purchase agreement (SPA) for the acquisition of the entire issued share capital of a *private company* limited by shares incorporated in England and Wales, where there will be an interval between exchanging the SPA and completing the transaction. It should be used in conjunction with *Checklist, Drafting a share purchase agreement*, which deals with the general matters to consider when drafting an SPA.

For more detailed information on the issues arising when exchange of the SPA and completion are not simultaneous, see *Practice note, Split exchange and completion: acquisitions*.

Agreement to sell and purchase shares

- **Dividend entitlement.** Which party is entitled to the benefit of any dividends that may be declared by the target company after exchanging the SPA but prior to completion? For further information, see *Practice note, Share purchase agreements: overview: Rights accruing to sale shares*.
- **Acquisition of all the shares.** Ensure the SPA includes an acknowledgement that the buyer is not required to complete the transaction unless it will acquire all of the sale shares (see, for example, *Standard document, Share purchase agreement: multiple individual sellers: non-simultaneous exchange and completion: clause 2.3*).

Conditions to completion

- **Identify any completion conditions.** Is completion of the transaction conditional upon the satisfaction of certain conditions? For example, completion may be conditional on obtaining some or all of the following:
 - consent to the transaction from the shareholders of one or both parties;
 - merger clearance in the UK or in another applicable jurisdiction;
 - if the target company operates in a regulated industry (such as banking or insurance), consent to the transaction from the relevant market regulator;

- government clearance for the transaction under the National Security and Investment Act 2021 (for background, see [Practice note, National Security and Investment Act 2021: overview](#));
- tax clearance for the transaction from [HMRC](#) (for example, where the seller is taking some form of paper consideration for the sale shares); or
- consent to the transaction from a third party, such as the target company's lender, or one of its major customers or suppliers.

For further information, see [Practice notes, Share purchase agreements: overview: Conditions precedent, Share purchases: overview: Transaction consents and approvals](#) and [Split exchange and completion: acquisitions: Identifying the conditions](#).

- **Timescale for satisfying conditions.** Consider when any applicable completion conditions are likely to be satisfied. If exchange will take place before this occurs, ensure the relevant conditions are included in the SPA as conditions precedent to completion. For further information, see [Practice note, Split exchange and completion: acquisitions: Conditions precedent: drafting points](#).
- **Waiver of conditions.** Should either party be entitled to waive any of the applicable completion conditions? If so, consider whether this should be a unilateral right exercisable by one party (for instance, where the condition benefits a particular party only), or whether both parties must consent to the waiver. For further information, see [Practice note, Split exchange and completion: acquisitions: Waiving unsatisfied conditions](#).
- **Obligations to satisfy conditions.** Consider the steps each party must take towards satisfying the completion conditions, and whether these steps should be specified in the SPA. What standard should each party be required to use to ensure that the completion conditions are satisfied (for example, best endeavours or reasonable endeavours)? For further information, see [Practice note, Split exchange and completion: acquisitions: Obligation to procure satisfaction of conditions](#).
- **Longstop date.** Consider the longstop date by which the conditions to completion must be satisfied (or, if applicable, waived). For further information, see [Practice note, Split exchange and completion: acquisitions: Period for satisfying conditions](#).
- **Failure to satisfy completion conditions.** Consider the consequences of a completion condition not being satisfied (or waived, as appropriate) on or before the specified longstop date. In particular:
 - Should the SPA terminate automatically on the longstop date in the event of a conditions failure?
 - If the SPA will terminate, consider whether certain of its terms should survive termination. For example, it is usually appropriate for any confidentiality, costs and governing law clauses to continue in force.
 - Is it appropriate for each party's accrued liabilities to the other to continue after termination of the SPA? For instance, if one party has given undertakings in connection with the satisfaction of the completion conditions, liability for a breach of those undertakings should be expressly preserved following termination of the SPA.
 - Will each party be responsible for their own transaction costs if the conditions are not satisfied and the SPA is terminated (see also [Costs](#))?

For further information, see [Practice note, Split exchange and completion: acquisitions: Failure to satisfy conditions precedent](#).

Period between exchange and completion

- **Gap undertakings.** Consider whether the buyer requires any positive undertakings from the seller concerning the conduct of the target company's business between exchange and completion, such as undertakings to:
 - procure that the business is carried in the ordinary course;
 - maintain the trade and trade connections of the target company; and
 - promptly disclose any material change in the financial position or assets of the target company.

For further information, see [Practice note, Split exchange and completion: acquisitions: Conduct of business between exchange and completion](#).

- **Matters subject to buyer's consent.** Consider whether the SPA should prohibit the target company from taking certain actions between exchange and completion (for example, actions capable of having a significant impact on its financial position or prospects), unless the buyer consents to the relevant action. Common areas of restriction include:
 - disposing of or acquiring a material asset;
 - issuing shares;
 - making changes to the target company's officers or key employees;
 - incurring significant capital expenditure;
 - committing to new borrowings or making loans to a third party;
 - terminating or varying a material contract; and
 - declaring a dividend or making any other distribution.
- **Buyer's remedies.** What remedies are required if the seller breaches its pre-completion undertakings? If the buyer expects to be able to terminate the SPA in these circumstances, an express provision to this effect will be necessary. For further information, see [Practice note, Split exchange and completion: acquisitions: Gap covenant breaches](#).
- **Material adverse event.** Consider who should bear the risk of a material adverse change or event (MAC) occurring in relation to the target company between exchange and completion. Does the buyer require the right to withdraw from the transaction in these circumstances? For further information, see [Practice notes, Material adverse change \(MAC\) clauses: acquisitions](#) and [Practice note, Split exchange and completion: acquisitions: Material adverse change \(MAC\) clauses](#). For a precedent MAC clause, see [Standard clause, Material adverse change \(MAC\) clause: share purchase agreement](#).
- **Intervening insolvency.** Consider whether it is appropriate to address the risk of either party or the target company entering insolvency proceedings in the gap between exchange and completion. If the buyer requires protection against this eventuality, it could be conferred by making the continued solvency of the target company (and, if appropriate, the seller) a completion condition, by means of an actual or notional repetition of insolvency-related warranties, or by way of a MAC clause. From the seller's perspective, it could consider seeking a right to terminate the SPA if the buyer enters an insolvency procedure between exchange and completion. Securing such a right may be particularly important where the transaction involves a substantial element of vendor finance (such as an allotment of shares in the buyer

or loan notes) or deferred consideration. For further information, see [Practice note, Split exchange and completion: acquisitions: Counterparty risk between exchange and completion](#).

Warranties and disclosure

- **Date warranties are given.** If the seller is giving warranties to the buyer on exchange of the SPA, will they be repeated at (or even at all times up to and including) the completion date by reference to the circumstances prevailing at repetition? For further information on this issue, see [Practice notes, Warranties and indemnities: acquisitions: Split exchange and completion](#) and [Split exchange and completion: acquisitions: Repetition of seller's warranties](#), and [Checklist, Seller warranties and limitations on liability: commonly negotiated issues: share purchases: Repetition of warranties after exchange](#).
- **Buyer's remedies.** What remedies should the buyer have in respect of a breach of warranty that comes to light (or, if the warranties are repeated, occurs) after exchange of the SPA but before completion? Consider the following points in particular:
 - Should the buyer have the right to terminate the SPA and claim damages for the breach, or should its remedies be limited to either a claim for damages or termination of the SPA only?
 - If the buyer will have the right to terminate the SPA, should this right apply regardless of the circumstances or significance of the breach?
 - Should the available remedies differ depending upon whether the breach occurred before or after the SPA was exchanged?

For further information on this issue, see [Practice note, Split exchange and completion: acquisitions: Remedies for breach of repeating warranties](#) and [Checklist, Seller warranties and limitations on liability: commonly negotiated issues: share purchases: Buyer's remedies for breach of warranty between exchange and completion](#).

- **Updating the disclosure letter.** If any warranties will be repeated between exchange and completion, will the seller have the right to deliver an updated disclosure letter at completion? If the buyer is prepared to accept an updated disclosure letter, consider whether:
 - there should be any constraints on the matters that can be disclosed, such as limiting the updated disclosures to matters occurring between exchange and completion; and
 - the buyer should have the right to terminate the SPA if the disclosed issue is significant.

For further information, see [Practice notes, Split exchange and completion: acquisitions: Updating the disclosure letter](#) and [Disclosure: acquisitions: When should the disclosure letter be delivered?](#), and [Checklist, Seller warranties and limitations on liability: commonly negotiated issues: share purchases: Updating disclosure letter after exchange](#).

- **Warranties not repeated.** If the warranties will not be repeated following exchange of the SPA, consider whether an undertaking is required that the seller will not take or permit any action between exchange and completion which may cause a breach of warranty, thereby limiting the buyer's risk to external factors and ensuring the seller remains liable for matters within its control. For further information, see [Practice note, Split exchange and completion: acquisitions: Obligation not to breach warranties](#).

Completion

- **Completion date.** When will completion take place? If there are conditions to completion, will completion occur on a specified date (provided the conditions have been satisfied or waived), or will completion take place on whatever date the conditions are satisfied (or a specified number of days after this)? For further information, see [Practice note, Split exchange and completion: acquisitions: Timing of completion](#).
- **Seller's failure to perform completion obligations.** What rights and remedies does the buyer need if the seller fails to perform its completion obligations? It is common practice to provide that in these circumstances, the buyer has the option of deferring completion, terminating the SPA or proceeding to completion. Sellers can be expected to insist that any such rights are reciprocal. For further information, see [Practice note, Split exchange and completion: acquisitions: Failure to complete](#).

Costs

- **Indemnity for costs.** Consider whether either party should be required to indemnify the other in respect of its transaction costs in any circumstances. For instance, the buyer may require the seller to reimburse its costs in the event that:
 - the completion conditions are not satisfied and the SPA is terminated as a result; or
 - the buyer withdraws from the transaction because the seller fails to perform its completion obligations, or breaches a gap undertaking.

For further information, see [Practice note, Split exchange and completion: acquisitions: Costs allocation and break fees](#).

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